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An Alternative Anti-Trafficking Action Plan

**A Proposed Model Based on
a Labor Approach to Trafficking**

Editors: Hila Shamir, Maayan Niezna

Authors: Assaf Bondy, Hanny Ben-Israel, Tamar Barkay, Avinoam Cohen, Yuval Livnat,
Tamar Megiddo, Maayan Niezna, Yahel Kurlander, Shahar Shoham, Hila Shamir

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Alternative Anti-Trafficking Action Plan: A Proposed Model Based on a Labor Approach to Trafficking

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The image: A page of personal, handwritten notes of a Thai migrant worker in the agriculture sector, showing working hours.

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Overview

The TraffLab Alternative Anti-Trafficking Action Plan (hereinafter: the Alternative Plan) aims to offer an alternative vision of how to address human trafficking given the failure of the dominant anti-trafficking approach to address the structural, root-causes that cause, sustain and enable severe forms of labor market exploitation. Contemporary policies to combat human trafficking include criminal enforcement, restrictions on migration, and protection of human rights and assistance for identified trafficked persons. This approach addresses only the symptoms and does not alter the underlying causes of human trafficking.

In contrast, the approach underlying this Alternative Plan, known as the “labor approach” to human trafficking, seeks to address the economic, social and legal conditions that cause vulnerability and exposure to exploitation, and to narrow the power disparities between workers and those who benefit from their exploitation by strengthening the bargaining position of the workers and creating effective tools for workers and their representatives to transform and improve their working conditions.

In January 2019, the Office of the National Anti-Trafficking Coordinator in the Israeli Ministry of Justice published a new National Action Plan to Combat Human Trafficking 2019-2024 (hereinafter: the National Action Plan). The creation of a new national plan, the solutions it proposed, and its blind spots—the solutions and issues it failed to address—led us to write this Alternative Anti-Trafficking Action Plan, based on a labor approach to trafficking. In the following chapters, we* set forth concrete policy recommendations for addressing the structural issues that we believe are the root causes that underlie much of the phenomena of human trafficking in the contemporary Israeli labor market, and to which, we argue that the prevailing approach to human trafficking has failed to respond.

The Alternative Plan offers an ambitious vision and plan of action for a possible policy agenda, firmly based on the existing legal framework and the current situation in Israel yet seeking to offer a fresh perspective that aims to identify and recognize the forces driving human trafficking in Israel and the limitations of the solutions adopted thus far, and to propose alternative solutions for addressing them effectively.

* The authors of this Alternative Plan are researchers from different fields who form part of the TraffLab: Labor Perspective to Human Trafficking research group. The TraffLab project is funded by the European Research Council (ERC) and led by Prof. Hila Shamir (Principal Investigator), Tel Aviv University.

The Alternative Plan consists of three parts: prevention, enforcement and partnerships, all of which reflect the need to address the underlying causes of trafficking and exploitation. The section focusing on prevention is the most comprehensive of the three, and the main aspects of prevention and structural change are also present in the other two parts. Each part contains several short chapters, each focusing on a different aspect of the migration regime and labor market regulation in Israel which is currently characterized by structural vulnerability to severe exploitation. Each chapter also proposes policy guidelines for change.

Prevention

Chapter two addresses the role of **migration and labor market policies** in creating vulnerability to human trafficking. The chapter underscores the need to rethink the building blocks of these policies that create vulnerability to trafficking. This remains true even under the presumption that Israel's migration policy is restrictive, based on the right of return, and designed to prevent migrant workers from settling in Israel. It calls for reshaping aspects of migration policy and ensuring periodic review of specific areas and their implications.

Chapter three addresses restrictions on mobility between employers—**binding ('kvila'), also known as tied visa arrangements**—as a significant underlying cause of structural vulnerability to human trafficking. It emphasizes the need to enable workers to have easy and accessible labor market mobility and to completely and **effectively eradicate arrangements binding workers to specific employers**.

Chapter four focuses on high **recruitment fees** paid by migrant workers as part of their entry process and job placement in the Israeli labor market, as a factor in creating vulnerability to severe exploitation in the labor market that could amount to human trafficking. Working under debt impedes workers' ability to leave exploitative employers or take action to change unsafe working conditions, thereby facilitating the exploitation of workers at the hands of their employers. The chapter proposes a series of legislative and regulatory amendments intended to lower recruitment fees and to protect and compensate workers who were forced to pay such fees.

Chapter five discusses **bilateral labor agreements** with countries of origin—the primary tool employed by the State of Israel to tackle the high recruitment fees that push workers into debt bondage. The chapter recognizes the efficacy of bilateral labor agreements as a solution to this problem. However, it also suggests that the agreements to which Israel is a party could go further by serving as potentially effective tools for safeguarding the rights of migrant workers and regulating additional transnational issues—reinforcing

rights and strengthening enforcement mechanisms, enhancing the bargaining power of migrant workers and preventing human trafficking, as well as providing a secure mechanism for the transfer of remittances. The chapter highlights the need for transparency of bilateral labor agreements and the importance of including enforcement and dispute resolution mechanisms within them.

Chapter six discusses the role of intermediaries—**recruitment and placement agencies in the agriculture, construction and care sectors**. Reforms in the regulation of intermediaries under Israeli law had positioned them as key actors in the migratory process, with responsibility to enforce and implement components of Israel’s migration programs. This chapter presents the discrepancy between the alleged responsibility of these agencies to facilitate labor market mobility and protect workers’ rights and the system of distorted incentives that leads them to primarily serve the interests of employers. The chapter proposes fundamental and systematic reform to existing employment patterns, in a manner that addresses the inherent conflict of interests faced by placement agencies and eliminates their financial incentives to oversee or overlook worker exploitation. The chapter argues for changing the responsibilities and remuneration structures of intermediaries, while guaranteeing collective representation for migrant workers in these sectors.

Enforcement

Chapter seven discusses **protective employment legislation** as the cornerstone of protecting workers’ rights in general, and the rights of vulnerable workers in particular. Migrant workers currently suffer from de jure exclusion from some protective legislation, as well as from a de facto lack of enforcement of the rights they do have. The chapter proposes the application and enforcement of protective legislation as a central tool in the prevention of human trafficking. This would include, for example, revoking the requirement that care workers live in the homes of their employers and applying the Hours of Work and Rest Law to them; re-examining the residency and employment conditions for “volunteers” and “students” in work-study programs in agriculture; promoting workers’ rights enforcement mechanisms; allocating labor inspectorates with sufficient resources, and guiding them to strategically target sectors in which workers are particularly prone to exploitation; and guaranteeing equal access to the labor courts for non-Israeli workers.

Chapter eight identifies three major failings in the area of **identification of victims of trafficking and enforcement of workers’ and migrants’ rights** that require fundamental reform, namely: an inadequate identification mechanism for victims of trafficking, limited and ineffective enforcement of workers’ rights, and the almost complete absence of

criminal prosecutions for offenses of slavery and forced labor. Changes to the identification and referral mechanism require clarification of the defining characteristics of slavery and forced labor and the evidentiary standard of proof required, institutional change in the approach of the entity responsible for identification, and an increase in proactive measures for victim identification. Reforms to the enforcement mechanism include establishment of a special investigative expert unit to deal with slavery and forced labor offenses, integrated and strategic enforcement in collaboration with other enforcement agencies and civil society actors, and the expanded use of administrative enforcement measures.

Partnerships

Chapter nine discusses the important role of **family, community** and social networks in protecting the rights and dignity of migrant workers. It identifies the connection between policies designed to prevent migrant workers from settling in Israel, limiting community and family life and access to support networks, and the creation of an environment in which severe forms of labor market exploitation thrive. The chapter proposes expanding the rights of migrants to family and community, including permitting migrants to form and maintain romantic and familial relationships after their arrival in Israel, granting migrants permission to remain in Israel with a work permit after giving birth, and removing barriers to family visits to enable maintaining family ties. Although such changes challenge the rationale of preventing long-term settlement, which lies at the heart of Israel's labor migration policy, they would reduce the individualization and instrumental treatment of workers and play an integral role in protecting their humanity.

Chapter ten focuses on the role of **organized labor** and the potential of trade unions in Israel to improve the working conditions of vulnerable workers, including non-Israeli workers, and reduce vulnerability to trafficking. Trade unions around the world play an increasingly active role in preventing human trafficking through collective action—a trend that, so far, has not been replicated in Israel. Trade unions must develop inclusive collective action strategies, establish divisions dedicated to organizing migrant workers on both employer-based and sector-based levels with the aim of increasing the representation of migrant workers in sectors vulnerable to trafficking, reform workplace practices, and strengthen the enforcement of workers' rights. The chapter further proposes establishment of a national council for labor migration that would bring together trade unions, employers, state representatives, civil society organizations and migrant organizations, and would serve as a forum for dialogue and consultation regarding changes to work migration programs Israel and Israel's labor migration policy.

The final chapter addresses the role and responsibility of multinational corporations in battling severe forms of labor exploitation in their production and supply chains. There is growing recognition that corporations are often the primary beneficiaries of trafficking in their production and supply chains. Accordingly, attempts to address human trafficking that seek to tackle its structural causes must address corporate responsibility for the working conditions in their manufacturing and supply chains. The chapter proposes recognizing corporate responsibility in this field through establishing direct liability via the adoption of strengthened and adapted human rights due diligence legislation, while learning from existing models throughout the world and their shortcomings. The proposed model suggests recognizing torts and contract litigation claims by workers and by civil society organizations as well as state enforcement and sanctions. It further calls for requiring workers' participation in the processes of shaping and enforcing the norms of corporate responsibility.

It is our hope that policymakers, researchers and the general public will find interest in the diverse range of policy proposals presented in this Alternative Plan, and that it will both facilitate a deeper understanding of the root causes of human trafficking in Israel and encourage a wider use of the rich toolbox at our disposal as a society to comprehensively address this phenomenon. Human trafficking is not an inevitable reality. While it is possible to effectively combat human trafficking, to do so requires a willingness to address the structural elements of Israel's migration regime and labor market regulation. We hope that the State of Israel will choose to focus attention on these structural elements and address them through an effective policy to tackle human trafficking.

The English version of this plan reflects our understanding that while some issues and proposed solutions are unique to the Israeli context, many challenges are common to migrant receiving countries in the Global North, and some issues may also be relevant to countries in the Global South. Specific chapters of this plan may therefore assist practitioners, activists and scholars elsewhere. Moreover, we believe that proposing concrete alternatives to the dominant anti-trafficking policies is a crucial aspect of the labor approach, and other structural approaches that focus on the root of human trafficking in receiving countries. We offer this plan as a tool for scholars, activists and policymakers who may wish to take on similar endeavors in other contexts. We welcome requests for information and consultation about the process that led to this plan or the policy areas we focused on, or any other aspect that might be helpful for similar projects.

Introduction

Hila Shamir and Maayan Niezna*

This chapter offers an alternative approach—which we refer to as the “labor approach”—to the prevailing policy tools used to address human trafficking. The chapter provides an overview of the struggle against human trafficking in Israel over the last two decades and the shortcomings of the approach Israel has adopted to combat it. It establishes the need for an alternative method and presents the rationale and objectives of this Alternative Anti-Trafficking Plan.

Background

Over the past two decades, human trafficking received widespread attention and the attempts to address it proliferated in international law as well as in various domestic legal systems, including Israel's. Some consider human trafficking to be one of the gravest violations of human rights of our time.¹ Since the beginning of the 21st century multiple international and regional treaties dedicated to combating human trafficking have been adopted. The two main manifestations of the international community's willingness to address human trafficking are the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which supplements the UN Convention against Transnational Organized Crime (hereinafter: Trafficking Protocol),² and the US. Trafficking Victims Protection Act (2000) (hereinafter: US TVPA).³ Earlier

* Hila Shamir is a professor of law at the Tel-Aviv University Faculty of Law and is the Principal Investigator of the TraffLab (ERC) research project; Maayan Niezna is a Postdoctoral Research Fellow in Modern Slavery and Human Rights, Bonavero Institute of Human Rights, University of Oxford, and a Visiting Research Fellow at TraffLab (ERC) at Tel Aviv University. Her research focuses on the elements of trafficking for labor exploitation.

¹ Press Release, Secretary General, *Secretary-General Calls Human Trafficking 'One of The Greatest Human Rights Violations' of Today*, U.N. Press Release SG/SM/8323 (1 August 2002). Available at: www.un.org/press/en/2002/sgsm8323.doc.htm

² The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319; Doc. A/55/383 (signed 15 November 2000; entered into force 12 December 2003).

³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). Another document, also important though to a lesser extent, was a framework decision of the Council of the European Union in 2002, which followed US legislation and the Trafficking Protocol. Almost a decade later, in 2011, this decision was replaced by a directive of the European Union. Both documents adopted

human trafficking instruments focused primarily on the forced movement of women and girls across borders for purposes of sexual exploitation in prostitution. In the Trafficking Protocol and since its introduction, a broader definition of human trafficking has been adopted.⁴ The contemporary definition includes the trafficking of both men and women, trafficked across borders or subjected to exploitation within their own countries, and includes various situations of severe exploitation in the labor market, beyond the sex industry, including forced labor, slavery or slavery-like practices and the removal of organs. The combined power of the two legal instruments along with the adoption of a wide array of similar regional and national tools that followed in their wake, changed the global approach to addressing human trafficking.⁵ Stemming from these legal instruments, the dominant approach to addressing human trafficking includes criminalization of traffickers, the tightening of border controls and restrictions on migration, and support and human rights protections for the (relatively few) victims who are recognized as such.

This Alternative Anti-Trafficking Plan (or the “Alternative Plan”) offers a different approach. The following chapters translate a “labor approach” to trafficking—an approach presented in this chapter—into clear policy proposals. The authors of this Alternative Plan are researchers in the field of migration and labor in Israel, specializing in the study of human trafficking in various disciplines—law, sociology, labor studies and anthropology. The researchers collaborate as part of the TraffLab: Labor Perspective to Human Trafficking project, funded by the EU European Research Council (ERC) and led by Prof. Hila Shamir of Tel Aviv University.⁶ Some of the authors were also involved with the working teams in connection with Israel’s National Action Plan to Combat Human Trafficking 2019-2024 (hereinafter: the National Action Plan).⁷

the framework of the Trafficking Protocol and did not offer any significant new perspectives on understanding or dealing with human trafficking.

See Council of the European Union, Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings, 19 July 2002, 2002/629/JHA; Directive 2011/36/EU, of the European Parliament and of the Council of 5 April 2011, on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, Council Directive 2011/36/EU, 2011 O.J. (L. 101) (EU).

⁴ Article 3 of the Trafficking Protocol, *supra* note 2. For a description of the history of the definition of human trafficking, see ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING, 12-25 (2010) (hereinafter: Gallagher, *The International Law*).

⁵ For an analysis of the international impact of policy regarding human trafficking in Israel, see Daphna Hacker, *Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law*, 28 HARV. HUM. RTS. J. 11 (2015). (Hereinafter: Hacker, *Strategic Compliance*). For an analysis of the impact of regulatory changes on human trafficking in light of the US’s role as a powerful actor in the international arena, see ASIF EFRAT, GOVERNING GUNS, PREVENTING PLUNDER: INTERNATIONAL COOPERATION AGAINST ILLICIT TRADE, 178-195 (2012).

⁶ For further information regarding the TraffLab project and research group, visit www.trafflab.org

⁷ Yuval Livnat, Hanny Ben-Israel, Maayan Niezna and Hila Shamir participated in discussions of the Enforcement Team and the Prevention team.

We developed this Alternative Plan to demonstrate how, in our view, a plan to combat human trafficking that seeks to address its root causes would look, and to explain how it could effectively work to reduce severe exploitation in the Israeli labor market. The following chapters set forth the directions that we believe should be taken to address the structural elements underpinning human trafficking in the contemporary Israeli labor market, elements that we believe the prevailing approach for combating human trafficking—as reflected in the National Action Plan—inadequately addresses. Taken as a whole, the Alternative Plan offers an ambitious vision and plan of action for a possible future.⁸ It is firmly rooted in the existing legal framework and the current situation in Israel yet proposes considered and innovative ‘outside the box’ insights that aim to identify and recognize the forces driving human trafficking in Israel and the limitations of solutions offered thus far and offers effective solutions for tackling human trafficking. The chapters of this Alternative Plan reflect a combination of significant practical experience and academic research, which offer a fresh perspective on existing problems. Each chapter was written by different authors, and the positions presented therein reflect the views of the author(s) of that particular chapter only.

The accepted approach to human trafficking

Since the adoption of the Trafficking Protocol, 168 countries have passed anti-trafficking legislation⁹ and formulated policies in accordance with the minimal anti-trafficking standards set forth in the US TVPA. As a consequence, around the world anti-trafficking institutions developed rapidly, and a surprisingly similar approach to combating human trafficking developed.¹⁰ The anti-trafficking approach that emerged incorporates components from the Trafficking Protocol and the TVPA in national anti-trafficking legislation, that include laws based on what became known as the “3 Ps paradigm” developed in those documents: prosecution, protection and prevention.¹¹

The accepted approach to combating human trafficking includes criminalizing human trafficking (Prosecution), tightening border controls and occasionally closing borders entirely to groups perceived as particularly vulnerable to exploitation (Prevention), and

⁸ Inspiration for the “possible futures” starting point is derived from various joint projects, among others, LEANNE WEBER, *RETHINKING BORDER CONTROL FOR A GLOBALIZING WORLD: A PREFERRED FUTURE* (2015).

⁹ UNODC, *GLOBAL REPORT ON TRAFFICKING IN PERSONS*, 45 (2018).

¹⁰ For an analysis of the negative aspects of this uniformity and a critique of the approach offering a ‘one size fit all’ solution for all arenas of human trafficking, see Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 791 (2009); Rachel Salazar Parreñas, *Trafficked? Filipino Hostesses in Tokyo’s Nightlife Industry*, 18 YALE J. L. & FEMINISM 145, 169-77 (2006).

¹¹ For an explanation of the “3 Ps paradigm”, see the US Department of State website: <https://www.state.gov/3ps-prosecution-protection-and-prevention>.

providing assistance and rehabilitation to individual victims who have been recognized as such, after they have been ‘rescued’ (Protection). The main rights granted to identified trafficked persons include: guaranteeing victims of trafficking will not be prosecuted for their lack of legal status in the country,¹² operating victim shelters¹³ and providing special visas and residence permits for recognized victims.¹⁴ In most countries, the rehabilitation process ends in repatriation. This approach focuses on the individual criminal and the individual victim and sees human trafficking as an exceptional crime. It aims to ‘save’ and ‘rescue’ individuals from exploitative working environments and to ensure that they subsequently receive support through rehabilitation, rescue and repatriation to their countries of origin. This set of measures sees trafficked individuals as passive victims. Although this approach may clearly offer important assistance to some of those who have been subjected to human trafficking, it addresses only the symptoms of the problem and not its underlying causes. It fails to address the economic, social and legal conditions that make workers vulnerable to exploitation and, for the most part, is ineffective in curbing human trafficking.

The dominant anti-trafficking approach reaches a very small number of individuals, and there is no sign that it deters or reduces occurrences of human trafficking. According to a 2016 estimate by the International Labour Organization, some 40.3 million people were victims of “modern slavery” worldwide, of whom 24.9 million were under circumstances of forced labor, including victims of human trafficking.¹⁵ According to the US Department of State Report 2020, only 118,932 victims of human trafficking were identified

¹² Gallagher, *The International Law*, 284, *supra* note 5. Furthermore, this is an indicator utilized by the US State Department in its compliance assessment to determine tier rankings. See US DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT, 35 (2019) (hereinafter: US Department of State Report 2019); see also US DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT, 39 (2020) (hereinafter: US Department of State Report 2020).

¹³ For a discussion on victim shelters as an accepted practice throughout the world, see Anne Gallagher & Elaine Pearson, *The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking*, 32, 73 (2010) HUM. RTS. Q. (hereinafter: Gallagher & Pearson, *The High Cost of Freedom*); see also Daphna Hacker & Orna Cohen, Research Report, THE SHELTERS IN ISRAEL FOR SURVIVORS OF HUMAN TRAFFICKING 12-20 (2012) (hereinafter: Hacker & Cohen, *Shelters in Israel*).

¹⁴ Gallagher & Pearson, *The High Cost of Freedom*, *ibid*, 78. The US policy of providing visas to victims of human trafficking stands out in this context. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 21, 29 (2001).

¹⁵ This figure first appeared in a 2017 report by the International Labour Organization. See International Labour Organization, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 9 (2017): www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm. The US Secretary of State adopted this figure in the introduction to the US Department of State Report 2019. See US Department of State Report 2019, *supra* note 13, p. iv.

worldwide, and, of those victims, only 13,875 were outside the sex industry.¹⁶ The figures for prosecutions and convictions are lower still.¹⁷ This suggests that the existing tools currently employed to combat human trafficking—which focus on criminal law, the tightening of border controls, and protecting human rights *ex-post*—may carry significant rhetorical weight but ultimately help very few, and even then, their degree of efficacy is questionable. In view of the inadequacy of the existing framework, we have based this Plan on an alternative approach to combating human trafficking, which we refer to as the “labor approach”.

Labor approach to human trafficking

The labor approach to human trafficking¹⁸ views the roots of the phenomenon in the exploitation of power disparities in the labor market. The current dominant approach focuses on rescuing and assisting victims after the fact, i.e., addressing the human rights of victims after their exploitation, and settles for raising awareness and providing information as sufficient prevention tools, thus reflecting a perception of human trafficking as an exceptional crime. In contrast, the labor approach seeks to implement changes in the structures of the labor markets in which workers are particularly vulnerable to trafficking. This approach shifts the focus from individual harms toward structural causes that shape the power disparities between victims and traffickers, the social and economic conditions that enable severe labor market exploitation, and *ex-ante* rather than *ex-post* assistance. In order to address the root causes of human trafficking, and in accordance with the labor approach, workers must be granted legal, individual and collective rights in order to transform their working conditions. Labor and employment protections developed in the early 20th century, in response to workers’ struggle that led to structural reform in the labor market. The development of the labor movement and of labor law strengthened workers’ bargaining positions and ultimately lead to a redistribution of wealth between capital and workers.

¹⁶ See US Department of State Report 2020, *supra* note 12, p. 43. These victims also receive only partial support. For a discussion on the limited support provided by shelters for victims of human trafficking worldwide, see US AGENCY FOR INTERNATIONAL DEVELOPMENT, THE REHABILITATION OF VICTIMS OF TRAFFICKING IN GROUP RESIDENTIAL FACILITIES IN FOREIGN COUNTRIES: A STUDY CONDUCTED PURSUANT TO THE TRAFFICKING VICTIM PROTECTION REAUTHORIZATION ACT, 2005, 6–7 (2007) pdf.usaid.gov/pdf_docs/PNADK471.pdf.

¹⁷ In 2019, only 9,548 people were convicted of human trafficking offences globally, and only 498 of those convictions were outside of the sex industry. See US Department of State Report 2020, 43, *supra* note 13.

¹⁸ The labor approach to human trafficking was developed by one of the authors of this Introduction in two key articles: Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012); Hila Shamir, *A Labor Approach to Human Trafficking: 20 Years of the International Attempt to Address Human Trafficking*, *Iyunei Mishpat*, 44 TEL AVIV UNIV. L. REV. 44, 377 (2021) Hebrew. This approach lies at the core of the work of the TraffLab (ERC) research group, of which the authors of this Alternative Plan are members.

The basic premise of the labor approach is, thus, that human trafficking is not solely a criminal phenomenon executed by criminal elements, but rather should be understood as a labor market phenomenon. From this perspective, human trafficking can be better understood if positioned on a spectrum of exploitation and commodification of workers in the labor market. On such a spectrum human trafficking is at the extreme exploitation end, while decent work—representing a fuller choice and consent of the parties, upholding protective employment laws and providing for minimal conditions of employment—stands at the other end. On the spectrum between these two extremes lies a range of different degrees of exploitation and commodification of workers. The tolerance and non-prevention of ‘milder’ forms of exploitations creates a ‘climate’ conducive to human trafficking and enables the escalation of exploitation.¹⁹

Through the lens of the labor approach, the difference between ‘run of the mill’ exploitation of workers and human trafficking is a difference of degree and not of kind. All forms of labor include a certain degree of commodification of workers, with forced labor and human trafficking being its most extreme manifestations. The understanding that human trafficking is an extreme form of exploitation of vulnerable workers that exists at different degrees throughout the labor market turns the focus of anti-trafficking policy away from criminal law and toward tools that will position workers at the decent work end of the spectrum by improving workers’ bargaining power and labor market options. This approach leads to addressing the underlying economic and legal conditions that enable trafficking for labor exploitation and facilitate its continued existence.

An approach that treats human trafficking as a product of structural vulnerability rather than of exceptional criminal activity will seek to achieve different objectives from those sought by the dominant approach. While the protection and prosecution components of the dominant approach may assist in deterrence and encourage victims of trafficking to cooperate with the authorities, they do not deal with the structural elements of the labor market which make workers vulnerable in the first instance. Most notably, the labor approach’s preventive toolkit offers a much more expansive set of policies that seeks to address the disparity in bargaining power between employers and employees. The depth of this power disparity is structured by elements such as, for example, restrictions on workers’ ability to change employers, heavy debt burdens (e.g. due to recruitment fees),

¹⁹ See also Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, York: Joseph Rowntree Foundation (2010).

The reference to a ‘climate’ conducive to human trafficking has been credited to Attorney Rahel Gershuni, today a leading global expert in the fight against human trafficking and previously one of the leaders of the fight against human trafficking in Israel, including as the National Anti-Trafficking Coordinator during its formative years.

or the partial application or insufficient enforcement of protective employment legislation to the most vulnerable workers. Accordingly, the labor approach emphasizes policies that address elements which impact the balance of power between workers and their employers.

A labor approach to human trafficking emphasizes identification of factors that affect exploited workers' bargaining positions and focuses on improving their vulnerability through economic, social and legal solutions that go beyond the 'rescue' of a particular individual. Furthermore, the labor approach offers the victims themselves both individual and collective legal means to resist and prevent exploitation that may expose them to trafficking, thereby restoring power to their hands. This approach thus views workers as agents of change, rather than merely as passive victims requiring rescue. It relies on the potential for dynamic and ongoing labor relations and change that also comes from below, which can occur only by addressing the structural issues and power disparities. Accordingly, the labor approach also turns to strategies of collective action and collective bargaining (not necessarily in the traditional sense through a recognized trade union, but also through alternative forms of organization), protective legislation and its enforcement, establishing context-specific standards, and addressing corporate responsibility for exploitation in production and supply chains, as well as the role of migration policy,²⁰ in an attempt to redress the unequal power relations in sectors in which workers are particularly vulnerable to human trafficking.

Adopting and implementing the labor approach requires considering that an individual's bargaining power, in accordance with his or her vulnerability to exploitation, is shaped by a complex mix of legal, economic, cultural and identity-based factors. Some of these factors are *structural*, and derive from the migration, labor, welfare and criminal justice policies of the country in which the exploitation occurs ('receiving country'). Others are *cultural or identity-based*, and the specific socioeconomic structure of the receiving country charges such identity traits meaning that produce vulnerability. Thus, for example, elements of identity, such as membership in an ethnic, racial, national or gender minority, affect the worker's bargaining power and vulnerability to exploitation, as do socio-cultural elements, such as belonging to a lower class or caste. Identity-based elements that undermine workers' bargaining power can combine with various structural—legal and economic—factors. This analysis can, thus, help to explain why

²⁰ See Guy Mundlak, *Neither Insiders nor Outsiders: The Contractual Construction of Migrant Workers' Rights and the Democratic Deficit*, *Iyunei Mishpat*, 27 TEL AVIV UNIV. L. REV 423 (2003) (Hebrew). In light of the fundamental assumptions of democracy, Mundlak offers a critique of the argument that the very act of consent by a migrant worker to come to Israel under the proposed terms creates a 'contractual construction' that can be used to justify delineating their rights and ability to impact the community.

sectors within the labor market where women or members of minority groups (national, ethnic, religious, racial, caste etc.) or migrant workers and non-citizens tend to work, are those with a stronger propensity for human trafficking.

Structural elements may arise from the migration regime, as well as from labor, welfare and criminal law. Primary factors of structural vulnerability arising from the migration regime include, first, lack of legal status in the country and the subsequent legal ramifications. Second, restrictions on mobility within the labor market resulting from tied visas (e.g., binding a worker to a single employer under the terms of the visa). A third element is high recruitment fees and debt, including debts to the employers, recruiters or manpower agencies. Fourth, structural vulnerability deriving from the regulation or structure of the labor market or exclusion from welfare mechanisms—for example, working in a sector or geographic region where labor law does not apply or is not enforced affects workers' bargaining power, or where the worker is dependent solely on income from the labor market, due to exclusion from protective safety nets afforded by the welfare state (e.g., medical insurance, unemployment benefits).²¹ Fifth, these structural elements may arise from the intersection of the migration regime and labor law. For example, various structural elements lead to physical and geographical isolation of workers—requirements such as residence at the home of the employer (or on their land) as part of the terms of the visa, or restrictions on establishing a family or a community, thus isolating the workers and disconnecting them from social networks. These foundations which generally derive from migration policy, are reinforced by employment structures (employment by families or through manpower agencies) that make it harder for workers to unionize and take collective action. Sixth, and finally, the structural vulnerability of workers may arise from practices related to outsourcing and subcontracting in production and supply chains. This aspect has two elements: on the corporate level, outsourcing and subcontracting afford those who make the largest profit—e.g., corporations—protection from legal liability for the exploitation of workers, from whom they gain significant profits. On the state level, this is manifested, for example, through the privatization of enforcement and supervision of migrant workers by private entities such as manpower agencies, which grant far-reaching powers to private entities that are themselves subject to limited oversight, thereby creating

²¹ See e.g. International Labour Organization, ILO Action Against Trafficking in Human Beings 2 (2008), which calls for dealing with the factors underlying human trafficking, such as poverty, lack of employment opportunities and the inefficiencies of labor migration systems and labor supervision. For a discussion on the root causes of human trafficking in relation to migrants, from a labor perspective, see Marjan Wijers & Marieke van Doorninck, *Only Rights Can Stop Wrongs: A Critical Assessment of Anti-trafficking Strategies* (2002) nswp.org/sites/nswp.org/files/WIJERS-ONLYRIGHTS.pdf; see also Inga Thiemann, *Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry*, 48(2) INDUSTRIAL LAW JOURNAL 199 (2019).

structural vulnerability. According to the labor approach, the root causes of human trafficking are found in the power disparity created by these factors. The labor approach seeks to address the structural factors which enable and drive human trafficking.

The Alternative Anti-Trafficking Action Plan based on the labor approach to trafficking, presented in the following chapters, addresses each of these central causes of vulnerability, maps their expression in Israeli policy, and offers policy recommendations to address them. The desired outcome is a change in the structural conditions—economic and legal—to prevent the creation of an environment that enables and facilitates severe forms of labor market exploitation.

The attempts to address human trafficking in Israel

In the late 1990s and early 2000s, trafficking into prostitution became commonplace in Israel's sex industry. It was estimated that thousands of women were trafficked into Israel every year, to be exploited in prostitution.²² Growing awareness to human trafficking through civil society campaigns, and particularly Israel's placement in the lowest tier (tier 3) in the US Trafficking in Persons (TIP) Department of State report A, led the Israeli parliament (the 'Knesset') to add, in 2000, an offence of human trafficking for purposes of prostitution to Israel's Penal Law.²³ At the same time, awareness of the need to address other forms of trafficking and exploitation, particularly slavery and forced labor, was also increasing. In 2006, the Penal Law was again amended with the passage of Israel's Anti-Trafficking Law.²⁴ The Anti-Trafficking Law expanded the definition of trafficking and added a new offence of "holding under conditions of slavery." "Holding a Person under Conditions of Slavery" is defined as:

- (a) Anyone holding a person under conditions of slavery for the purposes of work or services, including sex services—is liable to sixteen years imprisonment.

[...]

- (c) In this article, "slavery" means a situation under which powers generally exercised towards property are exercised over a person; in this matter, substantive control over the life of a person or denial of his liberty shall be deemed use of powers as stated.

²² For a description of the situation in Israel in the early 2000s, see Yossi Dahan and Nomi Levenkron, *Women as Commodities: Trafficking in Women in Israel*, 2003 (2003).

²³ Penal Law (Amendment 56), 2000.

²⁴ Prohibition of Trafficking in Persons Law (Legislative Amendments), 2006 (or the "Anti-Trafficking Law"), <<https://www.gov.il/en/Departments/Guides/prostitution?chapterIndex=4>>

“Trafficking in Persons” is defined as:

Anyone who carries on a transaction in a person for one of the following purposes or in so acting places the person in danger of one of the following, shall be liable to sixteen years imprisonment:

- (1) removing an organ from the person’s body;
 - (2) giving birth to a child and taking the child away;
 - (3) subjecting the person to slavery;
 - (4) subjecting the person to forced labor;
 - (5) instigating the person to commit an act of prostitution;
 - (6) instigating the person to take part in an obscene publication or obscene display;
 - (7) committing a sexual offense against the person. [...]
- (d) In this section, "transaction in a person" means selling or buying a person or carrying out another transaction in a person, whether or not for consideration.²⁵

The explanatory legislative notes to the proposed Anti-Trafficking Law emphasized the connection between these offences and the exploitation of migrant workers from developing countries.²⁶ Discussions in the Knesset Constitution, Law and Justice Committee to prepare the law for its second and third readings also revealed the clear connection between the offenses of slavery and forced labor, as well as trafficking for these purposes, and the treatment of migrant workers. This point was also raised in an assessment by the US Department of State in its 2006 report, which noted the significant extent of slavery and forced labor among migrant workers in Israel.²⁷ The explanatory notes and preliminary discussions in the Knesset reflect the broader context of the phenomena of trafficking and slavery in Israel and their structural characteristics, such as poverty, migration and exploitation of vulnerable workers. Despite this, the legal framework for these phenomena in Israel is a **criminal** framework, which focuses on individual criminal offenders, and not on the underlying structural factors.

