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The Empowerment of Migrant Workers in A Precarious Situation: Labor Inspection

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THE EMPOWERMENT OF MIGRANT WORKERS IN A PRECARIOUS SITUATION

Labor Inspection: Mapping Barriers to Migrant Workers' Rights Enforcement

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The Empowerment of Migrant Workers in a Precarious Situation*

*Labor Inspection: Mapping Barriers to
Migrant Workers' Rights Enforcement*

Fay Faraday[†]

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EXECUTIVE SUMMARY

This report is the second in a series to be produced by KNOMAD's Thematic Working Group on Migrant Rights and Integration in Host Communities which examines whether, how, and to what extent different rights-based strategies could empower transnational migrant workers performing low-paid work. UN and ILO instruments establish a detailed rights-based framework through which States commit to establish laws that deliver substantive labor protections to migrant workers in accordance with international standards. Through these instruments, States also commit to establish and implement effective labor inspectorates capable of enforcing those national laws. This report examines the institutional design of state-based labor inspectorates to assess their capacity to protect the labor rights of migrants who work in precarious circumstances in economic sectors with low pay.

The report undertakes a comparative analysis of labor inspectorates in five countries – Canada, Germany, Malaysia, Qatar and South Africa. It identifies macro-level trends that account for the persistent gap between the commitment to effective rights enforcement for migrant workers and the reality of rights violations that migrant workers experience. These countries were selected for comparison because they are located in five different geographic regions; are countries in which labor is performed by large numbers of migrant workers; and are countries to which migrant workers arrive through a mix of south-to-south and south-to-north migration flows. The research reveals that, despite the significant differences across these countries in terms of governance models, economies, legal systems and migration flows, their labor inspectorates share common weaknesses in institutional design which render them largely ineffective in protecting labor standards for migrant workers.

Part II briefly identifies the rights-based framework for effective labor inspection that is articulated in UN and ILO instruments. UN and ILO instruments are used as a reference point to allow for consistent cross-regional comparison. Part III undertakes a comparative analysis of labor inspectorates in the five countries of focus with reference to (i) the maturity of the inspection systems; (ii) the relationship between labor inspection and immigration; (iii) the structure of the labor inspectorate; (iv) the expertise of inspectors; (v) the scope of labor rights they are empowered to enforce; (vi) inspectorates' accessibility to migrant workers; and (vii) the efficacy of their remedial authority. The report reveals that labor inspectorates are largely failing migrant workers because none of the states studied has prioritized developing a labor inspectorate that is responsive to the unique precarity faced by migrant workers. As each of the states studied has distinct legal systems and weaknesses, the report does not attempt to propose country-specific reforms. Instead, Part IV identifies five critical needs in relation to (i) political will; (ii) expertise and focus of labor inspectorates; (iii) resourcing of labor inspectorates; (iv) the need to eliminate work and residency permits that are tied to single employers/sponsors; and (v) the need to expand secure routes of migration and immigration for workers in sectors with low pay. It also offers concluding comments and points towards directions for future research.

I. INTRODUCTION

In its 2021 *Global Estimate on International Migrant Workers*, the International Labour Organization (ILO) observed that “[i]nternational migrant workers constitute nearly 5 per cent of the global labor force and are an integral part of the world economy.”¹ The United Nations (UN) estimated that, in 2019, over 169 million individuals were working outside their usual country of residence, representing an increase of 5 million migrant workers in two years.² As the scale of transnational labor migration continues to expand, long-entrenched practices of exploitation and rights violations persist, particularly for migrants working in economic sectors with low pay. The legal, economic, and social constraints that facilitate the exploitation of migrant workers in equal measure impede workers’ ability to enforce their labor rights. But the normalization of discourse that locates the challenge to rights enforcement in *workers’ precariousness*, obscures the extent to which the institutional design of state-based enforcement systems plays a significant role in either perpetuating or mitigating workers’ marginalization. Precisely because migrant workers experience deep systemic disempowerment, monitoring and enforcement of rights by labor inspectors becomes “vital”.³ For this, States bear responsibility. It is well known that international legal instruments commit States to enact substantive labor standards that protect workers. But these binding legal instruments equally commit States to establish and operate labor inspectorates that can effectively prevent exploitation and enforce rights. As the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) observed: “Without full enforcement, a member State cannot be said to be ensuring effective implementation of international labor standards”.⁴ These obligations to establish effective enforcement infrastructure warrant further examination and this report aims to contribute to that literature. The report identifies the prescribed standards for labor inspection regimes mandated under the UN and ILO rights-based framework. Using these as standards a benchmark, the report then undertakes a comparative analysis focusing on labor inspectorates in five countries – Canada, Germany, Malaysia, Qatar and South Africa. It maps common barriers arising from the institutional design of labor inspectorates that impede implementation of the UN and ILO rights-based framework for worker protection and also highlights promising practices that warrant wider adoption. Based on the patterns observed, the report offers some macro-level recommendations to enhance migrant worker protection and identifies directions for future research.

¹ International Labour Organization, *ILO Global Estimates on International Migrant Workers – Results and Methodology*, 3d ed. (Geneva: ILO, 2021) at 5.

² United Nations/Department of Economic and Social Affairs 2019 figures cited in ILO, *Global Estimates on International Migrant Workers*, above note 1 at 20

³ ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Promoting Fair Migration: General survey concerning the migrant worker instruments*, 2006, ILC 105th Session, Report III, Part 1B at para. 460-461

⁴ CEACR General Survey, *Promoting Fair Migration*, above note 3 at para. 460-461

A. Situating the present research within the Empowerment of Migrant Workers in a Precarious Situation Series

This is the second in a series of research reports produced by KNOMAD’s Thematic Working Group on Migrant Rights and Integration in Host Communities which applies a rights-based framework to analyze the efficacy of strategies to empower low-wage migrant workers in a precarious situation. Cumulatively, the research series aims to identify state-based and non-state-based strategies that can enhance protection for migrant workers or empower migrant workers to combat their precariousness.

The first report in the series, *The Empowerment of Migrant Workers in a Precarious Situation: An overview*,⁵ established definitions and framing that carry forward through the series:

- **“Migrant worker”** is defined in accordance with the UN *International Convention on the Protection of All Migrant Workers and Members of Their Families* as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁶ This term encompasses migrants at all stages of their migration journey, from recruitment, through work, unemployment and return to their state of origin.
- **“Work”** encompasses all forms of remunerated labor.
- **“Employment”** refers specifically to work that is performed by workers within formal employment relationships.
- **“Precarity”** and **“precarious”** refer to the sociological condition created by social, economic, and political arrangements that distribute support and risk unequally across populations with the result that some populations face disproportionate economic and social harms.⁷

The series frames its discussion of migrant workers’ precarious situation by drawing on Vosko’s scholarship which measures the qualitative nature of precarity across multiple dimensions. Vosko defines **“precarious employment”** as

work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the

⁵ Fay Faraday, “The Empowerment of Migrant Workers in a Precarious Situation: An overview”. KNOMAD Paper No 39 (Washington, DC: World Bank, 2021) [*“Overview Report”*]

⁶ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNGA Resolution 45/158, 18 December 1990, A/RES/45/158 at Article 2(1) [*“Migrant Workers Convention”*]

⁷ This usage is derived from Judith Butler’s writing which differentiates between “precariousness” and “precarity” as follows: “Lives are by definition precarious: they can be expunged at will or by accident; their persistence is in no sense guaranteed. In some sense, this is a feature of all life, and there is no thinking of life which is not precarious [...] Precarity designates the politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence and death”: *Frames of War: When Is Life Grievable?* (London: Verso Books, 2010).

relationship between *employment status* (i.e. self- or paid employment), *form of employment* (e.g. temporary or permanent, part-time or full-time), and *dimensions of labor market insecurity*, as well as *social context* (e.g. occupation, industry, and geography) and *social location* (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).⁸

Vosko's model maps the variable degrees to which migrant workers experience insecurity along each of these five dimensions to reveal the multiple dynamics that together construct migrant workers' precarity.⁹

Similarly tracking Vosko's five dimensions of precarity, the series uses the term "**empowerment**" to refer to the degrees by which macro-level reforms increase migrant workers' experience of economic and social security in the status and forms of their employment, and in their positions within the labor market, their social context and their social location in the community in which they labor

The series acknowledges the contested politics of labor migration governance and the limitations of using a rights-based analysis when most states have not ratified the binding conventions that establish the substantive norms. The analysis of these constraints is detailed in the series' *Overview Report*.¹⁰ While not repeated here, recognition of the limits of the framing stand. Nevertheless, a rights-based framework is applied because it retains meaningful utility. It reflects a tripartite global consensus of the baseline protections that must be afforded to all workers. As such, it provides a normative counterpoint to unrestrained economic exploitation and provides an important foundation for social dialogue between states, social partners, civil society organizations and migrant organizations at national, regional and international levels.

B. Findings from the *Overview Report*

Despite the wide variation in governance structures, legal systems, economies, and cultures across the five States studied, strikingly common patterns of structural inequality and exploitative behaviour towards migrant workers emerged. The structures and practices that drive migrant workers' precariousness were revealed as systemic in a way that extends beyond the borders of any single State. The *Overview Report's* recommendations addressed three categories of reforms that focus on the drivers of precarity that have the deepest ramifications for migrant workers.

First, the *Overview Report* recommended reforms that could empower migrant workers by addressing the precarity that arises from their temporary or undocumented status.¹¹ The most empowering shift would be state action that targets the social, economic, environmental, and

⁸ Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2009) at 2

⁹ Vosko, *Managing the Margins*, above note 8 at 2.

¹⁰ Faraday, "Empowerment of Migrant Workers in a Precarious Situation: Overview", above note 5 at 5-12, 27-29

¹¹ Faraday, "Empowerment of Migrant Workers in a Precarious Situation: Overview", above note 5 at 53-57

political conditions that force people into transnational migration with the goal of rendering migration unnecessary, or merely one of many viable and freely chosen options. Beyond this, however, state action is needed to expand diverse and flexible options for permanent and regular immigration to counteract the hardening of borders that has propelled the escalation in temporary migration and growth of undocumented workers. All States in question have significant populations of undocumented workers. The *Overview Report* recommended that States introduce regularization programs to ensure that people who are undocumented can acquire regular status. It also recommended erecting “firewalls” that prevent labor inspectors, police, health care providers, and other public service providers from sharing any information about workers’ immigration status with immigration enforcement bodies.

Second, the *Overview Report* proposed reforms aimed to empower migrant workers by addressing the drivers of their labor market precarity.¹² A significant area of reform requires that States enact rigorous licensing, regulation and oversight of labor recruiters through bilateral and multilateral agreements and national legislation, and enact effective and meaningful remedies for workers who have been exploited by recruiters. States must also end the practice of issuing work permits that restrict workers to working for a single named employer. Instead, they must grant work permits that allow migrant workers labor mobility to leave exploitative working conditions and respond to labor market needs. States must also ensure that migrant workers have a meaningful and effective ability to exercise their freedom of association to unionize; to engage in collective bargaining; and to exercise the right to strike. As a bare minimum, they must ensure that their labor and employment laws comply with the substantive standards set out in the UN and ILO instruments to which they are bound. As becomes apparent in this report, the ability of labor inspectorates to protect migrant workers is severely compromised if the scope of substantive rights they can enforce is minimal.

Finally, the *Overview Report* proposed reforms that States can undertake to empower migrant workers by enhancing workers’ capacity to exercise voice – to advocate for themselves – and to enjoy social integration.¹³ This empowerment begins by ensuring that States do not engage in polarizing political discourse that demonizes migrant workers, but instead provide accurate information about migrant workers and their integral part in the national economy and social fabric. Those reforms aim to enhance national populations’ receptivity to migrant workers and counter discriminatory and violent action toward them. However, other active interventions are needed to support migrant workers’ practical integration through language training, skills development, and mentoring, as well as through ensuring access to affordable housing, health care, education for their children, social benefits, and public services. As the *Overview Report* noted,

migrant workers will be truly empowered when their social integration and safety are such that they can effectively enforce their rights, publicly advocate for their

¹² Faraday, “Empowerment of Migrant Workers in a Precarious Situation: Overview”, above note 5 at 57-60

¹³ Faraday, “Empowerment of Migrant Workers in a Precarious Situation: Overview”, above note 5 at 60-62

interests, and participate in political processes that shape the conditions in which they work and live.¹⁴

Accordingly, many of the reforms outlined above are preconditions that establish the security required before migrant workers can realistically access rights enforcement institutions in the States where they labor. But when migrant workers do access state-based rights enforcement institutions, these institutions must be intentionally designed so that they are receptive and responsive to migrant workers' actual precarity. It is to this issue that the present report turns.

C. Scope of the labor inspection report

While the *Overview Report* looked broadly at patterns of structural inequality and exploitative behaviour that facilitate widespread rights violations, this report takes a deeper look at the role and design of state-based labor inspection as one sightline that helps account for why this exploitation remains entrenched. As the *Overview Report* makes clear, multiple concurrent strategies are required to address the multiple roots of migrant workers' insecurity. Labor inspection cannot, on its own, rectify migrant workers' precarity as its mandate is limited to enforcing labor rights within the existing legal structure. Nevertheless, labor inspection has the potential to play an outsized role in empowering migrant workers if it acts as an effective bulwark against the disproportionate power that employers and recruiters exercise over migrant workers, and if it delivers rights enforcement that gives workers a measure of stability.

