

**Annex A: Migrant Rights International and Migrant Forum in Asia, MRI & MFA (2008) Living with RELA Operations and Whipping: An Appeal by Refugees from Burma Residing in Malaysia, distributed at the 7<sup>th</sup> session of the Human Rights Council, 18 March.**

*Statement Prepared Based on a Consultation with Leaders of 8 Refugee Community Organisations in Malaysia.*

To the Malaysian Government and the Members of the Human Rights Council

We, the leaders of refugee communities from Burma who are now living in Malaysia, want to tell you about how our people have suffered from operations conducted by The People's Volunteers Corps (RELA, *Ikatan Relawan Rakyat*) to arrest undocumented immigrants, as well as from the use of whipping as punishment for immigration offenses.

Many RELA raids happen in the middle of the night, while we are sleeping. RELA members bang on our doors, demanding entry into our homes. They break the locks, force their way in, and check every person for documents. If we do not produce anything, we, including our children and babies, are put into lorries and taken to Immigration Detention Depots. Although some of us show documents given by the United Nations High Commissioner for Refugees (UNHCR), RELA members often do not acknowledge them, and arrest us anyway. They also search our homes, taking money, jewelry, mobile phones, and other valuables. We know that they are not supposed to do this, but we don't know how to stop them. During these raids, some RELA members also ask us for bribes. If we pay these, they 'hide' us, until the operations are over. However, when we try to run away, we have been beaten with sticks that they carry.

We run away because we feel great fear, knowing that we might have to spend months in prison, suffer whipping, and then get deported. When we run away, RELA members chase us. Many of us have been injured, and some have died. In August 2006, a 15-year-old boy ran away from a raid in Sungai Patani and fell from a hill. He came to us to get medical help. We sent him to a clinic, but the doctor didn't detect what was wrong. At the hospital, another doctor said that he had broken his ribs and that the bones had pierced his internal organs. Three days after the RELA raid, he died.

In October 2007, a 47-year-old man, ran away from a RELA night raid of a construction site in Alor Setar. He hid inside the drain, which was partially covered with concrete slabs. The RELA member who chased him saw that he had disappeared, and tried to look for him using a stick to strike into the holes of the drain. At this time, the man was looking up out of the hole, and the stick pierced his eye, making him blind.

When RELA conducts raids in jungle or plantation areas, they also tear down our shelters, making us homeless, and taking away our valuables.

Because of RELA activities, ordinary people are pretending to be RELA. They detain us and say that they will arrest us if we don't pay them some money. Some have also

tried to cheat us with scams offering ‘protection’. Several weeks ago, three men came to one of our community centres, claimed that if we paid RM400, we could get a certificate of protection. Several restaurants and houses with immigrants have paid for this ‘service’. Our women have also been facing sexual harassment by RELA, Police, and people pretending to be members of these units, and we don’t know what to do.

### **RELA and Immigration Detention Depots**

In November 2007, RELA were given powers to assist in the management of some Immigration Detention Depots, while they were transferred from the Prisons Department to the Immigration Department. Since this happened, we who hold UNHCR documents are finding it difficult to visit our family and friends. The RELA members who guard the entrance threaten to arrest us.

In these detention depots, it has been difficult for our community members to contact the UNHCR as well as their family and friends. When they request to make outside contact, the guards ask them for money. The UNHCR is only allowed to visit those who have already been registered by them. Many of us are not yet registered, and therefore, the only way out for us is to be deported at the Thai border.

During the RELA raids, pregnant women are also arrested. We fear for their care in the detention depots. One of our community members was very weak after she delivered her baby in hospital. She was brought back to the detention depot, and was going to be deported. Thankfully, the UNHCR, who was visiting another detainee, happened to see her condition and intervened to prevent her deportation. Another woman, who was pregnant at the time of arrest, had a miscarriage while in detention due to poor living conditions and insufficient care during her pregnancy. She suffered from depression, but was still further detained after her miscarriage.

Our community members stay in detention for long periods of time; they don’t know how long they will stay – it can be for more than two years while they wait for resettlement. The food quality and living conditions are very poor. We find it difficult to live for such a long time in such conditions, especially those of us who are sick, pregnant, or have small children.

### **Whipping**

Since the end of 2006, with the introduction of Special Immigration Courts at the Immigration Detention Depots, many more of our community members have suffered from whipping. The judges have been using this punishment more frequently. Most people are given between 1-2 strokes of the whip. The sentence gets harsher if we have stayed longer in Malaysia, or if we have been arrested before.

When our community members are whipped, they are stripped naked. Their hands are tied apart, and their bodies positioned so that their buttocks are exposed. They are blindfolded. When they are struck, the pain is so tremendous that they shout, and some become unconscious. The whipping breaks their skin, and they bleed. Although some ointment is put on the fresh wounds, they take a long time to heal – sometimes up to two months. Most people have permanent scars. Our community members are haunted by this experience even several months after it has happened. One

community member was whipped three times, and now passes blood when he goes to the toilet.

## **Appeal**

We are more afraid of RELA than the Police, because the Police are more understanding about refugees in Malaysia and they are more controlled in their exercise of enforcement powers. RELA doesn't ask questions, they just do what they want during the operations, arrest our people and send them directly to the Immigration Detention Depots. The Police are willing to contact the UNHCR on our behalf, and to release us when they verify our documents.

We appeal to the Malaysian Government to:

1. Stop the arrest, imprisonment, whipping and detention of asylum seekers and refugees.
2. Allow asylum seekers and refugees to stay and work in Malaysia, at least temporarily on a special work permit, until we can go home or be resettled.
3. Allow all asylum seekers and refugees held in detention centers to contact the UNHCR and their families and friends regularly, and then release us once our status is verified, especially the sick, the pregnant women and children. This includes those who were not already registered by the UNHCR at time of arrest.
4. Withdraw RELA's powers to conduct raids and to arrest undocumented migrants, which directly affect our communities.
5. Stop the deportation of asylum seekers and refugees at the border, which places us in the hands of human traffickers.
6. Adhere to international customary law, as well as fulfill obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) to which the Malaysian Government is a signatory.

We appeal to the Members of the Human Rights Council to:

1. Pressure the Malaysian Government to respect the rights of asylum seekers and refugees and to extend protection and assistance to us in accordance with international human rights standards and obligations.
2. Pressure the Burmese Military Government to speed up the reform process to ensure real democracy, which includes giving equal rights to ethnic minorities, and to stop human rights abuses such as forced labour, portering, forced displacement, forced cultural assimilation, rape, land confiscation, religious persecution and racial discrimination, so that we can go home.

## **Background**

Malaysia is neither a signatory to the 1951 Convention Relating to the Status of Refugees nor to the 1967 Protocol. The United Nations High Commissioner for Refugees (UNHCR) registers and documents asylum seekers and refugees in Malaysia, intervening with law enforcement authorities to prevent arrest, detention and deportation.

RELA (The People's Volunteers Corps, or *Ikatan Relawan Rakyat*) is an auxiliary force comprising of Malaysian citizens. As of 29 January 2008, it has 504,421 members. It was formed under the 1964 Emergency (Essential Powers) Act. The 2005 Essential (*Ikatan Relawan Rakyat*) (Amendment) Regulations gives RELA members wide powers to crackdown on irregular migrants, including the right to bear firearms, search premises without warrants and to make arrests of suspected irregular migrants.

Civil society groups in Malaysia have called for RELA enforcement powers to be revoked and for their disbandment. Despite numerous accounts of physical and sexual abuse and misuse of powers, there are still attempts by the Malaysian Government to further strengthen RELA's powers through the enactment of new legislation. Civil society groups have also called for whipping to be abolished, on grounds that it is cruel, inhumane and degrading punishment.

