



FACULTY OF LAW
Lund University

Arie Poluzzi

Protection of Undocumented
Migrant Workers in the
Establishment of ASEAN
Instrument on the Protection
and Promotion of the Rights
of Migrant Workers

Master thesis
30 credits

Supervisor :
Lee Swepton

Master's Programme in
International Human Rights Law

Spring Semester 2011

Contents

1	INTRODUCTION	5
1.1	Background Information	5
1.2	Research Questions	6
1.3	Methodology	7
1.4	Definiton of Key Words	7
1.5	Scope of Thesis	8
2	ASEAN AND UNDOCUMENTED MIGRANT WORKERS	10
2.1	ASEAN and Its Latest Development	10
2.1.1	<i>ASEAN Charter</i>	11
2.1.2	<i>ASEAN Community</i>	13
2.1.3	<i>ASEAN Intergovernmental Commission on Human Rights (AICHR)</i>	16
2.2	ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers	17
2.3	Undocumented Migrant Workers in ASEAN	20
2.3.1	<i>Migration Patterns</i>	20
2.3.2	<i>Causes and Condition of Undocumented Migrant Workers in ASEAN</i>	23
2.3.3	<i>Controlling Undocumented Migrant Workers in ASEAN</i>	25
2.3.3.1	Migrant Policies toward Undocumented Migrant Workers in Thailand	25
2.3.3.2	Migrant Policies toward Undocumented Migrant Workers in Malaysia	27
2.3.4	<i>Human Rights Violation against the Undocumented Migrant Workers in ASEAN</i>	32
2.4	ASEAN Cooperation in Immigration Matters	34
3	INTERNATIONAL HUMAN RIGHTS LAW AND UNDOCUMENTED MIGRANT WORKERS	
3.1	International Human Rights Law Regime on Undocumented Migrant Workers	37
3.1.1.	<i>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW)</i>	37
3.1.2	<i>The Core Human Rights Conventions</i>	39
3.1.2.1	International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965)	40

3.1.2.2.	International Covenant on Civil and Political Rights (CCPR, 1966)	41
3.1.2.3	International Covenant on Economic, Social and Cultural Rights (CESCR, 1966)	42
3.1.2.4	International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)	44
3.1.2.5	International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)	45
3.1.2.6	International Convention on the Rights of Child (CRC, 1989)	46
3.1.3.	<i>The Bangkok Declaration on Irregular Migration (1999)</i>	48
3.1.4.	<i>The Palermo Protocols</i>	51
3.1.4.1	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children	52
3.1.4.2	Protocol against the Smuggling of Migrants by Land, Sea and Air	53
3.2	ILO Regime on Undocumented Migrant Workers	54
3.2.1	<i>ILO Conventions related to Migrant Workers</i>	55
3.2.2	<i>ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up (1998)</i>	57
3.2.3	<i>ILO Multilateral Framework on Labour Migration (2005)</i>	58
4	TOWARD THE ESTABLISHMENT OF ASEAN INSTRUMENT ON THE PROTECTION AND PROMOTION OF THE RIGHTS OF MIGRANT WORKERS	62
5	PROTECTION OF UNDOCUMENTED MIGRANT WORKERS IN THE DRAFTING OF ASEAN INSTRUMENT ON THE PROTECTION AND PROMOTION OF THE RIGHTS OF MIGRANT WORKERS	70
5.1	Legal Interpretation on the Coverage of Undocumented Migrant Workers	70
5.1.1.	<i>Authority and Responsibility of State on Immigration Matters</i>	70
5.1.2.	Juridical Conditions of Undocumented Migrant Workers	72
5.2	The Rights of Undocumented Migrant Workers and the Migration Law Enforcement	82
5.3	Extending Mechanism to Protect the Undocumented Migrant Workers under ASEAN Framework	93
6	CONCLUSION	95

Summary

ASEAN, as an intergovernmental organization in Southeast Asia, adopted ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers which contains obligation for both sending and receiving countries to provide protection and promotion the rights of migrant workers, including the undocumented migrant workers. The Declaration also mandates to establish an ASEAN legal instrument to ensure the guarantee of such protection of the rights of the migrants. Following the mandate, ASEAN Committee on the Implementation of such Declaration with its Drafting Team has been established. In its working development, the Drafting Team failed to make progress on the drafting of such instrument due to tension between receiving and sending countries in ASEAN over the issue of covering undocumented migrant workers into the draft instrument.

This thesis will try to analyse how far the obligation to protect the rights of undocumented migrant workers can be interpreted under the perspectives of general human rights law, labour law, migration law, and international law in general, and further, to incorporate such interpretations under the ASEAN legal framework mechanism.

The arguments will be constructed based on ASEAN's commitment toward protection of human rights and upholding the international law as mandated in the ASEAN Charter. The main argument will be based on the non-discrimination principle and the consequent follow-ups from there which leads to conclusion that undocumented migrant workers and all their rights, including those established from labour relationship must be covered in the draft instrument. Further, it is also argued that the measures taken for such protection can be balanced with the ones taken to enforce migration law so that they will cover the respective interest of the sending and receiving countries.

Preface

I would like to take this opportunity to thank my supervisor, Lee Swepston, for his close supervision; I sincerely appreciate his efforts and patience in guiding me in working on this thesis. I would also like to thank Swedish Government, Raoul Wallenberg Institute, for providing me the scholarship, and H.E. Ambassador Linggawati Hakim (Indonesian Ambassador for Sweden) and Indonesian Embassy in Stockholm for their kind assistance. I hope that this will become more leverage for Bilateral Dialogue on Human Rights between Indonesia and Sweden.

My special thanks also go to Desy Nurmala Dewi and Prof. L.S. Bosniak for providing substantive materials for the thesis, all staff and lectures in the Faculty of Law of Lund University, my fellow Indonesia friends and families in Lund-Malmo, my classmates, and all of my friends and colleagues in Sweden for these two years of wonderful friendship and togetherness in Sweden.

Finally I want to express my deepest gratitude to my family and friends in Indonesia for their constant love, support and encouragement, especially for my Mom and my late Dad, ... this one is for you.

Glory to the almighty God, who has given His blessing upon my life in so many mysterious ways.

Arie Poluzzi

Lund, May 2011.

Abbreviations

ACMW	ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers
ACMW-DT	ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers – Drafting Team
AEC	ASEAN Economic Community
AICHR	ASEAN Inter-governmental Commission on Human Rights
AIPA	ASEAN Inter-Parliamentary Assembly
ALMM	ASEAN Labour Ministerial Meeting
AMW Declaration	ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers
AMW Instrument	ASEAN Instrument on the Promotion and Protection of the Rights of Migrant Workers
APSC	ASEAN Political Security Community
ASCC	ASEAN Socio Cultural Community
ASEAN	Association of South East Asian Nations
BIMP-EAGA	The Brunei- Indonesia-Malaysia-Philippines East ASEAN Growth Area
CAT	International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CEDAW	International Convention on the Elimination of all Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CLMV	Cambodia, Laos, Myanmar, and Viet Nam
CRC	International Convention on the Rights of Child
CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
MOU	Memorandum of Understanding
RELA	Ikatan Relawan Rakyat Malaysia (Volunteers of Malaysian People Corps)
SLOM	Senior Labour Officers’ Meeting
TF-AMW	Task Force on ASEAN Migrant Workers
VCLT	The 1969 Vienna Convention on the Law of Treaties

VAP
VOA
WTO

Ventiane Action Programme
Visa-on-Arrival
World Trade Organization

1 Introduction

1.1 Background Information

ASEAN, as a regional organization, renewed its resilience by adopting ASEAN Charter and commit to establish an ASEAN community. As the main legal framework for the organization, one of the outstanding principles contained in the Charter is the principles to respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice¹;

The 13th ASEAN Summit held in Cebu, Philippines in 2007, adopted ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (hereinafter called the AMW Declaration), constitutes one of the follow-up measures taken up following the establishment of an ASEAN community. AMW Declaration contains obligation for both sending and receiving countries to provide protection and promotion the rights of migrant workers. Further, AMW Declaration mandates to establish an ASEAN legal instrument to ensure the guarantee on the protection of the rights of the migrants (hereinafter called the AMW Instrument)²

In following up such mandate, the 30th meeting of ASEAN Labour Ministerial Meeting (ALMM) has established ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (hereinafter called ACMW) as the focal point institution to coordinate the implementation of AMW Declaration as well as to facilitate the development of the AMW Instrument.³

¹ Article 2 para 2 (i) of ASEAN Charter

² ASEAN Web, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, <http://www.asean.org/19264.htm>, accessed on 2 February 2011.

³ *Ibid*, *Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, <http://www.asean.org/20768.htm>, , accessed on 2 February 2011.

Further, ACMW established an ACMW-Drafting Team (herein after called ACMW-DT) to formulate the instrument in question, which consists of respective representatives from sending (Indonesia and Philippines) and receiving countries (Malaysia and Singapore). After conducting seminar and three consultative meetings, ACMW-DT could not come up with agreement on incorporating issue of undocumented migrant workers into the AMW Instrument.

1.2 Research Questions

This thesis will analyze how the ASEAN legal framework and mechanism should work on the protection of the rights of undocumented migrant workers in ASEAN towards the on-going drafting process of the Draft Instrument. In fact, despite its collective legal and moral commitment on human rights promotion and protection, made and enshrined in the ASEAN Charter and AMW Declaration, yet the process of drafting of the AMW instrument remains stuck on the issue of covering the undocumented migrant workers.

Thus, the thesis is dedicated to address the following questions :

1. How the ASEAN legal norms should be interpreted to provide legal protection for the undocumented migrant workers in ASEAN due to the drafting process of AMW instrument?
2. What are the rights of undocumented that should be covered by such protection ?
3. How the receiving and sending countries should conduct its obligation respectively on the migration law enforcement and protection of undocumented migrant workers?

The answers of the questions above are expected to give human rights perspectives that may be contributive to understand on how ASEAN legal

framework should be applied as far as concerning undocumented migrant workers.

1.3 Methodology

The thesis is examined with descriptive and interpretative method. The factual conditions of legal object, namely the conditions and policies towards the undocumented migrant workers in ASEAN will be described and analyzed under the interdisciplinary and intersecting legal regimes, which includes, at the very least, human rights law perspective in general, migration law, and labour law regime. The interpretative legal analysis will be mainly emphasized on the protection of the rights of the undocumented migrants as subject of law in general. Further, all those analyses under the aforementioned legal regimes will be interpreted under the ASEAN legal framework in relation to human-rights based-approach and in the light of related international human rights law norms.

1.4 Definiton of Key Words⁴

There are various terms used as reference to the status of migrants who enter and work in the foreign country with no legal authorization, such as follows :

- **Illegal Migrant Workers** : this term is a negative one that Elie Wiesel, the Nobel Price winner once stated that a human being can not be illegal, therefore it can not be acceptable.
- **Undocumented Migrant Workers** : this term is recommended in the 1994 International Conference on Population and Development. However, this term is considered incomplete since it doesn't cover certain unlawful migration cases such as tourist or over-stayer who may undertake unemployment in the host country.

⁴ Mainly based on : Piyasiri Wickramasekera, *Asian Labour Migration : Issues and Challenges in an Era of Globalization*, International Migration Papers, ILO, Geneva, 2002, p.1-2

- Irregular Migrant Workers : this term is considered more complete in covering the various points of migration such as departure, transit, entry and return. This term is also recommended by the International Symposium on Migration in Bangkok and used in the Bangkok Declaration on Irregular Migration (1999) (hereinafter called Bangkok Declaration) and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter called CRMW).

However, for practical purposes, in this thesis, the term “Undocumented Migrant Workers” and “Irregular Migrant Workers” will be used in the similar sense, namely referring to labours who enter and work in the foreign country with no legal authorization. The first one will be used more frequently, simply to be in accordance with the one laid out in the AMW Declaration.

1.5 Scope of Thesis

The thesis will focus on the protection of undocumented migrant workers in ASEAN under the ASEAN legal framework which constitutes responsibility of every ASEAN member countries as a united regional entity as well as a subject of law in the realm of international law. The underlined scope of the thesis shall be mainly emphasized on legal perspective, and therefore will provide very limited non-legal perspectives and unnecessary details such as statistics. Therefore, factual situations of undocumented migrant workers in ASEAN will be only represented by those in Malaysia and Thailand as the main receiving countries in ASEAN. Further, due to wide aspect of human rights norms related with the phenomenon of undocumented migrant workers, the rights that will be discussed in general human rights perspective constitute the mostly related and vital ones, and therefore will not cover in details of rights for specific groups, such as the women and children rights.

The thesis is comprised of into six chapters, as follows :

- Chapter 1 is an introductory part.
- Chapter 2 provides description on ASEAN and its latest developments related to undocumented migrant workers, and the factual condition of undocumented migrant workers in ASEAN.
- Chapter 3 outlines international human rights law and international labour instruments related to the rights of undocumented migrant workers.
- Chapter 4 outlines the process of establishment ASEAN instrument on the protection and promotion of the rights of migrant workers.
- Chapter 5 outlines the legal interpretation on the protection of the rights of undocumented migrant workers under ASEAN legal framework and proposals made to improve and contribute to the on-going legal drafting process of the ASEAN instrument in question.
- Chapter 6 outlines the conclusion reached from the analysis and summary of recommendation.

2 ASEAN and Undocumented Migrant Workers

2.1 ASEAN and Its Latest Development⁵

The global political configuration nowadays is marked with the phenomenon of strengthened regional cooperation through the establishment of regional political entities such as European Union and African Union. This regional unification is purported in order to elevate the bargaining power of the region following the tight competition in globalization era. However, it does not always run on the continental basis, but also sub-continental.

On 8 August 1967, South East Asian countries established ASEAN (Association of South East Asian Nations) through the signing of the Bangkok Declaration by the ASEAN founding countries like Indonesia, Malaysia, Philippines, Singapore, and Thailand. The establishment of ASEAN initially was merely intended to accelerate the economic growth in the region, to promote peace and stability in the region, and to form cooperation in various common interests among its member countries. Along the time, the membership of ASEAN was extended from five original members to ten countries, which also covering Brunei Darussalam (1984), Viet Nam (1995), Lao PDR and Myanmar (1997), and the last one Cambodia (1999)⁶.

As the globalization era comes and in order to anticipate the greater dominance of East Asian countries, like China, Japan, and South Korea, towards the ASEAN countries, ASEAN as a regional entity in South East

⁵ Mostly based on ASEAN Web, www.asean.org, last accessed on 10 February 2011.

⁶ *Supra* Note 2, *About ASEAN – Overview*, http://www.asean.org/about_ASEAN.html, last accessed on 2 February 2011, the last four new members are commonly known as CLMV (Cambodia, Laos, Myanmar, and Viet Nam).

Asia, took some strategic policies to reinforce its cooperation. The reinforcement process was initiated by adopting the ASEAN Vision 2020⁷ in which the main idea is to establish an ASEAN Community, which is outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies. Such community establishment concept was agreed to be accelerated by 2015 in the 12th ASEAN Summit in 2007.⁸

2.1.1 ASEAN Charter⁹

The ASEAN Charter was signed on the 13th ASEAN Summit held in Singapore on 20 November 2007 and serves as the main legal and institutional framework for the ASEAN cooperation.¹⁰ The Charter consists of Preamble, 13 Chapters, 55 Articles and Annexes that reiterate all values, principles, rules and goals of ASEAN as well as development of its organizational bodies.¹¹ After one year of process of ratification made by all ASEAN member countries, the Charter finally entered into force on 15 December 2008, and has become a legally binding agreement among the ASEAN Member countries. The Charter then was registered with the Secretariat of United Nations, pursuant to Article 102, Paragraph 1 of the Charter of the United Nations.

As the main instrument that orchestrates the ASEAN cooperation, it is important to acknowledge several important elements the Charter contains,

⁷ ASEAN Vision 2020 adopted by ASEAN Leaders on the 30th Anniversary of ASEAN. See *Ibid.*

⁸ It was made by ASEAN Leaders in the 12th ASEAN Summit in January 2007 through the signing of the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015. See *Ibid.*

⁹ *Supra* Note 2, *ASEAN Charter*, <http://www.asean.org/21861.htm>, last accessed on 2 February 2011.

¹⁰ The making of ASEAN Charter began with the signing of Kuala Lumpur Declaration on the Establishment of ASEAN Charter on the 11th ASEAN Summit (2006) which constitutes a commitment of ASEAN Leaders to establish ASEAN Charter as the legal and institutional framework for the ASEAN cooperation ahead.

¹¹ See Chapter IV of ASEAN Charter.

such as purposes and principles of ASEAN, the rights and obligations of ASEAN Member countries and the relevant ASEAN operational bodies.

The purposes of ASEAN in general is to maintain and enhance peace, security, economic and socio cultural in the region.¹² Specifically, there are several purposes of ASEAN that need to be underscored as far as related to the phenomenon of undocumented migrant workers in ASEAN, namely:

- to create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;
- to alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;
- to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;
- to respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges;
- to enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice;
- to promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building;

Meanwhile, the principles of ASEAN¹³ are:

1. In pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.
2. ASEAN and its Member States shall act in accordance with the following Principles (as far as related to the undocumented migrant workers phenomenon):
 - (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
 - (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;
 - (e) non-interference in the internal affairs of ASEAN Member States;
 - (g) enhanced consultations on matters seriously affecting the common interest of ASEAN;

¹² Article 1 of ASEAN Charter

¹³ Article 2 of ASEAN Charter

- (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;
- (l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity;

Further, Article 5 of the Charter establishes the rights and obligations of ASEAN Member States determining that all Member States shall have equal rights and obligations under the Charter and that they shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership.

