Protecting Indonesian migrant workers, with special reference to private agencies and complaints procedures

by
W. R. Böhning
and
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INTERNATIONAL LABOUR OFFICE
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Foreword

This is a working paper of the ILO’s South-East Asia and the Pacific Multidisciplinary Advisory Team (SEAPAT). SEAPAT’s functions include: (i) advisory services to governments, employers’ and workers’ organizations on policies and technical issues within the ILO mandate; (ii) assistance in the preparation and updating of country objectives and country strategies in the labour field; (iii) assistance to constituents, notably ministries of labour, in the design, implementation, monitoring and evaluation of programmes and projects; and (iv) collection and dissemination of information and facilitating exchange of national experiences through analytical studies, reports, etc.

The Indonesian Ministry of Manpower (DEPNAKER) expressed interest in ILO assistance in the elaboration of a more protection-oriented strategy regarding the country’s citizens working abroad. I prepared a number of presentation for a first Workshop on the scope and limits of policy options on migration, which was held in Jakarta, 1-2 September 1998, with the participation of representatives of various ministries, workers’ organizations, private employment agencies and non-governmental organizations trying to help migrant workers - the “tripartite-plus” composition as it came to be called. One of the suggestions of this first Workshop was to convene a second Workshop on overseas employment institutions, to elucidate the field of operation of private agencies and different levels of complaint procedures for migrant workers.

This second Workshop took place in Jakarta, 24-26 November 1998, again in a tripartite-plus framework. The ILO input papers that were prepared for the November Workshop - by my Geneva-based colleague Carmelo Noriel on complaint procedures and by myself on private employment agencies - are herewith made available to the public at large. They may be of interest to Indonesians who have not been able to participate in the Workshop as well as to other migrant-sending countries which are still at a relatively low level of institutional or legislative development in this field.

At the end of this Working Paper can be found the report on the November 1998 Workshop as adopted by participants.

W. R. Böhning
Director
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December 1998
INTRODUCTION AND DEFINITIONS
by W. R. Böhning

1. In the headlong rush for growth - growth in the number of Indonesian migrant workers, growth in the savings they remit and growth in the economy - the protection of these workers and of their family members became a secondary consideration of little operational consequence. The Indonesian State neglected its primary function: to protect its citizens. The era of reformasi opens up the opportunity for redressing the balance.

2. What does protection mean in the context of international labour migration? The term refers to procedural and substantive principles to be enunciated in reformasi-inspired legislation (laws, regulations, court decisions, etc.) that will set out how the State and natural or legal persons should:

   (a) treat a migrant worker, not as a commodity but as a human being, from the moment the worker starts looking for employment abroad, while he or she stays there and until after the return to Indonesia;

   (b) prevent a migrant worker and members of his or her family from falling into the hands of unscrupulous officials, private employment agencies or employers; and

   (c) enable a migrant worker to seek redress for acts or omissions by the State, private employment agencies or employers which the migrant worker claims to be prejudicial in financial or other terms to himself or herself or to family members.

3. The goal of protection should not be overridden by a State-induced search for - or by the State’s toleration of private employment agencies’ activities resulting in - the placement of the largest number of Indonesian citizens abroad at the lowest cost to employers. Such an approach would be misguided in that it would perpetuate the mistreatment and abuse of migrant workers in unmanageable proportions. It would undermine the State’s efforts to protect them. It would indefinitely label Indonesians in the eyes of foreigners as easy to exploit, docile and disposable without consideration of dignity. It would continue to incur much unhappiness and sufferance on the part of both individual migrants and the members of their family staying behind in Indonesia or having joined them abroad. And yet it would not earn the country more remittances than a protection-inspired policy approach which vigorously combats mistreatment and abuse.

4. “Mistreatment” occurs where an Indonesian official or a private employment agency or the employer knowingly subjects an Indonesian migrant worker - prior to departure, during the journey, on arrival, during the period of employment or stay abroad or upon return - to conditions that contravene
(a) Indonesian legislation which is reformasi-inspired;
(b) laws or regulations of the country in which the migrant stays; or
(c) relevant bilateral or multilateral instruments or agreements.¹

5. "Abuse" exists where mistreatment incurs very serious pecuniary or other consequences; migrants are specifically subjected to unacceptably harsh working and living conditions or are faced with dangers to their personal security or life; workers have transfers of earnings imposed on them without their voluntary consent; candidates for migration are enticed into employment under false pretences; workers suffer degrading treatment or women are physically or emotionally abused or forced into prostitution; workers are made to sign employment contracts by go-between who know that the contracts will generally not be honoured upon commencement of employment; migrants have their passports or other identity documents confiscated; workers are dismissed or blacklisted when they join or establish workers’ organizations; they suffer deductions from wages without their voluntary consent which they can recuperate only if they return to their country of origin; etc.²

6. The State should not only adopt a policy to protect migrant workers but should also create and maintain an enabling environment so that Indonesians can obtain well-remunerated employment abroad and voluntarily remit large portions of their earnings.

7. The term "enabling environment" refers to measures to be taken by the State and private employment agencies to:

(a) help Indonesian to decide, on the basis of information that indicates the advantages, difficulties and dangers of overseas employment, whether to move, how to move and what kind of employment to accept or refuse;

(b) make it physically easy and financially cheap for Indonesians to journey from their household/family to staging points in the country and from there to worksites abroad as well as to return to their household/family unless private agents or employers undertake these transport obligations and carry them out at no cost to the workers;

(c) render transparent and free of charges or costs the migrant workers’ decision-making process regarding the choices of private recruitment agencies, type and conditions of employment, terms of employment contracts, social security or other welfare obligations and benefits, etc.;

¹ This definition is modelled on the ILO’s Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Article 2. ILO Conventions and Recommendations are generically referred to as international labour standards or “standards” for short. This Convention will henceforth be referred to as "Convention No. 143”.

² Taken from the notion of “exploitation” in ILO Governing Body: Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration (Geneva, 21-25 April 1997), Annex III, Paragraph 1.2 (GB.270/5). This report will henceforth be referred to as “ILO Meeting of Experts”.
establish the requisite administrative machinery and engage or train the necessary personnel to discharge the aforementioned functions effectively and efficiently.

8. Private employment agencies play a key role in contemporary international labour migration in that they, rather than the State, find employment - with good or bad conditions - for workers. The term "private employment agency" refers to any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

(b) services consisting of employing workers with a view to making them available to a third party;

(c) other services relating to job seeking, determined by the competent authority of the State after consulting the most representative employers’ and workers’ organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.\(^4\)

9. Recruitment means to link up workers wishing to be employed abroad with jobs offered by employers.

10. The term "migrant worker" refers to a natural Indonesian person who is to be engaged, is engaged or has been engaged in a remunerated activity or employment relationship in a State of which he or she is not a national.\(^5\)

11. An "employer" is a non-Indonesian natural person or a non-Indonesian legal person or enterprise whose headquarters are located outside the State of Indonesia and who seeks to engage, has engaged or has engaged a migrant worker in a remunerated activity under a written or oral contract of employment.

12. The form of overseas employment whereby an Indonesian enterprise carries out abroad a particular assignment, project, etc., and to that end moves both managerial personnel and Indonesian labourers to the foreign country concerned, is insufficiently important in empirical terms at present to warrant the consideration of this Workshop.

\(^3\) Sometimes abbreviated hereunder to "private agency" or "agency"

\(^4\) The preceding is modelled on the definition contained in the ILO’s Private Employment Agencies Convention, 1997 (No. 181), Article 1 (l). This standard will henceforth be referred to as "Convention No. 181".

\(^5\) Modelled on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, Article 2 (1). This Convention will henceforth be referred to as "UN Convention".
13. It should be the State’s aim to promote the existence of effective and socially responsible private employment agencies and to combat agencies which mistreat or abuse migrant workers or members of their family. To these ends, it is crucial to determine with precision the boundaries within which agencies can legitimately operate, the obligations they have to assume towards the State as well as the worker and the sanctions they may be subjected to. This is the first subject to be dealt with at the present Workshop.

14. Migrant workers tend to be vulnerable where they lack education, information, financial means or fall into the hands of officials, private agencies or employers who mistreat or abuse them; or because they cannot defend themselves abroad as easily as local workers can. Therefore, it is of major importance to accord migrant workers the possibility of claiming what is due to them under Indonesian legislation, the employment contract they have entered into or under international law. Individual complaint procedures are, hence, the second subject matter of the present Workshop.

First Subject:

SCOPE AND LIMITS OF PRIVATE AGENCIES’ RESPONSIBILITIES AND OBLIGATIONS

by W. R. Bühning

Theme (i)

Which services are appropriate for private agencies?

What are the issues?

15. Throughout the world, private employment agencies have grown in numbers and importance. In South and South-East Asia, they have progressively taken over the movement of jobseekers across borders. Governments feel constrained to operate on other countries’ territories, whereas private agents are free to contact anybody for commercial purposes; and Governments realized that private agencies were more effective and efficient than they themselves were at linking up their workers with foreign employment opportunities. Therefore, Governments tolerated or actively encouraged private employment agencies’ activities. Some Governments went as far as to place on them responsibilities which may be judged to go beyond the proper scope and role of recruitment and which gave free reign to kleptocratic tendencies, graft and corruption. Indonesia was perhaps the most notable case in this respect. Of this development, migrant workers were simultaneously beneficiaries - in that they found jobs - and losers - in that too many of them were badly treated. It is time to maximize their protection and to minimize the mistreatment and abuses to which the system has given rise. To these ends, two questions have been placed at the heart of this session of the Workshop:

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The advice of my colleagues Manolo Abella and Gopal Bhattacharya is gratefully acknowledged.
(i) is it justifiable to lay down in legislation that employment agencies should, in addition to recruitment, carry out related services because there are no practical, effective or efficient alternatives?

(ii) Can migrant workers be charged fees or costs for recruitment or related services?

Is recruitment the only service private employment agencies should discharge?

16. The Indonesian legislation currently in force lists, in the context of charges to be imposed on migrant workers (KEP.44/MEN/1994), the following services - which Indonesian agencies presumably can engage in legitimately (the terms hereunder are those of the English translation published in Business News):

(a) recruitment service;
(b) identity papers;
(c) health test;
(d) visa expense;
(e) accommodation expense prior to departing abroad;
(f) transportation expense.

