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Strengthening Protection for Intra-  
ASEAN Migrant Workers' Rights to  
Social Security:  
A Perspective from the Post-2015  
ASEAN Vision

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## Summary

This thesis explores the extent to which international human rights law and international labour law place obligations on States to protect migrant workers' fundamental rights, especially their rights to social security. More importantly, this thesis examines intra-ASEAN migrant workers' accesses to the social security benefits, as defined by the ILO Social Security (Minimum Standards) Convention, 1952 (No.102), in the ten ASEAN Member States. Considering the fact that most ASEAN Member States have not implemented social security programmes for unemployment benefits, and family benefits, this thesis thus only examine intra-ASEAN migrant workers' access to the seven branches of social security benefits, namely medical care benefits, sickness benefits, maternity benefits, invalidity benefits, old age benefits, survivors' benefits and employment injury benefits.

The study is based on the available literature and secondary data. The purpose of this thesis is to determine whether ASEAN Member States live up to their commitments to protect all ASEAN people, especially migrant workers' rights to social security.

The main conclusions of this thesis are: 1) there is a big gap between intra-ASEAN migrant workers' rights to social security in principle and intra-ASEAN migrant workers' access to social security benefits in practice; 2) although most ASEAN Member States do not directly exclude intra-ASEAN migrant workers from the coverage of social security programmes, a number of restrictions which have been imposed on the social security programmes are limiting intra-ASEAN migrant workers' equitable access to social security; 3) no bilateral or multilateral social security agreements have been signed among ASEAN Member States; 4) undocumented intra-ASEAN migrant workers are not covered by any social security system in any ASEAN Member States. At last, this thesis concludes with proposing recommendations based on these main findings.

## Acknowledgments

Words are hardly to express my feelings the moment when I added the full stop to the end of the very last sentence of this master thesis. Exhausted but happy. Finally, the two years' master study came to an end.

It was one of the best decisions I have ever made to come to Sweden to study international human rights law in Lund University. I have no regret for quitting the job and being away from home for two years. This two years' experience in Sweden makes it all worthwhile.

However, things would not have been going so well if I have not had the support from my family. Therefore, first and foremost, I would like to take this chance to express my heartfelt thanks to my family in Shanghai. Without their continued love, encouragement and support, I could not have come to Sweden to pursue my study here. Thanks for always being supportive.

Honestly, the process of writing a master thesis is bittersweet. It was not fun being working in front of the computer day and night for several months. Nevertheless, it was because of these long and dull hours, I learnt how to clear my mind and focus on studying and doing research by myself. In short, it was a process of learning.

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I would also like to thank Raoul Wallenberg Institute of Human Rights. Thanks for giving me the opportunities to work on different human right projects. And thanks for giving me the opportunities to work with people from different countries with different background. The projects which I was involved at RWI inspired me to write the topic about ASEAN and to focus on the people on the move. The three months' internship at RWI was such a valuable experience that confirms my determination to commit to human rights in my future career.

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## Abbreviations

AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AICHR	ASEAN Intergovernmental Commission on Human Rights
APSC	ASEAN Political-Security Community
ASCC	ASEAN Socio-Cultural Community
ASEAN	The Association Of Southeast Asian Nations
ASEAN-6	Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CLMV	Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
C19	The Equality of Treatment (Accident Compensation) Convention, 1925
C97	Migration for Employment Convention (Revised), 1949
C102	Social Security (Minimum Standards) Convention, 1952
C118	The Equality of Treatment (Social Security) Convention, 1962
C143	Migrant Workers (Supplementary Provisions) Convention, 1975
C157	The Maintenance of Social Security Rights Convention, 1982
GDP	Gross Domestic Product
ICCPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organizations
MNP	Movement of Natural Persons
MRAs	ASEAN Mutual Recognition Arrangements
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	The United Nations High Commissioner for Refugees

# 1. Introduction

## 1.1. Background and Context

Established on 8 August 1967 in Bangkok, the Association of Southeast Asian Nations (ASEAN), is an inter-government political and economic organization, encompassing Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam<sup>1</sup> — ten extremely diverse Southeast Asian countries, with a combined population of approximately 628 million people<sup>2</sup>, 8.6 per cent of the world's population.

With strong economic growth and uneven regional development, ASEAN has seen an increasing number of people moving across the borders seeking decent employment and livelihoods. Intra-regional labour migration has been a predominant trend in ASEAN today. According to the most updated data from the World Bank, approximately 10 million<sup>3</sup> international migrants were working in Southeast Asia and nearly 6.8 million<sup>4</sup> are from the countries within this region. Current intra-ASEAN labour migration is mainly dominated by low skilled workers, many of whom are undocumented migrants; and largely occurs in low-wage informal sectors, including domestic and care work, agriculture, fishing and forestry<sup>5</sup>.

The ongoing ASEAN economic integration speeds up current intra-regional labour migration. Officially established on December 31, 2015, the ASEAN Economic Community (AEC) is envisioned to have strong implications in terms of labour migration and human resource development<sup>6</sup>. With the regional development, it is estimated that some 14 million additional jobs would be generated by the AEC between 2015 and 2025<sup>7</sup>. Through the implementation of free flow of goods, services, investment, capital, and skilled labour within the region<sup>8</sup>, as laid out in AEC Blueprint, the intra-regional labour migration is expected to be further increasing in the decades to come.

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<sup>1</sup> ASEAN Member States: Available from: <<http://www.asean.org/asean/asean-member-states>>. [6 April, 2016]

<sup>2</sup> Data is based on International Monetary Fund's October 2015 estimates. *World Economic Outlook Database October 2015* Available from: <<http://www.imf.org/external/ns/cs.aspx?id=28>>. [6 April, 2016]

<sup>3</sup> The estimates are based on the Migration and Remittances Factbook 2016, World Bank Available from: <[www.worldbank.org/prospects/migrationandremittances](http://www.worldbank.org/prospects/migrationandremittances)>. [2 April, 2016]

<sup>4</sup> Ibid.

<sup>5</sup> ILO Regional Office for Asia and the Pacific, 2013, *Background paper: Progress on The Implementation of The Recommendations Adopted at The 3rd and 4th ASEAN Forum on Migrant Labour*, Bangkok, p. 1.

<sup>6</sup> Capannelli, G., ADB, 2014, *ASEAN Labouring Under Outdated Migration Policies*. Available from: <<http://www.eastasiaforum.org/2014/12/19/asean-labouring-under-outdated-migration-policies>>. [30 March, 2016]

<sup>7</sup> ILO and ADB, 2014, *ASEAN community 2015: Managing Integration for Better Jobs and Shared Prosperity*, Bangkok, Thailand, p. xii.

<sup>8</sup> ASEAN, 2008, *ASEAN Economic Community Blueprint*, Jakarta: ASEAN Secretariat, para. I. 4., p. 5.

The rapid growth of regional economy and the steady influx of labour migrants however, have not been accompanied with corresponding progress of substantial protection for those people who are in need of support. Intra-ASEAN migrant workers, as one of the key actors, are making tremendous contribution to employment, economic growth, development and alleviation of poverty of both the countries of destination and the countries of origin<sup>9</sup>. However, in reality they are among the least protected groups in ASEAN being subjected to exclusion, exploitation, discrimination and other forms of human rights violations.

Although ASEAN has recognized and confirmed the great contributions made by migrant workers and also the ten Member States have adopted a number of non-binding instruments affirming to protect migrant workers' rights and provide them with equitable access to social protection, in the absence of binding instruments and a regional monitoring system, and due to the principle of "no-interference", the implementation of these commitments is relatively weak and the coverage of the protection is very limited. Consequently, a large number of intra-ASEAN migrant workers, especially the workers in the informal sectors and those in an irregular situation, are left without any social protection.

## **1.2. Research Outline**

### **1.2.1. Defining Problem**

2015 was a critical year for ASEAN. With the establishment of ASEAN Community, ASEAN moved a major step forward toward a Post-2015 era with "sustained economic growth" accompanied by "lasting peace, security and stability as well as shared prosperity and social progress<sup>10</sup>". The Post-2015 ASEAN is anticipated as "a politically cohesive, economically integrated, socially responsible, and truly people-oriented, people-centered and rules-based ASEAN<sup>11</sup>."

In this transition period, social security is considered as a powerful tool to improve social inclusion and wellbeing of ASEAN people at large and to enhance the overall productivity and economic development of the entire ASEAN society in a long term. Having an equitable access to basic social security benefits in terms of medical care benefits, sickness benefits, maternity benefits, invalidity benefits, old age benefits, survivors' benefits, employment injury benefits, unemployment benefits, and family benefits, therefore is not only of essential importance for every ASEAN person but also for the Post-2015 ASEAN Community.

The right to social security is an inherent right that entitled to everyone. As a fundamental human right, it is enshrined in the Universal Declaration of

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<sup>9</sup> ILO, 2009, *Protecting The Rights of Migrant Workers: A Shared Responsibility*. Geneva, p.III.

<sup>10</sup> ASEAN, 2008, *The ASEAN Charter*, ASEAN Secretariat, Jakarta, Preamble.

<sup>11</sup> ASEAN, 2014, *Nay Pyi Taw Declaration on the ASEAN Community's Post-2015 Vision*, Nay Pyi Taw, Preamble.



Human Rights (1948), and the major human rights instruments of the United Nations (UN) and the International Labour Organizations (ILO). As for intra-ASEAN migrant workers, being members of ASEAN society, their rights to social security are recognized by ASEAN's Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007), and have also been outlined by ASEAN Socio-Cultural Community (ASCC) Blueprint (2009) and the Roadmap for an ASEAN Community (2009).

However, due to the fact that most ASEAN States impose restrictions on the access to social security protection, intra-ASEAN migrant workers are highly likely to be excluded, either directly or indirectly, from the coverage of social security programmes in either the countries of destination or the countries of origin. In addition, as international standards are poorly enforced in ASEAN States, it exists a large gap between migrants having rights to social security on paper and gaining access to social security benefits in practice<sup>12</sup>. Moreover some ASEAN countries may take a "national first" approach to social protection, neglecting to address the social protection requirements from migrant workers and the workers in the informal sectors<sup>13</sup>. Besides even if migrant workers have access to social security in the countries of employment, since there is no bilateral social security agreement among ASEAN States, a large number of intra-ASEAN migrant workers, who are working in different countries and are involved in different social security systems, are facing the situation that they are not eligible for the social security benefits which require minimum contribution periods or they are not allowed to take out social security benefits when their work contracts are expired.

### **1.2.2. Research Purpose & Questions**

In 2013, ASEAN ten Member States adopted the ASEAN Declaration on Strengthening Social Protection (ASEAN Social Protection Declaration), further strengthening their commitments to build a sharing and caring ASEAN Community. Article 1 of the Declaration provides that "everyone, especially those who are poor, at risk, persons with disabilities, older people, out-of-school youth, children, migrant workers, and other vulnerable groups, are entitled to have equitable access to social protection that is a basic human right and based on a rights-based/needs-based, life-cycle approach and covering essential services as needed<sup>14</sup>".

The main research question that guides and centers this thesis is:

- 1) To what extent do ASEAN Member States live up to their commitments to protect intra-ASEAN migrant workers' rights to social security?

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<sup>12</sup> Hall, A., 2012, *Migrant Workers and Social Protection in ASEAN : Moving Towards a Regional Standard?* Journal of Population and Social Studies, Volume 21 Number 1, p. 17.

<sup>13</sup> Ibid., p. 17.

<sup>14</sup> ASEAN, 2013, *ASEAN Declaration on Strengthening Social Protection*, Article 1, p. 2.

As declared by ASEAN Member States in Article 4 of the ASEAN Social Protection Declaration that “Implementation of social protection should be based on respect for fundamental freedoms, promotion and protection of human rights, promotion of social justice, social solidarity, non-discrimination, accessibility, reasonable accommodation, gender equality, social inclusiveness, coherence, and accountability<sup>15</sup>”, thus the sub-questions of this thesis are raised as followings:

- 2) What fundamental rights apply to migrant workers, and what protection is provided for migrant workers under the international human rights conventions?
- 3) What international standards are provided for the specific protection of migrant workers’ rights to social security?

### **1.2.3. Methodology and Materials**

The present research is conducted based on both theoretical and practical analysis. The above three research questions are answered through two different approaches. The main research question aims to see if there is a gap between intra-ASEAN migrant workers’ rights to social security in principle and their access to social security benefits in the ten ASEAN Member States in practice. The study of the main research question is conducted in chapter 5 of this thesis from *a de jure* and *de facto* perspectives. In examining intra-ASEAN migrant workers’ rights to social security in principle, the study is based on the relevant regional instruments adopted by the ten ASEAN States. While in examining intra-ASEAN migrant workers’ access to social security benefits in practice, the study is mainly based on the secondary data in relation to the effective social security programmes of the ten ASEAN Member States collected by the international organizations and the government publications, such as the information and data collected by the International Labour Organization and the United States Social Security Administration. Besides, the study also resorts to the available scholarly literature and official reports for further reference and deep research. In order to analyze whether the social security systems in ASEAN States support intra-ASEAN migrant workers’ right to social security, the study makes an assessment of intra-ASEAN migrant workers’ access to social security benefits in the ASEAN States. This assessment applies the theory summarized by Holzmann, et al.

The research questions 2 and 3 are closely related but question 3 has a more specific focus on the particular right to social security. As mentioned above, article 4 of the ASEAN Social Protection Declaration declares that the implementation of social protection should be based on respect for the promotion and protection of human rights<sup>16</sup>. Given that, in order to examine whether ASEAN States have realized the promotion and protection of intra-ASEAN migrant workers’ human rights, this thesis thus raises these two research questions 2 and 3 for the purpose to investigate and identify under

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<sup>15</sup> Ibid., Article 4, p. 3

<sup>16</sup> Ibid.

international human rights law and international labour law what fundamental rights apply to inter-ASEAN migrant workers and what are the minimum standards of the specific protection for migrant workers' rights to social security. The study of research questions 2 and 3 are conducted in chapters 3 and 4, respectively, by applying to a traditional legal dogmatic method. The study is mainly based on the relevant international human rights instruments and ILO conventions; and complemented by secondary sources, such as the general comments of the human rights treaty bodies and the official reports of the international organizations as well as the academic and scholarly literature. The findings of the two research questions are applied to the specific ASEAN context in order to examine the capability and willingness of the ten ASEAN States to protect and promote intra-ASEAN migrant workers' human rights.