2.1.2 ASEAN Community

The idea of developing an ASEAN community began since the adoption of ASEAN Vision 2020 on the 30th Anniversary of ASEAN, by ASEAN Leaders, which basically contains agreement to share the same vision on establishing more dynamic partnership among ASEAN countries through one ASEAN community, which later time frame of the establishment is accelerated to be established in 2015.¹⁴ The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community (APSC), ASEAN Economic Community (AEC) and ASEAN Socio-Cultural Community (ASCC). Each pillar has its own Blueprint, and together, they form the Roadmap for an ASEAN Community 2009-2015.¹⁵

¹⁴ Done through the signing of the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, by ASEAN Leaders at the 12th ASEAN Summit in January 2007. See *Supra* Note 8.

¹⁵ *Supra* Note 6, last accessed on 2 February 2011.

a. ASEAN Political Security Community (APSC) Blueprint

The APSC Blueprint was adopted by the ASEAN Leaders at the 14th ASEAN Summit on 1 March 2009 in Cha-am/Hua Hin, Thailand. It provides a roadmap and timetable to establish the APSC by 2015, which in its operationalization shall be guided by the principles and purposes contained in the ASEAN Charter. It also leaves room for flexibility to continue programmes/activities beyond 2015 in order to retain its significance and have an enduring quality.¹⁶

One of the activities set up in APSC Blueprint which is important as far as related to the protection of undocumented migrant workers is the promotion and protection of human rights, specifically to cooperate closely with efforts of the sectoral bodies in the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers¹⁷

b. ASEAN Economic Community (AEC) Blueprint

The ASEAN Economic Community (AEC) Blueprint was adopted the 13th ASEAN Summit on 20 November 2007 in Singapore to serve as a coherent master plan guiding the establishment of the AEC 2015. AEC envisages the following key characteristics: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. The AEC areas of cooperation are expected to transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital.¹⁸

¹⁶ ASEAN Political Security Community, <http://www.aseansec.org/18741.htm>, accessed on 5 February 2011

¹⁷ Set up under Item A.1.5, Sub item iii of APSC Blueprint

¹⁸ ASEAN Economic Community, <http://www.aseansec.org/18757.htm>, accessed on 5 February 2011

c. ASEAN Socio Cultural Community (ASCC) Blueprint

The ASCC Blueprint was adopted by the ASEAN Leaders at the 14th ASEAN Summit on 1 March 2009 in Cha-am/Hua Hin, Thailand. It represents the human dimension of ASEAN cooperation and the most feasible approach to the realization of people-oriented and socially responsible concept of ASEAN Community. ASCC Blueprint is also focused on nurturing the human, cultural and natural resources for sustained development of ASEAN Community.

The most important activities set out in ASCC Blueprint in the context of migrant workers are those laid out under item C.2 Protection and Promotion of the Rights of Migrant Workers. The activities are set up with strategic objective to ensure fair and comprehensive migration policies and adequate protection for all migrant workers in accordance with the laws, regulations and policies of respective ASEAN Member States as well as to implement the AMW Declaration. The actions that shall be taken to achieve the goals are :

- i. Operationalize the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers (ACMW) under the auspices of the Senior Labour Officials Meeting (SLOM) to implement the provisions of the Declaration and work towards the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers;
- ii. Institutionalise and convene on a regular basis the ASEAN Forum on Migrant Labour as a platform for broad-based discussions on migrant labour issues under the auspices of the ACMW, which reports to SLOM;
- iii. Promote fair and appropriate employment protection payment of wages and adequate access to decent working and living conditions for migrant workers and provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states;
- iv. Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers by, among others, facilitating the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant workers is arrested or committed to prison or custody or detained in any other manner, under the laws and regulation of the receiving state and in accordance with the Vienna Convention on Consular Relations;
- v. Facilitate data-sharing on matters related to migrant workers for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states;

- vi. Strengthen policies and procedures in the sending state to facilitate aspects of migration workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin;
- vii. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation and of the receiving state, provided that they fulfil the requirements under applicable laws, regulations, and policies of the said state, bilateral agreements and multilateral treaties;
- viii. Establish and promote legal practice of the sending state to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation, and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies; and
- ix. Promote capacity building by sharing of information, best practises as well as opportunities and challenges in relation to protection and promotion of migrant workers' rights and welfare.

2.1.3 ASEAN Intergovernmental Commission on Human Rights (AICHR)

One of the most progressive developments made in the ASEAN Charter is the establishment of ASEAN Inter-Governmental Commission on Human Rights (hereinafter called AICHR). The establishment of AICHR constitutes mandate from Article 14 of the Charter as well as ASEAN's commitment to develop a community with people-oriented basis. AICHR is an overarching human rights institution in ASEAN, in charge of promoting and protecting the human rights in ASEAN. Besides, AICHR also serves as consultative intergovernmental body and constitute as an integral part of the ASEAN organizational structure¹⁹. In order to fulfill its functions, the Commission is required to perform following tasks :

- to develop ASEAN Human Rights Declaration and human rights-related legal instruments;
- to promote public awareness on human rights;
- to promote capacity building among the ASEAN Member Countries in order to effectively implement obligations on human rights effectively;
- to strengthen human rights norms in ASEAN;

¹⁹ Article 2 of Terms of Reference (ToR) of AICHR

- to urge the participation of ASEAN Member Countries on various international human rights fora;
- to promote dialogue and consultation as well as cooperation among the ASEAN Member countries which involves many parties;
- to provide advisory service and technical assistance to the ASEAN sectoral bodies.²⁰

The AICHR runs two regular meetings per year²¹ in which best-practice and best-experience sharing conducted on voluntary and non-binding basis. So far, AICHR has already convened four meetings with the last one held on 14 February 2011 in Solo, Indonesia, with one of the pivotal agendas was the preparation of a draft of ASEAN Human Rights Declaration.²²

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

During the 12th ASEAN Summit held in Cebu, Philippines, on 13 January 2007, ASEAN Leaders signed ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (AMW Declaration). The consideration part of the AMW Declaration, reflects that the signing of the AMW Declaration purported to sustain the establishment of ASEAN Community along with the ASEAN commitment on promotion and protection of human rights. Apart from that, it also contains formal recognition upon the contribution of migrant workers to the society and economy of both receiving states and sending states of ASEAN and as well as acknowledgement upon the need to address cases of abuse and violence against migrant workers whenever such cases occur.²³

²⁰ Article 4 of Terms of Reference (ToR) of AICHR

²¹ Article 6.3 of Terms of Reference (ToR) of AICHR, however when necessary the ASEAN Foreign Ministers may instruct the AICHR to meet (Article 6.4)

²² *Supra* Note 2, 4th ASEAN Intergovernmental Commission on Human Rights Meeting Moves to the AICHR Agenda Forward, accessed on 20 February 2011.

²³ *Supra* Note 2

AMW Declaration basically consists of three main parts, namely General Principles, Obligations of Receiving and Sending States, and Commitments by ASEAN, which in details are as follows:

General Principles:

1. Both the receiving states and sending states shall strengthen the political, economic and social pillars of the ASEAN Community by promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN Member Countries;
2. The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented;
3. The receiving states and the sending states shall take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies; and
4. Nothing in the present Declaration shall be interpreted as implying the regularization of the situation of migrant workers who are undocumented.

Obligations of Receiving States

Pursuant to the prevailing laws, regulations and policies of the respective receiving states, the receiving states will:

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

state and in accordance with the Vienna Convention on Consular Relations.

Obligations of Sending States

Pursuant to the prevailing laws, regulations and policies of the respective sending states, the sending states will:

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

Commitments by ASEAN Member Countries

For purposes of protecting and promoting the rights of migrant workers, ASEAN Member Countries in accordance with national laws, regulations and policies, will:

15. Promote decent, humane, productive, dignified and remunerative employment for migrant workers;
16. Establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin;
17. Take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities;
18. Facilitate data-sharing on matters related to migrant workers, for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states;
19. Promote capacity building by sharing of information, best practices as well as opportunities and challenges encountered by ASEAN Member Countries in relation to protection and promotion of migrant workers' rights and welfare;
20. Extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the Embassies and Consular Offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements;
21. Encourage international organizations, ASEAN dialogue partners and other countries to respect the principles and extend support and assistance to the implementation of the measures contained in this Declaration; and

22. Task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.

2.3 Undocumented Migrant Workers in ASEAN

2.3.1 Migration Patterns

General presumption about the main factor that invokes labour migration is that there is a gap to fill in the supply-and-demand relation between high-level unemployment in one region and the high economic growth with labour force shortage in another region. Further, migration patterns, in general, may result from the various affecting differences and/or similarities between the countries of origin and the countries of destination, which become the triggering factors to form the patterns. Such differences and/or similarities may vary from demography, economy, social-political conditions, historical and cultural relations, or even technological linkages among the countries. Further, in the ASEAN context, the labour migration patterns are affected and formed by three important aspects²⁴, namely:

- a. Geographical aspect

The geographic contiguities between Indonesia and Malaysia, between Myanmar and Thailand, and between Mindanao (Philippines) and Sabah (Malaysia) provide opportunities for border crossing for people who cannot or do not know how to follow the formal procedures for international migration.

Further, based on geographical perspective, the migration within ASEAN region can be examined from its three subsystems, the Malay Peninsula

²⁴ G. Battistella, *Unauthorized Migrants as Global Workers in the ASEAN Region*, Southeast Asian Studies, Vol. 40, No. 3, December 2002, pp. 360 - 361.

(including Singapore); the Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA); and the Northern ASEAN countries,²⁵ which can be briefly describes as follows :

- Malay Peninsula

The Malay Peninsula is the most dynamic economic region within ASEAN since it hosts Malaysia and Singapore, the two most developed countries in ASEAN. Despite being an economically dynamic area, it is deficient in terms of population, with total population only around 30 million from 590 million people in whole ASEAN.²⁶ Thus, it requires massive labour forces which likely are foreign workers.

- BIMP-EAGA Sub region

The Brunei- Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) is a sub regional economic cooperation initiative in South East Asia established in 1994. The growth area comprised the entire sultanate of Brunei Darussalam; all provinces in Kalimantan and Sulawesi, the Maluku island chain and Papua in Eastern Indonesia; the federal states of Sabah and Sarawak, and the federal territory of Labuan in Eastern Malaysia; and the islands of Mindanao and Palawan in the Philippines. EAGA covers a land area of approximately 1.54 million square kilometers and is home to about 55 million people. The objective of BIMP-EAGA is to accelerate economic development in the four countries' "focus areas" which, although geographically distant from their national capitals, are in strategic proximity to each other, in one of the world's most resource-rich regions.

BIMP-EAGA cooperation aims to increase trade, tourism and investments with and outside the sub region by facilitating the free movement of people, goods, and services; making the best use of common infrastructure and natural resources; and taking the fullest advantage of economic complementation²⁷.

- Northern ASEAN Countries

²⁵ *Ibid*, pp. 353- 360.

²⁶ *Supra* Note 2, *Selected Basic ASEAN Indicator*, <http://www.aseansec.org/stat/Table1.pdf>, accessed on 12 February 2011

²⁷ About BIMP-EAGA, see <http://www.bimp-eaga.org/about.php>, accessed on 12 February 2011

On the northern part of South East Asia region, Thailand becomes the important player in the movement of population in the area. In 1970's Thailand served as the country of first asylum refugees for Cambodians, Laotians, Karens people from Myanmar, and Vietnamese (CLMV countries). It also developed an overseas labour programme, sending workers mostly toward the Middle East and Taiwan. Besides the historical fact of being the country of destination for CLMV refugees, the rapid economic growth in Thailand throughout 1980's become the triggering factor for the flow of migration workers from CLMV into Thailand.

b. Historical and Cultural aspect

Far before the establishment of ASEAN countries, people in the South East Asian region already established traditional economic areas, which is now entailed crossing international borders. The inherited common history also shares the common cultures, like language, that is pivotal in the labour relation and daily life of the labour migrants.

c. Intermediary aspect

This aspect sees the importance of social networking system for undocumented migrant workers which colludes with formal labour-recruiting system put in place in the region that facilitate the expansion of the overseas labour programmes. For example, in Malaysia, the professional intermediaries called *tekongs*, who are often former migrants having an established network of contacts in Malaysia, knowing how to obtain documentation, and accompanying the migrant to the employer in Malaysia. They play crucial role such as taking the prospective migrant to recruiting agent, financing the cost of migration (which the migrant must repay twice over), and sometimes it covers the whole process.²⁸

²⁸ Battistella, *Supra Note* 18, p. 361.

Thus, labour migration within the ASEAN region puts Indonesia, Philippines and Myanmar appear to be countries of origin while Malaysia, Singapore, and Thailand appear to be countries of destination.

2.3.2 Causes and Condition of Undocumented Migrant Workers in ASEAN

Apart from the triggering factors that determine the patterns of migration as described before, there are certain conditions that contribute to create the phenomenon of undocumented migrant workers in the labour migration. Those conditions are ²⁹ :

- Restrictive immigration policies in receiving countries.
This becomes the factor where the fast growth economic countries are lack of labour-shortage yet refuse admission of unskilled workers.
- Acute poverty and unemployment problems in countries of origin in acute emigration pressures.
- Political suppression and armed conflicts. In the ASEAN context, it can be best seen from the migration of Myanmar refugees and Indonesian Acehness (in the era of Free Aceh Movement, a separatist movement that already ended following the signing of peace agreement in Oslo, 2004). Most of them end up as undocumented migrant workers.
- Malpractices of private recruitment agencies. There are situations where the private recruitment agency sending workers in collaboration with local intermediaries which have no relationship with actual employer demand. In the end of such situation, the workers find no jobs waiting for them or at least, not as they expected, and finally fall into undocumented status.
- Activities of criminal gangs and traffickers. This is almost the same with the previous cause, where the process done through collusion among recruiters, immigration officers, traffickers, and job placement agents.
- Bureaucratic procedures which add to high costs of emigration

²⁹ Wickramasekera, *Supra* Note 4, pp. 23 – 24.

Hence, the situation and condition faced by undocumented migrant workers in ASEAN are generally similar to those faced by any undocumented migrant workers in other parts of the world. Undocumented migrant workers are likely to work in the informal sectors or in the remote areas. Their unlawful status makes them vulnerable to exploitation, and almost have no access to legal redress, and therefore, tend to fall into poverty and live in improper conditions. They also tend to resort to crime when unemployed.

In Malaysia, documented migrant workers who have entered Malaysia to work can only work for the employer who brought them into the country with work permits that valid for one year, and can be renewed annually for up to three years. A migrant worker's employment can be terminated, and the worker's work permit cancelled, by the employer at any time – and without the permit, the migrant worker becomes immediately subject to arrest and deportation.³⁰

The most classical situation may happen to undocumented migrant workers is when their employers take advantage of such non-legal recognition. The employers may assign the undocumented migrant workers with long hour works yet underpaid. In some worse cases, after all those long hours work and unfair wage, the employers deny and refuse to pay their salary and instead threaten to report them to the immigration authority. Being afraid to be deported by immigration authority, usually the undocumented migrant workers prefer to let go off the case and look for another jobs with possibility to face the same problem cycling again. Another worse case may involve situation where female undocumented migrant workers becomes the victims of sexual crime yet they are too afraid to expose the cases to the authority. It is common that when they report their case related to their deceiving or inhuman labour condition to the government official, their access to labour court is denied and they are subject to deportation.

³⁰ Philip S. Robertson Jr., *Paper on Migrant Workers in Malaysia – Issues, Concerns and Points for Action*, Fair Labor Association, October 2008, p. 2

Thus, such condition faced by undocumented migrant workers in ASEAN needs serious attention and improvement to be taken by ASEAN member countries.

2.3.3 Controlling Undocumented Migrant Workers in ASEAN

The task to handle the problems of undocumented migrant workers does not exclusively constitute responsibility of countries of destination but also countries of origin. However, in cognizance on the wide aspects that may significantly affect the choice of preventive methods the countries of origin may take in dealing with undocumented migrant workers, it is much more effectively feasible to concentrate more on the controlling approaches developed by countries of destination.

Mostly, the countries of destination are doing it by enforcing their immigration law, especially by cracking down the undocumented migrant workers. In the ASEAN context, it can be seen clearly from the measures taken by Malaysia and Thailand. Albeit Singapore is considered as one of the ASEAN countries of destination for labour migration, yet it can be assumed that in general, most of the migrant works in Singapore legally.³¹

2.3.3.1 Migrant Policies toward Undocumented Migrant Workers in Thailand

In Thailand, foreign migrants can be categorized into three: (a) lifetime migrants who entered Thailand before 1972 and received permanent resident status; (b) skilled migrant workers (c) unskilled migrant workers. Most of the unskilled migrant workers are undocumented, who come from

³¹ See U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Singapore*, <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136008.htm>, last accessed on 20 April 2011.

neighbouring countries, Myanmar (80-90 percent of the total), Laos and Myanmar.³²

Since 1992, Thailand has dealt the problems of undocumented migrant workers through: (a) allowing undocumented migrant workers to register for one year's work (1996) in certain sector such as agriculture, fisheries, construction, mining, domestic works, etc. (b) arresting and deporting undocumented migrant workers³³ and (c) creating work sites or economic zones in the border areas with the intention of keeping migrants at the border, not in the central Thailand³⁴.

Bilaterally, since 2003, Thailand has respectively signed MOUs on migrant workers with Cambodia, Laos and Myanmar.³⁵ As far as concerning undocumented migrant workers, in general, the MOUs constitute commitment to cooperate on suppressing illegal border-crossing and illegal employment. There is also regulated about sending back the names of the undocumented migrant workers already registered as workers in Thailand for verification process by the sending countries in order to convert their status to be documented.³⁶

According to U.S. Human Rights Report on Thailand (2009)³⁷, Thai government open a new round of registration for undocumented migrant workers from Laos, Cambodia, and Myanmar who arrived after 2004 and

³² ILO, *The Mekong Challenge – Employment and Protection of Migrant Workers in Thailand : National Laws/Practices versus International Labour Standards ?*, 2005, p. 4 However, the classification between the skilled and unskilled migrant workers doesn't provide guarantee that every skilled migrant workers are documented.

