

Trafficking: Suspend new provisions of Atip Act
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Dear Prime Minister Najib Abdul Razak,

Human Rights Watch writes to express serious concern about amendments to the Anti-Trafficking in Persons Act 2007 (Atip Act) that was approved by the Malaysian parliament in August and scheduled to take effect in October. We are concerned that the amendments conflate the serious rights abuse of human trafficking with the immigration violation of people smuggling.

As a result, front-line law enforcement officials will inevitably treat trafficking victims as undocumented migrants subject to immediate deportation, undermining government efforts to counter trafficking and risk exposing trafficked persons, abused migrants, and refugees to further rights violations. We are also concerned that the amendments narrow the legal definition of human trafficking, and by the amended law's failure to include any mechanisms to protect the rights of migrants conveyed by 'people smugglers.'

Should Malaysia wish to strengthen the law against people smuggling, but preserve protections for trafficked persons, the government should rescind all amendments to the Atip Act that relate to people smuggling and revise the Immigration Act and other legislation focused on border control. This would ensure that there are separate legal frameworks for dealing with human trafficking and with people smuggling.

Human Rights Watch monitors human rights in more than 90 countries worldwide. We have conducted in-depth research on human trafficking and forced labor since 1993 in such countries as the US, Saudi Arabia, Guatemala, Guinea, Indonesia, Singapore, Sri Lanka, Thailand, and the United Arab Emirates, as well as Malaysia. We have also encountered the practice of people smuggling in various regions of the world, and documented the abuses suffered by migrants and refugees alike at the hands of people smugglers. Our comments below are drawn from our extensive experience in documenting human trafficking and people smuggling around the world and in identifying strategies to address these serious problems and improve the protection of vulnerable individuals.

We include with the discussion of each issue specific recommendations for the Malaysian government. To prevent future abuses we urge that the recommendations be implemented before the Atip Act amendments go into effect in October.

Separate people smuggling from human trafficking - our principal concern with the amended Atip Act is that it conflates two distinct problems, human trafficking and people smuggling. This unfortunate and ill-considered change in government policy was achieved by the insertion of a new crime of 'smuggling of migrants' into new Part IIIA of the Atip Act, essentially criminalizing the facilitation of irregular migration into or out of Malaysia. International law and practice recognize that smuggling and trafficking are dissimilar and require different law enforcement strategies.

To reflect this, two separate protocols were added to the United Nations Convention against Transnational Organized Crime, specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol), which Malaysia has ratified, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, which it has not. Each protocol creates a separate international framework for what are

two distinct problems, and each supports a different police response.

The Atip Act amendments reveal the faulty assumption that the crimes of smuggling and trafficking are so closely related that tackling one will help to prevent the other. But international best practice in implementing anti-trafficking efforts demonstrates precisely the opposite: focusing on smuggling is likely to damage efforts to counter trafficking because it shifts the emphasis from countering exploitation of individuals, the hallmark of trafficking, to controlling immigration, thus effectively undermining identification and protection of human trafficking victims.

UN officials and non-governmental organizations in the region have repeatedly identified victim identification and protection as a weak link in Malaysia's anti-trafficking efforts. Human trafficking, as defined under international law, involves the use or threat of force or other forms of coercion and the giving or receiving of payments or benefits for the purpose of exploitation. It occurs not because people can enter Malaysia illegally, but because of exploitation and the difficulty faced by trafficking victims to come forward to report the crime. Trafficking is more closely related to violence against women, child abuse, and severe exploitation of forced labor than it is to irregular migration. Many trafficked people enter destination countries on valid visas or are nationals trafficked internally.

While people smuggling is a violation of a state's immigration laws, human trafficking is better understood as a series of human rights abuses that occur continuously against an individual over a period of time. Ending human trafficking and reducing irregular migration require different skills and diverse strategies. First and foremost, the legal framework for taking effective action against human trafficking needs to recognize that identifying and assisting victims of trafficking is critical to prosecuting a crime that is heavily dependent on evidence from eyewitness testimony. Traffickers often tightly control trafficked persons' movements and seize their passports and other personal identification documents.

Trafficking victims may not know how or where to access help to escape their situation, but unlike irregular migrants, they seek and need external assistance to escape their predicament. Post-rescue best practice emphasizes a 'victim-centric' response. Law enforcement officials must gain the trust of trafficking victims in order to provide assistance to support victims' physical and mental recovery, to ensure their protection from retaliation by traffickers, and to persuade them to testify in complex trafficking prosecutions. But when human trafficking is conflated in law with people smuggling, the frequent result is that front-line law enforcement officials fail to identify trafficking victims and instead treat all persons detained as undocumented migrants, subject to immediate deportation.

Experience in many countries has also shown that cracking down on irregular migrants can increase traffickers' ability to control and intimidate their victims who, fearful that seeking help will lead only to arrest and deportation, remain silent. Furthermore, front-line police and immigration officials become confused about the difference between trafficking victims and irregular migrants. In Malaysia, such confusion may be compounded in instances where local civilian and emergency responders from Ikatan Relawan Rakyat Malaysia (Rela) are given duties in immigration enforcement for which they are neither adequately trained nor sufficiently concerned to identify trafficked persons.

