

REALIZING THE RIGHTS OF MIGRANT WORKERS TO JOIN TRADE UNIONS AND TO SOCIAL PROTECTION *ASEAN TRADE UNION COUNCIL (ATUC)¹*

I. Background

1. As the pace of regional integration and globalization accelerates, the number of migrants from ASEAN Member States (AMS) has been increasing. UNDESA estimates that in 2015 about 20.2 million ASEAN nationals were living outside their country of origin. Intra-ASEAN migration reached 6.9 million, 48.7 per cent of whom were women.
2. A significant aspect of intra-ASEAN migration involves labour migration or migration for employment. A “migrant worker” is defined as one 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 or who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment;³ or who is to be engaged or employed, is engaged or employed, or has recently been engaged or

¹ Prepared by Atty. Benedicto Ernesto R. Bitonio Jr. (Philippines), Consultant, with the support of the ILO TRIANGLE in ASEAN. ATUC is a regional grouping of 18 national labor centers in nine (9) ASEAN member states except Brunei but including Timor Leste. Representing 13 million members, it was established in 1983 in Manila to collectively represent voices and interests of workers in the ASEAN process. Its member organisations are Cambodia Confederation of Labour (CLC); Cambodia Confederation of Trade Unions (CCTU); Cambodia Confederation of Unions (CCU); Confederation of Indonesian Trade Union (K-SPI/CITU); Confederation of All Indonesian Trade Union (K-SPSI); Confederation of Indonesia Prosperity Trade Union (K-SBSI); Lao Federation of Trade Unions (LFTU); Malaysian Trades Union Congress (MTUC); Confederation of Trade Unions Myanmar (CTUM); Federation of Free Workers (FFW); National Trade Union Center Philippines (NTUCPhl); Singapore National Trades Union Congress (SNTUC); Labour Confederation of Thailand (LCT); Thai Trade Union Congress (TTUC); State Enterprises Workers' Relations Confederation (SERC); National Congress of Private Industrial Employees (NCPE); Timor Leste Trade Union Council (TLTUC); and Vietnam General Confederation of Labor (VGCL).

² Art. 2, UN Convention on the Protection of All Migrant Workers and Their Families [1990]. “The term migrant worker includes:

- “(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.”

An associated term is “members of the family” which 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.

³ Art. 11, ILO Convention No. 97, Migration for Employment Convention (1949), Revised.

employed in a remunerated activity in a State of which he or she is not a national.⁴⁵

3. Immigration policies in labour-receiving or destination countries as well as labour market, economic and other factors in both sending and receiving countries affect the nature of migration for work. Some migrant workers eventually acquire permanent resident status in their countries of destination, while others remain temporary or “circular” migrants who work under a succession of short-term contracts for fixed periods either in one country or in several countries while maintaining residency in their home countries. Some migrant workers are professionals or highly-skilled while others are medium- or low-skilled. The main concern of this paper are the temporary or circular migrant workers with special emphasis on the medium or low-skilled.
4. ASEAN demonstrates the dynamics of intra-regional labour migration in stark terms. Four AMS - Brunei Darussalam, Malaysia, Singapore, and Thailand⁶ - are net labour-receiving States or States of employment/destination. Six - Cambodia, Indonesia, the Lao People’s Democratic Republic (PDR), Myanmar, the Philippines, and Viet Nam - are net labour-sending States or States of origin. UNDESA figures show that seven AMS⁷ deployed over 2.1 million migrant workers within ASEAN,⁸ much of whom were in the low and medium skill categories under temporary or short-term contracts.⁹ Reported cases of irregular migrants not captured in migration statistics also persist. Intra-regional labour migration is especially significant for Myanmar and Cambodia, which respectively deploy 93.4 and 66.8 percent of their migrant workers to other AMS.¹⁰
5. As in other regions, ASEAN governments and all stakeholders acknowledge that labour migration has economic and social benefits and costs. Under the overall framework of the ASEAN Community, labour migration is an integral and continuing part of the regional development discourse.¹¹ From the *ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers (2007)*¹² to the *ASEAN Consensus on the Protection and Promotion of the Rights*

⁴ Chapter 2, No. 3, *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers*. Signed at the 31st ASEAN Summit, November 13, 2017, Manila, Philippines. Under the Consensus, the applicability of the Consensus to different categories of migrant workers shall be subject to the laws, regulations, and policies of respective ASEAN Member States.

⁵ Art. 4.

⁶ In 2013: Malaysia hosted the largest number of migrant workers with 2.25 million migrant workers, 56.4 per cent of whom were from ASEAN countries; Thailand hosted 1.18 million migrant workers, 88.2 per cent of whom were from ASEAN countries; while Singapore hosted 1.32 million migrant workers which make up one-third of its workforce. In 2014, there were 52,161 migrant workers in Brunei Darussalam who made up a quarter of the country’s labour force. Among these migrant workers were 31,784 Indonesians and Filipinos who composed 61 per cent of the total migrant worker population. Moreover, a substantial share of migrant workers are domestic workers. In 2015, there were 9,884 domestic workers in Brunei Darussalam, out of which 9,851 were migrant workers and 9,656 were female.

⁷ Cambodia, Lao PDR, Indonesia, Myanmar, the Philippines, Thailand and Vietnam.

⁸ Six of these countries collect sex-disaggregated data and collectively deployed over 350,000 women migrant workers representing 52 per cent of the workers they deployed.

⁹ ADB and ILO, *ASEAN Community 2015: Managing Integration for better jobs and shared prosperity (2014)*, see pp. 83-100.

¹⁰ While Indonesia, the Philippines, and Viet Nam have higher deployments of migrant workers abroad, they have lower deployments within ASEAN: 6.37 per cent for Viet Nam, 14.2 per cent for the Philippines, and 46.7 per cent for Indonesia. In 2015, 88.3 per cent of migrant workers deployed by Indonesia were women - the highest share of all ASEAN Member States. Myanmar deployed the lowest share: only 13.1 per cent of deployed migrant workers were women.

