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# Mandatory HIV testing for employment of migrant workers in eight countries of South-East Asia: From discrimination to social dialogue



ILO Subregional Office for East Asia  
International Organization for Migration

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## Preface

In the spirit of protecting the basic human rights of women and men who seek work abroad, we present this study on mandatory HIV testing of migrant workers. Its purpose is to promote an informed dialogue amongst representatives from governments and workers' and employers' organizations throughout South-East Asia on this important subject.

This study is the result of recommendations made by two, leading regional organizations in the Asia-Pacific region: the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN).

In December 2005, representatives from the International Labour Organization (ILO) participated in the APEC "Workshop on HIV/AIDS and Migrant/Mobile Workers" held in Manila, Philippines. During the workshop, mandatory HIV testing of migrant workers arose as an important, and controversial, issue. Some representatives voiced concerns that mandatory testing violated workers' rights to dignity, privacy, work, and freedom from discrimination. Others maintained that states should have the power to regulate migration and to take measures to protect public health, and that this includes mandatory HIV testing.

As representatives debated the issue, it became apparent that, in some countries, labour legislation expressly forbade mandatory HIV testing, while migration legislation explicitly required it. However, as there was no regional comparative analysis of laws relating to mandatory testing, it was difficult to compare across countries.

As a result of this rich and varied debate, member economy participants recommended to:

"Commission a study on legal frameworks (i.e., health, labour and immigration policies), as well as bilateral agreements and practices of APEC members regarding HIV testing related to migration. This is with a view to harmonizing these policies and practices, in accordance with international law and best practice".<sup>1</sup>

During approximately the same time period, the ILO was finalizing a joint study with ASEAN entitled HIV and AIDS and the World of Work in ASEAN (ILO, 2005). This study also noted that "Member Countries in ASEAN differ in their opinions regarding HIV screening for employment of migrant workers. While many of the Member Countries' Ministerial Decrees/Codes of Practice/Guidelines do not allow forced pre-employment and employment HIV testing for local workers, HIV testing is included in medical examinations for migrant workers and used to screen out HIV-positive workers" (ILO, 2005, p. 54).

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<sup>1</sup> This recommendation was made at the APEC "Workshop on HIV/AIDS and Migrant/Mobile Workers" (5-8 December 2006, Manila).

This study also identified that a major gap in initiatives on HIV and AIDS and the world of work in ASEAN was that “valid information on the percentage of employers implementing this form of forced [HIV] testing and a catalogue of national legislation that permits such testing is not available and needs further study” (ILO, 2005, p. 54).

Mandatory HIV testing of migrants is in clear contradiction of the ILO *Code of Practice on HIV/AIDS and the World of Work*.<sup>2</sup>

In consonance with the *Code of Practice*, and on the specific topic of migrant workers, the ILO Committee of Experts has stated that “the refusal of entry or repatriation on the grounds that the worker concerned is suffering from an infection or illness of any kind which has no effect on the task for which the worker has been recruited, constitutes an unacceptable form of discrimination” (ILO, 1999, article 266). This is certainly the case of HIV-positive migrant workers, who can live long, productive and meaningful lives, if they are provided with appropriate care, treatment and support.

Therefore, on the basis of recommendations made by APEC and ASEAN, and guided by the principles of the Code of Practice, the ILO partnered with the International Organization for Migration (IOM) to commission this study. Because of its expertise and fieldwork in the region, IOM was a key partner for this initiative. The ILO and IOM have recently partnered to produce the joint ILO/IOM/UNAIDS policy brief on “HIV and International Migration”, and it and the “UNAIDS/IOM Statement on HIV/AIDS-Related Travel Restrictions” are leading documents in the field of migrant worker rights.

While this study focuses on legal and policy instruments, it is important to keep in mind that mandatory HIV testing is not a purely bureaucratic or political question. It is also a practice that has real impact on women and men who are seeking to better their own lives and those of their families through seeking work abroad.

The decision to leave home and work in a foreign country is fraught with emotional and physical strains. Financial pressures and great expectations from family and community often accompany migrant workers as they leave their villages to be screened and processed prior to overseas deployment. This stress is compounded in the final weeks before the expected departure.

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<sup>2</sup> The ILO’s *Code of Practice on HIV/AIDS and the World of Work* (hereafter referred to as the *Code of Practice*) has been hailed as “the most wide-ranging and comprehensive blueprint for workplace policy on HIV/AIDS ever developed.”

For a migrant worker who is refused work abroad because of testing HIV-positive, the impact of the diagnosis can be devastating.<sup>3</sup> This was the case of Nining Ivana, a 22-year-old worker from Indonesia, whose family's economic vulnerability encouraged her to find work abroad:

I contacted the workers' recruitment agency... [and] in November 2004 I took the psychometric test for a job in an electronic goods company. Afterwards I went to Jakarta for health screening. I thought this was just a formality... But like a thunderbolt out of the blue all my hopes crashed in a second when the agency official told me I was unfit to go. 'You cannot go because you have a disease,' he said. I took a quick look at the form with my health test data on his desk. Apparently I was suspected of being HIV-positive... (ILO, 2007).

The above account illustrates a number of issues relating to mandatory HIV testing. The candidate was, apparently, considered fit for the task for which she was being recruited and was rejected only on the basis of her HIV status. She did not learn about her HIV status from a certified healthcare worker, but, rather, from the recruitment agency official. Furthermore, there was no pre- or post-test counselling. She was left to recover from, in her own words, this "thunderbolt" all by herself.

Finding out one is HIV-positive, even while enjoying the support of friends and families at home, can be an earth-shattering experience. For migrants testing HIV-positive in a foreign country, the experience can be far worse. As the Coordination of Action Research on AIDS and Mobility (CARAM) notes:

When a migrant worker is diagnosed positive for HIV abroad, most likely they are immediately deported, without benefit of counselling and with no chance to organize their things or claim their salaries and other benefits from their employers... There are some instances where the migrant is not immediately deported due to a variety of reasons: the agency and the employer need to first settle who pays for the plane ticket; all flights are fully booked; or because they became involved in legal cases as a result of their HIV status. While they remain in the destination country, they are either detained by their employer...or in a government hospital (ACHIEVE/CARAM-Philippines, 2006).

Positions for and against HIV mandatory testing are often clearly expressed, but also very often the most essential questions regarding the practice remain unanswered. These are precisely the questions we hope to address in the following pages:

- "What sort of national legal standards prohibit/require mandatory HIV testing?";
- "What are the viewpoints of representatives from ministries of labour and workers' and employers' organizations regarding mandatory HIV testing?";
- "Where are the best opportunities for social dialogue on mandatory HIV testing?"

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<sup>3</sup> Migrants who test HIV-positive before departure can still benefit from local HIV support services, including counselling and medical referral.

In 2001, Juan Somavia, Director General of the ILO, stated in his address to the XII Interamerican Conference of Ministers of Labour in Ottawa that “A job lost is a family under threat and unprotected” (ILO, 2002). In this same vein, for every job denied because of HIV status, a worker becomes vulnerable. For every worker made vulnerable, a family is threatened. For every threatened family, a community is unprotected.

We hope this report will spur action to protect these workers, their families and their communities, and to respond to HIV in the workplace without resorting to mandatory testing.

Bill Salter, Director  
ILO Subregional Office for East Asia

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## Executive summary

This study was undertaken by the International Labour Organization (ILO) and the International Organization for Migration (IOM) in 2006, on the basis of recommendations made by APEC and ASEAN, and guided by the principles of the *ILO Code of Practice on HIV/AIDS and the World of Work*.

The purpose of the study is to promote dialogue amongst tripartite partners (representatives from governments, workers' and employers' organizations) throughout the region, and to provide a solid basis for an informed discussion on mandatory HIV testing for migrant workers. The study covered eight selected countries in South-East Asia: Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

Notably, most countries in the study have a law, a national policy or guidelines prohibiting HIV-based discrimination and mandatory testing for the purposes of work. Several countries have decrees without penalties, non-binding policies and other government-sanctioned efforts to dissuade employers from using mandatory HIV tests and from excluding workers with HIV.

When national laws and policies on HIV are compared to immigration laws and policies, none of the countries with binding labour laws prohibiting HIV-based discrimination for employment has immigration laws requiring mandatory HIV testing for incoming migrant workers. One country has non-binding national guidelines prohibiting mandatory testing and HIV-based discrimination, but its immigration law prohibits people living with HIV from migrating to the country.

The major migrant-sending countries covered by this study permit and facilitate pre-departure health examinations of migrant workers, which include an HIV test where required by the receiving countries. This is despite the existence of national laws protecting workers against HIV-based discrimination and mandatory HIV testing. While these sending countries recognize that mandatory testing is a violation of workers' rights, they, nevertheless, facilitate mandatory testing of their workers, thus, violating workers' rights to obtain work abroad.

Supplementary to the desk review, surveys were sent out to the ILO's tripartite partners (workers' and employers' organizations and Ministries of Labour) in the countries under study. The responses helped illustrate how some of the ILO's partners perceive the practice of mandatory HIV testing and their own roles regarding it. These unofficial comments revealed some interesting trends and, together with the desk review, suggested the following recommendations for the tripartite partners:

### 1. The tripartite partners are not, for the most part, providing HIV-related services to migrant workers.

#### *Areas for action*

- *Identify and map what services are available:* With the information on services that are already available, tripartite partners can consider how best to get involved in ensuring migrant workers are better linked to HIV-related services.
- *Reach out to migrant workers at all the stages of the migration process:* Social partners may look for creative ways to link up with various service providers, and to assist migrant workers to access services.

### 2. The tripartite partners tend not to handle cases of migrant workers being denied work because of their HIV status.

#### *Areas for action*

- *Identify who is handling cases of HIV-positive migrant workers being denied employment and map out steps they can take to redress their situation:* By providing a map or a checklist of existing services and organizations to HIV-positive migrant workers, you can help them from falling through the gaps. Establishing a clear referral network or system could significantly increase access to important services by those who require them.
- *Discuss why your organization is not handling these cases and consider doing so:* Discussion of why no one is following these cases among Ministries of Labour, workers' or employers' organizations can raise awareness and lead to advocacy against mandatory testing.

### 3. Opinions of mandatory HIV testing vary across the organizations.

#### *Areas for action*

- *Begin a dialogue within your own organization on mandatory HIV testing:* Workers' and employers' organizations have excellent opportunities to discuss the issue with their members and to align their own stances regarding mandatory testing. This dialogue should be informed by the ILO *Code of Practice on HIV/AIDS and the World of Work*, and their national codes of practice on HIV/AIDS.
- *Engage in a dialogue with all the tripartite partners at the national level:* National dialogue could help identify fears, misconceptions and prejudices that are often at the root of support for mandatory testing, and can help find constructive ways to overcome them.

#### 4. The benefits of voluntary testing are sometimes confounded with the negative practice of mandatory HIV testing for employment.

##### *Areas for action*

- *Provide sensitization sessions on differences between voluntary and mandatory testing:* Take every opportunity to clarify the benefits of knowing one's own HIV status, as distinct from the negative practice of mandatory testing. Educate partners and staff on the benefits of voluntary, confidential counselling and testing, and the impact of stigma and discrimination.
- *Facilitate access of your members to approved HIV testing centres in the community:* HIV testing should not be offered at the workplace, but workplaces can serve as conduits to HIV testing and related services in the community.

#### 5. Migrant-sending countries sometimes facilitate mandatory HIV testing at the request of migrant-receiving countries.

##### *Areas for action*

- *Identify the bilateral agreements relating to HIV and migration:* Tripartite partners should start off by becoming aware of their own country's agreements on mandating HIV testing and determine how they coincide with (or contradict) their own labour and migration legislation.
- *Engage national actors in a public policy debate:* As a next step, tripartite partners should identify who is in charge of facilitating mandatory testing at the national level and where the bulk of this testing is being carried out. The partners can then foment a more informed dialogue between migrant-sending and migrant-receiving countries within, and beyond, South-East Asia involving ILO's tripartite constituents and other national counterparts.

It is important that discussions on HIV mandatory testing do not dissolve into pitting countries of origin and destination against each other. The political and economic situation is complex, and all countries involved must first understand their individual roles in mandatory testing in order to limit, and to eventually abolish, this negative practice.

## Abbreviations

AIDS	Acquired Immunodeficiency Syndrome
ART	Anti-retroviral therapy
ASEAN	Association of Southeast Asian Nations
BFOQ	Bona fide occupational qualification
BIMPS	Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore
CARAM	Coordination of Action Research on AIDS and Mobility
CEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women
CHR	(former) United Nations Commission on Human Rights
CRC	Convention on the Rights of the Child
CSC	Civil Service Commission (Philippines)
DOLE	Department of Labour and Employment (Philippines)
FOMEMA	Foreign Workers Medical Examination Monitoring Agency (Malaysia)
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Rights of All Migrant Workers and Members of Their Families
IEC	Information Education Communication
ILO	International Labour Organization
IOM	International Organization for Migration
MOU	Memorandum of Understanding
NGO	Non-governmental organization
OFW	Overseas Filipino Worker
PEME	Pre-Employment Medical Examination
PHAMIT	Prevention of HIV/AIDS Among Migrant Workers in Thailand Project
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNIFEM	United Nations Development Fund for Women
UNRTF	United Nations Regional Task Force on Mobility and HIV Vulnerability Reduction
VCCT	Voluntary Confidential Counselling and Testing (sometimes written "VCT")
VDRL	Screening test for syphilis
WHO	World Health Organization

## 1. HIV and migration in South-East Asia

### We are living in a world with labour migration and HIV

Today, an estimated 191 million people, or 3 per cent of the world's population, are international migrants (UN DESA, 2005). Of these, an estimated 86 million are economically active (ILO, 2006).

Broadly defined, a migrant worker is "a person who is to be engaged, is engaged or has been engaged in remunerated activity in a State of which he or she is not a national" (1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as quoted in ILO, 2002). Almost all countries simultaneously send, receive and serve as transit points for migrants.

This massive movement of workers takes place against the background of the AIDS epidemic, which resulted in the deaths of 2.1 million people worldwide in 2007 (UNAIDS/WHO, 2007).

Migration itself does not inherently (or inevitably) lead to increased HIV risk. However, migration for work purposes and HIV risk are linked.

As the ILO *Code of Practice* states, "Certain types of work situations are more susceptible to the risk of infection than others, although the main issue is one of behaviour, not occupation" (ILO, 2001, p. 35). In the case of migrant workers, such work situations include separation from their spouses/partners, families and social support networks, and having to adjust quickly to foreign environments. Migrants may face communication and language barriers and lack access to social and health services. Poverty, social exclusion, loneliness and anonymity all contribute to vulnerability, and could increase the likelihood of risk-taking behaviours (ILO: ILO/AIDS and MIGRANT, 2002).

