



Project to Study and Analyse The Compatibility of Malaysian Laws with The International Convention on The Protection of The Rights of All Migrant Workers and Members of Their Families (ICMW)

Project Conducted by:

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This project is for The Human Rights Commission of Malaysia (SUHAKAM). This is a project to study and analyse the compatibility of Malaysian laws with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).

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Executive Summary

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) entered into force on 1 July 2003, after the threshold of 20 ratifying States was reached in March 2003.¹ And this was some 13 years after it had been formally opened for ratification in 1990. It has, however, attracted very little in the way of support from states; the recent ratifications by Fiji and Gambia have increased the number of State Parties to 55 states.

Malaysia has been, and continues to be, a major destination country for migrants. In the late nineteenth and early twentieth centuries, migrant labour was a central plank of British colonial policy and was consistent with the country's role as a supplier of commodities to the industrialised West. Since the 1970s and 1980s, the leading sector in economic growth has been a range of export-oriented manufacturing industries which is associated with labour-intensive production. The resurfacing of labour shortages, improved transportation and communication networks and a resurgence of migration have brought new challenges to the Malaysian Government. The current causes of migration are also different. People are no longer migrating because of economic reasons only. Political, ethnic and religious unrest in the region is also causing migration across borders. Malaysia thus has had to establish policies in areas such as labour migration, refugees' influx and human trafficking in order to better manage migration. The State's current regulatory structures and border control systems are evolving, and its periodic amnesty and deportation programmes are being carried out against the background of the human rights of the migrants.

¹ When El Salvador and Guatemala ratified it on 14 March 2003, this threshold was reached.

Labour migration has become a common feature of the labour market in ASEAN countries, and Malaysia is no exception. Indeed, Malaysia has benefitted greatly from the employment of migrant workers in several economically important sectors. During the last two decades, these workers have helped to provide the labour that has fuelled the country's emergence into an upper middle-income country. However, ensuring that migrant workers receive fair and humane treatment continues to prove challenging, with reports of abuse, discrimination and appalling living conditions in several major industries. In light of developments in international trade and international law and greater scrutiny of global labour supply chains, there has been increased pressure from the international community for Malaysia to enact policy and institutional reforms that will better protect the rights of migrants.

For decades, local and international civil society groups including the Human Rights Commission of Malaysia (SUHAKAM) have called on the Malaysian Government to accede and comply with international human rights treaties. Having acceded to 3 core human rights² treaties out of the 9, Malaysia is ranked as one of the lowest United Nations member states on this front. Despite constitutional guarantees of human rights, a myriad of human rights infringements continues to take place in the country.

As mentioned above, Malaysia has inevitably seen a growing number of documented migrant workers in the past few years with the number at 1,678,939 as of 31 August 2020³ and roughly

² Malaysia ratify only 3 core human rights treaties; Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD).

³ The official figures of migrant workers are from the office of the Director of Foreign Workers Immigration Department of Malaysia. According to the office, the office is unable to record the number of undocumented workers because of unofficial channels of entry to Malaysia and the status of 'undocumented' which make it hard for the office to get any conclusive and official record of undocumented migrant workers.

among these, the number of irregular foreign workers is estimated to be 1.23 million – 1.46 million.⁴ In addition, for the Trafficking in Persons report in 2020⁵ Malaysia had slipped to the Tier-2 Watch list as there were indicators in the reports warning of the practices that indicated forced labour; this thus makes it relevant for the Malaysian government to consider acceding to ICMW in order to combat human trafficking.

The main part of this report presents the findings of a series of detailed report and situation of the ICMW in a number of countries in the region, namely, Indonesia, Thailand, Philippines, Myanmar, Vietnam, as well as India and Bangladesh. The reports were based on semi-structured interviews carried out with major migration stakeholders in each country, including, inter alia, government officials from both central and regional authorities, members of political parties, and representatives of civil societies (i.e., relevant NGOs) on such issues as general awareness of the Convention, the nature and extent of any political or parliamentary activity carried out regarding it, and the main obstacles to ratification/accession. The summary and analysis of the findings of these studies take up Parts I-V of this report. Part I discusses the overview of the **ICMW Content and Implementation**. Part II then looks at the **Malaysian Legal Framework Regarding Migrant Workers**. Part III goes on to examine and provide the **Analysis of the Reasons for Non-accession to the Convention and Assessment of the Possible Consequences of its Implementation**. Part IV presents a set of recommendations for future action with a view to increasing support for, and ultimately the Accession/Ratification of the Convention, and part v

⁴ World Bank Group. 2020. Who is Keeping Score? Estimating the Number of Foreign Workers in Malaysia. <https://openknowledge.worldbank.org/bitstream/handle/10986/33730/Who-is-Keeping-Score-Estimating-the-Number-of-Foreign-Workers-in-Malaysia.pdf?sequence=1&isAllowed=y>

⁵ Trafficking in Person Report 20th Edition. Department of State. United States of America. Available at <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>

is the conclusion of the report. Part IV illustrates the legal roadmap. Additionally, relevant documents are provided in the Appendix.

PART I

1. OVERVIEW OF ICMW CONTENT AND IMPLEMENTATION

1.1 Brief History of the Adoption of the Convention

During the 20th century, a few international conventions were adopted to address and regulate migration for employment through various international agreements. However, it was not until after the economic downturn in the 1970s that the international community recognised that a new instrument was needed to deal with the protection of all migrant workers, including irregular migrant workers, who were often subject to abuse and discrimination.⁶ The first instrument that attempted to address these specific issues was the ILO Convention No 143⁷ of 1975, which contained provisions on the prevention of irregular migration and clandestine movements as well as rights aimed at protecting migrant workers from exploitation at work.⁸ The ICMW was adopted by the UN General Assembly on 18 December 1990;⁹ and after thirteen years and twenty ratifications, it

⁶ International Labour Organization (ILO), Migration for Employment Convention, 1939 (No. 66) (withdrawn), ILO, Inspection of Emigrants Convention, 1926 (No. 21) (shelved), ILO, Migration for Employment Convention (revised), 1949 (No. 97), ILO Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143).

⁷ ILO, Migrant Workers (Supplementary Provisions) Convention (No 143)

⁸ Cholewinski, R., 'International Labour Migration', in P. Opeskin, R. Perruchoud, J. Redpath-Cross (eds.), Foundations of International Migration Law, CUP, Cambridge, 2012, p. 288.

⁹ General Assembly resolution 45/158 of 18 December 1990.

came into force on 1 July 2003.¹⁰ Malaysia is not a signatory to the Convention, nor has Malaysia acceded to the Convention. In other words, Malaysia is not a party to the Convention.

1.2 Main Provisions of the Convention

The ICMW is a comprehensive instrument that covers the entire migration process from the recruitment and departure in the State of origin, migrant rights during transit as well as during the time in the State of destination and upon return.¹¹ It consists of nine parts. Parts I and II set out, inter alia, the definitions and a general non-discrimination clause which adds “nationality”, “conviction”, “age”, “marital status”, “birth” or “other status” and “economic position” as prohibited grounds for discrimination to the non-exhaustive list of protected grounds set out in the previous core human rights instruments.¹² This was implemented in order to reflect the common grounds on which migrant workers often experience discrimination. Part III provides for the rights of general application, i.e., those applying to all migrant workers and members of their families, irrespective of their status. Then, Part IV stipulates rights granted specifically to those in a regular

¹⁰ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

¹¹ Article 1(2) ICMW.

¹² Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD). International Convention on Elimination of All Forms of Racial Discrimination (ICERD), International Convention on Civil and Political Rights (ICCPR), International Convention on Economic, Social and Cultural Rights (ICESCR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the United Nations Convention against Torture or UNCAT), and International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

situation. Part V concerns rights of specific categories of migrant workers. Part VI sets out the obligations of States on cooperation and the promotion of sound, equitable, humane and lawful conditions of migration. The remaining parts (VII-IX) deal with the application, general provisions and potential restrictions to the ICMW.

The underlying purpose of the ICMW is the recognition that all migrant workers, both in regular and in irregular situation, are first and foremost human beings entitled to the enjoyment of fundamental rights without discrimination. The Convention does not present a new set of rights but largely restates the standards provided for by the International Bill of Human Rights¹³ such as the right to life (Article 6, ICCPR), the right to be free from torture (Article 7, ICCPR), the right to freedom of thought, conscience and religion (Article 18, ICCPR), right to equality, freedom of movement, freedom of peaceful assembly, right to form or join associations and freedom of speech. It basically expands on rights and entitlements which are already fully or partially covered by previous instruments.

The approach has a similar rationale to the underlying arguments in favour of developing specific international law in relation to women, children and persons with disabilities¹⁴ which is to codify and elaborate on the specificities of application of international human

¹³ The “International Bill of Human Rights” consists of the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

¹⁴ See the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention on the Rights of Children (CRC, 1989), the Convention on the Rights of Persons with Disabilities (CRPD, 2006).

rights law to these vulnerable categories. Many of the rights thus have a particular “migrant focus”, elaborating on existing rights which are of concern for migrant workers and their families. One new feature of the ICMW is that it provides a broad definition of a migrant worker, focusing on the engagement in a “remunerated activity” including individuals in the country of origin who are in preparation of taking up a remunerated activity in a country where they are not nationals, those who are already working in such a country, and those who are no longer working but are still in a country of which they are not nationals or are returning to their country of origin.¹⁵ In addition, the ICMW provides definitions of specific categories of migrant workers such as “seasonal workers”, “project-tied workers” as well as a definition of “members of the family” who also enjoy rights under the Convention.¹⁶ Moreover, the ICMW covers certain categories of migrant workers such as “frontier workers” and “self-employed persons” that are excluded under the migrant-specific ILO conventions.¹⁷

Importantly, the Convention aims to promote effective protection, for instance, by having several provisions on ensuring migrants’ access to legal remedies, thus bridging the gap between legal provisions and de facto enjoyment of rights. In the next section, some of the most important civil and political rights provided for by the ICMW are listed. The

¹⁵ Article 2(1) ‘The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.’

¹⁶ Article 2(2) for the specific groups of migrant workers; Article 4 defines “members of the family” as ‘persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.’

¹⁷ Migration for Employment Convention (Revised), 1949 (No. 97) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

specific migrant-focus of the relevant provisions of the ICMW is also highlighted. States have an option to introduce reservations to the incompatible ICMW provisions at the time of signature, ratification or accession.

Table 1 lists down the rights and obligations provided by the convention as well as the details of the particular provision.

Table 1: Annotated Provisions Specific to the Migrant Workers Convention¹⁸

No.	Provisions	ICMW Articles	Details
1	Applicability	Art. 1	The ICMW includes conviction, nationality, age, and economic position. The definition of “migrant worker” (MW) is broad and includes persons who are planning to or are actually working outside their own country or are ending work abroad and returning to their homelands. The ICMW applies to all MW residing and working in the territory of a State Party regardless of whether the country from which they came is a party to the Convention.
2	Definitions of migrant workers – states (origin, employment, transit)	Arts. 2-6	Not all migrants are MW. For the first time an international instrument provides a comprehensive definition of a MW centred on engagement in a “remunerated activity”. According to records from the drafting debates, the term “has been engaged” would include persons who have contracted an occupational disease which only manifests itself after they have left the country of employment, unemployed MW seeking employment and those who have been victims of work accidents and remain in the country of employment to collect disability benefits. The Convention clearly protects

¹⁸ International Catholic Migration Commission. 2006. Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties. A DO -IT-YOURSELF-KIT. Available at https://www.iom.int/sites/default/files/our_work/ICP/IDM/ICMC-Strengthening-Protection-of-Migrant-Workers-and-Their-Families.pdf

			women as MW and members of the families of migrant workers and uses inclusive language.
3	Persons excluded from the Convention	Art 3	Exclusion of investors reflects the concern of developing countries who wanted to confine the ICMW to the protection of the most vulnerable migrants. Refugees and stateless persons are excluded as they are protected under other international instruments.
4	Members of the family	Art 4	In a forward step, the Convention considers MW as social entities as well as economic entities and favours the reunification of families of MW. This is a compromise definition and is broad enough to encompass most family situations. The application of the definition of “members of the family” however, rests with the state of employment.
5	Documented and undocumented MW	Art 5	The Convention recognises that “the human problems involved in migration are even more serious in the case of irregular migration”. It identifies the need to encourage appropriate action “to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental rights” (Preamble).
6	Particular categories of MW	Arts. 57-63	The Convention provides definitions for specific categories of migrant workers such as “frontier workers”, “seasonal workers”, “itinerant workers”, “project-tied workers”, “specified employment workers” and “self-employed workers” (Art. 2). The “self-employed worker” category recognises the large number of migrant workers who operate a small family business. The ICMW covers many categories of MW excluded from other international conventions, in particular frontier workers and self-employed workers who are excluded from the two major ILO conventions. Art. 2 (2-g) creates a special category of “specified-employment workers” which refers to MW taking up employment for a “restricted and defined period of time”.
7	Right to urgent medical	Art 28	Art. 28 applies to both regular and irregular migrant workers and members of their families for whom no

	care		“emergency” healthcare can be refused.
8	Transfer of earnings, savings and belongings; import and export duties; taxation	Arts 32&47	The freedom to transfer earnings and savings is of extraordinary importance for migrant workers, many of whom support members of their families and dependents left behind who are reliant upon these earnings. “The freedom to transfer earnings and savings” contains a considerable improvement of the rights of MW.
9	Exemption from import and export duties and taxes	Arts 46 & 48(a)	The exemption from import and export duties along with the transfer of earnings (Articles 46, 48(a) and 47) serve to protect migrant workers and/or members of their families from being penalised because of their status or change in status.
10	Protection from destruction of ID and other documents	Art 21	According to the Convention, residency should not be forced, e.g., Art. 8, which grants migrant workers and their families the right to leave any state, including the state of origin, and the right to enter and remain in the state of origin subject to certain specified restrictions. Art. 21 protects migrant workers from employers who require them to submit their passports or other travel documents in order to force the migrant workers to stay in their employment for the duration of their contract.
11	Protection against (collective) expulsion	Arts 22&56	The Convention establishes protection for migrant workers against arbitrary expulsion when, for example, an employment contract ends. Articles 22 and 56 of the Convention prohibit measures of collective expulsion and impose certain procedural steps to be taken when issuing an expulsion decision. Migrant workers also have the right to return home if they so wish.
12	Authorisation to stay	Art 50(1)	No specific provision included, but Art. 50(1) imposes an obligation on States Parties “in the case of death of a migrant worker or dissolution of marriage... to favourably consider granting family members of that migrant worker residing in that state on the basis of family reunion an authorization to stay.”

13	Right to information on conditions for migration	Art 37 & 68.1(a)	When preparing to migrate, ideally, migrant workers should be able to acquire a basic understanding of the language, culture, and legal, social and political structures of the states to which they are going. Article 37, for example, establishes the right of migrant workers and members of their families who have the proper documentation to be informed preferably before their departure, or at the time of their admission to the state of employment, of all conditions applicable to their admission, as well as of the requirements they must satisfy in the state of employment and the authority to which they must address themselves for any modification of those conditions.
14	Right to be informed on rights arising from the Convention and states' obligations to inform	Art 33	All states must inform all migrant workers about their rights. This Article is one of the few provisions in the Convention that defines the specific responsibility of states of origin vis-à-vis migrant workers and members of their families.
15	Employment and residence authorisations	Arts 49 & 53	The Convention ties the right of residence to the employment of the migrant worker. For migrant workers in a regular situation, the Convention provides protection for those who lose their employment prior to the expiration of their work permit. This protection varies between migrants who can choose freely their activity and those who cannot, though neither group will be regarded as irregular nor will they lose their residence authorisation.
16	Authorisation to be temporarily absent without loss of status	Art 38	In the absence of such a provision, numerous migrant workers reportedly hesitate to visit their families, attend funerals, etc., for fear of losing their work authorisations: they are de facto forced to remain inside the host country. Such an article is in keeping with current analyses whereby more flexibility for documented migrants to travel between their countries of origin and host countries would help migrants maintain ties with their countries of origin.

17	Respect for cultural identity and links with state of origin	Art 31	This further strengthens provisions on cultural rights of migrants found in other articles (Arts. 26, 43, 45 and 67) by emphasising the importance of enabling them to maintain links with their state of origin.
18	Right to recourse to consular or diplomatic protection	Arts 16, 23, 65(2)	The Vienna Convention on Consular Relations (168 ratifications) expands the contents of this protection, in particular: “Article 36: Communication and Contact With Nationals of the Sending State 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: [...] (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”
19	Recruitment of workers for employment	Art 66	“Overall, the Convention seeks to play a role in preventing and eliminating the exploitation of all migrant workers and members of their families throughout the entire migration process. In particular, it seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and to discourage the employment of migrant workers in an irregular or undocumented situation.”

20	Obligation to comply with laws and regulations of states of transit and employment	Art 34	See UDHR Art. 29 “1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”
21	Conditions of international migration PART VI, entitled: “Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.”	Arts 64-70	This Section is of special interest in view of international developments and discussions on migration management and global governance: <ul style="list-style-type: none"> • Part VI of the Convention focuses primarily on the elimination of irregular migration. • Art. 64 promotes co-operation and consultation between states as a means to prevent the occurrence of the phenomenon of irregular migrant workers. • Arts. 65 and 66 establish the administrative machinery to deal with questions of migration as well as provide safeguards for recruitment. • Art. 70 provides for the minimum of protection of migrant workers and their families concerning their working and living conditions and complements the equal treatment approach contained in Arts. 25 and 43.
22	Repatriation of bodies of deceased migrants; compensation relating to death	Arts 71	This article typifies the need for specific provisions related to the situation of migrant workers and their families. At the same time, the inclusion in the Convention of this kind of Article has unduly contributed to the perception that the Convention i) creates new rights and ii) is too long.
23	Sanctions for organising clandestine movements	Art 68 1-b	A key provision of Art. 68 calls for collaboration to prevent and to suppress illegal or clandestine movements and employment. Its purpose is the prevention of trafficking of workers across frontiers, i.e., the organisation of labour migration in violation of international or national labour law. See also CRC Arts. 11 and 35.

			The Convention contains no articles specifically dealing with women's vulnerability to sexual abuses and exploitation. This article will have to be interpreted in light of more recent relevant international norms relating to protection of trafficked persons.
24	Sanctions on employers of irregular migrants	Art 68(2)	The Convention recommends that states take measures to eliminate employment of irregular migrants, including with sanctions on employers. These sanctions should not adversely affect the rights of migrant workers arising from employment.
25	Orderly return of migrants	Art 67(1)	This article should be read together with Articles 22 and 56 on expulsions. It emphasises the need for cooperation between states in the adoption of measures regarding the orderly return of migrants.
26	Measures to counter irregular migration	Art 69(1)	Art. 69(1-2) encourages the regularisation of an irregular situation but not only by expelling migrant workers and members of their families but above all by [considering] legalising their stay.
27	Regularisation of undocumented	Arts 35 & 69(2)	Although the Convention does not provide for a right to regularisation (Art. 35), it details elements to be taken into account when States Parties consider the possibility of regularisation, i.e., circumstances of entry, duration of stay, and family situation.
28	Freedom of movement	Article 8 Article 39 Article 79	All migrant workers and their families have the right to leave any State as well as to return and stay in their State of origin. These rights are particularly important for migrant workers. However, the wording used in the relevant provisions of the Convention is standard and does not show a specific migrant-focus since there are many types of migrant, i.e., documented/regular/undocumented/irregular. Article 39 is more specific in that it provides regular migrant workers and their families with the right to move freely and choose residence in the State of employment. This right can be restricted by law if

			<p>the State deems such restrictions are necessary to protect national security, public order, health, morals, or the rights and freedoms of others, and if they are consistent with the other rights in the Convention.</p> <p>According to Article 79 of the ICMW, nothing in the Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.</p>
29	Right to liberty and security	Article 16 Article 17	<p>Restated in Article 16(4) is the principle that no one should be arbitrarily arrested or detained, and any deprivation of liberty must be carried out in accordance with procedures established by law.</p> <p>This provision also refers to the case of arbitrary collective detention that may happen to migrant workers, particularly in case of discriminatory measures targeting a specific national group.</p> <p>Articles 16 and 17 provide for the rights and guarantees surrounding arrest and any restrictions of liberty, including administrative detention of migrants. For example, migrant workers and members of their families who are arrested shall be informed at the time of arrest, as far as possible in a language they understand, of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.</p> <p>Migrant workers and members of their families also enjoy the same rights as nationals during any form of detention under Article 17(7). Furthermore, in relation to the right to security, all migrant workers and their families are, under Article 16(2), entitled to protection by the State from violence, physical injury, threats and intimidation by public officials or by private individuals, groups or institutions. As this article extends to private individuals and groups, it can be interpreted that it includes protection against xenophobic acts against migrant workers and their families.</p>

30	Family reunification	Article 44	<p>The ICMW recognises the importance of families for migrant workers and Article 44 provides that States Parties shall take measures to facilitate the reunification of migrant workers and his or her family.</p> <p>However, the provision limits the States' obligation to pursue such measures only in so far as "they deem appropriate" and they "fall within their competency". Moreover, note that this article only applies to migrant workers in a regular situation.</p> <p>In relation to economic, social and cultural rights, the ICMW recognises several of the fundamental rights already recognised in other core treaties. However, it is worth noting that the ones provided for all migrant workers and their families are generally of a narrower scope compared to the ones granted to those in a regular situation, as well as to the interpretation provided to these rights by other treaty-based bodies.</p>
31	The right to health	Article 28 Article 43 Article 45	<p>Article 28 of the Convention states that all migrant workers and members of their families have the right to receive emergency health in equality with nationals. This right is more restrictive than the right to health provided for by Article 12 of the International Covenant of Economic, Social and Cultural Rights (hereinafter ICESCR) under which, according to its Committee, '[s]tates are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services'.</p> <p>Articles 43 and 45 of the ICMW provide regular migrant workers and members of their families with the right to equality with nationals in accessing social and health services, however only in so far as the requirements for participation in the respective schemes are met.</p>
32	The right to education	Article 30 Article 31 Article 43	<p>Article 30 affirms that the children of migrant workers, irrespective of their migratory status, have a right to access free primary and secondary</p>

		Article 45	<p>education in equality with nationals. Migrant workers in a regular situation have the right to access educational institutions, as well as vocational training and guidance to the same extent as nationals. The members of the family of the migrant worker enjoy equality with nationals in accessing educational institutions, as well as vocational training and guidance, provided the admission requirements and conditions for participation are met.</p> <p>The ICMW has included provisions aimed at protecting the migrant workers' link with their respective States of origin. For example, Article 31 requires States Parties to ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. In relation to children of migrant workers with a regular status, Article 45(3) asks that States Parties attempt to facilitate the teaching of their mother tongue and culture. Regular migrant workers and their families also have a right to participate in public affairs of their State of origin and to vote and be elected in elections of that State. Another indispensable feature of the Convention is its focus on labour rights for migrant workers, building on existing standards provided for by the ICESCR and the ILO conventions, as well as setting out a few unique provisions.</p>
33	The principle of equality at work	Article 25 Article 27 Article 54	<p>Article 25 of the ICMW protects the right to equal treatment with nationals at work for all migrant workers and members of their families in terms of conditions of work including, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment, and minimum age of employment. Similar provisions are included in the ILO Conventions No 97 and No 143.</p> <p>In relation to social security in the State of employment, all migrant workers and members of their families enjoy, under Article 27, the same treatment granted to nationals, however only in so far as they fulfil the requirements provided for by</p>

			the applicable legislation of that State and the applicable bilateral and multilateral treaties. Regular migrant workers are provided with additional rights under Article 54 in relation to protection against dismissal, unemployment benefits, and alternative employment in the event of loss of work.
34	Rights related to trade unions and other associations	Article 26	Under Article 26 , all migrant workers and members of their families have the right to join and seek the assistance of trade unions and associations that have been established according to law. This right is more restrictive than the approach taken by ILO, which has declared freedom of association to be a fundamental principle ¹⁹ and, in its Convention on the Freedom of Association and Protection of the Right to Organise, recognises that “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”. ²⁰ Under ICMW, the right to form a trade union or association only applies to migrant workers and members of their families in regular situations.
35	Freedom of thoughts and religion	Art 12	Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.
36	Right to equality with nationals regarding access to	Art 18	Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and

¹⁹ Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and Article 2 of the ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87).