¹¹ The ASEAN Community has three distinct pillars: the ASEAN Political-Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community. Each pillar has adopted a blueprint that recognises the importance of migration and the protection of workers’ rights.

¹² Also known as the *Cebu Declaration*, which states the obligations of sending and receiving States to collaborate and promote “the full potential and dignity of migrant workers in a climate of freedom, equality and stability. In support of the *Declaration*, the

of *Migrant Workers (2017)*,¹³ AMS have sought to maximize the benefits of labour migration while protecting migrant workers taking into account the fundamental principles and rights at work and decent work objectives. These documents complement similar recent initiatives at the international level, such as the *Bali Declaration*¹⁴ and the *New York Declaration*¹⁵ which called for the negotiation of a *Global Compact for Safe, Orderly and Regular Migration (GCM)*.¹⁶

II. The Problem

6. Governing and managing migrant workers pose unique challenges because of the nature and characteristics of migrant work. While it can be assumed that most national labour legislations draw guidance from international standards, there is wide divergence not only in the extent to which these recognize certain substantive rights and in the selectivity of their application. Under short-term employment contracts, migrant workers do not have adequate time, opportunity or incentive to meaningfully exercise or assert all of their rights in their States of employment. Labour laws that require non-nationals to complete periods of residency or exclude them altogether are not uncommon, with temporary low-skilled migrant workers the most easily excluded. In most instances, the employment contract is concluded in the State of origin (*lex loci celebrationes*) where the migrant worker is a national to be subsequently performed in the State of destination (*lex loci contractus*). This often gives rise to enforcement and conflict of law issues, among others.
7. Within AMS, migrant workers are mostly temporary and low-skilled with women having a disproportionate share. Sometimes working in relative isolation from other workers and with restricted freedom of movement, they have limited opportunities to socialize and organize, as well as limited access to counselling, welfare, complaint and redress mechanisms. Everywhere yet invisible and voiceless, migrant workers have very little economic, political and bargaining power in their States of employment. Hailed as heroes in their States of origin

ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) was formed to strengthen labour migration governance in the region and to develop an ASEAN Instrument on Migrant Workers. As part of this process, the regular conduct of an ASEAN Forum on Migrant Labour (AFML) was instituted. The AFML annually convenes key migration stakeholders from among ASEAN governments, workers' and employers' organizations, and civil society.

¹³ *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers*. Signed at the 31st ASEAN Summit, 13 November 2017, Manila, Philippines. This document states the general principles, fundamental rights of migrant workers and members of their families, specific rights of migrant workers, and obligations and commitments of AMS, with the view to promote and protect the human rights of workers embodied in international instruments and to respect national laws.

¹⁴ Adopted at the 16th Asia and the Pacific Regional Meeting, Bali, Indonesia, 9 December 2016. The Declaration affirms principles that

- Recognize the labour market needs of all;
- Are based on the general principles and operational guidelines on fair recruitment (2016), including no charging of recruitment fees or related costs to workers; and the entitlement of workers to keep in their possession travel and identity documents;
- Provide adequate protection to all migrant workers, including through better portability of skills and social security benefits;
- Take into account the ILO Multilateral Framework on Labour Migration (2005);
- Redress employer-worker relationships that impede workers' freedom of movement, their right to terminate employment or change employers, taking into account any contractual obligations that may apply, and their right to return freely to their countries of origin.

¹⁵ Adopted at the UN Summit, New York, 19 September 2016.

¹⁶ The GCM aims to be the first inter-governmental agreement to cover all dimensions of international migration in a holistic and comprehensive manner. It presents an opportunity to improve migration governance, address the challenges associated with it, and strengthen the contribution of migrants and migration to sustainable development. The process to develop the GCM was initiated. Negotiations for the GCM started in April 2017. The General Assembly will then hold an inter-governmental conference on international migration in December 2018 with a view to adopting incentive the global compact..

when they are still working, they often face insecurities arising from episodes of unemployment and absence of old age pension when they return home.

8. Migrant workers need to harness the power of voice and collective action to take more control of their working lives and beyond. Central to this is the effective recognition of two key rights -- the right to self-organization or to form or join trade unions and the right to social protection. It is the position of the ASEAN Trade Union Council (ATUC) that migration policies and institutions must always be built on the recognition that these rights are portable. A portable right is one that follows or is attached to the person wherever he or she goes. In relation to migrant workers, it is a right that 1) is recognized and given effect in both the migrant worker's State of nationality or origin and State of employment or destination; 2) when exercised in one State, can continue to be given effect in another such that the conditions and benefits for its full and free exercise and enjoyment is not bounded by the short-term nature or the place of employment but can be made operational and effective in both States of employment and States of origin; and 3) is not diminished or nullified simply by the migrant worker's cessation of employment or transfer of employment from one employer or one State to another. On the right to self-organization, the migrant worker should have the ability to keep his or her trade union membership or affiliation in the States of origin and of destination. On social protection or security, the migrant worker should have the ability to preserve, maintain, and transfer benefits from a social security programme from one country to another and between localities in a country (spatial portability), between jobs, and between members within a household (social portability).¹⁷ Since the right to social protection and security is attached to the migrant worker, this should include the ability to maintain and access the benefits of the social protection system of the country where he or she currently works. ATUC's position proceeds from ATUC's long-standing and continued advocacy for the fundamental principles and rights at work and the objectives of decent work¹⁸ as well as its statement of core principles.¹⁹

III. The legal framework

A. International instruments

¹⁷ Taha, Nurulsyahirah, Mahmood Messkoub and Karin Astrid Siegmann, "How portable is social security for migrant workers? A review of the literature." A review commissioned by the International Institute of Social Studies, The Hague (Erasmus University Rotterdam), within the project on 'Migration, Gender and Social Justice', funded by the International Development Research Centre (Canada) September 2013.

