

# Realizing the rights of migrant workers to social protection

*An action paper by the ASEAN Trade Union Council (ATUC)*



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### About the ASEAN Trade Union Council

The ASEAN Trade Union Council (ATUC) is a regional grouping of 18 national labour centres and trade union organizations in nine (9) ASEAN member states except Brunei but including Timor Leste. Representing 19.5 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 Cambodian Labour Confederation (CLC); Cambodian Confederation of Trade Unions (CCTU); Cambodian Confederation of Unions (CCU); Confederation of Indonesian Trade Unions (K-SPI/CITU); Confederation of All Indonesian Trade Unions (K-SPSI/CAITU); All Indonesian Trade Union Confederation (K-SBSI/AITUC); 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 (NTUC Phl); 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 Confederation (TLTUC); and Vietnam General Confederation of Labour (VGCL).

ATUC's principal objectives are:

- To represent the collective interests of workers in ASEAN countries at all appropriate policy-formulating and decision-making forums;
- To function as a collective and cohesive body to promote the well-being of workers in ASEAN countries;
- To network and interact with ATUC affiliates with regards to common issues affecting workers;
- To undertake research, education and training programmes for labour activists from ATUC affiliates;
- To help ATUC affiliates increase their membership levels through mutual cooperation and assistance; and
- To hold periodic meetings with a view to identifying common problems, challenges and issues and finding solutions for them in the true spirit of unity and solidarity.

## **About International Labour Organization’s Bureau for Workers Activities (ILO-ACTRAV)**

The Bureau for Workers’ Activities (ACTRAV) is the main link between the International Labour Office and the world of work through one of its constituents: workers’ organizations. ACTRAV ensures that the concerns and interests of workers’ organizations are taken into consideration in the policy development and activities of the International Labour Office, both at Headquarter and in the Field. ACTRAV supports workers’ organizations in the defense and promotion of workers’ rights.

## **About the ILO TRIANGLE in ASEAN Programme**

TRIANGLE in ASEAN (2015-2025) is a partnership between the Australian Department of Foreign Affairs and Trade (DFAT), the Global Affairs Canada (GAC), and the ILO. TRIANGLE in ASEAN delivers technical assistance and support with the overall goal of maximizing the contribution of labour migration to equitable, inclusive, and stable growth in ASEAN. TRIANGLE in ASEAN works in close cooperation with ASEAN bodies, governments, and social partners to achieve three inter-linking objectives: strengthening protection of the rights of migrant workers, enabling migrants to contribute to and benefit from economic and social development, and establishing labour mobility systems that are gender-responsive and increase the efficiency of labour markets.



# I. INTRODUCTION

1. Migrant workers should not be treated less favourably than nationals with respect to social security benefits. It is the position of the ASEAN Trade Union Council (ATUC) that migration policies and institutions must always be built on the recognition and portability of social protection.
2. This paper explores the legal basis and feasibility of promoting the portability of migrant workers' social protection. ATUC commissioned Atty. Benedicto Ernesto R. Bitonio Jr to draft this paper in order to guide ATUC advocacy work and actions, with support from ILO's TRIANGLE in ASEAN programme.



## II. BACKGROUND

3. 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. They also estimated that intra-ASEAN migration had reached 6.9 million, 48.7 per cent of whom were women.
4. A significant component of intra-ASEAN migration involves labour migration or migration for employment. A “migrant worker” is defined in ILO’s Migration for Employment Convention (Revised), 1949 (No. 97) as a person who migrates from one country to another with a view to being employed otherwise than on his or her own account. The scope of this convention excludes frontier workers, the short-term entry of members of the liberal professions and artistes, and seafarers. Additionally, ILO’s Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) follows this definition but excludes two additional categories including (1) persons coming specifically for purposes of training or education and (2) persons admitted temporarily to a country at the request of their employer to undertake specific duties or assignments for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.
5. 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 in either one country or 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.
6. ASEAN demonstrates the dynamics of intra-regional labour migration in stark terms. Four AMS – Brunei Darussalam, Malaysia, Singapore, and Thailand<sup>1</sup> – 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 AMS – Cambodia, Lao PDR, Indonesia, Myanmar, the Philippines, Thailand, and Vietnam – deployed over 2.1 million migrant workers within ASEAN,<sup>2</sup> much of whom were in the low- and medium-skill categories under temporary or short-term contracts.<sup>3</sup> 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.<sup>4</sup>