#### **1.2.4. Delimitation**

This thesis study has its limitations. As it can be seen from the title of the thesis, this study is limited by geographic area and study subjects. First of all, this thesis is limited by focusing on the region of ASEAN. As ASEAN is formed by ten Southeast Asian countries, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam, this thesis thus only reviews and examines the social security programmes and policies in these ten Member States. Any social security programme or policy in the country other than these ten ASEAN States, are not discussed in this study.

Further, the study subjects of this thesis is only limited to the intra-ASEAN migrant workers who originally come from ASEAN Member States and are to be engaged, are engaged, or have been engaged in remunerated activities in the ASEAN countries other than their home countries. Therefore, the study subjects do not include those migrant workers who originally come from the countries outside the ASEAN region; or those internal migrant workers who have never engaged in cross-border remunerated activities; or those ASEAN people who are living and working outside the ASEAN region and have never been engaged in any remunerated activities in the ASEAN countries other than their home countries.

In addition, due to time and space constraints, this study focuses on the social security benefits as defined by the ILO Social Security (Minimum Standards) Convention, 1952 (No.102). Thus any other social security benefit that is not defined by C102 is beyond the scope of this study. It has to be pointed out that when the study examines intra-ASEAN migrant workers' rights to social security in practice, considering that most ASEAN Member States have not implemented social security programmes for the unemployment benefits and the family benefits, this thesis thus limits the scope of the study only to the seven branches of social security benefits, namely medical care benefits, sickness benefits, maternity benefits, invalidity benefits, old age benefits, survivors' benefits and employment injury benefit, in the ten ASEAN Member States.

Moreover, the study of the main research question focuses on the coverage and the accessibility of the effective social security programmes of the ten ASEAN Member States. Therefore, the study does not go into the details of the provisions of each social security programme. Also it does not go deep into explaining or analyzing what factors may constitute the gap between ASEAN leaders' commitment in principle, and intra-ASEAN migrant workers' real rights and access to social security in practice.

### **1.2.5. Terms & Definitions**

For a better understanding of this thesis, some key terms are enumerated as below. More detailed definitions can be found in the following relevant chapters.

As such, in this thesis:

- the term “intra-ASEAN migrant worker” is meant to cover a general scope of migrant workers from an ASEAN perspective. In other words, intra-ASEAN migrant worker in this thesis represents every ASEAN person who is to be engaged, is engaged, or has been engaged in remunerated activities in one of the ASEAN country other than his or her home country;
- the term “protection” (or “protecting”) is interpreted as elimination of discrimination, assurance of equality, and realization of fundamental rights of all migrant workers;
- the term “social security benefits” indicates the nine branches of social security benefits as defined by the ILO Social Security (Minimum Standards) Convention, 1952 (No.102), namely, medical care benefits, sickness benefits, maternity benefit, invalidity benefit, old age benefit, survivors' benefit, employment injury benefit, unemployment benefit, and family benefit.

### **1.2.6. Thesis Structure**

The thesis consists of six chapters. The first chapter is an introduction of the general information of this thesis. Chapter 2 to 6 are as followings:

Chapter 2 of the thesis presents an overview of the social and economic background of ASEAN and the newly established ASEAN Community with a view to introducing the current intra-ASEAN labour migration and its impact on this region.

Chapter 3 starts by explaining the definition of migrant workers and interpreting the term intra-ASEAN migrant workers from an ASEAN perspective. Then the chapter presents a general overview of the international human rights framework in order to identify the fundamental rights that apply to intra-ASEAN migrant workers. Further on, this chapter provides a closer look at the three major international conventions on migrant workers, namely

the ICMW, ILO C97 and C143, with a view to analyzing the general protection for migrant workers under these three conventions. The last part of this chapter is dedicated to a brief overview of ASEAN's commitments on the protection of migrant workers' rights in the regional instruments and in practice.

Chapter 4 focuses on migrant workers' rights to social security as contained in the major international conventions. This chapter starts by clarifying the concept of social security and identifying the minimum standards of social security benefits. Further, this chapter reviews the specific protection for migrant workers' rights to social security under the major international conventions, namely the ICESCR, the ICMW, ILO C19, C118, C157, as well as C97 and C143.

Chapter 5 starts by presenting an ASEAN Vision on ASEAN peoples' rights to social security. Further on, this chapter examines the extent to which intra-ASEAN migrant workers have an access to social security in ASEAN Member States, with a view to assessing if the ten ASEAN Member States live up to their commitments to protect and promote intra-ASEAN migrant workers' right to social security.

Chapter 6 provides concluding thoughts and recommendations on protecting intra-ASEAN migrant workers' rights to social security from a post-2015 perspective.

## **2. ASEAN and Intra-ASEAN Labour Migration**

### **2.1. Introduction**

When envisioning the growth of economy, people barely see the linkage between the development and the labour migration. Indeed, labour migration is a complex phenomenon; and “migrant worker” is a heated topic. So before a further study of intra-ASEAN migrant workers’ right to social security, this chapter is aiming for a better understanding about the general context that forms current intra-ASEAN labour migration, and to explore the linkages between the labour migration and the regional development in ASEAN. Starting with an overview of the Association of Southeast Asian Nations and its newly established ASEAN Community, the chapter concludes with an analysis of the impacts of the intra-regional labour migration in ASEAN.

### **2.2. An Overview of ASEAN**

The Association of Southeast Asian Nations is an inter-government political and economic organization established on 8 August 1967 in Bangkok, Thailand by the five Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand<sup>17</sup>. A further five Southeast Asian countries, Brunei Darussalam, Viet Nam, Lao PDR, Myanmar and Cambodia have since joined ASEAN, making up what is today the ten Member States of ASEAN<sup>18</sup>.

In compliance with the fundamental principles as contained in the Treaty of Amity and Cooperation in Southeast Asia (TAC) of 1976, the Member States of the ASEAN have been cooperating with each other in pursuit of the main goals of the organization as stipulated in the ASEAN Declaration signed in Bangkok, Thailand to “accelerate economic growth, social progress, and cultural development in the region<sup>19</sup>” and “to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields<sup>20</sup>.”

#### **A. Economic Progress**

Strong economic performance and large combined population have made ASEAN one of the world’s most dynamic regions<sup>21</sup>. As a whole, ASEAN’s recent economic performance has been remarkable. According to the latest statistics from ASEAN, since 2007, ASEAN’s annual average growth in economy has been 5.1 per cent<sup>22</sup>, while in the global economy it has been 3.1

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<sup>17</sup> ASEAN Overview. Available from: <<http://www.asean.org/asean/about-asean/overview/>>. [7 April, 2016]

<sup>18</sup> Ibid.

<sup>19</sup> ASEAN, 1967, *The ASEAN Declaration (Bangkok Declaration)*, Bangkok.

<sup>20</sup> Ibid.

<sup>21</sup> ILO and ADB, *supra* note 7, p. 13.

<sup>22</sup> Ibid., p. 13.

per cent<sup>23</sup>; and the combined Gross Domestic Product (GDP) has reached to US\$ 2.6 trillion<sup>24</sup>, accounting for 3.3 per cent of the world's economy. If growth trends continue, ASEAN is projected to rank as the fourth-largest economy by 2050<sup>25</sup>.

## **B. The Social Context**

ASEAN is one of the most diverse regions in the world. Characterized by its immense and colourful culture and histories, ASEAN's diversity has permeated in all spheres in the ten countries. Take a quick look at the religions in this region for instance. More than 90 per cent of the populations in Myanmar and Thailand are Buddhists. While in Indonesia, Muslims account for almost 90 per cent of the whole populations, and in the Philippines, about 80 per cent of Filipinos are Roman Catholic<sup>26</sup>.

ASEAN's diversity has reached to the different measures of economic development. Currently the ten ASEAN countries are at different speed of development. For instance, Singapore, a country with less than one per cent of ASEAN population, its annual economic output has reached to US\$ 290 billion, almost 12 per cent of the overall GDP in ASEAN. And the GDP per capita, in Singapore is about 46 times higher than in Cambodia, a country which has been struggling to reduce poverty over two decades; and more than 40 times higher than in Myanmar, a frontier market which has recently emerged from decades of isolation<sup>27</sup>. (see Table 2-1).

Its diversity has also extended to the huge disparity between the rich and the poor. Recent strong economic performance in ASEAN is just like a double edged sword. While it has alleviated the overall level of poverty and boosted the general living standard in ASEAN<sup>28</sup>, it worsens the disparities between the rich and the poor. The growth of ASEAN economy has been accompanied with spectacular disparities in the living standard between the six more developed member countries, namely Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand (ASEAN-6) and the CLMV countries (Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam)<sup>29</sup>. The huge disparities can be easily seen from the vast difference of the annual

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<sup>23</sup> *World Economic Outlook Database October 2015*, *supra* note 2.

<sup>24</sup> ASEAN Economic Community, n.d., Available from: <<http://www.asean.org/asean-economic-community/>>. [11 April, 2016]

<sup>25</sup> Groff, S. P. 2014, *ASEAN Integration and the Private Sector*, Available from: <<http://www.adb.org/news/speeches/keynote-speech-asean-integration-and-private-sector-stephen-p-groff>>. [30 March, 2016]

<sup>26</sup> HV, V., Thompson, F., and Tonby, O., McKinsey & Company, 2014, *Understanding ASEAN: Seven Things You Need to Know*, Available from: <<http://www.mckinsey.com/industries/public-sector/our-insights/understanding-asean-seven-things-you-need-to-know>>. [23 March, 2016]

<sup>27</sup> *Ibid.*

<sup>28</sup> According to the joint report *ASEAN Community 2015* by ADB and ILO, it is estimated that between 1991 and 2013 there were about 83 million workers moved out of poverty into the middle class in ASEAN.

<sup>29</sup> ILO and ADB, *supra* note 7, p. 6.

GDP per capital (see Table 2-1), which is regarded as a good indicator of material standard of living.

And worse still, according to the latest Country Poverty Data by the World Bank, as of 2012, there were more than 169 million ASEAN people living in extreme poverty. Indonesia alone had more than 100 million people living at or under US\$ 3.1 per day. In the Philippines, nearly 40 million people were still struggling to survive on US\$ 3.1 per day, and more than 13 million were living under US\$ 2 per day. In Lao PDR, half of the country were living under International Poverty Line of US\$ 3.1 per day, and 30 per cent of total population were living on less than US\$ 2 per day<sup>30</sup>. Even today's economically more advanced countries, like Malaysia and Thailand, still have not yet eliminated the extreme poverty in their countries.

**Table 2-1:** List of ASEAN Countries' Population and GDP, 2015 Estimates

Country	Population*		GDP Nominal Millions of USD*		GDP Nominal *	
	Millions	Percentage	Millions of USD	Percentage	Per Capita USD	
<b>ASEAN</b>	628.78	100.0	2,459,381	100.0	3,911	100.0
<b>Indonesia</b>	255.46	40.6	872,615	35.5	3,416	87.3
<b>Thailand</b>	68.84	11.0	373,536	15.2	5,426	138.7
<b>Malaysia</b>	31.12	5.0	313,479	12.8	10,073	257.5
<b>Philippines</b>	101.42	16.1	299,314	12.2	2,951	75.5
<b>Singapore</b>	5.5	0.9	293,959	12.0	53,224	1,360.8
<b>Vietnam</b>	91.58	14.6	198,805	8.1	2,171	55.5
<b>Myanmar</b>	51.85	8.3	65,775	2.7	1,269	32.4
<b>Cambodia</b>	15.54	2.5	17,714	0.7	1,14	29.1
<b>Lao PDR</b>	7.03	1.1	12,548	0.5	1,785	45.6
<b>Brunei</b>	0.42	0.1	11,636	0.5	27,759	709.7

Note 1: the data is collected by the author based on the sources from the World Bank, the International Monetary Fund and the joint research report by ILO and ADB.

\* Source: International Monetary Fund, 2015, ASEAN Economic Outlook Database, Available from: <<https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/index.aspx>>. [7 April, 2016]

### C. The Labour Market

ASEAN's GDP growth is driven by its labour-force expansion and productivity improvements<sup>31</sup>. With a combined population of approximately 628 million people<sup>32</sup> (8.6 per cent of the world's population), ASEAN's

<sup>30</sup>The World Bank, 2011, *Poverty Headcount Ratio at \$3.10 A Day (2011 PPP) (% Of Population)*, Available from: <<http://data.worldbank.org/indicator/SI.POV.2DAY/countries?display=default>>. [8 April, 2016] Note: Cambodia and Lao PDR use the 2005 PPP conversion factors and corresponding \$1.25 a day and \$2 a day poverty lines.

<sup>31</sup> HV, V., Thompson, F., and Tonby, O., *supra* note 26.

<sup>32</sup> Source from *World Economic Outlook Databases*, *supra* note 2.



potential market is larger than the European Union or North America. And ASEAN has the world's third largest labour force, next to China and India<sup>33</sup>. The current labour-force in ASEAN is heavily concentrated in the sectors such as constructions, manufacturing, telecommunications, retail and transportation<sup>34</sup>.

**Table 2-2:** List of ASEAN Countries' Labour Force, Labour Productivity and Education and Skills, 2012 or Most Recent Year

Country	Population*		Labour Force**		Labour Productivity (constant 2005 international)**	Education and Skills Development**		
	Millions	Percentage	Millions	Percentage		US \$	Literacy Rate, Ages 15+ (per cent)	TVET Enrolment as Share of Total Secondary Enrolment (per cent)
<b>ASEAN</b>	628,78	100	309,88	100	286 119	-	-	-
Brunei	0,42	0.1%	0,19	0,1%	100 015	95.4	11.4	24.3
Singapore	5,5	0.9%	3,44	1,1%	98 072	95.9	11.6	-
Malaysia	31,12	5.0%	13,79	4,4%	35 751	93.1	6.8	36.0
Thailand	68,84	11.0%	39,40	12,7%	14 754	93.5	15.4	51.4
Philippines	101,42	16.1%	41,02	13,2%	10 026	95.4	-	28.2
Indonesia	255,46	40.6%	118,19	38,1%	9 848	92.8	18.0	27.2
Vietnam	91,58	14.6%	53,25	17,2%	5 440	93.4	-	24.6
Lao PDR	7,03	1.1%	3,08	1,0%	5 396	72.7	0.8	16.7
Cambodia	15,54	2.5%	7,40	2,4%	3 989	73.9	2.3	15.8
Myanmar	51,85	8.3%	30,12	9,7%	2 828	92.7	-	13.8

Note 1: the data is collected by the author based on the sources from the International Monetary Fund and the research report by ILO and ADB.

Note 2: "--" – data are not available.

\* Source: International Monetary Fund, 2015, ASEAN Economic Outlook Database, Available from: <<https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/index.aspx>>. [7 April, 2016]

\*\* Source: ILO and ADB, 'Table 1-4 Selected Labour Market Indicators in ASEAN', p. 8.

