



International
Labour
Organization

100
1919-2019

Judges, prosecutors and legal aid practitioners' training on forced labour

Facilitator's guide



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First published 2019

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ISBN: 978-92-2-132112-5 (print)
978-92-2-132113-2 (web pdf)

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Funding is provided by the United States Department of Labor under cooperative agreement number IL-27592-15-75-K--1.

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Printed in Malaysia

Acknowledgment

The development of this training manual was led by Archana Kotecha supported by Liva Sreedharan, with graphic design and layout by Fuad Afiq bin Misbahulmunir (ILO consultants), in close collaboration with Jodelen Ortiz Mitra and Hairudin Masnin of the ILO project “From Protocol to Practice: A Global Action on Forced Labour” (Bridge project) and the Judicial and Legal Training Institute (ILKAP).

Technical inputs were also provided by Beate Andrees, Bharati Pflug, Remi Doherty and Aurelie Hauchere of the ILO FUNDAMENTALS Branch; Alain Pelce, ILO-ROAP International Labour Standards and Labour Law Reform Specialist; ILO DCOMM, ILO International Training Centre, Malaysian Ministry of Human Resources, Malaysian Anti-Trafficking in Persons and Smuggling of Migrants Council, Attorney-General’s Chamber, Malaysian Trade Union Congress, Malaysian Bar Council, Human Rights Commission, selected Malaysian judges, prosecutors, legal aid practitioners, law enforcers, and members of civil society organizations.

Lastly, this initiative would not have been possible without the cooperation and support of ILKAP, particularly Director General YBhg. Dato’ Anita Harun, Zalina binti Haji Awang @ Mamat, Fazillah Begum binti Abdul Ghani (focal person for this initiative), Zurina binti Muhd, Hazlamizan bin Maliki and Yusrina bt Mohd Yusof.



Message from the International Labour Organization



This Facilitators' Guide to Training Judges, Prosecutors and Legal Aid Practitioners on Forced Labour is a crucial tool for Malaysia and other countries around the world. It is the result of a unique collaboration between the Judiciary and Legal Training Institute of Malaysia (ILKAP) and the ILO, a very enriching process for everyone involved. I believe that it will have a long lasting positive impact on victims' access to justice and protection.

According to the ILO's 2017 Global Estimates of Modern Slavery, there are an estimated 25 million people in forced labour globally. Forced labour destroys lives, disregards fundamental values and undermines our institutions. It is a grave violation of human rights that can result from a combination of ignorance, exclusion and a failure of the rule of law. It's an incredibly complex crime to measure, prevent, punish and remedy, which will be solved when all relevant stakeholders work closely together.

While the prevention of forced labour is paramount, more effective enforcement, prosecutions and better access to justice for victims of forced labour are also essential. When cases do arise, procedures must be in place to successfully protect victims.

Governments, employers and workers at the 2014 ILO International Labour Conference voted overwhelmingly to adopt the Forced Labour Protocol and Recommendation to give new impetus to the global fight against forced labour, including trafficking in persons and slavery-like practices. With this training programme, the country is responding to the Forced Labour Protocol's call to improve victim's access to protection, legal remedies and justice. ILO Convention 29 is nearly universally ratified and the supplementary Forced Labour Protocol enjoys a growing number of ratifications.

I congratulate the Malaysian government on the development of this manual. It is ILO's honour and privilege to have provided the necessary support.

Beate Andrees

Chief
Fundamental Principles and
Rights at Work Branch

Message from the Judicial and Legal Training Institute of Malaysia



As a member of the International Labour Organization (ILO), Malaysia adheres to the ILO's Convention No. 29 concerning forced labour. In this respect, Article 6 of the Federal Constitution stipulates that "no person shall be held in slavery and forced labour is prohibited".

Malaysia has a comprehensive framework of laws and regulations to protect labourers, irrespective of whether local or foreign. In addition to this, there are nine laws and regulations related to the issue of forced labour including the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670), the Workers' Minimum Standards of Housing and Amenities Act 1990 (Act 446) and the Passports Act 1966 (Act 150).

Malaysia is adamant in protecting the right of the labourers and does not condone to any form of forced labour. The Malaysian Government will continue to play its role in preventing forced labour in order to provide better protection of the rights of workers.

At the same time, employers are always encouraged to provide better facilities and working environment for their workers regardless of whether they are locals or foreigners.

As such, in conjunction with the enhancement of knowledge and skills of legal fraternities, the ILKAP and the ILO had unequivocally agreed to join force and collaborate in developing the training manual on forced labour for judges, prosecutors and legal aid practitioners who are directly handling these kind of cases concerning forced labour.

YBhg. Dato' Anita Harun

Director General

Judicial and Legal Training Institute (ILKAP)



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Background

This “Facilitator’s guide: Judges, prosecutors and legal aid practitioners’ training on forced labour” aims at providing a training package for legal practitioners who may be exposed to forced labour in the course of their duties in Malaysia. This joint initiative by the ILKAP and the ILO was based on the premise that well-trained criminal justice actors are key to an effective response to forced labour and play a crucial role in countering this crime.

The ILO Forced Labour Protocol that supplements Convention No. 29 highlights the important role that judges and lawyers can play in providing protection to victims and preventing them from falling back into a situation of vulnerability and exploitation. Article 4 requires governments to ensure that all victims, regardless of their presence or legal status, have access to appropriate and effective remedies.

The legal aid service providers, judges and prosecutors not only have the responsibility to punish offenders but must do so while respecting and protecting the human rights of, and addressing the needs of victims of forced labour. There is a greater possibility that victims would

freely consider participating in the criminal justice proceedings - thus enhancing effective criminal investigations - when their rights are protected and respected.

Additionally, this material was developed to raise awareness on forced labour as a serious crime and a violation of human rights, and to enhance the capability and skills of criminal justice and legal practitioners to adequately detect forced labour cases and utilise relevant legislation in line with international standards that Malaysia subscribed to.

The training package comprises of eleven modules and is fully in line with the latest international, regional and national standards and policy developments in Malaysia. A multi-disciplinary approach was undertaken to form the basis of this training: from desk research, legal analysis, case studies and key stakeholder interviews.

It takes into consideration the latest trends on forced labour as well as good practices to combat this crime. Appendix 1 contains a directory of services for victim support should case referral be required.

Tips for facilitators

1. The Facilitator's guide is merely a guide. The training modules are general in nature; therefore, it is important to adjust the approaches and contents in a way that respond to your audience and the particular context. The participants may represent a single category of participants (for example all legal aid service providers) or a mixed group. Your first task as a facilitator will be to assess the make-up and needs of the course participants and use the many practical exercises available in the Facilitator's Guide, supporting documents and additional handouts to put together the course that will suit them best. This will enhance overall learning experience for the participants.

2. The Facilitator's guide contains a number of recommended readings – Conventions, legislation, guidelines, publications, among others – which facilitators need to be acquainted with. These resources could be useful in preparing the classroom sessions. You may wish to download and print out extracts from some of these and use them as handouts in the classroom.

3. Facilitators should encourage participation and interaction among participants and engage them with questions, discussions, group work and practical exercises. Facilitators should try to maximise the knowledge available in the classroom including those of legal aid service providers, prosecutors and judges. Some exercises may benefit from forming diverse groups to facilitate diverse perspectives whereas in others it may be valuable for participants to take on roles that are different from their real-life professions, i.e. judges to role play as prosecutors so they can get a better idea of victim psyche through this form of engagement.

4. Facilitators should be mindful of the timing but also allow some flexibility. If, for example, interesting discussion appears in a training session, let the discussion flow, and adjust the next activities or modify the method of delivery.

5. The timings suggested for each part may be modified as it suits the needs of the group. Facilitators may modify the timing, in particular if the make-up of the participants suggests that some topics or exercises could be appropriately shortened or lengthened.



Structure of the guide

This Facilitator's Guide has eleven modules:

Module 1: The legal framework and definitions, describes the instruments that can be used to investigate, prosecute and adjudicate forced labour cases. Specific national laws that criminalise forced labour and related crimes are outlined alongside international standards. This module also tackles the differences between forced labour, sub-standard working conditions, and human trafficking.

Module 2: National, regional and global context of forced labour, provides the national and global context of forced labour, victimization and victim protection.

Module 3: Important concepts and indicators of forced labour, provides conceptual clarity on important concepts relating to forced labour such as debt bondage, psychological coercion and other indicators of forced labour.

Module 4: Use of forced labour indicators, provides guidance on how to use indicators to assess situations of forced labour.

Module 5: The victims of forced labour, provides background and the needs of victims of forced labour and discusses the challenges faced by law enforcement to investigate, prosecute and adjudicate forced labour.

Module 6: Ethics of working with people in vulnerable situations, provides background on traumatic experiences and their impact to the victims of forced

labour and discusses the significance of risk assessment. Furthermore, practical guidelines and interview techniques are recommended.

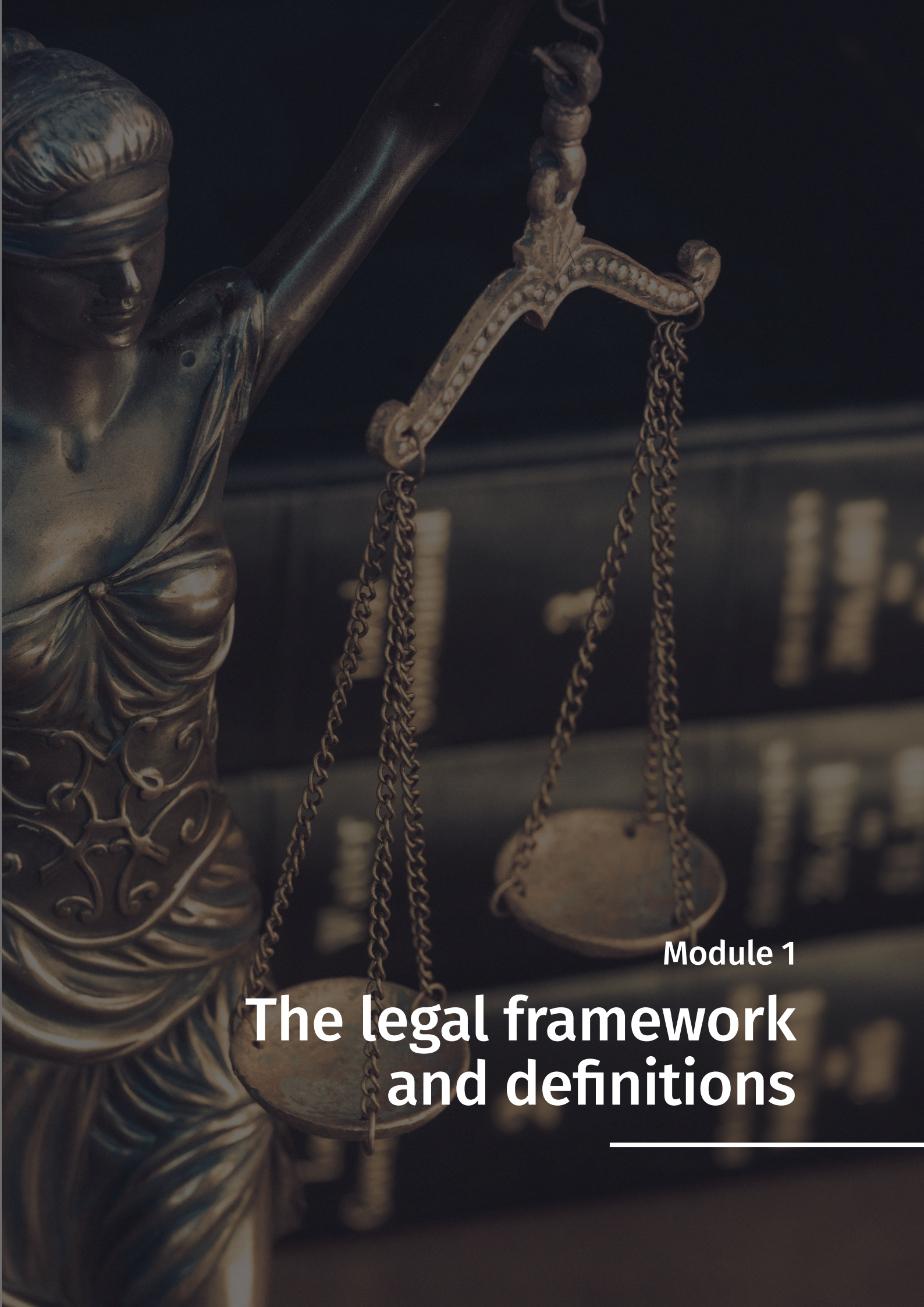
Module 7: Criminal proceedings and victims' rights, describes the criminal proceedings and in this context the rights of victims that must be respected throughout.

Module 8: Civil proceedings, provides background on the use of civil proceedings as an alternative avenue for compensation as well as practical challenges of pursuing civil claims.

Module 9: Corporate liability, describes the possibilities and challenges in holding corporates accountable for forced labour and human trafficking violations under both international and national standards.

Module 10: Using the anti-money laundering framework, describes the importance of using financial investigation and the anti-money laundering framework as useful tools in identifying and analysing financial transactions associated with human trafficking and forced labour. Furthermore, specific anti-money laundering law is outlined.

Module 11: Useful case law, covers a range of national judicial decisions on forced labour and jurisprudence from different jurisdictions to familiarise users with the growing body of case law on forced labour.



Module 1

The legal framework and definitions



Module 1

The legal framework and definitions

Section 1: International framework: forced labour and trafficking

Section 2: Distinguishing forced labour from human trafficking and sub-standard working conditions

Section 3: An analysis of national labour migration policy

Section 4: Access to justice of victims of forced labour

Section 5: National legislation

Section 6: Regional framework

Section 7: Alignment of national legislation with international standards

Learning objectives

- Be familiar with relevant international and regional legal instruments with regard to forced labour.
- Be able to interpret domestic legislation with the help of international instruments.
- Know which domestic laws on trafficking and forced labour exist.
- Understand the current mechanisms available to and used by victims of forced labour for accessing justice.
- Be able to compare national legislation with the existing international framework and identify the main gaps between the two.

Key words and concepts

- Forced labour is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.
- Indicators relating to children must be assessed taking into account the heightened physical and psychological vulnerabilities of children.
- One of the worst forms of child labour is forced or compulsory labour.
- Forced labour can be a form of exploitation in human trafficking cases **but forced labour can also exist independently of human trafficking.**
- Foreigners and migrant workers, documented or undocumented, are entitled to a constitutional right in Malaysia to be free from slavery and all forms of forced labour.
- Some labour laws do not apply equally to all types of workers and particularly exclude certain sectors for example, domestic workers , which is inconsistent with international labour standards.
- Lack of effective enforcement means migrant workers have few or no rights of recourse against labour rights abuses.
- There is currently a continuum of labour violation cases where less serious forms of forced labour activities are prosecuted under labour laws whilst more serious cases are prosecuted under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) or ATIPSOM.

Section 1: International framework: forced labour and trafficking

	Objectives	Participants will learn about the relevant ILO Convention, the Palermo Protocol and other UN treaties. Participants will understand the impact of international law on the interpretation of national law.
	Methodology	Quiz Conduct a pre-test. Refer to Quiz at the end of Module 1. Lecture • Explain the definition of forced labour as set out in the ILO Convention concerning Forced or Compulsory Labour (No. 29). • Brief input on the Palermo Protocol. • Brief input on other UN/ILO instruments. Group discussion (flip chart) Read the case studies and ask participants to identify the relevant crimes and determine what provisions of International law apply and note them on a flip chart.
	Supporting documents/ recommended reading	• ILO Forced Labour Convention, 1930 (No. 29) • The Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children • ILO Worst Forms of Child Labour Convention, 1999 (No. 182) • <i>Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement</i>, ILO, Geneva, 2005 • <i>Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children</i>, ILO, Geneva, 2012
	Suggested duration	90 minutes



Section 2: Distinguishing forced labour from trafficking and sub-standard working conditions

	Objectives	• Participants will become familiar with general characteristics of the crime of human trafficking and forced labour. • Participants will be able to distinguish forced labour from trafficking in persons. • Participants will be able to distinguish forced labour from sub-standard working conditions.
	Methodology	Brainstorming and discussion (flip chart) Ask participants about their thoughts regarding the differences and similarities between human trafficking, forced labour and sub-standard working conditions and note them on a flip chart. Lecture (power point) • Explain the differences between forced labour and human trafficking and the consequences of these differences. • Hand out a table that illustrates differences between forced labour and sub-standard working conditions. Exercise • Refer to Exercise 1 at the end of the module.
	Supporting documents/ recommended reading	• ILO Forced Labour Convention (No. 29) • The Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children • “Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement”, ILO, Geneva 2005
	Suggested duration	60 minutes

Section 3: An analysis of national labour migration policy

	Objectives	Participants will learn about the national labour migration policy in Malaysia that is attributed to the heavy influx of migrant workers.
	Methodology	Lecture Explain the history of labour migration to Malaysia.
	Supporting documents/ recommended reading	• “Labour Migration in Malaysia and Spain: Markets, Citizenship and Rights”, Blanca, G., Amsterdam University Press 2012 • “Review of labour migration policy in Malaysia”, ILO, Geneva 2016
	Suggested duration	25 minutes

Section 4: Access to justice of victims of forced labour

	Objectives	Participants will learn about the existing mechanisms for victims to access justice.
	Methodology	Lecture Discuss briefly about existing mechanisms available for victims on accessing justice and highlight the findings from the ILO 2018 gap analysis on how victims are using these mechanisms
	Supporting documents/ recommended reading	• ILO 2018 Gap Analysis on Malaysian Legislation, Policies and Programmes and the ILO Forced Labour Convention and Protocol • ILO 2017 Access to justice for migrant workers in Southeast Asia
	Suggested duration	30 minutes

Section 5: National legislation

	Objectives	Participants will be familiarised with the relevant national legislation.
	Methodology	Lecture Outline the relevant domestic legislation with regard to forced labour, e.g. specific anti-trafficking legislation, criminal law procedure, labour laws, etc. Individual group discussion • Read the case studies and identify the relevant crimes and determine what provisions in Malaysian laws apply. • Elaborate examples regarding the interpretation of national law through international regulations. • Present individual group findings.
	Supporting documents/ recommended reading	• National legislation • Case studies applying national law • ILO 2018 Gap Analysis on Malaysian Legislation, Policies and Programmes and the ILO Forced Labour Convention and Protocol
	Suggested duration	90 minutes

Section 6: Regional framework

	Objectives	Participants will learn about the relevant regional frameworks and guidelines on forced labour and relevant labour protection for migrant workers.
	Methodology	Lecture Outline the relevant regional frameworks and guidelines that address trafficking in persons, trafficking for forced labour, labour rights protection and issues relevant to migrant workers.

 Supporting documents/ recommended reading	• ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) • ASEAN Labour Ministers' Work Programme 2016-2020 • Bali Process Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime • ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children • Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons • ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases • ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons • ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers • ASEAN Declaration against Trafficking in Persons Particularly Women and Children • Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (COMMIT)
 Suggested duration	30 minutes

Section 7: Alignment of national legislation with international standards

 Objectives	Participants will understand how the laws in Malaysia give effect and in some cases differ from the international definition of forced labour and actions called for by international instruments.
 Methodology	Lecture Explain remaining gaps of domestic laws, policies and practices with the ILO Convention No. 29 and the Palermo Protocol.
 Supporting documents/ recommended reading	• ILO Forced Labour Convention, 1930 (No. 29) • The Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children • National legislation • ILO 2018 Gap Analysis on Malaysian Legislation, Policies and Programmes and the ILO Forced Labour Convention and Protocol
 Suggested duration	30 minutes

Section 1:

International framework: forced labour and trafficking

1. Forced labour

1.1 Definition (ILO Forced Labour Convention, 1930 (No. 29))

Article 1(1) of ILO Convention No. 29 requires that each Member of the ILO which ratifies the Convention to “suppress the use of forced or compulsory labour in all its forms”. This encompasses forced labour exacted by public authorities as well as by private persons.¹

Malaysia ratified the ILO Forced Labour Convention No. 29 in 11 November 1957. Such ratification goes with the obligation to eliminate forced labour as a matter of urgency, criminalise forced labour, impose adequate penalties to reflect the seriousness of the offense and strictly enforce the penalties. It is also critical that the law enforcement response includes prosecution under criminal law.



Forced labour is defined in ILO C.29 as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

The ILO’s definition of forced labour has two basic elements:

The work or service is exacted under the menace of a penalty

The work is undertaken involuntarily

According to the ILO, the definition makes no reference to the employment status of the worker and covers formal and informal employment relationships.² It is worth noting that in the Malaysian context where the employment relationship is sometimes between the outsourcing company or agency and the worker, it is possible for coercion to be exercised by the outsourcing company on the worker and this must be borne in mind when applying the forced labour indicators. **The extraction of work or services “under the menace of any penalty”** does not necessarily mean that some form of penal sanction is applied; the penalty might take the form of a loss of rights or privileges.

Menace of penalty can include presence or credible threat of: physical violence against a worker or their family or close associates, sexual violence, (threat of) supernatural retaliation, imprisonment or other physical confinement, financial penalties, denunciation to authorities (police, immigration, etc.) and deportation, dismissal from current employment, exclusion from future employment, exclusion from community and social life, removal of rights or privileges, deprivation of food, shelter or other necessities, shift to even worse working conditions, loss of social status.

1- ILO: *Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement*, 2005.

2 - ILO: *Hard to See, Harder to Count*, p.19, 2012.



Each of the following acts - considered as indicators of forced labour - when committed intentionally or knowingly by an employer against a worker, **can be considered a criminal offence within the existing criminal laws of most countries**. However, the offence may not necessarily be forced labour if both the elements of involuntariness and menace/threat of penalty are not present:

- **Physical or sexual violence:** The use of threat and application of physical or sexual violence can come within the scope of the criminal offence of assault.
- **Restriction of movement:** Confinement corresponds to the common law offence of false imprisonment, which is any restraint of liberty of one person under the custody of another.
- **Debt bondage/bonded labour:** The key to the power of the employer over the worker is the appearance of lawfulness of the contract. The deception as to the rights of the worker falls under the offence of obtaining pecuniary advantage or services by deception, which is unlawful in most countries.
- **Withholding wages or refusing to pay the worker at all:** The withholding of wages - where a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it - is theft in criminal law.
- **Retention of passports and identity documents:** The withholding of identity documents and passports may be theft depending on the intention of the employer, or it may be part of an offence of deception.
- **Threat of denunciation to the authorities:** The threat of denunciation to the authorities comes within the legal definition of blackmail in many jurisdictions. The standard definition is that a person is guilty of blackmail if, with a view to gain for himself or herself, or another or with the intent to cause loss to another, he or she makes any unwarranted demand with menaces.

For a list of other indicators of forced labour, go to Module 3: Important concepts on and indicators of forced labour.

Lack of consent or involuntariness of work undertaken can include birth/descent into “slave” or bonded status, physical abduction or kidnapping, sale of person into the ownership of another, physical confinement in the work location, psychological compulsion, i.e. an order to work backed up by a credible threat of a penalty for non-compliance, induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.), deception or false promises about types and terms of work, withholding and non-payment of wages, retention of identity documents or other valuable personal possessions.

The issue of voluntariness may have different consequences as regards the determination of whether the offence has been committed. For example, theft, requires a lack of consent in order to differentiate it from a voluntary gift. The degree of consent needed to achieve a conviction in respect of the crimes associated with forced labour will differ depending on the rules and interpretation

in different jurisdictions.³

The “voluntary offer” means the consent must be free and informed. If vitiated by deception or other means, the consent is no longer free and informed. Where migrant workers were induced by deceit, false promises and retention of identity documents or forced to remain at the disposal of an employer, the ILO supervisory bodies have noted a violation of the ILO Convention No. 29. They have also noted that in cases where an employment relationship is originally the result of a freely concluded agreement, the workers’ right to free choice of employment remains inalienable - i.e., a restriction on leaving a job, even when the worker freely agreed to enter it, can be considered forced labour.⁴

1.2 Exceptions

? What is not forced labour?

Article 2(2) of the ILO Convention No. 29 sets out certain exceptions pertaining to practices which would otherwise have fallen under the definition of forced labour: compulsory military service; normal civic obligations; prison labour carried out under supervision and control of public authority, and not for private individuals, companies or associations; emergencies and minor communal service under certain conditions.

1.3 Forced labour and children

Pursuant to international standards, a child is anyone below the age of 18 years.

The same definitional components of involuntariness and penalty apply to children but assessment of their cases need to be done in light of children’s vulnerabilities, their reduced capacity to work and their dependency on parents. In relation to consent, a child cannot be deemed to give consent and it may well be that one is required to consider the consent of the child’s parent, if appropriate.

In addition, it must be recognised that forced labour of children can occur when coercion is applied to the parents of the child. Whilst it is highly desirable that no child should labour, the reality is that child labour is common across different geographies and sectors.

There is an important distinction to be made between child labour secured with coercion and that which is not. According to the ILO, “any type of economic activity undertaken by a child should be considered as forced labour where some form of coercion is applied by a third party, either directly to the child worker or to his or her parents, whether to force the child to take a job or perform a task, or to prevent the child from leaving the work.”⁵

4 - *Id*

5- ILO: *General Survey, Giving globalization a human face*, 2012.



Coercion may take place at the time of recruitment to force a child to take on a job, or once the child starts work and the work/working conditions are different to what was previously agreed upon, or to prevent the child from leaving a job. If a child is in employment as a direct result of his/her parents being in forced labour the child is then also considered to be a victim of forced labour.⁶

Indicators relating to children must be assessed with the heightened physical and psychological vulnerabilities of children in mind.

In addition to the above, there may be non-wage benefits promised to children e.g. schooling. Certain restrictions on children, for example, lack of ability to contact parents may create isolation and have a far deeper impact than in the case of adults. Lesser coercion and penalties may be required when dealing with children. The ILO also notes that there are “many more and different forms” of abuse of vulnerabilities with children than with adults.⁷

? Forced labour is also one of the worst forms of child labour, as defined in the **ILO Worst Forms of Child Labour Convention, 1999 (No. 182)**. The Convention defines the worst forms of child labour to include “(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced labour, including forced recruitment of children for use in armed conflict.” Child labour amounts to forced labour not only when children are forced by a third party to work under the menace of a penalty, but also when a child’s work is included within the forced labour provided by the family as a whole.

1.4 The Forced Labour Protocol

The Forced Labour Protocol of 2014 complements and strengthens Convention No. 29 by explicitly providing for the obligation of ratifying Member States to prevent forced labour, to protect victims and to provide access to remedies, such as compensation for material or physical harm. These measures shall include specific actions against trafficking in persons for the purpose of forced labour (Article 1(3)).

It requires governments to develop a national policy and plan of action for the effective and sustained suppression of forced labour, as well as to take measures to better protect workers – in particular migrant workers – from fraudulent and abusive recruitment practices. It also emphasizes the role of the social partners in the fight against forced labour.⁸

The Forced Labour Protocol also calls on member States, including Malaysia to take effective measures for the identification, release, protection, rehabilitation and recovery of victims; to ensure that victims have access to effective remedies, irrespective of their presence or legal status in the national territory; to cooperate with each other in the prevention and elimination of all forms of forced or compulsory labour.

6- ILO: *Hard to See, Harder to Count*, p.22, 2012.

7 - ILO: *Hard to See, Harder to Count*, p.22, 2012.

8 - ILO Recommendation No. 203 provides more detailed guidance in each of these areas.

2. Trafficking in persons

2.1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), 2000

The Palermo Protocol makes the following important definitions:

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

The consent of a victim of trafficking in persons is irrelevant.

The recruitment, transportation, transfer, harbouring or receipt of a child **for the purpose** of forced labour shall be considered “trafficking in persons”.

2.2 Forced labour and trafficking

The ILO Committee of Experts on the Application of the Conventions and Recommendations (CEACR) has pointed out that the purpose of trafficking inherent in the definition provided in the Palermo Protocol – namely the exploitation of labour – allows for a link to be established between the Forced Labour Protocol and Convention No. 29, and makes clear that **trafficking in persons for the purpose of exploitation is encompassed by the definition of forced labour** provided under Article 2(1) of the Convention. Another key element contained in the definition of trafficking in persons – the means of coercion used against an individual, including the threat or use of force, abduction, fraud, deception, the abuse of power or a position of vulnerability, which definitely exclude the voluntariness or consent of the victim – also brings it within the scope of Convention No. 29.⁹

3. Other international instruments

The **International Covenant on Civil and Political Rights (1966)** sets out a separate and specific prohibition against forced labour in Article 8(3)(a). This states that “No one shall be required to perform forced labour”, subject to certain exceptions which are broadly similar to those in ILO Convention No. 29, in particular prison labour.

The **International Covenant on Economic, Social and Cultural Rights (1966)** also has a separate and specific prohibition against forced labour. There is no definition of forced labour, but there are exceptions made to the term. Article 6 of the Covenant establishes “the right of everyone to the opportunity to gain his living by work which he freely chooses

9 - ILO: *Eradication of forced labour: General Survey concerning the Forced Labour Convention*, para. 77, 2007.



or accepts.” Articles 7 and 8 set out certain conditions and rights that must be upheld, such as fair wages, equal remuneration for work of equal value, the right to form and join trade unions.

The **Convention on the Rights of the Child (1989)** is relevant and applicable to the issue of children in forced labour or the trafficking of children because of its broad prohibitions of the exploitation of children.

The **Slavery Convention (1926)** defines slavery in Article 1(1) in the following terms: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

The majority of trafficking and forced labour victims are undocumented migrants, for whom **ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Part I**, provides the most important framework of protection. In the case that regular migrant workers in a regular employment situation are found in forced labour, **ILO Migration for Employment Convention Revised 1949, (No. 97)** will apply.