7. 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.<sup>5</sup> From the *ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers (2007)*<sup>6</sup> to the *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017)*,<sup>7</sup> AMS have sought to maximize the benefits of labour migration while protecting migrant workers, taking into account decent work objectives and the fundamental principles and rights at work. These documents complement similar recent initiatives at the international level, such as the *Bali Declaration*<sup>8</sup> and *Global Compact for Safe, Orderly and Regular Migration (GCM)* adopted in December 2018<sup>9</sup>.



### III. THE PROBLEM

8. Governing and managing migrant workers poses 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 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 conflict of law and enforcement issues, among others.
9. Within AMS, migrant workers are mostly temporary and low-skilled, with women comprising a disproportionate share. Sometimes working in relative isolation from other workers and with restricted freedom of movement, migrant workers have limited opportunities to socialize and organize, as well as limited access to counselling, welfare, complaint, and redress mechanisms. At once everywhere yet invisible and voiceless, migrant workers have very little economic, political, or bargaining power in their states of employment. Hailed as heroes in their states of origin while they are still working, they often face insecurities arising from episodes of unemployment and the absence of old-age pensions when they return home.
10. **Central to the protection of migrant workers' rights is the effective recognition of 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 and portability of social protection.** 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 are 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.

**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).<sup>10</sup> 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, the objectives of decent work,<sup>11</sup> and its statement of core principles.<sup>12</sup>**



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## IV. THE LEGAL FRAMEWORK

### A. International instruments

11. The following United Nations (UN) and International Labour Organization (ILO) instruments on human rights and labour standards are objective points of reference in assessing social protection institutions across AMS:
  - *ILO Convention No. 19 (C.19), Equality of Treatment (Accident Compensation) (1925)*
  - *ILO Convention No. 97 (C.87), Migration for Employment [Revised] (1949)*
  - *ILO Convention No. 102 (C.102) Social Security (Minimum Standards) (1952)*
  - *ILO Convention No. 118 (C. 118), Equality of Treatment [Social Security] (1962)*
  - *ILO Convention No. 143 (C.143), Migrant Workers (Supplementary Provisions) (1975)*
  - *ILO Convention No. 157 (C. 157), Maintenance of Social Security Rights (1982)*
  - *ILO Recommendation 202 (R. 202), Social Protection Floors (2012)*
  - *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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981)*
  - *UN International Convention on the Protection of All Migrant Workers and Their Families (CMW)*
  
12. ILO Migration for Employment Convention No. 97 specifies that migrant workers should not be treated less favourably than nationals with respect to social security benefits. Conditions such as residency requirements may be imposed to the same extent as they apply to nationals. Exceptions are permissible only with respect to benefits which are payable solely from public funds, and benefits paid to persons who do not satisfy the conditions required for a normal pension. If migrant workers or their family members leave their country of employment, the benefits should follow the migrant

workers wherever they may reside. ILO Migrant Workers (Supplementary Provisions) No. 143 further notes that irregular migrant workers who cannot be regularized should, on the basis of their past employment, be able to claim social security benefits under the same conditions as nationals.<sup>13</sup>

13. Social Security (Minimum Standards) Convention No. 102 lays down the minimum standard for the level of social security benefits and the conditions under which these may be granted.<sup>14</sup> A later generation of social security conventions expanded C. 102, including two conventions specifically applicable to migrant workers (C. 118 and C. 157). An important standard ratified by six out of 10 AMS is the Equality of Treatment (Accident Compensation) Convention No. 19, which requires equal treatment of national and foreign workers.
14. 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 and to social security, among others.<sup>15</sup> Similarly, *CESCR* recognizes the rights to just and favourable terms and conditions of employment<sup>16</sup> and to social security.<sup>17</sup> *CEDAW* pays specific attention to social protection of women, particularly in relation to, among others concerns, pregnancy, maternity protection, family responsibilities and health care.<sup>18</sup>
15. 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.<sup>19</sup> It sets forth other rights of migrant workers and their families who are documented or in a regular situation in the place of employment.<sup>20</sup> 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.<sup>21</sup> It also explicitly recognizes the rights of migrant workers to be entitled to social security protection, including social security coverage in their country of destination under certain conditions.<sup>22</sup>