²⁰ Article 2 ILO Convention No. 87 (1948) (emphasis added).

	justice before courts		impartial tribunal established by law
37	Right to form associations and trade unions; etc	Art 40	Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

1.3 ASEAN Member States in relation to ICMW

ASEAN, as a regional cooperation deals with migration. Each ASEAN member state (AMS) acts as either sending countries, or receiving countries, or both. Undeniably, ASEAN have their own legal instruments in handling migrant workers, notably the **ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007** and **ASEAN Consensus on the Protection and Promotion of The Rights of Migrant Workers 2017**. This report will later discuss in detail regarding both of these legal instruments. In relation to ICMW, it is fair to say that most AMS are not a party to the said convention. Nevertheless, there are three (3) member states which act as sending countries who are parties to the ICMW. Table 2 shows the status of AMS in ICMW on whether they are a party to the convention or otherwise. As seen in Table 2, Indonesia and the Philippines are parties to the Convention. The Philippines and Indonesia have a long history of sending workers not only to ASEAN member countries but to other countries as well. Details of the date of signatory and/or ratification are available in Table 2. The next part of the report discusses the best practice by an AMS, namely the Philippines. Additionally, the Philippines is among the first state to sign and ratify the ICMW in ASEAN.

Table 2: Details of AMS in relation to ICMW

ASEAN MEMBER STATE	PARTY TO-THE CONVENTION	NOTE
Brunei	No	-
Cambodia	No	Signatory 27 Sept 2004
Indonesia	Yes	Signatory: 22 Sept 2004 Ratification : 31 May 2012
Laos	No	-
Malaysia	No	-
Myanmar	No	-
Philippines	Yes	Signatory : 15 Nov 1993 Ratification: 5 Jul 1995
Singapore	No	-
Thailand	No	-
Vietnam	No	-

1.3.1 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (henceforth referred to as the Declaration) was adopted in 2007, and it is particularly significant as it calls on both origin and destination countries to promote the full potential and the dignity of migrant workers.²¹ The Declaration affirms the important contributions of migrant workers to society and the economies of both the host (receiving) and the sending states in ASEAN and

²¹ Andy Hall. "Migrant Workers and Social Protection in ASEAN: Moving Towards a Regional Standard?" Journal of Population and Social Studies, Volume 21 Number 1. July 2012.

recognises that cooperation between the states is essential to resolve cases of migrant workers who, through no fault of their own, have subsequently become undocumented. It also acknowledges that the fundamental rights of migrant workers and their families who are already residing in the destination country must be considered. The Declaration requires member states to increase cooperation on issues affecting migrant workers but notes that “nothing in this declaration shall be interpreted as implying the regularisation of the situation of migrant workers who are undocumented”.²² The Declaration also calls for an “intensification of efforts to promote the welfare of migrant workers” and for destination countries to “facilitate access to social welfare services as appropriate”.

In the Declaration, pursuant to the prevailing laws, regulations, and policies of the respective receiving states, the **receiving states** will - ²³

1. Intensify efforts to protect the fundamental human rights, promote the welfare, and uphold the human dignity of migrant workers;
2. Work towards the achievement of harmony and tolerance between receiving states and migrant workers;
3. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfil the requirements under applicable laws, regulations, and policies of the said state, bilateral agreements and multilateral treaties;
4. Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
5. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and
6. Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations.

²² ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007.

²³ ASEAN Secretariat and Naomi HATSUKANO. 2015. Improving the Regulatory and Support Environment for Migrant Workers for Greater Productivity, Competitiveness, and Social Welfare in ASEAN. ERIA Discussion Paper Series. ERIA-DP-2015-76.

Next, pursuant to the prevailing laws, regulations, and policies of the respective sending states, the **sending states** will ²⁴

1. Enhance measures related to the promotion and protection of the rights of migrant workers;
2. Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;
3. Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad, as well as repatriation and reintegration to the countries of origin; and
4. Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

Lastly, for the purposes of protecting and promoting the rights of migrant workers, **ASEAN Member Countries, in accordance with national laws, regulations and policies**, will ²⁵

1. Promote decent, humane, productive, dignified, and remunerative employment for migrant workers;
2. Establish and implement human resource development programmes and 11 reintegration programmes for migrant workers in their countries of origin;
3. Take concrete measures to prevent or curb the smuggling and trafficking of persons by, amongst others, introducing stiffer penalties for those who are involved in these activities;
4. Facilitate data sharing on matters related to migrant workers, for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states;
5. Promote capacity building by sharing of information, best practices, as well as opportunities and challenges encountered by ASEAN Member Countries in relation to the protection and promotion of migrant workers' rights and welfare;
6. Extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the embassies and consular offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements;
7. Encourage international organisations, ASEAN dialogue partners, and other countries to respect the principles and extend support and assistance to the implementation of the measures contained in this Declaration; and
8. Task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the

²⁴ Ibid.

²⁵ Ibid.

implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.

In 2008, the work plan for the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (AICMW) was developed. In this work plan, four areas of cooperation were mentioned. The first aimed at promoting best practices and strengthening information dissemination. The second aimed at promoting migrant workers' rights by improving labour-migration governance. The third was on human trafficking in the context of the migrant worker issue. The fourth aimed at developing common rules amongst ASEAN countries. The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers of 2007 and the Action Plan of 2008 have been the policy foundations in dealing with migrant workers in ASEAN member states. Based on these documents, each country has been trying to prepare domestic laws and regulations to manage migrant worker. To follow up on the implementation of the declaration, the AICMW was established in 2008 and the ASEAN Forum on Migrant Labour took the role of a platform for the broad-based discussion.²⁶

1.3.2 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant

Workers

Ten years after the adoption of the Declaration on the Promotion and Protection of the Rights of Migrant Workers in ASEAN in February 2007 under the Philippines' chairmanship of ASEAN, the ASEAN heads of state/government signed the ASEAN Consensus on the Promotion and Protection of the Rights of Migrant Workers 2017 – a document aimed at giving effect to the commitments of the Declaration. The sheer fact that labour-sending and-receiving countries in ASEAN have managed to reach a compromise on a divisive issue after nearly eight years of negotiation is something of a relief. It was delivered in paragraph 22 of the 2007 Declaration

²⁶ Naomi HATSUKANO. 2015. Improving the Regulatory and Support Environment for Migrant Workers for Greater Productivity, Competitiveness, and Social Welfare in ASEAN. ERIA Discussion Paper Series. ERIA-DP-2015-76.

which called for the development of an ASEAN instrument to advance the principles of the Declaration and tasking the ASEAN Secretary-General to submit an annual report on the progress of implementing the Declaration's commitments to the Summit through the ASEAN Foreign Ministers.

Although the negotiations for a regional instrument started off in 2009 with the intention to develop a legally binding instrument, the ASEAN Consensus does not have legal weight, and will not require member states to ratify the document nationally for implementation. Rather, it carries a moral weight for national governments to implement measures that address the commitments expressed in the document. This may not fully satisfy either the sending or receiving countries, nor the civil society and stakeholder groups which have been participating in the negotiations. The document reflects the nature of reaching an agreement in an ASEAN setting, and thus constitutes the negotiated compromise that ASEAN governments are willing to accept at this juncture. Chapter 7 of the document highlights that the commitments of the ASEAN member states will be "in accordance with national laws, regulations and policies".

The ASEAN Consensus defines who constitutes a migrant worker in ASEAN, and who are considered undocumented. This differentiation is seen as important for the ASEAN countries expected to extend social protection and other services to the migrant workers. The inclusion of undocumented workers and families of migrant workers in the scope of access to shelter, and medical and legal services was one of the stumbling blocks during the negotiation process. The document's negotiation process, however, stands as an example of inclusive participation in discussing regional policy. The ASEAN Forum on Migrant Labour (AFML), established in 2008²⁷ as a broad-based platform for discussing migrant labour issues under the framework of the ASEAN Senior Labour Officials, is the first of its kind for a regional organisation, and

²⁷ The 1st meeting of the Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (AICMW) was held from 15 to 16 September 2008 in Singapore. The meeting adopted its work plan with four areas of cooperation. Under thrust 2, which pertains to strengthening protection and promotion of the rights of migrant workers by enhancing labour migration governance in ASEAN Countries, one of the recommended activities was to organize an "ASEAN Forum on Migrant Labour". The 1st AFML was held with the Department of Labor and Employment, Philippines from 24 to 25 April, 2008 in Manila, Philippines. Available at https://www.ilo.org/asia/WCMS_214213/lang--en/index.htm

should continue to be the venue for discussing progress at the national-level implementation as well as issues and concerns for migrant workers in ASEAN.²⁸

1.4. OIC Member States in relation to ICMW

Organisation of Islamic Cooperation (OIC) countries face multiple challenges with regard to the labour market developments. High unemployment rates, low levels of skills, lack of investment to new skills, high informal unemployment and high prevalence of skills mismatch are some of the labour market characteristics and challenges observed in many OIC countries. Here, there are issues of mismatch between the educational system and the needs of the labour market, the low levels of productivity coupled with relatively low wages, the emigration of skilled labour, and inadequate labour market information, among others. Table 3 shows the status of OIC member states in ICMW on whether they are a party to the convention or otherwise. As seen in Table 3, almost half of the OIC member states are parties to the said convention. Details of the date of signatory and/or ratification are available in Table 3.²⁹ The next part of the report looks at the initiative by OIC on migration based on **OIC Labour Market Strategy 2025**.³⁰

Table 3: Details of OIC in relation to ICMW

OIC MEMBER STATE	PARTY TO THE CONVENTION	NOTE
Afghanistan	No	-
Albania	Yes	Accession: 5 Jun 2007
Algeria	Yes	Accession: 21 Apr 2005

²⁸ Moe Thuzar. 2017. “The ASEAN “Consensus” on Migrant Workers: Not Ideal but a Basis to Continue Working”. Available at <https://www.iseas.edu.sg/media/commentaries/the-asean-consensus-on-migrant-workers-not-ideal-but-a-basis-to-continue-working-by-moe-thuzar/>

²⁹ United Nations Treaty Collections, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND

³⁰ OIC Labour Market Strategy 2025. 2018. The Statistical, Economic And Social Research And Training Centre For Islamic Countries (SESERIC). Available at <https://www.oic-oci.org/docdown/?docID=2907&refID=1076>

PROJECT TO STUDY AND ANALYSE THE COMPATABILITY OF MALAYSIAN LAWS WITH THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICMW)

Azerbaijan	No	-
Bahrain	No	-
Bangladesh	Yes	Signatory: 7 Oct 1998 Ratification : 24 Aug 2011
Benin	Yes	Signatory: 15 Sept 2005 Ratification : 6 Jul 2018
Brunei Darussalam	No	-
Burkina Faso	Yes	Signatory: 16 Nov 2001 Ratification: 26 Nov 2003
Cameroon	No	Signatory: 15 Dec 2009
Chad	No	Signatory: 26 Sept 2012
Comoros	No	Signatory: 22 Sept 2000
Côte d'Ivoire	No	-
Djibouti	No	-
Egypt	Yes	Accession : 19 Feb 1993
Gabon	No	Signatory: 15 Dec 2004
Gambia	Yes	Signatory: 20 Sept 2017 Ratification : 28 Sept 2018
Guinea	Yes	Accession : 7 Sept 2000
Guinea- Bissau	Yes	Signatory: 12 Sept 2000 Ratification : 22 Oct 2028
Guyana	Yes	Signatory: 15 Sept 2005 Ratification : 7 Jul 2010
Indonesia	Yes	Signatory : 2004 Ratification : 31 May 2012
Iran	No	-
Iraq	No	-
Jordan	No	-

PROJECT TO STUDY AND ANALYSE THE COMPATABILITY OF MALAYSIAN LAWS WITH THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICMW)

Kazakhstan	No	-
Kuwait	No	-
Kyrgyz Republic	Yes	Accession : 29 Sept 2003
Lebanon	No	-
Libya	Yes	Accession : 18 Jun 2004
Malaysia	No	-
Maldives	No	-
Mali	Yes	Accession :5 Jun 2003
Mauritania	Yes	Accession : 22 Jan 2007
Mozambique	Yes	Signatory: 15 March 2012 Ratification : 19 Aug 2013
Niger	Yes	Accession : 18 March 2009
Nigeria	Yes	Accession : 27 Jul 2009
Oman	No	-
Pakistan	No	-
Palestine	No	-
Qatar	No	-
Saudi Arabia	No	-
Senegal	Yes	Accession: 9 Jun 1999
Sierra Leone	No	Signatory: 15 Sept 2020
Somalia	No	-
Sudan	No	-
Suriname	No	-

Syria	No	-
Tajikistan	Yes	Signatory : 7 Sept 2020 Ratification: 8 Jan 2002
Togo	Yes	Signatory: 12 Nov 2001 Ratification : 16 Dec 2020
Tunisia	No	-
Turkey	Yes	Signatory :13 Jan 1999 Ratification : 27 Sept 2004
Turkmenistan	No	-
Uganda	Yes	Accession: 14 Nov 1995
United Arab Emirates	No	-
Uzbekistan	No	-
Yemen	No	-

1.4.1 OIC Labour Strategy 2025

Analyses on the OIC labour markets show that labour force participation rate, employment to population ratio, share of employment in services sector, and share of labour force with tertiary education are lower; however, female unemployment rate, share of vulnerable employment, share of employment in agriculture, inactivity rate, and share of labour force primary education are higher in OIC countries compared to non-OIC developing and developed countries. Considering the wide range of labour market challenges in OIC countries, several attempts have been made to address those challenges at the OIC level over the last decade. Regular meetings held at the OIC ministerial level and relevant decisions taken during these meetings to cooperate in addressing some of the critical challenges are perhaps the most noteworthy initiatives. In this context, the OIC has successfully developed the OIC Framework for Cooperation on Labour, Employment and Social Protection.³¹

³¹ Ibid.

An executive programme for the implementation of the framework was also launched in 2014, with nine areas of cooperation among the OIC member states. Moreover, the labour issues in the OIC were also underlined in the OIC Ten Year Programme of Action: 2016-2025, particularly goal 2.9 which proposed the specific goals for employment, infrastructure and industrialisation in the OIC. The OIC Ten Year Programme of Action 2016-2025 (OIC-2025), which was adopted at the 13th Islamic Summit held in Istanbul during April 2016, aimed at fostering cooperation for exchange of expertise and manpower and promoting transfer of knowledge, experiences and best practices. In the area of labour, it aimed at conducting joint action and training programmes with a view to generating considerable improvements in labour market conditions in OIC countries, thereby reducing unemployment, increasing labour productivity, and improving the state of occupational health and safety. More specifically, the Goal 2.9/v of the OIC TYPOA-2025, titled ‘Labour, Employment and Social Protection’, among others, aimed to

- Promote the exchange of information and best practices as well as strategies, policies and experiences in the area of occupational safety and health, employment, social protection and migration, with a view to promoting a culture of prevention and control of occupational hazards (Goal 2.9.14);
- Promote labour protection, which comprises decent conditions of work, including wages, working time and occupational safety and health, essential components of decent work (Goal 2.9.15);
- Improve information transparency on employment statistics and promote vocational training programmes (Goal 2.9.16).³²

The OIC Framework for Cooperation on Labour, Employment and Social Protection, which was adopted during the second Islamic Conference of Labour Ministers (ICLM) in Baku, aimed to facilitate collaboration and cooperation among the OIC member states through certain ways and means. It included six main areas of cooperation, namely ‘Occupational Safety and Health; ‘Reducing Unemployment’; ‘Workforce Capacity Development Projects’; ‘Foreign Migrant Labour’; ‘Labour Market Information Strategy’; and ‘Social Protection’. Migrant and foreign contract labour was also centred in the framework’s document. Migrant and foreign contract workers in an irregular situation are usually at high risk of exploitation. In this context, the framework aimed to increase the constructive effects of migration for development and

³² Ibid.

accelerate brain gain, among others. It was also emphasised that migrant workers should be treated fairly, irrespective of their legal status, and benefit from conditions of work that are no less favourable than those available to domestic workers.³³

1.5 Best Practice of ICMW – the Philippines

1.5.1 Background

In ASEAN, the only countries that have ratified the Convention are Indonesia and the Philippines. Both are net labour-sending countries. There are several Conventions that deal directly with migrant workers' rights, including the Migration for Employment Convention (Revised), 1949 (No. 97); the Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143); and the United Nations' International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, as well as several other key labour Conventions that ensure equal treatment for all workers in social protection. Out of the ASEAN Member States, only the Philippines has ratified all six; ratification remains especially weak in the main countries of destination.³⁴

The Philippines is among the earliest to sign and ratify the ICMW. The Philippines is seen to have good labour practice especially concerning migrant workers. Labour laws tend to exclude domestic workers or fail to offer effective protection due to a lack of enforcement. No member countries – except the Philippines – have specific laws for domestic workers.³⁵ The history of migration in the Philippines with immigration and emigration within the region can be traced back to hundreds of years. Due to American control from 1898 until the mid-1900, “international migration” for Filipinos meant movement to the United States for much of the twentieth century. The first group of Filipino workers arrived in Hawaii in 1906, and more followed, expanding to California, Washington, Oregon, and Alaska. Most were single men. They took positions in

³³ Ibid.

³⁴ Arisman and Ratnawati Kusuma Jaya. 2018. Protection of Human Rights and Labour Migration for Employment Purpose across ASEAN /; Center for Southeast Asian Studies. Jakarta: CSEAS, 2018.

³⁵ P. Martin and M. Abella. Reaping the economic and social benefits of labour mobility: ASEAN 2015, Background paper prepared for ASEAN Community 2015: Managing integration for better jobs and shared prosperity, Bangkok, ILO, forthcoming.

agriculture, fisheries, and low-wage services such as restaurants and domestic work. It is reckoned that the total number of Filipino workers in the USA amounted to 150,000 between 1907 and 1930, most of whom were in Hawaii.³⁶

However, the emergence of a “culture of migration” only happened in the last 30 years where people were encouraged to work abroad because of the stimulus of the government. In 1934, the Tydings Mcduffie Law (or the Philippines Independence Act) started to impose immigration quotas on Filipinos moving to the USA and this caused a dramatic decline in the number of migrants. The Second World War stalled migration to a greater extent. After the independence of the Philippines in July 1946, the situation recovered gradually.³⁷

Having personally benefited from the remittances sent by relatives or seeing the successful cases of others, working abroad has become an attractive option for most Filipinos. Although triggered by the government, the economic incentives later worked as a primary impetus for forming a migration culture. In the context of the ASEAN region, the Philippines has the most outgoing migrant workers across ASEAN. In the Philippines, four government entities are responsible for labour migration – the Philippines Overseas Employment Administration (POEA); the Overseas Workers’ Welfare Association (OWWA); the Department of Foreign Affairs; and the National Reintegration Center of Overseas Filipino Workers. As of 2010, the Philippine government had signed 49 bilateral labour agreements with 25 countries and territories.³⁸

In order to protect their migrant workers overseas, the Philippine government has mandated the establishment of the Office for the Undersecretary for Migrant Workers Affairs (OUMWA) at the Department of Foreign Affairs. Where there is a high number of overseas foreign workers’ concentration, the law mandates the setting up of a Filipino

³⁶ Asis, M. The Philippines’ culture of migration. Migration Information Source. Migration Policy Institute, 2006.

³⁷ Arisman and Ratnawati Kusuma Jaya. 2018. Protection of Human Rights and Labour Migration for Employment Purpose across ASEAN /; Center for Southeast Asian Studies, Jakarta: CSEAS, 2018.

³⁸ Ibid.

Workers Resource Center. The Philippines has 67 embassies, 23 consulates, four permanent missions, one extension office, and 38 Philippine Labour Overseas Offices that assist Filipinos living and working abroad. The Government of Philippines has a number of policies to ensure that Overseas Filipino Workers are protected overseas. According to the Republic Act 10022, OFWs can only be deployed in rights-compliant countries that satisfy the conditions prescribed in section 3 of the Act. Foreign employers who intend to hire Filipino workers are also required to go through an accreditation procedure administered by the Philippine Overseas Employment Administration (POEA). In addition, recruitment agencies must be licensed according to the POEA Rules and Regulations. Agencies are obliged, inter-alia, to negotiate the best terms and conditions of employment on behalf of the workers. They must also disclose all terms and conditions to migrant workers. Importantly, agencies have to assume joint and several liability with the employer. Newly licensed agencies are charged a deposit of one million pesos (35 approx. USD 22,000) in order to ensure compliance with the Rules. In terms of MoU, the Government of Philippines has also signed MoU³⁹ with labour corporations abroad.⁴⁰

1.5.2 The Philippines on ICMW

The Philippines participated in the deliberations of the draft of the ICMW in the early 1980s. The Philippine delegation contributed ideas and avidly supported the approval by the UN General Assembly. The Philippines ratified the Convention on 5th July 1995 and was thus, the first Asian country to do so. The most significant piece of legislation in the Philippines is the Migrant Workers' Act of 1995 or the Republic Act 8042 (hereinafter is

³⁹ In terms of MoU, the Government of Philippines has also signed MoU with labour corporations abroad. They have recently signed MoU with Cambodia as well as Indonesia on labour cooperation, and signed MoU with other sending countries as well as specific domestic corporations. As described by POAE to CSEAS, they targeted all the destination countries to sign the MoU that arranges for official deployment of workers' establishment on employment standard, human resource development and in the repatriation as well as the social protection prohibition.