³³ For example, following economic crisis in 1998 in that hit South-East Asia, the Thai Minister of Labour issued a directive which announced that undocumented foreign workers in specific sectors would be repatriated by 1 May 1998 or face eight years imprisonment and fines up to 110,000 baht. See Darunee Paisanpanichkul, *Burmese Migrant Workers in Thailand: Policy and Protection*, <http://www.burmalibrary.org/docs/LJOB10-darunee.htm>, accessed on 3 March 2011.

³⁴ The Ayeyawady - Chao Phraya - Mekong Economic Cooperation Strategy (ACMECS), an economic cooperation almost similar like BIMP-EAGA between Thailand and CLMV, for further info, please check : <http://www.acmecs.org/>

³⁵ MOUs with Cambodia (signed on 31 May 2003), Laos (signed on 18 November 2002), Myanmar (21 June 2003).

³⁶ ILO, *Supra* Note., p. 9.

³⁷ See U.S. Human Rights Report on Thailand (2009), <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136010.htm>, last accessed on 20 April 2011

are employed in certain sectors of economy to apply for work permit ID and complete a citizenship verification process with February 2010 as the deadline.³⁸ Migrants from Laos and Cambodia may do such verification at locations throughout Thailand.³⁹ Myanmar migrants must travel to processing centers along both sides of the Thai-Myanmar border due to Myanmar government insistence that registration take place within Myanmar.⁴⁰

2.3.3.2 Migrant Policies toward Undocumented Migrant Workers in Malaysia

Migrant workers in Malaysia come from more than 12 countries in Asia, with the majority coming from Indonesia. Other major sending countries including Nepal, Bangladesh, India, Pakistan, Viet Nam, Cambodia, Thailand and the Philippines. Nearly one in five workers in Malaysia is a documented migrant worker-there is some 2.2 million documented foreign workers in the country, and the estimated total workforce is 11.4 million. In addition, Malaysian immigration authorities estimate that there may be as many as an additional 2.2 million undocumented workers in Malaysia, meaning that migrant workers may make up nearly one third of Malaysia's labour force.⁴¹ Towards undocumented migrant workers, Malaysia's policies can be divided into three phases,⁴² as follows :

³⁸ *Ibid.* At the end of the year, the government agreed to extend for two years the original February 2010 deadline for citizenship verification.

³⁹ Laos and Cambodian governments took initiative by sending more officials to Thailand to assist the intensified verification process that their undocumented migrant workers do not have to cross back to their home countries for such purpose. See Jackie Pollock, et.al, *Policy Brief and Recommendation on Undocumented Labour Migration in Thailand*, <http://www.polis.leeds.ac.uk/assets/files/research/policy-brief-recommendation-undocumented-labour-migration-thailand.pdf>, accessed on 20 April 2011.

⁴⁰ Considering the non-conducive political condition in their home country, Myanmar undocumented migrant workers were, indeed, reluctant to identify themselves to their own government for reasons such avoiding possible retaliation for leaving the country illegally which may affect their families. Myanmar's military regime imposed harsh conditions such as fines and six months to five years imprisonment on citizens who have violated the country's migration laws. Another reason is that they feared that their identity will be misused by the regime for forged voting in the general election. See *Ibid.*

⁴¹ Amnesty International, *Trapped – The Exploitation of Migrant Workers in Malaysia*, March 2010, p. 10.

⁴² Vijayakumari Kanapathy, *Controlling Irregular Migration : The Malaysian Experience*, Institute of Strategic and International Studies (Malaysia), paper presented at the Regional

a. Phase I : 1950's to early 1980's

Malaysia practiced "open borders" after gaining independence in 1957. In the era of 1950's – 60's undocumented migrant workers were silently welcomed, especially those from Indonesia, since they were considered as fellow Malay races and could easily integrated with Malay society.

b. Phase II : Mid 1980's to 1997

The migrant policy developed to encourage legal recruitment and stem unlawful migration led to economic slowdown. At the beginning of this era, the policy and legal enforcement was soft and ambiguous since the illegal migrant workers phenomenon was considered as temporary problem. However, since 1991 the policies on formal recruitment was getting more developed that it was complemented with Regularization Programmes to legalize the entry and employment of undocumented workers without penalty, and the occasional imposition of total ban on new recruitment in 1993. This policy then followed with security operations to curb illegal entry, code-named Ops Nyah I (Get Rid Operation I) and internal surveillance to arrest, detain and deport "undocumented" migrants not responding to the registration exercise, code-named Ops Nyah II. Those arrested were held at the detention centres until deportation.

In 1995, Malaysia changed the course and developed a policy to import migrant workers again as its short-term strategy in facing the condition of labour-shortage in manufacturing industries for its economic development. Around this era, Malaysia's foreign labour recruitment procedures have been improved vastly over the years due to transparency and efficiency. Yet, even though the policies were considered successful in recruiting legal migrant workers, they unavoidably turned to be the contributing factor for the increasing number of the undocumented migrant workers. It occurred because of the increasing economic development required more labour force, while the government was taken the importing labour policy only as

short term strategy. On the other hand, this condition was also exacerbated with the abusive and corrupt enforcement in practices. Internally, Malaysia's Ministry of Home Affairs viewed migrant workers as a security issue while many other governmental institutions, especially those related with economic development, recognized the importance of migrant workers.

c. Phase III : 1997 Onwards

As financial crisis hit South East Asia, including Malaysia, it strongly affected the policy on migrant workers. The number of unemployment was rising due to the economic slowdown. This condition raised awareness of Malaysian public on job availability, which led further to perceiving migrants, especially those who were undocumented, as social and security threat. In addition, undocumented migrant workers who avoided compulsory health screening considered accountable for the spreading of communicable disease. However, regarding the criminal accountability, in fact, the number of crimes committed by foreigners was merely around 2.0 percent of the total crimes in the country.

Unfortunately, the negative perception in Malaysian public already established that it led the Government issued tougher policy such as increasing penalties for undocumented migrant workers and those who hire them. The fine for hiring foreign workers without permits rose from RM5, 000 to a maximum of RM10, 000 and imprisonment from one to five years upon conviction. The law also provided corporal punishment i.e. caning for repeat offenders. In August 2002, the Act was revised that it compensates illegal entry into Malaysia with a maximum fine of RM 10,000 or a jail term not exceeding five years or both, and mandatory caning, not exceeding six strokes with exemption for females from caning. Further, those found guilty of harbouring or employing undocumented immigrants were liable to fines of between RM 10,000 and RM 50,000 per employee and a jail term not exceeding one year, while those who hire more than five undocumented migrants would be liable for mandatory caning and jail terms of up to a maximum of five years.

Hence, owners or tenants of buildings proven guilty upon such offences in the first instance would be liable for fines of between RM 5,000 and RM 30,000 and/or a jail term not exceeding a year for each undocumented migrant found on their premises. For second and subsequent similar offence, the fine goes up to between RM10, 000 and RM60, 000 and/or a jail term not exceeding two years for each undocumented migrants. Project owners will also be held responsible if undocumented migrants were to be found on their premises.

However, before such tough laws were enforced, the undocumented migrants had been granted amnesty to allow them to return to their countries without being prosecuted. Unfortunately, the regularization and amnesty exercises have been perceived as weaknesses on the part of the government to control undocumented migration, encouraging foreigners to overstay and seek employment. This has prompted officials to declare that amnesty will no longer be granted.

Following the last amnesty programme, the state launched an aggressive nationwide surveillance policy to apprehend undocumented migrants still in the country. The state had mobilised the 500,000 strong RELA (Relawan Rakyat Malaysia or the citizen volunteer corps) to assist the police and the immigration authorities in their crack down on undocumented migrants. Such policy remains highly controversial for reported violence and extortion against foreigners. It has also been guilty of illegal detention in numerous occasions.⁴³ Despite calls by NGOs and other interest groups for the withdrawal of RELA from immigration surveillance, the state has continued to rely on their services, saying that it requires massive manpower to combat undocumented migration.

After more than a decade of policy experiments, Malaysia seemed to realize that unilateral efforts in addressing undocumented migration were difficult,

⁴³ See Human Rights Watch's *UPR Submission ; Malaysia (2008)*, downloadable at <http://www.hrw.org/en/news/2009/02/04/universal-periodic-review-malaysia>, last accessed 5 May 2011.

costly and strained diplomatic ties with sending countries and was no longer viable. Thus, it started to develop bilateral approach toward this issue in 2002 by making G-to-G agreement purported to ensuring the process of recruitment to be more systematic and transparent, and beneficial to all parties. Further, a compulsory Induction Course was also introduced to familiarise prospective migrants on Malaysian labour laws, customs and language. A Biometric Identification system has been introduced to ensure migrants who broke the laws did not re-enter the country under a different identify. However, following the introduction of visa-on-arrival (VOA) in September 2006 to support Malaysia tourism, in many cases are found that the VOA policy has been misused by the undocumented migrant workers as their entry point to Malaysia.

Despite the efforts in suppressing the illegal migration, in April 2009, US Senator Richard Lugar delivered a report to the US Senate Committee on Foreign Relations outlining the collusion between Malaysian immigration officials and human traffickers and smugglers at the border.⁴⁴

Thus, the issue continues and has created tension in the bilateral relation between Malaysia and the sending countries, especially with Indonesia, that the latter holds a moratorium suspending the migration of domestic workers to Malaysia in June 2009.⁴⁵ During the two years of moratorium, the number of undocumented migrant workers decreased sharply, totalling only 11,000 people, which before the moratorium, the rate was about 8,000 per month.⁴⁶ However, it was reported that the Malaysian Domestic Workers Agent Association says that Malaysia is in dire need of domestic workers. The Association estimate that Malaysia needs around 7,000 domestic

⁴⁴ Human Rights Watch, *Country Summary : Malaysia*, January 2010.

⁴⁵ *Ibid.* The suspension constitutes response to the continuing high number of abuses, including the highly-publicized case of Siti Hajar, who was owed 17,000 ringgits (US\$5,000) in back wages and was badly scarred from years of violence including repeated scaldings.

⁴⁶ The Jakarta Post, *Indonesia to resume sending maid next month*, <http://www.thejakartapost.com/news/2011/04/26/indonesia-resume-sending-maids-malaysia-next-month.html>, accessed on 5 May 2011.

workers to replace the one that gone back home due to contract expiration.⁴⁷ Currently, the two countries are still in the process of bilateral negotiation on the agreement to continue the sending of migrant workers and its protective mechanism.⁴⁸

2.3.4 Human Rights Violation against the Undocumented Migrant Workers in ASEAN

Basically, human rights violation towards undocumented migrant workers in ASEAN follow the same patterns happened to most undocumented migrant workers in general. Apart from not being covered in the labour law, the main cause of such violations lies on the lack of legal recognition for the undocumented migrant workers as legal subject before the national law of the country of destination. In general, the countries of destination develop criminalization approach, which only underscores on the breach of migration law as the main legal scheme in handling the phenomenon of undocumented migrant workers.

Starting from this point, human rights violations may initiate which its forms and process may vary and run systematically. From the description about the condition of undocumented migrant workers above, it is clear that many various forms of human rights violation occur to the undocumented migrant workers. It may range from violations on the rights of enjoyment of just and favourable conditions of work, which include fair wages, safe and healthy working conditions, and reasonable limitation of working hours.⁴⁹ Another is the right of non-discrimination based on nationality or other status and mainly as a person before the law.⁵⁰ Also as described previously,

⁴⁷ Jakarta Updates, *Indonesia Will Not Send Migrant Workers to Malaysia until Agreement in Place*, <http://www.jakartaupdates.com/939-01/indonesia-will-not-sent-migrant-workers-to-malaysia-until-agreement-in-place>, accessed on 5 May 2011.

⁴⁸ The Jakarta Post, *Supra* Note 46.

⁴⁹ Article 7 of ICESCR

⁵⁰ Article 16 of ICCPR

concerning the criminalization of violating migration law, resulting in canning as corporal punishment, toward undocumented migrant workers in Malaysia, turns out to be a distinctive violation of the right to be free from torture⁵¹.

The crackdown against undocumented migrants and immigrants living with their families as law enforcement process may result in separation of the family unit that leaves many children stateless. In Sabah, Malaysia, for example, about 10,000 children are considered stateless because they have been separated from their parents during the deportation procedure since their parents are undocumented as well, or they lack the necessary information and education to get registered. During such process, there have been reports about some children dying of various types of sickness.⁵² Thus, such process of legal enforcement abandons the right to family and the rights of the child.

As previously described, the Malaysian government involved civilian police called the RELA to hunt down undocumented migrant. The members of RELA are paid 80 Ringgits for each undocumented migrant they can arrest.⁵³ This financial bonus approach to some cases can also be seen as pitting migrant workers and locals against each other.⁵⁴ Aside from deportation, there are many reports on the arrested undocumented migrants experiencing verbal and physical abuse while in detention, which exceeds capacity.⁵⁵ The Malaysian Government has set up Special Courts in the detention camps – but these courts have been strongly condemned by the Malaysia Bar Council as facilitating a court process where migrant workers

⁵¹ Article 7 of ICCPR and CAT

⁵² Ramon Bultron, *Undocumented Migrants and Immigrants : Issues and Challenges for the Defense of Their Rights and Promotion of Their Wellbeing*, Paper Presentation for the Founding Assembly of the International Migrants' Alliance, 15 June 2008, Hong Kong SAR, p. 4

⁵³ Federation Internationale des Ligues des Droits de l'Homme (FIDH), *Undocumented migrants and refugees in Malaysia : Raids, Detention and Discrimination*, 2008, p.11

⁵⁴ Ramon Butlron, *Supra* Note 52.

⁵⁵ Human Rights Watch, *Supra* Note 43.

are not given the right to understand charges and processes against them in their own language, and are effectively denied the right to legal counsel.⁵⁶

Meanwhile, in light of preventive approach in human rights regime, the Verification Policy taken by Thailand as described earlier, doesn't take into consideration on the situation faced by Myanmar undocumented migrant workers, in case they have to cross back to Myanmar to conduct the verification process, that they may be subject to torture by the Myanmar military regime. In general, there are also many cases where violence involved in the raid and detention process against undocumented migrant workers in Thailand.

Thus, there are various systematic human rights violations, covering social and political rights, towards undocumented migrant workers in ASEAN that needs to be managed.

2.4 ASEAN Cooperation in Immigration Matters⁵⁷

ASEAN cooperation in immigration matters began for the first time in the 5th ASEAN Summit in 1995 in Bangkok, where the Heads of State of ASEAN initiated a consultative meeting of the first ASEAN Heads of Immigration, which later turned to be the ASEAN Directors General of Immigration Departments and Heads of Consular Divisions of the Ministries of Foreign Affairs of ASEAN Member Countries (DGICM), to focus on the simplification of immigration procedures to strengthen economic cooperation. In response to financial crisis in 1997, ASEAN Heads of State adopted a six year plan of action known as the Ha Noi Plan (HPA) at the 6th ASEAN Summit in 1998 in Viet Nam. The Plan contains a number of measures, which among others are: (a) accelerating the freer flow of skilled

⁵⁶ Robertson, Jr., *Supra* Note 30 , pp. 2-3

⁵⁷ Mostly based on ASEAN Web, *ASEAN Plan of Action for Cooperation on Immigration Matters*, <http://www.asean.org/16572.htm>, last accessed on 15 March 2011.

labour and professionals in the region; (b) encouraging the establishment of ASEAN Lane for facilitating intra ASEAN travel; and (c) strengthening ASEAN collaboration in combating the trafficking in, and crimes against violence and children.

Institutionally, DGICM also works in coordination with other ASEAN sectoral ministerial bodies, such as the ASEAN Chief of National Police (ASEANAPOL), in order to put into realization the ASEAN Plan of Action to Combat Transnational Crime⁵⁸

The 3rd Meeting of DGICM, held in Yangon in 1999, agreed to establish a High Level Ad-hoc Experts Group Meeting on Immigration Matters (EGIM) to carry out the following:

- i. Establish an institutional framework for ASEAN cooperation on immigration matters
- ii. Develop a Plan of Action for Cooperation on Immigration Matters
- iii. Establish an ASEAN Directory of Immigration Focal Points to facilitate networking among the immigration authorities in ASEAN, especially in the area of enforcement.

In 2006, ASEAN adopted ASEAN Framework Agreement on Visa Exemption, which regulates the visa exemption for citizens of ASEAN countries up to fourteen (14) days only for purpose of visit.⁵⁹ Further, under the DGICM meeting framework, it has been also established an ASEAN Immigration Intelligence Forum (AIIF). Until recently, AIIF is still in the process of drafting a comprehensive plan of the ASEAN against counter terrorism, yet already successful to come up with the Terms of Reference of Realtime Information Sharing on Lost and Stolen Passport and other documents as adopted by DGICM in the latter's meeting held in Manila, 2009. Further, up until present, the DGICM is still working on developing the several measures such as opening ASEAN lanes at the international

⁵⁸ It was adopted in the 2nd ASEAN Ministerial Meeting on Transnational Crimes (AMM TC) held in June 1999.

⁵⁹ Article 1 of ASEAN Framework Agreement on Visa Exemption

airports, visa-free entry for ASEAN nationals, possible use of smart cards as travel documents within the region, harmonization of ASEAN immigration embarkation and disembarkation cards.

3 International Human Rights Law and Undocumented Migrant Workers

Under the human rights perspective, the protection of undocumented migrant workers can be analyzed from two legal regimes, namely international human rights law in general and international labour law regime (ILO instruments) that such protection should be built upon the reinforcing norms of the two regimes.