17. Furthermore, PER-02/MEN/1994, Article 14, oblige private employment agencies to train migrant workers, to carry out skill testing and to offer pre-departure orientation. KEP.44/MEN/1994 adds “training in communications ability using a foreign language” (Article 25(b)) and mentions “health examining” (Article 28). Last but not least, the Minister of Manpower issued a Decree 29 May 1998 stipulating that “every Indonesian manpower stationed abroad shall be obligated to join the protection insurance program” and that “the premium (of the protection insurance program) shall be paid by the user of the Indonesian manpower or the Agency for the Implementation of Stationing” (Article 1(2), emphasis added).

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7 Decree of the Minister of Manpower containing The Implementation Directive for the Recruitment of Workers Domestically and Overseas, No. KEP.44/MEN/1994, 17 February 1994, Article 47(2)(a) and (b). The Decree will henceforth be referred to as “KEP.44/MEN/1994”.

In the Regulation of the Minister of Manpower concerned with The Recruitment of Workers Domestically and Overseas, No. PER-02/MEN/1994, 17 February 1994, Articles 11, 36(2) and (3), Indonesian policy makers have anchored the principle that Indonesian migrant workers shall be subject to fees and charges. The Regulation will henceforth be referred to as “PER-02/MEN/1994”.


18. Points 16 and 17 contain a formidable but somewhat vague list. The first question that needs to be answered is whether private recruitment agencies should be permitted or obliged by legislation to shoulder responsibilities apart from recruitment, i.e. whether in future they should be expected to take on some or all of these responsibilities? Or others? Would they want to do that? On which of the following could there be “tripartite plus” agreement?

(a) The provision of information to a candidate for foreign employment at the time when he or she manifests an interest in jobs abroad or is about to depart?

(b) The arrangement of individual or communal accommodation in Indonesia for a candidate for foreign employment between the time the migrant leaves his or her household/family and before departure abroad?

(c) The arrangement of private or public transport in Indonesia for a candidate for foreign employment, be it between his or her household/family and the point where documents are processed or the point from which he or she departs or crosses the border to another country, or be it upon return from abroad between the point of arrival and the migrant’s household/family?

(d) The arrangement of transportation for a migrant worker between the point of departure or border crossing in Indonesia and the location abroad where he or she is to work and stay, even where this arrangement would be paid for by the foreign employer but charged directly to the migrant worker or to his or her private employment agency?

(e) The provision of vocational or technical training to a candidate for employment abroad between the time private agencies have identified a job for him or her and the time of departure?

(f) The familiarization of a candidate for employment abroad with foreign languages between the time private agencies have identified a job for him or her and the time of departure?

(g) The facilitation of the transfer of a migrant worker’s earnings between the location abroad where he or she stays and his or her household/family in Indonesia, designated bank account or other specified destination?

(h) The payment on behalf of, or the transfer from, a migrant worker abroad to Indonesian private or public institutions of such social security contributions as the worker has voluntarily agreed to pay at defined intervals or upon commencement of the employment relationship?

(i) Is any other subject matter relevant?
19. Assuming there was agreement at the present Workshop among the Government, the most representative employers’ and workers’ organizations and Indonesian NGOs that private employment agencies in the country could justifiably engage not only in recruitment but also in certain selected related services, what needs to be done in that event? Several consideration come to mind immediately. The first is whether the scope, limits and legitimate functions of private employment agencies should - in the interest of promoting good governance and of promoting responsible and respected agencies - be laid down and circumscribed clearly in a future Indonesian law.

20. Assuming that certain of the services listed in point 18 should not be performed by private employment agencies, one would also have to consider who or which private or public institutions should could carry them out. And how.

21. The final but crucial issue is whether a migrant worker could be charged the costs of or fees for recruitment or for any other legitimate service or function provided by private employment agencies or by anybody else.

ILO's views

22. Until 1997, the International Labour Organization favoured public and gratuitous employment services and discouraged, or asked to supervise, fee-charging private agencies. In June of that year, the International Labour Conference adopted the Private Employment Agencies Convention, 1997 (No. 181), supplemented by the Private Employment Agencies Recommendation, 1997 (No. 188), which recognized the legitimacy of bona fide private agencies carrying out their tasks, side by side and in cooperation with public employment services. Furthermore, a Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration in April 1997 elaborated, inter alia, Guidelines on Special Protective Measures for Migrant Workers Recruited by Private Agents, which were formally endorsed by the Governing Body of the ILO in November 1997.

How to define employment agencies and their services

23. Convention No. 181 defines its object in Article 1(1) as follows (emphasis added):

   * Henceforth referred to as “Recommendation No. 188”.

   * See footnote 2 above. These ILO Guidelines cover the following subjects: means to promote orderly migration (Paragraph 2), controlling recruitment fraud and malpractices (Paragraph 3), self-regulation by private agencies (Paragraph 4), promotion of direct recruitment and simplification of procedures (Paragraph 5), and cooperation in control of illegal recruitment and trafficking of labour migrants (Paragraph 6). The ILO’s background analysis of these questions is contained in the Discussion paper Protecting the most vulnerable of today’s workers, MEIM/1997 (Geneva, ILO, 1997).

   * Point 23 contains the official and complete ILO definition which was abbreviated in point 8 above.
... the term "private employment agency" means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person ... which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers' and workers' organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

24. Article 1(1)(c) suggests that, of the recruitment-related services listed in point 18 above, the provision of information could justifiably be undertaken by private employment agencies, provided this was determined by the appropriate State body after consultation with the most representative employers' and workers' organizations.

25. The open-ended introductory term "such as" in Article 1(1)(c), in conjunction with the Article's consultation proviso, further suggests that other recruitment-related services may be assigned to private employment agencies provided the Government so determines after discussing the matter with the social partners.

26. The form in which this "determination" is to occur is indicated by Convention No. 181 in Article 14(1) as follows:

The provision of this Convention shall be applied by means of laws or regulations or by any other means consistent with national practice, such as court decisions, arbitration awards or collective agreements.

Indonesia's current quest for good governance and the establishment of the rule of law would seem to call for the "determination" of private employment agencies' responsibilities to be embodied in a parliamentary law.

Charging fees or costs to migrant workers?

27. As regards the question of fees, costs or charges, Convention No. 181 sets forth the following in Article 7 (emphasis added):

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1 Convention No. 181 applies to all categories of workers and all branches of economic activity but does not apply to the recruitment and placement of seafarers (Article 2(2)), for whom the relevant ILO standard is the Recruitment and Placement of Seafarers Convention (Revised), 1996 (No. 179).
1. Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.

2. In the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provisions of paragraph 1 above in respect of certain categories of workers, as well as specified types of services provided by private employment agencies.

28. Three points are worth making clear in relation to Article 7 of ILO Convention No. 181:

(a) States, in becoming a member of the International Labour Organization, accept the stipulations contained in the ILO’s Constitution, including the principle that “labour is not a commodity” which was formally incorporated into the Constitution through the 1944 Declaration of Philadelphia. This principle has always been interpreted to mean, inter alia, that workers should not have to pay for finding a job through a public or private agency;

(b) where workers in general and migrants in particular are required to comply with certain formalities, such as possessing valid identity cards, passports or medical certificates, or where they have to undergo medical examinations or skill testing, they could conceivably be requested to bear costs or fees of this kind, provided non-workers or non-migrants would normally be subject to the same costs or fees and the Government, hospitals, etc., were unwilling to make an exception for migrant workers;

(c) the second paragraph of Article 7, although it should not be viewed as a general “escape clause”, does provide the possibility, after tripartite consultations, of permitting limited fees or costs to be charged to migrant workers. However, several provisos have to be respected. The exceptions to the rule of “no fees or costs to workers”

(i) must be in the interest of the workers concerned. Put differently, the imposition of a fee or cost should not serve the interest of private agencies, employers or somebody else;

(ii) must be for specified types of services provided by private employment services themselves. This would appear to rule out, among those listed in point 18 above, such services as do not set out to match specific offers of and applications for employment; and,

(iii) must be agreed upon in tripartite consultation.

Procedural suggestions

29. The present Workshop affords Indonesian policy makers the opportunity to determine the scope and limits of private employment agencies’ responsibilities, and to do so in the light of
internationally agreed principles and in a "tripartism plus" framework that brings together competent State bodies, the most representative organizations of employers and workers as well as relevant NGOs. To facilitate discussions it is proposed

first to consider which, if any, of the recruitment-related services in point 18 above could legitimately be part of the domain of private employment agencies' activities. Each of them would have to be defined unambiguously in preparation of inclusion in future Indonesian legislation. It should be understood that no others could lawfully be undertaken by private agencies: they would have to be the responsibility of other private or public institutions, procedures or mechanisms to be identified and, where necessary, appropriately funded;

then to consider, in the light of points 27-28, the issue of charging fees or costs to migrant workers rather than to employers or Government;

and in the event that time is too short at this Workshop, as soon as possible thereafter to discuss the matter exhaustively in such a truly representative tripartite body within the framework of which effective consultations could be promoted between the Government and employers' and workers' organizations on the preparation and implementation of labour legislation as recommended by the ILO Direct Contacts Mission to Indonesia (24-28 August 1998). Given the particular situation of Indonesians employed outside Indonesian jurisdiction, who tend to turn to NGOs rather than trade unions to defend their interests, the consultative machinery concerned with migrant workers legislation ought to be established by DEPNAKER according to the "tripartism plus" formula already recommended by the ILO Technical Advisory Mission following the Workshop on Scope and Limits of Policy Options on Migration, Jakarta, 1-2 September 1998.¹³

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**Theme (ii)**

**What constitutes illegal acts or misconduct on the part of private agencies?**

**What are the issues?**

30. Individual private employment agencies conduct themselves lawfully and properly—where they comply with the licensing rules applicable to them, act within existing legislation and adhere to such Codes of Ethics/Practice/Conduct as the professional association to which they belong may have established. Not doing so is illegal or amounts to misconduct. Illegal acts or misconduct can occur deliberately or unknowingly - in the latter case, there is a problem of lack of information and awareness that ought to be remedied swiftly. Illegal acts or misconduct may be a one time event or an occasional happening, or they may amount to a pattern or practice, calling for graduated responses by the relevant institution.

What obligations - of a positive or negative nature - should be imposed on private agencies by law?

