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**Migrant Working Group (MWG)'s¹ recommendations for the Thai government
With regard to the development of the National Action Plan on Business and Human Rights**

The persistent labour shortage in Thailand, especially for the ‘difficult and dangerous’ jobs in the agricultural and industrial sectors (e.g., fisheries and construction), has maintained the need for migrant workers from the neighbouring countries like Myanmar, Laos and Cambodia, in order to keep the economy running.

At the same time, the migrant workers themselves seek better opportunities and income, having experienced political conflicts, poverty, and negative impacts of large-scale development projects that have involved forced mass relocation, thus the continuing flow of workers, notably from Myanmar. According to an unofficial estimate by some demographic researchers, there are currently about four million migrant workers in Thailand.

Their presence has contributed substantially to the economic growth of Thailand. A 2007 report by the International Labour Organization stated that migrant workers helped to generate up to 53 Million USD² for the Thai economy as well as contributed to the national budget in the form of sales tax on every product and service they purchased.

Despite the need for the labour of the migrant workers in certain industries and their contribution towards the economic growth of Thailand, migrant workers continue to face exploitation, discrimination and violation of their rights in Thailand. The State as well as Business have obligations to respect and protect the rights of migrant workers as reaffirmed in the UN Guiding Principles on Business and Human Rights. Pursuant to these obligations, the Thai Government has drafted the National Action Plan on Business and Human Rights. In May 2016, the Thai government has promised at the UN Human Rights Council meeting to review the state of human rights in Thailand to develop a national action plan on business and human rights. The Ministry of Justice’s Rights and Liberties Protection Department has been assigned to take the lead with collaboration from other Ministries concerning business operation of private sector. To develop the national action plan, the government has identified four issues including labor. In light of the management of migrant workers by Thailand, the Migrant Working Group has these recommendations to offer for the development of national action plan regarding migrant workers to ensure its compliance with the UN Guiding Principles on Business and Human Rights (UNGPs) as follows;

¹ Migrant Working Group (MWG) is a coalition of nongovernmental organization working with migrant population to promote their health, education and rights. It aims to promote dissemination of information among organizations working on migrant rights, analyzing prompts, determining policy issues and implementing activities jointly with the authorities, academia, and civil society to ensure migrant population enjoy their fundamental rights and achieve quality of life development.

² [/en--http://www.ilo.org/asia/whatwedo/publications/WCMS_098230/lang](http://www.ilo.org/asia/whatwedo/publications/WCMS_098230/lang)

State Responsibility to Protect Human Rights, UN Guiding Principles on Business and Human Rights (UNGPs)

Foundational Principles

Article 1. State must protect against human rights abuse within their territory and / or jurisdiction by third parties, including business enterprise. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

1. The management of migrant workers from neighboring countries; Myanmar, Laos PDR and Cambodia

The ability of migrant workers to reside and work in Thailand legally is directly related to Migration Management Policy that is adopted by the State. Such policies are related to immigration, and government to government agreements that are entered upon keeping the needs of business enterprises in destination countries and migrant workers in countries of origin.

Thailand enacted its first policy on migration management in 1991. The other specific laws that govern migrant workers are the Alien's Occupation Act of 2008 and the Immigration Act of 1979. Under these laws, migrant workers in Thailand can be divided into the following categories:

- Illegal migrant workers who have been granted permission to work in Thailand temporarily by having been documented and registered in the TR 38/1 system and having been issued with ID cards for non-Thai persons with the 13 digit number beginning with 00. The State requires a Nationality Verification process for migrant workers to enable them to obtain a passport from a home country, a visa and a work permit.
- Migrant workers who are employed under the Memorandum of Understanding on Employment of Migrant Workers from Myanmar, Laos and Cambodia.
- Irregular migrant workers who have been granted a permission to register under the National Council for Peace and Order (NCPO). They are issued a TorRor. 38/1, an Alien Civil Registration Card, a permission to reside temporarily in Thailand and are allowed to work in designated occupations. Later they will be required to have a nationality verification to have a passport, a work permit and a visa.
- Undocumented migrant workers - In addition, the government issued the NCPO order no 33/2560 (June 2017) allowing the undocumented migrant workers to register and enter to the nationality verification to have a passport, a work permit and a visa. Migrant workers from this group must complete their national verification by end of June 2018.