⁴⁰ Department of Foreign Affairs. 2011. Migrant Workers' Right to Social Protection in ASEAN: Case Study of Indonesia, Philippines, Singapore and Thailand. Mahidol Migration Centre, Institute for Population and Social Research, 2011.

referred to as RA 8042).⁴¹ It was introduced around the time of the ratification of ICMW. A wide range of institutional mechanisms was established to ensure the protection of the rights of migrant and overseas workers. Voting rights for overseas Filipinos became a reality. A major function of RA 8042 is the regulation of recruiting agencies to ensure that migrant workers are not abused or exploited, and job placement is appropriately matched with training and skills. This is the function that is expected to be phased out gradually under Sections 29 and 30 of RA 8042. NGOs in general believe that it is premature to deregulate recruitment agencies, while the association of recruitment agencies insists that the best way to enhance job opportunities abroad is to deregulate the industry. One of the good features of RA 8042 is the provision that penalises excessive charging of fees by recruitment agencies as an ‘act of illegal recruitment’. In relation to this, it may be noted that ICMW may not be in the consciousness of labour implementing agencies; however, the principles pertaining to the protection of migrant workers in ICMW are found in RA 8042. While it is seen as being a very valuable piece of legislation, there has been a range of bills proposed to amend RA 8042 in recent years.

The Welfare and Employment Office (WEO) of the Philippine Overseas Employment Administration (POEA) develops and implements policies and programmes to promote the interest and welfare of overseas Filipino workers and their families. Specifically, the WEO is responsible for the maintenance of the registry of workers for placement purposes, develops and signs recruitment agreements and foreign government employers and their instrumentalities, provides comprehensive facilities for handling all phases of recruitment of Filipino workers hired on government-to-government arrangements, and develops and implements pre-employment orientation programmes to inform applicant-workers on migration realities and employment conditions in host countries. RA 8042 has also contributed to the mediation/conciliation measures between employers and workers, the establishment of re-placement and monitoring centres and various other resource

⁴¹ An act to institute the policies of overseas employment and establish a higher standard of protection and promotion of the welfare of migrant workers, their families and overseas Filipinos in distress, and for other purposes.

centres. At the national level, there are differing opinions about whether the country itself can and does influence others — especially receiving countries. Some feel that the Philippines has successfully used the weight of the ICMR to pressure for better conditions for workers in some countries while others disagree. Statistical background and evidence of changes revealed that except for 2003, the growth trend of the country's overseas employment had been on an upward trend for the last five-year period, ending 2004. Indeed, there has been a marked increase in the skill level of Filipinos going offshore to work, a strategy that is government sponsored and implies greater success in locating these types of markets. Different destination patterns are more about locating and servicing more high skilled demands and not in response to the ratification of the ICMW. Additionally, the Philippines has become more acutely aware of its responsibility towards labour migrants and is seeking out better market and training according to these markets.⁴²

The important role of non-governmental organisations, as partners of government entities, in the implementation of the Convention is recognised by the Philippine Government. **Section 2 (h)** of the Republic Act No. 8042 or “The Migrant Workers and Filipino Act of 1995” explicitly provides, to wit: “*(h) Non-governmental organizations, duly recognized as legitimate, are partners of the State in the protection of Filipino migrant workers and in the promotion of their welfare. The State shall cooperate with them in a spirit of trust and mutual respect.*”

Reports regarding ICMW from the Philippines⁴³ incorporated inputs and information received from the Philippine government agencies, particularly the Department of Labor and Employment and its attached agencies, i.e., Philippine Overseas Employment

⁴² R. Iredale and N. Piper et al. 2005. Impact of Ratifying the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Family: Case Studies of the Philippines and Sri Lanka. Asia Pacific Migration Research Network. UNESCO.

⁴³ United Nations. 2009. Written Replies By The Government Of The Philippines Concerning The List Of Issues (ICMW/C/Phl/Q/1) Received By The Committee On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families Relating To The Consideration Of The Initial Report Of The Philippines (ICMW/C/Phl/1)*. Available at <https://digitallibrary.un.org/record/650831?ln=en>

Administration and the Overseas Workers Welfare Administration, Department of Foreign Affairs, Department of Justice and its attached agency, i.e., Bureau of Immigration, Department of Interior and Local Government (DILG) and its attached agencies, the Philippine National Police (PNP), the Department of National Defense, the Department of Finance and its attached agencies, i.e., Bureau of Customs and the Bureau of Internal Revenue, the Department of Education, the National Commission on the Role of Filipino Women, the National Commission on Indigenous Peoples, the National Economic Development Authority, the Commission on Filipinos Overseas, the Social Security System, the Bangko Sentral ng Pilipinas (Central Bank of the Philippines), the Presidential Human Rights Committee, the Commission on Human Rights (CHR), in consultation with various nongovernmental organisations (NGOs) and civil society organisations (CSOs) and international organisations, e.g., UNIFEM, ILO, UNICEF, WAGI-Miriam College, Migrant Forum Asia and the newly-established local NGO, Lola Grande Foundation for Women and Children, Inc.

In addition, in the Philippines, the Convention is also applied to refugees and stateless persons. The following domestic legislation, rules and regulations were promulgated for the purpose of applying the provisions of the Convention to the refugees and stateless persons under **Article 3(d)** of the Convention:

No.	Legislations	Provision	Details
1	BUREAU OF CORRECTIONS OPERATING MANUAL (30 March 2000)	Section 11. Stateless Inmates	A national of a State without diplomatic or consular representation in the country and a refugee or stateless person shall also be allowed to communicate with the diplomatic authorities of the state which take charge of his or her interests or any national or international authority tasked to protect such person.
2	Department of Foreign Affairs	Section 13 I of the	Rules and regulations for the implementation of Republic Act

	<p>ORDER NO. 11-97</p>	<p>Philippine Passport Act of 1996</p>	<p>No. 8239, otherwise known as the “Philippine Passport Act of 1996” defines a travel document as a means of certification or identifying document containing the description and other personal circumstances of its bearer, issued for direct travel to and from the Philippines that is valid for short periods or for a particular trip.</p> <p>“A Travel Document is issued only to persons, whose claim to Philippine citizenship is doubtful or who fall under any of the categories enumerated hereunder: “X X X 5) A stateless person who is likewise a permanent resident, or a refugee granted such status or asylum in the Philippines.”</p> <p>Section 13 I of the Philippine Passport Act of 1996 provides, moreover, that “a travel document, in lieu of a passport, may be issued to a stateless person who is likewise a permanent resident, or a refugee granted such status or asylum in the Philippines.”</p>
<p>3</p>	<p>Department of Labor and Employment Order No. 012-01</p>	<p>Omnibus Guidelines For The Issuance Of Employment Permits To Foreign Nationals</p>	<p>“Pursuant to the provisions of articles 5, and 40 of PD 442, as amended, the provisions of Rule XIV, Book 1 of its Implementing Rules and Regulations, Section 17 (5), Chapter 4, Title VII of the Administrative Code of 1987, the following Omnibus Guidelines for the issuance of Employment Permits are hereby promulgated:</p> <p>“RULE I. Coverage and Exemption. — “1. The following shall apply for Alien Employment Permit (AEP):</p>

			<p>1.1 All foreign nationals seeking admission to the Philippines for the purpose of employment: X X X</p> <p>1.5. Non-Indo Chinese Refugees who are asylum seekers and given refugee status by the United Nations High Commissioner on Refugees (UNHCR) or the Department of Justice under DOJ Department Order No. 94, series of 1998; “Resident foreign nationals seeking employment in the Philippines.”</p>
4	Proclamation No. 984 (26 March 1997)		Creating And Designating The Municipality of Morong, Province Of Bataan, Including The Area Of The Philippine Refugee Processing Center Complex (PRPCC) as The Morong Special Economic Zone Pursuant to Republic Act No. 7227 and Transferring the Land Comprising the PRPCC To The Bases Conversion Development Authority (BCDA).
5	Executive Order No. 249 (29 May 1995)		“Granting Permanent Resident Status to Certain Vietnamese Citizens and Filipino-Vietnamese Children Pursuant to Section 47 of The Immigration Act Of 1940”.
6	Executive Order No. 332 (12 August 1988)		Reconstituting the Task Force on International Refugee Assistance and Administration, and for other purposes.
7	Executive Order No. 554 (21 August 1979)	Section 47(b) of the Philippine Immigration Act	Creating a Task Force on International Refugee Assistance and Administration, Providing

		of 1940	Funds therefor and for other purposes.
8	Department Order No. 94, s. 1994		Establishing A Procedure for Processing Applications for the Grant of Refugee Status.
9	DOJ Department Order No. 12, s. 2001		“Omnibus Guidelines for the Issuance of Employment Permits to Foreign Nationals”
10	DOLE Department Order No. 19-02, series of 2002:		Amending Certain Provisions of Department Order No. 12, Series of 2001 Entitled “Omnibus Guidelines for the Issuance of Employment Permits to Foreign Nationals”.
11	DOLE Memorandum		Implementation of Rule II, Paragraphs 3.2 and 3.3 of Department Order No. 12, Series of 2001 Entitled “Omnibus Guidelines For the Issuance of Employment Permits to Foreign Nationals”.

Table 4: Domestic Legislation, Rules and Regulations were promulgated for the Purpose of Applying the Provisions of the Convention to the Refugees and stateless Persons in the Philippines

Apart from that, in the Philippines, the measures taken for the dissemination and promotion of the Convention are as follows. As one of its core functions to ensure workers’ protection, the Philippine Overseas Employment Administration (POEA), which is an attached agency of the Department of Labour and Employment, has intensified its public education and information campaign. This is being done through the conduct of the Pre-Employment Orientation Seminars (PEOS) and other anti-illegal recruitment seminars nationwide and the Pre-Deployment Orientation Seminars (PDOS) to all workers hired through government-to-government arrangement and name hires. The PEOS is a pre-

requisite for the issuance of passports to work abroad and it provides prospective overseas Filipino workers information on how to avoid illegal recruitment, the labour and employment condition in several countries of destination, and the realities of working in another country. In the implementation of the PEOS programme, the POEA is widening its network of partners by getting the support of various national agencies, local government units, industry associations, and professional groups.

The PEOS programme is a strategy of the Government to protect workers from exploitation and abuse by unscrupulous recruiters and employers. Its counterpart, the Pre-Departure Orientation Seminar (PDOS) under DOLE Overseas Workers Welfare Administration (OWWA) supervision also requires the orientation of OFWs on the culture of their host countries before they leave for abroad. Through these existing systems, the Philippine Government has strengthened its stand on the promotion of migrant workers' rights under the Convention. The Philippine Foreign Ministry also requires the Pre-Departure Orientation Seminar (PDOS) for Filipino diplomats, consular officials and embassy staff leaving for their first foreign assignment. The PDOS consists of, among others, an extensive briefing on Assistance to Nationals (ATN), one of the major pillars of the Philippine Foreign Service. Through this briefing, Foreign Service corps posted abroad would be sensitised on the profile of their respective assigned Filipino migrant communities, the challenges that the community faces and the assistance they require as well as the legal/systemic remedies to address such challenges.⁴⁴

Additionally, the various government agencies that deal with overseas employment and the protection of Filipino migrant workers coordinate their activities as follows.⁴⁵

⁴⁴ Ibid.

⁴⁵ Republic Act No. 8042. Migrant Workers and Overseas Filipinos Act of 1995.

Table 5 : Provisions and Government Agencies which Deals with overseas Employment and the protection of Filipino Migrant Workers

No	Provision	Details	Note
1	Section 20 of R.A. 8042	<p>SECTION 20 - An inter-agency committee composed of the Department of Foreign Affairs and its attached agency, the Commission on Filipinos Overseas, the Department of Labor and Employment, the Philippine Overseas Employment Administration, the Overseas Workers Welfare Administration, the Department of Tourism, the Department of Justice, the Bureau of Immigration, the National Bureau of Investigation, and the National Statistics Office shall be established to implement a shared government information system for migration.</p> <p>The inter-agency committee shall initially make available to itself the information contained in existing databases/files. The second phase shall involve link aging of computer facilities in order to allow free flow data changes and sharing among concerned agencies.</p> <p>The inter-agency committee shall convene to identify existing databases which shall be declassified and shared among member agencies. These shared databases shall initially include, but not be limited to, the following information:</p> <p>(a) Master lists of Filipino migrant workers/overseas Filipinos classified according to occupation/job category, civil status, by country/state of destination including visa classification;</p> <p>(b) Inventory of pending legal cases involving</p>	Provides for the establishment of a shared government information system for migration, the salient portions of which are quoted hereunder for ease of reference.

		<p>Filipino migrant workers and other Filipino nationals, including those serving prison terms;</p> <p>(c) Master list of departing/arriving Filipinos;</p> <p>(d) Statistical profile on Filipino migrant workers/overseas Filipinos/tourists;</p> <p>(e) Blacklisted foreigners/undesirable aliens;</p> <p>(f) Basic data on legal systems, immigration policies, marriage laws and civil and criminal codes in receiving countries particularly those with large numbers of Filipinos;</p> <p>(g) List of labour and other human rights instruments where receiving countries are signatories;</p> <p>(h) A tracking system of past and present gender disaggregated cases involving male and female migrant workers; and</p> <p>(i) Listing of overseas posts which may render assistance to overseas Filipinos, in general, and migrant workers, in particular.</p>	
2	Section 23 of R.A. 8042	<p>Provides that the following government agencies shall perform the following tasks to promote the welfare and protect the rights of migrant workers and, as far as applicable, all overseas Filipinos:</p> <p>(a) Department of Foreign Affairs. - The Department, through its home office or foreign posts, shall take priority action its home office or foreign posts, shall take priority action or make representation with the foreign authority concerned to protect the rights of migrant workers and other overseas Filipinos and extend immediate assistance including the repatriation of distressed or beleaguered migrant workers and other overseas Filipinos;</p>	

		<p>(b) Department of Labor and Employment - The Department of Labor and Employment shall see to it that labor and social welfare laws in the foreign countries are fairly applied to migrant workers and whenever applicable, to other overseas Filipinos including the grant of legal assistance and the referral to proper medical centres or hospitals:</p> <p>(b.1) <i>Philippine Overseas Employment Administration</i> - Subject to deregulation and phase out as provided under Sections 29 and 30 herein, the Administration shall regulate private sector participation in the recruitment and overseas placement of workers by setting up a licensing and registration system. It shall also formulate and implement, in coordination with appropriate entities concerned, when necessary employment of Filipino workers taking into consideration their welfare and the domestic manpower requirements.</p> <p>(b.2) <i>Overseas Workers Welfare Administration</i> - The Welfare Officer or in his absence, the coordinating officer shall provide the Filipino migrant worker and his family all the assistance they may need in the enforcement of contractual obligations by agencies or entities and/or by their principals. In the performance of this function, he shall make representation and may call on the agencies or entities concerned to conferences or conciliation meetings for the purpose of settling the complaints or problems brought to his attention.</p>	
3	<p>Section 28 of R.A. 8042</p>	<p>“COUNTRY-TEAM APPROACH” - Under the country-team approach, all officers, representatives and personnel of the Philippine Government posted abroad regardless of their mother agencies shall, on a per country basis, act as one country-team with a mission under the leadership of the ambassador. In this regard, the ambassador</p>	<p>“Country-Team Approach”</p>

		<p>may recommend to the Secretary of the Department of Foreign Affairs the recall of officers, representatives and personnel of the Philippine Government posted abroad for acts inimical to the national interest such as, but not limited to, failure to provide the necessary services to protect the rights of overseas Filipinos.</p> <p>Upon receipt of the recommendation of the ambassador, the Secretary of the Department of Foreign Affairs shall, in the case of officers, representatives and personnel of other departments, endorse such recommendation to the Department Secretary concerned for appropriate action.</p> <p>Pending investigation by an appropriate body in the Philippines, the person recommended for recall may be placed under preventive suspension by the ambassador.</p> <p>In host countries where there are Philippine consulates, such consulates shall also constitute part of the country-team under the leadership of the ambassador.</p> <p>In the implementation of the country-team approach, visiting Philippine delegations shall be provided full support and information.</p>	
4	<p>Section 20 of R.A. 9208</p>	<p>SECTION 20. INTER-AGENCY COUNCIL AGAINST TRAFFICKING. – There is hereby established an Inter-Agency Council Against Trafficking (IACAT), to be composed of the Secretary of the Department of Justice as Chairperson and the Secretary of the Department of Social Welfare and Development as Co-Chairperson and shall have the following as members:</p> <p>(a) Secretary, Department of Foreign Affairs;</p> <p>(b) Secretary, Department of Labour and Employment;</p> <p>(c) Administrator, Philippine Overseas</p>	<p>Otherwise referred to as the “Anti-Trafficking in Persons Act of 2003”.</p>

		<p>Employment Administration;</p> <p>(d) Commissioner, Bureau of Immigration;</p> <p>(e) Director-General, Philippine National Police;</p> <p>(f) Chairperson, National Commission on the Role of Filipino Women; and</p> <p>(g) Three (3) representatives from NGOs, who shall be composed of one (1) representative each from among the sectors representing women, overseas Filipino workers (OFWs) and children, with a proven record of involvement in the prevention and suppression of trafficking in persons. These representatives shall be nominated by the government agency representatives of the Council, for appointment by the President for a term of three (3) years.</p>	
5	Section 21 of R.A. 9208	<p>“The Council shall have the following powers and functions:</p> <p>(a) Formulate a comprehensive and integrated programme to prevent and suppress the trafficking in persons;</p> <p>(b) Promulgate rules and regulations as may be necessary for the effective implementation of this Act;</p> <p>(c) Monitor and oversee the strict implementation of this Act;</p> <p>(d) Coordinate the programmes and projects of the various member agencies to effectively address the issues and problems attendant to trafficking in persons;</p> <p>(e) Coordinate the conduct of massive information dissemination and campaign on the existence of the law and the various issues and problems attendant to trafficking through the LGUs, concerned agencies, and NGOs;</p> <p>(f) Direct other agencies to immediately respond to the problems brought to their attention and report to the Council on action taken;</p> <p>(g) Assist in filing of cases against individuals, agencies, institutions or establishments that violate the provisions of this Act;</p>	The mandate and functions of IACAT

		<p>(h) Formulate a programme for the reintegration of trafficked persons in cooperation with DOLE, DSWD, Technical Education and Skills Development Authority (TESDA), Commission on Higher Education (CHED), LGUs and NGOs;</p> <p>(i) Secure from any department, bureau, office, agency, or instrumentality of the Government or from NGOs and other civic organizations such assistance as may be needed to effectively implement this Act;</p> <p>(j) Complement the shared government information system for migration established under Republic Act No. 8042, otherwise known as the "Migrant Workers and Overseas Filipinos Act of 1995" with data on cases of trafficking in persons, and ensure that the proper agencies conduct a continuing research and study on the patterns and scheme of trafficking in persons which shall form the basis for policy formulation and programme direction;</p> <p>(k) Develop the mechanism to ensure the timely, coordinated, and effective response to cases of trafficking in persons;</p> <p>(l) Recommend measures to enhance cooperative efforts and mutual assistance among foreign countries through bilateral and/or multilateral arrangements to prevent and suppress international trafficking in persons;</p> <p>(m) Coordinate with the Department of Transportation and Communications (DOTC), Department of Trade and Industry (DTI), and other NGOs in monitoring the promotion of advertisement of trafficking in the internet;</p> <p>(n) Adopt measures and policies to protect the rights and needs of trafficked persons who are foreign nationals in the Philippines;</p> <p>(o) Initiate training programmes in identifying and providing the necessary intervention or assistance to trafficked persons; and</p> <p>(p) Exercise all the powers and perform such other functions necessary to attain the purposes and objectives of the Act."</p>	
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Additionally, migrant workers do not have the right to own real property in the Philippines. The Philippines, cognizant of the fundamental norms of human rights, has ensured that all people sojourning within its territory, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other indicators of status, are accorded fair and equal treatment in line with the “equal protection” clause of the Philippine Constitution.⁴⁶ It has been noted that neither the Convention nor the two major Covenants, i.e., the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights exist in a vacuum. Both Covenants accord recognition to the fact that the implementation of the State party’s obligations to give effect to the rights recognised therein shall be in accordance with its domestic constitutional processes, taking into account considerations appurtenant to national security, and public policy, inter alia. In this context, Philippine laws are applicable to non-resident foreign migrants sojourning in the country except those laws which are political in nature and are explicitly applicable to the citizens of the country alone. The equal protection clause is, thus, not without limitations.⁴⁷

There are rights/privileges that the law reserves only to Filipino citizens, such as:

- (a) The right of suffrage;⁴⁸
- (b) The right to hold public office;⁴⁹
- (c) To operate public services;

⁴⁶ The 1987 Constitution Of The Republic Of The Philippines – Article III. Bill of Rights. Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

⁴⁷ United Nations. 2009. Written Replies By The Government Of The Philippines Concerning The List Of Issues (ICMW/C/Phl/Q/1) Received By The Committee on The Protection Of The Rights Of All Migrant Workers And Members Of Their Families Relating To The Consideration Of The Initial Report Of The Philippines (ICMW/C/Phl/1)*. Available at <https://digitallibrary.un.org/record/650831?ln=en>

⁴⁸ The Constitutions of the Republic of Philippines; **Article V Suffrage**

Section 1. Suffrage may be exercised by all citizens of the Philippines not otherwise disqualified by law, who are at least eighteen years of age, and who shall have resided in the Philippines for at least one year and in the place wherein they propose to vote for at least six months immediately preceding the election. No literacy, property, or other substantive requirement shall be imposed on the exercise of suffrage...

⁴⁹ The Constitutions of the Republic of Philippines **Article IX** Constitutional Commissions.