31. Should the obligations of how private employment agencies are to conduct recruitment and related services as a minimum include:

(a) the signing of a written contract of employment before departure from Indonesia by at least the migrant and his or her employer where the agency did not itself become a party to the employment relationship?\(^{14}\)

(b) the prohibition to supply or use child labour?\(^{15}\)

(c) the prohibition knowingly to recruit, place or employ a migrant worker in a job involving unacceptable hazards or risks or where he or she may be subjected to abuse or discriminatory treatment of any kind?\(^{16}\)

(d) the promotion of equality of opportunity and treatment in access to foreign employment and to particular occupations, i.e. not to discriminate among migrant workers on the basis of race, colour, sex, religion, political opinion, national extraction, social origin or any other form of discrimination covered by Indonesian law and practice?\(^{17}\)

(e) the principle never to deny a migrant worker the right to freedom of association and the right to bargain collectively?\(^{18}\)

\(^{14}\) This question reflects the wording of Paragraph 5 of Recommendation No. 188. If the agency itself became a party to the employment contract, as is foreseen under, for example, the Philippines’ standard employment contract, this could give rise to what that country’s Migrant Workers and Overseas Filipinos Act of 1995, No. 8042, calls “joint and several” liability in its section 10. In PER-02/MEN/1994, Articles 1(o), 12(h) and 26(c), the principle that there should be a signed employment contract, and that the contract should be adhered to, has been mentioned indirectly. KEP.44/MEN/1994 touches on employment contracts in Article 49(2).

In the Jakarta Workshop held 1-2 September 1998 an advanced version of a contemporary model employment contract was presented in Chart 7. This sample represents the standard employment contract used for ordinary migrant workers by the Philippines Overseas Employment Administration.

\(^{15}\) This question reflects the wording of Article 9 of Convention No. 181.

\(^{16}\) This question reflects the wording of Paragraph 8(a) of Recommendation No. 188.

\(^{17}\) This question reflects the wording of Article 5 of Convention No. 181 and of the ILO’s Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

\(^{18}\) This question reflects the wording of Article 4 of Convention No. 181, of Paragraph 3(1)(h) of the ILO Guidelines and of the ILO’s Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which Indonesia ratified by presidential decree in June 1998.
the interdiction to withhold or confiscate, albeit temporarily, a migrant worker’s passport or travel documents?¹⁹

the interdiction to engage in or tolerate contract substitution, i.e. to force a migrant worker upon arrival in the country where he or she has been sent to work to accept a new contract of employment with conditions inferior to those contained in the contract which he or she signed prior to departure?²⁰

the principle that agencies should not advertise or solicit applications for workplaces that, in reality, do not exist?²¹

the interdiction of unfair advertising practices or of providing misleading or false information to a migrant worker on the nature and terms of conditions of employment or to an employer on the qualifications of the jobseeker?²²

the prohibition of using forged travel documents or misrepresenting a migrant worker’s personal details?²³

the interdiction to charge fees or costs in excess of those determined by the Government after tripartite consultation.

Self-regulation of agencies

32. Abstracting from the fact that there exists the Indonesian Manpower Service Association (APJATT), should the Government politically encourage or legislatively prescribe the establishment of one or several professional associations of private employment agencies to foster the performance of reliable and responsible services by individual private agencies?²⁴

¹⁹ This question reflects the wording of Paragraph 3(1)(g) of the ILO Guidelines.

²⁰ This question reflects the wording of Paragraph 3(1)(f) of the ILO Guidelines. The purpose of this interdiction would not by any means be to deprive Indonesians of jobs but to induce private employment agencies to avoid foreign agencies or employers offering bad jobs and, instead, to look for counterparts offering good jobs and adherence to contract stipulations.

²¹ This question reflects the wording of Paragraph 3(1)(a) of the ILO Guidelines.

²² This question reflects the wording of Paragraph 7 of Recommendation No. 188 and of Paragraph 3(1)(b) of the ILO Guidelines.

²³ This question reflects the wording of Paragraph 3(1)(c) of the ILO Guidelines.

²⁴ Among major migrant-sending countries, the Government of Bangladesh has accorded itself the power to “make rules for” the “formation of an association of recruiting agents and framing of (a) Code of Conduct to be observed by recruiting agents”, see The Emigration Ordinance, 1982, sec. 19(2)(m).
33. Should the Government, the most representative organizations of workers and relevant NGOs have a say in the form and contents of any self-regulatory instrument that professional associations of employment agencies ought to elaborate?

34. Should individual private agencies, once licensed, be required to become members of such a professional associations within a reasonable period of time?

ILO's views

Principles to guide licensing policies

35. For the same reasons for which a State licenses, for example, doctors or architects before they are allowed to offer their services, private recruitment agencies should prove that they are competent to engage in recruitment operations involving cross-border labour migrants and that they are capable of assuming the consequences of failed operations or misconduct. Indonesia has established certain rules to those ends, notably in Articles 1, 6 and 42 of PER-02/MEN/1994 and Articles 1, 6 and 8 to 17 of KEP.44/MEN/1994. ILO believes that:

(a) the existing rules ought to be revised at least in part in order to reflect strict principles of competence and financial responsibility;

(b) the Indonesian system of licensing could usefully draw a distinction between general or fundamental criteria of a long-term nature, which should preferably be laid down in a law, and more specific or potentially variable criteria, which might enter into force through ministerial regulation or decree, which could be revised readily by the same means if and when appropriate;

(c) the transgression of the rules of licensing should be considered as illegal or misconduct and be sanctioned in line with the gravity of the transgression, “including prohibition of those private employment agencies which engage in fraudulent practices and abuses”;

(d) public officials should not be permitted to form, or to form part of, a private employment agency, nor should their immediate descendants or ascendants.

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23 The ILO's views on this question are that professional associations are autonomous organizations which are free to decide what to do and how to do it, including whether or not to consult with outsiders on their internal affairs. For further details, see below points 45-46.

26 "Licensing" is meant to be a generic term. The words "certification", "accreditation", "registration", "authorization", "incorporation", "authentication" have the same meaning and are used interchangeably here.

27 The quotation is from Article 8(2) of Convention No. 181.
Which fundamental licensing principles should be laid down in law?28

36. Irrespective of whether the private employment agency would be a natural or legal person, an individual proprietor, a partnership or a corporation, the agency:

(a) should be licensed, be it under a domestic commercial or trading law or by such special system of certification as the Minister of Manpower may be responsible for. An individual, travel agent, businessman, employer, entrepreneur or any other entity active in Indonesia who or which engages without authorization in recruitment or related services, whether on a fee-charging or gratuitous basis, should be prevented from doing so and, if necessary, sanctioned administratively or juridically29;

(b) where the agency is not an Indonesian citizen, the foreign agent, employer, etc., should have his or her credentials reviewed and authenticated, be it by Indonesia’s diplomatic authorities in the country where the employment of Indonesians is envisaged or be it by the competent domestic authority to which reference was made in the preceding paragraph (a). Foreign agencies, employers, etc., should be allowed to operate on Indonesian territory provided they fulfill the licensing requirements stipulated in Indonesian law or if their credentials, although different in nature, were judged to be equivalent to Indonesian requirements;

(c) should be composed of officials without a criminal record and free from severe civil condemnations or recruitment violations;

(d) should demonstrate a managerial capability, i.e. competence in organizing and managing business-like operations, including in their range both domestic contacts with governmental authorities in Indonesia and international contacts with private or public sector representatives. To qualify for a license, an agency ought to possess office equipment and facilities, notably electronic communications equipment;

(e) should provide proof of competence both in identifying or selecting qualified Indonesians for jobs and in identifying overseas employment opportunities or in negotiating relevant contracts with foreigners;

(f) should document its financial capability, i.e. the possession of a certain minimum amount of paid-up capital or equivalent assets. This requirement is meant to ensure acquisition of the necessary logistics and disposition of the requisite financial resources:

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29 Where members of a migrant worker’s family or friends help a migrant to find a job abroad and to move there free of charge, this need not be considered to constitute an illegal act and, in any case, cannot be repressed effectively.
(i) to support international operations,

(ii) to sustain possible claims for compensation by Indonesian workers or foreign employers or other business partners, and

(iii) in the first instance, to satisfy the legal requirements for cash-bond deposits, surety bonds or such other minimum reserve stipulations or financial guarantees as may be a condition of obtaining a license and carrying out recruitment activities;³⁰

(g) should not charge a migrant worker any fees or costs in excess of those that may be determined by the Government after consultations with the most representative organizations of employers and workers;³¹ and

(h) should be subject to appropriate administrative, civil and penal sanctions, including imprisonment. Both the actual procedure or mechanisms of imposing penalties and the recourse or appeal procedures should be spelt out in sufficient detail.³²

37. Private agencies should be obliged by law to respect the obligations indicated in point 31 above.

Other matters to be dealt with by other instruments?³³

38. Policy makers could leave to lower-status instruments:

(a) the administrative or legal procedure for incorporating an Indonesian natural or moral person as a private employment agency;

³⁰ The current Indonesian principles, according to Article 6(3) of PER-02/MEN/1994 and Article 10(2) of KEP.44/MEN/1994, which foresee a minimum paid-up capital of Rp 375,000,000 for Private agencies operating both domestically and internationally and which impose a deposit requirement of 20 per cent, i.e. Rp 75,000,000, appear adequate in terms of the percentage involved but would seem to need updating as far as the absolute amount is concerned in light of the fall of the value of the Rupiah due to domestic inflation and international depreciation.

³¹ See above points 27-28 for the ILO’s views on this matter.

³² The subject of sanctions will be taken up in detail under theme (iii) below.

³³ Recommendation No. 188 states: “Where appropriate, national laws and regulations applicable to private employment agencies should be supplemented by technical standards, guidelines, codes of ethics, self-regulatory mechanisms or other means consistent with national practice.”
(b) the administrative or diplomatic procedure for authenticating non-Indonesian agencies, employers, etc., who seek authorization to carry out - alone or in conjunction with Indonesian private agencies - recruitment operations in Indonesia, including the open-ended specification of equivalence criteria recognizing the legitimacy of their operations;

(c) the definition and administrative application of criteria of managerial competence as well as the open-ended specification of documentary evidence;\(^{34}\)

(d) the definition and administrative application of criteria of recruitment capacity, including the open-ended specification of qualifications expected of officers and other staff of a private employment agency;\(^{35}\)

(e) the definition and administrative application of criteria of financial capability, including the open-ended specification of documentary proof required, such as statements of assets and liabilities or income-tax returns, as well as a specification or definition of:

(i) the absolute amount or the proportion of capital or assets to be blocked as financial guarantee, and

(ii) the administrative or financial procedure involved, including recourse mechanisms or appeal procedures.\(^{36}\)

Contents of relevant associations’ Codes of Ethics/Practice/Conduct

39. As a minimum, Codes of Ethics/Practice/Conduct should include stipulations such as:\(^{37}\)

(a) minimum standards for the professionalization of the services of private agencies, including specifications regarding minimum qualifications of their personnel and managers;\(^{38}\)

(b) the full and unambiguous disclosure of all charges and terms of business to clients;

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\(^{34}\) See above point 36(d).