This report undertakes a literature review and comparative analysis of state-based labor inspection in Canada, Germany, Malaysia, Qatar, and South Africa to identify points at which rights protection can be enhanced. To the extent that each country has distinct labor migration regimes for workers labelled "high skilled" or "low skilled", the analysis focuses on the circumstances of migrant workers – documented and undocumented – laboring in sectors with low pay. These countries were selected for comparison because they are located in five different geographic regions; are countries in which labor is performed by large numbers of migrant workers; and are countries to which migrant workers arrive through a mix of south-to-south and south-to-north migration flows. Germany is the country of labor for the world's second-largest population of migrant workers; Canada ranks eighth; South Africa is fifteenth; and Malaysia, eighteenth.¹⁵ Meanwhile, Qatar has the highest percentage of migrant workers relative to local population in the world. In Qatar, 95 percent of workers are migrant workers with temporary status in the country.¹⁶

Part II outlines the rights-based framework articulated in UN and ILO instruments that set binding standards for labor inspection. It also refers to UN and ILO instruments that provide non-binding guidance. Part III undertakes an analysis of labor inspectorates' effectiveness based on data

¹⁴ Faraday, "Empowerment of Migrant Workers in a Precarious Situation: Overview", above note 5 at 62

¹⁵ International Organization for Migration, *World Migration Report 2020* (Geneva, IOM 2019) at 26

¹⁶ As of March 2019, migrant workers make up over 89 percent of the total population in Qatar and 95 percent of all workers: Qatar, Planning and Statistics Authority, *Labor Force Survey: The first quarter (January – March)*, 2019 at 12-13

from the five focus countries to identify both barriers and best practices. Part IV identifies macro-level recommendations that emerge from the common patterns revealed by the research, offers concluding comments, and identifies directions for future research.

II. LABOR INSPECTION: A RIGHTS-BASED AND NORMATIVE FRAMEWORK FOR PROTECTING MIGRANT WORKERS

In the absence of a singular rights-based framework that applies to labor migration, this report focuses on UN and ILO instruments which, by virtue of being global in application, create a common reference point that facilitates comparative analysis across the five widely dispersed States being studied. As detailed in the *Overview Report*,¹⁷ migrant workers are protected by the *Universal Declaration of Human Rights* whose guarantees protect “all members of the human family” “without distinction of any kind, such as national or social origin.”¹⁸ They are similarly protected under the UN’s nine core human rights instruments¹⁹ and associated protocols which, among other rights, guarantee civil, political, economic, social, and cultural rights;²⁰ commit states to eliminate torture,²¹ enforced disappearances,²² and discrimination based on race and sex;²³ and

¹⁷ This section draws from Faraday, “Empowerment of Migrant Workers in a Precarious Situation: Overview”, above note 5 at 14-25 where the substance of these rights is addressed in more detail.

¹⁸ *Universal Declaration of Human Rights*, 10 December 1948, UNGA, 217 A (III), Preamble, Articles 1 and 2

¹⁹ *Migrant Workers Convention*, above note 6

²⁰ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entry into force 3 January 1976) [ICESCR]; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 5 March 2009, A/RES/63/117; *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128 (entered into force 11 July 1991)

²¹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force) [CAT]; *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199 (entered into force 22 June 2006)

²² *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006 (entered into force 23 December 2010) [CPED]

²³ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [CERD]; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW]; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000)

commit states to protect the rights of children²⁴ and people with disabilities.²⁵ Moreover, the UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*²⁶ articulates protections specifically safeguarding migrant workers across all stages of their migration journey from recruitment; preparation for migration; departure from their state of habitual residence; transit to the state where they will labor; their stay and work in the country of labor; and through to their return to their state of origin or state of habitual residence.

Meanwhile, the ILO's 1919 Constitution identifies "protection of the interests of workers when employed in countries other than their own" as a core part of its mandate.²⁷ Migrant workers are protected under the ILO's eight Core Conventions that set out universal rights in relation to freedom of association and the effective recognition of the right to collective bargaining;²⁸ the elimination of forced or compulsory labor;²⁹ the abolition of child labor;³⁰ and the elimination of discrimination in respect of employment and occupation.³¹ Two Conventions set out protections that are specific to migrant workers: ILO Convention 97 on *Migration for Employment*,³² and ILO Convention 143, the *Migrant Workers (Supplementary Provisions) Convention*.³³ Additional Conventions provide targeted protection to groups of workers in which the proportion of migrant workers is significant. Such is the case, for example, with the 2011 *Domestic Workers Convention*.³⁴ Still other Conventions, such as the *Private Employment Agencies Convention, 1997*³⁵ are significant because they regulate dynamics to which migrant workers are frequently subject. Further, unless migrant workers are explicitly excluded from the legal instruments, they are entitled to protection

²⁴ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC]; *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000 (entered into force 12 February 2002); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263 (entered into force 18 January 2002); *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, adopted by the Human Rights Council, 14 July 2011, A/HRC/RES/17/18 (entered into force 14 July 2011)

²⁵ *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106 (entered into force 3 May 2008) [CRPD]; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II (entered into force 3 May 2008)

²⁶ *Migrant Workers Convention*, above note 6

²⁷ ILO, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919 at Preamble

²⁸ ILO C87, *Freedom of Association and Protection of the Right to Organise Convention*, 9 July 1948 (entered into force 9 July 1948); ILO C98, *Right to Organise and Collective Bargaining Convention*, 1 July 1949 (entered into force 18 July 1951)

²⁹ ILO C29, *Forced Labour Convention*, 28 June 1930 (entered into force 1 May 1932); ILO C105, *Abolition of Forced Labour Convention*, 25 June 1957 (entered into force 17 January 1959)

³⁰ ILO C138, *Minimum Age Convention*, 26 June 1973 (entered into force 19 June 1976); ILO C182, *Worst Forms of Child Labour Convention*, 17 June 1999 (entered into force 19 November 2000).

³¹ ILO C100, *Equal Remuneration Convention*, 29 June 1951 (entered into force 23 May 1953); ILO C111, *Discrimination (Employment and Occupation) Convention*, 25 June 1958 (entered into force 15 June 1960)

³² ILO C97, *Migration for Employment Convention (Revised)*, 1 July 1949 (entered into force 22 January 1952)

³³ ILO C143, *Migrant Workers (Supplementary Provisions) Convention*, 24 June 1975 (entered into force 9 December 1978)

³⁴ ILO C189, *Domestic Workers Convention, 2011*, 15 June 2011 (entered into force 5 September 2013)

³⁵ ILO C181, *Convention Concerning Private Employment Agencies*, 19 June 1997 (entered into force 19 January 1997)

under the full range of substantive standards on working conditions, occupational health and safety, and social security that are detailed in the many Conventions, Recommendations, and Protocols adopted by the ILO.

On paper, then, to a large extent, the UN and ILO rights-based framework puts migrant workers on equal footing with national workers: unless the UN or ILO instrument expressly excludes migrant workers, they are entitled to the same workplace protections and rights as the nationals in the country where they labor, regardless of any irregularity in their migration status.³⁶ But, these rights have little practical meaning if they cannot be enforced. Accordingly, the UN and ILO instruments also commit States to establish labor inspectorates that meet rigorous standards of professionalism, procedural fairness, accessibility, and remedial effectiveness. The sections below outline the binding and non-binding normative frameworks that establish benchmarks for effective state-based labor inspectorates.

A. International Norms for Labor Inspection

Establishing effective labor inspection systems has been a priority responsibility for ILO Member States since the ILO's founding through the *Treaty of Versailles*.³⁷ The ninth general principle enshrined at the ILO's founding conference was that

Each State should make provision for a system of inspection in which women should take part, in order to ensure the enforcement of the laws and regulations for the protection of the employed.³⁸

Further, the *Universal Declaration of Human Rights* recognizes the *rights* to effective rights enforcement, and to effective remedies for rights violations among the core human rights it guarantees. The *Declaration* states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of [their] rights”,³⁹ and that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [them] by the constitution or by law”.⁴⁰ Giving precision to

³⁶ *Migrant Worker Convention*, above note 6, Articles 25, 54, 55; *C97 - Migration for Employment Convention*, above note 32, Article 6; *C143 - Migrant Workers (Supplementary Provisions) Convention*, above note 33; ILO, *International labour migration: A rights-based approach (Geneva: ILO, 2010)* at 120.

³⁷ CEACR, *Labour Inspection: General survey*, above note 3 at para. 3; Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 7 April 2016, E/C.12/GC/23 at para. 54; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, 28 August 2013, CMW/C/GC/2 at para. 63; CMW, *Concluding observations on the initial report of Turkey* (31 May 2016), CMW/C/TUR/CO/1 at para. 58(c) and (d).

³⁸ *Treaty of Peace of Versailles* (28 June 1919), Part XIII, Annex, Section II at 345

³⁹ *Universal Declaration of Human Rights*, above note 18, Article 10

⁴⁰ *Universal Declaration of Human Rights*, above note 18, Article 8

that system of accountability, the ILO has adopted Conventions that set out the elements and standards that States must meet to deliver an effective labor inspectorate.

Labour Inspection Convention, 1947 (No. 81) and the related 1995 Protocol most directly articulate States' responsibility to establish and maintain a system of labor inspection to enforce legal protections regarding conditions of work and the protection of workers in industrial, commercial and non-commercial workplaces.⁴¹ Convention 81 is one of the most widely ratified ILO Conventions, befitting its status as one of the ILO's four Priority Governance Conventions.⁴² Canada, Germany, Malaysia, Qatar, and South Africa have all ratified it. Convention 81 mandates that Member States "shall maintain a system of labor inspection" in industry and commerce that will apply to all workplaces that are covered by the legislation that labor inspectors enforce.⁴³ The 1995 Protocol to Convention 81 extended its application to all workplaces beyond those considered "industrial" or "commercial."⁴⁴ Only twelve states, however, have ratified the Protocol, none of which is in the cohort studied. Next, Convention 129, the *Labour Inspection (Agriculture) Convention, 1969* extends States' obligation beyond Convention 81 to maintain labor inspectorates with respect to agricultural undertakings that are informal, and so fall outside of an "industrial" setting.⁴⁵ Of the present cohort, only Germany has ratified this Convention. Finally, the ILO adopted non-binding Recommendation 82 which encourages states to extend the application of Convention 81 to the mining and transport sectors.⁴⁶ In addition, where particularly marginalized workers, like migrant domestic workers, are excluded from national labor protections, States are directed to develop mechanisms by which to monitor their conditions of work and to "strengthen labor inspection services to carry out such monitoring and to receive, investigate and address complaints of alleged violations."⁴⁷

1. Functions of a labor inspectorate

Convention 81 identifies three functions that a labor inspectorate is expected to fulfill which are, respectively, preventative, remedial, and prospective in nature:⁴⁸

⁴¹ ILO C81 - *Labour Inspection Convention, 1947*, 11 July 1947 (entered into force 7 April 1950) at Articles 1, 3, 22-24; ILO P81 - *Protocol of 1995 to the Labour Inspection Convention, 1947*, 22 June 1995, ILC 82nd Session, (entered into force 9 June 1998)

⁴² As of March 2022, 148 countries have ratified Convention 81.

⁴³ C81 – *Labour Inspection*, above note 41, Articles 1 and 2.

⁴⁴ P81 – *Protocol of 1995 to the Labour Inspection Convention, 1947*, above note 41

⁴⁵ ILO C129 - *Labour Inspection (Agriculture) Convention, 1969*, 25 June 1969 (entered into force 19 January 1972); see also ILO R133 - *Recommendation 133, Labour Inspection (Agriculture) Recommendation, 1969*, International Labour Conference, 53rd Session, 25 June 1969

⁴⁶ R82 - *Labour Inspection (Mining and Transport) Recommendation, 1947*, International Labour Conference, 30th Session, 11 July 1947

⁴⁷ CMW, *General Comment No. 1 on migrant domestic workers*, 23 February 2011, CWM/C/GC/1

⁴⁸ C81 – *Labour Inspection*, above note 41, Article 3

- (i) The **preventative function** aims to promote a culture of compliance with labor standards by providing employers and workers with technical information and advice to assist them to comply with the law.⁴⁹
- (ii) The **remedial function** involves enforcing workers' rights under national laws, regulations, arbitration awards, and collective agreements.⁵⁰
- (iii) The **prospective function** leverages labor inspectorates' knowledge of systemic patterns of rights violations or gaps in legal protection. It requires inspectorates "to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions."⁵¹ In this way, the international standards anticipate that effective labor inspection will strengthen compliance with existing standards while also building the foundation for raising those standards.

The present report is concerned only with the remedial function of labor inspectorates.

2. Structure and composition of labor inspectorates

Convention 81 sets out standards regarding the structure and composition of labor inspectorates which will best empower them to fulfill their designated functions. It mandates that labor inspectorates be under the control and supervision of a central authority.⁵² This promotes consistency of approach and application. It also requires that States provide an adequately trained and resourced professional inspectorate whose members have security of employment, and sufficient independence to protect them from external influence by government or other actors.⁵³ Members of the labor inspectorate "shall be recruited with sole regard to their qualifications for the performance of their duties", and the means of ascertaining their qualifications shall be determined by a competent authority.⁵⁴ Moreover, States must ensure that duly trained professionals, technical experts, and specialists are associated with the work of the labor inspectorate.⁵⁵ Article 8 of the Convention explicitly requires that labor inspectorates hire both men and women to serve as inspectors.⁵⁶ This requirement aims to ensure that labor inspectorates have access to highly feminized sectors of work, women's workplaces, and women's work experiences; provide a gender-balanced, gender-informed, and gender-responsive analysis of the terms and conditions of work; and are able to raise issues specific to women's rights in the workplace.