The Migrant Working Group has found that the State does not have the correct statistics of migrant workers who are required to complete the process of nationality verification. For example, in December 2017, the government claimed 1.9 million workers were required to complete nationality

verification. In the following months, however, the numbers have dropped successively from 1.6 million to 1.3 million (According to a press conference by the Ministry of Labor, 1.3 million migrant workers were supposed to complete nationality verification and right after the end of deadline for an extended period for workers to complete nationality verification, it was announced that there were 132,232 workers yet to have complete nationality verification.³)

A lack of clarity in terms of numbers offered by the government has promoted MWG to think there could be as many as 811,437 migrant workers who have yet to complete nationality verification in light of the original number of 1.9 million workers who were supposed to complete the process per the 16 January 2018 cabinet resolution.

As per the policy, migrant workers who have not completed the process of nationality verification within the deadline would be arrested, prosecuted and deported to their country of origin. Reportedly, such raids and arrests have begun since 1 July 2018.

Recommendations: State should investigate why there are so many migrant workers who have yet to complete nationality verification within the deadline.

Foundational Principles

Article 2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

B. Operational Principles - GENERAL STATE REGULATORY AND POLICY FUNCTIONS.

Article 3. In meeting their duty to protect, State should;

a. Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

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2. Ratification of international human rights treaties by Thailand - ILO 87 and 98

Thailand has ratified seven core international human rights treaties⁴ as well as 18 International Labour Organization Conventions and one Protocol.⁵

Nevertheless, two core ILO Conventions on labor have yet to be ratified by Thailand including the ILO Convention no. 87 on Freedom of Association and No. 98 on Right to Organize and Collectively Bargain. The UN Working Group on Business and Human Rights during their visit to

³ <http://www.mol.go.th/content/68631/1522576686>

https://www.doe.go.th/prd/main/news/param/site/1/cat/7/sub/0/pull/detail/view/detail/object_id/14496

https://www.doe.go.th/prd/assets/upload/files/alien_th/f45ff7d848ca050d0029a94317d5a0f1.pdf

https://www.doe.go.th/prd/alien/service/param/site/152/cat/23/sub/0/pull/detail/view/detail/object_id/4216

http://thainews.prd.go.th/website_th/news/print_news/TNSOC6107010010050

⁴ <http://humanrights.mfa.go.th/th/humanrights/obligation/international-human-rights-mechanism/>

⁵ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102843

Thailand in March 2018 and the European Parliament's Subcommittee on Human Rights (DROI) during their visit in July 2018 also recommended that Thailand should ratify the remaining core core conventions of the International Labour Organization.⁶

Recommendation: The Thai government, as a member of the International Labour Organization and its founding member since 1919, should make an effort to accelerate the process to ratify the remaining core Conventions as soon as possible.

In addition, the Thai government should come up with measures to support and develop a policy to promote the ILO's Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration).

3. Reform of domestic laws

Domestic laws should be subjected to reform so as to bring them in line with international human rights laws and ILO Conventions. MWG has found that the existing laws do not clearly prohibit discrimination based on race, nationality or gender. Further, some of the guidelines issued under these laws clearly violate standards of labour protection, such as;

- (i) Worker Remuneration: As a result of the Notification of the Wage Committee established by the virtue of the Labor Protection Act 1998, workers in certain sectors are barred from receiving minimum wage including workers employed in agricultural sector and home workers.

Recommendation: The policy should be reformed to ensure workers in all sectors equally enjoy a minimum wage.

- (ii) Social protection laws including the Social Security Act B.E. 2533 and the Workmen's Compensation Fund Act B.E. 2537: Secondary legislation and guidelines under these laws discriminate against employees in certain sectors, depriving them of access to insurance and benefits from the Workmen's Compensation Fund. These sectors include workers in agricultural and fishing sectors (seasonal workers), domestic workers and undocumented migrant workers.

Recommendation: the government must repeal secondary laws and guidelines found to be discriminatory in terms of access to social protection of the employees.

- (iii) Labour Relation Laws: Section 88 of the Labour Relation Act B.E. 2518 (1975) stipulates that only Thai employees can form a trade union. Section 101 stipulates that committee or sub-committee members of the trade union, amongst others, must have Thai nationality by birth. An Order of the Department of Labour governing Qualification of an Advisor and Registration Method, dated 29th August 1991 (formulated after a military coup by the National Peace Keeping Council), lays down that the advisor appointed for a labour negotiation or collective bargaining must be a Thai national who is at least 25 years old.