The **Domestic Workers Convention, 2011 (No. 189)** and **Domestic Workers Recommendation, 2011 (No. 201)** aim at dealing with the sectoral disadvantage domestic workers experience. The Convention provides explicitly that each ratifying State should take the necessary measures to respect, promote and realize the fundamental rights at work, including the elimination of all forms of forced or compulsory labour (Article 3(1)(b)). The Convention contains requirements for each ratifying State to develop and implement measures to ensure that domestic workers are informed of the terms and conditions of their employment (Article 7), that they enjoy equal treatment to that afforded to workers in general in terms of hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave (Article 10) and other working conditions, are protected from abusive practices of private employment agencies (Article 15), and are provided with access to justice (Article 16).

The **1998 ILO Declaration on Fundamental Principles and Rights at Work** adopted by all member States apply to all workers without distinction, whether they are locals or migrants, temporary or permanent, or whether they are in regular an irregular situation. It declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

Section 2:

Distinguishing forced labour from human trafficking and sub-standard working conditions

Forced labour is different from sub-standard or exploitative working conditions that may be found in some employment around the world. Victims in receipt of low wages may not be working in a forced labour situation if they are not working under the threat of a penalty or are freely consenting on their employment. In addition, sub-standard working conditions on their own are also not enough to determine the existence of a forced labour situation. **Various indicators can be used to ascertain when a situation amounts to forced labour, such as restrictions on workers' freedom of movement, withholding of wages or identity documents, physical or sexual violence, threats and intimidation or fraudulent debt from which workers cannot escape.**¹⁰ It is also of vital importance that these indicators are correctly weighted in order to arrive at a determination of forced labour. Incorrectly placing emphasis on one indicator as opposed to the other is likely to lead to an inaccurate determination.

The ILO Conventions relevant to trafficking and the Palermo Protocol originate from different bodies in different contexts. They are complementary and are not legal substitutes for each other.¹¹

Not all trafficking is forced labour (e.g. organ trafficking). For example, under the ATIPSOM, movement is not necessary to establish a trafficking case;¹² however, several cases of forced labour are likely to fall short of ATIPSOM requirements but would fall under labour laws on sub-standard working conditions despite satisfying the ILO definition of forced labour, such as: where a worker has no freedom to resign in accordance with legal requirements and is dismissed from employment; or where there is limited freedom of movement and communication and threats of dismissal from employment; or where there is deceptive recruitment and confiscation of identity documents.

The Palermo Protocol draws certain distinctions between trafficking for sexual exploitation on the one hand, and trafficking for forced labour or services (and also slavery, slavery-like practices and servitude). The ILO Convention No. 29 treats trafficking of persons for the purpose of commercial sexual exploitation as a form of forced labour.¹³

Consent is irrelevant in human trafficking if the means of coercion are established. In a forced labour situation, the consent of a victim is a relevant consideration. The terms "offered voluntarily" refer to the free and informed consent of a worker to enter into an employment relationship and his or her freedom to leave the employment at any time. The ILO CEACR suggests that when deception and fraud are involved in the presentation of the work offer to a worker, the worker's consent cannot be deemed to be informed and voluntary.

10 - ILO: *Questions and answers on forced labour*, 2012.

11 - ILO: *Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement*, 2005.

12 - Section 17A of the ATIPSOM provides that "the prosecution need not prove the movement or conveyance of the trafficked person but that the trafficked person was subject to exploitation."

13 - ILO: *The Cost of coercion*, p.6, 2009.



This therefore raises two questions:



Was consent given freely?



Does the worker retain the ability to withdraw his/her consent?

The issue of consent is of critical importance when a determination of legal protection needs to be made but also brings into question the kinds of “coercive pressures [that] are considered legitimate and illegitimate in labour relations”.¹⁴ Deceit often relates to working conditions, wages and living conditions. It is important to remember that consent is not a continuous concept and may be vitiated by deception and coercion at any point in an employment relationship.

SECTION 1 - 1.3 tackles the issue of forced labour of children, of which special considerations must be given.

Section 3:

Overview of the Malaysian labour migration policy

Malaysia’s reliance on migrant labour is rooted in its rapid economic and development growth post-independence from the 1970’s. The New Economic Plan which was mooted in 1970’s moved Malaysia’s economy from one based on agriculture to that of manufacturing. There was a visible increase then in internal migration of local workers from the agricultural sector to urban areas, fulfilling jobs in the manufacturing and service sectors.

Steep growth in state-led infrastructure development was also evident during the 70s which led to the flourishing of the construction sector. There was a huge lacuna in the labour market stemming from these developments. Both the agriculture and construction industries experienced labour shortages while households needed domestic help as more women were drawn to the workforce.¹⁵

Recognizing the immense shortage of labour which existed in the varying industries nationally, migrant workers were brought in to fill the gaps. Over time, jobs in manufacturing as well as the service sectors were opened to migrant workers. The demand for migrant workers in Malaysia has been on the rise ever since.¹⁶

14- ILO: *The Cost of Coercion*, p.6, 2009.

15 - Blanca, G.: *Labour Migration in Malaysia and Spain: Markets, Citizenship and Rights*. [Online]. Amsterdam: Amsterdam University Press, 2012.

16 - World Bank: *Malaysia Economic Monitor. Immigrant Labour*. [Online]. Kuala Lumpur: The World Bank. [Accessed 24 April 2018], 2015.

For many years, targets have been set nationally in the attempt to reduce dependency on migrant labour in order to encourage economic restructuring. Some of the strategies implemented include introducing a minimum wage scheme, enforcing that levy payments are made by employers, and raising the local retirement age. These strategies however have failed to change the local labour workforce composition.

Despite heavy reliance on migrant labour, the national rhetoric attached to migrant workers portray them as a threat to national security and problematic for the country's long-term social and economic development. This has resulted in the formulation of labour migration policies with a security lens rather than one of labour administration. Labour policies locally end up functioning as interim solutions serving to plug gaps which would assist with filling labour shortages.¹⁷

There are however some laudable policy developments which have taken place in Malaysia in recent years. The enactment of the national minimum wage law which covers migrant workers, the amendments to the ATIPSOM to provide for better victim protection, and the signing of bilateral MOUs with various countries of origins to reduce exploitation of workers are commendable. You will find relevant legislation which function to protect against human trafficking and forced labour in the following sections.

Section 4:

Access to justice of forced labour victims

According to the ILO 2017 study on Access to Justice of Migrant Workers in South-East Asia, the mechanisms for assistance with dispute resolution, administrative complaint mechanisms, and criminal and court hearing proceedings are established in legislation but not always accessible in practice.

In the event of a breach of labour rights, workers can lodge a complaint with the Labour Department and with the Industrial Relations Department. The Labour Department is mandated to accept complaints relating to violations of the Employment Act, the Minimum Wage Order, the Workers' Minimum Standards of Housing and Amenities Act, the Workmen's Compensation Act, and the ATIPSOM. The Industrial Relations Department is responsible for resolving cases of unfair dismissal, filed under Section 20 of the Industrial Relations Act.

Under the supervision of the Director of Public Prosecutions of the Attorney-General's Office of Malaysia, there are prosecution officers in every state serving as specialist prosecutors for trafficking in persons. A special court in Kuala Lumpur was established with the intention to expedite trials of trafficking cases. Five more special trafficking

17- ILO: *Review of labour migration policy in Malaysia*, 2016.



courts were established in 2018 in Ipoh, Perak; Balik Pulau, Penang; Melaka; Muar, Johor and Kota Kinabalu, Sabah. The Malaysian Bar also provides pro-bono services through its fifteen Legal Aid Centers (LAC), which differ in purpose to the Government Legal Aid Department (LAD). The LACs are funded by Malaysian Bar's practicing lawyers' membership subscriptions, while the LADs are government-funded. LACs assist both documented and undocumented foreign nationals including migrants and refugees. However, the resources and capacity of the LACs are insufficient to handle the demand for assistance by these vulnerable groups. The Malaysian LAD is in operation but assistance through this bureau is not rendered to migrant workers.

Many victims of forced labour are still reluctant to pursue remedies in the court or seek redress at the Labour Department, especially undocumented workers. The ILO 2017 report Access to Justice for Migrant Workers in South-East Asia indicated that service providers relied on informal mediation to resolve cases in Malaysia (53%), which is reportedly due to slow and ineffective administrative mechanisms. Most often lawyers, case workers, CSOs and union representatives mediate compensation with employers or agents either for non-payment of wages or permission to return to the country of origin before the expiry of the work permit. This is partly due to the difficulty in migrant workers' access to justice, and such mediation is therefore a more favourable option among workers themselves. Unfortunately, compensation very rarely, if ever, reflects loss of earnings, harm done for physical or psychological trauma and expenses incurred. It is also very common for negotiated settlements to reflect only a proportion of wages owed as opposed to the full amount.

The Labour Department often relies on workers to initiate a complaint of non-payment of wages before they investigate a potential trafficking case.

Under the ATIPSOM, there are provisions for compensation to those recognised as victims of trafficking including forced labour. In particular, under sections 66A and 66B, following a conviction under ATIPSOM, the Court may make an order for compensation by the convicted person to the trafficked person. The payment of compensation pursuant to ATIPSOM does not preclude the commencement of any civil claims by the trafficked person against the convicted persons.

The payment of compensation is subject to paragraph 432 of the Criminal Procedure Code of Malaysia and gives the Court the power to award the payment of compensation in instalments, allow additional imprisonment in lieu of payment of compensation and issue a levy for the sale of property of the convicted person to raise funds for the payment of the compensation order. Furthermore section 66A also provides for the payment of wage arrears upon order of the Court against the convicted person. The amount will be determined by the Court following an inquiry which may take into account evidence presented before the Court on such matter.

Section 5: National legislation

Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act 2007 (ATIPSOM)

Malaysia does not have a specific law or a country definition for forced labour. Nevertheless, forced labour is a pertinent indicator of exploitation to establish the act of trafficking under the ATIPSOM.



“Trafficking in persons” is defined under the ATIPSOM as all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.

“Exploitation” includes forced labour or services.

The legal definition of “trafficking in persons” as amended in 2010 limits the crime to those situations in which a person is exploited by means of “coercion”. Under the ATIPSOM, movement is not necessary to establish a trafficking case.

Since forced labour exists as a subset of human trafficking under the ATIPSOM, proving the element of coercion is central to making a case of trafficking/forced labour under the ATIPSOM. Coercion in ATIPSOM is defined as:

- (a) Threat of serious harm to or physical restraint against any person;
- (b) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (c) The abuse or threatened abuse of the legal process;

The definition of coercion sets the bar very high and in some cases is unattainable for other forms of forced labour.

At the heart of the issue is the fact that there are a range of cases that are likely to satisfy the forced labour indicators test¹⁴ but that would not fall within the definition of trafficking in the ATIPSOM by virtue of not satisfying the coercion element of the definition. Such cases may not be properly decided under the Penal Code as this law does not provide for a proportionately serious penalty.

14 - ILO: *Hard to See, Harder to Count*, p. 23-32, 2017.



Some cases would by default be dealt with under existing labour laws even though they would meet the definition of forced labour and satisfy the indicators requirement. Forced labour cases cannot be dealt with effectively by an application of piecemeal labour laws and in many instances Labour Courts or Tribunals are not best equipped with the knowledge and expertise to deal with these issues. Furthermore, victims are often unrepresented at this stage of the proceedings and it makes it difficult for victims to access remedy effectively.

For example, a case of **forced** overtime with financial penalties imposed on a worker would be adequate to satisfy a positive finding of forced labour pursuant to the forced labour indicators. Such a case might not satisfy the requirements of the definition of trafficking in ATIPSOM and would therefore be dealt with by labour courts as a labour issue. Further examples of cases of forced labour likely to fall short of ATIPSOM requirements and to fall under labour laws despite satisfying the forced labour indicators: where a worker has no freedom to resign in accordance with legal requirements and is dismissed from employment; or where there is limited freedom of movement and communication and threats of dismissal from employment; or where there is deceptive recruitment and confiscation of identity documents.



In addition, the non-criminalisation protection available for victims of trafficking/forced labour in ATIPSOM is not available to those whose forced labour cases are heard under different labour laws because they do not meet the ATIPSOM threshold.

Clear guidelines or illustrations on forced labour are needed to ensure that cases that satisfy the elements of forced labour but do not fall within the ambit of trafficking are still properly acted upon.

Without a national definition on forced labour, the different enforcement, legal and judiciary actors may act on forced labour cases differently. A further complication is the lack of appropriate legislation to address forced labour that are not the subset of the human trafficking as set out in ATIPSOM.

Where an individual is found to have entered the country in an irregular manner, the distinction between human trafficking and migrant smuggling rests on the interpretation of the definition of human trafficking – “all actions involved in acquiring or maintaining the labour or services of a person through coercion”. In making a distinction between a victim of human trafficking and a smuggled migrant, one would need to establish an element of “coercion” surrounding his/her entry for the purposes of acquiring or maintaining that person’s labour or services. This could essentially make it more likely that victims of human trafficking will be treated as undocumented migrants and be subject to deportation.

The Federal Constitution of Malaysia

Article 6 provides that “no person shall be held in slavery” and “all forms of forced labour are prohibited...”

Migrant workers, documented or undocumented, are entitled to a constitutional right in Malaysia. The Court in *Ali Salih Khalaf v. Taj Mahal Hotel*¹⁵ opined that all persons are equal before the law because Article 8(1) of the Federal Constitution uses the word “persons” and not “citizen”.

The equality before the laws is not always reflected in other labour laws, such as in the Employment Act 1955 where some provisions are not applicable to all workers in particular domestic workers.

Criminal and criminal law procedure - Penal Code (Act 574), Criminal Procedure Code (Act 593)

Sections 359 to 374 of the Penal Code deal with the criminal activities of kidnapping, abduction, slavery and forced labour. Section 374 provides that “[w]hoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both” This provision of the Penal Code is considered to provide too lenient a penalty to be applied to forced labour cases. As a result, the existence of this provision criminalising forced labour does not practically improve the protection available to victims of forced labour under the law. The Penal Code provision is not used in practice to deal with forced labour cases and would require a revision of its terms so it is commensurate with Malaysia’s obligations under the ILO Convention 29.

Labour laws that provide protection of workers’ rights

- Employment Act 1955
- Employment Restriction Act 1968
- Workers’ Minimum Standards of Housing and Amenities Act 1990
- Workmen’s Compensation Act 1952, Children and Young Persons (Employment) Act 1966
- Occupational Safety and Health 1994
- Factories and Machinery Act 1967
- Wages Consultative Council Act 2011
- Minimum Wages Act 2016
- Passports Act 1966
- Private Employment Agencies Act 1981 (and 2017 amendment)
- Industrial Relations Act 1967
- Trade Union Act 1959
- Contracts Act 1950
- Labour Ordinance (Sabah Cap. 67)
- Labour Ordinance (Sarawak Cap. 76)

¹⁵ - Industrial Court of Malaysia: *Case No: 22(27)/4-1580/12 between Ali Salih Khalaf v. Taj Mahal Hotel*, Award No. 245 of 2014, unpublished.



Employment Act 1955

- The Act is applicable to “Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person’s wages do not exceed RM 2,000 a month...or engaged in manual labour...or engaged as a domestic servant.” The Act is silent on the requirement for migrant and domestic workers to be documented, however, it contains provisions that exclude domestic workers from entitlement to maternity protection, rest days or holidays. Hours of work and conditions of service are also not protected. Such exclusions contradict Section 60L of the Employment Act 1955 which reinforces the concept of equality, and the prohibition of discrimination between different categories of workers.¹⁷
- The ILO has noted that the use of the term “domestic servant” to refer to domestic workers is derogatory and not aligned with the spirit of ILO Conventions.
- A 2012 report pointed out that many domestic workers are not paid at all for the first several months of work as their salaries are deducted to pay for recruitment fees.¹⁸

Employment Restriction Act 1968

Establishes the principle that non-citizens can only work in Malaysia if they are issued “a valid employment permit”.

Workers’ Minimum Standard of Housing and Amenities Act 1990

Applicable only to mining and estate workers, provides for “free and adequate” running water, adequate electricity and that the buildings are “kept in a good state of repair” including provisions for “health, hospital, medical and social amenities” to workers. The Act does not address the number of persons allowed to share a room or the requirement on bedding and other supplies which is a major issue amongst migrant workers. There are also no regulations on housing and amenities for workers employed in urban areas and in service sectors such as restaurants and factories as well as private homes.¹⁹

Workmen’s Compensation Act 1952

Does not expressly exclude migrant workers without work permits. However there has yet to be a case filed to test this provision. The Act bars a claimant from seeking compensation from the civil courts if the payment under this Act has been awarded.²⁰

16 - ILO: *Situation and gap analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol*, 2018.

17- Interview H

18 - The Equal Rights Trust: *Washing the Tigers: Addressing discrimination and inequality in Malaysia*, 2012.

19 - *Id.*

20- *Id.*

Occupational Health and Safety Act 1994	Provides “for securing the safety, health and welfare of persons at work” and to protect others from unsafe work practices. It applies to all sectors and does not exclude domestic workers.
Minimum Wages Order 2016	Applies to all employers, regardless of the number of workers, as well as all workers in the private sector, with the notable exception of domestic workers.
Passports Act 1966	Criminalises the possession of any passport or internal travel document issued for the use of some person other than himself.
Private Employment Agencies (Amendment) Act 2017	Provides for the licensing of any person or company that “acts as an intermediary” between employers and Malaysia workers for the placement of these workers in local positions or overseas. The amendment expands “enforcement provisions on private employment agencies in recruiting foreign workers including foreign domestic maids.” ²¹
Industrial Relations Act 1967	Governs the relationship between employers, workers and their trade unions including setting collective bargaining rules, and procedures for handling trade disputes and guaranteeing the freedom of association.
Trade Union Act 1959	Governs the management of trade unions. The Act prohibits non-citizens from holding office in or being employed as staff of a trade union.
Contracts Act 1950	Governs any kind of lawful agreement either by act, written or oral between two or more free consenting parties in exchange for a consideration. This includes employment contracts between agents or employers and migrant workers or domestic workers.

Other relevant laws

Immigration Act 1959	Requires that all persons wishing to enter Malaysia must enter and exit at designated checkpoints, and that all non-citizens hold either an entry permit or pass to enter Malaysia.
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Section 6: Regional framework

ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP)

- The aim of the ACTIP is to prevent and combat trafficking in persons and to ensure just and effective punishment of trafficking; protect and assist victims of trafficking in persons, with full respect for their human rights; and promote cooperation among the parties in order to meet these objectives.

ASEAN's Labour Ministers Work Programme 2016- 2020

- Overall objective is to improve quality of life for ASEAN people through workforce with enhanced competitiveness and engaged in safe and decent work derived from productive employment, harmonious and progressive workplace, and adequate social protection.
- Reduced incidence of workers in vulnerable situations, including forced labour, in ASEAN Member States is one of the intermediate targets by 2020.

Bali Process Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime

- The Declaration acknowledges the growing scale and complexity of irregular migration challenges both within and outside the Asia Pacific region and supports measures that would contribute to comprehensive long-term strategies in addressing the crimes of people smuggling and human trafficking as well as reducing migrant exploitation by expanding safe, legal and affordable migration pathways.
- The Declaration affirms respective international legal obligations and encourages members to identify and provide safety and protection to migrants, victims of human trafficking, smuggled persons, asylum seekers and refugees, whilst addressing the needs of vulnerable groups including women and children, and taking into account prevailing national laws and circumstances.
- Members are encouraged to "effectively criminalise people smuggling and trafficking in persons, in accordance with relevant international law, and regional instruments."
- The need to engage constructively with the private sector to combat human trafficking and related exploitation, including by promoting and implementing humane, non-abusive labour practices throughout their supply chains.

ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children

- The Plan of Action is intended to
 - Strengthen the rule of law and border control among ASEAN Member States;
 - Intensify efforts to prosecute trafficking in persons cases;
 - Strengthen regional cooperation based on shared responsibilities to effectively address demand and supply that fosters all forms of trafficking in persons, especially women and children, that leads to trafficking; and
 - adopt and implement appropriate labour laws or other mechanisms that promote and protect the interests and rights of workers to reduce their risk

Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons

- Countries should review and modify policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws on women (section 4.8)
- Countries of origin should examine ways of increasing opportunities for legal, gainful and non-exploitative labour migration. The promotion of labour migration by countries should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrants (section 4.9).

ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases

- One of the 2007 Senior Officials Meeting on Transnational Crime Work Plans was to implement the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children which commits ASEAN Member States to strengthen the legal and policy framework around trafficking in order to promote more effective national responses as well as greater regional and international cooperation especially in relation to the investigation and prosecution of trafficking cases and the protection of victims through the development of an ASEAN Handbook on International Cooperation.
- The purpose of this Handbook is to provide criminal justice officials within the ASEAN region with an introduction to the key tools of international cooperation and to provide guidance on how these tools might be relevant to the investigation and prosecution of trafficking in persons or related crimes.



ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons

- All forms of trafficking in persons and related crimes should be specifically criminalised in accordance with applicable international standards.

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

- Promote the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of each country (para. 1)
- Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers (para. 8)
- Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states (para. 9).
- Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies (para. 14).

ASEAN Declaration against Trafficking in Persons Particularly Women and Children

- Acknowledge social, economic and other factors that cause people to migrate making them vulnerable to trafficking in persons.
- Adopt measures to protect the integrity of their respective passports, official travel documents, identity and other official travel documents from fraud (para. 2)
- Intensify cooperation among our respective immigration and other laws enforcement authorities (para. 4)

Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (COMMIT)

- Applying national labour laws to protect the rights of all workers based on the principles of non-discrimination and equality (para. 25)
- Encouraging destination countries...to effectively enforce relevant national laws in order to reduce acceptance of exploitation of persons that fuels the continuing demand for the labour of trafficked persons... (para. 26)

Section 7:

Alignment of national legislation with international standards

Article 25 of the ILO Convention No.29 provides that the illegal exaction of forced labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying the ILO Convention No. 29 to ensure that the penalties imposed by law are adequate and are strictly enforced.²² Forced labour is prohibited under section 374 of the Penal Code which deals with the criminal activities of unlawful compulsory labour. Forced labour is also prohibited under Article 6 of the Federal Constitution of Malaysia.

As a party to the Palermo Protocol, Malaysia has an obligation to adopt such legislative and other measures as may be necessary to criminalise human trafficking related activities. The Palermo Protocol requires the creation of new criminal law sanctions for a combination of constituent elements, which include forced labour. The ATIPSOM identifies conduct which is considered to be a human trafficking activity and criminalises the act of trafficking for forced labour. However, the current ATIPSOM legislation does not define forced labour and the legislation very much conceives forced labour as a subset of human trafficking and no national legislation covers forced labour occurring independent of trafficking. This marks a departure from the understanding of forced labour as set out in ILO standards where there is a recognition that forced labour may or may not be a form of exploitation in under human trafficking.

Apart from the Malaysian Federal Constitution, the Penal Code and the ATIPSOM, labour laws provide another mechanism and sanctions that go beyond criminal and civil law. Malaysian laws and regulations that address forced labour and related issues as discussed in Section 5.

Administrative law, in particular regarding immigration status, is also important to the issue of forced labour when this involves migrant workers' presence in the country or work status of foreign nationals. This potentially has an effect on migrant workers' access to justice. The State's duty to protect migrant workers from forced labour must also be reflected in the administrative law aspect of the worker's status.

22 - ILO: *Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement*, 2005.



The integration of the labour law enforcement and the criminal justice approach in capturing the continuum of exploitation - the degree or severity of exploitation - is very subjective. It is not easy for judicial practitioners to determine which practices should be dealt with through long imprisonment term or fines particularly as cases may range from singular labour law violations to cases that present a real composition of offences that underlie the offence of forced labour e.g. coercion, deception, threats, theft etc... Hence, there needs to be a combination of both approaches to address the most serious violations as well as other less serious labour rights violations.²³

Practical Exercise for Module 1

Exercise 1: The legal framework and definitions		
	When	Do this exercise at the end of Section 2
	Duration	10 minutes group work 10 minutes presentation to the class
	Objectives	To become familiar with different elements – consent and the threat or menace of penalty – of forced labour
	Methodology	1.Split participants into two groups with Group 1 analysing Case One and Group 2 analysing Case Two. 2.Read the case studies and identify different elements of the definition of forced labour.

23- Roger Plant: *Trafficking for Labour Exploitation: challenges for criminal Law Enforcement*. Paper prepared for the Cambridge International Symposium on Economic Crime, Cambridge, United Kingdom, 2 September 2009.



Answers

Case One

Menaces of penalty are financial penalties (deductions from salaries or yearly bonuses), removal of rights or privileges (giving up a day's work or leave), and threat of dismissal from current employment. U is also required to work overtime exceeding his normal working hours and he is also deprived of her overtime payment. Consent cannot be deemed to have been given for working in such conditions.

Case Two

Although it appears that this was an employment relationship which was the result of a freely concluded agreement, the terms of the employment may have been altered when U. signed the second contract in a language which she did not understand. Consent cannot be deemed to be free informed. She also cannot exercise her freedom of choice to leave her employment due to coercion over the repayment of debt.

Quiz

1. N
2. N
3. Y
4. N
5. N
6. Y
7. Y
8. N
9. N. On its own being paid below the minimum wage or less than agreed is not sufficient to demonstrate forced labour. Unless there are other indicators present that taken together with payment of low wages can be considered to be indicative of forced labour.
10. N. Need to determine whether she was working under the threat of a penalty or without volunteering her employment. Some could say Yes with the need for further information to assess what the menace of penalty is to secure her compliance.
11. Y
12. N. Deception vitiates consent but there is no menace of penalty.
13. N
14. C
15. E



Case studies

Case ONE

U. works as a casual daily labourer in the plant maintenance unit on a palm oil estate. The target is to spread 15 – 17 sacks and if he does not reach his target, the employer would ask him to keep working with no overtime pay. He has to finish all the sacks before he can leave.

U. is often penalised for failing to meet targets or for his mistakes (for example, for picking unripe fruit). In most cases, the penalty involves deductions from his salaries or yearly bonuses or having to give up a day's work or leave. As U. is a casual daily labourer, he is particularly vulnerable as he can be 'scorched' (stopped from working for one or more days or let go altogether) if he fails to meet his targets.

Case TWO

U. was recruited by a labour broker in Indonesia to work as a domestic worker in Malaysia. She thought the terms were attractive and she would make good money for her family. She read and signed the contract. When she arrived in Malaysia, she was asked to sign a second contract in English which she did not understand. During her employment, she was given proper food and her overall welfare and well-being were taken care of by the employer. She was allowed to go outside the house to buy food whenever her employer instructed, but she was never given a key to the lock on the gate. U. knew that there would be a deduction of her monthly salary to cover all the necessary fees for her to work in Malaysia. However, she had no knowledge that the broker had asked her employer to keep her RM550 monthly salary after the seventh month and the money would be payable to her together with her airline ticket upon the expiry of her contract of employment. After a year, U. told her employer that she would like to return home to visit her family for a few days. Her employer informed her that the terms of the contract provided that she was not allowed to leave her employment until she paid off all her debt.

Task for both case studies

Identify different elements of the definition of forced labour. Specifically, what are the threats or menace of penalty in this scenario?

Quiz

1. Forced labour can result from internal or cross-border movement which renders some workers particularly vulnerable to deceptive recruitment and coercive labour practices whereas human trafficking can result only from cross-border movement.

☐ Y ☐ N

2. Forced labour always occurs in the context of human trafficking.

☐ Y ☐ N

3. Trafficking of persons for the purpose of commercial sexual exploitation is a form of forced labour.

☐ Y ☐ N

4. When the labour broker explained all the terms of the employment to the worker, regardless of whether they were accurate, the worker's consent can be deemed to be informed and voluntary.

☐ Y ☐ N

5. Sub-standard working conditions on their own are sufficient to determine the existence of a forced labour situation.

☐ Y ☐ N

6. While the Palermo Protocol draws certain distinctions between trafficking for sexual exploitation on the one hand, and trafficking for forced labour or services on the other, the ILO Convention No. 29 treats trafficking of persons for the purpose of commercial sexual exploitation as victims of forced labour.

☐ Y ☐ N

7. More than half of the victims of modern slavery globally were in forced labour.

☐ Y ☐ N

8. According to recent statistics, prosecution efforts under the offense of human trafficking for labour exploitation and the offense of forced labour are on par with the prevalence of the crime.

☐ Y ☐ N



9. M. is from Indonesia. She works as a domestic worker in Malaysia. Her employer pays her less than the minimum monthly salary of RM900. Is M. in a situation of forced labour?

☐ Y ☐ N

10. Y. voluntarily agreed and signed a contract to work in a factory assembling mobile phones. Her mother back home in the Philippines was sick and she told her employer that she needed to leave her job to return home. Her employer did not allow her to terminate her employment. Does this amount to forced labour? And why?

☐ Y ☐ N

11. According to recent statistics, Asia-pacific region accounts for the largest number of forced labourers.

☐ Y ☐ N

12. Z. was recruited to work on a manufacturing plant in Malaysia. She voluntarily accepted the job offer. Upon arrival, the terms of employment were significantly different from what were promised at the time she signed the contract. Does this amount to a situation of forced labour?

☐ Y ☐ N

13. Under the Palermo Protocol, many forced labour practices are not trafficking because they do not involve movement. Similarly, under the ATIPSOM, movement is also a requisite to establish a trafficking and forced labour case.

☐ Y ☐ N

14. Forced labour has been discovered across different industries in Malaysia. Which of the following is the lower-risk sector?

- | | |
|-------------------|------------------|
| a. Agriculture | b. Construction |
| c. Transportation | d. Manufacturing |

15. What indicators can be used to distinguish forced labour from sub-standard working conditions? Circle all the applies.