3.1 International Human Rights Law Regime on Undocumented Migrant Workers

3.1.1. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter called CRMW)⁶⁰ It is considered as the most comprehensive international treaty in the field of migration and human rights. It covers the protective scheme for one of the most vulnerable groups of people: migrant workers, regular or irregular situation, along with their family members, whether on the labour market, in the education and health systems or in the courts.⁶¹

⁶⁰ It was adopted by UN General Assembly Resolution No. 45/158 in 1990 and has entered into force since 1 July 2003 after being ratified by minimum 20 countries as laid out in Article. 87(1) of the Convention.

⁶¹ Paul de Guchteneire and Antonio Pecoud, *Introduction : The UN Convention on Migrant Workers' Rights, Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, UNESCO Publishing, 2009, p. 1.

Article 2 (1) of the Convention defines migrant worker as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. Meanwhile, article 5 of the Convention clarifies that migrant workers are considered to be documented or in a regular situation “if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.” Otherwise, they are considered to be non-documented or in an irregular situation. The rationale behind the recognition of rights of undocumented migrant workers is reaffirmed in the preamble of the Convention, in which States parties consider, *inter alia*, that irregular migrants are frequently exploited and face serious human rights violations and that appropriate action should be encouraged to prevent and eliminate clandestine movements and trafficking in migrant workers while at the same time ensuring the protection of their human rights.⁶²

Further, as the Convention covers the members of the families of the migrants under its protective scheme, article 4 of the Convention defines the members of the families of the migrants as follows, 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 member of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

Concerning its coverage, the Convention is designed with reaffirming and reinforcing articles as reflected in Article 1 which states that the Convention applies to all migrant workers and members of their families without distinction of any kind, followed with article 7 which provides that State parties should respect and ensure the rights contained in the Convention with the same manner. The Convention itself establishes Part III (consisting

⁶² Office of the UN High Commissioner for Human Rights, *the International Convention on Migrant Workers and its Committee – Fact Sheet No. 24 (Rev.1)*, 2005. p. 4.

of arts. 8-39) dedicated to broad series of rights to all migrants and their family members, in which the rights in question are spelled out from those contained in other core human rights instrument.

Unfortunately, apart from its comprehensive contents, the Convention does not gain much appreciation in terms of ratification. It's only been ratified by 44 countries⁶³, that it took thirteen years to enter into force, compared to ratification of other core human rights instruments.⁶⁴ Among the ten ASEAN countries, only Philippines that have ratified the ICRMW⁶⁵, while Cambodia only become a signatory country.⁶⁶

3.1.2 The Core Human Rights Conventions

The current core human rights conventions, which are relevant to the phenomenon of migrant workers, are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965), the International Covenant on Civil and Political Rights (CCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (CESCR, 1966), the International Convention on the elimination of all Forms of Discrimination against Women (CEDAW, 1979), the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), and the International Convention on the Rights of Child (CRC, 1989).

⁶³ UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en, last accessed on 28 March 2011.

⁶⁴ These are CERD (adopted in 1966, entered into force in 1969, and currently ratified by 174 parties), CESCR (adopted in 1966, entered into force in 1976, and currently ratified by 160 parties), CCPR (adopted in 1966, entered into force in 1976, and currently ratified by 167 parties), CEDAW (adopted in 1979, entered into force in 1981, and currently ratified by 186 parties), CAT (adopted in 1984, entered into force in 1987, and currently ratified by 147 parties), CRC (adopted in 1989, entered into force in 1990, and currently ratified by 193 parties). <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, last accessed on 5 May 2011.

⁶⁵ Signing on 15 November 1993 and ratifying on 5 July 1995

⁶⁶ Signing on 27 September 2004.

3.1.2.1 International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965)

CERD is devoted to eliminate racial discrimination as defined in its Article 1(1) and shall be applied without distinctions, exclusions, restrictions or preferences between citizens and non-citizens.⁶⁷ The Committee on the Elimination of Racial Discrimination, a UN treaty-based body monitoring the implementation of CERD, particularly concerns on the situation undocumented migrant workers not enjoying all rights and are more likely to suffer ill-treatment. In general, states should prohibit the passport confiscation by employers, control recruitment agencies, provide for irregular workers the mechanism to lodge complaints in case of infringement and ensure sanctions for employers who recruit undeclared workers. The Committee encourages regularization of undocumented migrant workers, in order to facilitate the implementation of CERD provisions on persons without status.⁶⁸

Towards such concern, the Committee recommended measures which are significantly related to undocumented migrant workers designed under Part VI. Expulsion and deportation of non-citizens of General Recommendation No. 30 on Discrimination against Non Citizens of the CERD, which recommend its State Parties to adopt following measures :

25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;
26. Ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the

⁶⁷ Article 1 (2) of CERD

⁶⁸ Office of the UN High Commissioner for Human Rights, *Supra Note No. 3*, p. 129-130. Further, see CERD's Thematic Discussion on Non Citizens and Racial Discrimination

personal circumstances of each of the persons concerned have been taken into account;

27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;
28. Avoid expulsions of non-citizens, especially of long-term residents that would result in disproportionate interference with the right to family life;

Other measures recommended in the aforementioned Recommendation are:

34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;
35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;

Among ten ASEAN Member Countries, only Brunei Darussalam, Malaysia, Myanmar, and Singapore that are not party to CERD. Meanwhile, Cambodia and Philippines are party through ratification, while Indonesia, Laos, Thailand, and Viet Nam are parties through accession.⁶⁹

3.1.2.2. International Covenant on Civil and Political Rights (CCPR, 1966)

The main issue for CCPR as far as concerning undocumented migrants is related to the migration law enforcement, especially in the process detention and deportation. As described in the previous chapter, such process of law enforcement may involve diverse violations of rights protected under

⁶⁹ See UN Treaty Collection on CERD, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en, last accessed on 29 March 2011.

CCPR, ranging from right to equality before the law (art. 3), prohibition of slavery, forced labour and trafficking in persons (art. 8), right to freedom of movement and to leave any country, including one's own and to return (art. 12). Another forms as described earlier ranging from ill-treatment or harassment, no fair trial for challenging decision on deportation, torture and degrading punishment, to the rights of children of undocumented migrant workers on health and education, etc.

Further, Human Rights Committee, as the UN body in charge of monitoring the implementation of CCPR, has come up with General Recommendation No. 15 on 'The Position of Aliens under the Covenant (1986)', which states that 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party'. This statement was recalled in General Comment No. 31 (paragraph 10) on 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004).⁷⁰

Among ten ASEAN Member Countries, Brunei Darussalam, Malaysia, Myanmar, and Singapore are not parties to the Covenant. On the other side, Laos and Philippines are parties to the Covenant through ratification, while Cambodia, Indonesia, Thailand and Viet Nam are through accession.⁷¹

3.1.2.3 International Covenant on Economic, Social and Cultural Rights (CESCR, 1966)

The main issue for CESCR concerning undocumented migrants is related to employment and the rights attach to it. However, the most important aspect that needs to be comprehended is the recognition of the status of

⁷⁰ Office of the UN High Commissioner for Human Rights, *Supra Note No. 3*, p. 127.

⁷¹ See UN Treaty Collection on ICCPR, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, last accessed on 29 March 2011

undocumented migrant workers in the Covenant. CESCR in its Article 2(2) recognizes that the rights enunciated shall be exercised without discrimination of any kind. However, in its Article 4, such rights may only subject to limitation as determined by law only in so far as this may be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society.

Further, the Committee on Economic, Social, and Cultural Rights (CESCR), a UN-Treaty-Body in charge of monitoring the implementation of CESCR, states its position towards the protection of the rights of undocumented migrant workers as reflected in several General Comments they come up with, as follows:

- General Comment No. 14 on ‘The Right to the Highest Attainable Standard of Health’ (2000) affirms that ‘States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services’ (article 34).
- General Comment No. 6 on ‘The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights’ (2005), states that ‘refugee or migrant status is one of the grounds of discrimination of women in the equal enjoyment of their human rights’ (paragraphs 5 and 10).
- General Comment No. 18 on the Right to Work (2005) (paragraph 18) states that the principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families.
- General Comment No. 20 (2009) on Non-Discrimination in Economic, Social and Cultural Rights (art. 2 of the CESCR), reaffirms that the principle of non-discrimination stating that “The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers,

stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”.

The positive aspects underlined by the Committee most often concern the ratification of ILO Conventions Nos. 97 and 143⁷² or the adoption and enforcement of legislation on trafficking. An example of a positive aspect is the National Sanitary Plan (PSN, 2003–2005) adopted in Italy, whose coverage was extended to irregular immigrants so that they can receive preventive medical treatment as well as urgent and basic treatment.⁷³

Among ten ASEAN Member Countries, Brunei Darussalam, Malaysia, Myanmar, and Singapore are not parties to the Covenant. On the other side, Laos and Philippines are parties to the Covenant through ratification, while Cambodia, Indonesia, Thailand, and Viet Nam are through accession.⁷⁴

3.1.2.4 International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)

CEDAW is an instrument specifically designed to guard the rights of women, especially on the gender equality issue, in which the Convention defines discrimination on the basis of sex⁷⁵. This gender equality approach covers as well the issue of employment and all its related aspect. Concerning undocumented migrant workers, the Committee on Elimination of All Forms of Discrimination against Women (hereinafter called the Committee), has adopted General Recommendation No. 26 on Women

⁷² ILO C97 on Migration for Employment and ILO C143 on Migrant Workers

⁷³ Office of the UN High Commissioner for Human Rights, *Supra Note No. 3*, p. 133.

⁷⁴ See UN treaty Collection on CESCR,

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, last accessed on 29 March 2011.

⁷⁵ Article 1 of CEDAW : For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Migrant Workers (2008) in which the Committee made classification that undocumented migrant women may fall into category of those who migrate independently and/or who join their spouses or other members of their families who are also workers.⁷⁶

The Committee also recognizes that States are entitled to control their borders and regulate migration yet it is expected that in doing so shall be done by promoting safe migration procedures as well as respecting, protecting, and fulfilling the human rights of women throughout the migration cycle.⁷⁷ In general, the Committee expects that the human rights violation towards women migrant workers should be addressed by applying sex-based and gender-equality approach in the countries of origin, countries of transit, and countries of destination. All ASEAN Member Countries already become party to this Convention.⁷⁸

3.1.2.5 International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)

Towards the phenomenon of undocumented migrant workers, in general, CAT mainly shall be observed during employment and the process of law enforcement. Article 1 of CAT applies basic principle of non-discrimination of any kind and further through its Article 2 states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

Article 3 of CAT reserves the principle of non-refoulement that requires State Party not to expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in

⁷⁶ Paragraph 4 of CEDAW's General Recommendation No. 26

⁷⁷ Paragraph 3 of CEDAW's General Recommendation No. 26

⁷⁸ See UN treaty Collection on CESCR,

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#59, last accessed on 29 March 2011.

danger of being subjected to torture. Hence, the Committee against Torture, a UN treaty body in charge of monitoring the implementation of CAT, has adopted General Recommendation on Conditions for Filing Complaints with Respect to Implementation of Article 3 (1997). Although, the article 3 and its General Recommendation does not specifically mention about migrant workers, not to mention the undocumented ones, it is obviously applicable to the situation often faced by undocumented migrant workers.

Further, in periodic reports developed by the Committee, States are requested to give details on legislation on places of detention within their jurisdiction and on training given to law enforcement and medical personnel.

Among ten ASEAN member countries, only Cambodia, Indonesia, Philippines and Thailand that are parties to CAT.⁷⁹

3.1.2.6 International Convention on the Rights of Child (CRC, 1989)

Article 2 of CRC states imposes obligation for the States Parties to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's status; as well as to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Further the Committee on the Rights of Child, a UN Treaty-based body in charge of monitoring the implementation of CRC, adopted several General

⁷⁹ See UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en, last accessed on 29 March 2011.

Recommendation concerning protection of the rights of children related to migrant workers issues, as follows:

- General Recommendation No. 3 on HIV/AIDS and the Rights of the Child (2003) (Paragraph 30) and General Recommendation No. 7 on Implementing Child Rights in Early Childhood (2005) (Paragraph 24), underscore the special vulnerability of some categories of children, including the migrant ones.
- General Recommendation No. 6 on Treatment of Unaccompanied Children (2005) states that the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness. (Paragraph 12). Among the principles developed under his General Recommendation are non-discrimination, the best interest of the child, and non-refoulement. The Recommendation covers the issue of access of children of migrant workers to health and education services.

Thus, the General Recommendations underscore the need to give special attention to the most vulnerable group of young children and to those who are at risk of discrimination, including children from migrant families.

All ASEAN Member Countries are parties to Convention of the Rights of Child (CRC).⁸⁰

⁸⁰UN Treaty Collection – CRC. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en, last accessed on 29 March 2011.

3.1.3. The Bangkok Declaration on Irregular Migration (1999)

The International Symposium on Migration “Towards Regional Cooperation on Irregular/ Undocumented Migration” was held in Bangkok in 1999; and attended by participants consisted of ministers and representatives from 18 countries⁸¹ plus one special administrative region from Asia and the Pacific. The symposium resulted in the adoption of the Bangkok Declaration on Irregular Migration (the Bangkok Declaration).

The adoption of the Declaration was indeed a collective recognition of the countries participated in the symposium, on the following issues:

- The international migration, especially, the irregular ones is considered to be an increasingly major economic, social, humanitarian, political and security concern for a number of countries in the Asia-Pacific region⁸²
- The increasing activities of transnational organized criminal groups and others that profit from smuggling of and trafficking in human beings, especially women and children, without regard to dangerous and inhumane conditions and in flagrant violation of domestic laws and international standards⁸³.

Further, the participating countries recognized that comprehensive, coherent and effective policies on irregular/undocumented migration have to be formulated within the context of a broader regional framework based on a spirit of partnership and common understanding and the need for international cooperation to promote sustained economic growth and

⁸¹ The participants came from Australia, Bangladesh, Brunei Darussalam, Cambodia, China, the Hong Kong Special Administrative Region, Indonesia, Japan, Republic of Korea, Lao PDR, Malaysia, Myanmar, New Zealand, Papua New Guinea, the Philippines, Singapore, Sri Lanka, Thailand and Viet Nam. In the context of ASEAN, all ASEAN member countries joined the Symposium and adopted the Declaration.

⁸² See Paragraph 4 of the Preamble

⁸³ See Paragraph 7 of the Preamble

sustainable development in the countries of origin as a long-term strategy to address irregular migration.⁸⁴

Several key provisions developed under the Declaration require involvement of countries of origin, transit, and destination separately and together in order to manage migration's positive and negative effects in a comprehensive and balanced manner. Those key provisions are as follows:

1. Comprehensive approach

- Paragraph 1 of the Bangkok Declaration provides that migration, and in particular irregular migration “should be addressed in a comprehensive and balanced manner, considering its causes, manifestations and effects, both positive and negative, in the countries of origin, transit and destination”.
- Paragraph 3 of the Bangkok Declaration provides that “regular migration and irregular migration should not be considered in isolation from each other”.

2. Cooperation, information sharing and technical and financial assistance

- Paragraph 2 of the Bangkok Declaration provides that “the orderly management of migration and addressing of irregular migration and trafficking will require the concerted efforts of countries concerned, whether bilaterally, regionally or otherwise, based on sound principles of equality, mutual understanding and respect.
- Paragraph 3 of the Bangkok Declaration provides that the capacity of countries should be enhanced through information sharing and technical and financial assistance.
- Paragraph 9 of the Bangkok Declaration provides that the participating countries and region should “exchange information on migration legislation and procedures for analysis and review, with a view to increasing coordination to effectively combat migrant traffickers”.

⁸⁴ See Paragraph 8 and 10 of the Preamble

- Paragraph 10 of the Bangkok Declaration provides that countries of origin, transit and destination should “strengthen their channels of dialogue at appropriate levels, with a view to exchanging information and promoting cooperation for resolving the problem of illegal migration and trafficking in human beings”.
- Paragraph 12 of the Bangkok Declaration provides that countries, “in accordance with their national laws and procedures, should enhance cooperation in ascertaining the identity of undocumented/ illegal migrants who seemingly are their citizens, with a view to accelerating their readmission”.
- Paragraph 15 of the Bangkok Declaration provides that the participating countries and region should “each designate and strengthen a national focal point to serve as a mechanism for bilateral, regional and/or multilateral consultations and cooperation on questions of international migration”.

3. Legislative and other measures

- Paragraph 6 of the Bangkok Declaration provides that countries of origin, transit and destination should “reinforce their efforts to prevent and combat irregular migration by improving their domestic laws and measures, and by promoting educational and information activities for those purposes”.
- Paragraph 8 of the Bangkok Declaration encourages the participating countries and region to “pass legislation to criminalize smuggling of and trafficking in human beings, especially women and children, in all its forms and purposes, including as sources of cheap labour, and to cooperate as necessary in the prosecution and penalization of all offenders, especially international organized criminal groups”.

4. Awareness raising

Paragraph 11 of the Bangkok Declaration provides that “greater efforts should be made to raise awareness at all levels, including through public

information campaigns and advocacy, of the adverse effects of migrant trafficking and related abuse, and of available assistance to victims”.

5. Return and treatment of migrants

- Paragraph 13 of the Bangkok Declaration provides that “timely return of those without right to enter and remain is an important strategy to reduce the attractiveness of trafficking. This can be achieved only through the goodwill and full cooperation of countries concerned. Return should be performed in a humane and safe way”.
- Paragraph 14 of the Bangkok Declaration provides that “irregular migrants should be granted humanitarian treatment, including appropriate health and other services, while the cases of irregular migration are being handled according to law. Any unfair treatment towards them should be avoided”.