Convention 81 also draws attention to the level of staffing that is required to ensure that labor inspectorates are effective. Article 10 requires that "the number of labour inspectors shall be sufficient to secure the effective discharge of the duties of the inspectorate" in light of the

⁴⁹ C81 – *Labour Inspection*, above note 41, Article 3(b)

⁵⁰ C81 – *Labour Inspection*, above note 41, Articles 3(a), 27

⁵¹ C81 – *Labour Inspection*, above note 41, Article 3(c)

⁵² C81 – *Labour Inspection*, above note 41, Article 4

⁵³ C81 – *Labour Inspection*, above note 41, Article 6

⁵⁴ C81 – *Labour Inspection*, above note 41, Article 7

⁵⁵ C81 – *Labour Inspection*, above note 41, Article 9

⁵⁶ C81 – *Labour Inspection*, above note 41, Article 8

importance of the duties it is charged to perform; the number, size and location of workplaces to be inspected; the number of workers at those workplaces; the complexity of the legal provisions the inspectorate oversees; the material resources available to the inspectorate; and “the practical conditions under which visits of inspection must be carried out in order to be effective.”⁵⁷ Inspectorates must also be provided with offices, transportation, and reimbursement of travel expenses that are necessary for the inspectors to do their work.⁵⁸

3. Standards on conducting labor inspections

Significantly, the Convention mandates a rigorous standard such that “[w]orkplaces shall be inspected *as often and as thoroughly as necessary* in order to ensure the effective application of the relevant provisions.”⁵⁹ Article 12 of the Convention identifies the powers that labor inspectors need to conduct their work. It requires that inspectors be empowered by national legislation “to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection.”⁶⁰ In carrying out the inspection, they must be empowered to interrogate witnesses, including the employer and staff of the workplace; require the production of any records that must be kept under national laws; copy documents and take extracts with them; enforce the posting of notices required by national law; and take or remove for analysis any sample or materials or substances used or handled in the workplace.⁶¹

4. Remedial authority of labor inspectorates

The Convention requires that, if labor inspectors observe defects in the workplace’s layout or operations that pose a threat to health and safety of workers, they must be empowered to make orders, including orders with immediate executory force, to address those health and safety threats.⁶² It also requires that inspectors be empowered to issue effective remedies where there is a breach of national laws or regulation, and the State must ensure that there are adequate penalties against those who obstruct the work of labor inspectors.⁶³

5. Accountability of labor inspectorates

Finally, to ensure both internal accountability and accountability with international standards, labor inspectors and inspectorates are required to prepare detailed reports on their activities, including annual reports which must be filed with the ILO.⁶⁴ States are also required to participate in the periodic reviews by the CEACR of the state’s compliance with the Convention, and respond to the comments and requests of the CEACR. Of note, the CEACR has made repeated requests over many years that Malaysia respond to the comments and requests it has made,

⁵⁷ C81 – *Labour Inspection*, above note 41, Article 10

⁵⁸ C81 – *Labour Inspection*, above note 41, Article 11

⁵⁹ C81 – *Labour Inspection*, above note 41, Article 16 [emphasis added]

⁶⁰ C81 – *Labour Inspection*, above note 41, Article 12(1)(a)

⁶¹ C81 – *Labour Inspection*, above note 41, Article 12(1)

⁶² C81 – *Labour Inspection*, above note 41, Article 13

⁶³ C81 – *Labour Inspection*, above note 41, Articles 17-18

⁶⁴ C81 – *Labour Inspection*, above note 41, Articles 14, 19-21

including with respect to compliance with Convention 81, the absence of which impedes the ILO's ability to conduct appropriate oversight of compliance with the Convention.⁶⁵

B. Non-Binding International Normative Framework

These binding ILO and UN commitments are reinforced through additional non-binding principles and guidelines for practical action and best practices that are particularly focused on the experiences of migrant workers. Three key non-binding frameworks are reviewed here: the 2006 *ILO Multilateral Framework on Labour Migration*;⁶⁶ the ILO's 2019 *General principles and operational guidelines for fair recruitment*;⁶⁷ and the UN's 2018 *Global Compact on Safe, Orderly and Regular Migration*.⁶⁸

The *ILO Multilateral Framework on Labour Migration* highlights the principle that migrant workers' rights (workplace rights, human rights, health and safety, social protections) must be given practical effect and promotion, and must be effectively enforced by labor inspectorates. It emphasizes that this requires a three-pronged approach. First, States must ensure that migrant workers have coverage under the full range of workplace protections in national law, and that the rights in those national laws and regulation meet the standards set out in ILO instruments.⁶⁹ In particular, this requires that States introduce legislation to effectively licence and regulate recruiters.⁷⁰ Second, States must ensure that workers are given the information they need to enforce their rights,⁷¹ and that employers are given information about their legal obligations.⁷²

⁶⁵ The CEACR's most recent scheduled review of Malaysia's compliance with Convention 81 was in 2014. Pre-dating 2014 and every year since then, the CEACR has issued Direct Requests and Observations to Malaysia raising increasingly strong concern about its failure to respond to the CEACR. In 2018, the CEACR wrote: "The Committee notes that none of the six reports requested have been received (on fundamental, governance and technical Conventions, most of which should include information in reply to the Committee's comments). The Committee hopes that the Government will soon submit these reports in accordance with its constitutional obligation": CEACR – *General Direct Request – Malaysia* (2018), ILC 107th Session. In 2021, in relation to "Serious failure to submit", the CEACR wrote in part: "The Committee notes with **regret** that the Government has once again provided no response to its previous comments. It recalls that the constitutional obligation of submission is of the highest importance and is a fundamental element of the standards system of the ILO": CEACR – *Observation on submission to competent authorities – Malaysia* (2021), ILC 109th Session [emphasis in the original]

⁶⁶ ILO, *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (ILO: Geneva, 2006)

⁶⁷ ILO, *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs* (ILO, Geneva: 2019)

⁶⁸ *Global Compact on Safe, Orderly, and Regular Migration*, adopted by the UN General Assembly on 19 December 2018, 73rd Session, Agenda items 14 and 119, A/RES/73/195

⁶⁹ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Principles 8 and 9 and related guidelines

⁷⁰ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Principle 11 and related guidelines; ILO, *General principles and operational guides for fair recruitment*, above note 67 at General Principle 3, Operational Guidelines 3 and 4.

⁷¹ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Guideline 8.2; ILO, *General principles and operational guides for fair recruitment*, above note 67 at General Principle 10

⁷² ILO, *Multilateral Framework on Labour Migration*, above note 66 at Guideline 10.9

Third, States must ensure that these rights are effectively enforced.⁷³ The ILO's *General principles and operational guidelines for fair recruitment* undertake a similar analysis focusing specifically on the recruitment of migrant workers. Together these two instruments identify many guidelines for actions that States should undertake to enhance labor inspection and rights enforcement for migrant workers, including:

- (i) providing effective enforcement mechanisms for the protection of migrant workers' rights, including by extending "extending labour inspection to all workplaces where migrant workers are employed, in order to effectively monitor their working conditions and supervise compliance with employment contracts;"⁷⁴
- (ii) "ensuring that the labour inspectorate or relevant competent authorities have the necessary resources and that labour inspection staff is adequately trained in addressing migrant workers' rights and in the different needs of men and women migrant workers;"⁷⁵
- (iii) providing effective remedies to all migrant workers for violations of their rights in the course of recruitment and employment;⁷⁶
- (iv) "providing effective sanctions and penalties for all those responsible for violating migrant workers' rights";⁷⁷
- (v) "creating effective and accessible channels for all migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation";⁷⁸ and
- (vi) providing migrant workers with the range of practical supports they require in order to enforce their rights, including interpretation, translation, and legal services.⁷⁹

Finally, it is worth noting the guidance provided by the UN's *Global Compact on Migration* which is a non-binding framework for international cooperation on migration. The *Global Compact* expresses States' "collective commitment to improving cooperation on international migration", and "sets out [States'] common understanding, shared responsibilities and unity of purpose regarding migration, making it work for all."⁸⁰ Among the ten cross-cutting and interdependent guiding principles it delineates, the *Global Compact* affirms that global migration must be "people-

⁷³ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Principle 10 and related guidelines and Guideline 8.3

⁷⁴ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Principle 10, Guideline 10.1

⁷⁵ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Guideline 10.2

⁷⁶ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Principles 8, 10 11 and related guidelines; ILO, *General principles and operational guides for fair recruitment*, above note 67 at General Principles 5 and 6, Operational Guideline 5

⁷⁷ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Guideline 10.7

⁷⁸ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Guideline 10.5; ILO, *General principles and operational guides for fair recruitment*, above note 67 at Operational Guideline 8

⁷⁹ ILO, *Multilateral Framework on Labour Migration*, above note 66 at Guidelines 10.10 and 10.11

⁸⁰ *Global Compact on Safe, Orderly, and Regular Migration*, above note 68 at Preamble and para. 7, 9

centred” in that it places individuals “at its core”, and “promotes the well-being of migrants and the members of communities in countries of origin, transit and destination”.⁸¹ It also stresses that

respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and are consistent with international law.⁸²

After outlining its guiding principles, the *Global Compact* establishes 23 objectives. The most relevant for the present purpose are the objectives to “facilitate fair and ethical recruitment and safeguard conditions that ensure decent work”; “address and reduce vulnerabilities in migration”; “provide access to basic services for migrants”; “strengthen the transnational response to smuggling of migrants”; “prevent, combat and eradicate trafficking in persons”; and “eliminate all forms of discrimination”.⁸³ Each of these objectives details further commitments, practical actions, and best practices which provide guidance for positive action by States. Of particular note, each of the objectives identified here requires effective systems of inspection, enforcement, and supports for migrants in the course of asserting rights.

With this comprehensive rights-based framework as a touchstone for assessing the operation of labor inspectorates in relation to migrant workers, this report now turns to its comparative analysis of the practices of labor inspectorates in the five States that are the subjects of the study.

III. COMPARATIVE ANALYSIS: LABOR INSPECTION IN FIVE STATES

The labor inspection systems in Canada, Germany, Malaysia, Qatar, and South Africa are analyzed below in relation to (i) the maturity of the inspection systems; (ii) the relationship between labor inspection and immigration; (iii) the structure of the labor inspectorate; (iv) the expertise of inspectors; (v) the scope of rights labor inspectors are empowered to enforce; (vi) the inspectorates’ accessibility to migrant workers; and (vii) the efficacy of their remedial authority.

A. Maturity of Labor Inspection Systems

The ILO Committee of Experts’ General Survey notes that “[i]n most member States, labour inspection is the primary mechanism to secure ... enforcement of legislation concerning conditions of work and the protection of workers.”⁸⁴ Canada and Germany each have well-established labor inspection institutions, with structures and powers that largely align with the ILO standards. South

⁸¹ *Global Compact on Safe, Orderly, and Regular Migration*, above note 68 at para. 15(a)

⁸² *Global Compact on Safe, Orderly, and Regular Migration*, above note 68 at para. 15(d)

⁸³ *Global Compact on Safe, Orderly, and Regular Migration*, above note 68 at Objectives 6, 7, 9, 10, 15 and 17.

⁸⁴ CEACR General Survey, *Promoting Fair Migration*, above note 3 at para. 477

Africa has been working with the ILO through two Decent Work Country Programs, beginning in 2011, and has undertaken numerous reforms to its labor inspectorate following recommendations made by the ILO in a 2010 audit.⁸⁵ The labor inspection systems in Malaysia and Qatar are in an earlier stage of transition.

1. Malaysia

Malaysia's labor inspection system on paper appears to align with the ILO standards outlined above, but, in practice, it lacks effectiveness. The CEACR has raised particular concerns about the breadth of rights violations that migrant workers experience, including through fraud and deception in the recruitment process, and "breaches of contract, payment of excessive recruitment and immigration fees, reduction or non-payment of salary, excessive working hours, a lack of rest day and conditions akin to debt bondage and servitude."⁸⁶ The CEACR also noted that it is common for migrant workers to be paid below the minimum wage; be subject to excessive overtime; have their passports and legal documents confiscated; and be subject to forced contract extensions. Repeated reports by the ILO and UN identify that forced labor, human trafficking, labor exploitation, and discrimination are ongoing problems for migrant workers in Malaysia;⁸⁷ that over 60 percent of migrant workers experience labor rights violations,⁸⁸ but that "the number of complaints filed by migrant workers remains negligible in comparison to the number of violations committed."⁸⁹ In view of all this, "the Committee notes with **deep concern** the persistence of labour rights violations and the continued abusive working conditions of migrant workers that amount to forced labour."⁹⁰ In a report published by the ILO, researchers described similar conditions and concluded that

The vulnerability of migrant workers to these abuses is intensified by the lack of fair, efficient, and accessible means to resolve complaints, reinforcing their status as a group of workers to which a largely different set of rules apply.⁹¹

⁸⁵ Republic of South Africa, Decent Country Work Program 2018-2023 (June 2018) at 13-14

⁸⁶ CEACR – Observation, *Forced Labour Convention, 1930 (No. 29) – Malaysia* (2015), ILC 104th Session re Articles 1(1), 2(1) and 25

⁸⁷ CEACR – Observation, *Forced Labour Convention, 1930 (No. 29)– Malaysia* (2019), ILC 108th Session; CEDAW Committee, *Concluding observations on the combined third to fifth period reports of Malaysia*, 14 March 2018, CEDAW/C/MYS/CO/3-5; ILO, *Situation and gap analysis on Malaysian legislation, policies and programmes, and the ILO Forced Labour Convention and Protocol (2018)*; Benjamin Harkins *Review of labour migration policy in Malaysia* (Bangkok: ILO, 2016); CEACR – Observation, *Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Malaysia* (2019), ILC 108th Session; CEACR – *Direct Request, Equal Remuneration Convention, 1951 (No. 100) – Malaysia* (2020), ILC 109th Session

⁸⁸ Benjamin Harkins, Daniel Lindgren, and Tarinee Suravoranon. *Risks and rewards: Outcomes of labour migration in South-East Asia - Key findings in Malaysia* (Bangkok: ILO, 2017) at p. 3

⁸⁹ Benjamin Harkins and Meri Åhlberg, *Access to justice for migrant workers in South-East Asia* (Bangkok: ILO, 2017) at pp. 14-15

⁹⁰ CEACR – *Observation C29 – Malaysia* (2019), above note 87 re Articles 1(1), 2(1) and 25 [emphasis in the original]

⁹¹ Harkins, Lindgren, and Suravoranon, *Risks and rewards*, above note 88 at 3

In 2018, through the Labour Law Reform and Industrial Relations project, the ILO conducted an assessment of Malaysia's labor inspectorate system. In 2019, the government of Malaysia, the Malaysia Trade Union Congress, and the Malaysian Employers Federation entered into a Memorandum of Understanding with the ILO which extends until 2025.⁹² Under this 7-year MOU, the ILO is providing technical assistance to help Malaysia develop a Decent Work Country Programme;⁹³ strengthen governance of labor migration;⁹⁴ and work towards meeting obligations under the ILO Forced Labour Convention.⁹⁵ At the time of writing, the ILO is continuing to support the Ministry of Human Resources to develop a Labour Inspection Strategic Compliance Plan. These developments warrant following to see how the inspection system is strengthened.

