

# 7

## The Rights of Non-Citizens: Migrant Workers and Trafficked Persons

This chapter focuses on the non-citizen groups of migrant workers and their families, and trafficked persons. These categories of non-citizens are very much interrelated, and at times the two groups are not even clearly distinguishable.

These categories of non-citizens are very much interrelated, and at times the two groups are not even clearly distinguishable. For instance, many people who are trafficked have started out as a migrant worker. When a migrant worker is exploited and unable to move freely, that person may be considered to have been trafficked. However, determining when a person has been exploited or is unable to move freely can be difficult. This is especially true in Southeast Asia, where many migrant workers live in fear of being trafficked, so it is useful to place the rights of migrant workers alongside the standards and activities that address human trafficking.

## 7.1 Migrant Workers

Throughout history, people have left their homes and travelled for work. Records show that Chinese and Indian people have migrated to Southeast Asia for hundreds of years. This may have been as manual labourers for the British Empire's plantations during the eighteenth and nineteenth century, or through family connects to countries like Indonesia and Thailand. Nowadays people moving for work are common. Every country in Southeast Asia is involved in the migration process as either sending countries, or receiving countries, or both. According to the ILO, half of the approximately 175 million migrants around the world are workers. However, it is only recently that the protection of migrant workers has been addressed as a human rights issue. Workers' rights predate World War II through the ILO which was established in 1919, though it was not until after World War II that a convention for migrant workers was introduced. By the 1970s, the increase in irregular migrant workers (originally called guest workers) was a growing concern in Europe. Many people from Turkey, Lebanon, and other Middle Eastern countries were moving to West Germany, France and other developed European countries for work. Because many of these migrants were irregular, there was a growing need to prevent clandestine, dangerous, and illegal labor migration. In the media were stories of people working in slave like conditions, or being killed on the way to Europe when their boat sunk or as they suffocated in closed containers (similar to stories that are still in the media nowadays). Not only was reducing these threats to life important, it was also necessary to simply improve the livelihood of such workers. For example, the mass expulsion of Asians from Uganda in the early 1970s prompted calls for a "right for non-citizens" (though similar expulsions of Indians from Myanmar in the early 1960s did not receive that much attention).

Discrimination, exploitation, and victimization were a concern for both sending and receiving countries. There were two fundamental problems - the abuse of migrant labor and trafficking - which needed to be addressed, but the question was if they should be considered a single problem, or treated as separate issues. The response was to keep the two problems separate; thus, migrant worker protection has tended to come through rights-based conventions and the ILO, whereas trafficking was responded to more commonly through criminal laws. Whether this has led to a strong protection system is still open to debate. The reasons are that these problems differ in a range of ways, including both the degree and the nature of violations. Further, as detailed below, it was decided that migrant worker rights would be considered a human rights issue, and later trafficking was considered a criminal issue. The result of the division is different treaties, managed by different sections of the UN, and also different levels of support from member nations of the UN, with the treaty on trafficking receiving widespread attention, and the migrant worker treaty struggling for recognition with low numbers of ratifications.



## FOCUS ON

### Introduction to the International Labour Organization (ILO)

The ILO was founded during the Paris Peace Conference as part of the League of Nations in 1919. Its main duty is to promote and protect international labor standards, which it achieves by adopting conventions (189 by 2014) and recommendations (202 by 2014). It has a unique structure consisting of three types of organizations: (1) workers' associations or unions, (2) employers' associations, and (3) States. It has 185 state members, including all Southeast Asia countries (though Myanmar's membership was restricted from 1998 to 2012 because it was not doing enough to eliminate forced labor). The ILO has established many standards in labor rights, including maternity leave, limitations on child labor, workplace safety standards, and minimum wage standards. In addition, the ILO has reporting procedures much like the UN, complete with complaints mechanisms. To be a member of the ILO, States must agree to the eight core conventions. These conventions cover four issues which are considered fundamental to protect workers: protection from slavery, right to a trade union, equality in the workplace (which is important for women), and protecting children.

1. Convention 29 on Forced Labour(1930)
2. Convention 87 on Freedom of Association and Protection of the Right to Organize (1948)
3. Convention 98 on the Right to Organize and Collective Bargaining (1949)
4. Convention 100 on Equal Remuneration (1951)
5. Convention 105 on the Abolition of Forced Labour(1957)
6. Convention 111 on Discrimination (Employment and Occupation) (1958)
7. Convention 138 on Minimum Age (1973)
8. Convention 182 on the Elimination of the Worst Forms of Child Labour(1999)

Providing standardized protection was recognized long before the adoption of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in 1990. While the UN did not start to address migrant worker issues till the 1970s— mainly because of a deal struck with the ILO in the 1940s that the ILO would protect migrants as workers and the UN would do the same for migrants as aliens—the ILO had already begun to adopt conventions on the subject.

The first ILO convention was Convention 66 concerning migration for employment; but as no State ever ratified it, it never came into force. Two migrant conventions were adopted in the post war years: Convention 97 (previously Convention 66) and Convention 143 (concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers). Convention 143 is generally known as the ILO's Migrant Workers Convention, but this convention also suffers from low ratification (24 states as of 2013, and only the Philippines from Southeast Asia). Growing violations in the 1970s finally forced the UN to become involved, but it was not until the late 1970s that there was enough political will to start a treaty protecting migrant workers.

A discussion ensued between the UN and ILO as to who should manage migrant worker rights, but in the end, the UN was seen as the better host. There were a few reasons for this. First, the ILO has a poor record of State ratification which it was hoped the UN could improve on (although this is debatable for the Migrant Workers Convention). Second, the UN is more conducive to developing country interests as the General Assembly is seen as a venue for developing countries because they hold the majority of the vote (with something like 140 of the 193 votes). Finally, a human rights treaty is more expansive in terms of protection than an ILO treaty which focuses on workers' rights alone. This is clear from the title of the treaty, which includes the rights of the worker's family as well.

## FOCUS ON

### The ILO Conventions and Recommendations Related to Migrant Workers

The main ILO conventions which protect migrant workers are:

- Convention concerning Migration for Employment (No. 97)
- Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143)
- Recommendation concerning Migration for Employment (No. 86)
- Recommendation concerning Migrant Workers (No. 151)
- Convention concerning Forced or Compulsory Labour (No. 29)
- Convention concerning Abolition of Forced Labour (No. 105)
- Domestic workers convention (No. 189)

## 7.2 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)

While drafting of the ICRMW may have started in the late 1970s, it was not until over a decade later that it was completed, and the treaty was adopted by the General Assembly on 8 December 1990. It took a further thirteen years for the ICRMW to gain the twenty ratifications necessary to come into force on 1 July 2003. The Philippines and Indonesia are the only Southeast Asia State parties to the ICRMW. Receiving States, or those States which have large migrant worker populations such as Thailand, Malaysia, and Singapore, are reluctant to ratify the Convention. This is unfortunate because it undermines the Convention's universality and implementation. Migrant worker human rights are weaker in the places where the most violations occur.

There are many reasons for low ratification worldwide. Nearly all current ratifications come from countries that send migrant workers overseas. The exceptions are countries which have both an inflow and outflow of migrant workers, or act as transit countries,



such as Mexico, Egypt, and Argentina. Generally, governments are reluctant to ratify because of concern about the obligations the Convention will put on administering the sometimes huge migrant worker sector. For example, countries such as USA, Russia, Germany, and Saudi Arabia, each have over five million migrant workers. In countries such as Singapore and Kuwait, the migrant worker population makes up nearly 50% of the working population. Changes to the conditions for migrant workers may have an impact on their economies. The exact nature of the impact is open to debate as there would be positive benefits from increased worker protection, alongside some economic costs.

