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Underlying Conditions: The Increased Vulnerability of Migrant Workers Under COVID-19 in Israel¹

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The COVID-19 pandemic, and with it the introduction of closures, quarantines and social distancing regulations by governments, has had an immense impact on labour markets and working conditions around the world. In various countries, governments have attempted to mediate the harsh economic results of closures through providing direct benefits or by supporting employers to retain workers. However, such policies have generally not been extended to non-citizens, who, as a result, have found themselves either without income or working long hours in sectors designated ‘essential’, such as care, agriculture, and construction, often under new restrictions and in the face of health risks.

This article considers the impact of key policies introduced in response to the spread of COVID-19 on migrant workers’ vulnerability through a specific case study: temporary migrant workers and other ‘unskilled’ non-citizen workers in the Israeli labour market. We explore the link between restrictive policies and measures resulting from COVID-19 and the increased risk of severe forms of labour market exploitation, in some cases amounting to forced labour, slavery and trafficking in persons. We argue that the impact of COVID-19 restrictions in the Israeli context has generally manifested not in the emergence of new forms of exploitation and coercion, but rather in the exacerbation and intensification of ‘underlying conditions’ that were already present, i.e., existing structural vulnerabilities to severe forms of labour market

¹ This research was conducted with the support of the TraffLab research project (www.trafflab.org) and funded by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No 756672). We thank Lilla Atar for her insights and research assistance and participants of the Private Law Theory Workshop at Tel Aviv University Faculty of Law for their comments on an earlier version of the text.

exploitation. However, we also find that the intensification of vulnerabilities has presented new opportunities for solidarity and resistance.

The article maps and analyses what has occurred during the COVID-19 pandemic regarding key elements of vulnerability that characterise the employment of these three groups, across the largest sectors employing non-citizen workers in Israel: care, construction and agriculture.² All three sectors are part of a secondary labour market, characterised by low wages, substandard working conditions, and employment of mostly non-citizens. All three sectors were designated as ‘essential’ during the pandemic. While the Israeli case is unique in many ways, it also bears a similarity to other migrant-receiving countries in the Global North. Specifically, the Israeli temporary migrant-worker regime, like many others across OECD countries, is characterised by mobility restrictions, housing restrictions, and exclusion from labour laws.³ We therefore believe that analysis of the impact of COVID-19 policies on the structural vulnerabilities to forced labour, slavery and trafficking in the Israeli context may be relevant to other migrant-receiving countries.

The Israeli case study offers a comparative look at the impact of COVID-19 policy on different groups of non-citizen workers that were subject to different regulations before and during the pandemic. Thus, alongside the case of temporary migrant workers, the pandemic policies posed significant challenges with respect to the entrance and employment of Palestinian workers in Israel – mostly daily labourers entering from the West Bank, in the Occupied Palestinian Territories (OPT) – whose entrance/exit regime is dictated by a permit regime. Asylum seekers, employed mostly in precarious jobs in the ‘nonessential’ hospitality and food sector, comprise the third group particularly harmed by the pandemic policies in Israel.⁴

The article proceeds as follows. Part One explores the notion of a continuum of vulnerability to severe forms of labour market exploitation. It further introduces the link between COVID-19 restrictions and the structural vulnerabilities of noncitizen workers to forced labour, slavery and trafficking. Part Two describes the methodology used for this research. Part Three turns to the Israeli case study and discusses the impact on non-citizen workers of three elements of policies geared towards reducing the risk of the spread of COVID-19: 1) increased government and employer control and surveillance, and severe mobility restrictions; 2) social

² According to the Population and Immigration Authority (PIBA), as of April 2020, there were over 57,000 documented migrant workers in the care sector, over 22,000 in agriculture, and over 14,000 in construction. (PIBA, “Foreigners in Israel Report,” April 2020) [Heb.]. In 2020, there were also over 60,000 Palestinian workers in the construction sector. In the agriculture sector there were over 4,700 workers with permanent permits and over 2,600 seasonal workers. Gilad Nathan, Annual Report International Migration—Israel 2019–2020, Submitted to the OECD Expert Group on Migration SOPEMI, (December 2020), 69.

³ See Hila Shamir, The Paradox of ‘Legality’: Temporary Migrant Worker Programs and Vulnerability to Trafficking,” in *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, Prabha Kotiswaran, (ed.) (Cambridge University Press, 2017), 471-474.

⁴ As of April 2020, there were over 31,000 asylum seekers in Israel (PIBA, “Foreigners in Israel Report” (n. 2, 2020): 2). Of course, not all of them work. In the ‘Deposit Law’ case (discussed below), the State’s data indicated about 17,787 working asylum seekers (HCJ 2293/17, *Gersagher v. The Knesset* (23 April 2020), para. 44).

distancing requirements, particularly their impact on non-citizen workers' living conditions; and 3) loss of income and exclusions from safety nets. Taken together, these three elements demonstrate how measures intended to reduce the spread of COVID-19 increased workers' vulnerability to exploitation amounting to forced labour, slavery and trafficking. Part Four considers the ways in which COVID-19 policies, by heightening and intensifying the structural vulnerabilities of non-citizen workers, created some new possibilities for change. We map what we believe the 'legacy' of COVID-19 will and can entail in relation to the rights and vulnerabilities of non-citizen workers. Finally, we offer some concluding remarks.

1. Continuum of vulnerability and exploitation

We approach the impact of COVID-19-related policies on non-citizen workers in Israel using a structural labour market approach that understands the work contract and workers' labour conditions as shaped by wider socioeconomic conditions and legal rules and institutions that impact workers' bargaining power and may place them in conditions of vulnerability.⁵ Under this perspective, forced labour, slavery and trafficking result predominantly from structural conditions that enable workers' exploitation – including migration law, welfare and employment protections, workers' ability to unionize, etc. – rather than from criminal activity. Drawing on a Marxist understanding of labour conditions under capitalism,⁶ we assume that most workers enter into a work contract under some form of economic compulsion, and that individual bargaining power is shaped by wider socioeconomic structures. Accordingly, to understand and prevent situations of severe forms of labour market exploitation, we need to address the structural causes that are the root causes of workers' vulnerability.

Shamir has called this understanding of the root causes of workers' vulnerability to severe forms of labour market exploitation, a 'labour approach' to human trafficking.⁷ From this perspective, the difference between 'routine' exploitation of workers and forced labour, slavery and trafficking is a matter of degree and not kind. The structural power imbalance between the parties to the labour contract characterises the work experience of many workers.

A useful framing of vulnerability to exploitation that reflects this understanding is as a continuum. At one end of the continuum are the strongest workers with a work contract based on choice and consent that follows the classic liberal conception of contracts. Here, effective bargaining takes place and workers have alternatives and voice. At the other end of the continuum are the most deeply disempowered and vulnerable workers. Work relationships at this end of spectrum are often outside the reach of employment and labour laws. Here, workers' weak

⁵ Virginia Mantouvalou, "Structural Injustice and the Human Rights of Workers," *Current Legal Problems* 73, no. 1 (October 2020): 59-87.

⁶ This view is based on the Marxist understanding of the commodification of all workers in capitalist systems. See Karl Marx, "Economic and Philosophic Manuscripts of 1844", in *The Marx-Engels Reader*, (New York: W. W. Norton & Company, 2d ed. 1978): 66, 70.

⁷ Hila Shamir, "A Labor Paradigm for Human Trafficking," *UCLA Law Review* 60 (2012): 76.

bargaining power – due to market dynamics as well as structural and legal elements, and often compounded by identity-based vulnerabilities – leads to substandard working conditions, rights violations and, in the extreme, forced labour, slavery and trafficking.⁸ This conception of forced labour, slavery and trafficking as aggravated exploitation of workers' vulnerability looks to the pervasive labour market dynamics that enable the exploitation and objectification of trafficked workers. The notion of continuum allows us to disentangle different characteristics of the working conditions of vulnerable workers, including violation of labour and employment rights; denial of an adequate standard of living; intensive coercion and control over workers; and denial of workers' humanity and entitlement to social rights and recognition as members of their community. Understanding the background legal, economic, and social conditions that shape workers' vulnerability across the continuum is required in order to conceive of effective ways to combat the forms of exploitation on the more coercive end.⁹

In the following section we detail non-citizen workers' existing structural vulnerabilities in Israel, before the pandemic, and the ways COVID-19-related policy has intensified and heightened them, escalating non-citizen workers' vulnerability to exploitation and repositioning them at the more extreme end of the continuum of vulnerability. We also cautiously note that by drawing attention to these characteristic of noncitizen workers' living and working conditions, the COVID era has also created some, albeit narrow, opportunities to reinvigorate noncitizen workers' rights claims and create some options for new coalitions and solidarities.