2. Qatar

Qatar also has an existing labor inspection system whose components, on paper, appear to align with the standards in ILO Convention 81. The 2014 report by the UN Special Rapporteur on the Human Rights of Migrants revealed that the extreme power imbalance under the *kafala* system created conditions where "exploitation is frequent" and migrant workers are "highly vulnerable to abuse."⁹⁶ In the same year, a review conducted by DLA Piper for the State of Qatar concluded that Qatari law provided a sufficient framework for effective labor inspections; the deficit was instead "an issue of the frequency, format and thoroughness of these inspections."⁹⁷ From 2018-2020, Qatar participated in a technical cooperation program through which the ILO assisted the State to repeal some elements of the *kafala* system; to reform the substance of its labor laws to better align with ILO standards; and to improve the functioning of the Labour Inspection Department.⁹⁸ All three of these changes are happening simultaneously and remain in transition. As with Malaysia, the developments here warrant tracking.

⁹² *Memorandum of Understanding between the Government of Malaysia, Malaysian Trade Union Congress, Malaysian Employers Federation and International Labour Organization on the Decent Country Work Programme in Malaysia (2019-2025)* (19 June 2019)

⁹³ ILO, *Promoting Decent Work for Sustainable Development: Malaysia Decent Work Country Programme (DWCP)* (ILO, 2020)

⁹⁴ *ILO-Malaysia MOU*, above note 92

⁹⁵ ILO, *Situation and gap analysis – Malaysia*, above note 87 at 1-7

⁹⁶ François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, Mission to Qatar, Human Rights Council, 26th Session, Agenda Item 3, Addendum (23 April 2014)

⁹⁷ DLA Piper, *Migrant Labour in the Construction Sector in the State of Qatar* (April 2014) at para. 304.2

⁹⁸ ILO, *Annual progress report on the technical cooperation programme agreed between the Government of Qatar and the ILO*, 7 October 2019, Governing Body, 337th Session, Geneva (24 October – 7 November 2019), Fifth item on the Agenda, CB/337/INS/5. In particular, Qatar repealed the requirement that workers have an exit visa before leaving the country, and the requirement that they receive a 'no objection certificate' from their employer before changing jobs: Qatar, *Law No 13 of 2018 amending some provisions of Law No. (21) of 2015 which regulates the entry and exit of expatriates and their residence*, Article 1; Qatar, *Decision No. 95 of 2019 by the Minister of Interior on the regulations and procedures regarding the exit of some categories of workers who are not subject to the Labour Law* at Article 1. Qatar also introduced a minimum wage law, and legislation providing some labour standards for domestic workers: Qatar, *Law No. 15 of 22 August 2017 which relates to domestic workers*; Qatar, *Law No. (17) of 2020 Determining the National Minimum Wage for Workers and Domestic Workers*

3. Canada, Germany and South Africa

While the labor inspection systems in Canada, Germany and South Africa are more mature than those in Malaysia and Qatar, each has shortcomings with reference to the ILO standards. As a product of Canada being a federal state, there are separate labor inspectorates in the federal jurisdiction and in each province and territory. They have minor variations, but the labor inspectorates generally follow the same structure. In Canada, labor inspectors are generally empowered in alignment with Convention 81. But Canadian laws place temporal restrictions on inspectors' power to enter a workplace only during "regular business hours"; at "any reasonable time"; "during daylight hours";⁹⁹ or with similar language. Further, inspectors cannot enter a "dwelling" where work is performed without the occupier's consent or a warrant.¹⁰⁰ South African law similarly restricts inspectors' entry to premises "at any reasonable time" and prohibits their entry into a private home without consent or a written order from the Labour Court. In both cases, this impedes investigations into the conditions under which domestic workers labor. In South Africa, this is exacerbated because the inspection procedure requires that the employer and domestic worker both be present during an inspection, which undermines domestic workers' ability to candidly report rights violations.¹⁰¹ In 2016, the CEACR warned that South Africa's temporal restriction on when inspectors can enter premises ("any reasonable time") is inconsistent with Convention No. 81's requirement that labor inspectors have unimpeded access to workplaces "at any hour of the day or night." The CEACR directed South Africa to bring this provision into compliance.¹⁰² As Canada only signed Convention 81 in 2019, its legislation and practices have not yet been subject to CEACR review but the same conclusion should be anticipated. In Germany, while inspectors' powers of investigation and sanction formally align with the requirements of Convention 81, academic analysis suggests that the "effectiveness of the labour inspection very much depends on the cooperation with works councils".¹⁰³ Where that cooperation is present, labor inspection can be effective; however, this is less possible in small and medium size operations, many of which do not have works councils.

⁹⁹ See, for example, Ontario, *Employment Standards Act, 2000*, s. 91(1) and (2); *Canada Labour Code*, RSC 1985, c- L2, s. 249(3); British Columbia *Labour Relations Act*, RSBC 1996, c. 113, s. 85(1); Alberta, *Employment Standards Code*, RSA 2000, c. E-9, s. 77(2)(a)

¹⁰⁰ Ontario, *Employment Standards Act, 2000*, above note 99, s. 91(3), s. 92

¹⁰¹ Brian Murahwa, *Monitoring and enforcement: strategies to ensure and effective national minimum wage in South Africa*, National Minimum Wage Research Initiative, Working Paper Series, No. 5 (University of Witwatersrand, November 2016) at 9

¹⁰² South Africa, *Basic Conditions of Employment Act*, No. 75 of 1997 (as amended), s.65(1); CEACR – Direct Request, *Labour Inspection Convention, 1947 (No. 81) – South Africa* (2017), ILC 106th Session re Article 12(1)(a) and (b). At the time of writing the provision remains unamended.

¹⁰³ Manfred Weiss, "The effectiveness of labour law: reflections based on the German experience" (2006), 48:3 *Managerial Law* 275-287 at 276

B. Conflicting Mandates: Labor Inspection Versus Immigration Enforcement

The effectiveness of labor inspectorates in Germany, Malaysia, and South Africa is severely hampered because working with undocumented status is criminalized in these states. Here, labor inspectors have a direct mandate to enforce immigration law with respect to undocumented work, and to collaborate with immigration authorities. Thus, rather than being institutions of assistance, labor inspectors pose a significant threat to undocumented workers who must expend time, energy, and resources to avoid detection. As Jinnah writes, these workers “do not only have weak citizenship status, but their everyday existence is an attempt to circumvent detection and survive as undocumented migrants, often at risk to themselves.”¹⁰⁴ In Canada and Qatar, workers are also at risk of detention and deportation when undocumented. Investigations with respect to their immigration status are conducted by immigration authorities, not the labor inspectorate, although instances of collaboration between labor inspectorates and immigration enforcement authorities have been recorded.

In all five countries, if detected, migrants face immediate arrest, detention, fines, jail time and/or deportation for working with undocumented status. In Germany, they can also be found criminally guilty of being an accessory to fraud.¹⁰⁵ In South Africa, immigration officers and police have broad discretion to detain individuals without a warrant, if the officer has “reasonable grounds” to believe they may be an “illegal foreigner”. This power is open to abuse as “reasonable grounds” are not defined in the legislation.¹⁰⁶ In Malaysia, labor inspectors are also required to collaborate with the police and the Department of Immigration in enforcing the anti-trafficking and anti-smuggling law. The CEACR warned that this “may not be conducive to the relationship of trust needed for enlisting the cooperation of employers and workers with labour inspectors.”¹⁰⁷ In these contexts, violations of undocumented workers’ labor rights remain unredressed. The CEACR continues to request information from Malaysia about how its labor inspectors carry out these functions so that they do not interfere with the labor inspectorate’s main objective of protecting workers.¹⁰⁸

¹⁰⁴ Zaheera Jinnah, “Negotiated Precarity in the Global South: A Case Study of Migration and Domestic Work in South Africa (2020) 14:1 *Studies in Social Justice* 210-227 at 217-218

¹⁰⁵ Germany, *Act to Combat Undeclared Work and Unlawful Employment* of 23 July 2004 (Federal Law Gazette I, p. 1842), amended by Article 2 Passage 1 of the Act of 18 July 2017 (Federal Law Gazette I, p. 2739); ILO, *Situation and gap analysis – Malaysia*, above note 87 at 27

¹⁰⁶ Jorge Bustamante, *Report of the Special Rapporteur on the human rights of migrants – Mission to South Africa* 20 May 2011, UNHRC 17th Session, Agenda item 3, A/HRC/17/33/Add.4 at para. 15-17; Kudakwashe P. Vanyoro, “Zimbabwean migrant domestic worker activism in South Africa”, *Migrating Out of Poverty Working Paper* 55 (Brighton, UK: University of Sussex, 2019)

¹⁰⁷ CEACR – Observation, *Labour Inspection Convention, 1947 (No. 81) – Malaysia* (2015), ILC 104th Session re Articles 3(2) and 5(a); ILO, *Situation and gap analysis – Malaysia*, above note 87 at 28.

¹⁰⁸ CEACR – Observation, *Labour Inspection Convention, 1947 (No. 81) – Malaysia* (2022), ILC 110th Session re Articles 3(2) and 5(a)

In Germany, Malaysia, and South Africa, uncovering undocumented labor is the primary focus of inspections with respect to migrant workers.¹⁰⁹ As Martin and Miller report, “Germany probably spends more to prevent the employment of illegal foreign workers than any other country.”¹¹⁰ Moreover, labor inspectorates can activate other state institutions in the detection and punishment of undocumented workers. German labor inspectors can call upon armed police to assist in conducting illegal employment inspections.¹¹¹ All public bodies in Germany, including the courts and housing authorities, “have an obligation to report persons with irregular residence status to immigration authorities” if they have “positive knowledge of the individual’s irregular status”.¹¹² As a result, undocumented migrants in Germany – most commonly in construction, the sex trade, and domestic work – “frequently face exploitative working conditions with virtually no way of invoking state help”.¹¹³

In 2015 and 2017, the CEACR expressed its ongoing concern that Germany’s labor inspectors are required to notify immigration authorities about workers in an undocumented situation. Its 2017 report emphasized that

the primary duty of labour inspectors is to protect workers and not to enforce immigration law and that any cooperation between the labour inspectorate and immigration authorities should be carried out cautiously, keeping in mind that the main objective of the labour inspection system is to protect the rights and interests of all workers, and to improve their working conditions ... [W]orkers in a vulnerable situation may not be willing to cooperate with the labour inspection services if they fear negative consequences as a result of inspection activities, such as the loss of their job or expulsion from the country.¹¹⁴

Meanwhile, the UN Committee on Economic, Social and Cultural Rights has directly stated in its General Comment No. 2 that “[l]abour inspectorates should focus on monitoring the rights of workers and not be used for other purposes such as checking the migration status of workers.”¹¹⁵

¹⁰⁹ Philip Martin and Mark Miller, *Employer Sanctions: French, German and US Experiences* ILO International Migration Branch Working Paper #30 (Geneva: ILO 2000) at 21; Bridget Anderson, *Worker, helper, auntie, maid? Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia* (Bangkok: ILO, 2016) at 26

¹¹⁰ Martin and Miller, *Employer Sanctions*, above note 109 at 21

¹¹¹ Martin and Miller, *Employer Sanctions*, above note 109 at 22-23

¹¹² Lilana Keith and Michele LeVoy, *A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice* (Brussels: PICUM, 2020) at 22-23; Platform for International Cooperation on Undocumented Migrants (PICUM), *Submission to the 54th Session of the Committee on the Elimination of Discrimination against Women, General Discussion on “Access to Justice”* (Geneva, 18 February 2013) at 4

¹¹³ Katharina Spiess, *The UN Migrant Workers Convention: An Instrument to Strengthen Migrants’ Rights in Germany* (Berlin: German Institute for Human Rights, 2007) at 5; Ulrike Hoffmann and Heike Rabe, “Severe forms of Labour Exploitation: Supporting victims of severe forms of labour exploitation in having access to justice in EU Member States – Germany, 2014” (German Institute for Human Rights, 2014) at 17-18, 21

¹¹⁴ CEACR - Direct Request, *Labour Inspection Convention, 1947 (No. 81) – Germany* (2018), ILC 107th Session re Article 3(1) and (2) of Convention No. 81 and Article 6(1), (2) and (3) of Convention No. 129.