The Migrant Workers Convention has expanded the protection from previous standards in important ways. One of the main contributions is the inclusion of undocumented migrant workers in the definition of a migrant worker.

### **7.2.1 Definition of a Migrant Worker**

The definition of migrant worker in the ICRMW is notable for being inclusive: A migrant worker refers to “a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.”

The main elements of this definition are:

1. A migrant worker is entitled to their rights before, during, and after work. The rights of a worker do not stop when they finish working (otherwise, it would be easy to deprive a worker of their rights by simply dismissing them). Further, it should also protect migrant workers from abuse when they are recruited and travelling to their work.
2. Workers only need to be paid to be seen as a worker. In other words, the work does not need to be legal or a specific kind of labor (although the treaty does distinguish some special categories of work which will be discussed below).
3. There is no distinction between documented and undocumented workers; migrant workers merely refer to people working outside their state of citizenship. Therefore, all migrant workers are entitled to such rights (although documented workers are also entitled to an additional set of rights).

Further, as the treaty emphasizes in its title and in the first article, migrant workers and members of their families should get access to all these rights. So the treaty covers protection for the worker, their wives/husbands, and children. However, in the ICRMW certain categories of people are not considered as migrant workers, and these include development workers, people working at an international organization like the UN, students, refugees, the stateless, and investors. For these people other mechanisms exist for their protection, for example consular protection through their Embassy, or other treaties that cover their situation (especially refugees and the stateless).

### **7.2.2 Migrant worker rights in the ICRMW**

In the ICRMW, there are three types of human rights for Migrant workers. Firstly, there are existing human rights which the worker is entitled to, but some governments try to ignore this. Second, there are new rights specific to migrant workers. Third, there are rights for specific types of migrant workers. Examining these in order, the ICRMW restates many existing human rights such as non-discrimination and the right to life. Freedoms in the ICCPR are also present, such as the freedom of expression and religion, and freedom from torture and slavery. The Convention also contains

legal rights such as the right to a fair trial, and freedom from arbitrary arrest. While it may seem redundant because these rights already exist in many other treaties, it is important they are explicitly given to migrant workers to ensure governments do not invent laws or practices to remove such rights. For example, a government may have a policy stating that illegal immigrants cannot make complaints to the police; this is clearly against the human rights standard of equal protection under the law. Further, in restating these rights, elements which may be of specific relevance to migrant workers are made even clearer. For example, verification of identity must be made within the law, and collective detentions are considered violations (although both these violations are common in Thailand and Malaysia).

## FOCUS ON

### **Rights All Migrant Workers and Their Families Have Access to, Regardless of Documentation Status**

- Non-discrimination
- Freedom to leave any country and to enter their country of origin
- Right to life
- Freedom from torture and ill-treatment
- Freedom from slavery or forced labor
- Freedom of thought, conscience, and religion
- Freedom of opinion and expression
- Freedom from arbitrary or unlawful interference with privacy, family, home, correspondence, and other communications
- Property rights
- Right to liberty and security of person
- Right to be treated with humanity under lawful arrest and detention
- Right to a fair and public hearing by a competent, independent, and impartial tribunal
- Prohibits retroactive application of criminal laws
- Prohibits imprisonment for failure to fulfill a contract
- Prohibits destruction of travel or identity documents
- Prohibits expulsion on a collective basis or without fair procedures
- Right to diplomatic assistance
- Right to recognition as a person before the law
- Equality of treatment between nationals and migrant workers for some work conditions and pay
- Right to participate in trade unions
- Equal access to social security
- Right to emergency medical care
- Right of a child to a name, birth registration, and nationality



- Equality of access to public education

The ICRMW also provides rights specific to migrant workers. For example, there can be no confiscation or destruction of identity cards (Art 21). A common practice with migrant workers is for the factories to keep or confiscate migrant workers' identity cards or passports making it difficult for them to leave and find other jobs. Such violations also make the migrant worker more vulnerable to police harassment as they may need to pay bribes because they no longer possess identification as required by the law. Another right is for migrants to have equal treatment and working conditions to nationals. There are rights about being able to stay in the country for a period of time once they finish work – this will stop a State from expelling workers immediately once their job has finished. Additional rights are: freedom from collective expulsion (Art 22), the right to access consular services if arrested (Art 23), and the right for children of migrant workers to have access to education (Art 30). Another important right is the ability to transfer earnings or remittances back to the migrant worker's home country.

The main objective of the treaty is to establish humane conditions for migrant workers. These are detailed in Part Six of the convention and include better services such as consular activities, ensuring the easy return of migrants to their home country, working toward the elimination of illegal and clandestine movement, and the recruitment of migrants.

## CONCEPT

### Remittances

Remittances are the money and goods which migrant workers and other people living outside their states, send home. Remittances have an important impact on communities, and in some cases on the national economy. Remittances form a large part of the Philippine's economy, and improve the conditions of many communities in Myanmar. Migrants can be a source of economic empowerment and the driving force behind new opportunities, despite being in another State or another region. Remittances are an important pull factor (something appealing which motivates people to migrate) in Southeast Asian migration. The protection of remittances and the ability to send remittances home is vital to such workers and amounts to a human right.

The rights of migrant workers are divided according to three separate categories: (1) the rights of all migrant workers (detailed above), (2) the extra rights given to documented migrant workers, and (3) rights for special categories of migrant workers.

Documented migrant workers are entitled to a further set of rights in 20 articles. These include the rights to form trade unions (Art 40), access to housing and social services (Art 43), and the integration of migrant worker children into local education institutions (Art 45). These extra rights for documented workers in regular situations can be seen as an attempt to encourage migrants to undertake documentation and regular migration.

Special categories of migrant workers include: frontier workers (people who work



across borders; for example, they live in one country and work in another), seasonal workers (people who work for a set number of months a year in another country), or project-tied workers (someone whose work in another country is for a specified time and ends once the project is completed). These workers are entitled to all the standard rights but their access to social services and children's education may be limited as they do not reside full-time in their country of work.

### 7.2.3 Challenges to the ICRMW

While the Convention takes significant steps forward in the protection of migrant workers, there are some weaknesses concerning emerging categories of migrant workers. For example, there is no specific provision for women migrant workers, thus making the treaty gender blind – it assumes women and men will need the same protection of rights. With the globalization of work and changing work practices which has been named the 'feminization of labour,' women now comprise the fastest growing labour sector. Many of the violations women could face, for example, sexual discrimination in the workplace, or unequal pay, are not directly addressed. It could be argued such issues may fall under non-discrimination in the workplace, but often these laws do not do enough to protect female migrant workers. This weakness is particularly apparent for domestic workers who are almost exclusively women. Because domestic work is often unregulated and the women work in private homes, it is much more difficult for them to raise complaints, organize themselves, claim overtime, and other work standards. In this region, some of the most well-known abuses have been of domestic workers (which in some cases has even led to the breaking of diplomatic ties; for example, the Flor Contemplacion case between Singapore and the Philippines). Other areas of rights not considered are youth workers (people under 18 seeking work) who may need special protection. The Minimum Age Convention (ILO 138) does protect people who are under the minimum age for the country they are working in (and this may be between 12-15 years old), but there is no recognition that people between 15-18 who are working may need special protection. Also, the second generation migrant workers, that is, adult children of migrant workers who are themselves migrant workers, are not mentioned in the treaty either. In most Southeast Asian countries with a history of migrant work have two and sometimes three generations of workers.