These provisions bar migrant workers from establishing a union and having leadership positions in the union or in negotiation and collective bargaining processes. These provisions are not in accordance with international human rights standards: ICESCR

⁶ <http://www.europarl.europa.eu/news/en/press-room/20180718IPR08201/political-rights-meps-stress-importance-of-free-and-fair-elections-in-thailand>

Article 8 (a) which guarantees the right of everyone to form trade unions., ILO Convention No. 87 (Convention concerning Freedom of Association and Protection of the Right to Organize, 1948) and the ILO Convention No. 98 (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949).

Recommendations: the government should urgently promote the right to the freedom of association of foreign employees in Thailand. This can be achieved by an amendment of the 1975 Labour Relation Act to allow foreign employees to form a union, to be a sub-committee or committee member and to be a union advisor in a collective bargaining.

- (iv) **Strengthening legal enforcement and revision of recruitment laws:** The State policy on management of migrant workers (Royal Ordinance Concerning the Management of Foreign Workers' Employment 2017) is in compliance with the ILO General Principles and Operational Guidelines on Fair Recruitment, in terms of prohibition of recruitment fee, prohibition against withholding the workers' personal documents, conditions for the termination of employment contracts for workers recruited through the G2G protocol, and the appointment and authorisation for law enforcement officials to make an intervention in the recruitment process by recruitment agencies and employers.

However, several other protections provided in the ILO's General Guidelines have still not been recognised, such as protection of workers from Thailand when working abroad, prevention of migrant workers from exploitation by third parties including illegal brokers and the freedom to organise and bargain.

Recommendations: The state should review applicable laws and ensure they are in compliance with the ILO General Principles and Operational Guidelines on Fair Recruitment in order to protect the workers, ensure safe migration and eradicate the use of forced labor and combat human trafficking.

- (v) **Protection of commuter or seasonal migrant workers along borders and SEZs:** Section 64 of the Royal Ordinance Concerning the Management of Foreign Workers' Employment 2017 provides for commuter and seasonal employment. The government has also signed agreements with neighbouring countries of Myanmar and Cambodia to revise the existing cross border migration agreements regarding the issuance of border pass for commuter or seasonal employment. As per these agreements, migrant workers living along the Thailand-Myanmar and Thailand-Cambodia borders are eligible to apply for work permits in menial labor sector and domestic work. The border pass issued to them shall be valid for up to three months.

In reality, MWG has found these workers have been increasingly employed as regular workers, particularly in Tak's Mae Sot District since it helps to bring down the production costs of the entrepreneurs. The workers are not obliged to get registered and to complete nationality verification or to be recruited through the G2G protocol. Through this arrangement, the commuter and seasonal workers are simply required to buy health insurance covering the period during which they are allowed to work. No other protections have been provided including protections provided for in the Labor Protection Act, social protection and labor relations. As a result, these workers have been made vulnerable to exploitation and deprived of their access to legal protection. Such a broad policy facilitates economic and business operation not based on respect of human rights. This is particularly

serious since the government has declared border areas including Mae Sot a Special Economic Zone where many benefits that are normally enjoyed by workers are exempted, etc.

Recommendation: The state should review employment policy in border area aiming to ensure that laws do not discriminate against any migrant worker and to ensure protection of their dependents in compliance with the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers which affirms collective responsibility between sending countries and receiving countries in ASEAN in terms of the protection and promotion of the rights of migrant workers and their family members in all procedure concerning migration as provided for in Chapter III of the Consensus.⁷

(vi) **Protection from the use of SLAPPs against workers:** There is increasing use of legal mechanisms by both State and Business sector against workers or human rights defenders taking action for protection of their rights. Such legal mechanisms are in the nature of civil and criminal litigations or Strategic Lawsuits against Public Participation (SLAPP). The purpose of such citations is to prevent people from making any effort to claim their entitlements. A number of migrant workers, activists and media representatives who have brought to light allegations of human rights violations against the workers have been prosecuted in this manner.

Recommendations: the state should review the laws to ensure protection of whistleblowers of human rights violation against workers. If the act has been committed faithfully, the whistleblowers should be exempted from either civil or criminal liabilities. Also, an effort should be made to raise the awareness about the roles of public prosecutors per the Public Prosecutor Organization and Public Prosecutor Act (including Section 21 which provides that public prosecutor must maintain their independence when deciding whether or not to charge a person for a crime and to perform their duties according to the Constitution and laws with faithfulness and fairness. The decision to charge a person or not should rest on consideration of public interest.

Article 3. In meeting their duty to protect, State should;

...

c. Provide effective guidance to business enterprise on how to respect human rights through out their operations.