- | | |
|--------------------------------|---------------------------|
| a. Restrictions of movement | b. Delay payment of wages |
| c. Physical or sexual violence | d. Fraudulent debt |
| e. All of the above | |

Exercise 2: The legal framework: forced labour and trafficking



When

Do this exercise at the end of Section 7



Duration

15 minutes group work
15 minutes group presentations/discussion (if time permits)



Objectives

To become familiar with all the relevant national legislation



Methodology

1. Split participants into two groups with Group 1 analysing Case One and Group 2 analysing Case Two.
2. Read the case studies and identify the relevant crimes and determine what provisions of Malaysian law apply.
3. Elaborate examples regarding the interpretation of national law through international regulations.
4. Present individual group findings



Answers

Case One

- Passport retention (s12(1)(f), Passports Act 1966), (s415; s417; s420, Penal Code 1936), (s56(1)(l), Immigration Act 1959)
- Illegal recruitment fee (Second Schedule, Private Employment Agencies Act 1981)
- Unlawful deductions from wages (s24; s91(c), Employment Act 1955)
- Lack of protective equipment (s15, Occupational Health and Safety Act 1994)
- Lack of housing amenities (s5, Workers' Minimum Standard of Housing and Amenities Act 1990)
- Child labour in hazardous work (s2, Children and Young Persons Employment Act 1966)
- Lack of consent (s6; s40, Personal Data Protection Act 2010)

Case Two

- Passport retention (s12(1)(f), Passports Act 1966), (s415; s417; s420, Penal Code 1936), (s56(1)(l), Immigration Act 1959/63)
- Illegal recruitment fee (Second Schedule, Private Employment Agencies Act 1981)
- Failure to pay wages (s19; s91, Employment Act 1955)
- Unlawful compulsory labour (s374, Penal Code 1936)
- Assault (s351, Penal Code 1936)
- Intimidation (s503; s506, Penal Code 1936)
- Confinement (s339; s340; s341; s342, Penal Code 1936)
- Cheating (s415; s417, Penal Code 1936)
- False imprisonment (common law offence)
- In relation to the charges on immigration violations, M. and K. shall not be prosecuted for the illegality of their residence in the country, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims of forced labour.
- In relation to the charges on theft to K., further investigation is needed to determine the facts of the case whether the charges were merely made by a disgruntled employer.



Case studies

Case ONE

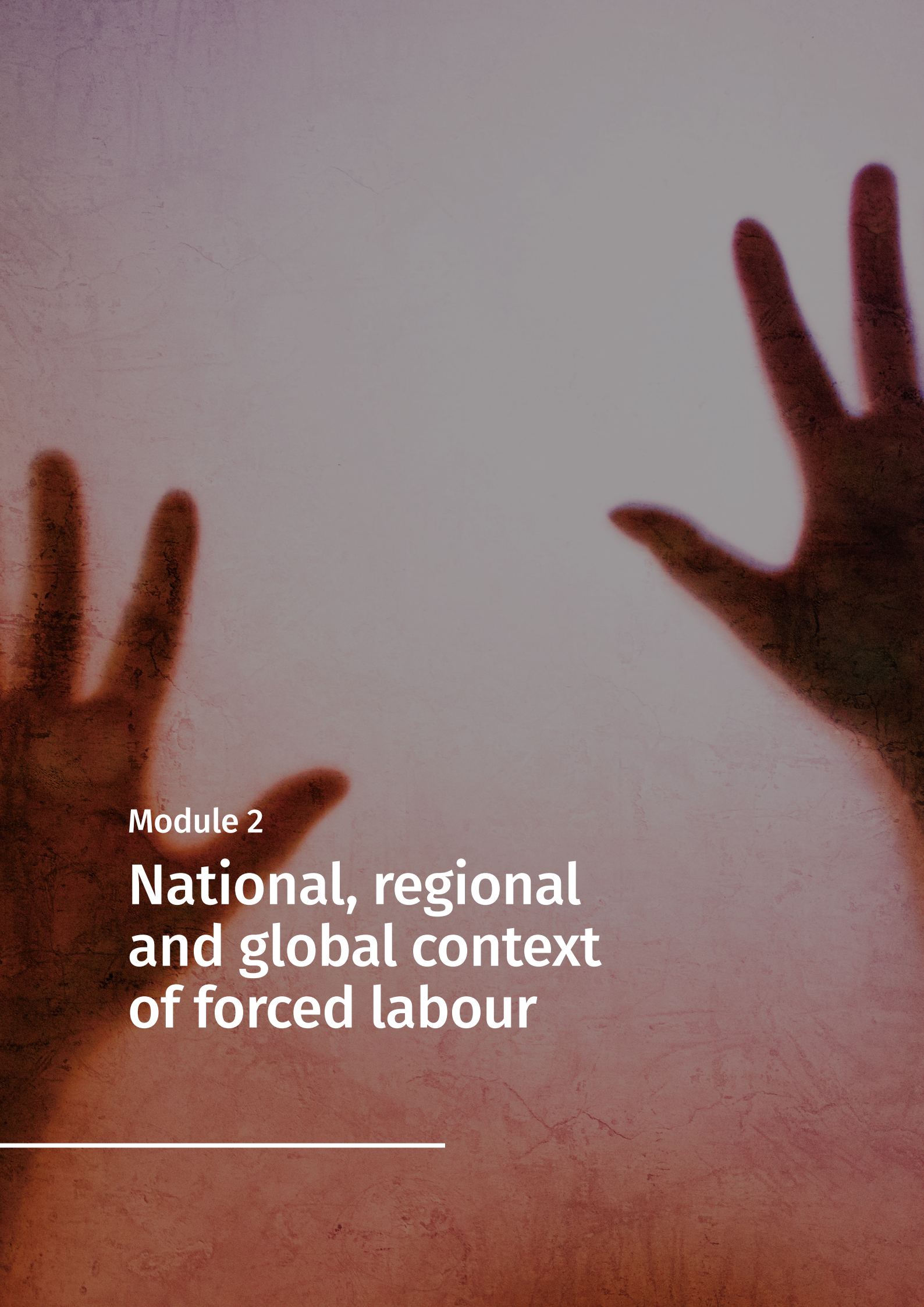
M. secured a job on a palm oil plantation in Malaysia through a labour broker in his home town in Cambodia. He paid a hefty recruitment fee and travel expenses which he agreed were to be deducted from his monthly wages. M. travelled to Malaysia with his wife and son. Upon arrival, his passport was seized, limiting his freedom of movement and ability to leave the plantation on his days off. On top of the debt owed for recruitment fees and travel expense, he was told that he had to pay for lodging and food for himself and his family. Even essential safety equipment such as gloves and goggles were added to the tab. During the harvesting season, his wife and son helped him harvest palm fruit to meet the employer's high harvesting quotas. M. is ill but is unaware of what the problem is as he is unable to visit a doctor. There are clinics on the plantation but they are only for collecting and analysing blood from the workers to determine if the workers are ill but this information is not shared with the workers.

Case TWO

K. came to Kuala Lumpur to work as a domestic worker. The broker told her that she could earn US\$200 to US\$300 a month and that she would get great benefits like free healthcare, one day off a week, and food. Upon arrival, her passport was confiscated. Her employer never beat her but they shouted at her and said a lot of hurtful and scary things to her. Her typical day involved waking up at 4:30am because it was a very big house. Sometimes she did not get to sleep until 12:30am in the morning. She had agreed with the employer that certain fees borne by her employer for her coming to Malaysia would be deducted from her initial salary up to seven months. She did not ask how she would be paid and did not know or comprehend the mode of payment of her monthly salary. She worked for two years straight without a day off. She had six and a half months of salary deducted for "costs" that her employer explained was the cost to hire her. Unable to bear her situation any more, M. asked her employer if she could leave to return home. Her employer responded by beating her and locking her in the house for 1 week. After her confinement, she was able to escape and seek help at a police station. However, she was not in possession of her passport that remained with her employer. The police said she was undocumented and that her employer had filed a case for theft against her. K. is arrested pending further investigation.

Task

1. For both cases, please identify the relevant crimes and determine what provisions of Malaysian and International law apply. Specifically, which legislation should be used to prosecute such crimes?
2. In relation to Case two, how would you deal with the fact that there are criminal charges pending against M.



Module 2

National, regional and global context of forced labour



Module 2

National, regional and global context of forced labour

Section 1: Situating the issue of forced labour within a local, regional and global context

Section 2: Non-criminalisation of victims of forced labour

Section 3: Understanding victimization

Learning objectives

- Gaining an idea of the local, regional and global extent of forced labour and the difficulties of obtaining accurate statistics and data on the crime.
- Understanding non-criminalization of victims of forced labour and circumstances and situations leading to their victimization.

Key words and concepts

- Victims of forced or compulsory labour should not be prosecuted for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

Section 1: Situating the issue of forced labour within a local, regional and global context

	Objectives	Participants will gain knowledge of the dimensions and gravity of the problem of forced labour.
	Delivery techniques/ activities	Quiz Take the true/false quiz to assess prior knowledge. Lecture (power point) • Outline the global scale of the crime and explain difficulties of data collection. • Outline the scale of the crime in Malaysia.
	Supporting documents/ recommended reading	• "Global Estimates of Modern Slavery", ILO, Geneva 2017 • "Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement", ILO, Geneva 2005 • "Forced Labor in the Production of Electronic Goods in Malaysia", Verite 2014
	Suggested duration	30-45 minutes

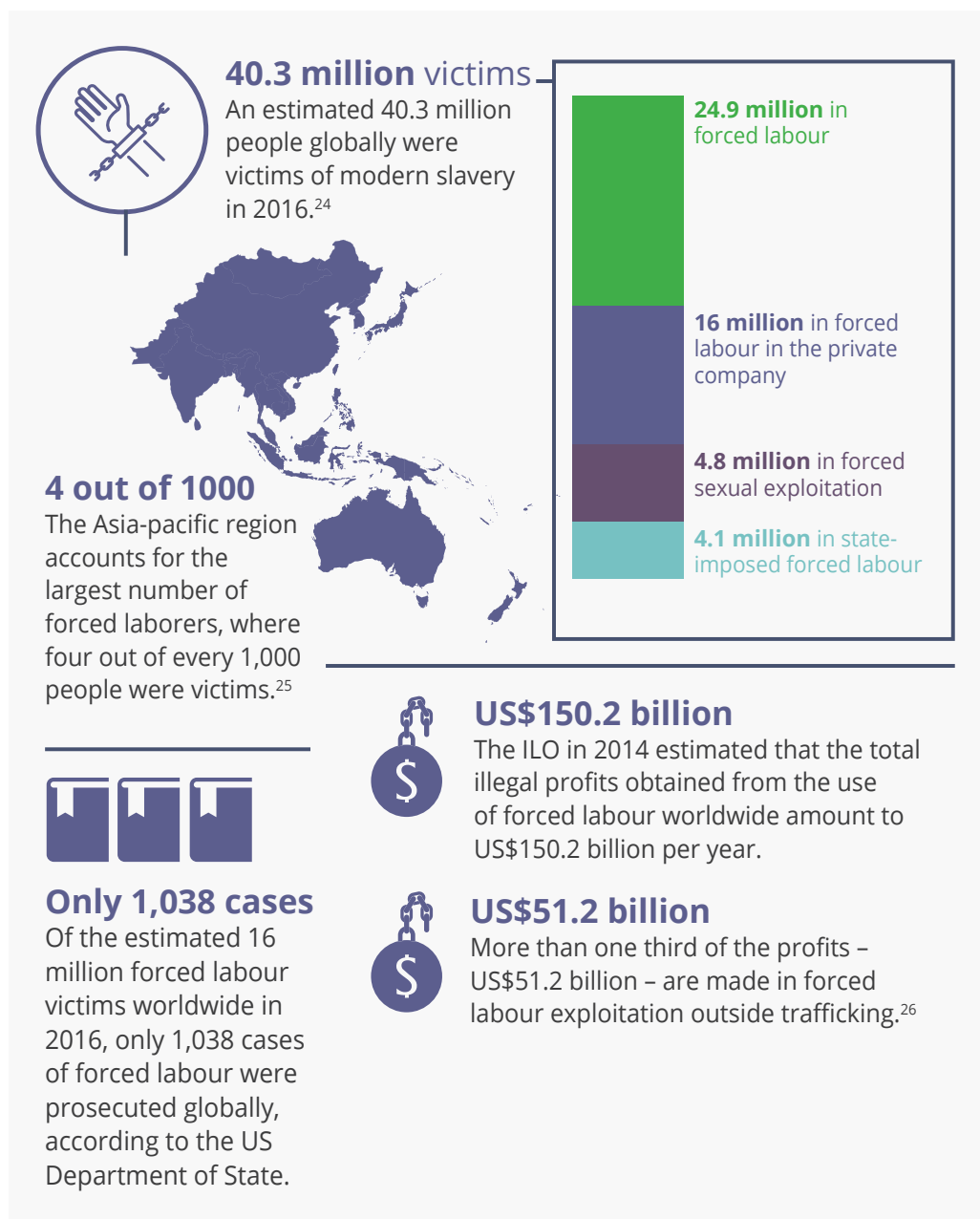
Sections 2 and 3: Non-criminalisation of victims of forced labour and understanding victimization

		Participants will understand the principle of non-punishment of victims of forced labour and what is victimization.
	Delivery techniques/ activities	Lecture (power point) Brief input on the legal instrument establishing the principle of non-criminalization and background on victimization.
	Supporting documents/ recommended reading	• The ILO Forced Labour Protocol supplementing the ILO Convention No. 29 • "ILO Standards on Forced Labour - The new Protocol and Recommendation at a Glance", ILO, Geneva 2016
	Suggested duration	30 minutes



Section 1:

Situating the issue of forced labour within a local, regional and international context



24- Global Estimates of Modern Slavery 2017, developed by the ILO and the Walk Free Foundation, in partnership with the International Organization for Migration

25 - Note that when accounting for the statistics in the Asia-Pacific region, the number does not distinguish between labour exploitation and forced labour or indicate that it is for the totality

26 - ILO: Profits and Poverty: The Economics of Forced Labour, 2014.



The Global Estimates of Modern Slavery 2017 indicate that men are disproportionately subject to forced labour in sectors that traditionally involve manual labour (construction, manufacturing and agriculture/fishing). They also confirm that men and boys can be victims in all aspects of modern slavery, including forced sexual exploitation. Notably though, in Asia and the Pacific, women and young girls accounted for over two thirds of those in forced labour.

In 2015, it was estimated that there were two million documented migrant workers, and two million or more undocumented migrant workers in Malaysia, according to the United Nations Special Rapporteur on trafficking in persons. Migrant workers (documented or undocumented) are made to work long hours, lack rest days, are not paid their wages, or even suffer physical and sexual abuse.²⁷ Various local and international reports have spanned across numerous labour rights issues from widespread withholding of identity documents in the fast food industry, earning below the national statutory minimum wages on palm oil plantation to excessive work hours and inadequate rest days in the electronic industry.

An interview with a workers' representative indicated that forced labour is not confined to migrant workers but also affects Malaysians.

27 - Preliminary findings, UN Special Rapporteur on Trafficking in persons, especially women and children, Maria Grazia Giammarinaro Visit to Malaysia" (23 -28 February 2015)



Section 2:

Non-criminalisation of victims of forced labour

A non-punishment clause was included in the ILO Forced Labour Protocol supplementing the ILO Convention No. 29: “Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour”.²⁸

The language specifically addresses “unlawful activities” and not “criminal activities”, thus potentially include activities that not only violate criminal laws but also other laws such as administrative law or immigration law. This can include immigration-related, prostitution, drug offenses that are linked to victims’ forced labour situations.²⁹

It is common for officials to ignore complaints in relation to passport confiscation or withholding of wages in cases of domestic workers, thereby failing to recognise potential signs of forced labour and instead taking action against those who complained for immigration violations.³⁰ Workers are most often penalised for being undocumented in the event their employer retains their passport and the employment arrangement ceases. Given that the work permit renewal process is employer driven, there are also instances reported where employers fail to renew the permits and do not inform the workers about this, accordingly. In the latter case, workers caught will be considered to be working illegally and criminalised by law enforcers despite the renewal failure being the employer’s fault. The ATIPSOM provides for the non-criminalisation of victims of trafficking in line with the requirements of the ILO Convention No. 29. However, the same victim protection is not available for forced labour under the Criminal Code provision or those whose cases are heard under various different labour laws because they do not meet the ATIPSOM threshold.

28 - Article 4(2) of the Protocol of the International Labour Organization (ILO) supplementing the ILO Convention No. 29

29 - ILO: ILO Standards on Forced Labour - The new Protocol and Recommendation at a Glance, 2016.

30 - US Department of State: Trafficking in Persons Report, 2015.

Section 3:

Understanding victimisation

There are some circumstances or vulnerabilities that lead to a higher susceptibility to victimisation.

Poverty, disability or illness, runaway or homelessness, war or conflict, inequality and discrimination are frequent causes of victimisation. On their own these circumstances are not adequate to lead to a determination of forced labour but when viewed in conjunction with other indicators can certainly contribute to occurrence of forced labour.

Migrant workers who have paid significant recruitment and travel fees often become highly indebted to traffickers, recruiters or other intermediaries and even their employers.



A study by Verite found that **recruitment fees that workers paid for their jobs in the electronic industry often exceeded legal and industry standards equivalent to one month's wage.** Of workers reporting recruitment fees paid to employment agents in their home countries, 92% were excessive. Of respondents reporting fees paid to their employment agents in Malaysia, 99% reported excessive levels.³⁸

Lack of legal status, language barriers, relationships of dependency and religious and cultural beliefs are also vulnerabilities that lead to victimisation.



Module 3

Important concepts and indicators of forced labour

Module 3

Important concepts and indicators of forced labour

Section 1: Unfree recruitment, work and life under duress and impossibility of leaving the employer

Section 2: Deception (indicator)

Section 3: Psychological coercion and isolation (indicator)

Section 4: Physical and sexual abuse (indicators)

Section 5: Abuse of a position of vulnerability (indicator)

Section 6: Excessive overtime (indicator)

Section 7: Intimidation and threats (indicators)

Section 8: Debt bondage/bonded labour (indicator)

Section 9: Withholding or non-payment of wages (indicator)

Section 10: Retention of identity documents (indicator)

Section 11: Restriction of movement (indicator)

Section 12: Abusive working conditions (indicator)

Learning objectives

- Understand the terms and concepts on forced labour as used in international instruments and/or recommended by the international guidelines.

Key words and concepts

- The mere fact of being in a vulnerable position does not necessarily mean that a person is in forced labour.
- The consent to work has to be freely given and informed and should exist throughout the employment relationship.
- The credibility and impact of the threats must be evaluated from the worker's perspective, taking into account his or her individual beliefs, age, cultural background and social and economic status.
- Debt bondage binds the worker to the employer for an unspecified period of time and bears no resemblance to a "normal" loan arrangement.
- Withholding of wages can and is often used as a means of coercion that does not allow workers to exercise their freedom to terminate an employment arrangement.
- Retention of a migrant's passport by his/her employer and/or outsourcing agency is common practice in Malaysia, but is not allowed by law.



Training Guide for Module 3

	Objectives	Participants will become familiar with key terms and concepts around forced labour.
	Methodology	Quiz Take the true/false quiz to assess prior knowledge. Lecture (power point) Explain different concepts and provide specific examples to illustrate situation of forced labour in Malaysia. Group discussion Divide participants into groups of five and ask each group to discuss the case scenario and identify different elements of forced labour. If you have enough time, one person from each group can present these to the class.
	Supporting documents/ recommended reading	• ILO Forced Labour Convention (No. 29) • Indicators of Forced Labour, ILO, Geneva 2012 “Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement”, ILO, Geneva 2005 • Forced Labor in the Production of Electronic Goods in Malaysia, Verite, 2014 • Trapped: The exploitation of migrant workers in Malaysia, Amnesty International, 2010 • Access to justice for migrant workers in South-East Asia, ILO, Geneva, 2017
	Suggested duration	60 minutes

Section 1:

Unfree recruitment, work and life under duress and impossibility of leaving an employer

UNFREE RECRUITMENT

– includes situations of deceptive and forced recruitment. Forced recruitment involves the application of deception or coercion by a third party. Being poor or illiterate would not constitute coercion per se but the abuse by a third party of a poverty situation or illiteracy may however constitute coercion. Deception involves deceit surrounding the nature of the work, working conditions, living conditions and/or wages such that any worker who is aware of the real conditions would not consent to being subjected to those.

WORK AND LIFE UNDER DURESS

– according to the ILO, this dimension covers “adverse working or living situations imposed on a person by the use of force, penalty or menace of penalty”.⁵ This would include excessive work or work that is not reasonably expected given the national labour law framework, degrading living conditions, limitations of all sorts on freedom e.g. freedom of movement and imposing “excessive dependency” on the worker by the employer. The issue of dependency is difficult as some dependencies e.g. reliance on employer for food and lodging may be created by the law and could be systemic. For example, work permits tying workers down to one employer are also an example of dependency created by the legal framework.

IMPOSSIBILITY OF LEAVING THE EMPLOYER

– in this instance leaving employment may entail a risk or penalty to the worker and this often involves limitations on freedom. Retaining wages creates coercion that often acts to prevent a worker from exercising their right to leave an employer. Workers feel that they stand to lose already earned wages if they leave. On the other hand, simply lacking alternative economic opportunities or not leaving because of poverty would not be considered to be symptomatic of forced labour unless the elements of coercion or lack of consent are present.

31- ILO: *Hard to See, Harder to Count*, 2012.



Section 2:

Deception (indicator)

Deceptive recruitment practices can include false promises regarding working conditions and wages, but also regarding the type of work, housing and living conditions, acquisition of regular migration status, job location or the identity of the employer. Children may also be recruited through false promises, made to them or their parents, concerning school attendance or the frequency of visits by or to their parents.³²



Deception relates to the failure to deliver what has been promised to the worker, either verbally or in writing. Workers cannot be deemed to have given free and informed consent.

Section 3:

Psychological coercion and isolation (indicators)

In situations of domestic servitude, verbal and emotional violence, constant insult, isolation, denial of a private life and individual autonomy, prohibition of communication with their family and various forms of daily harassment and reproaches undermine the victim's sense of self-efficacy and personal dignity and increase their sense of vulnerability.³³ Withholding of wages can also be a powerful form of coercion.

Other forms of psychological abuse can take place from being overworked, sleep deprived and living under substandard conditions. These tactics are used to keep victims in a state of permanent fearfulness, uncertainty, and therefore obligated to obey the demands of the abusers.



This can include intimidation and threats, lies and deception, emotional manipulation, and subjecting victims to unsafe, unpredictable, and emotionally threatening events.

Section 4:

Physical and sexual violence (indicators)

This is a very strong indicator of forced labour.

Perpetrators can apply actual physical or sexual violence to workers themselves or to their family members.

32- ILO: *Indicators of Forced Labour*, 2012.

33 - The Office to Combat Trafficking in Persons British Columbia: *Human Trafficking for Domestic Servitude*, 2014.

Some physical abuses by their employers can potentially amount to torture. It is not uncommon for domestic workers to be subjected to beatings, deprivation of food, scalding with hot water, and sexual assault. Migrant domestic workers are often afraid to seek justice for fear of losing their jobs or due to the threats made by their employers.³⁴

Other than the obvious physical abuses, violence can include forcing workers to take drugs or alcohol to gain control over them. Violence can also be used to force a worker to undertake tasks that were not part of the initial agreement, such as to have sex with the employer or a family member or, less extreme, to undertake obligatory domestic work in addition to their “normal” tasks.

Section 5:

Abuse of a position of vulnerability (indicator)



The drafting history of the Palermo Protocol indicates that the “**abuse of vulnerability**” is to be understood as referring to “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”³⁵

People who lack knowledge of the local language or laws, have few livelihood options, belong to a minority religious or ethnic group, have a disability or have other characteristics that set them apart from the majority population are especially vulnerable to abuse and are more often found in forced labour.



A study by Verite found that the rate of forced labour among only foreign workers in the electronics industry in Malaysia was higher, **at 32%, or nearly one in every three foreign workers.**³⁶

The mere fact of being in a vulnerable position, for example, lacking alternative livelihood options, does not necessarily mean that a person is in forced labour. It is when an employer takes advantage of a worker’s vulnerable position that a forced labour situation may arise. Forced labour is also more likely in cases of multiple dependency on the employer, such as when the worker depends on the employer not only for his or her job but also for housing, food and for work for his or her relatives.³⁷

34 - The Office to Combat Trafficking in Persons British Columbia: *Human Trafficking for Domestic Servitude*, 2014.

35 - See *Interpretative notes for the official records (Travaux Préparatoires) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, (B) Interpretive Note, Subparagraph (a))

36 - Verite: *Forced Labor in the Production of Electronic Goods in Malaysia*, 2014.

37 - ILO: *Indicators of Forced Labour*, 2012.



Section 6:

Excessive overtime (indicator)

Forced labourers may be obliged to work excessive hours or days beyond the limits prescribed by national law or collective agreement. They can be denied breaks and days off, having to take over the shifts and working hours of colleagues who are absent, or by being on call 24 hours a day, 7 days a week. The determination of whether or not overtime constitutes a forced labour offence can be quite complex. As a rule of thumb, if workers have to work more overtime than is allowed under national law, under some form of threat (e.g. of dismissal) or in order to earn at least the minimum wage, this amounts to forced labour.

According to the 2018 ILO “Situation and gap analysis on Malaysian legislation, policies, and programme and the ILO Forced Labour Convention and Protocol,” Under Article 60A(4)(a) of the Employment Act, limitations on overtime are to be decided via independent regulation. Limitations to overtime in Malaysia are under the “Employment (Limitations on Overtime Work) Regulations” laid out in 1980. The Regulations place a monthly ceiling of 104 hours on the quantity of time a person may be asked to work in excess of their normal working hours, in exceptional circumstances. The government is encouraged to review this as this contradicts the ILO Hours of Work (Industry) Convention (No. 1) of 1919 which introduced a maximum standard working time of 48 hours per week and eight hours per day as an international norm. In several exceptional cases, working time is allowed to exceed these limits, as long as daily working time remains not higher than ten hours, and weekly working time not higher than 56 hours.

Section 7: Intimidation and threats (indicators)

In addition to threats of physical violence, other common threats include denunciation to the authorities, loss of wages or access to accommodation, further worsening of working conditions or withdrawal of “privileges” such as the right to leave the workplace.³⁹

In a study by Verite, the lack of freedom to resign in accordance with legal requirements was found to be present for 50% of survey respondents. For foreign workers, the incidence was 57%. In other words, at least half of respondents could not leave their jobs before their contracts were finished, because they would either be charged an illegally high fine, would forfeit wages or runaway insurance, or would lose their passport, or would be forced to pay the balance of the levy, or would be denounced to the authorities.⁴⁰

The credibility and impact of the threats must be evaluated from the worker’s perspective, taking into account his or her individual beliefs, age, cultural background and social and economic status.⁴¹

A large number of registered refugees and asylum-seekers in Malaysia lack formal status and the ability to obtain legal work permits, leaving them vulnerable to further exploitation. Many refugees incur large smuggling debts leading to debt bondage. Children from refugee communities in Peninsular Malaysia are reportedly subjected to forced begging.⁴²

In a study by Verite, work-related threats and punishments was the menace of penalty most often recorded by respondents, followed by confiscation or destruction of identity documents and the compound vulnerability of denunciation and dismissal.⁴³

In some instances, labour brokers recruit workers who are under the age of 18 and obtain false passports. Underage workers are more likely to be deceived, more vulnerable to various forms of abuse, and more likely to suffer injuries on the job. In many cases, they are performing work they should not be doing e.g. hazardous work.⁴⁴

39 - ILO: *Indicators of Forced Labour*, 2012.

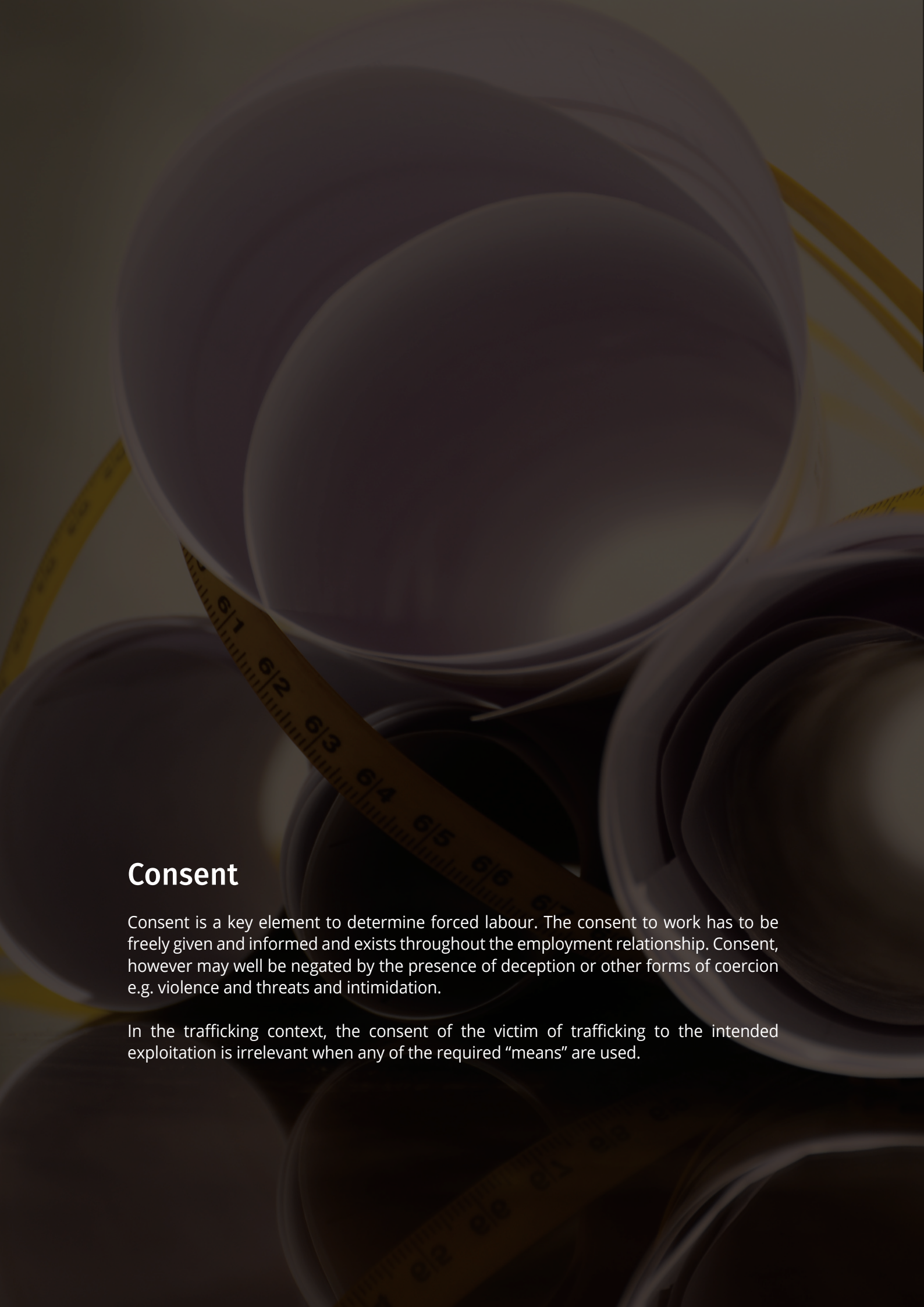
40 - Verite: *Forced Labor in the Production of Electronic Goods in Malaysia*, 2014.