## CASE STUDY

### The Flor Contemplacion Case

Flor Contemplacion was a Philippine maid working in Singapore who was charged and found guilty of murder. She was executed on 17 March 1995. However, many argue the facts of the case are still open to debate. A maid was found strangled, and the four year old boy she looked after was found drowned in a bath. Flor Contemplacion became a suspect after police read the murdered maid's diary and Flor confessed to the crime. Claims of mental instability on Flor's part and also that the boy's father strangled the maid after he discovered she had drowned his son, were ignored.

This case became a rallying point for many organizations advocating for greater migrant worker rights, particularly domestic workers in Singapore. People were especially concerned that her guilt was established too quickly, and that the police





did not pursue other avenues of investigation. The Philippines government offered little, if any, consular advice or protection to the maid; although belatedly sensing that people in the Philippines were very upset, they did protest her death sentence and later withdrew their ambassador from Singapore and abandoned some bilateral treaties.

Following this, Singapore gradually improved the legal protection of domestic workers, by introducing a “Maid Abuse” law (section 73 of the Penal Code) in 1998. Further, Singapore’s Manpower Ministry in 2012 announced a weekly day of rest for foreign domestic workers. However, this obligation only applies to new contracts made from January 2013 onwards. This is not the only case of a domestic worker being given the death penalty. More recently Sri Lankan and Indonesian Maids have received the death penalty in Saudi Arabia which has led to the sending countries adopting laws increasing the protection of domestic workers. For example, Indonesia banned migration of domestic workers to Saudi Arabia in 2011, but has recently signed an agreement with the Saudi government to allow travel under certain protective conditions (for example monthly wages, limited work hours, and non confiscation of their passports).

#### **7.2.4. Reasons for Low Ratification.**

There are many reasons for the low ratification of this treaty. As was mentioned, there is no State party to the treaty from a country which has received many migrant workers. Further, no developed country has ratified this treaty. However, many of the reasons given for not ratifying are often inaccurate. For example many developed countries consider the treaty will give migrant workers too many rights. However, the rights often exist within the domestic laws anyway, and there will be no extra burden. Some States consider if the conditions for work are too good, migrants will ‘flood’ into the country, and put huge strains on the welfare system, police, and local communities. This flood, however, has never occurred. Migrants go to where the work is, and they will not migrate to be unemployed. Thus migrant numbers reflect the demand for labour and not how good a country is.

States may consider some of the rights controversial. For example, that migrant workers should be treated the same as local workers in terms of pay, overtime, holidays, and termination of employment (Art 25). Indeed, some companies use migrant labor specifically because they are cheaper and can be paid below minimum wage. The business sector may pressure the government not to introduce laws which give workers too many rights. Other rights, such as citizenship rights for children, are often not agreed to.

There is also a concern that the ICRMW also recognizes undocumented workers. Most States simply called undocumented workers illegal migrants, and they can be easily arrested and deported. However, by recognizing the worker as rights holders changes this process. They should be able to legally challenge their deportation, or even their workplace if the law has been broken.

States often neglect the benefits of the treaty. As many countries in the world rely on migrant work to keep their industries growing, the mistreatment of migrant workers can be bad for the economy. If conditions are too bad migrant workers will not travel to

work in these places, or if a better work situation is found, they may leave for another country. Recently, with the democratic changes in Myanmar, the business sectors, which rely on Myanmar migrant workers in Malaysia and Thailand, are concerned that migrant workers would start returning home. Some factories are increasing wages and improving conditions as incentives for the migrant workers to stay.

### **7.3 Violations of Migrant Worker Rights**

Migrant workers face a range of threats and violations starting from recruitment through to the termination of their work. Migrant workers who are undocumented and in irregular situations are particularly vulnerable. Migrant workers face threats because they live outside of their State, and because they are portrayed as burdens to society and bad for the economy. Many migrant workers may be hesitant to report threats or violations because they see that the police or justice system does little to protect them. If the protection mechanisms are missing they must resort to their human rights to ensure their safety and fair treatment.

#### **Fraud**

Fraud committed against migrant workers is prevalent in the region. In such cases, companies or individuals promise lucrative work contracts (often upon payment of a fee), and only later does the worker discover there is no work, or if the job exists, that the conditions are not as promised. Contract substitution, where the original contract is changed for another, occurs widely, with the worker being passed on to another employer and doing entirely different work from what was promised, upon arriving in the country of destination. The worst example of this is kind of fraud is trafficking, where the worker often ends up in a slave-like situation. Forced labor can likewise exist in this situation, where the worker cannot leave the job even when the working conditions are unbearable, because of lack of identity papers and inability to repay the debt from the recruitment. Other violations include excessive fees and deductions included in the contract, so the wage is not nearly as much as promised.

#### **Bad workplace conditions**

At the workplace, migrant workers (particularly undocumented workers) can be at the mercy of their employers and local officials because they cannot get access to equal and fair protection of the law. More common violations include non-payment of wages, dirty, dangerous and unsanitary working conditions, and extended working hours. Sometimes domestic workers find they are required to work from 6 am (in order to get children to school) to midnight when they clean up after dinner. The average working week, which varies throughout Southeast Asia (but should be somewhere around 45 hours), can be as much as 72 hours.

However, the worst cases of abuse have been found on fishing boats. Frequently, fishermen are expected to work eighteen to twenty hours of hard manual labor per day, seven days a week. Sleeping and eating is possible only when the nets are down and recently caught fish have been sorted. Fishermen live in terribly cramped quarters, face shortages of fresh water, and they must work even when fatigued or ill, thereby risking injury to themselves and others.

#### **Violations outside the workplace**

Even outside the workplace, migrant workers can face discrimination in the form of police interference, constant surveillance, inability to send children to school, and inability to practice cultural activities such as weddings, religious practices, or national

days. Migrant workers can face violations upon termination of their employment. For most countries in Southeast Asia, an undocumented worker is considered a criminal and immediately expelled. Cases exist where factory owners do not want to pay their workers and instead call the police to pick up their undocumented workers and expel them from the country (where they cannot sue for lost wages). Given the weak standards surrounding expulsion in many countries, migrant workers know if they attempt to claim their rights from the wrong person they may be sent home, arrested or harmed. Malaysia has a law that allows the caning of undocumented migrant workers, and between 2005-2010, caned nearly 30,000 foreigners. All of these obstacles have a paralyzing impact on migrant workers and their ability to exercise their rights.

## CASE STUDY

### The Fear of Non-Citizens

In Chiang Mai, a city in Northern Thailand, a young female university student was tragically raped and murdered in her dormitory. The suspects, two ethnic Shan construction workers, were arrested. After the arrest, students started to rally and, supported by the police, asked for the expulsion of all migrant construction workers in Chiang Mai. A number of raids and forced expulsions occurred over the following days with several hundred people being expelled to Burma. The expulsions were illegal, and in some cases, Thai citizens caught up in the raids were expelled from their own country in Myanmar.

Malaysia has conducted mass expulsions of migrant workers, where tens of thousands of workers have been arrested and expelled in a short period of time (although this has not been done on a large scale since 2004). Mass expulsions are a rare yet dangerous violation of human rights, and an action clearly in contravention of a number of human rights and national laws. Yet people's fears of the non-citizen criminal remain high; and as a result victimization of innocent non-citizens often receives inadequate attention.

### **Forced labor**

Forced labour is one of the worst forms of labor violation. The ILO Convention 29 on Forced Labour (1930) defined it as:

“All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”



## CASE STUDY

### Forced Labor

This case study is from interview notes taken during a recent research project on migrant workers in Malaysia.

Note: all names used in this example, including people and company names, are pseudonyms.