\(^{35}\) See above point 36(e).

\(^{36}\) Recourse mechanisms and appeals procedures, given their fundamental role in administrative and juridical life, should figure in the highest status legal instrument used in Indonesia, i.e. a law. See above point 36(f).

\(^{37}\) The following is taken from Paragraph 4(1) of the ILO Guidelines and was presented in Chart 4 of the Workshop held in Jakarta, 1-2 September 1998.

\(^{38}\) Recommendation No. 188 specifies that “private employment agencies should have properly qualified and trained staff” (Paragraph 14).
the principle that private agencies must obtain from the employer before advertising positions and in as much detail as possible, all information pertaining to the job, including specific functions and responsibilities, wages, salaries and other benefits, working conditions, travel and accommodation arrangements;

(d) the principle that private agencies should not knowingly recruit workers for jobs involving undue hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind;

(e) the principle that migrant workers are informed, as far as possible in their mother tongue or in a language with which they are familiar, of the terms and conditions of employment;

(f) refraining from bidding down wages of migrant workers;

(g) maintaining a register of all migrant workers recruited or placed through them, to be available for inspection by the competent governmental authority provided that information so obtained is limited to matters directly concerned with recruitment and that in all instances the privacy of the workers and their families is respected.

Procedural suggestions

40. The present Workshop aims to promote sound principles in the field of the recruitment of Indonesian migrant workers. The Government, the social partners and NGOs should now draw on the principles put forward in the preceding points and take them further by specification, elaboration and addition. To facilitate discussions it is proposed

first to review the licensing principles to be incorporated in law which are set out in point 36 above;

second to examine the minimum obligations of private employment agencies to be spelt in law which are set out in point 31 above;

third to go through the list of other matters that could be embodied in instruments which do not have the same status as law and which are set out in point 38 above;

fourth to consider whether a “tripartism plus” group such as the one convened for the purposes of this Workshop should encourage the elaboration, within a reasonable period of time, of Codes of Ethics/Practice/Conduct by Indonesian professional associations of private employment agencies;

and in the event that time is too short at this Workshop, as soon as possible thereafter to discuss the matter exhaustively in such a truly representative tripartite body within the framework of which effective consultations could be promoted between the Government and employers’ and workers’ organizations on the preparation
and implementation of labour legislation as recommended by the ILO Direct Contacts Mission to Indonesia (24-28 August 1998). Given the particular situation of Indonesians employed outside Indonesian jurisdiction, who tend to turn to NGOs rather than trade unions to defend their interests, the consultative machinery concerned with migrant workers legislation ought to be established by DEPNAKER according to the "tripartism plus" formula already recommended by the ILO Technical Advisory Mission following the Workshop on Scope and Limits of Policy Options on Migration, Jakarta, 1-2 September 1998."

Theme (iii)
Sanctioning unlawfulness or misconduct?

What are the issues?

41. Despite the many stipulations in Indonesia's 1994 ministerial regulation and decree concerning private employment agencies, which include the possibility of sanctioning misconduct, it seems to have appeared secondary to policy makers in past years to ensure soundness of operations and the protection of workers. Where unsavoury practices came to light, informal ad hoc approaches were used, including intervention at ministerial level. Unlawfulness and misconduct tended to be hushed up; and migrant workers tended to lose out. The era of reformasi affords the opportunity to apply rules and procedures that will effectively combat irregularities. Theme (iii) therefore, puts forward ideas that involve the threat or imposition of sanctions, including financial compensation to migrants who are victims of fraudulent or abusive treatment or practices.

Why sanctions?

42. The purposes of sanctions are to:

(a) induce private employment agencies to pursue modes of operation that are not only beneficial to them but also beyond reproach in terms of future protection-oriented Indonesian legislation;

(b) redress wrongs that, in future, may be suffered by migrants through appropriate compensation;

(c) weed out agencies which engage in a pattern or practice of misconduct⁴⁶.


⁴⁶ Recommendation No. 188 states: "Members (of the ILO) should adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by private employment agencies."
What is meant by sanctions?

43. Sanctions can take many forms and intensities. Sanctions are bound to reflect Indonesian basic commercial laws and judicial practices as well as the peculiarities of its history and customs provided these peculiarities do not run counter to sound principles of accountable entrepreneurship and the protection of migrants. Among the possible forms of sanctions one might distinguish:

(a) the supervision or monitoring of agencies’ activities to check whether an individual agency or a sample of agencies adhere to Indonesian legislation or Codes of Ethics/Practice/Conduct;

(b) the investigation of

(i) unlawfulness that comes to light in the course of supervision and monitoring or of the probing of recruitment operations performed by unlicensed agencies and which come to the attention of the State through migrant workers, NGOs, reports in the media, etc.; and

(ii) allegations of irregularities or breach of obligations lodged by individual migrant workers, the most representative organizations of migrant worker or NGOs to which migrant workers address themselves;

(c) the application of administrative sanctions. These might include warnings, reprimands, financial or existential penalties, such as when the license to operate is suspended temporarily or cancelled forever;

(d) the application of civil or labour court procedures that may result in convictions following allegations of misconduct lodged with Indonesian courts by a migrant worker, his or her family members, a migrant workers’ organization, an NGO, DEPNAKER or a State prosecutor; or

(e) the application of penal court procedures where criminal activities or practices analogous to criminal activities are involved. As human beings are the object of the economic activities in question, i.e. recruitment, the scope of what constitutes criminal activities ought to be wider than is normally the case for commercial activities. For instance, illegal recruitment could well be made subject to criminal sanctions compared with unauthorized car repair services.

These measures may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices” (Paragraph 4).
Who is to sanction?

44. The institution and procedure involved depends on the form of the sanction, its substance and severity. For example, as regards

(a) *supervision or monitoring*, the State has a primary role to play in terms of seeing to it that licensing principles\(^{41}\) and substantive obligations\(^{42}\) are fully respected by the employment agencies operating under the auspices of the law. Similarly, the existing [professional associations of agencies](#), such as APJATI, should see to it that their future Codes of Ethics/Practice/Conduct are dutifully respected;

(b) *investigations*, the State should give itself the power to carry out investigations either by actually examining a matter or by referring it - as, for example, in the case of a complaint lodged with DEPNAKER - to the country’s civil, labour or penal courts. The [professional associations of agencies](#), too, should proceed to the examination of individual agencies where information comes to their knowledge that Codes of Ethics/Practice/Conduct are not fully respected or where complaints are lodged with them. When complaints fall outside professional associations’ procedures, they should refer them to the State body or courts competent to deal with them;

(c) *administrative sanctions*, a State body such as DEPNAKER can by legislation be accorded the power to express warnings, reprimands, impose compensation or existential penalties *provided* that the subject matter is of an administrative or procedural nature and *provided* that an agency so sanctioned has an effective right to a higher-level appeal first within the State hierarchy and, in the final instance, before the country’s highest court. Existing [professional associations of private employment agencies](#) should likewise give themselves the power to express warnings, reprimands, impose compensation or propose to the Government to exclude individual natural or moral persons from membership. The State’s licensing body should, of course, satisfy itself that rules or obligations have been breached which warrant suspension or cancellation of the licence before the competent authority proceeds to imposing the appropriate sanction. In the case of professional associations’ procedures, there should also be a possibility for appeal within every association;

(d) *court procedures*, the general provisions of reformed Indonesian civil, labour and penal law apply, which should include the independence of judges, the rule of law and the principle that “justice delayed is justice denied” since it is crucially important to the generally poor migrant worker populations.

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\(^{41}\) See point 36 above.

\(^{42}\) See point 31 above.
The autonomy of professional associations of agencies

45. Professional associations of private recruitment agencies are a special form of employers' organization and as such are autonomous bodies. The State can call for their establishment and foresee by law that professional associations should exist. The law can formulate the injunction that such professional associations should, inter alia, aim to promote minimum standards of professionalization; and it can express the wish that Codes of Ethics/Practice/Conduct be established. The State, in consultation with the most representative organizations of workers, the professional associations themselves as well as with educational institutions and universities could, where necessary, elaborate and embody in legislation the technical minimum standards of the recruitment profession - in the same way as standards are laid down for doctors, architects or welders and painters, for example. But the State cannot enforce either the form or the contents of the self regulation of professional associations.

46. Private employment agencies' autonomy is protected by the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which Indonesia ratified by presidential decree in June 1998. The following stipulations are of special interest to professional association of employment agencies (Article 9 and the references to "workers" or "workers' organization" have been dropped in the interest of focusing on the object of this Workshop):

Article 1
Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2
... employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3
1. ... employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4
... employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5
... employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of ... employers.
Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of ... employers' organisations.

Article 7

The acquisition of legal personality by ... employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention ... employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 10

In this Convention the term "organisation" means any organisation of ... employers for furthering and defending the interests of ... employers.

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that ... employers may exercise freely the right to organise.

ILO's Views

State powers of supervision or monitoring

47. The State can legitimately request professional associations of employment agencies or, indeed, individual agencies to report at regular intervals the number of migrants processed, their characteristics, destinations and the like. The State, as was indicated during the 1-2 September Workshop in Jakarta, may wish to encourage the performance of successful recruitment, including the protection of migrant workers, by rewarding excellence with prices or with privileges - for example, when it comes to processing agencies' candidates for employment abroad. But supervision or monitoring would certainly always comprise the connotation of routine screening with a view to detecting mistreatment and abuses. This could be accomplished by sifting through the responsible State body's documentation, where

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43 The ILO Guidelines concerning the principles to be included in a Code of Ethics/Practice/Conduct call for the establishment and maintenance of a "register of all migrants recruited or placed through them, to be available for inspection by the competent (State) authority" (Paragraph 4(1)(h) (emphasis added), for full text see above point 39(g)).
allegations of misconduct should be recorded. The records would be readily available in respect of allegations against agencies lodged with that State body by migrant workers, their family members, workers’ organisations, NGOs and the State itself. They could be supplemented by information concerning allegations lodged with courts and by convictions pronounced.