¹⁸ ATUC has continued active engagement with other stakeholders in sharing experiences and policy advocacy through various fora, among which is the ASEAN Forum on Labour Migration (AFML). In the recent 11th AFLM, ATUC launched the ATUC Information System on Labour Migration (ATIS), a platform to improve access to complaints mechanisms and building knowledge management systems for documenting cases.

¹⁹ ATUC Statement on the 31st ASEAN Summit and Inclusive Regional Integration, November 22, 2017. The core principles are: ILO standards and international instruments are the starting points for protection of migrant workers; national treatment should be the minimum standard for all migrant workers; national minimum standards coverage for all migrant workers (regardless of status); effective implementation of cooperative arrangements for social protection, while protecting migrant workers' take-home pay and enabling them to access social services in receiving countries, with due consideration to the special circumstances of women and other workers in vulnerable situations; and portable social protection.

Pursuant to this, ATUC and ILO entered into an Implementation Agreement on strengthening the role of trade unions in advocating and protecting migrant workers' rights as well as providing relevant services in ASEAN (March 2018). The agreement identified priority areas of intervention in labour migration governance, as follows: ensuring stakeholder involvement in developing regional labour migration policies and facilitating their national implementation; improving access to complaints mechanisms and building knowledge management systems for documenting cases; forging an effective partnership with employers' organizations; spreading awareness about challenges in and benefits of labour migration; capacitating trade union members towards gender-responsive and youth-responsive interventions and developing a trade union environment that is more inclusive of migrant workers, women and the youth; and developing common positions on union membership for migrant workers and the role of trade unions in negotiating employment terms for migrants.

9. The following United Nations (UN) and International Labour Organization (ILO) instruments on human rights and labour are objective points of reference in assessing trade union and social protection institutions across AMS:
- *UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1969)*
 - *UN International Covenant on Economic, Social and Cultural Rights (CESCR, 1976)*
 - *UN Optional Protocol on CESCR (2013)*
 - *UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981)*
 - *UN Optional Protocol on CEDAW (2000)*
 - *UN International Convention on the Protection of All Migrant Workers and Their Families (CMW)*
 - *ILO Convention No. 97 (C.87), Migration for Employment [Revised] (1949)*
 - *ILO Convention No. 87 (C. 87), Freedom of Association and Protection of the Right to Organise (1948)*
 - *ILO Convention No. 98 (C. 98), Right to Organise and To Collective Bargaining (1949)*
 - *ILO Convention No. 118 (C. 118), Equality of Treatment [Social Security] (1962)*
 - *ILO Convention No. 157 (C. 157), Maintenance of Social Security Rights (1982)*
 - *ILO Recommendation 202 (R. 202), Social Protection Floors (2012)*
10. The UN human rights conventions are premised on equality of every human person and renunciation of discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These conventions explicitly recognize and obligate all State Parties to ensure that workers shall enjoy their economic, social and cultural rights. *CERD* recognizes the rights to work in favourable conditions, to form or join trade unions and to social security, among others.²⁰ Similarly, *CESCR*

²⁰ *Article 5*

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

X x x

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

recognizes the rights to just and favourable terms and conditions of employment,²¹ to join trade unions,²² and to social security.²³ CEDAW pays specific attention to social protection particularly to women in relation to, among others, pregnancy, maternity protection, family responsibilities and health care.²⁴

-
- (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;

²¹ **PART III**

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

²² **Article 8**

1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

²³ **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

²⁴ **PART III**

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

11. The UN instrument specific to migrant workers is the *CMW*, which covers the “entire migration process of migrant workers and members of their families” comprising the 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.²⁵ It sets forth other rights of migrant workers and their families who are documented or in a regular situation in the place of employment.²⁶ In relation to equality and non-discrimination, the convention adopts national treatment as a foundational principle, in which all migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other terms and conditions of employment.²⁷ It also explicitly recognizes the rights of migrant workers to form or join trade unions²⁸ and to be entitled to social security protection including social security coverage in their country of destination under certain conditions.²⁹

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

²⁵ Art. 1, No. 2.

²⁶ **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.

²⁷ **PART III: Human Rights of All Migrant Workers and Members of their Families**

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 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.

²⁸ **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 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 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.

²⁹ **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

12. The rights to form or join trade unions and to be covered by social protection under the UN instruments mentioned above are to be interpreted in accordance with the specialized ILO instruments promoting and protecting these rights. The specific ILO instrument for migrant workers is C. 97. On trade unionism, the main ILO instruments are C. 87 and C. 98. On social security, it is C. 102 which lays down the minimum standard for the level of social security benefits and the conditions under which these may be granted.³⁰ A later generation of social security conventions expanded C. 102, including two conventions specifically applicable to migrant workers (C. 118 and C. 157).

B. Number of Ratifications: the ASEAN Scorecard

13. Among UN instruments, *CEDAW*, *CERD* and *CESCR* have relatively high number of ratification across AMS. All Member States ratified *CEDAW*, seven ratified *CERD*,³¹ and seven ratified *CESCR*.³² In contrast, as comprehensive as *CMW* is, only three AMS ratified it.³³ Among ILO instruments, the number of ratifications is not high. *C. 97* has only one ratification;³⁴ *C. 87* has four;³⁵ *C. 98* has five;³⁶ *C. 102* has none; and *C. 157* has one each.³⁷ The region though is generally supportive of *ILO Recommendation 202 (R. 2002)*, *Social Protection Floors (2012)*. Shown in the table below are relevant UN and ILO instruments with ratification by ASEAN Member States.

TABLE 1. Status of signature, accession to or ratification by ASEAN Member States of selected UN and ILO instruments (/ - Signed, accessed to or ratified; X - Did not sign, access to or ratify.)