In order to meet its company policy, a manufacturing company (Cyber) using migrant labour requested the labour agent to upgrade the working conditions to meet the legal minimum wage and the living conditions of the workers. Rather than do what Cyber asked, the labour agent negotiated the wage rate with the workers. The agent offered to pay them 41.50 Ringgit (about \$USD 13 per day), without holiday pay but without deducting anything except the recruitment levy which they were expected to pay. The workers verbally agreed to this arrangement.

A contract was then made in English and Malay languages that none of the workers understood, but they signed anyway trusting the word of the agent. The workers noted that the deductions were written in English and when they got back to their hostel, they tried to translate them using a dictionary. Unknown to the workers, the agent had already gone back to Cyber Company to report that the workers agreed to the new rate, but the Cyber management insisted that this was unacceptable even if the workers agreed since the terms still did not meet the minimum legal requirements.

The agent decided to pull the workers out of the company. While waiting to be assigned to a new company, the workers did not work and therefore they were not paid any wage. They were brought to a housing area, about 50 km away from their original hostel. They described the living area as being too small with 10 men in one room and 30 women staying in another single room.

Eventually, after 10 days, the workers were asked to report to the new company. The workers heard that working conditions in this company were very bad. They objected to the new assignment and requested to be assigned to another company. Instead of responding, the agent kept threatening to denounce them to authorities if they kept complaining. The workers then asked for their passports back so that they can look for another employer-agent, but the agent refused to give them their passports. They then requested to return to Myanmar but the agent refused to let them go. The agent kept threatening to have them arrested and at some point the agent did come to the hostel with some police officers. After that visit, the workers were scared so badly that they ran away from the employer, without their passports and without money except what little they have saved. They are still in Malaysia, trapped until they are apprehended, detained and eventually deported.



Forced labor has two key elements. First, that the work is involuntary, it is done against the will of the person. This can be forced recruitment, living under duress, and the impossibility of leaving the employer. The second, is that the work is done under the menace of penalty. In most cases this penalty is the threat of physical abuse, but it can be threats to family members, or threatened punishment if the person escapes. In cases of trafficking, forced labor commonly occurs in contexts where a person is not paid, the work is oppressive (for example, sexual services), and the person does not have freedom of movement to leave their place of work. Forced labor is at the extreme end of work place violations. Some violations at work may be minor; for example, poor work conditions (too hot, cold, dirty or insanitary conditions). Some conditions may be severe without being criminal; for example, verbal abuse or unauthorized reduction of wages. Other work place violations may become criminal without actually amounting to forced labor; for example, physical abuse, stealing wages, or child labour.

## CASE STUDY

### Protecting Child Migrant Workers

A publication by the Mahidol Migration Centre called *Invisible Victims of Trafficking in Thailand* gives the following account of a child looking for work in Thailand.

The boat left for sea and Khin had no idea where he was or where the fishing boat was headed. He was told to lift boxes of fish and pull fishing nets from dusk till dawn. He received some food but was not paid for his work. The person who controlled the workers neglected Khin as he was underage. Khin worked on the boat for seven days and when the boat docked at the pier, he was cast off with his friend.

Eventually, he fell into the hands of a Thai lady who locked the two boys in a room for three days before they were taken to another fishing boat. On seeing them, the new boat owner only accepted Khin's friend for work as he was 19 years old. Considered too young to work, Khin was left on the street alone, unable to speak any Thai and not knowing where he was and who he could ask for help. In the end, he just started wandering around. After three days, Khin was walking on an overpass when a car stopped and took him to a police station. The police station was in the Klong Toey district of Bangkok.

Having not eaten or drunk properly for three days, Khin was then sent to the Immigration Detention Center at Suan Plu in Bangkok where he was detained for three months. People from Myanmar and Thailand shared the cell with him. Later, Khin was deported to Mae Sot on the Thai-Myanmar border. Upon arrival, the immigration police handed him over to the Democratic Karen Buddhist Army (DKBA) in Myawaddy. As someone had to pay for his release, an aid worker eventually bought Khin from them and he was taken back to Mae Sot where he was brought to the safe house of a Myanmar aid organization. He then moved to a boarding school where he learnt Thai, English, and Myanmar. There, he made some friends and was happy. Khin is currently seeking regular education and care but he still does not have the legal documents to stay in Thailand and remains at risk of arrest, deportation, or re-trafficking.



### Exercise: Locating rights violations

For the two cases described here, forced labour in Malaysia and child workers in Thailand, detail the main violations to the people involved. Are these also human rights violations?

Examples of violations may be:

- Breaking contracts
- Excessive fees
- Underpayment or non payment of wages
- Long working hours
- Poor living conditions
- Poor access to health
- Seizure of documents
- Threats to security
- No freedom to move

### 7.3.1 Government Actions that can Protect Migrant Worker Rights

The Convention calls on States to prevent “illegal or clandestine movements and employment of migrant workers in an irregular situation,” and declares that states should ensure “sound, equitable, humane and lawful conditions.” Partly, this can be achieved through the increased regularization of migrant work, which allows all undocumented workers to eventually become documented. Legalizing migrant labor will reduce the scope and the need for a criminal economy in migration, leading towards less occurrences of trafficking. While this obligates the government to protect migrants from violations, it can also be used by governments as an excuse to target migrant workers by doing things such as increased policing along borders, raiding workplaces, and deporting undocumented workers. Further, it does not ask governments to improve the access to documented migration nor does it ask companies to assist in the regularization of their work force. The ICRMW states that the government should “take appropriate measures to ensure that [irregular situations] do not persist,” but it does not call for changes to immigration laws or policies, which may include many obstacles to regular documented entry.

Though the ICRMW prevents arbitrary expulsion, legal expulsion is allowed within the Convention. Indeed, expulsion is a right of the government, although it must be done through legal mechanisms. The migrant worker does have rights around expulsion, including the right to appeal and rights against collective expulsion. However, there is much room for interpretation surrounding the notions of lawful as opposed to arbitrary expulsion.

There are some activities governments can do which do not limit the rights of workers. This includes regulating the types of jobs migrant workers undertake. In countries such as Thailand and Malaysia, migrant workers are limited to specific

fields of employment (for example, Thailand’s migrant workers are limited to the fishery industry, manufacturing, domestic work, farming, shipping and construction). Generally, the type of work migrant workers do tends to fall into the category of the “Three Ds;” work that is dirty, dangerous and degrading. For example, work in the fishery industry may include dirty work such as gutting fish (a rather smelly job). An example of dangerous work is working on a fishing boat in the middle of the ocean. Degrading work may include being a commercial sex worker for sailors (although this is not a legal form of employment).

## CASE STUDY

### One Domestic Worker in Singapore Speaks Out

A Human Rights Watch report on domestic workers in Singapore, called *Maid to Order*, gives the following statement from an Indonesian maid working in Singapore:

“I was not allowed to go outside. I never went outside, not even to dump the garbage. I was always inside; I didn’t even go to the market. I felt like I was in jail. It was truly imprisonment. I was not allowed to turn the radio on either. I could only see the outside world when I hung clothes to dry. My employer said, ‘Don’t speak to anyone. Don’t speak to friends or to the neighbors.’ I wasn’t allowed to contact my relatives. I worked for three years. I had nobody to talk to. I asked my employers if I could return to Indonesia, and they said no. I was not happy or comfortable, and I wanted to go back. They said, ‘You have to finish your contract. You have to make sure you finish your contract before you go back.’”

Domestic workers are particularly vulnerable because they are isolated from friends and family. This problem is changing with the introduction of mobile phones and countries such as Singapore and Hong Kong introduced laws giving domestic workers a day off. However, protection is still not guaranteed. The day off in Singapore is not compulsory; employers can confiscate phones, and domestic workers may feel too threatened to make complaints.