State powers of investigation

48. What is under consideration here is the standard investigative procedure that the responsible State body - presumably DEPNAKER - may wish to see instituted in law in order to dispose of the formal authority to sanction illegal recruitment or erring agencies administratively or to submit a case to the country’s courts. DEPNAKER’s eyes and ears should be labour inspectors. Only a State prosecutor or higher authority should be entitled to use the police for the purpose of investigating suspected criminal activities. In normal circumstances, the State body should base its investigation on documentary evidence. It may, of course, call witnesses to testify. The results of the investigations, where mistreatment or abuses were found to exist, should give rise to the appropriate administrative sanction or to referral of the case to the civil, labour or criminal courts.

Administrative sanctions by the State

49. Where the State detects irregularities or unlawful behaviour on the part of a private employment agency, and where it is evident that the agency committed one or several of these acts deliberately or knowingly, the responsible State body should:

(a) address a warning to the agency if a migrant worker, his or her family members or a group of workers suffered no demonstrable or significant pecuniary or physical loss;

(b) in a repeat case, reprimand the agency and inform the professional association of employment agencies of which the concerned one is a member;

(c) attempt to settle a case of little financial consequence to the agency by way of mediation or arbitration, unless an amicable settlement is reached in the meantime by the contending parties and no question of violation of licensing rules or of other legal provisions is involved;

(d) rule in favour of financial compensation of the migrant worker(s) or family members for the pecuniary or physical loss they suffered. The agency should then pay compensation to the migrant(s) or family members directly. In case of opposition to the ruling by either the migrant(s) or the agency, the latter may nevertheless be required immediately to increase its deposit, surety bond or whatever financial guarantee
it had committed to obtain a license, by the contested amount of compensation in order to prevent the disappearance of fraudulent agencies.\textsuperscript{44}

(e) \textit{in case of grave mistreatment\textsuperscript{43} or abusive behaviour,\textsuperscript{46} consider whether to}

(i) \textit{permit the continued operation of the agency under specific conditions and for a limited period of time;}

(ii) \textit{temporarily suspend or entirely cancel the license of the agency and deprive its officials of the authority to engage in recruitment or related services for a certain time or for good;}

(iii) \textit{inform a State prosecutor with a view to instituting criminal proceedings, including the possibility of imprisonment.\textsuperscript{47}}

50. Where the agency in question exists in the form of a single proprietorship, no further considerations arise. Where it is a partnership, the State may have to consider whether all partners are concerned and the agency as such is to be closed or whether only certain partners are to be penalized. Distinctions of a similar kind may have to be drawn in the case of a corporation, especially where it pursues business activities other than recruitment. \textbf{The legal responsibility of a private employment agency should be limited in cases where individual officers should bear responsibility for unlawfulness fraud, etc.}

51. While the preceding points refer, in the perspective of protecting migrant workers, to irregularities that may be committed by private employment agencies, it is evident that \textbf{migrant workers can also contravene recruitment regulations} - for instance by breaches of discipline such as unjustified refusal to depart after finalization of all formalities - or \textbf{violate the conditions of employment contracts} which they have signed. Indonesian legislation should enable private agencies and the employers of migrants to lodge complaints before the responsible State body or civil or labour court and to seek redress, where appropriate. In the interest of balancing the rights and obligations of the main actors involved in overseas employment, the State should accord itself in future legislation the authority both to investigate suspected breaches of discipline or of employment contracts that may be committed by migrant workers and to impose appropriate sanctions. The forms and severity of such sanctions may follow the graduation suggested in the preceding point 49. This could include repatriation at the worker's expense and

\textsuperscript{44} The Philippine Overseas Employment Administration \textit{Rules and regulations governing overseas employment, as amended 1991} (Department of Labor and Employment, 1991), provide useful models and practices of interest to other countries.

\textsuperscript{43} See point 4 above for definition.

\textsuperscript{46} See point 5 above for definition.

\textsuperscript{47} The possibility of imprisonment is explicitly mentioned in Convention, No. 143.
the State's refusal to approve a migrant's future employment abroad where such approval is an indispensable part of the recruitment system. Appeals procedures should be available to migrants threatened by sanctions on the same lines as those indicated previously for agencies.

Courts

52. Where allegations of misconduct are submitted to Indonesian civil, labour or penal courts and a court declares the matter to be receivable, the normal judicial procedures apply and determine the course of events, including appeal of decisions.

Procedural suggestions

53. The present Workshop aims to promote sound principles of sanctioning violations of legislation and employment contract conditions in order to minimize mistreatment and abuses. The Government, the social partners and NGOs should now think through the criteria suggested in the preceding points and take them further by specification, elaboration and addition. To facilitate discussions it is proposed

first to review the principles governing sanctions which are set out in points 42-43 above;

second to examine the State's powers of imposing administrative sanctions which are set out in point 49 above;

and in the event that time is too short at this Workshop, as soon as possible thereafter to discuss the matter exhaustively in such a truly representative tripartite body within the framework of which effective consultations could be promoted between the Government and employers' and workers' organizations on the preparation and implementation of labour legislation as recommended by the ILO Direct Contacts Mission to Indonesia (24-28 August 1998). Given the particular situation of Indonesians employed outside Indonesian jurisdiction, who tend to turn to NGOs rather than trade unions to defend their interests, the consultative machinery concerned with migrant workers legislation ought to be established by DEPNAKER according to the "tripartism plus" formula already recommended by the ILO Technical Advisory Mission following the Workshop on Scope and Limits of Policy Options on Migration, Jakarta, 1-2 September 1998.46

Second Subject:
EFFECTIVE AND EFFICIENT COMPLAINT
PROCEDURES AND REDRESS MECHANISMS
FOR MIGRANTS
by C.C. Noriel

INTRODUCTION

Main concept and categories of labour disputes

54. It is apt to state that labour disputes, labour conflicts or labour problems are inherent in the employment relationship. This is the reason why the prevention and settlement of labour disputes is considered as an integral part of any industrial relations system.

55. Labour disputes in general fall into two main categories: rights disputes which involve violations of rights established under the law, an employment contract or collective agreement, and interest disputes which relate to issues arising from the establishment of rights, particularly through the process of collective bargaining. Other distinctions often made are between collective and individual disputes or between economic and legal disputes.

Dispute settlement procedures

56. In a typical industrial relations system, trade unions represent the interests of the workers in labour disputes, which sometimes lead to strikes or lockouts. The preferred methods of preventing and settling labour disputes are through the joint efforts and initiatives of the parties themselves or, if they fail, through the use of impartial third parties such as in conciliation, mediation, arbitration and adjudication. The latest development in this field has been the introduction of various new and innovative forms and techniques of dispute settlement under what is popularly termed alternative dispute resolution (ADR). They imply the free choice and agreement of the parties as to what method to apply, who to utilize and what ground rules to follow, whether the method chosen is conciliation, mediation, arbitration or any new and imaginative variation.

57. A new law is now being formulated and discussed in Indonesia covering the prevention and settlement of labour disputes in general with the aim of establishing an effective and efficient dispute settlement machinery, which will consist mainly of conciliation, mediation and arbitration. In particular, the new legislation will be designed to strengthen and reform existing institution and procedures or establish new ones, which will however build on the existing ones. The prevailing view is that the dispute settlement machinery under the new law ought to be autonomous, independent, accessible, simple and ensure the trust and confidence of the parties.
Migrant workers’ protection

58. Where does migrant workers’ protection stand under these new developments? In recent Indonesian consultations on the drafting of the dispute settlement law, a number of participants cited the urgent need to cover adequately the problems of migrant workers either under a new Manpower Act or under a distinct or separate legislation. This reaffirms the views expressed in the September 1998 Workshop regarding the necessity of new and effective legislation. The prevailing view of the tripartite-plus constituents is clearly for giving high priority to the promulgation of a new law covering migrant workers.

59. Many problems of migrant workers are of a special nature and have distinct features which distinguish them and set them apart from the problems of other workers based in Indonesia. In general, migrant workers suffer the disadvantage of not being represented by trade unions and being unable to benefit from collective bargaining. They work for employers based in other countries. They go through a different recruitment process which involves foreign and local employment agencies. They may spend substantial amounts, often of borrowed money, just to be able to work abroad. They have to comply with travel requirements to reach their places of employment. They are also highly susceptible to abuse, mistreatment and exploitation from the recruitment stage onward while being landed for remitting or bringing back enormous amounts of foreign currency to boost the national economy of their country. They are usually hailed as “national heroes” in their respective countries, particularly those affected by the current regional financial crisis.

60. The foregoing suggests that the basic question is whether the rights and welfare of the Indonesian migrant workers are adequately promoted and protected under the existing laws and policies and as they are implemented. It would seem that the prevailing view of the tripartite-plus constituents and all concerned in Indonesia, is clearly in the negative.

Theme (iv)

Should there be three tiers of individual complaint procedures?

What are the issues?

61. Migrant workers generally search for employment overseas out of necessity and often at great sacrifice to themselves and their families. They are one of the most exploited and victimized workers in the world. From the recruitment stage to arranging their journey to their employment destinations, while they are employed abroad and to their return travel or repatriation to their home country, they may be subjected to all kinds of mistreatment and abuses. These range from extortion, payment of exorbitant recruitment charges, false promises during the recruitment stage, delays or red-tape and corruption in the processing of travel requirements - mistreatment and abuses which may be a criminal nature - to various problems they have to cope with while employed abroad, to a repetition of abuses and exploitative treatment as they finish
their contracts and return to their country. These cases are sometimes documented and often publicized locally and internationally. This sad situation has persisted for a long time. No meaningful measures and programmes have been instituted by the Indonesian Government and others concerned to remedy it. Legislation is inadequate or simply not implemented. Implementing institutions are weak and ineffective. It is time to act to enable the migrant workers to effectively redress their problems and enable them to lodge complaints at various levels. New laws, procedures, guidelines and institutions to implement them must be put into place without any further delay. The general consensus in Indonesia is that the problems of migrant workers have remained unattended for years, and that providing the solutions through appropriate complaint procedures and redress mechanisms can not wait any more, particularly in light of the role of migrant workers in helping the country to weather one of the worst financial crisis in its history. Indeed, the question being asked time and again is, if reforms are not instituted now under the new era of reformasi, when would they ever see the light of day?