3.1.4. The Palermo Protocols

The Palermo Protocols related to the issue of undocumented migrant workers are Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; and the Protocol against the Smuggling of Migrants by Land, Sea and Air. Both Protocols constitute derivation from the United Nations Convention against Transnational Organized Crimes (UN-TOC).⁸⁵ Countries must become parties to the Convention itself before they can become parties to any of the Protocols.

⁸⁵ It was adopted by UN General Assembly Resolution 55/25 of 15 November 2000 and opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000; and entered into force on 29 September 2003. See UNCTOC, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>, last accessed on 30 March 2011.

3.1.4.1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003.⁸⁶ The Protocol has been signed by 117 countries and ratified by 147 countries. Among ten ASEAN member countries, only Brunei Darussalam, Singapore, and Viet Nam that are not parties to the Protocol.⁸⁷

Article 3 (a) of the Protocol, states that:

Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

Thus, apart from the fact that under the Palermo Protocols, this Protocol is not specifically dedicated to undocumented or irregular migrants, the definition on Trafficking in Persons above, which consists of the elements of acts, means, and purpose, in some situation may be relevant to the condition often faced by female and children undocumented migrant workers as they are vulnerable to be deceived and exploited into the force labour condition of prostitution or sex works.

⁸⁶ See Signatories to the United Nations Convention against Transnational Crime and its Protocols <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>, last accessed on 30 March 2011.

⁸⁷ Thailand only done signatory. See UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en, last accessed on 30 March 2011

In terms of protection of undocumented migrant workers who are victims of trafficking in person, the Protocols are quite comprehensive, since it provides following key provisions, namely:

- Criminalization of trafficking in persons through legislation (article 5)
- Protection of victims of trafficking in persons (Part II) which includes assistance to and protection of victims of trafficking in persons (article 6) and status of victims of trafficking in persons in receiving States which shall be considered with humanitarian and passionate manner (article 7) and repatriation of victims of trafficking in persons (article 8).
- Prevention, cooperation and other measures (Part III) which includes prevention of trafficking in persons, information exchange and training, mechanism for border measures, security and control of documents as well as checking the legitimacy and validity of documents.

3.1.4.2 Protocol against the Smuggling of Migrants by Land, Sea and Air

The Protocol against the Smuggling of Migrants by Land, Sea and Air was adopted by General Assembly resolution 55/25 and entered into force on 28 January 2004. The Protocols deals with the problem of organized criminal groups smuggling migrants and therefore aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterize the smuggling process. The Protocol is considered as one special achievement for successfully adopting global consensus on definition of smuggling of migrants.⁸⁸

⁸⁸ See UNCTOC, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>, last accessed on 30 March 2011.

The Protocol has been signed by 112 countries and ratified by 127 countries. Among ten ASEAN member countries, only Brunei Darussalam, Malaysia, Singapore, and Viet Nam that are not parties to the Protocol.⁸⁹

Article 3 (a) and (b) of the Protocol, states that:

- (a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;
- (b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

Compared to the aforementioned Trafficking Protocol, this Protocol in question has a stronger relevance to the condition of undocumented migrant workers since it underscores the legality of the entry. Just like the Trafficking Protocol, this Smuggling Protocol also provides quite similar protection mechanism for the victim of the crime, legislative criminalization on smuggling of migrants, and encourages cooperation on the law enforcement against smuggling of migrants.

3.2 ILO Regime on Undocumented Migrant Workers

The ILO’s Committee of Experts on the Application of Conventions and Recommendations in its report of 2011, recalls that international labour standards and the provisions of related United Nations human rights treaties are complementary and mutually reinforcing. Further, it emphasizes that continuing cooperation between the ILO and the United Nations with regard to the application of relevant instruments is essential, particularly in the context of United Nations reforms aimed at greater coherence and

⁸⁹ Thailand only done signatory. See UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en, last accessed on 30 March 2011

cooperation within the United Nations system and the human rights-based approach to development.⁹⁰

3.2.1 ILO Conventions related to Migrant Workers

Under the ILO Labour Standard, the most up-to-date instruments⁹¹ related to migrant workers are Convention No. 97 on Migration for Employment and Convention No. 143 on Migrant Workers (Supplementary Provisions).

The first Convention accompanied with its Recommendation No. 86 (1949) regulates in quite details the process of migrant employment along with its recruitment, placing, conditions, contracts, social security mechanism, etc. However, despite the non-discrimination clause contained in Article 6 of the Convention⁹², it clearly limits the non-discrimination principle on the equal treatment given to the nationals and lawful immigrant, and does not have a word on irregular or undocumented migrants.

Meanwhile, ILO Convention No. 143 on Migrant Workers (Supplementary Provisions) (C143), seems to be set up to fill the gap on protection over irregular migrant workers not covered in other related ILO instruments. This can be seen from its preamble which emphasizes the need to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequences; as well as its consideration on the right of every one to leave any country based on

⁹⁰ Paragraph 109 of ILO Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) – Third item on the agenda : Information and reports on the application of Conventions and Recommendations, 2011, p. 37

⁹¹ The earlier ILO instrument was Convention No. 66 on Migration for Employment (1939). This Convention never came into force. It was withdrawn by the Conference on 30 May 2000. It was revised in 1949 by Convention No. 97. Following the coming into force of this Convention, Convention No. 66 is no longer open to ratification.

⁹² Article 6 of C97 : Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

UDHR and ICCPR. The Convention does not specify the basic human rights of all migrant workers. Nonetheless, the Committee of Experts on the Application of Conventions and Recommendations (the ILO treaty supervisory body) has interpreted this norm to refer to the fundamental human rights contained in UN human rights instruments, particularly those that comprise the International Bill of Human Rights and the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as those rights articulated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁹³

The two main objectives of ILO Convention No. 143 are to regulate migration flows, eliminate clandestine migration and combat trafficking and smuggling activities; and to facilitate integration of migrants in host societies.⁹⁴ Against this backdrop, the C143 dedicates its first Part on Migration in Abusive Conditions. Article 1 of the C143 states that: Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers. Hence, C143 requires its Members to adopt all necessary and appropriate measures both within its jurisdiction and in collaboration to suppress clandestine movements of migrants for employment and illegal employment of migrants and combat trafficking.⁹⁵

Article 8 of the C143 reserves that migrant workers who reside legally in the territory for the purpose of employment cannot be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment. Hence, article 9 of C143 provides clear protection on irregular /undocumented migrant worker as follows:

⁹³ Patrick A. Taran and Eduardo Geronimi, *Globalization, Labour and Migration : Protection is Paramount*, International Migration Programme, ILO, 2003, p. 13.

⁹⁴ Patrick Taran, *the ILO Conventions and the Multilateral Framework on Labour Migration*, Paper presented at the IOM-ILO Workshop on Establishing Labour Migration Policies in Countries of the Western Balkans, held in Tirana, Albania, 9-10 February 2009, p. 3.

⁹⁵ Article 3 and 5 of C143

- migrant workers who are in unlawful conditions shall remain to be treated equally for himself and his family in respect of rights arising out past employment as regards remuneration, social security and other benefits;
- such claim on the rights mentioned above can be presented before the law;
- in case of expulsion of the worker of his family, the cost shall not be borne by them.

In its implementation, C143 is accompanied with the adoption of Recommendation No. 151 on Migrant Workers Recommendation, (1975)

Thus, the content of ILO Conventions 97 and 143 formed the basis for drafting the 1990 International Convention on migrant workers, which expanded and extended recognition of economic, social, cultural and civil rights of migrant workers rights.⁹⁶

All ASEAN Member Countries are member states of ILO, except Myanmar. Unfortunately, among all ASEAN Member Countries, only Philippines that ratified both Convention 97 and 143, while Malaysia ratified Convention 97 but declared it only applicable to Sabah State.

3.2.2 ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up (1998)

The adoption of ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up began from the social clause debate on trade and labour standard following the set up of WTO back in 1994. This issue then discussed in the UN World Summit on Social Development in 1995 which resulted in commitment to safeguard the basic rights of workers based on

⁹⁶ Taran, *Supra* Note 94, p. 4.

ILO standard mainly on the prohibition of forced and child labour, freedom of association, the right to organize and bargain collectively and the principle of non-discrimination. The process was later followed up in the first Ministerial Conference of WTO, held in 1996, in Singapore, where Trade Ministers avowed respect for core labour standards, and noted that these were in the provenance of the ILO. In 1998, the International Labour Conference successfully adopted the Declaration.⁹⁷

The most important provision laid out in the Declaration is Article 2 which states as follows:

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
 - freedom of association and the effective recognition of the right to collective bargaining;
 - the elimination of all forms of forced or compulsory labour;
 - the effective abolition of child labour; and
 - the elimination of discrimination in respect of employment and occupation.

Thus, all those fundamental rights mentioned in that article is relevant to improve the condition of undocumented migrant workers in many cases, as the Declaration requires ILO to give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and further stresses on obligation to observe such rights apart from their status of ratification to the respective ILO instruments of such rights.

3.2.3 ILO Multilateral Framework on Labour Migration (2005)

Following the globalization, the international labour migration phenomenon grows more complex and therefore requires a more developed international

⁹⁷ Background of ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up <http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm>, last accessed on 30 March 2011

framework to manage it. Against this backdrop, ILO held a tripartite meeting of experts, met in Geneva from 31 October to 2 November 2005, discussing the issue and successfully came out with the adoption of the ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration".⁹⁸

The main objective of the Framework is to provide practical guidance to the governments, employers' and workers' organizations on the development, strengthening, implementation and evaluation of national and international labour migration policies. Thus, the framework gives the guidance and guidelines needed by policy makers, stakeholders and analysts to improve national policy and practice on migration, which will be very beneficial for countries of origin, destination or transit countries.⁹⁹

The Framework consists of 15 main principles and corresponding guidelines. Basically, the Framework underscores the issues of decent work, management and governance of migration, promotion and protection of migrant rights, and, migration and development. It also attaches examples of best practices as well as a list of relevant Conventions and Recommendations.

Further, Patric Taran (2009) elaborates the principles and their corresponding guidelines contained in the Framework as follows:

1. Decent Work: The principle and guidelines focus on expanding opportunities for decent work at home or abroad, developing policies that create decent work, and supporting the Global Employment Agenda.
2. Means for International Cooperation on Labour Migration: The principle encourages international cooperation by governments and by employers' and workers' organizations to promote regulated labour migration. The guidelines contain recommendations on such issues as the exchange of

⁹⁸ See http://www.ilo.org/asia/whatwedo/publications/lang--en/docName--WCMS_146243/index.htm, last accessed on 31 March 2011.

⁹⁹ Taran, *Supra* Note No. 94.,p. 5.

information, intergovernmental dialogue and cooperation, bilateral and multilateral agreements, and development assistance.

3. Global Knowledge Base: The principle promotes the collection and application of knowledge and information on labour migration, and the guidelines contain recommendations on such issues as improving data collection and analysis, international exchange of data and research.
4. Effective Management of Labour Migration: There are four principles, which focus on the effective management of labour migration; expanding regular labour migration, taking labour market needs and demographic trends into account; social dialogue; and consultation with civil society. Among the guidelines developed corresponding to effective management of labour migration is to implement policies that ensure that specific vulnerabilities faced by certain groups of migrant workers, including workers in an irregular situation, are addressed.
5. Protection of Migrant Workers: There are three principles, promoting respect for the human rights of migrant workers; application of international labour standards to migrant workers, and enforcement of national law. Under this principle, several guidelines related to irregular migrant workers are :
 - adopting and enforcing legislation and policies that protect migrant workers from conditions of forced labour, including debt bondage and trafficking, particularly migrant workers in an irregular situation or other groups of migrant workers who are particularly vulnerable to such conditions;
 - entering into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, to regular migrant workers and, as appropriate, to migrant workers in an irregular situation;
6. Prevention of and Protection against Abusive Migration Practices: The principle concerns the prevention and elimination of abusive migration conditions. Corresponding guidelines address protecting victims of abusive conditions, sanctioning those who commit abusive practices and prevention of abuse and exploitation. Specifically the guidelines also

requires for adoption and implementation of legislation and policies to prevent irregular labour migration.

7. Migration Process: Two principles, one addressing an orderly and equitable process of labour migration and the other addressing the supervision of recruitment agencies. The guidelines provide specific recommendations on assistance to migrant workers during the migration process and supervision of recruiters to ensure that they respect the rights of migrant workers.
8. Social Integration and Inclusion: The principle encourages integration of migrant workers and their families in the destination country, while the guidelines specifically address anti-discrimination measures and means for assisting migrant workers and their families with integration. One of the guidelines states that, given the particular problems faced by irregular migrant workers or other vulnerable migrant workers as a result of their status, considering the implementation of policy options referred to in Convention No. 143 and its accompanying Recommendation No. 151;
9. Migration and Development: The principle promotes the contribution of labour migration to employment, economic growth and development for the benefit of both origin and destination countries. The corresponding guidelines address issues such as regional integration, enterprise creation, remittances and mitigating the loss of skilled workers.
10. Examples of Best Practices: A wide range of practices and policies from around the world are briefly summarized in the annex on best practices, with 132 examples provided.

4 Toward the Establishment of ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers

ASEAN Leaders adopted ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers during the 12th ASEAN Summit held in Cebu, Philippines on 13 January 2007, in which the ASEAN Leaders directed its officials to develop effective mechanism to safeguard migrant workers. The Declaration mandates both sending and receiving countries to provide protection and promotion the rights of migrant workers. In order to realize the goals of the Declaration, paragraph 22 of the Declaration provides that ASEAN Member Countries to task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.

In following up the mandate based on paragraph 22 of the Declaration, the ASEAN Ministers of Foreign Affairs, through their Statement adopted on 30 July 2007 during the 40th ASEAN Ministerial Meeting in Manila, Philippines, called for the establishment an ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (hereinafter referred to ACMW), which reports to the Senior Labour Officials Meeting (SLOM).

In such Ministerial statement, the Structure of the Committee is designed as follows:

- **Purpose of the Committee**

The Committee, in accordance with the national laws, regulations, and policies of Member Countries, will serve as the focal point within ASEAN to coordinate the effective implementation of the commitments made under the Declaration; and to facilitate the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers.

- **Structure of the Committee**

The Committee shall:

1. Be composed of one senior representative from each of the Member Countries, as well as a representative from the ASEAN Secretariat;
2. Be assisted by representatives from the concerned government agencies of each Member Country;
3. Report to the Senior Labor Officials Meeting (SLOM);
4. Be chaired by the representative of the country that holds the Chairmanship of the ASEAN Standing Committee; and
5. Be provided secretarial support by the ASEAN Secretariat.

- **Functions of the Committee**

Subject to the national laws, regulations, and policies of the Member Countries, the functions of the Committee will be as follows:

1. Explore all avenues to achieve the objectives of the Declaration;
2. Facilitate sharing of best practices in the ASEAN region on matters concerning the promotion and protection of the rights of migrant workers;
3. Promote bilateral and regional cooperation and assistance on matters involving the rights of migrant workers;
4. Facilitate data sharing on matters related to migrant workers, for the purpose of enhancing policies and programmes to protect and promote the rights of migrant workers in both sending and receiving countries;
5. Encourage international organizations, ASEAN Dialogue Partners and other countries to respect the principles and extend support and

assistance to the implementation of the measures contained in the Declaration;

6. Promote harmonization of mechanisms between both sending and receiving countries that promote and protect the rights of migrant workers to implement the ASEAN commitment reflected in paragraph 17 of the Declaration;
7. Work closely with the ASEAN Secretariat in the preparation of the report of the Secretary-General of ASEAN to the ASEAN Summit; and
8. Work towards the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers.

Previously, in the 5th ASEAN Senior Labour Officials Meeting (SLOM) held on 15-16 May 2007, it was agreed to establish ASEAN Forum on Migrant Labour designed to be the platform for the exchange of views on migrant workers issues. The forum can propose recommendation for the ASEAN Committee on the Implementation of Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). The first meeting of the Forum was conducted on 24-25 April 2008 in Manila, Philippines, where representatives of member countries shared the description on their national policies on migrant workers. The meeting also attended by representatives from ILO Bangkok, ILO Jakarta, IOM Philippines, Migration Centre, and Migrant Forum in Asia (MF). The meeting came up recommendation that ACMW to hold the first meeting before the 14th ASEAN Summit and that to institutionalize and to hold the ASEAN Forum on Migrant Labour on regular basis and place it under the ACMW and report to SLOM.¹⁰⁰

Meanwhile, the 20th of ASEAN Labour Minister Meeting (ALMM) held in Bangkok, Thailand, on 6-9 May 2008, was preceded by the Preparatory Senior Labour Officials Meeting (PrepSLOM) for the 20th ALMM, which the latter decided to establish a Working Group to provide following

¹⁰⁰ Report of ASEAN Forum on Migrant Labour, 24-25 April 2008.

comments on the draft of ASEAN Social and Cultural Blueprint relevant to labour issues:

- For the area and actions taken from the ASEAN Declaration on the Protection and Promotion of Migrant Workers, their wordings should be maintained as they appear in the Declaration.
- The actions related to the development of the Instrument on the Protection and Promotion of the Rights of Migrant Workers and those initiatives related to skills recognition should not be time bound.¹⁰¹

The 1st ACMW Meeting was held in Singapore, on 15-16 September 2008 and chaired by Thailand with the main agenda to determine the work plan of ACMW. The initial draft of the work plan proposed by ACMW contains the 4 thrusts, namely:

- Thrust 1 : Step up promotion of the rights of migrant workers against exploitation and mistreatment
- Thrust 2 : Strengthen protection of the rights of migrant workers by enhancing labour migration governance in ASEAN Countries
- Thrust 3 : Regional cooperation to fight human trafficking in ASEAN
- Thrust 4 : Development of an ASEAN instrument on the Protection and Promotion of the rights of Migrant Workers¹⁰²

In further discussion, the Meeting agreed, among others, on the following points:

- Consistency in using the term “protection and promotion” in discussing the rights of migrant workers.
- Regarding cooperation to fight human trafficking, ACMW will not duplicate the work undertaken by Senior Officials Meeting on Transnational Crime (SOM-TC)
- Prior to identifying the key principles for the ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers, a workshop

¹⁰¹ Agenda Item 7 : Preparation for an ASEAN Socio Cultural Community Blueprint, Paragraph 14 of Report of the Preparatory Senior Labour Officials Meeting for the 20th ASEAN Labour Ministers Meeting (ALMM), 6-7 may, 2008, Bangkok, Thailand

¹⁰² Annex 5 Report of the 1st Meeting of the Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), 15-16 September 2008, Singapore.

will be conducted to discuss the scope of coverage for principles on the rights of migrant workers.¹⁰³

Following the last point mentioned above, an ACMW Workshop on Scope Coverage and rights of Migrant Workers was held in Manila, Philippines, on 26-27 March 2009. The meeting was chaired by Indonesia and, unfortunately, not attended by representatives from Malaysia and Myanmar. The meeting was intended to discuss three main points, namely: definition and coverage of migrant workers, the key principles, and type of instrument. The meeting was also attended by representatives from ILO, IOM, and Ateneo Human Rights Center to share their views and opinions on the issues in question. Indonesia came up with basic paper which proposes that the instrument should be legally binding and in the form of “ASEAN Convention”, but it was reserved and not agreed by sending countries, especially Singapore. The discussion was tough on the issue of coverage of protection for undocumented migrant workers, in which those that are primarily sending countries wanted it to be comprehensive while those that are primarily receiving countries reserved it only for basic humanitarian level.