### 7.3.2 Migrant Worker Organizations

Migrant worker organizations vary in terms of their size and activities. There are three types of organizations which work on protecting the rights of migrant workers.

#### **International organizations**

Apart from the UN, which has a treaty body for the ICRMW and special rapporteurs on non-citizen rights, the other main international organizations managing migrant workers’ rights are the ILO (International Labour Organization) and the IOM (International Organization for Migration). While limited to giving technical advice and research, they do serve as important standard setting bodies.

#### **Local specialized NGOs**

These provide services to migrant workers such as legal advice, protection, and education. The two most prominent migrant worker NGOs in the region are the Migrant Workers Forum (based in the Philippines), and the ASEAN Migrant Workers Taskforce.



Both these organizations are heavily involved in advocacy and standard setting. In addition, grass roots organizations can also provide services (such as the Labour Rights Protection Network (LPN) based in Thailand or Tenaganita Women's Force in Malaysia). These groups offer such services as legal services, education for children of migrant workers, programs on health, shelter, advocacy on migrant worker rights, and the provision of humanitarian assistance for workers and their families. Some of these organizations get support from the ILO and IOM, thereby creating a situation where grass roots activities are able to gain international support.

### **Worker's unions**

These provide a means of mobilizing migrant workers whose individual voices often go unheard. Through union participation, migrants and their families gain representation, protection, and access to justice. However, given that migrant workers frequently do not have the right to join unions, nor can gain access to such organizations, their influence is as yet limited. Internationally, the United States based trade union, the AFL-CIO, works toward immigration reform, full foreign worker rights, supervision of child migrant workers, improved workplace standards, and legal representation for migrant workers and their families.

As can be seen, there are a number of ways that migrant workers get protected by these organizations. Protecting workers at the workplace is important, so they are not mistreated or abused. Organizations respond to this by informing police or labour ministry officials about workplace abuses. There is need to advocate for workers rights from the government and business sector, and to change attitudes of the public who may dislike migrant workers. The family of migrant workers need assistance, as well. Many children of migrant workers do not get access to basic services such as health and education, which can be provided by NGOs.

While there is a long way to go before migrant workers rights are protected, there have been improvements in the region over the past decades. With the coming into force of the ICRMW in 2003, and the establishment of many NGOs to protect migrant workers, there is more action in this area. However, problems still persist, and this is the case for the worst form of violations to migrant workers, that of trafficking.

## **7.4 Trafficked Persons**

The crime of human trafficking is most commonly considered a type of slavery. It occurs when someone is taken away from their home or residence and put into a situation where they are exploited; such exploitation can be forced labour or sex work. Human trafficking is a serious problem that has expanded greatly in the last twenty years for a number of reasons, mainly associated with globalization:

- Rise in transnational organized crime: Globalization has led to criminal activities and networks crossing borders because of changes in communication, technology, and travel. Human trafficking is now a very profitable illegal industry.
- Globalization of the economy: With more countries opening their economies and increased movement for labor and leisure, trafficking has become a profitable source of labor. Also, a global economy means moving money around the world to repatriate profits from illegal activities has become much easier.
- Easier travel: Large movements of people usually involve irregular movements of people and goods. Many trafficked persons travel legally to other countries, only



to find themselves in a trafficked situation.

- **Changing labor markets:** Rapidly industrializing countries in Southeast Asia often need large numbers of cheap workers. With more people willing to travel to find work outside their country, the possibility for trafficking increases. Further, large numbers of single male migrants may lead to a rising demand in commercial sex work, which can rely on trafficked women.

Laws on trafficking emerge from anti slavery laws, though trafficking itself has become in many ways a different crime to slavery. The prevention of slavery has a history dating from the first half of the 1800s, and the protection from slavery is now seen as a customary international law. Anti-trafficking laws date from the beginning of the 1900s, and the first anti-trafficking laws were commonly called “White Slavery Laws.” These laws were intended to protect white women and children from being sold into slavery, particularly in Africa and the Middle East. The white woman slave is now considered to be largely a myth that was invented to both control women and to represent Africans and people from the Middle East as evil. Even though this threat was never proven, a number of laws were introduced to stop this supposed trade including: the International Agreement for the Suppression of the White Slave Traffic (1904), the International Convention for the Suppression of the White Slave Traffic (1910), and the International Convention for the Suppression of Traffic in Women and Children (1921). An important legacy was set by these laws as they led trafficking laws to focus closely on women and on trafficking for sexual slavery. These are indeed serious problems, but this has meant that until fairly recently, the trafficking of men and labour trafficking has been overlooked by many organizations.

## CASE STUDY

### Trafficked onto a Fishing Boat

The following excerpt is from an October, 2011 *Myanmar Times* article entitled *Migrants tell of slavery at sea on Thai fishing boats*:

The day Hla Myint [not his real name] saw the sea for the first time was when traffickers delivered him, after a week’s trek through the jungle from Myanmar, to a ship on Thailand’s coast.

He said it was the beginning of seven months of “hell”, during which there were beatings “every day, every hour”.

Hla Myint decided to escape – throwing himself into choppy waters and clinging to a life buoy for five hours before reaching land – after seeing his captain kill a crewmate.

The man, who had been caught trying to escape, was savagely beaten and tortured in front of the rest of the fishermen.

“Later they took him to the back of the ship, stood him on the edge and shot him in the head. My heart pounded so hard when I saw that,” said Hla Myint.

His is one of a multitude of stories of slavery in Thailand’s multi-million dollar fishing industry, which campaigners say relies on forced labour to provide seafood for restaurants and supermarkets around the world.



#### **7.4.1 The Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, 2003 (The Palermo Protocol)**

Up until the 1990s, it was mainly human rights organizations (including the OHCHR) which managed responses to trafficking. However, within the UN, there was a move to criminalize trafficking, and this was eventually undertaken by the UN Crime Commission, which is now known as the UN Office on Drugs and Crime (UNODC). The Trafficking Protocol is one of three protocols to the United Nations Convention Against Transnational Organized Crime (2000). The other two protocols cover people smuggling and weapons. It is sometimes also called the Palermo Protocol, named after the city of Palermo in Southern Italy where the treaty drafting was completed. An important feature of the Protocol is that it criminalized the actions at an international level, as previously, it had been possible for recruiters to traffic someone to another country and not be guilty of a crime, because the actual exploitation occurred in another country, and the criminal was outside of the jurisdiction where the crime had occurred.

The first problem addressed by the protocol is finding a definition of trafficking, as none existed in international law. Once defined, there was also a need to criminalize it, and protect the rights of trafficked victims. Given this mixture of objectives, it is important to note that the Trafficking Protocol is not a human rights treaty as such, although it does have human rights elements and its objective is to protect human rights. The Trafficking Protocol is different from other non-citizen treaties, such as the migrant worker and refugee treaties, in that it has a clear objective to criminalize the activities associated with trafficking. When States ratify the Protocol, they are expected to prevent and combat trafficking in persons, protect and assist the victims of trafficking, and cooperate with other member states.

Trafficking appears in two other human rights treaties: in the CEDAW (Art 6), which seeks to “suppress all forms of traffic in women” and in the CRC Optional Protocol 2 on the sale of children, child prostitution, and child pornography. Both these treaties have their limitations: CEDAW does not define nor criminalize trafficking, while the CRC Optional Protocol criminalizes child prostitution but does not address the movement of children or the forced labor of children.

#### **7.4.2 Definition of Trafficking**

Much debate ensued during the drafting of the Trafficking Protocol, with states and NGOs arguing about the requirement that a person be coerced into exploitation, the role of prostitution, and the meaning of exploitation to name but a few. The definition in the Palermo Protocol states:

Trafficking in persons shall mean the [actions of] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

There are three key elements to this definition. For a situation to be trafficking, all three elements must exist (although for children, only the ‘action’ and ‘exploitation’ element are necessary).