What constitutes the three tiers approach?

62. The three tiers of dispute settlement or complaint procedures proposed here should logically be at the levels of the private employment agencies, DEPNAKER and the courts. This is consistent with the principles underlying general dispute settlement systems consisting of prevention and agreed methods, assistance of impartial third parties and, finally, adjudication.

First tier: private employment agencies

63. The first tier at the level of private employment agencies provides the crucial opportunity to undertake proactive and innovative steps to protect the rights and interest of candidates for migration or migrant workers by minimizing or preventing mistreatment and abuses through the issuance of clear guidelines, voluntary Codes of Ethics/Practice/Conduct and by providing the necessary assistance and counselling to migrant workers. It is also an opportunity to settle complaints amicably and by voluntary agreement either at the level of individual agencies or at the level of their professional associations.

Second tier: DEPNAKER

64. The second tier at the level of DEPNAKER is an important next step in case the problem or dispute is not resolved at the first tier. The principal tasks of DEPNAKER consist of preventive or preemptive measures at its level and by providing impartial and effective third-party assistance along the principles of conciliation, mediation and arbitration or other practical and innovative alternative forms of conflict resolution, should complaints remain unresolved. The role of DEPNAKER, however, goes beyond these tasks. As the principal Government agency responsible for the implementation of the country’s overseas employment programme, it is also expected to take the lead in recommending and instituting the necessary policies, legislation and procedures to effectively promote the programme, protect the rights and interests of migrant workers, and provide the necessary complaint procedures and redress mechanisms.
This includes the strengthening or establishment of the specific institutions required to implement the laws and policies.

65. DEPNAKER’s function of dealing with and resolving complaints involving parties in Indonesia, also extends to complaints arising from the actual employment relationship in foreign countries, where it can act through and in coordination with labour attaches where they are installed and with the Government’s foreign missions or embassies. DEPNAKER is finally responsible for dispensing administrative remedies such as suspending or revoking permits of employment of agencies or in satisfying claims for refunds of workers from the deposit of such agencies.

Third tier: Adjudication

66. The third tier represents the means of last resort in the form of resolution of the complaints of migrant workers through adjudication. The first two tiers are generally the preferred approaches considering that their end-results consist of voluntary agreements under a “win-win” approach. Adjudication can be costly, prolonged and excessively legalistic. On the other hand, adjudication may be the only appropriate way of resolving complaints, especially those involving rights and legal issues. Adjudication can be provided through existing arbitration institution (P4D/P4P), particularly for complaints relating to the terms and conditions of employment, including money claims of the workers, or through a labour court if one is created, or through the existing regular courts of justice. In many countries, Government arbitration or administrative bodies are preferred for the resolution of employment-related cases. Complaints involving acts which are criminal in nature and require the imposition of penalties such as fines and imprisonment, are appropriately within the province and jurisdiction of regular courts.

67. Several relevant international labour standards dealing with industrial relations and the prevention and settlement of labour disputes or the operation and role of private employment agencies provide some of the fundamental principles which can be considered in the development and strengthening of the three tiers complaint procedures for migrant workers.49 These standards include, among others, Conventions No. 87, 88 and Recommendation No. 188 as previously cited,46 the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Collective Agreements Recommendation, 1951 (No. 91), the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92),47 the Examination of Grievances Recommendation, 1967 (No. 130)48, the Labour Relations (Public Service) Convention, 1978 (No. 151), the Labour

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50 For the main text of Convention No. 87, see point 46 above.

51 Henceforth referred to as “Recommendation No. 92”.

52 Henceforth referred to as “Recommendation No. 130”.
Relations (Public Service) Recommendation, 1978 (No. 159), and the Promotion of Collective Bargaining Recommendation, 1981 (No. 163).

Procedural suggestions

68. If the three tiers approach is acceptable, it will be incumbent upon the Government and the social partners, including the employment agencies and NGOs, to review the existing legislation, practices and institutions at the three levels, to determine the inadequacies and limitations as the basis for recommending the necessary reforms. Under the first tier, it will be useful to identify what the employment agencies have done or are planning to do to protect migrant workers and to provide effective mechanisms and procedures to minimize or resolve their complaints, including any support or assistance they may require. At the second tier, the Government, DEPNAKER in particular, should be able to identify the weaknesses in the law and policies and their implementation as well as the structure and performance of existing institutions to serve as the basis for needed reforms in legislation and their implementation with a view to affording prompt and adequate protection to migrant workers and their families. As for the third tier, a decision must be made by the Government in consultation with all concerned on the need to clearly empower the existing Government arbitration body with jurisdiction to decide complaints involving employment issues and money claims of migrant workers, while leaving complaint of a criminal nature to the regular courts. An integrated approach to strengthen or establish effective complaint procedures and redress mechanisms based on the three tiers approach is highly recommended.

Theme (v)

What procedures should be foreseen by PJTKI and/or APJATI?

What are the issues?

69. Some of the worst problems and complaints of migrant workers about mistreatment and abuses arise at the recruitment stage and during their actual employment overseas. Rightly or wrongly, the blame is generally attributed to employment agencies, both legal and illegal ones. To be fair, not all employment agencies are guilty of abusing migrant workers and not all accusations against them are valid. The agencies have a key role to play in promoting and implementing the overall overseas employment programme. It can be granted that many of them are highly dedicated in performing their functions legitimately and in line with existing laws and policies not only for their own benefit but also for the workers’, their principals’ and the country’s as well. While some agencies may in fact be guilty of deliberate or intentional acts as charged, others may be held equally responsible, albeit indirectly in some cases, due to omission, indifference, sheer apathy or neglect. Employment agencies in general have the opportunity to improve their overall image in the industry, reclaim their good reputation, and project not only their legitimate and helpful functions but also a social conscience in the protection and promotion of the rights and interests of migrant workers. In particular, they are in a position to provide the necessary minimum procedures in dealing with workers’ problems and complaints at their own
level or at the level of their professional association, with a view to preventing or resolving those
problems as fairly and as expeditiously as possible. Yet, generally, hardly anything has been
done in this direction. It is time to take matters in hand as the industry grows with the active
support and encouragement of the Government.

What measures can be taken to effectively redress the
most common complaints of migrant workers?

70. It will be to the common interest of the migrant workers and the private employment
agencies if the latter are able to establish, on a voluntary basis, internal procedures to deal with
complaints and problems of the workers in an attempt to prevent or settle them amicably and as
fairly and promptly as possible.

71. Appropriate training and orientation of recruits on their rights and responsibilities under
existing laws and regulations, self-regulation, and the adoption of voluntary Codes of
Ethics/Practice/Conduct and other proactive measures can go a long way in preventing or
minimizing disputes and misunderstandings. A clear procedure as to how questions, complaints
or grievances of migrant workers and their families can be processed or redressed at the earliest
stage possible, can be immensely helpful. This is similar to how grievances are effectively
handled by the parties themselves under the provisions of collective bargaining agreements. It
is also comparable to how progressive employers are able to maintain sound labour management
relations, including the satisfactory management of conflicts in situations where workers are
either represented by trade unions or in their absence.

What is expected from individual employment agencies?

72. Although some agencies, especially the smaller ones, may find it impractical to establish
formal structures such as a Complaints Action and Counselling Desk, what is important in the
final analysis is to have a clear understanding and commitment to the principles and objectives
of dispute avoidance and resolution, which can certainly be carried out flexibly in various ways.
The necessary policies and initiatives can be implemented at the level of national organizations
and the individual private employment agencies including their regional branches.

The role of national organizations of employment agencies

73. The support and encouragement of national organizations of employment agencies and
the Government for effectiveness and success of this first tier approach, particularly as regards
individual employment agencies, can be crucial particularly in the beginning. Such support can
be directed mainly to facilitating the adoption of the necessary internal procedures and measures,
including voluntary Codes of Ethics/Practice/Conduct and their implementation through training,
publicity, and promotional and general awareness-building programmes at the national and local
levels\textsuperscript{31}. The national organizations may find it helpful to maintain contacts and collaborative and cooperative relations with national organizations in other countries similarly situated, such as ASEAN countries and others in Asia. Such collaboration can focus on identifying “best practices” in dealing with workers’ complaints and grievances and generally, on learning from each other’s experience. Any new legislation and programme on migrant workers ought to reflect the need to promote the principles and objectives underpinning the first tier.

**ILO’s views**

74. In the development and implementation of complaint procedures at the level of PJTKI and APJATI, it will be important to take the following principles into account:

(a) **Recommendation No. 130**

- Workers should have the right to submit their grievances without suffering any prejudice as a result, and to have them examined pursuant to an appropriate procedure for settlement within the undertaking. The grievances may relate to certain measures or situations concerning labour relations or employment conditions, where the worker or workers in good faith consider such measures or situations to be contrary to provisions of an applicable collective agreement or of an individual contract of employment, to work rules, to laws or regulations or to the custom or usage of the occupation, branch of economic activity or country.

(b) **Convention No. 181**

- Measures shall be taken to ensure that the workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively.\textsuperscript{34}

- To promote equality of opportunity and treatment in access of employment and to particular occupations, measures shall be taken to ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin or any other form of discrimination covered by national law and practice, such as age or disability\textsuperscript{35}

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\textsuperscript{31} Point 39 above lists the principles that, as a minimum, should be contained in a Code of Ethics/Practice/Conduct.

\textsuperscript{34} See also point 31(e) above.

\textsuperscript{35} See also point 31(d) above.
(c) Recommendation No. 188

- Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.

- Workers employed by private employment agencies should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.

- The competent authority should combat unfair advertising practices and misleading advertisements, including advertisements for non-existent jobs.\(^57\)

- Private employment agencies should not knowingly recruit, place or employ workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind\(^59\) and they shall inform migrant workers of the nature of the position offered and the applicable terms and conditions of employment.

- Private employment agencies should be encouraged to promote equality of employment through affirmative action programmes.

- Private employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods.