41 - ILO: *Indicators of Forced Labour*, 2012.

42 - US Department of State: *Trafficking in Persons Report*, 2017.

43 - Verite: *Forced Labor in the Production of Electronic Goods in Malaysia*, 2014.

44 - Amnesty International: *Trapped: The exploitation of migrant workers in Malaysia*, 2010.

The background of the slide features a close-up, slightly blurred image of a white ceramic bowl. A yellow measuring tape is draped across the scene, with its markings visible. The tape is positioned diagonally, with the numbers 6/1, 6/2, 6/3, 6/4, 6/5, and 6/6 clearly legible. The overall lighting is soft, and the colors are muted, creating a professional and somewhat somber atmosphere.

Consent

Consent is a key element to determine forced labour. The consent to work has to be freely given and informed and exists throughout the employment relationship. Consent, however may well be negated by the presence of deception or other forms of coercion e.g. violence and threats and intimidation.

In the trafficking context, the consent of the victim of trafficking to the intended exploitation is irrelevant when any of the required “means” are used.



Section 8:

Debt bondage/bonded labour (indicator)



Debt bondage generally consists of an artificial debt that cannot be paid off in a reasonable time. The employer/enforcer who engages in this criminal practice artificially inflates the amount of debt, often by adding exorbitant interest, deducting little or nothing from the debt and increasing the amount of time the so called debtor must work.⁴⁵

Of importance here is also the absence of transparent and accessible accounts that often allows for manipulation of debts to the workers detriment. This indicator can also include charging workers inflated prices for travel, lodging, safety gear, tools or job-specific training.

Some undocumented workers are reportedly charged additional amounts which according to their employers are to cover bribes payable to law enforcement.⁴⁶

As of 1 February 2018, the government has implemented a new policy that workers should not pay for the levy as this will be borne by employers. However, civil society and trade unions have reported that such amounts are still being deducted by the employer from the salaries of the workers to recoup the levy cost.⁴⁷ Enforcement of the policy may take time and in the interim it is essential for signs of salary deductions to be observed and factored into the determination of whether forced labour exists.

45- Ann Jordan: *Slavery, forced labour, debt bondage, and human trafficking: from conceptual confusion to targeted solution*, Program on Human Trafficking and Forced Labour, 2011.

46 - Amnesty International: *Trapped: The exploitation of migrant workers in Malaysia*, 2010.

47 - ILO: *Access to justice for migrant workers in South-East Asia*, 2017.



Debt bondage/bonded labour reflects an imbalance in power between the worker as debtor and the employer as creditor. It binds the worker to the employer for an unspecified period of time and bears no resemblance to taking a “normal” loan from a bank or other independent lender, for repayment on mutually agreed and acceptable terms.⁴⁸



According to the ILO and Walk Free Foundation’s 2017 Global Estimates on Modern Slavery, debt bondage affected half of all victims of forced labour imposed by private actors.

The Private Employment Agencies (Amendment) Act 2017 sets a limit on placement fees chargeable to a job seeker who is employed within Malaysia, requiring that fees be no more than 25% of the basic wages for the first monthly wages. For non-citizen workers employed within Malaysia, placement fees can be no more than one month of the basic wages for the first monthly wages.

In some instances, it is unclear what the ‘recruitment fees’ include. At a minimum, these include the combination of government fees for immigration processing, foreign levies and the agency’s own administrative fees can be substantial.⁴⁹

Section 9:

Withholding or non-payment of wages (indicator)

Irregular or delayed payment of wages does not automatically imply a forced labour situation. It is only when wages are systematically and deliberately withheld as a means to compel the worker to oblige in some ways, remain and deny him or her of the opportunity to change employer.⁵⁰



Withholding of wages can and is often used as a means of coercion that does not allow workers to exercise their freedom to terminate an employment arrangement. In countries where access to justice and avenues for seeking redress are limited, the coercive effect of withholding of wages is even more potent.

The most frequently reported complaint, and clearly the subject of the most widespread concern, is that workers are not paid all that they are due or that they are paid late.⁵¹

The law allows many of the fees, which are initially paid by employers, to be deducted from workers’ wages, incentivizing employers to prevent workers from ending their employment before fees are recouped.⁵² In the absence of a paper

48 - ILO: *Indicators of Forced Labour*, 2012.

49 - Women’s Aid Organization: *Human Trafficking in Malaysia: A Focus on Women and Children*, 2017.

50 - ILO: *Indicators of Forced Labour*, 2012.

51 - Amnesty International: *Trapped: The exploitation of migrant workers in Malaysia*, 2010; and Interview H

52 - US Department of State: *Trafficking in Persons Report*, 2017.

trail or digitised payments it can be extremely hard for a worker to prove the deductions.

Deductions also often compel workers to incur further debt in the form of a high interest loan taken to make ends meet.

Wage manipulation on unfounded grounds is a major issue. Many migrants were reportedly made to sign contracts in a language they do not know, in violation of Malaysian law, which stipulates that all contracts must be written in the native language of the signee. As a consequence of the language barrier, migrant workers are often ignorant of the content of the contracts they sign, often are unable to calculate the wages on their pay slips or understand the explanations offered for deductions and reduced pay for overtime, if they are offered at all.⁵³

A range of different flexible working conditions are sometimes imposed upon workers, ranging from payment by piece rates and quotas for workers with permanent contracts. Conflicts often arise where workers paid at piece rates do not meet the statutory minimum wage required by law.⁵⁴ Workers may feel obliged to work over the legal maximum because it is the only way they can earn the minimum wage (for example, where remuneration is based on productivity targets). In these cases, although in theory workers may be able to refuse to work, their vulnerability may mean that they have no choice and are therefore obliged to do so in order to earn the minimum wage or keep their jobs, or both. This then becomes a situation of imposing work under the menace of a penalty and can be considered forced labour.⁵⁵

The ILO explains that the obligation to do overtime work is not considered forced labour if it stays within the limits permitted by national legislation or specified in relevant collective agreements.⁵⁶ Above those limits, it is appropriate to examine the circumstances in which a link arises between an obligation to perform overtime work and the protection against forced labour. However, neither ILO Convention No. 1 nor ILO Convention No. 30 prescribes any specific limits to the total number of additional hours which may be worked during a specified period in case of permanent or temporary exceptions. Convention No. 1 merely states that the maximum of additional hours shall be fixed by regulations made by public authority. The ILO clarifies that such limits must be “reasonable” which must be evaluated based on the intensity of the respective work, its ability to produce physical or mental fatigue, and of possible negative consequences of fatigue for the respective worker and the public at large.⁵⁷ Forced labour occurs if overtime exceeds the weekly or monthly limits allowed by law and is made compulsory by threats of a penalty, irrespective of the reasons for such overtime.⁵⁸

53 - SOMO: *Outsourcing labour: Migrant labour rights in Malaysia's electronics industry*, 2013.

54 - Liberty Asia: *Malaysia's Palm Oil Industry*, 2018.

55 - Q&As on Business and Forced Labour, ILO, http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm#Q9 [accessed 1 December 2018].

56 - ILO: *Conditions of Work and Employment Programme*, Information Sheet No. WT-2, 2004.

57 - Q&As on Business and Working Time, ILO, http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_TIM_FAQ_EN/lang--en/index.htm#F28 [accessed 1 December 2018].



The menace to work overtime can come in many forms such as threats of fines for refusing to work overtime which effectively deter workers from declining to work overtime beyond legal limits. If the workers perceive a company policy of issuing fines for not working overtime exceeding legal limits as such a threat, this could be considered forced labour.⁵⁹ Furthermore, the ILO Committee of Experts on the Application of Conventions and Recommendations has noted that in some cases the menace may be more subtle e.g. fear of dismissal may drive workers to work overtime beyond what is allowed by national law.

Section 10:

Retention of identity documents (indicator)

The retention by the employer of identity documents is an element of forced labour if workers do not have access on demand and if they feel that they cannot leave the job without risking their loss.⁶⁰

Retention of the passports of migrants is a very common practice in Malaysia, with a survey by the Malaysian Employers Federation suggesting that 74 per cent of migrant passports are held by employers and outsourcing agencies, although this is illegal without the owner's permission and never advisable regardless.⁶¹ Retention of passports and other forms of identity documents is most certainly a form of coercion which on its own is unlikely to lead to a determination of forced labour but which in the presence of other indicators can be a powerful determinant of forced labour.

Section 11:

Restriction of movement (indicator)

Workers in forced labour may be locked up, guarded to prevent from escaping from their work place, have their movements controlled inside the workplace,



Due to the physical isolation of their workplaces (e.g. workers on palm oil plantations, domestic work in private homes), **restrictions on movement and inadequate mechanisms** established to ensure accountability of employers, a large number of domestic workers suffer from abusive working conditions. Tenaganita reported that nearly all of the cases they rescued are severe enough to be described as forced labour.⁶²

58 - ILO: *Conditions of Work and Employment Programme, Information Sheet No. WT-2, 2004.*

59 - ILO: *Conditions of Work and Employment Programme, Information Sheet No. WT-2, 2004.*

60 - ILO: *Indicators of Forced Labour, 2012.*

61 - ILO: *Access to justice for migrant workers in South-East Asia, 2017.*

62 - ILO: *Indicators of Forced Labour, 2012.*

through the use of surveillance cameras or guards, and outside the workplace by agents of their employer who accompany them when they leave the site.⁶³

Restrictions on domestic workers' freedom of movement and their communication with family, friends, and neighbours have several negative consequences. In addition to violating their rights under national and international human rights law, these restrictions make it difficult for them to seek help.

The building of hostels inside work premises, not typically visible to the public eye also has the potential to increase vulnerabilities of workers to conditions of forced labour.⁶⁴

Living on the premises where one works and having the freedom of movement restricted by virtue of living with an employer and depending on them for food and lodging present a significant indicator of forced labour. In several jurisdictions, in legal cases, judges often place a disproportionate emphasis on freedom of movement and use the existence of freedom of movement and therefore the ability to leave and seek help as way of negating all other indicators that may be present. The reality is that psychological coercion, debt bondage, document retention and threats and intimidation often act as invisible chains to maintain an individual in conditions of forced labour. It is inherently unreliable to place the weight of a determination of forced labour on a single indicator of freedom of movement.

Section 12:

Abusive working conditions (indicator)



Work may be performed under conditions that are degrading (humiliating or dirty) or hazardous (difficult or dangerous without adequate protective gear), and in severe breach of labour law.⁶⁵

A distinction must be drawn between workers who are under some form of economic compulsion to accept sub-standard working conditions because they simply have no alternative (exploitation or abuse of vulnerability, but not necessarily forced labour) and those against whom actual coercion is exercised by a third party to force them to undertake a job against their will (forced labour). However, abusive conditions should represent an "alert" to the possible existence of coercion that is preventing the exploited workers from leaving the job.⁶⁶

Sub-standard working conditions can include insufficient tools and protective gear necessary for the nature of the work or poor weather conditions. These risks may be exacerbated by lack of training or training in a language that the workers do not understand. Sub-standard working conditions do not on their own suffice to make a determination of forced labour.

63 - ILO: *Review of labour migration policy in Malaysia*, 2016.

64 - Interview A

65- ILO: *Indicators of Forced Labour*, 2012.

66 - ILO : *Background paper for the Vienna Forum to fight Human Trafficking 13-15 February 2008*, 2008.



Practical Exercise for Module 3

Exercise 3: Important concepts



When

Take the quiz before the start of this Module to assess prior knowledge.

Do the case study at the end of Section 12



Duration

15 minutes quiz
15 minutes case study



Objectives

To become familiar with important concepts in relation to forced labour



Methodology

For the case study, divide participants into groups of five and ask each group to discuss the case scenario and identify different elements of forced labour. If you have enough time, one person from each group can present these to the class.



Answers

Quiz

1. N
2. E
3. Y
4. Y
5. N
6. N. Irregular or delayed payment of wages does not automatically imply a forced labour situation. It is only when wages are systematically and deliberately withheld as a means to compel the worker to oblige in some ways, remain and deny him or her of the opportunity to change employer.
7. N. Passport retention on its own is not sufficient to lead to an assessment of forced labour.
8. N
9. a, b, c
10. Y. Where this is used as means of coercing the employee into compliance.

Case study

- Debt bondage
- Abuse of vulnerability
- Abusive working conditions
- Intimidation and threats
- Physical, sexual and psychological abuses
- Retention of identity documents
- Withholding of wages
- Deception



Case study

S. was introduced to V., a recruiter who was going around the provinces in Mindanao, Philippines looking for potential domestic workers in Malaysia. V. enticed S. to come to Malaysia and work for a middle-class family. She agreed to take her offer. The recruitment agency required her to pay a recruitment fee close to USD\$3,000 and to deposit another USD\$3,000 that she would get back upon termination of her contract. S. did not have that much money so the agency required her to hand over her identity papers until she had worked off the recruitment fee. S. did as requested and soon started to work in Malaysia - but in a bar instead of her employer's house.

Her employer didn't pay her for three years. She suffered frequent beatings for every mistake she made. At night, when male customers went to the bar to unwind and drink beer, her employer would force her to sit with and entertain them. The employer beat her and threatened not to feed her if she refused. People often behaved inappropriately with her and she felt very uncomfortable being at the bar.

S. complained to the agency and wanted to leave the job. The agency refused to hand over her identity documents as she had not yet worked off the recruitment fee. S. asked her employer if she could leave the employment, but her employer insisted that she still had to pay for the money the employer paid to hire her when she first came to Malaysia. Desperate, S. planned to escape. Her employer learned about the escape plan and pre-empted it by accusing her of stealing RM12,000. S. was taken to prison at a nearby police station. No lawyer came to represent her and she has been in jail for three months awaiting trial.

Objective

Identify the relevant indicators of forced labour.

Quiz

1. The mere fact that a person is in a vulnerable position is enough to establish a situation of forced labour.

☐ Y ☐ N

2. What are some of the threats or menace of penalty used to keep workers in a situation of forced labour? Circle all the applies.

- a. Denunciation to authority
- b. Threat of dismissal
- c. Removal of holiday privileges
- d. Wage deduction
- e. All of the above

3. The credibility and impact of the threats must be evaluated from the worker's perspective and is based on a subjective standard of any worker in the same position.

☐ Y ☐ N

4. The consent to work has to be freely given and informed before a person takes up employment but does not necessarily exist throughout the employment relationship.

☐ Y ☐ N

5. Debt bondage resembles a loan taken from a bank or other independent lender, just with very high interest.

☐ Y ☐ N

6. M. works on a palm oil plantation in Malaysia. The employer often delays payment of wages. Does this imply a situation of forced labour? Please explain.

☐ Y ☐ N

7. N. has agreed to her employer keeping her passport in an office safe box to prevent any loss. On her day off, M. requested access to her passport to go outside work premise which her employer denied. Does this amount to a situation of forced labour?

☐ Y ☐ N



8. R. is uneducated and comes from a poor family in Indonesia. She accepts sub-standard working conditions in a factory in Malaysia because she has no other alternative. Does this amount to a situation of forced labour? Please explain.

☐ Y ☐ N

9. What are some of the circumstances or vulnerabilities that lead to a higher susceptibility to victimisation? Circle all the applies.

- | | |
|--------------------------|---------------------|
| a. Lack of legal status | b. Language barrier |
| c. Disability or illness | d. Lack of training |

10. Actual physical or sexual violence applied to family members can amount to a situation of forced labour.

☐ Y ☐ N



Module 4

Use of forced labour indicators



Module 4

Use of forced labour indicators

Section 1: Purpose of the indicators

Section 2: Specific examples of the indicators

Section 3: Specific offenses which individually or in a cumulative manner add up to a criminal offense in forced labour

Learning objectives

- Understand how to use forced labour indicators identifying most common signs that point to the possible existence of a forced labour case.
- Be familiar with different criminal offenses that individually or in a cumulative manner add up to a criminal offense in forced labour.

Key words and concepts

- Physical or sexual violence is a very strong indicator and alone can point to a situation of forced labour.
- Each set of indicators assesses the element of involuntariness or the menace of a threat/penalty where several indicators carry different weight and must be taken together in order to indicate a situation of forced labour.

Training Guide for Module 5

	Objectives	• Participants will become familiar with and the indicators of involuntariness and coercion (i.e. penalty or menace of a penalty) and how to combine them to determine if a situation is one of forced labour. • For prosecutors this is a very important part of building a case by assessing available evidence in light of the indicators and making persuasive arguments.
	Methodology	Lecture Distribute a hand out of the indicators for class discussion and exercise. Group work • Divide participants into groups of five. Use the different indicators to assess the situation outlined in the case scenario. • Use the same case scenario and list all the offences under the different applicable legislation.
	Supporting documents/ recommended reading	• Indicators of Forced Labour, ILO, Geneva 2012 • Hard to see, harder to count: survey guidelines to estimate forced labour of adults and children, ILO, Geneva 2012 • From Every Angle: Using the law to combat human trafficking in Southeast Asia, Liberty Asia and Thomson Reuters, 2014
	Suggested duration	30-45 minutes



Section 1:

Purpose of the indicators

These indicators are intended to help frontline criminal law enforcement officials, labour inspectors, trade union officers, NGO workers and others to identify persons who are possibly trapped in a forced labour situation, and who may require urgent assistance. The indicators represent the most common signs or “clues” that point to the possible existence of a forced labour case.

The presence of a single indicator in a given situation may in some cases imply the existence of forced labour, such as physical or sexual violence which is a very strong indicator of forced labour. However, in other cases several indicators must be taken together to point to a forced labour case.



The indicators are derived from theoretical and practical experience of the ILO’s Special Action Programme to Combat Forced Labour (SAP-FL). They are based upon the definition of forced labour specified in the ILO Forced Labour Convention, 1930 (No. 29) as: “all work or service which is exacted from any person under the **menace of any penalty** and for which the said person **has not offered himself voluntarily**”.⁶⁷

⁶⁷ - ILO: *indicators of Forced Labour*, 2012.

Section 2:

Specific examples of the indicators

Forced labour is when the definition as per ILO Convention 29 is met and may involve any of the following dimensions: unfree recruitment, work and life under duress, or impossibility of leaving employers.

UNFREE RECRUITMENT (FOR ADULTS)	
Examples of indicators of involuntariness	Examples of indicators of penalty (or menace of penalty)
• Tradition, birth (birth/decent into "slave" or bonded status) • Coercive recruitment (abduction, confinement during the recruitment process) • Sale of the worker • Recruitment linked to debt (advance/loan) • Deception about the nature of the work • Deceptive recruitment (regarding working conditions; content or legality of the employment contract, housing and living conditions, legal documentation or acquisition of legal migrant status, job location or employer, wages/earnings) • Deceptive recruitment through promise of marriage	• Denunciation to authorities • Confiscation of identity papers or travel documents • Sexual violence • Physical violence • Other forms of punishment • Removal of rights or privileges (including promotion) • Religious retribution • Withholding of assets (cash or other) • Threats against family members • Exclusion from future employment • Exclusion from community and social life • Financial penalties • Informing family, community or public about worker's current situation (blackmail)



WORK AND LIFE UNDER DURESS (FOR ADULTS)	
Examples of indicators of Involuntariness	Examples of indicators of penalty (or menace of penalty)
• Forced overtime (beyond legal limits) • Forced to work on call (day and night) • Limited freedom of movement and communication • Degrading living conditions • Forced engagement in illicit activities • Forced to work for employer's private home or family • Induced addiction to illegal substances • Induced or inflated indebtedness (by falsification of accounts, inflated prices for goods/services purchased, reduced value of goods/services produced, excessive interest rate on loans, etc) • Multiple dependency on employer (jobs for relatives, housing, etc) • Pre-existence of a dependency relationship with employer • Being under the influence of employer or people related to employer for non-work life	• Denunciation to authorities • Confiscation of identity papers or travel documents • Confiscation of mobile phones • Further deterioration in working conditions • Isolation • Locked in workplace or living quarters • Sexual violence • Physical violence • Other forms of punishment (deprivation of food, water, sleep, etc) • Violence against worker in front of other workers • Removal of rights or privileges (including promotion) • Religious retribution • Withholding of assets (cash or other) • Withholding of wages • Threats against family members • Dismissal • Exclusion from future employment • Exclusion from community and social life • Financial penalties • Informing family, community or public about worker's current situation (blackmail)

IMPOSSIBILITY OF LEAVING EMPLOYER (FOR ADULTS)	
Examples of indicators of Involuntariness	Examples of indicators of Penalty (or menace of penalty)
• Reduced freedom to terminate labour contract after training or other benefit paid by employer • No freedom to resign in accordance with legal requirements • Forced to stay longer than agreed while waiting for wages due • Forced to work for indeterminate period in order to repay outstanding debt or wage advance	• Denunciation to authorities • Confiscation of identity papers or travel documents • Imposition of worse working conditions • Locked in work or living quarters • Sexual violence • Physical violence • Other forms of punishment (deprivation of food, water, sleep, etc) • Removal of rights or benefits (including promotion) • Religious retribution • Under constant surveillance • Violence imposed on other workers in front of all workers • Withholding of assets (cash or other) • Withholding of wages • Threats against family members (violence or loss of land or jobs) • Dismissal • Exclusion from future employment • Exclusion from community and social life • Extra work for breaching labour discipline • Financial penalties • Informing family, community or public about worker's current situation (blackmail)



The indicators of forced labour presented in the following tables are designed specifically to enable identification of forced labour of children and are derived from the indicators for adults presented above. All indicators are considered to be of equal severity in the case of children.⁶⁸ **It is important to note that forced labour could also be work performed by a child as a direct consequence of their parent or parents engaged in forced labour.**

UNFREE RECRUITMENT (FOR CHILDREN)	
Examples of indicators of involuntariness	Examples of indicators of penalty (or menace of penalty)
Tradition, birth • Child is born into a bonded family and is forced to work for his or her parents' employer Debt bondage • Recruitment as collateral for a loan given to parents or relatives • Recruitment as part of the employer's agreement to employ the parents or relatives • Recruitment in exchange for a cash advance or loan to the parents Abuse of cultural practices/power by the employer • Child sent to work for someone else by a previous employer without consent of the child or parents • Recruitment of the child in the context of a tradition perpetuated by those in power Coercive recruitment • Child kidnapped, taken by force Deceptive recruitment Deception about: • Access to education • Living conditions • Frequency of visits to or by parents • Nature of the job • Location of the job • Employer • Wages • Quantity of work • Social security coverage	• Family would lose benefits (land, housing, etc.) • Other family members would lose their job • Exclusion of child from future employment • Exclusion of family members from future employment • Violence against child • Violence against family members • Exclusion of family members from access to loans • Isolation • Threats against child or family members

68 - ILO: *Hard to See, Harder to Count*, pp.29-32, 2012.

WORK AND LIFE UNDER DURESS (FOR CHILDREN)	
Examples of indicators of involuntariness	Examples of indicators of penalty (or menace of penalty)
Forced work • Forced overtime • Forced to work on call (day and night) • Forced to work for the employer's private home or family • Forced to work when sick or injured • Forced to perform hazardous tasks without protection • Forced to take drugs, alcohol, illegal substances • Forced to engage in illicit activities • Forced to engage in sexual acts Limited freedom • Limited freedom of movement outside the workplace • No possibility of leaving the living quarters • No freedom to talk to their children or adults • No freedom to contact parents, family, friends • No Possibility of practicing own religion Dependency • Employer decides on matter relating to child's private life (marriage, education, health, religion) • Food, clothing and housing provided by employer in lieu of a wage • Degrading living conditions	• Physical violence • Psychological violence • Sexual violence • Punishment (deprivation of food, water, sleep, etc.) • Fines • Wage deductions • Threat of dismissal • Threat of denunciation to the authorities • Threats against family • Punishment/violence inflicted on other children in front of child • Locked in living quarters • Constant surveillance • Isolation • Prohibition on contact with parents and family members • Retention of identity papers • Withholding of wages



IMPOSSIBILITY TO LEAVE THE EMPLOYER (FOR CHILDREN)	
Examples of indicators of involuntariness	Examples of indicators of penalty (or menace of penalty)
Limited or no freedom to leave the employer	- Isolation - Confinement - Under constant surveillance - Family would lose benefits (land, housing, etc.) - Other family members would lose their job - Exclusion from future employment - Exclusion of family members from future employment - Threats or violence against child - Threats or violence against family members - Exclusion of family members from access to loans - Punishment (deprivation of food, water, sleep, etc.) - Withholding of wages - Unfulfilled promises of education, vocational training, etc. - Threat of denunciation to the authorities - Confiscation of identity papers - Punishment inflicted on other children in front of child - Threat of further deterioration in working conditions - Threat of forced sexual exploitation



Section 3:

Specific offenses which individually or in a cumulative manner add up to a criminal offense in forced labour⁶⁹

Physical or sexual violence

- Voluntary causing hurt (s321; s323, Penal Code)
- Voluntary causing grievous hurt (s322; s325, Penal Code)
- Causing hurt with intent to cause illegal acts to be done (s327, Penal Code)
- Assault (s351, Penal Code)
- Criminal intimidation (s503; s506, Penal Code)
- Assault in attempt wrongfully to confine a person (s357, Penal Code)
- Ill treatment of a person under age 18 (s31(1), Child Act)

Restriction of movement

- Wrongfully confining a person (s340; s342, Penal Code)
- Wrongful restraint (s339; s341, Penal Code)
- False imprisonment (common law offence)

Debt bondage/bonded labour

- Excessive interest for the loan (s17A, Moneylenders Act)

69- Liberty Asia and Thomson Reuters: *From Every Angle: Using the law to combat human trafficking in Southeast Asia*, 2014.

Withholding wages or refusing to pay the worker at all

- Habitually dealing with slaves (s371, Penal Code)
- Ill treatment of a person under age 18 (s31(1), Child Act)
- Failure to pay wages (s19; s91, Employment Act)
- Unlawful deductions from wages (s24; s91(c), Employment Act)
- Cheating (s415; s417, Penal Code)
- Cheating with knowledge of wrongful loss caused to a person whose interest the offender is bound to protect (s418, Penal Code)
- Theft (s378, Penal Code)

Retention of passports and identity documents

- Obtaining property by deception (s415; s417; s420, Penal Code)
- Having a passport or internal travel document issued for the use of other person other than himself (s12(1)(f), Passport Act)

Threat of denunciation to the authorities

- Criminal intimidation (s503; s506, Penal Code)

Practical Exercise for Module 4

Exercise 4: Using forced labour indicators		
	When	Do this exercise after section 3
	Duration	20 minutes
	Objectives	To become familiar with the indicators of involuntariness and coercion (i.e. penalty or menace of a penalty) and how to apply them to determine a situation as one of forced labour.
	Methodology	1. Divide participants into groups of five. Ask participants to refer to the hand out. Use the corresponding indicators to assess the situation outlined in the case scenario. 2. List all the offences under the different applicable legislation to the same case scenario.