However, the meeting successfully adopted Recommendations which contains the following points:

1. The adoption of the following definition of “migrant worker” for the instrument that will be formulated: “A migrant worker is a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.”
2. All migrant workers shall be covered by the instrument. The common rights and specific rights of regular and irregular workers shall be defined in the instrument,
 - A migrant worker is considered as documented or in a regular situation if he or she is authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.

¹⁰³ *Ibid*, Agenda Item 4 : Discussion and Endorsement of the ACMW Workplan, Paragraph 13.

- A migrant worker is considered as non-documented or in an irregular situation if he or she does not comply with the conditions provided for in subparagraph (a) above.
- 3. The instrument shall cover and define the fundamental rights of family members of migrant workers already residing with them without undermining the application by the receiving states of their laws, regulations and policies.
- 4. The instrument shall cover rights of migrant workers for the entire migration process.
- 5. The rights to be covered in the instrument shall refer to those guaranteed under the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. In upholding these rights, Member-States recognize the sovereignty of states in determining their respective migration policies.

Meanwhile, for Core Principles of the Instrument, the Workshop came up with following recommendations:

1. It shall include and cover all migrant workers in ASEAN, irrespective of their legal status (as in line with the affirmation made by ASEAN Member Countries in 1999 in the Bangkok Declaration on Irregular Migration).
2. It shall recognize that migrant workers benefits both sending and receiving states
3. It shall follow the principles of non-discrimination in treatment provided to migrant workers during the entire migration process.
4. Given the predominance of women who are migrating for work, the fourth principle shall be to ensure migration policy and practices are gender-sensitive
5. To ensure that the above principles are met, and in accordance with their principles
6. It shall abide by core conventions and major instruments on human rights.

Following the Workshop and Thrust 4 of Work plan of ACMW, ACMW established ACMW Drafting Team (ACMW-DT) which consists of four (4) countries, namely Indonesia - Philippines (representing sending countries); and Malaysia – Thailand (representing receiving countries).

ACMW-DT has already held three meetings to develop the ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers as mandated by ACMW. The first meeting was held in Bangkok, Thailand on 1 April 2009 and also attended by representatives from ILO and IOM. In the meeting, Indonesia proposed the outline for drafting the instrument in question. However, the meeting failed to reach consensus on the proposed outline of the Instrument since Malaysia argued that it was not ready to discuss the draft of the instrument and needed more time to study the proposed outline comprehensively. Further, Malaysia has clearly stated that it refused to accept the recommendations resulted in the Workshop held in Manila, since it didn't attend the Workshop in question.¹⁰⁴

The 2nd Meeting of ACMW-DT was held in Bali, Indonesia, on 25-26 June 2009 discussing about the Work plan, Terms of Reference (ToR) and Outline draft Instrument of ACMW-DT. The meeting agreed on draft ToR as well as inserting recommendations made in the Manila Workshop on the background chapter of the ToR. The representatives for ACMW-DT shall consist of three persons and the chairmanship will be held on alphabetical basis of the names of ASEAN countries. The 3rd Meeting of ACMW-DT was held in Kuala Lumpur, Malaysia, on 6-8 December 2009 and chaired by Indonesia.¹⁰⁵

From all those three meetings, there has been no significant substantial progress made, instead the whole process is deadlock. The main cause of the deadlock is the persistent refusal made by Malaysia to allow consideration of either undocumented migrant workers or families of migrant workers in the scope and coverage of the negotiations on the draft instrument in question. The last meeting decided that these points of contention should be referred for consideration by the entire ACMW - composed of focal points of all 10 ASEAN governments.¹⁰⁶

¹⁰⁴ Anonymous, Staff of Ministry of Foreign Affairs of the Republic Indonesia, April 2011.

¹⁰⁵ *Ibid*

¹⁰⁶ ALIRAN, *Migrant Workers' Rights : ASEAN fails to agree*, <http://aliran.com/1059.html>, last accessed on 23 April 2011

Despite the pressure from NGOs on the deadlock process¹⁰⁷, the ASEAN countries have not shown any signal to take up the issues to the main concerns of ASEAN leaders following the holding of 18th ASEAN Summit.¹⁰⁸

Thus, until now, the process of establishment of the ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers has been stuck with deadlock following the contradicting positions of sending and receiving countries mainly on the issue of undocumented migrant workers.

¹⁰⁷ The Jakarta Post, ASEAN leaders lack commitment on migrant worker: NGO, <http://www.thejakartapost.com/news/2011/05/07/asean-leaders-lack-commitment-migrant-worker-ngo.html> and ASEAN urged to speed up talks on migrant worker protection, <http://www.thejakartapost.com/news/2011/04/11/asean-urged-speed-talks-migrant-worker-protection.html>, last accessed on May 7, 2011.

¹⁰⁸ The Jakarta Post, ASEAN 'unlikely to discuss worker rights' <http://www.thejakartapost.com/news/2011/03/10/asean-%E2%80%98unlikely-discuss-worker-rights%E2%80%99.html>, last accessed on May 7, 2011.

5 Protection of Undocumented Migrant Workers in the Drafting of ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers

This chapter is dedicated to analyzing the main aspects related to undocumented migrant workers that should be incorporated into the protective scheme provided in the draft of ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers.

5.1 Legal Interpretation on the Coverage of Undocumented Migrant Workers

In making analysis on the protection of the rights of undocumented migrant workers, it is necessary to take into account on the perspective of international migration law, especially on the understanding on authority and responsibility of State over the migration matters and its relation to the State's obligations under international law in general and those specifically derived from international human rights law.

5.1.1. Authority and Responsibility of State on Immigration Matters

Article 1 of the Montevideo Convention on Rights and Duties of States sets permanent population and defined territory as two of four elements for the State to be recognized as subject of international law.¹⁰⁹ Indeed, the provisions contained in the Convention developed from the widely

¹⁰⁹ Article 1 of the Montevideo Convention on Rights and Duties of States (1933) - The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

recognized and accepted norms as part of international customary law that State posses broad authority to regulate the movement of non-citizens across their territory, as reflected in the following typical legal perspective:

It is an accepted maxim of international law that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.¹¹⁰

Thus, in exercising its sovereignty, State holds prerogative to enact laws and regulations on immigration matters such as passports issuance, visa/entry admissions, exclusion and expulsion of aliens, and border control. Such enactment and regulation shall pursue the interest of national protection, which may depend on diverse factors, ranging from national security, economic, condition of bilateral relationship, public order, etc.

When it comes to labour migration, the primary basis of protecting national interest usually leads States to restrict the migration policies in order to protect their own citizens in national labour market, by granting entry admission merely for prospective migrants who can provide evidence to support themselves during their stay in the country. Indeed, compared to the grounds for refusing the presence of aliens, the grounds for barring entry are more limited. In most cases, the main grounds for expulsion are if the migrant enters the territory in violation of law, fails to comply with terms of admission or has been involved in criminal activities.¹¹¹ Accordingly, in general practice, State usually sets up distinction in applying migration policies towards the nationals of different countries depending on each particular value of such countries to meet the State's national interest.

Despite the underlying principle that State enjoys such wide authority, the development of modern international law has taken into consideration human rights norms on the exercise of such authority. Modern international

¹¹⁰ David A. Martin, "The Authority and Responsibility of States," in Aleinikoff, *Migration and International Legal Norms*, 2003, p. 31

¹¹¹ *Ibid.*, p. 34.

law reserves human rights observance as the obligations for State to uphold. This upholding of human rights norms as general obligations extend to all persons, citizen or alien, within the jurisdiction of the state. However, the norms do not affect the state exercise of authority on setting up the criteria for the entry admission.¹¹² Article 2 (1) of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, adopted by the UN General Assembly in 1985, reflects this notion :

“Nothing in this Declaration shall be interpreted as legitimizing any alien’s illegal entry into and presence in a State, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens, However, such laws and regulations shall not be incompatible with the international legal obligations if that State, including those in the field of human rights.”

5.1.2. Juridical Conditions of Undocumented Migrant Workers

As a follow-up activity of the adoption of AMW Declaration, the drafting of AMW Instrument should be conducted in accordance with the norms established and agreed in AMW Declaration, and generally, with those contained in ASEAN Charter, considering the latter as the main binding legal instrument for the whole cooperation framework of ASEAN as an international intergovernmental organization. Hence, obligations of a State deriving from membership of an international organization may stem from the constituent instrument of the organization.¹¹³

Accordingly, since these obligations stemmed from membership of ASEAN, at least there are three¹¹⁴ ASEAN principles that should be primarily observed on the drafting process of AMW Instrument, namely :

¹¹² *Ibid*, p.32

¹¹³ Paul Reuter, *Introduction to the Law of Treaties*, 1989, p. 113

¹¹⁴ Article 2 (2) (b, i, j) of ASEAN Charter. The selection of these three principles doesn't mean other principles are not also important.

- shared commitment and collective responsibility in enhancing regional peace, security and prosperity;
- respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

As described earlier, the key issue that causes the deadlock in the drafting process of AMW Instrument is the inclusion of undocumented migrant workers into its protective scheme, in which the receiving countries are against the idea of such inclusion while on the contrary, the sending countries insist on such idea.

The main challenge to such inclusion comes from Malaysia which, apart from its political will, underscores its precautionous position concerning undocumented migrant workers on three points, namely :

- conformity between ASCC norms with the general principle in the AMW Declaration,
- non-regularization of undocumented migrant workers
- non-defining of the term migrants worker in accordance with any treaty to which Malaysia is not a party.

The first two positions are already accommodated by the points contained in the General Principle of the Declaration in question itself.¹¹⁵ The third position constitutes a reservation by character, which may be presumed as anticipation toward the drafting process to define migrant worker in reference to the one contained in International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

¹¹⁵ See Paragraph 1 and 4 of General Principles of the AMW Declaration

(CRMW)¹¹⁶, considering that CRMW sets up definition of migrant workers which also includes the undocumented ones.

AMW Declaration clearly states in its General Principles that the undocumented migrant workers should be included in the whole protective scheme on migrant workers cases under the ASEAN cooperation framework¹¹⁷; and specifically determines obligation for receiving countries to protect the fundamental human rights of migrant workers¹¹⁸. Eventhough, these General Principles and obligations derive from a Declaration which is not legally binding in character, they, at least, contain moral obligations that all ASEAN Member States have expressed and agrees commonly. The Declaration itself may serve as one of the milestones for the realization of the whole orchestra of ASEAN vision, especially on the establishment of ASEAN community through inter-ASEAN migration of labour force.

Indeed, such positions taken by Malaysia, may reflect most of concerns of the receiving countries in general which creates the classic international debate on interpreting the actual relationship between states' immigration-regulatory powers and their general human right obligations to undocumented aliens. Thus, in relation to the issue of human rights protection of the undocumented migrant workers in the ASEAN instrument drafting process, it is necessary to understand, at the first place, the striking balanced perspective between the opposing legal arguments entailed in such classic debate.

One of the most persistent arguments against the protection of human rights of undocumented migrant workers is that they are not considered as member of national community, built upon social contract, whose rights are under the State's obligation to protect. In this perspective, as the migrants enter the state's territory without consent, it constitutes a direct violation of the state's

¹¹⁶ It should be kept in mind that Philippines is the only ASEAN member countries that already ratified it.

¹¹⁷ See Paras 2 and 4 of General Principle of AMW Declaration

¹¹⁸ See Para 5 of the AMW Declaration.

expressed intention to condition entry upon consent, and is therefore they are not entitled to the benefits of community membership, including most rights. States views the very presence of irregular migrants both as a violation of their sovereign exclusionary powers and as a rupture of the social contract that binds the nation. Therefore, human rights interests to protect the rights of undocumented migrant workers contend not merely with state's jurisdictional independence from international norms, but also with a central substantive aspect of sovereignty: state's absolute territorial powers, one attributive of which is their virtually uncontested authority to control the admission and expulsion of aliens and to confer nationality – to, in effect, prescribe the composition of the national community.¹¹⁹

Another basic argument for refusing the access to rights for undocumented migrant workers is that such protection can be considered as penalizing documented migrant workers, as the added value of residing and working lawfully in a state would be diminished by the fact that those who are undeclared are also entitled to rights. It is argued that if States are expected to be successful to prevent irregular migration, then they should not become home to undocumented migrants and hence would not need to commit themselves to afford them rights.¹²⁰

In fact, despite the adoption of CRMW in 1990, many states are unwilling to ratify the Convention on the grounds that such access to rights for the undocumented migrant workers are not to be found in other treaties, and it generally disallows differentiation between migrants who have moved in a regular or irregular manner.¹²¹ The problem is that, in reality, the presence of irregular migrants would probably persist no matter how much genuine effort States come up with to avoid them, so thus the issues of their rights remain entailing and relevant.

¹¹⁹ L.S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, International Migration Review Vol. XXV, No.4, pp. 752 - 755

¹²⁰ Peter Van Krieken, *Migrants' Rights and the Law of the Sea : Further Efforts to Ensure Universal Participation*, International Migration, Vol. 45, No. 1, 2007, p.24

¹²¹ Global Commission on International Migration (GCIM), *Migration in an Interconnected World : New Directions for Action*, Geneva,Switzerland, 2005, p. 57.

Thus, from the arguments constructed above, there are issues of membership of nationality and different treatment, which the latter is sometimes understood as discrimination, that becomes the main reason for the refusal for the access to rights for undocumented migrant workers. Against those arguments on the “membership” of undocumented migrant workers in the national community, it is said that, although, they are not *de jure* members of such community, in certain respects, they can be considered as *de facto* members by virtue of their economic and cultural contributions, and therefore it is reasonable for the community to provide them with legal recognition and certain basic rights.¹²²

An indepth and progressive constructed legal analysis in human rights law regarding the status of undocumented migrant worker may be referred to the Advisory Opinion requested by Mexico in 2003 to the Inter-American Court of Human Rights on the Juridical Condition and Rights of Undocumented Migrants, in which also considers the opinion from various human rights law institution, such as European Court of Human Rights, the Human Rights Committee, and the African Commission of Human and People’s Rights, etc. This Advisory Opinion is constructed based on the following points of deliberate consideration¹²³ :

1. The obligation to respect and guarantee human rights as observed by the Human Rights Committee with regard to the provisions of Article 2 of CCPR¹²⁴, is not confined merely to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. Thus, it is very

¹²² L.S. Bosniak, *Supra* Note 119, p. 750.

¹²³ Inter-American Court of Human Rights , Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States, on Legal Status and Rights of Undocumented Migrants, Paras 70-127

¹²⁴ Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

important that individuals, including undocumented migrant workers, should know what their rights are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant.