Section 1. (1) The Civil Service shall be administered by the Civil Service Commission composed of a Chairman and two Commissioners who shall be natural-born citizens of the Philippines and, at the time of their appointment, at least thirty-five years of age, with proven capacity for public administration, and must not have been candidates for any elective position in the elections immediately preceding their appointment.

- (d) The application of the rules on succession of foreign nationals as provided under article 16, paragraph 2, and article 1039 of the Civil Code of the Philippines;
- (e) The limited right to acquire ownership over corporations or enterprises, such as: enterprises with paid-up capital of the equivalent in Philippine Pesos of less than US\$ 2,500,000.00 shall be reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens; and forty per cent interest or shares of stock in a condominium project shall be exclusively owned by Filipino citizens; and
- (f) The right to acquire lands, except if the acquisition was made prior to the 1935 Constitution, acquisition through hereditary succession, or acquisition by a foreign national who is a former natural born citizen subject to the limitations prescribed under Batas Pambansa Bilang (National Law No.) 185 and the Republic Act No. 8179.⁵⁰

Ownership of lands by Filipinos is founded on reasons of public policy, which are enshrined in the Constitution.⁵¹

Aliens, including non-resident foreign migrant workers, are neither allowed to acquire lands of the public domain nor acquire private lands except in cases of hereditary succession, as provided under **Section 7, article XI of the Constitution**.⁵²

The Supreme Court has consistently ruled that the phrase “hereditary succession” in the aforementioned constitutional provision is interpreted to mean intestate succession (i.e., by operation of law) and not testamentary succession (i.e., through a last will and testament), as otherwise the

⁵⁰ United Nations. 2009. Written Replies By The Government Of The Philippines Concerning The List Of Issues (ICMW/C/Phl/Q/1) Received By The Committee On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families Relating To The Consideration Of The Initial Report Of The Philippines (ICMW/C/Phl/1)*. Available at <https://digitallibrary.un.org/record/650831?ln=en>

⁵¹ **Section 3, article XII (National Economy and Patrimony) of the 1987 Constitution provides: Sec. 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks.**

Agricultural lands of the public domain may be further classified by law according to the uses to which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead, or grant.

⁵² **Sec 7.** Save in cases of hereditary successions, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

prohibition can easily be circumvented. Other exception to the prohibition on the ownership of lands in the Philippines by a foreign citizen is that provided under **Section 8, Article XII of the 1987 Constitution.**⁵³

The Legal Assistant for Migrant Workers under **Section 24 RA 8042** is primarily responsible for the provision and overall coordination of all legal assistance services to Filipino migrant workers as well as overseas Filipinos in distress. In the exercise of these primary responsibilities, he/she discharges the following duties/functions:

- Issue guidelines, procedures and criteria for the provision of legal assistance services to Filipino migrant workers;
- Establish close links with the relevant government agencies such as, among others, the Department of Labor and Employment (DOLE), Philippine Overseas Employment Administration (POEA) and Overseas Workers' Welfare Association (OWWA), as well as with non-governmental organizations assisting migrant workers, to ensure effective coordination in providing legal assistance to migrant workers;
- Tap the assistance of the Integrated Bar of the Philippines (IBP), other bar associations, and reputable law firms, as the need arises, to complement government services and resources to provide legal assistance to migrant workers;
- Administer the Legal Assistance Fund for Migrant Workers and to authorize its disbursement, subject to approved guidelines and procedures, governing its use, disposition and disbursement; – Keep and maintain an information system for migration as provided in Section 20 of RA 8042; and
- Prepare its budget for inclusion in the budget of the Department of Foreign Affairs in the annual General Appropriations Act.

⁵³ **Sec. 8.** Notwithstanding the provision of Section 7 of this Article, a natural born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private lands, subject to limitations provided by law.

Apart from that, Assistance to Nationals (ATN) Fund and Legal Assistance Fund (hereinafter referred to as the LAF) is provided for under **Section 25 of RA 8042**⁵⁴ and shall be used exclusively to provide legal services to migrant workers and overseas Filipinos in distress. Pursuant to a **Department of Foreign Affairs Order 12-08**, the LAF can be used for:

- Fees for competent private counsel, local or foreign, not exceeding US\$ 3,000 per accused;
- Bail bonds to secure the temporary release of workers under detention not exceeding US\$ 3,000 per accused;
- Court fees not exceeding US\$ 500 per accused;
- Charges and other reasonable litigation expenses, including expenses necessary to reach an amicable settlement of the case, up to US\$ 3,000 per accused;
- Travelling expenses, including reasonable transportation expenses and per diems, in accordance with applicable rules and regulations; and
- Communication expenses in connection with legal assistance cases, in accordance with applicable rules and regulations.

Pursuant to **Migrant Workers and Overseas Filipinos Act (1995)**, the State allows the deployment of OFWs only in countries where the rights of Filipino Migrant Workers are protected based on existing labour and social laws, bilateral agreements concluded, multilateral conventions, declarations and resolutions and other protective measures. Human resource development (HRD) cooperation has been an important element of the bilateral labour agreements that the Philippine Government negotiates with labour receiving countries of Filipino workers. The Philippine Government has forged agreements with the HRD component of the

⁵⁴ **Sec. 25.** Legal Assistance Fund - There is hereby established a legal assistance fund for migrant workers, herein after referred to as Legal Assistance fund, in the amount of One hundred million pesos (P100,000,000.00) to be constituted from the following sources: Fifty million pesos (P50,000,000.00) from the Contingency Fund of the President; Thirty million pesos (P30,000,000.00) from the Presidential Social Fund; and Twenty million pesos (P20,000,000.00) from the Welfare Fund for Overseas Workers established under Letter of Instruction No. 537, as amended by Presidential Decree Nos. 1694 and 1809. Any balances of existing fund which have been set aside by the government specifically as legal assistance or defense fund to help migrant workers shall, upon effectivity of this Act, be turned over to, and form part of, the Fund created under this Act.

Western provinces of Canada, namely Saskatchewan, British Columbia and Manitoba, and the UAE. The Government has also forged an agreement with Bahrain that will promote cooperation between the Philippines and Bahrain on health services cooperation including AHRD programmes for Filipino Health professionals. Given the difficulties encountered in forging BLAs with some receiving States, not to mention the tedious process for their negotiation, the Philippines has also resorted to adopting alternative approaches to strengthen mechanisms to protect OFWs, especially with host countries with no bilateral agreements with the Philippines. This involves the pursuit of bilateral agreements which are less formal and dealing with operational arrangements on areas of mutual concern such as entry procedures, verification of recruitment documents, shared information and database to facilitate deployment, the creation of Joint Commissions which meet at regular intervals to dialogue and informally resolve bilateral concerns, including labour issues, and formation of technical committees with foreign embassies.

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In addition, the Philippines has carried out initiatives to promote the accession to the Convention of countries receiving Filipino workers. On October 2008 in Manila, the Department of Foreign Affairs spearheaded the Philippines' hosting of the Second Global Forum on Migration and Development (GFMD) with the central theme of "Protecting and Empowering Migrants for Development." The Manila GFMD brought together countries of migrant origin, transit and destination and countries at all stages of economic, social and political development that are represented by policymakers from a wide range of government agencies, including Ministries and Departments of Immigration, Development, Labour, Foreign Affairs, Gender Equality, Home Affairs, Justice, Interior, Integration and Nationals abroad. The Manila GFMD also drew on the knowledge and experience of international agencies, including those that make up the Global Migration Group (UNCTAD, ILO, IOM, World Bank, UNHCHR, UNHCR and others),

⁵⁵ United Nations. 2009. Written Replies By The Government Of The Philippines Concerning The List Of Issues (ICMW/C/Phl/Q/1) Received By The Committee on The Protection Of The Rights Of All Migrant Workers And Members Of Their Families Relating To The Consideration Of The Initial Report Of The Philippines (ICMW/C/Phl/1)* Available at <https://digitallibrary.un.org/record/650831?ln=en>

regional organisations and bodies, academia, NGOs, trade unions, the private sector, and above all the migrants.⁵⁶

The Philippine Government chose as its flagship the theme of “Protecting and Empowering Migrants for Development” to highlight the human face of migration in a debate that often only addresses the rational economic implications of migration for development. Governments from both origin and host countries welcomed the opportunity to discuss the rights of migrants and ways of protecting and empowering them to enhance their development, without being doctrinaire. Participating governments expressed their participation in the discussion in the spirit of shared responsibility and partnership. Within ASEAN, the Philippines is thus far the only country that has ratified the 1990 International Convention on the Protection of the Rights of All Migrants and Members of the Their Families. In 2007, at the initiative of the Philippines in the ASEAN Summit it hosted in Cebu, ASEAN made a ground breaking move to address the issue of migrant workers when its leaders signed the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Declaration mandates ASEAN countries to promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions of migrant workers. The Declaration calls for clear commitments to protect the rights, dignity and welfare of migrant workers, by providing them access to legal services, fair and just conditions or work, and promoting tolerance between migrant communities and populations of the receiving state, among others. As a follow-up, the Philippines also hosted the ASEAN Ministerial/Post Ministerial Meeting in Manila which produced the Statement on the Establishment of a Committee to Implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Committee was tasked to develop/draft the ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers.⁵⁷

⁵⁶ Ibid.

⁵⁷ Ibid.

1.6 Consideration of Malaysia's Accession to the Convention

ICMW has become a concern to the Ministry of Human Resource (MOHR) International Division for some time. The last update regarding ICMW was in late 2018 before there was a change of government, making the government's stand to remain as what it was previously. Now, since there is a new government, the said department soon started working on considering the issue of accession to the Convention again. The MOHR then organised a series of Focus Group Discussions with various government stakeholders including the Immigration Department, the Ministry of Home Affairs and the Ministry of Foreign Affairs to examine the provisions of the ICMW and the need for Malaysia to accede to it. Many of the government stakeholders are against Malaysia acceding to ICMW as they find it an unnecessary burden. The MOHR, on the other hand, leaves it open as they understand that ICMW might be relevant for Malaysian migrant workers who work abroad. The Ministry also notes that most of the parties to the ICMW are sending countries. The MOHR also understands the need for the application of the ICMW for migrants who work in Malaysia and the need for them to be with their family. Yet, this concern must be weighed against budgetary constraints. Take, as an example, the crucial need of education. It was pointed out that the government needs to subsidise RM30, 000 per student enrolled in government schools. If the migrant worker's families are allowed to follow and to be admitted in government schools, this will definitely be an additional financial burden for the government. The consultants were informed that there are many awareness programmes led by ILO that are backed up or in collaboration with the MOHR. The MOHR understands the need to treat the migrant workers equally and to respect their human rights. In any event, the MOHR must endeavour as best it could to assist the migrant workers. Currently, regarding the

status of ICMW, the MOHR upholds the view of the then ministers of Human Resources, Foreign Affairs and Home Affairs who stated that there is no urgent need for Malaysia to accede to the ICMW. Be that as it may, the MOHR however maintains its view that ICMW has its advantages and acceding to the Convention—would make Malaysia a better destination country and will provide better protection to Malaysians working abroad.⁵⁸

The Ministry of Foreign Affairs (MOFA) agrees that ICMW is one of the rising concerns especially for receiving countries, like Malaysia. In considering the image of MOFA at the international arena, the Ministry’s representatives might have agreed to accession just to avoid critiques from other states. The MOFA had participated in the Focus Group Discussions and the ministry shares the majority view of being not in favour of acceding to ICMW as it is not urgent for Malaysia to do so.⁵⁹

Additionally, the Immigration Department of Malaysia has a clear stand that Malaysia will not consider acceding to the ICMW⁶⁰. The Director of Foreign workers expressed it clearly that migrants coming to Malaysia, which were in the numbers of 1,678,939⁶¹ as of 31 August 2020, are not allowed to marry or bring their families to Malaysia by reason of their work visa.⁶² The explanation given by the Immigration Department was very much related to the issue of security of the country. The Immigration Department claimed that it was “unmanageable” to allow the

⁵⁸ Noor Haryantie Noor Saidin, Principal Assistant Secretary, Ministry Of Human Resource, International Division. Interview conducted on 23 July 2020 at MOHR, Putrajaya.

⁵⁹ Subashini a/p Kamarapullai, Principle Assistant Secretary, Ministry of Foreign Affairs, Human Rights and Humanities Division. Interview conducted on 3 August 2020 via telephone conversation.

⁶⁰ Statement recorded by the Director of Foreign Workers, Immigration Department of Malaysia.

⁶¹ See Annex 2 for a more detailed statistic.

⁶² Recruitment Terms And Conditions Of Foreign Worker, Immigration Department Of Malaysia, Available at <https://www.imi.gov.my/portal2017/index.php/en/foreign-worker.html>

migrants' family members to come to Malaysia looking at the current figure of the migrants themselves, and this is without even considering the issue of irregular migrants.⁶³

ICMW is one of the many legal instruments that are relevant to migrant workers. Protection of migrant workers is not a new issue being discussed. Based on his experience of over 20 years in handling migrant issues, Mr Alex Ong from Migrant Care,⁶⁴ managed to lay down all the issues faced by migrants as well as the Government in handling the migrant workers. It is undeniable that we need migrant workers here in Malaysia, especially in certain industries such as palm oil, construction and domestic work. Most of the ICMW signatories are sending countries, and the Convention is relevant for them as they want to protect their workers working abroad. ICMW for Malaysia is a different set of stories as we have different practices when it comes to migrant family. As mentioned, migrant workers in Sabah are allowed to bring in their families as most of the migrant workers there are from the Philippines and the endless border issues have compelled Sabah to adopt a wholly different set of practice when it comes to migrant workers. On the other hand, the situation is different for Peninsular Malaysia as well as Sarawak where family members of migrant workers are not allowed at all to enter.

The problem regarding bringing in migrant workers' families member only arises when the legitimate migrant worker is the sole bread winner of the family, i.e., the husband/father and not

⁶³ Mohammad Abiddin Bin Abd Rahman, Director, Malaysian Immigration Department, Foreign Workers Department. Interview conducted on 2 October 2020 at the Malaysian Immigration Department's HQ, Putrajaya.

⁶⁴ Mr Alex Ong was one of the members of the Independent Committee on the Management of Foreign Workers chaired by retired Court of Appeal Judge, Dato' Seri Mohd Hishamudin Yunus. This Committee appointed by the Government in October 2018 came up with a report in early 2019, with recommendations, one of which is that Malaysia accedes to the ICMW. This Report is yet to be made public by the Government, despite recommended to do so by the Committee; and despite the urging by Mr Kula Segaran, the Minister of Human Resources then, who initiated the appointment of the Committee, that the Report be made public. (*Kula raps home ministry over foreign worker management Free Malaysia Today Report*, June 23, 2020.)

the wife and the children. All the benefits of an employment would only cover the employee and not his family members. The crucial problem would arise if there were, for example, an accident involving a family member or the family member falling sick, in which case the benefit would not be extended to the family member concerned. In such a case, Malaysian employers are not ready to extend the benefits to the family member. To worsen the issue, let us suppose that there is an accident that leads to death. This will be another level of protection that will need to be discussed in depth. The issue of inequality for children that will be requiring educational support also needs to be taken into consideration, and this will include the number of children per family. The right to education of a child is a human right and no migrant should be prejudiced with regard to this right just because of the lack of protection by the destination country. In addition, the right to social security is also another issue to consider if Malaysia were to accede to the ICMW. This concerns the social security of migrant workers here in Malaysia where their entitlement of the same is not that certain. The right to retirement benefits is also an issue as this also concerns the family if they are brought in by reason of the ICMW provisions. It was also suggested that the Portable Social Protection mentioned in one of the ASEAN meetings be considered. It was suggested that the social protection of a particular worker from a particular country should be portable and will carry wherever the migrant worker works. This will assist and lessen the burden of a destination country such as Malaysia, in realising the ICMW. The need for a workable minimum wage that is relevant for migrant workers is also crucial. It was also suggested that the practices of certain countries are examined, including but not limited to other ASEAN Countries such as Philippines and the EU countries, the Abu Dhabi protocol, and other related international instruments. Lastly, it was agreed that Malaysia will need to work

more on the protection for migrants before agreeing to ICMW as we would not want to prejudice any party by acceding to the ICMW as it is.⁶⁵

PART II

2.0 OVERVIEW OF THE MALAYSIAN POLICY ON LEGAL MIGRATION

Policies to manage labour migration have generally remained ad hoc since they were first introduced as an “interim solution” to fill labour shortages over two decades ago. Prominent features of the policy framework have included a detailed quota system for entry of migrant workers and efforts to regularise illegal migration through temporary amnesties. These measures have often been followed by bans on new admissions and large-scale law enforcement actions to detain and deport those migrants who do not register with the authorities. Although frequent changes have been made, the policies have been consistent in respect to admitting migrant workers only for the purpose of meeting the immediate labour needs of employers rather than allowing for longer term settlement.⁶⁶

Despite their ubiquity within the labour market, the Malaysian Government has not readily accepted the role that migrant workers play in filling the demand for low-skilled workers (with a few notable sectoral exceptions such as in domestic work). For many years, targets have been set and policies introduced to reduce the number the country employs in order to encourage economic restructuring. The New Economic Model of Malaysia in 2010 and other policy

⁶⁵ Alex Ong, Migrant Care, NGO working on Migrant rights in Malaysia. 16/7/2020 via Google Meet.

⁶⁶ Harkins, Benjamin, Review of labour migration policy in Malaysia / Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project), ILO Regional Office for Asia and the Pacific. Bangkok: ILO, 2016.

documents have sought to reduce dependency on migrant workers through a variety of strategies, including charging a levy for their employment, introducing a minimum wage, raising the retirement age, and increasing the number of women entering paid employment. However, changing the composition of its labour force has proven difficult to achieve, with employers complaining of severe shortages in some industries when more restrictive policies have been applied. Pushback from the private sector has contributed to awkward policy shifts and incoherence in some cases, such as the abrupt decision to allow payment of the migrant workers' levy to be transferred back to the workers after instituting a minimum wage. The goal of capping employment of migrants at 1.5 million workers as of 2015 once again appears unrealistic and has contributed to a situation where as much as half of the migrant workforce are now thought to be undocumented. The Eleventh Malaysia Plan (2016–2020) maintained this objective – envisaging a limit on the employment of low-skilled migrant workers of 15 per cent of the total workforce by 2020.⁶⁷

Political and public discourse have regularly dovetailed in portraying migrant workers as potential threats to national security and detrimental to the country's long-term social and economic development. As a result, the Government has typically formulated labour migration policy from the standpoint of controlling immigration and maintaining public safety rather than labour administration, as evidenced by the authority granted to the Ministry of Home Affairs (MOHA) over migration issues. Recent years have seen the rise of increasingly virulent rhetoric against migrants within the popular media, blaming them for a host of social problems ranging from electoral fraud to increases in street crimes. Scapegoating of migrants, regardless of the

⁶⁷ Ibid.

realities, has contributed to an environment where exploitation and abuse are sometimes viewed as acceptable. The results of a survey of public attitudes among Malaysian nationals showed that while nearly 40 per cent of the respondents felt that migrants have made a positive contribution to the economy, over 80 per cent believed that irregular migrants should not be entitled to any rights at work and that Government policy should be more restrictive.⁶⁸

The Malaysian national policy places stringent conditions on foreign labour in the form of legal migrants. Foreign low-skilled workers are part of the low-income group who enter Malaysia in order to improve their economic situation. This stringent national policy has forced many of them to migrate illegally. The mobility of low skilled workers does not come with any privileges. These foreign labourers seek to escape the poor living conditions in their home countries which is the main reason that compels them to migrate and find work elsewhere.⁶⁹

2.1 Malaysian Legal Framework Regarding Migrant Workers

Table 6: Malaysian Acts and Provisions on Migrant Workers

No.	Legal Framework	Provisions	Details
1	Federal Constitution	<p>Part II Fundamental Liberties</p> <ol style="list-style-type: none"> 1. Article 5 - Liberty of the person 2. Article 6 – Slavery and forced labour prohibited <p>Another significant principle under the Constitution is the prohibition against</p>	<p>In Malaysia, the Federal Constitution is the supreme law of the land which came into force in 1957. Federal Constitution is the fundamental law of the land and a kind of ‘higher law’ which is used</p>

⁶⁸ International Labour Organization (ILO). 2011. Public Attitudes towards Migrant Workers: A Four Country Study. Available at: http://www.ilo.org/asia/info/WCMS_159851/lang--en/index.htm

⁶⁹ S. Nadia A. A. and Salawati M. B. 2018. Labour Mobility in the ASEAN Community: Impact of Policies and Law on Foreign Workers in Malaysia, the ASEAN Community, Legal Issues, UKM Press.

		<p>slavery and forced labour that are enunciated in Article 6. This is in line with the nation's stance to value human rights and to share its sentiment on condoning any malevolent act involving workers with the global community.⁷⁰ ILO states that forced labour, the contemporary form of slavery, happens when "people are compelled to work through the use of violence, pressure, or by more elusive means such as accumulated debt, retaining of identity papers, or threats of denunciation to immigration authorities."</p> <p>One main concern involving migrant workers in Malaysia is the current practice of outsourcing the foreign workers through licensed companies. Consequently, the principal employers hold no responsibility over the migrant workers. This practice results from the recent amendments to the Employment Act 1955 which institutionalised outsourcing by recognising labour contractors as employers. This amendment also legalised the labour outsourcing agents to remain as the employer of a migrant worker even after the recruited worker has started working.⁷¹</p> <p>A report by the Malaysian Trade Union Congress showed complaints by the migrant workers on inter alia,</p>	<p>to measure the validity of all other laws. Any law inconsistent with the Federal Constitution may be challenged in court. According to Suffian LP in Ah Thian v Government of Malaysia,⁷⁵ doctrine of Parliament supremacy is not applicable in Malaysia.</p> <p>The power of the Parliament and of the State Legislatures in Malaysia is restricted by the Federal Constitution and they cannot make any law as they please.</p> <p>Hence, it has shown to us that the Parliament and the State Legislatures are subject to the provisions of the Federal Constitution.</p> <p>All the other institutions created by the Federal Constitution and in delivering their powers from it are subject to its provisions as well. The supremacy of the Federal Constitution is set out in Article 4(1), and 162(6) and s.73 of the Malaysia Act 1963.</p>
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⁷⁰ Arifin, Z. 2012. The Malaysian perspective on human rights and freedom on 21st century and the role of court. Paper Presented at 50th Turkish Constitutional Court and International Symposium Organised by Turkey Constitutional Court, Istanbul.