Country/ Instrument	Bru	Cam	Ind	Lao	Mal	Mya	Phil	Sing	Thai	Viet	Tim
CERD	X	/	/	/	X	X	/	/	/	/	/
CESCR	X	/	/	/	X	/	/	X	/	/	/
CESCR Protocol	X	/	X	X	X	X	X	X	X	X	/
CEDAW	/	/	/	/	/	/	/	/	/	/	/
CEDAW Protocol	X	/	/	X	X	X	/	X	X	X	/
CMW	X	/	/	X	X	X	/	X	X	X	/
C 97	X	X	X	X	X	X	/	X	X	X	X
C 87	X	/	/	X	X	/	/	X	X	X	/

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.

C. 118 a2. 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.

³⁰ The Convention covers the nine principal branches of social security, namely medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors' benefits.

³¹ Brunei, Malaysia and Myanmar have not ratified.

³² Brunei, Malaysia and Singapore have not ratified. Timor-Leste, in which ATUC has a national affiliate, ratified *CEDAW*, *CERD* and *CESCR*.

³³ Cambodia, Indonesia and the Philippines. Timor-Leste also ratified.

³⁴ The Philippines.

³⁵ Cambodia, Indonesia, Myanmar and the Philippines.

³⁶ Cambodia, Indonesia, Malaysia, the Philippines and Singapore. Timor-Leste also ratified C. 87 and C. 98.

³⁷ The Philippines for both conventions.

C 98	X	/	/	X	/	X	/	/	X	X	/
C 118	X	X	X	X	X	X	/	X	X	X	X
C 157	X	X	X	X	X	X	/	X	X	X	X

IV. Realizing Portable Union Membership

14. Is portable trade union membership possible under existing international and national legal instruments? What measures and institutional arrangements are helpful in enabling migrant workers to effectively realize their right to form or join trade unions or associations across AMS?³⁸ What about their right to collective bargaining?

15. Portability of trade union membership allows a migrant worker to exercise the right to form, join or retain membership in and be represented by a trade union not only in the State of employment but also in the State of origin or State of which he is a national. UN and ILO instruments clearly recognize the right of migrant workers to organize or to form or join trade unions, specifically in their States of employment but without foreclosing the possibility that they can also exercise the same right in their States of origin. A review of the state of ratification of these instruments and their incorporation into national laws and practices, however, suggests that operationalizing the idea of portability is a complex process.

A. Role of Relevant Conventions

16. *CMW* recognizes the right of migrant workers and their families in documented or in regular situations and in certain non-regular situations. For those in regular situations, migrant workers can engage in trade union activities in their State of employment, specifically:

“(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.”³⁹

17. Also for those documented or in a regular situation, *CMW* specifies that in States of employment, migrant workers and members of their families shall have the right to form associations and trade unions for the promotion and protection of their economic, social, cultural and other interests.⁴⁰ Further, States of employment shall facilitate, in accordance with their national legislation, the

³⁸ Para. 20, *ASEAN Consensus*.

³⁹ Article 26.

⁴⁰ Art. 40, No. 1.

consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities. Migrant workers may also enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.⁴¹

18. In both States of origin and destination, there is an obligation for State Parties to 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.⁴²
19. Finally, whether or not the migrant worker or member of his or her family is documented or in a regular situation, *CMW* also states that 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 or the protection of the rights and freedoms of others.⁴³
20. Whereas *CMW* focuses on the rights of a specific group at a specific place – i.e., migrant workers and their families at the State of employment -- the ILO instruments contains no such specification. The main ILO convention on migration for employment, *C. 97*, recognizes the rights of migrant workers to be protected from the time of recruitment to the time of employment. At this stage, the State of origin bears the responsibility to undertake protective measures. *C. 97* also obligates ratifying States to give migrant workers lawfully within its territory treatment no less favourable than that which it applies to its own nationals in respect of membership in trade unions and enjoyment of the benefits of collective bargaining in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities.⁴⁴ For this purpose, the State of employment bears the responsibility. On the other hand, *C. 87* and *C. 98* do not make explicit reference to migrant workers. The obligation to comply is on the State of employment which ratified the conventions, regardless of whether the employment involves a national of the State or a migrant worker.
21. Under the *ASEAN Consensus*, the law of the State of employment is given primacy. Thus, migrant workers have the right to join trade unions and associations subject to the national laws, regulations and policies of the receiving State.⁴⁵ Further, the receiving State will, in accordance with its national legislations, regulations, and policies, provide migrant workers the right to join trade unions and associations.⁴⁶ On the other hand, the sending State will ensure the right of returned migrant workers to establish associations, participate in policy making and programmes affecting migrant workers, and access services for returned migrant workers and their family members in accordance with the

⁴¹ Art. 42, No. 2 and 3.

⁴² Art. 42, No. 1.

⁴³ Art. 26, No. 2 and Art. 40, No. 2.

⁴⁴ Art. 6.1(a)(ii).

⁴⁵ Chapter 4, No. 19, Specific Rights of Migrant Workers, *ASEAN Consensus*.

⁴⁶ Chapter 6, No. 38, Obligations of Receiving States, *idem*.