The following section focuses on the trends in migration and HIV, how they are interconnected, and the implications for mandatory HIV testing.

### Labour migration in South-East Asia

Labour migration in South-East Asia is diverse in nature. It involves women and men, skilled and unskilled, long- and short-term workers. The process spans from being highly-regulated to being completely unregulated by governments.

The number of temporary labour migrants from South-East Asia has increased significantly in the last 30 years. For example, about 100,000 migrant workers were first deployed from the Philippines in 1979; the number climbed steadily, reaching 446,095 in 1990, 653,574 in 1995, 841,628 in 2000, 933,588 in 2004 (Asis, 2006) and was as high as 981,677 in 2005 (Philippines Overseas Employment Administration, 2006). Indonesia also experienced an increase of its outgoing migrant workers from 86,264 in 1990 to 382,514 in 2004 and 474,310 in 2005 – a significant raise of 550 per cent (Soeprono, 2006).

The unprecedented boom in migration within South-East Asia is explained by the rapid growth of a number of economies in the region. A significant “pull” factor is the high demand for low-skilled and inexpensive labour in more developed countries, particularly those with ageing populations and low fertility rates, which seek migrants to maintain economic competitiveness. A significant “push” factor is the social and economic disparity amongst Southeast Asian countries. Many workers find themselves unable to survive on the opportunities available in their own countries, and they turn to migration to improve their lives.

The development, social and economic trends that the region is experiencing are likely to continue in the foreseeable future and labour migration can be expected to continue and grow in the region. In order to achieve their domestic goals while ensuring the protection and adequate treatment of migrant workers who make enormous economic contributions to their country of origin and to the country in which they work, it will be necessary for governments to develop comprehensive but flexible labour migration policies.

Countries of both origin and destination have lately taken a more interventionist approach to manage labour migration. There has also been growing interest by governments on the links between migration and development and towards a better understanding of the contributions that labour migrants make in both their home countries and the countries in which they go to work.<sup>4</sup> Moreover, in recent years there has been an increasing recognition that migrants’ health issues should be given more attention as healthy migrants are productive migrants, and more likely to make positive contributions to their host communities.

However, although some governments have taken some steps to improve migrants’ access to health services, most national health policies in South-East Asia and other regions do not yet include migrants and mobile populations’ health concerns within their public health strategies, national plans of action or surveillance systems.

Strong political will and commitment from migration and health policy makers are crucial in recognizing the need for migrant-inclusive, culturally appropriate health policies for the migrants’ right to health, improved healthcare access, and developing integration and prevention strategies.

## HIV trends in South-East Asia

When it comes to addressing the global AIDS epidemic, there have been encouraging developments. These include better access to HIV treatment, prevention programmes and more affordable anti-retroviral drugs. Nevertheless, the number of people living with HIV continues to increase globally. While the overall HIV prevalence is still relatively low (0.7 per cent), the Southeast Asian region has one of the most

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<sup>4</sup> For example, a 2007 ILO study, “The economic contribution of migrant workers to Thailand: Towards policy development” (<http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub07-30.pdf>), estimates that the total contribution of migrant workers in Thailand to output should be in the order about 6.2 per cent of Thailand’s GDP.

rapidly growing HIV epidemics in the world (WHO, 2007).<sup>5</sup> Between 2004 and 2006, there was a 15 per cent increase in the number of new HIV infections in South and South-East Asia (UNAIDS/WHO, 2006).

National HIV infection rates in the region are on the rise due to a combination of unprotected commercial sex, unprotected sex between men and unsafe injecting practices (UNAIDS/WHO, 2006). Epidemiological trends differ widely amongst (and within) countries in the region, and they are constantly evolving.

For example, in some parts of Indonesia and in Viet Nam, injecting drug use, overlapping with unprotected sex, is a key driver of the epidemic. In Cambodia and the Philippines, unprotected sex is the major mode of transmission (UNAIDS/WHO, 2006).

In Thailand, in the early- to mid-1990s, the epidemic was driven by unprotected sex with sex workers. Consequently, the Thai government employed a “100% condom” policy that significantly lowered HIV prevalence. By 2005, however, approximately one third of new infections in Thailand occurred among what was hitherto considered a “low-risk” group: married women, who are presumably being infected by their spouses. This signals the shifting of the epidemic to a broader population, and it presents new challenges for the Thai prevention effort (UNDP, 2004).

## Mobility, HIV vulnerability and the gender dimension

“If you wanted to spread a sexually transmitted disease, you’d take thousands of men away from their families, isolate them in single sex hostels and give them easy access to alcohol and commercial sex. Then to spread the disease, you’d send them home every once in a while to their wives and girlfriends” (Mark Lurie, South African Medical Research Council, 1999).

While levels of risk-taking differ from person to person, migrants can have a difficult time protecting themselves from HIV or dealing with the consequences of infection. Within this reality, men and women face different vulnerabilities.

In parts of South-East Asia, migration is becoming feminized, the two most visible cases being Indonesia and the Philippines, where women make up between 62 per cent and 75 per cent of workers who are deployed legally on an annual basis (Asis, 2005). These female migrant labourers are concentrated in female-dominated occupations, and are more likely than male migrants to be employed in domestic work and the entertainment industry.

<sup>5</sup> The WHO definition of South-East Asia includes: Bangladesh, Bhutan, Democratic People’s Republic of Korea (DPR Korea), India, Indonesia, Maldives, Myanmar, Nepal, Sri Lanka, Thailand, Timor-Leste.

Having generally very little power to negotiate with people in positions of authority, female migrants can be more vulnerable to physical and sexual abuse. This is particularly true when they work without documentation, as they may be less likely to approach authorities to seek help, for fear of being caught. In these environments, they may suffer from coercion and violence, and the risk of being exposed to HIV is greater.

Male migrants, on the other hand, are more likely to engage in high-risk sexual behaviour or to inject drugs with shared needles. So-called “mobile men with money” often engage the services of sex workers while away from their families. For example, seafarers have reported loneliness and working in an all-male environment as key reasons they seek sex workers when in port (Chantavanich, 2000).

Whether male or female, migrants with uncertain legal status and those working in the informal economy are among the most vulnerable to HIV. They have very little (or no) legal protection or access to social and health services. Even if they are aware of the risks, they often do not have information regarding their rights and available services, and are reluctant to seek appropriate healthcare services for fear of being arrested or deported.

Table 1. Migration for work in South-East Asia

Country	Cambodia	Indonesia	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
Population, 2005 (thousands)	14 071	222 781	25 347	50 519	83 054	4 326	64 233	84 238
HIV prevalence <sup>6</sup> , 2007; (range)	0.8 (0.7-0.9)	0.2 (0.1-0.3)	0.5 (0.3-0.8)	0.7 (0.4-1.1)	<0.1 (NA<.2)	0.2 (0.1-0.3)	1.4 (0.9-2.1)	0.5 (0.3-0.9)
Estimated number of people living with HIV, 2007 (thousands); (range); % female <sup>7</sup>	75 [67-84] 29%	270 [190-400] 20%	80 [52-120] 27%	240 [160-370] 42%	8.3 [6-11] 27%	4.2 [2.6-7.3] 29%	610 [410-880] 42%	290 [180-470] 27%
Stock of migrants in the country, 2005 (thousands)	304	160	1 639	117	374	1 843	1 050	21
Official deployment of migrant workers (thousands)	>184 <sup>8</sup>	382.5 (2004)	No data available	>2.5 <sup>9</sup>	981.7	100-150 (2005)	148.6 departures (2004)	67.4
Top destinations	Thailand, Malaysia, South Korea	Saudi Arabia, Malaysia, Hong Kong, UEA, Brunei	No data available	Thailand, Malaysia, Singapore, South Korea	Saudi Arabia, Hong Kong, UAE, Taiwan, Japan, Kuwait	No data available	Taiwan, Singapore, Israel, Japan, Malaysia	Taiwan, Malaysia, South Korea, Japan

Sources: UNAIDS/WHO Global HIV/AIDS, 2008 Report on the Global AIDS Epidemic, UN DESA Trends in Total Migrant Stock: the 2005 revision. Also refer to the country review section of this study for other sources.

<sup>6</sup> HIV prevalence is for adults 15-49 years.

<sup>7</sup> Percentage of women aged 15 and over living with HIV. This was calculated based on estimated number of women living with HIV, as a percentage of the estimated number of adults (aged 15 and over) living with HIV.

<sup>8</sup> Total deployment to Cambodia top 3 destination countries only.

<sup>9</sup> Total deployment to Myanmar top 5 destination countries only.

## 2. HIV testing: voluntary or mandatory?

### HIV testing: Why and How?

Taking an HIV test is the only way to know one's HIV status. The most commonly used and relatively inexpensive diagnostic tests – HIV antibody tests – have been available for over two decades. With advances in testing technology, particularly with the development of rapid tests based on blood or even saliva, testing is becoming increasingly accessible and widespread.

Testing and finding out one's HIV status has long been viewed as a key entry point for individuals to access HIV-related care and prevention services, and to help people reduce their risk of acquiring or transmitting HIV (WHO, 2003). For this reason, leading international organizations in the field of HIV/AIDS, such as UNAIDS and WHO, recommend HIV testing for all those who may have been exposed to HIV.

The UNAIDS/IOM Statement on HIV/AIDS-Related Travel Restrictions (2004) and the UNAIDS/WHO Policy Statement on HIV Testing (2004) acknowledge that many countries require HIV testing for immigration purposes on a mandatory basis and that some countries conduct mandatory testing for pre-recruitment and periodic medical assessment of military personnel for the purposes of establishing fitness.

However, these statements recommend that this testing should be **voluntary** and **based on informed consent**, there should be strict adherence to **confidentiality** (e.g., the results should be shared only with the person being tested), and there should be **counselling** before taking the test and after the results are given.

#### Box 1: Different types of HIV testing

UNAIDS and WHO distinguish between four types of HIV testing:

1. **Voluntary counselling and testing:**  
Client-initiated HIV testing provided through voluntary counselling and testing.
2. **Diagnostic HIV testing:**  
Offered whenever a person shows signs or symptoms that are consistent with an HIV-related disease or AIDS to aid clinical diagnosis and management. This includes HIV testing for all tuberculosis patients as part of their routine management.
3. **A routine offer of HIV testing by healthcare providers:**  
Should be made to all patients being assessed for a sexually transmitted infection; seen in the context of pregnancy (to facilitate an offer of antiretroviral prevention of mother-to-child transmission); or seen in clinical and community-based health service settings where HIV is prevalent and antiretroviral treatment is available (injecting drug use treatment services, hospital emergencies, internal medicine hospital wards, consultations etc.) but who are asymptomatic.
4. **Mandatory HIV screening:**  
For blood and blood products destined for transfusion, and of donors prior to all procedures involving transfer of body fluids or body parts.

*Source:* UNAIDS/WHO, 2004. Policy statement on HIV testing. Available: [http://www.who.int/rpc/research\\_ethics/hivtestingpolicy\\_en\\_pdf.pdf](http://www.who.int/rpc/research_ethics/hivtestingpolicy_en_pdf.pdf) [31 October 2008].

## Stigma and discrimination

Although the epidemic varies from country to country, there is one constant factor: people living with HIV (or presumed to be living with HIV) are often subject to stigmatization and discrimination. Migrant workers are often already marginalized, stereotyped as having a negative impact on the economy, culture and social order of their host countries. Add to this stereotype the misperception that migrants are responsible for “bringing” HIV into the country where they work, and migrants are marginalized still further.

The cornerstone of the United Nations’ consensus on HIV testing, in whatever setting this testing takes place, is *voluntary confidential counselling and testing* (VCCT).

The voluntary and confidential nature of testing and the provision of pre- and post-test counselling are essential, in part, because there is still strong stigma and discrimination associated with HIV.

Such stigma comes from fear of infection based on inaccurate knowledge about transmission and prevention. Also, it is often intertwined with some people’s negative associations of HIV with specific groups of marginalized people, such as sex workers, men who have sex with men, drug users, and migrants. As such, people outside these groups may be lulled into a false sense of their own security. That is, they may think, “I’m faithful to my husband, so I can’t get HIV” or “I only need to use condoms when I’m with a sex worker, but not with my regular girlfriends”.

Furthermore, if people are afraid they will be discriminated against, blamed, ostracized, or subjected to violence by members of society who link the notion of “immorality” with being HIV-positive, then it may encourage them to avoid HIV-related services. It may push them underground altogether, thus making it very difficult for them to access even basic information on HIV.

## Why counselling?

HIV testing should be accompanied by both pre- and post-test counselling. Pre-test counselling is essential, because it helps healthcare workers to assess the level of risk of the clients as well as their readiness to take the test. In addition, it provides healthcare workers with an opportunity to explain the meaning of the possible test results to the clients. Post-test counselling is also important. For patients who test positive, it helps them understand, and cope with, the diagnosis of an HIV infection. For patients who test negative, it provides an opportunity to discuss safer sex and the dangers of injecting drug use.

## Mandatory vs. Voluntary testing

In spite of VCCT’s many benefits, there still exist organizations and countries around the world that pursue policies of mandatory HIV testing. For example, many Armed Forces carry out mandatory HIV testing, in order to secure the blood supply on the battlefield. Some resettlement governments request HIV testing of refugees in the process of resettlement. Some local governments require HIV testing to secure a marriage license, and a number of prison settings mandate HIV testing to provide support to (or to isolate), those living with the virus.

All of the above are forms of mandatory HIV testing, because the individual cannot choose whether he or she wants to be tested or not.

## Mandatory testing for purposes of employment

The type of mandatory testing most relevant for this study is mandatory HIV testing for purposes of employment.

Within the workplace, there are many variations of mandatory testing, some blatant, some subtle. One variation is when an enterprise requires all job applicants, or current employees, to undergo an HIV test as a part of a general physical examination. They then hire only those who test negative for HIV, and fire workers<sup>10</sup> who test positive. A second variation is when an enterprise makes the HIV test “optional”, but then rejects all applicants who do not agree to be tested. Given the desperation of job applicants vying for limited posts, many will agree to be tested but not in a way that signifies full and informed consent.

Another variation is when an enterprise draws blood for, ostensibly, other purposes and then tests secretly for HIV. Again, in this case, the enterprise rejects those workers who are HIV-positive. In all these variations, enterprises seldom inform those tested what their HIV status is, so the workers are doubly wronged: not only are HIV-positive workers discriminated against, but they are also denied information they could use to protect their health.

The main objective of this type of mandatory testing is to exclude workers from being employed in the formal economy. This then disrupts workers’ social benefits and avoids enterprises’ responsibilities to provide care and support.

## Mandatory testing for purposes of employment for migrants

States carrying out mandatory HIV testing of migrant workers seeking employment abroad should be clearly distinguished from enterprises that carry out mandatory HIV testing of nationals within the country.