⁷¹ Rohani, A.R., Muhammad A.A.T., Kamaruddin H.A.B. and Mohammad N.B.A.R. 2014. Migrant labour and issues on outsourcing system in Malaysia. International Conference on Liberal Arts & Social Sciences 2014, Organised by USMPOTO, Hanoi.

⁷⁵ [1976] 2 MLJ 112,113.

		<p>contract fraud and debt bondage by their employment agencies which are tantamount to forced labour. In several instances, the migrant workers were treated as commodity, sold from one agent to another.⁷² Outsourcing companies are appointed by the government to facilitate the recruitment and management of migrant workers in this country. They should abide by the conditions stipulated by the Ministry of Human Affairs. In the event of failure to comply with the recruitment guidelines, stricter punishment should be given to these outsourcing companies. This is particularly important when the issue of migrant workers' forced labour is involved.</p> <p>3. Article 8- Equality</p> <p>The notion of equality as embedded in the Federal Constitution (the Constitution) serves as a common basis for the foreign workers' right to fair employment in Malaysia. This principle is also regarded as the most fundamental human right and is described as the "starting point of all liberties".⁷³ Workers, regardless of whether they are local or migrant, should enjoy working in an environment of fairness and equality. Migrant workers must also be entitled to various employment rights and benefits which are currently enjoyed by the local workers. Nonetheless, such rights in principle are not</p>	
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⁷² Mahalingam, M., 2016. Postcolonial Indian labour migration to Malaysia: Trajectories, trends, and tensions in international migration in Southeast Asia: Continuities and discontinuities. Kuala Lumpur: Springer Asia Limited.

⁷³ Salbiah, A., 2005. Gender equality under article 8 of federal constitution: Human rights, Islam, and "feminisms". The Malaysian Bar. Available at http://www.malaysianbar.org.my/gender_issues/gender_equality_under_article_8_human_rights_islam_and_feminisms_by_salbiah_ahmad.html

		<p>absolute, but merely qualified.</p> <p>The Constitution of Malaysia of 1963 does not explicitly provide for social security, save for listing this as an area falling within the federal legislative competency. The Constitution generally extends protection to foreigners on the basis of equality even though the prohibited grounds of discrimination indicated in the Constitution do not, per se, include nationality. Article 8(1) of the Constitution stipulates that “All persons are equal before the law and entitled to the equal protection of the law”. Article 8(2) provides: “Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, and descent, place of birth or gender in any law.”</p> <p>4. Art 9 – Prohibition of Banishment and Freedom of Movement</p> <p>This article only applies to Citizens of Malaysia. It prohibits the authority to banish/exclude the citizen. The right to move freely within the Federation and to reside anywhere therein can be limited by the special immigration laws applying in Sabah and Sarawak and by other exceptions set out in the article.</p> <p>Migrant workers highly rely on their passport, their work visas and pass to move around. This right is</p>	<p>The Scope of Freedom of Movement :</p> <p>Government of Malaysia & Ors v Loh Wai Kong (1979) 2 MLJ 33⁷⁶</p> <p>Learned judge rejected the application for an order directing the authority to issue a passport. Art 9 is silent as to the citizen’s right to leave the county, to travel overseas and to have a passport. The constitution is unable to guarantee a right to be enjoyed outside the jurisdiction.</p> <p>The consultants agrees that the freedom of movement should include the</p>
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⁷⁶ [1979] 2 MLJ 33

		<p>not applicable to them.</p> <p>5. Art 10 - Freedom of Speech, Assembly and Association.</p> <p>Every CITIZEN has the right to freedom of speech and expression though it comes with certain limitations and exceptions. This also applies to the right to assemble peaceably as well as right to form associations.</p> <p>The rights under Art 10 are limited and the parliament has the power to pass various restrictive laws.</p> <p>Unlike local workers, migrant workers are not allowed to form their own associations in Malaysia. Yet, associations to represent the interest of migrant workers would play an important role to safeguard their welfare. Thus, it is suggested that foreign workers be allowed to form associations to represent their interest in the country.⁷⁴</p>	<p>freedom to travel overseas. Loh Wai Kong case is arguable.</p>
2	<p>The Immigration Act 1959</p>	<ol style="list-style-type: none"> 1. Provides the rules for admission and stay of migrant workers in Malaysia and enforcement has been mandated to the Immigration Department of the MOHA. 2. In August 2002, the law was amended as an attempt to control the flow of irregular migrants. The amended Act criminalises migrants who do not comply with Malaysian immigration policies relating to 	

⁷⁴ Mohd Hishamudin Yunus. 2019. Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf>

		<p>entry, stay and work, making them subject to arrest if caught by authorities or the People’s Volunteer Corps (RELA).</p> <p>3. Introduced stringent punishments for both employers hiring undocumented migrants and irregular migrants themselves, including fines of up to MYR 10,000 (US\$2,280), prison sentences extending to five years, caning and fast-tracked deportations.</p>	
3	<p>The Employment Act 1955</p>	<p>1. The terms of employment and conditions of work for migrant workers are regulated by the Employment Act, which the MOHR has been tasked to administer.</p> <p>In principle, this framework of labour legislation provides equality of treatment for registered migrants with nationals in terms of wages, work hours, holidays, terminations, non-discrimination, freedom of association, access to complaint mechanisms and other protections. In practice, however, labour laws are often ineffectively enforced for migrant workers.</p> <p>It is illegal under the Employment Act for employers to include any provision in a contract of service which “restricts the right of any employee” to join a trade union, participate in trade union activities, or associate with other employees for the purpose of organising a trade union.⁷⁷ However,</p>	

⁷⁷ Employment Act 1955, s. 8.

		<p>under article 10(1) (c) of the Federal Constitution, only citizens have the right to form associations. This means that migrant workers are not allowed to form associations but may freely join associations and bargain collectively in association with unions that have been formed by citizens.⁷⁸</p>	
<p>4</p>	<p>The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM)</p>	<p>1. The Anti-Trafficking in Persons Act criminalised trafficking for purposes of labour exploitation, in line with the international standards established under the United Nations (UN) Palermo Protocols. It was amended to become the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act in 2010 (ATIPSOM), which broadened the definition of trafficking to include all actions involved in acquiring or maintaining the labour or services of a person through coercion.</p> <p>2. The law is comprehensive in criminalising all dimensions of trafficking and establishes stringent penalties of up to twenty years imprisonment and fines for those convicted.</p>	

⁷⁸ Both ILC Individual Case (CAS) - Discussion: 2016, Publication: 105th ILC session (2016) and C.98 Observation (CEACR) - adopted 2017, published 107th ILC session (2018), acknowledge that the Employment Act 1955 and the Industrial Relations Act 1967 grant migrant workers the right to collective bargaining.

		<p>3. Following enactment of the law, the Malaysian Government launched a five-year National Action Plan (2010–2015) aimed at improving preventive measures, protection services and social awareness.</p> <p>4. In November 2013, the Malaysian Government put into place standard operating procedures for the investigation and prosecution of trafficking offenses and a follow-up Action Plan for the period of 2016–2020 was later developed.</p>	
5	Occupational Safety and Health Act 1994	<p>The Occupational Safety and Health Act (OSHA) 1994 is the main law governing workplace safety and health issues in Malaysia and provides “for securing the safety, health and welfare of persons at work” to protect others from unsafe work practices.</p> <p>This act applies to all sectors listed in Schedule 1 of the Act with the exception to working on board of ships or the armed forces because they are covered under other specific legislations.</p>	Requirement of this Act does not discriminate between local and migrant workers.
6	Workmen’s Compensation Act 1952 (WCA)	<p>WCA was enacted “to provide for the payment of compensation to workmen for injury suffered in the course of their employment.”⁷⁹</p> <p>“Workman” under the WCA is defined broadly to include anyone employed under a contract of employment, whether written or oral, and whether paid by time or by work done. Specifically excluded from this definition, however, are persons</p>	Section 2(2) of the WCA states that if “in any proceedings for recovery of compensation under this Act it appears to the [DoL] or the Court that the contract of service . . . under which the person was working at the time of the accident was illegal, the [DoL or the Court] may, if having regard to all

⁷⁹ Workmen’s Compensation Act 1952, Preamble.

		<p>engaged in non-manual labour earning more than RM 500 per month, domestic workers, casual workers and out-workers (those who take piecework back to their homes).⁸⁰</p> <p>It is mandatory for Employers to insure all the foreign workers employed by them under the Foreign Worker Compensation Scheme. There is no exclusion in respect of migrant workers whose employment is not covered by a VP (TE).⁸¹</p>	<p>the circumstances of the case . . . it thinks proper so to do, deal with the matter as if the injured person had at such time been a person working under a valid contract of service.”⁸²</p> <p>Where a migrant worker takes up employment in breach of his/her immigration pass, a question arises as to the ‘legality’ of the employment contract.⁸³</p> <p>The Malaysian courts have yet to apply the WCA to an undocumented migrant worker’s case. In the event where illegality stems from an employer’s act or omission, it is simply not right to penalise a worker who has suffered harm. In the event of undocumented workers, one could argue that despite illegality, an employment relationship can be implied by the conduct of both parties.⁸⁴</p>
7	Industrial Relations Act	The Industrial Relations Act (IRA) 1967 governs the relationship between employers, employees and their trade	Section 20(1) of the IRA states that: “Where a workman, irrespective of

⁸⁰ Workmen’s Compensation Act s. 2(1), definition of ‘workman’.

⁸¹ Workmen’s Compensation Act Section 26(2).

⁸² Workmen’s Compensation Act s. 2(2).

⁸³ Berg, L. Migrants rights at work: Law’s precariousness at the intersection, 2015, chapter 6.

⁸⁴ ILO. 2018. Situation and Gap Analysis analysis on Malaysian legislation, policies and programmes, and the ILO Forced Labour Convention and Protocol. Available at https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_650658.pdf

	<p>and 1967</p>	<p>unions including setting collective bargaining rules, and procedures for handling trade disputes and guaranteeing the freedom of association.</p> <p>Representations are filed at the Industrial Relations Department closest to the workplace and must be filed within 60 days of the dismissal (which includes constructive dismissal). CSOs cite that most migrant workers' cases of dismissal are based on principles of constructive dismissal, for example, cases where migrant workers are dismissed for joining a union or participating in a union activity.</p>	<p>whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment.”</p> <p>Section 2 of the Act defines “Workman” to include “any person employed by an employer under a contract of employment to work for hire or reward.” In the case of <i>Ali Salih Khalaf V Taj Mahal Hotel</i>⁸⁵ the Industrial Court held that “any person” would include a migrant worker, regardless of whether they have a work permit or pass to work in Malaysia.</p>
<p>8</p>	<p>Trade Union Act 1959</p>	<p>Trade Union Act 1959 seeks to control activities of trade unions “so that they can develop in an orderly and peaceful manner.” The Act lays down stringent statutory and procedural provisions for the formation and operations of trade unions in Malaysia.</p> <p>The Act prohibits non-citizens from holding office in or being employed as staff of a trade union.⁸⁶</p>	<p>In the MEF’s ‘Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia’, it is stated that 74% of the respondent companies did not allow their migrant workers to join a union despite the law not prohibiting migrant workers from joining.</p>

⁸⁵ Industrial Court of Malaysia: Ali Saleh Khalaf and Taj Mahal Hotel, Case No. 22-27/4-1580/12, Award No. 245 of 2014, unpublished.

⁸⁶ Trade Union Act 1959, ss. 28(1)(a) and 29(2)(a).

			<p>In 2008, the Malaysia Trade Union Congress (MTUC) lodged a complaint at the ILO Governing Body alleging that Malaysia had refused migrant domestic workers the right to organise. The Committee found the allegation to be true and recommended that Malaysia “ensure the immediate registration of the association of migrant domestic workers”.⁸⁷</p>
9	Passport Act 1966	<p>In accordance with the Passports Act 1966, all persons who enter and exit Malaysia must hold a valid passport and non-citizens must hold a valid visa.</p> <p>Section 12 (1f) of the Act states that it is an offense for any person who “without lawful authority, has in his possession any passport or internal travel document issued for the use of some person other than himself.” Violation is subject to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.</p>	<p>Pursuant to Section 10 of the Act, Customs, Police and Immigration Department are responsible for enforcement of the provisions of the Act.</p> <p>MTUC and the CSOs have observed that the provisions of the Act relating to prohibition against holding another person’s passport are weakly enforced.</p> <p>Passports are often retained by the agents or employers as soon as the migrant arrives in the country. Often migrants are told that the passports</p>

⁸⁷ Report in which the committee requests to be kept informed of development - Report No 353, March 2009, Case No. 2637, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911366

			<p>are retained to ease administrative processes such as obtaining or renewing the work permit or VP (TE).</p> <p>Employers assert that they retain passports so that they cannot be lost or damaged and/or to prevent the worker from running away. Replacement of the passport at foreign embassies causes burdensome and costly bureaucratic difficulties.</p>
10	Employment Restriction Act 1968	<p>The Employment Restriction Act 1968 establishes the principle that the employment of a non-citizen in any business in Malaysia must be subject to the issuance of a valid employment permit.</p> <p>Section 10 of the Act restricts the employment permit to the particular employment and the employer stated on the permit with a validation period not exceeding two years.</p> <p>The Act is under the purview of the MOHR and confers enforcement powers to the Director General of Labour.</p>	<p>However, this Act is not widely used. Since the management of migrant workers falls under the purview of the Ministry of Home Affairs, the issue of employment passes, enforcement thereof and immigration matters are dealt under the Immigration Act 1959/63 rather than the Employment Restriction Act 1968.⁸⁸</p>
12	Private Employment Agencies Act 1981	<p>Private recruitment agencies are regulated under the Private Employment Agencies Act 1981.</p> <p>The Act, administered by the MOHR, provides for the licensing of any</p>	<p>Outsourcing of management of migrant workers to agencies shields principal employers from accountability for</p>

⁸⁸ ILO. 2018. Situation and Gap Analysis on Malaysian Legislation, Policies and Programmes, and the ILO Forced Labour Convention and Protocol. Available at https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_650658.pdf

		<p>person or company that “acts as an intermediary” between employers and Malaysian workers for the placement of these workers in local positions or overseas.</p> <p>The Act was amended in August 2017 to increase the government’s ability to regulate recruitment activities of private employment agencies.</p> <p>Key features of the amendment include the consideration of past convictions on trafficking in persons or forced labour for granting of licenses, as well as revocation and suspension of license if they have a history of detention in relation to trafficking in persons or forced labour.</p> <p>Allowable placement fees imposed on migrant workers are capped to not more than one month of basic wages.</p>	<p>workplace harms, exploitation and excludes migrant workers from company grievance procedures because the worker works for a company that is not his/her employer. This also goes against the principle of security of tenure as workers are sent to several companies to work based on the availability of work and wages are paid on a daily basis.⁸⁹</p>
13	Contracts Act 1950	This Act governs any kind of lawful agreement formed by act, in writing or	See: <i>Sampath Kumar Vellingiri & 78 Yang Lain</i>

⁸⁹ ILO: Review of Labour Migration Policy in Malaysia, Bangkok, 2016.

		<p>orally between two or more free consenting parties in exchange for consideration.</p> <p>This includes employment contracts between agents or employers and migrant workers including domestic workers. A contract is deemed legal and enforceable if all parties freely consent to the terms of the contract.</p> <p>A migrant worker who is forced to commit to a contract or a substituted contract may have a remedy in the civil courts. However, for the migrant worker to pursue a case in the civil courts, he would have to obtain a special pass and remain in the country throughout the duration of the case which may take years.</p>	<p><i>v Chin Well Fasteners & Co Sdn Bhd</i>⁹⁰</p>
14	<p>Employees Social Security Act 1969</p>	<p>Effective 1 January 2019, employers who hire foreign workers (excluding domestic servants) shall register their employees with Social Security Organisation (SOCSO) and contribute to the Employment Injury Scheme under the Employees' Social Security</p>	

⁹⁰ The defendant (employer) hired a group of Indian migrant workers using the services of a recruitment agent in India and a consultant in Malaysia. The Indian agent made verbal representation to the workers that they would receive salaries as high as RM750 per month but that they would have to pay their travel cost and levy to which they agreed and duly paid. The Malaysian agent submitted a contract to the Indian Embassy in KL which stated that the workers would be paid RM600 and the employer would bear the travel cost and levy. When the workers received their first month's salaries, they found that the employer had only paid them a salary of RM350 and had deducted a sum of RM120 for the levy payment. The workers were able to obtain a copy of the contract submitted by the employer from the Indian Embassy and discovered that the contracts had only been signed by the employer. When they returned to the workplace, their timecards were withheld and they were asked to sign a different contract with lower salary and benefits. Upon continuous protest, the employer stated that he would be sending the workers back to India. In response, some of the workers locked themselves in the hostel, resulting in the employer cutting off the electricity and water. Some of the workers signed the contract under duress. The High Court held that the workers had agreed to take on the employment based on the representations made by the Indian agent and that the second contract was void as the workers had not seen nor signed it. In the Court of Appeal, the court held that the contract submitted to the Indian Embassy was a valid contract as it was approved by the Indian government and that no changes could be made without the Embassy's approval. Further, the employer wilfully submitted the contract to the Embassy and therefore could not rely on the absence of signatures to invalidate the contracts. The employer was ordered to honour the verbal contract between the agent and the workers comprising the payment of RM 750 wages, overtime, the cost of their airfare, and levy payments.

		<p>Act 1969 (Act 4). The rate of contribution is 1.25% of the insured monthly wages and to be paid by the employer. Registration can be made via ASSIST portal or by submitting the registration form to the nearest PERKESO office.</p> <p>Existing foreign workers in Malaysia who have valid Foreign Workers Compensation Scheme (FWCS), they have to register with SOCSO by their employers a day after expiration of FWCS, subject to the end of the cooling-off period for FWCS on 31 December 2019. Starting from 1 January 2020, all employers shall register with SOCSO although such foreign workers are still covered under FWCS.</p> <p>New foreign workers entering Malaysia on or after 1 January 2019 have to register with SOCSO once they are validated by the immigration Department of Malaysia at any gazetted port of entry.</p>	
15	Employees Provident Fund Act 1991	<p>Prior to 1st August 1998, expatriates and foreign workers were not required to contribute to the EPF although they may elect to do so.</p> <p>However, with effect from 1st August 1998, all foreign workers and expatriates earning less than RM2, 500 per month are also required to contribute to EPF with the exception of certain categories.</p> <p>Those who are exempted from making the compulsory contribution are</p> <ul style="list-style-type: none"> ▪ employees or workers holding Employment Pass or expatriates holding Visit Pass (Temporary Employment) 	

		<p>whose monthly wages is not less than RM2,500</p> <ul style="list-style-type: none"> ▪ Thai workers who enter Malaysia with a Territorial Pass ▪ Seamen ▪ Foreign domestic maids ▪ Self-employed persons ▪ Out-workers who do cleaning and alteration repair works ▪ Persons detained in custody, in prison, Henry Gurney School and mental hospital ▪ Pensioners <p>Nevertheless, the above can choose to contribute to the fund.</p>	
16	Employment Insurance System Act 2017 And The EIS	<p>The Employment insurance System Act 2017 (EIS) is an act that aims to encourage the employees to seek re-employment apart from strengthening their employability in the labour market through placement programmes.</p> <p>The Act applies to all industries having one or more employees who are Malaysian citizens or permanent residents in Malaysia. Hence, all employers in the private sector who have one or more employees are obligated to insure their employees (“insured person”). The Act is applicable to all employees including part-time workers irrespective of the amount of wages.</p>	
17	Penal Code	<p>The Penal Code defines criminal offences in Malaysia, and sets guidelines for punishment. Section 374 provides that “whoever unlawfully compels any person to labour against the will of that person,</p>	

		<p>shall be punished with imprisonment for a term which may extend to one year or with fine or with both.” Buying or disposing of any person as a slave (Section 370), habitual dealing in slaves (Section 371) and unlawful compulsory labour in Section 374 all refer to “any person” and not “citizen”. However, the penalties are considered lenient to deter forced labour practices could be raised to bring the provision in line with Malaysia’s obligation pursuant to ILO Convention 29⁹¹.</p>	
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PART III

3.0 ANALYSIS OF THE REASONS FOR NON-ACCESSION TO THE CONVENTION AND ASSESSMENT OF THE POSSIBLE CONSEQUENCES OF ITS IMPLEMENTATION IN MALAYSIA

3.1 Introduction

Despite the variety of policy approaches on immigrant admission and stay as well as different structural conditions in Malaysia, it is possible to observe similarities regarding the concerns on ICMW commonly expressed by Malaysia that prevents the state from acceding to the Convention The analysis in this part focuses on these concerns, which are of a legal, financial or administrative and political nature. The analysis is founded on the

⁹¹ *The Forced Labour Convention, 1930 (No. 29) made reference to a transitional period during which recourse to forced or compulsory labour might be had subject to specific conditions, as set out in Article 1, paragraphs 2 and 3, and Articles 3 to 24. Over the years, the Governing Body, the International Labour Conference but also the ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, acknowledged that these provisions, commonly known as “transitional provisions” were no longer applicable. In 2014, the International Labour Conference adopted a Protocol to Convention No.29, which expressly provided for the deletion of the transitional provisions*

Stakeholders' replies on the issue of accession to the Convention. The ICMW consists of nine parts: scope and definitions; non-discrimination with respect to rights; human rights of all migrant workers (Part III, which also includes the rights of migrants in an irregular or undocumented situation); other rights of migrants who are documented or in a regular situation; provisions applicable to particular categories of migrants; the promotion of sound, equitable, humane and lawful conditions in connection with international migration; application of the Convention; general provisions; and final provisions. The Convention is considered the most comprehensive international treaty covering the rights of migrant workers beyond the realm of work, inspired by existing legally binding agreements, United Nations human rights studies, the conclusions and recommendations of meetings of experts, and debates and resolutions on the migrant worker question in United Nations bodies over two decades.

3.2 Obstacles to the Ratification of the Convention

According to UNESCO,⁹² the main obstacles to ratification of the ICMW revolve around the following issues:

- In some States where migration is limited on their territory, the Governments do not see a need to legislate.
- The Convention is not well known and therefore not high on the political agenda.
- Some States lack the necessary infrastructure to apply the Convention.
- Some States do not wish international agreements to interfere with their migration policies which they view as a strictly national affair.
- Economic instability and high unemployment prompt states to give preference to national over foreign workers.
- Concerns regarding the need to extend protection to members of migrants' families.
- States do not wish to extend protection to undocumented migrants.