²⁵ Article 377A of the Penal Law, 1977.

²⁶ Draft Anti-Trafficking Law (Legislative Amendments) 2005 (7 November 2005) Draft Anti-Trafficking Law (Legislative Amendments) 2006 (26 January 2006); CrimA 6327/12, *Ibrahim Joulani v. State of Israel*, para. 31 (6 September 2016); CrimA 8027/13, *John Doe v. State of Israel*, para. 45 (27 May 2018) (hereinafter: *Doe case*).

²⁷ US DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT, 145 (2006).

The legislative and policy changes in Israel arose due to pressure by the US Government and the efficacy of the US Trafficking in Persons (TIP) Department of State report, from the creation of the Anti-Trafficking National Coordinator position, which significantly influenced the shaping of the agenda, and the extensive activity of civil society organizations and feminist organizations.²⁸ As stated above, at the outset, the 2001 US report placed Israel in the third and lowest tier of compliance with standards for combating human trafficking.²⁹ The significance of such ranking was that Israel faced losing non-humanitarian US aid. In light of the potential economic consequences of such a step, the Israeli government began to treat the issue of human trafficking more seriously, and its efforts proved fruitful: the 2002 US Department of State report ranked Israel in the second tier indicating improvement in meeting the anti-trafficking standards. However, in 2006—a major turning point for Israel—the US State Department report placed Israel on a watch list, placing it in danger of returning to the shameful third tier. In the 2012 report and all subsequent reports until 2020, Israel has been ranked in the top tier.³⁰ In 2021, Israel again dropped to the second tier.³¹

We argue that the Israeli Anti-Trafficking Law and its accompanying policies reflect the dominant approach in the international struggle against human trafficking, which focuses primarily on criminalizing human trafficking, creating international cooperation to tackle transnational organized crime networks involved in human trafficking, tightening border controls, and providing an ex-post human rights safety net for recognized victims.³²

Israel took a vigorous approach to border control with regards to trafficking for prostitution, and restricted entry to Israel of young women from the former Soviet Union—first through stricter enforcement at airports, and then, when in response the place of entrance changed, enforcement expanded to seaports, and finally to pedestrian border crossings through the Sinai Desert. Israel also gradually developed human rights protections for identified trafficked persons. Similarly, Israeli police and prosecution began intensely enforcing the law in relation to the Israeli sex industry with frequent

²⁸ Hacker, *Strategic Compliance*, *supra* note 5.

²⁹ Regarding Israel's ranking in the third tier, see US DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT*, 88 (2001).

³⁰ Regarding the decision to raise Israel to the second tier, see the US DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT*, 63 (2002). Regarding the decision to raise Israel's ranking to the first tier, see US DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT* 194 (2012).

³¹ US DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT*, 306 (2021).

³² For a detailed discussion on the response that developed to human trafficking and the role of civil society organizations and feminist organizations in shaping the struggle against human trafficking in Israel, see Hila Shamir, *Anti-trafficking in Israel: Neo-abolitionist Feminists, Markets, Borders, and the State*, in *GOVERNANCE FEMINISM: AN INTRODUCTION*, 149 (2018) (hereinafter: Shamir, *Anti-trafficking in Israel*).

brothel raids and closures, as well as prosecutions with heavy penalties, that strongly impacted the Israeli sex industry.

Beyond criminal enforcement and tighter border controls, Israel also established a relatively generous program of protection and rehabilitation for victims of trafficking. In 2004, a shelter was established for female victims of trafficking ('Ma'agan'), followed in 2009 by a shelter for male victims ('Atlas'). These shelters provide recognized victims with shelter, food, healthcare services, mental health care and employment training.³³ In addition, the 2006 law established a right to legal aid for trafficking victims; established a fund (financed by forfeiture funds) to provide trafficking victims rehabilitation and compensation, and amended the Criminal Procedure Law to protect victims who testify against their traffickers.³⁴ Moreover, the Minister of the Interior granted visas for trafficking victims to enable them to remain, and in some circumstances also to work, in Israel.³⁵ However, the number of victims of human trafficking who have benefited from this support and rehabilitation is low. For example, between 2001 and 2012, which was a peak period for human trafficking in Israel, only 657 individuals were identified as victims.³⁶ Between 2004 and 2013, only 367 victims were referred to shelters for trafficking victims,³⁷ and between 2004 and 2019, only 170 victims of sex trafficking—and only 25 victims in other sectors—received legal aid from the State in connection with

³³ Hacker & Cohen, *Shelters in Israel*, *supra* note 13.

³⁴ Anti-Trafficking Law, *supra* note 24. As part of the Anti-Trafficking Law, several laws were amended. Legal aid was provided for people who were subjected to human trafficking or held under conditions of slavery, in proceedings both under the Entry into Israel Law or in "civil proceedings arising from the commission of those offenses" (Para. 1 of the Addendum to the Legal Aid Law 1972). Protection afforded to those who testify against defendants charged with human trafficking offenses is set forth in Article 2b of the Amendment of Procedure (Examination of Witnesses) Law 1957. The designated fund, forfeiture proceedings and definitions of the circumstances in which sums are collected from the fund for the benefit of trafficking victims or the offense of holding a person under conditions of slavery are established in Article 377 d-e of the Penal Law, 1977.

³⁵ Shamir, *Anti-trafficking in Israel*, *supra* note 33; see also the website of the Office of the National Anti-Trafficking Coordinator, https://www.gov.il/he/departments/general/victims_identification_process (Hebrew). For a discussion on the number of visas issued to victims of human trafficking, see Maria Rabinovich, *Overview of Actions Taken by Israel to Combat Human Trafficking: Response to Trafficking in Women* (Knesset Research and Information Center, 2013) (hereinafter: Rabinovich, *Overview of Actions by Israel*). For a discussion of the process of receiving visas in its beginnings, see Nomi Levenkron and Tal Raviv, *Visas for Victims of Human Trafficking: The Reality and the Ideal*, Hotline for Migrant Workers' Report (2006).

³⁶ Rabinovich, *Overview of Actions by the State of Israel*, pp. 41-42, *supra* note 35.

³⁷ *Ibid*, p. 60. Of these, 293 were victims of human trafficking in the sex industry, and 74 were victims of exploitation in other sectors of the labor market.

their recognition as victims of trafficking.³⁸ From 2011 to 2019, 538 victims of human trafficking were recognized as such by the police and referred to shelters for rehabilitation.³⁹ From 2009 to 2018, 265 victims of human trafficking were granted one-year rehabilitation visas, and only 12 rehabilitation visas were extended beyond one year.⁴⁰

Additional achievements during the first decade of the struggle against human trafficking included the establishment of a Standing Committee of Directors-General for Combating Human Trafficking and the creation of the role of the National Anti-Trafficking Coordinator, who is responsible for liaising between the various authorities, as well as between them and non-governmental organizations.⁴¹ In 2007, two national action plans were formulated, one for combating sex trafficking and the other for combating labor trafficking.

In practice, significant differences exist between the steps taken to address trafficking into the sex industry and steps taken to address human trafficking in other labor sectors. In the wake of persistent campaigns within Israeli civil society, led by feminist

³⁸ Ministry of Justice, Anti-Trafficking Coordinator, “Recognition Process for Victims of Trafficking and Those Held under Conditions of Slavery” (21st May 2019). www.gov.il/he/departments/general/victims_identification_process

It should be noted that an additional group recognized as victims of human trafficking and transferred to shelters during those years were victims of torture in Sinai. These victims were recognized as a consequence of the exploitation they were subjected to in Sinai, and not in the Israeli labor market. Their story is, therefore, less pertinent to the questions at the foundation of this Alternative Plan regarding severe exploitation within the labor market but is relevant to the issue of identification. See MIRIAM VAN REISEN ET AL., *THE HUMAN TRAFFICKING CYCLE: SINAI AND BEYOND* (2014). See also Yehuda Goor, *Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps*, 36 *BERKELEY J. OF INTL. L.* 111 (2018).

³⁹ This statistic was provided in response to a freedom of information request, regarding the struggle against human trafficking, submitted by the authors of this chapter on 6 January 2020. The response from the Commissioner of Public Information in the Ministry of Justice was received on 10 March 2020. Regarding this statistic, it should also be noted that on 14 March 2019, the authors of this chapter also submitted a Freedom of Information request to the Ministry of Labor, Social Affairs and Social Services for information on this subject. According to the Ministry’s response of 6 February 2020, over its 15 years of operation, the Ma’agan shelter has taken in 551 women from 20 countries, and during its 10 years of operation, the Atlas shelter has taken in 347 men.

⁴⁰ Response to a freedom of information request, regarding the struggle against human trafficking, submitted by the authors of this chapter on 13 March 2019. The response from the Commissioner of Public Information in the Population and Immigration Authority, received on 14 April 2020, noted that 420 requests for rehabilitation visas for victims of trafficking were rejected between 2013 and 2018, with the highest number of rejections (121) in the care sector. According to the data, not a single request for recognition as a victim of sex trafficking was rejected during these years.

⁴¹ Decision 63 of the 31st Government “Establishment of a Standing Committee of Directors-General and Appointment of an Anti-Trafficking Coordinator” (21 May 2006).

organizations who sought to eradicate prostitution, together with an impressive mobilization of State actors, the State's Attorneys Office and the Israel Police, and with US backing, Israel acted decisively and comprehensively against sex trafficking, particularly through border and police enforcement, as noted above, with a significant number of investigations and criminal indictments.⁴² As a result, Israel is currently one of the only countries in the world about which it can be said that human trafficking for purposes of prostitution has been significantly reduced, and, at certain times, almost completely eradicated. Although in recent years victims of sex trafficking have been identified, recent cases do not resemble the situation of sex trafficking in Israel in the early 2000s—neither in the scope or number of victims, nor in the extent of the exploitation and harm. Victims of sex trafficking continue to be identified in Israel, albeit not in large numbers, and in recent years there was some small increase in these figures. This increase is commonly attributable to a decision to abolish the visa requirement for tourists from countries of the former Soviet Union, a requirement that was introduced at the height of the Israel's anti-trafficking efforts.

As noted, this development led to Israel receiving the top tier-ranking (tier 1) in the US Department of State TIP Reports between 2012-2020. However, we believe that a high ranking allowed Israel, perhaps too conveniently, to rest on its previous achievements and not take broader action to combat other forms of human trafficking.⁴³ In 2021, for the first time in almost a decade, Israel was ranked in tier 2, with concerns over poor identification processes, insufficient investigation and government policies that increase migrant workers' vulnerability to trafficking cited as key reasons for this low ranking.⁴⁴

Although the 2007 National Action Plan to Combat Labor Trafficking (hereinafter: the 2007 National Action Plan) included reference to structural elements (such as mobility of migrant workers, state supervision over recruitment in countries of origin and policies to encourage migrant workers to complain about violations), none of these structural elements were defined as high-priority objectives,⁴⁵ and, in practice, no operative arrangements were introduced to advance these elements (with the exception, years later, of bilateral agreements with countries of origin, as discussed in further detail below).

⁴² See the discussion in chapter 8 of this Alternative Plan, regarding enforcement and identification.

⁴³ Maayan Niezna, Modern Slaves Forgotten in the Data from the Fight Against Human Trafficking WALLA! NEWS, 19 July 2020 news.walla.co.il/item/3373182 (Hebrew) (hereinafter: Niezna, Modern Slaves); Shamir, *Anti-Trafficking in Israel*, *supra* note 32.

⁴⁴ US DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2021), 306

⁴⁵ Ministry of Justice Plan, Standing Committee of Directors-General for Combating Human Trafficking, "National Action Plan for Combating Slavery and Human Trafficking for Slavery or Forced Labor" (10 April 2007).

While Israel acted comprehensively to eradicate human trafficking for purposes of prostitution, mainly through increased police activity and border controls (which benefitted, but also harmed, Israeli and foreign sex workers),⁴⁶ the same cannot be said regarding Israel's approach to human trafficking in other areas. In order to understand the limited scale of activities to combat human trafficking in other areas, it is sufficient to examine the criminal enforcement system in place. The number of victims identified outside of the sex industry remains low, and there have been only two convictions for 'holding under conditions of slavery', only one of which involved migrant workers (the second involving cults). The sole conviction for 'holding migrant workers under conditions of slavery' was obtained in 2012.⁴⁷ There has been one conviction for forced labor, and there have been only two exploitation convictions in the last eight years.⁴⁸ Generally, complaints alleging conditions of slavery in the construction, agriculture and care sectors

⁴⁶ Shamir, *Anti-trafficking in Israel*, *supra* note 32.

⁴⁷ CrimC (Jer) 13646-11-10, *State of Israel v. Ibrahim Joulani* (published in Nevo, 29.2.2012). The case involved a migrant worker from the Philippines who was forced to work in the Joulani household, with her passport held by the couple. She was forbidden from leaving the house and there were periods in which she was imprisoned there. The room where she slept was very small, with a small shower and toilet, and she worked for long hours with almost no breaks and without any rest days or holidays, isolated from her surroundings and almost entirely cut off from any social connections. During her 22 months of employment, she received total wages of only 2,250 USD, with the exception of occasional one-time "bonuses" of between one hundred to three hundred NIS. (*Ibid.*) In a precedent-setting case, the Jerusalem District Court convicted the Joulani couple, who appealed to the Supreme Court. On appeal, they claimed selective and discriminatory enforcement, on the basis that there were many cases of exploitation of migrant workers, yet the charges here were filed specifically against Arabs. They further argued that they could not be convicted of 'holding under conditions of slavery' because that offence was vaguely worded, and under the principle of legality, it was not possible to convict someone of an offence that was defined in such broad and unclear terms. The Supreme Court unanimously rejected the couple's appeal and upheld the District Court's ruling. (*Joulani case*, *supra* note 27). See also the discussion in chapter 8 of this Alternative Plan regarding identification and enforcement.

⁴⁸ This statistic was provided in response to a freedom of information request, under the Freedom of Information Law, regarding convictions for forced labor and for exploitation of migrant workers, submitted by the authors of this chapter on 18 March 2019. The response, received from the Commissioner of Public Information in the Ministry of Justice on 17 July 2019, stated that between 2012 and 2018, only four criminal indictments were filed for offenses of exploitation against migrant workers, only two of which resulted in convictions. However, only one of the two cases that did result in convictions involved exploitation by a placement agency toward migrant workers (CrimC (Rehovot MC) 18974-07-14, *State Attorney, Economic Department v. Ayelet Yagodnik* (published in Nevo, 27 October 2016)). The other case involved extortion by an inspector from the Tel-Aviv Yafo Municipality of migrant workers from the Philippines selling food from a stall in Levinsky Park, from whom the inspector took bribes under various threats. See CrimC (Tel Aviv MC) 40622-03-12, *State of Israel v. Goni* (published in Nevo, 13 May 2013). The forced labor conviction was CrimC (BS) 523-03-19 *State of Israel v Anon* (3 December 2020). The judgment was given after the Hebrew version of this plan was published.

have not resulted in criminal charges leading to convictions, even though the victims in these sectors were identified and transferred to shelters for trafficking victims.

The focus of attention and efforts was and remains on prostitution; through widespread enforcement efforts, tougher criminalization and the expansion of prosecution to clients.⁴⁹ Finally, changes to the Economic Crimes Unit in the Israel Police reduced it from a unit with over 100 officers⁵⁰ and a team dedicated specifically to trafficking, slavery and exploitation offences against migrant workers down to a single police officer dedicated to these offenses.⁵¹

Despite the lack of enforcement surrounding labor trafficking, and of any meaningful attempt to address it in the 2007 National Action Plan, several steps have been taken in Israel to address the structural elements that create conditions conducive to the growth of human trafficking. In the wake of the High Court of Justice ruling voiding binding arrangements (hereinafter: HCJ binding decision), the State instituted an employment reform with respect to migrant workers, such that they are no longer bound to one employer.⁵² Furthermore, following on from proceedings that began with a petition to the High Court of Justice by civil society organizations,⁵³ the State recognized that the high recruitment fees migrant workers were being charged led to debt burdens and made the workers vulnerable. Over the last decade, the Israeli Government has entered into bilateral agreements with various migrant workers' countries of origin. These agreements have led to a reduction in the recruitment fees paid by migrant workers and, subsequently, in the debts that created their dependency on their Israeli employers.⁵⁴

Despite these positive developments, there is also a visible reduction in the effectiveness of these two measures, which are being eroded and circumvented. First, in the years that have passed since the HCJ binding judgment, there has been a clear trend of erosion of the sweeping ban on binding and a slow return to binding arrangements. This is the case

⁴⁹ This trend culminated in the passing of the Prohibition on Prostitution Consumption Law (Temporary Order and Legislative Amendment) 2019. See also, Yeela Lahav Raz, "Before the Prohibition on Prostitution Consumption Law Comes into Effect" *Behevrat HaAdam—Anthropology in Israel and Around the World* (6 July 2020) (Hebrew). behevrat-haadam.org/yeela-lahav-raz-2/

⁵⁰ According to Superintendent Michal Almog during a discussion in the Knesset Subcommittee on Combating Trafficking in Women and Prostitution in 2013, before it was disbanded the Saar Department (tasked with investigating slavery and forced labor) consisted of 110 people. See Protocol of Session No. 2 of the Subcommittee on Combating Trafficking in Women and Prostitution, 19th Knesset (8 July 2013).

⁵¹ Niezna, *Modern Slaves*, *supra* note 43.

⁵² H CJ 4542/02, *Kav LaOved v. State of Israel* (30 March 2006). See also the discussion in chapter 3 of this Alternative Plan regarding binding arrangements.

⁵³ H CJ 2405/06, *Kav LaOved v. The Director of the Auxiliary Unit for Foreign Workers*, (17 December 2018).

⁵⁴ See chapters 4 and 5 of this Alternative Plan, addressing recruitment fees and bilateral agreements.

particularly in the care sector, where workers face restrictions on moving between geographical locations, restrictions on the number of times they are permitted to change employers, and restrictions on leaving employers in situations of “humanitarian visas”, after the workers’ visas were extended,⁵⁵ and in the construction sector, under the control of foreign construction companies (known as execution companies, ‘Chevrot Bitzua’).⁵⁶

Second, in parallel with the signing of bilateral agreements, recent years have shown a rise in the development of alternative recruiting methods designed to circumvent those agreements and to continue to recruit migrants who pay high recruitment fees—including participants in agricultural work/study programs, experts and volunteers. One example that has gained attention concerns “work/study students” in the agriculture sector, who pay large sums to join programs claiming to be academic study programs, but which, in practice, are indistinguishable from employment in the agriculture sector.⁵⁷

The lack of response to precarious working conditions and exclusion of migrant workers from protective employment laws (particularly in the care sector)⁵⁸ also reflect the lack of an adequate response to structural elements. The lack of an effective response to structural causes of trafficking, slavery and exploitation is also evident in the shared characteristics of the victims identified in Israel and the offenders against whom criminal proceedings are instituted. Most of the victims identified are victims of aspects peripheral to the struggle against trafficking, that do not reflect structural problems.⁵⁹

⁵⁵ For the severe ramifications of binding on workers’ rights, see Letter from Adv. Meytal Russo and Adv. Michal Tadjer of Kav LaOved to MK Haim Katz, Minister of Labor, Social Affairs and Social Services, from 1 January 2019, “Expanding binding arrangements for migrant workers in the care sector through Entry into Israel Regulations (delineating geographical areas for employing foreign workers in the care sector) (amended), 2018” (<https://tinyurl.com/y26g6tr2>) (Hebrew); See also the discussion in chapter 3 of this Alternative Plan regarding binding.

⁵⁶ See Decision 1321 of the 34th government, “Bringing in Foreign Construction Companies” (18 September 2017); Decision 4059 of the 34th government, “Expanding the Pool of Foreign Construction Companies” (26 July 2018); Labor Dispute 14051-08-18, *Baneli Orok et al. v. Yilmazlar International Ltd.* (pending, Tel Aviv Regional Labor Court).

⁵⁷ US DEPARTMENT OF STATE, ISRAEL AND THE GOLAN HEIGHTS 2018 HUMAN RIGHTS REPORT 60 (2018) www.state.gov/wp-content/uploads/2019/03/ISRAEL-AND-THE-GOLAN-HEIGHTS-2018.pdf; Lee Yaron, Josh Breiner, They Came to Learn Botanical Sciences in Israel and Were Forced into Working in Agriculture in Harsh Conditions, *HA’ARETZ*, 8 March 2019 (Hebrew).

⁵⁸ Hanny Ben Israel and Michal Tadjer, *Is It Finally Friday? Work and Rest in the Employment of Migrant Caregivers in Israel*, 7) 69, 72 (2015) (Hebrew). See also the discussion in chapters 7 and 8 of this Alternative Plan regarding protective employment legislation, and identification and enforcement.

⁵⁹ See chapter 8 of this Alternative Plan regarding identification and enforcement.

Among the victims of trafficking and slavery identified in Israel in recent years, the largest group is that of victims of the torture camps in Sinai—asylum seekers, mostly from Eritrea, who were trafficked and subjected to horrific torture in Egypt’s Sinai Desert region, with the aim of extorting ransom from them or their families in exchange for their freedom.⁶⁰ In recent years, hundreds of victims of these torture camps have been identified as victims of trafficking, mostly by civil society organizations. The vulnerability of these victims arises, in part, from actions taken by the Israeli government toward asylum seekers, in attempts to encourage them to leave the country and to deter new migrants from arriving. The challenges in protecting this group, that are in large part a consequence of government policy, have led to the need for government and civil society actors dealing with human trafficking to invest considerable resources in efforts to expand existing protections to victims of the torture camps in Sinai. The increased focus on this group reflects the negative impact of restrictive migration policy on victims of trafficking.⁶¹ However, it also shows how significant resources have been channeled toward a “peripheral” aspect of the struggle against trafficking, i.e., the protection of victims who have been trafficked outside of the country and who were harmed outside of the most common contexts of trafficking (the sex industry and the labor market), and situations in which the State can, at most, protect them but cannot prevent trafficking of additional victims or address the factors enabling exploitation. In other words, protecting the rights of migrants is unequivocally an important step but will not lead to combating the structural factors that enable or encourage human trafficking.

Another significant group of victims of slavery identified in recent years is that of Israeli women held under conditions of slavery in abusive cults. Since the Penal Law was amended to include a provision prohibiting ‘holding under conditions of slavery’, only six slavery cases have come before the courts, three of which involved abusive cults.⁶² An important decision, in May of 2018, in one of those cases clarified the definition of slavery

⁶⁰ Hotline for Refugees and Migrants Report, *“The Dead of the Wilderness”: Testimonies from Sinai Desert, 2010* (2011); Physicians for Human Rights and Hotline for Refugees and Migrants *Tortured in Sinai, Jailed in Israel: Detention of Slavery and Torture Survivors under the Anti-Infiltration Law, June-September 2012* (2012).

⁶¹ For a detailed discussion on the connection between a restrictive migration policy and harm to victims of trafficking, see James C. Hathaway, *Human Rights Quagmire of ‘Human Trafficking’*, 49 VA. J. INT’L L. 1 (2008); Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL’Y J. 405 (2010).

⁶² CrimiC 23751-02-10, *State of Israel v. Ratzon* (9 September 2014); CrimA 8271/14, *Ratzon v. State of Israel* (18 July 2016) CrimC 6749-08-11, *State of Israel v. D.A. and A.M.* (10 September 2013—the appeal against this conviction is the *Doe* case, *supra* note 27; ToI Staff ‘Jerusalem cult suspect named as details emerge of alleged enslavement of women’ (Times of Israel, 14 January 2020) <<https://www.timesofisrael.com/jerusalem-cult-leader-named-as-details-emerge-of-alleged-enslavement-of-women/>>

under Israeli law and offered an expansive definition.⁶³ That ruling determined a standard for recognizing cases of slavery that was not high. However, because the few subsequent decisions have focused primarily on exceptional and sensationalist cases, it is difficult to assess how the findings in that decision will be interpreted in cases that represent more widespread situations that have yet to reach the courts.

Alternative Anti-Trafficking Action Plan: A Proposed Model Based on a Labor Approach to Trafficking

In January 2019, the Office of the National Anti-Trafficking Coordinator in the Ministry of Justice published the new National Action Plan to Combat Human Trafficking 2019-2024, in collaboration with relevant government offices. As we write this report, inter-ministerial teams are working to create a program to implement the principles set forth therein. The National Action Plan details necessary measures in the fields of enforcement (including the use of technological and fiscal tools and a focus on proactive enforcement against labor trafficking), victim protection (including targeting vulnerable victims and improving identification procedures), required cooperation (with the business sector, academia and civil society organizations) and in the area of prevention (including promoting bilateral agreements and regulatory arrangements to protect migrant workers, instituting training programs and raising public awareness, and advancing preventive legislation).⁶⁴

The formulation of the new National Action plan, the solutions proposed therein, and the solutions or problems that it fails to address led us to translate the labor approach presented in this chapter into this Alternative Anti-Trafficking Plan. This Alternative Plan is divided into three parts: **prevention, enforcement and partnerships**. Further to the argument set forth in this chapter that presented the labor approach to human trafficking, we sought to concentrate not on the same elements of dealing retroactively (ex-post facto) with trafficking—criminal prosecution and the rehabilitation aspect, but rather to focus on preventive structural changes. Accordingly, the section on prevention is the most comprehensive of the three parts of this Alternative Plan, and the central aspects of prevention and structural changes are also present in the other two sections.

⁶³ *Doe case*, *supra* note 27. For a different approach to the interpretation of slavery, see *Siliadin v. France*, App no. 73316/01, para. 122, Eur. Ct. H.R. (2015).

⁶⁴ For the guiding principles of the implementation program, see Decision 4463 of the 34th Government “National Action Plan to Tackle Human Trafficking 2019-2024 and Amendment to the Government Decision” (13th January 2019), in Article 2 of the decision (Hebrew).

Each chapter of the Alternative Plan focuses on a different aspect of the migration regime and labor market in Israel, which, at present, contains structural vulnerability to severe exploitation, and also offers policy proposals for change. The first section of this Alternative Plan focuses on prevention. **Chapter two** (following this introduction), authored by Avinoam Cohen, presents the broad framework for this perspective and places it alongside Israel's **migration policy and labor market regulation**, as two main areas that create vulnerability of workers to exploitation and necessitate in-depth analysis in any anti-trafficking plan. The following chapters relate in further detail to four central components of Israel's policy regarding the employment of non-Israeli workers, which generate vulnerability to exploitation: **Chapter three**, authored by Maayan Niezna, addresses the various ways in which **binding (tied visas)** continues to exist in temporary labor migration programs, with dire consequences for workers' rights, and calls for its eradication. **Chapter four**, authored by Yuval Livnat, addresses **recruitment fees**, and offers a series of policy proposals to combat the phenomenon of charging non-Israeli workers recruitment fees as part of the process of entry into the Israeli labor market. **Chapter five**, co-authored by Tamar Megiddo and Yuval Livnat, focuses on **bilateral labor agreements**, one of the major policy tools Israel utilizes to reduce recruitment fees. The chapter explains Israel's turn toward bilateral agreements and examines the unfulfilled potential of this regulatory tool to improve and strengthen workers' rights and prevent human trafficking. **Chapter six**, authored by Yahel Kurlander, discusses **placement and manpower agencies**. These intermediary entities were given important enforcement power and service provision responsibilities in Israel's temporary migrant work programs. They serve a double function, both in a supervisory and monitoring role vis-à-vis employers, while simultaneously intended to assist in the protection of workers' rights. The chapter explains why these intermediaries are failing to fulfill their mission to protect workers' rights and, in fact, even create a series of new problems in protecting those rights. It then offers several policy proposals to address the ways in which recruitment agencies intensify the vulnerability of workers to human trafficking.

The second section of the Alternative Plan focuses on enforcement and includes two chapters. **Chapter seven**, authored by Hanny Ben-Israel, discusses the application and enforcement of **protective employment legislation** on populations vulnerable to exploitation. The chapter presents the general rule of universality in Israeli labor law (the applicability of labor and employment law to all workers in the economy), and contrasts this with the reality in which certain groups of workers are excluded in various ways from parts of Israel's protective employment legislation. This chapter offers a concrete set of policy proposals to improve and protect the rights of vulnerable workers. **Chapter eight**, authored by Maayan Niezna, discusses two major failures in the existing framework for combating human trafficking in Israel—**enforcement and identification**. This chapter

highlights the limited and ineffective enforcement of workers' rights and the almost complete lack of criminal prosecutions for offenses of slavery, forced labor and trafficking for purposes of slavery and forced labor (i.e., outside of the sex industry), and offers a series of policy proposals to increase enforcement and to develop an effective identification mechanism for victims of human trafficking.

The third section of the Alternative Plan focuses on **partnerships** and turns attention from the State toward other actors and assesses their roles and responsibilities. **Chapter nine**, co-authored by Shahar Shoham and Hanny Ben-Israel, deals with **community and family**, and the central role of social support networks—communal and familial—in upholding the humanity, rights and dignity of migrant workers, and in reducing their vulnerability to human trafficking. The chapter reviews the central components of migration policy in Israel, aimed at the prevention of long-term settlement by migrant workers and ensuring the separation of non-Israeli workers from their families and communities. It then offers several policy proposals to reduce the isolation of vulnerable workers. **Chapter ten**, authored by Assaf Bondy discusses the role of **Organized labor** in prevention and response to human trafficking. This chapter examines the absence of trade unions in Israel in the struggle against human trafficking and offers an inclusive and corrective collective strategy for, amongst other goals, protection rooted in organized collective activity against severe exploitation in the labor market and human trafficking of the most vulnerable workers. Finally, **Chapter eleven**, co-authored by Hila Shamir and Tamar Barkay, turns the focus to **corporate responsibility** and emphasizes the role of corporations in the relevant sectors as producers of significant revenues from the exploitation of workers further down their production and supply chains. The chapter examines recent global developments that seek to impose various demands on corporations to make them an integral part of the struggle against human trafficking and recommends a number of policy proposals in this regard.

This Alternative Plan does not address human trafficking for purposes of prostitution. Some of this Alternative Plan's authors take the position that the approach to sex work should not differ substantially from the approach to other sectors of the labor market, and, therefore, the identical factors of debt prevention and binding, application and enforcement of protective workers' rights legislation, and unionization of workers must be considered. Under this approach, Israel's policy of increased criminalization in this area, through the Prohibition on the Consumption of Prostitution Act of 2019, that criminalized the purchase of sexual services, is the incorrect approach, in that rather than empowering workers in the sex industry, it reduces their bargaining power, thus further entrenching their vulnerability. Israel's chosen approach directs the State's enforcement powers to marginalized populations, whereas international experience has shown that

rather than 'saving' them, such measures tend to increase their vulnerability to violence and harassment. From a labor approach perspective, this legislation will, therefore, result in a weakening of the bargaining power of sex workers, the strengthening of the stigma associated with their work, and the exacerbation of their vulnerability to exploitation and human trafficking. However, due to the various aspects of regulation of the sex industry and migration into it in Israel and the breadth of the issue, we have decided not to include this issue in the Alternative Plan at this stage. We hope to address the issue in future versions of the plan.

As members of the TraffLab research group, it is our hope that the general public, policymakers and researchers in this field will find interest in the diverse range of policy proposals included in this Alternative Plan and that, through it, we can promote the use of the rich array of tools at our disposal as a society to comprehensively deal with the phenomenon of human trafficking. Human trafficking is not an inevitable reality. Although it is possible to effectively combat human trafficking, this requires a willingness to address the structural elements of Israel's migration regime and labor market. We hope that the State of Israel will choose to focus its attention on these structural characteristics and deal with them when shaping the emerging policy to combat human trafficking.

Prevention



A hand is holding a piece of pink paper with a handwritten table on a wooden surface. The table has four columns and thirteen rows. The columns contain numerical values, and the rightmost column contains integers. The handwriting is in black ink.

1	05.30	12.00	13.00	14.00	1
2	06.30	12.00	13.00	14.00	2
3	06.30	12.00	13.00	14.00	2
4	06.30	12.30	13.30	14.30	1½
5	06.30	12.00	13.00	14.30	1½
6	06.00	12.00	13.00	14.00	3
7	06.30	12.00	13.00	14.00	2
8	06.30	12.00	13.00	14.00	2
9	06.30	12.00	13.00	14.00	2
10	06.30	12.30	13.30	14.30	2½
11	06.30	12.00	13.00	14.00	2
12	06.30	12.00	13.00	14.00	2
13	06.30	12.00	13.00	14.00	3

Migration Policy and the Labor Market

Avinoam Cohen*

This chapter will propose that any plan to combat human trafficking which seeks to address its root causes must consider certain elements of migration policy in Israel. This remains true even under the presumption that Israel's migration policy is restrictive, return-based, and designed to prevent migrant workers from staying permanently in Israel.

Background

Israel's most recent National Action Plan to Combat Human Trafficking (the "National Action Plan") explicitly states that it does not engage in the question of migration policy and status in Israel.¹ In doing so, it adopts the position that no inherent link exists between protection of those entangled in situations of trafficking or slavery and their status in the country. This approach follows the supplementary Protocol to the United Nations Convention against Transnational Organized Crime, which states that "each State Party shall give appropriate consideration to humanitarian and compassionate factors", yet abstains from establishing binding directions regarding status and migration policy.² This is despite the fact that many victims of human trafficking are foreigners without official legal status or with temporary status, and whose vulnerability and exposure to exploitation are intrinsically linked to their migration status (or lack thereof). This approach reflects a presumption that trafficking and slavery can be addressed without recourse to significant shifts in the migration policies that shape the status of migrant workers and render them vulnerable to trafficking.

*Dr Avinoam Cohen lectures at the College of Management Law School, teaches at the Migration Studies MA program at Tel Aviv University, and is also a TraffLab (ERC) Research Fellow at Tel Aviv University.