In ASEAN, member countries vary greatly in terms of labour force, labour productivity and skills<sup>35</sup> (see Table 2-2 above). Take a comparison between Indonesia and Brunei for instance. More than 38 per cent of ASEAN labour force is concentrated in Indonesia; while only 0.1 per cent of ASEAN labour force comes from Brunei. But, when it comes to labour productivity (the value added per worker), which is also correlated to education and skill level, the annual productivity per worker in Brunei is more than 10 times the level in Indonesia.

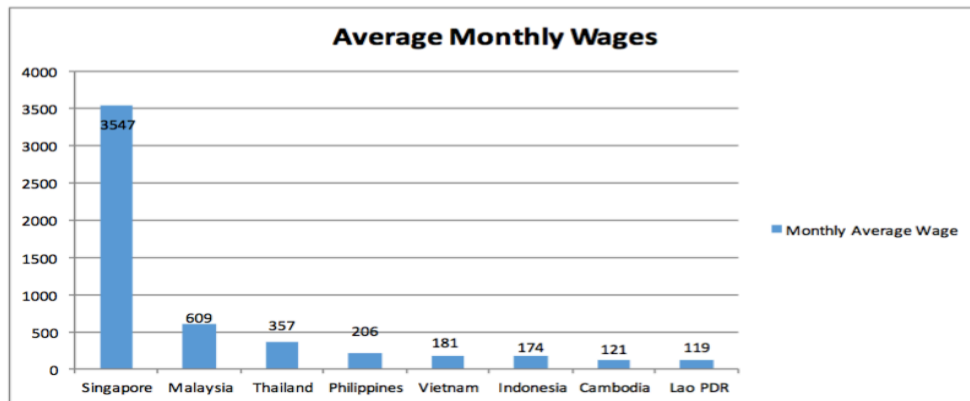
With respect to education and skills, when looking at literacy rate among working age, it seems no big difference between ASEAN countries, and most ASEAN countries have high literacy rate. However, when it comes to the enrolment in technical and vocational education and training (TVET), there is still enormous distance between higher GDP countries, like Indonesia and Thailand, and lower GDP countries such as Cambodia and Lao PDR.

<sup>33</sup> Ibid.

<sup>34</sup> HV. V., Thompson. F., and Tonby. O., *supra* note 26.

<sup>35</sup> ILO and ADB, *supra* note 7, p. 26

**Figure 2-1: Average Monthly Wage 2012 (US \$)**



Note 1: Data for Singapore is based on the administrative records from the Central Provident Fund Board. Data for the other countries is based on the figures from the respective national labour force surveys. Data for Lao PDR refer to 2010 and to wage workers who receive monthly wages.

Note 2: No data are available for Brunei Darussalam and Myanmar.

Source: ILO and ADB, 2014, 'Table 1-4 Selected Labour Market Indicators in ASEAN', p. 67.

Huge income differences between ASEAN countries have intensified this region's inequality. According to World Bank's Country Income Classification updated in 2015<sup>36</sup>, Brunei and Singapore are positioned as high-income countries; whereas Cambodia is categorized as low income country and the rest ASEAN countries are ranked as middle-income countries<sup>37</sup>. The monthly average wage in ASEAN vary widely from US\$ 3547 in Singapore to US\$ 121 per month in Cambodia. Even between the middle income countries, the salary gap is also remarkable between upper middle income countries and lower middle income countries. For instance, as shown in Figure 2-1 above, a worker in Malaysia (upper middle income country), earns US\$ 609 per month on average, which is more than 5 times the average monthly salary of a worker in Lao PDR (lower middle income country).

It is estimated that in the near future ASEAN will face a labour gap between more developed high income countries and less developed low income countries. Some developed ASEAN countries will face the challenges from lower birth rate and rapid aging of working population, and which would cause a growing labour shortage in these countries. According to the research conducted by ILO and ADB<sup>38</sup>, between 2015 and 2025, the proportion of the elderly people aged 65 and above in Thailand will have risen from 8.9 per cent to 16.1 per cent; and in Singapore from 9.0 per cent to 17.3 per cent. While the youth population in both countries will be less than 11.5 per cent

<sup>36</sup> World Bank, 2015, *World Bank Country and Lending Groups*, Available from: < [http://data.worldbank.org/about/country-and-lending-groups#Low\\_income](http://data.worldbank.org/about/country-and-lending-groups#Low_income) >. [April 10, 2016]

<sup>37</sup>Note: High income Countries: Brunei Darussalam, Singapore; Upper Middle Income Countries: Malaysia, Thailand; Lower Middle Income Countries: Indonesia, Lao PDR, Myanmar, the Philippines, Viet Nam; Low Income Countries: Cambodia.

<sup>38</sup> ILO and ADB, *supra* note 7, p. 7.

in 2025. On the other hand, some less developed ASEAN countries, like Indonesia, Lao PDR, the Philippines, and Viet Nam will experience a rising share of youth population and a high rate of youth unemployment over the same period<sup>39</sup>. In the Philippines, for instance, the working-age population will expand by 35.0 per cent between 2010 and 2025, and the youth will account for more than 17 per cent of the population. As time moves on, these varied aging trends among the ten ASEAN States may affect the labour supply and demand in this region and would trigger a new round of labour migration in the near future<sup>40</sup>.

### 2.3. An Overview of ASEAN Community

Having recognized the diversity and disparities within the region, the leaders from the ten ASEAN States, for the realization of a single ASEAN community, then reached an agreement on a shared vision of ASEAN as a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies<sup>41</sup>.

At the 12th ASEAN Summit in January 2007, the leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015<sup>42</sup>. And on November 22, 2015, ASEAN leaders signed the Kuala Lumpur Declaration in Malaysia and formally declared the establishment of ASEAN Community. The establishment of ASEAN Community has been seen as a major milestone in ASEAN's integration process. It is set for the purpose to "ensure lasting peace, security and resilience<sup>43</sup>," with an aspiration towards "a truly rules-based, people-oriented, people-centered ASEAN Community, where peoples continue to participate in and benefit fully from the on-going process of ASEAN integration and community building.<sup>44</sup>"

The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Social-Cultural Community. In order to achieve the ASEAN Vision by implementing concrete and productive actions, in 2009 the ASEAN leaders adopted a series of comprehensive and systematic roadmaps, namely the ASEAN Political-Security Community (APSC) Blueprint; the ASEAN Economic Community (AEC) Blueprint, and the ASEAN Socio-Cultural Community (ASCC) Blueprint, which provide directions through strategic measures based on the assumption that the three pillars of the ASEAN Community are interdependent and interrelated<sup>45</sup>.

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<sup>39</sup> Ibid., p. 9.

<sup>40</sup> Ibid., p. 7.

<sup>41</sup> ASEAN Overview, *supra* note 17.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> ASEAN, 2015, Kuala Lumpur Declarations on The Establishment of the ASEAN Community. Available from: <<http://www.asean.org/kuala-lumpur-declaration-on-the-establishment-of-the-asean-community/>>. [11 April, 2016]

<sup>45</sup> ASEAN Communities. Available from: <<http://www.asean.org/>>. [11 April, 2016]

Table 2-3 below highlights the aims and focuses of each community and summarizes the aspects which are related to migration cooperation at the regional level within the ASEAN Community.

**Table 2-3: ASEAN Community and Labour Related Actions in Blueprint**

ASEAN Community	Aims and Focuses *	Labour Related Actions in Blueprint**
ASEAN Political – Security Community (APSC)	<p><b>Aim:</b> to ensure that countries in the region live at peace with one another and with the world in a just, democratic and harmonious environment.</p> <p><b>Focus:</b> political development; shaping and sharing of norms; conflict prevention; conflict resolution; post-conflict peace building; and implementing mechanisms.</p>	<ul style="list-style-type: none"> <li>Strengthen criminal justice responses to trafficking in persons</li> <li>Protect victims of trafficking</li> </ul>
ASEAN Economic Community (AEC)	<p><b>Aim:</b> towards a highly integrated and cohesive; competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centred community, integrated with the global economy.</p> <p><b>Focus:</b> (i) A Highly Integrated and Cohesive Economy; (ii) A Competitive, Innovative, and Dynamic ASEAN; (iii) Enhanced Connectivity and Sectoral Cooperation; (iv) A Resilient, Inclusive, People-Oriented, and People-Centred ASEAN; and (v) A Global ASEAN.</p>	<ul style="list-style-type: none"> <li>Facilitate movement through issuance of visas and employment passes for business and skilled labour;</li> <li>Recognition of professional qualifications;</li> <li>Implement and development in the area of services;</li> <li>Core competencies and qualifications in priority services;</li> <li>Strengthen labour market program capacities</li> </ul>
ASEAN Socio-Cultural Community (ASCC)	<p><b>Aim:</b> to realize an ASEAN Community that is people-oriented and socially responsible with a view to achieving enduring solidarity and unity among the peoples and Member States of ASEAN.</p> <p>It seeks to forge a common identity and build a caring and sharing society which is inclusive and where the well-being, livelihood, and welfare of the peoples are enhanced.</p> <p><b>Focus:</b> nurturing the human, cultural and natural resources for sustained development in a harmonious and people-oriented ASEAN.</p>	<ul style="list-style-type: none"> <li>Human resource development;</li> <li>Promote decent work;</li> <li>Promote and protect rights of migrant workers</li> </ul>

\*Source: ASEAN Communities. Available from: < <http://www.asean.org/>>. [11 April, 2016]

\*\* Source: Jurje, F. and Lavenex, S., 2015, Table 1: Labour Mobility Cooperation in AEC, *ASEAN Economic Community: What Model for Labour Mobility?* Working Paper No 2015/02 January 2015, p. 7, National Center for Competence in Research.

### 2.3.1. ASEAN Economic Integration: An Opportunity for Skilled Labour

The ASEAN Economic Community, which is regarded as the most advanced of the three pillars of the ASEAN community, is at the heart of ASEAN’s transformation process to an advanced step of economic development<sup>46</sup>. Inspired by the model of European Union, ASEAN envisages the AEC to have four key characteristics, namely (i) single market and production base; (ii) competitive economic region; (iii) equitable economic development; (iv) ASEAN’s integration into the globalized economy<sup>47</sup>, in order for further

<sup>46</sup> ASEAN Up, *Benefits of the ASEAN Economic Community*, Available from: < <http://aseanup.com/benefits-asean-economic-community-aec/>>. [11 April, 2016]

<sup>47</sup> *ASEAN Economic Community Blueprint*, supra note 8, p. 6.

realization of economic integration, stability, competitiveness and dynamism in the region of ASEAN<sup>48</sup>.

In terms of being *a single market and production base*, according to the ASEAN Economic Community Blueprint, the AEC is expected to facilitate the mobility not only of goods but also of skilled labour, professionals, and travelers in general<sup>49</sup>. Characterized by five core elements: (i) free flow of goods; (ii) free flow of services; (iii) free flow of investment; (iv) freer flow of capital; and (v) free flow of skilled labour<sup>50</sup>, the ASEAN single market and production base creates a prosperous labour market which is evolving towards more mobility in the region<sup>51</sup>. With the adoption of the 1995 ASEAN Framework Agreement on Services (AFAS) and then later in 2012 the ASEAN Agreement on Movement of Natural Persons (MNP), labour mobility within ASEAN region is becoming an important aspect of regional economic integration<sup>52</sup>.

As one of the most awaited benefits of the ASEAN Economic Community<sup>53</sup>, the labour mobility, however, is not unrestricted. The AEC does not guarantee or seek a full labour mobility<sup>54</sup>. Instead, it aims to facilitate the mobility of high skilled labour in ASEAN<sup>55</sup>. In order for a better understanding of the facilitated movement of the high skilled labour, “free flow of skilled labour” shall be read in conjunction with the ASEAN Mutual Recognition Arrangements (MRAs), which so far have listed eight fields of high skilled professions that have been agreed to be offered with facilitated movement. Such eight professions are including medical doctors, dentists, nurses, architects, engineers, accountants, surveyors and tourism professionals<sup>56</sup>. Comparing with ASEAN’s combined 310 million strong workforce, these eight professions only account for 1.5 per cent of the total workforce<sup>57</sup>. While more than 87 per cent of migrant workers in ASEAN are either unskilled or low-skilled<sup>58</sup> and they are so far not covered by this regional free labour mobility movement.

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<sup>48</sup> *Benefits of the ASEAN Economic Community*, supra note 48.

<sup>49</sup> *ASEAN Economic Community Blueprint*, supra note 8, p. 5.

<sup>50</sup> *Ibid.*, p. 8.

<sup>51</sup> ASEAN UP, *Overview of the ASEAN Skilled Labor Market*. Available from: <<http://aseanup.com/overview-of-the-asean-skilled-labor-market/>>. [12 April, 2016]

<sup>52</sup> Jurje, F. and Lavenex, S., 2015, *ASEAN Economic Community: What Model for Labour Mobility?* National Center for Competence in Research, Working Paper No 2015/02 January 2015.

<sup>53</sup> *Overview of the ASEAN Skilled Labor Market*, supra note 53.

<sup>54</sup> Sugiyarto, G. and Agunias, D.R., 2014, *A “Freer” Flow of Skilled Labour within ASEAN: Aspiration, Opportunities and Challenges in 2015 and Beyond*, IOM Issue in Brief, Issue No. 11., P. 4.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Migrant Workers in ASEAN: The Hidden and Neglected Workforce*. Available from: <<http://www.establishmentpost.com/migrant-workers-asean-hidden-neglected-workforce/>>. [12 April, 2016]

## 2.4. The Rise of Intra-ASEAN Labour Migration and Its Impact on the Development in ASEAN

“Throughout human history, migration has been a courageous expression of the individual’s will to overcome adversity and to live a better life<sup>59</sup>”.

The growth of migration has been a social and structural reality faced by ASEAN and its Member States. According to the statistics by the UN and the World Bank, between 1990 and 2013, the number of registered international migrants in ASEAN increased more than threefold from 2.9 million to more than 10 million. Over the same period, the number of intra-ASEAN migrants climbed from 1.5 million to 6.8 million (see Table 2-4). Thus more than two thirds of international migrants within ASEAN come from other ASEAN countries. Besides it is estimated that a large number of undocumented intra-regional migrants are living and working in other ASEAN countries. As it is difficult to collect the data of undocumented migrants, the actual figures of intra-ASEAN migrants are probably much higher than the official statistics.