Answers

Unfree recruitment

- Recruitment linked to debt
- Deceptive recruitment
- Confiscation of travel documents

Work and life under duress

- Forced overtime
- Limited freedom of movement
- Induced or inflated indebtedness
- Multiple dependency on employer
- Confiscation of travel documents
- Locked in workplace or living quarters

Impossibility of leaving employer

- Forced to stay longer than agreed while waiting for wages due
- Forced to stay for indeterminate period in order to repay outstanding debt
- Confiscation of travel documents
- Locked in workplace or living quarters

Possible offences under the different legislation

- Habitually dealing with slaves (s371, Penal Code)
- Failure to pay wages (s19; s91, Employment Act)
- Unlawful deductions from wages (s24; s91(c), Employment Act)
- Cheating (s415; s417, Penal Code)
- Cheating with knowledge of wrongful loss caused to a person whose interest the offender is bound to protect (s418, Penal Code)
- Theft (s378, Penal Code)
- Obtaining property by deception (s415; s417; s420, Penal Code)
- Having a passport or internal travel document issued for the use of other person other than himself (s12(1)(f), Passport Act)
- Wrongfully confining a person (s340; s342, Penal Code)
- Wrongful restraint (s339; s341, Penal Code)
- False imprisonment (common law offence)
- Excessive hours of work (s60A, Employment Act 1955)
- Restriction on time allotted for the rest day (s59(1), Employment Act 1955)
- Unlawful compulsory labour (Section 374, Penal Code)

Case study

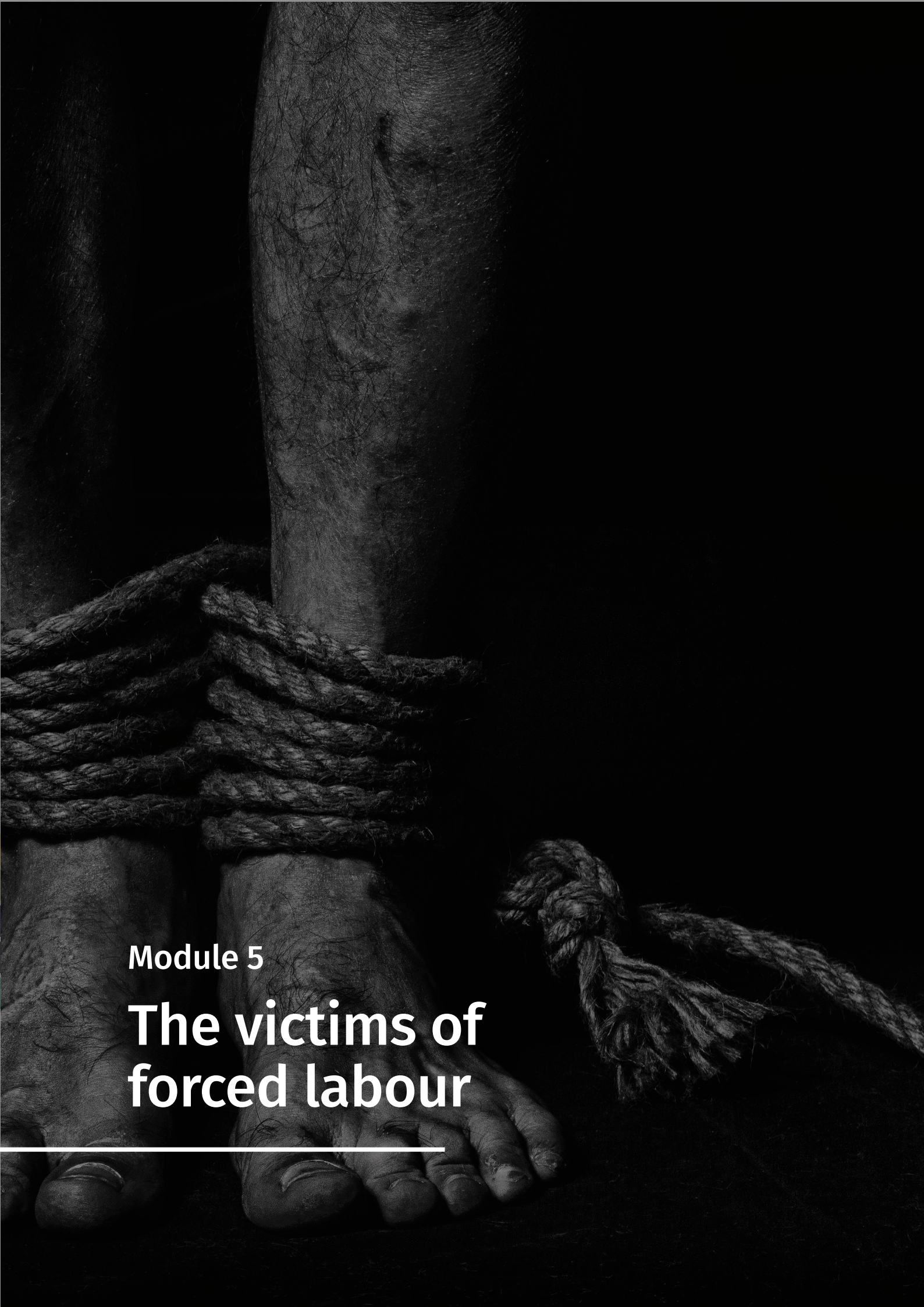
M. is a young man from Indonesia. He read an advertisement about a position at an electronic assembling plant in Malaysia and applied. The recruiter told him that he would receive RM2,000 a month. He read the contract where all the terms reflected what the recruiter had told him and signed. The agency helped him to get a passport and a visa in exchange for a fee (US\$3,200). He borrowed money from his wife's family to cover the expenses.

Upon arrival in Malaysia, a woman picked him up and drove him to another agency where he was presented with a second contract in a foreign language. He was told to sign. His travel documents were taken.

At the factory, each day he was forced to wake up at 6am and work until 10pm. He got Sunday afternoon off but he was not allowed to leave the apartment that was right next to the factory where he worked. Because he was not allowed to go out, he had no choice but to buy his necessities at an inflated price from a store located inside the factory. He was only paid RM1,000 a month because room, food, agency fees and any other expenses were deducted. At the end of his contract term, he was not able to leave because according to the employer he had not paid off all his debts.

Task

Please list all the offences under the different legislation that you can identify above.



Module 5

The victims of forced labour

Module 5

The victims of forced labour

Section 1: Understanding groups impacted by forced labour: sectors/people

Section 2: The needs

Section 3: Identification Issues

Section 4: Challenges in working with victims

Section 5: Challenges from the enforcement perspective

Learning objectives

- Know who the victims of forced labour and understand their needs.
- Be able to adopt a rights based approach in dealing with victims.
- Be able to balance law enforcement interests with promoting the human rights of the victims.
- Understand the challenges of the law enforcement to criminalise forced labour and related labour rights violations.

Key words and concepts

- A rights based approach is essential when working with victims of forced labour in order to assist victims with recovering, accessing remedy and engaging with the criminal justice system.
- The more subtle forms of coercion do not translate well in the identification process and therefore impact the assessment of an individual as a victim.
- Control over victims is also often achieved by coercion, threats and harassment towards the worker and his/her loved ones.
- Victims may not come forward or assist in the investigation because they have irregular migration status or are undocumented which can lead to prosecution or deportation.
- The degree or severity of exploitation is a very subjective concept, which is not generally covered in labour standards.
- There are many legal and operational hurdles to law enforcement e.g. lengthy legal proceedings.
- When evidence is lacking to prove a case of human trafficking, victims should be encouraged to pursue other cases of forced labour and labour rights violations that may still be relevant to their given situation.



Training Guide for Module 5



Objectives

- Participants will become familiar with the sectors where forced labour is pervasive and certain vulnerabilities that contribute to forced labour.
- Participants will understand both the immediate and long-term needs of the victims.
- Participants will understand the challenges in working with victims of forced labour, hence the need to take a victim-centred approach.
- Participants will gain knowledge on the challenges that have contributed to low prosecution of forced labour and related crimes.



Methodology

Lecture (power point)

- Identify populations vulnerable to forced labour
- Identify sectors at risk of practicing forced labour is
- Identify factors that have made victim identification difficult
- Discuss challenges of law enforcement in investigating, prosecuting and adjudicating cases of forced labour in Malaysia

Group work

- Re-enact the situation described in the case scenario. Participants should in turn re-enact an interview situation between a victim of forced labour and a prosecutor.
- Instruct participants acting in the role of prosecutors to pay attention to the victim's needs, think about information gaps they may be seeking to address as a prosecutor and identify potential challenges in relation to the testimony.
- For judges, observe the process to evaluate the quality of evidence that may come about and the victim psyche. It is valuable for judges to participate in the exercise as prosecutors so they can get a better idea of victim psyche through this form of engagement. The challenges in enforcement are very relevant as they go to the heart of the difficulties with putting a case together and the evidence that is possible to access.
- For judges issues such as debt bondage and fear of being undocumented and passport retention can help to explain why despite the existence of freedom of movement, workers who are experiencing forced labour may chose to remain in an exploitative situation.



Supporting documents/ recommended reading

- Forced Labor in the Production of Electronic Goods in Malaysia, Verite, 2014
- Trapped: The exploitation of migrant workers in Malaysia, Amnesty International, 2010
- Access to justice for migrant workers in South-East Asia, ILO, Geneva, 2017



Suggested duration

60-90 minutes



Section 1:

Understanding groups impacted by forced labour: sectors/people

Forced labour could occur in sectors *such as*:



Some characteristics that may be present amongst workers working in forced labour include:

- Living in groups in the same place where they work and leaving those premises infrequently, if at all;
- Living in degrading, unsuitable places, such as in agricultural or industrial buildings;
- Often not being adequately dressed for the work they do: for example, they may lack protective equipment, gear or clothing;
- Being fed very little;
- No access or very little access to their earnings;
- No written labour contract or no contract in a language they understand;
- Working excessively long hours;
- Having their identity documents withheld;
- Significant dependency on their employer for a number of services, including work, transportation, food and accommodation;
- Being unable to move freely or having restricted freedom of movement or being watched or under surveillance;
- Disciplined through fines or other penalties such as loss of privileges or deterioration in working/living conditions; and
- Often subjected to insults, abuse, threats or violence.

Some sector specific observations that suggest the existence of forced labour or other forms of labour exploitation are as follows:⁷⁰

- Notices or other worker communication being provided in languages other than those spoken by the workers especially where there is a large community of migrant workers;
- There are no health and safety notices or training provided to workers;
- The employer or manager is unable to show the documents required for employing workers from other countries;
- Poor and lack of transparent record-keeping in relation to worker payments, deductions and permits;
- Exposure to harmful chemicals with no adequate training, education and protection;
- There is evidence that labour laws are being breached;
- There is evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages; and
- There is evidence of families with children working on unsafe premises.

In addition to the abovementioned characteristics, there are a number of systemic vulnerabilities that contribute to forced labour:

- The use of informal and unregulated labour contractors/brokers/intermediaries/recruitment agencies;
- The use of outsourcing or recruitment agencies to front employment relationships such that there is a lack of clarity over who the employer is;
- The payment of placement fees and government levies. Even though the burden may be placed by the law on employers, it is not uncommon to see employers passing on these costs to workers through salary deductions;
- Being tied to an employer by the work permit.

According to the Global Estimates on Modern Slavery 2017, **forced labour of children** takes two pre-dominant forms. It can result from their guardians themselves being in forced labour, in which case the children work with their parents or at least for the same employer. Or the children may be in forced labour on their own as a result of trafficking, deceptive recruitment, or coercive means used by their direct employer. In the former case, parents are more likely to be aware of their children's situation and working conditions. In the latter case, parents are less likely to be aware, as with children who migrate alone or are trafficked into forced labour, particularly domestic work.

70 - Labour Exploitation, Ireland Anti-Human Trafficking Unit, http://www.blueblindfold.gov.ie/en/bbf/pages/labour_exploitation [accessed 1 December 2018].



Section 2: Needs

! When working with victims of forced labour, one needs to be aware of their needs and to be appropriately responsive in order to assist victims with recovering, accessing remedy and engaging with the criminal justice system where appropriate.⁷¹

A rights based approach is essential and the following are some points worth considering:

- Victims of forced labour may experience physical, sexual and psychological violence resulting in significant and long lasting ill effects on physical and mental health.
- Victims may face a number of health risks and diseases and may not be able to access appropriate medical services due to irregular status, lack of awareness of health issues or remoteness of working location or restricted freedom of movement.
- In many cases, unsanitary, crowded living conditions, poor nutrition and lack of adequate medical care also contribute to a host of adverse health conditions.⁷² It is common for psychological damage to persist even after physical wounds have healed. In some sectors e.g. fisheries substance abuse is a common method to keep workers going for long hours.
- Ahead of an interview or any kind of engagement with the victim it is vital to ensure that the victim's basic needs are met. This may involve referral to an appropriate service provider, a risk assessment for safety, provision of food, access to medical services and counselling support; and safe and secure housing.
- Victims must be assessed for psychological abuse even in the absence of physical signs of abuse.
- Due to commitments and obligations towards their families back home and debts owed, the priority needs for some victims may well be recovering wage arrears and compensation. This does not in any way diminish the enormity of their suffering or what has happened to them.
- There is no hierarchy of victims and each situation should be judged on its own facts.
- The victim's and their family's safety must be a key consideration and there may be enhanced considerations where the victim is a child.
- Victims must be protected from harassment and intimidation by the perpetrator and his/her associates particularly in relation to the victim's engagement with the criminal justice system. There must be a careful and deliberate risk assessment that will also evaluate the need for victim witness protection.

71 - UNODC, *Anti-human trafficking manual for criminal justice practitioners, Module 3: Psychological reactions of victims of trafficking in persons*, 2009.

72 - Details taken from *National Symposium on the Health Needs of Human Trafficking Victims – Post Symposium Brief* - US Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation

Section 3:

Identification issues

The difficulties associated with identification of victims of forced labour or human trafficking are well-documented. In addition, given the very close relationship between legitimate business and the illicit practise of forced labour, detection and identification of victims can present a significant challenge. Some factors contributing to difficulties with identification of forced labour include:

- The reluctance of victims to come forward due to fear for their life or for the life of their loved ones;
- Victims' lack of awareness of their rights
- Victims' fear of authorities as well as the lack of faith in justice systems
- Victims' fear of becoming undocumented and homelessness given the extensive dependency on employers for accommodation and work permit sponsorship
- The existence of psychological coercion and wage deductions that are very hard to get an evidence
- Due to a lack of clarity and guidance on the issue of forced labour, enforcement authorities will often seek trafficking characteristics in a forced labour victim and their response may not be appropriate. This may lead to a lack of identification of forced labour and more hardship for the victim.

! The weighing of indicators and the disproportionate emphasis on indicators such as freedom of movement without appropriate consideration of the other indicators of involuntariness and penalty/menace of a penalty is problematic from an identification perspective.

Malaysia's legal framework currently does not define forced labour and there is a resulting lack of conceptual clarity in its application by law enforcement and the judiciary.

Concepts of psychological coercion often do not translate well in the identification process and therefore impact the assessment of an individual as a victim.

Taking an immigration and national security approach which warrants focusing on the undocumented nature of the victim as opposed to the reasons for being undocumented and the exploitation experienced by the victim are opposite to a rights-based approach and this also impacts the identification process. Mis-identification of victims as criminals can lead to wrongful prosecution for offences committed as a direct result of being in forced labour.



Section 4:

Challenges in working with victims of forced labour

Vulnerabilities

- A victim-centred approach must be taken. There must be no assumptions made about issues such as legal status of the worker. It is of fundamental importance for judges and prosecutors to look into the root cause of migrants becoming undocumented. There is also a need for the employer to be summoned to attend court and be answerable for acts or omissions that may have impacted the said worker. Additionally, cultural sensitivity in terms of language and customs should be respected. Misunderstandings can often result in victimisation. It is particularly important to have carefully vetted and checked interpreters in order to eliminate any conflicts of interest from emerging that may be detrimental to the quality of evidence being provided and ultimately to the victim.

Abuse of trust

- Victims are often recruited by someone he/she knows such as family members, relatives, intimate partners, friends, acquaintances in the community. Child victims of forced labour are often in their predicament because their parents are in the same situation.
- On the other hand, victims often develop trust or complex feelings of misguided loyalty to an employer who is exploiting them. This may cloud their judgment and impair their ability to seek help.

Informality of work

- The involuntary servitude of domestic workers, whose workplaces are informal, connected to their off-duty living quarters, or in a private home and not often shared with other workers presents a challenge. Such an environment, which often socially isolates domestic workers, is conducive to abuses as labour inspectors cannot inspect private property as easily as they can inspect formal workplaces.⁷³

Control

- Victims could be controlled and trained by perpetrators on how to respond to police interviews. Control over victims is also often achieved by coercion, threats and harassment towards the worker and his/her loved ones.

73 - US Department of State: *Trafficking in Persons Report*, 2011.

Criminalisation	Victims may not come forward or assist in the investigation because they have irregular migration status or are undocumented. Both of these can lead to prosecution or deportation.
Passport retention and withholding of i-Kad by employers	The identification and protection of victims particularly children who may not readily self-identify as victims poses a challenge. The absence of an identity document often leads to the presumption of someone being undocumented and being in breach of the law. This is particularly difficult in the case of migrant workers whose employment have been terminated and have become undocumented overnight. This same reason may also lead to a migrant worker not seeking help or self-identifying for fear of becoming undocumented.
Limited knowledge of rights/access to justice	- There are many factors that hinder victims' from seeking justice, such as age, culture, race, language, resources, education or citizenship. - Victims need information in a language that they can understand about the judicial process, their own rights and responsibilities in the criminal proceedings. - Information can help familiarise victims with the criminal proceedings which can lead to less psychological distress and avoid re-victimisation. - Lack of legal representation often deters victims from participating in the criminal proceedings. Legal representation is not accorded to foreign nationals above the age of 18 under the National Legal Aid Foundation.⁷⁴
Age verification of young victims	Child victims often lack identity document or carry false identity papers that mis-state their age.
Lengthy process	Victims may not wish to engage with the criminal justice process due to the lengthy nature of proceedings which can often lead to a loss of income by the victim and difficulties with finding lodgings during the proceedings.

74 - ILO: *Gap Analysis of Alignment of Malaysian Legislation, Policies, and Programmes to ILO Forced Labour Convention, Protocol and Recommendation*, 2018.



Language barriers

- Obtaining an interpreter in some cases may be difficult because victims come from remote locations where only a few people can speak the ethnic language. Small communities also increase the chance that the interpreter will know the victim or the trafficker.
- The perception that Indonesian victims understand the local language, Bahasa Malaysia, and therefore do not require an interpreter in a formal setting may dilute the understanding of the victims.
- Due to language barriers, the process of investigating cases becomes lengthened. Sometimes, it takes months before law enforcement can act and assist victims.

Section 5:

Challenges from an enforcement perspective

Lack of guidance on how to use the indicators of forced labour in practice

- The forms of coercion are subtle and difficult to capture. The existence of the Standard of Procedures and indicators of forced labour alone is not enough without a clear explanation on how each specific indicator of forced labour is determined.
- The degree or severity of exploitation also present another challenge as it is a very subjective term, which has not generally been covered in labour standards. This is especially difficult in certain less regulated sectors e.g. domestic work where there is no regulation around number of working hours, rest days⁷⁴ and the minimum wage.⁷⁵
- Different courts practice the law differently without a standardised guideline. Courts in Petaling Jaya, for example, hardly issue a whipping sentence for immigration offences but the courts elsewhere do.⁷⁶
- Identification of labour trafficking cases often relies on reactive labour inspections in response to workers' complaints of non-payment of wages and other violations.

74 - Interview B

75 - A weekly rest day is stipulated in the contract of employment

76 - Indonesia requested a minimum wage of RM1,200 per month for their domestic workers while the Philippines requested US\$400 (RM1,650) per month in 2015

Uneven law enforcement	Although employment laws provide equal protection between national workers and migrant workers, uneven law enforcement has contributed to division of labour force whereby migrant workers are exploited and are often not recognised as victims due to the difficulties identified earlier in relation to identification.
Imbalance of power between employers and workers	- According to an interviewee, employers hire lawyers to submit letters of representation to the labour department to inform them that the arrears have been settled and the case is withdrawn by the worker.⁷⁷ This is one of the main challenges faced when handling cases with multiple labour law violations. As soon as the unpaid wages are settled between the employer and worker, all other violations are forgotten and not pursued further by the court, victim as well as the employer.⁷⁸ This falls short of an adequate response to the issue of forced labour. Victims are often reliant on NGOs with limited resources to provide them with legal representation. - Permission to stay and work in Malaysia is strictly tied to an employer, and in some cases the threat of retaliatory dismissal is used to coerce migrant workers.⁷⁹
Criminalisation of migrant workers by the immigration laws and policies	- Migrant workers are often charged for violations of the Immigration Act, such as illegal stay and being undocumented. In practice, the Immigration Act supersedes every other law in the country. This often has devastating consequences for workers whose documents are withheld by employers or agents hence making workers more vulnerable to forced labour, arrest, detention and deportation. Some aggrieved workers opt for out of court settlements as there is an immediate and pressing need to access funds and also because the prospect of lengthy court proceedings involves too many challenges. - The routine arrest, detention, and deportation of undocumented workers, regardless of the reasons for their undocumented status, means that migrant workers in abusive situations are less likely to attempt to escape, as they fear being intercepted by immigration authorities. “Special Pass” is required to remain in the country while pursuing legal remedies. Immigration authorities have the discretion to issue a Special Pass for a period not exceeding one month, which can be extended for a maximum of three months but does not allow employment.⁸⁰ Finding readily available accommodation and being able to support oneself and honour financial commitments during such time is also very difficult and adds to the difficulties with pursuing legal remedies.

77 - Interview D

78 - Interview A

79 - Verite: *Forced Labor in the Production of Electronic Goods in Malaysia*, 2014.

80 - Interview E



Challenges encountered when navigating the judicial system

- Court proceedings could be lengthy and legalistic, which create serious challenges for migrants seeking access to remedy as they are only permitted to stay for 30 days on a Special Pass visa and subject to restrictions as mentioned above according to an interviewee.⁸¹ Not being able to work during such time to pay off debts or honour financial commitments to the family can prompt a worker to accept a settlement that is far less than what he is owed.
- Court cases are often postponed for a variety of reasons leading to the victims' visa expiring midway. The victims run the risk of being charged as 'illegal' in Malaysia. The workers may end up getting deported before the original case has been tried, cases thrown out and the victim blacklisted and unable to enter Malaysia for the next five years.⁸² This is not only detrimental from a victim's perspective but also from the perspective of wanting to create deterrence for the crime of forced labour. Criminalising victims puts off other victims from coming forward and cases that are not seen through are then unable to create comprehensive precedent value for future cases.
- Prosecutors need to conduct thorough investigations before charging victims as failure to do such could result to losing a case of forced labour, or lengthen the prosecution process that will enable the perpetrator to find a counter-measure against the victim. Careful case assessment by investigating officers by identifying and weighing different indicators of forced labour is critical. It is also essential for the Prosecution to meet with the victims ahead of the hearing in order to best prepare for the case. There are multiple subjective elements that need to be addressed in the case preparation and psychological coercion is one such element. Meeting with the victim is an essential way to understanding and adding more context to the facts of the case.

81 - ILO: *Access to justice for migrant workers in South-East Asia*, 2017.

82 - Interview F

Challenges relating to labour inspections

- There are slightly over 300 labour inspectors in Malaysia while the number of registered employers is at 300,000.
- The Ministry of Human Resources has limited resources to fulfil its labour inspection mandate, particularly in terms of staffing. As a result, the Ministry responds to specific complaints from migrants but lacks the resources to comprehensively inspect their workplaces.⁸³ Investigations are reactive rather than proactive. As such it is important to create an environment within which migrant workers are educated about the rights and empowered to seek help so the number of investigations can increase.
- In 2016, labour inspectorates conducted 49,610 labour inspections, which resulted in the issuance of 5,297 correction notices and the referral of 27,063 labour disputes to the labour courts. Labour officials referred two cases to the Attorney General's Chamber for prosecution, while the rest were resolved through back-payment for exploited workers and levied fines for non-compliant employers.⁸⁴
- An improved labour inspection strategy also requires close collaboration with other regulatory/certification bodies and employers association.

Forced labour and ATIPSOM

- Police is mandated to investigate cases under the ATIPSOM first. However, other forced labour cases tend to be referred to labour courts and are rarely prosecuted under the ATIPSOM. If elements of forced labour are present, the police will often charge the alleged perpetrators under Section 12 of the ATIPSOM because the ATIPSOM is more general, hence there is a higher chance of obtaining a conviction.⁸⁵ However, the ATIPSOM was designed with trafficking in mind and as such it could not prosecute a forced labour case that may not meet the trafficking threshold thereunder.
- When evidence is lacking to prove human trafficking, victims may lack the motivation to pursue other cases that may still be relevant to their given situation.

83- ILO: *Review of labour migration policy in Malaysia*, 2016.

84 - U.S. Department of State: *Trafficking in Persons Report*, 2017.

85 - Interview G



Involvement of other members of the judicial system

- There are reports of some court staff allegedly advising victims to plead guilty so the sentence was lighter and to enable them to return home sooner.⁸⁶ Victims who are not beneficiaries of independent legal advice may fall prey to poor advice on the merits of pleading guilty.

Corruption

- Corruption is a major hindrance to enforcement of the laws (i.e. touting or accepting bribes by lawyers, enforcers, prosecutors or judges) and deterrence of forced labour practices. Anti-corruption should be strengthened to improve trust in the justice system and judges must specifically ask victims if they have been asked to pay bribes or encouraged to plead guilty.

Lack of enforcement of other related laws/ inadequacies of other laws

- Employers are often not charged for withholding passports. The onus for work permit renewal is also placed on the workers; however, they are not able to renew their permits without the presence of their employers.⁸⁷ This is a systemic issue that must be considered by prosecutors and judges when assessing the reasons why an individual may be undocumented or may have chosen not to access help even if they had freedom of movement.
- Inadequate regulation of recruitment agencies including those in the sending countries has proven a major regulatory challenge for the Government. Mandatory licensing of recruitment agencies is required under the provisions of the Private Employment Agencies Act but evidence suggests that compliance with rules and regulations continue to be a challenge. It is to be noted however, that the Act was amended in 2017.
- Bureaucratic procedures can be a hindrance to effective enforcement. E.g. in cases of fishing, the Malaysian Maritime Enforcement Agency (MMEA) can conduct arrests on land, however, the chain of custody cannot be broken. There has to be enough evidence to show that the suspect is in fact, on land, and MMEA will be required to obtain the necessary documentation in order to pursue the arrest.⁸⁸

86 - Interview G

87 - Interview C

88- Interview B

Practical Exercise for Module 5

Exercise 5: The victims of forced labour		
	When	Do this exercise after section 5
	Duration	25 minutes role play
	Objectives	To understand both the needs of the victims and challenges in working with victims of forced labour
	Methodology	1. Participants should in turn re-enact an interview situation between a victim of forced labour, a judge and a prosecutor. 2. Instruct participants acting in the role of prosecutors to pay attention to the victim's needs, think about information gaps they may be seeking to address as a prosecutor and identify potential challenges in relation to the testimony and engagement of the witness. 3. For judges, observe the process to evaluate the quality of evidence that may come about and the victim psyche. It is valuable for judges to participate in the exercise as prosecutors so they can get a better idea of victim psyche through this form of engagement. The challenges in enforcement are very relevant as they go to the heart of the difficulties with putting a case together and the evidence that is possible to access. For judges issues such as debt bondage and fear of being undocumented and passport retention can help to explain why despite the existence of freedom of movement, workers who are experiencing forced labour may chose to remain in an exploitative situation.
	Answers	n/a



Role play

Your name is _____, you are ____ years old, from a poor family in Cambodia. You are an unskilled labourer looking for work in Malaysia. You heard that construction companies were always looking for temporary workers and were given the name of a place where workers were recruited on a daily basis. You were soon hired for a week and started to work at a construction site in Selangor. You were given very hard work and beaten all the time. You also had to work day and night shifts on many occasions and were very tired at the end of the week. You never received an employment contract and were not sure whether it was legal to work like this but you were too afraid to ask. At the end of the week you only received RM200, much less than what other workers on the same construction site made. You wanted to complain but the employer said you would not receive more than this as you were just an unskilled peasant. You could not approach the authorities because you were not sure whether the paperwork the employer had given you was a proper work permit.

Method

Re-enact an interview situation – 1 victim, 1 prosecutor, 1 judge

Thinking Points

- *Consider the individual you are interviewing*
- *Pay attention to their needs*
- *Think about the information gaps you may be seeking to address*
- *Think about the identification related issues that you may still have questions about*
- *Identify challenges you foresee in relation to the testimony*



ETHICS

Module 6

Ethics of working with people in vulnerable situations



Module 6

Ethics of working with people in vulnerable situations

Section 1: Avoiding secondary victimisation

Section 2: Understanding Post-Traumatic Stress Disorder (PTSD)

Section 3: Understanding the impact of coercion and control

Section 4: Risk assessment

Section 5: Practical guidelines for working with victim witnesses

Section 6: Interview techniques

Learning objectives

- Understand the impact of traumatisation in order to promote a better understanding of the need for assistance.
- Know the symptoms of post-traumatic stress disorder.
- Be familiar with a range of control methods and impact of coercion and control on victims.
- Be able to comprehend the range of victims' reactions, such as hostility, apathy, etc.
- Be able to balance law enforcement interests with promoting the human rights of the victims e.g. interview techniques.

Key words and concepts

- The whole process of criminal proceedings may cause secondary victimisation.
- Studies of victims of trafficking and related forms of exploitation including forced labour (particularly for sexual exploitation) have found that victims display many PTSD symptoms which manifest in different forms.
- The effect of coercion and control on a victim to secure compliance during the period of exploitation are often present post-exploitation and through criminal justice proceedings.
- Risk-assessment in forced labour is an attempt to decide how likely it is that a hazard will become reality and what measures should be taken to reduce or eliminate it completely and protect the victim.
- Investigations strongly rely upon the victims' accounts and testimony in criminal proceedings, thus it is essential that individual circumstances and expressed needs and wishes of each witness are taken into account.

Training Guide for Module 6

	Objectives	• Participants will become familiar with the terms trauma, PTSD and able to recognise certain behaviours of victims as possible consequences of the trauma. • Participants will know how to avoid secondary victimisation and to develop the required interviewing skills.
	Methodology	Lecture • Explain the terms of trauma, PTSD , complex PTSD syndrome and associated symptoms, and how to recognise potential effects of trauma in the context of forced labour • Explain how trauma can influence the credibility and testimonies of victims • Explain the risk of and how to avoid secondary victimisation • Explain the risk assessment process • Explain interviewing techniques Group work (role play) Divide participants into groups of three. Participants should in turns re-enact an interview and interrogation situation with a victim of forced labour (roles: victim, prosecutor/judge).
	Supporting documents/ recommended reading	• "Identifying and Investigating Cases of Forced Labour and human trafficking", Dr Shahrzad Fouladvand, WISE • "Working with Refugee Children Current Issues in Best Practice", ILPA, 2011
	Suggested duration	60 minutes



Working with vulnerable victims requires a clear understanding of the (i) impact of trauma on the individual; (ii) the effect of grooming or coercion by the exploiter; (iii) the needs of the individual; (iv) engaging victim's participation and collaboration in investigations and criminal justice proceedings without putting the individual at risk and causing further trauma. This can be a particularly difficult balancing act as law enforcement and prosecutors are under a lot of pressure to investigate and prosecute and this to a large degree relies on how well the victim can deliver as a witness. The pressure on victims is tremendous and unless there is the support of NGOs and victim witness advocates the process can be extremely difficult for victims. A constant risk assessment is also essential to ensure that if the victim witness is at risk, he/she is offered the requisite protection. This chapter explores some of the key ethics to bear in mind when working with victims.