¹¹⁵ CESCR, *General Comment No. 23 (2016)*, above note 37 at para. 54

The direction to separate workplace rights enforcement from investigation of immigration status has also been endorsed by the European Commission Against Racism and Intolerance. Its *General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination* recommends, among other actions, that states “[e]nsure an effective system of workplace monitoring and inspection by separating the powers and remit of labour inspectors from those of immigration authorities”.¹¹⁶

The fundamental conflict in the mandates of these labor inspectorates exacerbates rather than alleviates migrant workers’ risk of exploitation. It signals to employers that violating the labor rights of undocumented workers will not be punished as the immigration violations take priority. Even if exploitation increases, a vicious cycle continues to spiral: migrant workers cannot come forward to file complaints; the conditions are not disclosed to inspectors; and employers face no consequences, leaving them confident in continuing to violate rights.¹¹⁷ This runs directly contrary to the direction of the UN Committee on the Rights of Migrant Workers that

[w]hile States parties may refuse migrant workers who do not have work permits access to their labour markets, once an employment relationship has been initiated and until it is terminated, all migrant workers, including those in an irregular situation, are entitled to equal conditions of work and terms of employment.¹¹⁸

Prioritizing the scrutiny of immigration status over violations of labor rights also reinforces the precarity that all migrant workers, documented or undocumented, face as a result of racism and xenophobia which equates migrants with “illegality”, and frames them, *per se*, as a threat to the national security. For example, various surveys of Malaysian nationals have revealed that over 80 percent believe that migrants commit a high number of crimes; roughly 75 percent “thought migrants were threatening the country’s culture and heritage”,¹¹⁹ and “over 80 percent believed that irregular migrants should not be entitled to any rights at work and that Government policy should be more restrictive.”¹²⁰ In this context, a research report published by the ILO found that

the rise of increasingly virulent rhetoric against migrants within the popular media, blaming them for a host of social problems ranging from electoral fraud to increases

¹¹⁶ European Commission Against Racism and Intolerance, *General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination*, Council of Europe, Strasbourg, adopted 16 March 2016 at para. 29

¹¹⁷ This cycle is effectively portrayed in PICUM, *Firewall and Labour: Fighting Exploitation, Promoting Decent Work* [undated brochure], online: https://picum.org/wp-content/uploads/2019/04/Labour_FIREWALL_ENG-WEB-1.pdf (accessed 6 July 2021)

¹¹⁸ CMW, *General Comment No. 2* (2013), above note 37 at para. 62

¹¹⁹ Anderson, *Worker, helper, auntie, maid?* above note 109 at 28

¹²⁰ Harkins, *Review of labour migration policy in Malaysia*, above note 87 at p. 3

in street crime ... has contributed to an environment where exploitation and abuse are sometimes viewed as acceptable.¹²¹

These experiences underscore the importance of the collective commitment made by UN Member States in the 2018 *Global Compact for Safe, Orderly and Regular Migration* to provide access to basic services for migrants by “ensur[ing] that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services”.¹²² To advance that objective, there is an increasing call for and implementation of “firewalls” that prohibit public services, including labor inspectorates, from sharing information about migrant workers’ status with immigration enforcement agencies so that workers can seek enforcement of their rights and have access to basic elements of social security and inclusion such as healthcare.¹²³ The latter has been of particular concern during the COVID-19 pandemic as undocumented migrant workers have faced significant barriers to safely accessing health care and vaccines for fear of detection and deportation by immigration authorities.¹²⁴ The UN Committee on Migrant Workers, the UN Special Rapporteur on the human rights migrants, and the UN High Commissioner for Human Rights issued a Joint Guidance Note urging states to ensure equitable access to COVID-19 vaccines for migrant workers regardless of their immigration status, specifically by “enact[ing] firewalls between immigration enforcement and the provision of COVID-19 vaccination, in order to prevent fear or risk of reporting, detention, deportation and other penalties as a result of migration status.”¹²⁵

C. Structure of Labor Inspectorates

Convention 81 sets a normative standard in which “labour inspection shall be placed under the supervision and control of a central authority.”¹²⁶ In a federal state, this would be either “a federal authority or a central authority of a federated unit.”¹²⁷ This central authority is also directed to promote “effective co-operation between the section services and other Government services” or other institutions engaged in similar activities and to promote “collaboration between officials of

¹²¹ Harkins, *Review of labour migration policy in Malaysia*, above note 87 at p. 3

¹²² *Global Compact for Safe, Orderly and Regular Migration*, above note 68

¹²³ United Nations, Office of the High Commissioner of Human Rights, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations* (Geneva: 2018) at 11, 51; François Crépeau and Bethany Hastie, “The Case for ‘Firewall’ Protections for Irregular Migrants”, (2015) 17 *European Journal of Migration and Law* 157-183; ECRI, *General Policy Recommendation No. 16*, above note 116 at 13, 15, 19 and 26.

¹²⁴ See, for example: Brendan Kennedy, “‘I’m living in fear’: Undocumented workers worry that getting the COVID-19 vaccine could lead to unwanted immigration woes”, *Toronto Star* (24 March 2021), online: <https://www.thestar.com/news/gta/2021/03/24/im-living-in-fear-undocumented-workers-worry-that-getting-the-covid-19-vaccine-could-lead-to-unwanted-immigration-woes.html> (accessed 6 July 2021);

¹²⁵ UN Committee on Migrant Workers, UN Special Rapporteur on the human rights of migrants, and UN High Commissioner for Human Rights, *Joint Guidance Note on Equitable Access to COVID-19 Vaccines for All Migrants* (Geneva: 18 March 2021) at 3

¹²⁶ C81 – *Labour Inspection*, above note 41, Article 4(1)

¹²⁷ C81 – *Labour Inspection*, above note 41, Article 4(2)

the labour inspector and employers and workers or their organizations.”¹²⁸ While the norm of centralization promotes consistency and coordination of approach, the five labor inspectorates at issue display a much more fractured practice, either due to the institutional structure of the inspectorate, or to its lack of resources. Malaysia and South Africa both have national labor inspectorates which, in structure, generally align with ILO standards, however, as addressed in the next section, their effectiveness is undermined by resource deficits, and the challenges posed by trying to regulate compliance in large informal sectors. By contrast, Qatar’s national labor inspectorate is undermined by policy deficits. Meanwhile, Germany and Canada have multiple highly decentralized labor inspection bodies which create barriers to effective and consistent rights enforcement. The latter three systems are reviewed below.

1. Qatar

Qatar has a centralized national labor inspectorate but, until 2019, it “lacked a clearly articulated labour inspection policy”¹²⁹ to guide its actions. In March 2019, “the strategic unit of the labour inspectorate became operational” and began to develop a strategic inspection plan.¹³⁰ In April 2019 the labor inspection policy was adopted and it’s guiding principles now

underline the vocation of the Labour Inspection Department to act as a catalyst for the prevention of occupational accidents, diseases and fatalities, and for promoting compliance with labour law in general. To achieve this goal the Labour Inspection Department will a) promote, b) inform, c) influence and d) enforce the law, as necessary. The policy will guide all labour inspection actions and will ensure that labour inspectors act in a strategic and consistent manner and following common values embedded in national law and ratified International Labour Standards.¹³¹

The policy sets out the Labour Inspection Department’s powers to monitor the implementation of labor law, health and safety and the payment of wages; conduct “regular and sudden inspections of workplaces”; guide employers on how to correct irregularities; issue warnings and direct competent authorities to take necessary action; assess risks from use of hazardous substances at work; collect data and conduct evidence-based strategic inspections; adopt policies to ensure consistency of approach; conduct awareness-raising and information campaigns; and provide for transparency and accountability of inspections.¹³² A positive practice that Qatar has adopted is to have its inspectors use digital checklists so that information collected during inspections is reported consistently and systematically.

¹²⁸ C81 – *Labour Inspection*, above note 41, Article 5

¹²⁹ Qatar Ministry of Administrative Development, Labour and Social Affairs (ADLSA) and ILO, *Assessment of the Qatar Labour Inspection System* (Doha: ILO, 2019) at 2

¹³⁰ CEACR – Observation, *Labour Inspection Convention, 1947 (No. 81) – Qatar* (2021), ILC 109th Session re Articles 3, 12 and 16

¹³¹ *Labour Inspection Policy – State of Qatar* (2019), online: <https://www.adlsa.gov.qa/en/Labour/Labour-Inspection/Attachments/Labour%20Inspection%20Policy.pdf> (accessed 24 May 2020)

¹³² *Labour Inspection Policy – State of Qatar*, above note 131

Formally, Qatar’s labor inspection system appears to track key ILO benchmarks which is appropriate as this inspection framework has been developed during the three-year ILO technical assistance project. However, the policy is only nascent. Qatar is focusing on data collection and building the capacity of labor inspectors to better engage in strategic enforcement.¹³³ The real test will be in how rigorously it is implemented in practice as more aspects of the system become operational.

2. Germany

In Germany, standards and targets for labor inspection are coordinated centrally at the federal level but inspection occurs in a decentralized way at the state level. Administrative structures for labor inspection vary across the sixteen federal states and inspection is carried out through a network of over 100 local entities with different names and different mandates: “The resulting organization is therefore complex and not homogenous”.¹³⁴ Fragmenting inspection across multiple entities poses challenges for coordination, consistency of approach and information-sharing across different data collection/record keeping technologies.¹³⁵ This has been particularly highlighted with regard to labor trafficking and forced labor where decentralization of monitoring at the state level creates inconsistencies because enforcement depends on “individual projects and initiatives”.¹³⁶

3. Canada

In Canada, labor standards are established and enforced variously at the federal, provincial or territorial level based on the nature of the employer’s operations. Industries like transportation, communications and banking which cross provincial and territorial borders are regulated federally. Migrant workers in these industries are protected by federal labor and employment laws and their labor and human rights are monitored by federal agencies. The vast majority of work in Canada, however, is regulated at the provincial or territorial level. As a result, the protection of migrant workers’ rights is divided across one federal, 10 provincial and 3 territorial jurisdictions, each of which has distinct laws and distinct labor inspectorates whose political and resource priorities vary. That fragmentation is exacerbated even within a single Ministry of Labour. For example, in Ontario, while the enforcement of labor standards and occupational health and safety standards operate out of the same provincial Ministry of Labour, they are staffed by separate divisions of enforcement officers. As a result, within each jurisdiction, multiple groups of labor inspectors are responsible for monitoring and enforcing different rights which are set out in different pieces of legislation and enforced by different specialized tribunals or courts. Different sets of inspectors may be

¹³³ CEACR – *C81 Observation – Qatar* (2021), above note 130 re Technical cooperation

¹³⁴ European Federation of Public Service Unions, *A mapping report on Labour Inspection Services in 15 European countries* (Brussels: EPSU Secretariat, 2012) at 42; Hoffmann and Rabe, “Severe forms of labour exploitation”, above note 113 at 8

¹³⁵ EPSU, *A mapping report on Labour Inspection Services*, above note 134 at 44-45

¹³⁶ Almut Bachinger et al, *The Role of Labour Inspection in Addressing Demand in the Context of Trafficking in Human Beings for Labour Exploitation*, DemandAT Working Paper No. 12, October 2017 at 47-48

investigating concerns at the same workplace but do not share information. This lack of communication duplicates effort, increases inefficiency, and gives each group of inspectors a fragmented and incomplete picture of the workplace dynamic. Canada only ratified Convention 81 in June 2019 so its first compliance review by the CEACR has not yet occurred. The developments here will again be worth following.

In each of the five states of focus, then, fundamental concerns arise due to the ways that labor inspectorates' institutional structure contributes to ineffective enforcement of labor rights for migrant and national workers.

D. Security, expertise and resources of the labor inspectorate

ILO Convention 81 calls for a state's labor inspectors to be well-trained and well-resourced professionals who have sufficient job security and economic security to insulate them from improper pressure.

In all five countries of focus, labor inspectors are public service employees but they face varying degrees of security. In Canada and Germany, labor inspectors are unionized public service employees with permanent status and so meet the Convention's requirements with respect to job security and independence. In Qatar, until recently, inspectors overwhelmingly had been migrant workers with renewable one-year temporary status. This raised significant concern about their independence. However, a joint ADLSA-ILO report in 2019 noted that all 270 labor inspectors are now Qatari nationals.¹³⁷ In a context where 95 percent of the workforce is not Qatari, it remains to be seen whether the inspectors' citizenship status translates into more rigorous rights enforcement or conflicting loyalties in which inspectors more strongly identify with Qatari and other business owners. In South Africa, any public servant can be appointed as a labor inspector without the ILO's mandated requirement that they be recruited solely on the basis of their qualifications.¹³⁸ The positions receive very low pay, there are no formalized training modules and limited opportunities for career advancement. As a result, retention is a persistent problem as qualified inspectors routinely leave for better paid and more satisfying employment.¹³⁹

As analyzed in the *Overview Report*, the conditions of precarity that migrant workers face are multilayered and complex.¹⁴⁰ Their precarity is constructed through the intersection of immigration laws and policies as well as labor laws, and in some states criminal laws, creating a unique dynamic of insecurity. To effectively investigate violations of migrant workers' rights, labor

¹³⁷ ADLSA-ILO, *Assessment of the Qatar Labour Inspection System*, above note 129 at 5

¹³⁸ C81 – *Labour Inspection*, above note 41, Article 7 states that “Subject to any conditions for recruitment to the public service which may be prescribed by national laws or regulations, labour inspectors *shall be recruited with sole regard to their qualifications for the performance of their duties.*” [emphasis added]

¹³⁹ EY and South Africa Department of Labour, *Adequacy of resources for effective inspections to be conducted within the South African labour market* (March 2017) at 10-11, 39-43, 84-85; South Africa, *Decent Country Work Program 2018-2023*, above note 85 at 13-14

¹⁴⁰ Faraday, “Empowerment of Migrant Workers in a Precarious Situation: Overview”, above note 5 at Part III

inspectors require substantive expertise in multiple areas that together will give a holistic understanding of migrant workers' precarity and the dynamics that facilitate exploitation by employers and recruiters. This necessary expertise includes:

- (i) the substantive labor rights that are guaranteed to migrant workers;
- (ii) the specific contexts and employment relationships within which different migrant workers perform their work (for example, the specific dynamics of and laws relating to domestic work or agricultural work);
- (iii) the substantive laws on labor recruitment and regulation of private employment agencies, including knowledge of the complex patterns and practices of transnational recruitment agencies and their subcontracting chains;
- (iv) the way transnational labor migration laws and policies affect power dynamics and scope of agency for migrant workers within their work relationships (for example, the impact of restrictive work permit terms, work and residency permit renewal periods, housing, language, family separation, access to health care, bilateral agreements between states) such that employer-worker power imbalances are qualitatively different from those faced by national workers;
- (iv) the way dynamics of discrimination and xenophobia operate in the workplace and community at large to produce unique forms of social isolation and precarity for migrant workers; and
- (v) the fact that migrant workers are entitled to labor rights even if they are working with undocumented status.