**Annex B: Human Rights Committee of the Bar Council et al. (2008) Memorandum to SUHAKAM on the Fire Incident at the Lenggeng Immigration Detention Centre, submitted 15 May.**

**Background**

On 21<sup>st</sup> April 2008, an incident occurred at Lenggeng Immigration Detention Centre where an administration building was burned. According to mainstream press, the riots were started by 60 Myanmar detainees after they were told news that their applications for resettlement to a third country had been rejected by United Nations High Commission of Refugees (UNHCR). Fourteen detainees were arrested under Sections 148 (possession of dangerous weapons) and 438 (committing mischief by fire or use of explosive substance) of the Penal Code. They were held at Ibu Pejabat Polis Daerah (IPPD) Seremban.

However, in a press statement, the UNHCR denies any rejection of applications and that the applications were still being processed.

Through our investigation and interviews with several migrants, some who are under detention while others who have been deported, it became clear that the actual event differs vastly from reports in mainstream press that has been very misleading and painted a negative image of refugees.

Firstly, only three of the arrested were Burmese refugees registered with the UNHCR. The others arrested comprised of a Cambodian, a documented Vietnamese migrant worker, six Indonesians, and three more Burmese asylum seekers that have yet to file their refugee status application to the UNHCR.

Secondly, we have found that the cause of the riots was due to abuse of power and violence committed by immigration officers instead of the denial of resettlement applications to the UNHCR.

Thirdly, it is still unclear who actually started the fire. It is unfair to put the blame on the detainees when no independent investigation has been conducted to verify this and only one side of the stories from the Immigration Department and the RELA are being heard.

**Sequence of events**

On 20<sup>th</sup> April 2008, at approximately 8.00pm, during a thorough search of the cells in Block C, immigration officers found some tobacco and a cigarette butt, both prohibited items.

According to witnesses, the officers called on nine male detainees from Block C and took them to the investigation room for questioning. The nine detainees were made up of six Burmese, two Indonesians and a Pakistani. The detainees were called in for questioning in pairs. Once the detainees were in the office, they were not questioned but were punched, kicked and beaten by five officers. An Urdu speaking detainee from Block B was called in to interpret for the Pakistani detainee. He joined in and

punched at least one of the Burmese as the officers watched. After the beatings, they were asked if they had smoked the tobacco. All six Burmese denied smoking.

The six Burmese were returned to their cells. The Pakistani and two Indonesians were then taken into the investigation room. Some detainees at the surrounding blocks could see through the glass silhouettes and hear the three being beaten. They could also hear their loud cries. The Pakistani, later identified as Mohammad Noor Bassar, crawled out of the investigation room. According to eyewitnesses, he dragged himself on his hands and was frothing at the mouth. Upon seeing the Pakistani, the detainees within the cells began to shout in protest and some threw plastic water bottles out of their cells. Thereafter, the Pakistani and two Indonesians were taken away and did not return to the cells. At approximately 10.00pm, a RELA head officer arrived at the detention centre and ordered the detainees to maintain their composure.

On 21<sup>st</sup> April 2008, at around 8am, when breakfast was being distributed, many detainees voiced their refusal to eat and went on a hunger strike. Usually, there were at least five immigration officers and ten RELA officers on duty. At approximately 12pm, many of the arrested noticed that the RELA and immigration officers left the detention blocks, leaving the detainees alone and locked in their blocks.

According to a few detainees, some detainees in Block B broke the gate at the fence surrounding the block. They got out and opened the gates of the other blocks. Some detainees rushed out of the blocks, while others stayed in their blocks. After a while, there was smoke coming from the direction of the office in the middle of the four blocks. All the detainees escaped to the main compound area.

At the compound area, the detainees were made to squat. A RELA officer pointed out the fourteen suspects. Two of the Burmese arrested, Francis Thawng and Chin Khawn Thawng, were among the Burmese who had been beaten on the 20<sup>th</sup> April 2008. The fourteen were then taken in two vans to the Ibu Pejabat Polis Daerah Seremban. On the way, Francis Thawng and Mohammad Hassan were assaulted in the van by an immigration officer who burned them with cigarette butts and beat them with a torchlight.

The rest of the Burmese detainees at Lenggeng were transferred by bus to Tanah Merah Detention Centre on the same day. According to a Burmese who was on a bus, immigration and RELA officers hit him and a few others with batons.

### **Point of complaint**

The above incident and mayhem at the Lenggeng camp is only the tip of the iceberg. It is a reflection of the conditions in the detention centers that are becoming unbearable and inhuman. The abuse, violence and different forms of maltreatment of the detainees and mismanagement of the detention centres require serious and independent investigations with the political will to bring about drastic changes and reforms.

As a member of UN Human Rights Council, as the largest receiving country of migrant workers in Asia, Malaysia is obligated to observe and show commitment in upholding international standards and principles and human rights.

SUHAKAM as the human rights institution established by the government to promote and protect human rights in the country, must view with concern and be challenged to independently act to ensure justice is done to those unjustly treated and make accountable the officers responsible for the continuous deterioration of conditions in the camps and the intense violations of human rights.

Therefore, we would like to bring the following issues to SUHAKAM's attention:

- 1) The mistreatment of detainees by immigration and RELA officers is increasingly rampant and out of control. There is a disregard for the basic human rights of the detainees in the Immigration Detention Centres.
  - a. The baseless accusation of the nine detainees who were beaten up on 20<sup>th</sup> April 2008 without given the chance to provide defence against the accusation. It would seem the immigration officers involved were not seeking for any answers from the detainees.
  - b. Given the rampant corruption practice in detention camps, it raises questions as to how cigarettes got into the detention camp in the first place.
  - c. No officer in charge of a detention centre has the right to use force or violence on any detainees. The force and violence used on the Pakistani detainee and on others constitute assault which must be punished.
  - d. As authorities in the Immigration Detention Centres, the immigration and RELA officers have failed to guard the rights of the detainees. Instead, they are responsible for the violation of the rights of the detainees.
  
- 2) The management of the Immigration Detention Centres has been known to be not only incompetent, but mismanaged with little or no respect to detainees and the right to life. There are problems of severe overcrowding, unhygienic living conditions, prolonged and indefinite detention, outbreak of diseases, and no access to medical treatment.
  - a. Immigration Detention Centres are holding centres prior to deportation of undocumented migrants. However, refugees and asylum seekers are being held in detention centres for prolonged periods. Malaysia ought to protect the rights of refugees and asylum seekers as they face risks if deported to their home countries or if they fall victim to trafficking agents.
  - b. Overcrowding in Immigration Detention Centres is an ongoing problem that needs to be addressed fast. However, instead of solving the issue at hand, RELA officers continue to conduct raids and arrests of refugees, asylum seekers and undocumented migrants contributing to the swelling of numbers of detainees in already extremely overcrowded conditions.
  - c. The Immigration Detention Centres should be recognized as holding centres where foreigners remain prior to repatriation. They are not correction centres for criminals. Thus, these detention centres must be administered and managed as holding centres where it then becomes

centres for foreigners who do not have proper documents and thus not criminals.

## **Demands**

We are of the view that the misuse of power and the violence committed by the immigration and RELA officers in this event is very serious and warrants immediate and effective actions to uphold justice.

- 1) We call on SUHAKAM to conduct an independent and open inquiry into the violence committed by the immigration officers on the 20<sup>th</sup> April 2008 event against the six Burmese, two Indonesians and Mohammad Noor Basser, the Pakistani.
- 2) We call on SUHAKAM to ensure immediate protection of victims and witnesses, particularly those currently detained in Immigration Detention Centres. SUHAKAM should also ensure that any plans to deport the victims and witnesses are stopped.
- 3) We urge SUHAKAM to call for a total review of management in Immigration Detention Centres. The government should stop the Immigration Department and the RELA from managing detention centres. The Prison Authority who is properly trained with management skills and experience should take over the management of these detention camps.
- 4) We urge SUHAKAM to press the Malaysian Government to cease the rampant raids and arrests of refugees and asylum seekers, and to release all recognised refugees, asylum seekers and persons of concern to the UNHCR.
- 5) We call on SUHAKAM to push for the Malaysian Government to immediately ratify the 1954 Convention Relating to the Status of Refugees and its 1967 Protocol. If Malaysia considers itself a civilised nation, it should not condone the practice of torture and inhumane treatment of detainees. This determination must be reflected by ratifying the 1984 International Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment.