¹ "The goal of the plan is to focus on the steps necessary to eradicate human trafficking and associated crimes; **its goal is not to resolve matters of regulation at the micro level, to adopt a position regarding migration policy and status in Israel or to draft a general plan to eradicate prostitutions**" (bold in source). For the National Action Plan, see Resolution 4463 of the 34th Government "National Action Plan to Combat Human Trafficking 2019-2024 and Amendment to Government Decision", p.3 of the draft appended to the Resolution (13.1.2019).

² Article 7 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, November 15, 2000.

In this chapter, I argue that no attempt to combat human trafficking can be effective without addressing its root causes, including various elements of immigration programs to Israel. Although the State's position is that "Israel is not an immigration country", this relates only to acquiring *permanent status* in Israel. However, Israel's migration regime includes additional components relating to temporary immigration and various restrictions on mobility, the work visa system, and arrangements that apply to workers without a fixed status in the labor market.

These aspects of the migration regime do not inevitably derive from the regulations relating to acquiring permanent status. Consequently, they should be re-examined in the framework of the National Action Plan, which would not necessitate deviation from the fundamental principles underpinning the existing migration regime. A generalized approach to the migration regime that fails to distinguish between its various components limits the capacity of the National Action Plan to provide a renewed and more accurate assessment of the impact of the various elements of the migration policy on the struggle against human trafficking in Israel.

Israel's migration regime is not based on restriction of movement and entry into the country, even though Israel does not encourage permanent immigration outside the terms set forth in the Law of Return.³ Accordingly, the Israeli labor market has developed in such a way that certain sectors are heavily reliant on migrant labor (and in particular temporary migrant workers) and non-citizen Palestinian commuters (subject to the military regime and a separate permit system). Although the borders are open to workers—whether explicitly or in practice—the work visas granted are restrictive and conditional: non-Israeli workers have limited access to economic and social rights, most channels to permanent status are blocked to them, and there are minimal protections against expulsion in circumstances of unauthorized presence in Israel.⁴ These elements of the migration regime seemingly appear to be in tension—inviting workers into Israel while at the same time enforcing a restrictive visa regime. In practice, the interrelationship of these elements creates and amplifies opportunities for abuse and

³ The findings of quantitative studies examining changes in migration policy since the mid-twentieth century emphasize that migration policies have tended not toward being more restrictive, but rather toward being more selective. See Hein de Haas, Katharina Natter & Simona Vezzoli, *Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies*, 52(2) INTERNATIONAL MIGRATION REVIEW 324 (2018).

⁴ This bears a certain resemblance to the migration regime in the United States, which is relatively tolerant toward unauthorized entry and stay. Cox and Posner argue that it is best to select immigrants in retrospect, following their entry, and that this approach is preferable to the European model which is more selective upon entry and more challenging in expelling those deemed to be unsuitable for long-term residence in the country. Adam Cox & Eric Posner, *The Second Order Structure of Immigration Law*, 59(4) STAN. L. REV. 809 (2010).

exploitation of migrants. Such is the way a systemic problem develops, one which is particularly pronounced in the cases of those who work or stay without a permit or in violation of the terms of their entry visas. The new National Action Plan specifically touches on some aspects of the movement and visa regimes⁵; however, it does not address them systematically, nor does it link the potential for exploitation by the immigration industry (mediators, recruiters) and abuse and exploitation within the Israeli labor market.

The efforts to prevent human trafficking will not be complete without considering the impact of migration policy and various institutional arrangements that create or reinforce existing structural vulnerabilities among migrant workers, whether or not they entered the country legally.⁶

Main Policy Recommendations

The National Action Plan, which seeks to provide a solution to the underlying factors that enable human trafficking, should include a periodic analysis of the structural problems arising from the basic principles of Israel's migration policy and the direct and indirect restrictions on participation in the labor market and the need for protective labor laws. Following such analysis, recommendations to update and amend specific, individual rules within these areas should be examined.

This approach is based on an understanding that the measures necessary to eradicate human trafficking must include addressing the issues surrounding migration policy and

⁵ Indirectly, there is reference to different aspects of migration policy, such as reliance on bilateral agreements or a cautious recommendation to carefully examine visa termination agreements in cases where there is concern that these circumstances may give rise to human trafficking.

⁶ Just over a decade ago, in the wake of a rise in the number of non-Israeli workers in the Israeli labor market, an Israeli government committee was established to examine "shaping policies regarding non-Israeli workers", led by then Deputy Governor of the Bank of Israel, Zvi Eckstein. This committee recommended considerably reducing the number of non-Israeli workers, including through significant negative incentives to discourage employers from reliance on foreign labor and to prioritize Israeli workers. See Committee on Employment Policy Final Report, p. 53 (2010) (hereinafter: Eckstein Committee Report) (Hebrew). Although protection of non-Israeli workers was not the specific focus of the Committee, which was working to achieve internal Israeli social and economic goals, the Committee did not refrain from considering the impact of situations of abuse, exploitation and human trafficking and even "complex moral questions" regarding the status of the children of migrant workers. See Eckstein Committee Report, pp 25-27 (Hebrew). On this basis, its recommendations included not only reference to interventions in the structure of the labor market and restrictions on mobility, but also to the protection of the rights of migrant workers in the migration process.

its implementation. This, in turn, requires overcoming the unjustified reluctance to address structural and institutional aspects that impact various forms of human trafficking. Such an approach necessitates institutional and political support in order to enable a structured and consistent migration policy.

Given the dependence on migrant workers in certain sectors (especially agriculture, construction, care and hospitality), regulation was designed to ensure high turnover that would prevent those workers from settling down. Restrictions on employment and the duration of stay of foreigners in Israel were aimed at ensuring that their presence was entirely based on (local) needs as the basis on which entry, residence and work permits were granted from the beginning. This provides the background to the regulations shaping the various temporary work migration programs, which include permits for employment and work to foreigners in Israel, tracks for employing experts, permits for students to live and study in Israel, and tourist visas, among others.

The combination of restrictions and conditions to entry arising from migration policy and arrangements rooted in labor market policies may potentially create ongoing and systemic harm to authorized migrants as well. Competition for entry and work visas is entrenched in the migration industry and binds migrant workers in debts to third-party recruiters and others in their countries of origin and often also in Israel. Restrictions on labor market mobility and exemptions from the application of protective labor law legislation and various welfare provisions result in workers' increased vulnerability and dependence on employers. Restrictions on residing in Israel alongside family members also contribute to social isolation and increased vulnerability to exploitation.⁷

While the authority over matters of immigration is characterized by a particularly wide margin of discretion,⁸ there is an absence of guiding standards to enable periodic assessment of the working assumptions regarding proper policy, in accordance with information gathered on the impact of the policy and its implementation on de facto manifestations of human trafficking.⁹

⁷ For a structured analysis of the factors underpinning systemic vulnerability, including among legal migrants, within the framework of temporary work migration programs, see: Hila Shamir, *The Paradox of "Legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 471 (Prabha Kotiswaran, ed., 2017).

⁸ Yigal Marzel, *On the (Broad) Discretion of the Minister of the Interior under the Entry into Israel Law, 1952*, EDMOND LEVI BOOK 249 (Ohad Gordon, ed. 2017) (Hebrew).

⁹ An example can be found in the policy that enabled binding workers to their employers, until this policy was struck down by the Court in H CJ 4542/02 *Kav LaOved v. Government of Israel*, PD 61(1) 346 (2006); and later, in the policy exempting foreign construction companies (known as execution companies, 'Chevrot Bitzua') and enabling them to come to Israel with their workers, thus deviating from the principle

A number of reforms designed to prevent the exploitation and vulnerability of migrants began to take shape in Israel. Two of the most important—regarding binding arrangements and recruitment fees—came in response to appeals by civil society organizations and with the intervention or orders of the High Court of Justice. Thus, for example, the regulation of employment was reformed, and a new system of manpower agencies replaced a binding arrangement that was abolished by a High Court of Justice ruling.¹⁰

The change in binding arrangements and the creation of alternative arrangements, such as manpower agencies in the construction sector, reduced the systemic vulnerability of migrants which exposed them to exploitation that might amount to human trafficking. However, the return of arrangements that create increased dependence on employers and restrict workers' mobility between employers—as has occurred in the care sector, with respect to foreign construction companies in the construction sector, and with training programs in the agriculture sector—has once again increased migrant workers' vulnerability and exposure to exploitation.¹¹

An additional change in migration policy took place with the gradual transition to reliance on bilateral agreements between Israel and the migrant workers' countries of origin, in order to regulate the migration process and to prevent exploitation related to recruitment fees and the ensuing debt that arose from the migration process.¹² This change is a welcome and positive one; however, its implementation and efficacy must continue to be assessed and examined over time. It is noteworthy that in 2020, the International Organization for Migration exited its role overseeing the bilateral agreement between Israel and Thailand. This has changed the recruitment process for migrant workers from Thailand and has the potential to negatively impact the significant achievements of this agreement with regard to recruitment fees. Thus, the recruitment and hiring processes of migrant workers from countries which have entered bilateral agreements with Israel must be examined and monitored, in order to prevent an erosion

that workers should not be bound to their employers via binding arrangements. This policy was affirmed in the case of the construction company Yilmazlar in H CJ 10843/04, *Hotline for Migrant Workers v. Government of Israel* PD 62(3) 117 (2007).

¹⁰ H CJ 4542/02 *Kav LaOved v. Government of Israel*, PD 61(1) 346 (2006).

¹¹ See the extended discussion in chapters 3 and 4 below, which addresses the issue of workers in agricultural training programs within the discussion on binding arrangements and recruitment fees.

¹² H CJ 2405/06 *Kav LaOved v. The Director of the Auxiliary Unit for Foreign Workers*, (published in Nevo, 17.12.2018).

of the efficacy of agreements intended to prevent recruitment fees, for example, by circumvention through alternative channels.¹³

The gradual return of binding arrangements in different formats, and the changes that have occurred or may occur in the framework of implementation of the bilateral agreements to which Israel is a signatory, highlight the **need for periodic monitoring of the impact of implementation of the migration policy, and the agreements and restrictions established pursuant to it.** This would enable changes in policy and implementation where an accumulation of cases amounting to human trafficking occurs.

Such examination must also define the legal channels that enabled cases of human trafficking to reappear and amend the regulations accordingly. For example, it is possible to periodically examine migration programs or relief in granting tourist visas when there has been an aggregation of indicators of human trafficking, according to the Delphi indicators,¹⁴ or according to identification principles as determined by the State in the framework of improvements to the identification process,¹⁵ even if this does not reach the legal threshold for a trafficking offense in every instance. For example, it seems ripe to reassess the arrangement with foreign construction companies, the student/trainee arrangement, facilitation of the issuance of visas from countries of the former Soviet Union, and the migration and employment arrangement in the care sector.

Periodic oversight of the migration policy rules and their implementation, with the aim of preventing the creation or entrenchment of conditions favorable to human trafficking offenses, **must also include regulation regarding citizens or agencies in Israel.** There must be periodic evaluation of the granting of employment permits (whether directly or via manpower agencies) or educational and training programs and the like, when evidence of exploitative or abusive practices that may reach the threshold of the definition of human trafficking begins to accumulate. For so long as the migration policy relies on migrant labor in employment sectors characterized by low wages, the authority to grant and condition permits should be actively used to increase incentives to act in accordance with the law.¹⁶

In order to enable adjustments and changes to the arrangements governing migrant workers, as well as Israeli citizens and manpower agencies, and in light of information

¹³ See chapter 5 below for a detailed discussion of bilateral agreements.

¹⁴ U.N. INTERNATIONAL LABOR ORGANIZATION, Operational Indicators of Trafficking in Human Beings, Results from a Delphi survey implemented by the ILO and the European Commission (ILO, 2009): <https://tinyurl.com/yzjl2f7r>. See also chapter 8 of this Alternative Plan below discussing enforcement and identity.

¹⁵ See chapter 8 of this Alternative Plan for a detailed discussion of a system for identifying victims of trafficking.

¹⁶ See chapter 7 of this Alternative Plan below for a detailed discussion of protective labor law legislation.

regarding vulnerability and exploitation or attempts to circumvent the arrangements intended to protect workers and migrants, **policy tools and arrangements that are knowledge-led and sensitive to changes on the ground** must be adopted. For example, it is possible to examine an option to adopt **standards allowing for flexible and context-specific implementation**, as has been done in countries that have adopted various points-based systems for assessing eligibility for permanent or temporary migration. In such situations, points could be assigned not only to assess a person's eligibility for a particular migration program, but also to assess employer suitability or other frameworks to safeguard the rights of those who come to Israel, for example, for work or professional training.

Limitations of the Proposed Policy

The adoption of a flexible approach and a reflexive regulatory policy that enables adjustments and changes based on information and developments on the ground requires orderly decision-making processes and a consistent and firm approach by the State actors leading these processes. Such an approach is often absent in decision-making mechanisms in Israel generally, and particularly in decision-making in the field of migration and labor policy. Flexible standards in the absence of clear and consistent commitments to prevent the structural factors for the development of human trafficking may result in unintended and undesirable consequences, such as the creation of workarounds to circumvent the agreements designed to protect the rights of migrants in the workplace. Therefore, structured and transparent institutional processes are required to ensure periodic oversight of and adjustments to the migration policy to achieve the aim of preventing human trafficking.

Binding

Maayan Niezna*

This chapter focuses on the binding arrangement that was officially struck down by the High Court of Justice in 2006 yet has not fully disappeared from the landscape of Israel's migration policy. This chapter will make the case that the restriction on changing employers is one of the most evident underlying causes of a structural vulnerability to human trafficking, and that it thereby follows that safeguarding the rights of workers to easy and accessible labor market mobility would be an effective anti-trafficking measure.

Background

Migration policy impacts labor law and labor relations' dynamics in multiple ways, generally weakening the bargaining power of workers and reinforcing the control their employers are able to exert over them. One specific example is the significant power held by employers as a result of workers' visas being tied to one employer. This further exacerbates the already stark bargaining power disparities between employers and workers. A situation whereby a work visa is dependent upon employment with a specific employer, and, thus, termination of the employment relationship—irrespective of the cause—results in loss of the work visa and residence permit in Israel, is referred to in Israel as a “binding arrangement” and stands out as a prominent example of the negative impact of migration policy on workers' rights.

The binding arrangement ties legal residence and employment in Israel to employment with a specific employer, which significantly detracts from the freedom of contract of migrant workers. Restricting migrant workers' ability to exit abusive or otherwise unsuitable workplaces fundamentally undermines both the contractual foundations on which labor law is based and the ability of workers to influence their working conditions.¹

* Maayan Niezna is a Postdoctoral Research Fellow in Modern Slavery and Human Rights, Bonavero Institute of Human Rights, University of Oxford, and a Visiting Research Fellow at TraffLab (ERC) at Tel Aviv University. Her research focuses on the elements of trafficking for labor exploitation.

¹ Guy Mundlak “Neither Insiders nor Outsiders: The Contractual Construction of Migrant Workers' Rights and the Democratic Deficit” 27(2) TAU Law Rev. (November 2003), pp. 423-488; Hanny Ben Israel, THE

Under such an arrangement, if a worker exits the workplace or is dismissed, the immediate penalty is loss of documented status, creating vulnerability to arrest and deportation. These measures may be considered a form of “legal coercion” to continue an employment relationship, as they de facto eliminate the bargaining power of migrant workers seeking to improve their working conditions or to choose employers who are willing to offer improved conditions.² Preventing workers from changing employers has been recognized as a breach of the Forced Labour Convention by the Committee of Experts of the International Labour Organization.³ Factoring in substantial debts (as a consequence of high recruitment fees or promissory notes) that take years to repay and a higher income than that available in the country of origin, as well as the loss of documented status and harsh financial sanctions involved in leaving an employer, make binding arrangements particularly restrictive.

In 2006, the Supreme Court of Israel struck down the binding arrangement, in a harshly worded judgment that held that such arrangements violated the basic rights of migrant workers and infringed upon their liberty and their dignity, and described the system as “a modern form of slavery”.⁴ This judgment retains profound symbolic significance, as well as clearly setting out the prohibition on binding both in principle and as a legal precedent.

Despite this judgment, however, and while recognizing that in some branches the system of binding to a specific employer was lifted *prima facie*, in practice, a substantial percentage of non-Israeli workers nonetheless continues to be bound to their employers. In the **care** sector, for example, restrictions were enacted to restrict workers’ movement between different geographic regions⁵ and measures were put in place to supervise workers’ changes in patient-employers.⁶

These restrictions, which reestablished, and even reinforced and tightened the binding arrangement within the care sector, make it harder for workers to change employers and create a chilling effect on their motivation to do so, even in cases of abusive working

FRAGILE STRING TO LIFE ITSELF – LABOR, MIGRATION AND CARE BETWEEN ALTRUISM AND INSTRUMENTALISM (research paper, Tel Aviv University Faculty of Law, October 2018) 39, pp. 48-51 (hereinafter: Hanny Ben Israel).

² Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers* 34 *Comp. Lab. L. & Pol’y J.* 95, 129 (2012); Virginia Mantouvalou, *The UK Modern Slavery Act 2015 - Three Years On*, 81 *MODERN LAW REVIEW* 1017 (2018); Hila Shamir, *The Paradox of “Legality”: Temporary Migrant Worker Programs and Vulnerability to Trafficking*, in *REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY* 471 (Prabha Kotiswaran, ed., 2017).

³ JEAN ALLAIN, *SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING* 220 (2013).

⁴ HCJ 4542/02 *Kav LaOved v. Government of Israel*, Paragraph 4 of the Judgment of Vice-President Emeritus M. Cheshin (published in Nevo, 30 March 2006).

⁵ Entry into Israel Regulations (Determination of Geographical Areas for the Employment of Foreign Caregivers), 2014.

⁶ Entry into Israel Regulations (Supervision of the Changes of Employment of Foreign Caregivers), 2014.

environments.⁷ Furthermore, within the care sector there is an absolute and definitive form of binding for any workers who have been in Israel for a period in excess of 51 months. By a conservative estimate, such workers make up approximately 40% of all workers in the care sector.⁸ Absolute binding also restricts an expanding group of care workers in Israel on “humanitarian” visas, which extend their right to reside in Israel in cases where a unique bond has formed between a specific worker and their patient.⁹

In the **construction** industry, thousands of workers are bound to foreign construction companies (known as execution companies, ‘Chevrot Bitzua’). These are companies that operate in Israel and directly employ the migrant workers who work for them. Workers in foreign construction companies are subject to de facto and de jure restrictions on changing employers.¹⁰ The most well-known example in this field is the Turkish construction company Yilmazlar, and in recent years there has also been a significant increase in employment via Chinese construction companies. Employment via foreign construction companies is de facto based on almost absolute binding: an Immigration Authority regulation allows movement between employers in “exceptional” cases only,¹¹ and data that has been provided on this question emphasizes that even under this limited exception, workers are not actually able to change employers in practice.¹² The employment arrangement via foreign construction companies continues to be in use,

⁷ Hanny Ben Israel, *supra* note 1, p. 50.

⁸ This analysis is based on figures published by the State in 2017 (in its response dated 3 March 2017 to HCJ 9971/16 *Kav LaOved v. Minister of Welfare* (published in Nevo, 16 April 2019)), which demonstrate that of a total of 50,162 registered migrant workers in the care sector who were present in Israel as of the end of the year in question, 18,860 had lived in Israel for a period of more than five years (37% of all workers). The percentage of workers subject to absolute binding arrangements is likely to be higher, as these figures do not take into account workers who have been in Israel for more than four years and three months.

⁹ Under the terms of the 2011 Amendment to the Entry into Israel Law, it was decided that that the Minister of the Interior is entitled to extend a permit for continued employment of a worker in the care sector on humanitarian grounds, even where the condition of continuous employment for over one year with the same employer has not been met, provided that the permit is not extended beyond provision of care to only one patient. Likewise, an annual cap on the number of permits to be provided under this provision was established. See Entry into Israel Law (Amendment 20) (Extension of Permit for Foreign Worker in the Care-giving Sector), 2011. Although this amendment was intended for application in exceptional cases, in practice, thousands of such “humanitarian” permits have been issued for work in the care sector over the years, under conditions of absolute binding to one employer.

¹⁰ See, e.g., Request for Administrative Appeal 5147/19, *Sinan Guler v. State of Israel - Population and Immigration Authority* (published in Judicial Authority database, 29 December 2019) (hereinafter: *Guler* case).

¹¹ HCJ 2385/16 *Histadrut Leumit v. Government of Israel*, Clause D of the judgment (published in Nevo, 2016).

¹² See process in *Guler* case, *supra* note 10; Letter from Mali Davidian, Supervisor of Freedom of Information Law in the Population and Immigration Authority, to Michal Tadjer, Kav LaOved, “Procedures of Foreign Contracting Firms in the Construction Industry” (15 March 2020), para. 7.

despite reports of coercion, violence and harsh conditions that have circulated for over two decades.¹³

In addition, the freedom of movement of Palestinian workers is restricted by binding to the employer listed in the work permit (albeit in practice there exists a trade in permits within the construction industry, and employment with employers other than the one listed on the permit is common) and by constant oversight of the duration of their stay in Israel. At the time of writing, a new arrangement has been adopted that will end the binding arrangement of tens of thousands of Palestinian workers to their Israeli employers, but this has yet to come into force.¹⁴ This arrangement redefines “the quota that has been set for the construction industry as ‘belonging’ to workers and not employers, so that workers will be able to move freely between different employers within the construction industry”.¹⁵ At the same time, the arrangement also sets out a proposal that will enable permit-holding workers to enter Israel to seek employment. These measures are expected to reduce binding arrangements and the high recruitment fees currently paid by workers; however, it is too early to know how effective the implementation will be, and there is reason to suspect that this arrangement will also fail to eliminate the high recruitment fees paid by the workers.

In the **agriculture** sector, “educational” and “voluntary” programs essentially act as arrangements that circumvent the recruitment of workers via the system set out in bilateral agreements.¹⁶ Such programs bind workers to a specific employer with no possibility to change, in contrast to the arrangements applied to other workers in the sector. At the same time, while officially those workers in the agriculture sector who arrive under bilateral agreements are not subject to binding arrangements, there are notable practical obstacles that hinder their market mobility between both employers and manpower or placement agencies.¹⁷ Since the binding arrangement was struck down, migrant workers in the agriculture sector have been allowed to move between employers and between the placement agencies responsible for them. In practice, based on numerous testimonies, such movement is difficult to achieve, in part because it is

¹³ *Ibid*; H CJ 10843/04 *Hotline for Migrant Workers v. Government of Israel*, clause B(3) 117; Report by the Hotline for Refugees and Migrants and Kav LaOved, *Expendable Labor: 20 Years of Exploitation and Binding of Construction Workers from Turkey* (2020) hotline.org.il/yilmazlar20years/.

¹⁴ Population and Immigration Authority, 9.1.1001 “Protocol for Standardizing Employment of Palestinian Workers in the Construction Industry in Israel” (22 October 2020).

¹⁵ *Ibid* para. B.10.

¹⁶ H CJ 2405/06 *Kav LaOved v. The Director of the Auxiliary Unit for Foreign Workers* (published in Nevo, 17 December 2018), para. 7.

¹⁷ For a discussion on the different private agencies, see chapter 6 of this Alternative Plan.

contrary to the interests of the farmer and the agency.¹⁸ From a legal perspective, the placement agencies are required to satisfy the worker's demand, however as the agencies receive a monthly payment from the employing farmer, it is in their interest to offer a limited response to the request. More specifically, the agencies have no interest in supporting a worker requesting to switch to working with a farmer who works with another agency. As a consequence, agencies have often been noted to obstruct and delay such requests. In practice, this limits the freedom of choice and mobility of workers who struggle to leave exploitative employers or work to which they are unsuited for other reasons. We will expand on this point further in chapter 6 of this Alternative Plan, which addresses the role of manpower and placement agencies.

The Main Policy Recommendations—Ensuring Market Mobility for Workers

A bedrock principle of the labor approach for human trafficking is **the complete and effective elimination of all absolute binding arrangements**. Such a measure is necessary irrespective of the arrangement that will replace the binding system, which must facilitate labor market mobility, both de jure and de facto. From a legislative perspective, there is an alternative proposal that would retain a balance between upholding the basic rights of migrant workers and the basic principles of temporary, sector-specific labor migration. This proposal would involve a “sectoral binding” model, providing migrant workers with permits to work in a specific sector —agriculture, construction, care, manufacturing, hospitality etc.—and permitting them freedom of movement between employers within that sector. Technically, this is the same arrangement the State adopted following the High Court of Justice's 2006 judgment on binding arrangements; however, as has been detailed above, this arrangement is not being enforced in the cases of many workers. This mobility will be subject to the same labor laws that apply to local workers, e.g., regarding the required notice period before resignation. No restrictions should be imposed on labor market mobility that are not imposed equally on Israeli workers, and no regulations should be added that have the direct or indirect consequence of impeding workers' labor market mobility.¹⁹

In **sectors with a high concentration of non-Israeli workers**—care, construction and agriculture—freedom of movement and mobility between permit-holding employers should be maintained for all the workers in the sector. The nature of the workplace and accommodation, the wages offered, and physical or mental difficulties associated with the position or with the sub-sector are all legitimate considerations for migrant workers

¹⁸ Yahel Kurlander, *The Recruitment Industry in the Israeli Agricultural Case: Growth, Prosperity, and Decay*, PhD Dissertation, University of Haifa (2019).

¹⁹ E.g., the Entry into Israel Regulations (Supervision of the Changes of Employment of Foreign Caregivers), 2014.

when choosing a job or changing jobs, as they are for Israeli workers, and these considerations should not be denied or restricted.²⁰ In the case of employers who are unable to offer competitive wages or conditions compared to the rest of the sector, alternative inducements may be considered to encourage workers to choose these employers—however, a worker may not be prevented from moving to another employer within the same sector.

In sectors or sub-sectors with **a limited number of non-Israeli workers**, or where permits for employing migrant workers require specific training or skills that pose practical challenges to change of employers—e.g. “expert foreign worker” permits within a sector that are provided to highly-skilled workers who may be relevant to a specific employer or small group of employers—an arrangement should be adopted that would decouple the decision to leave one’s employer from the loss of legal status. Wherever possible, such incidents should be resolved on a case-by-case basis. At the same time, enhanced enforcement measures should be implemented at both the recruitment and employment stages to limit the risk to vulnerable workers of accumulating debts or being coerced into accepting abusive or harmful working conditions through a perceived lack of alternatives.²¹

Together with eliminating the binding system via primary and secondary legislation, **there is a need to simultaneously remove practical obstacles and facilitate labor market mobility.** This will necessitate proactive engagement by State authorities in facilitating placement with a new employer; publishing information that is accessible to workers (in the relevant languages and through accessible channels) regarding regulations for moving between employers and the details of employers who hold available permits; ensuring the accuracy of such information; and, above all, supervising the manpower and placement agencies and creating a system of incentives to encourage them to enable workers’ mobility, or at the very least not to prevent it. The influence of manpower and placement agencies over de facto and de jure binding is discussed further in chapter 6 below.

²⁰ This is in contrast to the approach taken by the State authorities, which considers caregivers’ requests to change employers in favor of one who is able to pay higher wages, to move from Israel’s geographic periphery to its center or from a “difficult” patient who requires intensive treatment to an “easy” patient, as invalid or “arbitrary” claims that may be restricted. See HCJ 4542/02 *Kav LaOved*, *supra* note 4., Respondent’s Statement, 21 May 2003; Entry into Israel Regulations (Determination of Geographical Areas for the Employment of Foreign Caregivers), 2014.

²¹ See the discussion in chapter 4 of this Alternative Plan regarding recruitment fees.

Limitations of the Proposed Policy Recommendations

Sector-specific binding also restricts migrant workers to certain sectors, most of which are characterized by harsh working conditions, difficult and exhausting work and low wages—sectors in which local workers are disinclined to take jobs.

Within these sectors, the working conditions tend to be broadly similar, and therefore, labor market mobility, even in those cases where it is possible, is not always sufficient to bring about meaningful improvement in working conditions. The secondary labor market, dominated primarily by non-citizen workers and characterized by limited and ineffective oversight, serves as fertile ground for exploitation, human trafficking, slavery and coerced labor. For all the vast importance of eliminating the binding system, this alone will not provide a comprehensive solution to all the challenges posed by the secondary labor market. The elimination of the binding system should be reinforced with appropriate protective labor laws, which in turn should be reinforced by effective enforcement measures, a commitment to eliminate recruitment fees, and additional measures that will be discussed elsewhere in this Alternative Plan. In addition, binding migrant workers, even if introduced on a sectoral basis rather than with respect to individual employers, perpetuates the narrative that portrays migrants as cheap labor, and not as equal members of society—a narrative that finds further expression in their definition as temporary workers with no pathway to permanent status. While this policy will reduce the most egregious forms of exploitation, it does not represent a whole-hearted commitment to the human dignity owed to migrant workers and is a manifestation of the prevailing attitude of objectification and instrumental treatment of migrant workers.²²

²² For more regarding the various facets and implications of this attitude towards migrant workers, which is notably absent from existing programs to combat trafficking, see the discussion in chapter 9 of this Alternative Plan, below, which addresses issues of family and community.

Recruitment Fees

Yuval Livnat*

This chapter discusses the high recruitment fees paid by migrant workers as part of their entry process into Israel, as well as during their period of sojourn. It underscores how working under the shadow of debt acts to suppress the willingness of workers to move from one employer to another, to voice complaints, or to act to change unsafe working conditions, thereby facilitating the exploitation of workers at the hands of their employers. Thus, high recruitment fees provide fertile ground for harsh exploitation within the labor market that could amount to human trafficking. Israel has chosen to combat this issue by entering bilateral agreements with the workers' countries of origin. Nonetheless, there is lingering suspicion that recruitment fees will find their way back into the migration industry despite such agreements. This chapter proposes a series of legislative amendments and regulations intended to restrict high recruitment fees in Israel.

Background

Recruitment fees are payments collected from migrant workers by manpower agencies or their subcontractors in the countries of origin and/or in Israel, in exchange for arranging work in Israel. Such payments entrench the weakened position of migrant workers within the labor market, and under certain situations might push them into forced labor or conditions of slavery. This is a consequence of the fact that, in most cases, migrant workers are required to take out loans in their home country—often with high interest rates from “gray market” loan sharks—to finance the high recruitment fees involved in coming to Israel. Under these circumstances, migrant workers become particularly susceptible to exploitation, as their employers—often aware of the workers' debt burdens and their desperate need to repay these loans—may exploit the situation by demanding work under conditions that violate protective employment legislation.

*Dr. Yuval Livnat serves as the academic supervisor of the Refugee Rights Clinic at Tel Aviv University Faculty of Law and is also a research fellow in the TraffLab (ERC) research group. He holds a bachelor's degree from Tel Aviv University, a master's degree from Northwestern University and a Doctor of Juridical Science from Columbia Law School. His research covers migration law and public interest lawyering.

This does not constitute debt bondage in the classic sense, as the worker is not required to pay off their debt to the employer, but rather to a third party. Nonetheless, this constitutes debt bondage by another name, a situation that enables the employer to exploit the workers' debt to a third party to undermine the workers' free will and force them to work under conditions that fall drastically short of reasonable and legal standards. The risk of being left without work at all (especially under the binding arrangement, see chapter 3 above) compels the workers to remain with their employers, even when conditions are substandard, and to work long hours. This is particularly true in the period immediately following the workers' arrival in Israel, when they do not yet speak the language and are unfamiliar with local laws and customs or potential sources of support and assistance.

Binding these workers to specific employers (in contravention of the ruling of the High Court of Justice¹) worsens their conditions further still. Such is the case for many Palestinian workers, construction workers employed by foreign construction companies (known as execution companies, 'Chevrot Bitzua'), some workers in the care sector, and those workers who are part of an (often dubious) training, work experience and volunteering program.² A combination of binding arrangements and high recruitment fees leaves workers in a particularly weak bargaining position, where leaving their employment will lead not only to the loss of wages from the current employer, but also to the loss of their status in Israel, resulting in an inability to repay the debts they incurred to finance the recruitment fees.

Israeli law regulates recruitment and placement of migrant workers in Israel through a series of laws, regulations and procedures. The applicable law requires any person engaged in recruitment and placement of workers generally (and migrant workers in particular) to hold a designated license to engage in this area,³ and limits the maximum sum that the license holder is permitted to collect from a worker as part of the recruitment and placement process.⁴ Despite the regulations in place, violations of the law are frequent, and enforcement is limited.⁵

¹ HCJ 4542/02 *Kav LaOved v. Government of Israel*, (2006).

² See the discussion in chapter 3 of this Alternative Plan regarding binding arrangements.

³ Articles 62 and 65, Employment Service Law 1959.

⁴ Regulation 2 of the Employment Service Regulations (payment from the job-seeker for recruitment services), 2006.

⁵ See, e.g., State Comptroller *Report 53b* (2003); Gal Talit, Yoram Ida & Sigal Levy, *Implications of Collection of Excessive Brokerage Fees for Migrant Workers in the Domestic Care Sector in Israel*, 58(1) INTERNATIONAL MIGRATION 219 (2019); See also Yuval Livnat, "Israel's Bilateral Agreements with Source Countries of Migrant Workers: What is Covered, What is Ignored and Why?" (publication pending).