2. Methodology

The article is based on socio-legal documentary analysis of legal documents, including primary legislation, secondary legislation, emergency-order regulations, decrees and court decisions. We further reviewed secondary sources such as reports, journalistic and academic writing, as well as data originating from our ongoing engagement, as researchers and activists, with various stakeholders who work closely with workers, including practitioners from civil society organisations, regulators and manpower agencies. Data was gathered between April 2020 and April 2021. We collected and reviewed all primary legal sources concerning non-citizen workers in Israel from this period. We identified the most significant and relevant documents,

⁸ The notion of a continuum of exploitation was introduced by Skrivankova (see Klara Skrivankova, "Between Decent Work and Forced Labour: Examining the Continuum of Exploitation," *York: Joseph Rowntree Foundation*, 2010): 17, 19). See also, Shamir, "A Labor Paradigm," 110; Judy Fudge, "Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization," *Social & Legal Studies* 27, no. 4 (2018): 414–34; Jonathan Davies, "From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry," *Criminology & Criminal Justice* 19, no. 3 (July 2019): 294–310; Bridie France, "Labour Compliance to Exploitation and the Abuses In-between," (London: Labour Exploitation Advisory Group, 2016). However, there is also criticism of the limitations of this notion; see Cathryn Costello, "Migrants and Forced Labour: A Labour Law Response," in *The Autonomy of Labour Law*, Alan Bogg, Cathryn Costello, ACL Davies, Jeremias Adams-Prassl, (eds.) (London: Hart Publishing, 2015): 199.

⁹ Jens Lerche, "A Global Alliance Against Forced Labour? Unfree Labour, Neo-Liberal Globalization and the International Labour Organization," *Journal of Agrarian Change* 7, no. 4 (2007): 425, 430–31.

which were then analysed in-depth. Secondary sources were used to address specific developments or gaps in the data already gathered.

3. The impact of COVID-19 policies on workers' vulnerability

In order to explain the increased vulnerability of non-citizen workers resulting from COVID-19 policies, we first introduce the regulation of non-citizen workers in Israel prior to COVID-19, and then discuss the impact of COVID-19 and the combined effect of the underlying conditions together with COVID-19 policies along the three dimensions introduced above.

3.1 The regulation of non-citizen entry and work in Israel: Palestinian workers, temporary migrant workers and asylum seekers

A highly precarious group of workers in the Israeli labour market are non-citizens. Non-citizen workers were incorporated into the Israeli labour market in three waves: first came Palestinian day-labourers from the OPT, since 1967; second were migrant workers from various countries, primarily since the early 1990s; and since the late 2000s many asylum seekers have arrived, primarily from Eritrea and Sudan.

Palestinians have been a part of the Israeli labour market since the late 1960s, when workers from the newly occupied territories entered low-wage, precarious sectors, primarily agriculture and construction.¹⁰ The day-labour entry of Palestinian workers from the OPT to Israel fluctuated due to changes in the political situation. It decreased following the outbreak of the first *Intifada* (uprising which began in December 1987) and, due to growing demands in Israel to rely instead on migrant workers, fell again after the second Intifada (especially in 2004-2008).¹¹ Over the last decade, policies regarding Palestinian work permits changed, with the numbers steadily increasing.¹² Currently, Palestinian workers are the largest group of non-citizen workers in Israel in several sectors, most notably construction.¹³ Before the pandemic, most Palestinian workers were day labourers – returning to their homes, families and communities every day, or every week.¹⁴

¹⁰ State Comptroller Annual Report 65 I, "Ministry of Interior, Administration of Border Crossings, Population and Immigration, Employment of Palestinian Workers in the Construction Industry in Israel" (State Comptroller, 2014) [Heb.]: 491 (hereinafter: State Comptroller 2014).

¹¹ Yael Berda, *The Bureaucracy of the Occupation: The Permit Regime in the West Bank 2000-2006* (Jerusalem: Hakibbutz Hameuchad, 2012) [Heb.]: 94.

¹² Wifag Adnan and Haggay Etke, "Illicit Trade in Work Permits for Palestinian Workers in Israel," *Bank of Israel's Selected Research and Policy Analysis Notes* (October 2019) [Heb.]: 79-95.

¹³ International Labour Organisation, "The Situation of Workers of the Occupied Arab Territories" (Report of the Director-General, 109th Session, 2021): 20-24.

¹⁴ Compare the definition of 'frontier worker' under the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 2(a).

Palestinian workers are particularly vulnerable in the Israeli labour market due to the occupation, which creates a combination of economic, legal and political precarity. The Israeli policies restricting the development of the Palestinian economy and labour market are key causes of the need for Palestinians to seek work in Israel. Their bargaining power in the Israeli labour market is significantly weakened by a security apparatus that seeks to control their entrance, exit and working conditions.¹⁵ Moreover, the economic dependence of the OPT on Israel, the various restrictions on free movement, and the political power that Israeli employers have and Palestinian workers lack further limit their bargaining power.¹⁶ National security concerns are an additional factor determining workers' rights and restrictions. Although the Israeli government deploys a permit regime, which allows Palestinian workers to obtain permits only following individual screening that excludes those considered potential threats to national security, the mere presence of Palestinian workers in Israel is considered a security risk. They are therefore subject to intense control and monitoring by their employers.¹⁷ The political control of Israel over the territories shapes economic dependency, which in turn shapes the control of employers over their workers.

A second group of non-citizen workers are temporary migrant workers. Temporary labour migration was formally introduced into Israel in 1993. The 'sealing off' of the OPT, which was justified by security considerations, created a shortage in the Israeli secondary labour market.¹⁸ In order to deal with the labour shortage, the Israeli government established a temporary worker visa program. To date, permits to employ migrant workers are limited to the construction, agriculture and care work sectors. While the demand for workers in construction and agriculture was the direct result of the sealing-off of the Occupied Territories, the same was not true for care work. Palestinians were not previously employed as in-home care-workers, nor was there, in fact, a thriving care market.¹⁹ The temporary work regime in the care sector was developed in tandem with the developments in the Israeli welfare state in the late 1980s and early 1990s.²⁰

Israel considers itself the national state of the Jewish people, an identity maintained despite the significant numbers of non-Jewish citizens (especially Arabs, comprising about 20%

¹⁵ Leila Farsakh, *Labour Migration and the Palestinian State: The Political Economy of Palestinian Labour Flows to Israel* (London: Routledge, 2005); Amir Paz-Fuchs and Yaël Ronen, "Occupational Hazards," *Berkeley J. Int'l L.* 30 (2012): 580.

¹⁶ *Ibid.*

¹⁷ Maayan Niezna and Michal Tadjer, "Situation Report: Developments and Reform in the Employment Conditions of Palestinians in Israel" (Kav LaOved, 2021).

¹⁸ Adriana Kemp and Rebeca Raijman, *Migrants and Workers: The Political Economy of Labor Migration in Israel* (Tel Aviv: Hakibbutz Hameuchad, 2008) [Heb.].

¹⁹ Moshe Semyonov, Rebecca Raijman and Anat Yom-Tov, "Labor Market Competition, Perceived Threat, and Endorsement of Economic Discrimination against Foreign Workers in Israel," *Social Problems* 49, no. 3 (August 2002): 416-431.

²⁰ Hila Shamir, "Migrant Care Workers in Israel: Between Family, Market, and State," *Israel Studies Review* 28, no. 2 (2013): 192-209.

of the population), and the steady and formal reliance on temporary labour migration since the early 1990s has not changed that. As a result, labour migration, like other forms of migration of non-Jews, is always perceived as temporary²¹ – migrant workers, regardless of their social ties, skills, and length of stay, are not entitled to permanent residence or citizenship in Israel. The temporary stay of migrant workers is a policy compromise between economic interests and the need for cheap low-skilled labour on the one hand, and demographic considerations on the other – namely, the state’s concern with maintaining a Jewish majority in the country, which has led to a strong objection to integrating migrants into the Israeli community.²² This entrenched and institutionalised temporariness is a key element in explaining the structural vulnerability of migrant workers, and its intensification under COVID-19.