Submitted by:

Human Rights Committee, Ad Hoc Immigration Subcommittee of the Bar Council  
Suara Rakyat Malaysia (SUARAM)  
Tenaganita



## **Annex C: National Human Rights Society (2008) Case Comment on Lee Seng Kee v. Sukatno and Ong Thean Soo, 1 September.**

### **SUMMARY:**

On 25<sup>th</sup> February 2008, in the case of *Lee Seng Kee v. Sukatno and Ong Thean Soo* (“*Lee Seng Kee*”) the High Court of Malaya ruled that a driver who was a Malaysian citizen was not liable for the loss of income suffered by a migrant worker as a result of a motor vehicle accident caused by the Malaysian citizen due to the lack of immigration status of the migrant worker.<sup>1</sup> The matter attracted some media attention in the Malaysian press.<sup>2</sup>

This High Court ruling that an irregular migrant worker cannot receive compensation for loss of income constitutes a violation of the right to an effective remedy and right to equal protection by the law, which are peremptory norms of international law (*jus cogens*), and to which Malaysia is obligated to uphold. Although justified by the High Court on grounds of public policy, the decision of the High Court will also only further exacerbate the vulnerability of the migrant worker population in Malaysia. The decision of the High Court also underscores the urgent need for Malaysia to fully implement its international human rights obligations in domestic law and the importance of Malaysia’s accession to further international human rights instruments that reiterate the rights of migrant workers.

### **BACKGROUND:**

*Lee Seng Kee* involved an Indonesian national migrant worker, a pedestrian, who was struck by a motor vehicle driven by a Malaysian citizen in 1996.<sup>3</sup> The plaintiff migrant worker brought an action for damages caused by the motor vehicle accident due to the negligence of a Malaysian driver. There was some argument in both the original Session Court judgment and in the ruling of the High Court as to the exact sequence of events that led to the accident, but in all possible scenarios at least one Malaysian driver was at least partially at fault for the accident.

As a result of the accident, the migrant worker was hospitalized and permanently paralyzed.<sup>4</sup> The Session Court judgment issued in 2001 awarded the migrant worker general damages for pain and suffering of RM150,000 and special damages for various expenses related to the injuries caused by the accident and the litigation,

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<sup>1</sup> *Lee Seng Kee v. Sukatno and Ong Thean Soo*, [2008] 1 L.N.S. 226 (High Court of Malaya at Ipoh, Civil Appeal No. 12-186-01, V. T. Singham, J.) (23 May 2008) (hereafter the “High Court Decision”). The High Court Decision overturned an unreported decision in the matter of the Sessional Court of Malaya (hereafter the “Sessional Court Decision”).

<sup>2</sup> “Carpenter appeals against court award” *The Star*, 6 October 2006; “Court rules against injured illegal worker” *New Straits Times*, n.d.

<sup>3</sup> The Sessions Court and the High Court disagreed on the actual cause of and apportioning of liability for the accident; there were two cars, both ostensibly driven by Malaysians, either one of which might have been the first car to strike the Indonesian national. The Sessions Court divided cause and liability between the Indonesian national and the Malaysian driver Lee Seng Kee (High Court at ¶ 1) while the High Court found the Malaysian driver Ong Thean Soo to be the cause of the accident but not liable due to a technicality in the pleadings (High Court at, respectively, ¶ 63 and 96).

<sup>4</sup> High Court decision at ¶ 60. As an indication of the seriousness of the injuries to the Indonesian national, the trial court initially awarded 16 years worth of lost earnings.

including costs of treatment, costs of pampers, nursing care and RM153,600 for “loss of income at RM 800.00 per month for 16 years.”<sup>5</sup> The total damages awarded amounted to RM418,126 excluding stipulated interest from 1996 to 2001, of which the judge apportioned liability of 50 percent to the defendant on the basis that the migrant worker was also partially responsible for the accident.

Upon appeal, one of the defendant Malaysian drivers challenged, amongst other issues, the award of damages by the Session Court for lost earnings to the migrant worker. The High Court ruled that an irregular migrant worker couldn’t receive compensation for lost earnings.<sup>6</sup> In the words of the Court:

It is not then open to this court to strain the Immigration laws and introduce an arbitrary right to accommodate or entertain the plaintiff’s claim where the plaintiff had glaringly contravened the express provision of the Immigration laws and where criminal proceedings is contemplated against him if he is caught. This court is of the considered view that to allow this infringement of an express statute provision, arguably tantamount to opening a ‘new horizon’ which if allowed can go on at infinitum and open to interpretation according to whims and fancies of individual presiding officer and this ought to be discouraged for the sake or certainty, finality and public policy.

In addition to the Court’s refusal to allow damages due to lost earnings in Malaysia, the Court also failed to grant lost earnings based upon the migrant worker’s possible future earnings in Indonesia. The High Court relied upon the wording of s. 28A(2)(c)(i) of *the Civil Law Act 1956* in justifying its decision (although the referenced provision simply requires proof of receipt of “earnings by his own labour or other gainful activity” and makes no reference to the immigration status of plaintiffs).<sup>7</sup>

The High Court’s decision is a marked departure from previous jurisprudence, which held that the status of a migrant worker was irrelevant to the remedies available to him/her. In the *Assunta Hospital v. Dr A Dutt*<sup>8</sup> the Federal Court held that

whether [a worker] can get an extension of his visit-pass so as to be able to stay in this country or the issue of a work-permit in order to be able to take up the appointment are not matters that can influence the court in the proper exercise of the jurisdiction conferred on it.

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<sup>5</sup> High Court Decision at ¶ 6 (quoting item (2)(v) in the Session Court Decision order for damages)

<sup>6</sup> High Court decision at ¶ 112: ““The learned Sessions Court Judge after having found that the plaintiff was an illegal worker had erred in law and on the facts in awarding damages for the loss of earnings which was illegally earned.”

<sup>7</sup> The full text of s. 28A(2)(c)(i) reads as follows: “[28A(2)(c)] in awarding damages for loss of future earnings the Court shall take into account: (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured”

<sup>8</sup> [1981] 1 MLJ 105

More recently, the Industrial Court has held that it has “jurisdiction to order reinstatement to a foreigner claimant” whether or not the individual has the required immigration status “if at the end of the day the court comes to the finding that his dismissal is without just cause and excuse.”<sup>9</sup>

The High Court’s decision also goes against the Court of Appeal’s decision in *Tay Lye Seng & Anor v. Nazori bin Teh & Anor*.<sup>10</sup> in which an irregular migrant work was allowed to recover for lost earnings arising from a motor vehicle accident in Singapore. Ironically, in this case, the irregular migrant worker was a Malaysian citizen.