4. Requiring human rights due diligence report by business enterprises

The state should ensure and advise large business entities which employ migrant workers as main production force to produce a human rights due diligence report⁸. It should be part of an effort to prevent labor exploitation. The report must be disclosed to public to raise the awareness and to ensure verification. Such report is instrumental for the enhancement of transparency and traceability based on good governance.

⁷ <http://asean.org/storage/2012/05/16-ASEAN-Declaration-on-the-Protection-and-Promotion-of-the-Rights-of-Mi...pdf>

⁸ <http://www.nhrc.or.th/getattachment/5b8db0f0-ee83-4987-9fe8-583160dc8005/.aspx>

THE STATE-BUSINESS NEXUS

Article 4. State should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate by requiring human rights due diligence.

5. Review of government procurement

The State is also an economic actor. Section 8 of the Government Procurement and Supplies Management Act B.E. 2560 states that it must be ensured that procurement and supplies management most benefit the State and it has to be carried out in compliance with the principles of worthiness, transparency, efficiency, efficacy and accountability in both the procurement and recruitment processes.

MWG has found important elements are missing from the law including the review of human rights compliance through the procurement process by the state. Studies have been conducted on state construction projects which employed migrant workers, and it has been found that the migrant workers were paid less than minimum wage. Also, women workers were paid less than their male counterparts even though they handled work with the same nature and with the same responsibility.

Recommendations: The law should be reformed to oblige the State to review human rights protection compliance when entering a procurement deal with either a state enterprise or a business.

The Corporate Responsibility to Respect Human Rights, UN Guiding Principles on Business and Human Rights (UNGPR)

Foundational Principles

Article 11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Article 12: The responsibility of business enterprises to respect human rights refers to internationally recognised human rights - understood, at a minimum as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work

6. Adopting “employers pay” principle

Until now, business sector in Thailand opts to minimise their production costs by shifting to the use of cheap migrant workers recruited from neighbouring countries to replace domestic labor. It has given rise to illegal labor recruitment process in the sending countries. Migrant workers are charged exorbitantly in their home countries in order to get across the border illegally to work in Thailand. The authorities in both Thailand and sending countries are aware of the problem and have signed G2G agreements to facilitate labor recruitment and to minimise such risk.

The process is, however, costly and involves highly complicated document processing. It has again given rise to the intervention of brokers who offer to help workers who want to come and work in Thailand, though they are not ready to be involved with the document processing. Under such

predicament, migrant workers are forced to pay lots of recruitment fees and other surcharge more than what they afford to pay and as a result has incurred debts. It has made them vulnerable to debt bondage and becoming trafficking victims eventually.

According to a study by the ILO, in order to move and work in Thailand, each migrant worker is supposed to pay 251 dollars, the amount of which is equal to their one month pay. Such costly migration fees have prompted a number of migrant workers to incur debt and it takes them a long time to service all the debt. As a result, they have to endure an exploitative employment.⁹

Recommendations: workplaces that employ migrant workers should be held responsible for recruitment fees and other relevant expenses based on the employers-pay-principle.¹⁰ Such expenses should then be included in their production costs.

7. Being responsible for one's own supply chain

According to the press conference during the visit of the UN Working Group on Business and Human Rights in March 2018 and all the stated recommendations.

Therefore, MWG support recommendations made by the UN Working Group to encourage the state to develop a national action plan regarding the relationships between large corporations and their supply chain, recruitment, and outsourcing and subcontracting which yield undesirable impact on human rights. The UN Working Group has found certain companies rely on outsourcing, the act of which contains human rights risks while it is not clear that the UN Guiding Principles on Business and Human Rights (UNGPs) ensures companies have to be held responsible for human rights impact in their own supply chain.

Access to Remedy, UN Guiding Principles on Business and Human Rights (UNGP)

Foundational Principles

Article 25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and /or jurisdiction those affected have access to remedy.

8. Non-judicial remediation and grievance mechanisms

8.1. **Undocumented migrant workers** are generally deprived of their access to remediation and grievance mechanism including the KR7 complaint procedure or complaint with the Labor Relations Committee under the Labor Welfare and Protection Office. Some workers have been warned by the Labor Welfare and Protection Office's staff that by lodging a complaint through this mechanism, an undocumented worker shall risk being arrested. As a result, the workers have decided against exercising their right to complain when they are subject to rights violation committed by their employers. In addition, the state should consider offer help on a humanitarian basis to undocumented migrant workers per Article 7 of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers signed by Thailand.¹¹ Or in terms of access to social protection, if a worker is registered as

⁹ https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_628387.pdf

¹⁰ <https://www.ihrb.org/employerpays/the-employer-pays-principle>

¹¹ <http://asean.org/storage/2012/05/16-ASEAN-Declaration-on-the-Protection-and-Promotion-of-the-Rights-of-Mi....pdf>

a temporary worker or is undocumented, they may likely have no access to rights protection including workers employed under the border area employment initiative. A lack of such access is blatantly a breach to social protection laws which aim to offer protection to a worker based on their types of work, rather than on their legal statuses.