In the case of mandatory testing of migrants entering a country for the purposes of employment, states have the right to set immigration laws and to regulate entry into their countries. As part of regulating entry, states sometimes use mandatory HIV tests to bar the entry of people living with HIV. This practice contradicts the ILO *Code of Practice on HIV/AIDS and the World of Work* and the UNAIDS/IOM Statement on HIV-related Travel Restrictions, but it may, sometimes, be in accordance with a country’s legal system.

On the other hand, enterprises carrying out mandatory HIV testing violate national labour laws that prohibit mandatory testing (in the countries where such laws exist).

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<sup>10</sup> There are more subtle ways in which HIV-based discrimination can manifest itself. A worker can be denied advancement, or find herself/himself given less important work than before. Social isolation from colleagues may also result, if the test results are not kept confidential, as is often the case.

Recruiting agencies and enterprises are becoming more and more actively involved in the process of testing job candidates abroad for HIV, and they sometimes require testing well before the state becomes involved. However, states are the primary actors that require migrants to undergo HIV tests. Regardless of which entity originally requires the test, it will be the state that decides whether the migrant worker needs to prove her/his HIV status to enter the country.

A state's intention in carrying out mandatory testing may be to protect the general public or to ease the burden on the national health system. Nevertheless, the effect of denying a migrant worker's entry into a given country based on HIV status is to deny him or her work opportunities – it is, in other words, discrimination.

In this way, while states' and enterprises' motivation for using mandatory HIV tests may be different, the end result is the same: screening out workers from entry into the job market.

### Box 2: The ILO *Code of Practice on HIV/AIDS and the World of Work* and mandatory testing

One of the *Code of Practice's* ten key principles states that there should be “no [HIV] screening for purposes of employment”. The *Code of Practice* defines “screening” as “measures whether direct (HIV testing), indirect (assessment of risk-taking behaviour) or asking questions about tests already taken or about medication” (ILO, 2001, p. 3). Mandatory HIV testing for employment violates this principle; furthermore, by its application, such testing violates five other key principles of the Code as well:

**Non-discrimination** (in practice, the purpose of mandatory testing is to discriminate against workers with HIV, either those seeking work or those currently employed);

**Confidentiality** (the test results are commonly shared with enterprises or national authorities in violation of confidentiality, and sometimes not released to the patient);

**Healthy work environment** (the threat or practice of mandatory testing drives workers away from the formal economy and into potentially dangerous activities);

**Continuation of employment relationship** (testing is used purposefully to disrupt the relationship between workers and employers and to repatriate HIV-positive workers);

**Care and support** (a workplace that tests and, consequently, discharges workers because of their HIV status is the antithesis of a workplace that provides appropriate care and support).

The *Code of Practice* makes it clear that these principles apply to **all** workers and to **all** workplaces. Therefore, it is inconsequential whether the worker is seeking employment within his or her own country or searching for work abroad.<sup>11</sup>

<sup>11</sup> The *Code of Practice* states that its provisions apply to:

- (a) All employers and workers (including applicants for work) in the public and private sectors; and
- (b) All aspects of work, formal and informal. (ILO, 2001, p. 2)

## The case against mandatory testing for employment

The ILO and IOM do not recommend mandatory testing of migrant workers for two main reasons:

1. Mandatory HIV testing for employment represents a **serious human rights violation**, and
2. Mandatory HIV testing for employment is **not an effective public health response**.

Both arguments are mutually enforcing; indeed, protecting an individual's rights to health and to confidentiality promotes the health of the overall community.

### A Case for human rights

Some employers argue that mandatory HIV testing will help them better meet the health needs of their workers. However, in the great majority of cases, mandatory HIV testing does not result in better access to services or more care and support for the person living with HIV. Mandatory testing for employment is a direct violation of the right to bodily integrity and dignity, and its aim is to violate the right to work.

An HIV-positive worker can live with the virus for many years without any symptoms of the disease, and without posing any threat of HIV transmission to his or her fellow workers through casual contact. With proper care, support and treatment, she or he can continue to contribute to the workplace and to society, and live a productive, meaningful life for decades.

Within the workplace, mandatory HIV testing lowers morale and may even lower production, as workers fear the test as yet another way to undercut their hard-earned rights at work and job security. Perhaps most damaging, mandatory HIV testing in the workplace heightens stigma and encourages discrimination of people who belong to certain ethnic, sexual, national and occupational groups.

For these reasons, the ILO *Code of Practice* states, "HIV testing should not be required at any time of recruitment or as a condition of continued employment. Any routine medical testing, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing" (ILO, 2001, p. 25).<sup>12</sup>

As it stands today, mandatory HIV tests are fuelled by (and feed into) discrimination and geared to certain workers' exclusion from the labour market. As the Open Society Institute notes, "efforts to increase access to HIV testing must be accompanied by vastly scaled-up efforts to confront the stigma and human rights abuses that deter people from seeking HIV tests in the first place, as well as increased access to antiretroviral treatment and evidence-based HIV prevention" (Open Society Institute, 2007, p. 7).

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<sup>12</sup> In addition, the *Code* states that neither should HIV testing be required to be eligible for national social security schemes, general insurance policies, occupational schemes and health insurance (ILO, 2001, p. 25, article 8.2 [a]).

The true aim of mandatory HIV testing for employment is often either to exclude individuals whose medical care is perceived as being too costly, or to make a misguided moral statement about sexual practices that a group deems unacceptable. In this sense, mandatory HIV testing falls in the same category as mandatory pregnancy and virginity tests, because the information gained can only be used to the detriment of the person tested and does not provide any greater enjoyment of human rights for the individual or the larger community.

Mandatory HIV testing, therefore, creates a two-tiered system of rights, with dignity, integrity and work afforded to those without the virus, and deprivation and exclusion forced upon those living with the virus. This violates the state's responsibility and accountability for human rights, "not only for the direct or indirect violation of rights, but also for ensuring that individuals can realize their rights as fully as possible" (UNAIDS, 2005, p. 12).

### A Case for public health

Another commonly-employed argument in support of mandatory HIV testing is that it helps ensure that those infected get access to healthcare, and that the public is protected by preventing the person living with HIV from spreading it further.

However, when it comes to migrant workers, evidence does not convincingly show that mandatory HIV testing leads to greater access to HIV-related services. In fact, anecdotal evidence<sup>13</sup> shows that migrant workers or potential migrant workers who test positive for HIV frequently disappear from the system, whether they were tested prior to their departure or after they had entered the receiving country and were deported following detection of their HIV status.

This "disappearance" is often due to a lack of information and support given to the HIV-positive migrant worker. For example, it is possible that the migrant worker is only told that s/he has failed the medical exam without further explanation. There also may be no referral system that would link migrants to other services, either in the same country or in another. It may also be a matter of internalized stigma and discrimination: those who test HIV-positive may simply fear being stigmatized and prefer to keep their status hidden by avoiding any HIV-related services.

If the test result of a migrant worker is found to be HIV-positive, the local health office informs the director or manager of an NGO, as well as the immigration office. Usually the NGO invites the migrant to come in and they explain the predicament and help them to return home (for example, by raising money for the airfare). Unfortunately, many HIV-positive migrants tend to disappear after being told that they have a positive result (Lee, 2006).

<sup>13</sup> For example, the 2007 study by CARAM-Asia, *State of Health of Migrants: Mandatory Testing* ([http://www.caramasia.org/index.php?option=com\\_content&task=view&id=592&Itemid=343](http://www.caramasia.org/index.php?option=com_content&task=view&id=592&Itemid=343); accessed 10 October 2008).

Despite efforts by some NGOs and governments (such as that of the Philippines), to systematically reach out to migrants, the current reality is that not only do these HIV-positive workers often not get access to necessary care, but they are also often detained, deported or not allowed entry into the country of destination.

Moreover, as the ILO *Code of Practice* notes, HIV thrives where “economic, social and cultural rights are violated, and also where civil and political norms are ignored” (ILO, 2001, Appendix I). Workers who seek to avoid mandatory testing can become more easily marginalized and poor, and they may feel compelled to turn to illegal, unregulated channels of migration. This may make migrants more vulnerable to trafficking, less protected, and burdened with greater expenses. This makes them less likely to access HIV-related information and services, and, in turn, more vulnerable to infection. The end result of this exclusion may be a worsening of the public health situation.

The argument that mandatory HIV testing protects public health is equally unconvincing. HIV is spread through very private acts: primarily sex, as well as injecting drug use. For this reason, it is impossible to police. The only way to help ensure that people are protected from HIV is to convince them to change their own behaviours. Mandatory testing requires people to be passive; whereas, if testing is voluntary, it is argued that people may be more likely to take responsibility for their own actions and make the necessary behavioural changes.

Furthermore, there are practical limitations inherent in the HIV test itself which undermine the so-called public health objectives of mandatory testing.

As indicated above, the most widely available diagnostic test is an antibody test that responds to the presence of certain antibodies that the body has produced in response to HIV. Usually, it takes 12 weeks after infection before there are enough antibodies to be detected through this test. This is called the “window period”.<sup>14</sup> By the nature of the antibody test, even if everyone is tested, it will not capture all those who are HIV-infected.

As such, mandatory testing can create a false sense of security. Testing negative can reinforce feelings that one is not at risk and thus, those individuals may not take precautions. Meanwhile, those who are, in fact, HIV-positive but who tested negative – because they were in the window period – can unknowingly transmit HIV and may not seek medical attention.

UNAIDS and IOM have noted a similar situation regarding travel restrictions based upon HIV status. Such restrictions “may encourage nationals to consider HIV/AIDS a ‘foreign problem’ that has been dealt with by keeping foreigners outside their

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<sup>14</sup> In some countries, the recommendation is to wait for 6 months after possible exposure to HIV. The WHO states that detectable antibodies appear within “normally a period of about 14-21 days” (WHO Diagnostics and Laboratory Technology, Frequently Asked Questions; [http://www.who.int/diagnostics\\_laboratory/faq/window\\_period/en/](http://www.who.int/diagnostics_laboratory/faq/window_period/en/); accessed 24 July 2008), and that most HIV infection can be detected at 12 weeks. In rare occasions, sero-conversion can take up to 6 months for some individuals (WHO Factsheet on HIV; [http://www.who.int/hiv/about/hiv/en/fact\\_sheet\\_hiv.htm](http://www.who.int/hiv/about/hiv/en/fact_sheet_hiv.htm); accessed 23 July 2008).

borders, so that they feel no need to engage in safe behaviour themselves” (UNAIDS/IOM, 2004). Moreover, the International Task Team on HIV-related Travel Restrictions (established by UNAIDS in January 2008) has stated that “HIV specific restrictions on entry, stay and residence based on HIV status are discriminatory, do not protect the public health and are overly broad in terms of rationally identifying those whose entry or stay might result in an undue burden on public monies” (UNAIDS, 2008b, back cover).

Testing everyone regularly – in a workplace or in a country – is highly impractical and prohibitively expensive. It only provides a snapshot of infection at one point in time; it does not guarantee what the individuals may do afterwards. Money would be much better spent on public information and education campaigns, behaviour change communication, and increased access to social services.

In summary, UNAIDS, the ILO and IOM favour *voluntary* HIV testing – in the context of confidentiality, informed consent and pre- and post-test counselling – as opposed to *mandatory* HIV testing of workers, whether individuals are seeking work within their countries of origin or abroad, to preserve their human rights and promote public health.

### 3. Methodology

The baseline for this study was to establish a regional pointer for comparative analysis of laws relating to mandatory HIV testing for purposes of employment, as well as to deepen the understanding of the ILO's tripartite partners' (Ministries of Labour and workers' and employers' organizations) roles vis- -vis such testing. This study was undertaken in 2006, and included the following:

**(a) Desk review of related laws and policies in the eight countries:**

The review included published laws and policies related to labour and migration available in 2006.<sup>15</sup> Official translations were used, with the exception of four laws that were only available in unofficial translation. (See Appendix I for a list of documents included in the review.)

**(b) Survey of the ILO's tripartite partners:**

The ILO conducted a survey of the ILO partners' viewpoints regarding HIV testing of migrant workers in all eight countries. Only one surveyed country chose not to respond.

Thirteen responses were received from seven countries, from a mixture of governments,<sup>16</sup> workers' and employers' organizations. The purpose of the survey was to gauge the range of tripartite partners' understanding and concerns about mandatory HIV testing in the context of migration for work. It was not meant to solicit official opinions from the organizations, and it was done with the understanding that the positions would not be attributed to the respondents. (See Appendix II for the survey questions.)

The findings were supplemented by unpublished data from IOM and reports by CARAM-Asia<sup>17</sup>.

The study has two main limitations that need to be highlighted:

1. The study looked at published national laws and policies available in 2006. The study did not look into actual practices on the ground. Practices mentioned in the report were taken from reports of third parties, primarily the NGO CARAM-Asia, as well as feedback from experts working on migration issues in Southeast Asia.
2. Although undocumented cross-border migration and internal migration are major concerns for many countries in the region, the study focuses only on laws and policies that address voluntary cross-border migration through established legal channels, as it is in this context that mandatory HIV testing takes place.

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<sup>15</sup> Where possible, updates have been provided, but they may not reflect the current state of legislation at the time of this study's publication.

<sup>16</sup> Ministries of Labour in all eight countries were consulted. In some countries, additional ministries were consulted, because they had specific mandates to work with migrant workers.

<sup>17</sup> Co-ordination of Action Research on AIDS and Mobility in Asia (CARAM-Asia) is an initiative of NGOs involved in migration issues in Asia. It advocates for migrants' health rights through participatory action research initiatives on HIV and mobility.

## 4. Trends in national policies and legislation

The following review shows the diverse approaches taken by countries in terms of policies and legislation on HIV-based discrimination and mandatory HIV testing for work. Some countries have national laws on HIV/AIDS, while others do not. Some have developed their own *Codes of Practice* and have gone on to make very specific legislation for workplaces, while others have done neither. At the same time, there are a number of similarities.

Notably, most countries in the study have a law, a national policy or guidelines prohibiting HIV-based discrimination and mandatory testing for the purposes of work. Mandatory HIV testing and discrimination in the workplace are banned by law in three countries (Cambodia, Philippines and Viet Nam). The other countries in this study have decrees without penalties, non-binding policies and other government-sanctioned efforts to dissuade employers from using mandatory tests and from excluding workers with HIV (see Table 2).

When national laws and policies on HIV are compared to immigration laws and policies, a very interesting picture emerges. None of the countries with binding laws prohibiting HIV-based discrimination for employment had immigration laws that *required* mandatory HIV testing for incoming migrant workers. One country has non-binding national guidelines prohibiting mandatory testing and HIV-based discrimination, but its immigration law prohibits people living with HIV from migrating to the country.