#### HUMAN RIGHTS ANALYSIS:

The rights to an effective remedy and to equal protection of the law are peremptory norms of international law (*jus cogens*)<sup>11</sup>. These are reflected in all international human rights treaties<sup>12</sup>, which is evidence that there is a universal obligation to

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<sup>9</sup> *Microsoft Malaysia Sdn Bhd v. Michael Brian Davis* [2002] 2 ILR 453 (Industrial Court, Kuala Lumpur, K Ramakrishnan) Award No. 450 Of 2002, Case No: 5/4-524/00 (30 May 2002)

<sup>10</sup> [1998] 3 CLJ 466

<sup>11</sup> *Advisory Opinion OC-18/03 of September 17, 2003 requested by the United Mexican States* (Inter-American Court of Human Rights) at ¶ 101; *General Comment 15, The situation of aliens in accordance with the Covenant*, U.N. Human Rights Committee 11/04/86, CCPR/C/27, paras. 1, 2, 4, 7, 8 and 9; *Communication No: 211/98 - Legal Resources Foundation v. Zambia*, African Commission of Human and Peoples’ Rights, decision taken at the 29th Ordinary Session held in Tripoli, Libya, from 23 April to 7 May 2001, para. 63; and Article 55(c) of the UN Charter; Article 8(1) of the Constitution of Malaysia.

<sup>12</sup> Some of these international instruments are: OAS Charter (Article 3(1)); American Convention on Human Rights (Articles 1 and 24); American Declaration on the Rights and Duties of Man (Article 2); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (Article 3); Charter of the United Nations (Article 1(3)); Universal Declaration of Human Rights (Articles 2 and 7); International Covenant on Economic, Social and Cultural Rights (Articles 2(2) and 3); International Covenant on Civil and Political Rights (Articles 2 and 26); International Convention on the Elimination of All Forms of Racial Discrimination (Article 2); Convention on the Rights of the Child (Article 2); Declaration on the Rights of the Child (Principle 1); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Articles 1, 7, 18(1), 25, 27, 28, 43, 45(1), 48, 55 and 70); Convention on the Elimination of All Forms of Discrimination against Women (Articles 2, 3, 5 to 16); Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Beliefs (Articles 2 and 4); Declaration of the International Labor Organization (ILO) concerning the Fundamental Principles and Rights in Work and their Monitoring (2(d)); Convention No. 97 of the International Labor Organization (ILO) concerning Migrant Workers (revised) (Article 6); Convention No. 111 of the International Labor Organization (ILO) concerning Discrimination with regard to Employment and Occupation (Articles 1 to 3); Convention No. 143 of the International Labor Organization (ILO) concerning Migrant Workers (supplementary provisions) (Articles 8 and 10); Convention No. 168 of the International Labor Organization (ILO) concerning Promotion of Employment and Protection against Unemployment (Article 6); Proclamation of Teheran, the Teheran International Conference on Human Rights, May 13, 1968 (paras. 1, 2, 5, 8 and 11); Vienna Declaration and Programme of Action, World Conference on Human Rights, 14 to 25 June 1993 (I.15; I.19; I.27; I.30; II.B.1, Articles 19 to 24; II.B.2, Articles 25 to 27); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Articles 2, 3, 4(1) and 5); World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Programme of Action (paragraphs 1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66 and 104 of the Declaration); Convention against Discrimination in Education (Article 3); Declaration on Race and Racial Prejudice (Articles 1, 2, 3, 4, 5, 6, 7, 8 and 9); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Article 5(1)(b) and 5(1)(c)); Charter of the Fundamental

respect and guarantee the human rights arising from these general basic principles. In addition, they form part of the general principles of international law binding on states as mentioned under Article 38 of the Statute of the International Court of Justice. More than 111 states expressly prohibit discrimination in their constitutions.<sup>13</sup> Article 8(1) of the Federal Constitution of Malaysia also guarantees equality before the law.

The right to work, guaranteed under Article 23 of the Universal Declaration of Human Rights includes the right to just and favourable remuneration and protection against unemployment. Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition.

In 2000, the General Assembly reiterated “the need for all States to protect fully the universally recognized human rights of migrants, especially women and children, regardless of their legal status, and to provide humane treatment, particularly with regard to assistance and protection”<sup>14</sup>. In relation to the employment related rights of migrants, the Inter-American Court has stated:

the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.<sup>15</sup>

The denial of a irregular migrant worker the ability to receive compensation for lost earnings is a violation of Article 8(3) of the Migrant Workers Recommendation, 1975 (No. 151) issued by the International Labor Office (ILO)<sup>16</sup> and contrary to the formal opinion of the ILO on the scope and content of ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and

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Rights of the European Union (Articles 20 and 21); European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 1 and 14); European Social Charter (Article 19(4), 19(5) and 19(7)); Protocol No.12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1); African Charter of Human and People’s Rights “Banjul Charter”(Articles 2 and 3); Arab Charter of Human Rights (Article 2); and Cairo Declaration of Human Rights in Islam (Article 1).

<sup>13</sup> Marc Bossuyt *L’Interdiction de la Discrimination dans le Droit International des Droits de L’Homme* (1976) at 78; Carmen Tiburcio *The Human Rights of Aliens under International and Comparative Law* (2001) at 79 fn. 16.

<sup>14</sup> United Nations General Assembly, Resolution A/RES/54/166 on “Protection of migrants” of 24 February 2000.

<sup>15</sup> *Advisory Opinion OC-18/03 of September 17, 2003 requested by the United Mexican States* (Inter-American Court of Human Rights) at ¶ 134

<sup>16</sup> Article 8(3) of the Migrant workers Recommendation, 1975 (No. 151) reads as follows: “Migrant workers whose position has not been or could not be regularised should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights.”

Treatment of Migrant Workers and Recommendation No. 151 on Migrant Workers (dated 1 November 2002)<sup>17</sup>.

The regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all non-nationals who are in their territory. This does not mean that the Malaysian government cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular status. States and employers are not obliged to hire migrant workers. However, under international human rights law, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation.

Nor does the fact that the decision in question involves private parties or a decision made by the judicial branch of the Malaysian state. Under international human rights law, a state must not violate an individual's rights and ensure the protection of those rights from violations by others, including private individuals and other branches of government. As stated by the Inter-American Court, a state violates its obligations under international law "when a worker resorts to the corresponding judicial body to claim his rights and this body does not provide him with due judicial protection or guarantees."<sup>18</sup>

#### PUBLIC POLICY GROUNDS:

Although the Court cites public policy reasons for denying such relief, such grounds cannot preempt the human rights of migrant workers and, in any case, its ruling actually encourages irregular migration.<sup>19</sup>

The High Court explained its decision as required by its desire to maintain public order and to respect the rule of law in Malaysia:

"This court is of the respectful view that sanctity and certainty of the Immigration laws have to be maintained and strictly observed, otherwise it would undermine, frustrate and tantamount to relieving the offender in the instant case, the plaintiff, from observing or complying with the requirements of the Immigration laws in this country. There would no doubt be chaotic state of affairs in this country if this court were to condone and freely legitimize the illegal earnings in violation

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<sup>17</sup> As quoted in *Advisory Opinion OC-18/03 of September 17, 2003 requested by the United Mexican States* (Inter-American Court of Human Rights) at ¶ 47 (p. 15)

<sup>18</sup> *Advisory Opinion OC-18/03 of September 17, 2003 requested by the United Mexican States* (Inter-American Court of Human Rights) at ¶ 154

<sup>19</sup> On the ruling encouraging the irregular migration of workers: "limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demand" per *Gorgonio Balbuena, et al. v. IDR Realty LLC, et al.* (New York Court of Appeal, 21 February 2006);

of the Immigration laws and indirectly condone foreigners to work in this country without a valid work permit or pass and identification as required by law.”

However, in fact, the High Court’s decision removes all matters relating to the employment of irregular migrants from the rule of law. The Court’s rationale, taken to its logical conclusion, would prevent irregular migrants from using the rule of law and the Malaysian judicial system to settle disputes related to employment. The decision of the High Court is likely to lead to a “chaotic state of affairs” which it fears.