**Table2-4:** Bilateral Estimates of Intra-ASEAN Migrant Stocks in 2013

	Intra-ASEAN			Total Migration			Share of Intra-ASEAN to Total Migration (%)	
	Outward Migration	Inward Migration	Ratio of Outbound/Inbound	Outward Migration	Inward Migration	Ratio of Outbound/Inbound	Outward Migration	Inward Migration
ASEAN	6 788 063	6 788 063	-	21 278 965	10 206 052	-	-	-
Brunei Darussalam	1 179	32 199	0,04	43 118	206 173	0,21	3%	16%
Cambodia	771 061	69 579	11,08	1 118 878	75 566	14,81	69%	92%
Indonesia	1 241 826	44 858	27,68	4 116 587	295 433	13,93	30%	15%
Lao PDR	930 976	14 582	63,84	1 294 218	21 801	59,37	72%	67%
Malaysia	1 056 788	1 747 111	0,60	1 683 132	2 408 329	0,70	63%	73%
Myanmar	1 982 713	0	-	3 139 596	103 117	30,45	63%	0%
Philippines	449 339	6 252	71,87	6 001 696	213 150	28,16	7%	3%
Singapore	68 818	1 229 495	0,06	282 213	2 323 252	0,12	24%	53%
Thailand	190 389	3 618 373	0,05	1 007 294	4 490 941	0,22	19%	81%
Vietnam	94 974	25 614	3,71	2 592 233	68 290	37,96	4%	38%

Source: Authors’ tabulations of data from the World Bank, *the Migration and Remittances Factbook 2016*, which includes new bilateral data on migration stocks”, World Bank: <[www.worldbank.org/prospects/migrationandremittances](http://www.worldbank.org/prospects/migrationandremittances)>. [2 April, 2016].

As always, migration inevitably involves work. In ASEAN, migrant workers have taken considerable share in current migrant stocks. Gradually the intra-regional labour migration is taking shape. This labour migration trend flows not only between developing and developed countries, but between developing countries as well. It is estimated there are 57 intra-regional migration corridors in ASEAN<sup>60</sup>. All ASEAN countries have been involved as countries of origin, transition and destination. The main trend is highly concentrated in five corridors, namely Myanmar to Thailand, Indonesia to Malaysia, Malaysia to Singapore, the Lao PDR to Thailand, and Cambodia to Thailand. And these five migration corridors represent 88 per cent of the

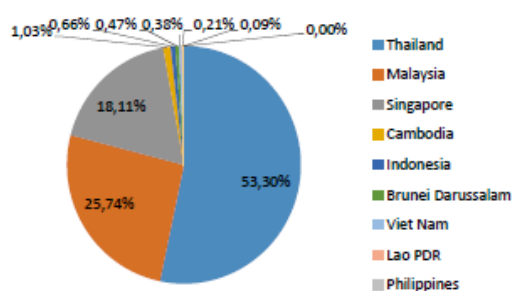
<sup>59</sup> *International Migrant Day*. Available from: <<http://www.un.org/en/events/migrantsday/>>. [12 April, 2016]

<sup>60</sup> Sugiyarto, G. and Agunias, D.R., *supra* note 56, p. 7.

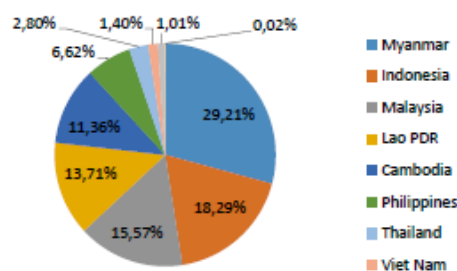
total intra-ASEAN migrant stock<sup>61</sup>.

Singapore, Thailand and Malaysia, as the three main destination countries, are hosting more than 97 per cent of the migrant workers from other ASEAN countries. Thailand alone is hosting over 53 per cent of intra-ASEAN migrants (see Figure 2-2). Myanmar, Indonesia and Malaysia are the three main sending countries dominating current intra-ASEAN labour migration flow. The output from the three main labour sending countries accounts for more than 63 per cent of the whole intra-ASEAN migrant workers, of which more than 29 per cent of intra-ASEAN migrants come from Myanmar, nearly 20 per cent from Indonesia and 15 per cent from Malaysia (see Figure 2-3).

**Figure 2-2:** Per cent of Intra-ASEAN Migrants, by Country of Destination, 2013



**Figure 2-3:** Per cent of Intra-ASEAN Migrants, by Country of Origin, 2013



Source: Authors' tabulations of data from the World Bank, *the Migration and Remittances Factbook 2016*.

Current intra-ASEAN labour migration largely occurs under temporary migration regimes and for less skilled work<sup>62</sup>. As mentioned, there are more than 87 per cent of migrant workers who are either unskilled or low-skilled<sup>63</sup>. For decades, some economically more advanced ASEAN countries like Singapore and Malaysia have been recruiting low-skilled workers for temporary stays in order to fill labour market niches, especially in the low-wage sectors, including domestic and care work, construction, manufacturing, agriculture, fishing and forestry<sup>64</sup>. Malaysia, for instance, has long employed Indonesians in its plantations since 1990s on<sup>65</sup>. In Singapore and Thailand, a large number of foreign domestic workers are recruited in temporary contracts, many of which are undocumented. Although the AEC facilitates high skilled labour mobility, the flows of low- and semi-skilled migrant workers, including undocumented migrant workers are very likely to continue for a long term. Because of demographic factors and existing economic disparities, these low skilled migrant labour will be highly needed in the countries with rapid aging labour population to sustain production and maintain economic growth.

<sup>61</sup> Ibid., p. 7.

<sup>62</sup> ILO, *Labour migration in Asia and the Pacific*, Available from: <<http://www.ilo.org/asia/areas/labour-migration/lang--en/index.htm>>. [13 April, 2016].

<sup>63</sup> *Migrant Workers in ASEAN: The Hidden and Neglected Workforce*, *supra* note 60.

<sup>64</sup> ILO *Background paper*, *supra* note 5, p. 1.

<sup>65</sup> Sugiyarto, G. and Agunias, D.R., *supra* note 56, p. 4.

“Migration is a powerful driver and important consequence of economic, political and social change<sup>66</sup>”.

The nature, cause, and reason pushing and pulling labour mobility are various and complex. It may be associated with the country of origin or/and the countries of destination; it may also relate to personal factors or/and intervening obstacles<sup>67</sup>. UNHCR’s Director of International Protection, Volker Türk<sup>68</sup> once summarized in his speech that the causes of the cross-border population movement in this region are complex, as the “the uneven availability of protection, assistance and long-term solutions, family and community dispersal, labour needs, well-established travel routes, as well as smuggling networks, are all part of the complex fabric of labour mobility.<sup>69</sup>”

The dominant factors of current intraregional labour migration in ASEAN appear to be directly related to recent economic and social situations. The rising inequalities in economic development, the widening gaps in the standards of living between ASEAN countries, the rapid aging of working population and the growing shortage of labour force are the primary factors pushing current labour migratory movements. As the connectivity between the countries increases, people are increasingly likely to move across the borders to other ASEAN countries searching for better job opportunities, which may not be available in their home country. The economically more advanced ASEAN countries, like Singapore, Malaysia and Thailand have become the preferred countries of destination. Whereas those relatively less developed, lower income countries with higher rate of growth among the working-age population, like Myanmar and Indonesia, have been the main sending countries providing a continuous supply of labour flow.

Moreover, current labour mobility is also an important consequence of a Post-2015 ASEAN Vision. With “free movement of goods, services, investment, skilled labour, and freer flow of capital<sup>70</sup>”, the AEC facilitates not only the flow of trade and capital between the countries, but also accelerates the labour mobility across the borders. For the fulfillment of ASEAN’s vision of a further economic developed community, there is an increasing demand for service and labour of all skill levels within the region. During this development process, it is estimated to generate some 14 million new jobs in this region between 2015 and 2025<sup>71</sup>. As a result, it is expected to stimulate

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<sup>66</sup> United Nations Economic Commission for Europe, 2011, *Statistics on International Migration a Practical Guide for Countries of Eastern Europe and Central Asia*, United Nations, Geneva, Preface.

<sup>67</sup> Lee, Everett S. summarized four kinds of factors which enter into the decision to migrate and the process of migration: 1) Factors associated with the area of origin; 2) Factors associated with the area of destination; 3) Intervening obstacles; 4) Personal factors.

<sup>68</sup> Volker Türk is the Assistant High Commissioner for Protection and Director of the Division of International Protection of the UNHCR.

<sup>69</sup> UNHCR, 2013 *UNHCR welcomes Jakarta Declaration to address irregular movements in Asia-Pacific*. Available from: < <http://www.unhcr.org.uk/news-and-views/news-list/news-detail/article/unhcr-welcomes-jakarta-declaration-to-address-irregular-movements-in-asia-pacific.html> >. [13 April, 2016]

<sup>70</sup> *ASEAN Economic Community Blueprint*, *supra* note 8, para. 4., p. 5.

<sup>71</sup> ILO and ADB, *supra* note 7., p. 14.



the increase of intra-ASEAN labour migration and accelerate the human resource development in this region<sup>72</sup>.

#### 2.4.1. Impacts of Intra-ASEAN Labour Migration

“Migration and development are inextricably linked, with development shaping migration and migration, in turn, influencing development in ways that are sometimes not well recognized.<sup>73</sup>”

People always link development closely with the growth of economy. The World Bank however argues that the gains from international migration, especially for developing countries, surpass the expected gains from liberalizing trade in merchandise<sup>74</sup>.

From a macro perspective, the rapid growth of labour migration brings impacts not only to the countries of origin and destination, but its effects also extend to the ASEAN community, since the whole ASEAN is sharing a common goal of “One Vision, One Identity, One Community<sup>75</sup>.”

In the countries of destination, migrant workers as one of the key actors, develop the labour market and contribute to the growth of the economy. Nevertheless, there are many concerns that have been centered on whether the continuous inflows of migrant workers would either reduce the wages of the local workers or increase unemployment in the local labour market. According to the results from numerous studies, the labour migration have weak effects on overall wages or unemployment, as migrants are complements, not substitutes, for the large majority of workers in receiving countries<sup>76</sup>. In reality, most of the migrant workers are doing jobs that nationals do not want or cannot fill<sup>77</sup>. The arrival of migrant workers fills the gaps in labour market through their skills, labour power, services and competitiveness<sup>78</sup>. Also the coming of migrants increases the size of the host-country labour force, and by increasing the labour force, it increases GDP<sup>79</sup>.

In the mean time, the countries of origin are facing a dilemma. When benefiting from the positive consequences of emigration, they are also facing the challenges posed by the labour output. Indeed, as it pointed out in the report of International Migration and Development, the departure of workers can “reduce the pressure from the labour surpluses; through remittances it can improve the well-being of migrants’ families; via multiplier effects,

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<sup>72</sup> Capannelli, G., *supra* note 6.

<sup>73</sup> United Nations, 2006, *International Migration and Development: Report of The Secretary-General*, Globalization and interdependence: international migration and development, Sixtieth sessions, p. 44.

<sup>74</sup> *Ibid.*, p. 45.

<sup>75</sup> The motto of ASEAN. Available from: < <http://asean.org/asean/about-asean/asean-motto/> >. [13 April, 2016].

<sup>76</sup> *International Migration and Development*, *supra* note 76, p. 45.

<sup>77</sup> *Labour Migration in Asia and the Pacific*, *supra* note 65.

<sup>78</sup> *Ibid.*

<sup>79</sup> United Nations, ESCAP, 2016, *Asia-Pacific Migration Report 2015*, p. 58.

remittances can promote income growth and help to reduce poverty at the community and national levels; through financial intermediation, remittances can also facilitate productive investments<sup>80</sup>; and moreover, once return, these workers will bring back skills and knowledge acquired abroad that can be useful for the development of their home countries. However, with the “brain drain” of high skilled workers, and a continuous lose of low- and semi-skilled labours, it seems difficult to develop labour productivity and to promote economy growth in the countries of origin.

“The precise nature of the contribution of labour migration to the countries of origin and destination is dependent on the conditions under which migration takes place<sup>81</sup>.” In other words, to what extent ASEAN and its Member States can gain from current labour migration is determined by the regional migration management, national policies and legal systems. With well-arranged migration management, people-oriented economic and political policies, as well as equitable system by laws, it can be anticipated that this intra-ASEAN labour migration is to be an ever-larger engine playing a key role in ASEAN’s regional development<sup>82</sup>. And consequently not only migrant workers and their families, but also the countries of destination and origin, together with the ASEAN Community will all benefit from the intra-ASEAN labour migration.

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<sup>80</sup> *International Migration and Development*, *supra* note 76, p. 52.

<sup>81</sup> *Asia-Pacific Migration Report 2015*, *supra* note 82. p. 82.

<sup>82</sup> *Ibid.*, p. 7.

## **3. Migrant Workers and Migrant Workers' Rights**

### **3.1. Introduction**

A precondition for maximizing the potential benefits brought by labour migration is to recognize and respect the rights of migrant workers and to ensure them equal treatment and protection without discrimination. Today the rapid growth of labour mobility in ASEAN brings significant attention to intra-ASEAN migrant workers. Who are they? What rights do they have? How to protect their rights? It is crucial for ASEAN to face and answer these questions, particularly at this critical transition time.

The present chapter looks for these answers from the most relevant provisions that are reflected in the core international human rights instruments and fundamental labour rights standards. Special focus is then on the three international conventions that are of most relevance to the protection of migrant workers' rights, namely International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (1990), Migration for Employment Convention (Revised), 1949 (No. 97) (C97), Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (C143). The last part of this chapter examines the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ASEAN Declaration on Migrant Workers) (2007) and analyses how ASEAN and its Member States commit themselves to protecting the rights of intra-regional migrant workers.

### **3.2. Who are the “Migrant Workers”?**

Migrant workers are commonly understood as persons who travel across country borders in search of employment. In some contexts, “migrant worker” is also called “foreign worker” or “expatriate employee”. However, not every foreign worker is “migrant worker” in the legal sense. Some particular professions and some persons with special migrant status are excluded from the term “migrant worker” in the international legal instruments, such as diplomats, state officials, international students, trainees, liberal professions and artists, seafarers, refugees, stateless persons, and etc.

There is no universal definition of “migrant worker”. The concept of “migrant worker” reflected in different legal instruments varies over time. The International Labour Organization, for instance, uses different terms to describe migrant workers. In Migration for Employment Convention (Revised), 1949 (No. 97), “a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment” (article 11), has been defined as “migrant for employment”. However, the term “migrant for employment” under the Convention excludes frontier workers; short-term entry of members of the liberal professions and artists; and seamen in its scope.