⁹² United Nations Educational, Scientific and Cultural Organization (UNESCO) (2003). United Nations Convention on Migrants' Rights – Information Kit (Paris, UNESCO).

- Concerns that ratification would send out a signal to potential migrants and spur immigration.

3.2.1 Non-party - Sending Countries

According to the ICMW, the main obligations for origin countries are to provide information on conditions of admission and remunerated activity; to give the right to emigrate and return; to regulate and monitor recruitment agencies; to assist migrants in the resettlement and reintegration process; and to provide overseas voting rights. Crucial obligations for sending countries are pre-departure information campaigns and training sessions, monitoring of workers abroad and the imposition of sanctions on brokers and recruiters operating illegally.⁹³ Under the current institutional arrangements in many countries, this is a difficult task.

The accession/ratification and implementation processes of any United Nations convention are complex undertakings and the governmental budgets and expert staff assigned to such matters are often limited. In addition, the sheer number of private recruitment agencies, and the allegedly high level of collusion between government circles and recruitment agencies obstruct any serious efforts to regulate and monitor out-migration from the perspective of migrants' protection.

Another serious obstacle to accession/ratification, as expressed by government officials, is the misgiving of losing out on the regional job market as host countries might be disinclined to employ foreign workers who would be perceived as too 'rights conscious'. This concern particularly affects countries of origin which highly depend on a small

⁹³ See www2.ohchr.org/english/law/ICMW.htm.

number of destination countries and the majority of whose migrants are mainly low-skilled workers.⁹⁴

3.2.2 Non- party Receiving/Destination Countries

In accordance with the ICMW, destination countries are obliged to observe the right to join trade unions for any migrant and the right to form associations and trade unions for legal migrants; provide minimum social welfare (such as medical care); ensure equality of treatment in respect of remuneration and conditions of work and employment; allow documented migrants to be temporarily absent without affecting the authorisation to stay or work; allow liberty of movement, of choosing the residence and access to alternative employment for legal migrants; give the right to seek alternative employment in case of termination of the remunerated activity for migrant workers not authorised to freely choose their remunerated activity; and work towards providing family reunification and extend to children of migrants the right to education.⁹⁵

Accession to/ratification of the ICMW would also mean that many countries of destination, such as Gulf Cooperation Council [GCC] member States, would have to redesign their temporary labour migration schemes, which are tied to one specific employer. Yet, these countries consciously designed these temporary labour migration schemes with the intention to not let migrant workers become permanent residents. For example, GCC countries usually prefer to use the term ‘temporary contract worker’ instead of ‘migrant worker’. Similarly, many other countries of destination of migrants in Asia do not consider themselves as countries of immigration. Governments hold that if they were to be a party to the ICMW, this would result in a large-scale influx and eventual settlement of foreign workers. Another major obstacle to being a party is that governments are not

⁹⁴ Piper, N., and B. Yeoh. (2005). “Introduction to special issue: Meeting the Challenges of HIV/AIDS in Southeast and East Asia”, *Asia Pacific Viewpoint*, Vol. 46, Issue 1, pp. 1-5, April.

⁹⁵ *Ibid.*

prepared to extend rights to irregular migrants as they are considered to be violators of immigration laws. However, ways in which the status of migrants can become irregular (at times beyond their knowledge or control) are complex. Moreover, gaining support for the protection of migrant workers is difficult in many countries of destination as foreign workers are often perceived by the national population as competitors in the labour market.⁹⁶

3.2.3 Malaysia

Being a party to the Convention would impose some additional obligations on Malaysia considering the existing obligations under the Federal Constitution and Malaysian legislations in the area of labour immigration as discussed in PART II of this report and when comparing such obligations under the Convention. These obligations touch mainly upon areas which would most likely be considered as problematic such as the one on family reunification which leave Malaysia a broad margin of discretion.

In the consultants' observations, the ICMW fully recognises States' sovereignty in determining who is allowed to enter the State's territory. **Article 79** states clearly that: '*Nothing in the [present] Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families*'. Furthermore, the Convention is an instrument drafted carefully to set the general parameters for a wide range of national policy and regulatory concerns relating to migration management. The main idea underpinning this instrument is that irregular migration has a negative impact on both the States involved and the migrants; therefore, irregular channels of migration should be countered while trying to favour

⁹⁶ UNESCAP. 2020. Situation Report on International Migration in South and South-West Asia. Available at https://www.unescap.org/sites/default/files/SDD_PUB_Sit-Rep-book.pdf

regular migration. This idea clearly results from **Part VI** of the ICMW, notably from **Article 68**, paragraph 1, compelling States to collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation, through the adoption of measures, including the following: *'(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration; (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements; (c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation'*.

Apart from that, there are concerns claiming that when the ICMW is acceded/ratified, the management of migrant workers' movements in Malaysia is limited, including those who lose or leave the employment as permission to enter has been granted.⁹⁷ Here, based on the consultants' analysis of the ICMW, as a first step to overcoming this obstacle to accession/ratification, it would be useful to ask States to specifically identify these rights and then compare their scope with the relevant national, regional and international provisions by which States are already bound. As many other provisions of the Convention, the Article dealing with this issue is worded in permissive and flexible terms. **Article 51** provides that *'migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work*

⁹⁷ Ibid, note 17.

permit'. However, the same Article also recognises the possibility for States to issue an authorisation of residence, which is expressly dependent upon the specific remunerated activity for which the migrant was admitted, in which case a migrant who lose or leave the employment before the expiration of the work permit may be removed.⁹⁸ The sovereignty of States is thus fully respected.

In addition, there are also concerns that ratifying the ICMW will act as a “pull factor” for a hike in the number of irregular migrants.⁹⁹ However, a clear empirical evidence on this issue is lacking because of the absence of accession/ratification on the part of high-income countries. Research so far has demonstrated that most irregular migrants do not choose their destination by comparing the welfare systems of various countries¹⁰⁰ but rather by the existence of labour demand of which they are attracted to.

3.3 Legal Obstacle: Compatibility and Incompatibility of the Provisions of the Convention with National Law and Suggested Modifications to Overcome Incompatibility

⁹⁸ The full provision of Article 51 reads as follows: *‘Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.’*

⁹⁹ Ibid, note 14 & 17.

¹⁰⁰ International Steering Committee for the Campaign for the ratification of the migrants’ rights convention, Guide 1 reobhlo on ratification – International Convention on the Protection of the rights of all migrant workers and members of their families, p. 33, quoting R. Romero-Ortuño, ‘Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?’, in European Journal of Health Law, 11 (3).

A number of national law provisions may not be fully compatible (or, in some case, may be incompatible) with the provisions of the Convention. Table 7 lists down all the provisions concerned in ICMW and explains the inconsistency or incompatibility with Malaysian laws such as the Employment Act 1955 (West Malaysia), Sabah Labour Ordinance (Sabah), Sarawak Labour Ordinance (Sarawak), Workmen's Compensation Act 1952, Worker's Minimum Standard of Housing and Amenities Act 1990, Children and Young Persons Act 1966, Industrial Relations Act 1967, Trade Unions Act 1959, Occupational Safety and Health Act 1994, Wages Council Act 1947, Employment (Termination and Lay-Off Benefits) Regulation 1980, Employees Provident Fund Act 1991, and Employees' Social Security Act 1969.

No.	Provisions in ICMW	Compatibility with Malaysian Laws	Incompatibility with Malaysian laws	Suggested modifications to overcome incompatibility
1	<p>Article 7 No Discrimination</p> <p>Article 10 Not subject to torture or to cruel, inhuman or degrading treatment or punishment</p>	<p>Art 8 FC Equality</p>	-	<p>The Constitution generally extends protection to foreigners on the basis of equality even though the prohibited grounds of discrimination indicated in the Constitution do not, per se, include nationality.</p>
2	<p>Article 9 Right to life</p> <p>Article 16 Right to liberty and security of person</p> <p>Article 24</p>	<p>Art 5 FC- Liberty of person</p>	-	<p>The provision applies to every person, irrespective of their nationality.</p>

	Recognition as a person before the law			
3	Article 11 Not in slavery or servitude	Art 6 FC – Slavery and forced labour prohibited Section 374 Penal Code Sec 2 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007	-	Present laws against forced labour in Malaysia are stated in the Penal Code and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. It is imperative that Malaysia takes urgent enforcement measures to address this issue. 101
5	Article 12 Freedom of thought, conscience and religion	Art 11 FC Freedom of Religion	-	Art 11 is applicable to ALL PERSONS even though the Constitution is silent on nationality.
6	Article 13 Freedom of expression		Art 10 FC – Freedom of speech, assembly & association only applicable to citizens.	Sec 4 of Peaceful Assembly Act is consistent with Art 10 of FC. Therefore, it is necessary for the government to look at this seriously and amend accordingly in

¹⁰¹ Mohd Hishamudin Yunus. 2019. Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf>

				respecting the commitment to international human rights convention.
7	Article 14 Right to the protection of the law against such interference or attacks		Art. 8, right to equal protection of the law. Access to justice is a basic fundamental human right for all persons, regardless of their citizenship or immigration status. Migrant workers face numerous barriers in accessing the administrative legal system provided under the labour laws, and the civil and criminal justice systems in Malaysia. Migrant workers are often fired by employers for filing complaints with government officials, NGOs or trade unions. Termination of employment results in the cancellation of the work permit which is the basis in law for the migrant's right to stay in Malaysia. Thus, filing a complaint prompts action by the employer that makes the migrant complainant subject	It is imperative that the administrative and legal framework governing foreign workers be reformed to remove the various obstacles to foreign workers accessing justice in Malaysia's administrative and legal system. The Legal Aid Bureau (Biro Bantuan Guaman) and the Yayasan Bantuan Guaman Kebangsaan (YBGK) schemes should be made available to foreign workers. Opening up these schemes to foreign workers will enable them to gain access to justice in the administrative and legal system available in Malaysia. ¹⁰³

			to immediate deportation. ¹⁰²	
8	<p>Article 15 Right to fair and adequate compensation</p> <p>Article 25 Remuneration at less favourable than that which applies to nationals of the State of employment</p>	<p>Section 2(2) & Sec 26(2) Workmen's Compensation Act (WCA) 1952</p>		<p>The Malaysian courts have yet to apply the WCA to an undocumented migrant worker's case. In the event where illegality stems from an employer's act or omission, it is simply not right to penalise a worker who has suffered harm. In the event of undocumented workers, despite illegality, an employment relationship can be implied by the conduct of both parties.¹⁰⁴</p>
10	<p>Article 18 Right to equality with nationals of the State concerned before the courts and tribunals</p>	<p>Article 8 Federal Constitution Equality extends to all persons whether citizens or not; and, accordingly, to all migrant workers</p>		<p>There is a requirement for the Malaysian government to consider practices in different nations that do give board and safe houses to</p>

¹⁰³ Ibid.

¹⁰² Ibid.

¹⁰⁴ ILO. 2018. Situation and Gap Analysis on Malaysian Legislation, Policies and Programmes, and the ILO Forced Labour Convention and Protocol. Available at https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_650658.pdf

		<p>whether documented or undocumented.</p> <p>Employment Act 1955 applies to all workers, irrespective of whether the person is a local worker or a foreign worker. Even a migrant worker is accorded the right to make a complaint about discrimination at work to the Director General of Labour.</p> <p>Section 20(1) of the Industrial Relations Act 1967</p>		<p>migrant workers as they seek after their rights in the Labour Departments, Labour Courts, Industrial Courts and even the Civil Courts.</p>
11	<p>Article 21 Unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits</p>	<p>Section 12(1)(f) Passports Act 1966</p>	<p>Nevertheless, the withholding of migrant workers' passports is widely used as a mechanism of control by employers over the workers which enhances their vulnerability and restricts their movements.¹⁰⁵</p>	<p>It is important to find a mechanism to deal with employers who do not surrender the passports of migrants who have returned to their home countries, leading to risks that such passports may end up on the black market or be used to facilitate the</p>

¹⁰⁵ Mohd Hishamudin Yunus.2019. Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf>

				travel of another person.
16	Article 26 Right to Association and Trade Union	Sec 28(1)(a) & Sec 29 (2)(a) Trade Union Act 1965	Although the Trade Unions Act 1959 provides that a migrant worker can be a member of a trade union, yet under the law, he/she is prohibited from holding an executive position in trade unions. It can be argued that this prohibition is discriminatory in nature and is in contravention of Article 8 of the Federal Constitution.	In 2008, the Malaysia Trade Union Congress (MTUC) lodged a complaint at the ILO Governing Body alleging that Malaysia had refused migrant domestic workers the right to organise. The Committee found the allegation to be true and recommended that Malaysia “ensure the immediate registration of the association of migrant domestic workers”. It is about time for Malaysia to adhere to this recommendation. ¹⁰⁶
17	Article 27 Social Security	Employees’ Social Security Act 1969 (Act 4) Workers	Employee Provident Fund ¹⁰⁷ Employment insurance system ¹⁰⁸	1. It is mandatory for employers to insure all foreign workers on their payroll.

¹⁰⁶ Report in which the committee requests to be kept informed of development - Report No 353, March 2009, Case No. 2637, ILO,

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911366

¹⁰⁷ The Employees Provident Fund Scheme is governed by the Employees Provident Fund Act 1991.

		<p>Compensation Act 1953 -Foreign Worker Compensation Scheme (FWCS) -Foreign Worker Hospitalisation and Surgical Insurance Scheme (FWHSS)</p>	<p>2. Employers intending to take out such insurance policies for their foreign workers must go through the Skim Perlindungan Insurans Kesihatan Pekerja Asing (SPIKPA), an appointed third-party service provider that sees to the healthcare needs of foreign workers such as packaged health insurance and hospitalisation benefits.¹⁰⁹</p> <p>3. Ensure the Foreign Worker Compensation Scheme which covers injury sustained outside the workplace is sufficiently covered.</p> <p>4A. It should be mandatory for employers and migrant workers to participate in the EPF scheme or similar pension saving-type funds.</p>
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¹⁰⁸ The Employment Insurance System is governed by the Employment Insurance System Act 2017. The EIS is primarily aimed at helping laid-off employees who are looking for another job and who contribute to SOCSO. The scheme took effect on 1 January 2018 and is administered by SOCSO.

¹⁰⁹ Mohd Hishamudin Yunus. 2019. Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf>

				The contributions by migrant workers and employers ought to be at the same rate as paid by Malaysian workers and their employers. It is further suggested that foreign workers be included in the EIS.
18	Article 28 Right to receive any medical care	Occupational Safety and Health Act 1994 Occupational Safety and Health (Use and Standards of Chemicals Hazardous to Health) Regulations 2000 are only applicable to documented migrant workers.	It is a common complaint that the premium cost is unduly high and the RM20, 000 overall coverage annual limit is insufficient to accommodate a major medical emergency.	Insurance to cover non hospitalisation treatment. Strengthen the OSH regulatory requirements by amending the Occupational Safety and Health Act 1994 to enhance employers' roles and responsibilities in preventing occupational accident and diseases.
19	Article 29 Right to a name, to registration of birth and to a nationality Article 44- Family unity and reunification	Art 15 A FC Special power to register children Child Act 2001	Immigration Act 1959/63 disallows migrant workers with the Temporary Employment Pass from marrying locals. Malaysia does not grant automatic citizenship upon birth within the territory;	The government's policy on prohibiting family members of migrant workers from joining them here and prohibition on marriage are discriminatory and against

			<p>these children will be considered irregular migrant unless their parents can provide relevant documents to the National Registration Department (passport, working permit, marriage certificate, among others) as proof of their ‘valid & legal existence’.</p> <p>Sec 27 of the Contracts Act 1950</p> <p>Low skilled migrant workers are not allowed to bring family members or allowed to get married in Malaysia.</p>	<p>international human rights and should be reviewed.</p> <p>The MOHR should formulate a policy that accords with international standards, Malaysia’s obligation under CEDAW¹¹⁰ and domestic law.¹¹¹</p>
20	<p>Article 30 Right of access to education</p> <p>Art 43 – Equality of treatment with nationals in relation to: Access to educational institutions and services subject to</p>	<p>Education Act 1996 (Act 550)</p> <p>Child Act 2001</p>	<p>Section 2 of the Human Rights Commission Act 1999 (Act 597) defines human rights as fundamental liberties as enshrined in Art 12 FC</p> <p>Right to Education Right to education is not friendly towards</p>	<p>The Education Act does not expressly discriminate children on the ground of their citizenship status and therefore, immigrant children could be enrolled in any public funded school. The</p>

¹¹⁰ CEDAW was ratified by Malaysia in August 1995 with reservations to Article 2(f), 5(a), 7(b), 9 and 16. In February 1998, the country withdrew its reservations in respect of Articles 2(f), 9(1), 16(1)(b), 16(1)(d), 16(1)(e) and 16(1)(h). In 2010, Malaysia withdrew its reservations to Article 5(a), 7(b) and Article 16(2) while maintaining its reservation to Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) on consideration that these Articles were in conflict with the Federal Constitution and Islamic Law (Shari’a). See Human Rights Commission Of Malaysia: An Independent Report To The Committee On The Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW). Available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/INT_CEDAW_IFN_MYS_27118_E.pdf

¹¹¹ Under s 27 of the Contracts Act 1950, any agreement in restraint of marriage is void.

	admission requirements		irregular migrant children living in the country as the legislations have not guarantee this right to the children. The main obstacle faced by these children is the lack of documentation. As a result of the denial into public schools, these children receive informal education at home or from their respective communities.	Ministry of Education should formulate a policy that is in line with international standards and Malaysia's obligation under CRC. ¹¹²
24	Article 41 Right to vote and to be elected at elections of that State		Art 119 of the Federal Constitution only allows citizens and permanent residents to vote in elections.	Many of the migrant workers in Malaysia are only temporary workers. It is important to ensure that Malaysia has the legal competence with respect to the voting rights of third-country nationals.

Table 7: Compatibility and Incompatibility of the Provisions of the Convention with National Law and Suggested Modifications to Overcome Incompatibility

3.4 Policies Obstacle

3.4.1 Rights under the Convention

¹¹² Malaysia acceded the United Nations Convention on the Rights of the Child (CRC) on 17 Feb 1995. See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en

a) **Protection Policy**

The previous section of the report shows the compatibility of the ICMW with the national laws does not bring any significant added value between Malaysian nationals and third country nationals. It is claimed that migrant workers' rights are already sufficiently protected in the national law.¹¹³

The first argument may also be put forward for all the other UN human rights treaties addressing specific categories of individuals, such as the **Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities**. All these conventions were ratified by Malaysia. There are significant reasons why Malaysia has decided to adopt separate conventions to address the rights of specific categories of individuals. These reasons are based on the fact that, despite the existence of universal normative instruments, rights were not adequately being recognised and extended to vulnerable groups in practice. Such a remark is also valid with regard to the rights of migrant workers who represent an important group that is at risk of being submitted to discriminatory practices and exploitation. Moreover, other international and regional human rights instruments may lack specificity on how these rights are to be applied to migrants in situations that are often migrant-specific.¹¹⁴

It is important to unequivocally address this perspective because it also applies to the other international conventions that focus on vulnerable groups, e.g., women, children, racial and ethnic minorities, and disabled people. The reason for such emphatic focus in these distinct conventions is that, despite the existence of universal normative instruments, rights were not in fact, adequately being recognised or extended to

¹¹³ Ibid, note 14.

¹¹⁴ I. Slinckx, 'Migrants rights in UN human rights conventions', in P. de Guchteneire, A. Pécoud, and R. Cholewinski, (eds.), *Migration and human rights. The United Nations Convention on Migrant Workers' Rights*, Cambridge University Press and Unesco Publishing, 2009, p. 122.

vulnerable groups, and it became necessary to elaborate the Conventions explicitly and specifically in detailing the application of universal rights to them. Indeed, as regards migrants, in some countries, human rights norms contained in the broader international or regional instruments were made applicable only in the context of citizenship, thereby categorically limiting or excluding their extension to non-nationals or non-citizens. Accordingly, the ICMW provides specific guidance on application of international standards to one important group at risk of otherwise being inadequately protected in national law. Moreover, although other international and regional human rights instruments do indeed apply to migrants, they may lack specificity on how these rights are to be applied to migrants in what are often migrant-specific situations.¹¹⁵

Such application is supported further by the ICMW monitoring mechanism. The Committee on Migrant Workers has the expertise to look at migration in a comprehensive way, bringing together all elements of the human rights-based approach to migration and applying it to the specific situation of the country concerned, thereby assisting it in addressing possible deficiencies in the application of the rights of migrants. In this context, it is also important to remember that national legislation and practices which may at present be in compliance with human rights standards can be easily changed, while treaty obligations remain binding for States Parties and thus provide a permanent protection against human rights violations.¹¹⁶

b) ICMW is too limited

The ICMW scope excludes seafarers, trainees, and refugees; it does not address private recruitment agencies, it does not include gender specificity regarding the

¹¹⁵ The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat (Brussels). Available at: <http://www.december18.net/web/docpapers/doc7039.pdf>; Isabelle Slinckx. 2009. "Migrants' rights in UN human rights conventions" in Paul de Guchteneire, Antoine Pécoud & Ryszard Cholewinski (eds.): Migration and human rights. The United Nations Convention on Migrant Workers' Rights (Cambridge University Press and UNESCO Publishing).

¹¹⁶ The International Steering Committee for the Campaign For Ratification Of The Migrants Rights Convention. 2009. Guide On Ratification Of The International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families (ICRMW). Available at <https://www.ohchr.org/Documents/Press/HandbookFINAL.PDF>

particular risks and vulnerabilities of women migrant workers, and it does not adequately address the challenge of regulating migration.

It is important to note that the drafters of the ICMW excluded certain categories of people crossing borders because these categories are explicitly covered under other international instruments or distinct legal regimes. In particular, seafarers, refugees, and civil servants are covered by other specific international instruments, such as the ILO Maritime Conventions, the 1951 Convention on the Status of Refugees, and the international diplomatic law.

With regard to gender-based vulnerabilities, perhaps by today's expectations, such a Convention should include more specific normative guidance to ensure gender specific protection against the specific risks faced by women migrants. However, the Convention certainly does not preclude gender-specific legal provisions and implementation measures in the incorporation of its provisions in national law and practice.