**The “action”element**

The action element is what someone has to do to commit the crime of trafficking. The actions are listed as: recruitment, transportation, transfer, harboring, or receipt of persons. This list covers the full spectrum of the migration movement, from the initial recruitment till the person is received at the other end. The importance of this element is that it criminalizes the entire process. Trafficking is not merely the exploitation of a person, but also the selling or recruiting of someone into a trafficked situation. Because the protocol is a criminal treaty, it means that anyone conducting one of these acts is committing a crime.

**The “means”element**

The means element is what the trafficker does to ensure the person ends up in a trafficked situation, such as coerce, abduct, or deceive someone. In a sense, this is what turns the action above into a crime. If a taxi driver takes someone to a workplace where they become trafficked, that taxi driver has not committed a crime (assuming the driver knows nothing about this), but woman selling a child to a fishing boat captain (as the case earlier in the chapter) is clearly committing trafficking. The definition provides a wide range of “means” from physical threats such as abduction, to lying or deceiving someone, and also includes the abuse of power, and getting paid to assist in trafficking.

**The “purpose” element**

The purpose indicates what compels one person to traffic another, and based on the Protocol, it is for the purpose of exploitation. The definition gives some examples of exploitation, but it does not actually define exploitation. Instead, the Protocol sees the common purposes of trafficking to be sexual exploitation (where a woman is forced to be a sex worker) or forced labor (where a person is made to work against their will, is not paid or is underpaid, and does not have the freedom to leave a job). It is accepted that exploitation can be defined by the convention on Forced Labour, detailed above as: “All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” The definition also notes the removal of organs, or organ trafficking as a purpose. This is not a very common crime, especially in Southeast Asia, although individual cases have been documented in Nepal, China and India.

The above definition applies to adults only. An exploited child only needs to prove the action and purpose elements for trafficking to occur. The Trafficking Protocol does not specify a gender or age, anyone can be trafficked. It does not specify that borders must be crossed, so people can be trafficked even within their own country. It does not specify the situations that people can be trafficked into, so trafficking situations can occur in factories, homes (for a domestic worker), brothels, streets (for child beggars), or on fishing boats. The Protocol also clearly states that the consent of the victim is irrelevant if any of the means were used.

## DISCUSSION AND DEBATE

### Which of These Cases Amount to Trafficking?\*

There are many areas where the definition of trafficking can be unclear. For example:

- a. If a recruiter thinks they are sending someone to a good job, but it actually turns out to be a trafficked situation, is the recruiter guilty of trafficking?
- b. If a manager refuses to pay a migrant worker after a month's work, is this trafficking?
- c. If a migrant worker is continually sexually harassed at her workplace, is this trafficking?
- d. An 8 year old from a neighboring country is brought to the city to be a child beggar. The child is happy to work as a beggar as she gets fed and is able to work with friends, although she does not get paid. Has the child been trafficked?
- e. A woman meets and marries a foreigner through the internet. When she travels to his home, she finds that he expects her to work all day at his business and he also hits her. The husband considered this is what all wives should do for their husbands. Has the wife been trafficked?

\*Answers in the box below

### The Answers

- a. This is not trafficking as the recruiter did not set out to deceive the person. However, one must also bear in mind that this is the most common excuse given by recruiters.
- b. This is not trafficking as the level of exploitation is not high enough. Exploitation must involve a lack of freedom, e.g., if the person is prevented from leaving the job or place of work. While these cases may not be trafficking they are still crimes (either a violation of workers' rights or assault). However, if it can be proven that the migrant worker was recruited for the purpose of being exploited then it can be labor trafficking.
- c. This is not trafficking for the reasons stated in (b) above.
- d. This is trafficking. There is no need to prove "means" where a child is involved.
- e. This is debatable, and would only amount to trafficking if the husband deliberately used the marriage to get unpaid work from the woman (that is, he deceived her which proves the "means"), and he prevented her from leaving the house (thereby proving the "purpose"). If not, then his behavior could amount to assault or domestic violence.



### **7.4.3 Human Rights Elements in the Trafficking Protocol**


The Protocol does offer protection to victims of trafficking. This is achieved in a variety of ways such as by protecting the victim's privacy, providing them with the necessary physical and psychological assistance, and repatriating them (or helping them to return home). Importantly, it states that victims of trafficking should not be criminalized or jailed. A common response of the police when they discover an undocumented person is to immediately detain them so they can be expelled from the country. Even upon their return, a victim may be jailed by his or her own government for immigration related offenses. Unfortunately this concern is not directly addressed in the Protocol. However, since coming into force, guidelines and resolutions have been passed declaring that this should be considered a standard of State practice.

To understand how trafficking victims right can be protected, it is important to discuss how people end up in a trafficked situation. While the media and some organizations talk mainly about young women who are tricked or coerced into sex trafficking, this is not the only form of trafficking, and it is probably not a very common form of trafficking though it is likely one of the worse kinds. Recent studies done in Southeast Asia have highlighted the large number of males who are trafficked into work on fishing boats or agriculture. Frequently the workers think they are starting a legitimate job but soon realize the conditions of employment has taken away their freedom. This is also the same for female domestic workers who find themselves trapped in the houses of their employers. It is far more common for non-citizens to be trafficked than nationals, for nationals can simply escape to the police for protection, whereas non-citizens may be afraid to report to the police, and if they did they do they may not have the language skills necessary. While there is trafficking into the sex industry, particularly brothels whose main clientele are migrant workers themselves, trafficking for labour is much larger and less policed in the region. Because of this, a key to protecting the rights of trafficked persons is by providing more protection at the workplace. But as the previous section has detailed, governments of countries with large migrant worker populations are reluctant to do this, meaning that trafficking for labour will continue.

The patterns of trafficking in Southeast Asia differ from other regions. In South Asia it is more common to find women trafficked into commercial sex work in India from neighboring Nepal and Bangladesh. South Asians may find themselves in a trafficked situation in the gulf States and large numbers of workers travel to work in UAE, Kuwait, and Saudi Arabia. There is trafficking from Eastern Europe into Western Europe, and Africa into Europe, for labour and commercial sex work as well.

## CASE STUDY

### Who is trafficked? Underserved Victims




Determining the prevalence of trafficking is complicated. Many victims of human trafficking are never identified. The same person may be trafficked multiple times. Some authorities and organizations may over or under report trafficking numbers. Hence, human trafficking statistics can be unreliable and misleading. Assumptions about what people may be most vulnerable to trafficking can result in underserved populations. The United Nations Inter-Agency Project on Human Trafficking (UNIAP), which works in six countries across the Greater Mekong Sub-Region (Cambodia, China, Lao PDR, Myanmar, Thailand, and Vietnam) recognized the prevalence of underserved victims and launched an initiative. This Support to Underserved Victims initiative aims activities at groups that are regularly overlooked or denied services. UNIAP explains:

“One group of trafficking victims that is often underserved is male victims of labour exploitation, forced to work on boats or in plantations or factories. While laws and policies have been revised across much of the Greater Mekong Sub-region recognizing male victims of trafficking, there remains a lack of provision of services. Further populations include those recruited through formal channels into unpaid and forced domestic work, or sex workers who entered the sector willingly and were then exploited, but not regarded as trafficked and cannot therefore access appropriate assistance. Often they are instead treated as criminals, or forced to return home in considerable debt.”