For example, migrant workers coming to work legally in Israel used to pay (and the majority continue to pay) recruitment fees far exceeding the permissible limit before entering the country, and sometimes even during their sojourn in Israel. In some cases, those payments are collected by entities not even authorized to engage in this area. Palestinian commuters pay a significant percentage of their monthly salaries to unauthorized recruiters (known as “*raisim*”).⁶ In addition, there are migrant workers who arrive in Israel under the guise of training and volunteering programs who are not students or volunteers but essentially “workers”, as defined under labor law. They also often pay significant sums to recruiters to facilitate their arrival in Israel. A similar issue of note regards workers for foreign construction companies, who are required to sign “promissory notes” naming the employers as beneficiaries.⁷

In recent years, Israel has signed bilateral agreements (or “BLAs”) with several countries of origin of migrant workers who come to Israel legally. These agreements regulate, among other issues, the recruitment process of these workers from their countries of origin to Israel. They have taken the authority to recruit and place workers out of the hands of private individuals in Israel and the countries of origin and transferred them—with one exception in China that will be discussed below—to the governments.⁸ These agreements were seemingly introduced as a result of justified concerns that legal enforcement against private criminal elements involved in the recruitment and placement of migrant workers would always be limited, in part due to challenges surrounding evidentiary and legal (extra-territorial) challenges embedded in the cross-border practice of collecting unlawful recruitment fees. Indeed, from the available body of evidence, it appears that BLAs have contributed significantly to a reduction in the recruitment fees migrant workers have been forced to pay in connection with their arrival in Israel. It also appears that workers arriving under these agreements do not pay recruitment fees in excess of the amounts permitted under Israeli law.⁹ At the same time,

⁶ Kav LaOved, “How Much Are Palestinian Workers in Israel Paying and for What”, May 1, 2014 <https://tinyurl.com/y7j9g7hk> (Hebrew); Bank of Israel, *Illegal Trade in Work Permits for Palestinian Workers in Israel: The Current Situation and Planned Reform* (25 September 2019) <https://tinyurl.com/yxi6pqqz> (Hebrew); Maayan Niezna, Kav LaOved “*The Occupation of Labor—Employment of Palestinian Workers in Israel*” (25 November 2018).

⁷ See the discussion in chapter 3 of this Alternative Plan regarding binding arrangements.

⁸ See the discussion in chapter 5 of this Alternative Plan regarding bilateral agreements.

⁹ Rebeca Raijman and Nonna Kushnirovich, *The Effectiveness of the Bilateral Agreements: Recruitment, Realization of Social Rights, and Living & Employment Conditions of Migrant Workers in the Agriculture, Construction and Caregiving Sectors in Israel, 2011-2018* (2019), https://www.gov.il/BlobFolder/reports/efficiency_of_bilateral_agreements/en/CIMI_BilateralAgreementsBooklet_ENG_1219.pdf; Yahel Kurlander, *The Commodification of Migration—on the growth, expansion and changes in the recruitment industry for migrant workers in agriculture from Thailand to Israel* 192-

however, Israel continues to invite migrant workers from countries with whom Israel has not entered BLAs, as well as Palestinian workers from the West Bank and (de facto) workers on training and volunteering programs, and those workers continue to pay recruitment fees considerably higher than the legally permitted maximum. Furthermore, the experience of other countries shows that the efficacy of bilateral agreements tends to erode over time, resulting in a gradual backslide to collection of excessive recruitment fees by various actors involved in the migration process.¹⁰ An additional concern is that the same private actors who, prior to the bilateral agreements coming into effect, collected exorbitant recruitment fees, will seek alternative ways to profit at the expense of migrant workers, such as through commissions on sending money back to their countries of origin.¹¹

In addition, the Population and Immigration Authority very rarely exercises its authority to revoke employers' permits to employ migrant workers or the licenses of placement agencies to engage in international recruitment and/or placement of migrant workers in Israel. Such is the case even where there appears to be evidence of involvement of these parties in collecting unlawful recruitment fees.¹²

Main Policy Recommendations

Based on the situation described above, the following policy recommendations are proposed to eliminate unlawful recruitment fees through a series of amendments to the legislation and procedures currently governing this issue in Israel.

Amendments to laws and regulations—general

- Israel continues to face the “flying visa” phenomenon, in which a worker is brought to Israel fraudulently, with the aim of making the worker pay the recruitment fee, without the recruiter taking the steps necessary to ensure that the worker will actually be able to work in Israel.¹³ Such conduct should be recognized as a criminal offense under the section of the Penal Code concerning human trafficking, slavery and forced labor. In addition, the license of any

195. (Hebrew) (PhD dissertation, University of Haifa—Department of Sociology, 2019) (hereinafter: Kurlander, *Commodification of Migration*).

¹⁰ KARL FLECKER, *Canada's Temporary Foreign Worker Program (TFWP) Model Program—or Mistake?*, CANADIAN LABOUR CONGRESS REPORT (2011).

¹¹ Kurlander, *Commodification of Migration*, p. 185, *supra* note 9.

¹² Protocol of Meeting No. 742 of the Labor, Welfare and Health Committee, 20th Knesset, 29 March 2018 at p. 9.

¹³ See, for example, Kav LaOved “*High Court of Justice Appeal on Behalf of an Indian Worker and Victim of a Flying Visa*”, 3 June 2009 <https://tinyurl.com/yxjnj6h4> (Hebrew);

placement agency found to be involved in such incidents should be revoked, and any guarantees deposited with the agency should be forfeited.

- To keep recruitment fees low, the law should clarify that the permitted payment by the worker for recruitment services set forth in the Employment Service Law includes VAT.¹⁴
- A significant portion of the fees collected by Israeli recruitment agencies from migrant workers is not reported to the Israel Tax Authority. Yet, so far, the Israel Money Laundering and Terror Financing Prohibition Authority has taken only a minor role in combating excessive recruitment fees. In some of the migrant workers' countries of origin, there is either no restriction on the amount that recruiters are permitted to collect from workers, or the maximum sum exceeds that permitted under Israeli law.¹⁵ To allow for more active engagement by the Money Laundering Authority, the double criminality requirement in Israeli law regarding profits derived from offenses related to excessive recruitment fees charged to migrant workers (as ascribed by Israeli law) must be revoked by amending the Prohibition of Money Laundering Law 2000. The final clause of Article 2(b) of this Law requires double criminality—i.e., an offense must be criminalized both in Israel and in the foreign country—as a condition for applicability of the law. Article 2(c), however, stipulates an exception to this general rule, and should be amended to also exclude application of the double criminality condition to the offenses detailed in paragraph (18b) of the First Appendix, which includes offenses under Article 80(b) of the Employment Service Law prohibiting charging migrant workers recruitment fees in an amount above the permitted maximum. Furthermore, Paragraph 18b of this Appendix should itself be amended to include additional relevant sources of law, including relevant articles from the Employment of Employees by Manpower Contractors Law 1996, in conjunction with procedures governing construction companies, which determine the maximum amount that a migrant worker in the construction industry may be charged in recruitment fees.
- The law should clarify that the Commissioner for Foreign Workers' Labor Rights in the Ministry of Labor, Social Affairs and Social Services has the authority to handle complaints by Palestinian workers and migrants employed in Israeli settlements in the West Bank, including regarding recruitment fees. Alternatively, the

¹⁴ Regarding the lack of clarity on this subject, see Tax Appeal 17466-01-12, *Ozer LaHaklai v. VAT Rehovot* (published in Nevo, 28 October 2013).

¹⁵ See, e.g., Clause H.1 of Population and Immigration Authority Regulation 9.7.0003 “Procedures for Inviting and Employing Foreign Workers from China in Israel in the Construction Sector” (13 June 2017), “*In accordance with the applicable legislation in China, Chinese companies are permitted to receive recruitment fees in a sum equivalent to up to 12.5% of the annual salary of workers they recruit for work abroad.*”

authority to deal with such matters should be delegated to an official within the Israel Defense Force's Civil Administration, and the designated official should receive the necessary training.

- Article 69(g)(3) of the Employment Service Law should be amended to stipulate that Israeli recruitment/placement agencies will be required to compensate any migrant worker who has paid recruitment fees in excess of the amount permissible under Israeli law to a foreign recruitment agency that was contracted with an Israeli agency. Compensation due will be equivalent to the difference between the amount permitted and the fees charged. The migrant worker will be entitled to file suit against the Israeli agency in an Israeli court for the excessive fees paid by the worker abroad. The liability of the Israeli agency and that of the foreign company shall be joint and several; in such cases, the Israeli recruitment agency will be able to include an indemnification clause in its contract with the foreign recruitment agency.¹⁶
- In cases which raise suspicions that a foreign citizen in Israel has been involved in charging recruitment fees to another foreign citizen, the suspect should not be deported from Israel before conclusion of the investigation. Should there be sufficient evidence, and in the absence of any special circumstances preventing doing so, the individual would be subject to criminal charges. Should the foreign victim be required to remain in Israel for purposes of the investigation or to provide testimony, their sojourn permit will be extended so that they may continue to work and earn wages in Israel. In addition, the foreign victim and the victim's family in their country of origin will be provided protection, as necessary—in cooperation with local law enforcement in the country of origin—against any harm arising from the victim's complaint and testimony.
- The State will apply the principle of non-refoulement¹⁷ to workers who were forced to take out loans abroad on the "gray market" in order to finance recruitment fees and whose lives would be endangered should they return to their home country without repaying those loans. Should such danger cease upon repayment of the loan, the State will grant the worker permission to continue to work to earn wages in Israel in order to finance repaying the loan.

¹⁶ This does not prejudice Article 69 of the Employment Service Law 1959. Exclusive jurisdiction of the Labor Courts should also be established as part of the legislative revision. For a similar legal arrangement in the Philippines, see Supreme Court of the Philippines' ruling in *Sameer Overseas Placement Agency, Inc. v. Joy C. Cabiles*, G.R. No. 170139 (5 August 2014), <https://www.chanrobles.com/cralaw/2014augustdecisions.php?id=629>

¹⁷ The principle of non-refoulement provides that a state shall not deport a foreign citizen to a country where that person's life or liberty is in danger. This principle, which is enshrined in customary international law, is a broader version of the similar principle stipulated in Article 33 of the Convention Relating to the Status of Refugees (which applies exclusively to refugees). See H CJ 4702/94 *Al-Tai et al. v. Interior Minister* (1995).

Policy recommendations regarding migrant workers invited to Israel (caregiving, agriculture, construction, hospitality, etc.)

- In view of the background set forth above, the main recommendation for combating illegal recruitment fees is for the State of Israel to recruit migrant workers exclusively through **governmental** bodies¹⁸ in Israel and in the countries of origin, while restricting recruitment fees to an amount not exceeding the maximum amount permitted under Israeli law and in the countries of origin. This recruitment system should be regulated through **bilateral agreements**, alongside the creation of effective enforcement mechanisms and ongoing supervision to ensure compliance with the agreements.¹⁹
- Migrant workers should be brought to Israel only from countries with consular representation in Israel,²⁰ and under the terms of the bilateral agreement, Israel should encourage the country of origin to appoint a labor attaché at the consulate.
- As an outcome of the State's recognition of its central responsibility in recruiting and bringing migrant workers to Israel (where they are entering with work permits), the Attorney General should recognize the State's prima facie duty of care toward migrant workers in matters pertaining to unlawful recruitment fees, in accordance with principles of negligence in tort law.
- When a BLA involves for-profit, non-governmental entities, the terms of the agreement should require stricter oversight of the activities of those entities. For example, the BLA with China establishes the involvement of a non-governmental organization on the Chinese side—China International Contractors Association (CHINCA)—which may be for-profit. It is unclear to what extent this organization is beholden to the manpower agencies incorporated under it. In situations of this kind, it is recommended to investigate and ensure proactive oversight to protect

¹⁸ This is known as a G2G (government-to-government) recruiting mechanism, as will be discussed in further detail in the discussion on bilateral agreements in chapter 5 of this Alternative Plan below. A government agency would be able to receive support from private entities on strictly technical matters; however, it will not be permitted to delegate its authority to a private contractor (See: HCJ 2303/90 *Eli Philipovitch v. Registrar of Companies* 46(1) 410 (1992)). Nothing would prevent the involvement of professional non-profit organizations, such as the International Organization of Migration (IOM).

¹⁹ For a discussion on the proposed policies relating to bilateral agreements as a tool for combating human trafficking, see chapter 5 of this Alternative Plan below.

²⁰ In accordance with Article 5 of the Vienna Convention on Consular Relations (1969), consular officials are entitled to act to promote the interests of the citizens of their country within the foreign country in which they are posted. Furthermore, they are authorized to issue passports to citizens of their country (important in cases where passports are withheld by the employer/recruitment agency).

workers, as well as to verify the efficacy of the lottery component of recruitment (see below).

- Some of the BLAs introduce a lottery mechanism to prevent the payment of high recruitment fees. In such cases, an oversight mechanism should be established to ensure there are no structures in place within the country of origin which would undermine the lottery system. The 2020 BLA with Thailand, for example, includes a lottery that determines the order of arrival for an interview with a representative of the Thai Ministry of Labor. Following the interview, however, there is no further lottery. This creates concerns over the potential for requests for bribes by Thai representatives, as a condition for “passing” the interview. In these situations, establishing a stricter oversight mechanism for the interview stage in Thailand (for example, by including a representative from Israel or the IOM in the interviews) is recommended.

To the extent Israel continues to permit recruitment of migrant workers from countries without bilateral agreements and by non-governmental actors, it is recommended to establish the following principles in laws and regulations (as relevant):

- Placement agencies with a permit to recruit migrant workers will be permitted to contract or collaborate solely with licensed recruitment agencies in the countries of origin.
- In order to facilitate monitoring of placement agencies’ accounting practices, ensure that workers are not being charged recruitment fees, and prevent placement agencies from exploiting migrants’ dependence and lack of knowledge in order to sell them various services, Israeli placement agencies will engage solely in recruiting and bringing migrant workers to Israel, in the narrowest meaning (known as a “Single Purpose Company” or SPC). Accordingly, the agencies will not be entitled to provide paid “consulting services” to foreign recruiting agencies beyond their regular business interactions related to bringing workers to Israel.²¹
- Individuals or companies with ties to placement agencies with permits to recruit migrant workers (relatives, subsidiary companies, etc.) will be prohibited from entering into business arrangements with migrant workers in Israel or related entities (for example, for the sale of health insurance, telephone cards, etc.). This would also apply to family members or subsidiaries of other entities authorized by regulation to provide specific services to migrant workers, such as placement agencies in the agriculture sector (which are responsible for providing specific

²¹ This is to prevent disguising recruitment fees as payments made by the foreign agency for “consulting services” that are unrelated to bringing workers to Israel. See *A. Gamish Manpower Services Ltd. v. Ashdod VAT Director* (published in Nevo, 24 October 2012); *Ozer LaHaklai v. VAT Rehovot* (published in Nevo, 28 October 2013).

services to workers and employers within the agriculture sector in Israel, in accordance with Population and Immigration Authority procedures), manpower agencies in the care sector, and the like.

- To ensure that foreign recruitment firms are legally registered and comply with Israeli law (regarding limitation of the Israeli placement agency's activities solely to recruitment of migrant workers, the permissible maximum recruitment fees, etc.), a draft of the agreement between the Israeli placement agency and the foreign agency should be presented for approval to the Commissioner for Foreign Workers' Labor Rights in the Ministry of Labor, Social Affairs and Social Services prior to signature. The Commissioner should be permitted to make enquiries with government representatives of the foreign country to ensure that the foreign company is legally registered. Upon approval, a signed draft of the agreement should be filed with the Commissioner.
- Israeli placement agencies authorized to recruit migrant workers, construction sector manpower agencies and private agencies should be required to submit audited annual financial reports to the Commissioner for Foreign Workers' Labor Rights by March 31 of every year for the previous calendar year, to monitor the prohibition on charging recruitment fees in excess of the maximum allowed by law, as well as the company's adherence to the requirements of its SPC status.
- To prevent bringing in workers solely for purposes of collecting recruitment fees, without a genuine need within the labor market and without sufficient employment permits, Israeli placement agencies would be prohibited from entering into agreements with foreign companies to bring in workers, and Israeli representatives abroad would be prohibited from issuing entry visas to migrant workers, unless 97% of the migrant workers for whom permits were issued to work in Israel in the relevant sector are already employed in the sector.
- Where the recruitment/placement agency has submitted a request to the Population and Immigration Authority to cancel a B1 work visa and residency permit for a migrant worker—after the visa has already been issued to the worker, prior to the worker's arrival in Israel—the visa would not be cancelled before the Authority has verified, as necessary and in cooperation with the Israeli Embassy and law enforcement in the countries of origin, that the worker had not paid any recruitment fees, and there were no suspicions of fraudulent activity on the part of the recruitment agency (flying visa).

Palestinian workers from the West Bank

At the time of writing, some measures protecting Palestinian workers from excessive recruitment fees were adopted, but more needs to be done. The provisions of the new regulations should be fully implemented (which, in turn, would implement Cabinet

Decision 2174 regarding the cancellation of the binding of Palestinian workers to their employers in the construction sector).²² Measures for monitoring and supervision should be adopted to ensure worker mobility between contractors authorized to employ Palestinians. It is also recommended that the instruction in the Cabinet Decision (and the regulations) stating that a Palestinian worker's permit will be revoked if the worker fails to find a permit-holding-Israeli employer within 60 days be cancelled. In view of the difficulty for Palestinian workers to locate employers on their own, such provision may perpetuate workers' dependence on recruiters.

A mechanism—similar to those described in the aforementioned BLAs—should be established that would place the responsibility for recruitment and placement of workers in the hands of governmental or quasi-governmental actors. For example, although the government decision allows Palestinian workers to enter Israel for short periods of time to find employers, an arrangement should be considered whereby the Israeli Employment Service would be responsible for directing Palestinian workers to employers with available employment permits. Similar principles should be adopted to enable labor market mobility from one employer to another, including in other sectors in which Palestinian workers are employed in Israel, such as agriculture and manufacturing.

At the same time, law enforcement authorities (civil and criminal) must work to identify, investigate and prosecute, as well as impose economic sanctions and administrative punitive measures, on unauthorized Palestinian recruiters (*"raisim"*) who charge recruitment fees to Palestinian workers. This should also apply equally to Israeli employers and recruiters who work in collaboration with those recruiters.

Migrant workers coming to Israel through work/study programs

In light of the increasing number of migrants who arrive as part of work/study programs, the National Anti-Trafficking Coordinator, together with the relevant government offices, should assess whether the programs in question are legitimate or merely a front for employing migrants in violation of protective employment laws, and whether these migrants are being charged prohibited recruitment fees under the guise of or in addition to other fees such as "tuition fees" and the like.

Limitations of the Proposed Policy

This chapter presents the main problems with the existing regulation of the recruitment framework and proposes a number of broad, as well as specific, solutions for addressing

²² See: Population and Immigration Authority 9.1.1001, "Procedures for Arranging Employment of Palestinian Workers in the Construction Industry in Israel" (22 October 2020).

these issues. However, experience has shown that the recruitment and placement market tends to find ways to circumvent the regulations in force and loopholes to exploit their access to migrant workers, in order to generate profits in various and unusual ways. Therefore, mechanisms should be created for updating, periodic review and monitoring of existing regulations, to ensure effective policies to prevent the collection of excessive recruitment fees.²³

²³ See the discussion on the importance of creating periodic assessments in chapter 2 of this Alternative Plan, on migration and labor policy, above.

Bilateral Labor Agreements

Tamar Megiddo and Yuval Livnat*

This chapter discusses bilateral labor agreements (BLAs) as a tool for combating human trafficking. It advances the case for BLAs as a potentially effective tool for safeguarding the rights of migrant workers, far beyond the important role they already play in Israel in reducing the recruitment fees paid by them. The chapter further demonstrates how, by regulating additional related transnational issues (or issues that require inter-governmental cooperation), BLAs can safeguard rights and strengthen enforcement mechanisms while at the same time increasing the bargaining power of migrant workers, thereby reducing their vulnerability to exploitation and preventing human trafficking.

Background

Bilateral labor agreements (BLAs) are international agreements between two countries that set out the terms under which citizens of one country will be permitted to temporarily relocate to the other country (and occasionally vice-versa) for work. Most of these agreements are signed between destination countries in the Global North and countries of origin in the Global South. There are around 600 such agreements worldwide today, but their existence and content are confidential in many countries. Countries tend to sign such agreements in the wake of increased labor migration from the sending country to the receiving country; however, it is unclear whether this is a cause or effect—whether the increase in migrants leads to the signing of the agreement, or whether it is the signing of the agreement that brings about an increase in the number of migrants.¹

* Dr. Tamar Megiddo is a lecturer at the College of Law and Business, teaching and researching public international law, law and technology, and migration and refugees, and leading the Migration, Globalization and Technology legal clinic. She also serves as a research fellow at Tel Aviv University (TraffLab ERC research project) and at the University of Haifa (the Minerva Center for the Rule of Law under Extreme Conditions). Megiddo holds a bachelor's degree from the Hebrew University of Jerusalem and a masters' and doctorate in law from New York University. Her work has been published in leading academic journals including the Harvard International Law Journal, The Yale Journal of International Law and Theoretical Inquiries in Law. Dr. Yuval Livnat serves as the academic supervisor of the Refugee Rights Clinic at Tel Aviv University Faculty of Law as well as a research fellow in the TraffLab (ERC) research group. He holds a bachelor's degree from

Attempts to achieve a global consensus on the rights of migrant workers have failed. The two most significant multilateral treaties are the 1949 **Migration for Employment Convention (Revised)**, which has 49 signatory states,² including only a handful of destination countries for migrant labor (including Israel), and the 1990 **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**, which has 54 signatory states, not one of which is a significant destination country.³ The 1949 convention includes an annex containing a model BLA.⁴ From 1945 onward, countries have increasingly turned to BLAs to regulate labor migration: 270 bilateral agreements were signed between the years 1945-1989⁵, and from 1990 to 2015, 312 additional agreements were signed.⁶

A study conducted by the Center for International Migration and Integration (CIMI)⁷ found that Israel's bilateral agreements have had a profound impact on reducing the recruitment fees that were imposed on migrant workers. This resulted in reduced debt incurred by migrant workers in their migration process.⁸ At the same time, the impact of these BLAs on the working conditions of the migrants was ambiguous: in certain areas there has been improvement, while in others the situation remained the same or even deteriorated following the signing of a BLA.⁹

Tel Aviv University, a master's degree from Northwestern University and a Doctorate of Juridical Science from Columbia Law School. His research focuses on migration law and public interest lawyering.

¹ Adam S. Chilton & Eric A. Posner, *Why Countries Sign Bilateral Labor Agreements*, 47 J. LEG. STUD. S45, S48-S49 (2018). (hereinafter: Chilton & Posner).

² Convention (No. 97) Concerning Migration for Employment (Revised 1949), July 1, 1949, 120 U.N.T.S. 71.

³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly Resolution 45/158 of 18 December 1990, 2220 U.N.T.S. 3 (2009); United Nations Treaty Collection, Ratification of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en.

⁴ Piyasiri Wickramasekara, *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*, ILO (2015).

⁵ Chilton & Posner, p. S45, *supra* note 1.

⁶ *ibid*, p. S49.

⁷ CIMI is involved in migration and integration. Among other things, the organization provides support in implementing bilateral agreements and operates a support hotline for workers who came under a bilateral agreement. For more, see the Center's website: <https://www.cimi.org.il/labor-migration>

⁸ Rivka Reichman & Nonna Kushnirovich, The Effectiveness of the Bilateral Agreements: Recruitment, Realization of Social Rights, and Living & Employment Conditions of Migrant Workers in the Agriculture, Construction and Caregiving Sectors in Israel, 2011-2018, 6 (2019) (hereinafter: Reichman and Kushnirovich). tinyurl.com/s8m726wv

⁹ Reichman & Kushnirovich, *supra* note 8.

Main Policy Recommendations

BLAs are one tool in the labor migration regulatory toolbox. This regulatory tool is unique because it is the result of negotiation and agreement between the country sending the workers and the country receiving them (even if this negotiation is not necessarily carried out on equal footing, economically and politically). As will be discussed further in this chapter, BLAs offer specific advantages in combating human trafficking, such as optimizing the response to issues that require inter-governmental coordination, but also disadvantages, such as sidelining trade unions, human rights' groups and the wider public in both countries from the negotiation and drafting stages.

The built-in advantage of BLAs as a regulatory tool is evident in some aspects of the effort to combat human trafficking, for example aspects that are inherently transnational, and addressing them is therefore only possible through cooperation between authorities in the sending and receiving countries. Hence, for example, the issue of exorbitant recruitment fees, that are often paid in the country of origin and lead to exploitation in the country of destination (as was discussed in chapter 4), has been significantly improved since Israel began signing BLAs.¹⁰ This is a consequence of the stipulations within the BLAs, according to which the worker recruitment and placement process would be G2G (government-to-government), i.e. carried out by government representatives of both countries, rather than private migration industry actors in both countries.¹¹ In addition, a mechanism was established to select workers via a lottery system.¹² Therefore, it is worth considering regulating additional transnational issues (or issues that require inter-governmental cooperation) that relate to human trafficking, and that are significant for preventing or responding to situations involving exploitation of migrant workers via BLAs.

Alongside the unique advantage of BLAs in regulating fundamentally transnational issues, these agreements have an additional advantage: the provisions contained in them are less susceptible to unilateral changes, as changes to clauses or mechanisms set out in BLAs would be considered a breach of international obligations with potential diplomatic ramifications. Thus, for example, the BLAs Israel has signed to date have codified the establishment and operation of a hotline for migrant workers in the native languages they

¹⁰ Ibid; Yahel Kurlander, *The Commodification of Migration—on the Growth, Expansion and Changes in the Recruitment Industry for Migrant Workers in Agriculture from Thailand to Israel* 192-195 (Hebrew) (PhD dissertation, University of Haifa—Department of Sociology, 2019).

¹¹ The bilateral agreement with China is not fully G2G, and it therefore requires stricter oversight. See the discussion in chapter 4 above regarding recruitment fees.

¹² The lottery aspect of the most recent agreement with Thailand is only partial, and therefore it too requires stricter oversight. See the discussion in chapter 4 of this Alternative Plan above regarding recruitment fees.

speak (operated in recent years by CIMI). While Israel could have set up such a mechanism to assist workers in receiving information and lodging complaints against employers and manpower agencies even without doing so by way of BLAs, the fact that it is bound to do so by these agreements provides extra support in retaining this service and makes it harder to shut it down on financial or other pretexts. Furthermore, these agreements also have legal relevance within Israel, as commitments made as part of BLAs to support migrant workers may provide them with enforceable rights in an Israeli court under the “presumption of congruence” between international law and Israeli law.¹³ Thus, for example, Israel’s 2020 agreement with Thailand enshrines certain rights—including regulations regarding a “pre-departure period” of 60 days for migrant workers upon the conclusion of their work in Israel (which will enable them, among other things, to settle their accounts with their employer) and a period of 90 days to find an alternative employer (in order to reduce the worker’s dependence on a specific employer). These periods were previously only partially and inconsistently defined in the guidelines of the Population and Immigration Authority. Once they were stipulated in a BLA, they will now be protected over time, and when violated, the courts can enforce them.

To guarantee the continuation and enforceability of rights granted via BLAs, **we recommend that the mechanism for renewing BLAs be triggered automatically** (i.e. automatically renewed alongside an option to proactively cancel it if desired). This will ensure that rights that have already been afforded to workers in BLAs or mechanisms created to protect them, will remain in place over time.

We further recommend that protective mechanisms such as these be applied equally to migrant workers from other countries, even if their arrival in Israel is not covered by a BLA. In relation to Palestinian workers such an extension of rights from BLAs may not be possible, in light of the political situation. It is therefore important to establish alternative protective mechanisms to protect Palestinian workers, for example when it comes to recruitment fees.

Building on the preceding discussion, the following are a series of policy recommendations regarding the drafting and implementation of BLAs as a tool to combat human trafficking.

¹³ H CJ 2599/00 *Yated—Non-Profit Organization for Parents of Children with Down Syndrome v. Ministry of Education*. (2002); H CJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel*, para. 37 of the opinion of Justice Levy (2006); Administrative Appeal 4204/13, *The State of Israel v. Solo*, paragraph 2 of the opinion of Justice Hayut (majority opinion) (published in Nevo 27 July 2014).

Guiding principles for inviting migrant workers and signing agreements

- Migrant workers are to be invited to Israel exclusively under the framework of BLAs.¹⁴ This principle will also apply to workers of foreign construction companies (known as execution companies, 'Chevrot Bitzua').¹⁵ The signing of BLAs for volunteers or students in work-study programs should also be considered.¹⁶
- In light of the civic character of BLAs, a draft of the agreement should be published for public comments before it is finalized and signed, in line with current practices in relation to certain regulation and legislation bills.¹⁷
- Agreements should not be confidential but rather published and readily available. This includes BLA appendices (such as implementation protocols). Israel should refuse to sign BLAs where the other party demands that they not be published.

Recommendations regarding the mechanisms set out in the agreements

- The agreements should be renewed automatically.¹⁸
- Israel should ensure that the "Joint Committees" set up as part of the agreements, that include representatives from Israel and the other signatory country, will meet on a regular basis.¹⁹ Israel should permit affiliated organizations, such as NGOs working with migrant workers, migrant community organizations or trade unions, to present materials or appear before committees during their periodic meetings.

¹⁴ Article 6 of the 30th government's Decision 4024 "Permits for Employing Foreign Workers" (31 July 2005) declares that "with the goal of preventing negative exploitation of foreign workers and the charging of excessive fees from these workers, to instruct the unit responsible for foreign workers in the Ministry of Economy to reach an agreement for recruitment of foreign workers for labor in Israel, to be done under supervision of the International Organization for Migration (IOM) or another arrangement set out for this purpose, and to guarantee that permits will be provided to exclusively employ workers recruited under the agreement signed". In practice, migrant workers continue to come to Israel, for example in the care sector, outside the framework of bilateral agreements and International Organization for Migration supervision.

¹⁵ For a discussion on foreign construction companies, see chapter 3 of this Alternative Plan above, on binding.

¹⁶ For a discussion on bringing students in work-study programs and volunteers to Israel, see chapter 3 above, on binding, and chapter 4 above, on recruitment fees.

¹⁷ Regarding the obligation to publish legislation bills, see: "Processing Governmental Bills" Attorney General Guidelines 2.3005, Article 26; "Secondary Legislation: Process and Guidelines" Attorney General Guidelines 2.3100 (60.012), Article 21.

¹⁸ This is the case with the majority of agreements Israel has signed to date. At the same time, the agreement with Bulgaria, for example, requires active renewal after a defined period.

¹⁹ The available literature suggests that, in practice, such committees rarely meet, and that the outcomes of these meetings are often shrouded in uncertainty, see: Ryszard Cholewinski, *Evaluating Bilateral Labour Migration Agreements in the Light of Labour and Human Rights*, in THE PALGRAVE HANDBOOK OF INTERNATIONAL LABOUR MIGRATION: LAW AND POLICY PERSPECTIVES 231, 239 (Marion Panizzon et al., eds., 2015). It is therefore important to ensure that these committees operate effectively.

- The agreements should clarify which **international conflict resolution mechanism** will be used to settle disagreements and conflicts, in order to guarantee the signatory states' ability to address failings in implementing the agreement or breaches of it.
- The agreements should guarantee that migrant workers are provided with **suitable and appropriate mechanisms for pursuing claims or filing complaints**:
 - At present, the ability of migrant workers to file a complaint or pursue claims against an employer, a manpower agency or another party that caused them damages during their period of residence in Israel is subject to the Israeli statute of limitations and the Israeli judicial system. The agreements should establish mechanisms designed to ensure **the realization of the right to sue in an Israeli court**, within the period of limitations, even **after the migrant workers have returned to their home countries** (for example by easing the process of signing affidavits abroad and obtaining a visa to testify).
 - The agreements should provide for a **supplementary** mechanism for workers allowing them to submit a complaint at their country's embassy in Israel, and for the complaint to be investigated through diplomatic channels. This mechanism will neither replace nor be a condition for an appeal in a court of law.
 - The agreements will establish a **supranational complaint investigation mechanism** that migrant workers will be able to turn to with complaints regarding Israel's adherence to its obligations toward them as defined in the BLA. At a minimum, this should apply in situations where they are unable to access the Israeli legal system (whether because of accessibility issues after they left the country or because the avenues for their complaint have been exhausted within the Israeli legal system).
- The agreements should establish the most-favored nation principle, at least insofar as this regards the rights of migrant workers. The significance of this principle, which is also accepted in other bodies of international law (e.g., bilateral investment treaties), is that Israel commits to equal rights for all migrant workers entering its territory under the framework of BLAs. This is justified by the duty to not discriminate between migrant workers performing identical jobs on the basis of the BLAs that brought them to Israel, or, in other words, on the basis of their nationality.

Content of bilateral labor agreements that Israel should seek to sign

- The agreements should incorporate an equal treatment clause that guarantees that the prevailing labor law will apply equally to Israeli citizens and migrant workers.²⁰
- Furthermore, the agreements should also include a general equal rights clause. This will clarify that, other than certain exceptions which will be agreed upon separately (e.g., regarding social benefits, or political rights that are expressly reserved for citizens), migrant workers will be granted equal human rights to those enjoyed by citizens of the State.
- The agreements will address the issue of remittances from Israel to the countries of origin. A fair, safe and effective mechanism will be set up for workers' remittances to be transferred to their home countries.
- The agreements should address matters pertaining to social benefits or will refer to supporting agreements that address these benefits (including accumulating and adding up insurance periods and dividing responsibility for paying benefits) and taxation (preventing dual taxation and regulating payments between the country of origin and the destination country).
- The agreements should address exploitative working conditions and clarify that withholding personal documents and similar practices are unequivocally prohibited.
- The agreements should address the unique challenges faced by female migrant workers, especially in distant and/or isolated workplaces, and particularly those faced by care workers who live and work within the patient's home. Thus, for example, the agreements should set out clear and appropriate regulations and complaints mechanisms to prevent sexual harassment, address sexual assault and ensure the rights of workers during pregnancy and childbirth, if only by referring to the applicable general Israeli law and emphasizing equal rights in these contexts as well.
- The agreements should address the matter of an injured worker's return to their home country and return of the body of a deceased worker for burial in their country of origin (in view of the need for collaboration between national authorities and other actors in both countries).