Section 1: Avoiding secondary victimisation

The whole process of criminal investigation and trial may cause secondary victimisation, because of difficulties in balancing the rights of the victim against the rights of the accused or the offender, or even because the needs and perspective of the victim are entirely ignored.⁸⁹

Secondary victimisation refers to victimisation that "occurs, not as a direct result of the criminal act, but through the response of institutions and individuals who are insensitive to the needs and vulnerable status of the victim."⁹⁰ Victims may sometimes be viewed solely as tools for investigation and prosecution and their rights are protected only to the extent that they are considered useful for criminal proceedings. Secondary victimisation will frequently occur for example where the victim is asked to repeat the account of exploitation multiple times to multiple different agencies and may encounter a judge who is not very sensitive to the experience of the victim. The recounting of the experience and the insensitivity can lead to the victim being re-traumatised and this is a setback to the recovery process which will most certainly impact the quality of victim participation in proceedings. Caring for a victim and being sensitive to their needs are compatible with the prosecutors' desire for a robust witness.

Judges need to be sensitive to victims' situation and not view them as mere "numbers". The ASEAN Practitioner Guidelines on Criminal Justice Responses recommends that "all prosecutors and judges should be sensitised to understand the crime of trafficking and be informed of the applicable legal framework."

The UN Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power 1985 and the Recommended Principles and Guidelines on Human Rights and Human Trafficking 2002, developed by the UN High Commissioner for Human Rights (which also covers victims of trafficking for forced labour), both emphasised the need for close collaboration with NGOs, law enforcement and other stakeholders to ensure that victims are not re-victimised and that they receive the appropriate care and protection.

89 - UNODC: *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 3, 2009.*

90 - *Id*

Section 2:

Understanding Post-Traumatic Stress Disorder (PTSD)

Post-traumatic stress disorder (PTSD) is a term that describes a mental health disorder caused, in part, by exposure to one or more traumatic events. This disorder manifests in a number of severe psychological symptoms experienced by those who have been exposed to a life-threatening experience that has had a traumatic effect on them.⁹¹

Various measures of PTSD have been devised. Examples of common symptoms measured include recurrent thoughts/memories of terrifying events, trouble sleeping, and inability to feel emotions, feelings of shock, grief and adjustment. Not everyone who experiences a traumatic event will develop PTSD.⁹² PTSD should not be confused with the normal response to a disturbing episode.

For victims of forced labour, the traumatic events they experience are often repetitive and prolonged—which can sometimes distinguish their reactions from those who have survived a single life-threatening event. For many who have worked with victims of chronic trauma, such as domestic violence victims, this type of repetitive abuse/fear is considered a separate syndrome: complex post-traumatic stress disorder.⁹³

The distinction between PTSD and complex post-traumatic stress disorder is important to investigators because it emphasises that the reaction to ongoing trauma is actually a physiological re-organising of the individual's natural responses or instincts that makes them hyper-prepared to respond to stressful events.⁹⁴

A common characteristic of PTSD is the tendency of symptoms to decline over time in most people—although they can linger and lead to long-term psychiatric conditions in some and may re-emerge at stress-filled times.⁹⁵ It is very important for law enforcement, prosecutors and judges to be alert to these conditions in order to respond appropriately in the event of occurrence.

Studies of victims of trafficking and related forms of exploitation including forced labour (particularly for sexual exploitation) have found that victims display many PTSD symptoms. The pattern of a steady decline in symptoms was also found in these victims, although rates of decline varied between symptoms. Another common feature of PTSD reflected in studies on trafficking in persons was that some victims still have symptoms sometime after removal from the site of exploitation.⁹⁶

PTSD can often cause dissociation and impact the recollection of events. Unfortunately, if these symptoms are not correctly understood, the witness may be discredited for changing their account of events.

91- UNODC: *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 3, 2009.*

92 - *Id*

93 - *Id*

94 - *Id*

95 - *Id*

96 - *Id*



Section 3:

Understanding the impact of coercion and control

Control methods can include uttering threats to the victim or person known to the victim, emotional abuse, physical violence, sexual abuse, intimidation, branding, tattooing, supporting a drug or alcohol dependency, identification papers taken and withheld, debt bondage, exploiting a victim's fear of police, exploiting a victim's vulnerability, such as immigration status or lack of education, language fluency, or knowledge of local customs and laws, isolation from the public and/or within a group, providing answers to the investigator on behalf of the victim or prompting the victim to answer questions during field interviews, exploiting a victim's cultural or religious beliefs. The effect of coercion and control on a victim to secure compliance during the period of exploitation are often present post-exploitation and through criminal justice proceedings. It may manifest itself in the form of fear, reluctance to engage, fabrications, hostility, denial, misguided loyalty to the perpetrator or it may also affect recollection of events.

PTSD and the impact of coercion and control make very compelling reasons for the engagement of psychologists in legal proceedings as they are able to testify as to the state of mind and perhaps explain in a sense or corroborate the reasons why an individual would have acted in a certain way. This is especially important when assessing how an individual interprets threats. What may not appear to be menacing to a bystander or a judge may be very threatening to a vulnerable worker who is dependent on his/her employer in more ways than one.

Section 4:

Risk assessment

“Risk” is defined to be the likelihood of a potential hazard becoming reality and the consequences if it does. Risk assessment in forced labour is an attempt to decide how likely it is that a hazard will become reality and what measures should be taken to reduce or eliminate it completely and protect the victim. Each case is unique and should be assessed on its own facts and circumstances.⁹⁷

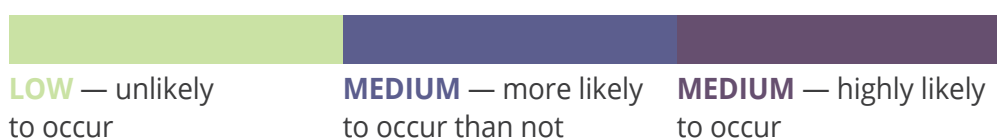
Sometimes the information that may call for forced labour/trafficking risk assessment may come from different sources, including interviews with victims, NGOs, the product of enquiries, previous intelligence or information from surveillance and other specialist investigation techniques. Whatever the source of your information, it should not be ignored. Moreover, there may be different risks at different stages of forced labour cases and thus the risk assessment needs to be a continuous and evolving process.⁹⁸

Throughout forced labour investigations and court proceedings, the safety of the victim or witness must be continually assessed based on all relevant facts and circumstances.

The four key questions to address in any forced labour risk assessment process are:⁹⁹



There are three levels of risk:¹⁰⁰



Who or what is at risk? This may include: Victims of forced labour and trafficking in persons, including identified and unidentified victims, those fully cooperating with law enforcement as victim-witnesses, partially cooperating or not cooperating; family, friends, partners of victims; other witnesses; law enforcement staff, prosecutors or other agencies including NGOs and interpreters.¹⁰¹ In some cases, the integrity of the investigation and prosecution may be at risk from externalities such as coercion by exploiters especially if they are influential or attempting to bribe those involved with the investigation/legal case.

97 - UNODC: *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 5, 2009.*

98 - *Id*

99 - *Id*

100 - *Id*

101 - *Id*



When investigating incidents of forced labour and working with victims:

- Conduct ongoing risk assessments as situations evolve;
- Take steps to ensure the safety of victims or potential victims;
- Seek the assistance of victim services and/or non-governmental organizations;
- Confirm the identities of victims - the production of documentary evidence may prove extremely difficult given that they may have been confiscated by the traffickers. To facilitate the issuance of temporary travel and/or identity documents it will be necessary to contact the relevant embassy or consulate to obtain replacement travel documents.
- Coordinate with the MOHR, MOHA/MAPO and AGC to establish whether the person is a victim of forced labour; and
- Consider potential harm to family members and persons known to them when evaluating risk;
- If necessary, contact the witness protection program.

Getting these processes right creates a rights based environment for victims who may then in turn be more willing to collaborate and participate in criminal justice proceedings.

When working with child victims, contact the relevant child protection agency. Be mindful that children may have different needs to adults and may be impacted in different ways than adults.

Law enforcement must ensure that the safety of the victim is prioritised when testifying in court. Use of video technology and the like in order to avoid contact with the perpetrator might be considered when heightened risks are identified or where children are concerned.

Both the existing level of risk posed to the safety and welfare of the victims and their families as well as possible risks that may arise as a result of the criminal justice process must be taken into account.

There may be many occasions when criminal justice practitioners are required to assess risk in jurisdictions outside their own. Examples include arranging the repatriation of a victim, identifying appropriate support services for him or her and assessing risk to family and friends in the country of return. It is very important to engage with organizations on the ground in the country of return but also law enforcement counterparts who may be able to provide the protection required.

Section 5

Practical Guidelines¹⁰² for Working with Victim Witnesses

- Victims must be treated with dignity and as victims not as criminals
- Victims must be treated with the appropriate language, cultural and gender sensitivities
- Victims must be fully informed of their rights and their responsibilities as a witness in legal proceedings
- Victims must be risk assessed continually and be protected from harm
- Victims' need for access to remedies is an important need
- Victims' wishes such as returning home or remaining in Malaysia must be considered
- Children must be given special consideration

102 - Dr Shahrzad Fouladvand (WISE): Identifying and Investigating Cases of Forced Labour and human trafficking.



Section 6

Interview techniques

Good practice in interviewing vulnerable witnesses is essential to the viability of the investigation. In the majority of cases, investigations strongly rely upon the victims' accounts and testimony in criminal proceedings. Therefore, it is essential that the prosecutor as well as court officials take into account the individual circumstances and expressed needs and wishes of each witness.

The following PEACE model guideline provides a useful tool in planning and conducting interviews with vulnerable witnesses:¹⁰³

Planning and preparing for the interview

- A risk assessment should be conducted as soon as possible.
- Forced labour cases may require additional planning compared to other interviews, such as arranging interpreters, social supporters and accommodation.
- Other measures should be taken, such as considering a psychological assessment, assessing the victim's physical health, providing appropriate clothing, meals and accommodation. The victim's migration status should be established as soon as possible.

Engaging with the victim witness and explaining the process and content of the interview

- Typically, the victim should be told what is going to happen in the interview, how information obtained might be used and victim's rights.
- If an initial interview indicates that the victim is so severely traumatised that obtaining an account would seriously affect his or her mental health, consider terminating the interview and making alternative enquiries.

Account from the victim/witness is obtained

- Interviews should open, where possible, by asking the victim to give a free narrative account. This is an uninterrupted account of relevant events in the victim-witness's own words.
- Interviewers follow this approach by expanding and clarifying the account.
- Refer to third party sources e.g. medical evidence, social worker assessments, NGO representative.
- Ask the individual to provide their account of events by writing their statement in their own words or using drawings.¹⁰⁴

103 - UNODC: *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 8, 2009.*

104 - ILPA: *Working with Refugee Children Current Issues in Best Practice, 2011.*

Closing an interview appropriately

- The content of the interview may be summarised and the victim is given the opportunity to add anything and informed what will happen next.
- Review for any new or changed risks the interview has revealed.

Evaluating the content of the interview

- Always consider and assess any risks to the victim, their family or others that have been revealed in the interview.
- Evaluation should take place after each interview, no matter how short the interview was.
- Evaluation in forced labour cases should also assess the mental and physical condition of the victim in light of what has happened in the interview. This may involve reference to experts such as doctors and psychologists.
- Work closely with other investigators and those managing the investigation to identify further enquiries to be made outside the interview and additional points to explore during the interview.

The following guidelines provide a useful tool in planning and conducting interviews with child witnesses.¹⁰⁵

Preparing for the formal interview

- Conduct the interview as soon as the child is ready to share his/her experience. Remember that as time passes, the child might not fully remember his or her experience. It is also important to remember that some victims take longer periods to recover from traumatic experiences.
- A child's story may be better understood once information has been gathered from all relevant sources e.g. perpetrators, co-victims and witnesses.
- Where legally permitted, video or audio recordings can be used to reduce emotional distress to the child caused by recounting the experience during the investigation and criminal justice process.
- Preferably, a child should be interviewed by an interviewer of the same sex.
- Reduce intimidation on the by wearing civilian clothes, providing a comfortable interview room, providing the child with paper and pencils to help them to draw what happened to them, allowing breaks and extra time during the interview.

105 - The Bali Process: *Assisting and Interviewing Child Victims of Trafficking: A Guide for Law Enforcement, Immigration and Border Officials*,.



Formal interview

- Have the correct attitude – the child feels more comfortable in a friendly environment. For example, start by asking about his or her interests or likes.
- Listen and allow the child to talk uninterrupted.
- Pay close attention to the child's behaviour, language and emotion.
- Do not pressure or intimidate the child.
- Additional support — allow the child to be supported during the interview by an appropriate adult such as a parent or guardian/ support person, social worker, psychologist or lawyer.

Use an appropriate questioning style

- With younger children care must be taken to develop questions that are appropriate for their particular age and maturity level.
- Use open-ended questions.
- Do not ask multiple questions at once.
- Children can be prompted to provide more details about their experience with questions such as: Then what happened? What happened next? What did you see? What did you hear?

Practical Exercise for Module 6

Exercise 6: Ethics of working with people in vulnerable situations		
	When	Do this exercise after section 6
	Duration	15 minutes
	Objectives	• To understand the impact of traumatising and be familiar with victims' reactions as a result of coercion and control. • To be able to balance law enforcement interests with promoting the human rights of the victims.
	Methodology	1. Divide participants into groups of three. Participants should in turns re-enact an interview and interrogation situation with a victim of forced labour (roles: victim, prosecutor, judge). 2. For victim, re-enact possible behavioural patterns and reactions of a victim of forced labour with post-traumatic stress disorder (PTSD), such as avoiding thoughts, feelings, or conversations associated with the trauma; denial and being unable to recall an important aspect of the trauma etc. 3. For prosecutor, re-enact responses where L., supposedly a victim of forced labour, is brought in for an interview. 4. For judge, re-enact an interrogation situation where some of the questions and behaviours influence secondary victimisation, such as victim blaming and minimisation; safety concerns trivialised or dismissed by judge; victims feeling judged during trial etc.
	Answers	n/a



Role play

L. is a 16-years old girl from Indonesia who was arrested for document forgery. She has many bruises and burns on her body. She does not understand Bahasa Malaysia and is very hostile towards the authority. When a male translator is brought in, she either refuses or is unable to speak. She begins to visibly shake. Later, a female translator is brought in. L. says that her bruises and burns were entirely her fault. When pressed on the issue, she says she works as a domestic worker. She refuses to identify her employer by name.

Method

Re-enact an interview situation where L., supposedly a victim of forced labour, is brought in for the prosecutor to interview.

Thinking Points for prosecutors

Address immediate needs before you start; allow breaks during interviews; avoid pressing on issues that cause distress; arrange for support services such as medical assistance, shelter or safe houses; if you can, assure the victim that measures are being taken to prevent harm against victim's family members or other loved ones etc.

Re-enact possible behavioural patterns and reactions of a victim of forced labour with post-traumatic stress disorder (PTSD).

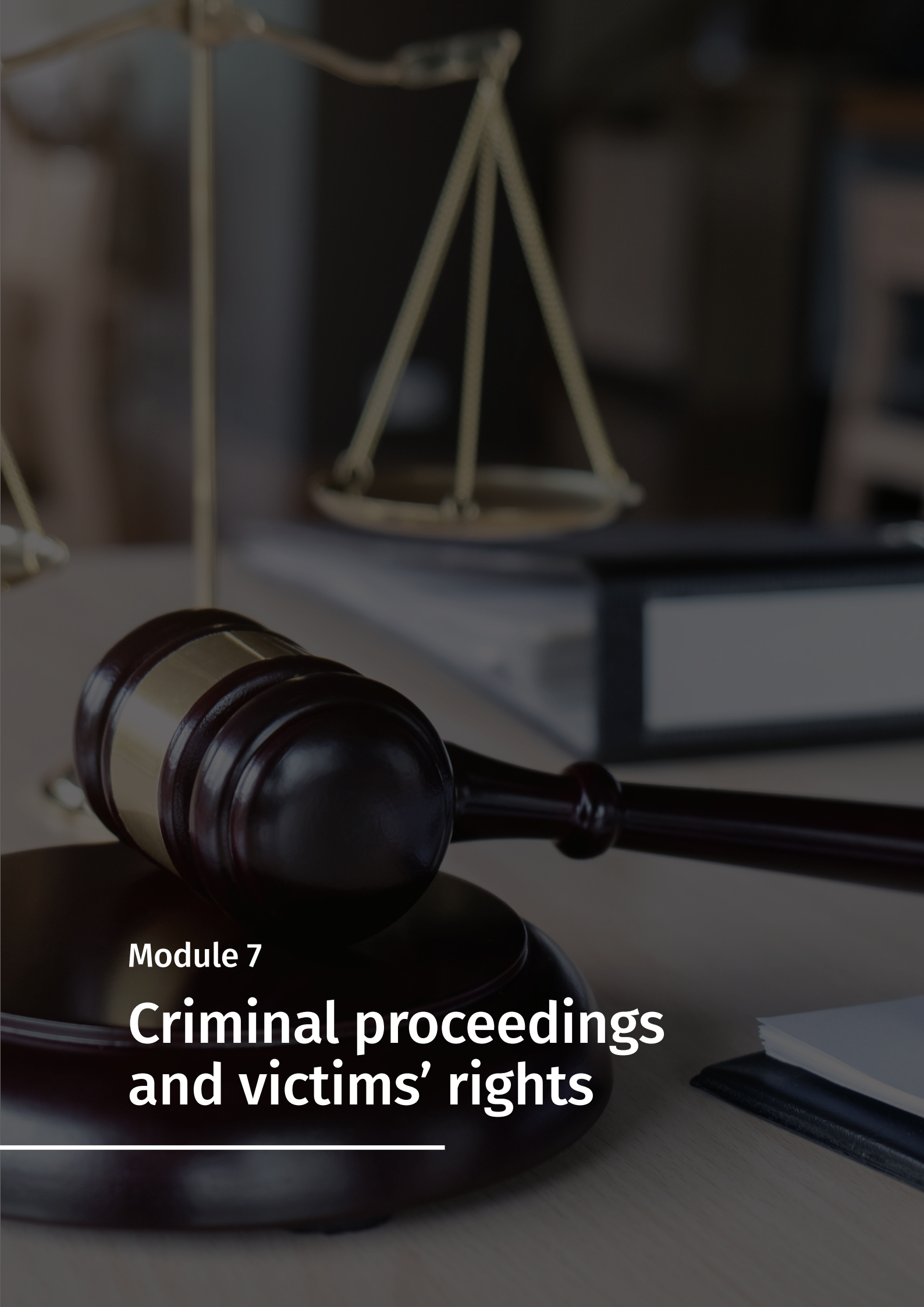
Thinking Points for victims

Exhibit behaviours such as avoiding thoughts, feelings, or conversations associated with the trauma; denial and being unable to recall an important aspect of the trauma etc.

Re-enact an interrogation situation where some of the questions and behaviours influence secondary victimisation.

Thinking Points for judges

Exhibit behaviours such as victim blaming and minimisation; safety concerns trivialised or dismissed by judge; victims feeling judged during trial, the need for a screen, the need for breaks etc.



Module 7

Criminal proceedings and victims' rights



Module 7

Criminal proceedings and victims' rights

Section 1: The victim's rights

Section 2: Inter-agency collaboration

Section 3: Working with the trade unions, Malaysian Bar and NGO partners

Section 4: The need for advanced corroboration and documentation

Section 5: Understanding other crimes that may be involved e.g. document fraud, battery, rape, kidnapping, retention of identity documents

Learning objectives

- Learn about the rights of victims throughout the criminal proceedings and how to ensure that those rights are respected through a rights based approach.
- Understand the need for co-operation among different actors such as relevant government agencies, trade unions, Malaysian Bar Council, NGOs, interpreters, experts.

Key words and concepts

- Forced labour should be understood as a process rather than as a single offence where various criminal offences could be invoked to address certain elements of the full range of crimes involved in forced labour.
- Shortcomings in the criminal justice system can limit victims' access to service they need leading to re-victimisation of the victims.
- Remedies must be made available and workers must be provided information in a language they understand about the different avenues available to seek compensation.
- The right of victims to remain in Malaysia during legal proceedings must be upheld.
- Victims of forced or compulsory labour must not be prosecuted for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.
- Everyone in the criminal justice process chain needs to know the victims' special needs and employ appropriate measures within the context of their respective roles.

Training Guide for Module 7

	Objectives	• Participants will improve their knowledge and skills when dealing with victims during criminal proceedings. • Participants will understand the need to collaborate with different actors to provide a holistic criminal justice response.
	Methodology	Lecture • Discuss different rights of victims in the criminal justice proceedings. • Ask participants to share relevant experience based on their respective roles on the extent of collaboration across different agencies, whether they have worked with different actors e.g. trade unions, NGOs, interpreters, experts. Group work (role play) Split participants into groups of four and role play the characters of the victim; the NGO representative, the Prosecutor and the Judge as provided in the case scenario below.
	Supporting documents/ recommended reading	• “The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy”, Anne T. Gallagher, 2010
	Suggested duration	60 minutes



Section 1: The victim's rights

Engaging with the criminal justice system can be an incredibly difficult experience for victims who are recovering from being in an exploitative situation. The decision to engage with proceedings can often be a difficult one as it often involves employers fighting back with accusations of theft etc... or victims can sometimes be subjected to the criminal justice process as criminals, for example, where they are found to be undocumented or where accusations of theft might be made against them by a disgruntled employer. Victims are often not advised of their rights and are not eligible for legal aid such that their ability to make an informed decision about engagement with the criminal justice system is often mired by ignorance and subject to coercion by employers or poor legal advice to plead guilty. Victims who receive appropriate and adequate care and support are more likely to cooperate with the criminal justice system. However, inadequacies of criminal justice systems can limit victims' access to service they need leading to re-victimisation of the victims.



ILO Recommendation n.203 states that:

"11. Taking into account their national circumstances, Members should take the most effective protective measures for migrants subjected to forced or compulsory labour, irrespective of their legal status in the national territory, including:

- (a) provision of a reflection and recovery period in order to allow the person concerned to take an informed decision relating to protective measures and participation in legal proceedings, during which the person shall be authorized to remain in the territory of the member State concerned when there are reasonable grounds to believe that the person is a victim of forced or compulsory labour;
- (b) provision of temporary or permanent residence permits and access to the labour market;
- (c) facilitation of safe and preferably voluntary repatriation."

- Victims have the right to compensation from their exploiter for material (e.g. all the costs of medical treatment, transportation, damage to property and lost earnings) and non-material damages (e.g. physical and mental pain/suffering, fear, severe disability, reduced working capacity (future non-pecuniary damage))¹⁰⁶. Remedies must be made available under criminal law and civil law and workers must be provided information in a language they understand about the different avenues available to seek compensation.
- Victims often shun legal proceedings because of a lack of timely, comprehensive and language appropriate legal advice when assistance is sought. Interpreters are often not available and where there is no witness victim coordinator, victims may feel lost and disengage in the process.

106 - Anne T. Gallagher: *The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy*. Paper submitted for the expert consultation convened by the UN Special Rapporteur on Trafficking in Persons, especially women and children on: "The right to an effective remedy for trafficked persons", 2010.

- Victims seeking compensation must pay for a Special Pass (RM100) and there may be other costs such as transport to court, food, lodging etc. Given that they are not allowed to work whilst on a Special Pass, other than those assessed and allowed by ATIPSOM, there is very little incentive to engage with the criminal justice system as the outcome is uncertain and this may lead the victim more indebted than before. The Special Pass fee is in addition to any lawyers' fees.¹⁰⁷
- International law upholds the right of victims to remain during legal proceedings. Victims must not be deprived of the opportunity to participate effectively in legal proceedings (including actions related to remedies). The major hindrance to victims' participation in legal proceedings is the requirement to be present in Malaysia. Having been deported for immigration law violations, migrant workers are automatically not allowed to re-enter Malaysia for the next five years.¹⁰⁸
- Victims must not be detained or prosecuted for their involvement in unlawful activities that are a direct consequence of having been in forced labour e.g. criminal implications of sex work, unlawful employment, and unlawful immigration etc.
- To promote engagement of victims with the criminal justice system we suggest the following:
 - Making information that is language sensitive available to all victims
 - Making legal advice available to victims at shelters or as they seek assistance
 - Making government legal aid support available to victims who are foreign nationals
 - Providing a reflection and recovery period during which time victims are supported with food, lodging and other reasonable expenses in order to enable them to make a decision about engaging with the justice system
 - Allowing victims the right to work whilst they are going through proceedings
 - Full guarantee of protecting the identity of the victim
 - Witness protection, when required based on assessment

107 - Interview A

108 - Interview C



Section 2:

Inter-agency collaboration

The victimisation process in forced labour is complex and prolonged. To counter the effects of this process, the rights/ needs based approach to addressing the problems of victims must be equally comprehensive and effective.

Everyone in the criminal justice process chain needs to understand the victims' special needs and employ appropriate measures within the context of their respective roles.

Children's rights must be protected. There should be child psychologists who could provide support to the children involved in forced labour, whether they participate with legal proceedings or not. Article 7 of Convention on the Worst Forms of Child Labour calls for the withdrawal and rehabilitation of children from trafficking.

Upon coming into contact with potential victims of forced labour, the following principles should be used:¹⁰⁹

- Victims of trafficking (including for forced labour) should be identified as victims of crime;
- They should not be treated as criminals; and
- They should not be treated as a source of evidence alone.

There needs to be a closer collaboration between the judiciary, law enforcement and the immigration to avoid victims' suffering the consequences of the employers' mistakes in not renewing the work permit.¹¹⁰

Malaysian enforcement agencies and prosecutors could also cooperate with trade unions, other legal aid centers, civil society organizations, inside and outside Malaysia as well as their government counterparts in source countries for investigations, litigation, victim protection and support.

There may be subtle differentiation between the treatment of various agencies and their budgetary allocation depending on whose purview they fall under. This can be quite challenging for the agencies concerned and must be a serious consideration by the Government when allocating resources. This is all the more reason for inter-agency collaboration to ensure that victims are not impacted by a lack of joint action.¹¹¹ For example, in the event of someone being criminalised for being undocumented, it should be possible for the immigration authorities to retrieve immigration records to validate the fact that the individual is not undocumented. This information ought to be communicated to law enforcement investigating officer so that when it comes to making a decision to prosecute this is taken into account as relevant evidence. The information sharing must take place in a short time frame particularly where the individual is being detained.

109 - UNODC: *Anti-human trafficking manual for criminal justice practitioners, Module 11, 2009.*

110 - Interview A

111 - Interview B

Section 3:

Working with trade unions, Malaysian Bar and NGO partners

NGOs provide support to victims throughout the criminal justice process by undertaking a range of measures which include:

Providing legal assistance	Helping connect with other trade unions, NGOs and lawyers to pursue legal cases on behalf of victims, pursuing prosecutions and obtaining legal compensation.
Pursuing claims	Liaising with law enforcement and working with lawyers.
Preparing the victim	Supporting the victim to provide statements to the police and to testify in court.
Witness protection	Protecting victims and other witnesses who are often re-victimised by further threats and intimidation by traffickers.
Providing support	Finding housing for victims, translation services, health services, forensic interviews, and general social services.

Trade unions, Malaysian Bar Council and NGOs help improve the victims' experience with the criminal justice system. It is widely reported that without NGO legal support, many trafficking cases would not make it through court.



Section 4:

The need for advanced corroboration and documentation

Below are some tips when working with interpreters:¹¹²

- Use only trained and qualified interpreters.
- Check your local intelligence and criminal records systems and, where appropriate and possible, against the intelligence and records systems of other countries where they may have originated or resided in.
- If possible, use the same interpreter throughout the process. This reduces the stress on the victim.
- Some victims may originate from communities that are very small in Malaysia, meaning that there is a good chance the interpreter may know the victim. There is also the possibility that the interpreter knows of the victim or their family through links in their country of origin or residence.
- Interpreters may be at risk of intimidation, threats and corruption even though they are not initially associated with the traffickers.

112 - UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners*, Module 10, 2009.

Section 5:

Understanding other related crimes

Forced labour should be understood as a process rather than as a single offence. Other crimes may be committed to ensure the compliance of victims, maintain control, protect the operations or maximise profits. It may begin with document fraud to secure work authorisation and continue with assault or retention of identity documents to keep workers under control. Depending upon the size and sophistication of the operation, laundering the proceeds of crime may be involved. These acts constitute criminal offences in most countries and could be invoked to address certain elements of the full range of crimes involved in forced labour.

This could be useful where penalties for forced labour do not sufficiently reflect the seriousness of the crime. There may also be cases where the evidence is not sufficient to support prosecution for forced labour, but may be sufficient for a prosecution for related offences.¹¹³

113 - UNODC: *Toolkit to combat trafficking in persons*, 2008.



Practical Exercise for Module 7

Exercise 4: The criminal justice proceedings and victims' rights		
	When	Do this exercise after section 5
	Duration	25 minutes
	Objectives	To improve their knowledge and skills when dealing with victims during criminal proceedings
	Methodology	Split participants into groups of four and role play the characters of the victim; the NGO representative, the Prosecutor and the Judge as provided in the case scenario below.
	Answers	n/a

Role play

Split into groups of four and role play the character of the victim; the NGO representative, the Prosecutor and the Judge as provided in the scenario below.

L. is from Indonesia. She was recruited to work as a domestic worker in Malaysia. She did not have a passport and had never left the country before so the recruitment agent helped her obtain a passport and a work permit. At the house of her employer, L. was forced to work around the clock from early morning until close to midnight. She worked at the employer's restaurant until 10.00 p.m. and after which helped with the house chores at the employer's house. She was frequently beaten and required hospitalisation on one occasion. After the first month, the employer told her that she would keep her salary for her every month so she did not lose it and she could have it all back after the first year upon the expiry of her contract of employment. L. agreed that such an arrangement was good for her and L. believed her and continued working. At the end of the first year, the employer did not pay her and reasoned that after the deductions for the work permit, L. still owed her money. Since L. did not want to return home without a decent amount of money for her family, she continued to work for her employer for another two years. Her work permit expired but her employer failed to renew her permit. After three years L. could not take it any longer and left the house of the employer for good.

Victim

You want to go back to Indonesia, but you want the money that the employer owes you before you leave. You do not have much money on you and need to find another job to buy food and pay for part of a room where you currently stay that is shared with five other people. You are also without your passport and fearful about being undocumented and at risk of arrest by the authorities.