Recommendation: the state should review such protection mechanisms to ensure the workers have access to remediation without any discrimination.

8.2. Migrant workers' access to justice provided for by the Act for the Granting of Compensation to Aggrieved Parties and Accused in Criminal Cases BE 2548

The 2001 Damages Act, regarding Damages for injured persons and Compensation and Expense for accused in criminal cases, was promulgated in accordance with the 1997 Constitution of the Kingdom of Thailand which confirm the right of a party aggrieved from the action of another party to access to remedies which shall be provided by the state when convicted party could not provide such remedies and/or there is no other resolution. The law is applied universally to protect persons, regardless of their race, nationality, religion, language, or other status. As such, the law encompasses migrant workers in Thailand. If the injured person or defendants meet the relevant criteria are eligible to apply for compensation or damages from the Rights and Liberties Protection Department. Applications for compensation are reviewed and awarded/denied by the Compensation Committee.

Since the enforcement of the Act in 2001, migrant workers have been able to access to the compensation¹².

However, the Compensation Committee issued their new decision to prohibit the undocumented migrants to access the fund in May 2015. The Compensation Committee outlining the decree as the committee was agreed that the undocumented applicant of compensation fund is not involved in the accused crime and met with criteria for the legal definition of the victim. Nevertheless, the committee refused to provide the compensation to the victim due to irregular status, and exercised the legal authorization to prohibit the payment of remedy to persons without regular entry status. The Compensation Committee's decision is in clear breach of the Constitution of the Kingdom of Thailand, the Universal Declaration of Human Rights (UDHR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

Recommendation, the government should review, revise and revoke any decision of Compensation Committee which is found to discriminate against migrant workers depriving them of the right to have access to the damages for injured persons and compensation and expenses for the accused in criminal cases.

8.3 **Employee Fund** Some migrant workers are unable to tap into the Employee Fund, even an instruction has been made by the labor inspector, since they are not able to show the officials all the documents required or since they are undocumented workers. Being without any support while the case is going on the Court hampers their ability to fight their case considering that the party in dispute is a big corporation with much more financial power and other power.

¹² See case studies at page 19-English version

<https://issuu.com/hrdfoundation/docs/095058%2F12144173>

[6e637fdc3cd81d/30?ff=true&e=8](https://issuu.com/hrdfoundation/docs/6e637fdc3cd81d/30?ff=true&e=8)

Recommendation: the state must ensure that all workers have access to the Employee Fund as provided for by the Labor Protection Act which reiterates that all workers are eligible to protection regardless of their legal status.

9. Judicial remediation and grievance mechanisms

9.1 **Mediation and negotiation memo** Regarding the use of judicial remediation, particularly the Labor Court, it has been found that an emphasis has been placed on mediation between the employees and the employers. After an agreement can be reached, the Court would just prepare a remediation agreement. Nevertheless, from our experience offering legal assistance to migrant workers, it has been found that mediation has been made based on the basis that both parties have unequal standings without considering fundamental human rights. As a result, the amount agreed upon is usually lower than the standard compensation. As to legal execution, only a few workers have received remedies as instructed. The memo is not criminal legal binding, Employers often capitalize on this loophole to avoid taking the responsibility. Now the burden has been shifted to the employees as they have to look for the property of their employers and to ensure they are put on an auction. The process is highly complicated, costly and time-consuming and it has prevented employees from having remedies.

Recommendation: regarding judicial mechanisms, an attempt must be made to prevent the capitalization of legal execution to prevent an employee from having the remedies.

9.2. **Insufficient interpretation service** At present, the Ministry of Labor does not have enough interpreters who can speak the languages spoken by the migrant workers. It is not enough to assist them during the interaction with the labor inspectors and in the court.

Recommendation: A policy must be established to hire interpreters to ensure that every worker has access to justice process.

9.3 **Legal execution** In many instances, the companies in dispute have terminated their operations and therefore legal execution cannot be made even though the workers have won the case over them. Such companies, after terminating their operation, have reopened again by registering in new names to carry out similar business operations.

Recommendation, the state should come up with a measure to inspect the termination of business and the reopening as another company to prevent a company from avoiding legal execution.

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