Limitations of the Proposed Policy

The significant disadvantage of BLAs is the lack of effective enforcement mechanisms—ultimately, these agreements rest on enforcement mechanisms within

²⁰ A clause of this nature is included in some of the agreements Israel has signed (such as those with Bulgaria, Moldova and Romania), but not in all of them.

Israel. Therefore, as the study by Rebeca Raijman and Nonna Kushnirovich found,²¹ BLAs alone are unable to provide a full and comprehensive solution to diminishing the vulnerability of migrant workers to severe exploitation. BLAs are able to provide stronger foundations for migrant workers' rights than those that exist absent of such agreements; however, their implementation necessitates a comprehensive system effectively safeguarding these rights, and the removal of barriers to ensure that the workers have access to law enforcement and the legal system. BLAs are therefore a useful tool, but they are insufficient as a sole measure. Furthermore, as noted in chapter 4 above on recruitment fees, the protective mechanisms in BLAs may weaken over time—both in the country of origin and the country of destination. Therefore, our recommendations in the chapters regarding migration policy (chapter 2 above) and recruitment fees (chapter 4 above) need to be taken into account, and the recommendations in them applied, in tandem with the measures we recommended here. It is important to carry out a periodic assessment and oversight of the mechanisms set out in BLAs and their implementation. This is in addition to an assessment of the enforcement of the rights and procedures established for the protection of migrant workers' rights in the country of origin and the destination country. Here, the goal is to ensure that the agreed principles in the BLAs continue to be enforced and fulfill their role in regulating migration and the rights of workers.

²¹ Reichman and Kushnirovich, *supra* note 8.

Placement and Manpower Agencies

Yahel Kurlander*

This chapter discusses the role of placement agencies in the agriculture and care sectors and manpower agencies in the construction industry. These agencies form a vital part of the employment infrastructure for migrant workers in Israel in their respective sectors. These bodies were designed to regulate the migrant labor market and to privatize enforcement, and they have also become part of a system to prevent illegal residence. They act as a supervising body that enforces labor and employment regulations, while, at the same time, are also supposed to be assisting in safeguarding the workers' rights. This chapter presents the discrepancy between the intended role of these organizations in supporting workers, protecting their rights and enabling their mobility in the labor market, and the reality on the ground, where they primarily serve the interests of employers. This conflict of interest ultimately means that the agencies fail to fulfill their role in contributing to the prevention of severe exploitation and human trafficking.

Background

This chapter discusses private entities—placement and manpower agencies—tasked with recruiting, guiding and placing (and sometimes also employing) migrant workers in the three primary sectors in which they are employed in Israel today: care, agriculture and construction. In these sectors, bilateral agreements have been signed with migrant workers' countries of origin to regulate the recruitment process and prohibit the collection of recruitment fees. The agreement with the Philippines regarding the care sector came into force in August last year (2021) and is yet to show its effectiveness.

Private agencies within these three sectors work under a number of different frameworks in placing, guiding, recruiting or employing migrant workers. The source of these

* Dr. Yahel Kurlander is a research fellow at the TraffLab (ERC) research group at Tel Aviv University and a lecturer at Tel Hai academic college.

arrangements lies in a series of government decisions and the recommendations of inter-ministerial committees, mostly from the early 2000s.¹ The aim of these arrangements was to change the employment model for migrant workers in Israel that existed at the time. From the State's perspective, the motivation behind changing the employment models was to refocus on migration regulation with the chief areas of focus being significant increase in illegal residency in Israel; unfair competition between migrant workers and Israeli workers; binding to specific employers; inadequate working conditions and artificial demand for migrant workers that was based not on an interest in their work, but on a desire to maximize recruitment fees. The new arrangements were generally designed to resolve the main problems identified by the State, by creating a binding and more detailed regulatory framework for private entities involved in the recruitment and placement of migrant workers and strengthening government oversight of their actions.

The structure of migration and labor in Israel creates a situation whereby the relationships between migrant workers, and employers and agencies are defined by dramatic disparities in the power dynamics, which serve as fertile ground for exploitation. In the context of these complex relationships, the responsibilities of employers of migrant workers extend beyond employment alone into housing, healthcare, legal status and other areas. The relationship with the employer and the agency is therefore the source of the worker's basic rights and often a condition for their realization. The employment model established for the private agencies has brought about significant improvements over the previous model. However, it has also established an almost completely privatized space of responsibilities and obligations, in which private entities bear the responsibilities and obligations for safeguarding workers' rights, while also acting as a supervisor of services outside of the employment relationship. In the case of provision of services to patients requiring home care, this structure reduces the State's direct responsibility, isolating the State from political pressure and the costs of failures in providing these services, while at the same time empowering its autonomy and control.²

Manpower agencies have been active within the construction industry since 2005. These manpower agencies act as the employers of the workers and provide workers to contractors. These workers remain employed by the agencies, while de facto working for the contractors. In the agricultural sector, since the implementation of the bilateral agreement in 2012, the role of private agencies changed, and agencies became responsible for placing and supporting workers, as well as providing placement services

¹ For an overview of the government work on this subject, see: Committee on Employment Policy *Final Report*, p. 53 (2010).

² Mimi Ajzenstadt & Zeev Rosenhek "Privatization and New Modes of State Intervention: The Long-Term Care Program in Israel" *Journal of Social Policy* 29 (2), 247-262 (2000).

for farmers. Within the care sector, agencies recruit migrant workers from countries of origin, connect these workers to employers in Israel, and provide a range of services throughout the period of employment to both workers and employers.³ The care sector differs from the agriculture and construction sectors, as a bilateral agreement has not yet been implemented, and worker recruitment is carried out via private entities that charge exorbitant recruitment fees. However, from an employment perspective, manpower agencies in the construction industry differ in that they act as direct employers, in contrast to the agriculture sector in which the employer is the farmer, and the care sector, in which the patient is the employer (either directly or together with an agency).

In all three sectors, the agencies are responsible for supporting and assisting migrant workers in moving between employers (or agencies), ensuring they are paid, providing assistance with visa matters and ensuring employers fulfill their obligations to provide health insurance to the workers.⁴ The main roles of the private entities are as follows:

The construction sector—manpower agencies

In the construction sector, the agency is listed as the employer of the migrant worker, and an employment relationship exists between them.⁵ Agencies in construction hold permits to employ migrant workers, and they enter into agreements with various contractors and provide them with a workforce. As of 2019, 38 manpower agencies were licensed by the Population and Immigration Authority (PIBA) to act as contractors for the construction sector.⁶ Migrant workers in the construction sector come to Israel under bilateral agreements signed with their countries of origin. One purpose of these agreements was to reduce the excessive recruitment fees that workers in the process of migrating to work in the construction sector in Israel were charged.⁷ At the time of

³ See PIBA Protocol 9.2.0001 “Foreign Private Offices’ Procedure for Caregiving Foreign Workers” (Hebrew) (1.12.2019) (hereinafter: protocol for placement agencies in the care sector).

⁴ PIBA Protocol 9.3.0001 “Procedure for Placement Agencies in the Agriculture Sector Recruiting Foreign Workers” (Hebrew) (14 June 2015) (hereinafter: Procedure for Placement Agencies in the Agriculture Sector); PIBA Procedure 9.4.0001 “Conditions for Permit to Employ Foreign Workers in the Construction Industry by Manpower Contractors” (30 January 2019) (hereinafter: Construction Industry Employment Protocol).

⁵ There are also foreign construction companies (known as execution companies, ‘Chevrot Bitzua’) active in the construction industry. They act as direct employers and do not form part of the discussion in this chapter. For a discussion on problems with the employment model of the foreign construction companies, see the discussion in chapter 3 above of this plan regarding binding.

⁶ PIBA Circular “List of Authorized Construction Corporations” (8 November 2020), and see list of manpower agencies for 2019:

www.gov.il/BlobFolder/policy/authorized_corp_constructions/he/auth_corps_0919.pdf (Hebrew)

⁷ See discussion in chapters 3-5 above regarding binding, recruitment fees and bilateral agreements.

writing, Israel has signed and implemented bilateral agreements for the construction industry with Moldova, China, Ukraine, Romania and Bulgaria.

Agriculture sector—placement agencies

In the agriculture sector, the farmer is the employer and has an employer-employee relationship with the migrant worker. This limits the agencies' role to placement and mediation only.⁸ In 2012, a bilateral agreement came into effect in the agriculture sector that included a change in the method of recruitment of migrant workers to the sector, severing the connection between the placement agencies in Israel and the recruitment agencies in Thailand. This led to a dramatic reduction in the recruitment fees that were being paid by migrant workers. An additional consequence was a reduction in the number of agencies active in the sector. In 2010, for example, there were 36 Israeli agencies operating, and by 2018, this was down to only 14 authorized agencies in the agriculture sector.⁹ Since the bilateral agreement came into effect, agencies in the agriculture sector have changed their approach and no longer recruit workers. Instead, they offer services for migrant workers during their time in Israel, as well as provide services to farmers. The agencies receive payment from the migrant workers—a fixed sum limited by PIBA regulations. The agencies also receive payment from the farmers, in the form of a variable monthly fee that is not addressed in the regulations and is as agreed between the agency and the farmer. In exchange for this payment, the agency offers the farmer a tailored and varied range of services that expands beyond the services the agency is intended to provide to the farmer under the regulations.

Care sector—recruitment, placement and manpower agencies

In the care sector, the patient is the employer. However, in cases where the patient is entitled to care benefits from the National Insurance Institute, the agency acts as a co-employer. The agencies in the care sector recruit workers from various countries to work in Israel, including from the Philippines, Moldova, Sri Lanka, India and Nepal. They engage in recruitment and placement of migrant workers and also provide additional services to the patients and to migrant workers themselves; for example, according to PIBA regulations, the agencies are required to visit the patient's home on a quarterly basis. The agencies also assist workers in changing employers, mediate between workers and employers in cases of workplace disputes, provide assistance in ensuring medical insurance, and, where possible, in extending permits and visas. As of February 2020,

⁸ Procedure for Placement Agencies in the Agriculture Sector Recruiting Foreign Workers, *supra* note 4.

⁹ Yahel Kurlander *The Commodification of Migration—on the Growth, Expansion and Changes in the Recruitment Industry for Migrant Workers in Agriculture from Thailand to Israel* (Hebrew) (PhD dissertation, University of Haifa—Department of Sociology, 2019) (hereinafter: Kurlander, *Commodification of Migration*).

there were 99 placement agencies active in the care sector in Israel.¹⁰ A bilateral agreement signed with the Philippines in 2018 regarding recruitment of migrant workers has yet to be implemented, and, thus, recruitment and placement of new workers continues to be in the hands of the agencies in the manner described here.

Main Policy Recommendations

This chapter will present two key and interconnected structural failings that define the present situation regarding the role of the agencies in their respective sectors. The first and most important failing is the inherent conflict of interest due to the fact that the agencies are intended to serve both the workers and the employers. The second, which demonstrates the power disparity between those involved in recruitment and the workers they recruit, is the role of the interpreters working for the agencies and their disproportionate influence under the current system—an influence that is often exploited to violate workers' rights and to further profit at their expense. After introducing these failings, this chapter will propose policy solutions to address them and to reduce the vulnerability of migrant workers to exploitation and human trafficking.

Inherent conflict of interest

While numerous differences exist between the various agencies discussed thus far, in all cases, there is an inherent conflict of interest, in that they serve the competing interests of both the migrant workers and the Israeli employers with whom they have contracted to provide a workforce (farmers, contractors and care patients). This situation creates an inherent conflict of interest: On one hand, the agencies are charged by the State with partially safeguarding the workers' rights—and even receive payments from workers for this purpose; on the other, the workers are the “product” that the agencies offer employers in their respective sectors. The migrant worker is dealt the weaker hand, as the agencies' commitment favors the employer over their duty to the workers. In this scenario, the Israeli employer is the long-term prospect, the “returning customer” whose satisfaction is what ultimately builds the agencies' reputation. The tension between these two conflicting roles creates structural vulnerability for the migrant workers, making them susceptible to violations of their rights by the agencies and exacerbating the power disparity between the workers and their employers.

In the care sector, as the bilateral agreement has not yet been implemented, agencies continue to recruit migrant workers and to receive fees for their recruitment and placement. Because their main source of profit lies in bringing in new workers, the agency has significant financial incentive to recruit new workers rather than retain existing ones,

¹⁰ PIBA Circular “List of Authorized Placement Agencies for Recruiting and Assisting Foreign Workers in the Care Sector” (5 February 2020).

thus reducing its interest in protecting the rights and welfare of the existing care workers. In recognition of this structural problem, in 2013 the PIBA regulations for the care sector attempted to address the issue of incentives by distinguishing between the care manpower agencies that pay the migrant workers' wages through National Insurance benefits and the recruitment and placement agencies.¹¹ In practice, the requirements set out in the protocol are not enforced, and there is significant overlap between manpower agencies in the care sector and the recruitment and placement agencies, which are disguised and in breach of the regulations.¹² This difficulty can be clearly seen in the mandated periodic social worker visits to the patients' homes. These visits are supposed to take place separately, with the manpower agency representing the employer's interests and the recruitment and placement agency representing the worker's interests. In practice, the two are often combined. The social workers who are sent by the combined agency (manpower, recruitment and placement) often face a conflict between their commitment to safeguarding the patient's wellbeing, as required by the manpower agency and their commitment to protecting the rights of the worker as required by the recruitment and placement agency—when these interests collide.

In the agriculture sector, the inherent conflict of interest highlighted thus far ultimately leads to the binding of migrant workers to their employers. As detailed in chapter 3 above, following the High Court of Justice ruling against binding of migrant workers, the workers are not bound *de jure* to their employers. However, their arrival is still dependent on farmers' permits. The farmers rely on these permits to have placement agencies connect them to workers, via PIBA, and PIBA is tasked with enforcing the bilateral agreement between Thailand and Israel (TIC). Therefore, every farmer and every worker is connected to an Israeli placement agency, which receives payment for the services provided to both. Thus, despite the fact that the agencies are obligated to assist migrant workers in finding alternative workplaces if necessary, in practice, they create obstacles designed to preserve the circumstances of both the farmers and the workers. This is true particularly where a worker requests transfer to an employer linked to a different agency. As a consequence, the agencies exert significant control over the workers' freedom of mobility within the labor market and have a clear interest in restricting transfers only to farmers who work with their own agency, so they retain both the worker and the farmer—and their fees. In fact, mobility between agencies is practically non-existent.¹³ In practical terms, binding is primarily manifested upon the worker's first stay in Israel. Transfer of a worker who recently arrived in Israel from one agency to another would

¹¹ See Protocol for Placement Agencies in the Care Sector, *supra* note 3. (Hebrew)

¹² This information is based on a conversation between the author of this chapter and Adv. Michal Tadjer of the Legal Department at Kav LaOved.

¹³ Kurlander, *Commodification of Migration*, *supra* note 9.

require the original agency that received the worker on arrival to transfer the payment received from the worker to the new agency. This makes transfers between agencies during the initial period even more rare.

In the construction sector, the employment model allows for mobility between manpower agencies and worker mobility within the labor market; however, it also creates a different set of problems. PIBA regulations allows construction workers to transfer from one manpower agency to another once a quarter, and earlier in cases where their rights are being violated (subject to approval from the relevant PIBA office). As far as we are aware, workers do indeed transfer between agencies.¹⁴ However, a common problem in this sector is that of “informal employment”. The workers are formally employed by the construction manpower agencies and receive a salary and their full rights under labor law and the relevant collective agreements. However, they also work directly and informally for subcontractors who pay them additional sums, but usually without regard for the workers’ rights. The result is dangerous employment for long hours, in violation of the protective legislation.¹⁵ Further research is required in this sector; however, it is presumable that employment of workers by manpower agencies that serve only as mediators who are not themselves contractors within the industry enables other actors and stakeholders to create the same type of informal and exploitative relationships. The problem in the construction sector appears to be of a different nature, not arising from a conflict of interest, but rather from the separation of the manpower agency’s role as registered employer, and the instruction and supervision of the direct employer—the contractor.

The failures in the three sectors, as described above, are evidenced in two widespread problems in the employment and conditions of migrant workers: inadequate pay and inadequate living conditions.¹⁶ The agencies’ obligation to ensure adequate and proper wages and living conditions often conflicts with their commitments to farmers, care patients or construction contractors who violate their workers’ rights in these areas. The State’s lack of enforcement,¹⁷ regarding the responsibilities of both the agencies and the

¹⁴ Response to direct parliamentary question No. 737 on 27 October 2020, on examination of the statistics regarding mobility of foreign workers between employers. A copy can be found with the writer of this chapter.

¹⁵ Rebeca Rajjman and Nonna Kushnirovich, *The Effectiveness of the Bilateral Agreements: Recruitment, Realization of Social Rights, and Living & Employment Conditions of Migrant Workers in the Agriculture, Construction and Care Sectors in Israel, 2011-2018* (2019) (Hebrew).

¹⁶ Ibid; Rebeca Rajjman and Nonna Kushnirovich, *Recruitment of Migrant Workers in Agriculture and Construction in Israel: The Impact of Bilateral Agreements* (Ruppin Academic Center and CIMI) (2015).

¹⁷ Kav LaOved, *Below the Minimum: Non-Enforcement of Wage Law as a Structural Element in the Agricultural Sector in Israel* (2014). <https://tinyurl.com/94efwa8z>

employers to fulfill their legal obligations under the protective laws and collective bargaining agreements, indicates the ineffectiveness of existing arrangements in protecting workers' rights.

Another indicator of the agencies' failings is that migrant workers in these sectors are very often unaware of with which agency they are affiliated. According to the Center for International Migration and Integration (CIMI) hotline for workers who come to Israel under bilateral agreements, the most common reason for calls from migrant workers in the agriculture sector (47% of calls) and construction sector (81% of calls) is "seeking information".¹⁸ Of the calls that cited "seeking information" as the reason for the call, the majority of the requests (74% in 2019) were requests to identify their agency. Given such a high percentage of migrant workers who do not even know with which agency they are registered, it clearly follows that they would be unable to turn to them for support and assistance.

In response to this information gap, in February 2019, PIBA launched an online service enabling migrant workers to search for information regarding the type of visa they hold, the sector, the name of their current employer, the date and reason for the termination of employment where relevant, geographical area (in the care sector) and the agency responsible for them. This service is effective in facilitating migrant workers' access to information when they are in Israel. At the same time, two years after its launch (as of April 2021), the service remains available only in English and Hebrew, and has not been translated into the languages spoken by the migrant workers. Furthermore, the fact that the information is being made accessible does not necessarily mean that workers will turn to the agency for support. Presumably, agencies remain distant from the workers, and are not perceived as an effective source of support in improving working conditions. Thus, renewed consideration of the role of agencies in the framework regulating temporary migrant workers in Israel is in order.

Although conflict of interest is a fundamental problem shared by all the sectors, it is far from the only problem with the role of agencies. Conflicts of interest should be viewed in the context of the range of other issues rooted in the deep power disparity between the agencies and the migrant workers,¹⁹ and that result in a very low level of commitment by the agencies to the interests of the migrants and the safeguarding of their rights. This is further exacerbated by the low level of enforcement by the State.²⁰

¹⁸ PIBA, *2019 Data of the Foreign Workers' Hotline Established as Part of the Bilateral Agreements* (2020). <https://tinyurl.com/y2t7rbgs> (Hebrew)

¹⁹ See the discussion in chapter 4 of this Alternative Plan regarding recruitment fees.

²⁰ See the discussion in chapter 8 of this Alternative Plan regarding identification and enforcement.

Main policy recommendations to resolve the conflict of interest issue

The proposed solution is to abolish or adjust the triangular model either through direct employment by the agencies, or by splitting the agencies into two separate entities: one responsible for safeguarding the workers' interests, and the other for protecting employers' interests.

Direct employment by agencies: The first alternative would be to transform the role of the agency to that of the employer. In this scenario, the worker would enter a comprehensive contractual relationship with the agency, similar to the existing situation in the construction industry. In this situation, the State would be required to regulate and ensure enforcement with regard to a relatively small number of employers-agencies—a number large enough to enable mobility, but small in comparison to the number of farmers and care patients.²¹ Creating competition between the agencies for migrant workers could potentially encourage better and fairer employment conditions, similar to the existing competition for workers among the agencies in the construction industry. While widespread and severe violations of workers' rights occur within the construction industry, this is more due to “informal employment”, rather than the formal employment by the agencies. In addition, this would also facilitate the State's role in enforcement, due to the need to oversee a smaller number of employers.

A government report in 2006 assessed this alternative in the context of the care sector. It found, however, that “this model has been ruled out owing to the necessity of maintaining a direct working relationship between the care patient employing the foreign worker and the worker, in light of the personal nature of the service provided.”²² It is the belief of this writer that this argument on its own is inadequate in view of the severe violations of the workers' rights and restrictions on their freedom of movement. However, adopting such a solution would also require a structural response to prevent development of an informal labor market, as has occurred in the construction industry.

Separating the agencies into two separate entities, each responsible for protecting the interests of a different group (employers and migrants): The second alternative follows the formal situation in the care sector, where there are two separate entities—one charged with protecting the interests of the employer and the other charged with

²¹ A similar argument was raised in the discussions of the inter-ministerial team addressing revision of the employment model of Palestinian workers in the construction industry. See Ministry of Construction and Housing, *Summary Report on the Work of the Inter-ministerial Team on Changing the Employment Model of Palestinian Workers in the Construction Industry*, 21 (2016).

²² *Report of the Inter-ministerial Team for Assessing the Care Sector*, 8 (2006).

protecting the interests of the workers, in a manner intended to prevent conflicts of interest. Under this framework, the entity designated to protect the workers would not receive remuneration of any kind from the employers and would be tasked solely with protecting the workers. In this scenario, all payments from the employer to this entity would be completely prohibited, regulation and enforcement of the agencies would be increased, and migrant workers would be permitted full mobility between agencies, with more favorable agencies attracting workers and creating competition for workers among the agencies.

Such an approach would also necessitate implementing and enforcing a protocol which would create de facto separation between the entities—and not merely a theoretical one, in such a way as to ensure a complete separation of employers' and workers' interests. Furthermore, financial incentives for these entities to engage in exploitative practices would need to be minimized. For example, it would be important to undertake a serious assessment of the business models of these entities, to consider the activities of not-for-profit organizations, and to perhaps include an element of State funding for their work and/or State incentives for proper conduct. The existing model in the care sector does not do this. The failure of the current model in the care sector highlights the need to create a separate system of interests, including meaningful proactive enforcement of this separation by the State and an understanding of the financial interests of the agencies.

For every solution, the various State authorities tasked with safeguarding the rights of migrant workers in Israel—the Commissioner on Foreign Workers' Labor Rights at the Ministry of Labor, the National Anti-Trafficking Coordinator at the Ministry of Justice, and the CIMI hotline—should be granted enforcement powers and should recruit new inspectors to enable effective use of these powers.

Furthermore, in light of the difficulty in guaranteeing that a restructured organization would indeed serve the interests of the workers as intended, or in cases where such an organization does not exist—establishing a union to represent the interests of migrant workers is recommended. Trade unions have the potential to bring about changes in working conditions and labor relations by safeguarding rights and enforcement mechanisms even where State regulation and oversight is lacking or insufficient.²³ Such representation could be implemented either by establishing a trade union of migrant workers to represent the policy interests of all migrant workers, or on a sector-specific basis, or, alternatively, by integrating migrant workers into existing trade unions. Such a

²³ See the discussion in chapter 10 of this Alternative Plan regarding organized labor.

step would require initiative and action by civil society organizations but could also benefit from State backing and support in certain aspects.

It should be noted that guidelines rooted in collective agreements do apply to the working conditions of some migrant workers. In agriculture and construction, there are collective agreements that apply to Israeli and Palestinian workers, but not to migrant workers. Thus, these collective bargaining agreements should be expanded to also apply to migrant workers in these sectors. This is of particular importance in the care sector, where there is no collective bargaining agreement at all, but where there are many issues that harm both workers and patients and are in desperate need of regulation. For example, despite the High Court of Justice calling on the legislature to regulate work and rest hours for care workers, this has not yet happened.²⁴ The existing employment model does not include solutions for temporary employment to replace a worker who is unable to work (e.g. due to holidays, home-country visits, illness, pregnancy and childbirth, etc.). Collective agreements can act as an appropriate regulatory arena for resolving these matters, for the precise reason that they are the result of communication between employers and workers and are intended to serve the interests of both sides.

Communication, language and Interpreting

Many migrant workers, especially those in the construction and agriculture sectors, do not speak English, and communication with agencies and employers is predicated on the use of interpreters. Agencies in the agriculture sector, aware of this issue, are required to employ an interpreter under the relevant PIBA protocols.²⁵ In the construction sector, the PIBA protocol instructs agencies to provide “reasonable” interpreting services.²⁶ At the same time, the fact that often only the interpreters are able to understand the workers and convey information to them places interpreters in a position of power and with significant responsibility. The interpreters are a sensitive and weak point in the labor migration system in Israel, and supervision over them is inadequate. Workers have complained of interpreters lacking professionalism, abusing their position by demanding various payments from workers for their services, as well as employers encouraging the creation of a “local boss” amongst the workers to act as an interpreter, who can abuse that position to violate the rights of the other workers.

Main policy recommendations for tackling the dependence on interpreters

So long as the existing model of the agencies remains in place, the proposed solution regarding the work of interpreters is to formulate clear procedures for their work and to

²⁴ Further Hearing in the HCJ 10007/09 *Gluten v. The National Labor Court* (2013).

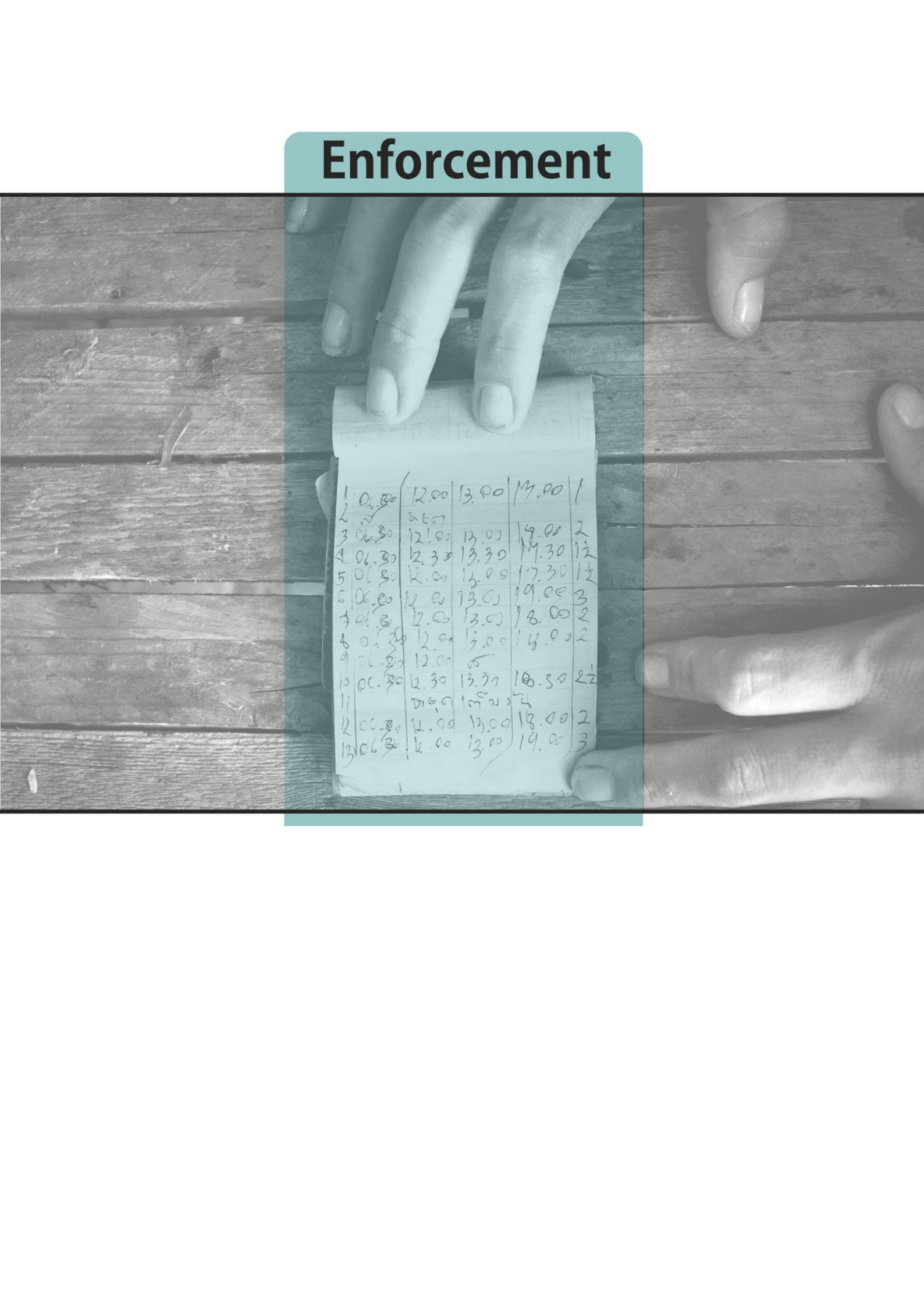
²⁵ Article 6c Protocol for Placement Agencies in the Agriculture Sector, *supra* note 4.

²⁶ Article 6.13.3, Construction Industry Employment Protocol, *supra* note 4.

introduce quality control standards for interpreters. Interpreters would undergo professional training by the Ministry of Labor's Office for Foreign Workers' Rights or another State authority, to educate them on migrant workers' rights and whom to approach in the event of any violations. Interpreters would receive qualification only after passing a series of tests of their interpreting abilities and their understanding of workers' rights, and how they handle inquiries independent of the agency.

In the model proposed above, should representation of migrant workers be created in the various sectors, whether through the establishment of a new organization or by allowing migrant workers to join existing labor unions, and the signing or updating of collective bargaining agreements accordingly, these organizations may have a role in hiring interpreters on the workers behalf, and through training and supervision of interpreters.

Enforcement



A hand is holding a small piece of paper with a handwritten table on a wooden surface. The table has 5 columns and 13 rows of data. The columns contain numerical values, some with decimal points, and some with slashes. The rows are numbered 1 through 13. The handwriting is in black ink on a light-colored paper.

1	06.30	12.00	13.00	17.00	1
2	06.30	12.00	13.00	17.00	1
3	06.30	12.00	13.00	17.00	2
4	06.30	12.30	13.30	17.30	1 1/2
5	06.30	12.00	13.00	17.30	1 1/2
6	06.30	12.00	13.00	17.00	3
7	06.30	12.00	13.00	18.00	2
8	06.30	12.00	13.00	18.00	2
9	06.30	12.00	13.00	18.00	2
10	06.30	12.30	13.30	18.30	2 1/2
11	06.30	12.00	13.00	18.00	2
12	06.30	12.00	13.00	18.00	2
13	06.30	12.00	13.00	19.00	3

Chapter 7

Protective Employment Legislation

Hanny Ben-Israel*

This chapter introduces the importance of protective employment legislation and its enforcement in safeguarding the rights of vulnerable workers. Protective employment legislation is important for all workers, but is of particular importance to workers whose access to other sources of market power, such as labor market mobility or possibilities for collective action, is severely restricted. This chapter examines the ways in which protective employment legislation fails to provide sufficient protection for migrant workers in Israel today, whether as a result of explicit exclusion or through lack of enforcement. It also offers concrete proposals to strengthen those protections, with the aim of reducing workers' vulnerability to exploitation as a central tool in the prevention of human trafficking.

Background

Labor law rests on three foundations—contract, protective employment legislation and collective action—representing different sources of power for workers in the labor market. Of the three, protective employment legislation is of particular importance, in light of the structural obstacles that make it difficult for marginalized workers, such as migrant workers on temporary labor migration programs (TLMPs), to meaningfully utilize other sources of power.¹ In the absence of bargaining power as a consequence of binding arrangements and debts, and in light of the many challenges of unionizing faced by migrant and other marginalized workers, protective employment legislation is often the only source of power meaningfully available to workers. It is intended to ensure minimum standards for working conditions and, at the very least, to provide workers with an avenue to seek redress where these standards fail to be upheld.

*Hanny Ben-Israel is a doctoral candidate at Tel Aviv University Faculty of Law, as part of the TraffLab (ERC) research group. From 2006-2015, she worked as an attorney at Kav LaOved.

¹ For a discussion of the structural elements of TLMPs, see Hila Shamir, *The Paradox of "Legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking*, in *REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY* 471 (Prabha Kotiswaran ed., 2017).

Protective employment legislation and its enforcement should therefore stand at the focus of any effective program to combat trafficking. As discussed in the introduction to this Alternative Plan (chapter 1), a labor approach to trafficking does not view trafficking as a phenomenon qualitatively different from other forms of labor market exploitation. Protective employment legislation and its effective enforcement therefore serve an important role in this approach: they have the power to protect against a wide range of violations, which within certain contexts or cumulatively may amount to trafficking. This approach is preferable to focusing enforcement efforts solely on extreme cases of exploitation, which hold a limited potential in creating meaningful, structural change.

Although Israeli labor law is formally committed to the principle of universality of labor law (i.e., that its norms apply fully to all workers in Israel, without discrimination based on one's documented status or citizenship), this commitment is largely theoretical and is characterized by significant disparities and gaps in practice. One example illustrating this gap is the working conditions of migrant workers in agriculture: despite the theoretical entitlement of these workers to full rights as workers under Israeli labor law, the overwhelming majority are employed under conditions that fall significantly below the minimum standards in almost every respect, including wages far below the mandatory minimum wage, illegal deductions and withholding of wages, long working hours without rest, failure of employers to pay basic social benefits, compulsion to work through illness, inadequate living conditions, and severe safety violations such as the use of pesticides or the operation of heavy machinery without protective equipment or prior training.