In another ILO convention, Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), “migrant worker” is described as: “a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker” (article 11(1)). Part I of the Convention “Migrations In Abusive Conditions”, includes migrants both “regularly admitted” and “illegally employed” in another country.<sup>83</sup> When it comes to Part II. “Equality of Opportunity and Treatment”, the term however does not cover the migrants in an irregular condition or workers in some particular sectors, such as frontier workers; short-term liberal professions and artists; seamen; trainees and students; or employees temporarily admitted at the request of their employer for specific duties or assignments<sup>84</sup>, as stipulated in article 11 (2).

The United Nations has adopted a more comprehensive definition of the term “migrant workers”. In the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990), article 2 (1) 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.” In addition, the Convention defines some particular categories of migrant workers in order to distinguish them from the general migrant workers, and entitles them with additional rights which are set out in Part V of the Convention. These additional rights are particularly applying to such migrant workers, including “frontier worker”; “itinerant worker”, “project-tied worker”, “self-employed worker” and “specified-employment worker” who have been excluded from ILO conventions.<sup>85</sup>

These definitions of the term “migrant worker” evolved along with the change of global migration and have become more comprehensive over time. It is necessary to emphasize that the use of different terminology, or the absence of established categories, should not be an obstacle or barrier for the States concerned to extend the rights and protections to all migrant workers in practice<sup>86</sup>.

In reality, “migrant worker” is by no means just a legal term which can be easily labeled and categorized. Migrant workers as human beings in essence, have multiple characters and may face situations of cumulative vulnerability<sup>87</sup>; as workers, they are making tremendous contribution to the economic growth, development and alleviation of poverty of both the countries of destination and the countries of origin<sup>88</sup>. Therefore, instead differentiating migrant workers by skills, salary levels or the length of time

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<sup>83</sup> ILO, 2007, *International Labour Standards on Migrant Workers’ Rights: Guide for Policymakers and Practitioners in Asia and the Pacific*, Bangkok, p. 7.

<sup>84</sup> ILO, 2016, *Promoting Fair Migration - General Survey concerning the Migrant Workers Instruments*, Geneva, paras. 121-127, pp. 40-42.

<sup>85</sup> APF, 2012, *Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions*, Australia, p. 3.

<sup>86</sup> *Promoting Fair Migration*, *supra* note 87, para.128, p. 42.

<sup>87</sup> *Promoting and Protecting the Rights of Migrant Workers*, *supra* note 88., p. 12.

<sup>88</sup> ILO, 2005, *Multilateral Framework on Labour Migration*, Geneva. Principle 15, p. 29.

in the country of employment, or distinguishing some particular categories of migrant workers from the general migrant workers, the term ‘intra-ASEAN migrant worker’ in this thesis is meant to cover a general scope of migrant workers from an ASEAN perspective. In other words, “intra-ASEAN migrant worker” in this thesis represents every ASEAN person who is to be engaged, is engaged, or has been engaged in remunerated activities in one of the ASEAN countries other than his or her home country; who as a member of ASEAN society, is involved to fulfill a common goal for a sustainable and inclusive ASEAN Community.

### **3.3. Migrant Workers’ Rights**

It is well known that intra-ASEAN migrant workers are one of the key actors making great contribution to the regional social and economic development in ASEAN. As of today, most intra-ASEAN migrant workers come from developing countries, and the majority of them are economically weak, politically powerless and socially marginalized. These migrant workers are among the least protected groups in ASEAN who may have been victims of the worst forms of abuse and exploitation, and may have been subjected to unequal treatment. Falling into such vulnerable situation, they are unable to enact their rights or even fail to claim their rights. Consequently, they have to resort to other vehicles seeking for special protection and claiming for equal rights.

The rights of the rightless have to be upheld by others.<sup>89</sup> Eventually, the rights of intra-ASEAN migrant workers have to be upheld by the rule of law, by regional policies; by joint collaboration of ASEAN Member States; and by national legislation in each ASEAN State as well. The Universal Declaration of Human Rights (UDHR) stresses that recognition of the rights is “the foundation of freedom, justice and peace in the world<sup>90</sup>”. Whereas recognition and understanding rights of intra-ASEAN migrant workers is of essential importance for the achievement of the ASEAN Vision. In order for a comprehensive knowledge of the rights that belong to intra-ASEAN migrant workers, it is important to start by looking at the rights of all migrant workers in general.

Rights are contained in social principles, political practice and legal theories. This section only looks for the rights that are contained in the international legal instruments. Considering that international human rights treaties and labour standards are essential legal foundations which are guiding and influencing regional and national legislations; also considering that the existing wide range of international human rights instruments, and labour standards, including declarations, principles, guidelines and recommendations, do not create any new rights but rather reinforcing the rights which have already been contained by the core treaties and conventions of the United Nations and the International Labour Organization; due to space

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<sup>89</sup> Rancière. J., 2004, *Who is the Subject of the Rights of Man?* The South Atlantic Quarterly 103:2/3, Spring/Summer 2004, Duke University Press, p. 298.

<sup>90</sup> UN General Assembly, 1948, *Universal Declaration of Human Rights*, Preamble.

constraints, this section therefore presents a short account of the framework of international human rights instruments and labour standards, and reviews the relevant rights contained in these major instruments that are applicable to migrant workers.

### **3.3.1. What Rights Apply to Migrant Workers?**

Considering migrant workers' dual features, being humans and being workers, it is essential to explore migrant workers' rights from both general human rights perspective and from specialized labour rights perspective.

Firstly, migrant workers are human beings. Thus, fundamental human rights that are contained in the UN human rights treaties shall apply to migrant workers.

As the founding document for the international human rights framework, the Universal Declaration of Human Rights grants all rights and freedoms in the Declaration to "all human beings" including migrant workers. Although the Declaration is not legally binding, most rights within the Declaration have been recognized and included in the nine core human rights treaties of the United Nations<sup>91</sup>. In this respect, the rights contained in these core treaties that apply to everyone, are applicable to migrant workers as well. These core international human rights treaties are listed as follows<sup>92</sup>:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965)
- International Covenant on Civil and Political Rights (ICCPR) (1966)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)
- Convention on the Rights of the Child (CRC) (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (1990)
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (2006)

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<sup>91</sup> *Promoting and Protecting the Rights of Migrant Workers*, *supra* note 88., p. 4.

<sup>92</sup> United Nations, The Core International Human Rights Instruments and their monitoring bodies. Available from: <  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>. [20 April, 2016]

- Convention on the Rights of Persons with Disabilities (CRPD) (2006)

To find out the extent to which migrant workers' rights are guaranteed by these treaties, an effective way is to check the basic principle behind each treaty. "All human beings are born free and equal in dignity and rights"<sup>93</sup>. In general, "non-discrimination" is the fundamental principle of international human rights law and it is of essential importance for ensuring all persons, including migrant workers in the equal enjoyment of human rights<sup>94</sup>. Looking through these human rights treaties, the principle of "non-discrimination" is laid down at the heart of each instrument.

The ICCPR, for instance, have stressed in article 2 (1) that states must guarantee all individuals within the territory to enjoy the political and civil rights without distinction of any other kind. In this regard, also reading in connection with Paragraph 2 of ICCPR General Comment No. 15: the Position of Aliens Under the Covenant, the rights set forth in the ICCPR are guaranteed to citizens and non-citizen alike, excepting that some of the rights which are expressly applicable only to citizens, such as "the right to vote" as articulated in article 25<sup>95</sup>. Also the ICESCR provides that the rights in the Covenant shall be exercised without discrimination. Although it does not explicitly eliminate distinctions or preferences on the basis of nationality and it allows developing countries to decide by themselves "to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals<sup>96</sup>", the Committee on Economic, Social And Cultural Rights recognizes in the General Comment No. 20 that "nationality" is one of the additional prohibited grounds, and further the Committee stresses that "the Covenant rights apply to everyone including non-nationals, such as [...] migrant workers [...], regardless of legal status and documentation<sup>97</sup>." Apart from the two major human rights Covenants, other core human rights treaties also uphold the principle of "non-discrimination" in the specific fields, such as race and gender; and focus on particular groups of people including children, people with disabilities and migrant workers<sup>98</sup>.

Realizing migrant workers' special needs for protection, in 1990 the United Nations adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which particularly addresses migrant workers' human rights and ensures them equal treatment

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<sup>93</sup> *Universal Declaration of Human Rights*, *supra* note 93, Article 1.

<sup>94</sup> U.N. Human Rights Committee, 2009, ICESCR General Comment No. 20: *Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, para. 2, p. 1.

<sup>95</sup> U.N. Human Rights Committee, 1986, CCPR General Comment No. 15: *The Position of Aliens Under the Covenant*, para. 2, p. 1.

<sup>96</sup> U.N. 1966, *International Covenant on Economic, Social and Cultural Rights*, Article 2 (3),

<sup>97</sup> ICESCR General Comment No. 20, *supra* note 97, para. 30, p. 9.

<sup>98</sup> *Promoting and Protecting the Rights of Migrant Workers*, *supra* note 88., p. 5.

and additional protections. The following section will discuss more in detail about this Convention.

Secondly, migrants are workers. These fundamental principles and rights related to work as embodied in the ILO conventions are applicable to all workers, including migrant workers.

Affirming that “all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity<sup>99</sup>”, the International Labour Organization has adopted 189 conventions, 6 protocols and 204 recommendations covering all aspects of labour issues of all persons at work<sup>100</sup>. Among them, the ILO has identified eight conventions of fundamental rights, which as reaffirmed by the ILO Declaration on Fundamental Principles and Rights at Work, shall be respected, promoted and realized by all ILO Member States, even if they have not ratified those conventions<sup>101</sup>.

The eight fundamental Conventions are listed as follows<sup>102</sup>:

- Forced Labour Convention, 1930 (No. 29)
- Freedom of Association Convention, 1948 (No. 87)
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
- Equal Remuneration Convention, 1951 (No. 100)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182).

Notably the rights contained in these eight fundamental Conventions are considered as fundamental rights for all workers including migrant workers. And these fundamental rights at work are covering four subjects, namely<sup>103</sup>:

- freedom of association and the effective recognition of the right to collective bargaining
- the elimination of all forms of forced or compulsory labour

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<sup>99</sup> ILO, 1944, *The Declaration of Philadelphia*, Part II (a).

<sup>100</sup> ILO NORMLEX, Available from: <  
<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0> >. [2 May, 2016]

<sup>101</sup> ILO, 1998, *ILO Declaration on Fundamental Principles and Rights at Work*, Introduction.

<sup>102</sup> ILO, Conventions and Recommendations, Available from: <  
<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> >. [24 April, 2016]

<sup>103</sup> Ibid.



- the effective abolition of child labour
- and the elimination of discrimination in respect of employment and occupation.

In particular, having recognized the labour issues in relation to the “workers employed in countries other than their own”, the ILO affirmed in the preamble of the ILO Declaration on Fundamental Principles and Rights At Work (1998) that ILO “should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation<sup>104</sup>”.

Upholding the principles of “non-discrimination” and “equality of opportunity and treatment”, the ILO has adopted a number of standards that specifically highlight the labour rights of migrant workers. These standards include two major Conventions in terms of migrant workers, which will be discussed in more detail in the following sections, and three non-binding recommendations:

- Migration for Employment Convention, 1949 (No. 97)
- Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- Migration for Employment Recommendation (Revised), 1949 (No. 86)
- Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100)
- Migrant Workers Recommendation, 1975 (No. 151).

In addition, the ILO has recently adopted the Domestic Workers Convention, 2011 (No. 189), which is regarded as being concerned with migrant workers as well. The Convention has recognized the special character of domestic workers and ensured them with effective protection and fundamental rights at work, including freedom of association and right to collective bargaining. Although this convention does not address migrant workers’ labour issues directly, since migrants, especially migrant women and girls have constituted a significant proportion in the domestic work sector, the Convention is of particularly importance for millions of migrant domestic workers, especially for migrant women and girls. However, due to time and space constraints, this thesis is not going to discuss domestic migrant workers as a specific case, therefore it will not review Domestic Workers Convention in detail.

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<sup>104</sup> ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 104, Preamble.

### **3.4. The Protection of Migrant Workers' Rights in the Three Major Conventions**

The term “protection” in this thesis is interpreted as elimination of discrimination, assurance of equality, and realization of fundamental rights of all migrant workers. Labour migration as a transnational process, comprises preparation, departure, transit and entire period of stay and remunerated activity, that involves States of origin, transit, and employment<sup>105</sup>. Indeed, with regard to the protection of migrant workers' rights, States of employment withhold more obligations as required by international conventions. However, the protection cannot be fulfilled by States of employment alone. All countries involved have to share the responsibility to promote, respect and fulfill migrant workers' rights during the entire migration process.

What rights are protected under the three migrant workers' conventions? Do these conventions protect the rights of undocumented migrant workers as well? What obligations are placed on the states concerned? This section aims to look for these answers by analyzing the three major international conventions.

#### **3.4.1. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

Having been aware of the impact of migrant workers, in 1990, the United Nations adopted the ICMW, as a response to the vulnerability of migrant workers, aiming at ensuring migrant workers and their families an equality of treatment with nationals of the State concerned.

Consisting of 93 articles in nine parts, the ICMW is regarded as the most comprehensive international treaty that provides a broad mandate protecting the rights of all migrant workers irrespective of their migratory status.

The nine parts contained in the ICMW are:

- Part I. Scope and definitions
- Part II. Non-discrimination with respect to rights
- Part III. Human rights of all migrant workers
- Part IV. Other rights of migrant workers who are documented or in a regular situation
- Part V. Provisions applicable to particular categories of migrant workers
- Part VI. The promotion of sound, equitable, humane and lawful conditions in connection with international migration

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<sup>105</sup> UN General Assembly, 1990, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Article 1 (2).

- Part VII. Application of the Convention
- Part VIII. General provisions
- Part IX. Final provisions

Recognizing that migrant workers, especially the undocumented migrant workers who are also called migrants in an irregular situation, are more vulnerable to exploitation and face more serious human rights violations in the specific circumstances<sup>106</sup>; and also realizing the need to take appropriate action to “prevent and eliminate clandestine movements and trafficking in migrant workers<sup>107</sup>”, the ICMW, instead creating any new rights for migrant workers and their families, reinforces and complements the rights that have been already contained in other core UN human rights treaties and ILO Conventions<sup>108</sup>; and it establishes minimum standards for States Parties to set the laws and the judicial and administrative procedures, directly relevant to documented and undocumented migrant workers and their families, for the fulfillment, protection and promotion of their rights<sup>109</sup>.