2. The principle of non-discrimination, together with equality before the law and equal protection, are elements of a general basic principle related to the protection of human rights. The Advisory Opinion differentiates the using of the terms distinction and discrimination, in which the term “distinction” will be used to indicate what is admissible, because it is reasonable, proportionate and objective, the term “discrimination” will be used to refer to what is inadmissible, because it violates human rights. Therefore, the term “discrimination” will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights. One of the most significant human right norms that provide restrictions on state action on the immigration matters is the anti-discrimination norm. In this case, the anti-discrimination norm serves as a modest burden for the state to come up with justification for any distinctions drawn in law on practice by applying rational basis of reasonableness and proportionality judgment for the differentiation relevant to the purpose that is sought to be achieved.¹²⁵
3. The principle of equality before the law and non-discrimination are considered as *jus cogens* because they are fundamental principles that permeates all laws, where the whole legal structure of national and international public order rests on them, including every act of the

¹²⁵ Martin, *Supra* Note 110, p.35. Significantly, the “reasonable and proportionate” test does not appear in the UN Human Rights Committee’s General Comment No. 18, Non Discrimination, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994). The European Court of Human Rights, as quoted by the Inter-American Court of Human Rights in the Paragraph 90 of this advisory, holds that the principle of equality of treatment is violated if the distinction has no objection and reasonable justification, which must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principle which normally prevail in democratic societies.

powers of the State, in all their manifestations, related to respecting and ensuring human rights.¹²⁶

4. The character of *jus cogens* of those principles in question applies to all States whether or not they are party to a specific international treaty, and gives rise to effects to the third parties, including individuals. Consequently, respecting and ensuring the promotion and protection of those norms fall under *erga omnes* obligation for States, that the latter cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.
5. Referring to the UN General Assembly Resolution 56/170 on Protection of Migrants, migrant workers, as a subject of human rights, are generally considered to be in a vulnerable situation, who frequently faces cultural prejudices in their State of destination and are absent from their State of origin's protection. Based on these considerations, the General Assembly reiterated the need for all States to protect fully the universally recognized human rights of migrants, especially women and children, regardless of their legal status, and to provide humane treatment, particularly with regard to assistance and protection.
6. Regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. Yet, it doesn't mean that States cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.
7. States may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective,

¹²⁶ Inter-American Court of Human Rights, *Supra* Note 123, Paras 100 – 101

proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity.¹²⁷

8. The Court also refers to its Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law which, *inter alia*, states that for “the due process of law” a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. In this case, the right to due process of law should be recognized within the framework of the minimum guarantees that should be provided to all migrants, irrespective of their migratory status. The broad scope of the preservation of due process applies not only *ratione materiae* but also *ratione personae*, without any discrimination.
9. Further, the Court observed that the list of minimum guarantees of due legal process applies when determining rights and obligations of “civil, labor, fiscal or any other nature”, which shows that due process affects all these areas and not only criminal matters. Therefore, the administration is not exempt from its duty to comply with human rights obligation, that the minimum guarantees must be observed in administrative processes whose decision may affect the rights of persons. In this respect, the State must guarantee that access to justice is genuine and not merely formal that the rights derived from the employment relation, despite the administrative measures adopted, since the employment relationships are established under both public law and private law and, in both spheres, the State plays an important part. In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into

¹²⁷ *Ibid*, Paragraph 119, The African Commission on Human and Peoples’ Rights of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter [the African Charter of Human and Peoples’ Rights] and international law.

consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*).

Thus, the Advisory Opinion, as a source of international law¹²⁸, has deliberately corroborated obligation *erga omnes* for the protection of undocumented migrant workers by establishing status of *jus cogens* on the principles of non-discrimination and equality before the law.

Malaysia's reservation toward ASCC is that the term of migrant workers shall not be defined in accordance to any treaty which Malaysia is not party. In this case, this reservation is likely to be intended to avoid the drafting process to make definition of migrant workers referring on the one contained in CRMW, which cover irregular or undocumented migrant worker as well. Such reservation shall be in accordance with the norm under the 1969 Vienna Convention on the Law of Treaties (VCLT) which determines that reservation is prohibited so far it would defeat or is incompatible with the object and purpose of a treaty.¹²⁹

The purpose of ASCC is reflected in its primary goal which is to contribute to realizing an ASEAN Community that is people-centered and socially responsible with a view to achieving enduring solidarity and unity among the nations and peoples of ASEAN by forging a common identity and building a caring and sharing society which is inclusive and harmonious where the well-being, livelihood, and welfare of the peoples are enhanced.¹³⁰ In terms of object of treaty, migrant workers and all its related aspects constitute valid object that they are mainly laid out under the Activity C.2. Protection and Promotion of the Rights of Migrant Workers of ASCC with its Strategic objective to ensure fair and comprehensive migration policies and adequate protection for all migrant workers in accordance with the laws, regulations and policies of respective.

¹²⁸ See Article 38(1)(d) of the Statute of ICJ

¹²⁹ Article 18 and Article 19 (c) of CLTV

¹³⁰ Paragraph 4 of ASCC

Consequently, upon regulating the object and realizing the purpose related to this ASEAN migrant workers issue, it inevitably requires clear and internationally accepted definition on migrant workers along with the obligations to respect the consequences arising there from, especially on the protection of their rights.

Hence, pertaining the protection of migrant workers, the corroboration of *jus cogens* norms of principle of non-discrimination and equality before the law as elucidated in the Advisory Opinion mentioned earlier, requires reference to the internationally recognized definition of migrant workers, so that the application of such *jus cogens* principles can be conducted fairly due to possible application of proportional distinction in providing the protection of the rights of persons in general and for those who are migrant workers by *de facto*. In this case, the internationally recognized and accepted definition of migrant worker is the one laid out in the CRMW. Consequently, if the drafting process of the instrument in question should come up with definition of migrant workers adopted from CRMW, which is not contrary to the ASEAN commitment to uphold international law, Malaysia's reservation shall be considered invalid since its effect may defeat and incompatible with the object and purpose of ASCC, in this case the protection of migrant workers, including the undocumented ones.

From the description above, the inclusion of undocumented migrant workers into the protective scheme provided under the drafting of ASEAN Instrument in question, has become a positive obligation *erga omnes* for all ASEAN Member Countries, as a regional entity as well as part of international community, to fulfill their collective commitment to respect the promotion and protection of human rights by upholding the norms preserved in UN Charter and international law, which consequently lead to the shared commitment and responsibility in enhancing regional peace, security and prosperity, as laid out in the principles contained in ASEAN Charter as the main legal framework for ASEAN cooperation.

5.2 The Rights of Undocumented Migrant Workers and the Migration Law Enforcement

Despite the determination of the juridical status of undocumented migrant workers as described above, the Inter-American Human Rights Court in its Advisory Opinion cited above, doesn't specifically determine certain rights for undocumented migrant workers yet it only elaborates on three main basic of legal stances¹³¹, as follow :

- The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.
- Legal instruments that regulate labor rights at the domestic or/and the international level, must be interpreted according to the principle of the application of the norm that best protects the individual, in this case, the worker.
- Undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice.

This recognition of the rights is in accordance with the Article 8 of ILO Migrant Workers Recommendation, 1975 (No. 151) which states that "Migrant workers whose position has not been or could not be regularized should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards

¹³¹ Inter-American Court of Human Rights, *Supra* Note 123, Paras 148, 156, and 160.

remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights.”

Meanwhile, CRMW sets up differentiation between the rights applicable for all migrant workers and those applicable limited only for the regular/documented ones.¹³² Among those rights covered for all migrant workers are : right to life, right to freedom of movement, freedom from torture or from cruel, inhuman or degrading treatment or punishment, right to freedom from slavery or servitude, and forced labour, right to freedom of thought, conscience, and religion, right to freedom from arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications or unlawful attacks on his or her honor and reputation, right to freedom from arbitrarily deprived of property, right to liberty and security of person as well as effective protection by the State against violence, physical injury, threats and intimidation, freedom from individual or collective arrest, detention, and to due process of law in general.

CRMW permits states to provide less protection to undocumented migrant workers compared to the regular ones. Under the terms of CRMW, the undocumented do not have guarantees on, among others, rights to family unity, certain trade union freedoms, liberty of movement, participation in public affairs in the state of employment, equality of treatment with nationals with regard to certain government benefit programs, including housing, educational, and health-related services, and further employment protections.¹³³ In other words, under the terms of the CRMW, the undocumented may continue to enjoy institutionally-sanctioned second class status of migrant workers.¹³⁴

¹³² Part III of CRMW – Human Rights of All Migrant Workers and Members of Their Families

¹³³ Part IV of CRMW – Other Rights of Migrant Workers and Members of Their Families who are Documented or in A Regular Situation.

¹³⁴ Bosniak, *Supra Note* 119, p. 750.

However, despite the differentiation of rights made in CRMW, there are certain rights of undocumented migrant workers that need to be elucidated further, namely:

1. Freedom of Association :

As mentioned earlier, freedom of association falls under Part IV of the CRMW : Other Rights of Migrant Workers and Members of Their Families who Are Undocumented or in a Regular Situation. Since CRMW differs the rights that belong all migrants and the rights specifically belong to the regular migrants, it can be assumed that freedom of association can only be exclusively enjoyed by documented migrant workers. However, under the ILO regime, article 2 of ILO Convention No. 87 on Freedom of Association clearly states that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. This allowance is also reflected in the Article 8 of Migrant Workers Recommendation, 1975 (No. 151) mentioned earlier. Further, this principle is reaffirmed by the ILO Committee on Freedom of Association on the case of rejection for registration by the South Korean Government toward Migrants Trade Union (MTU), which states as follows:

The Committee recalls in this regard the general principle according to which all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing [Digest, op. cit., para. 216]. The Committee further recalls that when examining legislation that denied the right to organize to migrant workers in an irregular situation – a situation maintained de facto in this case – it has emphasized that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87, and it therefore requested the Government to take the terms of Article 2 of Convention No. 87 into account in the legislation in question [Digest, op. cit. para. 214]. The Committee also recalls the resolution concerning a fair deal for migrant workers in a global economy adopted by the ILO Conference at its 92nd Session (2004) according to which “all migrant workers also benefit from the protection offered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). In addition, the eight core ILO Conventions regarding freedom of association and

the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labour and the elimination of child labour, cover all migrant workers, regardless of status” [para. 12].¹³⁵

Toward these contradictory legal stances, ASEAN should determine its position in accordance with ILO regime that allows undocumented migrant workers to join enjoy the right to freedom of association, considering the general commitment toward human rights as mandated by the ASEAN Charter and the fact that all ASEAN countries are member of ILO, in contradiction to the fact that among the ASEAN, it is only Philippines that already ratifies CRMW.

2. Right to Health Services :

Just like right to freedom of association, right of health services also falls under Part IV of the CRMW. However, on the latest development, in 2000, Committee on ESCR adopted General Comment 14 on the Right to the Highest Attainable Standard of Health, which under the section of Specific Legal Obligations, states as follows:

In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and *illegal immigrants*, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy;¹³⁶

In comparison, the undocumented migrant workers in most of EU countries still faces restriction to access the health services,¹³⁷ for examples:

... in Belgium, France, Italy, the Netherlands, Portugal and Spain, the laws provide for the system to cover fully or partially the costs for the undocumented migrants who cannot afford to pay them. In contrast, Germany, Greece and Switzerland restrict access to health care to emergency care alone. In Sweden, undocumented

¹³⁵ Para 778 of the 353th Report of the Committee on Freedom of Association (2009)

¹³⁶ Para 14 Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000)

¹³⁷ See PICUM, *Access to Healthcare for Undocumented Migrants in Europe*, Brussels, (2007)

migrants are not entitled to access the health system unless they pay for the full cost of health services, even in emergencies. In the UK, the system leaves the choice of accepting undocumented migrants to general practitioners (only in relation to primary health care).¹³⁸

Reflecting on the this issue, the ASEAN countries should refer to the consideration of humanitarian reason laid out in Paragraph 2 of the General Principle of the ASEAN Declaration, as basis of cooperation to resolve the cases of undocumented migrant workers, limited only to those who become the undocumented not because of their own fault. Although such principle establishes reservation on the faulty condition of the undocumented migrant workers, the general principles of human rights, as interpreted by the General Comment mentioned earlier should be taken into consideration.

In practice, it is understandable that governments would consider that providing access to healthcare to undocumented migrant workers might become a triggering factor contributing to the increasing illegal migration, yet humanitarian approach as agreed should also be taken into consideration. Therefore, it is recommended to adopt the approach developed by Germany, Greece, and Switzerland as reasonable compromised practice that such access to health is provided only limited for emergency care alone.

3. Right to Education for the Children of Undocumented Migrant Workers

Under Article 45 of CRMW, the right to education is only provided for the family members of the documented migrant workers. In contrary, Article 28 of CRC states that: “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all”. As article 2 of CRC

¹³⁸ Sergio Carrera & Massimo Merlino, *Undocumented Immigrants and Rights in the EU, Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?*, Centre for European Policy Studies, December 2009, pp. 26-27.

prohibits any kind of discrimination, including “other status” of the children’s parents for the enjoyment of the rights of child, the Committee on the Rights of the Child has stated that overt or hidden discrimination preventing children from accessing their right to education, offends the human dignity of the child and may undermine or even destroy their potential.¹³⁹ Regarding this issue, far before the adoption of CRMW in 1990 and its entry into force in 2003, the U.S. Supreme Court has recognized this right in the famous case of *Plyler v. Doe* in 1982¹⁴⁰.

Further on this issue, Joseph H. Carens argued in favor for the right of children undocumented migrant workers to educational service, as follows: the right to a free public education should be regarded as a basic human right, much like emergency medical care, that the state is morally obliged to provide to all children residing within its jurisdiction, regardless of their immigration status. In the modern world, it is simply not possible for most children to flourish (or even to function) without receiving a basic education.¹⁴¹ Toward this issue, it should be noted that all ASEAN Member States already ratified CRC and that it thus becomes their obligation to be subjected to the obligation under CRC as realization of their commitment to uphold human rights and international law as observed in ASEAN Charter.

Not only providing the general human rights provisions, CRMW also establishes several provisions that are characteristically very relevant to the condition of undocumented migrant workers, which among others are¹⁴² :

- migrant worker or member of his or her family shall not be imprisoned merely on the ground of failure to fulfill a contractual obligation
- migrant worker or member of his or her family shall not be expelled or deprived of his or her authorization of residence or work permit merely

¹³⁹ Para 10 of CRC’s General Comments No. 1 on Aim of Education (2001)

¹⁴⁰ ["Court considers education for illegal alien children"](#). The Telegraph (a newspaper in Nashua, New Hampshire). 1 December 1981, <http://news.google.com/newspapers?nid=2209&dat=19811201&id=i6ErAAAIBAJ&sjid=gfwFAAAAIBAJ&pg=4509,116260>, last visited on 1 May 2011.

¹⁴¹ Joseph H. Carens, *The Rights of Irregular Migrants*, pp.169 – 173, http://www.creum.umontreal.ca/IMG/pdf_Joe_Carens.pdf, last accessed on 1 May 2011.

¹⁴² See article 20 – 22 of CRMW

on the grounds of failure to fulfill an obligation arising out of a work contract unless fulfillment of that obligation constitutes a condition for such authorization or permit.

- prohibition of confiscating or attempting to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits, except by the public official duly authorized by law.
- prohibition of collective expulsion
- in case of expulsion, migrant workers have the opportunity to settle any claims for wages and other entitlements

Despite the fact that most of ASEAN countries are not parties to the CRMW, the specific provisions above are necessary for making effective protection of undocumented migrant workers, for they meet most of the situations of human rights abuse faced by undocumented migrant workers in ASEAN. Therefore, it is recommended that these provisions to be included in the draft of ASEAN instrument in question.

Meanwhile, along the process of drafting of the instrument in question, Task Force on ASEAN Migrant Workers (TF-AMW)¹⁴³, a civil society initiative based in Singapore, was established in order to response the request for assistance in implementing human rights provisions of the VAP (2004-2010), especially on the elaboration of the instrument in question. In such response, TF-AMW finally come up with the Civil Society Proposal on ASEAN Instrument on the Promotion and Protection of the Rights of Migrant Workers (hereinafter called the Proposal) containing recommendations to be further taken into account and used by the ASEAN

¹⁴³ TF-AMW comprises regional networks of civil society organizations and related trade unions, namely : Asian Forum on Human Rights and Development (FORUM-ASIA), Union Networks International Asia-Pacific Regional Office (UNI APRO), Migrant Forum in Asia (MFA), Asia Pacific Forum on Women, Law and Development (APWLD), Coordination of Action Research on AIDS and Mobility (CARAM Asia), and Think Centre – South East Asia Migrant Workers Initiatives. See further <http://www.searchproject.ca/pubs/Task%20Force%20on%20ASEAN%20Migrant%20Workers.pdf>, and <http://www.workersconnection.org/>, last accessed 23 April 2011

countries in the process of negotiation of the instrument in question. The proposal itself is made based on inputs garnered from relevant civil societies within two years (2007-2009) intensive bottom-up consultation processes. The proposal was formally submitted to the ASEAN Secretariat on 12 May 2009 during the 6th ASEAN Senior Labour Officials Meeting (SLOM) held in Valentine, Lao PDR, which in turn shared it with the ASEAN Senior Labour officials.

Pertaining undocumented migrant workers, the Proposal contains technical recommendations,¹⁴⁴ as follows:

1. All ASEAN Member States shall recognize and protect the rights of undocumented migrant workers and ensure their well-being. Migrants shall not be penalized because of lack of status or documents.

This recommendation is in accordance with the general obligation to protect human rights based on the principle of non-discrimination as elaborated previously.

2. Governments shall adopt procedures to speedily and effectively regularize their status and provide necessary identification documents. Receiving countries shall devise and implement (at regular intervals) programs to ensure undocumented migrant workers in their territory are provided with opportunity to undergo an administrative procedure that will allow them to become documented without being penalized. This shall be accomplished through implementation of administrative programs that enable undocumented migrant to come forward without fear of punishment, register themselves (and families) and regularize their status, seek legal employment or convert their existing works status to legal employment to gain access to full range of services available to migrant workers under this Framework Instrument and national laws.

¹⁴⁴ Paras 76, 77, 78, and 89 of the TF-AMW's the Civil Society Proposal on ASEAN Instrument on the Promotion and Protection of the Rights of Migrant Workers

However, this recommendation to regularize the undocumented migrant workers proposed is contradictory to the Paragraph 4 of General Principles of AMW Declaration.¹⁴⁵ Regularization of undocumented migrant workers is within the absolute authority of the receiving country as an exercise of sovereignty that should be left to the political domain of such country to decide. In this case, such refusal pays respect to the principle of non-intervention preserved in Article 2 (2.e) of the ASEAN Charter. However, while there would be no obligation to regularize and bearing in mind the practices conducted by receiving countries so far, States may consider the extent to which and how they would establish programs leading to the regularization of undocumented workers under conditions which they themselves would decide.

3. All receiving countries shall establish effective migrant workers assistance hot-lines, with ability to receive phone from migrant workers in their own language, English, and the language of the host country, which shall be connected also to representatives of sending countries in the receiving countries, such as Embassy personnel, empowered to provide assistance to migrant workers in distress.