- Private employment agencies should have properly qualified and trained staff.\(^59\)

**Procedural suggestions**

75. A general review of the main problems and complaints of migrant workers over the years and how they were dealt with at the level of individual employment agencies and their national organizations is a good starting point. How did the problems arise? What were the causes? Could they have been prevented by the workers or by the agencies and, if so, how? Are the agencies or their organizations solely responsible? Are there external factors which may have contributed to the problems and the difficulties in resolving them? What overall measures or programmes are needed to effectively prevent and/or settle the complaints of migrant workers and improve the general situation?

\(^{56}\) See also point 31(a) above.

\(^{57}\) See also point 31(h) and (i) above.

\(^{58}\) See also point 31(c) above.

\(^{59}\) See point 36(d) and (e) above.
Theme (vi)
What procedures should be initiated by DEPNAKER?

What are the issues?

76. The Government, DEPNAKER in particular, is responsible for the laws, policies, institution and procedures for the effective prevention and settlement of the complaints and problems of migrant workers. This responsibility has at least two main dimensions. First, the Government lays down the policies, programmes or legislation and establishes the necessary implementing institutions in the field of overseas employment. Second, it administers and manages the implementation of the policies, programmes and legislation. In the latter case, DEPNAKER is bound to establish the necessary procedures and provide the necessary services for the effective and efficient resolution of the complaints of migrant workers. How has DEPNAKER fared? Information available points to many serious weaknesses and inadequacies of existing policies, legislation and implementing institutions in addressing the problems and complaints of migrants. The general feeling, even in Government, is that it is now time to act to correct all the weaknesses and inadequacies in the existing system and legislation. It is also recognized that one of the priorities for reform is the protection of the rights and interests of migrant workers.

What is the role of DEPNAKER in dealing with migrant workers' complaints?

77. When disputes reach DEPNAKER after attempts to settle them fail at the first tier, its principal role should be to conciliate or mediate and, if necessary, arbitrate based on clearly established procedures as may be prescribed by law. The procedures should be inspired by a clear understanding of the nature and types of the problems and complaints of migrant workers and their families, starting with the recruitment to their actual employment overseas and until their return to home base. These problems usually include cases of illegal recruitment and mistreatment\(^{60}\) and abuses\(^{61}\) during the entire process of recruitment and employment abroad. These approaches are basically in line with the principles of general dispute settlement. Here again, training and orientation of the migrant workers, private employment agencies and Government officials assigned to conciliate, mediate or arbitrate the law, procedures and practices will be of great importance.

The experience of the Philippines

78. The well-known experience and foresight of the Philippines in creating the Philippine Overseas Employment Administration (POEA) more than fifteen years ago, can be instructive and helpful in the development of a new law and programme on migrant workers in Indonesia. The POEA, for example, was given the necessary functions and jurisdiction by law over all matters relating to the rights and welfare of migrant workers from the recruitment stage up to

\(^{60}\) For a definition of “mistreatment”, see point 4.

\(^{61}\) For a definition of “abuse”, see point 5.
their return after completing work abroad. These cover the resolution of complaints and cases such as illegal recruitment, suspension and revocation of the permits of agencies, and employment questions where employers and the agencies are considered to be jointly and severally liable. They also cover cases against migrant workers involving compliance with their legal and contractual obligations.

79. In the law creating the POEA, the rights and obligations of migrant workers, agencies and employers are spelt out. In cases of labour complaints and disputes, the POEA conciliates or mediates to settle the cases. It is also empowered to hear and decide such cases, if necessary. Its decision is considered final and executory unless appealed - based on special grounds such as fraud, coercion, abuse of discretion or questions of law - to the National Labour Relations Commission (NLRC) which is the main tripartite arbitration body in the country, or to the Secretary of Labour and Employment in cases of the suspension or cancellation of the license of recruitment agencies. Under recent legislation, the main functions of the POEA concentrated on providing administrative remedies, while the NLRC was given jurisdiction over issues relating to the terms and conditions of employment.62

80. The proceedings of the POEA and NLRC are not bound by the same strict rules of evidence as court proceedings. However, the main responsibilities of recruitment agencies, foreign employers and the migrant workers themselves, including the legal sanctions and punishments, are clearly spelt out in the law, rules and regulations. Some aspects of illegal recruitment may be criminal in nature that warrant the imposition of penalties which can go as far as life imprisonment. Such cases fall under the jurisdiction of regular courts, although the POEA makes itself available to provide legal assistance to the victims. Enforcement of foreign judgments has to be sought from the regular courts.

Thailand’s experience

81. The experience of Thailand in dealing with illegal recruitment cases is also relevant to Indonesia. It has been reported that the cheating of job applicants for overseas work and illegal recruitment cases has been on the rise in Thailand lately. The deception of workers include paying for inexisten jobs, getting jobs but at lower salaries than agreed upon, being forced to work in places other than those promised. It is estimated that about 400 illegal recruitment agencies exist at present compared with 160 legal overseas job placement agencies. It is also reported that about 2,500 overseas job-seekers have sought help against cheating by employment agencies in the first ten months of 1998.

82. The Ministry of Labour and Social Welfare of Thailand, through its Employment Department, oversees the implementation of the overseas employment programme and the Job Placement and Job Seekers Protection Law. To assist in the enforcement of the law in the face of the increasing rate of abuses against migrant workers, a Centre for Coordinating Suppression

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of Swindling of Job Seekers has been established under the Ministry to assist the workers affected. Most of the recorded cases of cheating and victimization of job applicants concerned lawfully registered agencies. When agencies are unable to refund the payment made to them by job applicants, the Ministry is authorized to use their deposit (cash, government bond or letter of bank guarantee) to satisfy the workers’ claims. Should the deposit become insufficient, workers can file a case with the labour court for the full satisfaction of their claims. There is a plan at present to limit the number of overseas and local job placement agencies to enable the Government to better control and follow-up on their activities.

The challenge to DEPNAKER

83. The development of Indonesia’s new strategy on overseas employment covering the formulation of the necessary legislation and programme and the strengthening or establishment of the necessary institution at all levels, for the promotion and protection of the rights and interest of migrant workers, can benefit greatly from the experience of other labour-sending countries in South East Asia and the Asian region as a whole. It is essential that any new legislation and programme should be able to confront all the problems of mistreatment, abuses, and sad experiences of job applicants and migrant workers, including those deriving from the activities of the private employment agencies covering the entire process from recruitment, preparation, deployment, employment and the return and reintegration of all migrant workers, which have been going on for too long and which continue to persist up to the present.

84. DEPNAKER should take the lead to incorporate in any new legislation and policy the clear requirements, obligations and responsibilities on the part of employment agencies, their foreign principals and official contacts. The necessary regulations and procedures must also be established, including the implementing institutions for the protection of migrants. The procedures should be clear and simple. The complainants should readily know where to go and what to do, in filing and following up on their complaints. The proposal to officially introduce a recruitment agreement to be concluded between the intending migrant and his or her agency to protect the workers is well worth pursuing. Government services in dealing with workers complaints should be accessible, efficient and inexpensive.

ILO’s views

85. The Government, and DEPNAKER in particular, may find the following principles to be important and helpful in the formulation, promulgation and implementation of the necessary laws and policies for the effective prevention and settlement of cases involving migrant workers:

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83 On these questions, see points 15-53 above.
(a) Recommendation No. 92

- Voluntary conciliation machinery, free of charge and expeditious, shall be made available to assist in the prevention and settlement of labour disputes.

(b) Convention No. 181

- Where workers are recruited in one country for work in another, the Members concerned shall consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment.

- A member shall take measures to ensure that child labour is not used or supplied by private employment agencies.\(^6a\)

- The competent authority shall ensure that adequate machinery and procedures, involving as appropriate the most representative employers' and workers' organizations, exist for the investigation of complaints, abuses and fraudulent practices alleged to have been carried out by private employment agencies.\(^6b\)

Procedural suggestions

86. Since no special provisions on complaint procedure and redress mechanism dealing with migrant workers' complaints exist in the current legislation in Indonesia, the enactment of new legislation and policy which fills this serious gap is of the essence. DEPNAKER should take the lead in this direction. The procedure and mechanism should cover complaints arising from recruitment to employment until the workers come back home. They should be clear and simple as to the obligations, responsibilities and rights of all the parties involved, how to file and pursue complaints, the respective functions and jurisdiction of the various Government bodies responsible for the settlement or resolution of the complaints and the necessary sanctions, penalties and enforcement of agreements, awards and decisions.

Theme (vii)

What court procedures should be appropriate?

What are the issues?

87. What exists at present in Indonesia are general complaints procedures, mechanisms and institutions applicable to labour disputes in general with no special reference to migrant workers. Thus, problems of migrants have been dealt with mainly through \textit{ad hoc}, informal and practical

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\(^6a\) See also point 31(b) above.

\(^6b\) See also points 41-52 above.
means, which is not the best interest of the complainants. What will be required to address this inadequacies and weaknesses, particularly in the adjudication of the legal issues raised in the complaints? Government labour dispute arbitration bodies are in place but they have hardly handled any case affecting migrant workers. Another legal recourse for the complainants is to go to the regular courts. This can be a difficult course to take. The various complaints of migrant workers can fall under three main types of cases: administrative, employment-related and civil or criminal. The experience of other countries shows the need to spell out clearly the respective jurisdiction of various Government institutions, including the judiciary. Labour ministries or agencies under them are usually given the final authority to impose certain administrative sanctions, while cases involving terms and conditions of employment are often left to existing institutions for conciliation, mediation and arbitration. The jurisdiction of regular courts to try civil and criminal cases continues to be respected. The Government should take these considerations and approaches in mind in deciding on the appropriate procedures for the adjudication of migrant workers’ complaints.

What are the options for the adjudication of workers’ complaints?

88. There can be several options for the ultimate resolution through adjudication of cases or disputes involving migrant workers when they do arise following the failure to prevent or settle them under the first two tier procedures. The power of adjudication of labour disputes are generally entrusted to labour courts, regular courts or, as is popular in many countries, arbitration bodies or tribunals (voluntary or compulsory). It may be noted that, at present, the arbitration approach appears to be preferred in the drafting of the main dispute settlement law of Indonesia on grounds of effectiveness, efficiency and accessibility.

89. The choices include the strengthening or refocusing of existing Government institutions based on new legislation which will have the capability to deal with the three main types of complaints: administrative, employment issues and civil or criminal. Based on the current system, DEPNaker and the relevant department under it have the final authority to deal with cases of an administrative nature. Employment issues can be lodged before the reinforced Government arbitration body which can create a special section or corps of specialists on migrant workers problems, while civil/criminal cases would continue to be addressed by the regular courts. This option is in line with the existing Government structure in Indonesia and of the functions or authority of the POEA and the NLRC in the Philippines.