In oral comments in Court preceding the issuance of written reasons, the judge further explained that he felt obliged to make his decision in order to discourage further irregular migration:

"It will be an affront to the public conscience and interests to grant Sukatno the relief which he claimed and if allowed, would seem to be indirectly assisting or encouraging foreigners to come illegally to this country and also encourage the commission of similar offences by other illegal immigrants."

In fact, the removal of the protection of the law (and the ability to seek damages with respect to lost income by irregular migrants) will only encourage more irregular migration as it will decrease the effective cost of hiring such a migrant. Employers will now be more likely to hire and to mistreat an irregular migrant as they need not fear being required to pay damages related to income.

The removal of employment-related rights, including the ability to seek compensation for lost earnings, have been explicitly noted as bad public policy by the courts and legislators of other jurisdictions, including jurisdictions that, like Malaysia, are host to a large number of irregular migrants. The New York State Court of Appeal recently held that to disallow irregular migrants to recover lost earnings would actually *increase* irregular migration:

An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens. This, coupled with the fact that illegal aliens are willing to work in jobs that are more dangerous and undesirable -- and for less money -- than their legal immigrant and citizen counterparts, would actually increase employment levels of undocumented aliens, not decrease it as Congress sought by its passage of [immigration legislation].<sup>20</sup>

In recognition of this reality, many migrant worker receiving jurisdictions have implemented laws and policies to increase the protection of migrant workers. The High Court’s decision in *Lee Seng Kee* will have the opposite effect than it

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<sup>20</sup> *Gorgonio Balbuena, et al. v. IDR Realty LLC, et al.* (New York Court of Appeal, 21 February 2006 at p. 20 (Graffeo, J., for the majority) (citations omitted).

intended. The public policy considerations upon which it bases its decision actually point in the direction of providing greater protections to irregular migrants.

#### THE HUMAN RIGHTS OF MIGRANTS:

Various international instruments very explicitly prohibit the discrimination against migrant workers with respect to wages due to their immigration status. Such an act is an express violation of Article 25(3) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* and Article 9(1) of the *ILO Convention 143 on Migrant Workers (Supplementary Provisions) Convention* of 1975.<sup>21</sup> Unfortunately, Malaysia has not signed these international instruments. Indeed Malaysia is not a party to any of the major human rights treaties relating to migrants, including those related to refugees, migrant workers and stateless persons.

Nevertheless, on 26 April 2006, Malaysia, as part of its successful campaign to join the Human Rights Council of the United Nations, pledged to “actively support international action to advance the rights of vulnerable groups”.<sup>22</sup> Migrants are amongst the most vulnerable groups in any society and have been identified explicitly as such by the United Nations.<sup>23</sup> Malaysia’s inaction in the advancement of the rights of migrants stands in the face of its public pledge to take such action.

#### RECOMMENDATIONS:

The Government of Malaysia must ensure the protection of the fundamental rights of migrant workers, regardless of their immigration status, to just and favourable remuneration for their work, protection against unemployment and to the effective and equal protection of the law. Migrant workers must be able to seek compensation for lost earnings arising as a result of various events, including broken contracts of employment, workplace injuries and other injuries caused by the negligence of others.

The Government of Malaysia must ensure that s. 28A of the *Civil Law Act 1956* and other provisions must be interpreted in keeping with Malaysia’s international human rights obligations.

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<sup>21</sup> Article 25(3) of the MWC states in full: “States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.” Article 9(1) of ILO Convention 143 reads: “1. Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.”

<sup>22</sup> *Aide-Memoire of the Permanent Mission of Malaysia to the United Nations on “Malaysia’s Candidature to the United Nations Human Rights Council”* (28 April 2006) at ¶ 14.6

<sup>23</sup> United Nations General Assembly, Resolution A/RES/54/166 on “Protection of migrants” of February 24, 2000;

The Government of Malaysia must demonstrate its support of action to advance the rights of vulnerable people such as migrants by becoming a state party to the international human rights treaties that protect such groups.

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Written 1<sup>st</sup> September 2008



**Annex D: Ad-hoc Immigration Subcommittee of the Bar Council (2008)  
Recommendations arising from the Bar Council Conference on Developing a  
Comprehensive Policy Framework for Migrant Labour, 18-19 February.**

Introduction

Malaysia has been experiencing full employment since the early 1990s. The number of documented migrant workers in the country is 2.1 million and together with those who are undocumented, migrant workers constitute roughly 25% to 30% of the total labour workforce. In fact the percentage of migrants in our workforce is probably the highest in the region or even the world<sup>24</sup>. Malaysia needs migrant labour and will continue to depend heavily on migrant labour for many years to come. In the construction industry, for example, the portion of migrant workers is between 70-90%.

Despite the huge presence of migrant workers in the country, the Malaysian government does not have in place a comprehensive policy framework to deal with migrant labour. What we have instead are a series of interim measures and ad hoc policies. To compound the problem, different governments agencies and Ministries have been tasked to deal with different facets of the Migrant issue. After more than 30 years it is unfortunate that Malaysia does not have a properly constituted national mechanism to deal with the issue of migrant labour.

Conference

The Conference: Developing a Comprehensive Policy Framework for Migrant Workers was organised to deal with the gaps in existing policy and come out with a comprehensive policy framework that would address the various dimensions of the situation of migrant labour.

The specific objectives of the Conference were as follows:

1. To document the contents, consequences and gaps in existing Malaysian labour migration policies and other relevant policies, as well as their implementation;
2. To compare Malaysian policy and practices with international best practices;
3. To develop a concrete policy framework for the placement and treatment of migrant workers, as well as a plan of action for its development and implementation;
4. To achieve consensus and mobilize support among stakeholders, governmental and others for measures under the above point 3.

The Conference took place on 18 and 19 February 2008 at the Crystal Crown Hotel in Petaling Jaya and was attended by a broad spectrum of people including

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<sup>24</sup> Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

representatives from government agencies and ministries dealing with migrant labour, members of the judiciary, representative from the AG's chambers, members of foreign missions and civil society groups including NGOs, academics, Trade Unions and Employers' Organizations.

### Rights Based Approach

We believe that the crux to developing a just way of dealing with migrant workers is to see them as human being and by the adoption of a rights based approach.

The rights-based approach is anchored on the belief that every human being has inalienable rights. This fundamental principle is enshrined in Article 2 of the Universal Declaration of Human Rights which states, “ ... everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status”.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs”. The principle of non-discrimination and equal rights for all persons is also enshrined in Article 8 of the Federal Constitution.

The rights based approach means that we no longer consider persons as Indonesian, or Bangladeshi or migrant workers, but as a human being whose dignity and well-being we should be concerned about. In accordance with this, the terms and conditions of employment of foreign workers should be no less favourable than that of Malaysian workers<sup>25</sup>. Our treatment of foreign workers should comply with ILO's Decent Work Principles that encompass respect for basic human rights, access to employment, safe and healthy working conditions and social security.

### Comprehensive Labour Policy

The rights based approach should be part of a comprehensive labour policy that provides projections of the type and form of labour that Malaysia needs to respond to the current situation. Such a labour policy should define the kind of skills and capacities to be developed, and all issues pertaining to recruitment and placement.

At the core of this policy should be the principles of respect of basic human rights, access to employment, safe and healthy working conditions and social security. The rights of migrant workers need to be defined and recognised especially in areas of conflict, in the course of exercising the rights enshrined both by international and national instruments. The right to seek redress when there are labour rights violations and the need to seek health care treatment should be recognised by all related

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<sup>25</sup> If we look at the provisions of both the Employment Act and the Industrial Relations Act, we will find that migrant workers are “covered”. In fact the Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers

agencies so that the legal status requirements are easily met without any form of conditions.