national laws, regulations and policies of the sending State.⁴⁷

22. The obligation to afford recognition and effect to UN and ILO conventions is binding and obligatory on States that signed, ratified or accessed to these conventions. From a legal standpoint, therefore, obligatory incorporation of international instruments in the national systems across AMS rests on ratification of the relevant instruments. The situation in the region is such that net labour-sending States or States of origin have ratified more instruments than net labour-receiving States or States of employment. Specifically, only Cambodia, Indonesia and the Philippines ratified *CMW*. Only the Philippines ratified *C. 97*. Only Cambodia, Indonesia, Lao PDR and the Philippines ratified *C. 87*. All the ratifying States of *CMW*, *C.97* and *C. 87* are sending States. On the other hand, only two receiving States – Malaysia and Singapore – ratified *C. 98*. In other words, *CMW*, *C. 97* and *C. 87* do not have binding and obligatory force in the Member States for which the right is recognized – i.e., those currently classified as receiving States or States of employment.
23. Notwithstanding the above, it is noteworthy that the UN conventions with broader application which include the right of all workers to organize and to form or join trade unions enjoy a wider base of support in AMS. *CERD* recognizes the right of all workers without distinction to organize and to form or join trade unions.⁴⁸ *CERD* was ratified by seven of ten AMS, namely labour-sending Cambodia, Indonesia, Lao PDR, the Philippines and Vietnam, and labour-receiving Singapore and Thailand.⁴⁹ *CESCR* sets forth the economic, social and cultural rights to be enjoyed equally by all men and women, including the right of everyone to form and join the trade union of one's choice, subject only to the rules of the organization concerned, for the promotion and protection of one's economic and social interests.⁵⁰ It was ratified by seven of ten AMS, namely Cambodia, Indonesia, Lao, Myanmar, the Philippines and Vietnam.⁵¹
24. Adding up the States which bound themselves to at least one instrument on the right to self-organization and the right to form or join trade unions, the only State in AMS which does not have an explicit international obligation to recognize and respect this right is Brunei Darussalam (although it must be mentioned that it is also committed to respect this right through the *ASEAN Declaration* and the *ASEAN Consensus*). In addition, all AMS are also members of the ILO and are covered by the general supervisory procedures of the *ILO Constitution* and the *Declaration of Fundamental Principles and Rights at Work*, regardless of ratification of specific conventions.
25. Thus, even with the low number of ratification, the specific provisions of international instruments, as mentioned above, still exert strong moral suasion, if not legal force, for AMS to continue developing national and regional institutions that will allow migrant workers the fullest exercise of their right to organize and

⁴⁷ Chapter 5, No. 28, *idem*.

⁴⁸ Art. 5, (e)(ii).

⁴⁹ Timor Leste, in which ATUC has a national affiliate, also ratified.

⁵⁰ Art. 8.1(a). The article also states that no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

⁵¹ Timor Leste also ratified.

to form or join unions, and subsequently to engage in collective bargaining. ATUC will continue to pursue its advocacies in this direction without losing sight of its longer-term continuing campaign for ratification of all relevant conventions.

B. Role of National Laws

26. Even without ratifying the relevant conventions, States are still morally bound to be guided by the principles of these conventions in crafting its national laws and regulations. An important point of inquiry, therefore, is whether national laws across AMS provide adequate space for migrant workers to effectively exercise their right to form or join unions. National laws and regulations on the matter show that across AMS, legal principles connected to nationality, employment status and place of employment inevitably affect the exercise of this right.
27. With respect to nationality, at one end of the spectrum is open union membership regardless of nationality. Cambodia's trade union law, which is the most recent trade union law enactment among AMS, declares that workers and employers have, without distinction whatsoever, the right to establish a worker union or employer association of their choice. Thus, all workers and employers, regardless of their race, colour, sex, belief, religion, political opinion, nationality, social origin, or health status, shall have the right to be a member of a worker union or employer association.⁵² The law also allows foreign nationals to become leaders or persons with responsibility in the administration of the worker union.⁵³ At the other end of the spectrum are States which limit the right. In the Philippines, aliens or non-nationals are prohibited from forming or joining a trade union, except when their employment is covered by the appropriate employment permit and their State of origin grants a reciprocal right to Filipino migrant workers.⁵⁴ In Vietnam, only laborers who are Vietnamese may establish, participate in and operate a trade union.⁵⁵ Between the two extremes are Indonesia, Malaysia, Singapore and Thailand whose trade union laws neither explicitly exclude nor include migrant workers from exercising the right.
28. Across AMS, the right to form, join or retain membership in a trade union is generally tied to the status of being in an employment relationship and the place of employment. In Indonesia, every worker/ laborer has the right to form and become a member of a trade union/ labor union,⁵⁶ a worker/laborer being defined as any person who works for a wage or other forms of remunerative exchange.⁵⁷ In Malaysia, the right to form, join or retain membership in a trade union is

⁵² Arts. 5 and 6, Law on Trade Union (Royal Kram NS/RKM/0516/007 dated 17 May 2016), at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103389/125600/F1146872348/KHM103389%20Eng.pdf>. Accessed on 17 November 2018.

⁵³ Art. 20, *idem*.

⁵⁴ Art. 284 [279] of the Labor Code prohibits all aliens, natural or juridical, as well as foreign organizations from engaging directly or indirectly in trade union activities without prejudice to normal contacts between Philippine labor unions and recognized international labor centers, provided that aliens working in the country with valid permits may exercise the right to self-organization and join or assist labor organizations of their own choosing for purposes of collective bargaining, and that these aliens are nationals of a country which grants the same or similar benefits to Filipino workers.

⁵⁵ Article 5.1, Law on Trade Union (2012), at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91648/126466/F2018106582/VNM91648%20Eng.pdf>. Accessed on 17 November 2018.

⁵⁶ Art. 5 (1), Act Concerning Trade Union/Labor Union (Act No. 21: 2000), at <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/57553/119982/F313591142/IDN57553%20Eng.pdf>. Accessed on 17 November 2018.