Recommendation: Rescind all provisions on people smuggling in the amended Atip Act. Any revisions to the law against people smuggling should be achieved through amendments to existing law, such as the Immigration Act, or on passage of a new law that focuses solely on people smuggling. The government should ensure in its public pronouncements and programs not to conflate human trafficking with people smuggling.

Amend the Definition of Trafficking in the Atip Act - The definition of trafficking in the amended ATIP Act has been narrowed considerably and no longer complies with international law. The new definition limits the crime to those situations in which a person is exploited by means of 'coercion.' Coercion is defined in the Atip Act as use or threats of physical harm and 'the abuse of the legal process.' This is inconsistent with the UN Trafficking Protocol, which states that trafficking includes not only cases of coercion, but also 'of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person' (article 3).

This broader definition covers in particular cases of child trafficking where adults use their power over children to force them into exploitative work and prevent them from escaping. It is also essential to effectively prosecute traffickers who abuse adult victims by using fear, psychological manipulation and spiraling debt to prevent the victim from seeking help. The law's exclusion of these situations from the definition of human trafficking will exclude many trafficked persons from the protection of the Atip Act.

Recommendation: Amend the definition of human trafficking in the Atip Act to bring it in full compliance with international law, as set out in the UN Trafficking Protocol, by listing all the means of coercion and exploitation listed in the protocol.

Provide comprehensive protections for migrants - The amended Atip Act specifically excludes smuggled migrants from any protection or assistance guarantees unless 'the smuggled migrant is a trafficked person' (new Section 41A), completely discounting the needs of smuggled migrants. Migrants who arrive with the help of smugglers may experience assault, robbery, deprivation of liberty, rape or even death at the hands of smugglers, but may nevertheless not fulfill the definition of being a trafficked person if the smuggler does not coerce the person for purposes of exploitation, as defined in the UN Trafficking Protocol, such as for prostitution, other forms of sexual exploitation, or forced labor.

They may need emergency health care, including maternal and child health. They may require legal advice and support, and should have an opportunity to access justice and seek a remedy for abuses they have suffered. Effective prosecution of people smugglers will ultimately require the voluntary assistance and testimony of the migrants who have been smuggled. The amended Atip Act will allow law enforcement authorities to take measures unrelated to trafficking, such as to arbitrarily detain migrants, to interrogate them about smuggling networks, and to charge them with giving support to people smugglers because they paid for their own journey.

Giving support would even include renting a conference facility for a meeting about undocumented migration. Penalties for the broadly-defined crime of supporting people smuggling are draconian and roughly approximate to those given for human trafficking. For instance, under new article 26F, a person providing 'any premises, room, or place' for the purposes of committing a people smuggling offense is subject to receive up to 10 years in prison and a fine. New article 26H criminalizes the actions of any person who 'conceals or harbors, or prevents, hinders, or interferes with the arrest of any person knowing, or having reason to believe that person is a smuggled migrant,' offenses subject to up to 10 years in prison and a fine.

We also regret that there are no provisions that guarantee humane treatment of smuggled migrants during interception, detention, and deportation proceedings, or that require police

and immigration enforcement officers to treat migrants humanely in accordance with international law.

Preventing human trafficking in the future requires a clear and effective legal framework that recognizes and encourages the contribution of undocumented migrants in reporting incidents of human trafficking and in cooperating in the prosecution of traffickers. However, the amended Atip Act will engender fear among migrants, and likely erode nascent cooperation between migrants and anti-trafficking advocates and law enforcement officials.

Recommendations: In addition to removing people smuggling from the Atip Act, revise people smuggling laws to protect the rights of undocumented migrants. Ensure that migrants whose lives or safety have been endangered by smugglers have access to medical care and to justice. Ensure that any law criminalizing smuggling requires officials to treat migrants humanely, and that effective measures are taken to train police and immigration officials.

Ensure respect for non-refoulement obligation - Many individuals smuggled into Malaysia are refugees and asylum seekers fleeing persecution. Malaysia is the destination for the fourth largest number of asylum-seekers globally, with the UN High Commissioner on Refugees (UNHCR) registering 40,000 new asylum applications in 2009. The anti-smuggling amendments to the Atip Act do not recognize the unique needs of refugees and asylum seekers. This omission risks increasing the possibility that refugees will be detained and deported to places where they face further persecution or where their lives or freedom may be threatened in violation of Malaysia's non-refoulement obligations under international law.

Recommendation: Amend the Atip Act to ensure that UNHCR is provided with timely access to all smuggled migrants so that refugees and asylum seekers among them have the opportunity to file asylum claims. Ensure that persons held in detention centers have access to refugee status determination procedures so that refugees can be identified and released, and not returned to places where they face persecution.

Human Rights Watch has serious concerns that the amended Atip Act risks undermining efforts to counter trafficking by subsuming it into efforts to control irregular migration. We also are concerned that the newly revised law excludes many vulnerable trafficked persons from protection and ignores the protection needs of migrants and refugees. We urge that implementation of the new provisions of the Atip Act contrary to international law be suspended and that the government promptly revise the law to remove provisions related to people smuggling and restore to it a definition of trafficking that meets international standards.

Human Rights Watch appreciates your immediate attention to our comments and recommendations. We welcome the opportunity to discuss these matters further with you or your representative.

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