Moreover, despite the existence of national laws protecting workers against HIV-based discrimination and mandatory HIV testing, all major migrant-sending countries in this study permit and facilitate pre-departure health examinations of migrant workers, and these include an HIV test where this is a requirement of the receiving country.

All states had signed one or more Memorandum of Understanding (MOU) with other states on the sending and receiving of migrant labour. None of these agreements referred specifically to HIV testing as a condition of sending or of entry.

Some agreements seek to ensure that migrant workers receive the same benefits and conditions as citizens of the host country. This approach is consistent with the International Convention on the Rights of All Migrant Workers and Members of their Families, and the ILO Conventions 97 and 143. The separate memoranda between Thailand and its neighbours, Cambodia and Myanmar, take this approach.

**Table 2. Summary of national laws and policies in eight countries in South-East Asia**

Country	HIV in the workplace	Receiving migrant workers	Sending migrant workers
Cambodia	National law and policies prohibit compulsory HIV testing and discrimination on the grounds of HIV status in the workplace.	No mandatory HIV testing or exclusion of foreign workers with HIV.	HIV testing occurs according to the requirements of the receiving country. (Medical certificate required by decree)
Indonesia	Mandatory HIV testing in the workplace is prohibited by government decree. No penalties provided.	No mandatory HIV testing or exclusion of foreign workers with HIV.	HIV testing occurs according to the requirements of the receiving country. (Health certificate required by law)
Malaysia	Non-binding Code of Practice on HIV in the workplace issued in 2001, which includes provision against mandatory testing and discrimination on the grounds of HIV status. HIV-related discrimination remains legal.	Persons with HIV are prohibited immigrants. Foreign workers testing HIV-positive in Malaysia are deported.	No relevant information found.
Myanmar	There is no law which prohibits discrimination on the grounds of HIV status in the workplace. According to government officials, Government policies do not support compulsory HIV testing in the workplace, nor exclusion from work on the grounds of HIV infection.	No relevant information found.	HIV testing occurs according to the requirements of the receiving country. (Health certificate required by law)
Philippines	National law and policies prohibit compulsory HIV testing and discrimination on the grounds of HIV status in the workplace.	Compulsory HIV testing of migrants is prohibited by law.	HIV testing occurs according to the requirements of the receiving country. (Medical examination is regulated in the Operational Guidelines issued by the Department of Health)
Singapore	There is no law which prohibits compulsory HIV testing or discrimination on the grounds of HIV status in the workplace.	Persons with HIV are prohibited immigrants. Foreign workers testing HIV-positive in Singapore are deported.	No relevant information found.
Thailand	Non-binding Ministerial Code of Practice on HIV in the Establishment prohibits discrimination on the grounds of HIV status in the workplace.	No mandatory HIV testing or exclusion of foreign workers with HIV.	HIV testing occurs according to the requirements of the receiving country. (Physical exam is required by law)
Viet Nam	National law prohibits compulsory HIV testing and discrimination on the grounds of HIV status in the workplace.	Foreigners applying for a work permit must provide a health certificate. An HIV test is included; however, discrimination is prohibited.	HIV testing occurs according to the requirements of the receiving country. (Medical certificate required by decree)

## 5. Review of national policies and legislation

To give a context for the discussion, this section first summarizes international standards that pertain to migration and HIV/AIDS. It then provides a country-by-country review of national laws and policies of the eight countries.

At the beginning of each country summary, basic information on migration and HIV (such as estimates on the number of the stock of migrants in a given country and the official deployment of migrant workers as of 2006) is provided. For ease of reference, the data are also presented in Table 1.

### Context of relevant international standards

International law is founded upon mutual respect for the sovereignty of individual states. It is the sovereign right of all nations to determine their migration policies, including determining whether foreign nationals can enter their territories, unless required by specific treaties or agreements that they adhere to, such as the 1951 UN Convention on the Status of Refugees and Stateless Persons. This principle of sovereignty is widely recognized in international legal instruments, which provide that, except regarding asylum seekers and returning citizens, states have the right to determine who enters their borders. International agencies have recognized and respected this principle. IOM and UNAIDS, for example, have observed that "The regulation of immigration matters and both short- and long-term entry into a country is widely recognized as falling within the sovereign power of the individual State concerned (UNAIDS/IOM, 2004).

The ILO's General Conference also acknowledged in 2004 the sovereign right of all nations to determine their migration policies, including determining entry into their territory and under which conditions migrants may remain (ILO, 2004).

At the same time, states have certain obligations to respect the freedom of movement of people within their own borders. The Universal Declaration of Human Rights (Article 13) states:

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Moreover, the concept of freedom of movement is expanded in the International Covenant on Civil and Political Rights (ICCPR) which provides (Article 12):

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public

## 6. Country-by-country review<sup>19</sup>

### Cambodia

Population <sup>20</sup> , 2005: .....	14,071,000
HIV prevalence, 2007: .....	0.8 per cent <sup>21</sup>
Estimated No. people living with HIV, 2007: .....	75,000 (29 per cent female) <sup>22</sup>
Stock of migrants in country <sup>23</sup> , 2005: .....	304,000
Official deployment of migrant workers: .....	>184,251
Top destinations: .....	Thailand, Malaysia, South Korea

According to the Ministry of Labour and Vocational Training of Cambodia, 1,776 and 468 Cambodian workers departed for Malaysia and South Korea respectively in 2005.<sup>24</sup> Of these migrants, an estimated 2,244 migrants were tested for HIV prior to departure. The total of 182,007 Cambodian workers renewed their work permits in Thailand in 2005.<sup>25</sup>

### HIV in the workplace

*Law on the Prevention and Control of HIV/AIDS, 2002:*

- The law provides that all HIV tests shall be done with the voluntary and informed consent from the individual (article 19).
- Compulsory HIV testing to determine pre- or post-conditions for employment, admission to educational institutions, as well as for the exercise of freedom of abode, travelling, and the provision of medical services or other services is strictly prohibited (article 20).
- The confidentiality of all persons with HIV must be maintained, and this provision applies specifically to health professionals, employers and recruitment agencies (article 33).
- The results of an HIV test must be given to the person who voluntarily requests the test (article 35).

<sup>19</sup> Information reflects country legislation available in 2006. Where possible, updates have been provided but may not capture recent changes in legislation.

<sup>20</sup> UNAIDS/WHO Global HIV/AIDS Online Database (2005); the database cites low and high estimates; here, we have only included the middle estimate.

<sup>21</sup> The HIV prevalence is for adults, 15-49 years of age. HIV data source: UNAIDS/WHO Report on the global HIV/AIDS epidemic 2008.

<sup>22</sup> The number of people living with HIV/AIDS includes children. However, the proportion of those living with HIV who are women (age 15 and over) was based on the estimated number of women living with HIV as a percentage of the estimated number of adults (age 15 and over) living with HIV.

<sup>23</sup> UN DESA, Trends in Total Migrant Stock: the 2005 revision.

<sup>24</sup> Unofficial communication with IOM, 2005.

<sup>25</sup> Statistics published by the Ministry of Labour of Thailand, 2005.

- 'Discrimination in any form at pre- and post-employment, including hiring, promotion and assignment, living in society based on the actual, perceived or suspected HIV/AIDS status of an individual or his/her family members is strictly prohibited. Any termination from working based on the actual, perceived or suspected HIV/AIDS status of individual or his/her family members is deemed unlawful' (article 36).
- The HIV/AIDS law overrides other laws (article 53).
- Violation can result in a fine, imprisonment, and revocation of professional licenses (articles 48-52).

*Implementing Guidelines of the Law on the Prevention and Control of HIV/AIDS, 2005:*

- The Guidelines note that the National AIDS Authority endorses the International Labour Organization's *Code of Practice on HIV/AIDS and the World of Work*, and will use the Code to promote HIV/AIDS prevention, treatment, and care initiatives in workplaces.

*(Prakas #086) Decree on the Creation of the HIV/AIDS Committee in Enterprises and Establishment and Managing HIV/AIDS in the Workplace, 2006:*

- Notes HIV/AIDS is a workplace issue and provides guidance for the management of HIV/AIDS based on defined principles. These principles include specific references to discrimination and HIV screening.
- 'In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status' (article 12 (b)).
- 'HIV/AIDS screening should not be required of job applicants or persons in employment' (article 12(f)).
- 'HIV infection is not a cause for termination of employment. As with many other conditions, persons with HIV-related illnesses should be able to work for as long as medically fit in available, appropriate work' (article 12 (h)).

*Policy, Strategy and Guidelines for HIV/AIDS Counselling and Testing, 2002, Ministry of Health:*

- Compulsory testing for HIV under any circumstances is prohibited, unless required by law (section 2.2). Compulsory testing is defined as 'testing which is required in order to access a particular benefit or service (e.g., visa, employment, medical care, etc.) but where the subject has the option of rejecting the service or benefit and thus avoiding the test'.
- Mandatory testing for HIV under any circumstances is prohibited in the Kingdom of Cambodia (section 2.1). The Guidelines define mandatory testing as 'testing that is conducted without any option for refusal'. (Note that these terms may be used differently by other agencies.)

*Trade Union Policy on Prevention and Management of HIV/AIDS in the Workplace in Cambodia, 2006*, Cambodian Confederation of Trade Unions (CCTU) and the Cambodian Labour Confederation (CLC):

- Recognizes the above-mentioned legislation and guidelines, as well as the ILO *Code of Practice on HIV/AIDS and the World of Work*.
- Addressed to all members of trade unions in Cambodia.
- Provides guidelines to address HIV epidemic in the workplace, including through the elimination of stigma and discrimination on the basis of real or perceived HIV status.

## Receiving migrant workers

*Law on Immigration, 1994*:

- Requires that immigrant aliens must ‘demonstrate sufficient physical aptitudes in performing their professions, proved by medical certificates issued by doctors in their native country’ (article 11(3)). HIV test results are not required.

*Decree on the Management of Foreigners Work Permits, 1995*:

- A ‘certificate of health from a physician from the immigrant country’ is required, however an HIV test result is not specified (article 2(a)(3)).

*Sub-Decree on the Formalities of Application for Authorization to Enter, Exit and Reside in the Kingdom of Cambodia of Immigrant Aliens, 1996*:

- Requires an alien who applies to stay in Cambodia as an immigrant alien to ‘provide a health certificate which was issued by a medical doctor of his/her country of origin’ (article 3.4). An HIV test is not required.

## Sending migrant workers

*Law on the Prevention and Control of HIV/AIDS, 2002*:

- Requires the State to develop information education communication (IEC) materials on HIV/AIDS for tourists and travellers in both Khmer and in other appropriate languages (article 7).
- Requires the State to provide information, HIV/AIDS educational materials or organize workshops for all Cambodian workers, diplomatic officials, and civil servants, on the causes, modes of transmission, means for prevention, and the consequences of HIV/AIDS before their departures for overseas assignment (article 8).
- Guarantees ‘the full right to the freedom of abode and travel’ to people living with HIV (article 38).

*Implementing Guidelines of the Law on the Prevention and Control of HIV/AIDS, 2005:*

The Guidelines note,

...under the HIV/AIDS law the Royal Government of Cambodia, through the Ministry of Tourism and the Ministry of the Interior, and in conjunction with partners such as the International Organization for Migration, will produce information and education resources on HIV/AIDS for tourists and travellers for distribution at all points of entry and exit to the Kingdom of Cambodia, and at popular tourist destinations. This may also include showing educational videos on HIV/AIDS awareness at points of transit for mobile populations...

Information and education resources on HIV prevention and health promotion will also be distributed to all Cambodian workers leaving the Kingdom of Cambodia to work in foreign countries, including diplomatic officials and public servants. This is required by Article 8 of the HIV/AIDS law. These information and education resources will be distributed without charge to all Cambodians before they leave Cambodia. Companies involved in exporting Cambodian workers abroad must be involved in the provision of education and information resources on HIV/AIDS and birth spacing to Cambodian workers going abroad. As well as the strong humanitarian reasons for labour-exporting companies to contribute to protecting the health and well-being of Cambodian workers, there is also the fact that these companies have an economic interest in maintaining the health of their workers. In many countries the HIV/AIDS epidemic has decimated the working age population, and this has damaged the economies of these countries, including the economic viability of the business sector, and the material well-being of all citizens of these countries (p. 13).

*Decree on Education of HIV/AIDS, Safe Migration and Labor Rights for Cambodian Workers Abroad No. 108, 2006:*

- Notes the vulnerability of Cambodian workers overseas to HIV and other infectious diseases, as well as problems of exploitation and human rights infringements (article 1).
- Directs the Committee for the Control of HIV/AIDS of the Ministry of Labour and Vocational Training to 'provide training and raise awareness on HIV/AIDS to Cambodian workers who are to move abroad for employment so they can understand methods of prevention and strategies for avoiding potential risks in order to prevent and control HIV infection...' (article 2).
- The education programmes are to be provided for Cambodia workers before they leave the country and on their return, and also for their families (article 2).
- Companies receiving workers for employment abroad are also directed to collaborate in this training (article 4).

*Sub-Decree on the Export of Khmer Labor to Work Overseas, 1995:*

- Specifies that when signing an employment contract, each worker shall provide a 'Medical Certificate issued by the Health Department' (article 13).

### Comment: Cambodia

In 2006, a pre-departure training project was approved by the Ministry of Labour and Vocational Training for an initial period of one year. The objective was to increase the awareness of female migrant workers on the following topics: safe migration; labour rights; immigration policies of receiving countries; HIV/AIDS and reproductive health; and the contractual obligations of employers, labour agents and government. Activities included development of a safe migration curriculum and pre-departure training in up to 12 recruitment agencies. The project was implemented by CARAM-Asia with funding from UNIFEM.

HIV testing of Cambodians intending to work overseas takes place because destination countries require this before they accept foreign workers. CARAM-Asia reports that:

The Cambodian Ministry of Labour oversees the medical test and it is carried out at a Cambodian Labour Hospital, though some recruitment centres use private doctors because they are less expensive. Prospective migrant workers reported that they received almost no information about what they were being tested for... (CARAM-Asia, 2005)

## Bilateral agreements

*MOUs between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Cooperation on the Employment of Workers, 2003:*

- Provides that authorized employment agencies in each country shall inform each other of available job opportunities and provide lists of applications with information for the consideration of prospective employers. The authorized agencies coordinate with the immigration and other authorities regarding visas, work permits etc. The memorandum does not mention health requirements for the entry of foreign workers.
- 'The Parties in the employing country shall ensure that the workers enjoy protection in accordance with the provisions of the domestic laws in their respective country' (Article XVII).
- 'Workers of both Parties are entitled to wage and other benefits due for local workers based on the principles of non-discrimination and equality of sex, race, and religion' (Article XVIII).

## Translation and Use of the ILO's *Code of Practice*

- The ILO's *Code of Practice on HIV/AIDS and the World of Work* has been translated into Khmer and is being used by the ILO's tripartite partners as a basis for workplace action.