A 2014 report published by Kav LaOved found that migrant workers in agriculture suffer from severe violations of their rights as workers—violations so harsh, pervasive and extensive that they can be considered a structural characteristic of employment in the agriculture sector in Israel. According to the report, the wages of migrant workers in agriculture are at least 30% lower than the legal minimum wage, with no social benefits, with an estimated financial impact on the workers of half a billion NIS per year.² The employment conditions of migrant workers in agriculture in Israel were the subject of an investigation by Human Rights Watch, who in 2015 published a damning report documenting severe violations of basic rights.³ The Israeli High Court of Justice likewise

² Kav LaOved, *Below the Minimum: Non-Enforcement of Wage Law as a Structural Element in the Agricultural Sector in Israel* (2014). <https://tinyurl.com/94efwa8z>

³ Human Rights Watch, *A Raw Deal—Abuse of Thai Workers in Israel's Agricultural Sector* (2015). <https://www.hrw.org/report/2015/01/21/raw-deal/abuse-thai-workers-israels-agricultural-sector>

recently issued a ruling acknowledging the exploitative working conditions of migrant workers in agriculture.⁴

Indeed, there is a deep disparity between labor law's commitment to universality—a commitment expressed in inalienable rights, formal equality between migrants and citizens in all aspects of their labor rights and regardless of a worker's immigration status — and the reality of employment for migrant and other marginalized workers in Israel. Gaps of enforcement characterize both mechanisms for public enforcement of employment laws (currently under the authority of the Ministry of Labor, Welfare and Social Services, and the Population and Immigration Authority) and mechanisms that allow for private enforcement (filing a lawsuit in the labor courts).⁵

In terms of mechanisms for public enforcement of employment laws by government agencies, a lack of resources and personnel for enforcement, as well as a failure to exercise enforcement powers, have become structural characteristics of labor markets relying on migrant and other marginalized workers in Israel. These elements have been extensively documented: a report by the State Comptroller, for example, noted significant shortcomings characterizing the work of the government agencies responsible for enforcing the rights of migrant workers.⁶ Another report addressed workers' safety regarding the use of pesticides and found that, despite the existence of a government body responsible for safeguarding agricultural workers regarding pesticide exposure, annual inspections were carried out for less than one percent of workers. It was further found that inspectors lacked sufficient tools to deter employers who commit safety violations on their farms, and that safety violations were primarily seen in the working conditions of migrant workers.⁷

Another report by Kav LaOved, analyzing the data published by the Regulation and Enforcement Administration in the Ministry of Labor, Welfare and Social Services on the enforcement of labor laws between 2016-2019, demonstrates that the Regulation and Enforcement Administration's already small budget was reduced by almost 40% over these four years, and that the enforcement activity carried out, especially among migrant

⁴ HCJ 4296/19 *Yudnagen Pongasek v. Minister of Finance* (Published in Nevo 16 September 2020) (hereinafter: *Pongasek case*). (Hebrew)

⁵ Guy Mundlak, *Workers or Foreigners in Israel? Contract of Adhesion and the Democratic Deficit*, 27 TEL AVIV UNIV. L. REV. 423-487 (2003) (hereinafter: Mundlak, *Workers or Foreigners*). (Hebrew)

⁶ State Comptroller, *Ministry of Interior—Population, Immigration and Border Authority—Bringing Foreign Workers to Israel and Upholding Their Rights, Annual Report 65c*, (2015) (hereinafter: State Comptroller Report 65c). (Hebrew)

⁷ State Comptroller, *Ministry of Agriculture and Rural Development—Use of Pesticides on Vegetables and Fruit, Annual Report 67b* (2017). (Hebrew)

workers, was almost non-existent.⁸ The report also indicated a complete lack of enforcement within the largest sector of employment for migrant workers in Israel, a sector rife with severe violations: the home care sector.⁹

Another example of enforcement gaps can be found in the conduct of the Commissioner for Foreign Workers' Labor Rights. While this government agency was established over a decade ago for the explicit purpose of strengthening the protections of migrant workers and their rights,¹⁰ it is struggling to fulfill its mandate: it is underfunded and understaffed,¹¹ has so far refrained from utilizing its enforcement powers,¹² handles only few complaints from migrant workers¹³ and has never provided an annual report to the Knesset regarding its activity, as required by law.¹⁴ Data regarding requests made to the Commissioner shows that the majority of requests for information from the Commissioner are actually from employers.

⁸ Kav LaOved, *Who Protects the Workers? An Analysis of the Enforcement of Workers' Rights by the Regulation and Enforcement Administration in Israel* (2020). (Hebrew)

⁹ Ministry of Labor, Social Affairs and Social Services, *Regulation and Enforcement Administration—Activity Summary 2019* (2020). (Hebrew)

¹⁰ The position of Commissioner for Foreign Workers' Labor Rights was established by an amendment to the Foreign Workers Law 1991 (hereinafter: the Foreign Workers Law) in 2010. Under this amendment, the authority of the Unit for Foreign Workers was transferred from the Ministry of Industry, Trade and Employment (the present-day Ministry of Labor) to the Population and Immigration Authority. The establishment of the Commissioner for Foreign Workers' Labor Rights was intended, in part, to ensure that the rights of migrant workers in Israel would not be harmed as a result of the transfer: concerns over blurring the vital distinction between the different enforcement authorities and identification of those charged with enforcement of protective employment legislation with the detention and deportation apparatus, led to a decision to expand the areas of activity of the Commissioner for Foreign Workers' Labor Rights within the Ministry of Industry, Trade and Employment and strengthening its status.

¹¹ In the past, the Commissioner's office was staffed by only one attorney, while today there are two attorneys on staff. Regarding the standards and resources of the Commissioner's office, see State Comptroller Report 65c, p.1115, *supra* note 6.

¹² Chief among its powers is the authority to intervene in legal proceedings in its areas of responsibility, to pursue civil cases and to request general injunctions (see respectively Articles 1(23)(a)(3), 1(28) and 1(29) of the Foreign Workers Law)—authorities which have not been exercised even once in all its years of operation. Regarding this failure to exercise authorities through the year 2015, see the State Comptroller Report 65c, *supra* note 6, at pp. 1113-1114.

¹³ State Comptroller Report 65c, *supra* note 6, at pp 1114-1115.

¹⁴ Under Article 6e(b) of the Foreign Workers Law, the Commissioner for Foreign Workers' Labor Rights is required to submit to the Minister of Labor an annual report on its activities. This report must be published and submitted, with the Minister's comments, to the Knesset Interior Committee, who may demand clarifications and additional information. To the best of our knowledge, the Commissioner has never submitted a single report. The malfunction of the Commissioner was examined in litigation before the High Court of Justice, see H CJ 7201/16 *Kav LaOved v. Commissioner for Foreign Workers' Labor Rights* (Published in Nevo, 15 September 2016) (Hebrew).

Enforcement gaps are also manifested in failures of government agencies to utilize and operationalize protective legislation in practice. For example, migrant workers are theoretically eligible to receive fundamental and mandatory social benefits such as a pension and severance pay.¹⁵ Because pension funds do not accept non-citizens for membership, these social benefits are supposed to be collected from employers through a state-run deposit mechanism provided for in the Foreign Workers Law.¹⁶ However, migrant workers in agriculture are excluded from this mechanism as a result of pressure from the agricultural lobby,¹⁷ and even for those migrant workers to whom it does apply, it is a highly discriminatory arrangement in that it serves only as a capital savings mechanism, without providing for any kind of employment related insurance coverage, and is also subject to draconian confiscation of funds in cases of visa overstay, without basic due process requirements or judicial oversight.

In terms of mechanisms for private enforcement of employment laws by workers, obstacles have been introduced in recent years in order to restrict the access of migrant workers and other marginalized workers, such as Palestinians, to enforcement mechanisms, including the labor courts. This was done with the express purpose of limiting these mechanisms' relative accessibility to workers. A prominent example of this trend is Regulation 116a of the Labor Court Regulations (Rules of Procedure) 1991, enacted in 2016 following pressure from employers of Palestinian workers in agriculture. This regulation provides that should a non-Israeli citizen bring a case before the Labor Court, the plaintiff must deposit a guarantee as a precondition to consideration of the case.¹⁸ This regulation places a heavy financial burden on a group of already marginalized workers and restricts their access to the labor courts, which are the only bodies authorized to adjudicate labor disputes.¹⁹

¹⁵ Extension Order for Comprehensive Pension Insurance in the Economy 2007, in accordance with the Collective Agreements Law 1957. See also Collective Dispute (national) 18/08, *The Association of Contractors and Builders in Israel Ltd v. The New Histadrut—Construction and Wood Workers Union* (published in Nevo, 15 November 2009). (Hebrew)

¹⁶ Article 1K1(a) of the Foreign Workers Law.

¹⁷ Regarding the challenges in applying the deposit fund mechanism to migrant workers in agriculture, see the *Pongasek* case, *supra* note 4.

¹⁸ The regulation is qualified by Article 116a(b) of these regulations, which states that the deposit of a guarantee shall not be required to the extent the plaintiff provides preliminary proof of their case, or if the defendant could receive reimbursement of expenses from the plaintiff should the case be dismissed.

¹⁹ A petition challenging the constitutionality of this regulation was rejected by the High Court of Justice, see HCJ 7016/16 *Adalah—The Legal Center for Arab Minority Rights in Israel v. Minister of Justice* (published in Nevo 17 September 2018). (Hebrew)

Failures and gaps in enforcement are obviously significant in explaining migrant workers' exploitative working conditions, but they are but one piece in a larger picture. In recent years, the lack of meaningful enforcement of employment law norms has deteriorated, in a gradual yet constant downward spiral, into outright opposition to the idea that some labor standards even apply. There are many examples of this worrying trend.

One example is in the home care sector. While migrant care workers' work is based on round-the-clock employment and includes an obligatory live-in arrangement at the home of the employer,²⁰ these workers were formally excluded from the Hours of Work and Rest Law 1951 over a decade ago, and are only entitled to minimum wage for round-the-clock work. The exclusion was formalized in a High Court of Justice's ruling, and was approved by a majority vote on additional review before an extended panel of justices.²¹ While the reasoning of the decision indicates that the High Court of Justice did not intend for the exclusion of migrant care workers from the Hours of Work and Rest Law to be permanent, but rather an intermediate measure until an alternative legislative arrangement was finalized, such an arrangement was never adopted. The draconian exclusion became a permanent reality that has encroached upon additional basic rights, including the right to full weekly rest.²²

Asylum seekers, most of whom are employed in menial, low paying jobs were similarly *de facto* excluded from the Minimum Wage Law 1987 by an amendment to the Foreign Workers Law requiring their employers to deposit 20% of their wages into a fund that the workers would be eligible to receive only after abandoning their asylum applications and leaving the country, in order to encourage departure from Israel.²³ Although the High Court of Justice recently struck down this provision as unconstitutional,²⁴ the willingness of the legislature to approve such an extreme measure indicates, among other things, the dwindling status of presumably cogent employment rights such as the right to a minimum wage.

²⁰ Article A of Population and Immigration Authority Procedure 9.2.0002 "Procedures for Handling a Request for a New Permit or Extension of a Permit for Employing a Foreign Worker in the Care Sector" (7 June 2015) (Hebrew).

²¹ HCJ 1678/07 *Yolanda Gluten v The National Labor Court* (2009) (hereinafter: the *Gluten* case); Additional Review 10007/09 *Yolanda Gluten v The National Labor Court* (2013) (Hebrew).

²² For more on this topic, see Hanny Ben-Israel and Michal Tadjer, *It's Finally Friday? Work and Rest in the Employment of Migrant Caregivers in Israel*, 7 TEL AVIV UNIV. J. OF LAW & SOCIAL CHANGE 69 (2015). (Hebrew)

²³ Article 1K1(a) of the Foreign Workers Law as amended by Article 4 of the Law for the Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel (Amendments and Temporary Provisions) 2014. (Hebrew)

²⁴ HCJ 2283/17 *Gersagher v the Knesset*, published in Nevo (2020). (Hebrew).

The agriculture sector is, too, rife with examples of this trend. Israel has in recent years approved and expanded the recruitment of thousands of migrant workers for “volunteer” or “work-study programs” in agriculture. These workers are employed on a nearly-full-time basis, and often beyond, performing difficult manual work on agricultural farms, yet it is claimed that they are not workers in an employment relationship, but rather “volunteers” or “students” participating in a practicum or an externship, and are therefore not entitled to fundamental labor rights.²⁵

Furthermore, there has recently been a disturbing increase in calls from within the government to exclude entirely groups of migrant workers from the basic protections afforded under the law. Prof. Avi Simhon, Chairman of the National Economic Council and Economic Advisor to former Prime Minister Binyamin Netanyahu, advocates denying the right to a minimum wage to migrant workers in the agriculture and care sectors, as well as revoking the requirement of pension contributions by their employers. Such calls, which have been published on a regular basis for some time,²⁶ are also supported by the Ministry of Agriculture and, apparently, by the former Prime Minister himself.²⁷

Main Policy Recommendations

The policy proposed herein is based on the recognition that protective employment legislation and its enforcement represent an area of central and fundamental importance in combating severe forms of labor market exploitation, and not an issue peripheral to the fight against “real” trafficking. Thus, the approach laid out in the National Action Plan to Combat Human Trafficking 2019-2024, which distinguishes between “issues surrounding regulation of foreign workers [reserved] for other entities” and the core of the struggle against human trafficking, is an approach harboring limited potential to bring about tangible change. This is true even under the optimistic assumption that the new plan will be fully implemented. A labor approach that recognizes the close link between labor market regulation and the creation of conditions for severe exploitation, and,

²⁵ For media coverage of this phenomenon with regard to volunteers, see Gilad Shalmor “Investigation: How Volunteers from Africa Are Exploited”, *Mako*, 20 March 2018; regarding work-study programs see: Liat Natovich-Koshizky, “Coming to Learn about Agriculture—and Becoming Foreign Workers”, *NRG* 31, July 2015; Lee Yaron, Josh Breiner, “They Came to Study Botanical Sciences in Israel and Were Forced to Work in Agriculture under Harsh Conditions”, *Ha’aretz*, 8 March 2019. (Hebrew)

²⁶ For examples of calls to deny migrant workers basic labor rights, see Meirav Arlosoroff, “Netanyahu’s Advisor: Foreign Workers to Receive Below Minimum Wage”, *The Marker*, 10 April 2018 (Hebrew); Or Kashti, “Netanyahu Adviser Pushing Plan to Cut Benefits, Wages for Foreign Workers”, *Haaretz*, 28 December 2019; Avi Simhon, “Foreign Workers Should Not Be Entitled to the Same Conditions as Israeli Workers”, *Globes*, 25 February 2020. (Hebrew)

²⁷ Ariel Whitman, “Netanyahu: Consider Revoking the Minimum Wage Requirement for Foreign Workers” *Israel Hayom*, 12 August 2018. (Hebrew)

respectively, the significant potential of interventions focused on minimum employment standards and their enforcement as a strategy for combating trafficking, is one that offers more significant promise. This approach requires the formation of concrete and operational plans to address some of the most significant aspects of workers' vulnerability.

The basis of such an approach would be a renewed striving for universal application and enforcement of protective employment legislation in the labor market, with the aim of creating equality in the employment conditions of citizens and migrant workers—both documented and undocumented—and improvement of working conditions in the most vulnerable sectors. This approach generally rejects unique employment standards and arrangements for migrants (insofar as they detract from basic rights) as well as the exclusion of certain groups of workers from fundamental rights, and seeks to ensure open and equitable access to both public and private enforcement mechanisms. This approach requires significant revision of a range of unique arrangements, usually discriminatory and inferior, developed for different groups of workers, mainly migrants, whether according to sector or to immigration status. The following is a non-exhaustive list of the types of changes required in the framework of a labor approach:

- Significantly reforming the working conditions of migrant workers in the care sector: as mentioned, over the years, work in the care sector has evolved into round-the-clock, temporally unlimited employment, for minimum wage only—a situation both exacerbated and legitimized by migrant care workers' formal exclusion from the Hours of Work and Rest Law.²⁸ This exclusion, coupled with the live-in requirement, essentially coerces workers to engage in round-the-clock work for no pay beyond the minimum for 8 hours, and leaves very little room to meaningfully negotiate with employers over working hours. The already problematic background of binding arrangements²⁹ and debts³⁰ further deepens migrant care workers' pervasive vulnerability to severe forms of exploitation.
- Significantly reforming the working and recruitment conditions of “volunteers” and “students” in agriculture to ensure fair employment.
- Ensuring effective enforcement of health and safety measures, especially in high-risk sectors such as agriculture and construction, and establishing health and

²⁸ See the *Gluten case*, *supra* note 21.

²⁹ See the discussion in chapter 3 of this Alternative Plan regarding binding.

³⁰ See the discussion in chapter 4 of this Alternative Plan regarding recruitment fees.

safety standards in high-risk sectors where they are presently lacking, such as in the care sector.³¹

- Ensuring real enforcement of employment rights in practice by adapting resources, establishing standards for labor inspectors and prioritizing the most vulnerable sectors such as agriculture, care and construction; and adapting the enforcement mechanisms to the characteristic challenges faced by workers in vulnerable sectors, such as language barriers, isolated employment (migrant workers in agriculture), and home employment (migrant care workers).³²
- Ensuring basic social benefits such as pension and severance pay through equitable and suitable mechanisms for collection from employers.
- Revoking Regulation 116a of the Labor Court Regulations (Legal Proceedings), to ensure that non-Israeli workers enjoy equal access to the labor courts.

Limitations of the Proposed Policy

The proposed policy has several limitations. First is the inherently limited power of protective employment legislation itself. Without detracting from its importance as a tool for safeguarding fundamental rights, protective employment legislation cannot compensate workers for a lack in other sources of market power, chief among these being labor market mobility (as a consequence of binding arrangements and debts). As noted by Prof. Guy Mundlak, denying migrant workers market power pulls the rug out from under any protective measures added to their contractual status, as this status presupposes the existence of a market in the first place and the possibility for mobility within it.³³ Similarly, the power of protective employment legislation cannot substitute for the power of unionization and collective action.

A second limitation is that the political feasibility that the necessary changes will be adopted is low. Migrant workers have very limited political influence, unlike the groups who benefit from their cheap labor and have an interest in preserving the status quo. Employers of migrant workers in different sectors generally succeed in effectively promoting their interests in the Knesset, to the considerable detriment of workers in these sectors.³⁴ Moreover, meaningful change requires extensive investment in

³¹ Despite the common stereotype of care workers performing light domestic chores or serving as “companions” for the elderly or people with disabilities, in practice care work involves hard and often tedious and risky physical labor, which may result in both physical and psychological harms. Nevertheless, the health risks associated with care work are not recognized. As a result, basic safety standards have never been established for in-home care workers, as has been done in other sectors.

³² For further discussion, see chapter 8 of this Alternative Plan regarding identification and enforcement.

³³ Mundlak, *Workers or Foreigners*, at 442, *supra* note 5.

³⁴ For a comprehensive analysis of employers' client politics vis-à-vis the Knesset and government officials in the context of migrant workers in the agriculture and constructions sectors, see: Adriana Kemp and

enforcement mechanisms including in resources and personnel, in the frequency and thoroughness of labor inspections, and in building bonds of trust between labor inspectors and migrant worker communities. The limited political influence wielded by migrant workers makes these needed institutional changes appear highly unlikely.

Rebeca Raijman, *Workers and Strangers: The Political Economy of Labor Migration in Israel*, 72-80 (2008). (Hebrew)

Enforcement and Identification

Maayan Niezna*

This chapter presents three major failings in the Israeli anti-trafficking system: a failed identification mechanism, limited and ineffective enforcement of workers' rights, and an almost complete absence of criminal proceedings for slavery, forced labor and labor trafficking. The chapter proposes a fundamental and institutional change in the identification and referral mechanism, as well as changes in enforcement policy, in particular a transition toward meaningful enforcement based on an understanding of the conditions and structural problems in those sectors in which migrant workers are employed; effective enforcement of all violations of labor laws; and support in addressing the difficulties and concerns faced by vulnerable workers. These changes reflect the foundations essential for effectively combatting human trafficking.

Background

Slavery, forced labor and labor trafficking were prohibited under the Penal Law back in 2006, yet this legislation has not resulted in effective enforcement. Violations of migrant workers' rights are widespread, and enforcement is extremely limited. The three main problems with enforcement in Israel are that: the identification mechanism is faulty; enforcement is of limited scope and reach; and it does not address the structural problems which cause migrant workers to be vulnerable to exploitation.

Failed identification mechanism

Victim identification is key to successful enforcement. An effective identification mechanism is necessary in order to pursue administrative or penal countermeasures or to identify common signs of exploitation, without which victims cannot be protected. Despite the importance of identification to enforcement in the protection against and prevention of trafficking, analysis of the data and of individual cases reveals significant failures in the identification process in Israel, as illustrated by a number of recent

petitions.¹ Between 2015 and 2017, no male victims and only very few female victims of slavery and forced labor were identified. The victims who have been identified in recent years were identified by civil society organizations.² State authorities have consistently failed to identify victims of slavery and labor trafficking. Improving the identification mechanism is, therefore, a key objective of the new National Action Plan, and will, hopefully, indeed bring about change. Such change will require fundamental structural reform to the identification process, establishment of clear standards for identification, expansion of the circle of actors engaged in identification, and investment in the resources required to facilitate the necessary changes.

Limited scope of enforcement and prosecution

In addition to the shortcomings in the identification mechanism noted above, and since 2011, when the Sa'ar Unit—a special police unit tasked with investigating slavery and labor trafficking offenses—was disbanded, there have been few investigations and no prosecutions of such offenses. This contrasts with the relatively extensive enforcement with regard to sex trafficking offenses.³ The sole conviction for holding migrant workers in conditions of slavery was obtained in 2012.⁴ Only two cases of forced labor were investigated between 2017 and 2019.⁵ Not a single complaint alleging conditions of slavery in the construction, agriculture or care sectors has resulted in criminal charges.

* Maayan Niezna is a Postdoctoral Research Fellow in Modern Slavery and Human Rights, Bonavero Institute of Human Rights, University of Oxford, and a Visiting Research Fellow at TraffLab (ERC) at Tel Aviv University. Her research focuses on the elements of trafficking for labor exploitation.

¹ See e.g. HCJ 1591/18 *Jane Doe v. Minister of Justice* (published in Nevo, 17 September, 2020); HCJ 687/20 *John Doe v. Israel Police* (published in Nevo, 16 June, 2020); HCJ 6548/20 *Kav LaOved v. Israel Police* (published in Nevo, 17 September 2020); see also, Hotline for Refugees and Migrants, Letter to the Minister of Public Security: Critical Shortcomings in Managing Investigations into Victims of Human Trafficking (3 August 2020) <https://hotline.org.il/legal-action/6710> (all Hebrew).

² This statistic is particularly striking in comparison to other countries. A report on the identification mechanism in the United Kingdom, for example, found that only about 11% of referrals originated from civil society organizations. See, National Crime Agency, National Referral Mechanism Statistics—End of Year Summary 2018, 2019, EOY18-MSHT v1.0, at p. 14.

³ For more on the failings of law enforcement in responding to offenses and on the need for a dedicated unit with identification and enforcement authority, see Hotline for Refugees and Migrants and Kav LaOved, Letter to Israel Police: Response to Trafficking and Slavery Violations against Migrant Workers (3 June 2020) (Hebrew). hotline.org.il/legal-action/policetrafficking

⁴ CrimC (Jer) 13646-11-10, *State of Israel v. Ibrahim Joulani* (published in Nevo, 29 February 2012).

⁵ US DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 238 (2018) www.state.gov/j/tip/rls/tiprpt/2018/index.htm For data on the number of complaints and enquiries regarding trafficking, slavery and forced labor violations, see also the response of the Israel Police Commissioner, received 26 May 2020, to Kav LaOved's request, pursuant to the Freedom of Information Law, of 20 February 2020.

Alongside the shortcomings in the identification mechanism itself, failures in identification and enforcement also exacerbate the failures in the prevention mechanisms. This is a consequence of the systematic and extensive use of tied visas ('binding') for tens of thousands of workers, systemic and severe violations of workers' rights, and the absence of a response to high recruitment fees in some sectors.

Lack of response to structural problems

Criminal enforcement cannot resolve the underlying structural issues that make migrant workers particularly vulnerable, namely, social isolation; extreme power disparities between the workers and their employers; heavy debt burdens incurred by the workers to finance the migration process and high recruitment fees;⁶ fear of deportation and loss of status; and the de facto binding to their employers that reduces (or entirely eliminates) the workers' already limited bargaining power.⁷

Even in the context of limited enforcement in Israel, no real attempt has been made to focus on cases where vulnerability has arisen from these systemic problems. The overwhelming majority of persons identified in Israel as victims of slavery and trafficking are victims of exploitation in criminal settings, unrelated to systemic flaws—victims of sex trafficking, asylum seekers tortured outside of Israel, and women in abusive cults. Certain sectors—agriculture and care—have been categorized as particularly vulnerable to slavery. Yet, enforcement in these sectors has not been adapted to the characteristics making them vulnerable sectors. For example, no effort has been made to facilitate access to translation services for workers in agriculture in the periphery or to proactively conduct investigations in the care sector. Other vulnerable sectors, such as construction and hospitality, have not even been defined as vulnerable sectors by the government.

In preliminary discussions ahead of the passing of Israel's Anti-Trafficking Law, concerns were raised that enforcement of slavery-related violations may be selective and ineffective.⁸ Indeed, employers and recruiters who are perceived as "upstanding citizens" are not charged with slavery or labor trafficking offences.

⁶ Bilateral agreements can provide a solution, but they have not been introduced in all sectors. Even in those sectors where they have been introduced, additional mechanisms may be necessary. See the discussion in chapter 4 of this Alternative Plan regarding recruitment fees.

⁷ Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. Rev. 76 (2012); Cathryn Costello, *Migrants and Forced Labour: A Labour Law Response* in *THE AUTONOMY OF LABOUR LAW* (A. Bogg et al., eds., 2015).

⁸ See e.g., the remarks of a representative of the National Public Defender Yoav Sapir in the Knesset's Constitution, Law and Justice Committee discussion of the Anti-Trafficking Law: "...broad criminalisation would allow for very wide discretion on the question of when to file criminal charges[...]. My concern is that ultimately, those who are charged **will not be the same people who are bringing in exorbitant sums of**

Main Policy Recommendations

Meaningful reform to the identification system

There is urgent need for extensive reform of the identification mechanism in Israel. Measures to improve the identification system include analysis of the shortcomings in the existing system; institutional changes to the identification mechanism accompanied by the adoption of appropriate protocols; and changes to the guidelines regarding identification of victims.

Research and analysis of the shortcomings in the existing system

For years, various government agencies have been trained in matters of trafficking, slavery and identifying victims. Nevertheless, the authorities have continued to fail to identify victims and have themselves often acted in ways that have undermined protection and enforcement. These included, for example, the mishandling of complaints, detention of asylum-seeker victims of trafficking, and deportation, without any prior investigation, of migrant workers who may have been victims of trafficking or slavery. The apparent failure of training to positively impact victim identification necessitates an assessment of the potential underlying causes —whether training is being provided to the wrong actors, is insufficient, or fails to lead to the desired changes in procedures and attitudes. Such an assessment requires a critical approach and a willingness to discuss in-depth changes. Academics and civil society organizations, particularly those with proven experience in victim identification, should be involved in this research.

This research should be accompanied by a wide-ranging survey of workers in vulnerable sectors (construction, agriculture, care, hospitality, and the like) regarding the most conspicuous violations and harms in each sector. Where changes in recruitment or employment practices have occurred (such as “students” in work-study programs in the agriculture sector or changes in the nature of hiring experts in industry and construction), these types of changes should be subject to particular scrutiny already in the early stages.

Changing working procedures

This change has four aspects: refinement of the characteristics and indicators of slavery, forced labor and labor trafficking; institutional reform of the identification mechanism;

money through this ugly phenomenon. Rather, it will always be easier to target the simple people who have done something not significantly different from what the law permits and from what the employment regime—and we know that these are mainly foreign workers, allows.” [emphasis added] For the full protocol, see Protocol No. 46 of the Knesset Constitution, Law and Justice Committee, 17th Knesset (9 August 2006).

response to the obstacles faced by victims in receiving recognition and assistance; and an intensification of proactive measures to identify victims.

Refinement of the characteristics and indicators of slavery requires adding the **recognition of victims of forced labor** to victim recognition procedures and compiling lists of indicators and red flags tailored to the various sectors and worker profiles.⁹

Likewise, identification and referral guides should be tailored for those holding key positions (border control officials, police officers, workplace inspectors, etc.). As general training has failed to provide recipients with adequate tools for identification, a **clear and binding protocol** should be established, which would include mandatory questions and assessment to be conducted by state authorities in every case involving a person belonging to an at-risk group. This would include, for example, mandatory enquiries at every pre-deportation hearing, as well as mandatory questions for inspectors on behalf of the Ministry of Labor and the Population and Immigration Authority, as well as police officers, upon encountering circumstances pre-designated as raising red flags. A decision will be required as to whether to create a formal test that assigns a weight to each of the various indicators, or whether it would be left to the discretion of the relevant actor(s) to determine whether the sufficient indicators exist. The former model is more suitable for a large number of agents with limited training, while the latter requires more in-depth training, which may be more consistent with a smaller, permanent team for whom victim identification would comprise a significant part of its role.

Institutional reform to the identification mechanism will include adaptation of the identification mechanism to meet the volume of referrals (whether directly by the victims themselves or their representatives, or as a result of proactive investigations), and to the skills and sensitivities required. Equally, there is a need for rapid response in cases where the victim of trafficking, slavery or forced labor might still be under the control or supervision of the trafficker, captor or employer. Victim identification requires a **low administrative standard of proof** (in contrast to the high evidentiary standard required for a criminal conviction and that which guides police work in criminal cases), appropriate

⁹ Useful sources for establishing procedures:

U.N INTERNATIONAL LABOR ORGANIZATION, OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS: RESULTS FROM A DELPHI SURVEY IMPLEMENTED BY THE ILO AND THE EUROPEAN COMMISSION (ILO, 2009); U.N INTERNATIONAL LABOR ORGANIZATION, ILO INDICATORS OF FORCED LABOUR (2012) (hereinafter: Delphi Indicators); JUDY FUDGE, DEIRDRE McCANN & INTERNATIONAL LABOUR OFFICE, UNACCEPTABLE FORMS OF WORK: A GLOBAL AND COMPARATIVE STUDY, 49-51 (2015). Indicators in the Toolkit for Identifying Victims of Forced Labor and Slavery published by the Ministry of Justice, the Center for International Migration and Integration and the American Jewish Joint Distribution Committee in Israel, <https://tinyurl.com/yjbtstfqd> may also be useful. In any case, the resulting document must be adapted to the individual circumstances and the activities of the Population Authority and the specific questions their representatives must ask.

training for working with vulnerable communities, **and an absence of institutional conflicts of interest.**

One clear conflict of interest, for example, exists between the approach guiding various agencies within the Population Authority to seek the deportation of migrants without legal status or to narrowly interpret guidelines granting temporary or permanent status to migrants on the one hand, and the need to protect potential victims, handle applications in good faith, and prioritize their commitment to protect victims as a matter of utmost importance, on the other hand. Ideally, a single authority would be responsible for compiling information and making decisions regarding recognition of victims. This body would be comprised of a suitable number of appointed members equipped with the relevant training to work with vulnerable victims, to assess evidence according to administrative standards, and to understand the nature of trafficking and slavery violations—outside of the “sensationalist” context of sex trafficking. A combination of training in law and social work (without a requirement of a degree or license to practice in either profession) may be sufficient to meet these needs.

Instituting the necessary reforms—regarding both refinement of the characteristics and indicators of slavery and institutional reform to the identification system—requires decisions as to whether a centralized or decentralized approach is preferable, and whether the identification mechanism itself should be a passive one that receives enquiries only, or one which actively seeks to locate victims.¹⁰

Response to the difficulties faced by victims in receiving recognition and support requires increasing incentives for victims to come forward and improving the work of the authorities with migrant workers on an individual and community level. For example, it should be possible to extend the visas of workers who have filed justified complaints (in an administrative procedure, according to a low standard of proof), including in cases of serious violations that do not meet the threshold for trafficking and slavery offenses. This incentive may reduce the extreme power disparity between workers and employers, which is one of the root causes of forced labor.

Ongoing contact between appropriately trained inspectors and police officers and migrant workers in Israel should be maintained through periodic meetings with the community; an understanding of employment norms within the sector; and the creation of ties to facilitate direct communication with migrant workers. The relationship between

¹⁰ In the UK, for example, there is a decentralized and proactive detection system and a centralized identification system; in Brazil there is a proactive and centralized system that integrates detection and identification.

migrant workers and enforcement actors should include guaranteeing available and **professional translation** into the various relevant languages—not only within the context of the hotline, but also in the context of enforcement measures and in the relevant police units.¹¹

Intensification of proactive initiatives to identify victims

Trafficking, slavery and forced labor are rarely reported, and the vulnerability of the victims to exploitation and their living and working conditions (dependence on the employer, foreignness, isolation from their surroundings) impose additional obstacles to reporting and complaining. In other words, these are “hidden crimes” that are usually discovered only through proactive investigation by law enforcement. Responses to this challenge require, in addition to the necessary improvements in the identification mechanism, measures focused on enforcement. There is a need for **extensive proactive investigations** by the various authorities. These investigations should consider ways to integrate migrant workers—for example as part of undercover investigations.