⁵⁷ Art 1 (6), *idem*.

subject to the qualification that one must be *bona fide* employed in the establishment, industry or occupation in which the union is registered.⁵⁸ In the Philippines, all persons employed have the right to self-organization and to form, join or assist labor organizations of their own choosing for purposes of collective bargaining,⁵⁹ with an employee being eligible to be a union member on the first day of employment.⁶⁰ In Singapore, “workmen” have the right to form or join a trade union, with a “workman” being any person who has entered into or works under a contract of service or apprenticeship with an employer, whether the contract is for manual labour, clerical work or otherwise, is express or implied, oral or in writing.⁶¹ In Thailand, persons who become members of a labour union shall be employees of the same employer, with the objective of the union being to improve terms and conditions of employment.⁶² In Vietnam, members of a trade union are persons working in agencies, organizations and enterprises.⁶³

C. Evolving a Portable Organizing Model

29. National trade union laws and regulations in AMS generally require the migrant worker to first have the status of being in an employment relationship as a condition to form or join a union in the State of employment. There is no issue with this requirement in regard to one whose place of work is also his place of nationality or permanent residence and whose employment is not for a limited term. But applied to a migrant worker, the short term of his employment, unfamiliarity with the laws of the State of employment, and in some instances relative isolation from or lack of communication with other workers can create practical constraints and weaken his incentive to form or join.
30. May the worker exercise the right to self-organization before he is actually employed or at his State of origin instead of at his State of employment? May a migrant worker retain membership in a trade union after the term of his employment ends, or between one term or place of employment to the next? What policy can ensure that the right follows the worker wherever he goes so that he can exercise it continuously and effectively?
31. In this regard, three provisions in C. 87 are relevant. One, freedom of choice under which workers 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.⁶⁴ Two, the right of workers' and employers' organisations to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes, without

⁵⁸ Part V, No. 26, Trade Union Act of 1959 (Act 262), as amended, at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/10327/99503/F626669980/MYS10327.pdf>. Accessed on 17 November 2018.

⁵⁹ Art. 253 [243], Labor Code of the Philippines.

⁶⁰ Art. 297 [277] (c), *idem*.

⁶¹ Part I, No. 2, Trade Unions Act, Revised Edition 2004, at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/54098/65129/F-1441370165/SGP54098.pdf>. Accessed on 17 November 2018.

⁶² Art. 95 in relation to Art. 86, Labour Relations Act (B. E. 2518, 1975), at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/14497/132167/F-577929038/THA14497%20Eng.pdf>. Accessed on 17 November 2018.

⁶³ Art. 5, Law on Trade Union (2012), *idem*.

⁶⁴ Art. 2, ILO Convention No. 87.

interference or restriction on its lawful exercise by government authority.⁶⁵ And three, the right of trade unions to federate and confederate nationally and affiliate internationally,⁶⁶ a right that is equally recognized in the *CESCR*.⁶⁷

32. Based on these provisions, a practical model of portable trade union membership not dependent on State action through legislation or regulation but on the exercise of trade union autonomy can emerge. As trade unions have full freedom to define the terms of membership subject only to the interests of public order and national security as defined by the State in which they operate, they can incorporate in their constitution and rules provisions 1) allowing them to accept or retain members who do not have the status of being in an actual employment relationship even if they are still in the State of origin, and 2) indicating their international trade union affiliations. Once deployed, the migrant worker can then become a member or at least be represented by the affiliate trade union in the State of employment. This kind of “union passport” effectively internalizes the legal and practical constraints discussed above, specifically the precondition that one must be actually employed in the State of employment before he can exercise his right to organize.
33. For this model to be effectively operationalized, trade unions themselves will have to restructure possibly along industry, occupational or skills categories or sectors, with special arrangements to those migrant workers who are engaged in occupations that are difficult to reach (i.e., household or domestic workers). National affiliates should also make representations with their respective governments so that this expanded trade union model will be officially and formally recognized.

V. Promoting Social Security and Protection

34. Under *C. 102*, the nine principal branches of social security are 1) medical care, 2) sickness, 3) employment injury, 4) family, 5) maternity, 6) unemployment, 7) old age, 8) invalidity, and 9) survivors' benefits. Benefits under the first five are available while the covered worker is employed, while the rest are available when the covered worker is not employed or can no longer be employed. The development of social security institutions across AMS is uneven, and within countries such institutions tend to be scattered and fragmented. This is to a large extent due to differences in political and economic systems, levels of economic and institutional development, and large informal sector share in employment especially among the sending countries. Although existing legislations embody elements of international social security conventions, not one among the AMS ratified *C. 102*. In fact, the Philippines is the only country which ratified ILO social security conventions.⁶⁸

A. General social security laws

⁶⁵ Art. 3, *idem*.

⁶⁶ Art. 5, *idem*. Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

⁶⁷ Art. 8.1(b) provides that trade unions shall have the right to establish national federations or confederations and the right of the latter to form or join international trade-union organizations.

⁶⁸ *Convention 118* and *Convention 157*, both ratified by the Philippines in 1994.

35. All AMS have social protection schemes in some form but none cover all nine branches. The areas covered include maternity, old age/pension, sickness, injury and disability, death, and survivorship including adaptation benefits. The common types of social security programs are social insurance, provident fund, employer liability programs, employees' compensation which is typically a distinct program, and maternity protection which may or may not be a part of the general social security program. The most common and most developed social security provisions pertain to old age, disability or death, work injury and maternity protection. Unemployment insurance is present in two countries⁶⁹ while a housing program exists in one.⁷⁰
36. As to the financing and design of programs, there are several variations. One is employer liability directly financed by employers. Another is social insurance managed by the State and typically contributory except for voluntary members or self-employed where workers solely contribute. A third are contributory provident fund programs managed by a Board consisting of representatives of Fund members. A fourth is an employees' compensation program paid for solely by the employer and managed by the State.
37. The idea of a social protection floor has been mentioned in regional declarations of governments. How this has become part of the policy agenda of individual governments is not readily apparent, although at least some elements of a social protection floor may be part of national social and welfare policies. One Member State's law institutionalizing a State-funded "staircase model" appears to deliberately integrate features of a social protection floor. The law mandates the extension of social security coverage to the whole population in the categories of health, work injury, old age, and death of the breadwinner. The law follows a staircase approach with non-contributory schemes for the poor, contributory schemes for the self-employed, and statutory social security schemes for formal sector workers.⁷¹
38. The ultimate aim of social security and protection is universal coverage, which is a policy declaration in some AMS. However, eligibility requirements and qualifying conditions vary. Programs may require as a condition for receiving benefits a minimum length of service with a particular employer or minimum number of contributions from both employer and employee, or a ceiling or maximum amount of benefits that can be availed of, or behavior clauses on the part of the covered worker, or citizenship or nationality requirements. and may exclude certain groups of workers such as informal workers and migrant workers. Funding, adequacy of benefits and sustainability are also persistent issues. As a result, certain groups of workers tend to be excluded from coverage particularly informal and low-skilled workers, those under short term contracts, and migrant workers particularly the circular migrants.
39. A recent study finds many challenges and shortcomings on migrant workers' access to social protection within AMS. Legislative barriers limiting migrant

⁶⁹ Thailand, which is voluntary and self-funded; and Vietnam, which is contributory.