In view of this complexity, the ILO Committee of Experts has recommended that labor inspection be conducted by specialized bodies with particular expertise in migrant labor:

Given the particular challenges of monitoring and enforcement of migrant workers' rights that the specificities of their situation create, the Committee considers that the creation of competent bodies specific to migrant workers to which these workers can present complaints or access particular advice or guidance may be particularly useful.¹⁴¹

None of the states of focus has followed this CEACR recommendation. To the extent that the labor force in Qatar consists almost exclusively of migrant workers, its labor inspectorate is effectively focused on migrant workers. However, "because the inspectorate was significantly expanded in a short period of time, there are gaps in capacity and experience" and so Qatar's current focus is on building the capacity of its inspectors.¹⁴² Again, as elements of the *kafala* system

¹⁴¹ CEACR General Survey, *Promoting Fair Migration*, above note 3 at para. 517

¹⁴² ADLSA and ILO, *Assessment of the Qatar Labour Inspection System*, above note 129 at 5

are being changed and new labor laws have been introduced in the last four years, the system is in too great flux to fully assess its potential. In particular, as labor inspectors are now Qatari and workers are overwhelmingly migrants, it will be important to observe whether Qatari labor inspectors have access to sufficient qualified interpreters so that they can meet and speak with migrant workers in their own language.¹⁴³

Meanwhile, none of the other states of focus has created or trained a labor inspectorate that is uniquely competent to address the circumstances of migrant labor. Not only do they fall short of the multilayered expertise recommended by the CEACR, but concerns have been raised about the basic standard of inspectors' professionalism in Malaysia and South Africa. The South African Department of Labour itself reports concerns with inspectors' lack of clarity on the Department's objectives and inspectors' roles, inconsistency in processes and procedures, lack of communication and lack of confidentiality.¹⁴⁴ The CEACR has also raised concerns that labor inspectors are not required by law to treat the source of complaints as absolutely confidential.¹⁴⁵ In 2016, the ILO observed that in Malaysia inspectors received limited training; had limited legal experience; lacked incentives towards career advancement; and that "retention is a challenge" for the inspectorate.¹⁴⁶ A 2017 Malaysian Ministry of Human Resources Policy Briefing further noted complaints that officers were unable to convey accurate information and lacked professionalism; that there was poor coordination of enforcement teams; and that labor inspectors were given multiple tasks and functions which prevent them from developing subject matter expertise.¹⁴⁷ The Ministry concluded that while the public had high expectations of labor inspectors, inspections did not fulfill their purpose due to inspectors' "lack of understanding on labour inspection's purposes and the spirit that stands behind it – quantity over quality."¹⁴⁸

Finally, all five of the labor inspectorates studied face resourcing challenges. Those challenges are particularly severe in South Africa, Malaysia, and Qatar. The CEACR has noted not only that South Africa faces a persistent shortage of labor inspectors and high turnover, but that inspectors are dispersed across the country in a way that does not correspond to the population and industry density, leaving the most populous hubs underserved.¹⁴⁹ South Africa relies primarily on employer's voluntary self-compliance for implementation of labor standards rather than formal rights enforcement. As Jinnah writes

¹⁴³ The lack of interpreters was a significant problem before the ILO began its technical cooperation program in Qatar: Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, Mission to Qatar, above note 96 at para. 45, 51 and 103

¹⁴⁴ EY and South Africa DOL, *Adequacy of resources*, above note 139 at 90-99

¹⁴⁵ CEACR – Direct Request, *C81 – South Africa* (2017), above note 102 re Article 15(c)

¹⁴⁶ ILO Observations of Malaysia's Labour Inspection system listed in Malaysia, Ministry of Human Resources, *Policy Briefing: Labour Inspection & Enforcement Series*, Vol. 1 (August 2017) at 1

¹⁴⁷ Malaysia, Ministry of Human Resources, *Policy Briefing*, above note 146 at 1

¹⁴⁸ Malaysia, Ministry of Human Resources, *Policy Briefing*, above note 146 at 1

¹⁴⁹ CEACR – Direct Request, *C81 – South Africa* (2017), above note 102 re Articles 6, 7, 10, 11 and 16; EY and Department of Labour, *Adequacy of Resources*, above note 139 at 33-39

In South Africa, the response to low compliance has been to tighten the regulatory space, introducing new laws on minimum wages, for example, and to increase awareness campaigns for workers to demand their rights. However, there have been few successful attempts to increase the enforcement mechanisms by, for example, beefing up inspectorates or instituting punitive action such as issuing fines to non-compliant employers. There is also an assumption that compliance will increase with awareness.¹⁵⁰

Meanwhile, in 2016, there were only 350 labor inspectors in all of Malaysia responsible for investigating over 400,000 workplaces. The inspector-to-worker ratio of 1:35,078 significantly exceeds the ILO benchmark of 1:20,000 for transition markets.¹⁵¹ Qatar, has 270 labor inspectors, most of whom have been recently hired, who are assisted by only 12 interpreters¹⁵² to oversee a workforce of over two million migrant workers.¹⁵³ Without a sufficient number of trained interpreters who can accompany inspectors to work sites to meet with workers, the efficacy of inspections will be greatly diminished. In Germany, concerns have been raised that “due to personnel deficits, inspections are not carried out on a regular basis.”¹⁵⁴ And in Canada, a shortage of labor inspectors is also a persistent weakness of the system. In 2018, following a multi-year Task Force which studied the rise of precarious work and the inadequacy of employment standards enforcement, Ontario’s provincial government committed to double the number of inspectors. But, after a provincial election and change of government the same year, the plan to hire inspectors was cancelled and Ministry of Labour staff were instructed not to initiate any new proactive inspections.¹⁵⁵ The inspectorate has increasingly shifted towards employer self-audits using online tools.¹⁵⁶

Again, while the job security, training and resource deficits within labor inspectorates undermine their capacity to enforce rights for national and migrant workers alike, these deficits weigh more heavily on migrant workers because the unique layers of exploitation that they face are deeper and more complex in light of predatory recruitment, restrictive work permits, temporary

¹⁵⁰ Jinnah, “Negotiated Precarity”, above note 104 at 215

¹⁵¹ Malaysia, Ministry of Human Resources, *Policy Briefing*, above note 146 at 1; Harkins, *Review of labour migration policy in Malaysia*, above note 87 at 5

¹⁵² ADLSA and ILO, *Assessment of the Qatar Labour Inspection System*, above note 129 at 5

¹⁵³ Qatar, Planning and Statistics Authority, *Labor Force Survey*, above note 16 at 13

¹⁵⁴ Hoffmann and Rabe, “Severe forms of labour exploitation”, above note 113 at 9

¹⁵⁵ Special Advisors C. Michael Mitchell and John C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report* (May 2017); The plan to hire labour inspectors was cancelled after only 75 of the planned 175 hires were made: Sara Mojtehdzadeh, “Ministry of Labour puts hold on proactive workplace inspections, internal memo says”, *Toronto Star* (25 October 2018), available online: <https://www.thestar.com/news/queenspark/2018/10/25/ministry-of-labour-puts-hold-on-proactive-workplace-inspections-internal-memo-says.html> (accessed 23 November 2020)

¹⁵⁶ Sara Mojtehdzadeh, “Labour ministry to reduce number of inspectors probing workplace abuse, union memo reveals,” *Toronto Star* (10 June 2019), online: <https://www.thestar.com/politics/provincial/2019/06/10/labour-ministry-to-reduce-number-of-inspectors-probing-workplace-abuse-union-memo-reveals.html> (accessed 6 July 2021)

status, criminalization of undocumented status, social and geographic isolation, and language barriers. All of this means that migrant workers have lower capacity to activate a complaint-driven enforcement system to protect their rights and are more reliant on proactive enforcement by state-based inspectorates. When those inspectorates are unable to effectively and proactively oversee compliance, rights enforcement is aspirational rather than real.

E. Scope of rights enforced and means of enforcement

In each of the countries studied, migrant workers regularly face a broad range of rights violations, which, despite the differences in political and legal systems, cultures and geography, are very similar in nature. It is well-documented in all five countries that migrant workers in sectors with low pay face multiple challenges: predatory recruitment; forced labor, labor trafficking, and debt bondage; contract substitution; coercion through threats of deportation; withholding of passports, work permits and other identity documents; and being deliberately forced out of status by employers and recruiters who make them work on terms inconsistent with their work permits.¹⁵⁷

Wage theft is the most common rights violation they face. Workers report not being paid at all, being paid far below the minimum wage, and working many unpaid overtime hours. They also work in circumstances where they have not been given a contract at all; are not given a contract in a language they understand; face contract substitution where they are forced to work under terms different than those agreed to; and/or they are given falsified pay slips which do not properly record their entitlements or earnings.¹⁵⁸ They are also frequently intentionally “misclassified” as independent contractors rather than employees so that they fall outside the scope of labor and employment laws, and so that employers can avoid paying taxes and other social security contributions.

In addition, employers deduct disproportionately large sums for rent or food; deduct the costs of recruitment from workers’ pay; restrict migrant workers’ movement; and restrict workers’ ability to communicate with trade unions or other organizations that may provide assistance. Migrant workers report that employers use physical violence or threats of violence to prevent them

¹⁵⁷ Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Toronto: Metcalf Foundation, 2014); European Union Agency for Fundamental Rights (FRA), *Protecting migrant workers from exploitation in the EU: workers’ perspectives* (Luxembourg: Publications Office of the European Union, 2019) at 34-35; Spiess, *The UN Migrant Workers Convention*, above note 224 at 5; Hoffmann and Rabe, “Severe forms of labour exploitation”, above note 113 at 17-18, 21; Harkins, Lindgren and Suravoranon, *Risks and rewards*, above note 88 at 3; CEACR – *C29 Observation – Malaysia* (2019), above note 87; Amnesty International, *All Work, No Pay: The Struggle of Qatar’s Migrant Workers for Justice* (2019); Stella Vettori, “The exploitation of migrant labour in the hospitality industry in South Africa” (2017) 6:4 *African Journal of Hospitality, Tourism and Leisure* 1-12 at 3, 7-9

¹⁵⁸ Hoffmann and Rabe, “Severe forms of labour exploitation”, above note 113 at 18-20; German Institute for Human Rights, *Development of the human rights situation in Germany July 2017 – June 2018*; Migrant Workers Alliance for Change, *Unheeded Warnings: COVID-19 and Migrant Workers in Canada* (Toronto: MWAC, June 2020); Caregivers Action Centre, Vancouver Committee for Domestic Workers and Caregivers Rights, Caregiver Connections Education and Support Organization and Migrant Workers Alliance for Change, *Behind Closed Doors: Exposing Migrant Care Worker Exploitation during COVID-19* (October 2020)

from seeking help or leaving the employment relationship. Assaults and sexual assaults have also been reported.¹⁵⁹

In all of the states of focus, particular concern is raised with respect to the rights violations that domestic workers encounter because of the multiple challenges they face: a high incidence of predatory recruitment; isolation in their employers' private homes; concentration in informal work relations; overwhelming legal or practical inability to unionize; gendered and racialized discrimination; and frequency of gender-based violence.¹⁶⁰ This concern is amplified by the fact that, very often, labor inspectors are legally prohibited from entering private homes.

In the face of these pervasive practices of rights violations, labor inspectorates' capacity to protect migrant workers is thwarted by the limited scope of rights that inspectorates are authorized to enforce, by an institutional reliance on complaint-driven rather than proactive enforcement, or both.

In Malaysia, Qatar and South Africa, the labor inspectorate generally has authority to enforce labor protections broadly. However, this does not translate into effective rights enforcement for migrant workers. In South Africa, migrant workers are primarily working in informal work relations which are difficult to monitor. But more fundamentally, the focus of labor inspection with respect to migrants is to identify those with undocumented status. In all states where working without status is criminalized, migrant workers are unlikely to disclose rights violations during an inspection because doing so puts them at risk for detention and deportation. In Malaysia and Qatar, large populations of migrant workers are excluded from the laws that labor inspectorates have the power to enforce. This is particularly the case with domestic workers who are subject either to separate legal regulation or regulation through bilateral agreements which places them wholly outside the mandate of the labor inspectorate.

In Germany, the most critical shortcoming of the labor inspection system is its limited focus on enforcing occupational health and safety laws, jurisdiction over which is itself divided between the general labor inspectorate, accident insurance bodies, and the separate sectoral labor inspectorates for mining and public administration.¹⁶¹ While "health and safety" is interpreted

¹⁵⁹ Hoffmann and Rabe, "Severe forms of labour exploitation", above note 113 at 18-20; Faraday, *Profiting from the Precarious*, above note 157; Caregivers Action Centre, *Behind Closed Doors*, above note 158; Harkins, *Review of labour migration policy in Malaysia*, above note 87.

¹⁶⁰ Faraday, *Profiting from the Precarious*, above note 157; Caregivers Action Centre, *Behind Closed Doors*, above note 158; CEACR, Direct Request - *Domestic Workers Convention, 2011 (No. 189) – Germany* (2017), ILC, 106th Session; CEACR, Direct Request - *Domestic Workers Convention, 2011 (No. 189) – Germany* (2021), ILC, 109th Session; CEACR – Direct Request, *Domestic Workers Convention, 2011 (No. 189) – South Africa* (2021), ILC 109th Session; Anderson, *Worker, helper, auntie, maid?*, above note 109 at xviii, 40, 75; CEDAW Committee, *Concluding observations – Malaysia* (2018), above note 87; European Center for Constitutional and Human Rights, *Accountability for forced labor in a globalized economy: Lessons and challenges in litigation, with examples from Qatar* (Berlin: ECCHR, 2018); Jinnah, "Negotiated Precarity", above note 104.