Scope of enforcement measures

In light of the deficiencies in enforcement, the **Sa’ar Unit should be reestablished** or, in the alternative, an equivalent police unit specializing in slavery, forced labor and labor trafficking should be established in its place. Training investigators in the central police headquarters in the different regions to investigate these violations is important; however, experience has shown that such training is an inadequate substitute for a professional unit to coordinate the anti-trafficking work. In addition to establishment of a specific unit, **combined investigations** and cooperation should be encouraged between the various enforcement bodies: the Israel Police; the Economic Department at the Office of the State Attorney (and perhaps also the Cyber Unit); the Israel Tax Authority, the Commissioner for Foreign Workers’ Labor Rights; labor inspectors, and the Population and Immigration Authority. Integrated enforcement should be conducted in such a way that would not cause concerns among the workers. For example, a clear distinction is required between the enforcement of migration laws (illegal employment or residence) and enforcement of abuse of workers or labor law violations.

In addition, the **firewall** between bodies that are tasked with providing services and social benefits (national insurance, welfare, health) and enforcement authorities (in particular, the Population and Immigration Authority), must be maintained. This is to ensure that migrants who demand their rights will not risk detention or deportation, even in cases where they are working or residing in Israel without a valid visa.

¹¹ An example of linguistic accessibility for migrant workers is the work of the Foreign Workers Division of the Histadrut Leumit, the second-largest trade union in Israel, whose workers speak Chinese and are thus able to communicate directly with migrant workers in the construction industry.

Alongside criminal proceedings for severe cases, **additional administrative enforcement** tools can be utilized. These include **imposing fines** (and using the proceeds to compensate migrant workers whose rights have been violated or to protect and enforce their rights), **revoking permits** to employ migrant workers upon receipt of administrative evidence of grave or recurring violations of labor laws, and **creating suitable alternatives** which would also enable the revocation of permits, including in the care sector, in situations where there is a suspicion of harm to workers.

The **Commissioner for Foreign Workers' Labor Rights** has the potential to contribute significantly to protecting migrant workers from exploitation and forced labor. The resources available to the Commissioner must be increased in order to enable the Commissioner to respond to complaints and conduct legal proceedings in appropriate cases. The Commissioner's authority must be expanded to all violations of migrant workers' rights in the care sector, and instructions must be given to enforcement authorities to provide the Commissioner with information regarding suspected violations of migrant workers' rights and to include the Commissioner in all relevant correspondence and discussions.

A **report on enforcement actions** against trafficking, slavery, forced labor and related offenses must be published **annually**. This quantitative report should be supplemented by an analysis of patterns of harm and exploitation in the different sectors, with the input of professionals regarding the characteristics of offenses in a particular sector or against a particular group.

Response to structural problems

Shaping an effective enforcement model to address the major difficulties, where the root causes of exploitation are systemic and exploitation involves violations of a range of rights and is not limited to extreme cases, is challenging.

According to the labor approach to trafficking, enforcement against trafficking and forced labor must take into account a number of structural issues. First, enforcement is required **against the entire spectrum of violations, and should not be focused only on the most extreme cases**. Low wages, long working hours, substandard living and working conditions, safety violations, fraud, threats, etc., may cumulatively constitute slavery, but they also constitute exploitative and harmful employment practices even outside the extreme circumstances of slavery and trafficking.¹² Without a commitment to address these types of violations, workers have no incentive to complain, their employers believe

¹² JOSEPH ROWNTREE FOUNDATION, KLARA SKRIVANKOVA, BETWEEN DECENT WORK AND FORCED LABOUR: EXAMINING THE CONTINUUM OF EXPLOITATION 13 (2010).

they can act with impunity, and enforcement authorities conclude these violations are not serious, thereby reducing the likelihood of them ever recognizing and addressing extreme cases. In other words, enforcement plays a role in advance prevention, and not only in retrospective punitive actions. Enforcement should be amplified for offenses of **abuse and exploitation**, including common cases of exploitation that are often not handled with the appropriate degree of severity. Enforcement should be increased in connection with **withholding or retention of passports**, which is a significant indicator of labor trafficking.¹³ The lack of sufficient enforcement is reflected, for example, in a recent report by Kav LaOved, that found that enforcement against employers for violations of labor laws is limited, and the rate of enforcement actions relative to the volume of complaints is low.¹⁴

Enforcement measures should be adapted to the conditions in the market and in the specific sectors. Enforcement must be focused and increased in those areas where laws, regulations and employment arrangements subject workers to increased vulnerability and are unlikely to change. This is the case, for example, with regard to **workers who are unable to change employers due to binding arrangements**, such as care workers who have been in Israel for more than five years; care workers whose mobility between employers is limited by geographical constraints and those allowed to work only for persons with severe disabilities; employees of Yilmazlar and other foreign construction companies;¹⁵ workers on expert visas who are unable to find another employer in Israel; and workers subject to arrangements that circumvent bilateral agreements, such as trainees and students. Moreover, there is a need for increased enforcement in relation to **workers over whom employers' measures of supervision and control are particularly restrictive**, such as Palestinian workers with permits to stay in Israel overnight, whose stay in Israel is restricted to a location under the employer's control and supervised by a "security trustee". Until recently, these workers were also required to surrender their identity cards to the trustee—a demand legally equivalent to the offense of withholding a passport.¹⁶ Finally, there is a need for increased enforcement regarding workers who are isolated from their surroundings, workers with particularly long working hours, and workers who pay extortionate sums to reach Israel. The interests and preferences of

¹³ Delphi Indicators, *supra* note 9, p.4.

¹⁴ Kav LaOved, *Who Protects the Workers—an Analysis of the Enforcement of Workers' Rights by the Regulation and Enforcement Administration in Israel* (3 May 2020) (Hebrew) <https://tinyurl.com/y4tafxjb>

¹⁵ See the discussion in chapter 3 of this Alternative Plan concerning binding.

¹⁶ See Maayan Niezna and Kav LaOved, *The Occupation of Labor—Employment of Palestinian Workers in Israel* (2018) <https://tinyurl.com/y5fb7h5s>. This demand has recently been revoked, pursuant to legal proceedings, see HCJ 2730/20 *Kav LaOved v. Minister of Health* (26 August 2020), and Paragraph 7 of Respondents' preliminary response on 5 May 2020 (Hebrew).

complainants must be considered in the formulation of enforcement policy and its implementation in individual cases.

Limitations of the Proposed Policy

Criminal enforcement in extreme cases cannot replace the systematic reform of deep-seated, structural problems that lead to or create a climate conducive to exploitation. These problems and the systems of prevention required as a potential response have been mentioned in part here and have also been discussed elsewhere in this Alternative Plan. Even if undertaken on a significant scale, increased and enhanced enforcement with regard to specific offenses will not eliminate the need for fundamental reform. Taking steps to improve enforcement may create a false sense that the issues have been resolved and, thus, reduce the commitment to fundamentally changing those factors that render workers vulnerable and lead to their exploitation. However, even effective preventive action that does provide a response to structural issues cannot fully replace administrative and criminal enforcement, which is intended to prevent exploitation in the present and act as a future deterrent, as even significant systemic changes will not prevent all violations.

The control of private actors (placement agencies and employers with permits) over workers' entry into Israel is one cause of harm to workers. **Privatization of the authority** to determine who enters and exits the country shapes the power dynamic, making enforcement necessary yet also limiting its efficacy. The privatization of enforcement powers to various actors is particularly noteworthy. Examples include the transfer of supervision over employment conditions for care workers from the Ministry of Welfare to private placement agencies, which have a potential conflict of interest between looking after their patient and looking after the care worker;¹⁷ the requirement that employers of Palestinian workers supervise their workers' sleeping accommodations and hold their identity documents; the conditioning of reimbursement of permit fees to manpower agencies in the construction industry on the worker leaving the country at the end of their visa term; and the requirement that employers of asylum seekers deduct a deposit from their wages to ensure their departure from the country as soon as a decision is issued against them.

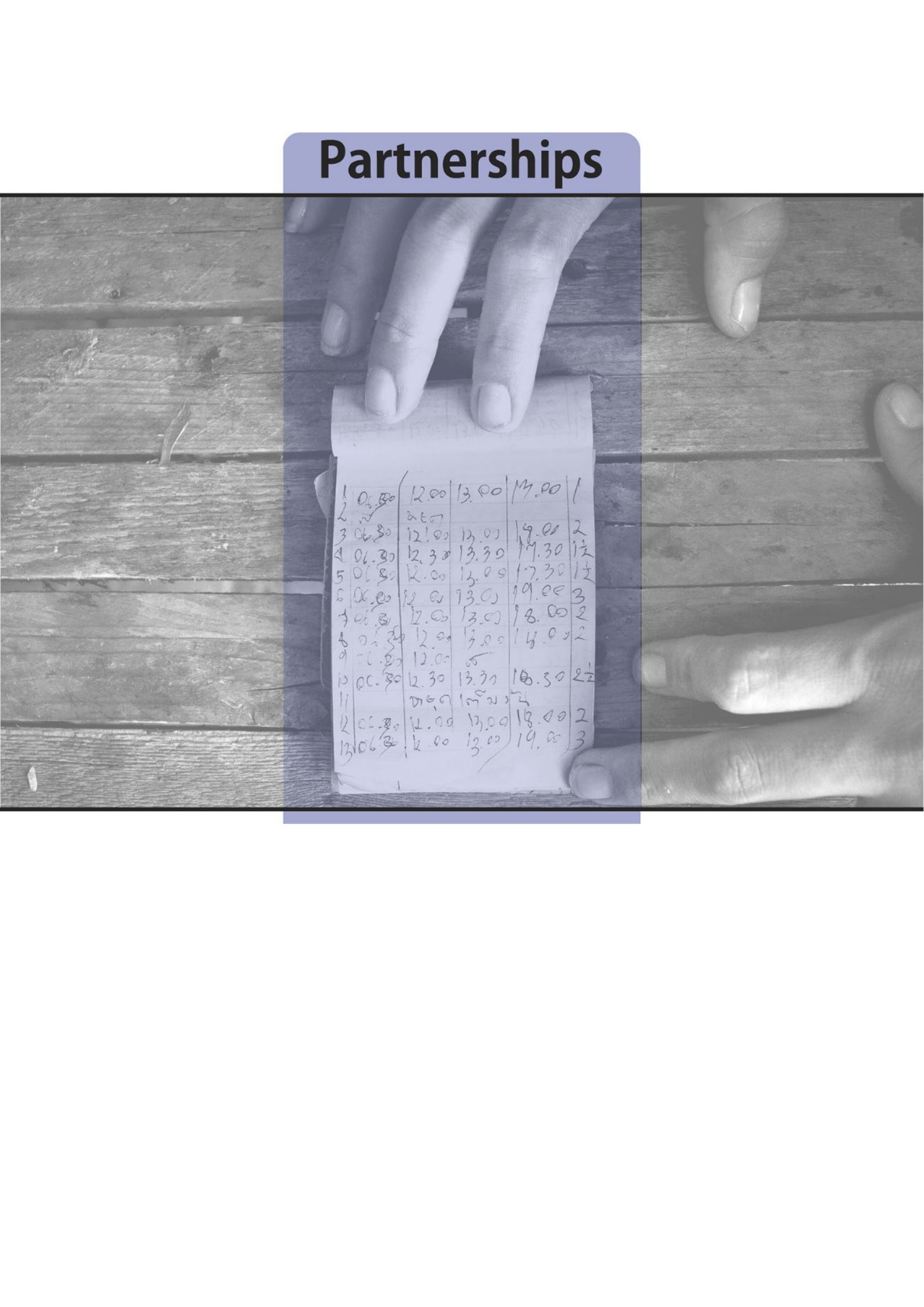
Workers and the enforcement regime have different interests. The violations of interest to the enforcement system are not necessarily those that are of interest to victims. For example, the enforcement authorities may attach greater importance to retention of or threats to retain passports or to payment of "gray" wages (in the construction industry,

¹⁷ See the discussion in chapter 6 of this Alternative Plan regarding placement and manpower agencies.

for example), while workers are likely to prioritize wage theft, withholding of wages or pay lower than agreed upon. Furthermore, sanctions following enforcement measures and the involvement of the authorities may ultimately harm those they seek to protect. Enforcement may turn sanctions against employers or recruiters into sanctions that actually harm the workers, for example, loss of the workplace, loss of status and even deportation. Careful consideration must therefore be given to development of a prevention and enforcement system that is implemented in collaboration with workers and their representatives, in a manner that would not decrease the workers' interest in cooperating or in raising complaints.

Finally, absent changes in the political climate and the attitude of the authorities towards migrant workers, any identification or enforcement measures which increase the State's obligations and liability may **reduce victim recognition**, due to opposition to the extension of migrant visas and to actions that may be seen as encouraging migration to and settling in Israel and to be contrary to the interests of certain groups within Israeli society, such as farmers and care patients.

Partnerships



A hand is holding a small piece of paper with a handwritten table on a wooden surface. The table has 5 columns and 13 rows. The columns contain numerical values, and the rightmost column contains integers. The handwriting is in blue ink.

1	0.00	12.00	13.00	14.00	1
2	0.00	12.00	13.00	14.00	1
3	06.30	12.00	13.00	14.00	2
4	06.30	12.30	13.30	14.30	1 1/2
5	06.30	12.00	13.00	14.30	1 1/2
6	06.00	12.00	13.00	14.00	3
7	06.30	12.00	13.00	14.00	2
8	06.30	12.00	13.00	14.00	2
9	06.30	12.00	13.00	14.00	2
10	06.30	12.30	13.30	14.30	2 1/2
11	06.30	12.00	13.00	14.00	2
12	06.30	12.00	13.00	14.00	2
13	06.30	12.00	13.00	14.00	3

Family and Community

Shahar Shoham and Hanny Ben-Israel*

This chapter focuses on the central role of family and community in protecting the humanity, rights and dignity of migrant workers. It identifies the critical role of family and community relationships in creating social support networks and providing a space for workers to share their experiences, collaborate against exploitation and injustices, and receive information about their rights. Policies designed to prevent migrant workers from settling in Israel limit community and family life, create fertile ground for exploitative employment, and lead to an unnatural degree of social atomization. A program seeking to address the root causes of human trafficking must therefore account for the rights of migrant workers to family and community.

Background

A central foundation of Israel's migration regime is the prevention of long-term settlement by migrant workers. The policy measures created to realize this goal include restrictions on the length of lawful stay in Israel permitted for migrant workers, as well as significant restrictions on and policing of migrants' family lives, leisure, and communities.

These policies result in family separation and social atomization and negatively impact the development of support networks and community cohesion within migrant populations. Communities offer a space for workers to share their experiences, collaborate as a group against exploitation and injustices and share information regarding their rights. Restricting family and community life and access to support networks creates fertile ground for exploitative employment practices, which may result in trafficking. The restrictions on and policing of families also aggravate the instrumentalization and commodification of migrant workers, reducing them to their labor only.¹ The

*Shahar Shoham is a doctoral candidate at the Institute for Asian and African Studies at the Humboldt University of Berlin and a visiting researcher with the TraffLab (ERC) research group. Her ethnographic research focuses on the labor migration regimes from Thailand to Israel from the perspective of a sending

institutionalization of such an extreme degree of instrumentalism and commodification necessitates addressing these policies as part of any plan to combat human trafficking.

The formation of migrant communities in countries of destination is an integral element of migration. Migrant communities are dynamic, diverse and are directly affected by migration and labor regimes in countries of destination. These communities can form around shared ethnicity, nationality, religious affiliation, or geographic region, and can exist simultaneously and across multiple spaces—for example, virtually, between different countries of migration or rural and urban areas, and in the public arena. They enable solidarity, support networks, material and psychological assistance, and the establishment of institutions or organizations to benefit community members, leisure, religious and cultural activities. Migrant communities may also play a role in leadership building and participate in struggles such as unionizing, combating exploitation and abusive employment, fighting deportation and opposing racist and discriminatory treatment in destination countries.² However, formation of migrant communities may be accompanied by negative aspects, for example, intra-community policing of behaviors on the basis of gender or participation in the exploitation of other migrants.³

While formally migrants are not restricted or prevented by laws and procedures in Israel from unionizing through trade unions or from establishing community organizations, in

community. Hanny Ben-Israel is a doctoral candidate at Tel Aviv University Faculty of Law, as part of the TraffLab (ERC) research group. From 2006-2015, she worked as an attorney at Kav LaOved.

¹ For more on the attitude of the State toward migrant workers, see Hanny Ben Israel and Oded Feller, *No State for Love: Violations of the Right to Family of Migrant Workers in Israel* (2006), <https://law.acri.org.il/pdf/RighttoFamily.pdf> (hereinafter: Ben-Israel and Feller).

² For examples exploring the agency of migrant workers from Asia in establishing their communities around the world, including under restrictive immigration regimes, see articles from the special issue: Mark Johnson & Pnina Werbner, *Diasporic Encounters, Sacred Journeys: Ritual, Normativity and the Religious Imagination Among International Asian Migrant Women*, 11:3-4 *THE ASIA PACIFIC JOURNAL OF ANTHROPOLOGY* 205 (2010).

³ It should be noted that the potential negative impact of the structural conditions on migrant workers is not a purely Israeli phenomenon. While away, migrants continue to be impacted by the shifting economic and socio-political dynamics in their countries of origin and by the ways they impact their families back home. Many countries of origin have adopted an approach that promotes labor migration and remittances as a solution for resolving issues of poverty and inequality. (The Philippines is one notable example. For further reading see: Robyn Magalit Rodriguez, *The Labor Brokerage State and the Globalization of Filipina Care Workers*, 33(4) *SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 794 (2008)). This approach, and the policy measures promoting it, lead to pressure on migrants to send most of their earnings to family members in their countries of origin, resulting in significant dependence on remittances and causing migrant workers to be the primary breadwinners for an often large circle of family members. This immense pressure may prevent many migrant workers from complaining about abusive employment conditions and from leaving exploitative employers. Many also continue to migrate to work in different destinations, spending years and even decades on the move as a cheap and vulnerable workforce.

practice, a history of policing and enforcement policies toward undocumented migrants in Israel, which have traditionally focused on community leaders,⁴ exclusion from membership in trade unions,⁵ and the structural conditions of the labor migration regime in Israel, have acted as de facto restrictions.⁶ Structural conditions of the labor migration regime in Israel include, for example, an obligation to live in the employer's home (in the care sector) or farms (in the agriculture sector), leading to social isolation and preventing the integration of migrant workers into the public spaces, as well as subjecting them to constant oversight and control by their employers. In addition, long working hours and days off given primarily (if at all) on Saturdays, the Sabbath, when there is no public transportation, leave many workers employed in areas far from urban centers isolated and unable to meet with other migrants.⁷

The implementation of bilateral agreements in recent years, and in particular the agreement with Thailand in the agriculture sector, was intended, among other purposes, to improve the protection of workers' rights. Paradoxically, it has also exacerbated the social isolation of Thai workers, due to the randomized placement of workers. Although intended to reduce corruption in the recruitment process, randomized placement effectively prevents workers from migrating to Israel together with members of their home communities by applying to work with the same employer, as was possible prior to the agreement. These procedures negate migrants' ability to choose to work alongside friends or acquaintances, thereby limiting their opportunities to form social networks and support systems to assist them in coping with harmful employment conditions, social isolation, communication difficulties and other challenges. Social isolation adds an

⁴ Amiram Gil and Yossi Dahan, *Between Neo-Liberalism and Ethno-Nationalism: Theory, Policy and Law with Respect to the Deportation of Migrant Employees from Israel*, MISHPAT UMIMSHAL (LAW AND GOVERNMENT), 347-367 (2007) (Hebrew).

⁵ For many years, migrant workers were ineligible for membership in the Histadrut—Israel's largest trade union. Its constitution was amended in this regard only in 2010. For further discussion, see chapter 10 of this Alternative Plan regarding organized labor.

⁶ For further reading on the challenges and obstacles in promoting unionization of migrant workers in the care sector, see Guy Mundlak & Hila Shamir, *Organizing Migrant Care Workers in Israel: Industrial Citizenship and the Trade Union Option*, 153(1) INTERNATIONAL LABOUR REVIEW 93 (2014).

⁷ For further reading on the impact of physical and social isolation on the social lives of migrant workers from Thailand who worked in agriculture in Israel, see Matan Kaminer, forthcoming. "Saving the face of the Arabah: Thai migrant workers and the asymmetries of community in an Israeli agricultural settlement." *American Ethnologist*. Pre-Print:

https://www.academia.edu/49066048/Saving_the_face_of_the_Arabah_DRAFT; Shoham Shoham, *Pickers and Packers: Translocal Narratives of Returning Thai Agriculture Labour Migrants from Israel* (MA thesis, Berlin Humboldt-Universität, May 2017).

additional layer of complexity for women, as migrating alone increases their exposure to sexual harassment and abuse.⁸

The family lives of migrant workers in Israel are subject to particularly draconian policies. One of the most extreme of which is the prohibition on having a family in Israel, a prohibition seen as an instrumental step in the fight against long term settlement of migrant workers in the country. Despite a continually increasing demand for migrant workers, and although the law allows for their extended stay in Israel, preventing migrant workers from settling in the country remains a key element of Israel's labor migration policy.⁹ The perception is that restricting the period of lawful stay is an insufficient safeguard in this respect, and that preventing migrant workers from forming families and forcing family separations are legitimate—and necessary—policy tools to prevent migrant workers from settling in Israel.¹⁰ Thus, policies sanction giving birth in Israel, forbid arriving in Israel with first-degree relatives, and also forbid entering into relationships with other migrant workers while working in Israel.¹¹

Under a policy that was in place for many years (and to a large extent persists today), the visas of migrant workers who gave birth in Israel were revoked, and as a condition for their renewal, workers were forced to choose between leaving Israel with their babies immediately following their maternity leave (3 months), or sending their newborns to their country of origin by the end of their maternity leave.¹²

This policy leaves migrant workers who give birth in Israel with a cruel choice between forced separation from their babies at the age of three months—in order to continue working in Israel (at least to repay the costs of coming to Israel)¹³ and provide for their families—and leaving the country, thus relinquishing the opportunity to make a living,

⁸ For more on changes in migration policy in the agriculture sector, the process of formulating bilateral agreements with Thailand and their impact on migrants, see: Yahel Kurlander, *The Commodification of Migration—on the growth, expansion and changes in the recruitment industry for migrant workers in agriculture from Thailand to Israel* (Hebrew) (PhD dissertation, University of Haifa—Department of Sociology, 2019); Matan Kaminer, *At the zero degree / Below the minimum: Wage as sign in Israel's split labor market*, 43(3) DIALECTICAL ANTHROPOLOGY, 317-32 (2019).

⁹ Hanny Ben Israel, *The Fragile String to Life Itself—Labor, Migration and Care between Altruism and Instrumentalism* 51 (Masters Thesis, Tel Aviv University Faculty of Law, October 2018) (Hebrew).

¹⁰ *Ibid*, p.90.

¹¹ *Ibid*; Ben-Israel and Feller, *supra* note 1.

¹² The procedure in its original wording was attached as an appendix to a letter of 22 October 2004 from Attorney Yuval Roitman of the State Attorney's Office to Yuval Livnat, an attorney at Kav LaOved. For the current wording of the procedure, see Population and Immigration Authority Procedure 5.3.0023 "Procedure for the Treatment of Pregnant Foreign Workers or Foreign Workers Who Have Given Birth in Israel" (5 September 2018).

¹³ See the discussion in chapter 4 of this Alternative Plan regarding recruitment fees.

which was attained at significant financial expense and effort. In 2011, the High Court of Justice held this policy unconstitutional and determined that it resulted in “profound violation of the constitutional rights of the migrant worker”.¹⁴ However, the Court’s ruling did not bring about meaningful change in practice. This results from two factors. First, the employment structure in the care sector, where most migrant women in Israel are employed, is based on round-the-clock work and a mandatory live-in arrangement. Second, the policy of separation was found constitutional with respect to workers who work in Israel for more than five years.¹⁵

In addition to the policy towards migrants who give birth in Israel, migrant workers are prohibited from migrating to Israel with first-degree family members. While such prohibition is a common feature of temporary labor migration programs, in Israel the restrictions on migrant workers’ rights to a family are compounded by several exceptional policy decisions.

The first of these is a policy prohibiting migrant workers from receiving visits from first-degree family members during their stay in Israel. According to the Population and Immigration Authority (PIBA) guidelines, applications to allow visits by family members will be approved only in “exceptional” cases, subject to special permission and deposit of a bank guarantee, usually in the sum of tens of thousands of shekels.¹⁶ This policy places significant constraints on the ability of migrant workers to maintain contact with family members, and at the very least, to meet with them during the period they work in Israel.

Another exceptional policy prohibits having a family after arrival in Israel, whether by way of marriage, or even a romantic relationship without marriage. This prevents migrant workers who wish to retain their work visas from engaging in romantic relationships with or marrying other migrant workers while in Israel. PIBA’s policy is to revoke or refuse to extend the work permit of migrant workers suspected of being romantically involved with or marrying another migrant worker while in Israel, and to condition the extension of one worker’s visa on his or her partner leaving the country permanently.¹⁷

By effectively denying migrant workers partnership or parenthood, this policy denies migrant workers the right to meaningful relationships, which has long been recognized

¹⁴ HCJ 11437/05 *Kav LaOved v. Ministry of Interior*, Opinion of Justice Procaccia (2011), para. 33, <https://tinyurl.com/diz72w4r>

¹⁵ Hanny Ben Israel and Michal Tadjer *Is It Finally Friday? Work and Rest in the Employment of Migrant Caregivers in Israel*, 7 TEL AVIV UNIV. J. OF LAW & SOCIAL CHANGE 69 (2015) (Hebrew).

¹⁶ Population and Immigration Authority Procedure 5.4.0003, “Procedure for Foreign Nationals Requesting Entry to Israel from Countries with Visa Exemptions” (1 December 2009).

¹⁷ For a discussion on these policies, see Ben-Israel, *supra* note 9, pp. 94-95.

as a basic, universal human right. These draconian policies have far-reaching consequences on migrants' ability to lead full lives and they further entrench the commodification of migrant workers, seeing them solely as tools for labor, rather than as full human beings.

Main Policy Recommendations

The core of Israel's immigration policy, which severely restricts the possibilities for non-Jews to obtain long term status in the country, is unlikely to change. Nonetheless, a genuine commitment to fighting human trafficking necessitates a renewed assessment of a number of policy aspects that are based on a truly extreme instrumentalist view of migrant workers, or that indirectly enable excessive vulnerability to exploitation and an exceptional degree of social isolation and atomization.

Israel has de facto become an immigration state, partly due to its decision to rely on migrant workers as a permanent workforce in several sectors. The State's permission to various groups, such as migrant workers in the care sector, to live and work lawfully in Israel for many years indicates a loose and partial adherence to its purported aim to prevent long-term residence as a central principle of the Israeli migration regime. Thus, it would appear that regulatory arrangements cannot completely deny or ignore reality. Nevertheless, there are a number of more moderate and less comprehensive measures¹⁸ that may beneficially impact the fight against human trafficking. Key measures include:

- Cancellation of the policy requiring that workers reside in the employer's home in the care sector: This requirement is a key source of vulnerability, both in terms of labor rights (residing in the employer's home often results, in practice, in the care worker's unlimited availability, an intense workload, and a blurring of the lines between work and private time), and in terms of community isolation. It also creates an extreme mutual dependency which restricts workers' personal and leisure time and intensifies their social isolation. In addition, it is unclear as whether this arrangement is always beneficial for the employer.
- Amendment and proactive enforcement of weekly days of rest: Migrant care workers are entitled to only 25 hours of rest per week,¹⁹ and, in reality, many receive no weekly rest at all. Migrant workers in the agriculture sector are entitled to 36 hours of rest per week; however, in practice many of them receive significantly less, and some receive no rest at all. In addition to severe

¹⁸ See also the discussion in chapter 2 of this Alternative Plan regarding migration policy and the labor market.

¹⁹ See the discussion in chapter 7 of this Alternative Plan regarding protective employment legislation.

infringement of workers' rights, as well as physical and emotional strain, the lack of meaningful leisure time deprives workers of support from their communities and the opportunity to take advantage of available support networks, and sometimes even leaves them unable to leave their settlements or the farms where they live.

- Revocation of the policy prohibiting migrant workers from engaging in romantic relationships after their arrival in Israel.
- Amendment of the policy regarding family visits, mainly a reduction of the high deposit required, in order to make these visits feasible and to allow migrants to maintain contact with their families.
- Application of the policy enabling mothers to remain in Israel under the terms of their work permit after giving birth, including those who have completed 63 months of employment.
- Adoption of a gender-sensitive approach to policies regarding women migrant workers in agriculture, for example, to avoid situations where farms employ only one woman migrant worker.

Limitations of the Proposed Policy

The proposed steps include reforms to arrangements perceived as important in preventing migrant workers from settling in Israel, and any attempt to uproot them is likely to be met with opposition. Furthermore, the proposed steps, even if fully implemented, are a far cry from providing a comprehensive response to all aspects of vulnerability faced by migrant workers. For example, the proposed policy reforms alone are clearly insufficient to provide a response to other causes of structural vulnerability discussed elsewhere in this Alternative Plan, such as binding, recruitment fees and exclusion from protective legislation. The proposed reforms do not provide a complete response to the issue addressed in the present chapter as well, namely the social and community isolation of various groups of workers. For example, they do not resolve the issues of geographical isolation of those employed in remote villages with lack of access to public transportation, the isolation inherent in domestic employment (even without factoring in live-in work) or the social isolation resulting from language barriers, with many migrant workers speaking neither Hebrew nor English. The proposed reforms are also insufficient to overcome the vulnerability and fluidity of informal support networks composed of temporary or undocumented migrants.

Organized Labor

Assaf Bondy*

This chapter focuses on organized labor and the potential of unions and other industrial relations actors to improve the rights of vulnerable workers, including non-Israeli workers, and make their voices heard within the labor market and wider Israeli society. Despite long lasting decline of labor movements around the world, in recent years organized labor has become increasingly active in the prevention of human trafficking through various forms of collective action. This development, however, has not yet taken hold in Israel. This chapter outlines a path for an inclusive collective strategy to ensure safeguards against severe forms of labor market exploitation of the most vulnerable workers.

Background

Trade unions in Israel are regulated under the Collective Agreements Law and Settlement of Labor Disputes Law, as well as by additional Israeli labor law norms. This institutional basis positions trade unions as actors with great potential to impact redistribution between workers and employers, and deepen democracy in Israel, through worker representation, collective bargaining and persistent struggle over the distribution of resources in society.

Unions' favorable status under Israeli law and longstanding involvement in shaping Israel's economy, and particularly their ability to utilize collective action (and especially strikes) enables them to take a leading role in creating meaningful improvements to working conditions and labor relations in the labor market in relation to all workers.¹

* Dr. Assaf Bondy is a researcher in the TraffLab (ERC) research group and a postdoctoral fellow at the Sociology department at Haifa University. Bondy's research studies the representation of workers and employers and the shifting impact of their representation on regulation of the labor market and political economy. Within this framework, Bondy's research assesses the impact of representation of cleaning and construction workers on the development of subcontracted employment, changes to representation and sectoral regulation within the labor market in Israel, the shifting relationships between different actors in labor relations and their impact on economic governance and growth.

There is widespread consensus among researchers that unionized workers are better protected from severe exploitation and human trafficking due, in part, to the work of trade unions in setting workplace standards and enforcing workers' rights, even in the absence of state regulation or enforcement. Integration of unions, and other organizations representing workers, in the decision-making process affecting non-Israeli workers— such as policies regarding recruitment, visa conditions, labor market mobility etc.— could thus contribute significantly to safeguarding their rights and to reducing their vulnerability to human trafficking.

Historically unions had a central role in shaping Israel's society and economy, yet in Israel, as in other countries in the Global North, they also have a history of exclusion of and even discrimination against marginalized populations. Numerous studies have highlighted how discriminatory policies of trade unions in Israel led to marginalization and exclusion of migrant workers.² This record has presumably affected the extent of migrant workers' vulnerability to human trafficking, in particular regarding migrant workers in the agriculture and construction sectors, where trade unions are engaged in collective bargaining and, at least formally, represent all workers. In recent years, however, following legal activity by civil society organizations, and in the wake of decisions by state institutions and the judiciary, a notable shift in the policy of trade unions toward the inclusion of migrant and other marginalized workers has occurred.³ This shift raises hopes that trade unions in Israel may be able and willing to bring about improvements in the situation of these workers while addressing the causes of human trafficking.

Considering the numerous shortcomings of trade unions in their representation of migrant workers and in light of the changes in their activities in this area in recent years, in this chapter we suggest viewing trade unions as partners in shaping labor migration policies, improving the rights of migrant workers and enforcing and monitoring those rights. Welcoming migrant workers into the membership ranks of trade unions would be a necessary first step toward this achievement. However, trade unions should not stick to their traditional strategies of exclusive representation but rather, following pluralist industrial relations regimes, represent workers alongside civil society organizations that historically and currently are the main champions of migrant workers' rights in Israel, as

¹ GUY MUNDLAK, *ORGANIZING MATTERS: TWO LOGICS OF TRADE UNION REPRESENTATION* (Edward Elgar Publications, ILERA series, 2020).

² Assaf S. Bondy, *The (Dis)advantages of Sector-Level Bargaining: Outsourcing of Cleaning Work and the Segmentation of the Israeli Industrial Relations System*, 60 (5) *JOURNAL OF INDUSTRIAL RELATIONS* 691 (2018).

³ Assaf S. Bondy & Jonathan Preminger, *Collective Labor Relations and Juridification: A Marriage Proposal*, *ECONOMIC AND INDUSTRIAL DEMOCRACY* (2020), online first <https://doi.org/10.1177/0143831X20983593>

well as representatives of migrant-worker-led organizations and communities (such as elected representatives of refugee groups in Israel).