⁷⁰ Philippines.

⁷¹ Thailand, through the National Social Security Law (Law No. 40/4004).

workers' access to social security benefits are compounded by the fact that social security systems cover only part of the labour force. In some AMS countries, migrant workers are often employed in sectors of the labour market that are either not covered by social security or in which compliance with social security laws are poorly enforced. A worker's specific immigration status (including when a person is an undocumented migrant worker) may make him or her ineligible for accessing benefits. It may also be that the worker is not covered by social security systems of either the host or the home country, as a result of any or a combination of lack of extra-territorial application of domestic laws; nationality and/or residence requirements; a contribution period required for long-term (e.g., retirement) benefits; worker is employed in the informal economy; and documentation and other bureaucratic/administrative barriers. Other more specific impediments include legal restrictions relating to the scope of application of protective legislation, as well as factors impacting directly and indirectly on migrant workers, such as exclusion or exemption of categories of workers from protection (in particular domestic workers); exclusion of smaller employers; the inability of migrant workers to meet the eligibility criteria for accessing certain social security benefits, in particular long-term benefits such as an old-age pensions; the inadequate time that a migrant worker has to finalize social security benefit payments upon termination of employment; and the large-scale absence of portability arrangements in the legal systems of ASEAN countries of destination and countries of origin. In most AMS there are a large variety of measures applicable to various categories of migrant workers regarding access to social security benefits.⁷²

40. Further, social security mechanisms are typically designed to be country-specific, structured to serve workers employed for a continuous period within the country, not those outside it. In this regard, migrant workers have inherent limitations to be covered by social security. Some States of employment do not allow migrant workers social security coverage or exclude them from tax-funded or other social protection schemes. In cases where coverage is allowed, there may be conditions such as completion of a vesting or qualifying period before one can be eligible for the benefits. The short duration of employment may render compliance with the vesting requirements impossible. Practical barriers (e.g. documentation, language, lack of information) to effectively access social security protection systems. The ILO notes that migrant workers working in the formal sector are legally covered by existing national social security systems, but may face challenges in exercising their rights to benefits, particularly in the case of old-age pensions. The majority of migrant workers, confined in low-skilled and low-paid jobs in the informal sector, are still excluded from national schemes in the countries of destination. Some countries (such as Indonesia, Philippines and Sri Lanka) have developed specific schemes to cover their nationals while they are working abroad.⁷³

B. Approaches in Dealing with the Situation of Migrant Workers

41. *MCW* recognizes these complexities by adopting the national treatment standard

⁷² Marius Olivier, "Social protection for migrant workers in ASEAN: Developments, challenges, and prospects," International Labour Organization (2018), pp. xiv-xv.

⁷³ ILO. World Social Protection Report (2018), p. 150.

while encouraging bilateral and multilateral negotiations between States of employment and States of origin. It thus provides:

- “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.”
42. There are generally four approaches in extending social protection and social security to migrant workers: i) unilateral action by the sending State; ii) bilateral agreements on social security between sending and receiving States; iii) multilateral agreements among several sending and receiving States; and iv) international instruments such as treaties and conventions.
 43. The Philippines, which has the biggest number of overseas workers among AMS, has the most developed model for the first approach. It has taken unilateral actions to provide social protection to its temporary migrant workers (known as overseas Filipino workers or OFWs) as well as permanent migrants in a foreign country. These migrant workers can enjoy the same social security benefits as private sector employees if they enroll as self-employed members of the country’s social security system.⁷⁴ This essentially makes their social security protection self-funded. Recruitment agencies are required to secure a compulsory insurance policy for each migrant worker, at no cost to the latter, effective for the duration of the migrant worker’s employment to cover accidental death; permanent total disablement; repatriation cost of the worker when his/her employment is terminated without any valid cause, including the transport of his or her personal belongings; subsistence allowance benefit for a migrant worker who is involved in a case or litigation for the protection of his/her rights in the receiving country; money claims arising from employer’s liability; provision for compassionate visit when a migrant worker is hospitalized; medical evacuation; and medical repatriation.⁷⁵ Welfare benefits are also provided to OFWs registered with the Overseas Workers Welfare Administration including, among others, social benefits such as death and disability benefits, health care benefits, and education and training benefits.⁷⁶
 44. While there are bilateral labour agreements among some AMS, there is no existing bilateral agreement specific to social security. A prototype of what could

⁷⁴ Republic Act No. 8282 (1997), Sec. 9.

⁷⁵ Republic Act No. 8042 (1995), Sec. 37-A, as amended by Republic Act No. 10222 (2010). This is in addition to the performance bond required to be posted by recruitment agencies under Sec. 10 of R.A. No. 8042.