## Indonesia

Population, 2005: ..... 222,781,000  
 HIV prevalence, 2007: ..... 0.2 per cent  
 Estimated No. people living with HIV (per cent women), 2007: ..... 270,000  
 (20 per cent women)

Stock of migrants in the country, 2005: ..... 160,000.  
 Official deployment of migrant workers: ..... 382,500 (2004)<sup>26</sup>  
 Top destinations: ..... Saudi Arabia, Malaysia, Hong Kong, UAE, Brunei

More than 382,500 Indonesians travelled overseas to take up employment in 2004. Destination countries included Saudi Arabia (203,446), Malaysia (127,175) and Hong Kong (14,183). An estimated 352,105 (92 per cent) were tested for HIV prior to departure (Soeprobo, 2006).

## HIV in the workplace

There is no law in Indonesia prohibiting discrimination in employment on the grounds of HIV status.

*Tripartite Declaration 'Commitment to Combat HIV/AIDS in the World of Work, 2003, Government of Indonesia, the Indonesian Chambers of Commerce and Industry, the Indonesian Employers' Association and workers' organization representatives:*

- Endorses the ILO *Code of Practice on HIV/AIDS and the World of Work* as the basis for implementing workplace programmes on prevention, care and support, and urges all parties to work together 'to deal with stigma and discrimination against workers with HIV/AIDS.'

*Decree on HIV/AIDS Prevention and Control in the Workplace (KEP.68/MEN/IV/2004) 2004, Ministry of Manpower and Transmigration:*

- Cites as its basis international, regional and national agreements on HIV/AIDS, as well as the ILO *Code of Practice on HIV/AIDS and the World of Work*, and the 2003 National Tripartite Declaration.
- Prohibits employers or officials from performing HIV tests 'as part of recruitment requirements or working status of workers/labourers or as a compulsory regular medical check-up' (article 5(1)).
- HIV tests can be performed with written consent (article 5(2)), and must be accompanied by pre- and post-test counselling (article 5(3)).
- HIV-related medical information must be treated as confidential in the same way as other medical records (article 6).
- Technical matters concerning the implementation of the decision will be set out in further guidelines, technical instructions, and implementing regulations (article 6).

<sup>26</sup> T.B. Soeprobo: *Country Report: Indonesia*, Paper presented at the 12<sup>th</sup> Workshop on International Migration and Labour Market in Asia, Tokyo, 17 Feb. 2006. Available at: [http://www.jil.go.jp/english/events\\_and\\_information/06\\_0217\\_report.htm](http://www.jil.go.jp/english/events_and_information/06_0217_report.htm) [29 Oct. 2008].

## Receiving migrant workers

No relevant information found.

## Sending migrant workers

*Decree of the Minister of Health regarding general check-up for Indonesian workers to be employed overseas and for expatriates to work in Indonesia* (No. 138/MENKES/SK/II/1996) 1996, Minister of Health:

- Health tests at medical centres certified by the Ministry of Health are required for migrant workers before departure and upon return.
- In practice the tests are only performed systematically before departure, and not on return (ILO, 2007).

*Placement and Protection of Indonesian Overseas Worker Act, 2004:*

- Provides for health examination in the worker pre-placement phase (article 31(d)).
- Requires that workers to be recruited by private agencies must be physically healthy (article 35(b)).
- Every prospective worker must undergo a health examination (article 49 (1)).
- The specific provisions of the health examination will be set out by Presidential Decree (article 49(2)).
- Agencies are prohibited from placing workers who do not meet the health requirements (article 50).
- To be placed abroad, workers must possess a health certificate from the health examination (article 51).

*Implementing Guidelines for the Prevention and Treatment of HIV/AIDS in the Workplace* (KEP.20/DJPPK/VI/2005) 2005, Director General of Labour Supervision Development:

- Requires all companies to provide HIV education for their employees at all levels, including to migrant workers during training (ILO, 2007).

*Ministerial Regulation concerning 'Final Preparation of Indonesian Migrant Workers'* (No. PER.04/MEN/II/2005) 2005:

- Includes providing workers with information and materials on HIV/AIDS.

### Comment: Indonesia

CARAM reports that the pre-departure orientation seminars address the sexual transmission of HIV and how to prevent transmission in this context; however, other modes of transmission are not discussed, and other deficiencies in the training have been identified. It was also reported that health certificates are not given to potential migrant workers, but are sent directly to the recruitment agencies, and that no pre- or post-test counselling is delivered (CARAM-Asia, 2005).

In 2006, the ILO and the Ministry of Health met to develop further guidance and regulations regarding HIV testing of Indonesian workers recruited for placement overseas. HIV testing is required for potential migrant workers destined for Malaysia and Saudi Arabia, among other countries (ILO, 2007).

#### *Placement and Protection of Indonesian Overseas Worker Act:*

- Provides that migration agencies are responsible for migrant workers' reintegration into Indonesia, including the provision of health services, if needed on return.

### Bilateral agreements

Indonesia has MOUs with labour-receiving countries, including Malaysia, Philippines, and the Republic of Korea.

*Memorandum of Understanding on the Sending of Workers to the Republic of Korea under the Employment Permit System, 2006, Department of Manpower and Transmigration of the Republic of Indonesia and the Ministry of Labor (MOL) of the Republic of Korea:*

- Provides that job seekers must pass 'the health examination determined by the MOL' prior to selection for the job seekers' roster (paragraph 7(2)(b)).
- The MOL will conduct a further health examination for workers before they start work (paragraph 14(1)).
- If there is any worker with 'abnormalities according to the result of the health examination', the MOL can take 'adequate measures such as notifying the Ministry of Justice' (paragraph 14(2)).
- A worker who returns to Indonesia due to disqualification in the health examination must bear his or her own expenses, unless assisted by the government of Indonesia (paragraph 14(3)).

### Translation and Use of the ILO's *Code of Practice*

The ILO's *Code of Practice on HIV/AIDS and the World of Work* has been translated into Bahasa Indonesian and is being used by the ILO's tripartite partners as a basis for workplace action.

## Malaysia

Population, 2005:.....	25,347,000
HIV prevalence, 2007: .....	0.5 per cent
Estimated No. people living with HIV, 2007: .....	80,000 (27 per cent women)
Stock of migrants in the country, 2005: .....	1,639,000
Official deployment of migrant workers: .....	n.d.
Top destinations: .....	n.d.

At the end of 2005, there were 1.94 million documented migrant workers in Malaysia, with another estimated 700,000 undocumented workers in the country (Kanapathy, 2006). In 2003, of the 716,000 foreign workers who underwent a medical examination after a year's stay in Malaysia, 122 had contracted HIV (MCA, 2005).

### HIV in the workplace

There is no law in Malaysia prohibiting discrimination in employment on the grounds of HIV status.

*Code of practice on prevention and management of HIV/AIDS at the workplace, 2001*, Department of Occupational Safety and Health, Ministry of Human Resources:

- Applies to all employers and all employees in any workplace (article 2).
- Discrimination on the grounds of HIV status (article 3.3.4) and HIV screening (article 3.3.6) are not permitted.
- The code is not mandatory and no penalties are provided.

### Receiving migrant workers

*Immigration Act, 1959/63*:

- Classifies as prohibited persons those who are 'suffering from a contagious disease which makes his presence in Malaysia dangerous to the public'.
- The First Schedule (Part II) of the *Prevention and Control of Infectious Diseases Act 1988* lists 'Human Immunodeficiency Virus Infection (All Forms)'.
- Regulations to the Act may be made regarding entry to, movement within, and departure from Malaysia.

### Comment: Malaysia

Since 2004, migrant workers coming to Malaysia are required to attend a pre-departure Induction Course; however, the health information content is reported to be minimal (17). Pre-entry medical examinations were reportedly ineffective in excluding foreign workers with communicable diseases including HIV for reasons which included the falsification of medical certificates (Kanapathy, 2006).

All migrant workers are now required to undergo a medical examination within a month of arrival in Malaysia, including for HIV infection. The examination is conducted through the Foreign Workers Medical Examination Monitoring Agency (FOMEMA), which provides results ('fit' or 'not fit') electronically to the Ministry of Health and the Department of Immigration to facilitate issuance of a work pass or deportation. Migrant workers are required to sign a consent form prior to being tested, 'though they are rarely aware they are being tested for HIV' (Verghis, 2005) and pre-test counselling is not routine (CARAM-Asia, 2005). Migrants testing HIV-positive are deported, making post-test counselling and treatment difficult if not impossible (CARAM-Asia, 2005).

Annual examinations are required for the renewal of permits, although white collar workers may be exempt (Kanapathy, 2006).

## Sending migrant workers

No relevant information found.

## Bilateral agreements

Malaysia has signed MOUs to monitor and control the flow of migrant labour with Bangladesh, China, Indonesia, Pakistan, Sri Lanka, Thailand and Viet Nam. The main purpose of these MOU is to establish a framework to facilitate the recruitment and selection of workers from the source countries (Dairam, 2006).

## Translation and Use of the ILO's *Code of Practice*

Malaysia's *Code of Practice on Prevention and Management of HIV/AIDS at the Workplace* was finalized while the ILO's *Code of Practice* was still being drafted in 2001. For this reason, the national *Code of Practice* is used as a reference point of the ILO's tripartite partners in Malaysia, and the ILO's *Code of Practice* has not been translated into Bahasa Melayu. However, its text reflects the basic principles of the ILO's *Code of Practice*. On the topic of mandatory testing, Malaysia' *Code of Practice* provides the following guidance:

- 3.3.6. Screening/HIV-antibody Testing Employers should not practice screening or HIV-antibody testing as a pre-condition to employment, promotion, or other employee benefits (ILO, 2001, p. 6).

## Myanmar

Population, 2005:.....	50,519,000
HIV prevalence, 2007: .....	0.7 per cent
Estimated No. people living with HIV, 2007: .....	240,000 (42 per cent women)
Stock of migrants in the country, 2005: .....	117,000
Official deployment of migrant workers: .....	>2,500
Top destinations: .....	Thailand (mostly undocumented), Malaysia, Singapore, South Korea

Ministry of Labour of Myanmar reports that in 2005 there were 2,493 migrants through regular channels from Myanmar to: Malaysia (1,863); Singapore (490); South Korea (127); Japan (13); and Qatar (13) (from unofficial communication with IOM, 2006). Of these, an estimated 2,366 workers were tested for HIV prior to departure. The total of 539,416 renewed their work permits in Thailand in 2005.<sup>27</sup>

## HIV in the workplace

There is no law in Myanmar prohibiting discrimination in the workplace on the grounds of HIV status. In 2005 Myanmar government officials indicated that HIV prevention measures included: exemption from HIV testing in case of pre-employment health assessment; no compulsory testing for HIV in workplaces; and confidentiality of HIV results. A positive HIV test does not result in exclusion from the workforce (ILO, 2005).

## Receiving migrant workers

No relevant information found.

## Sending migrant workers

*Law Relating to Overseas Employment, 1999:*

- Provides for the creation of a multi-sectoral Supervisory Council.
- Duties of the Council include recruiting and selecting workers for overseas employment (section 8(c)), and preventing workers who are found unsuitable for overseas employment by the Inspections Subcommittees from departing to take up such employment (section 8(i)).
- Before going abroad, a worker must undergo a medical examination as directed by the Supervisory Committee, and obtain a health certificate (section 20(a)).

<sup>27</sup> Statistics published by the Ministry of Labour of Thailand, 2005.

## Bilateral agreements

*Memorandum of Understandings between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation on the Employment of Workers, 2003:*

- Provides that authorized employment agencies in each country shall inform each other of available job opportunities and provide lists of applications with information for the consideration of prospective employers.
- The authorized agencies coordinate with the immigration and other authorities regarding visas, work permits etc.
- Does not mention health requirements for the entry of foreign workers.
- 'The Parties in the employing country shall ensure that the workers enjoy protection in accordance with the provisions of the domestic laws of in their respective country' (Article XVII).
- 'Workers of both Parties are entitled to wage and other benefits due for local workers based on the principles of non-discrimination and equality of sex, race, and religion' (Article XVIII).

## Translation and Use of the ILO's *Code of Practice*

- The ILO's *Code of Practice on HIV/AIDS and the World of Work* has not been translated into any of the national languages of Myanmar.

## Philippines

Population, 2005:.....	83,054,000
HIV prevalence, 2007: .....	<0.1 per cent
Estimated No. people living with HIV, 2007: .....	8,300 (27 per cent)
Stock of migrants in the country, 2005: .....	374,000
Official deployment of migrant workers: .....	981,677
Top destinations: .....	Saudi Arabia, Hong Kong, UAE, Taiwan, Japan

Philippines Overseas Employment Administration (POEA) reports that approximately 982,000 workers were deployed overseas in 2005 (POEA, 2006). Top destination countries included Saudi Arabia (193,991); Hong Kong (94,553); UAE (81,707); Taiwan (46,714); Japan (42,586); and Kuwait (40,248). An estimated 436,613 (44.5 per cent) of these workers were tested for HIV before departure.

## HIV in the workplace

*Philippine AIDS Prevention and Control Act, 1998:*

- Provides that ‘the State shall extend to every person suspected or known to be infected with HIV/AIDS full protection of his/her human rights and civil liberties. Towards this end...
  - (1) Compulsory HIV testing shall be considered unlawful unless otherwise proved by this Act;
  - (2) The right of privacy of individuals with HIV shall be guaranteed; and
  - (3) Discrimination, in all its forms and subtleties, against individuals with HIV or persons perceived or suspected of having HIV shall be considered inimical to individual and national interest...’ (section 2(b)).
- ‘Compulsory testing’ is defined as ‘HIV testing imposed upon a person attended or characterized by the lack of vitiated consent, use of physical force, intimidation or any form of compulsion’ (section 3(c)).
- ‘Compulsory HIV testing as a pre-condition to employment... shall be deemed unlawful’ (section 16).
- Standardized pre- and post-test counselling is required for persons having an HIV test (section 20).
- ‘Discrimination in any form from pre-employment to post-employment, including hiring, promotion or assignment, based on actual, perceived or suspected HIV status of an individual is prohibited. Termination from work on the sole basis of actual, perceived or suspected HIV status is deemed unlawful’ (section 35).

*Rules and Regulations, Philippine National AIDS Council:*

- The rules and regulations are intended to guide the implementation of the Act.
- Compulsory testing shall not be imposed as a pre-condition to employment (section 27).

- Discrimination in any form, from pre-employment, including hiring, promotion or assignment, actual, perceived or suspected HIV status is prohibited (section 46):

All individuals seeking employment shall be treated equally by employers who shall not make any distinction among job applicants on the basis of their actual, perceived or suspected HIV status. Persons with HIV/AIDS already employed by any public or private company shall be entitled to the same employment rights, benefits and opportunities as other employees, namely:

- (a) Security of tenure;
- (b) Reasonable alternative working arrangements, when necessary;
- (c) Social security, union, credit and other similar benefits; and
- (d) Protection from stigma, demotion, discrimination and termination by co-workers, unions, employers and clients.