Key challenges in the present situation

- A history of discrimination against non-Israeli workers, and disinterest and inaction on the part of trade unions in promoting migrant workers' rights, led to the non-cooperation and exclusion of unions from shaping, influencing and implementing relevant aspects of Israel's labor migration policy. Trade unions in Israel traditionally allocated minimal resources toward representation of non-Israeli workers, and the extent of their engagement in shaping policy in this area (e.g., in regulating employment of non-citizen Palestinian workers) has been characterized by a very limited impact on working conditions and has been met with criticism.⁴
- Sectoral/centralized regulation in most migrant labor intensive sectors: Sectoral regulation of working conditions enables broad regulatory coverage of the norms it produces across the sector. Sectoral collective agreements have existed for decades in sectors that are currently dependent on migrant labor (e.g., construction, agriculture and hospitality). However, sectoral regulation in Israel suffers from two main faults: most of these agreements do not generate significant additional protections suited to the unique rights and needs of migrant workers' rights; additionally, these agreements are defined by a chronic disconnect to the situation "on the ground", offering limited ability to represent the interests of workers and effectively enforce their rights.
- Minimal enforcement of workers' rights: Currently in Israel trade unions rarely take steps to enforce and uphold the rights provided by law or in sectoral collective agreements to protect migrant workers and other marginalized communities. Low rates of enforcement limit the efficacy of these regulatory mechanisms, since, de facto, migrant workers find it very difficult to enforce them independently. Even where union-based enforcement mechanisms do operate, the majority of enforcement is reactive, rather than proactive, and occurs in response to workers' complaints.
- Minimal direct representation of migrant workers: Currently, trade unions in Israel do not allocate resources for direct representation of workers outside of unionization efforts. This restricts the access of marginalized workers generally, and migrant workers in particular, to having their voices heard and their interests represented by unions in spheres other than individual litigation.

⁴ State Comptroller, *Annual Report 65a* (2014), chapter entitled "Administration of Border Crossings, Population and Immigration—Employment of Palestinian Workers in the Construction Sector in Israel". (Hebrew).

- De facto refraining from unionizing migrant workers: Trade unions in Israel have refrained from proactively unionizing migrant workers. Even where measures have been taken in the past, they were not highly successful, due to a minimal investment of resources (for example, an attempt by the “Koach LaOvdim” union to organize migrant workers in the agriculture and care sectors and an attempt by the “Ma’an” trade union to unionize Palestinian workers in the construction industry).⁵

Main Policy Recommendations

This chapter focuses on trade unions (alongside additional industrial relations actors) and their potential to improve the rights of migrant workers and represent their voices in the labor market and in Israeli society. In contrast to top-down state regulation, union organizing is a unique toolbox that combines regulatory capacity—the ability to regulate the labor market through collective agreements—and enforcement capacity through litigation or collective action— as well as the capacity to represent the interests of migrant workers in solidarity and make their voices heard, enabling regulation tailored and adapted to their needs. The voluntary premise of trade unions and their organizational capacity to represent workers and improve workers’ working conditions create a promising prospect for their engagement in policy-making to address harmful employment practices and to improve the status of migrant workers in Israel.

Social Dialogue: A National Council for Labor Migration

We propose the creation of a dedicated forum for regulating working conditions of migrant workers in Israel. Such a forum would engage different actors and stakeholders and would provide a meaningful space for the voices of migrant workers and more inclusive regulation of their working conditions. This proposition is based on the multi-stakeholder “round-table” model that characterized the Israeli approach at various junctures in recent decades (for example, following the global financial crisis of 2008-2009, or in the context of the response to work accidents in the construction industry in 2018-2019) and has provided space for pluralistic inclusion and representation of the interests of various stakeholders in regulation of the labor market.

⁵ See, e.g., Guy Mundlak & Hila Shamir, *Organizing Migrant Care Workers in Israel: Industrial Citizenship and the Trade Union Option*, 153 (1) INTERNATIONAL LABOUR REVIEW 93 (2014); the union Ma’an is an exception since it focuses its organizing work on organizing Palestinian workers. Despite its important work, Ma’an still remains a very small and relatively marginal industrial relations actor in Israel. For more on the work of “Ma’an”, see heb.wac-maan.org.il/?cat=29.

The proposed model is for a four-way social-dialogue council featuring trade unions, the State, employers, and migrant and civil society organizations, each with equal representation, based on the following principles:

- A national council for labor migration will be established, with its powers enshrined in legislation (or by binding governmental decree). The council will include representatives of the State, trade unions, employers' organizations (including recruitment and placement agency representatives) and civil society organizations. This council will create a framework for mandatory consultation on developments and changes in migration programs, labor migration quotas and desired policy on labor migration. Regarding labor rights, the council will act to strengthen sectoral regulation, responding to specific issues affecting migrant workers, such as working hours, accommodation, workplace safety, deductions, employment conditions, home country visits, and the like.
- Trade unions will establish a division for organizing migrant workers that will engage in both employer-based and sector-based organizing and representation, with the aim of increasing migrant workers' union representation and strengthening non-judicial enforcement capabilities. This division will operate through active outreach to migrant workers, similar to current operations of Israel's largest union, the General Federation of Labor (the Histadrut) in relation to Israeli workers through its Organizing Division. As part of the effort to organize migrant workers and guarantee their representation in collective bargaining, migrant workers will be invited to join trade unions at subsidized membership fee rates.
- Trade unions will act to establish a unit for enforcement of employment legislation, collective agreements, and extension orders in sectors that employ migrant workers and are considered susceptible to recurring violations of workers' rights (including sectors without collective agreements). This enforcement unit will also be responsible for providing migrant workers with information regarding their visa conditions and rights under relevant temporary migrant work programs, as well as assistance in accessing and enforcing their rights vis-a-vis employers and the state. This can be achieved, for example, through the operation of a helpline and office reception hours to provide migrant workers with assistance and information as well as the publication of "know your rights" leaflets (or a website), in the various languages spoken by migrant workers, containing possible remedies and the helpline's contact information. The helpline and in-person reception can serve to establish trust and communication between trade unions and migrant worker communities, and can be operated in collaboration with existing worker centers and civil society organizations who

have already gained community trust.⁶ In addition to encouraging proactive enforcement activity (through trade unions), the helpline can also serve as a way for the union to better understand the situation and needs of workers, and pave the way to promote unionization. These measures will serve to gather information and promote unionization, as well as to develop optimal means for enforcement that meet the changing needs of the migrant workers.

To finance these operations, trade unions will channel the funds they receive from workers in migrant labor -intensive sectors (in particular construction, agriculture, and hospitality) toward enforcement of the rights of migrant workers, in cooperation with civil society organizations.

- Employers' organizations (including organizations representing recruitment and placement agencies) will be required to show active enforcement of collective agreements and expansion orders, including the collection and publication of data on actual working conditions in trafficking prone sectors.
- Sectoral collective agreements will include regional and national arbitral tribunals—with workers' and employers' arbitrators—in which workers can file complaints against employers and resolve disputes in a more accessible and affordable forum.

Limitations of the Proposed Policy

In many cases, the traditional representation structures of trade unions are not compatible with the needs of migrant workers, workers in vulnerable sectors or informal workers, or with the patterns and structures of work in these sectors (e.g. subcontracted, informal, or short-term employment). Temporary migrant workers, for example, come to Israel for limited periods. Their temporary status increases their fear of harassment by the authorities or reprisal by their employers, even more so than for Israeli workers. Their temporary status may make them reluctant to invest the time, energy and resources required for unionization or even to pay union membership fees. Informal employment, common among migrant workers in Israel, creates an additional barrier to collective action and collective agreements regarding working conditions. Established trade unions therefore rarely invest energies and resources in unionizing these workers or to address their needs.

⁶ Although a hotline, operated by CIMI, is currently available, it is primarily used for directing inquiries to the State and does not assist workers in realizing their rights or in providing them with representation. The support provided by civil society organizations such as Kav LaOved also does not profess to offer collective representation of workers or to take the lead on collective solidarity campaigns.

However, a range of alternative solutions for collective representation (“Alt-Labor”) have developed around the world in response to these challenges.⁷ These alternative forms of representation and collective action—which in some cases are founded with the support and leadership of traditional trade unions—do not attempt to meet the threshold for legal recognition as trade unions or the representation requirements for entering into collective agreements. Rather, they seek to act as alternative arenas for collective action and bases for community power building. Presumably, placing the collective interests of vulnerable workers—including trafficked individuals—at the forefront of the anti-trafficking will create new priorities, different from those which frame the current debate.

⁷ See Steven K. Ashby, *‘Traditional’ Labor and ‘Alt’ Labor: Comparisons, Critiques, and Perspectives* 43(2) LABOR STUDIES JOURNAL, 1 (2018); JEREMY AVINS, MEGAN LARCOM & JENNY WEISSBOURD, NEW FORMS OF WORKER VOICE IN THE 21ST CENTURY – WORKING PAPER (2018).

Corporate Responsibility

Hila Shamir and Tamar Barkay*

This chapter seeks to broaden the boundaries of the current debate around human trafficking in Israel as these are delineated by both the State and non-governmental and other non-profit organizations. It will discuss the notion of corporate responsibility to avoid human and workers' rights violations, and to ensure fair employment conditions throughout the supply chain (including among subcontractors), whether in Israel or elsewhere. The chapter seeks to learn the lessons of regulatory mistakes made in other countries, and proposes imposing direct responsibility on corporations, creating effective enforcement mechanisms, and ensuring workers have a voice in shaping and enforcing corporate standards.

Background

Human trafficking and modern slavery are global challenges rooted in the power relationships and structures upon which global labor markets have been built and by which they are characterized in recent decades. The policies of liberalization of capital and trade, privatization and deregulation that were adopted by many countries in the early 1980s facilitated and even encouraged the import of cheap labor from the Global South to the Global North and a shift in manufacturing from the Global North to subcontractors in the Global South. The increased mobility of workers and goods has far-reaching consequences; at the same time as it drives the economic empowerment of multinational corporations, it also serves as fertile ground for new models of harmful employment and severe exploitation of workers. This applies to the secondary labor markets in the Global North and the lower tiers of the global supply chain in the Global South. Subcontractors throughout the global supply chain exploit workers in a myriad of ways in order to remain competitive in the face of constant pressure to find quicker and cheaper ways to produce goods.¹ This dynamic is manifested in the list of raw materials

*Hila Shamir is a professor of law at the Tel-Aviv University Faculty of Law and the PI of TraffLab (ERC) research group; Dr. Tamar Barkay is the head of the sociology and anthropology program and a lecturer in

and products extracted or produced through child labor and forced labor, which was published by the U.S. Department of Labor in September 2018 and is updated since.² Indeed, the expansion of global supply chains that have enabled corporations to significantly expand their profits is one of the key risk factors for severe exploitation of workers.

The international and national efforts to address human trafficking have expanded over the previous decade, beyond the employer-employee specific relationship to include the wider power structures and global manufacturing supply and consumption patterns and trends. Research in this field has shown that often the direct employer is not necessarily the primary beneficiary of worker exploitation. Rather, the employers themselves may be under supply chain pressures and therefore subject to significant economic constraints, strict deadlines, low profit margins, etc. One study into the textiles industry in India, for example, indicated a clear correlation between violations of workers' rights at the lower tiers of the supply chain—including threats and violence—and the time and cost pressures being applied by multinational corporations ordering the products at the top of the supply chain (lead firms).³ In view of this understanding, a labor approach to trafficking that seeks to tackle the structural factors that drive it must also address lead firms' responsibility for the structure of their production and procurement supply chains and its ramifications on workers' rights, imposing responsibility on corporations,⁴ and creating structures for establishing standards and enforcing workers' rights rooted in workers' knowledge and perspectives regarding their needs.⁵ The 2019-2024 National Action Plan to tackle human trafficking in Israel addresses this in general terms in the

the Department of Multidisciplinary Studies at Tel-Hai College and a research fellow in the TraffLab (ERC) research group at Tel-Aviv University.

¹ Mark Anner, *Binding Power: The Sourcing Squeeze, Workers' Rights, and Building Safety in Bangladesh Since Rana Plaza* (2018).

<https://ler.la.psu.edu/gwr/documents/CGWR2017ResearchReportBindingPower.pdf>

² U.S. DEP'T OF LABOR BUREAU OF INTERNATIONAL LABOR AFFAIRS, 2020 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2020). Available at:

www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPR List Online_Final.pdf

³ Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1 (2013). See also Mark Anner (2018), *supra* note 1.

⁴ Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *Global Justice, Labor Standards and Responsibility*, 12 TIL 439 (2011); TIM BARTLEY, "RULES WITHOUT RIGHTS, LAND, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY" (2019).

⁵ The leading model here is the Worker Driven Social Responsibility Network, wsr-network.org/. For more on the difference between this approach and CSR, see Jennifer Gordon, "The Problem with Corporate Social Responsibility" (2017)

<https://wsr-network.org/resource/the-problem-with-corporate-social-responsibility/>.

context of future activities in this area.⁶ This chapter will seek to identify potential ways forward in terms of effective policy that places the onus on local and multinational corporations that benefit financially from workers' severe exploitation and human trafficking.

The initial intersection of corporate responsibility and the efforts to address human trafficking occurred through **voluntary initiatives** led by multinational corporations concerned about reputational damage arising from revelations of human trafficking in their supply and production processes. The widespread criticism regarding the efficacy of these initiatives has led to attempts in recent years to “harden”—through national legislation—the “soft” and voluntary regulations adopted by corporations. Such attempts can be seen in transparency and human rights due diligence (HRDD) legislation in several countries in recent years that requires corporations to report on the measures they are taking to prevent human trafficking in their production and supply chains. In Israel, the former stage of voluntary initiatives is still in its infancy, and the latter stage of more stringent state legislation is not yet on the horizon. This chapter will first introduce these two stages of regulation by focusing on the anti-trafficking activities of corporations and countries around the world, before moving on to consider the criticisms of this approach and offering an alternative path.

Voluntary corporate initiatives

In recent years there is growing recognition of the imbalance between the overwhelming influence of multinational corporations on labor markets on the one hand, and the inability or unwillingness of states and transnational bodies to adequately regulate them on the other. Furthermore, as noted above, there is growing awareness that modern slavery and human trafficking are inextricably linked to global supply chains. These realizations have led to a flurry of initiatives in recent years centered on corporate responsibility to prevent severe workers' exploitation in corporate supply chains.⁷ These initiatives are rooted in the widespread understanding in recent decades that corporations bear responsibility for their social and environmental negative impacts (addressed under the umbrella term of Corporate Social Responsibility). This approach was apparent in various guiding principles issued by the International Labour Organization (ILO), the United Nations (UN), and The Organisation for Economic Co-operation and Development (OECD) which directly address corporate responsibility to

⁶ Article 4.V of Decision 4463 of the 34th Government “National Action Plan to Tackle Human Trafficking 2019-2024” (13 January 2019).

⁷ Siobhán McGrath & Fabiola Mieres, ADDRESSING THE DEMAND SIDE IN AND THROUGH SUPPLY CHAINS: MAPPING THE FIELD OF INITIATIVES AROUND HUMAN TRAFFICKING, FORCED LABOUR AND SLAVERY, DEMANDAT WORKING PAPER No. 8. (2017).

avoid human and workers' rights violation and their obligation to uphold the rights of workers throughout their supply chain.⁸ Many of these anti-trafficking initiatives are carried out in collaboration with business, governmental, non-governmental and international organizations; and all of them are based on the voluntary participation of corporations. Nevertheless, ample studies have shown that such initiatives mostly serve corporations' reputational purposes, are often purely declarative and in fact lack enforcement and sanction mechanisms, and therefore do not drive meaningful change in the working conditions of vulnerable workers.⁹

Legislative initiatives

The increasing awareness that voluntary initiatives are failing to deliver meaningful change has led a number of countries—including the United Kingdom, the Netherlands, France, Australia, Germany and the State of California in the USA—to adopt new legislation, known as “transparency legislation” or “human rights due diligence legislation” (HRDD). Such legislation requires corporations to declare the measures they are taking to prevent human trafficking in their production and supply chains (transparency legislation) and to actively ensure that their suppliers are not involved in such practices (due diligence).¹⁰ The aim of such legislation is to increase the level of transparency in supply chain management and to expose corporations that allow severe exploitation in their supply chain to public and consumer pressure. As with the voluntary initiatives, these laws currently do not include enforcement and sanction mechanisms. Rather these laws are animated by an assumption that corporations who do not comply or poorly comply with legislative requirements and with their declared commitments will be exposed to economic sanctions due to consumer boycotts (“power of the purse”). The

⁸ Rep. of the ILO, Tripartite declaration of principles concerning multinational enterprises and social policy (Fifth edition) (2017) adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th sessions (March 2017). Available at: <https://tinyurl.com/gv6gxxm> ;

OECD Guidelines for Multinational Enterprises (2011): <http://www.oecd.org/daf/inv/mne/48004323.pdf>
United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31 (2011). Available at: https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

⁹ RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY (2013); Genevieve LeBaron, *Subcontracting Is Not Illegal, But Is It Unethical? Business Ethics, Forced Labor, and Economic Success*, 20(2) BROWN JOURNAL OF WORLD AFFAIRS, 237 (2013); JEAN ALLAIN, ANDREW CRANE, GENEVIEVE LEBARON & LAYA BEHBAHANI, FORCED LABOUR’S BUSINESS MODELS AND SUPPLY CHAINS (Joseph Rowntree Foundation and Queens University, 2013); JOONKOO LEE, GLOBAL SUPPLY CHAIN DYNAMICS AND LABOUR GOVERNANCE: IMPLICATIONS FOR SOCIAL UPGRADING (ILO Research Paper No. 14, 2016); Sijeong Lim & Aseem Prakash, *From Quality Control to Labor Protection: ISO 9001 and Workplace Safety, 1993–2012*, 8 GLOBAL POLICY 66 (2017).

¹⁰ INTERNATIONAL TRADE UNION CONFEDERATION, BUSINESS AND HUMAN RESOURCE CENTRE, MODERN SLAVERY IN COMPANY OPERATIONS AND SUPPLY CHAINS: MANDATORY TRANSPARENCY, MANDATORY DUE DILIGENCE AND PUBLIC PROCUREMENT DUE DILIGENCE (2017).

absence of legally binding enforcement mechanisms and sanctions reflects a belief that severe exploitation of workers in corporate supply chains will be exposed by consumer groups and other civil society stakeholders and will therefore pose a real business risk that will incentivize corporations to take action to address human trafficking in their supply chains.

Criticism of regulatory developments in the field

Despite the increase in voluntary anti-trafficking initiatives and the proliferation of transparency and HRDD legislation, there is no evidence that global supply chains have transformed and that there is a decrease in severe labor market exploitation of workers, thus raising significant doubts regarding their efficacy.¹¹ The central argument against the turn to transparency and HRDD legislation is that reliance on corporate goodwill and presumed consumer power is insufficient. In order to tackle human trafficking and modern slavery in supply chains, there is a need for deeper structural change that will address the underlying conditions and interests that drive and enable severe forms of labor market exploitation in global supply chains.

Specifically, corporate anti-trafficking legislation is ineffective because it does not mandate the adoption of inspection and enforcement mechanisms and does not include sanction against corporations that violate the commitments they make. Private enforcement mechanisms (including a vast industry of audit companies, standards, accreditation agencies, etc.) have proven to be unreliable time after time. In the best-case scenario, they are easily manipulated. In the worst case, they are afflicted by the systemic corruption and an inherent conflict of interests between private audit companies and the corporations that hire them.¹²

Indeed, so far, the impact of corporate anti-trafficking legislation has been underwhelming. Studies show that compliance rates are low, and the reporting itself is minimal. For example, a study in the UK found that only 30% of corporations that published annual modern slavery statements complied with the minimal legal

¹¹ JEAN ALLAIN, ANDREW CRANE, GENEVIEVE LEBARON & LAYA BEHBAHANI, FORCED LABOUR'S BUSINESS MODELS AND SUPPLY CHAINS (Joseph Rowntree Foundation and Queens University, 2013); Judy Fudge, *Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization*, 27(4) SOCIAL AND LEGAL STUDIES 414-434 (2017); Jennifer Gordon, *The Problem with Corporate Social Responsibility*, Worker Driven Social Responsibility Network (<https://wsr-network.org/wp-content/uploads/2017/07/Gordon-CSR-vs-WSR-FINAL-July-2017.pdf>); Genevieve LeBaron, Neil Howard, Cameron Thibos & Penelope Kyritsis, *Confronting Root Causes: Forced Labour in Global Supply Chains* (Open Democracy and SPERI, 2018).

¹² GENEVIEVE LEBARON, COMBATTING MODERN SLAVERY: WHY LABOUR GOVERNANCE IS FAILING AND WHAT WE CAN DO ABOUT IT 121-151 (2020) (hereinafter: LEBARON, MODERN SLAVERY).

requirements of the UK Modern Slavery Act, and an analysis of the largest corporations in the United Kingdom (FTSE 100) found that reporting was sparse and of poor quality.¹³

Of course, we might be at a preliminary stage in a longer process of regulatory transformation resulting in demanding a regulation which requires that corporations will not only provide reports regarding their anti-trafficking activities, but also take proactive measures to combat human trafficking. This transformation may occur through more stringent legislation,¹⁴ or following litigation by workers, civil society organizations or others acting against corporations found to be in breach of their commitments.¹⁵ With the benefit of a decade's worth of experience since this process began, what can be asserted is that so far no sanctions have been imposed on corporations where human trafficking has been discovered in their production and supply chains. Furthermore, it appears that despite the proliferation of the private regulation industry, there has been no evidence of significant improvements on the ground regarding workers' rights.

The efficacy of the corporate social responsibility approach to combating human trafficking and modern slavery in supply chains is still up for debate. However, global media coverage and public debate surrounding the responsibility of corporations to safeguard human rights and workers' rights has undoubtedly had a significant impact on raising awareness regarding the extent and scope of human trafficking and modern slavery and the central role of corporations in enabling and perpetuating them. Attempts to reinforce legislative initiatives through more concrete reporting requirements,

¹³ Business and Human Rights Resource Center, UK Modern Slavery Compliance with Minimum Requirements (2018)

https://media.business-humanrights.org/media/documents/files/FTSE_100_Briefing_2018.pdf.

¹⁴ Preliminary evidence of this can be seen in the findings of the independent review commissioned to assess the UK law, which recently recommended expanding the obligations of corporations under the law. See, Independent Review of the Modern Slavery Act 2015: Final Report (May 2019), p. 39; available at: <https://tinyurl.com/y5lxglse>

¹⁵ No corporations have faced liability as a consequence; however, the court finding against Samsung in France over misleading advertising, after severe exploitation was uncovered in its supply chain, has led some in the field to anticipate existing due diligence legislation paving the way for more significant liability in the future. See, Violations of Workers' Rights: Landmark Indictment of SAMSUNG France for Misleading Advertising, SHERPA, 3 July 2019. <https://www.asso-sherpa.org/violations-of-workers-rights-landmark-indictment-of-samsung-france-for-misleading-advertising>. In November 2019, the first lawsuit was filed over a breach of the Duty of Vigilance Act following rights violations by the oil company Total in Uganda. The case is ongoing due to questions regarding legal jurisdiction. See, Business and Human Rights Resource Center, Six NGOs File Lawsuit Against Total Over Alleged Failure to Respect Duty of Vigilance Act in its Operations in Uganda (24 Oct. 2019) <https://tinyurl.com/y2j4snjp>; Julien Collinet, *Due diligence: Has France really laid the foundations to end corporate impunity?* EQUAL TIMES (19 February 2020). Available at: <https://tinyurl.com/yvggtojf>

intensified oversight and enforcement mechanisms and international collaborations¹⁶ can be seen as evidence of this impact.

Israel

So far both the public and the private sectors in Israel are not active participants in global attempts to combat human trafficking and modern slavery in global supply chains. There has been no attempt either by the Israeli State or Israeli multinational corporations to address the role of Israeli corporations with subcontractors in the Global South in perpetuating human trafficking and modern slavery. The Israeli interpretation of the corporate social responsibility approach is defined by a tendency on the part of corporations to avoid engaging in issues that are perceived as being political in nature or contentious among the Israeli public.¹⁷ This tendency can be seen, for example, in the lack of engagement with dominant global discourse surrounding corporate social responsibility, including the impact of business activity in the Occupied Palestinian Territories, human rights and workers' rights in supply chains and the rights of migrant workers.¹⁸

Israeli civil society has been similarly absent from this field. Trade unions in Israel focus primarily on safeguarding the rights of Israeli workers,¹⁹ while Israeli civil society organizations engaged in safeguarding the rights of workers and migrants—e.g. Kav LaOved, the National Coalition for Direct Employment, and the Hotline for Refugees and Migrants—that tackle human trafficking and other forms of exploitation of workers in Israel focus on the State's role in creating and permitting exploitative structures and the culpability of direct employers. Yet this may be changing. An organization called "Fair Trade Israel" was launched in 2021 to address the role of corporations in human rights violations and environmental degradation, with the goal of advancing legislation in this area.

Main Policy Recommendations

¹⁶ OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains (Vienna, February 2018), available at: <https://www.osce.org/secretariat/371771?download=true>

¹⁷ Anat Bein-Lubovitch, The Small Market: Israeli Companies' Fear of Taking a Political Stand, *GLOBES* (5 March 2018) <https://www.globes.co.il/news/article.aspx?did=1001226085> (Hebrew); Tamar Barkay, Neoliberalism and Zionism: Corporate Social Responsibility and the Social Struggle over Israeliness, 33 *THEORY AND CRITICISM* 45-71 (2008) (Hebrew).

¹⁸ Tamar Barkay & Ronen Shamir, Israel vs. BDS: Corporate Social Responsibility and the Politics of Human Rights, 17 (4) *GLOBALIZATIONS* 17(4), 698-713.

¹⁹ See the discussion in chapter 10 of this Alternative Plan regarding trade unions.

Attempts to reduce human trafficking and modern slavery in global supply chains through the corporate social responsibility approach have not met with success thus far. At the same time, these attempts have increased global public awareness around severe exploitation of workers in the supply chain, contributed to exposing the scale of the problem and given rise to hundreds of initiatives to tackle it. The absence of a local Israeli debate around the ways in which Israeli corporations participate in perpetuating severe forms of workers' exploitation is notable.

We believe that successfully combating human trafficking and modern slavery requires both international and inter-sectorial cooperation. Based on this, the main recommendation in this chapter is to expand Israel's new National Action Plan to combat human trafficking to include **reporting, inspection and enforcement mechanisms as well as sanctions**, requiring Israeli corporations to avoid violations of workers' rights throughout their supply chain. While presenting a detailed model on this matter is beyond the scope of this report, we do provide a list of principles that we argue should guide and be an integral part of effective policy in this area.

Principles that should underpin corporate anti-trafficking legislation

- **Establish direct legal liability:** making corporations responsible for human trafficking in their supply chain must entail more than mere transparency, but also contractual, tort and criminal liability. The adopted policy should encourage corporations to take an active part in improving workers' rights throughout their supply chains by making them directly liable for severe rights violations.
- **Inspection, enforcement and sanction mechanisms:** market sanctions are insufficient to effectively transform corporate behavior in relation to workers' rights exploitation in their supply chains. Establishing corporate responsibility must be supported by creating clear causes of action—under tort and contract law—for workers and consumers against lead firms, and by significant state sanctions for violations. Inspection and enforcement should not be entrusted to corporate-funded private auditing bodies or to the consumers' "power of the purse" alone. It must also engage State agencies tasked with assessing whether corporations have met the obligations they have taken upon themselves, as well as governmental procurement practices and requirements that can set new standards for Israeli businesses.
- **Ensuring workers' representation in the process of shaping and enforcing corporate commitments:** processes for establishing standards in supply chains should include the active engagement—and leadership—of workers.²⁰ Experience has

²⁰ One of the proven success models in combating human trafficking in the supply chain is the "Worker Driven Social Responsibility" scheme. One notable example of this success is the Fair Food Program, which

shown that workers have the most relevant knowledge regarding violations of their rights and the effective ways to prevent them. Therefore, legislation and regulation should encourage participation of trade unions and of workers' organizations. Where the sector or workplace in question is not organized, another form of worker representation should be established to guarantee workers' voices are present in these processes.

Adoption of Human Rights Due Diligence Legislation—an improved French model

At present, there is no existing legislative model that establishes direct corporate responsibility and liability for human trafficking in corporate production and supply chains. We believe that the most developed legislation currently in force is the French Corporate Duty of Vigilance Law.²¹ The law requires large corporations in France (those employing more than 5,000 workers in the country or more than 10,000 workers globally) to carry out due diligence on human rights violations by drafting a plan to tackle the negative consequences of their actions, their supply chains and their business relationships. The significant benefit of this law is the presence of sanctions in cases where a corporation is found to have violated the commitments it set out in the plan, where the plan itself or its methods of implementation are inadequate, or where the corporation fails to submit such a plan.

There are several significant criticisms of the French Act. First, due to the size requirement it applies to a small number of corporations (approx. 150 companies). Second, no significant sanctions have yet been applied to corporations under its provisions. Arguably, a key reason for this is that the burden to prove corporate responsibility is placed on the shoulders of civil society plaintiffs and private entities that often lack resources and do not have sufficient access to information to substantiate their claims. Third, the law has been criticized for not requiring corporations to include a commitment to specific changes or outcomes in their due diligence plan. Fourth, the Act does not include provisions regarding individual liability of corporate officeholders in case of violations, an element that further weakens the efficacy of the law.

was awarded the Presidential Medal for Extraordinary Efforts to Combat Modern-Day Slavery during the Obama presidency. For information regarding this program, see Greg Asbed & Steven Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017); SUSAN MARQUIS, I AM NOT A TRACTOR! HOW FLORIDA FARMWORKERS TOOK ON THE FAST FOOD GIANTS AND WON 12 (2017).

²¹ Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies.

It is recommended that Israel adopt legislation that reflects the view that corporations are liable for human trafficking in their supply chains and responsible for preventing it. Given the numerous shortcomings in existing legislative models and the relative advantages of the French model, as outlined above, it is recommended to adopt legislation that adapts the French model to fit the Israeli context, and adjusts it to provide solutions to the problems noted above:²² application to a significant number of companies; cases brought by State authorities; a requirement to include commitments to changes or outcomes in the corporate plan; and application of sanctions to individuals within the corporation where these are deemed appropriate. Furthermore, it is necessary to implement the policy principles outlined above—emphasizing effective inspection and enforcement mechanisms, sanctions, and an active and leading role for workers in shaping the due diligence plan and oversight and inspection mechanisms for its implementation.

Adopting public procurement legislation—developing an Israeli model for local and global procurement

One promising tool for changing market standards involves the State using its power as a major buyer to influence corporations interested in doing business and providing goods and services to the State. Such “public procurement legislation”²³ conditions successful applications for government tenders—and the subsequent market advantage these confer—on organizations working proactively to prevent human trafficking in their supply chains. Such legislation has great potential to instill new market standards and practices and contribute to addressing severe workers’ rights violations. In the Israeli context, for example, such legislation could create a strong incentive for large construction companies to safeguard the rights of the many and varied subcontractors’ workers employed in their projects. Another example could relate to agriculture: requiring that only corporations that source from suppliers who provide certifiably fair working conditions to farmworkers in their fields and farms can contract with the State.

While public procurement legislation is one of the most under-developed tools in combating human trafficking, given corporations’ inherent interest in adhering to standards set by the State as a potential business partner, it is also among the most

²² In a document drafted in 2017, the International Trade Union Confederation proposed guidelines for legislation that provided a promising model for addressing these criticisms. See International Trade Union Confederation, *MODERN SLAVERY IN COMPANY OPERATIONS AND SUPPLY CHAINS* 25 (2017) and see also critical discussion by Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELBOURNE JOURNAL OF INTERNATIONAL LAW 9 (2019)

²³ John Howe & Ingrid Landau, *Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design*, 51(4) JOURNAL OF INDUSTRIAL RELATIONS 1 (2009).

promising tools.²⁴ At the same time, the concerns raised in the debate thus far regarding questions of enforcement and efficacy apply equally to this situation. It is, therefore, recommended to adopt procurement legislation that would condition the award of State tenders and contracts on effective action to prevent human trafficking. This legislation must be drafted with care and consideration given to inspection, enforcement, prevention of false reporting, and detailed implications on working conditions and workers' rights.

Limitations of the Proposed Policy

Despite the growing recognition that large corporations are among the primary beneficiaries of human trafficking, no proven effective model of corporate responsibility for identifying and addressing human trafficking and modern slavery in their supply chains has yet been implemented. There are some who argue that the structure of global supply chains, with many links forming a complex chain of contracts, was designed for that exact purpose: to offer corporations plausible deniability for the consequences of their business decisions, including human trafficking.²⁵ In view of the vast and increasing influence of corporations over policy and legislation, it is to be anticipated that attempts to establish corporate responsibility for trafficking and exploitation in supply chains will be met with significant opposition. Nonetheless, the first signs of such attempts can already be seen around the world, and these may be cautiously considered the beginning of a new regulatory development.

Moreover, corporate responsibility, even if implemented directly and effectively, will not be sufficient on its own. There is a need for comprehensive State-backed safeguards for the rights of the most vulnerable workers, including migrant workers and other marginalized groups. Establishing corporate responsibility is insufficient without addressing the structure of labor markets in which workers are vulnerable to exploitation: guaranteeing the applicability and enforcement of protective employment law and collective labor law, ensuring a migration policy that does not restrict the labor market mobility of workers and does not saddle them with heavy debt burdens.²⁶ Corporate responsibility will be relevant and effective when there are adequate background conditions to enable workers to stand up for their rights—both as individuals and as a collective—and to work with consumers and other individuals and groups to ensure a fairer and more just society for all.

²⁴ Focus on Labour Exploitation, *Briefing: Public Procurement to Prevent Human Trafficking and Forced Labor*, September 2018. Available at: <https://tinyurl.com/y5hde3qa>

²⁵ Genevieve LeBaron, Penelope Kyritsis, Cameron Thibos & Neil Howard, *Confronting Root Causes: Forced Labour in Global Supply Chains* (Open Democracy Report, 2019); LEBARON, MODERN SLAVERY, *supra* note 12.

²⁶ See chapters 3 and 4 of this Alternative Plan.

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www.trafflab.org, trafflabor@gmail.com

Tel Aviv University