Moreover, compared to a number of earlier core international human rights instruments, the ICMW is deliberately drafted in gender neutral language. On the issue of balancing migration regulatory measures with protections, the logic of this Convention, shared with that of other human rights instruments, is that protection of vulnerable populations is not about regulating them and their movement through coercive or restrictive measures. Rather, the Convention recognises that the first need for proper regulation is to provide explicit, enforceable and accountable legal protection to vulnerable persons, in this case in the context of increasing international labour mobility. Regulation of movement itself can and should be done by other means, including by supervising labour market supply and demand. Indeed, one of the express objectives of the Convention is to eliminate the main incentive for seeking and hiring irregular migrant labour, namely the ease with which such labour can be exploited because

of the non-protection of rights and unequal treatment of migrants. Furthermore, there are other specific and complementary international standards that provide guidance on how criminal forms of moving persons across borders and/or exploiting them in destination countries are to be addressed, notable among them the Protocols on trafficking in persons and smuggling of migrants supplementing the 2000 United Nations Convention against Transnational Organized Crime.

c) ICMW infringes upon State sovereignty

There are concerns that were raised during the interview conducted by the consultants with the stakeholder¹¹⁷ that ICMW would limit the sovereign rights of States to decide upon who enters their territory and for how long they can remain.”¹¹⁸

However, this notion is clearly dispelled by the first sentence of **Article 79** of the Convention which states: “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.” States Parties to the Convention thus retain their sovereignty with regard to the decision on whether to admit or refuse entry to any migrant, in accordance with the peremptory international law norms.

d) ICMW does not adequately give preference to local people

Concerns on the issue of locals suffering from unemployment and the fiscal constraints faced by the country disincline Malaysia from granting foreign workers equal access to economic, social and educational benefits. Additionally, there is also the wish to reserve the right to give preference to national workers over foreign workers. This question goes to the heart of the notion of non-

¹¹⁷ Mohammad Abiddin Bin Abd Rahman, Director, Malaysian Immigration Department, Foreign Workers Department. Interview conducted on 2 October 2020 at the Malaysian Immigration Department’s HQ, Putrajaya.

¹¹⁸ Ryszard Cholewinski and Euan MacDonald. 2007. The Migrant Workers Convention in Europe. Obstacles to ratification of ICRMW: EU/EEA Perspectives, (UNESCO Migration Studies, Paris), pp. 51- 54.

discrimination and equality of treatment that is well established in the human rights norms. It also challenges the premises of labour market stability and social cohesion in industrialised societies, i.e., societies whose work forces are increasingly internationalised. ICMW recognises that the challenge of protection of migrant workers and national workers is fundamentally the challenge of ensuring equal treatment. It is also bound up in the challenge of stability of labour markets and working conditions. In established industrial economies, labour market stability depends on the conservation of gains manifested in prevailing wages and working conditions that have been achieved as consequences of economic development, increases in productivity, and by collective bargaining between employers and workers' unions.¹¹⁹

Permitting differential treatment - differential levels of rights protections - directly allows for undermining and underbidding prevailing wages and working conditions. Furthermore, explicitly polarising different identities in the labour force, such as between national and foreign workers, sets the stage for rejection, hostility, xenophobia and even violence against the targeted group. This is accentuated when groups such as migrants are implicitly or explicitly identified as the cause of unfair labour market competition and lowering of standards and pay levels. Targeted groups are often vulnerable and under-protected to begin with; such differentiations accentuate their marginalisation and increase their vulnerability to exploitative employment with substandard pay and conditions. The Convention provides norms of equality of treatment precisely to prevent discriminatory treatment that would undermine working conditions and labour market stability, and consequently provoke resentment, xenophobia and violence against migrants blamed for deteriorating conditions and unemployment.¹²⁰

¹¹⁹ The International Steering Committee For The Campaign For Ratification Of The Migrants Rights Convention. 2009. Guide On Ratification Of The International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families (ICRMW). Available at <https://www.ohchr.org/Documents/Press/HandbookFINAL.PDF>

¹²⁰ Ibid.

e) **ICMW gives rights to undocumented and irregular migrants**

Another area of concern is that the ICMW also covers the protection of undocumented and irregular migrant workers. In Malaysia, this group of migrants are considered as unwelcomed and officially clustered as *PATI (Pendatang Asing Tanpa Izin)* and are not entitled to any rights and benefits of employment.

This is an important issue to examine. All migrant workers and members of their families are human beings, regardless of their immigration status. A main impetus for elaborating the Convention was to provide States with explicit guidance on the application of universal human rights to migrants irrespective of their status, given that they were often without recognition or protection as human beings in host countries. One of the Convention's main values is making explicit that the set of fundamental rights contained in the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and other core international human rights instruments need to be articulated in national law for migrants as well, in order to ensure that these rights are indeed applied universally.

The recognition that such fundamental rights extend to undocumented and irregular migrants is increasingly reaffirmed in regional as well as international processes and jurisprudence. In actuality, economies of many countries benefit from the employment of irregular migrant workers who are paid lower wages and whose labour conditions are not protected. In some countries, this unfair competition is evidently tolerated by authorities.¹²¹ Implementation of the equal treatment required by the Convention should do much to take away the incentive for employers to hire irregular migrant workers and would thus diminish the demand for such labour.¹²²

¹²¹ Ibid.

¹²² See the Preamble to the Convention "Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more

3.4.2 Consequences of Implementing the Convention

(a) ICMW places substantial strains on government resources

Malaysia seems to acknowledge the financial and administrative burden that the ratification of the Convention may entail. This concern may be considered as underlying the general view expressed on the costs and administrative burdens that the Convention's ratification would involve compared to its alleged limited benefits. It is undeniable that the ratification of the Convention and the actual enforcement of the rights recognised therein would carry with them both some costs - notably for law enforcement, for pursuit of due process and justice, for training of authorities and for public education - and the need to put in place the institutional framework and infrastructures necessary to ensure the implementation of its provisions. This is particularly true for Malaysia that would have to develop their institutional framework to effectively manage migration.¹²³

With regard to the financial burden of ratification, it is important to take into consideration the relation of costs and benefits of migration management system that is centred on the respect of the human and labour rights of migrants. To date, Malaysia has no proper migrant management mechanism and is still practicing an ad hoc basis policy. This is highly related to the issue of cost as there are no proper plans in the budgetary which might increase over the years.¹²⁴

With regard to administrative obstacles to ratification, it is undeniable that an effective and legally sound management of migration can be very challenging in terms of putting in place the necessary institutions and procedures. The challenge

widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned".

¹²³ Ibid, note 14.

¹²⁴ Ibid, note 14 and 17.

is amplified by the complexity of national processes dealing with migration in many countries. In Malaysia, the lack of a clear demarcation of competencies among the Governmental Ministries dealing with migration and the number of authorities managing different aspects of this phenomenon represents a major challenge, which may have an impact on the decision to ratify the Convention.¹²⁵

Hence, Malaysia needs to cope with this highly complex issue if they want to ensure that migration has a positive impact not only on migrants, but also on the nation's development and society at large. Irrespective of the ratification of ICMW, if a State is faced with immigration or emigration, it has to put in place appropriate procedures for an effective migration management. Hence, the ratification of the Convention would represent nothing more than an incentive to adopt measures that are already necessary to prevent social tensions. To underpin a constructive debate in Malaysia, further in-depth research would need to be carried out on the costs and benefits of adhering to the Convention, the fiscal impact of migration as well as other relevant issues.¹²⁶

However, cost-benefit analyses have consistently shown that, firstly, the costs of non-recognition of rights, of tolerating discrimination and exclusion of vulnerable groups are ultimately far higher than the costs of administration of rights and justice. Secondly, innumerable studies in a broad range of countries have demonstrated that, over time, migrants and immigrants contribute considerably more through taxes and labour to host societies than they draw in benefit or welfare payments and services.¹²⁷

¹²⁵ Ibid, note 14 & 17.

¹²⁶

International Migration Outlook, https://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2020_ec98f531-en

¹²⁷ Sharan Burrow. 2006. Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development, Presentation to the Roundtable 3 on Globalization and Labour Migration, ECOSOC High-Level Segment, Geneva, 5 July 2006; Miguel Sebastián. 2006. Inmigración y economía española: 1996-2006; UK Home Office. 2007. The economic and fiscal impact of immigration: A Cross-departmental submission to the House of Lords Select Committee on Economic Affairs; Reiner Münz et al. 2007. What are the migrants' contributions to employment and growth? A

b) ICMW will promote irregular migration

Another issue of concern is that explicitly recognising the basic rights of ALL migrants by ratifying the Convention will somehow encourage further inflows of irregular migrants since Malaysia is a receiving country. As Malaysia clearly group migrants according to their documents, this might send the wrong signal.

While a country's recognition of the rights of any particular group may conceivably be an attraction to that country for members of the group concerned, there is no empirical evidence that ratification of the Convention by destination countries so far has been followed by increased arrivals of irregular migrants. More to the contrary, there is evidence that most irregular migrants do not choose their destination country on the basis of a comparison between the benefits of different welfare systems.¹²⁸ Migrants arrive because they are looking for work, and as long as there is a demand for their labour, they will come. Nor is there conclusive evidence that regularisation programmes by a considerable number of migrant destination countries in Europe and elsewhere in recent years have led to increased arrivals of irregular migrants hoping for possible subsequent regularisation opportunities. Nonetheless, history also demonstrates that people have often "voted with their feet" to escape oppression, privation and denial of human rights to migrate to lands of greater freedom and opportunity.¹²⁹

PART IV

European approach (Hamburg, Hamburg Institute of International Economics, Migration Research Group); and ILO. 2004. Towards a Fair Deal for Migrant Workers in the Global Economy, Report VI, International Labour Conference.

¹²⁸ R. Romero-Ortuño. 2004. "Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?" in European Journal of Health Law, 11(3).

¹²⁹ The International Steering Committee For The Campaign For Ratification Of The Migrants Rights Convention. 2009. Guide On Ratification Of The International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families (ICRMW). Available at <https://www.ohchr.org/Documents/Press/HandbookFINAL.PDF>

4.0 RECOMMENDATIONS

The Convention creates a legal framework for managing migration in a sustainable and long-term manner. It addresses some of the core issues pertaining to the modalities of migration governance including but not limited to management issues such as admission, stay and return. It thus creates a structure on which to base migration management with the individual remaining at the centre. Being a thematic human rights instrument focusing on a particular group of persons, it aims to ensure that persons crossing borders remain protected with a specific focus on their possible vulnerabilities and needs.

4.1 Lessons for Malaysia from the Philippines and OIC experience

(a) Philippines

State Parties to the ICMW come mainly from the Global South and are on the sending side of the migration process.¹³⁰ The Philippines' underlying principle which guides the management of migration of its nationals is the constitutional mandate to afford full protection to labour, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

To address attendant costs of migration, the State commits to maximize the benefits and minimize the costs of overseas employment through mechanisms for the orderly and systematic facilitation and documentation of workers, provision of adequate protection to minimize abuses and exploitation before, during, and after employment. These responses will show that the Philippines has a policy preference for circular or temporary migration. Some of these mechanisms are the Migrant Workers and Overseas Filipinos Act of 1995; an anti-illegal recruitment program; and, the Reform Package for Household Service Workers.¹³¹

¹³⁰ Sookrajowa S.S., Pécoud A. (2019) United Nations Migrant Workers Convention. In: Ratuva S. (eds) The Palgrave Handbook of Ethnicity. Palgrave Macmillan, Singapore. https://doi.org/10.1007/978-981-13-2898-5_142

¹³¹ Rebecca J Calzado. 2007. Labour Migration and Development Goals: The Philippines Experience. International Dialogue on Migration. Available at

As stated in PART I of this report, the most significant piece of legislation in the Philippines is the Migrant Workers' Act of 1995 or the Republic Act 8042 which was introduced around the time of the ratification of ICMW. A wide range of institutional mechanisms was established to ensure the protection of the rights of migrant and overseas workers where voting rights for overseas Filipinos became a reality. A major function of RA 8042 is the regulation of recruiting agencies to ensure that migrant workers are not abused or exploited, and job placement is appropriately matched with training and skills.

Malaysia being a receiving country can enact a piece of legislation especially on Migrant workers to ensure that the rights of migrant workers are not left out. Reference to Migrant Workers' Act of 1995 or the Republic Act 8042 could possibly be made and adjust accordingly to situation and needs of migrant workers in Malaysia. From there, a legal framework can be developed in ensuring the rights of migrant workers are being protected.

(b) OIC

Lessons from OIC can be learnt through OIC Labour Market Strategy 2025 as discussed in PART I of this report. In many OIC countries, there is a necessity to address labour market issues such as youth and women employment, social inclusion and other related matters. Ministerial meetings are held regularly since 2011 to tackle common problems faced by member states. The OIC Framework for Cooperation on Labour, Employment and Social Protection, which was adopted during the second Islamic Conference of Labour Ministers (ICLM), aims to facilitate collaboration and cooperation among the OIC member states through certain ways and means. It includes six main cooperation areas: namely; 'Occupational Safety and Health'; 'Reducing Unemployment'; 'Workforce Capacity Development Projects'; 'Foreign Migrant Labour'; 'Labour Market Information Strategy'; and 'Social Protection. Migrant and foreign contract labour is also centred in the framework document. Migrant and foreign contract workers in an irregular situation

are usually at high risk of exploitation. In this context, the framework aims to increase the constructive effects of migration for development and accelerate brain gain, among others.

Malaysia can learn from this strategy. Perhaps, this is relevant to be applied at ASEAN level. Nevertheless, for a start, looking at the labour market challenges and practices faced by ASEAN Member State, Malaysia can prepare a strategy document and conduct an analytical study on the major challenges and obstacles in ASEAN. In order to be able to propose a solid strategy, Malaysia could learn from how OIC conducted their analytical study.

Overall, this strategy aims to stimulate cooperation among the member states in addressing some common labour markets problems and challenges. There is definitely a need for a comprehensive strategy to address the multiple and complex challenges faced by OIC countries. This requires action on many fronts including employment regulations, job creation, skills development, welfare benefits and many others. In this regards, this strategy aims that cooperation in this area is translated into concrete actions to promote improvements in the level of employment, productivity and well-being with effective responses to the new requirements and demands of the labour market.¹³²

In light of the findings of the study and of the analysis of the possible obstacles to the ratification and challenges in the implementation of the ICMW, the consultants provide the following recommendations:

Recommendation 1: Accede and fully implement all international legal instruments that promote human, labour and gender equality rights of migrant workers, in particular the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

¹³² OIC Labour Market Strategy 2025. 2018. The Statistical, Economic And Social Research And Training Centre For Islamic Countries (SESRIC). Available at <https://www.oic-oci.org/docdown/?docID=2907&refID=1076>

- a) Adopt, implement and enforce legislation and policies that:
- guarantee both men and women migrant workers the right to freedom of association, freedom of peaceful assembly, freedom of religion and ensure compliance by employers' and workers' organisations;
 - protect migrant workers from conditions of human exploitation and forced labour, including debt bondage and trafficking, in particular, for migrants with irregular status or groups of migrant workers who are especially vulnerable to such conditions;
 - ensure respect for the minimum age for admission to employment and effectively prohibit the worst forms of child labour, including trafficking and forced labour of migrant children and children of migrant workers;
 - eliminated all forms of discrimination against migrant workers in access to medical treatment, access to children education, access to justice, employment and occupation, for example, eliminate discriminatory medical examination for HIV status or pregnancy and 'protective' measures for women which restrict entry into productive and safe migrant work for women.
- b) Establish mechanisms for regular labour market analysis with a gender lens, including:
- sex-disaggregation¹³³ in collection and analyses of data;
 - specific labour policies and legislation to address inequalities by
 - (I) covering economic sectors with many women migrants, and
 - (ii) Identifying risks and vulnerabilities for women migrants and irregular migrant workers in specific occupations and in the areas

¹³³ Sex-disaggregated data are data that are collected and analysed separately on males and females.

of employment, maternity protection, wages, occupational safety and health and other conditions of work.

- c) Intensify measures aimed at detecting and identifying abusive practices against migrant workers, including physical or sexual harassment or violence, restriction of movement, debt bondage, forced labour, withholding or underpayment or delayed payment of wages and benefits, retention of passports or identity or travel documents, and threat of denunciation to authorities, particularly in sectors outside the usual avenues of regulation and protection, such as domestic work.
- d) Formulate, as part of a comprehensive migration policy, a programme of protection, incorporating the substantive provisions of the ILO migration instruments. Such a programme should include at least the following:
- orientations to provide migrant workers with adequate information in the language they understand and other assistance services, including effective consular services with both female and male staff;
 - supervision of private recruitment agencies to prevent fraudulent practices;
 - effective enforcement mechanisms for the protection of migrant workers' rights and training on human rights for all government officials involved in migration;
 - social services to assist migrant workers on access to safe housing, education and language training, and assistance in finding employment opportunities;
 - remedial measures and 'safe places' for victims of trafficking and abuse, especially women and children;
 - legislation and policies to prevent abusive practices, migrant smuggling, trafficking in persons, and irregular labour migration;
 - Community-level action to address the root causes and impact of migration and trafficking with a focus on gender inequalities.

- e) Adopt measures to ensure that all migrant workers' wages are paid directly to them on a regular basis, that they have the freedom to dispose of their wages as they wish, and that their wages are paid upon the termination of employment in accordance with the relevant ILO instruments, and national law and practice.
- f) Extend labour inspection to all workplaces where migrant workers are employed in order to effectively monitor their working conditions and supervise compliance with employment contracts. Additionally, ensure that labour inspection authorities have the necessary resources and staff who are adequately trained in addressing migrant workers' rights and the different needs of men and women migrant workers.

Recommendation 2: Utilise ICMW as a benchmark reference of international human rights law in the development and review process of Malaysian legislation in the field of migration and other activities on migration management, and as a migrant management mechanism. Good practices identified by ICMW could provide further reference.

This would ensure further mainstreaming of a rights-based approach to both regular and notably, irregular labour migration into the Malaysian internal policy. Further improved mainstreaming of migration and migrants' rights protection considerations into the development cooperation programming would also be recommended. In order to realise this, it is important to:

- a) Raise awareness of migrant worker issues among employers, particularly those that hire large numbers of migrants, and secure their involvement in promoting migrants' rights and welfare.
- b) Ensure that employers, recruitment agencies or concerned authorities facilitate migrant workers' departure, journey, and reception by providing information, training and assistance in a language they understand prior to their departure and on arrival concerning the migration process, their rights and the general conditions of life and work in the destination country.

- c) Raise awareness of hiring practices and working conditions among employers to promote the principle of equal treatment between nationals and migrant workers as well as adopt and promote employers' code of practice, including the use of written employment contracts.
- d) Cooperate with governments, trade unions, and NGOs to advocate for informed, transparent and rights-based migration policies, including the prevention and protection against abusive migration practices such as smuggling, trafficking in persons, and practices of forced labour and child labour.

Recommendation 3: Creating a migrant workers' network to ensure effective representations.

- a) Actively organise migrant workers, including women, and assist them in forming their own organizations to ensure that they have effective voice and representation.
- b) Create and reinforce community support networks for migrant workers.
- c) Inform members about the ILO and its machinery, and ensure that all workers, including migrant workers, understand their rights and important ILO Conventions and international instruments that apply to them.
- d) Network with workers' organisations in origin and destination countries to ensure that migrant workers are informed of their rights and are provided with assistance throughout the migration process.
- e) Utilise the full array of formal means available to unions within the ILO supervisory system to secure the rights of migrant workers under the ratified Conventions.

- f) Form partnerships with existing trade unions or workers' associations and maintain good relationship with employers and the government.
- g) Maintain good working relationships, cooperate and exchange information with the government, employers' associations and NGOs to advocate for informed, transparent and rights-based migration policies.
- h) Promote public education and awareness-raising campaigns regarding the contributions that migrant workers make to the countries in which they work.
- i) Strengthen training for migrant workers in legal literacy, financial education (budgeting and remittances), vocational skills development, and organising skills and opportunities.

PART V

5.0 Conclusion

The UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families broke ground in international law by articulating baseline treatment for migrants. Nevertheless, based on the discussion, it can be seen that the low level of ratification reflects difficulty in shifting the perception by many sovereign states of migrants as intruders/suplicants to one of migrants as rights bearing subjects.

Perfecting migrant workers' rights could never be a fortnight task. A sovereign state need to consider a lot of factors, practices and policies in providing rights for migrant workers. As Malaysia is not a yet a party to the ICMW, this report analysed all the relevant local legislations and policies in Malaysia. The analysis had indicate the compatibilities as well as incompatibilities of ICMW provisions with Malaysian National legislations/provisions. Perhaps, it is fair to say that all these while, Malaysia has been providing many rights/protection to migrant workers. ICMW if acceded by Malaysia, will assist to enhance the rights/protection in a wider aspect.