Termination from work on the basis of actual, perceived or suspected HIV status is deemed unlawful.

HIV-infected employees shall act responsibly to protect their own health and prevent HIV transmission. Acts of discrimination against an individual seeking employment, or in the course of employment, because of his/her actual, perceived or suspected HIV status, shall be reported to the DOLE by those in the private sector and to the CSC by those in the government offices and government-owned corporations. DOLE and CSC shall resolve any such matters brought to their attention, including the implementation of administrative sanctions, as may be appropriate:

- Penalties for discriminatory acts include a fine and imprisonment for six months to four years. In addition, licenses or permits of schools, hospitals and other institutions found guilty of committing discriminatory acts shall be revoked (section 53).
- The Philippine National AIDS Council is also tasked with ensuring specific coverage of 'the protection of the rights of individuals with HIV' (section 55(6)).

## Receiving migrant workers

*Philippine AIDS Prevention and Control Act, 1998:*

- 'Compulsory HIV testing as a pre-condition to... the exercise of freedom of abode, entry or continued stay in the country, or the right to travel... shall be deemed unlawful' (section 16).
- 'The freedom of abode, lodging and travel of a person with HIV shall not be abridged. No person shall be quarantined, put in isolation, or refused lawful entry or deported from Philippines Territory on account of his/her actual, perceived or suspected HIV status' (section 37).

*Alien Social Integration Act, 1995:*

- Provides for the documentation of aliens unlawfully resident in the Philippines prior to June 30, 1992 'subject to national security and interest, and in deference to internationally recognized human rights' (section 2).
- Requires that the applicant provide 'a medical certificate stating that... he is not afflicted with the Acquired Immune Deficiency Syndrome' (section 4.4).

**Comment 1: Philippines**

Section 4.4 of the *Alien Social Integration Act* would be overridden by the *Philippine AIDS Prevention and Control Act*, which automatically repeals, amends or modifies 'any laws, presidential decrees, executive orders and their implementing rules inconsistent with the provisions of this Act' (section 51).

**Sending migrant workers***Regulations of the Philippines AIDS Prevention and Control Act:*

- Repeat the protections provided in the Act.
- Provide that HIV/AIDS education and information should be targeted for Filipinos going abroad (section 5(d)).
- All Overseas Filipino Workers (OFWs) shall attend an HIV/AIDS education seminar prior to departure (section 16).

*Operational Guidelines In the Conduct of Pre-Employment Medical Examination of Overseas Workers and Seafarers, 2003, Department of Health:*

- Note in Part III Conduct of Pre-Employment Medical Examination (PEME) that 'Test for HIV antibodies or hepatitis B antigen or VDRL as required by country of destination or per principal's request shall be done' (section 2.3).
- The results of the PEME are to be provided to the employment agency within seventy-two hours (section 2.5).
- 'In the event that medical findings indicate the need for certain minor ailments to be treated, the clinic shall advise the agency/company of the estimated period/time that said treatment shall be undertaken so that the same may be referred to the agency/company for his acquiescence' (section 2.5).

### Comment 2: Philippines

There is no reference in the Guidelines to the provision of the results to the OFW or to post-test counselling.

CARAM reports that prior to the medical examination, migrant workers have to give written permission to allow the medical report to be given to the agency. 'In the event of a failing result, migrant workers were directed to either return to the clinic for confirmation and treatment, or they were told they failed the test and could no longer proceed with their applications' (CARAM-Asia, 2005).

#### *Migrant Workers and Overseas Filipinos Act, 1995:*

- Purpose is to protect and promote the welfare of Filipino migrant workers, their families and overseas Filipinos in distress.
- Notes that the dignity and fundamental human rights and freedoms of Filipino citizens shall not, at any time, be compromised or violated (section 2 (c)).
- Provides that the State shall deploy overseas Filipino workers only in countries where the rights of Filipino migrant workers are protected (section 4).
- This section also notes that 'taking positive, concrete measures to protect the rights of migrant workers' is sufficient to satisfy this requirement (section 4(d)).

### Bilateral agreements

The Philippines has entered into bilateral labour agreements with 13 countries – twelve countries of destinations and one country of origin. Labour recruitment and special hiring agreements have been concluded with Norway, Papua New Guinea, South Korea, Switzerland, Taiwan and United Kingdom. Labour, employment and manpower agreements have been concluded with Commonwealth of Northern Marianas Islands, Iraq, Jordan, Kuwait, Libya and Qatar (Go, 2006).

### Translation and Use of the ILO's *Code of Practice*

- The ILO's *Code of Practice on HIV/AIDS and the World of Work* is available in English in the Philippines, and steps are being taken to translate it into Filipino. The *Code of Practice* is being used by the ILO's tripartite partners as a basis for workplace action.

## Singapore

Population, 2005:.....	4,236,000
HIV prevalence, 2007:.....	0.2 per cent
Estimated No. people living with HIV, 2007:.....	4,200 (29 per cent women)
Stock of migrants in the country, 2005:.....	1,843,000
Official deployment of migrant workers:.....	100,000 – 150,000 (2005)
Top destinations:.....	n.d.

In 2005 the stock of estimated migrants in Singapore was 1.8 million. The number of Singaporeans living overseas in 2005 was estimated to be between 100,000-150,000 (Yap, 2006).

## HIV in the workplace

There is no law in Singapore prohibiting discrimination in employment on the grounds of HIV status. In 2006, the Health Promotion Board and AIDS Business Alliance launched the RESPECT Programme (Rallying Employers to Support the Prevention, Education and Control of STI/HIV/AIDS).

## Receiving migrant workers

*Immigration Act:*

- Defines as a prohibited immigrant ‘any person suffering from Acquired Immune Deficiency Syndrome or infected with the Human Immunodeficiency Virus’ (section 8(3)(ba)).

*Employment of Foreign Workers Act:*

- States that applicants for a work permit or renewal are required to have a medical examination, which includes an HIV test.
- This requirement also applies to foreigners who seek employment passes of six months duration or more.
- Foreigners testing positive for HIV infection will not be granted work permits or employment passes and will be deported (Singapore Ministry of Health, 2000).

## Sending migrant workers

No relevant information found.

## Bilateral agreements

No relevant information found.

## Translation and Use of the ILO’s *Code of Practice*

- The ILO’s *Code of Practice on HIV/AIDS and the World of Work* is available in English in Singapore.

## Thailand

Population, 2005:.....	64,233,000
HIV prevalence, 2007: .....	1.4 per cent
Estimated No. people living with HIV, 2007: .....	610,000 (42 per cent women)
Stock of migrants in the country, 2005: .....	1,050,000
Official deployment of migrant workers: .....	148,596 departures (2004)
Top destinations: .....	Taiwan, Singapore, Israel, Malaysia, Brunei

In 2005 the stock of estimated migrants in Thailand was about 1 million (UN DESA, 2005)<sup>28</sup>. The same year about 148,596 Thai workers left for overseas employment, of whom about 18 per cent were female (10). Top destination countries included (Taiwan (69,982); Singapore (11,338); Israel (10,611) Japan (5,857); Malaysia (5,853); Brunei (5,680) and Hong Kong (4,126). An estimated 109,492 (73.7 per cent) of these workers were tested for HIV before departure. Over the period 2001-2005 the Thai Ministry of Labour reported that 41 HIV positive workers were repatriated from the following countries: Taiwan (37); Brunei (3); and Singapore (1).

## HIV in the workplace

There is no law in Thailand prohibiting discrimination in employment on the grounds of HIV status.

*Code of Practice on Prevention and Management of HIV/AIDS in the Workplace*, 2005, Department of Labour Protection and Welfare:

- The Code prohibits discrimination in employment on the grounds of HIV status (section 5.1.1).
- The Code is non-binding.

## Receiving migrant workers

*Immigration Act* BE 2522 (1979):

- Prohibits the entry of persons with prescribed diseases.

### Comment 1: Thailand

HIV is not a prescribed disease. The Thai government has initiated a process of registering previously undocumented workers from the neighbouring countries of Cambodia, Lao PDR and Myanmar. An HIV test is not required for registration.

<sup>28</sup> United Nations, Department of Economic and Social Affairs: *Trends in total migrant stock: the 2005 revision* (New York, 2005).

## Sending migrant workers

*Employment Agencies and Employment Seekers Protection Act* BE 2528 (1985):

- Requires employment agencies to send employment seekers for a physical examination according to the criteria, method and at the medical facility prescribed by the Director General.

*Notification on the Application for Approval as Place for Physical Examination of Job Seekers Going to Work Abroad Under Job Seekers Placement and Job Seekers Protection Act*, 1990:

- The notification specifies separate forms of certificates for Saudi Arabia and for other countries.

## Bilateral agreements

MOUs have been signed with countries including Cambodia, Lao PDR, and Myanmar. The memoranda with these countries provide that ‘Workers of both Parties are entitled to wage and other benefits due for local workers based on the principles of non-discrimination and equality of sex, race, and religion.’

### Comment 2: Thailand

At the time of publication of this research, Thailand was offering registered migrants a comprehensive health package, including PMTCT and OI treatment. Some registered migrants in Thailand were receiving ART through support from the Global Fund to Fight AIDS, Tuberculosis and Malaria.

## Translation and Use of the ILO’s *Code of Practice*

The ILO’s *Code of Practice on HIV/AIDS and the World of Work* has been translated into Thai and is being used by the ILO’s tripartite partners as a basis for workplace action. In addition, Thailand’s Ministry of Labour developed its own *Code of Practice on Prevention and Management of HIV/AIDS in the Establishment* in 2005 which was informed by the ILO’s *Code of Practice*. On the topic of HIV testing, the Ministerial *Code of Practice* notes the following:

- 5.1.1 There must be no requirement for testing for HIV/AIDS or request for a reference certifying whether a person is HIV-positive or negative as part of the screening of job applicants and employees, as part of the employment conditions, or as part of promotion or granting of benefits for the employees (Page 3).

At the time of publishing this study, the ILO and UNAIDS were supporting Thailand’s Ministry of Labour to carry out consultations to draft a *National Code of Practice on HIV/AIDS Prevention and Management in the Public and Private Sector Workplace*.

## Viet Nam

Population, 2005:.....	84,238,000
HIV prevalence, 2007: .....	0.5 per cent
Estimated No. people living with HIV, 2007: .....	290,000 (27 per cent women)
Stock of migrants in the country, 2005: .....	21,000
Official deployment of migrant workers: .....	67,447
Top destinations: .....	Taiwan, Malaysia, South Korea, Japan

In 2004, 67,447 Vietnamese workers went abroad for work contracts, including to Taiwan (37,144); Malaysia (14,567); South Korea (4,779) and Japan (2,752). An estimated 56,490 (83.8 per cent) were tested for HIV prior to departure (Thang, 2006). In 2005 there were about 21,000 migrants in the country.

## HIV in the workplace

*Labour Code, 2002:*

- ‘An employee must have his health examined during recruitment and, on a regular basis, during employment...’ (article 102).

*Law on HIV/AIDS Prevention and Control, 2006:*

- Prohibits ‘discriminating against HIV-infected people’ (article 8).
- Article 14(2) states that the employer shall not be allowed to
  - (a) Terminate the labour or job contract of an employee or cause difficulties to this person in his/her work on the ground that such person is infected with HIV;
  - (b) Force a physically fit employee to change the job he/she has been doing on the ground that such person is infected with HIV;
  - (c) Refuse to give a salary raise to or to promote an employee, or fail to ensure his/her legitimate rights or benefits on the ground that such person is infected with HIV; and
  - (d) Request a job applicant to have an HIV test or produce an HIV test result, or refuse to recruit a person on the ground that such person is infected with HIV... (unless the application is for an occupation or profession on the government list.)
- The Government may issue ‘a list of occupations and professions requiring HIV testing before recruitment’ (article 28(3)).
- The law applies to Vietnamese and foreign agencies, organizations and individuals in Viet Nam (article 1.2)’.

## Receiving migrant workers

*Decree on Issuance of Work Permits for Foreigners Working in Enterprises and Organisations in Viet Nam, 1996:*

Circular No. 08/2000/TT-BLĐTB&XH, approved 29 March 2000: *Guidelines on how to Issue Work Permits for Foreigners Working in Enterprises and Organizations in Viet Nam* II.1.a: The application for a work permit must include a health certificate issued by a Vietnamese hospital or clinic at no lower than the provincial level or issued by other country following local legal regulations. The health certificate is valid in 6 months (six months) from the date of its issuance to the date when the authorized government office receives the application for work permit.

*Circular providing guidelines for issuance of work permits for foreigners working in enterprises and organizations in Viet Nam (No. 09-LTDBXH-TT) 1997:*

- Reiterate the requirement for a health certificate ‘issued by a Vietnamese hospital at no lower than the provincial level or issued by a foreign invested hospital or health clinic...’ (section II 1(b)).
- For renewal of the work permit, no health certificate is required if the application is lodged before the expiry of the work permit.

## Sending migrant workers

*Decree on Vietnamese Manpower Export (No. 152) 1999:*

- Vietnamese seeking to work overseas must submit a health certificate to the relevant manpower-exporting enterprise (Article 7(2)(c)).

*Guidelines on the Implementation of the Decree on Vietnamese Manpower Export (Circular No. 28/1999/TT-BLĐTBXH) 1999, Ministry of Labour, Invalids and Social Affairs:*

- Reiterates the need for a health certificate.

### Comment

Pre-departure HIV testing is not government policy. However, it is a requirement of all employers and employment agencies receiving Vietnamese migrant workers. Therefore recruiting agencies in Viet Nam include an HIV test in the medical clearance form and all prospective migrant workers have to undergo the test.

*Law on HIV/AIDS Prevention and Control, 2006:*

‘Agencies and organizations engaged in sending Vietnamese people to work or study abroad shall be responsible for regularly organizing propaganda and education on HIV/AIDS prevention and control for every labourer and trainee’ (article 16.4).

*Law on Sending Vietnamese Workers Overseas Based on Labour Contracts:*

Section 2, article 30.6, section 3/article 33.6 reads as follows: “sending companies are responsible for ensuring regular health checkups for workers, provision of treatment to workers in case of sickness or labour accidents. . . In case of loss of working ability, workers will be sent back to Viet Nam with support of sending companies”. Chapter III, section I, article 43.2 reads: “those to work overseas have to submit health certificate issued by relevant health agency”.