A third group of precarious non-citizen workers consists of asylum seekers who began entering Israel from the late 2000s, mostly in the early 2010s, predominantly from Eritrea and Sudan.²³ Asylum seekers are employed mostly in precarious jobs in the hospitality and food sectors. A key difference between asylum seekers and the two groups of non-citizen workers considered above is that migrant and Palestinian workers are mostly recruited to work in Israel in jobs that citizens reject. While they are not welcome as permanent members of society, their labour is desirable, and was considered essential before and during the pandemic. Asylum seekers, on the other hand, are deemed undesirable even as temporary workers by the Israeli government, which has adopted different policies geared towards preventing their settlement in Israel, and eventually facilitated their departure from Israel. As outright deportation of asylum seekers would violate international law and the *non-refoulement* principle, the government has adopted various measures, including detention, economic sanctions and pressure to facilitate what it has referred to as ‘voluntary return’. Alternatively, this policy has been termed ‘constructive expulsion’ by its critics.²⁴ This continues the logic of temporariness that Israel deploys in relation to the other two groups of non-citizen workers discussed above.

The vulnerability of these three groups of non-citizens differs, as the regulation of stay and work of each group – which will be further discussed below – differs in important respects. These differences reflect both the needs of employers in the labour sector in which non-citizens work, and the means of settlement prevention tailored to their different legal status and mobility characteristics. Yet they all experience some exclusion (*de jure* or *de facto*) from protective labour and employment legislation and from the social safety-nets offered to citizens.

²¹ *Ibid.*

²² Hila Shamir and Guy Mundlak, “Spheres of Migration: Separation and Infiltration of Political, Economic and Universal Imperatives in Structuring Israel’s Migration Regime,” *Middle East Law and Governance Journal* 5 (2013): 112-172.

²³ H CJ 7146/12, *Adam v. The Knesset*, Judge Arbel’s central opinion, paras. 3-6.

²⁴ H CJ 7385/13, *Eitan – Israeli Immigration Policy Center v. The Government* of Israel, Judge Vogelmann’s opinion, paras. 109-112; Judge Arbel’s opinion, para. 6.

3.2 COVID-19 policy and non-citizen workers in Israel

The COVID-19 pandemic reached Israel at the end of February 2020. In the early stages of the pandemic, Israel adopted swift and strict policies to contain it: three lockdowns were introduced during 2020 – in March, September and December 2020 – each lasting several weeks. At the height of the lockdowns, businesses deemed nonessential closed, the education system was shut down, gatherings were prohibited or restricted, and people were asked to stay at home. People could leave their homes for designated purposes (work, grocery shopping, exercise) but otherwise were required to stay within a 500-meter perimeter of their homes. At the same time, regulation was introduced to protect workers and the public in essential sectors, including requirements for personal protective equipment and social distancing. These measures were accompanied by border closures and a two-week quarantine requirement for entrants once borders were reopened.²⁵

Due to the shutdown of businesses and resulting loss of income and high levels of unemployment, the government introduced measures such as the extension of unemployment benefits, one-time universal cash transfers, and various assistance packages to support small businesses and independent contractors.²⁶ Non-citizen workers were excluded from these measures, and were ineligible for the benefits and assistance packages that were provided only to citizens working in the formal economy.

Three elements that existed prior to COVID-19 intensified and became particularly harmful during the pandemic, due to steps taken to reduce the spread of COVID-19: first, mandatory control and surveillance of workers by employers and the government, and mobility restrictions; second, substandard living conditions and violations of basic health and safety requirements; and third, exclusion from social security and social rights. Control, restrictions of movement, inadequate housing, poor health and safety conditions and exclusion of migrants from welfare benefits and social rights are common in various temporary work migration programmes.²⁷ However, these three elements were exacerbated, to the detriment of non-citizen workers, by policies geared towards reducing the risk of the spread of COVID-19. This

²⁵ Ittai Bar-Siman-Tov, "Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures," *The Theory and Practice of Legislation* 8, no. 1-2 (July 2020): 11-48.

²⁶ Leah Achdut, "The Corona Crisis and the Israeli Labour Market," *Social Security* 110 (2020): 1-20 [Heb.]

²⁷ See, for example Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press, 2013); Sally C. Moyce and Marc Schenker, "Migrant Workers and Their Occupational Health and Safety," *Annual Review of Public Health* 39 (April 2018): 351-365; Adriana Kemp and Rebeca Raijman, "Bringing in State Regulations, Private Brokers, and Local Employers: A Meso-Level Analysis of Labor Trafficking in Israel," *International Migration Review* 48, no. 3 (September 2014): 604-42; Virginia Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery," *Journal of Law and Society* 42, no. 3 (2015): 329-57; Shamir, "Paradox of Legality"; Sallie Yea and Stephanie Chok, "Unfreedom Unbound: Developing a Cumulative Approach to Understanding Unfree Labour in Singapore," *Work, Employment and Society* 32, no. 5 (October 2018): 925-41; Rebecca Raijman and Nonna Kushnirovich, *The Impact of Bilateral Agreements on Labor Migration to Israel: A Comparison between Migrant Workers Who Arrived Before and After the Implementation of Bilateral Agreements* (PIBA, Ruppin Academic Center and CIMI Research Report, 2019).

aggravated workers' vulnerability to severe forms of labour exploitation and treatment amounting to forced labour, slavery and trafficking. We turn next to these three elements. Under each element, we focus on the groups of non-citizen workers most affected by it.

a. Increased control, surveillance, and severe mobility restrictions

Non-citizen workers are often subject to strict measures of control regarding their entrance, exit, work and stay in the country. In Israel, such measures have been increasingly 'privatised' over recent decades and outsourced to private employers.²⁸ Some restrictions – such as binding workers to a single employer, restriction of movement, constant surveillance, exclusions from protective legislation, violation of rights with impunity, and withholding of identity documents – are implemented by private actors. Such employment situations, if not mandated by the state but rather initiated by private actors, arguably could, in some cases, amount to forced labour, slavery and trafficking.²⁹ Against this backdrop, various measures adopted to reduce the risk of the spread of COVID-19 through restricted mobility and increased surveillance have disproportionately impacted non-citizen workers who were already under intense surveillance and whose movement was already restricted. While many of these measures applied to the general population and led to heated public debate as to whether they were required to save lives or violated human rights,³⁰ the impact on non-citizen workers was particularly harsh. Moreover, due to their concentration in 'essential' sectors, many non-citizen workers continued working regularly, at times putting their health at great risk, while other workers were furloughed, laid-off, or began to work remotely from home. The newly introduced mobility restrictions and increased surveillance had a particularly harmful impact on two groups of workers: live-in migrant caregivers and Palestinian construction workers.

Migrant Care Workers

The care sector is the largest migrant-receiving sector in Israel, employing over 50,000 temporary migrant workers in in-home care.³¹ Care workers are employed by disabled and elderly individuals who have been found to be in need of assistance in daily living activities and long-term care. Workers receive a visa for up to five years, that can be extended if it is

²⁸ Kemp and Raijman, "Migrants and Workers".

²⁹ On indicators of coercion at the state of destination, see, for example, European Commission and International Labour Office, "Operational Indicators of Trafficking in Human Beings: Results from a Delphi Survey Implemented by the ILO and the European Commission," (2009); Shamir, "Paradox of Legality".

³⁰ See, e.g., Sarah Joseph, "International Human Rights Law and the Response to the Covid-19 Pandemic," *Journal of International Humanitarian Legal Studies* 11 (2020): 249-69; Alessandra Spadaro, "COVID-19: Testing the Limits of Human Rights," *European Journal of Risk Regulation* 11 (2020): 317-25.

³¹ PIBA, "Foreigners in Israel Report" (2020).

determined that a special care relationship has been formed that requires visa extension.³² As a result, approximately one-third of migrant care-workers reside in Israel for more than five years legally. Regardless of the length of their stay, when their visa expires or if their employer passes away, they are required to leave the country. Workers in the last months of their stay are similarly restricted.³³ Others can move between employers within the sector up to three times but are geographically bound to the area in which their first employer resides.