## FOCUS ON

### The Difference between Human Trafficking and Smuggling



Human trafficking differs from people smuggling in several ways. The government view is that trafficked people are victims, whereas smuggled people break immigration laws intentionally to enter a country illegally. When smuggling people, the smugglers and the people being smuggled attempt to covertly transport themselves from one country to another because they are not allowed to legally enter. In other words, this act is voluntary and the people involved are considered free before, during, and after the transport. Trafficking differs as these victims are often deceived, coerced, and are not free to make the choice (that is, they are usually forced into some sort of bondage).

In practice, the distinction is rarely this clear cut because it is often difficult to measure levels of voluntariness; for example, smuggled people may also be subject to coercion (whether for more money, threats against family members, or threats to their security). A person may start out being smuggled but may soon find themselves in a trafficked situation. For example, they may be forced to work somewhere after discovering they need to pay extra money to their “smuggler.” Thus, a person need not be trafficked out of the country (but could have left voluntarily) to end up in a situation of trafficking.

## **Repatriation**

In some cases, it is in the best interests of victims to be returned to their country of origin. Repatriation is a right, and when done properly, requires a consultation process to ensure that the trafficked person is ready and willing to return. Proper repatriation allows time for rehabilitation and legal redress. It also ensures the person is able to make a safe and dignified return home. In Southeast Asia, however, there is still much to be learned about best practices in this area as governments often forcibly repatriate trafficked persons.

The repatriation of a victim of trafficking may often seem the easiest and best solution. In some situations, though, a trafficked victim may not want to be deported back home. For example, they may prefer to be a migrant worker, stay in the country and find a job, rather than arrive home, penniless. Indeed, they may have debts from traveling to the other country, and may need to work to pay the debt off. Finally, victims are often deeply embarrassed about being trafficked into sex work, and may face discrimination in their home villages.

## **7.5 Challenges to Identifying Trafficked Persons**

Identifying a trafficked victim can be a challenging component of ensuring that trafficked persons are protected. Correct identification will mean that a victim gets many protections such as access to legal assistance or NGO help, shelter, the right to not be returned to an insecure situation, protections from being prosecuted, and not being arrested, detained, or expelled from the country. The identification of a trafficked person in the Palermo Protocol is limited because it does not outline who or how a person is declared trafficked. It may be assumed that this will fall primarily to the State which the person was trafficked to, although the State of nationality has the additional responsibility to accept that person as a victim of trafficking upon their return.

Ideally, the trafficked person will be regarded as a victim and the State should have adequate policing and protection to find and help them. This works well in cases of raids and rescues from brothels or factories. In such situations, the police or other authorities usually determine if the person has been trafficked. But in cases where an undocumented person approaches local authorities with stories about their exploitation, they may be treated as a trafficked person (assuming the local authorities are aware of the law), but they may also be considered an illegal migrant (and deported from the country) if the authorities are either unaware or unable to identify the person as trafficked. What is worse, in such cases, the traffickers often escape justice.



## CASE STUDY

### Thailand (April 2008)

A truck driver smuggling 121 Myanmar migrant workers, locked them in the back of his truck but did not ensure adequate ventilation. As a result, 54 Burmese migrants died of suffocation. Many of the surviving women were considered trafficked and given assistance. However, the surviving men were defined as “illegal aliens” and deported. This was because the law in Thailand at the time only recognised women as victims of trafficking. The law has since changed and now all victims would receive the same treatment. Four years later, the truck driver, the truck owner, and those who assisted the smuggling, were sentenced to between 6 to 10 years in jail.

A further challenge is that not all countries in Southeast Asia have a law which criminalizes trafficking. A serious problem was that many States only recognized women who were trafficked, and not males. Though, this has been changed with the ratification of the protocol or changes to domestic laws. Throughout Southeast Asia most States have introduced or updated their trafficking laws to comply with the Palermo Protocol. Table 12-1 shows the local laws and the compliance of the laws to the Palermo Protocol.

**Table 7-1: Anti-Trafficking Laws in Southeast Asia**

|                  | Palermo Ratification | Domestic Trafficking Law   | Features   |
|------------------|----------------------|--|--|
| <b>Brunei DS</b> | No                   | The Trafficking and Smuggling Persons Order (2004)                         | The Order prohibits sex and labor trafficking. Sex trafficking has penalties for up to 30 years whereas labor trafficking only prescribes penalties of up to three years imprisonment. |
| <b>Cambodia</b>  | Yes                  | The Law on Suppression of Human Trafficking and Sexual Exploitation (2007) | Domestic law similar to Palermo Protocol.  |
| <b>Indonesia</b> | Yes                  | Anti-Trafficking Law (2007)  | Domestic law similar to Palermo Protocol. Criminalizes debt bondage, labor exploitation, sexual exploitation, and transnational and internal trafficking.                              |
| <b>Laos</b>      | Yes                  | No specific law  | Laos has laws criminalizing trafficking, although they only apply to women and children, not men.  |



|                    |     |   |   |
|--------------------|-----|---|---|
| <b>Malaysia</b>    | Yes | Anti-Trafficking Law (2007)<br>Amended in 2010        | Domestic law similar to Palermo Protocol, except that it treats prostitution as a form of exploitation. The 2010 amendment broadens the definition of trafficking to include all actions involved in acquiring or maintaining the labor or services of a person through coercion. |
| <b>Myanmar</b>     | Yes | The Anti-Trafficking In Persons Law (2005)            | Domestic law similar to Palermo Protocol.   |
| <b>Philippines</b> | Yes | The Anti-Trafficking Persons Act (2003)               | Domestic law similar to Palermo Protocol. The law allows private prosecutors, including NGOs, to file lawsuits against traffickers.   |
| <b>Singapore</b>   | No  | No specific law                                       | The Penal Code criminalizes most forms of trafficking, but does not criminalize the use of 16 and 17 year old children for prostitution.  |
| <b>Thailand</b>    | Yes | The Anti-Trafficking In Persons Act, B.E. 2551 (2008) | Domestic law similar to Palermo Protocol.   |
| <b>Vietnam</b>     | Yes | No specific law                                       | No clear definition of trafficking, and only covers women and children.   |
| <b>Timor</b>       | Yes | No specific law                                       | Does not have a penal code that comprehensively criminalizes human trafficking. However, the Immigration and Asylum Act (2003) prohibits trafficking in women and children for prostitution and forced labor.   |

### 7.5.1 NGO Responses

In Southeast Asia, one of the major organizations working to combat trafficking is the United Nations Inter Agency Project on Human Trafficking (UNIAP). Established in 2000, UNIAP is a coordinating body within the UN, bringing together the various UN agencies working in this area (UNDP, UN Women, UNICEF, OHCHR, and UNODC). UNIAP is also a coordinating body within the region which organizes responses in the Greater Mekong Sub-Region.

NGOs working on trafficking include the Global Alliance Against Trafficking in Children and Women (GAATW), an alliance of more than 100 NGOs from across the world which is based in Bangkok. In addition, Ending Child Prostitution and Trafficking (ECPAT) focuses on child trafficking. Other international organizations include Anti-Slavery, the SOLD Project, the Coalition Against Trafficking in Women (CATW), the Polaris Project, and the International Rescue Committee (IRC).

### **Responses: the four P's**

The Protocol provides a range of measures which States should undertake to prevent trafficking, such as information exchange, training police to identify trafficking, strengthening border controls, imposing criminal penalties on traffickers, and introducing domestic criminal laws on trafficking. These are often described as the “Four P's” (note that it was the “Three P's” before Policy and Cooperation were added). The four P's are:

1. **Policy and Cooperation:** governments need to have policies in place to strengthen cooperation and training to combat trafficking.
2. **Prevention:** active policing and education will prevent people from the risk of trafficking.
3. **Prosecution:** ensuring laws are policed and used so suspected traffickers are put on trial.
4. **Protection:** ensuring victims of trafficking have their rights respected, and they are given opportunities to recover and be reintegrated into their communities if necessary.