*Decree on Instructing in Details on How to Implement Some Articles of the AIDS Law:*

Article 20 reads: “a list of occupations and professions requiring HIV testing before recruitment: air-crew per civil aviation law, special occupations related to national defense/security. Detecting workers with HIV during recruitment, employers have to fully follow article 14 of AIDS law. Depending on the HIV/AIDS situation, MoH in close collaboration with MoLISA supplement other occupations/professions requiring HIV testing before recruitment and submit for PM’s approval”.

## **Bilateral agreements**

No relevant information found.

## **Translation and Use of the ILO’s *Code of Practice***

The ILO’s *Code of Practice on HIV/AIDS and the World of Work* has been translated into Vietnamese and is being used by the ILO’s tripartite partners as a basis for workplace action.

## Analysis of survey responses from the ILO's tripartite partners

In the previous section, we surveyed national laws and policies relevant to HIV-based discrimination and mandatory HIV testing for work in the eight countries covered by this study. This next section is different in that it synthesizes insights, feedback and concerns by some of the ILO's tripartite partners within these countries. That is, it is not about the laws and policies, but rather, about how some of the ILO's partners *perceive* the practice of mandatory HIV testing and their own roles regarding it.

As mentioned in the section on methodology, these comments were not collected to determine the official positions of the ministries or workers' and employers' organizations whose representatives were consulted, but, rather, to identify gaps, convergences and opportunities for dialogue. Therefore, the responses will not be presented on a country-by-country basis, but together, grouped around the five major observations that arose from the survey results. (We refer to particular countries by a letter designation: Country "A"; Country "B"... etc.)

After the discussion of each observation, a box on "Areas for action" is provided. This is meant as a starting point for the ILO's tripartite partners who want to address these issues in their own countries.

### 1. The partners of the ILO are not, for the most part, providing HIV-related services to migrant workers

Of the seven survey responses, three reported that their governments were providing pre-departure orientations for their nationals going overseas for work. The orientations include either a module on HIV/AIDS or are supplemented with HIV/AIDS prevention information. None of the seven mentioned services for migrant workers during the later stages of migration, including upon return to their country of origin. (The survey did not delve into the question of the effectiveness of pre-departure orientations.)

Only one response mentioned the provision of HIV/AIDS services for incoming migrants, and that was limited to the distribution of leaflets.

One workers' organization indicated that it conducts activities in the community, and two employers' organizations noted that they have workplace programmes which could, potentially, benefit incoming and outgoing migrant workers. Nevertheless, the specific situation, needs and vulnerabilities of migrant workers are not being targeted.

It would be unrealistic to expect one organization in a given country to provide all HIV/AIDS-related services to migrant workers. What is essential, however, is that there exist a referral network of service-providers at the national level – including counselling, HIV testing and STI testing and treatment, ART, treatment of opportunistic infections, and legal support. While ministries of labour and workers' and employers' organizations may not be able to – nor should be expected to – provide all of these services, they are often very well positioned to serve as a conduit for workers to access them.

What the survey failed to identify were any kinds of services for migrants after they test positive for HIV in their pre-departure medical screening or after they test positive abroad (and are at the point of being deported/repatriated). There are many logistical difficulties in reaching migrant workers once they are on the move. Therefore, awareness-raising and services based in the source communities and workplaces are critical in reaching potential migrant workers long before they migrate, and after they return. Community-based referral networks in sending countries can also be particularly useful.

### *Areas for action:*

- Identify and map what services are available:

Whether or not the particular agency/organization will be providing direct services to migrant workers, knowing what services are already available is a first step. With this information in hand, tripartite partners can consider how best to get involved in ensuring migrant workers are better linked to HIV-related services. The aim is to help ensure that workers are able to protect themselves, have a greater understanding of living with HIV, and have access to counselling, treatment, care and support.

- Reach out to migrant workers at all the stages of migration:

Based on a clearer picture of what services are available to migrant workers, social partners may look for creative ways to link up with various service providers, and to assist migrant workers to access the network. Community- and workplace-based awareness building and service present a key entry point.

## **2. No tripartite partners responded that they had handled a case of a migrant worker being denied work because of his/her HIV status**

Three respondents to the survey said that they were aware of their own nationals being denied work abroad as a result of testing positive for HIV. However, none of these respondents had actually handled such a case. Although mandatory HIV testing is certainly a labour rights issue, it is possible that the ILO's tripartite partners in the countries surveyed do not see this as part of their mandate and/or are not tasked to handle these cases.

This leads us to ask: who, if not the ministries of labour and workers' and employers' organizations in a given country, has the mandate to protect workers' rights in the context of mandatory HIV testing?

In addressing HIV/AIDS among migrant workers, tripartite partners need to know whether the services and coverage provided by other organizations are sufficient to ensure that HIV-positive workers and their families are not falling through the cracks. The least that can be done to alleviate the negative impact of mandatory HIV testing is to ensure that those who test positive – migrant or non-migrant workers – have their basic rights protected, and have access to the necessary support, treatment and care networks.

### *Areas for action:*

- Identify who is handling cases of HIV-positive migrant workers being denied employment:

The tripartite partners may not take up, directly, cases of migrant workers being denied employment because of their HIV status. They can, however, play an important leadership role in mobilizing and coordinating with relevant partners – NGOs, human rights organizations and legal defence funds – to establish referral networks and standard procedures.

- Map out steps HIV-positive migrant workers can take to redress their situation:

HIV-positive migrant workers may come to your organization for information on how to redress their situation. By providing a map or a checklist of existing services and organizations, you can help stop HIV-positive migrant workers from falling through the gaps.

- Discuss why your organization is not handling these cases and consider doing so:

Ministries of labour, workers' or employers' organizations have an excellent opportunity for dialogue within their own membership and amongst other agencies. At the very least, discussion of why no one is following these cases can raise awareness and lead to advocacy against mandatory testing.

### **3. Opinions on mandatory HIV testing vary across the organizations**

The survey responses reveal a range of opinions on mandatory HIV testing, both within the countries and across organizations consulted. As cited in the following box one workers' organization representative in country "A" voices support for mandatory HIV testing, while another workers' organization representative in country "B" opposes mandatory testing. Likewise, employers' organizations' representatives from countries "A" and "C" express positive and negative views, respectively, on mandatory testing.

What makes this comparison even more interesting is that the employers' organization representative in country "A" opposes mandatory HIV testing (under certain conditions), while the workers' organization representative in country "A" supports it.

<p><i>“[Our trade union] supports...regulation requiring migrant workers coming to [our country] to undergo medical examination and certification. <b>We therefore have no objection to HIV test requirement imposed on [migrants from our country] seeking to work in other countries”.</b></i></p> <p>(Workers’ organization, Country A)</p>	<p><i>“<b>I don’t agree that [workers from our country] should be tested for HIV before being allowed to work outside the country”.</b></i></p> <p>(Workers’ organization, Country B)</p>
<p><i>“For those... working in the health industry, [HIV testing] may be justifiable, but for other sectors such test is most likely irrelevant.... HIV is a personal matter and <b>a test should only be conducted if it is relevant to ensure safety and health of people at work.</b> No other reason can justify such a test”.</i></p> <p>(Employers’ organization, Country A)</p>	<p><i>“Every country has its own regulations in accepting a foreign worker’s application. <b>All foreign workers, including [those from our country], should comply with the law and regulations of that particular country they intend to work in”.</b></i></p> <p>(Employers’ organization, Country C)</p>

As a first step, it is important to hold national dialogues to find out why some people favour mandatory HIV testing. Such dialogue can identify fears, misconceptions and prejudices that are often at the root of support for mandatory testing, and it can help find constructive ways to overcome them. This dialogue can also bring out, as mentioned below, that the positive benefits of voluntary HIV counselling and testing are sometimes being confused with the negative impact of mandatory testing.

#### *Areas for action:*

- Begin a dialogue within your own organization on mandatory HIV testing:

Workers’ and employers’ organizations are well-placed to discuss the issue with their members and to align their own stances regarding mandatory testing. This dialogue should be informed by the ILO’s *Code of Practice on HIV/AIDS and the World of Work*, and their national *Codes of Practice* (where existing) which set out very clear obligations not to engage in mandatory HIV testing for employment.

- Engage in a dialogue with all the tripartite partners at the national level:

Once you have settled on a common position within your organization on mandatory HIV testing, then you can engage the other partners in a tripartite discussion. From the outset, it is important not to assume that a given partner has a certain position on mandatory testing. Rather, use the opportunity to listen and to exchange opinions. In addition to discussing the international legal instruments that prohibit mandatory HIV testing, it may be necessary to conduct new research at the country level to show the negative consequences of mandatory HIV testing.

#### 4. The benefits of voluntary testing are sometimes confounded with the negative practice of mandatory HIV testing for employment

Some of the survey responses confound the benefits of voluntary HIV testing (knowing one's own status) with the negative practice of mandatory HIV testing (screening for purposes of employment). In the experience of the ILO and IOM in the region, this is a common misunderstanding.

A number of respondents rightly point out that HIV testing itself can be good, if it empowers individuals to look after their health. Indeed, this is consistent with WHO guidelines on counselling and testing that encourage people to know their status, in order to prevent further HIV transmission and to access appropriate treatment, care and support services.

However, subjecting a worker to an HIV test when that worker (or spouse or family) is not prepared for the results exposes him or her to stigma, discrimination, and, in some cases, violence. We should consider the HIV test as a means for workers to take charge of their health, not as a way to restrict a person's right to work.

This confusion over voluntary and mandatory testing is seen in the response of the government representative of Country "B" in the box below:

*"It is always good to be aware of [one's] own physical condition, especially when leaving family and going to [a] place where there could be no support group. I see going through medical exams, including HIV test, as a positive thing".*

(Government, Country B)

*"In my opinion, testing HIV is not a problem. The problem is that after HIV test, if a worker is HIV-positive and he/she is not allowed to work abroad, that is a problem".*

(Employer's organization, Country C)

The failure to distinguish between voluntary and mandatory testing reflects a lack of sensitization on the subject and signals a need for dialogue. It is possible that, once we clarify the differences between the two types of HIV testing, the ILO's tripartite partners will encourage their members to know their own status and discourage the use of mandatory testing, both for workers inside and outside their countries of origin.

### *Areas for action:*

- Provide sensitization sessions on differences between voluntary and mandatory testing:  
Take every opportunity to clarify the benefits of knowing one's own HIV status, as distinct from the negative practice of mandatory testing. Educate partners and staff on the barriers to HIV testing, stigma and discrimination, and the importance of counselling. Encourage them to put themselves "in the shoes" of migrant workers, imagining what it would be like to be denied employment because of their HIV status.
- Facilitate access of your members to approved HIV testing centres in the community:  
Entering into a dialogue about voluntary versus mandatory testing creates a great opportunity to respectfully encourage your members to know their own status. While the ILO *Code of Practice* does not encourage employers to test workers in the workplace, it recognizes that workplaces can serve as conduits to services in the community.

## **5. Migrant-sending countries sometimes facilitate mandatory HIV testing at the request of migrant-receiving countries, in opposition to their own standards and legislation**

Most countries in this study have laws or policies of some sort which prohibit mandatory HIV testing and discrimination on the grounds of HIV status. However, a number of these countries sometimes facilitate mandatory HIV testing of their citizens seeking to migrate to other countries for work (for individual country contexts, see the 'Review of National Policies and Legislation' in this report). In some cases, an HIV test may be part of the standard pre-employment medical examination and is carried out in the migrant workers' country of origin. The testing may even take place at state-funded medical centres.

'... unless specified by the employer, we perform the Phase I in all pre-employment medical examinations of overseas workers, which includes the 8 basic examinations, HIV/AIDS test, VDRL test, Hepatitis B test and pregnancy test if female'.

(Respondent from a testing clinic for overseas workers, Country B)

The migrant-sending country is faced with a difficult choice. It can either refuse to comply with migrant-receiving countries' requests for mandatory HIV testing (which would mean virtually halting legal migration for work to those countries), or it can facilitate mandatory HIV testing (which the migrant-sending country has identified as a violation of workers' rights).

For example, in the case of one country surveyed, the government respondent noted that regulations prohibited HIV testing as a pre-requisite for recruitment. However, an MOU between that same country and a country of destination requires health

screening for labour migrants: this includes the HIV test. A closer look at practices at the country level may reveal that countries of origin may be entering into agreements – formal or informal – that provide for mandatory HIV testing.

“According to the national AIDS law, it is considered unlawful to have compulsory HIV testing and the right to privacy of individuals with HIV shall be guaranteed. These mandatory HIV tests are usually a requirement of the receiving country, thus need to be followed by the migrants in order to work outside of the country”.

“At present, we can only follow the requirements of the recipient countries for overseas workers. HIV testing can be discriminating, particularly for people applying for work”.

(Government, Country B)

As discussed above, it is sometimes unclear what the relationship is between the labour and migration legislation. This situation can be compounded if there is a bilateral agreement (or even an informal understanding) between the countries that mandate HIV testing for migrants. Before entering into a dialogue between countries of origin and destination, the tripartite partners should be aware of their own country’s agreements and engage national actors on this topic.

It is important that discussions on HIV mandatory testing do not dissolve into pitting migrant-sending and migrant-receiving countries against each other. The political and economic situation is complex, and all countries involved must first understand their individual roles in mandatory testing in order to limit, and to eventually abolish, this negative practice.

#### *Areas for action:*

- Identify the bilateral agreements relating to HIV and migration:

Given the complex political and economic realities of migrant-sending and migrant-receiving countries, establishing social dialogue on mandatory HIV testing may be difficult. A good starting point is for tripartite partners to become aware of their own country’s agreements on mandating HIV testing and determine how they coincide with (or contradict) their own labour and migration legislation.

- Engage national actors in a public policy debate:

As a next step, tripartite partners should identify who is in charge of facilitating mandatory testing at the national level and where the bulk of this testing is being carried out. (For example, if employment agencies are facilitating mandatory HIV testing at a state-funded medical centre then workers’ and employers’ organizations can bring this to the attention of the government and point to discrepancies in the national legislation.) Once the situation becomes clear at the national level, then the partners can foment a more informed dialogue between migrant-sending and migrant-receiving countries within, and beyond, South-East Asia.

## Conclusion

This study, undertaken by the ILO and IOM, reviewed the legislations and policies of eight countries in South-East Asia with the purpose of promoting informed discussions between governments and workers' and employers' organizations on mandatory HIV testing for migrant workers.

The desk review of Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam pointed out that despite the existence of national laws and policies protecting workers against HIV-based discrimination and mandatory HIV testing in these countries, those that are mainly countries of origin permit and facilitate pre-departure health examinations of migrant workers, and these include an HIV test where required by the receiving country. From an ILO and IOM perspective, however, any HIV testing related to entry and stay should be done voluntarily, on the basis of informed consent. Adequate pre- and post-test counselling should be carried out, and confidentiality strictly protected.