⁷⁶ Republic Act No. 10801 (2015), Sec. 35.

evolve into a social protection scheme established in the destination country is that established through the Memorandum of Understanding (MOU) between the governments of Cambodia and Thailand, under which the authorized agencies in the country of employment are required to set up a savings fund to which migrant workers shall contribute 15% of their monthly salary. The accumulated contributions are to be refunded to them upon termination of their employment and return to their home country.⁷⁷

45. Pursuing specific bilateral social security agreements is not by any means easy. Receiving States typically have more developed social protection and social security legislations than sending States. Because the principle of reciprocity is part of any bilateral agreement, both receiving and sending States may face political and practical constraints. Sending States are in a particularly weak position, having no leverage to negotiate unless they first improve the social protection and security provisions for their own nationals at home.
46. As for the third and fourth approaches, it can be recalled that following the 2008-2009 financial and economic crisis and as part of ASEAN's regional integration process, AMS have advocated for improved social protection and progressive extension of coverage to all following a life-cycle approach. In 2013, during its 23rd Summit in Brunei Darussalam, this led to the adoption of the ASEAN Declaration on Strengthening Social Protection by the ten ASEAN Heads of State, pledging the completion of social protection floors as a priority to achieve growth with equity. Committed to actualizing this Declaration, in 2015 the Member States agreed on a Regional Framework and Plan of Action for its implementation. Increased social protection is also a core priority of the 2016–20 Senior Labour Officials Meeting's Work Programme. Currently the Member States are defining a monitoring framework to measure progress in extending social protection, using relevant SDG targets and indicators. This instrument will be used to gauge compliance of the Member States with the 2013 Declaration. To this end, AMS have agreed to collaborate on policy-oriented research on topics such as current and future trends of pension systems, social protection of migrant workers, the challenges of extending coverage to workers in the informal economy, financing social protection and monitoring progress in social protection.⁷⁸
47. Nevertheless, ASEAN is threading very slowly on social security. There is no existing ASEAN-wide social protection or social security agreement that can cover migrant workers wherever they are in the region. On the other hand, the level of ratification of international conventions and treaties on social security across AMS is low. The *ASEAN Consensus* does not expressly mention social security, although it does have some provisions allied with social protection, such as the provision that Receiving State will provide migrant workers with access to adequate medical and health care in accordance with the applicable laws,

⁷⁷ Arts. XI-XII, Memorandum of Understanding Between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Cooperation in the Employment of Workers (may 31, 2003). Under the MOU, the two countries have agreed to take all necessary measures to ensure proper procedures for the employment of workers; effective repatriation of workers who have completed terms and conditions of employment or are deported by relevant authorities of the other party before completion of the terms and conditions of their employment; due protection of workers to ensure that there is no loss of the rights and protection of workers and that they receive the rights that they are entitled to; and protection of, and effective action against, illegal border crossings, trafficking of illegal workers and illegal employment of workers.

⁷⁸ ILO. World Social Protection Report (2018), p. 148, citing ILO and ADBis (2014).

regulations and policies of the Receiving State.⁷⁹ Also, migrant workers shall have the right to transfer their earnings and savings in any modes of transfer in accordance with laws and regulations on currency transmission in the Receiving and Sending States.⁸⁰ Further, the receiving State shall ensure that, if migrant workers leave the Receiving State, they should not lose their rights to benefits arising from their employment in accordance with the national laws, regulations, and policies of the Receiving State.⁸¹

C. ATUC's Advocacy Agenda

48. Clearly, the bigger task is to translate the aspirational pronouncements to concrete operational mechanisms that will give effect to the right to social security and protection as a portable right attached to the migrant worker taking into account its spatial dimension (that is, the migrant worker can effectively exercise and enjoy the right wherever he is) as well as its temporal dimension (that is, the migrant worker has the continuing ability to accumulate or totalise, aggregate and move his or her contributions wherever he or she goes over his or her entire working life).
49. For this purpose, ATUC proposes national, sub-regional and regional consultations among governments and all stakeholders with two major agenda items. The first item in the agenda will be to effectively operationalize and implement the points recognized in the *ASEAN Consensus*, specifically:
 - How to ensure that migrant workers, especially the low-skilled and those in vulnerable occupations, will not lose their rights or benefits arising from their employment when they leave the receiving State.
 - How to promote the right of migrant workers to transfer their earnings and savings in any modes of transfer in accordance with laws and regulations on currency transmission in the receiving and sending States.
 - How to facilitate enrolment and access of migrant workers in social security systems in States of origin.
50. The points emphasised in the *ASEAN Consensus* tend to lean toward a unilateral approach, with sending States ultimately being primarily responsible for setting the mechanisms for totalisation and aggregation. A second item in the agenda, therefore, is to find feasible combinations of unilateral, bilateral or multilateral approaches. The basic talking points in this regard are the following:
 - Unilateral approaches should be guided by international labour standards, with a view of harmonising conditions of coverage, eligibility, access, and benefits across countries consistent with such standards.

⁷⁹ No. 41, *ASEAN Consensus*.

⁸⁰ No. 18, *idem.*

⁸¹ No. 17 (b), *idem.*

- States of employment should provide basic health, medical and repatriation benefits and assistance for migrant workers who suffer occupational disease, injury or death arising from employment;
 - States of employment and origin should agree on concrete ways to provide legal assistance and fair treatment to migrant workers in distressed situations, consistent with international human rights conventions;
 - Migrant workers should be allowed membership in the social security system of the State of employment, and should have equitable access and entitlement to the social security benefits accorded to nationals of the State of employment.
 - There should be an effective regional mechanism to enable the totalisation of social security contributions from and aggregation of all services rendered by the migrant worker under various contracts and regardless of the destination country for purposes of qualifying for social security benefits in the current State of employment or in the home State.
 - There should be regional common principles and procedures for the withdrawal or transfer of totalised or accumulated contributions upon transfer or termination of employment or upon retirement.
51. Complementary to the above agenda, ATUC will continue to push for effective universal social protection coverage across AMS, particularly the inclusion of migrant workers in building the concept of social protection floors. It will also continuously strengthen its capacity to provide pre-departure and re-integration assistance, enhance arrangements among national affiliates in providing on-site services and assistance, and disseminate information on social security.

#####