NGO

Victim came to you seeking assistance. Victim told you her situation and asked you whether she could go to court to get her money back. She was concerned that she would have to leave the country because her work permit had already expired and she was undocumented.

Prosecutor

You are a public prosecutor and you have been assigned to the victim's case. The facts presented to you indicate that victim carried a fake passport and an expired work permit. The victim told you that the recruiter arranged for her passport and she did not know whether it was real or not. You are required to make an assessment as to whether there is adequate evidence to suggest that the victim's immigration offences ought to be prosecuted but you are uncertain as other facts of the case suggest that the individual might be a victim of forced labour.

Judge

You are the judge appointed to this case. The Prosecutor has asked for compensation for material and non-material damages. The Prosecutor is also requesting that the victim's offence of overstaying is not her own doing and therefore that ought not to be held against her.



Module 8

Civil proceedings



Module 8

Civil proceedings

Section 1: Issues to consider before initiating civil litigation

Section 2: Practical challenges

Learning objectives

- Understand the possibility of bringing a civil action and procedural challenges that obstruct victims from accessing civil compensation.

Key words and concepts

- A civil proceeding may be more attractive as the burden of proof is on a balance of probabilities.
- A civil claim can be run in parallel with a criminal prosecution.
- Reliance on labour law related remedies is difficult for victims from sectors not protected by labour law.
- There are a number of procedural challenges that have obstructed victims' access to civil remedies including the length of civil proceedings, lack of legal aid, identification of perpetrators and assets etc.

Training Guide for Module 8

	Objectives	Participants will be familiar with different avenues of access to justice.
	Methodology	Lecture • Brief input on Malaysia's Civil Law Act 1956 • Identify practical challenges in accessing civil remedies • Ask legal practitioners to share relevant experience representing clients in civil proceedings • Ask prosecutors to share relevant experience pursuing criminal and civil causes of action together • Ask judges to share relevant experience in deciding to award compensations in civil proceedings Group work (role play) • Read the case scenario and advise your client on whether to pursue the civil or criminal option and explain (i) reasons for your choice; and (ii) what her rights are under both options • Ask participants to present some of their responses to the class.
	Supporting documents/ recommended reading	• Civil Law Act 1956
	Suggested duration	45 minutes



Section 1:

Issues to consider before initiating civil litigation

For some victims, using civil proceedings to seek compensation is a more attractive option than engaging with the criminal process where there is reliance on the prosecutor to make the case for compensation and where the burden of proof is higher than in civil cases. Proceedings in a labour tribunal, or to access funds from a state fund or to freeze the assets of a perpetrator are all civil proceedings.

In Malaysia, the law provides that victims may bring a claim for harm or loss suffered in respect of personal injury.¹¹⁴ The items that can be claimed for under the law are specific damages and general damages e.g. pain and suffering, loss of amenities, loss of future earnings.¹¹⁵ In awarding damages for loss of future earnings, the Court shall not award damages to an injured person who has attained the age of sixty or above at the time when he was injured; and in any other case, it must be proved or admitted that the plaintiff was receiving earnings by his own labour or other gainful activity before he was injured.¹¹⁶ The Court shall take into account only the amount relating to the injured person's earnings at the time when he was injured and not any prospect of the earnings being increased at some time in the future.¹¹⁷ The Court shall also take into account any diminution of any amount by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured.¹¹⁸

Victims' rights in civil litigation are similar to rights under the criminal proceedings. A civil proceeding may be more attractive as the burden of proof is on a balance of probabilities whereas criminal proceedings require a beyond reasonable doubt burden of proof to be satisfied. Hence, even if criminal proceedings fail and the law allows for civil claims, victims may still choose to avail themselves of this option.

Impact of and on a criminal investigation/prosecution also needs to be considered particularly whether the criminal prosecution is ongoing. Because restitution is not an independent civil cause of action, only the prosecutor of the criminal case may request it from the court. A civil claim can be run in parallel with a criminal prosecution.

It is important to consider whether the defendant is within the jurisdiction and is financially solvent (i.e. have some assets that can be used to pay compensation).

114 - Civil Law Act 1956 (as amended by Civil Law (Amendment) Act 1984 and Civil Law (Amendment) Act 2018) (the "Civil Law Act")

115 - Awarding damages in civil claims, Malaysian Bar Council, http://www.malaysianbar.org.my/members_opinions_and_comments/awarding_damages_in_civil_claims.html [accessed 1 December 2018]

116 - Section 28A(2)(c)(i) of the Civil Law Act

117 - Section 28A(2)(c)(ii) of the Civil Law Act

Section 2:

Practical Challenges

Poor access to information and legal support result in victims generally not aware of their rights and not provided with legal aid.

In some jurisdictions, reliance on labour law related remedies is difficult for victims from sectors not protected by labour law e.g. domestic workers and those who are undocumented or in the country illegally.

Procedural challenges

- Lengthy proceedings - lengthy court process results in migrants unable to remain in the country until the end of the case.
- Lack of legal representation or legal aid
- The statute of limitations in Malaysia for civil claims (contractual and tort disputes) is six years in Peninsular Malaysia.¹¹⁹
- Reliance on the success of criminal proceedings
- Identifying the perpetrator and assets - difficulties identifying the perpetrator and even where the perpetrator is identified there may be difficulties identifying and securing assets against which any successful claims could be enforced.
- Unavailability of victims - victims may not be available for discovery and may have returned home due to difficulties with remaining in country. In many cases, employers cancel the work permit once the migrant workers file cases against the employers.
- Costly process - victims may not know how to fund their civil claim. The sum that migrant workers claim is usually very small. The victims can go to the small claims court if the amount is below RM5000; however, lawyers are not allowed to represent victims in small claims court.¹²⁰

Labour law tribunals/small claims courts are not always best equipped to deal with the complexities of a forced labour case. They are better suited to dealing with simple labour law violations.

Civil proceedings are often very complex in damage calculation especially on non-financial losses e.g. pain and suffering etc. A civil claim can be made up of but not limited to:

- Unpaid wages
- Medical costs
- Repayment of illegal or excessive recruitment fees
- Pain and suffering
- Loss of opportunity
- Degrading treatment
- Other fictitious costs passed on to the victim by the exploiter

119 - Limitation Act 1953.

120 - Interview C



Practical Exercise for Module 8

Exercise 8: Civil proceedings		
	When	Do this exercise after Section 2
	Duration	20 minutes for case study 10 minutes for presentation to the class
	Objectives	To understand different avenues of access to justice under Malaysian law.
	Methodology	1. Read the case scenario and advise your client on whether to pursue the civil or criminal option and explain (i) reasons for your choice; and (ii) what her rights are under both options 2. Ask participants to present some of their responses to the class.
	Answers	As a lawyer, you need to ask your client to consider the following issues: • Is T. working in the country legally? If T. is undocumented or does not have a legal work permit, it may be difficult to rely on labour law related remedies. In any event labour law remedies are likely to be inadequate in this particular case given the nature of the abuses: extremely long working hours, restricted freedom of movement, and very low wages. • Is the defendant, an Indian citizen, in Malaysia and financially solvent? It can be difficult to locate the defendant and locate assets that can be used to pay compensation. • Is T. willing to stay in Malaysia until the end of trial? The whole process could take years to complete and there is no guarantee that T. would receive compensation at the end. • Does T. have enough money to support a civil claim? There is no legal aid for victims to file a civil claim and T. would be responsible to pay for the legal fee. Based on the considerations above, it is advisable for T. to pursue a criminal option. The victim's fear of harassment, reprisals and intimidation by the employer must be considered should criminal proceedings start.

Case study

T. came from Vietnam to work in Malaysia in an underground garment factory. The sweatshop was heavily protected with video cameras and iron doors. T. had to work 12-15 hours daily and often in extreme temperature for a salary of RM250 a month. He was locked up in the workshop and once every two weeks he was allowed to go out without a guard. The sweatshop, owned by an Indian citizen, had been running for several years with 15-20 undocumented employees who changed regularly. His co-worker told him that some of the orders came from famous brands but T. did not know because he could not read the labels. The main priority for T. is to send money home to support his family and to pay off his existing debts so he can move on to a better employer. He is nervous and fearful about being a witness against his employer as he knows he is capable of harassing him and maybe even harming his family.

Objective

Having carefully considered your client's needs, please advise the client on whether to pursue the civil or criminal option and explain (i) reasons for your choice; and (ii) what are her rights are under both options.



Module 9

Corporate liability

Module 9

Corporate liability

Section 1: Identifying the legal standards

Section 2: Accountability and transparency in the criminal justice process

Section 3: Cross-border crimes

Section 4: Joint corporate liability in non-standard employment (outsourcing/sub-contracting)

Section 5: Establishing the employer-employee relationship

Learning Objectives

- Understand the liability of companies and corporate actors.
- Know the legal tests to prove the conduct of a corporate entity.
- Identify the major hindrances in cases of corporate accountability.

Key words and Concepts

- Any person primarily responsible for the management of the company can be held liable for decisions in respect of matters relevant to the business of the company including for the crimes committed in violation of the ATIPSOM.
- The issues of separate legal personality and limited shareholder liability present significant legal challenges to prove corporate accountability.
- In authoritative European jurisprudence, outsourcing was found not to be an excuse for ignoring labour abuses and denying corporate accountability.
- Migrant workers employed by outsourcing or contract labour companies have heightened vulnerabilities to exploitative labour conditions and reduced ability to resolve disputes.



Training Guide for Module 9



Objectives

- Participants will be familiar with concepts of corporate liability for human trafficking, forced labour or other forms of labour exploitation.
- Participants will learn the legal tests to prove the conduct of a corporate entity and a corporate actor.
- Participants will be familiar with the procedural hurdles for migrant workers to hold companies liable in cross-border claims.



Methodology

Lecture

- Brief input on the corporate liability provision under the ATIPSOM
- Brief input on director liability under the Companies Act 2016
- Identify procedural challenges in pursuing cross-border claims against companies
- Use the case in Belgium to highlight jurisprudence to extend corporate liability to subcontractor or outsourcing agency for trafficking for forced labour

Group work

- Divide participants into groups of five. Read the case scenario and determine who the employer is in this case and who bears the legal responsibility for labour rights violations.
- Ask participants to present some of their responses to the class.



Supporting documents/ recommended reading

- "The Corporate Crimes Principles, Advancing investigations and prosecutions in human rights cases", Amnesty International and the International Corporate Accountability Roundtable, 2016
- Companies Act 2016
- "Access to justice for migrant workers in South-East Asia", ILO, Geneva 2017
- "Forced Labor in the Production of Electronic Goods in Malaysia", Verite, 2014



Suggested duration

60 minutes

Section 1: Identifying the legal standards

A “body corporate” can be held liable for offences under the ATIPSOM and any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate, or was responsible for the management of any of the affairs of the body corporate can be found guilty of that offence.¹²¹

Establishing liability for companies and corporate actors involved in corporate crimes can present certain legal and evidentiary challenges. For example, applicable laws can set out specific legal tests for establishing liability. Under some criminal laws, the state must prove that the defendant had the required guilty state of mind when committing the offence whereas the state of mind of the defendant is irrelevant in other criminal laws or strict liability offences. Some laws may also provide for specific offences that are applicable only to corporate entities. Therefore, legal practitioners must know the laws applicable to corporate crimes in the jurisdiction in question and the required evidence to establish liability.¹²²

In Malaysia, directors, including the chief executive officer, the chief financial officer, the chief operating officer or any other person primarily responsible for the management of the company, can be held liable for decisions in respect of matters relevant to the business of the company. The Companies Act 2016 requires a director to exercise “reasonable care, skill and diligence” and use his powers for “a proper purpose and in good faith in the best interest of the company.”¹²³ A director will not be held liable for a business judgment if he makes such decision based on an informed basis, in good faith and for the best interests of the company.¹²⁴

Furthermore, the UN Guiding Principles on Business and Human Rights (UNGPR) provides that most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on a company’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is “knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime”. The UNGPR notes that conducting appropriate human rights due diligence should help business enterprises to address the risk of legal claims against them. However, companies conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

121 - There do not appear to be any companies or officers that have been found guilty of offences under the ATIPSOM

122 - Amnesty International and the International Corporate Accountability Roundtable: *The Corporate Crimes Principles, Advancing investigations and prosecutions in human rights cases*, 2016.

123 - Section 213 of the Companies Act 2016.

124 - Section 214 of the Companies Act 2016.



There are different legal tests to prove the conduct of a corporate entity:

- The corporate entity will be liable if a member of the board of directors or a senior level official was involved in committing the offence (known as the “identification” or “directing mind and will” principle); or
- The corporate entity will be liable for the relevant wrongful acts of any worker or agent if they were acting within the scope of their employment and, in some jurisdictions, acting in part to benefit the company (known as “vicarious liability” or “respondent superior”).¹²⁵

In practice, it can be difficult to find evidence of the involvement of board members or senior level officials in an offence, and to identify which particular official was involved. This may require analysis of complex corporate documents to determine who has authority to make decisions on behalf of the company and how the entity is actually managed and makes decisions. Furthermore, some evidence may be located in multiple jurisdictions, which presents additional challenges.¹²⁶

Section 2:

Accountability and transparency in the criminal justice process

Issues of independence and accountability are especially problematic in corporate liability cases due to the power and influence of the corporate actors involved. Criminal defamation and cross-claims are often used by corporates to silence claims of accountability against their operations.

In jurisdictions where prosecutors have discretion over whether to prosecute cases or not, this discretion can potentially lead to abuse. Prosecutors must be able to make that decision free of outside influence.¹²⁷

125 - Amnesty International and the International Corporate Accountability Roundtable: *The Corporate Crimes Principles, Advancing investigations and prosecutions in human rights cases*, 2016.

126 - *Id*

127 - *Id*

Section 3:

Cross-border crimes

Issues of separate legal personality and limited shareholder liability present significant legal challenges for accountability where the case involves a parent company that operates through a local subsidiary or joint venture in a different jurisdiction. This “governance gap” has created an environment where corporate actors are able to operate with impunity.¹²⁸

The laws in the state where a parent company operates may not provide for jurisdiction over offences committed abroad. Even where grounds for exerting jurisdiction exist, there are additional procedural hurdles that prosecutors may need to overcome before exercising jurisdiction, including: (1) the need to obtain consent from government officials; (2) legal restrictions on the parent company’s home jurisdiction prosecuting crimes more closely connected with another jurisdiction; (3) a requirement that the relevant act be an offence in both jurisdictions; or (4) a requirement that the suspect be present in the jurisdiction where crime occurs.¹²⁹

The major hindrance in cross-border claims is the requirement to be present in Malaysia. To initiate a cross-border claim, the migrant would have to return to Malaysia and make at least one court appearance. Having been deported, they are automatically not allowed to re-enter Malaysia for the next five years.¹³⁰

Section 4:

Joint corporate liability in non-standard employment

In an interesting case of trafficking for exploitation in motorway restaurants in Belgium, the First Instance Court of Ghent, 19th chamber held the contractor liable for the exploitation of trafficked workers by the subcontractor that provided cleaning services. The contractor was not in direct or even indirect employment relationship with the workers and denied any knowledge, control or impact over working conditions of the workers.¹³¹

The Court found basis for extending liability for trafficking for forced labour, arguing that abuses by the subcontractor would not have been possible without the contractor “deliberately ignoring malpractices”.

Outsourcing was also found not to be an excuse for “deliberately ignoring exploitation of workers”. Not ending a contract after having acquired knowledge about such exploitation was considered sufficient ground for being an accomplice of such exploitation.

128 - *Id*

129 - *Id*

130 - *Interview C*

131 - UNODC Case No. 2012/3925



Section 5:

Establishing the employer-worker relationship

In some cases, it is difficult to establish the employer-worker relationship where there is no direct contractual arrangement. In Malaysia, the outsourcing policy often artificially divides accountability for meeting the terms of employment to the outsourcing agency while the employer is directly responsible for managing the workers. This shift in responsibility has contributed to greater abuse of migrants and lack of accountability of those on whose premises migrants work.¹³²

When complaints are filed by migrant workers, identifying the employer who bears legal responsibility often proves difficult in the outsourcing and subcontracting arrangement. The outsourcing arrangement denies workers' protection they are entitled to and employer accountability inherent in an employer-worker relationship.¹³³ Courts undertake thorough tests (i.e. control, independence, integration, mixed) to determine Contract of Service/Contract for Service or to determine who is the employer. It is also interesting to identify elements such as who holds and uses worker data in order to identify elements of an employer/worker relationship and also the elements of conduct that can lead to a contract being implied between two parties in the cases where there is no written contract.

Migrant workers employed by outsourcing or contract labour companies have heightened vulnerabilities to exploitative labour conditions and reduced ability to resolve disputes.

132 - Verite: *Forced Labor in the Production of Electronic Goods in Malaysia*, 2014.

133 - ILO: *Access to justice for migrant workers in South-East Asia*, 2017.

Practical Exercise for Module 9

Exercise 9: Corporate liability		
	When	Do this exercise after section 5
	Duration	20 minutes for case study 15 minutes for presentation to the class
	Objectives	To understand who bears responsibility for labour rights violations committed against migrant workers.
	Methodology	1. Divide participants into groups of five. Read the case scenario and determine: 2. Who is the employer in this case? 3. Who bears the legal responsibility for labour rights violations? 4. Is the undocumented migrant worker entitled to pursue any legal action and if yes against whom? Ask participants to present some of their responses to the class.



Answers

To determine the employer, elements such as control and independence should be considered. In this case, the recruitment company placed S. to work in a cleaning service company, provides accommodation, pay wages, and exerts pervasive control and limitation of any outside contact. The level of control is sufficient to determine that the recruitment company is the employer of S. regardless of what was stated in the contract.

The cleaning service company, however, should be held accountable for the wrongdoings of the recruitment company. With reference to the ruling in the Belgian case, the abuses by the recruitment company would not have been possible without the cleaning company “deliberately ignoring malpractices”. Therefore, an employer-worker work arrangement that attempts to shift responsibility to a third-party should not be accepted as an excuse for deliberately ignoring exploitation of workers. Both cleaning service company and the recruitment company should be held accountable.

Generally, migrant workers employed in an irregular status are not entitled to the same protection under the Employment Act in Malaysia, however, the ATIPSOM offers protection irrespective of the immigration status of the individual.

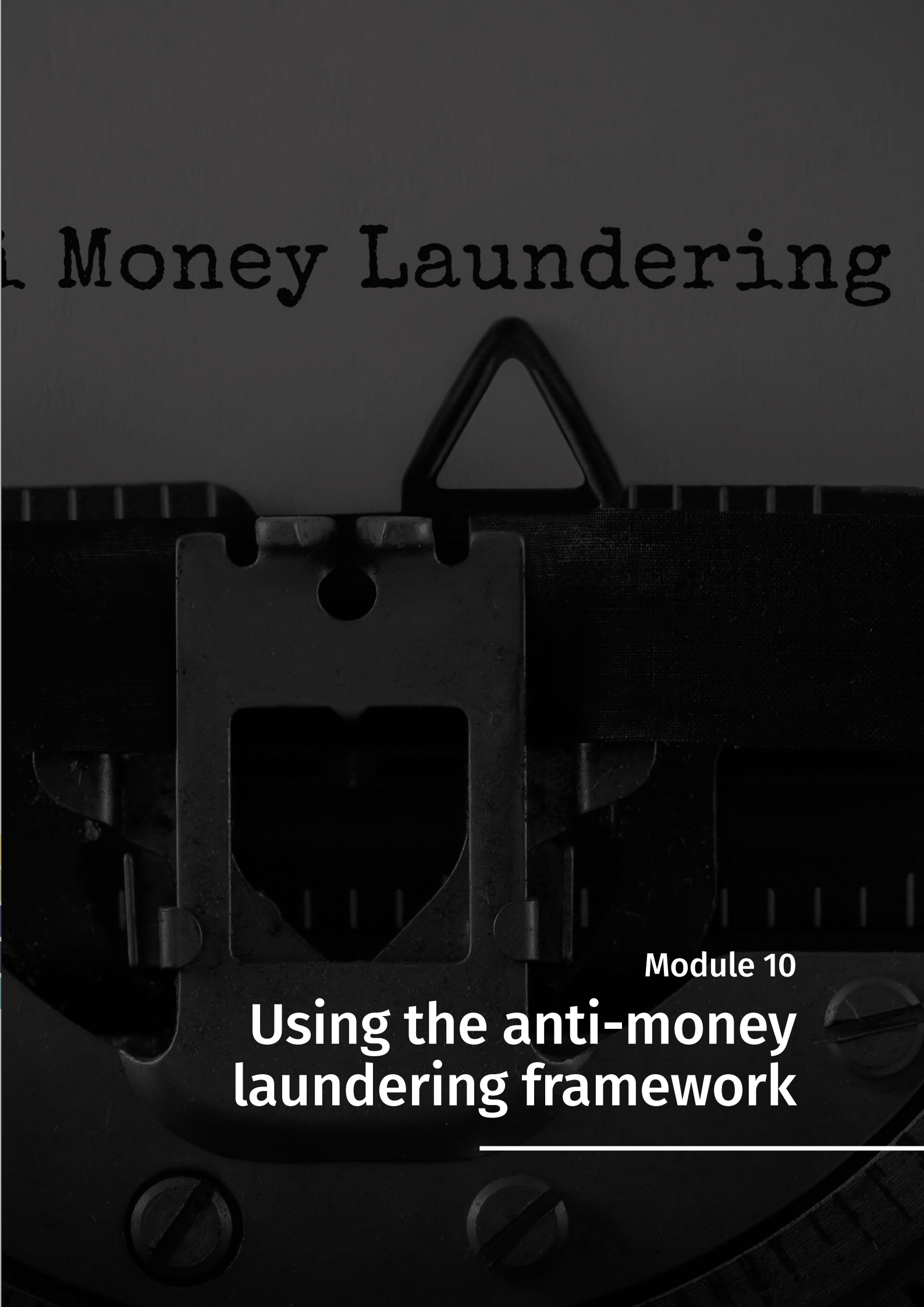
Case study

S. agreed to leave his home in Indonesia in return for lawful employment in Malaysia. The recruitment company arranged for S. to work in a reputable cleaning service company in Selangor. Upon arriving in Malaysia, the outsourcing agency declined to provide S. with lawful status as promised. He worked on a cleaning team of five cleaning houses in Selangor and Kuala Lumpur. He was made to work 7 days a week, without breaks, from 7 a.m. until 10 p.m., for a continuous period of several weeks. Other workers were also from foreign countries. They had signed a contract with the outsourcing agency that they were not able to understand, most of them were not able to say whether they were working as workers or as independent workers. His wages were withheld to be paid only at the end of the engagement period by the outsourcing agency, on the level drastically below minimum pay standards in Malaysia and average costs of living. S. lived in substandard house arranged by the recruitment company. There was evidence of threatening, pervasive control and limitation of any outside contact.

Questions to consider

- *Who is the employer of S. in this case?*
- *Who bears the legal responsibility for labour rights violations?*
- *Since S. did not have a lawful employment status in Malaysia, is he entitled to pursue any legal action and if yes against whom?*

Money Laundering



Module 10

**Using the anti-money
laundering framework**

Module 10

Using the anti-money laundering framework

Section 1: Financial investigations and criminal investigations

Section 2: Forced labour and related offences as a predicate crime

Learning objectives

- Leverage anti-money laundering framework to disrupt human trafficking, forced labour and other forms of labour exploitation.

Key words and concepts

- It is best when a financial investigation is conducted along with the criminal investigation of a suspected human trafficking and forced labour activity.
- Offenses under the ATIPSOM are predicate offenses for the purposes of money laundering legislation in Malaysia.



Training Guide for Module 10

	Objectives	Participants will be familiar with offences of trafficking in persons under the ATIPSOM as predicate offences in respect of money laundering legislation.
	Methodology	Lecture • Brief input on the “serious offences” under the Anti-Money Laundering, and the Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 • Discuss useful tools for detection, investigation, co-operation and confiscation Group work • Divide participants into prosecutors group and judges group. Read the case scenario and determine how the existing anti-money laundering law and the ATIPSOM can be applied in this case. • As a prosecutor, what are likely the most impactful interventions? • As a judge, what would be the defining features in seeking to determine corporate liability? • Ask participants to present some of their responses to the class.
	Supporting documents/ recommended reading	• Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 • Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
	Suggested duration	45 minutes

Section 1:

Financial investigations and criminal investigations

The ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) provides that Member States should order relevant authorities to conduct financial investigations into human trafficking related activities/ transactions (Article 17.2, 17.6).

The 2007 ASEAN Practitioner Guidelines on Criminal Justice Responses to Trafficking in Persons affirms that: “all forms of trafficking in persons and related crimes should be criminalised in accordance with applicable international standards”. The ASEAN Practitioner Guidelines further affirm that: “offences of trafficking in persons, together with trafficking related crimes are recommended to be predicate offences in respect of money laundering legislation and assets confiscation provisions”.

The anti-money laundering framework provides useful tools for detection, investigation, co-operation and confiscation, including financial intelligence units, whose expertise in financial crime can support law enforcement in identifying and analysing financial transactions associated with forced labour/human trafficking.

It is best when a financial investigation is conducted alongside the criminal investigation of a suspected forced labour/human trafficking activity.

Financial investigation also offers many benefits to the victims as corroboration of victim's account and taking the burden away from victims. It can also improve possibilities of compensation for victims and also facilitate the enforcement of orders particularly where assets have already been identified and seized at the time of conviction. Pursuant to Financial Action Task Force Recommendation 4, many countries have adopted legal mechanisms allowing for the confiscation of criminal assets without a criminal conviction and without the need to prove the unlawful origin of each asset in a trafficker's possession.

Criminal proceeds and other assets discovered during the investigation should be frozen or seized. Prosecutions are most often for the predicate offence itself, although a money laundering charge may be added to the charges.

In some trafficking cases where it is not possible to secure a conviction, there may be a possibility of securing a conviction under the anti-money laundering framework and this must be explored by prosecutors.



Section 2:

Forced labour and related offences as a predicate crime

Under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, “serious offence” means—

- (a) any of the offences specified in the Second Schedule;
- (b) an attempt to commit any of those offences; or
- (c) the abetment of any of those offences.

One of the offences specified in the Second Schedule include offences under the ATIPSOM.



The criminalisation of human trafficking and making offenses under the ATIPSOM predicate offenses for the purposes of money laundering legislation present a very potent tool to not only prosecute but also to disrupt trafficking networks by targeting the assets of traffickers and creating possibilities of compensation for victims.

Practical Exercise for Module 10

Exercise 10: Using the Anti-Money Laundering Framework	
 When	Do this exercise after section 2
 Duration	20 minutes for case study 15 minutes for presenting responses to the class
 Objectives	To be familiar with the offense under the ATIPSPOM as a predicate offence in respect of money laundering legislation.
 Methodology	1. Divide participants into prosecutors group and judges group. Read the case scenario and determine: 2. As a prosecutor, how the existing anti-money laundering laws and ATIPSPOM can be applied in this case and where are likely the most impactful interventions? 3. As a judge, what would be the defining features in seeking to determine corporate liability? Ask participants to present some of their responses to the class.
 Answers	For prosecutors Offences under the ATIPSPOM are deemed “serious offences” under schedule 2 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. If there are unlawful activities involved, ie offence of money laundering, section 4 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 will be applicable. For judges • The sub-contract between the New Zealand fishing company and the Malaysian fishing company • The Contract of Service between the Malaysian fishing company and the crewing agencies



Case study

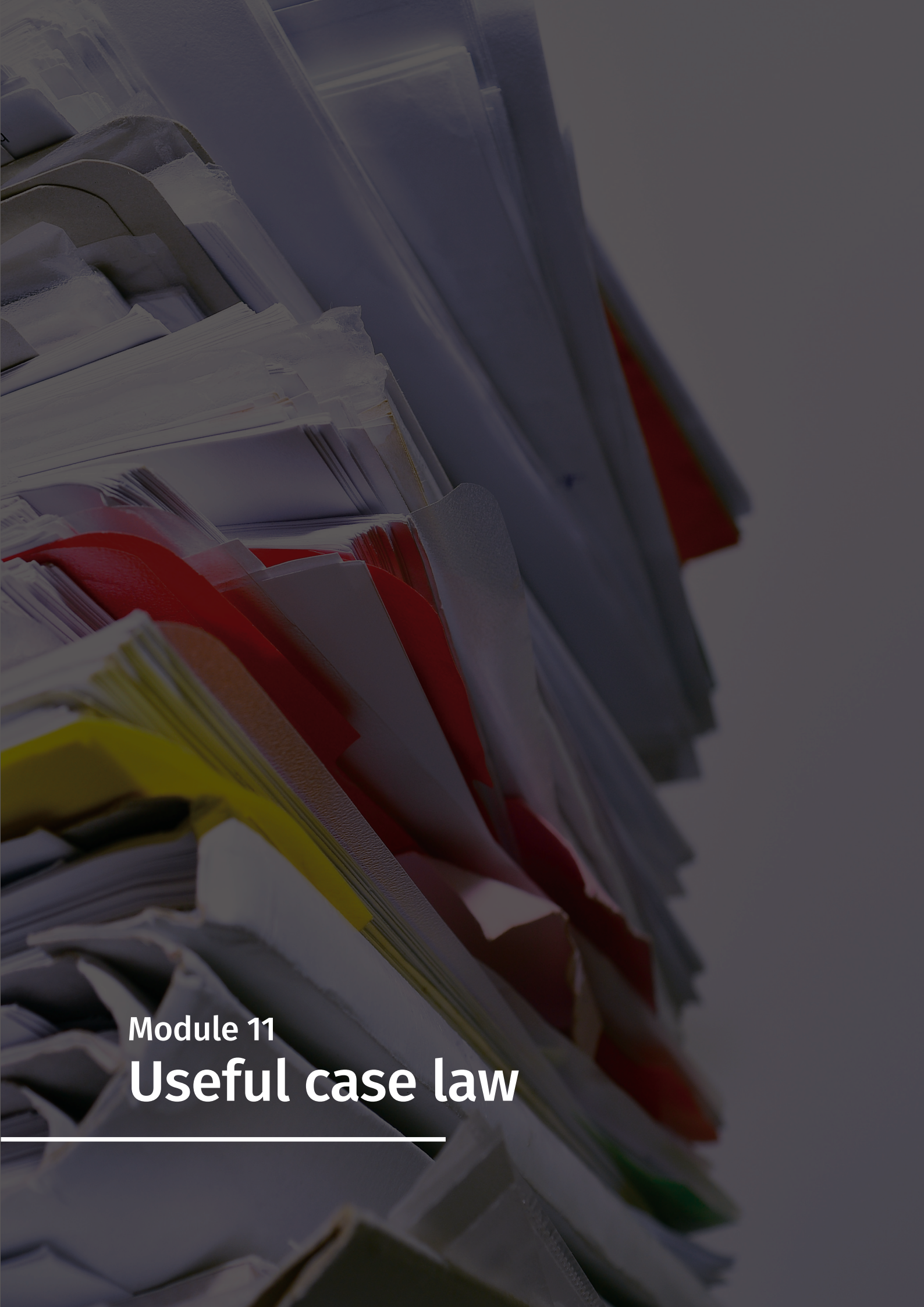
Between 2007 and 2013, an Indonesian crew of 500 men was enslaved aboard three Malaysian flagged fishing trawlers and subjected to physical violence and sexual abuse. Their passports seized, the men were forced to work long and arduous shifts way beyond internationally-sanctioned contract hours while the owners of the vessels withheld the salaries promised to them, all conditions qualifying as forced labour. While the activities of the vessel operators were clearly illegal, the ships were in fact operating legally, fishing in New Zealand waters under a legitimate fishing quota issued to a long-established New Zealand fishing company, which in turn contracted it to a major Malaysian fishing company. The Malaysian fishing company hired Indonesia workers to man its three trawlers through a Malaysian crewing agency which worked in partnership with an Indonesian agency.