## Recommendations

The Conference came out with 16 recommendations covering three broad areas:

- A. Right to Livelihood
- B. Arrest and Detention
- C. Social Challenges

### **A. Right to Livelihood**

#### **1. Ratification of International Conventions**

The Malaysian government as a show of its commitment to such a rights-based approach should ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and all international human rights conventions and International Labour Standards that are applicable to non-citizen migrant workers. Three specific instruments that were put together to specifically deal with the situation of migrant workers are – ILO Conventions 97 and 143 on migration for employment and the 1990 International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families.

#### **2. Giving the Ministry of Human Resources the Leading Role**

At the heart of a comprehensive policy on migrant workers is the issue of “work” not security. Hence the power to permit companies to recruit migrant workers should rest with the Ministry of Human Resources rather than the Ministry of Home Affairs.

If there is a demand for foreign labour then the Ministry of Human Resources is in the best position to determine the specifics of such a demand i.e. in which industries and why such a demand exists. In fact since it is the Ministry of Human Resources to which migrant workers turn to when they faced problems at the workplace, it seems painfully obvious that it should be the Ministry of Human Resources which is in the best position to determine which companies deserve to be given the permission to recruit migrant workers.

The central role played by the Ministry of Human Resources should be complemented by the formation of an Inter-Ministerial Coordinating Body.

Various Ministries and government agencies are involved in the management of migrant workers, but this work is poorly coordinated. The Ministry of Home Affairs (KHEDN) is responsible for approving outsourcing companies and approving applications for those who want to bring in migrant workers. The running of detention centres for migrant workers is under the Jabatan Penjara which used to be under the Ministry of Internal Security (KKDN). Meanwhile when migrant workers face work

related problems they turn either to the Labour Department or the Industrial Relations Department, which are under the Ministry of Human Resources.

An example of poor coordination between different government agencies is epitomized by the recent story in the NST<sup>26</sup> that 442 foreigners continue to remain in prison even after having served their sentences as a result of lack of coordination between the Prisons Department and the Immigration Department. The lack of inter departmental coordination is also evident when hundreds of migrant workers are denied a special pass by officials in the Immigration Department despite the fact that they need to remain in the country to pursue claims that they have made in the Labour Office or Industrial Relations Department.

The current Inter-Ministerial Coordinating Body, which is a Cabinet Committee, does not work. There is a lack of transparency and questions arise about its effectiveness.

An inter-ministerial/departmental body needs to be set up to deal with all matters pertaining to the recruitment, placement and employment of foreign workers. Such a body should see representation from the following Ministries – Human Resources, Home Affairs, Health and Education. A body of this nature, which houses Ministries and Departments, which deal with, the various dimension of the situation of migrant workers, would be a minimum starting point to the developing of coherent and workable policy pertaining to migrant workers. This body will set in place monitoring and evaluation mechanism as well as address areas of conflict, developing a consolidated approach including capacity building, and conducting multi-stakeholder dialogues and consultation.

Such a coordinating body should be chaired by the Ministry of Human Resources that has been identified as the pivotal Ministry for the management of migrant workers.

### **3. Giving Foreign Workers Real Access to Justice**

It is extremely difficult for a migrant worker to remain in the country, in order to pursue a claim in the courts, when he/she no longer has a valid work permit.

The current policy of issuing a special pass to migrant workers caught in such a situation is fraught with problems. Employers often flaunt the law and deny migrant workers their rights in law. When asked to account, employers have the luxury of arbitrarily cancelling the work permit of their foreign workers, refusing to take part in negotiations and delaying the court process. They do this with impunity because they know that the foreign worker caught in such a situation has great difficulty remaining in the country to pursue his legal rights.

In order to remedy this situation mechanisms and procedures need to be developed in so that:

- (a) A migrant worker is allowed to remain in the country in order to pursue a claim which he/she has lodged;

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<sup>26</sup> Free, but they're still in jail: NST 9 February 2008

- (b) The migrant worker is allowed to work during this period in order that he/she can support himself/herself; and
- (c) All cases involving migrant workers are fast tracked.

This can be done by first issuing the migrant worker with a Special Pass and then a Visit Pass.<sup>27</sup> The Special Pass would allow the migrant worker to remain in the country and seek employment. Upon obtaining employment the migrant worker can then be issued with a Visit Pass so that he/she can work while waiting for the outcome of the legal action. The Visit Pass obtained under such circumstances will cease once the migrant worker's case is amicably settled or the relevant court makes a final decision.

#### **4. Scrapping Labour Outsourcing**

Thousands of migrant workers have been exploited and left stranded without jobs or food as a result of the policy of allowing outsourcing companies to operate. Migrant workers have lost thousands of ringgit as a result of unscrupulous agents. The system has failed and has led to a form of bonded labour and trafficking in human persons.

Only employers should be given the right to recruit. Contractors for labour should not be given this opportunity. Such direct recruitment will take place within the framework of MOU's signed between the Malaysia and the sending countries, which must stipulate the need to adhere to the ILO's Basic Work Principles.

#### **5. Recognising Domestic Servants as Workers and Providing them all Basic Benefits and Rights**

Around 380,000 migrant workers are employed as domestic servants. The Employment Act provides very minimal protection to domestic servants. There is no provision that domestic servants receive a rest day, sick leave, annual leave or paid public holidays. There is no provision for overtime and also no restriction on the number of hours that a domestic servant can be made to work. It cannot be right that domestic servants be made to work 24 hours a day, 365 days a year!

Since domestic workers work in individualised and isolated work conditions, state intervention is necessary to ensure worker rights are accorded and protected. Thus domestic workers must be recognized as workers.

A new domestic workers act should be developed where forms of work are defined; a comprehensive standard contract signed in source country and attested in Malaysia is enforced; days off determined; mechanisms for monitoring established; benefits such as basic social security and contract completion bonus are defined and responsibilities and penalties stated.

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<sup>27</sup> The details of this proposed mechanism are outlined in the Bar Council Memorandum on Special Pass.

## **6. Recognizing the Right of Migrant Workers to become Members of Trade Unions and to take part in Trade Union Activities**

The Trade Union Act does not prohibit migrant workers from becoming members of trade unions or taking part in trade union activities. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organize a trade union.<sup>28</sup>

Notwithstanding this, many standard employment contracts that are furnished to migrant workers provide an express prohibition against becoming a member of a trade union or taking part in trade union activities. All employers must be advised on the proper position in law and care must be taken to ensure that all employment contracts are free of such repugnant provisions. Sanctions should be imposed on employers who deny their migrant workers their basic rights to unionize.

## **7. Introducing Strong Sanctions in case of Exploitative Labour Practices**

Employers have no qualms about denying their workers their rights in law because the sanctions against such exploitative labour practices are so weak. The maximum fine, for example, of a breach of provisions in the Employment Act is a mere RM10,000. There is no provision for jail terms. As long as there is no threat of strong sanctions, employers will flaunt the law. The only way to ensure that employers have a greater regard for the law is to introduce harsher penalties including jail terms for employers who blatantly and wilfully deny their workers their basic rights as outlined in law.

In many cases involving the non-payment of wages, the labour department appears reluctant to fine the employer even where severe exploitation is present and complaints are made. Cases are conveniently classified as claims under Section 69 of the Employment Act, which involves protracted litigation when the issue could have been expeditiously solved.

## **8. Setting up Wages Councils**

Wages Councils need to be set up in sectors where wages are particularly depressed and it is difficult for workers to form trade unions. For a start Wages Councils need to be set up to provide for minimum wages in the following sectors – Construction industry, restaurant outlets and domestic servants.

## **9. Giving Refugees, Asylum Seekers and Stateless Persons the Right to Work**

Refugees, asylum seekers and stateless persons are not given the opportunity to work. In order to survive they are forced to accept employment in the informal sector of the economy and in the kind of jobs that regularised workers would generally avoid. Their “illegal” status means that they are not in the position to complain or combat instances of abuse. They suffer great hardship and are prone to much exploitation.