Workers are required to reside at the home of care recipients (their employers), which further limits their ability to establish friendships and create communities. The housing requirement can create difficulty in distinguishing between work and leisure or personal time.³⁴ Moreover, pursuant to a labour court ruling, these workers are excluded from labour laws granting rest time and overtime pay.³⁵ As a result, their working hours can be long, partially uncompensated, and dependent mostly on the needs of the care recipient. Employers can employ only one worker at any given time, and migrant care-workers similarly are allowed to work for only one employer, creating an intense dependency between care-workers and care recipients. Migrant care-workers are not permitted, by regulation, to migrate to Israel with family or to establish a romantic relationship or start a family in Israel.³⁶

The requirement to live with the employer, the long hours of work, and the prohibition on family formation, coupled with the intense, demanding, and intimate nature of care work, lead to workers' isolation and detachment from a migrant community. To mitigate the isolation and detachment, many workers share 'community flats' – flats that several workers rent together, usually closer to city centres, which they use during their days off. As they cannot afford the costs of renting a place outside the employer's home individually, and by regulation are not allowed to live outside the employers' home, these shared weekend flats allow them community life, social interaction and rest. Their time in community flats therefore serves not just the great need for physical rest, but also as a form of leisure, human connection, and social, community existence.

During the pandemic, migrant care-workers, like the rest of the population, were under lockdown and required to stay at home. Yet care-workers' accommodation with their employers meant that they were in fact under lockdown within their place of work. Moreover, because the

³² PIBA, "Foreigners in Israel Report" (2018): 14 [Heb.].

³³ A noteworthy example is the case of a Filipina woman, deported from Israel after working legally for seventeen years - AdminC 494/07 (Jer.), *Amon v. Minister of Interior*; AdminA, 8947/08 *Amon v Minister of Interior* (1 July 2010).

³⁴ Hanny Ben Israel, "Protective Labor Legislation," in *An Alternative Anti-Trafficking Action Plan: A Proposed Model Based on a Labor Approach to Trafficking*, *TraffLab Research Group Policy Paper*, Hila Shamir and Maayan Niezna (eds.) (Tel Aviv University, 2020) (hereinafter: *TraffLab Alternative Plan*); Guy Mundlak and Hila Shamir, "Bringing Together or Drifting Apart? Targeting Domestic Work as 'Work Like No Other'," *Canadian Journal of Women and the Law* 23 (2011): 289-308.

³⁵ *Ibid.*

³⁶ Shahrar Shoham and Hanny Ben Israel, "Family and Community," in *TraffLab Alternative Plan*.

elderly were considered an at-risk population, many of them did not leave their homes at all and did not receive visits from families or others. As a result, many care-workers could not even take their day off or leave the workplace at all. Moreover, regulations and instructions of the Ministry of Health and the Population and Immigration Authority (PIBA) prohibited them from using ‘community flats’. This prohibition was justified as a measure to prevent the spread of the virus. The regulation further clarified that workers could spend time in individual flats or vacation homes, yet this ignored the economic infeasibility of such alternatives for most of these workers, who earn below minimum wage.³⁷

As a result, many workers remained for months as sole in-home care providers to disabled and elderly individuals, with no ability to exit their workplaces. The new regulation further restricted the limited rights migrant care workers had to leisure time and privacy, and significantly increased employer control and surveillance over them. Employers were empowered by the regulation to request that care workers not leave the house, and to inspect what they did and who they met during their days off, if they had any. Data collected by civil society organisations indicated that months after the beginning of the pandemic, many workers had no rest and simply stopped leaving their employers' homes altogether— some without even one free day outside the house in months.³⁸

The inability to leave one's place of employment, where work and home are one and the same, or to socialise with anyone other than their employer meant that all aspects of rest, leisure, private and family life were suspended. Workers subject to these conditions were, for several months, denied the ability to exit their role as workers and live a fully human and multidimensional existence. Such a situation clearly objectifies workers, as key aspects of their humanity, other than labour power, are denied. COVID-19 regulation prioritised employers' interests over those of the workers, intensifying workers' objectification and their treatment as mere instruments for performing labour, as opposed to humans with needs beyond work and subsistence.³⁹

Palestinian construction workers

A similar denial of workers' full humanity and limitation to their role as workers can be identified in the situation of Palestinian construction workers. To prevent potential spread of the virus, Palestinian workers' entrance into Israel changed almost overnight from daily commuting

³⁷ PIBA, “Guidelines for Care Sector Foreign Workers and Their Employers,” (19 April 2020) [Heb.]; Ministry of Health, “Announcement to Foreign Workers Residing in the Employer's Home” (9 May 2020) [Heb.].

³⁸ Kav LaOved, “How Did the Coronavirus Pandemic Impact Migrant Workers in Israel?” (17 December 2020) [Heb.].

³⁹ Commissioner for Foreign Workers' Labor Rights, Ministry of Labor, Social Affairs and Social Services, “The COVID-19 Crisis: A Letter to Foreign Workers Providing At-home Care and Their Employers,” (17 March 2020) [Heb.]; PIBA, “Guidelines for Care Sector Foreign Workers and Their Employers”.

to de-facto seasonal migration, without proper safeguards to protect their rights under the new situation.⁴⁰

Before the pandemic, most Palestinian workers would cross a checkpoint between the OPT and Israel every day or once a week. The movement between the West Bank and Israel is through crowded checkpoints, where workers stand in long lines and wait to cross for a significant time each day. The Israeli government perceived the crowded checkpoints and the movement between regions as risk factors for increased contagion and decided to adopt measures to minimise the risk. It announced that permits for Palestinian workers would be issued for 30 days in the agricultural sector or 60 days in the construction sector.⁴¹ During the entire duration of their stay in Israel, the workers were to be under the constant supervision of their employers, or employers' representatives, thus preventing them from leaving the workplace. However, the requirement for constant monitoring predated the pandemic, and resulted from national security concerns. Under the pre-pandemic permit regime, employers were required to enforce control measures and restrictions of movement, and to monitor the whereabouts and behaviour of their workers. Regulations adopted following the COVID-19 outbreak intensified the level of surveillance of Palestinian workers, now applied day and night, for weeks on end.

Under the COVID-19 permit requirements, workers were restricted from leaving their place of residence (which was, for some, the construction site), and employers were instructed to report to the authorities any 'suspicious or irregular behaviour' – a vague term that was used in the regulations without clear explanation or example of what might constitute such behaviour.⁴² While there is currently no evidence of misuse of these extreme measures to discipline or punish workers during the pandemic, there have been examples of such abuse in the past, such as fabricated claims by employers regarding security concerns aimed at preventing unionisation.⁴³

The first version of the COVID-19 permit requirements for the entry of Palestinian workers to Israel included a requirement that employers retain the identity documents of their workers. Such a measure is tantamount to withholding documents, an extreme control measure recognised as an indicator of trafficking and forced labour.⁴⁴ Shortly after the new regulations were announced, Israeli NGOs petitioned the High Court of Justice (Israel's Supreme Court), arguing against several aspects of the new regulations, including the living arrangements (discussed below) and the requirement to retain documents. Following the petition, the

⁴⁰ Maayan Niezna, "Under Control: Palestinian Workers in Israel During COVID-19," *Border Criminologies* (blog), (7 July 2020).

⁴¹ Ministry of Construction and Housing, "An Outline for Return of Palestinian Workers to the Construction Sector" (2020) [Heb.]; Niezna "Under Control".

⁴² *Ibid.*

⁴³ Maan-Workers Association, "Zarfati Garage Flings False Security Accusations Against Workers' Committee Chairperson", (28 July 2014).

⁴⁴ European Commission and International Labour Organization, "Operational Indicators of Trafficking in Human Beings"; Maayan Niezna, "The Occupation of Labor – Palestinian Employment in Israel," (2021).

requirement was revoked, with the authorities claiming that it had been mistakenly included in the regulation.⁴⁵ The other control measures – the constant supervision, the prohibition on leaving the premises, and the employers’ reporting duties – all remained unchanged. According to recent publications, some employers rely on private security firms to monitor the whereabouts of Palestinian workers while they are in Israel.⁴⁶

The situation of Palestinian construction workers under COVID-19 regulation, like that of migrant care-workers, demonstrates how the measures adopted to reduce the spread of the virus failed to address the complex realities of non-citizen workers and their existing living arrangements and mobility restrictions, and, as a result, increased workers’ vulnerability. Moreover, it exemplifies not only the ways in which restrictions applied to the entire population played out differently with specific groups of workers due to structural causes, but also how the regulation applied to these workers extended well beyond the restrictions endured by citizens. As a result, non-citizens’ working and living conditions under COVID-19 regulation reflected what the literature identifies as ‘badges’ of modern slavery – strict control and surveillance of workers in and outside the workplace, and intense limitations on physical mobility.⁴⁷

Under the restrictions described above, workers’ movement was framed as a risk to national security, to public health, or the health of their employers/patients. The combination of new limitations and existing regulation on work environments led to workers having no free or unsupervised time for weeks on end. Policymakers clearly prioritised employers’ interests and the (perceived) public interest above the rights of workers in precarious employment, if the latter were even considered at all. We suggest that this neglect results from the perception of non-citizen workers in the so-called ‘low-skilled’ sectors first and foremost as ‘working hands’, labour power to be controlled and used efficiently, and not as human beings, right-bearing members of society with personal lives, relationships and an existence outside the workplace.