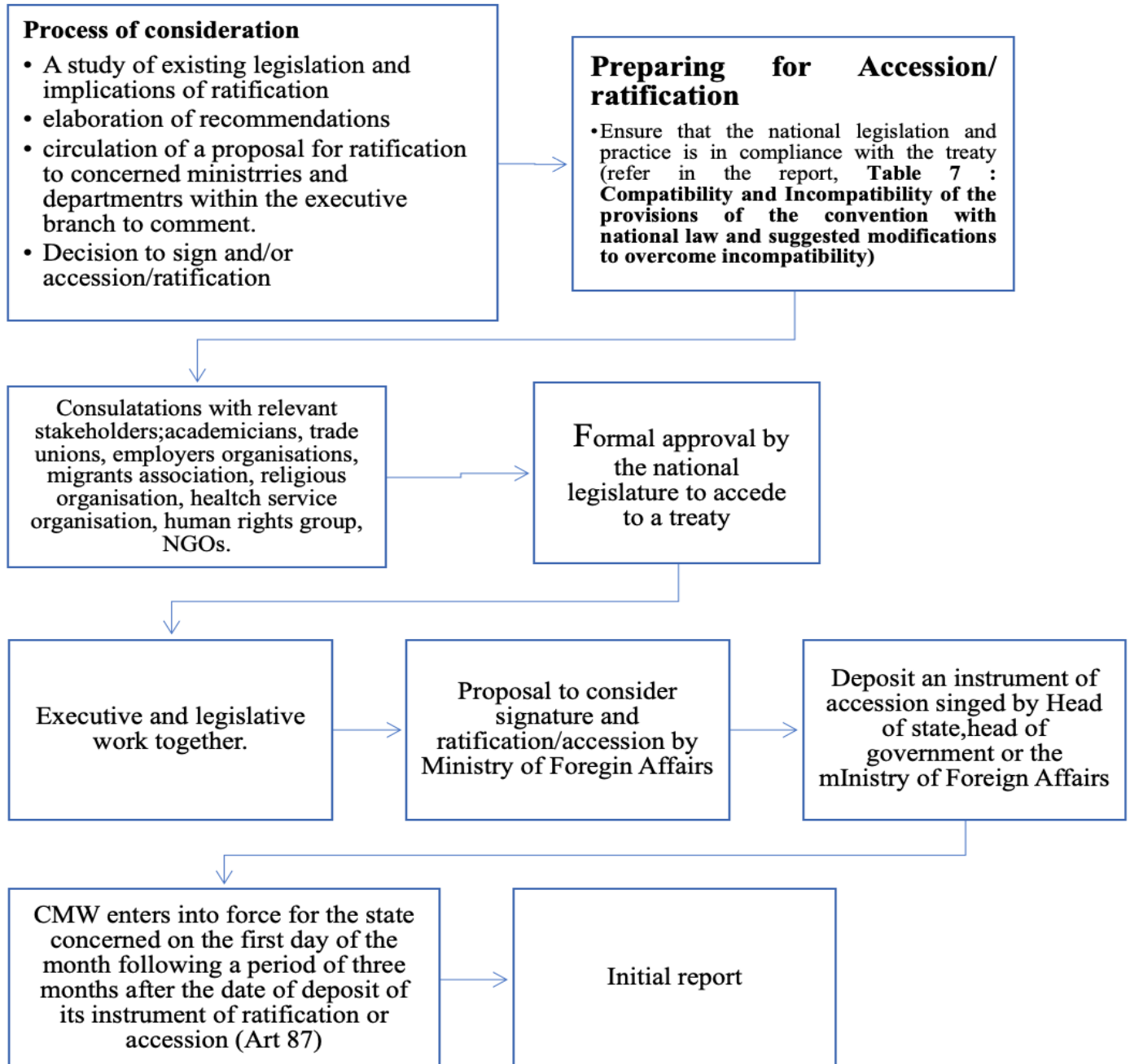
Protection and human rights grow with time. ICMW is seen to have catered almost all aspect of migrant workers. We must appreciate the migrants' contribution to the economic development of our country, and there must not be any feeling of prejudice towards them. They should not be looked upon as desperate or vulnerable people whom employers can take advantage of to exploit or ill-treat. Instead, they deserve a decent wage and fair terms of employment, and nothing less than equal protection of the law.¹³⁴

¹³⁴ Mohd Hishamudin Yunus. 2019. Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf>

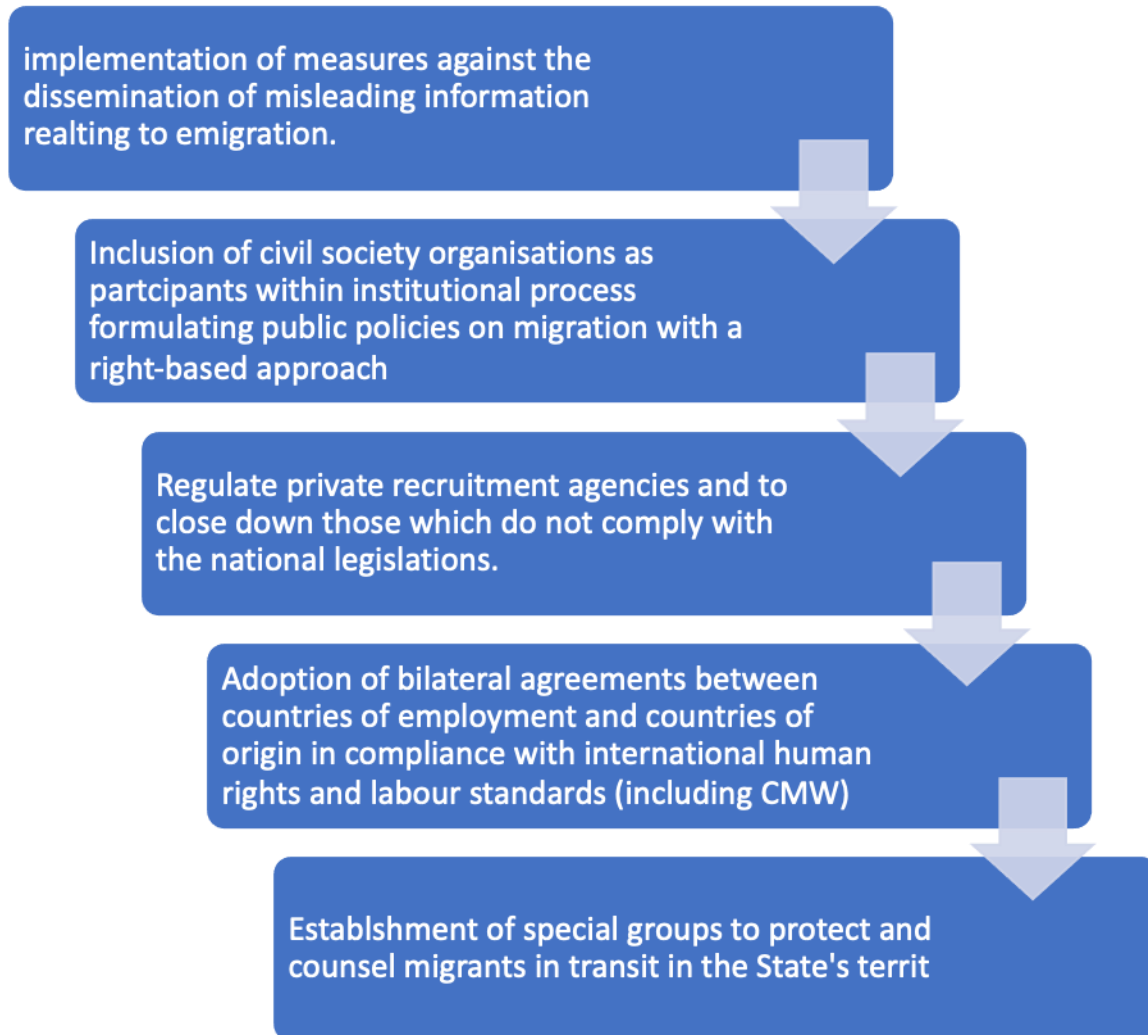
PART IV

6.0 Legal Roadmap

Appointment of a taskforce to be headed by the Ministry of Human Resources. Recommended taskforce member: SUHAKAM and Independent Committee on the Management of Foreign Workers lead by retired Court of Appeal Judge, **Dato' Seri Mohd Hishamudin Yunus**



Practical Effects of Accession



APPENDIX I

Malaysian Legislations

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM)
 Contracts Act 1950
 Employees Provident Fund Act 1991
 Employees Social Security Act 1969
 Employment Act 1955
 Employment Insurance System Act 2017 and the EIS
 Employment Restriction Act 1968
 Federal Constitution
 Immigration Act 1959
 Industrial Relations Act and 1967
 Occupational Safety and Health Act 1994
 Passport Act 1966
 Penal Code
 Private Employment Agencies Act 1981
 Trade Union Act 1959
 Workmen's Compensation Act 1952

Philippines Legislations

Legal Assistance Fund Act
 Migrant Workers and Overseas Filipinos Act of 1995
 Republic Act No. 8042.
 The 1987 Constitution of the Republic of the Philippines
 The Constitutions of the Republic of Philippines

APPENDIX II

1. List of Treaties/ Conventions

UNITED NATIONS

No.	Treaties/ Conventions
1	Universal Declaration of Human Rights (UDHR)
2	International Covenant on Economic, Social and Cultural Rights(ICESCR)
3	International Covenant on Civil and Political Rights (ICCPR)
4	Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
5	Convention on the Rights of the Child (CRC)
6	Convention on the Rights of Persons with Disabilities (CRPD)

7	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)
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ILO

No.	Treaties/ Conventions
1	International Labour Organization (ILO), Migration for Employment Convention, 1939 (No. 66) (withdrawn), ILO, Inspection of Emigrants Convention, 1926 (No. 21) (shelved)
2	ILO, Migration for Employment Convention (revised), 1949 (No. 97)
3	ILO Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143)

ASEAN

No.	Treaties/ Conventions/Declaration
1	ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers
2	ASEAN Consensus on the Protection and Promotion of The Rights of Migrant Workers

APPENDIX III

Provisions of the Convention (ICMW)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Adopted by General Assembly resolution 45/158 of 18 December 1990

Preamble

The States Parties to the present Convention,

Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,

Taking into account also the principles and standards set forth in the relevant instruments elaborated within the framework of the International Labour Organisation, especially the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No.151), the Convention concerning Forced or Compulsory Labour (No. 29) and the Convention concerning Abolition of Forced Labour (No. 105),

Reaffirming the importance of the principles contained in the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization,

Recalling the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration of the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Code of Conduct for Law Enforcement Officials, and the Slavery Conventions,

Recalling that one of the objectives of the International Labour Organisation, as stated in its Constitution, is the protection of the interests of workers when employed in countries other than their own, and bearing in mind the expertise and experience of that organization in matters related to migrant workers and members of their families,

Recognizing the importance of the work done in connection with migrant workers and members of their families in various organs of the United Nations, in particular in the Commission on Human Rights and the Commission for Social Development, and in the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, as well as in other international organizations,

Recognizing also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families, as well as the importance and usefulness of bilateral and multilateral agreements in this field,

Realizing the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community,

Aware of the impact of the flows of migrant workers on States and people concerned, and desiring to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families,

Considering the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment,

Convinced that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection,

Taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family,

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged

in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned,

Convinced, therefore, of the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally,

Have agreed as follows:

Part I: Scope and Definitions

Article 1

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

Article 2

For the purposes of the present Convention:

1. The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.
- 2.

- (a) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;
- (b) The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;
- (c) The term "seafarer", which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national;
- (d) The term "worker on an offshore installation" refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;
- (e) The term "itinerant worker" refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;
- (f) The term "project-tied worker" refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;
- (g) The term "specified-employment worker" refers to a migrant worker:
 - (i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or
 - (ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or
 - (iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;
- (h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Article 3

The present Convention shall not apply to: (a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;

- (b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;
- (c) Persons taking up residence in a State different from their State of origin as investors;
- (d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;
- (e) Students and trainees;
- (f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Article 4

For the purposes of the present Convention the term "members of the family" refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

Article 5

For the purposes of the present Convention, migrant workers and members of their families:

- (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
- (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

Article 6

For the purposes of the present Convention:

- (a) The term "State of origin" means the State of which the person concerned is a national;
- (b) The term "State of employment" means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be;
- (c) The term "State of transit," means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

Part II: Non-discrimination with Respect to Rights

Article 7

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Part III: Human Rights of All Migrant Workers and Members of their Families

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 9

The right to life of migrant workers and members of their families shall be protected by law.

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 11

1. No migrant worker or member of his or her family shall be held in slavery or servitude.
2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.
3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.
4. For the purpose of the present article the term "forced or compulsory labour" shall not include:
 - (a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;
 - (b) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
 - (c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.

Article 12

1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.
2. Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4. States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.
3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputation of others;
 - (b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;
 - (c) For the purpose of preventing any propaganda for war;
 - (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 14

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

Article 15

No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

Article 16

1. Migrant workers and members of their families shall have the right to liberty and security of person.
2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
3. Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.
4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.
5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.
6. Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.
7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
 - (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
 - (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;
 - (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

8. Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

9. Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

Article 18

1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
2. Migrant workers and members of their families who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.
3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:
 - (a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them;
 - (b) To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;
 - (e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
 - (f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against themselves or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Migrant workers and members of their families convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.
6. When a migrant worker or a member of his or her family has, by a final decision, been convicted of a criminal offence and when subsequently his or her conviction has been reversed

or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person.

7. No migrant worker or member of his or her family shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of the State concerned.

Article 19

1. No migrant worker or member of his or her family shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, he or she shall benefit thereby.

2. Humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right of residence or work, should be taken into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family.

Article 20

1. No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.

2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.

Article 21

It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.
5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.
6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.
8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.
9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 23

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be

informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.

Article 24

Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.

Article 25

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

(b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Article 26

1. States Parties recognize the right of migrant workers and members of their families:

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;

(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

Article 27

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Article 29

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

Article 30

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

Article 31

1. States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of

origin. 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.

Article 32

Upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings.

Article 33

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:

- (a) Their rights arising out of the present Convention;
- (b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State. 2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall co-operate with other States concerned.

3. Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

Article 34

Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI of the present Convention.

Part IV: Other Rights of Migrant Workers and Members of their Families who are documented or in a Regular Situation

Article 36

Migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in the present part of the Convention in addition to those set forth in part III.

Article 37

Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

Article 38

1. States of employment shall make every effort to authorize migrant workers and members of the families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.
2. Migrant workers and members of their families shall have the right to be fully informed of the terms on which such temporary absences are authorized.

Article 39

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.
2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 40

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.

2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

Article 41

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Article 42

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.

3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

Article 43

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:

- (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;
- (b) Access to vocational guidance and placement services;
- (c) Access to vocational training and retraining facilities and institutions;
- (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;
- (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;

(f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;

(g) Access to and participation in cultural life.

2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

Article 44

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

Article 45

1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:

(a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met;

(c) Access to social and health services, provided that requirements for participation in the respective schemes are met;

(d) Access to and participation in cultural life.

2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.

3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate.

4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

Article 46

Migrant workers and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreements and the obligations of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and household effects as well as the equipment necessary to engage in the remunerated activity for which they were admitted to the State of employment:

(a) Upon departure from the State of origin or State of habitual residence;

(b) Upon initial admission to the State of employment;

(c) Upon final departure from the State of employment;

(d) Upon final return to the State of origin or State of habitual residence.

Article 47

1. Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements.

2. States concerned shall take appropriate measures to facilitate such transfers.

Article 48

1. Without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment:

(a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;

(b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families. 2. States Parties shall endeavour to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.

Article 49

1. Where separate authorizations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity.

2. Migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.

3. In order to allow migrant workers referred to in paragraph 2 of the present article sufficient time to find alternative remunerated activities, the authorization of residence shall not be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits.

Article 50

1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State.

2. Members of the family to whom such authorization is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment.

3. The provisions of paragraphs 1 and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State.

Article 51

Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.

Article 52

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.

2. For any migrant worker a State of employment may:

(a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;

(b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:

(a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;

(b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own

account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 53

1. Members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker in accordance with article 52 of the present Convention.

2. With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States Parties shall consider favourably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements.

Article 54

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

- (a) Protection against dismissal;
- (b) Unemployment benefits;
- (c) Access to public work schemes intended to combat unemployment;
- (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.

Article 55

Migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity.

Article 56

1. Migrant workers and members of their families referred to in the present part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III.
2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit.
3. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

Part V: Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families

[Article 57](#)

The particular categories of migrant workers and members of their families specified in the present part of the Convention who are documented or in a regular situation shall enjoy the rights set forth in part m and, except as modified below, the rights set forth in part IV.

[Article 58](#)

1. Frontier workers, as defined in article 2, paragraph 2 (a), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.
2. States of employment shall consider favourably granting frontier workers the right freely to choose their remunerated activity after a specified period of time. The granting of that right shall not affect their status as frontier workers.

[Article 59](#)

1. Seasonal workers, as defined in article 2, paragraph 2 (b), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year.
2. The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

Article 60

Itinerant workers, as defined in article 2, paragraph 2 (A), of the present Convention, shall be entitled to the rights provided for in part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State.

Article 61

1. Project-tied workers, as defined in article 2, paragraph 2 (of the present Convention, and members of their families shall be entitled to the rights provided for in part IV except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 45, paragraph I (b), and articles 52 to 55.

2. If a project-tied worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18, paragraph 1, of the present Convention.

3. Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.

4. Without prejudice to the provisions of article 47 of the present Convention and to relevant bilateral or multilateral agreements, States Parties concerned shall permit payment of the earnings of project tied workers in their State of origin or habitual residence.

Article 62

1. Specified-employment workers as defined in article 2, paragraph 2 (g), of the present Convention, shall be entitled to the rights provided for in part IV, except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 52, and article 54, paragraph 1 (d).

2. Members of the families of specified-employment workers shall be entitled to the rights relating to family members of migrant workers provided for in part IV of the present Convention, except the provisions of article 53.

Article 63

1. Self-employed workers, as defined in article 2, paragraph 2 (h), of the present Convention, shall be entitled to the rights provided for in part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.

2. Without prejudice to articles 52 and 79 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Article 64

1. Without prejudice to article 79 of the present Convention, the States Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families.

2. In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

Article 65

1. States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, inter alia:

- (a) The formulation and implementation of policies regarding such migration;
- (b) An exchange of information, consultation and co-operation with the competent authorities of other States Parties involved in such migration;
- (c) The provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment, on agreements concluded with other States concerning migration and on other relevant matters;
- (d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

2. States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

Article 66

1. Subject to paragraph 2 of the present article, the right to undertake operations with a view to the recruitment of workers for employment in another State shall be restricted to:

(a) Public services or bodies of the State in which such operations take place;

(b) Public services or bodies of the State of employment on the basis of agreement between the States concerned;

(c) A body established by virtue of a bilateral or multilateral agreement.

2. Subject to any authorization, approval and supervision by the public authorities of the States Parties concerned as may be established pursuant to the legislation and practice of those States, agencies, prospective employers or persons acting on their behalf may also be permitted to undertake the said operations.

Article 67

1. States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation.

2. Concerning migrant workers and members of their families in a regular situation, States Parties concerned shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

Article 69

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

Part VII: Application of the Convention

Article 72

1.

(a) For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as "the Committee");

(b) The Committee shall consist, at the time of entry into force of the present Convention, of ten and, after the entry into force of the Convention for the forty-first State Party, of fourteen experts of high moral standing, impartiality and recognized competence in the field covered by the Convention.

2.

(a) Members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal systems. Each State Party may nominate one person from among its own nationals;

(b) Members shall be elected and shall serve in their personal capacity.

3. The initial election shall be held no later than six months after the date of the entry into force of the present Convention and subsequent elections every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to all States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties that have nominated them, and shall submit it to the States Parties not later than one month before the date of the corresponding election, together with the curricula vitae of the persons thus nominated.

4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the

Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the States Parties present and voting.

5.

- (a) The members of the Committee shall serve for a term of four years. However, the terms of five of the members elected in the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting of States Parties;
- (b) The election of the four additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of the present article, following the entry into force of the Convention for the forty-first State Party. The term of two of the additional members elected on this occasion shall expire at the end of two years; the names of these members shall be chosen by lot by the Chairman of the meeting of States Parties;
- (c) The members of the Committee shall be eligible for re-election if renominated.

6. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party that nominated the expert shall appoint another expert from among its own nationals for the remaining part of the term. The new appointment is subject to the approval of the Committee.

7. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee.

8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 73

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention:

- (a) Within one year after the entry into force of the Convention for the State Party concerned;
- (b) Thereafter every five years and whenever the Committee so requests.

2. Reports prepared under the present article shall also indicate factors and difficulties, if any, affecting the implementation of the Convention and shall include information on the characteristics of migration flows in which the State Party concerned is involved.

3. The Committee shall decide any further guidelines applicable to the content of the reports.

4. States Parties shall make their reports widely available to the public in their own countries.

Article 74

1. The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports.

2. The Secretary-General of the United Nations shall, in due time before the opening of each regular session of the Committee, transmit to the Director-General of the International Labour Office copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports, in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the present Convention that fall within the sphere of competence of the International Labour Organisation. The Committee shall consider in its deliberations such comments and materials as the Office may provide.

3. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence.

4. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies to submit, for consideration by the Committee, written information on such matters dealt with in the present Convention as fall within the scope of their activities.

5. The International Labour Office shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.

6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered.

7. The Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations, based, in particular, on the examination of the reports and any observations presented by States Parties.

8. The Secretary-General of the United Nations shall transmit the annual reports of the Committee to the States Parties to the present Convention, the Economic and Social Council, the Commission on Human Rights of the United Nations, the Director-General of the International Labour Office and other relevant organizations.

Article 75

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The Committee shall normally meet annually.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 76

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

- (a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;
- (d) Subject to the provisions of subparagraph (c) of the present paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention;
- (e) The Committee shall hold closed meetings when examining communications under the present article;

- (f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:
 - (i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
 - (ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of the present article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 77

1. A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration.

2. The Committee shall consider inadmissible any communication under the present article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. The Committee shall not consider any communication from an individual under the present article unless it has ascertained that:
 - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
 - (b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual.
4. Subject to the provisions of paragraph 2 of the present article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
5. The Committee shall consider communications received under the present article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
6. The Committee shall hold closed meetings when examining communications under the present article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of the present article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by or on behalf of an individual shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 78

The provisions of article 76 of the present Convention shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

Part VIII: General provisions

Article 79

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

Article 80

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention.

Article 81

1. Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:

- (a) The law or practice of a State Party; or
- (b) Any bilateral or multilateral treaty in force for the State Party concerned.

2. Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act that would impair any of the rights and freedoms as set forth in the present Convention.

Article 82

The rights of migrant workers and members of their families provided for in the present Convention may not be renounced. It shall not be permissible to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights. It shall not be possible to derogate by contract from rights recognized in the present Convention. States Parties shall take appropriate measures to ensure that these principles are respected.

Article 83

Each State Party to the present Convention undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 84

Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.

Part IX: Final provisions

Article 85

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 86

1. The present Convention shall be open for signature by all States. It is subject to ratification.
2. The present Convention shall be open to accession by any State.
3. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 87

1. The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Convention after its entry into force, the Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of its own instrument of ratification or accession.

Article 88

A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application.

Article 89

1. Any State Party may denounce the present Convention, not earlier than five years after the Convention has entered into force for the State concerned, by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of the receipt of the notification by the Secretary-General of the United Nations.
3. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
4. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 90

1. After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting shall be submitted to the General Assembly for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Convention and any earlier amendment that they have accepted.

Article 91

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-general of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 92

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.
3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 93

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

In witness whereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

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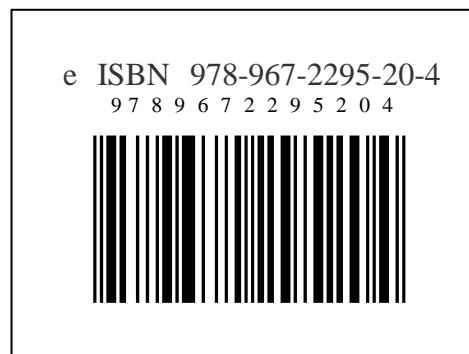
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PROJECT TO STUDY AND ANALYSE THE COMPATABILITY OF MALAYSIAN LAWS WITH THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICMW)



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