¹⁶¹ EPSU, *A mapping report on Labour Inspection Services*, above note 134 at 42; ILO, *Labour Inspection Structure and Organization – Germany*, online: https://www.ilo.org/labadmin/info/WCMS_209470/lang--en/index.htm (accessed 6 July 2021)

broadly to include hours of work, maternity protection, and employment of young workers, these rights are examined as elements of occupational health and safety. Most core workplace rights, including wages, fall outside of the mandate of labor inspectors. Moreover, sectoral regulation of different workers can leave them outside even the limited health and safety inspection. For example, because they are excluded from the *Hours of Work Act*, domestic workers fall outside the scope of inspection altogether.¹⁶² In addition, there is a lack of effective proactive monitoring in the sectors where most migrant workers are employed: construction, agriculture, restaurants, care work (for children and the elderly), cleaning, housekeeping in hotels, and meat processing.¹⁶³ Moreover, no body has a focus on inspections with respect to trafficking for labor exploitation. Labor inspectors who are investigating occupational health and safety, and financial authorities investigating undocumented employment may pass on information about suspected trafficking for labor exploitation to criminal prosecutors, but this is not their mandate and is “in practice, only a side effect of other, more prioritised inspection activities”.¹⁶⁴

Finally, in Canada, inspectors within the relevant Ministries of Labour are responsible for enforcing occupational health and safety and employment standards laws. While occupational health and safety protection is afforded to “workers” broadly defined,¹⁶⁵ employment standards apply only to those in formal employment relationships.¹⁶⁶ This creates an incentive for employers to informalize work or misclassify workers as independent contractors to avoid regulation, or to use temporary help agencies and complex networks of subcontracting which make it difficult to determine who is the “employer.”¹⁶⁷ More fundamentally, employment standards legislation has numerous “exemptions”, incorporated in response to employer groups’ demands for “special treatment” for their industry, sector or occupation. In Ontario, there are 85 full or partial exemptions from legislated minimum standards leaving less than a quarter of workers entitled to the full scope of employment standards protection.¹⁶⁸ These exemptions apply equally to national and migrant workers but the differential regulation of sectors (such as agricultural and domestic work) in some cases aligns with a segregated labor force comprised predominantly of migrant workers.

In all five countries studied, it is recognized that the most effective means of protecting migrant workers’ rights is through proactive labor inspection “blitzes”. However, as outlined earlier,

¹⁶² CEACR – *Direct Request C189 - Germany (2017)*, above note 160, re Article 2

¹⁶³ Hoffmann and Rabe, “Severe forms of labour exploitation”, above note 113 at 18

¹⁶⁴ Bachinger, *Trafficking Human Beings for Labour Exploitation*, above note 136 at 49-52

¹⁶⁵ Ontario, *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 1(1): “worker” means any of the following ...
1. A person who performs work or supplies services for monetary compensation...”

¹⁶⁶ Ontario, *Employment Standards Act, 2000*, above note 99, “employee” includes, (a) a person ... who performs work for an employer for wages”. Mitchell and Murray, *Changing Workplaces Review*, above note 155 at 265-269

¹⁶⁷ Mitchell and Murray, *Changing Workplaces Review*, above note 155 at 262-265. See also, ILO, R198 – *Employment Relationship Recommendation, 2006*, 15 June 2006, ILC 95th Session which urges states to combat work arrangements that try to disguise the nature of employment in order to deprive workers of legal protections to which they would otherwise be entitled.

¹⁶⁸ Leah F. Vosko, et al, *Closing the Employment Standards Enforcement Gap: An Agenda for Change* (2017) at 14

the scarcity of state resources allocated to labor inspection means that in all five states the primary means of enforcement is complaint-driven. Rather than being led proactively by state-based institutions, activation of enforcement depends on individual workers to file formal complaints. In reviewing Qatar’s compliance with Convention 81, the significance of conducting strategic proactive inspections was underscored by the CEACR’s finding that almost no inspections are initiated in response to worker complaints: in the first eight months of 2018, *no* labor inspections and only *seven* occupational health and safety inspections were undertaken in all of Qatar in response to complaints.¹⁶⁹ Proactive enforcement was more effective. In the 19,328 labor inspection visits and 22,736 health and safety visits conducted the same year in Qatar, approximately 70 percent of inspections revealed no violations, but the CEACR raised concerns that employers were typically given advance notice of inspections. However, in the 1,302 inspections with respect to wage protections, *100 percent* disclosed violations.¹⁷⁰

Where it exists, however, proactive enforcement is not necessarily adequate. In Ontario, only occupational health and safety inspections are typically conducted proactively, frequently, and are unannounced. Very few employment standards inspections are conducted proactively, and employers are typically notified in advance.¹⁷¹ Moreover, the inspections focus on only a limited range of possible violations, and are conducted with a view to “educating” employers in order to promote voluntary compliance.¹⁷² Where proactive inspections have targeted workplaces that employ migrant workers, they have discovered that between 60 to 80 percent of employers are in breach of mandatory minimum standards.¹⁷³ The rate of employer non-compliance is similar when blitzes have been conducted in sectors dominated by national workers. This broad culture of non-compliance can thrive where the extreme power imbalance between employers and workers is paired with low rates of unionization and ineffective state enforcement.

¹⁶⁹ CEACR – *Observation C81 – Qatar* (2021) above note 130, re Article3(1)t

¹⁷⁰ CEACR – *Observation C81 – Qatar* (2021) above note 130, re Articles 3, 12 and 16 (Sufficient number of labour inspections and coverage of workplaces)

¹⁷¹ Mitchell and Murray, *Changing Workplaces Review*, above note 155 at 72-73; Kevin Banks, *Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness* (Toronto: Ontario Ministry of Labour, 2015)

¹⁷² Ontario’s most recent employment standards blitz directed at protecting migrant worker rights took place in 2016. The Ministry of Labour expressly stated that “The goal of these blitzes was to educate employers and promote compliance with the ESA in sectors that often employ these vulnerable workers.” Moreover, that blitz focused only issues of record keeping, hours of work, overtime pay, vacation with pay, minimum wage, and public holidays – all of which are rights from which agricultural workers are excluded: Ontario Ministry of Labour, Training and Skills Development, *Blitz Results: Young Workers and Temporary Foreign Workers* (30 September 2016), online: https://www.labour.gov.on.ca/english/es/inspections/blitzresults_ywtfw.php (accessed 25 June 2021).

¹⁷³ The results of Ontario’s employment standards blitz are posted on the Ministry of Labour website: <https://www.labour.gov.on.ca/english/es/topics/proactiveinspections.php> (accessed 23 November 2020). Manitoba’s Employment Standards Branch notes the following with respect to its Special Investigations Unit which conducts proactive employment standards investigations: “During 2014-2015, the Unit conducted over 400 investigations. Almost half of these investigations were the result of information received from the public and the Unit identified violations in 80 per cent of these cases”: https://www.gov.mb.ca/labour/standards/special_investigations_unit.html (accessed 23 November 2020)

F. Accessibility to migrant workers

As the primary labor inspectorates outlined above often have only partial jurisdiction to address migrant workers' rights, or they eschew proactive enforcement, workers are often left to navigate a bewildering array of institutions to rectify rights violations. Canada provides a good example of how fragmented that enforcement system can be. As noted above, occupational health and safety and employment standards are enforced by the Ministry of Labour. However, within each of the 14 different legal jurisdictions in Canada, there is even further fragmentation. The right to be free of discrimination is enforced before human rights tribunals. Monitoring of migrant workers' housing conditions is carried out by municipal housing inspectors. Redress for illegal recruitment fees is addressed exclusively through a complaint-driven process before provincial labor boards. Meanwhile, other elements of predatory recruitment practices such as requiring workers to pay for their flights to Canada, contract substitution, failure to provide the hours of work promised, and predatory rents for accommodation must be enforced before civil courts. Wrongful dismissal is also addressed in civil courts. Fraud, forced labor and human trafficking are enforced through the criminal law courts but must be brought forward by government-employed prosecutors and so are outside the control of migrant workers. This fragmentation of legal claims across multiple tribunals and courts, none of which has expertise in the circumstances of migrant labor, makes it extremely complicated, costly and inefficient for migrant workers to enforce their rights. It is a far cry from the CEACR's recommendation that states provide a single, expert body with specialized training to address rights enforcement for migrant workers.

The conditions of precarity outlined in the *Overview Report*¹⁷⁴ present overwhelming barriers that largely prevent migrant workers from filing formal complaints to seek rights enforcement. While there are instances where they have, these remain exceptional in all five states studied. An analysis in Malaysia concluded that while migrant workers there have the right to file complaints for labor standards violations or unjust dismissal, in practice "the number of complaints filed by migrant workers remains negligible in comparison to the number of violations committed."¹⁷⁵ The statement is equally applicable with respect to the other four states.

Given this report's focus on state-based labor inspectorates, it is beyond the scope to address the range of community-based organizations through which migrant workers receive support. However, examples of state-based supports show some promise in assisting migrant workers within the existing national frameworks. Canada, and Germany have systems of state-funded legal assistance that low wage migrant workers can access. In Qatar, legal aid is only available to migrant workers in criminal law cases, not to enforce labor rights.¹⁷⁶ In Malaysia, legal aid is only available to non-citizens in cases of capital punishment.¹⁷⁷ In Germany, a series of

¹⁷⁴ Faraday, "Empowerment of Migrant Workers in a Precarious Situation: Overview", above note 5 at Part III

¹⁷⁵ Harkins and Ahlberg, *Access to justice*, above note 89 at 14-15

¹⁷⁶ Obiora C. Okafor, *Preliminary findings of the United Nations Independent Expert on human rights and international solidarity at the end of his visit to Qatar* (10 September 2019) at 4

¹⁷⁷ CEDAW Committee, *Concluding observations – Malaysia* (2018), above note 87 at para. 13

detailed applications must be made to access funding for initial legal advice, for interpretation, and for legal aid that can cover a portion of court costs of lawyers' fees. Before qualifying for support, the substance of the worker's claim is also screened to determine if it has a reasonable chance of success.¹⁷⁸ By contrast, in Canada, legal aid is available in most, but not all, provinces and territories to low income workers through (i) community legal clinics; (ii) specialized legal clinics which serve either distinct racialized or linguistic communities; (iii) lawyers in private practice who accept legal aid certificates through which they receive payment from the relevant government office; and (iv) publicly funded legal clinics that are attached to specific administrative tribunals and that advise and represent claimants before those tribunals. Canada also has a unique legal aid clinic that specializes in serving local and migrant women who have experienced violence, and migrant women, including migrant sex workers, who have experienced coercion and exploitation in the course of their labor migration journey. This clinic also provides 24/7 access to emergency interpretation services by telephone in over 200 languages. Migrant women are connected to interpreters within 30 seconds and all interpreters have been specifically trained to work in high-stress emergency contexts in a trauma-informed way with women who have experienced violence.¹⁷⁹ This is a leading example of a gender-responsive, people-centred access to justice support.

G. Efficacy of labor inspectors' remedial authority

Finally, the efficacy of a labor inspectorate is ultimately measured by the extent to which it delivers real protection from rights violations and meaningful remedies where rights have been violated. The *Labour Inspection Convention* requires that national laws provide for "adequate penalties for violations of the legal provisions enforceable by labour inspectors"; that inspectors be empowered to take steps, including the initiation of measures with immediate executory force, to remedy defects in a workplace to pose a threat to the health and safety of workers; and to initiate legal proceedings to enforce the applicable legislation.¹⁸⁰ This section examines four elements of institutional design with respect to the efficacy of state-based remedial authority: (i) migrant workers' security of status while formal rights enforcement is pursued; (ii) whether proceedings deliver timely remedies; (iii) whether remedies are responsive to the needs of migrant workers; and (iv) the labor inspectorate's capacity to ensure that there is compliance with remedial orders.