Payments were made from the Malaysian fishing company to the Malaysian and Indonesian crewing agencies in US dollars via the international banking system, subjecting the transactions to "Know Your Customer" (KYC) and "Anti-Money Laundering" (AML) laws and regulations of the banks across whose system the money passed.

Task

Please discuss how the existing anti-money laundering laws and the ATIPSOM can be applied in this case and where the most impactful interventions are likely to be for a prosecutor.

As a Judge what would be the defining features in seeking to determine corporate liability.



Module 11

Useful case law



International case law

Prosecutor v. Kunarac, Case No. IT-96-23 (22 February 2001) and Case No. IT-96-23-A (12 June 2002) (Appeals Chamber)

Factual Background

In Kunarac, defendants were charged with enslavement for acts that included keeping two girls in a house for several months and treating them as personal property. The girls were required to do all household chores and comply with all sexual demands. This was the first time a charge of enslavement had been brought before the ICTY.

Legal Analysis

The Trial Chamber was required to determine what was meant by enslavement as a crime against humanity under Article 5(c). After reviewing the applicable law, including the Slavery Conventions, the Forced Labour Convention, the Nuremberg Charter and case law, decisions of the European Court of Human Rights, including Van der Mussele, and the work of the UN International Law Commission, the Trial Chamber held that enslavement, as a crime in customary international law, “consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”.

The Trial Chamber decided that enslavement incorporated elements of forced labour and found the following factors relevant: the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example: the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s

position of vulnerability; detention or captivity; psychological oppression or socio-economic conditions. Further indications of enslavement include: exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.

The Appeals Chamber affirmed and added that “the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘chattel slavery’, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery’, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.”

Prosecutor v. Krnojelac, Case No. IT-97-25 (15 March 2002) and Case No. IT-97-25-A (17 September 2003) (Appeals Chamber)

Factual Background

In Krnojelac, the lead defendant was charged with several counts based on the forced labour of detainees in a detention camp called KP Dom.

Legal Analysis

The Trial Chamber understood the enslavement charges to be based on forced labour. The Kunarac Court had already identified forced labour as an indicator of enslavement, but it had not further defined forced labour. The Krnojelac Court, observing that “involuntariness is the fundamental definitional feature of ‘forced or compulsory labour’”, held that: “[This is a] factual question which has to be considered in light of all the relevant circumstances on a case by case basis... What must be established is that the relevant persons had no real choice as to whether they would work”.

The Trial Chamber considered the following factors relevant:

- The substantially uncompensated aspect of the labour performed;
- The vulnerable position of the detainees;
- The allegations that unwilling detainees were either forced to work or placed in solitary confinement;
- The inhumane conditions in the detention camp

and concluded that the beliefs and fears of the detainees, in particular in the context of the general inhumane conditions and atmosphere in the KP Dom, are relevant to a determination whether they worked voluntarily, but a reliance solely on such unsupported conclusions expressed by the witnesses would not be justified.

The Appeal Chamber disagreed and concluded that “given the specific detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have arrived at the conclusion that the detainees’ general situation negated any possibility of free consent...[T]he detainees’ personal conviction that they were forced to work must be proven with objective and not just subjective evidence”.

Siliadin v. France, Application No. 73316/01 (26 July 2005)

Factual Background

The applicant alleged that the criminal law provisions of France did not provide her sufficient and effective protection against servitude or forced labour. Siwa-Akoka Siliadin had arrived in France from Togo in 1994 at the age of 15. Her father had arranged that she work for a family there, in return for attending school and having her visa regularised. She became an unpaid housemaid for the family of Mr. and Mrs. B. and her passport was taken from her.

Legal Analysis

Siliadin argued that France had positive obligations to adopt criminal law provisions that would adequately deter and punish such offences. The existing criminal law provisions were vague and poorly defined. This was the first time the Court was called upon to consider whether Article 4 imposed positive obligations on states, and it concluded that it did. It based its conclusion in part on the fact that Article 4 “enshrines one of the most basic values of the democratic societies making up the Council of Europe” (Para. 82). It further noted the absolute ban on forced labour for the benefit of private individuals contained in Article 4 of the Forced Labour Convention (Para. 85).



The Court analysed the two elements of forced labour and concluded that Siliadin was subjected to forced labour within the meaning of Article 4 of the Convention:

- **Menace of any Penalty** - The Court notes that although the applicant was not threatened by a 'penalty', the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised. Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.
- **Voluntary Offer** - As to whether she performed this work of her own free will, it was clear from the facts of the case that she was not given any choice.

C.N. and V. v. France (2012)

Factual Background

The applicants were two sisters who were born in Burundi and had French nationality. They arrived in France aged 16 and 10 years old following the 1993 civil war in Burundi and lived with their aunt and uncle. The applicants were made to do all the housework and had been used as "housemaids" to look after the family's disabled son, with no access to a bathroom and only an unhygienic makeshift toilet at their disposal. They were not allowed to eat with the family and were given only basic staples and occasional leftovers. They had no leisure activities, were not paid or given days off.

The applicants brought the case to the European Court of Human Rights and alleged that they had been held in servitude and subject to forced labour at the home of Mr and Mrs M. and that France had failed in its positive obligations under the Convention to protect them from servitude and forced labour.

Legal Analysis

The Court reasoned that forced labour within the meaning of Article 4 means "work or service which is exacted from any person under the menace of any penalty, against the will of the person concerned and for which the said person has not offered himself voluntarily". Factors that must be taken into account include the type and amount of work involved. These factors help distinguish between "forced labour" and assistance which can reasonably be expected of other family members or people sharing accommodation.

The Court found that only the first applicant was forced to work in a permanent state of servitude within the meaning of Article 4. Her condition began when she was a minor (16 years old) and continued to adulthood. She did not go to school, received no training and received no days off or leisure activities. In contrast, the second applicant, who was aged 10 when she started living with the Ms attended school and spent time with school work and activities before helping the first applicant with chores, so her life was not confined to the Ms' home.

People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473 (19 September 1982)

Factual Background

The principal allegation was that the contractors paid wages to jamadars – crew bosses – who deducted a commission and then paid the actual workers less than the legal minimum wage of 9.25 rupees per day. The issue before the Supreme Court was whether the forced labour provision of Article 23 was applicable to a situation of workers being paid less than the minimum wage.

Legal Analysis

The Court examined what is meant by the term 'force' in 'forced labour'. Article 23 prohibits 'forced labour' – that is labour or service which a person is forced to provide – and the 'force' that would make such labour or service 'forced labour' may arise in several ways. There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force'.

It may be physical force, force exerted through a legal provision, such as a provision for imprisonment or fine in case the worker fails to provide labour or service, compulsion arising from hunger and poverty, want and destitution.

Any factor that deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force', and if labour or service is compelled as a result of such 'force', it would be 'forced labour'.

The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstance, which leaves no choice of alternatives to a person in want and compels him to

provide labour or service even though the remuneration received for it is less than the minimum wage.

Chowdury and Others v. Greece (Application no. 21884/15) (30 March 2017)

Factual Background

42 Bangladeshi nationals were recruited in Athens and other parts of Greece between the end of 2012 and early 2013, without a Greek work permit, to work at the main strawberry farm in Manolada. They had been promised a wage of 22 euros for seven hours' work and three euros for each hour of overtime. They worked every day from 7 a.m. to 7 p.m. under the supervision of armed guards. Their employers had warned them that they would only receive their wages if they continued to work. The applicants lived in makeshift shacks without toilets or running water. The applicants alleged that they had been subjected to forced or compulsory labour. They further submitted that the State was under an obligation to prevent their being subjected to human trafficking, to adopt preventive measures for that purpose and to punish the employers.

Legal Analysis

The Court concluded that the working conditions clearly amounted to human trafficking and forced labour and corresponded to the definition of trafficking in human beings set out in Article 3a of the "Palermo Protocol" and Article 4 of the Council of Europe's Anti-Trafficking Convention. That being so, the Court concluded that the applicants' situation fell within the scope of Article 4 § 2 of the Convention in so far as it concerned human trafficking and forced labour.



C.N. v. the United Kingdom (no. 4239/08)

Factual Background

The applicant travelled to the United Kingdom from Uganda to escape from the sexual and physical violence which she had experienced. The applicant worked as a live-in carer for an elderly Iraqi couple. The job was emotionally and physically demanding, with C.N. being on-call twenty-four hours a day and having only one afternoon per month off. C.N.'s wages were deducted or withheld.

The applicant argued that the police's conclusion that the lack of payment for the applicant's work was no more than an absence of "honour among thieves" was against a fundamental disregard of the ILO's key indicators of forced labour.

Legal Analysis

The Court noted that the circumstances which the applicant described were remarkably similar to the facts of the Siliadin case, the only notable differences being that the applicant was older than the applicant in Siliadin and that it was an agent – and not her "employers" – who she claimed were responsible for the treatment contrary to Article 4 of the Convention. The Court found the legislative provisions in force in the United Kingdom at the relevant time to be inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention on Human Rights (prohibition of Slavery and Forced Labour).

R v Yogalingam Rasalingam (unreported, District Court of New South Wales, 10-11 October 2007)

Factual Background

A restaurant owner was accused of bringing another man from his home town in southern India to Australia to work in his restaurants in circumstances amounting to human trafficking. In the employment arrangement between the two men, the man agreed to working 365 days a year, without payment for the first year, but that during this time the employer would provide money to the victim's family each time he returned to India. The victim testified that upon arrival his passport, airline ticket, and other documents were taken away from him, he was forced to sleep on the floor, and was told that he would be deported if he complained to the authorities. He was forced to work seven days a week, sometimes for more than 15 hours a day. Mr Rajendran never received any payment and there was no evidence to suggest that any money had ever been transferred to his family in India.

Legal Analysis

The point of contention during the trial was whether the circumstances amounted to exploitation as required by s 271.2(1B) Criminal Code (Cth). Under the law, 'exploitation' is defined to include 'forced labour' a term that is itself defined as: ...the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats: (a) is not free to cease providing labour or services; or (b) is not free to leave the place or area where the person provides labour or services. (dictionary and s. 73(2) (3) Criminal Code (Cth)).

The Crown case was that the accused had made an implied threat to the complainant that he would be deported should he leave his employment. Evidence included the testimony of the complainant that it was his understanding he had to stay and work for the accused for four years, on the basis that some money would be sent to his father and the complainant would get permanent residency at the end of this period. He said the accused had told him the story of another person who had left their employer and had subsequently been sent home. The judge ruled that there was sufficient evidence of the elements of the offence for the matter to go to the jury. However, the jury returned a verdict that acquitted the accused on the 'trafficking in persons' charge.

R v Tang [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008)

Factual Background

Wei Tang, the owner of a licensed brothel, recruited five Thai women to work in Australia as sex workers in accordance with agreed conditions that each woman would have to work off a debt, but there was no written contract. All of them consented to come to Australia to work, on the understanding that, once they had paid off their "debt", they would have the opportunity to earn money on their own account as sex workers.

The complainants were then flown to Sydney from Bangkok, escorted by one or two people and picked up at the airport by a representative of the Australian 'owner', who would pay off the escort and take the complainants to an apartment or hotel in Sydney and keep them there until a decision was made as to the brothel at which she was to work.

The respondent agreed to accept the complainants as contract workers in her brothel, and who also agreed to take up a 70% interest in a syndicate which would "purchase" the women for the sum of \$20,000. The complainants acknowledged a debt to the syndicate in the amount of \$45,000. For each customer serviced, the complainants' debt would be reduced by \$50. Each complainant was to work in the respondent's brothel six days per week. The complainants earned nothing in cash while under contract except that, by working on the seventh day each week, they could keep the \$50 per customer that would, during the rest of the week, go to offset their contract debts.

They were not held under lock and key, though the complainants' passports and return airfares were retained by the respondent. The complainants were well-provisioned, fed, and provided for. On rare occasions they were able to leave the premises with consent or under supervision.

Tang was convicted of possessing and exercising ownership over a slave. The Victorian Court of Appeal found that despite the conviction being adequately supported by evidence, the trial judge provided an inadequate direction to the jury in respect of the fault element of the offence and ordered a retrial. The Court of Appeal of the Supreme Court of Victoria determined that leave to appeal be granted and that the convictions and sentence be quashed accordingly. The prosecutor appealed the case to the High Court of Australia, with Tang making a cross-appeal on three grounds: the first two dealing with the meaning and constitutional validity of s 270.3(1)(a) of the Australian Criminal Code Act 1995, which speaks of "a person who ... possesses a slave" and the third ground being the directions to the jury.



Legal Analysis

The High Court of Australia considered the concept of “slavery” in the context of decisions in *Kunarac* and *Siliadin* respectively. The High Court concluded that the definition found in the Slavery Convention applies to both *de jure* and *de facto* slavery, but avoided taking on an expansive notion of enslavement as developed in the *Kunarac* case.

Regarding the ground for cross-appeal, Tang argued that the Court of Appeal erred in determining that offences in this case fell under s 270.3(1)(a) and that they were not confined to situations akin to “chattel slavery”. The High Court turned to the *Kunarac* case to support its understanding that slavery goes beyond that of treating a person as chattel, noting that “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”.

The High Court also noted that s 270.1 speaks only of ‘condition’ not ‘status’ and Australian law is concerned with *de facto* slavery, not status of slavery. The High Court concluded that in this case the evidence of the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation could explain the conditions of control and exploitation. The accused must have “possessed” the worker with the intentional exercise of power attaching to a right of ownership. It was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants.

To distinguish between slavery and harsh and exploitative conditions of labour, the High Court looked at the nature and extent of the powers exercised over a complainant, in particular the capacity to deal with a complainant as a commodity, an object of sale and purchase. The exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative employment, and absence or extreme inadequacy of payment for services also should be considered.

The High Court upheld the appeal, setting aside the orders of the Court of Appeal and dismissing Ms Tang’s appeal on conviction.

Malaysian Case Law

**Mohamad Nizam Bin Mohamad
Selihin and Nurafida Binti Zamhari v
Public Prosecutor
High Court of Sabah and Sarawak at
Kuching
Ya Puan Celestina Stuel Galid J
Criminal Appeal No: KCH-
42S(A)-1/5-2017**

Factual Background

The complainant was a child from Indonesia. She came to Sarawak from West Kalimantan after being offered RM300.00 for a job as a babysitter. She entered the country without a proper travel document and was picked up at the Sarawak border. The complainant was taken to work for the Appellants, husband and wife, but there was no mention about the salary. Initially the complainant was treated nicely, but after three months, she was physically and verbally abused. She was kicked for attempting to escape. She was at times made to stay outside of the house from 7 a.m. to 4 p.m. to pluck grass and arrange the bricks and was without food the whole time. The complainant eventually escaped and sought help from the Indonesian Consulate.

Key Findings

The Court dismissed the appeal by the appellants and affirmed the decision of the Sessions Court convicting the appellants for an offence under Section 14 of the ATIPSOM and Section 34 of the Penal Code. In finding a prima facie case under section 14 of the ATIPSOM, the prosecution would need to prove that (a) the victim was a child; (b) that the victim had been trafficked; and (c) that the trafficking of the victim was for the purpose of exploitation.

On the first ground whether the victim was a child, the Court found the use of x-ray examination of the bones supplemented by medical books to be sufficient to provide an appropriate range of age and concluded that the victim was a child within the meaning of the ATIPSOM.

On the second and third grounds whether the complainant was trafficked for the purpose of exploitation, the Court reasoned that ill treatment and abuse on their own and without more are not sufficient to establish the offence of trafficking under the ATIPSOM. Based on the photographs of the injuries and witness testimonies, the Court concluded that the injuries were in fact caused by the appellants. The Court reasoned that a threat of serious harm fell under the definition of “coercion” which was not limited to just actual or physical threat and concluded that by kicking the victim for attempting to run away, the message was clear that the complainant was going to suffer harm if she tried to run away and amounted to coercion as defined under the ATIPSOM. Having keys to the house and the freedom to leave did not negate coercion in this case. The Court further explained that “exploitation” did not necessarily include the physical act of restraining and forcing a person to do an act but can include even threats to intimidate one into submission.

Kicking the complainant as a result of her trying to run away, taken together with the fact that the complainant was not paid her salaries and that she was subjected to physical abuses and harsh working and living conditions, all the elements of the offence under section 14 of the ATIPSOM were fulfilled.

On the charge involving common intention under section 34 of the Penal Code, the Court accepted that the act of the 1st Appellant in kicking the victim for attempting to run away amounted



to coercion. The Court also accepted the Prosecution's evidence that both appellants mistreated the complainant. The Court then concluded that the element of common intention existed between the 1st and 2nd appellants in committing the offence under this section.

The Court found that the questionable character of the complainant, as raised by the appellants, did not create a reasonable doubt in the Prosecution's case.

On the ground whether the sentence was manifestly excessive, the Court followed the principle that the sentencing discretion belonged to the court of first instance as the sentencing court and the appellate court may only interfere with the lower court's decision on sentencing on limited grounds including: (a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentencing; (b) there had been an error on the part of the trial judge in appreciating the material facts placed before him; (c) the sentence was wrong in principle; or (d) the sentence imposed was manifestly excessive or inadequate.

The Court found that the sentence imposed by the Sessions Court was well-reasoned and did not find any grounds for this Court's intervention in that decision.

**Mohamad bin Abdullah v Public
Prosecutor
High Court (Johor Bahru)
Collin Sequerah J
Criminal Appeal No: 42S-03-04 OF
2017
27 December 2017**

Factual Background

Complainants 1, 2, 3 were from Indonesia and forced into prostitution. All their respective entries into this country were arranged through agents and friends in Indonesia. Complainants 1 and 2 entered Malaysia legally on a social visit pass. Complainant 3 was picked up by the appellant at the port of entry. Complainants were at all times accompanied to and from the Nan Yang Hotel by the appellant. The appellant was in possession of the keys to the rooms.

They worked from 6 p.m. to 6 a.m. and were not paid for their services. Complainant 1 was accompanied by the appellant to work at other hotels as well. Although the complainants were in possession of their passports and mobile phones, they were not able to run away because their movements were restricted and closely monitored by the appellant and they needed the money.

Key Findings

On appeal by the prosecution, the High Court ruled that the prosecution had made out a prima facie case in respect of the First Charge and called for the appellant's defence. In respect of the Second Charge, the High Court upheld the decision of the Sessions Court to acquit the appellant.

The issue to decide was whether there was evidence of coercion. The evidence adduced by the prosecution indicated that the door to the complainants' rooms were locked from the outside and they had no keys. There appeared to be another door leading to these rooms that was locked from the outside as well. The complainants were accompanied by the appellant at all times. The fact that the complainants had in their possession their mobile phones and their passports did not necessarily indicate that their movements were unrestricted as they could only move around when accompanied by the appellant. Freedom to move freely within the premises also could not be construed to mean they were free to move in and out of the said premises.

Coupled with the fact that the complainants were unwilling to work as prostitutes as indicated by their intentions to escape, the Court concluded that the complainants were subject to coercion. The Court further ruled that the fact that the complainants had to continue to work despite their unwillingness to do so did not absolve the appellant in any way as the consent of the trafficked person is irrelevant under section 16 of the ATIPSOM.

With respect to the element of trafficking, the Court reasoned that definition of "trafficking in persons" in section 2 encompassed several acts which included conveying, transferring and harbouring. Based on the evidence that the appellant acted as an escort who was responsible for conveying and transferring the complainants to and from the place where

they provided their services and harbouring the victims by confining them to the rooms and sending food, these acts therefore had come within the definition of "trafficking in persons" as stated in section 2.

Since complainants 1 and 2 entered Malaysia on a social visit pass, by exposing them to risk of prosecution under regulation 39(b) of the Immigration Regulations 1963 for contravening or failing to comply with any condition imposed in respect of, or instruction endorsed on, any Pass, Permit or Boundary Pass, this also amounted to coercion of the victims under section 2 which included the abuse or threatened abuse of the legal process.

The Court ruled that the Session Court Judge had not erred in principle, law or facts when he held that the defence had failed to raise a reasonable doubt in the prosecution case and found that the case did not fall within the categories of the principles that warranted appellate interference. The appeal against conviction is therefore dismissed.

Appendix 1

Victim support providers

Appendix 1

LEGAL AID CENTERS	
Johor	Johor Legal Aid Centre Tingkat 5, Mahkamah Sesyen & Majistret, Jalan Ayer Molek 80000 Johor Bahru, Johor Tel: 07-223 5698 / Fax: 07-226 9024 / Email: lacjb15@gmail.com Bar Council Legal Aid Centre, Muar (Bilik Peguam) Kompleks Mahkamah Muar, Jalan Temenggong Ahmad 84000 Muar, Johor Tel: 06-951 4700 / Fax: 06-951 4700 / Email: lacmuar@gmail.com
Kedah	Kedah Legal Aid Centre (Alor Setar) Kedah Bar Committee, No. 54, Jalan Utama 3/1, Kompleks Perniagaan Utama Jalan Sultanah Sambungan, 05350 Alor Setar, Kedah Tel: 04-733 3467 / Fax: 04-730 8305 / Email: kedahlac@gmail.com
Kelantan	Kelantan Legal Aid Centre Tingkat Bawah, Bangunan Mahkamah Tinggi, Jalan Hospital, 15000 Kota Bahru, Kelantan Tel: 09-744 8660 / Fax: 09-744 8660 / Email: abbyklac@yahoo.com
Kuala Lumpur	Kuala Lumpur Legal Aid Centre Level 2, Wisma Hang Sam , 1, Jalan Hang Lekir, 50050 Kuala Lumpur Tel: 03-2072 2050 / 03-2072 2051 / 03-2072 2052 / Fax: 03-2072 3005
Malacca	Malacca Legal Aid Centre No. 10, Jalan PPPS, Pusat Perniagaan Putra Sentosa, 75150 Hang Tuah Jaya, Bukit Baru, Melaka Tel: 06-230 9509 / 07 / Fax: 06-230 9340 / Email: mcca.legalaid@gmail.com
Negeri Sembilan	Negeri Sembilan Legal Aid Centre No.3 Jalan S2 D38, Magistrate's Square Seremban 2, 70300 Seremban Negeri Sembilan (Opposite Court Complex Seremban 2) Tel : 06-601 3844 / 06-601 3843 / Fax : 06-601 3845 / 06-601 3353
Pahang	Kuantan Legal Aid Centre No. B64, Tingkat 1A, Lorong Tun Ismail 6, Off Jalan Tun Ismail 25000 Kuantan, Pahang Tel: 09-515 9244 / Fax: 09-515 9243 / Email: lacktn@yahoo.com Temerloh Legal Aid Centre Bilik Peguam, Bangunan Mahkamah Tinggi, 28000 Temerloh, Pahang Tel: 09-296 9410 / Fax: 09-296 9410 / Email: pbgtloh@gmail.my



Penang	Penang Legal Aid Centre No.21, Greenhall, Ground Floor, 10200 Penang Tel: 04-261 7451 / Fax: 04-261 6840 / Email: lacpg2011@gmail.com Butterworth Legal Aid Centre No. 11, 2nd Floor, Lorong Jermal Indah, Taman Jermal Indah, 12300 Butterworth, Penang Tel: 04-310 8451 / 04-310 8452 / Fax: 04-3108453 / Email: lacbwth@gmail.com
Perak	Perak Legal Aid Centre No.39, Jalan Dato Maharajalela, 30300 Ipoh, Perak Tel: 05-255 0523 / Fax: 05-243 1530 / Email: PerakLAC@gmail.com
Perlis	Perlis Legal Aid Centre No.15, Tingkat Atas, Taman Guru Jaya, 01000 Kangar, Perlis Tel: 04 9770272 / Fax: 04 9770198 / Email: lacperlis@gmail.com
Selangor	Selangor Legal Aid Centre No. 41-A, Jalan Bola Jaring 13/15, Seksyen 13, 40100 Shah Alam, Selangor Tel: 03-5510 7007 / Fax: 03-5510 7009 / Email: lacselangor@outlook.com Kuala Selangor Legal Aid Centre No. 32, Jalan Bendahara 1/1, Taman Bendahara, 45000 Kuala Selangor, Selangor Tel: 03-3281 2428 / Fax: 03-3281 2427 / Email: kualaselangorlac@yahoo.com
Terengganu	Terengganu Legal Aid Centre Tingkat 5, Kompleks Mahkamah, Jalan Sultan Muhamad, 21100 Kuala Terengganu, Terengganu Tel: 09-622 0249 / Fax: 09-622 0249 / Email: lac_trg@yahoo.com

MALAYSIAN ANTI-TRAFFICKING IN PERSONS AND ANTI SMUGGLING OF MIGRANTS AND MINISTRY OF HUMAN RESOURCES HOTLINE

Tel: 03-8000 8000 (1MOCC Call Center)
Operates from 7:30am to 9:00pm daily

MALAYSIAN TRADE UNION CONGRESS (MTUC)

- Legal support
- Case management
- Awareness raising
- Advocacy
- Monitoring and observation
- Collective bargaining
- Research
- Capacity building
- Organizing

Wisma MTUC, 10-5, Jalan USJ 9/5T, 47620 Subang Jaya, Selangor

Tel: 03-80242953

Fax: 03-80243225 Email: sgmtuc@gmail.com.com

NON GOVERNMENTAL ORGANIZATIONS

Name	Contact Details	Description	Service Provision
Good Shepherd Services	Lorong Setiabistari 2, Medan Damansara, 50490 Kuala Lumpur, Malaysia Tel: 03 20117406 Fax: 03 20957406 Email: info@goodshepherd.my	Established in Malaysia in 1972, it is a worldwide congregation of women religious present in 73 countries to assist those who are marginalized	• Medical • Shelter • Case management • Awareness raising • Advocacy • Research • Capacity building
Migrant88	L11-9, Menara Sentral Vista 150, Jalan Sultan Abdul Samad, Brickfields, 50470, Kuala Lumpur Email: info@migrant88.com	Founded in 2016, Migrant88 is an organization that provides cross border support for migrants and develops national policies in home countries for safer migration	• Medical • Shelter • Case management • Awareness raising • Monitoring and observation • Advocacy • Research • Capacity building
Migrant Care	A1-13-3, Titiwangsa Sentral Condominium No. 1, Jalan Cemur, 50400, Kuala Lumpur Email: secretariat@migrantcare.net	Founded in 2004 and headquartered in Jakarta, Migrant Care is an organization that aims to strengthen protection of migrant workers by building their capacity to increase their bargaining power	• Medical • Shelter • Legal support • Case management • Awareness raising • Advocacy • Research • Capacity building • Rescue • Capacity building in education
North South Initiative (NSI)	A-2-7, Pusat Perdagangan Seksyen 8, Jalan Sg Jernih 8/1, 46050 Petaling Jaya, Selangor Tel: 03-7931 0741	A youth lead initiative founded in 2011 to help bridge the solidarity divide between the North and South in terms of human rights and social justice	• Legal support • Case management • Awareness raising • Advocacy • Monitoring and observation • Research • Capacity building



Tenaganita (HQ)	12, Jalan 6/11, Seksyen 6, 46000 Petaling Jaya, Selangor Tel: 03-7770 3691/71 Tenaganita 24 hour hotline: 012 335 0512/ 012 339 5350	Founded in 1990, Tenaganita is a human rights organization dedicated in assisting, building, advocating and protecting migrants, refugees, women and children from exploitation, abuse, discrimination, slavery and human trafficking	• Medical • Shelter • Legal support • Case management • Awareness raising • Advocacy • Monitoring and observation • Research • Capacity building
Tenaganita (Penang)	Penang	Established in 2014 and headquartered in Selangor, Tenaganita Penang is a human rights organization dedicated in assisting, building, advocating and protecting migrants, refugees, women and children from exploitation, abuse, discrimination, slavery and human trafficking	• Medical • Shelter • Legal support • Case management • Awareness raising • Advocacy • Capacity building
Women's Aid Organization (WAO)	No. 5, Jalan 20/2A, Taman Paramount, Selangor, 46100 Petaling Jaya Tel: 03 7957 5636 / 0636 WAO Hotline: 03 7956 3488 WhatsApp/SMS TINA: 018 988 8058	Founded in 1982, WAO provides services (emotional and social support) to any women who requests it and works towards the elimination of discrimination against women	• Medical • Shelter • Legal support • Case management • Awareness raising • Advocacy • Research • Capacity building



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