#### **A. The Principle of Non-discrimination**

The principle of non-discrimination is the key component of the ICMW, which constitutes a central thread running through the Convention. As it is clearly reflected in the scope that the Convention is applicable to all migrant workers with no discrimination on any ground, Part II of the Convention, in particular, requires States Parties to respect and ensure all migrant workers, whether documented or undocumented, the rights contained in the Convention without distinction of any kind. Article 7 stipulates that:

“... the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”

Moreover, recognizing the vulnerability of all migrant workers in some particular situations, such as unable to take part in trade union; be subject to expulsion; lacking of access to recourse, etc., hence, in Part III (articles. 8 to 35) the ICMW sets out a broad series of rights and identifies a number of guarantees, for all migrant workers and members of their families, including undocumented migrant workers<sup>110</sup>. For instance, article 22 protects all migrant workers from arbitrary expulsion, and article 26 particularly

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<sup>106</sup> UN, 2005, *The International Convention on Migrant Workers and its Committee Fact Sheet No. 24*, p. 4.

<sup>107</sup> *ICMW*, *supra* note 108, Preamble.

<sup>108</sup> *Promoting and Protecting the Rights of Migrant Workers*, *supra* note 88., p. 12.

<sup>109</sup> *The International Convention on Migrant Workers and its Committee Fact Sheet No. 24*, *supra* note 109, p. 1.

<sup>110</sup> *Ibid.*, p. 5.

guarantees all migrant workers to be able to join and take part in activities of trade unions and of any other lawful associations.

Indeed, the ICMW does distinguish migrant workers between documented and non-documented; and the Convention also enumerates different rights and protection based on different migratory status. But since such differentiations are necessary in the specific circumstances, and proportionate to the legitimate aim pursued, the differential treatment is permissible and will not be considered as discrimination<sup>111</sup>.

## **B. The Principle of Equality for All Migrant Workers**

The other essential component of the ICMW is the principle of equality. The Convention outlines a set of rights particularly addressing that migrant workers and their families shall enjoy “the same treatment granted to nationals” and shall be treated “not less favourably” than nationals.

For instance, article 18 of the ICMW articulates that migrant workers shall have right to equality before the courts and tribunals of the State concerned. Article 25 stipulates that all migrant workers, regardless of migratory status, shall enjoy treatment no less favourable than that applicable to nationals in terms of remuneration, conditions of work and other terms of employment. With respect to social security, article 27 of the Convention, which is to be discussed more in detail in the following chapter, mandates that the States of employment shall provide the same treatment as granted to nationals to the migrant workers and their families “in so far as they fulfilled the requirements”. And in the situation of emergency, article 28 requests States to ensure equal treatment of any medical care for all migrant workers, documented and undocumented, and their families.

## **C. Other Rights of Migrant Workers Who Are Documented or in A Regular Situation**

The rights and freedoms set forth under the ICMW are divided into two parts: those applicable to all migrant workers irrespective of their migratory status (Part III) and those applicable to migrant workers in a regular situation (Part IV)<sup>112</sup>. In addition to the rights guaranteed to all migrant workers, the migrant workers in a regular situation are entitled with additional rights and protections which are specified in Part IV of the Convention, such as the right to liberty of movement in the territory of the State of employment (art. 39); the right to form trade unions in the State of employment (art. 40), although the ILO says this is a right that belongs to all including undocumented migrant workers; the right to transfer earnings and savings (art. 47), and etc.

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<sup>111</sup> U.N., Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2013, General Comment No. 2: *On The Rights of Migrant Workers In An Irregular Situation And Members Of Their Families*, para. 18, p. 7.

<sup>112</sup> Migrant Rights International, the 1990 Convention, Available from: <[http://www.migrantwatch.org/about\\_the\\_convention/BasicRights.html](http://www.migrantwatch.org/about_the_convention/BasicRights.html)>. [20 April, 2016]

Part IV of the Convention also stresses that in terms of some specific social rights, migrant workers in a regular situation and their families shall enjoy equality of treatment as nationals of the States in relation to education, housing, social, health and other services in the State of employment as stipulated in articles 43 and 45.

#### D. Responsibility of States Under the Convention

As written in the scope, the ICMW shall apply during the entire migration process of migrant workers and their families, from preparation for migration, departure, transit, period of stay and work in the States of employment, until return to the States of origin. By ratifying the Convention, all countries involved, including States of employment and origin, as well as States of transit thus are obliged to ensure all migrant workers and their families, whether documented or non-documented, to receive comparable treatment and protection within their territory<sup>113</sup>.

For an easy and clear reference of the rights and freedom granted to all migrant workers under the ICMW, Table 3-1 & 3-2 have summarized and compiled these rights and the responsible States below (not including the rights to their family members). Table 3-1 includes the rights applicable to all migrant workers, irrespective of their migratory status; and Table 3-2 includes the rights specifically applicable to documented migrant workers.

**Table 3-1: Human Rights of All Migrant Workers**

<b>Human Rights of All Migrant Workers</b>	
<p><b>Responsibility of States of Employment</b> (articles 16-20);</p> <ul style="list-style-type: none"> <li>• Right to a fair and public hearing with all the guarantees of a due process (articles 16-20);</li> <li>• Right to be provided with necessary legal assistance, interpreters and information in an understood language (article 16);</li> <li>• Right to liberty and security and freedom from arbitrary arrest or detention (article 16);</li> <li>• Right to be presumed innocent until proved guilty (article 19);</li> <li>• Prohibition to be subject to measures of collective expulsion (article 22);</li> <li>• Right to have recourse to diplomatic or consular assistance and protection (article 23);</li> <li>• Right to recognition everywhere as a person before the law (article 24);</li> <li>• Right to equality with nationals before the courts and tribunals (article 18)</li> <li>• Right of equal treatment with nationals in respect to remuneration and other conditions of work such as overtime, holidays, etc. (article 25);</li> <li>• Right to join freely any trade union (article 26);</li> <li>• Right to enjoy the same treatment as nationals regarding social security benefits in so far as they fulfill the legislation requirements (articles 27);</li> <li>• Right to emergency medical care (article 28);</li> <li>• Right to preserve a cultural identity (article 31);</li> <li>• Right to transfer earnings and savings upon the termination of their stay in the State of employment (article 32)</li> </ul>	<p><b>Responsibility of States of Origin and States of Employment, as well as States of Transit</b></p> <ul style="list-style-type: none"> <li>• Right to life (article 9);</li> <li>• Right to freedom from torture or cruel, inhuman or degrading treatment or punishment (article 10);</li> <li>• Right to freedom from slavery, servitude or forced compulsory labor (article 11);</li> <li>• Right to freedom of thought, expression, conscience and religion (articles 12 and 13);</li> <li>• Right to privacy (article 14);</li> <li>• Right to property (article 15);</li> <li>• Right to information by the State of origin, State of employment, or the State of transit of their rights arising from the present Convention, the conditions of their admission, and their rights and obligations in those States (article 33);</li> <li>• Right to freedom of movement to and from their countries of origin (article 8)</li> </ul>

<sup>113</sup> *Promoting and Protecting the Rights of Migrant Workers*, supra note 88., p. 4.

**Table 3-2: Other Rights of Documented Migrant Workers**

<b>Other Rights of Migrant Workers Who Are Documented or in a Regular Situation:</b>	
<b>Responsibility of States of Employment</b>	<b>Responsibility of States of Origin</b>
<ul style="list-style-type: none"> <li>• Right to be temporarily absent, for reasons of family needs and obligations, without effect on their authorization to stay or work (article 38);</li> <li>• Right to liberty of movement in the territory of the State of employment (article 39);</li> <li>• Right to form associations and trade unions in the State of employment (article 40);</li> <li>• The right to equality of treatment with nationals in respect of protection against dismissal, unemployment benefits and access to alternative employment (article 54);</li> <li>• Right to enjoy from export and import taxes (article 46).</li> <li>• The right to equality of treatment with nationals of the State of employment, including access to educational, vocational and social services (article 43);</li> <li>• Right to information, including all conditions concerning their stay and their remunerated activities (article 37)</li> </ul>	<ul style="list-style-type: none"> <li>• Right to participate in the public affairs of the State of origin, in accordance with its legislation (article 41);</li> <li>• Right to vote and to be elected in the State of origin, in accordance with its legislation (article 41);</li> </ul>

Source: Constructed by the author of this thesis on the basis of the information from Migrant Rights International, *the 1990 Convention*, Available from: < [http://www.migrantwatch.org/about\\_the\\_convention/BasicRights.html](http://www.migrantwatch.org/about_the_convention/BasicRights.html)>. [27 April, 2016]

Moreover, recognizing the complexity of labour migration, Part VI of the Convention requires all the States concerned to cooperate for promoting sound, equitable, humane and lawful conditions in connection with migrant workers and their families. As such, all States, including States of transit, have responsibility, as stipulated from article 64 to article 71, to maintain appropriate services to facilitate migrant workers and their families during the entire migration process (article 65); to take necessary measures to prevent and eliminate “illegal or clandestine movements and employment of migrant workers in an irregular situation” (article 68); to regulate the situation of undocumented migrant workers in accordance with applicable legislation and bilateral or multilateral agreements (article 69); and to ensure working and living conditions of documented migrant workers and their families keeping with the standards of fitness, safety, health and principles of human dignity (article 70).

### **3.4.2. Migration for Employment Convention, 1949 (No. 97)**

As early as 1919, the ILO has realized the importance of the protection of “the interests of workers employed in countries other than their own<sup>114</sup>”. In 1949, in order to deal with the prevailing kinds of migration after World War II, the ILO adopted the Migration for Employment Convention aiming to provide protection for documented migrant workers during the whole migration process from departure to return. However, this Convention does not apply to migrants in an irregular situation or people who are working as

<sup>114</sup> ILO, 1919, *Constitution of The International Labour Organization*, Preamble, recital 2.

frontier workers, seamen, liberal professions and artists with short term entry, or self-employed foreign migrants<sup>115</sup>.

The main objective of the ILO Convention No. 97 is to ensure “no less favourable treatment” and to eliminate discrimination in relation to employment and living conditions for migrants in a regular situation<sup>116</sup>.

In relation to remuneration, membership of trade union, benefits of collective bargaining, accommodation, employment taxes and legal proceedings relating to matters referred in the Convention, article 6 of the Convention requires States to provide every migrant worker in a regular situation with “no less favourable treatment”. However, as the Convention does not require the State to provide the same treatment, it is interpreted that States are allowed to apply no less favourable treatment to migrant workers which does not have to be identical to the treatment enjoyed by nationals<sup>117</sup>.

In particular, article 6(1)(b) stresses that with respect to social security, Member States shall ensure every migrant lawfully in the territory of the State to receive the treatment no less favourable than that the State applies to its own nationals. Under this provision, “social security” means “legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security programme”. As for what specific protection is provided under this Convention for migrant workers’ right to social security, it will be discussed in detail in the next chapter.

### **3.4.3. Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)**

Adopted in 1975, the ILO’s Migrant Workers Convention No. 143 was the first international treaty, earlier than the ICMW which was adopted in 1990, directly addressing the rights of migrant workers in irregular situations and sets out minimum standards for the protection of migrant workers in both regular and irregular situations<sup>118</sup>.

The Convention No. 143 consists of 24 articles structured in 3 parts:

- Part I. Migration in Abusive Conditions
- Part II. Equality of Opportunity and Treatment
- Part III. Final Provisions

Pursuant to article 1 of the Convention that “Each Member for which this Convention is in force undertakes to respect the basic human rights of all

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<sup>115</sup> *Promoting and Protecting the Rights of Migrant Workers*, supra note 88., p. 42.

<sup>116</sup> *Promoting Fair Migration*, supra note 87, para. 331, p. 111.

<sup>117</sup> *Ibid.*, para. 332, p. 111.

<sup>118</sup> *Promoting and Protecting the Rights of Migrant Workers*, supra note 88., p. 43.

migrant workers”, Part I of the Convention, requires both countries of origin and destination to fully respect and protect the fundamental rights of all migrant workers, including migrants in an irregular situation<sup>119</sup>. In particular, having special concerns on the abusive conditions of the migrant workers who are in an irregular situation and are engaged in unlawful employment, Part I of the Convention encourages States to take appropriate measures and cooperate with other States to “suppress clandestine movements of migrants for employment and illegal employment of migrants” (article 3), to prosecute “manpower trafficking” (article 5), to “prevent and eliminate abuse” (article 7) and to ensure an equal treatment in respect of “rights arising out of past employment” (article 9).

Nevertheless, like the ICMW, the Convention No. 143 also divides the rights and freedoms into two parts: Part I is designed for all migrant workers irrespective of their migratory status, and Part II is only for migrant workers and their families who are lawfully within the territory. Part II sets out requirements for States to guarantee migrant workers with equal opportunity and treatment in relation to employment and occupation, social security, trade union and cultural rights and of individual and collective freedoms (article 10). However, the migrants in an irregular situation or migrants who are working as frontier workers, liberal professions and artists with short term entry, seamen, trainees or students, and persons who come for specific duties in defined period of time (article 11 (2)) are not covered under Part II of the Convention.

### **3.5. The Protection of Migrant Workers’ Rights in ASEAN**

As mentioned in chapter 2, labour migration is anticipated to play a key role in ASEAN’s regional development<sup>120</sup>. ASEAN has placed high expectation on migrant workers for the benefits they would contribute to the regional sustainable development and prosperity. To maximize these potential benefits, ASEAN and its Member States have to recognize and respect the rights of all migrant workers and to ensure them with effective protection without discrimination.

A significant start for protecting Intra-ASEAN migrant workers’ rights would be to ratify and implement international conventions. However, widespread concerns are raised about how much capability and willingness ASEAN Member States have to provide protection for these migrant workers. Not all ASEAN States are willing to be bound by international treaties. So far, only the Philippines has ratified all three major conventions on migrant workers. As for these main countries of destination, such as Brunei, Malaysia, Singapore, Thailand, none of them has ratified any of these three conventions (see Table 3-3). And the ratification of other core fundamental conventions also remains relatively low. Both countries of origin and destination have concerns about the ratification of international conventions. Countries of origin worry that ratification would cause a loss of labour markets in countries

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<sup>119</sup> *Promoting Fair Migration*, supra note 87, para. 275, p. 89.

<sup>120</sup> See p. 24 of the thesis.



of destination to other non-ratifying competitors; while countries of destination are concerned that ratification would bring up more technical and institutional challenges on national legislation and administrations<sup>121</sup>.