As a result of the pandemic, some restrictions of movement and increased surveillance applied to the population as a whole. Some might therefore dismiss the dire description offered here as ‘life under COVID’, rather than indicative of forced labour, slavery and trafficking. It is important to note, however, that “slavery is ultimately about control. Control which deprives a person, in a significant manner, of their individual liberty or autonomy; and ultimately, that this control is meant to allow for exploitation and is typically maintained through coercion or violence”.⁴⁸ It is the control and objectification of workers that lies at the heart of such

⁴⁵ HCJ 2730/20, *Kav LaOved v. Minister of Health*, “Primary Response of Respondents 1-4”, 5 May 2020, para. 7 [Heb.].

⁴⁶ Niezna and Tadjer, “Situation Report”.

⁴⁷ Amir Paz-Fuchs, “Badges of Modern Slavery,” *The Modern Law Review* 79, no. 5 (2016): 757–85, 765, 783; see also Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law* (New York: Cambridge University Press, 2017): 295.

⁴⁸ Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden, Boston: Martinus Nijhoff Publishers, 2013): 120.

phenomena. Accordingly, we argue that such policies, implemented in disregard of their impact on workers' market position and bargaining power, and denying their humanity and right to life outside work, should be understood as root causes of forced labour, slavery and trafficking.

b. Deterioration of living conditions and violations of basic health and safety conditions in the workplace

Migrant workers' substandard living conditions and hazardous work environments have drawn world-wide attention during COVID-19. In Israel, non-citizens' harsh housing conditions and substandard occupational health and safety conditions were well known and documented before the pandemic.⁴⁹ Yet the pandemic created new challenges, and, at times, new solutions. These challenges had a particularly notable impact on Palestinian construction workers and migrant workers working in the agricultural sector.

Palestinian Construction Workers

Construction was designated an 'essential' sector, and work continued as usual during this period. The label shows that the distinction is not neutral and reflects political and economic agendas, as construction is not an urgent service (as opposed to, for example, care or food production). Rather, it serves primarily the private and public interests of fast building and continued profits, while prioritising these benefits over workers' safety and protection from infection.

Palestinians are the largest group of non-citizen workers in the construction sector.⁵⁰ As noted above, prior to COVID-19, Palestinian workers were daily labourers, and most of them did not require accommodation in Israel. The minority of workers that received overnight permits did not draw much policy attention and often slept in construction sites. The regulations concerning their accommodations were laconic, as compared to the detailed regulation of the accommodation required for migrant workers, referring to "bed etc. in residence", "toilets in sanitary conditions", and "a corner for personal needs such as eating and drinking".⁵¹ Moreover, Palestinian workers were the only group of workers that while working in Israel, did not have health insurance in Israel, and were expected to receive all medical services in the West Bank. This raised, and continues to raise, practical obstacles to workers receiving necessary treatment, including following work accidents.⁵²

⁴⁹ BBC News, "Who Cares About Israel's Thai Workers?" (25 November 2018).

⁵⁰ There are over 60,000 permit-holding Palestinian construction workers, as compared to approximately 14,000 migrant workers. See PIBA, "Foreigners in Israel Report" 4 (2020).

⁵¹ District Coordination and Liaison and PIBA, "Request and Commitment to Let Worker Residents of Judea, Samaria and Gaza into Israel" (undated; revised as explained below).

⁵² HCJ 2730/20, *Kav LaOved v. Minister of Health*, Petition of 28 April 2020; Niezna and Tadjer, "Situation Report".

On 18 March 2020, Israel decided to prevent entrance from the OPT generally but made special arrangements for the continued entry of Palestinian workers, who overnight became de-facto seasonal workers who could not return home and were required to stay in Israel for months. The poor accommodation standards and improvised solutions for workers who had never been required previously to sleep in Israel meant that some workers slept in construction sites, without beds, toilets or running water, and in dangerous conditions.⁵³ The lack of health insurance in Israel, the closures that prevented their return to the West Bank, and the prohibitive high costs of private medical insurance left workers with no access to basic medical services, in the middle of a pandemic.⁵⁴

The precarious situation led Israeli NGOs to petition the High Court of Justice in April 2020, citing the conditions explained above.⁵⁵ The petition resulted in some immediate improvements in early May, including a change in the requirement to withhold identity documents, discussed above. In addition, Palestinian workers received health insurance coverage, and clear standards for accommodation were introduced, generally reflecting the legal standards for accommodation of migrant workers. There was a clear indication of improvement in the accommodation of construction workers in the later months of the pandemic, with a survey by the Bank of Israel reporting that, “About half of all workers noted that their employers provided them with reasonable or good sleeping and hygiene arrangements, and only a few noted that they had bad sleeping and hygiene arrangements.”⁵⁶

The impact of the pandemic on Palestinian workers demonstrates the neglect of workers’ basic needs – such as housing, health and safety – and the need for civil society to intervene reflects the extreme vulnerability of these workers. Recent data collected by civil society organisations suggests that the situation of most Palestinian workers worsened as a result of the pandemic.⁵⁷ Workers reported fewer employment opportunities and non-payment for the days that they were unable to work during COVID, demonstrating their dependency on employers and their limited bargaining power.

⁵³ *Ibid.*

⁵⁴ HCJ 2730/20, *Kav LaOved v. Minister of Health*.

⁵⁵ *Ibid.*

⁵⁶ Bank of Israel, “Palestinian Employment in the Israeli Economy During the COVID-19 Crisis,” 29 December 2020 [Heb.].

⁵⁷ Niezna and Tadjer, “Situation Report”.

Migrant workers in the agriculture sector

Like construction and care, the agriculture sector was also designated as essential during the COVID pandemic.⁵⁸ As a result, the 32,000 non-citizen workers in this sector, most of them migrant workers from Thailand,⁵⁹ continued working throughout this period.

Israel's Foreign Workers' Law (1991) requires employers of migrant workers to provide them with "suitable accommodation". In the agriculture sector, most employers house workers on farms. Due to land-use regulation,⁶⁰ however, structures on farms can be built solely for agricultural use, such as sheds, haylofts, etc.⁶¹ As a result, migrant workers usually reside in temporary structures not well-suited for long-term housing, such as mobile homes, converted sheds, and shipping containers. The result is a routinized sectoral practice of substandard accommodations and crowded makeshift structures without proper sanitation or ventilation and no cooling and heating devices, needed especially in the Israeli desert, where many of the workers reside.⁶²

In the following paragraphs, we will discuss the ways in which the pandemic disclosed the 'underlying conditions' of workers' living and working conditions, as crowded and unsanitary accommodations posed a particular problem for quarantine requirements. The solutions adopted also demonstrate migrant workers' vulnerability.

In mid-March 2020, PIBA closed off Israel's borders to anyone without Israeli citizenship or a residence permit.⁶³ As a result, migrant workers who were outside the country at the time (e.g., visiting their families in the country of origin) as well as new workers who were supposed to begin working in Israel could not enter Israel until August 2020. At that time, all persons permitted to enter the country were required to quarantine for two weeks, in order to guarantee they were not infected with COVID-19. One could quarantine either in his or her place of residence, or in hotels and other facilities converted to quarantine dorms and provided by the State.

Employers complained that the border closure led to severe labour shortages in the sector. The agricultural lobby pushed for allowing returning migrant workers and new arrivals to enter

⁵⁸ See Emergency Regulations of 22 March 2020 (limiting the number of workers to curb the spread of the novel coronavirus) [Heb.].

⁵⁹ PIBA, "Foreigners in Israel Report" (2020). See also, Adi Maoz, *Annual Report 2019*, (Kav LaOved, 2020) [Heb.].

⁶⁰ PIBA, Procedure 37.07B, "Permission to Use Land for Housing Foreign Workers" (24 May 2020) [Heb.].

⁶¹ Aricha Fromm et al., "Policies, Guidelines, and Criteria for Agricultural Structure Planning," The Authority for Rural and Agricultural Planning and Settlement Development, Division of Regional Rural Planning, (2013) [Heb.].