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<sup>28</sup> Section 8, Employment Act

We propose that refugees, asylum seekers and stateless persons who are in Malaysia be allowed to work based on the terms and conditions granted to migrant labour.

## **B. Arrest and Detention**

### **1. Develop a Simple Way to Determine if a Migrant Worker is Documented**

It is unfortunate that after all these years the authorities have yet to devise a simple mechanism and procedure to determine the legal status of migrant workers. In light of this there is all the more reason why the authorities should uphold and reaffirm the right of all migrant workers to keep their passports.

The i-kad that the Ministry of Home Affairs proposes to introduce for all documented workers is a good idea, but the authorities should issue such a card to the migrant worker within two weeks of his/her arrival in the country.

As it is, the kad jalan that is issued is often only issued weeks after the migrant worker comes to the country, and this places the migrant worker in a very vulnerable situation – where he often does not have either his passport or any other documentation with him/her. In addition to issuing the i-kad, arrangements must be made to have sufficient i-kad “readers” made available to enforcement agencies.

### **2. Disband RELA**

Raids should only be conducted by those who are properly trained to handle arrests and only by those who have the necessary equipment to recognise if the documents carried by the migrant worker (including the i-kad) are genuine.

Far too often, raids are carried out by departments and agencies, for example RELA, which do not have the ability to determine the authenticity of documents in the processions of migrant workers. The result of such raids is that they are ineffective and prove a great inconvenience to a large number of migrant workers who are documented. RELA has been formed through the emergency ordinance regulations. The perspective is then derived from the angle of security. The record of abuses and RELA’s framework demands that RELA should be disbanded.

If the Immigration department lacks capacity, then the department needs to be expanded and strengthened.

### **3. Stop draining the resources of the Prison System**

There are presently 11,900 foreigners in our prison system. Foreigners make up 33% of the prison population. It has to be pointed out, however that foreigner only account

for 2%<sup>29</sup> of the crimes committed in Malaysia and that the vast majority of foreigners in our prison system, are there as a result of immigration offences.

The overcrowding in prisons causes many problems to the Jabatan Penjara and makes it difficult for them to concentrate on rehabilitation. We propose that it become policy to:

- (a) Deport migrant workers who are found guilty of immigration offences. Putting them into the prison system is a drain on valuable resources<sup>30</sup>;
- (b) Doing away with the punishment of whipping which we consider to be a form of cruel and inhumane treatment;

No one should be deported without due process and those arrested for alleged immigration offences must have access to legal representation.

#### **4. Providing amnesty and opportunities for regularization**

Providing amnesty and opportunities for undocumented workers to be regularised should be part of the policy framework. Mechanisms should exist where those who are undocumented can surrender and leave the country when they want to, without any threat of sanctions.

### **C. Social Challenges**

#### **1. Health**

Migrant workers should be entitled to the same medical benefits that Malaysian citizens are entitled to in the public health system. The present system of making migrant workers pay exorbitant rates for treatment in government hospitals is ill conceived. Discouraging migrant workers from seeking treatment is detrimental to everyone in the long run.

There should be proper screening of all migrant workers to prevent the spread of infectious diseases. However, regular mandatory testing of migrant workers is discriminatory, threatens the job security of workers and with deportation included, makes access to treatment a problem. This form of screening brings about a profiling of migrants as vectors of diseases and creates a false sense of security that Malaysians are free from diseases. If there is a need to screen the health of migrants, then the health screening must be done with consent and counselling and the principle of confidentiality upheld.

#### **2. Education**

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<sup>29</sup> Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

<sup>30</sup> It is estimated that it cost roughly RM25 per day to maintain a person in prison. What this means is that when a Session Court judge sentences a migrant worker to 3 months in jail, it cost the taxpayer RM2150. Much more than the cost of paying for the deportation of the migrant worker concerned.



Education is a fundamental right. Children of migrant workers, refugees, asylum seekers and stateless persons should be entitled to free schooling along the same lines as that of Malaysian children.

The argument that providing health and education to such classes of people is a drain on the resources of the nation is ill conceived. Migrant workers make significant contribution to the GDP. In addition to this, it is important to point out that they pay a levy. Between 1998 and 2002, RM700 million was collected in levies, but only between RM6 – RM14 million a year of this is used in direct operating expenditure.<sup>31</sup>

### **3. Media**

In order to change attitudes about migrant workers, the media needs to play an important role. The media rather than reinforcing stereotypes about migrant workers should raise awareness of migrant workers' rights, highlight human rights violations, give migrants a voice and highlight the important and positive contribution that migrant workers make to the Malaysian economy.

### **Conclusion**

The above recommendations can only work if principles of governance namely democracy, transparency and accountability are adhered to and corruption is eliminated.

It is important that we develop a meaningful and effective system of social dialogue so that all stakeholders concerns will be discussed and effectively resolved through regular meetings.

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<sup>31</sup> Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

## **Annex E: Migration Working Group (2007) Joint Statement on RELA Taking Over Immigration Detention Centres. 7 December.**

*Presented to the Human Rights Commission of Malaysia (SUHAKAM)  
Prepared in collaboration with Non Governmental Organisations within the Migration Working Group  
(MWG) Network*

### Contact Details

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We, the undersigned civil society organisations, are greatly alarmed at the recent Cabinet decision to have RELA (*Ikatan Relawan Rakyat*) take over the management of Immigration Detention Centres/ Depots.

According to newspaper reports, the Cabinet has relieved the Prisons Department of its jurisdiction over Immigration Detention Centres, and will place them under the control of RELA by the end of the year. This is a temporary measure until the Immigration Department has the resources to take over, which may take up to two years.

This move suggests that RELA will have greater control over the entire process, starting from arrest and detention to the deportation of migrants and refugees.

We are concerned that:

- 1. RELA volunteers do not have the specialized skills, experience, and training required to handle the detention of people according to international guidelines. They also do not have the organizational infrastructure (in terms of full-time staff, standard operational procedures and accountability mechanisms) required for the task of this magnitude.**

The detention of human beings is a deprivation of liberty. In civilized countries, and in accordance with international laws, there are rules and regulations concerning detention. These include:

- the prohibition of arbitrary detention,
- limits to provisional or preventative detention,
- minimum material conditions of detention (which include the separation of different categories of detainees, accommodation conditions that are decent, living conditions that ensure the self-respect of detainees, basic standards for medical services, as well as regulated procedures for discipline and punishment),
- special conditions of detention for vulnerable groups (including children, mentally or physically ill persons and pregnant women)

Although there have been assertions that RELA will be trained on “policing” and “handling of riots”, we do not think that this is sufficient for the competent administration of large numbers of migrants in detention facilities.

The issue of the competent management of detention centres is not new. In 2003, SUHAKAM reported on seven detention centres, highlighting issues such as unhygienic living conditions, detainees languishing without assistance, prolonged and indefinite detention, severe overcrowding, deplorable conditions of buildings, skin diseases, an outbreak of meningitis, as well as the detention of trafficked persons, asylum seekers, and refugees. SUHAKAM's recommendation then was for Prisons to take over the management of detention centres. Reports from detainees indicate that conditions of detention have improved markedly under the administration of the Prisons Department.