This recommendation is in accordance with the Paragraph 20 of AMW Declaration¹⁴⁶

4. Arrest and detention of undocumented migrant workers should be treated as an administrative offense, and not a criminal matter, especially through corporal punishment such as whipping, considering it is a blatant violation of prohibition of torture. Further, such arrest and detention should only be done by permanent civil servants with a legal mandate to do so. Locally recruited paramilitary or civilian auxiliaries

¹⁴⁵ Para 4 of AMW Declaration : Nothing in the present Declaration shall be interpreted as implying the regularization of the situation of migrant workers who are undocumented.

¹⁴⁶ Para 20 of AMW Declaration : Extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the Embassies and Consular Offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements;

shall not be authorized to arrest or otherwise detain migrant workers, and shall be prohibited from involvement in deportation procedures.¹⁴⁷

This recommendation may serve the principle of prohibition of torture as observed in CAT, which similar to the non-discrimination principle, already evolves into *jus cogens* norm with obligation *erga omnes* to uphold it.¹⁴⁸

5. Receiving countries should also systematically screen the undocumented migrant workers who are detained by authorities to ascertain whether they are victims of human trafficking or not, and further, if they are so, distinct procedures of law enforcement should be as observed.

This recommendation is in accordance with the ASEAN Declaration against Trafficking in Persons, Particular Women and Children, which is reaffirmed in the ASEAN Leaders' Joint Statement in Enhancing Cooperation against Trafficking in Persons in Southeast Asia.¹⁴⁹

Apart from the recommendations made by TF-AMW, there are several other approaches that ASEAN may take into consideration in setting up the balanced mechanism between the obligation to protect the rights of undocumented migrant workers and the enforcement of immigration law.

¹⁴⁷ See the cases of RELA Malaysia as previously described.

¹⁴⁸ See Paras 169 – 170 case of *Prosecutor v. Furundžija* (ICTFY, 1998).

¹⁴⁹ Paras 5 and 6 of ASEAN Declaration against Trafficking in Persons Particularly Women and Children :

5. To distinguish victims of trafficking in persons from the perpetrators, and identify the countries of origin and nationalities of such victims and thereafter ensure that such victims are treated humanely and provided with such essential medical and other forms of assistance deemed appropriate by the respective receiving/ recipient country, including prompt repatriation to their respective countries of origin;
6. To undertake actions to respect and safeguard the dignity and human rights of genuine victims of trafficking in persons;

Paras 3 and 4 of ASEAN Leaders' Joint Statement in Enhancing Cooperation against Trafficking in Persons in Southeast Asia (adopted on May 8, 2011 at the 18th ASEAN Summit, held in Jakarta) :

3. To promote a victim-centered approach by distinguishing victims of trafficking in persons from the perpetrators, and identifying the countries of origin and nationalities of such victims;
4. To ensure that such victims are treated humanely and provided with such essential medical and other forms of assistance deemed appropriate by the respective receiving/recipient country, including prompt repatriation to their respective countries of origin;

The enforcement of immigration law should not only targeting on the undocumented migrant workers. One of the policies in law enforcement that should be observed, as already legally enacted and practiced by the receiving countries, is the penalization of the employment of undocumented migrant workers. This approach is really important to eliminate the abusive conditions of irregular or undocumented migrant workers which in most cases resulted from the employers' treatment toward them as well as to contribute to suppressing the number of illegal migration. Further, the approach is also in accordance with collective commitment laid out in Paragraph 17¹⁵⁰ of AMW Declaration as well as Article 6¹⁵¹ of Smuggling Protocol and Article 5 (1) and 2 (b) of Trafficking Protocol.¹⁵²

Meanwhile, the obligation to protect undocumented migrant workers imposed on sending countries can generally be conducted in preventive manner which may deal with much wider aspect than a mere strengthening border control, such as improving internal economic conditions that lead to more job opportunities provided. Therefore, the measures proposed here are limited to those that are tangible and direct technical approach for protecting the undocumented migrant workers, which are as follows :

¹⁵⁰ Para 17 - Take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities.

¹⁵¹ Article 6 – Criminalization : 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

¹⁵² Article 5 – Criminalization :

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

1. Bearing in mind the condition of irregular or undocumented migrant workers which in some cases may not be caused by their own faults¹⁵³, i.e. victims of trafficking in persons, it is strongly recommended that the measures of monitoring and regulating of labour recruitment agencies and brokers should be taken by setting up preservation of joint and severable liability between the recruiting agency in the sending country and the employer in the receiving country, that both of them can be held legally liable for any financial claims or damages resulting from violations of employment contract and other violations of worker's rights.
2. Ensuring that overseas Embassies shall be provided with adequate and trained resources and staff to play a pro-active role in protecting migrant workers overseas, especially the diplomats. Further, considering the sizeable number of female migrant workers and the gender sensitive approach, it is recommended that female diplomats should be attached to the embassies in the country where there are sizeable number of migrant workers.

Thus, the recognition of the rights of undocumented migrant workers in ASEAN should be followed with the effective measures on law enforcement in order to set up balance between the obligation to protect the rights of undocumented migrant workers and the obligation to combat illegal migration.

5.3 Extending Mechanism to Protect the Undocumented Migrant Workers under ASEAN Framework

As described earlier, the work of ASEAN to protect migrant workers has been concentrated mainly on the drafting of the AMW instrument, which unfortunately its progress has been suspended for long mainly because of the tension on the issue of undocumented migrant workers. Indeed, under

¹⁵³ *Ibid*, see also Para 2 of AMW Declaration : The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented;

ASEAN framework, there are various cooperation established, which to some extent, considering the wide extent of the issues involved in the protection of undocumented migrant workers, are relevant to support the continuation of the drafting process and further, to contribute to the cohesive and comprehensive development of the instrument in question. In this respect, ACMW has been given mandate to explore all avenues to achieve the objectives of AMW Declaration as its legal basis. Considering the slow progress of AMW Instrument, it is necessary that ACMW takes more initiative to push the process and invite related ASEAN or/and non-ASEAN agencies to involve and contribute to dissolve the blocking issue of undocumented migrant workers in such drafting process. Among the initiatives that can be taken by ACMW are:

- Build an intensive communication with AICHR to assist in elaborating the rights of migrant workers and further to recommend AICHR to create a Sub-Committee on the Rights of Migrant Workers as part of the AICHR.¹⁵⁴
- Propose to ASEAN DGICM, ASEANAPOL, and ASEAN Migration Forum to put the issue of undocumented migrant worker as one of their main agendas and to come up with recommendations on the issue.
- Build an intensive communication with the ASEAN Inter-Parliamentary Assembly (AIPA) in order to look for support to push the governments of respective ASEAN Member countries to include the protection of the rights of undocumented migrant workers in the draft of AMW Instrument.

¹⁵⁴ Para. 176 of TF-AMW's Civil Society Proposal : ASEAN Framework Instrument on the Protection and Promotion of the Rights of Migrant Workers.

6 Conclusion

From analysis described in previous chapters, it can be concluded that undocumented migrant workers must be covered in the protective scheme laid out in the draft instrument in question, that not only it has been mandated by the AMW Declaration question and ASEAN legal framework in general, but it essentially constitutes obligation *erga omnes* based on application of *jus cogens* principle of non-discrimination and equality before the law that prohibits discrimination based on migratory status. Such protection of rights toward undocumented migrant workers can also be extended to the protection of their rights arisen from established labour relationship as consequences of such *jus cogens* application, yet provided with reasonable distinction in the enjoyment of certain rights due to migratory status.

On the other side, regarding the efforts to suppress the number of undocumented migrant workers, immigration law enforcement also needs to be conducted through effective measures yet accompanied with its human rights approach so that it will cover the interest of both sending and receiving countries.

While it appears unlikely that ASEAN may not go as far as the international standards, and while Malaysia does not want to move at all, on this point, it is necessary for ASEAN to take more serious willingness and explore more initiatives under ASEAN mechanism to break the deadlock on the issue of undocumented migrant workers and resume the drafting process of the instrument.

In relation to Malaysia's persistent position, the approach that can be developed may be as follows :

- The first would be that Malaysia to find some formula that it could accept, such as saying that undocumented migrants would have no rights to remain in the country once discovered but that they would be treated with full respect for human rights during their repatriation.
- Second, that the instrument can be drafted with flexibility that would allow ratifying States to opt out of certain points subject to periodic review and the possibility of opting back in at a later stage (like flexibility in ILO standards).

However, these two approaches are not desirable from human rights point of view yet may turn to be effective as breaking points toward the deadlock. In case ASEAN fails to define its own preferred approach, then the one left is the obligations of ASEAN member countries that contained in the ILO and UN conventions.

The most important thing is, that in order to ensure the effectiveness of mechanism of such protection, it is strongly recommended that the form of the ASEAN instrument will be finally adopted as legally binding instrument, such as Convention, considering that it constitutes development of its preceding non-legally instrument, the AMW Declaration.

Bibliography

Treaties, Resolutions, Reports, and General Comments

Bangkok Declaration on Irregular Migration (1999)

ILO Convention No. 97 on Migration for Employment

ILO Convention No. 143 on Migrant Workers

ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up (1988)

ILO Multilateral Framework on Labour Migration (2005)

ILO Recommendation No. 151 on Migrant Workers, (1975)

ILO Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) – Third item on the agenda: Information and reports on the application of Conventions and Recommendations (2011)

The 353th Report of the ILO Committee on Freedom of Association (2009)

International Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (1984)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

International Convention on the Rights of Child (1989)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

UNCTOC Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000)

UNCTOC Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)

The Committee against Torture (CAT), General Recommendation on Conditions for Filing Complaints with Respect to Implementation of Article 3 (1997)

The Committee on Economic, Social, and Cultural Rights (CESR) - General Comment No. 14 - The right to the highest attainable standard of health (2000)

The Committee on Economic, Social, and Cultural Rights (CESR) General Comment No. 6 on 'The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights' (2005)

The Committee on Economic, Social, and Cultural Rights (CESR) General Comment No. 18 on the Right to Work (2005)

The Committee on Economic, Social, and Cultural Rights (CESR) General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (2009)

The Committee on Elimination of All Forms of Discrimination against Women, General Recommendation No. 26 on Women Migrant Workers (2008)

The Committee on the Rights of Child (CRC), General Recommendation No. 3 on HIV/AIDS and the Rights of the Child (2003)

The Committee on the Rights of Child (CRC), General Recommendation No. 7 on Implementing Child Rights in Early Childhood (2005)

The Committee on the Rights of Child (CRC), General Recommendation No. 6 on Treatment of Unaccompanied Children (2005)

Human Rights Committee, General Recommendation No. 15 on 'The Position of Aliens under the Covenant' (1986)

Human Rights Committee General Comment No. 31 (paragraph 10) on 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004).

Office of the UN High Commissioner for Human Rights, the International Convention on Migrant Workers and its Committee – Fact Sheet No. 24 (Rev.1), (2005)

The Montevideo Convention on Rights and Duties of States (1933)

The Vienna Convention on the Law of Treaties (1969)

ASEAN Instruments

ASEAN Charter (2008)

ASEAN Declaration against Trafficking in Persons Particularly Women and Children (2007)

ASEAN Framework Agreement on Visa Exemption (2006)

ASEAN Political Security Community Blueprint

ASEAN Economic Community Blueprint

ASEAN Socio Cultural Community Blueprint

ASEAN Leaders' Joint Statement in Enhancing Cooperation against Trafficking in Persons in Southeast Asia (adopted on May 8, 2011 at the 18th ASEAN Summit, held in Jakarta)

Report of ASEAN Forum on Migrant Labour, 24-25 April 2008.

Report of the Preparatory Senior Labour Officials Meeting for the 20th ASEAN Labour Ministers Meeting (ALMM), 6-7 May, 2008, Bangkok, Thailand.

Report of the 1st Meeting of the Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), (2008).

Terms of Reference (ToR) of ASEAN Inter-governmental Commission on Human Rights

Task Force on ASEAN Migrant Workers (TF-AMW)'s Civil Society Proposal: ASEAN Framework Instrument on the Protection and Promotion of the Rights of Migrant Workers (2009).

Human Rights Reports

Amnesty International, *Trapped – The Exploitation of Migrant Workers in Malaysia* (March 2010)

ILO, *The Mekong Challenge – Employment and Protection of Migrant Workers in Thailand: National Laws/Practices versus International Labour Standards?* (2005)

Federation Internationale des Ligues des Droits de l'Homme (FIDH), *Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination*, (2008)

Human Rights Watch's UPR Submission: Malaysia (2008)

Human Rights Watch, Country Summary: Malaysia, January (2010).

PICUM, *Access to Healthcare for Undocumented Migrants in Europe*, Brussels, (2007)

U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Human Rights Report: Singapore*, (2009)

U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Human Rights Report : Malaysia* (2009)

Books

De Guchteneire, Paul and Pecoud, Antonio, Introduction : *The UN Convention on Migrant Workers' Rights, Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, UNESCO Publishing, (2009)

Global Commission on International Migration (GCIM), *Migration in an Interconnected World : New Directions for Action*, Geneva, Switzerland, (2005)

Martin, David A. "The Authority and Responsibility of States," in *Migration and International Legal Norms*, edited by Aleinikoff, T. Alexander, and Chetail, Vincent., T.M.C Asser Press (2003)

Reuter, Paul, *Introduction to the Law of Treaties*, (1989)

Articles and Papers

Battistella, G., *Unauthorized Migrants as Global Workers in the ASEAN Region*, Southeast Asian Studies, Vol. 40, No. 3, (December 2002)

Bosniak, L.S., Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention, *International Migration Review* Vol. XXV, No.4, p. 752 - 755

Bultron, Ramon, *Undocumented Migrants and Immigrants : Issues and Challenges for the Defense of Their Rights and Promotion of Their Wellbeing*, Paper Presentation for the Founding Assembly of the International Migrants' Alliance, Hong Kong SAR, (2008).

Carrera, Sergio, and Merlino, Massimo, *Undocumented Immigrants and Rights in the EU, Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?*, Centre for European Policy Studies, December (2009).

Kanapathy, Vijayakumari, *Controlling Irregular Migration : The Malaysian Experience*, Institute of Strategic and International Studies (Malaysia), (2007)

Robertson, Jr., Philip S., *Migrant Workers in Malaysia – Issues, Concerns and Points for Action*, Fair Labor Association, (October 2008)

Taran, Patrick, *the ILO Conventions and the Multilateral Framework on Labour Migration*, (2009).

Taran, Patrick A., and Geronimi, Eduardo, *Globalization, Labour and Migration : Protection is Paramount*, International Migration Programme, ILO (2003)

Wickramasekera, Piyasiri, *Asian Labour Migration : Issues and Challenges in an Era of Globalization*, International Migration Papers, ILO, Geneva, (2002)

Van Krieken, Peter, *Migrants' Rights and the Law of the Sea : Further Efforts to Ensure Universal Participation*, International Migration, Vol. 45, No. 1 (2007)

Web Materials

ALIRAN, *Migrant Workers' Rights : ASEAN fails to agree*, <http://aliran.com/1059.html>, last accessed on 23 April 2011

ASEAN, www.asean.org

Background of ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up
<http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm>, last accessed on 30 March 2011

BIMP-EAGA, see <http://www.bimp-eaga.org/about.php>, accessed on 12 February 2011

Carens, Joseph H., *The Rights of Irregular Migrants*, http://www.creum.umontreal.ca/IMG/pdf_Joe_Carens.pdf, last accessed on 1 May 2011.

Jakarta Updates, *Indonesia Will Not Send Migrant Workers to Malaysia until Agreement in Place*, <http://www.jakartaupdates.com/939-01/indonesia->

[will-not-sent-migrant-workers-to-malaysia-until-agreement-in-place](#), last accessed on 5 May 2011.

ILO, www.ilo.org

Paisanpanichkul, Darunee, *Burmese Migrant Workers in Thailand: Policy and Protection*, <http://www.burmalibrary.org/docs/LIOB10-darunee.htm>, accessed on 3 March 2011.

The Telegraph, "Court considers education for illegal alien children", 1 December 1981, <http://news.google.com/newspapers?nid=2209&dat=19811201&id=i6ErAAAIIBAJ&sjid=gfwFAAAAIIBAJ&pg=4509,116260>, last visited on 1 May 2011.

The Ayeyawady - Chao Phraya - Mekong Economic Cooperation Strategy (ACMECS), <http://www.acmecs.org/>

The Jakarta Post, *ASEAN leaders lack commitment on migrant worker: NGO*, <http://www.thejakartapost.com/news/2011/05/07/asean-leaders-lack-commitment-migrant-worker-ngo.html> and ASEAN urged to speed up talks on migrant worker protection, <http://www.thejakartapost.com/news/2011/04/11/asean-urged-speed-talks-migrant-worker-protection.html>, last accessed on May 7, 2011.

The Jakarta Post, *ASEAN 'unlikely to discuss worker rights'* <http://www.thejakartapost.com/news/2011/03/10/asean-%E2%80%98unlikely-discuss-worker-rights%E2%80%99.html>, last accessed on May 7, 2011.

The Jakarta Post, *Indonesia to resume sending maid next month*, <http://www.thejakartapost.com/news/2011/04/26/indonesia-resume-sending-maids-malaysia-next-month.html>, last accessed on 5 May 2011.

UNODC, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>, last accessed on 30 March 2011.

UN Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, last accessed on 5 May 2011.

Table of Cases

Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of September 17, 2003*, requested by the United Mexican States, on *Legal Status and Rights of Undocumented Migrants*.

ICTFY, *Prosecutor v. Furundžija* (1998).

U.S. Supreme Court, *Plyler v. Doe* in 1982.