⁶² See Rajjman and Kushnirovich, "The Impact of Bilateral Agreements"; Kav LaOved "We live here . . . Violation of the 'Suitable Accommodation' Law for Agriculture Migrant Workers" (June 2020) [Heb.].

⁶³ See PIBA, "Population and Migration Authority Update: Only Tourists and Foreign Nationals Whose Lives are Not Based in Israel to be Denied Entry" (4 April 2021) [Heb.].

Israel. The authorities were reluctant to open the borders, a decision further complicated by the question of the cost and arrangements required for migrant workers to quarantine. In late July, just before Israel relaxed its border closure, PIBA published a regulation,⁶⁴ which prohibited the quarantine of migrant workers in farms and instead required them to quarantine in hotels, apartments, or housing with no more than eight workers, with a maximum of two per room. The regulation further required posting a security guard – like those deployed in quarantine hotels – tasked with preventing quarantined individuals from leaving the facility or otherwise violating quarantine regulations.⁶⁵ Migrant farm workers, unlike other entrants into the country, could not quarantine in their own residences. Presumably, this was due to policymakers' awareness of workers' substandard and crowded living conditions, which could not guarantee effective quarantine.

The issue of funding the workers' quarantine further complicated the proposed arrangement. Neither employers nor the government were willing to provide or fund the workers' quarantine arrangements. The cost of the hotels repurposed as quarantine facilities was considerable, and the outraged farmers demanded a less expensive solution.⁶⁶ Several options were considered, including quarantining workers at a defunct immigration detention facility, deep in the Israeli desert⁶⁷ – an option to be pursued only if found to be cheaper than the alternatives. The need to remove the formal designation of the facility as a 'prison' was also mentioned.⁶⁸ Ultimately, this proposal was abandoned after it was leaked to the press.⁶⁹

In late August, before the first workers arrived in Israel from Thailand, Thailand was re-categorised as 'green', meaning entrants from Thailand were no longer required to quarantine upon arrival.⁷⁰ The Israeli Ministry of Agriculture presented the decision to classify Thailand as 'green' as an achievement that represented the interests of Israeli farmers.⁷¹ In December, as the number of COVID cases rose again in Israel and a third lockdown was announced, the 'green

⁶⁴ PIBA, "Notice Regarding the Eligibility Criteria for Re-entry Visa (Inter-Visa) Applications for Foreign Agriculture Workers Returning to Israel After Being on Leave in Their Home Countries (23 July 2020) [Heb.]; PIBA, "Notice Regarding the Eligibility Criteria for Inviting Foreign Workers to Work in the Agriculture Sector (2 August 2020) [Heb.].

⁶⁵ Guards were also posted in quarantine of Israeli citizens returning from abroad.

⁶⁶ Yael Kurlander and Idit Zimmerman, "'Suitable Accommodation' for Agricultural and Care Migrants Before and After Covid-19," *Hagira* (forthcoming) [Heb.].

⁶⁷ The facility, 'Holot', was used for the detention of asylum seekers until March 2018.

⁶⁸ The idea of using Holot for quarantine was also raised by MK Amir Ohana, the Minister of Public Security, in early August, in answer to a question about the facility's fate. Jonathan Lis, "Israel Weighs Using Empty Detention Facility to Quarantine Returning Foreign Workers," *Ha'aretz*, (12 August 2020).

⁶⁹ *Ibid.*

⁷⁰ Ministry of Agriculture: "Pressure from the Ministry of Agriculture Proved Effective: Thailand Added to the Green List" (1 September 2020) [Heb.].

⁷¹ *Ibid.*

list' policy was revoked, and PIBA announced reinstatement of the previously proposed hotel quarantine policy.⁷² The estimated cost of the hotels discussed in August turned out to be inflated, however, and employers agreed to pay the lower cost. While the cost was eventually born by employers, there is reason for concern that it will subsequently be passed on to the workers themselves.

The impact of COVID-19 policies on migrant farm workers' housing reveals the instrumental treatment of workers by employers and the State alike. While the State has formally acknowledged for the first time the workers' poor accommodations, the decision whether to invest additional funding in creating better, less-crowded housing solutions for workers remains with the employers, and the accommodation requirements remain unenforced. Moreover, despite having been dropped, even considering the idea of quarantining workers in a remote detention facility reveals that workers are yet again arguably being treated purely as labour power – abstracted from their humanity. Migrant workers' physical wellbeing was considered only in order to protect their labour power, when it was threatened by the virus or in high demand (due to labour shortages, as further discussed below), or when their bodies posed risks to the public as a whole.

c. Loss of income and exclusion from social security safety nets

The groups of workers discussed thus far were made vulnerable to exploitation by COVID-19-related policies because their work was deemed 'essential', and the new restrictive conditions further increased their vulnerability. Some workers experienced weakened bargaining power, for others working and living conditions worsened, and for many risk levels were heightened, but they were all able to continue to earn income. The vulnerability of another group of non-citizens – asylum seekers – increased not as a result of instrumentalisation and objectification, but rather stemmed from their being deemed both non-essential and non-deserving of any measures adopted by the government to support citizens and permanent residents who lost their income.

Since the entry of asylum seekers (referred to as "infiltrators" under Israeli law) to Israel, and especially with the larger numbers who entered Israel in 2010-2012, they have been treated by the State as an undesirable presence. Despite many having resided in Israel for more than a decade, the needs and possible rights stemming from their long-term presence have been ignored by policymakers, and arrangements concerning their presence in Israel have reflected the notion of a short-term stay. Indeed, the main declared policy goal was their removal. Due to the principle of *non-refoulement*, Israel has usually refrained from outright deportations. However, turning asylum seekers back to Egypt at the border, prohibitions on residing in the centre of Israel or its large cities, prolonged, even indefinite, detentions, 'voluntary return' (or 'constructive expulsion') to third countries, and various coercive means were all components of

⁷² PIBA, Letter to placement agencies: "Urgent Notice Regarding the Need for Self-Quarantine for Foreign Workers Entering Israel from Thailand—COVID-19 Pandemic" (22 December 2020) [Heb.].

the State's pre-Covid policy – until rejected by the Supreme Court following civil society organisations' petitions.⁷³

All of these measures reflect the insistence on temporary stay and prevention of the settlement of asylum seekers. Another key tool adopted by Israel was the introduction of economic incentives for departure, foremost the arrangement known as the 'Deposit Law'.⁷⁴ The law required employers to deduct 20% of asylum seekers' monthly salary to a special fund, which served as a 'deposit' that asylum seekers would receive only upon departure from Israel. It was deemed particularly cruel because of asylum seekers' meagre incomes. Asylum seekers work mainly in the cleaning and hospitality sectors, which are prone to workers' rights violations and informality. According to the State's data, as of 2019, about 40% of the working asylum seekers made less than minimum wage.⁷⁵ Moreover, asylum seekers are excluded from the social security scheme, and, as a result, are not entitled to benefits, welfare services or national healthcare.⁷⁶

The sectors where most asylum seekers work were deemed 'non-essential.' As a result, when lockdown was introduced many of their workplaces closed, leaving families without any income and struggling to survive. From the second lockdown, in autumn 2020, Israeli NGOs working with asylum seekers estimated that 80% were unemployed.⁷⁷ Moreover, because they are ordinarily excluded from the universal healthcare applicable to citizens and permanent residents in Israel, their healthcare depends upon employment. When asylum seekers lost their jobs, they were therefore stripped not only of income but also of health insurance.⁷⁸ Without work or access to social security, asylum seekers had no alternative means of obtaining basic subsistence – to pay for food, shelter or medical services. NGOs reported increasing concerns of hunger and homelessness among asylum seekers, with a severe impact on women and children.⁷⁹ Attempts by civil society to include asylum seekers in any of the benefit packages the

⁷³ Rivka Weill and Tally Kritzman-Amir, "Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Entrants in Israel in a Comparative and International Context," *University of Pennsylvania Journal of International Law* 41 (2019): 43.

⁷⁴ HCJ 2293/17, *Gersagher v. The Knesset* (23 April 2020) ("Deposit Law Case"). The case concerned the 'Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel Law 5775-2014 (Legislative Amendments and Temporary Provisions) 5775-2014'. In references to this case, we rely on an unofficial translation by UNHCR: <https://www.refworld.org/docid/5f6b194c4.html>

⁷⁵ Deposit Law Case, President Hayut's opinion, para. 43.

⁷⁶ *Ibid*, Judge Hendel's opinion, para. 3.