90. The other option is the establishment of a labour court. A key advantage of an arbitration body, however, is that it is not bound by the strict rules of evidence and can be less legalistic in approach as well as less expensive. It can also be tripartite or tripartite-plus in composition to draw from the special expertise of members who are particularly knowledgeable about the plight and distinct problems of migrant workers. Whatever choice is made, however, the parties which include the workers and their employers and the private employment agencies have the right to expect that the institution will be effective and efficient and that the decisions or awards emanating from it will be fair and expeditious.
ILO's views

91. Based on comparative practices and the general principles under the relevant international labour standards, one can state that, for adjudication to work, the enabling law and implementing regulations must be clear on all aspects of the proceedings and procedures such as the rights and obligations of all the parties, the functions and jurisdiction of the adjudication body, the right to appeal, the adjudication process, the requirements at the recruitment stage, the handling of cases against foreign employers, what constitutes prohibited acts, sanctions and enforcement. The institutions responsible for adjudication, including the regular courts, must strive to enjoy the trust and confidence of the parties. They should be given autonomy and independence to render fair and impartial judgments. Proceedings should be simple and not excessively legalistic. Complaints must be acted upon without delay. Adjudication should also be easily accessible to the parties.

Procedural suggestions

92. As regards migrant workers' various types of complaints and the remedies applicable to each of them, the authority and jurisdiction of various Government bodies including the judiciary should be clearly clarified under a new legislation. What should be the jurisdiction of DEPNaker, the Government arbitration body and the regular courts or a labour court if it is decided to establish one? After deciding the question of jurisdiction, it is equally important also to decide the composition, structure and procedures, including resource requirements of the various adjudication bodies to enable them to effectively and efficiently carry out their respective functions. These are the two sets of questions which are relevant to consider in the discussion of proposals to strengthen the adjudication arm of the Government for the proper and expeditious resolution migrant workers' complaints.

Concluding comments

93. The institution and procedures for the effective and efficient prevention and settlement of complaints and disputes involving migrant workers with their distinct attributes depend and are based on the same requirements and principles as underpin the prevention and settlement of labour disputes in general. These include the need for a clear legal framework and procedures, simplicity, fairness, least cost, accessibility, timeliness, ensuring the trust and confidence of the parties and social justice.

94. The preceding principles should be kept in mind in the formulation and adoption by Indonesia of the appropriate new strategy, legislation and programme on overseas employment consistent with international labour standards and practices and its own national goals and aspirations for its people.
REPORT OF THE WORKSHOP ON
OVERSEAS EMPLOYMENT INSTITUTIONS
Jakarta, 24-26 November 1998

95. Upon invitation by DEPNAKER, the Workshop on Overseas Employment Institutions took place in Jakarta, 24-26 November 1998. Participants included, besides DEPNAKER and other Government officials, representatives of private employment agencies, workers' organizations, NGOs, the Philippine Association of Service Exports and the ILO.

96. Following the Welcome Remarks delivered by Mr. Suwanto, Secretary-General of DEPNAKER on behalf of the Minister of Manpower, and the introductory speech by Mr. I. Ahmed, Director, ILO Jakarta, the Workshop focused on various aspects of two they subject matters which importantly impinge upon the protection of Migrant Workers:

(i) the scope and limits of private employment agencies' responsibilities and obligations,

(ii) effective and efficient complaints procedures and redress mechanisms for migrants.

97. The general context of the Workshop is a recognition that:

- The regulation of Private Employment Agencies and the protections for Indonesian Migrant Workers should be dealt with by legislation rather than by Ministerial Decree

- There are significant problems faced by Indonesian Migrant Workers (and especially by unskilled women workers in household employment) which need to be addressed

- There are lessons to be learnt from the Philippines experience and legislation and from the information and advice provided by the ILO experts.

This provides the basis for the needed work to reform and improve Indonesian laws and practices relating to Migrant Workers.

98. Weaknesses in Indonesian manpower placement abroad arise because the role of Government, the duties and responsibilities of PJTKIs, and the rights and obligation of Migrant Workers are not clearly defined. It is essential that they be set out in an Act of Parliament or Presidential Decree. The Government and DEPNAKER should take the lead in this exercise.

99. There is a need for greater professionalism in all bodies dealing with Migrant Worker questions, including in Government and private agencies.
100. In accordance with DEPNAKER regulations and guidance, at present basic services provided by PJTKI are recruitment and placement including but not limited to selection, documentation, training, transportation, board and lodging, and medical examination. It should be clear what fees might be charged for these services and whether the fees should be paid by the worker or the employer. It is essential that there be transparency both as to the services provided and the fees charged. Other services may be provided by PJTKI, but these should be provided on a voluntary or optional basis where the worker has the choice whether to take up these services and where the fees or charges for the services are clearly identified.

101. There should be a Special Act on Indonesian Migrant Workers. A "tripartite plus" Drafting Group should be set up by DEPNAKER to formulate specific legislative proposals. The membership of the Group would include representatives of employers, including APJATI and workers' organizations and NGOs working in the area, and the Group may call for ILO technical assistance. The legislation would establish the framework for the work of PJTKI and the protection of Indonesian Migrant Workers. It would deal with, among others, licensing requirements, improper practices and the range of services provided and fees charged by PJTKI.

102. APJATI should consider the adoption of a Code of Ethics or Conduct for Private Recruitment Agencies.

103. The concept of Pre-Employment Orientation Programmes for prospective Migrant Workers should be pursued with these programmes being provided by DEPNAKER, APJATI, workers' organizations or NGOs or by all these bodies working together. The programmes would provide information and advice about overseas employment including about Recruitment Agencies and their services and fees.

104. Migrant Workers are entitled to have a clearly defined recruitment agreement with a PJTKI as well as a well spelt out contract of employment:

- in which the terms of engagement are clear;
- which is signed before departure; and
- which is not able to be substituted for another contract upon arrival in the receiving country.

This, together with the Orientation Programme and other measures, will help Indonesian Migrant Workers to make informed and intelligent decisions about overseas employment.

105. Where contracts of employment are renewed in the receiving country, there should be an obligation to inform the PJTKI who placed the worker, and DEPNAKER, so as to ensure that basic social security etc., can be continued.

106. DEPNAKER and the Department of Foreign Affairs should jointly examine further measures to assist Indonesian Migrant Workers in other countries with their problems and concerns. These include assistance through the work of Labour Attaches, the holding of forums
for Indonesian Migrant Workers in the receiving country, the establishment of safehouses, and the appointment of Migrant Workers Assistants in Indonesian Embassies who can act as translators/conciliators/mediators/arbitrators for dealing with problems raised by Migrant Workers in the receiving country.

107. The ILO was asked to convene, as a first step, a Regional Workshop of representatives of Associations of Recruitment Agencies. It should provide a forum for the discussion of issues and developments relating to Indonesian Migrant Workers and for the identification of standard safeguards and protections etc., for these workers, including resistance to higher and higher fees being charged by brokers from migrant-receiving countries, watchlisting brokers and employers engaging in undesirable practices, etc. As a second step, consideration might be given to holding a meeting with professional associations of receiving countries or even with the participation of governmental and non-governmental bodies. The ILO might also assist in the formulation of standard employment contracts for specified groups of Migrant Workers.

108. At present, Indonesia has no special provision for complaint procedures or redress mechanisms for Migrant Workers. This means that many workers' complaints go unresolved.

109. There is a need for effective and efficient complaint procedures for Migrant Workers to be established. These need to be developed by DEPNAKER in consultation with APJATI, unions, NGOs and others, having regard to the nature of the complaints being dealt with. The three broad categories of complaints are:

- complaints against PTJKIs in relation to recruitment and placement activities, the drawing up of formal contracts of employment and the making of other employment arrangements
- complaints arising in the course of employment, where a variety of issues need to be considered, including: who is responsible for such problems - the employer or the PTJKI? has the PTJKI fulfilled the responsibility to find proper and genuine employment with a reputable employer? There also needs to be an examination of the concept of joint and several liability and the Philippines' experience, the role of insurance (to cover unpaid wages or the losses associated with unfair termination etc.) and the use of standard or model contracts of employment with procedures for the resolution of disputes included in them
- complaints against Government institutions relating to manpower, immigration, social security, etc., matters.

110. There should be three tiers of the complaint procedures:

(i) bilateral negotiation between the worker and the Recruitment Agency;

(ii) mediation/conciliation/arbitration by DEPNAKER;

(iii) recourse to the courts, if necessary.
The emphasis should be on mechanisms aimed at the prevention or voluntary resolution of complaints between the parties, including through the use of effective grievance procedures established by APJATI?

111. There is a recognition that recourse to the courts may involve lengthy and costly proceedings and may therefore only be appropriate in limited cases (for example, criminal matters). Special machinery should be established by DEPNAKER, in consultation with the social partners and NGOs, to provide Migrant Workers with access to affordable, efficient and effective means of having their complaints investigated and resolved.

112. There is a need for the complaint procedures and the remedies available to Migrant Workers be clearly set out in legislation and that appropriate support be given to such workers by Government, unions and NGOs in the exercise of their rights.

113. Consideration should be given to ways of assisting Migrant Workers to understand their rights and, where necessary, to pursue those rights through the complaint procedures. In this regard, DEPNAKER should establish an Advisory and Advocacy Unit for Migrant Workers. This Unit would provide advisory, conciliation and mediation services and assist in the resolution of problems and complaints of Migrant Workers.

114. There is a need for all concerned, i.e. Government, recruitment agencies, workers’ organizations and NGOs to work together to ensure that fair and proper treatment is accorded to Indonesian Migrant Workers in all aspects of the recruitment process, their employment overseas and their return to Indonesia.

115. DEPNAKER should monitor the problems experienced by Indonesian Migrant Workers and should hold regular meetings with representatives of Recruitment Agencies, unions and NGOs regarding these problems and other issues relating to Migrant Workers.

116. To ensure full commitment to Migrant Workers’ protection, there should be comprehensive coverage of their protection needs. There should also be public commitment and support for the proper functioning of Private Employment Agencies.

117. DEPNAKER is asked by all the participants to examine seriously the conclusions of the Workshop and to take positive steps to implement the measures proposed.