**Table 3-3:** Ratification of Conventions related to Migrant Workers, 2016.

ASEAN Countries	International Covenant on Civil and Political Rights	International Covenant on Economic, Social and Cultural Rights	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	ILO Migration for Employment Convention, 1949 (No. 97)	Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
Brunei					
Cambodia	YES	YES			
Indonesia	YES	YES	YES		
Lao PDR	YES	YES			
Malaysia					
Myanmar		YES			
Philippines	YES	YES	YES	YES	YES
Singapore					
Thailand	YES	YES			
Vietnam	YES	YES			

Source: ILO NORMLEX Database; Office of the United Nations High Commissioner for Human Rights.

### 3.5.1. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

Recognizing the great contribution of migrant workers to the social and economic development in ASEAN; in the mean time, realizing current low rate of ratification of international treaties and the poor implementation; also taking into consideration the weak political will of the Member States, ASEAN thus takes up the issues with respect of migrant workers' rights through non-binding declarations.

In 2007, the ten ASEAN Member States adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. Although not legally binding, the Declaration is thought of as a significant commitment by ASEAN and its Member States toward the full application, promotion and protection of migrant workers' rights.

It is notable that this Declaration applies to both documented and undocumented migrant workers. It calls on countries of origin and destination to promote and protect the dignity and fundamental rights of all migrant workers and their families; and to work together to resolve the cases of migrant workers who have become undocumented through no fault of their own<sup>122</sup>.

<sup>121</sup> Cholewinski, R., Migration Policy Institute, 2005, *Protecting Migrant Workers in a Globalized World*, Available from: < <http://www.migrationpolicy.org/article/protecting-migrant-workers-globalized-world> >. [29 April, 2016]

<sup>122</sup> *Promoting and Protecting the Rights of Migrant Workers*, supra note 88., p. 61.

### 3.5.2. ASEAN's Commitment on the Protection and Promotion of Human Rights

In 2007, the same year of the adoption of the ASEAN Declaration on the Migrant Workers, the ten ASEAN Member States ratified the ASEAN Charter, a regional binding treaty, declaring the application, promotion and protection of human rights and fundamental freedoms in this region (article 1 (7)), as one of the purposes of the Charter. In pursuit of that purpose, ASEAN and its Member States reaffirm the principle of respecting fundamental human rights and freedoms of everyone (article 2.2 (i)) by upholding the United Nations Charter as well as international human rights law (article 2.2 (j)). Moreover, in article 14, the Charter proposes to establish an ASEAN human rights body in conformity with the purposes and principles relating to the “promotion and protection of human rights and fundamental freedoms”.

In 2009, guided by the ASEAN Charter, ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR), a consultative body to promote and protect human rights within ASEAN regional context. The Terms of Reference of the AICHR has highlighted 14 mandates and functions of the AICHR, including “to develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community”(4.1); “to promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States”(4.4); “to encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments” (4.5); and “to promote the full implementation of ASEAN instruments related to human rights” (4.6). However, since the AICHR is an integral part of the ASEAN organizational structure, which is dependent on ASEAN States’ governments<sup>123</sup>, thus the AICHR does not have monitoring function. And as of today, ASEAN does not have independently regional human rights mechanism.

In 2012, the ASEAN Human Rights Declaration was adopted unanimously by all ten ASEAN Member States. The Declaration reaffirms ASEAN’s and Member States’ commitment in promoting the human rights of all ASEAN people; and affirms that human rights, including “all the civil and political rights<sup>124</sup>” as well as “all the economic, social and cultural rights<sup>125</sup>” enshrined in the UDHR belong to *everyone*. Further, Article 4 of the Declaration specially emphasizes that the rights of migrant workers are “inalienable, integral and indivisible part of human rights and fundamental freedoms<sup>126</sup>.”

These series of measures taken by ASEAN and its Member States in the last decade strengthen their commitment in promoting and protecting fundamental rights of all ASEAN people, including intra-ASEAN migrant workers. As of today, the ten ASEAN States have not, however, proceeded

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<sup>123</sup> ASEAN, 2009, *Terms of Reference of the AICHR*, Article 3, p. 6.

<sup>124</sup> ASEAN, 2012, *ASEAN Human Rights Declaration*, Article 10.

<sup>125</sup> *Ibid.*, Article 26.

<sup>126</sup> *Ibid.*, Article 4.

to adopt any regional legally binding instrument for the enforcement of such commitment. As the saying that “practice is the sole criterion for testing truth”, while the commitment repeatedly reaffirmed in documents, due to lack of legal effect, how effectively ASEAN and its Member States fulfill this commitment remains to be examined in practice.

### **3.6. Concluding Remarks**

In theory, migrant workers enjoy the same fundamental human rights and labour rights as entitled to the nationals of the States of employment. In practice, migrant workers’ assured rights relies more on States’ commitment, and regional collaboration.

ASEAN today is undertaking development toward an inclusive and caring ASEAN Community. On the way to the ASEAN Vision 2025, for the full fulfillment of a sustainable integration, it is time for ASEAN and ASEAN States to value migrant workers’ contribution to ASEAN Community, and take pragmatic measures to extend long term and holistic protection to all intra-ASEAN migrant workers.

Among all the fundamental human rights, the right to social security is directly related to migrant workers’ financial wellbeing. As mentioned, most migrants travel across borders for economic reasons. They seek for employment out of their own countries in order to make a better life for themselves and to support their families at home. Therefore, ensuring intra-ASEAN migrant workers an adequate access to social security benefits would be an effective long term protection and a powerful tool to improve the social inclusion and wellbeing of all ASEAN people.

Before going further to examine intra-ASEAN migrant workers’ right to social security, the following chapter is reviewing international standards for the right to social security, and particularly for migrant workers’ rights to social security.

## 4. Migrant Workers' Rights to Social Security

### 4.1. Introduction

The dynamic ASEAN economy is, due to a large extent, by virtue of its large combined population and abundant labour supply. Nevertheless, it is estimated that not too long from now ASEAN labour force will shrink. The rapid growth of aging population and the declining fertility rates in some ASEAN countries is widening the labour gap between higher income countries and lower income countries, and which consequently will cause social and economic insecurity and raise structural challenges in this region. Intra-regional labour migration is therefore expected to alleviate the pressure from the growing labour gap and intra-ASEAN migrant workers are anticipated to take over the key role to continue this regional development.

Sustainable economic development is associated with extensive and comprehensive social security policies. It is because a strong social security system plays a critical role as automatic social and economic stabilizer in helping to support structural transformation of national economies, foster inclusive and sustainable growth, promote decent employment<sup>127</sup>, and empower people to make timely adjustment to adopt to the changes in the economy and in the labour market<sup>128</sup>. In this regard, ensuring every ASEAN person, especially intra-ASEAN migrant workers, to have equitable access to income security, including retirement income security, and to have effective access to health care and other social security benefits, is of crucial importance for ASEAN in fostering regional economic and social development for the short term and in the the long run<sup>129</sup>.

Social security is by no means a mere economic policy. It is a fundamental human right for everyone enshrined in the Universal Declaration of Human Rights, and the core international legal instruments. However, today a large majority of people have not fulfilled this universal right. According to ILO's most recent version of the World Social Protection Report (2014/2015), only 27 per cent of the worlds' population have access to a comprehensive social security system, whereas 73 per cent are covered partially or not covered by social security programme at all<sup>130</sup>.

Due to the fact that most countries impose restrictions on the enjoyment of social security benefits, such as periods of employment, economic activity, or residence, registration<sup>131</sup>, which are not to the advantage of those migrant workers who are employed temporarily in private or informal sectors, thus a

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<sup>127</sup> ILO, 2014, *World Social Protection Report 2014/15: Building Economic Recovery, Inclusive Development and Social Justice*, p. 2.

<sup>128</sup> ILO, 2012, *Social Protection Floors Recommendation, 2012 (No. 202)*, Preamble.

<sup>129</sup> *World Social Protection Report 2014/15*, *supra* note 130, p. 2.

<sup>130</sup> *Ibid.*, p. 1.

<sup>131</sup> Kulke, U., 2007, *Filling the Gap of Social Security for Migrant Workers: ILO's Strategy*, p. 7.

large number of migrant workers, especially those who are in an irregular situation are unable to participate in social security in the countries of employment<sup>132</sup>. Even migrant workers who have satisfied most requirements for the social security benefits, if they fail to satisfy the minimum required periods for contribution, they may be unable to enjoy the full benefits; or they are highly likely to lose some or all of these acquired benefits if they want to return to their home countries, as the social security benefits may not be exportable<sup>133</sup>. Meanwhile, in the countries of origin, many migrant workers are facing the risk to lose the entitlement of social security benefits in their home countries, because they have been absent for a long time and because some countries directly exclude citizens who work abroad from their social security system.

To address intra-ASEAN migrant workers' social security rights, it is necessary to clarify the concept of social security and to specify the protection provided for migrant workers' right to social security. The present chapter, at the outset, is looking for the definition of social security and to identify the minimum standard for the social security benefits. Further, it examines the protection for migrant workers' right to social security under the ICESCR; the ICMW, and a number of ILO social security conventions.

#### **4.2. What is Social Security?**

Established mostly by national legislation, the notion of "social security" varies with cultures, values, traditions and institutional and political structures of each country<sup>134</sup>. Generally, the term "social security" is understood as "[...] the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner."<sup>135</sup>

The ILO has developed an international normative framework of "social security". According to the ILO's Declaration of Philadelphia (1944) that "the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care"<sup>136</sup>, "social security" refers to two main functional dimensions, namely "income security" and "availability of medical care"<sup>137</sup>. The notion adopted by the ILO's recently published World Social Protection Report 2014/15 makes additional reference to disability protection, family support and general protection

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<sup>132</sup> Pasadilla, Gloria O., 2011, *Social Security and Labor Migration in ASEAN*, ADB Research Policy Brief 34, p. 9.

<sup>133</sup> Ibid., p. 9.

<sup>134</sup> ILO, 2003, *Social Protection, A Life Cycle Continuum Investment for Social Justice, Poverty Reduction and Sustainable Development*, p. 14.

<sup>135</sup> ILO, *Facts on Social Security*, International Labour Office, Geneva, 1989

<sup>136</sup> *The Declaration of Philadelphia*, *supra* note 102, Part III (f).

<sup>137</sup> *World Social Protection Report 2014/15*, *supra* note 130, p. 163.

against poverty and social exclusion<sup>138</sup>, which covers “all measures providing benefits, whether in cash or in kind, to secure protection, inter alia, from

- lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member;
- lack of (affordable) access to health care;
- insufficient family support, particularly for children and adult dependants;
- general poverty and social exclusion.<sup>139</sup>”

In many contexts “social security” is also called “social protection”. “Social protection”, however has a broader scope than “social security”. By definition, “social protection” can be interpreted as having not only traditional social security measures, but also non-statutory or private measures for providing social security<sup>140</sup>, including the protection provided between members of the family or members of a local community<sup>141</sup>. But when “social protection” is put in a context that only addresses the traditional measures to the poorest, most vulnerable or excluded members of society, these two terms, “social protection” and “social security” are largely interchangeable<sup>142</sup>. In this chapter, the term “social protection” is used as an alternative expression of “social security”.

Social security includes a range of measures covering both short term protections and long term cares. The ILO Social Security (Minimum Standards) Convention, 1952 (No.102) (C 102), which is considered as the flagship of all ILO social security conventions, identifies nine principal branches of social security benefits, namely medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors’ benefits. Among them, old age, invalidity (also called “disablement”) and survivors’ benefits are usually recognized as the measures for long term care, while the remaining six are for short term protections.

Social security is achieved through various social security programmes. Differentiated by their financing method, social security programmes can be categorized as contributory programmes and non-contributory programmes. There are six main types of social security programmes that are commonly provided among the countries across the world, including the ten ASEAN countries, namely social insurance programme, provident fund programme, individual account programme, employment-liability programme, social assistance programme, and universal coverage programme (see Table 4-1). Among them, social assistance programme and universal coverage

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<sup>138</sup> Mahidol Migration Centre, 2011, *Migrant Workers’ Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore and Thailand*, p. 16.

<sup>139</sup> *Ibid.*, p. 163.

<sup>140</sup> *Social Protection, A Life Cycle Continuum Investment for Social Justice, Poverty Reduction and Sustainable Development*, *supra* note 138, p. 14.

<sup>141</sup> *World Social Protection Report 2014/15*, *supra* note 130, p. 162.

<sup>142</sup> *Ibid.*, p. 162.

programme are commonly recognized as non-contributory programmes, while the other four are contributory programmes. The totality of statutory social programmes constitutes social security system. And public authorities have the responsibility to ensure that the county’s social security system is under effective supervision and benefits are available for the relevant social risks and contingencies<sup>143</sup>.

**Table 4-1:** Types of Social Security Programmes and Financing Methods

Social Security Programmes	Financing Methods
Social insurance Programme	Publicly administered and financed primarily by contributions from workers and employers.  Additional income may come from the investment of programme's reserve funds and, from government subsidies.
Universal coverage Programme	Financed from general government revenues and that apply to the entire resident population, subject to whatever eligibility requirements may be prescribed in the programme's legislation
Provident Fund Programme	Mandatory collective savings programmes that are publicly administered and financed from contributions by workers and/or employers and from the investment earnings of the fund.  Contributions made by, or on behalf of, a worker are credited to the worker's account along with a part of the fund's investment earnings proportional to the balance in the worker's account.
Individual Private Accounts Programme	Financed by contributions by workers and/or employers, and those contributions are credited to a worker's account along with earnings from the investment of previous contributions.  Systems of individual accounts are privately administered, subject to regulation and supervision by public agencies. When the worker retires, the funds in her or his account must be used to provide some form of periodic benefit, usually through the purchase of an annuity.
Employer-liability Programme	Each employer is obligated to provide benefits or services to its employees when specific contingencies occur – for example, on termination of employment or if a worker suffers an employment injury.
Social Assistance Programme	Financed from general government revenues and that apply to the entire resident population, subject to whatever eligibility requirements may be prescribed in the programme's legislation  The entitlement is subject to a means-test.

Source: Compiled by the author of this thesis on the basis of the information from Tamagno, E., 2008, *Strengthening Social Protection for ASEAN Migrant Workers through Social Security Agreements*, pp.5-6.

### 4.3. The Right to Social Security as a Fundamental Human Right for all Human Beings

The right to social security as enshrined in the UDHR is an inherent right that entitled to everyone of the society. The right to social security has two essential elements: the right to have an equal access to social security system, and further, the right to enjoy equal treatment and protection. The Committee on Economic, Social and Cultural Rights defines “the right to social security” as “the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents<sup>144</sup>.” Moreover, the Committee adds that, “the right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether

<sup>143</sup> Committee on Economic, Social and Cultural Rights, 2008, General Comment No. 19: *The Right to Social Security (art. 9)*, Introduction, p. 4.