*We strongly recommend that:*

- *Immigration Detention Centres remain under the jurisdiction of the Prisons Department, who are better trained and equipped to handle detention facilities*
- *The Prisons Department be allocated greater resources to address existing deficiencies in the detention system, such as the insufficient provision of basic facilities and services necessary for different categories of detainees*
- *SUHAKAM be vigilant in fulfilling its mandate to monitor detention conditions, safeguarding, in particular, the rights of women and children in detention in accordance with recommendations by the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child in their concluding observations on Malaysia dated 31 May 2006 and 2 February 2007 respectively*
- *Immigration policies and practices concerning migrants and refugees be reviewed to eliminate unnecessary and unjust detention of migrants and refugees, which contributes to overcrowding and concomitant strain in resources. These include the detention of: documented migrant workers, migrant workers awaiting the outcome of court judgments, asylum seekers and refugees, infants, children, pregnant women, trafficked persons, the physically and mentally ill, and other vulnerable migrants.*

**2. If RELA is to take over Immigration Detention Centres, there is potential for abuse that has not been given sufficient consideration by government authorities.**

Civil society groups have, on numerous occasions, voiced concerns about mistreatment, violence and wrongful arrests committed by RELA volunteers during operations to arrest migrants. We have highlighted cases of valid documents being torn up, migrants being beaten, sexual violence against women, shelters being burnt down, monies and possessions being stolen, and documented migrant workers and refugees being arrested.

However, the response of government officials has ranged from denial to justification to excuses. Instead of taking firm action against RELA, there have, instead, been recommendations to increase their powers under a proposed RELA Bill. We are concerned that these abuses, already occurring outside, will continue to occur within places of detention.

Under the existing Essential (*Ikatan Relawan Rakyat*) (Amendment) Regulations 2005, RELA has very wide and discretionary powers. This includes powers to stop any person by the standard of reasonable belief that the person is a terrorist, undesirable person, illegal immigrant or an occupier in order to make inquiries and to arrest these persons without warrant. They also have powers to enter and search premises without a warrant and to carry arms. Recent incidents have shown that RELA officers have arrested and detained persons on their own, without an oversight mechanism involving a competent authority.

Law enforcement work that involves powers to arrest, search and detain must only be given to competent and specially trained full-time authorities coupled with clear provisions in terms of powers and accountability, as these powers affect fundamental liberties and freedoms. These powers should not be extended to a volunteer civilian body with partially trained part-time members; they should be limited to Police and Immigration officials with clear guidelines and accountability mechanisms.

The use of RELA is not a durable solution to the issue of undocumented migrants; neither is the repeated use of arrest, detention and deportation. These are short-term, crisis-handling approaches of dealing with long-term, structural issues. We hold that the solution lies in a realistic and comprehensive review of immigration policies.

*We strongly recommend that:*

- *The existing enforcement powers of RELA over migrants and refugees be revoked*
- *The proposed RELA Bill be open for public discussion and scrutiny in consultation with civil society groups*

**3. If RELA is to take over Immigration Detention Centres, they lack the capacity to deal with the health concerns of detainees that are linked inextricably to the right to life.**

In addition, to general health problems, there have been a diverse range of emergency health problems amongst detainees in Immigration Detention Centres such as stroke, epilepsy, complicated hernia, obstetric complications, and ante-natal problems and abdominal problems requiring emergency care. These depend on competent response by authorities to detect and ensure that urgent medical assistance is provided, including timely access to ancillary services and to patient care beyond emergency care.

In relation to mental health, studies indicate that conditions of detention cause and/or perpetuate severe mental health problems, including depression, severe and chronic post-traumatic stress disorder, anxiety disorder and suicidal ideation. This is especially serious in the light of the life experiences of refugees and asylum seekers who have survived torture, persecution, human rights abuses, and witnessed various forms of violence perpetrated on their family and others.

During raids, RELA has already demonstrated insensitivity to the needs of women and children. RELA volunteers do not allow them time to pack necessary supplies

such as milk, diapers, and sanitary napkins. The lack of these provisions seriously compromise the health of children and infants, as well as creates vulnerabilities for women detainees, who have been subject to sexual abuse, violence and exposure to sexually-transmitted diseases in exchange for necessary hygiene supplies.

We are also concerned about the possible termination of the contract of the private company that was brought in by the Prisons Department to provide health services to Immigration Detention Centres as this will further jeopardize health service provision to detainees.

*We strongly recommend that:*

- *SUHAKAM strengthen the monitoring of Immigration Detention Centres, in particular in relation to the right to health, in line with internationally agreed ethical principles and human rights standards, and with its reports and recommendations tabled and debated by Parliament*
- *SUHAKAM verify information regarding the termination of services of the private company that provides medical care to detainees, assessing the potential impact this will have on health service provision to detainees*
- *SUHAKAM seeks clarification from the Malaysian Government regarding how it plans to meet the health needs of detainees, as well as the process and mechanisms for medical and health referrals from Immigration Detention Centres*
- *The Malaysian Government ensures the continuation of the existing constructive cooperation between the Prisons Department and civil society groups and United Nations agencies, especially in the area of provision of health services in Immigration Detention Centres*
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**4. There is a strong emphasis on the speedy arrest, detention, imprisonment, sentencing and deportation of migrants and refugees, which may further contribute to the miscarriage of justice and the *refoulement* of refugees**

One of the main reasons cited by newspaper reports for the handover is the facilitation of admission into detention centres as well as faster deportation.

Some civil society groups have already highlighted the miscarriage of justice that occurs as a result of the fast processing of cases through the Special Immigration Courts set up in Immigration Detention Centres. These include the inability of some detainees to understand court proceedings, the lack of translators, the difficulty of obtaining legal assistance while detained, and the pressure to plead guilty, as detainees are not allowed to post bail and wish to avoid prolonged detention required when claiming trial.

We are also concerned that existing checks and balances afforded by the Prisons Department in the processing of detainees will be removed. We are concerned that existing cooperation afforded to the United Nations High Commissioner for Refugees (UNHCR) in their interventions for asylum seekers and refugees will be jeopardized, leading to the continued detention of vulnerable refugees and a higher incidence of

*refoulement* (the return of a refugee against his/her will to a territory where his/her life or freedom can be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion). Similarly, we are concerned that the basic services given to detainees by civil society groups in order to address existing gaps in the system will also be jeopardized.

*We strongly recommend that:*

- *The Malaysian Government ensures that cooperation between UNHCR and law enforcement agencies with regard to detained asylum seekers and refugees remains*
- *The Malaysian Government ensures that cooperation between civil society groups and law enforcement agencies in the provision of basic services to detainees remains*
- *The Malaysian Government releases all documented asylum seekers and refugees and ensures that none are refouled, in order to meet their international obligations under international customary law*

We draw the attention of the Malaysian Government to the following international guidelines:

- 1955 UN Standard Minimum Rules for the Treatment of Prisoners (UN Economic and Social Council Resolution 2076)
- 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules', UN General Assembly Resolution 40/33, of 29 November 1985)
- 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly Resolution 43/173, of December 9, 1988)
- 1990 Basic Principles for the Treatment of Prisoners (UN General Assembly Resolution 45/111, of 14 December 1990)
- 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty ('The Havana Rules', UN General Assembly Resolution 45/113, of 14 December 1990)

We, the undersigned civil society organisations:

1. **Malaysian Trade Union Congress (MTUC)**
2. **Kumpulan ACTS Bhd.**
3. **Coordination of Action Research on AIDS and Mobility, Asia (CARAM Asia)**
4. **Aliran Kesedaran Negara (ALIRAN)**
5. **Amnesty International Malaysia (AI)**
6. **Suara Rakyat Malaysia (SUARAM)**
7. **All Women's Action Society (AWAM)**
8. **Building & Wood Workers International (BWINT)**
9. **Women's Aid Organisation (WAO)**
10. **Health Equity Initiatives**
11. **National Human Rights Society (HAKAM)**
12. **Labour Resource Centre (LRC)**

- 13. Migrant Desk, Melaka-Johor Diocese**
- 14. Penang Office for Human Development (POHD)**
- 15. Civil Rights Committee of the Kuala Lumpur Selangor Chinese Assembly Hall**
- 16. Writers Alliance for Media Independence (WAMI)**
- 17. Education and Research Association for Consumers, Malaysia (ERA Consumer)**
- 18. Migrant CARE**