To supplement the law and policies desk review, surveys were sent out to the ILO's tripartite partners (workers' and employers' organizations and ministries of labour) in the participating countries. The responses helped illustrate how some of the ILO's partners *perceive* the practice of mandatory HIV testing and their own roles regarding it. These unofficial comments revealed some interesting trends and suggested recommendations of their own for the tripartite partners.

While this report makes several recommendations in the section above, there are still major gaps in our knowledge about the practice of mandatory HIV testing of migrant workers. Most tripartite partners consulted were not aware of cases of mandatory testing occurring in their countries, although it is a commonplace occurrence. Workers who have been mandatorily tested are not going to the tripartite partners for advice or support, and, except for a few specialized NGOs, they oftentimes do not seek help elsewhere either. It is important that these gaps in knowledge are filled and that all stakeholders involved are aware of their role in HIV mandatory testing if appropriate and coherent policies to protect the human rights of migrant workers are to be shaped.

Upwards of hundreds of thousands of workers from the region are being tested for HIV without their informed consent each year, in contradiction of the ILO *Code of Practice on HIV/AIDS and the World of Work*, and in violation of their human rights. Moreover, some of them have their rights violated even further by being denied employment as a result of their HIV status.

We hope that this study is a call to action to protect the dignity of workers, within the overall framework of respect for their basic human rights, who are being excluded from the labour market by this negative practice of mandatory HIV testing.

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## Appendices

### I. Laws and policies reviewed

#### Cambodia

*Law on Immigration, 1994*

*Law on the Prevention and Control of HIV/AIDS, 2002*

*Implementing Guidelines of the Law on the Prevention and Control of HIV/AIDS, 2005*

*Decree on the Creation of the HIV/AIDS Committee in Enterprises and Establishment and Managing HIV/AIDS in the Workplace, 2006*

*Decree on the Management of Foreigners Work Permits, 1995*

*Decree on Education of HIV/AIDS, Safe Migration and Labor Rights for Cambodian Workers Abroad No. 108, 2006*

*Sub-Decree on the Export of Khmer Labor to Work Overseas, 1995*

*Sub-Decree on the Formalities of Application for Authorization to Enter, Exit and Reside in the Kingdom of Cambodia of Immigrant Aliens, 1996*

*Trade Union Policy on Prevention and Management of HIV/AIDS in the Workplace in Cambodia, 2006*

*Policy, Strategy and Guidelines for HIV/AIDS Counselling and Testing, 2002*

#### Indonesia

*Placement and Protection of Indonesian Overseas Worker Act, 2004*

*Decree on HIV/AIDS Prevention and Control in the Workplace (KEP.68/MEN/IV/2004) 2004*

*Decree of the Minister of Health regarding general check-up for Indonesian workers to be employed overseas and for expatriates to work in Indonesia (No. 138/MENKES/SK/II/1996) 1996, Minister of Health*

*Implementing Guidelines for the Prevention and Treatment of HIV/AIDS in the Workplace (KEP.20/DJPPK/VI/2005) 2005*

*Ministerial Regulation concerning 'Final Preparation of Indonesian Migrant Workers' (No. PER.04/MEN/II/2005) 2005*

*Tripartite Declaration 'Commitment to Combat HIV/AIDS in the World of Work, 2003*

*Memorandum of Understanding on the Sending of Workers to the Republic of Korea under the Employment Permit System, 2006*

#### Malaysia

*Immigration Act, 1959/63*

*Code of practice on prevention and management of HIV/AIDS at the workplace, 2001*

## Myanmar

*Law Relating to Overseas Employment, 1999*

*Memorandum of Understandings between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation on the Employment of Workers, 2003*

## Philippines

*Alien Social Integration Act, 1995*

*Migrant Workers and Overseas Filipinos Act, 1995*

*Philippine AIDS Prevention and Control Act, 1998*

*Rules and Regulations to guide the implementation of the Philippine AIDS Prevention and Control Act*

*Operational Guidelines In the Conduct of Pre-Employment Medical Examination of Overseas Workers and Seafarers, 2003*

## Singapore

*Employment of Foreign Workers Act*

*Immigration Act*

## Thailand

*Employment Agencies and Employment Seekers Protection Act BE 2528 (1985)*

*Immigration Act BE 2522 (1979)*

*Notification on the Application for Approval as Place for Physical Examination of Job Seekers Going to Work Abroad Under Job Seekers Placement and Job Seekers Protection Act, 1990*

*Code of Practice on Prevention and Management of HIV/AIDS in the Workplace, 2005*

## Viet Nam

*Labour Code, 2002*

*Law on HIV/AIDS Prevention and Control, 2006*

*Decree on Issuance of Work Permits for Foreigners Working in Enterprises and Organisations in Viet Nam, 1996*

*Decree on Vietnamese Manpower Export (No. 152) 1999*

*Circular providing guidelines for issuance of work permits for foreigners working in enterprises and organizations in Viet Nam (No. 09-LTDBXH-TT) 1997*

*Guidelines on the Implementation of the Decree on Vietnamese Manpower Export (Circular No. 28/1999/TT-BLDTBXH) 1999*

## II. Study Questionnaire

1. When [citizens of your country] go abroad for work, they are sometimes asked to take an HIV test. What is your opinion about workers [from your country] being tested for HIV before being allowed to work outside [of your country]?
2. Are you aware of/have you ever handled a case involving a worker [from your country] going abroad and HIV testing? (For example, a worker who tested HIV positive before leaving [the country] and was, thus, denied work abroad.) If so, please explain.
3. Does your organization provide HIV-related services to workers [from your country] going abroad, or to migrants from other countries coming to [your country]? (For example, pre- and post-arrival orientations or workshops on HIV.) If so, please explain.

### III. Excerpt From The ILO Law And Practice Report

(HIV/AIDS and the World of Work, Report IV(1), International Labour Conference, 98<sup>th</sup> Session, Geneva, 2009)

#### Testing, screening and confidentiality

173. The way in which testing, screening and confidentiality are dealt with is central to whether national action against HIV/AIDS is consistent with the code of practice and with the principles adopted by almost all actors on this question. The code treats this very difficult subject at some length, as follows:

#### 4.6. *Screening for purposes of exclusion from employment or work processes*

HIV/AIDS screening should not be required of job applicants or persons in employment.

#### 4.7. *Confidentiality*

There is no justification for asking job applicants or workers to disclose HIV-related personal information. Nor should co-workers be obliged to reveal such personal information about fellow workers. Access to personal data relating to a worker's HIV status should be bound by the rules of confidentiality consistent with the ILO's code of practice on the protection of workers' personal data, 1997.

...

#### 8. *Testing*

Testing for HIV should not be carried out at the workplace except as specified in this code. It is unnecessary and imperils the human rights and dignity of workers: test results may be revealed and misused, and the informed consent of workers may not always be fully free or based on an appreciation of all the facts and implications of testing. Even outside the workplace, confidential testing for HIV should be the consequence of voluntary informed consent and performed by suitably qualified personnel only, in conditions of the strictest confidentiality.

#### 8.1. *Prohibition in recruitment and employment*

HIV testing should not be required at the time of recruitment or as a condition of continued employment. Any routine medical testing, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing.

#### 8.2. *Prohibition for insurance purposes*

- (a) HIV testing should not be required as a condition of eligibility for national social security schemes, general insurance policies, occupational schemes and health insurance.
- (b) Insurance companies should not require HIV testing before agreeing to provide coverage for a given workplace. They may base their cost and revenue estimates and their actuarial calculations on available epidemiological data for the general population.

- (c) Employers should not facilitate any testing for insurance purposes and all information that they already have should remain confidential.

174. Although they are dealt with extensively in the code of practice, these principles are not always easy either to reconcile or to apply in practice. They also express conflicting imperatives. Both individuals and society as a whole have a significant interest in discovering and knowing everyone's HIV status, especially in high-prevalence situations or when health and safety are at stake. On the other hand, the possibility – indeed likelihood – of stigmatization and discrimination against HIV-positive persons is a powerful disincentive to undergoing tests and getting treatment and care in and beyond the workplace.

175. The principle that testing should not be compulsory, which has been accepted by all co-sponsors of UNAIDS and by most activist organizations, is in fact widely violated. Pre-employment testing is a persistent phenomenon, in spite of widespread legislative prohibition of the practice. In addition, a number of countries require HIV testing before allowing migrants to enter their countries, and do not allow HIV-positive individuals to enter. In many cases, this reflects a conviction that HIV/AIDS is a “foreign” phenomenon and that it can be blocked by such measures (see below).

176. Nevertheless, there is today a change in the medical aspects of HIV/AIDS since this principle was adopted in the code of practice in 2001. The importance of knowing one's status is more fully understood, and treatment for the control of the virus is now available far more widely. As was already indicated in Chapter I, the expanded provision of ARV treatment has meant that significant numbers of lives have been extended.

177. This naturally raises the question of whether it has become more imperative to require that testing be carried out, so that people can know their status and obtain treatment. Is there any valid reason for qualifying the rule against compulsory testing in this situation?

178. The response of the AIDS community remains negative. In the first place, treatment is *more* widely available; it is far from *universally* available, and for financial and institutional reasons remains beyond the reach of most sections of the population in most places. Second, in spite of progress in awareness, persons living with and affected by HIV/AIDS are still subject to rampant discrimination, stigmatization, loss of employment and social ostracism. Although the code of practice calls for a more open and accepting environment, the time has not yet arrived when it is actually the prevailing philosophy.

179. The discussion on testing has now been put into a wider framework of encouraging everyone to “know their status”. This makes it incumbent on all those concerned – governments, health services, employers, and others – to work towards a situation in which most people wish to know their status and it is relatively easy for everyone wishing to know their status to be able to do so. A broad societal response is required for this to be practical. It means, among other things, that workplaces need to be able to ensure confidentiality and job security, and to promote

access to treatment. Knowing one's status helps to ensure sustainability of enterprises, while maintaining the material benefits and dignity for individuals with HIV that comes from having access to and maintaining gainful employment. The work the ILO has been doing together with the UNAIDS secretariat on employment opportunities for PLHIV is in the early stages but has already been a significant advance. Nevertheless, a great deal remains to be done.

## Forms and modalities of testing

180. The ILO code of practice provides not only that testing must be voluntary, but that it should take place only with informed consent. As Chapter III shows, some national laws provide that this consent has to be in writing.

181. Nevertheless, the proportion of people who actually do know their status is very low in most regions. A Joint WHO/UNICEF/UNAIDS Technical Consultation on scaling up HIV testing and counselling in Asia and the Pacific was informed that fewer than 10 per cent of PLHIV in the region are aware of their status.<sup>34</sup> The consultation concluded that there is an urgent need to scale up access to HIV counselling and testing as a means of enhancing access to comprehensive HIV prevention, care and treatment. It also stated that existing models of voluntary counselling and testing need to be strengthened, scaled up and complemented by approaches that build on the potential of health services to offer HIV counselling and testing. This kind of approach to HIV testing, initiated by healthcare providers – so-called “provider-initiated counselling and testing”, or PICT – should be accompanied by counselling and confidentiality and conditional on the person's informed consent (that is, the “three Cs”). The WHO and UNAIDS secretariat issued guidance on PICT in May 2007.

Another aspect of this approach has been applied with respect to the prevention of mother-to-child transmission, whereby all pregnant women are tested for HIV unless they refuse.

182. This kind of approach is formally in compliance with the ILO code's position that testing must be voluntary and based on informed as well as formal consent. It certainly has advantages in increasing the number of people who are informed of their status, and in the right circumstances may also reduce the stigma often attached to testing, since it does not test only patients at risk, but all patients attending health facilities even if they are asymptomatic.

183. However, the Office has noted concerns that PICT may in fact result in disguised mandatory testing because the persons concerned must take action to prevent tests being carried out, which puts them under considerable pressure to agree to testing. Given the wide variations in the way testing is made available, and the practical difficulties of ensuring that the “three Cs” are in fact in place in all situations, there are so many cases in which the conditions of voluntariness are

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<sup>34</sup> Conclusions and recommendations, Joint WHO/UNICEF/UNAIDS Technical Consultation on scaling up HIV testing and counselling in Asia and the Pacific, Phnom Penh, Cambodia, 4-6 June 2007, available at: [http://www.searo.who.int/LinkFiles/AIDS\\_ConclusionsNRRecommendations.pdf](http://www.searo.who.int/LinkFiles/AIDS_ConclusionsNRRecommendations.pdf).

questionable that considerable care needs to be exercised in the application of PICT. The Office has therefore found it difficult to endorse this principle without reservations, in the light of the code of practice and lessons drawn from experience.

184. The Recommendation does not have to impose on member States the choice of means by which the principle of voluntary testing is reconciled with the urgent need to expand the number of people who know their status. It could leave open the possibility for member States, in consultation with relevant stakeholders and the community, including social partners, to look at their specific context and reflect on an effective solution to testing with respect for fundamental rights, reinforcing the need for member States to design and implement prevention strategies hand-in-hand with detection. It might be appropriate for the Recommendation to call for more widely available testing, outside the workplace, and safeguards for privacy, supported by measures to make treatment more widely available and more affordable.

185. In addition, in view of the widespread practice of requiring that some occupational categories be tested (see Chapter III), there should be a discussion in the course of adopting the proposed Recommendation as to whether the code's language should be re-examined to set the conditions under which limitations to voluntariness may be permissible. This is a basic human rights principle, but the number of countries or professional certifying bodies that have found it necessary to qualify that principle is sufficient to make further discussion necessary.

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<sup>35</sup> See WHO/UNAIDS: *Guidance on provider-initiated HIV testing and counselling in health facilities*, 2007, available at: [http://whqlibdoc.who.int/publications/2007/9789241595568\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241595568_eng.pdf).

#### IV. Summary of the Translations of the ILO *Code of Practice on HIV/AIDS and the World of Work* Available for Countries Studied in this Report

Country	Language of Translation
Cambodia	Khmer
Indonesia	Bahasa Indonesian
Malaysia	Available in English
Myanmar	Not translated
Philippines	Available in English and in the process of being translated into Filipino
Singapore	Available in English
Thailand	Thai
Viet Nam	Vietnamese

# Mandatory HIV testing for employment of migrant workers in eight countries of South-East Asia: From discrimination to social dialogue

In the spirit of protecting the basic human rights of women and men who seek work abroad, we present this study on mandatory HIV testing of migrant workers. Its purpose is to promote an informed dialogue amongst representatives from governments and workers' and employers' organizations throughout South-East Asia on this important subject.

Upwards of hundreds of thousands of workers from the region are being tested for HIV without their informed consent each year, in contradiction of the ILO *Code of Practice on HIV/AIDS and the World of Work*, and in violation of their human rights. Moreover, some of them have their rights violated even further by being denied employment as a result of their HIV status.

We hope that this study is a call to action to protect the dignity of workers who are being excluded from the labour market by this negative practice of mandatory HIV testing.

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