The ability to engage the remedial authority of labor inspectorates is undermined in all five states because migrant workers in sectors with low pay can only work on permits that restrict them to working for one employer. In Germany, their residency permit is similarly restricted. When migrant workers seek to enforce their rights, they are almost uniformly terminated from their work. Yet, being without work and residency is not feasible for migrant workers,¹⁸¹ so most are forced into

¹⁷⁸ Germany, Federal Ministry of Justice and Consumer Protection, *Financial aid for legal advice and court costs* (Berlin: January 2020)

¹⁷⁹ Barbra Schlifer Commemorative Clinic: <https://www.schliferclinic.com/>

¹⁸⁰ C81 – *Labour Inspection*, above note 41, Articles 13, 17 and 18

¹⁸¹ Weiss, above note 103 at 282; Harkins and Åhlberg, *Access to justice for migrant workers in South-East Asia*, above note 89 at 15

working with undocumented status while awaiting resolution of their case or hiring on a new restricted permit. In none of the states studied are migrant workers automatically entitled to temporary resident permits that would enable them to remain in the country and work while pursuing a legal claim. In Canada and Malaysia, migrants can apply for, respectively, a temporary resident permit or a “Special Pass” for this purpose. However, in both countries, granting the permits is discretionary and the permits are of extremely short duration which does not correspond to the length of legal enforcement proceedings. In Malaysia, permits are for one month, renewable to a maximum of three months. In Canada, they are for three months, renewable at the federal authority’s discretion and subject to cancellation at any time.¹⁸² Across all five countries, the precarity created by their tenuous status often leads migrant workers to abandon legal claims, settle them for less than they are entitled to, or leave the country before achieving a resolution.¹⁸³

Second, legal proceedings to enforce rights are lengthy. In Germany and Malaysia, claims may be processed in six months, but elsewhere the process can be lengthier. In 2018, Qatar created Dispute Settlement Committees¹⁸⁴ to accelerate rights adjudication. They aim to complete an initial mediation with the Labour Relations Department within 7 days of a complaint being filed. If not resolved at mediation, the matter is referred to the Dispute Settlement Committee which must complete the hearing within three weeks. The parties can appeal the Committee’s decision to the court which must issue a decision within 30 days of the first hearing. On this schedule, the entire dispute should be resolved through mediation, adjudication and appeal within six weeks.¹⁸⁵ However, an Amnesty International study involving over 2000 workers who filed wage complaints with the Dispute Settlement Committee beginning in March 2018 shows that the revised system is not working as planned. Each stage of the dispute takes significantly longer than outlined. Rather than a maximum of 14 days from filing the initial complaint, in practice it took as long as eight months just to get the decision from the Committee. Combined with the non-payment of salaries that the workers complained of, this lengthy process left workers without income for up to a year.¹⁸⁶

Meanwhile, Canada’s landmark ruling in favour of migrant workers illustrates the perils of lengthy legal proceedings. In 2015, two female migrant workers from Mexico were awarded the highest human rights damages ever ordered by a Canadian human rights tribunal: \$165,000 and \$55,000 CAD respectively in a case where their employer had sexually assaulted them, sexually

¹⁸² Canada, *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 24. Section 24(1) of the Act states that temporary resident permits “may be cancelled at any time.” Re Malaysia, see Harkins and Ahlberg, *Access to justice for migrant workers in South-East Asia*, above note 89 at 14-15

¹⁸³ Re Qatar, see Amnesty International, *All Work, No Pay*, above note 157 at 38-41; Re Canada see: *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675; Fay Faraday, *Canada’s Choice: Decent work or entrenched exploitation for Canada’s migrant workers* (Toronto: Metcalf Foundation, 2016) at 62, fn 135

¹⁸⁴ Qatar, *Law No. 13 of 16 August 2017 which amends several provisions of the Labour Law promulgated by Law No. 14 of 2004 and Law No. 13 of 1990 which promulgates the Civil and Commercial Proceedings Law Qatar Law No. 15 of 22 August 2017 which relates to domestic workers*

¹⁸⁵ Amnesty International, *All Work, No Pay*, above note 157 at 16

¹⁸⁶ Amnesty International, *All Work, No Pay*, above note 157 at 18-37

harassed them and discriminated on the basis of sex.¹⁸⁷ The case is an anomaly not only because of the size of the award but also because the migrant workers had an extraordinarily rare level of support: they were unionized and also supported by a community advocacy organization. More significantly, the legal case began in 2008 with over 40 migrant workers from Mexico and Thailand who alleged a stunning pattern of abusive conduct by this employer. However, by the time the case was finally decided *seven years later*, only two workers remained. Most workers had either returned to Mexico or Thailand or had disappeared into undocumented work. So even in the most successful human rights case brought by migrant workers, actual success was exceptional rather than available to all who suffered harm.

Third, a critical question is whether the remedies that a labor inspectorate is empowered to order correspond to the needs of migrant workers. In many situations, there is a profound mismatch.

In Malaysia, where a migrant worker has managed to enforce their rights successfully in the legal system, the remedy provided in 63 percent of cases is to return the worker to their country of origin.¹⁸⁸ While some workers who had been trafficked or in forced labor wanted this outcome, for others “considering repatriation to be a ‘remedy’ may be a mischaracterization due to the loss of income, loss of opportunity and investment in migration costs.”¹⁸⁹ Meanwhile, because exploitation is dealt with under the criminal law of trafficking, migrant workers in Malaysia do not receive compensation for wages owing. Therefore, “most opt to seek financial remedy through a negotiated settlement” rather than pursue a claim in court.¹⁹⁰ Similarly, in Germany, where employers are found to be employing migrant workers on terms less favourable than German nationals, the “remedy” is to revoke the work permits. This effectively deprives workers of *any* employment and so presents a serious disincentive to enforcing their rights.¹⁹¹ Similarly, when workers are found to be working while undocumented, they are deported. This was the case in 2019 for 120 construction workers who were suspected to be victims of trafficking for labor exploitation. But they “were not provided any of their rights as potential or presumed victims”; were made homeless by the authorities; had their passports confiscated before eventually being deported; were given 2-year bans from re-entering Germany; “and no action [was] taken to remedy the labour abuses they experienced”.¹⁹² These remedial mismatches run counter to the required primacy of labor rights and prioritize immigration law objectives at the expense of workers’ rights.

¹⁸⁷ *O.P.T. v. Presteve Foods Ltd.*, above note 182

¹⁸⁸ ILO, *Situation and gap analysis – Malaysia*, above note 87 at 10

¹⁸⁹ ILO, *Situation and gap analysis – Malaysia*, above note 87 at 10

¹⁹⁰ Harkins, *Review of labour migration policy in Malaysia*, above note 88 at 7-8

¹⁹¹ CEACR – Direct Request, *Migration for Employment Convention (Revised), 1949 (No. 97) – Germany (2020)*, ILC 109th Session re Access to legal proceedings in practice; CEACR – Direct Request, *Migration for Employment Convention (Revised), 1949 (No. 97) – Germany (2013)*, ILC 102nd Session

¹⁹² Keith and LeVoy, *A Worker is a worker*, above note 112 at 29-30

Fourth, in the exceptional circumstances where migrant workers are able to get a legal order in their favour, in many cases they never realize the benefit of that remedy due to lack of compliance by employers and weak follow up enforcement.

In Germany, a common problem is that employers manipulate their corporate form to evade liability: they disappear, shut down, repeatedly declare insolvency, and then pass ownership to a family member or friend. In other cases, employers have simply not complied with the orders.¹⁹³ In Canada, labor inspectorates initially attempt to secure employers' voluntary compliance and only if there is not voluntary compliance will the inspectorate issue an Order to Pay. However, monies are only fully recovered in 38 percent of cases where any workers – national or migrant – have orders in their favour.¹⁹⁴ The more serious penalties and prosecutions that are available to inspectorates under the law are rarely activated. However, when proactive investigations are conducted, not only do they discover more violations of the law, they secure full recovery of monies owed in 92 to 99 percent of cases.¹⁹⁵ Interestingly, in Ontario, proactive inspections were ceased in 2018.¹⁹⁶ Finally, in Qatar, employers are acculturated to a system in which they are not held accountable for rights violations and so frequently do not appear at the legal proceedings and do not pay back wages when ordered to do so. The Committees do not appear to have the power to compel employers to participate and do not have power to enforce their rulings.¹⁹⁷ Employers take advantage of these structural weaknesses. Knowing that the workers are impoverished, rather than participating in the legal proceedings, employers engage in strategies of delay which exacerbate the pre-existing power imbalance. They then negotiate settlements with the workers for amounts well below what the workers are owed. Often workers are forced by poverty to accept the settlements or leave the country without receiving any compensation.¹⁹⁸ In 2019, the ILO Project Office in Qatar assessed the state's Wage Protection System. It found that although "decisions are normally ultimately made in favour of workers (with recourse to WPS data), the employers are often not responsive. Therefore, decisions are not enforced quickly, or not enforced at all."¹⁹⁹ As of October 2019, Amnesty International reported that no funds had been paid out to workers through the Workers' Support and Insurance Fund.²⁰⁰

¹⁹³ FRA, *Protecting migrant workers from exploitation in the EU*, above note 157 at 86-88, 90; Hoffmann and Rabe, "Severe forms of labour exploitation", above note 113 at 21-22

¹⁹⁴ Vosko, et al, *Closing the Employment Standards Enforcement Gap*, above note 168 at 26.

¹⁹⁵ Sara Mojtehdzadeh, "It's been more than a year since a Toronto barbershop was ordered to pay her \$5,000 in missing wages. She's still waiting", *Toronto Star* (18 November 2019), online:

<https://www.thespec.com/business/2019/11/18/it-s-been-more-than-a-year-since-a-toronto-barbershop-was-ordered-to-pay-her-5-000-in-missing-wages-she-s-still-waiting.html> (accessed 28 June 2021); Banks, *Employment Standards Complaint Resolution, Compliance and Enforcement*, above note 171 at 60

¹⁹⁶ Mojtehdzadeh, "Ministry of Labour puts hold on proactive workplace inspections," above note 155

¹⁹⁷ Amnesty International, *All Work, No Pay*, above note 157 at 41

¹⁹⁸ Amnesty International, *All Work, No Pay*, above note 157 at 38-41

¹⁹⁹ Ray Jureidini, *Assessment of the Wage Protection System in Qatar* (Doha: ILO, 2019) at 27

²⁰⁰ Amnesty International, *All Work, No Pay*, above note 157 at 15

IV. CONCLUDING COMMENTS: EMPOWERING MIGRANTS BY STRENGTHENING LABOR INSPECTORATES

In very large measure, labor inspectorates around the globe are failing migrant workers. In none of the countries studied do migrant workers receive effective protection of the substantive rights outlined in binding international labor rights instruments and non-binding frameworks on migrant worker rights. To some extent, this failure arises because national laws or bilateral agreements fail to meet those substantive international standards, or allow for exemptions or lower standards in economic sectors where migrant workers are concentrated.

More profoundly, even as the scale of labor migration has grown, and grown rapidly, none of the States studied has prioritized developing a labor inspectorate that is responsive to the unique precarity faced by migrant workers. Many of the structural concerns with labor inspectorates create impediments for national and migrant workers alike (fragmentation of enforcement across multiple bodies, lack of resources for enforcement, inspectors' lack of expertise, restricted scope of rights enforced, and inefficacy of remedies). However, the impact of those structural concerns lands more heavily on migrant workers because of the unique and exacerbated dimensions of labor market precarity created through their status as migrants. Their "recruitment" debts, restricted work and residency permits that tie them to a single employer, temporary status, language barriers, lack of familiarity with the local legal system, social location and isolation, and lack of unionization all accumulate in a way that both facilitates their exploitation and makes access to rights enforcement, or even disclosure of rights violations, challenging to unlikely.

For a labor inspection system to effectively protect the rights of migrant workers, it must be designed with reference to the structural barriers erected by the workers' precarity. Yet, in some cases, the design of labor inspectorates actively amplifies that precarity. This is most obvious in the three states that prioritize immigration law enforcement over protecting labor rights (Germany, Malaysia and South Africa), leaving undocumented workers wholly unprotected and exacerbating prejudice against migrants. But it also arises because labor inspectors are not trained to enforce rights with an understanding of migrant workers' precarity, and are not resourced to conduct the proactive rights enforcement (with appropriate language interpretation) that is critical for workers who are vulnerable to deportation if they complain. And it arises from remedies that effectively deport workers, leaving them with recruitment debts but no income stream to repay them; that send them back to economies from which they originally needed to migrate to find economic support; and that drive them into undocumented status putting them at even greater risk. That precarity has only increased during the COVID-19 pandemic.

The immovable bottom line is that addressing the effectiveness of labor inspectorates requires the political will of the State to address systemic issues of institutional design. There is no shortage of recommendations, principles and guidelines for practical action that States can follow to meet the international standards. As each of the States studied has distinct legal systems and

weaknesses, this report does not attempt to propose country-specific reforms. However, at a macro-level, seven critical needs across all the States studied emerge:

1. Specialized national labor inspectorates must be intentionally developed that are dedicated to enforcing the comprehensive range of rights violations that migrant workers experience across the full arc of their migration journey. This must ensure that migrant workers can have their recruitment, housing, workplace, health and safety, and human rights enforced through a single institution that can appreciate the holistic nature of the drivers and the impacts of the rights violations.
2. These specialized labor inspectorates must be staffed by personnel who are chosen specifically based on their expert qualifications. These labor inspectors must be trained in all the complexities of labor migration and labor rights of migrant workers, so that they have a comprehensive and systemic understanding of how different dimensions of migrant worker precarity are constructed and interact.
3. Members of the specialized labor inspectorates must have security of tenure and be compensated at a level that ensures their independence.
4. Labor inspectorates must be resourced at a level that in reality allows them to engage in extensive strategic proactive inspection in the sectors where migrant workers are concentrated, and in sectors where migrant workers are at high risk of exploitation.
5. Labor inspectorates must include interpreters who are experts in the languages of the largest populations of migrant workers and must have access to other language interpreters as needed so that inspectors can engage in clear and effective communication with migrant workers in their own language.
6. Labor inspectorates must be designed (and audited) to ensure their accessibility to migrant workers whether that access is through in-person engagement or through the use of technology that is easy, safe and readily available for workers to use.
7. Labor inspectorates must be empowered to issue and enforce remedies that are responsive to migrant workers' needs and that deliver real redress for violations of workers' rights.

These reforms are urgently needed. But, generating the political will for this systemic change is difficult. Creating political will has only been possible where external oversight is brought to bear and threats to national reputation have been at stake. For example, FIFA's 2010 decision to award the 2022 World Cup²⁰¹ to Qatar, and the subsequent focus on migrant labor's role in constructing

²⁰¹ The Fédération Internationale de Football Association's international football tournament takes place every four years.

the related massive infrastructure projects, drew significant critical international attention to Qatar's treatment of migrant workers. Followed by the 2014 report by the UN Special Rapporteur on the human rights of migrants and the 2018-2020 Technical Cooperation Program with the ILO, this external presence has helped shift practices incrementally toward international standards. Similarly, the ILO's seven-year Memorandum of Understanding to provide technical assistance to Malaysia provides incentive and guidance for incremental movement towards international standards.

While political will that drives systemic reform is needed, being dependent on political will is a long-term and uncertain prospect that is even more uncertain as States continue to battle with the consequences of the pandemic. Without abandoning the imperative to generate the political will to make systemic change, it is important to seek points of leverage beyond state-based labor inspection, and to harness technologies that can shift the effectiveness of labor rights enforcement for migrants in the absence of the necessary political will. That will be the focus of the next research report in this KNOMAD series.

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