⁷⁷ Physicians for Human Rights - Israel, Hotline for Refugees and Migrants, ASSAF-Aid Organization for Refugees and Asylum Seekers in Israel, The Association for Civil Rights in Israel, Worker's Hotline and ARDC - African Refugee Development Center, "Asylum Seekers in Israel Left Destitute During Covid 19 Crisis - October 2020" (2021).

⁷⁸ *Ibid*, p. 2.

⁷⁹ *Ibid*, pp. 2-3.

government introduced have failed, leaving them with no income.⁸⁰ Israeli civil society organized to get food and other assistance to the most needy families, but the need was greater than what philanthropic efforts could provide, leaving many without support.⁸¹ Some asylum seekers have resorted to taking exploitative informal and illegal jobs to support their families,⁸² though due to its underground nature, it is premature to estimate and analyse the extent and scope of this phenomenon.

Prior to the pandemic, several civil society organisations petitioned the High Court of Justice to void the Deposit Law, citing the violation of asylum seekers' fundamental rights – their right to property, the right to live in dignity and have an adequate standard of living, and the right to equality. They criticised what they referred to as 'constructive expulsion', the true objective of the law and presented data on the impact of the arrangement on asylum seekers. The State argued that the Deposit Law did not violate asylum seekers' right to live in dignity, the infringement of the right to property was proportionate, and the objectives of the law were legitimate.⁸³ The court ruled during the pandemic and found the Deposit Law to be unconstitutional (see discussion in part 4, below).

Asylum seekers' increased vulnerability under COVID-19 resulted, therefore, not from excessive use of their labour power but from their exclusion from all protective measures when the labour market was brought to a stop, which, in turn, led to destitution. This exclusion represented, and during COVID further entrenched, the State's refusal to acknowledge their long-term presence and any State responsibility for their wellbeing, highlighting two aspects of non-citizen workers' vulnerability. First, economic destitution and exclusion from social security can push workers to turn into undesirable and exploitative jobs, their lack of alternatives rendering them vulnerable to severe forms of labour market exploitation. Second, noncitizens' exclusion from social security also strongly reflects their exclusion from the host society, which persists despite their lengthy residence in the host country, raising families in the host country, participating in its labour market, and contributing to its social and cultural life.

Taken together, these three key elements demonstrate how measures intended to reduce the spread of COVID-19 increased the vulnerability of non-citizen workers, their objectification and instrumental treatment, and the denial of their humanity, intensifying their vulnerability to exploitation, forced labour, slavery and trafficking. This resulted not necessarily from an intention to weaken these workers, but more often from indifference or neglect to take into account their pre-existing vulnerability or their interests, beyond their labour power.

⁸⁰ Or Kashti, "86 Percent of Tel Aviv Asylum Seekers Lack Food Security, First Official Survey Finds," Ha'aretz (5 March 2020).

⁸¹ ASSAF, "ASSAF's Work During COVID-19 Lockdown March-May 2020" (2020).

⁸² Lee Yaron, "Some 80 Percent of Asylum Seekers in Israel Are Out of Work, Lack Health Insurance," Ha'aretz (26 October 2020); Lee Yaron, "Asylum Seekers in Israel Forced to Fend for Themselves During Coronavirus Crisis," Ha'aretz, (24 March 2020).

⁸³ Deposit Law Case, paras. 12, 13, 16.

We now turn to examining some of the cracks that opened up in Israeli policies towards noncitizen workers to improve their working and living conditions during COVID-19. Some have been noted already in this section – the extension of health insurance and housing regulations to Palestinian workers; land-use decisions regarding accommodation for workers on farms; and the High Court of Justice’s decision annulling the Deposit Law (discussed below), accompanied by civil society’s reaction to the plight of asylum seekers. In the next section, we will analyse these and additional developments, exploring whether they are temporary and superficial or represent deeper policy changes and a willingness to include non-citizen workers.

4. Openings, possibilities, and the potential legacy of COVID-19

The impact of the COVID-19 outbreak, with the closures and restrictions that followed, was mostly negative. As demonstrated above, the situation of many non-citizen workers deteriorated, and vulnerability to exploitation increased, with the conditions of some akin to forced labour, slavery and trafficking. Nonetheless, COVID-19 policies, by heightening and intensifying the structural vulnerabilities of non-citizen workers, have also drawn attention to their humanity, essential role in the Israeli economy, and socioeconomic rights, and have created some (albeit limited) opportunities to re-examine policies and improve workers’ working and living conditions. Through heightened attention to vulnerability, but also through new coalitions and solidarities, some limited opportunities for change by non-citizen workers and civil society actors that support them have emerged.

While some changes are temporary and likely to be considered unusual measures taken in a time of emergency – such as the temporary increase in bargaining power, or visa extensions for workers already present in Israel – we suggest that other changes may prove more persistent. Short-term policy changes may linger, due to inertia or change in the reference point. Thus, any attempt to reinstate the previous arrangement is expected to be very visible, require justification, and likely to result in criticism and objection from civil society and even from state officials. It should be clear, though, that many of the tentative ‘wins’ are still limited, possibly only cracks in the system that can perhaps be strategically widened by non-citizen workers and their advocates. We believe that most of these cracks and openings will most likely close swiftly in the face of the persistent patterns of control and vulnerability non-citizen workers encounter. Below, we will identify and discuss key openings.

Extension of stay in Israel

Perhaps the most striking changes have been the extension of temporary migrant workers’ visas, the transition to seasonal work for Palestinian workers, and the opening up of labour sectors to asylum seekers. Various countries, including, for example, Portugal and Canada, extended stay for and even provided residency to some immigrants and asylum seekers. In Israel, no such sweeping move was taken, yet migrant workers’ visas have been extended as a result of

the pandemic,⁸⁴ Palestinian workers are no longer required to exit Israel on a daily basis,⁸⁵ and asylum seekers and undocumented migrant workers have been granted permits to work in the care sector in nursing homes.⁸⁶ While all are temporary changes, possibly reflecting no more than government responsiveness to the needs of the market rather than humane treatment of workers, they have opened cracks in the strict temporary-stay regime, showing that what was perceived as an impossibility – due to security reasons, skill levels, or fear of settlement – is, in fact, possible. Policymakers' awareness of the contribution and labour power of those already in Israel, rather than the constant push to add new temporary hands, may be used by advocates in the future to push for better, less restrictive migration policy.

Increased bargaining power

When the borders closed and new migrant workers could not enter Israel, the demand for workers in migrant-receiving sectors increased. As discussed above, COVID-19 brought with it increased control and vulnerability to exploitation, but, in some cases, workers were also able to utilize the increased demand for workers in the sector to improve their working conditions. Perhaps the best example in the Israeli case is in the agriculture sector, where the shortage led to significant change in migrant workers' ability to move between employers, as well as to some increase in their market power, as many employers were left with visas they could not exercise and in need of workers.

In the agriculture sector in Israel – before and during COVID – private placement agencies were responsible for placing workers with employers and facilitating workers' movement between employers, if the workers or the employer desired a transfer. Placement agencies are paid relatively small sums for their services by workers and much more significant sums by employers.⁸⁷ As a result, they tend to be more 'loyal' to employers than to workers and are usually reluctant to facilitate workers' movement to another employer, particularly where a worker has requested transfer to an employer contracted with a different agency. Hence, workers' mobility is de facto severely limited.⁸⁸ However, during COVID, due to the great demand for labour and the shortage of workers, workers could more easily find an employer independently, because many employers were left with 'vacant visas' and could use the high demand for

⁸⁴ PIBA, "Notification Regarding the Extension of Permits for the Employment of Foreign Workers, and of B/1 Foreign Workers' Visas in Different Sectors" (29 March 2020).

⁸⁵ See note 62 and accompanying text.

⁸⁶ Lee Yaron, "Following the Corona Crisis: Foreign Workers without a Permit will be Allowed to Work in Nursing Homes," Ha'aretz (12 April 2020).

⁸⁷ Yahel Kurlander, "Placement and Manpower Agencies" in *TraffLab Alternative Plan*.

⁸⁸ Rajjman and Kushnirovich, "The Impact of Bilateral Agreements on Labor Migration to Israel".

workers to pressure agencies to service them more diligently.⁸⁹ Though at present we do not have complete data concerning migrant workers' mobility to demonstrate that workers enjoyed freer movement within the labour market, anecdotal data suggests that this was the case.⁹⁰

Although short-lived, this shortage demonstrated the impact of employment structures and migration policies on workers' bargaining power and the potential for non-citizen workers and their advocates to call for structural reforms in the incentive structure of placement agencies as a way to increase workers' employment and exit options.