## B. Number of ratifications: the ASEAN scorecard

16. Among ILO instruments, the most ratified convention on migrant workers' social protection is the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), which has been ratified by six out of ten AMS. C. 97 has only one ratification;<sup>23</sup> C. 102 has none; and C. 157 has one.<sup>24</sup> The region is generally supportive of ILO Recommendation 202 (R. 2002), *Social Protection Floors* (2012).
17. Among UN instruments, *CEDAW*, *CERD*, and *CESCR* have a relatively high number of ratification across AMS. All Member States ratified *CEDAW*, seven ratified *CERD*,<sup>25</sup> and seven ratified *CESCR*.<sup>26</sup> In contrast, as comprehensive as *CMW* is, only three AMS ratified it.<sup>27</sup> 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; ✗ - Did not sign, access to, or ratify.)**

Country/ Instrument	Bru	Cam	Ind	Lao	Mal	Mya	Phil	Sing	Thai	Viet
CERD	✗	✓	✓	✓	✗	✗	✓	✓	✓	✓
CESCR	✗	✓	✓	✓	✗	✓	✓	✗	✓	✓
CEDAW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CMW	✗	✓	✓	✗	✗	✗	✓	✗	✗	✗
C 19	✗	✗	✓	✗	✓	✓	✓	✓	✓	✗
C 97	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗
C 87	✗	✓	✓	✗	✗	✓	✓	✗	✗	✗
C 98	✗	✓	✓	✗	✓	✗	✓	✓	✗	✗
C 118	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗
C 157	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗

## V. PROMOTING SOCIAL SECURITY AND PROTECTION

18. 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*.

### A. General social security laws

19. 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 countries,<sup>28</sup> while a housing program exists in one.<sup>29</sup>
20. 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.

21. 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 – in the categories of health, work injury, old age, and death of the breadwinner – to the whole population. 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.<sup>30</sup>
22. 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, a minimum number of contributions from both employer and employee, a ceiling or maximum amount of benefits that can be availed of, behavior clauses on the part of the covered worker, or citizenship or nationality requirements. In addition, AMS 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 (especially circular migrants).
23. A recent study finds many challenges and shortcomings for migrant workers' access to social protection within AMS. Legislative barriers limiting migrant 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 is a large variety of measures applicable to various categories of migrant workers regarding access to social security benefits.<sup>31</sup>

24. 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 barriers to social security coverage. 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 also exist. The ILO notes that migrant workers employed 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 to low-skilled and low-paid jobs in the informal sector, are still excluded from national schemes in 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.<sup>32</sup>

## **B. Approaches in dealing with the situation of migrant workers**

25. *CMW* recognizes these complexities by adopting the national treatment standard 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.”

26. 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.
27. The Philippines, which has the greatest 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, who can enjoy the same social security benefits as private sector employees in the Philippines. Under a new social security law, all sea-based and land-based OFWs are now compulsorily covered by the Philippine social security system. For sea-based OFWs, the manning agencies are declared to be agents of their foreign principals and are considered the employers for purposes of remitting social security contributions. On the other hand, land-based OFWs are declared as compulsory members and are considered in the same manner as self-employed persons.<sup>33</sup> 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 if 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.<sup>34</sup> 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.<sup>35</sup>

28. While there are bilateral labour agreements among some AMS, there is no existing bilateral agreement specific to social security. A prototype of what could evolve into a social protection scheme is 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.<sup>36</sup>
29. 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.
30. 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 including 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.<sup>37</sup>
31. 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. In addition, 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 States will provide migrant workers with access to adequate medical and health care in accordance with the applicable laws, regulations, and policies of the Receiving State.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

### C. ATUC's advocacy agenda

32. Clearly, the bigger task is to translate the aspirational pronouncements to concrete operational mechanisms that will give effect to social security and protection as a portable right attached to the migrant worker. This must take into account its spatial dimension (that is, the migrant worker can effectively exercise and enjoy the right wherever he or she is) and 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).
33. 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.
34. 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.
- 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, 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.