Many activities are undertaken by civil society to contribute to the four P's. Education is important as rather simple actions can be done to reduce trafficking, including travelling with family members, keeping in telephone contact with family, and being more cautious about accepting promising work offers without some background checking.

## **A. Chapter Summary and Key Points**

### **Migrant Workers**

#### **Migrant Workers**

Migrating for work has been happening for centuries, though the numbers now are much greater. There are two fundamental problems, the abuse of migrant labour and trafficking, which are protected in separate treaties. For migrant workers the ILO began working on this issue after World War II, and the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in 1990. The ICRMW is a human rights treaty, so it has a broader protection of rights including the family and rights outside of the workplace. The treaty is not widely ratified and no developed country, or country with a large migrant worker population has ratified it. A migrant worker refers to “a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.” This definition protects migrant workers before, during, and after work; it means the worker only need to be paid to be seen as a migrant worker, and there is no distinction between documented and undocumented workers. The treaty covers protection for the worker, their wives/husbands, and children.

## **Migrant Worker Rights**

There are three types of human rights for migrant workers. Firstly, there are existing human rights which the worker should be getting anyway, but some governments try to ignore this. Examples of this include access to a court, freedom of expression, and freedom from arbitrary arrest. Second, there are rights specific to migrant workers which include no confiscation or destruction of identity cards, equal treatment and working conditions to nationals, and rights about being able to stay in the country for a period of time once they finish work. There are also special rights for some types of workers. Documented migrant workers are entitled to rights to form trade unions and access to housing and social services. Some special categories of migrant workers such as frontier workers or seasonal workers are entitled to all the standard rights but their access to social services and children's education may be limited as they do not reside full-time in their country of work.

## **Challenges to the ICRMW**

The Convention has some weaknesses such as no specific protection for women, who may face sexual discrimination in the workplace or unequal pay. Another weakness is protecting domestic workers who are almost exclusively women and youth workers (people under 18 seeking work). One challenge is the low ratification of the treaty. Developed countries may consider the treaty gives migrant workers too many rights, and if the conditions for work are too good, migrants will 'flood' into the country. States may consider some of the rights controversial such as treating migrant workers the same as local workers in terms of pay, overtime, holidays, and termination of employment. There is also a concern that the ICRMW recognizes undocumented workers, as most States simply called undocumented workers illegal migrants, and they can be easily arrested and deported.

## **Violations of Migrant Worker Rights**

Migrant workers face threats because they live outside of their state and because they are portrayed as burdens to society and bad for the economy. Many migrant workers may be hesitant to report threats or violations because they see that the police or justice system does little to protect them. They face fraud as companies or individuals promise lucrative work contacts (often upon payment of a fee), and only later does the worker discover there is no work, or if the job exists, that the conditions are not as promised. There are bad workplace conditions, and workers may face non-payment of wages, dirty, dangerous and unsanitary working conditions, and extended working hours. Even outside the workplace, migrant workers can face discrimination in the form of police interference, constant surveillance, inability to send children to school, and inability to practice cultural activities such as weddings, religious practices, or national days. Forced labour is one of the worst forms of labor violation.

## **Government Actions that can Protect Migrant Worker Rights**

States must promote humane and lawful conditions for work. They should be stopping illegal migration and protecting people from violations that occur when people are transported illegally into a country. States are allowed to legally expel people, although it must be done through legal mechanisms. Another action governments can do is regulate the types of jobs migrant workers undertake. Though the type of work migrant workers do tends to fall into the category of the "Three Ds" or work that is dirty, dangerous and degrading.

## **Migrant Worker Organizations**

Migrant worker organizations include International Organizations like the UN, ILO and IOM. There are local specialized NGOs providing services to migrant workers such as legal advice, protection, and education. And there are Worker's unions which work toward immigration reform, full foreign worker rights, supervision of child migrant workers, improved workplace standards, and legal representation for migrant workers and their families.

### **Trafficked Persons**

Trafficking has increased recently because of a rise in transnational organized crime, and the globalization of the economy, labour market, and travel. Anti-slavery laws start in the early 1800s, and anti trafficking laws date from the beginning of the 1900s. These laws were intended to protect white women and children from being sold into slavery, particularly in Africa and the Middle East, which is now considered to be largely a myth.

### **The Trafficking Protocol**

The Trafficking Protocol is one of three protocols to the United Nations Convention Against Transnational Organized Crime (2000). It criminalized trafficking at an international level. Importantly it gives a definition of trafficking, as none previously existed in international law. Trafficking is made up of three elements: the actions of recruitment, transportation, or receipt of persons; by means of threat, force, coercion, abduction, or deception, and for the purpose of exploitation. An exploited child only needs to prove the action element and the exploitation element for trafficking to occur. The Protocol protects victims of trafficking by providing them with the necessary physical and psychological assistance, repatriating them, and giving them access to a court. The best interests of victims may be to return them to their country of origin, but this requires a consultation process to ensure that the trafficked person is ready and willing to return.

### **Challenges to Identifying Trafficked Persons**

Identifying a trafficked victim can be a challenging as it is assumed that this will be done by the State which the person was trafficked to. Ideally, the trafficked person should be considered a victim and the State should have adequate policing and protection to find and help them. A challenge is that not all countries in Southeast Asia have a law which criminalizes trafficking. Some States only recognized women as victims of trafficking, and not males.

### **NGO Responses**

There are many organizations such as UNIAP and GAATW who protect the rights of trafficked victims. They are may be considered to be responding to the four P's of counter trafficking activities: Policy and Cooperation, Prevention, Prosecution, and Protection

## **B. Typical exam or essay questions**

- What are some of the negative things people say about migrant workers in your country and what are accurate criticisms of these views? How do migrant workers contribute to the economy, workforce, and community in your country?
- Discuss the laws regulating migrant labour in your country. Do the laws force

people into undocumented situations or do they protect the rights of workers?

- If you live in a sending country, what preparation and protection does your government offer to migrants who are travelling overseas to work?
- Is the law on trafficking in your country in compliance with the Palermo protocol? Does it have the same definition, and does it provide the same rights as Palermo? Are there any major weaknesses in the domestic law?
- Find a case of trafficking that has occurred in your country. How was the situation identified, and how was the victim protected? Do you consider the initiatives by the government enough to combat trafficking?
- List the four categories of non-citizens rights. Alongside each category, name the main international bodies that work on these non-citizen rights, the institutions and organizations that actively protect the rights of non-citizens in your country, and the relevant domestic laws which protect these people.

## C. Further Reading

### Migrant Workers

The most used textbooks on migrants workers are

- Aris Ananta
- Evi Nurvidya Arifin
- Ryzard Chuzwelxyzol

Much research on migrant workers can be found on the ILO website:

Reports on migrant works in Southeast Asia have been done by

- Human Rights Watch, *Maid to order: ending abuses against migrant domestic workers in Singapore*.
- Human Rights Watch, *From the Crocodile to the Tiger: Abuse of Migrant Workers in Thailand*.
- ILO, *Employment practices and working conditions in Thailand's fishing sector*.

### Trafficking

The most detailed book on the protocol is Anne Gallagher's *The international law of human trafficking*, New York: Cambridge University Press, (2010).

Useful websites on trafficking include:

- The Nexus Institute Publications
- United Nations Inter-Agency Project on Human Trafficking (now called UN ACT)
- United Nations Office on Drugs and Crime