Social Rights

In many countries, including Israel, the pandemic revived demands for a wider and more generous welfare state, which also impacted non-citizen workers. The willingness to offer health insurance coverage to Palestinian workers is illustrative. This was a policy that civil society had pushed for in the past and seemed relatively unlikely to be realized. COVID and the new sensitivities to the fragility of the body and the embeddedness of non-citizens in Israeli society may have hastened its introduction.

In the case of asylum seekers, their desperate situation, without jobs or welfare benefits, demonstrated the real and devastating cost of the Deposit Law. In April 2020, a month into the first lockdown and the humanitarian crisis in the asylum seekers' community brought on by COVID-19 policy, the High Court of Justice published its decision in the Deposit Law case. The Court held that the Deposit Law violated the right to property, though it analysed it through a social lens, considering notions of exploitation, withholding wages, and the ability to afford basic necessities.⁹¹ The Court stated that though its conclusion was valid irrespective of the crisis, the crisis and its effects reaffirmed the conclusion.⁹² Previous interventions by the Court in similar aspects of Israel's migration policy had resulted in backlash and the introduction of new measures.⁹³ Yet, a year has passed since the ruling was issued, and no new law or policy has been proposed or promoted. While still too early to determine, it is possible that without the sense of urgency that characterised previous such legislative amendments, due to the 'distraction' of the pandemic and perhaps even public attention to the destitution of asylum seekers, the introduction of new coercive measures is less likely.

Another social right impacted by COVID-19 is the right to health, in particular the issue of access to the vaccine. The vaccine rollout in Israel began quickly, with the ambitious goal of

⁸⁹ Informal conversations with agricultural placement agencies' representatives (30 March; 15 April; 22 May 2020).

⁹⁰ PIBA: "Additional Supports to Farmers Regarding Foreign Workers during COVID-19" (25 March 2020). [Heb].

⁹¹ Deposit Law Case, Judge Hayut's opinion, paras. 43-44.

⁹² *Ibid*, para. 61.

⁹³ Weill and Kritzman-Amir, "Between Institutional Survival and Human Rights Protection".

becoming the first country to vaccinate the majority of its population.⁹⁴ Initially, it was unclear whether migrant workers' private health insurance would cover the vaccine. Following some civil society pushback, the government decided to vaccinate non-citizens and citizens alike. However, it was abundantly clear that the vaccination of non-citizens was first and foremost a measure to protect Israeli citizens from the continued spread of the pandemic.

The first to be vaccinated among non-citizens were migrant care-workers,⁹⁵ whose work with the most vulnerable population prioritized their vaccination. Regarding asylum seekers, there were several policy shifts until their path to the vaccine was granted.⁹⁶ Most telling was the instrumental treatment of Palestinian workers. In a heavily criticized decision, the Israeli government opted not to provide vaccines to the OPT,⁹⁷ excepting only Palestinian workers who entered Israel, who were provided an opportunity to receive the vaccine at the checkpoints upon their entry to Israel. However, such workers may be the only ones in their families or neighborhoods vaccinated, given the sustained shortages of vaccine in the OPT - to which Israeli policy contributed.

Another troubling manifestation of Israel's instrumental treatment of workers is the exclusion of migrant workers from the 'perks' accompanying the status of being vaccinated. Migrant workers have been denied access to a 'green passport' that allows Israelis to enter public spaces and travel more readily upon vaccination.⁹⁸ The Ministry of Health claims it has not issued green passports to non-citizens because of a bureaucratic problem, but the problem has persisted for months and, as of this writing, has not yet been resolved.⁹⁹

Perhaps the most significant impact on migrant workers' social rights is in relation to housing. This may not be surprising, given that the lockdowns led to an increase in the time the population as a whole spent indoors, at home. In the case of migrant workers, lockdowns and social distancing regulations presented both some significant opportunities and some dangers. For migrant workers in agriculture, the regulation that served to address the spread of the pandemic also led to some positive policy developments. As discussed above, prior to COVID, workers' inhumane living conditions had been well documented, yet thoroughly ignored.¹⁰⁰ With

⁹⁴ Isabel Kershner, "How Israel Became a World Leader in Vaccinating Against Covid-19," NY Times (1 January 2021).

⁹⁵ PIBA, Important Notice Concerning Coronavirus Vaccinations for Foreign Caregivers (24 December 2020).

⁹⁶ Alon Bernstein, "Foreign Nationals, Asylum Seekers Get COVID-19 Vaccines in Tel Aviv," Times of Israel (9 February 2021).

⁹⁷ Einat Albin et al., Israel: Legal Responses to COVID-19, The Oxford Compendium of National Legal Responses to Covid-19, par. 114 (2021).

⁹⁸ *Ibid*, par. 110.

⁹⁹ Adv. Irit Ulman (Workers' Rights Clinic, TAU), Pre HCJ petition: Refusal to Grant a Green Passport to Foreign Workers and Others (12 April 2021).

¹⁰⁰ Kurlander and Zimmerman, "Suitable Accommodation".

COVID, it became clear that farm workers' crowded accommodations had the potential to increase infection and therefore could not be used for quarantine. To reduce the chances of transmission, the Israel Land Authority allowed landowners to build additional temporary structures on farmland without the usual bureaucracy and fees.¹⁰¹ This decision was adopted as a temporary COVID-related measure, valid until July 2020.

Similarly, for Palestinian workers, the improved housing regulation adopted during COVID will most likely prove 'sticky' and positively impact workers who continue to stay in Israel overnight. In general, one could make the case that the improved living conditions may now enable Palestinian workers to rely more on consecutive stay in Israel than in pre-pandemic 'regular' times. However, it should be noted that for the workers themselves, the change to longer consecutive stays in Israel, even under adequate housing conditions, is unappealing. Workers interviewed by an NGO during the pandemic indicated that after the pandemic, they would prefer to commute daily and return to their families and homes.¹⁰²

For caregivers, the pandemic may leave a very troubling legacy. The state's ability to require workers to avoid staying in community apartments, de facto leading to unbroken stays at their employers' homes and under their control, with fewer days and time off, may be an attractive option for some employers, who may continue such requirements in the future. It is too early to predict the lingering impact of such change, but the slow relaxation of COVID regulation in relation to migrant care-workers and existing patterns of around-the-clock care in the sector may lend themselves to intensification of demands for workers' availability.

Conclusion

In this article we have discussed the ways in which COVID-19 restrictions have meshed into and exacerbated the existing vulnerabilities of non-citizen workers in Israel. The emergency measures adopted pushed asylum seekers far below the poverty line and migrant workers into completely unacceptable living conditions, resulting in intensive control of over every aspect of their time and movement, and amounting to forced labour, slavery and trafficking. We have shown that non-citizen workers in Israel were pushed so quickly into extreme precarity because in the pre-COVID routine, they were already in a highly vulnerable situation. The 'regular' order keeps non-citizen workers controlled and vulnerable to severe exploitation, but in a way that usually falls just outside the scope of the prohibitions on forced labour, slavery and trafficking. For many of them, we argue, COVID-related policies tipped the scales, intensifying non-citizen workers' vulnerability and exploitation.

Our analysis shows that employers' control and workers' dependency are shaped, in large part, by government policies and restrictions, and intervention is often required to address the

¹⁰¹ Israel Land Authority, "Placing Portable Structures for Foreign Workers - Temporary Order for the Corona Pandemic Crisis" Decision 4787 (25 March 2020) [Heb.].

¹⁰² Niezna and Tadjer, "Situation Report".

vulnerability created by the same government charged with preventing forced labour, slavery and trafficking. Extreme and draconian measures that, if deployed by individual employers, are indicators of forced labour, slavery and trafficking, are regularly part of the temporary migration policy toolbox. Subjecting workers to employers' control day and night, wilfully neglecting their health and safety, and severely restricting their mobility were policies readily available when the pandemic hit because they were, in fact, already in place well before the spread of COVID. However, just as the existing harsh policies enable draconian measures in times of emergency, changes introduced during the crisis may inform the imagination in the future, demonstrating that the interests served by labour migration can be promoted while maintaining workers' dignity. Here we have attempted to sketch the positive and negative alternatives opened up by the pandemic and to highlight some of them, the promising as well as the troubling. Policymakers, state officials, civil society and workers and their organisations will be the ones who create COVID's legacy and will have to choose which possibilities to pursue.