35. The first challenge is how to include the discussion on a regional approach to social security in the technical and policy agenda of ASEAN governments. Since the *ASEAN Consensus* leans toward a unilateral approach, a strategic step moving forward is for ATUC to directly initiate the process with a **model regional social security agreement** that addresses the issues and operationalizes the principles in the first and second agenda items described above. To develop this model, ATUC will need technical support in specific activities and outputs, including but not limited to:

- i) Preparation of a discussion paper to serve as the basis for crafting a model agreement
  - Updated mapping of laws, regulations, and institutions on social security and social protection across ASEAN.
  - Reviewing and surveying of relevant bilateral agreements within ASEAN and regional social security agreements outside ASEAN.
  - Identification of possible substantive provisions to be included in a model social security agreement, including potential issues, constraints, and recommended options.

- ii) Drafting of an initial model agreement
    - A national technical workshop among national affiliates and other stakeholders, guided by the discussion paper.
    - A regional technical workshop to formulate an initial model agreement.
  - iii) Finalization of the initial model agreement
    - High-level workshop and discussion of the initial model agreement among ATUC Leaders.
    - Adoption of a final model agreement.
    - Adoption of communication and advocacy strategy.
  - iv) Actual advocacy
    - Presentation of the model social security agreement to individual ASEAN Member States.
    - Inclusion of the model agreement in the technical and policy agenda of relevant regional forums, particularly the ASEAN Labour Ministers Meeting, the ASEAN Senior Labour Officials Meeting, and the ASEAN forum of Migrant Labour (AFML).
    - Building of coalition of trade unions, NGOs and other stakeholders to support the model agreement.
36. 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.

- 1 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.
- 2 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.
- 3 ADB and ILO, *ASEAN Community 2015: Managing Integration for better jobs and shared prosperity (2014)*, see pp. 83-100.
- 4 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.
- 5 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.
- 6 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 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.

- 7 *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers*. Signed at the 31<sup>st</sup> 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.
- 8 Adopted at the 16<sup>th</sup> 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.
- 9 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 in April 2017. The General Assembly then held an inter-governmental conference on international migration in December 2018, adopting the global compact.
- 10 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.
- 11 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 build knowledge management systems for case documentation.
- 12 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 the 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 the 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.

- 13 ILO. International Labour Standards on Migrant Workers' Rights: Guide for Policymakers and Practitioners in Asia and the Pacific (Bangkok, 2007).
- 14 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.
- 15 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:
  - (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;
    - (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;
- 16 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.

#### 17 Article 9

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

#### 18 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.
  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.

19 Art. 1, No. 2.

20 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.

21 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.
- 22 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.
  - 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.
- 23 The Philippines.
- 24 The Philippines for both conventions.
- 25 Brunei, Malaysia, and Myanmar have not ratified.
- 26 Brunei, Malaysia, and Singapore have not ratified. Timor-Leste, in which ATUC has a national affiliate, ratified *CEDAW*, *CERD*, and *CESCR*.
- 27 Cambodia, Indonesia, and the Philippines. Timor-Leste also ratified.
- 28 Thailand, which is voluntary and self-funded; and Vietnam, which is contributory.
- 29 Philippines.
- 30 Thailand, through the National Social Security Law (Law No. 40/4004).
- 31 Marius Olivier, "Social protection for migrant workers in ASEAN: Developments, challenges, and prospects," International Labour Organization (2018), pp. xiv-xv.
- 32 ILO. World Social Protection Report (2018), p. 150.
- 33 Republic Act No. 11199 (2019), Sec. 9-B.
- 34 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.
- 35 Republic Act No. 10801 (2015), Sec. 35.

- 36 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.
- 37 ILO. World Social Protection Report (2018), p. 148, citing ILO and ADBis (2014).
- 38 No. 41, *ASEAN Consensus*.
- 39 No. 18, *idem*.
- 40 No. 17 (b), *idem*.



# Realizing the rights of migrant workers to social protection

*An action paper by the ASEAN Trade Union Council (ATUC)*

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