<sup>144</sup> Ibid., para. 2, p. 2.

obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies<sup>145</sup>.” To put it simply, the right to social security is the right of every person to have an equal access to adequate social benefits and to enjoy an equitable treatment, without being discriminated of any kind.

The right to social security is considered as of essential importance in maintaining human dignity for all persons<sup>146</sup>. It thus has been recognized as a fundamental human right for all human beings. Article 22 of the UDHR recognizes that the right to social security belongs to every member of the society and the society has duty to make the most of all the advantages to ensure every one in the society fulfill their fundamental right. Moreover, article 25 further consolidates and complements the social security right as provided under article 22 and specifies a number of social rights, including the right to medical care, right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one’s control, for the purpose of ensuring that every person has “a standard of living adequate for the health and well-being of himself and of his family<sup>147</sup>”. Besides, article 25 (2) also identifies the necessity to have special care and assistance for motherhood and childhood.

However, as mentioned, from a legal perspective, the UDHR does not have binding force, and therefore there is no obligation for States to comply with the Declaration. But, since the UDHR has strong moral force and far reaching influence, thus the recognition of the right to social security in the UDHR has been a universal guidance for more legal instruments to accept this fundamental right in their legal provisions. This section is to examine how the ICESCR interprets the social security right as a fundamental human right to all human beings; and how the ICMW protects migrant workers’ rights to social security.

#### **4.3.1. Right to Social Security in the International Covenant on Economic, Social and Cultural Rights**

The right for everyone to social security is strongly affirmed in the ICESCR. Upholding the principle of “non-discrimination and equality”, article 9 of the Covenant provides that, “the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” Moreover, articles 10, 11, and 12 also mention expressly that Member States must provide adequate protection and assistance to ensure everyone to realize his or her rights to family protection, an adequate standard of living and adequate access to health care<sup>148</sup>.

According to the Committee on Economic, Social and Cultural Rights, the right to social security consists of five essential elements that apply in all

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<sup>145</sup> Ibid., para. 9, p. 4.

<sup>146</sup> Ibid., para. 1, p. 2.

<sup>147</sup> UDHR, *supra* note 93, article 25 (1).

<sup>148</sup> , General Comment No. 19: *The Right to Social Security (art. 9)*, *supra* note 148, para. 22, p. 7.



social circumstances, including availability of social security system, social risks and contingencies, adequacy, accessibility, and relationship with other rights<sup>149</sup>. Specially with regard to “accessibility”, the Committee highlights five key criteria contributing to the application and realization of this fundamental right, namely coverage, eligibility, affordability, participation and information, and physical access<sup>150</sup>.

First and foremost is the universal coverage for all persons. The social security system shall include every person in the social security programmes, without discrimination on any of the grounds prohibited under article 2, paragraph 2 of the Covenant<sup>151</sup>. The social security system shall especially ensure individuals with most vulnerable status not to be left out of the system. Secondly, considering that some of the social programmes establish certain conditions for the obtainment, withdrawal, reduction or suspension of the social benefits, these qualifying conditions must be established “reasonable, proportionate and transparent”<sup>152</sup>. Thirdly, with regard to the accessibility of the contributory benefit programmes, the costs and charges associated with the contribution must be reasonable so that no one will be left out because he or she can not afford these charges. Fourthly, the social security system must be open and transparent so that every person is able to seek and receive sufficient information about social security programmes and the entitled benefits. Last but particularly related to migrant workers’ situations is that social security services must be physically accessible. In this regard, since migrant workers are no longer living in their home country, they should be able to access the social services in the countries of employment.

As mentioned, in addition to an equal access to social benefits, Member States have obligations to guarantee every person an equal treatment without discrimination. Reading article 9 of the ICESCR in conjunction with article 2 (2), it is clear that toward the full realization of the right to social security, States have immediate obligations to undertake the guarantee that the right to social security will be exercised without discrimination of any kind<sup>153</sup>. Since the treaty bodies include nationality in the prohibited grounds of discrimination, the social security right under the ICESCR thus also apply to non-nationals. In this respect, migrant workers, regardless of their migratory status, shall all enjoy equal treatment in access to both contributory and non-contributory social security programmes for income support, primary and emergency medical care and family support<sup>154</sup>.

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<sup>149</sup> Ibid., pp. 4-9.

<sup>150</sup> Ibid., para. 22, 23, 24, 25, 26, & 27, p. 8.

<sup>151</sup> Ibid., para. 23, p. 8.

<sup>152</sup> Ibid., para. 24, p. 8.

<sup>153</sup> Ibid., para. 40, p. 12.

<sup>154</sup> Ibid., para. 37, p. 12.

#### **4.3.2. Migrant Workers' Rights to Social Security in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

Upholding the two founding principles of “non-discrimination” and “equality”, the ICMW extends the protection of the social security rights to all migrant workers, irrespective of their migratory status<sup>155</sup>.

With regard to the right to social security for all migrant workers, article 27 (1) of the Convention provides that, “migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties”. Reading article 27(1) in conjunction with article 7 of the Convention, migrant workers’ right to social security can be understood as all migrant workers shall have the equal right as entitled to the nationals to access and maintain benefits in the country of employment, if they fulfil the requirements laid out by the applicable legislation and applicable bilateral and multilateral treaties. Meanwhile, although Member States enjoy certain margin of discretion in asserting to what extent the right to social security would be guaranteed to the non-nationals, the countries of employment have obligations to secure all migrant workers, including the migrants in an irregular situation not to be arbitrarily excluded from the social security benefits or be limited to access such benefits based on migrant workers’ nationality or migration status<sup>156</sup>.

However, article 27 of the Convention does not explicitly differentiate between contributory social security and non-contributory social security. Many migrant workers, especially those in an irregular situation do not participate in contributory social security programmes in the countries of employment, and thus they are unable to receive any social benefits or assistance from the countries of employment, even when in an extremely vulnerable and impoverished situation. Considering that these migrant workers, even they do not participate in contributory social security programmes, however they do contribute to financing social protection programmes by paying indirect taxes, the Committee of Migrant Workers thus interprets article 27 of the Convention that migrant workers, including undocumented migrant workers shall also have access to non-contributory social benefits on a non-discriminatory basis, “to the extent that the applicable legislation of the State party concerned provides for such an entitlement”<sup>157</sup>.

As to the migrant workers in a regular situation, the ICMW grants them additional social protection. As mentioned in the previous chapter, Part IV of the Convention only applies to migrant workers in a regular situation. Article 54 under Part IV of the Convention ensures all migrant workers in a regular

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<sup>155</sup> Committee on Migrant Workers, 2010, General Comment No. 1: *On Migrant Domestic Workers*, para. 18, p. 4.

<sup>156</sup> General Comment No. 2: *On The Rights of Migrant Workers in an Irregular Situation and Members of Their Families*, *supra* note 114, para. 67, p. 18.

<sup>157</sup> *Ibid.*, para. 70, p. 18.

situation to enjoy equality in treatment in the States of employment with regard to dismissal and unemployment benefits, and also assures them the right to address their cases to the competent authorities of the State of employment in the cases that the terms of their work contracts have been violated by the employers. Although the protection and entitlements under article 54 do not cover migrant workers in an irregular situation, considering the actual circumstance of these undocumented workers, such differentiation under the Convention is regarded as reasonable and objective.

#### 4.4. ILO Standards for the Protection of Migrant Workers’ Rights to Social Security

The achievement of social security for all is one of the core mandates of the International Labour Organization. The ILO Constitution recognized that to achieve social justice for the universal and lasting peace, it is necessary to prevent unemployment, to protect the worker against sickness, disease and injury arising out of his employment, to provide protection for children, young persons and women, to establish provision for old age and injury and to protect the interests of workers when employed in countries other than their own<sup>158</sup>. In 1944, four years earlier than the UDHR, the ILO’s Declaration of Philadelphia has recognized its solemn obligation to further among the nations of the world to achieve a number of goals, including “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care” as well as “provision for child welfare and maternity protection<sup>159</sup>.” To this end, the ILO has adopted a number of international conventions and recommendations specially concerning social security (see Table 4-2), which have not only specified the obligations for the ratifying States, but also set up standards guiding States toward the realization of the right to social security for all.

**Table 4-2:** Major ILO Social Security Conventions and Recommendations

• Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)	• Income Security Recommendation, 1944 (No.67)
• Social Security (Minimum Standards) Convention, 1952 (No. 102)	• Employment Injury Benefits Recommendation, 1964 (No.121)
• Equality of Treatment (Social Security) Convention, 1962 (No. 118)	• Invalidity, Old-age and Survivors' Benefits Recommendation, 1967(No.131)
• Employment Injury Benefits Convention, 1964 (No. 121)	• Medical Care and Sickness Benefits Recommendation, 1969 (No.134)
• Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128)	• Maintenance of Social Security Rights Recommendation, 1983 (No.167)
• Medical Care and Sickness Benefits Convention, 1969 (No. 130)	• Employment Promotion and Protection against Unemployment Recommendation, 1988 (No.176)
• Maintenance of Social Security Rights Convention, 1982 (No. 157)	• Maternity Protection Recommendation, 2000 (No.191)
• Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)	• List of Occupational Diseases Recommendation, 2002 (No.194)
• Maternity Protection Convention, 2000 (No. 183)	

Source: ILO Conventions and Recommendations. Available from: < <http://www.social-protection.org/gimi/gess/ShowWiki.action?wiki.wikiId=792>>. [11 May, 2016].

<sup>158</sup> *Constitution of the International Labour Organization, supra* note 117, Preamble.

<sup>159</sup> *The Declaration of Philadelphia, supra* note 102, Article III (f) & (h).

Moreover, having realized that it is vital to specify additional protection for migrant workers to fulfill their social security rights, in addition to general social security conventions, the ILO has particularly adopted several conventions which establish standards on the protection of the right to social security specifically for migrant workers<sup>160</sup>, namely the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and the Maintenance of Social Security Rights Convention, 1982 (No. 157).

The key principles that have been laid down through the above three ILO conventions can be summarized as follows<sup>161 162</sup>:

- Equality of treatment and non-discrimination: as basic principles, are laid down in the core of all these three conventions. By ratifying these conventions, Member State undertakes the obligations to treat migrant workers in the same way as it treats its own national workers and to entitle migrant workers the same rights as to the nationals;
- Determination of the applicable legislation: by establishing rules to determine the applicable legislation, these conventions ensure that the social security protection for migrant workers is only governed by the legislation of one country at one time;
- Maintenance of acquired rights: any acquired right, no matter where it has been acquired, should be guaranteed to migrant workers by any of the countries concerned;
- Maintenance of rights in the course of acquisition: as for the benefits which are designed to be conditional to a minimum qualifying period, the period of affiliation completed by the migrant workers in any of the countries concerned shall be calculated together;
- Provision of benefits abroad: no restriction shall be imposed regarding to the export of the benefits for which the migrant workers and their dependants have been qualified in any of the countries concerned;
- Reciprocity: Member State which has ratified the relevant convention shall apply the same mechanisms to the migrant workers from other country which has also ratified the same convention. This principle is fundamental to all social security conventions.

In order to examine ILO standards on the protection of migrant workers' rights to social security, this section is mainly focusing on the three ILO social security conventions, namely C19, C118 and C157. It is to examine how these three ILO conventions apply to migrant workers to protect their rights to social security. Besides, this section is also to take a closer look at C97 and C143 to identify what specific protections are provided under these two ILO

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<sup>160</sup> Kulke, U., *supra* note 135, p. 10.

<sup>161</sup> *Ibid.*, p. 10.

<sup>162</sup> Tamagno, E., 2008, *Strengthening Social Protection for ASEAN Migrant Workers through Social Security Agreements*, pp. 8-11 & 16.

migrant workers conventions for migrant workers, including migrants in an irregular situation, in terms of their rights to social security.

#### **4.4.1. Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)**

The Equality of Treatment (Accident Compensation) Convention, 1925 (C19) is the earliest ILO convention particularly for protecting and strengthening migrant workers' rights to social security. As it is stated by its name, C19 sets up rules on the "equality of treatment" for "national and foreign workers as regards workmen's compensation for accidents".

The scope of the Convention is limited only to the workmen's compensation as regards work-related accident that happened in the country of employment, which is now more often referred to as employment injuries. According to article 1 of the Convention, each ratifying State shall guarantee migrant workers, who are from other ratifying countries, the same treatment in regard to the compensation for work-related accident as it grants to its nationals. The guarantee of equal treatment is also extended to the dependants of migrant workers<sup>163</sup>.

With regard to the payment of the compensation, the Convention does not directly require ratifying State to guarantee the export of payment to migrant workers. According to article 1 (2) of the Convention, the equality of treatment shall not be conditional to the residence of foreign workers and their dependants. In that regard, if the ratifying country does not impose any restriction on its nationals and their dependants to receive such compensation abroad, then in the principle of equality of treatment, no restriction shall be imposed on foreign workers and their dependants either, even when they are not living within the territory of that country<sup>164</sup>.

It is noted that as of today 121 countries have ratified C19, including six ASEAN countries, namely, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, and Thailand.

#### **4.4.2. Equality of Treatment (Social Security) Convention, 1962 (No. 118)**

The Equality of Treatment (Social Security) Convention, 1962 (C118) establishes rules on equality of treatment of nationals and non nationals in social security, especially for migrant workers<sup>165</sup>. Particularly, C118 provides rules that relate to the maintenance of acquired rights and of rights in course of acquisition.

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<sup>163</sup> Ibid., p. 27.

<sup>164</sup> Ibid., p. 27.

<sup>165</sup> ILO, Social Protection, Available from: < <http://www.social-protection.org/gimi/gess/ShowRessource.action?ressource.ressourceId=936&longTitle=C118> >. [11 May, 2016]

The scope of “social security” under C118 covers all nine branches of social security benefits as defined by C102. Member State can freely choose and decide to accept the obligations of the Convention in relation to any one or more of the branches of social security for which the Member State has legislation in force (article 2 (1)).

Upholding the principle of equality of treatment, C118 requires Member State to grant equal treatment in respect of the accepted branches of social security, to the nationals of any other State for which this Convention is in force. In respect of the survivors’ benefits, the Convention does not have special requirement about the nationality of the survivors, as if they are the survivors of the nationals of a Member for which the Convention is in force (article 3 (2)). Besides, the Convention also extend the equal treatment to the refugees and stateless persons without any condition of reciprocity (article 10 (1)). However, the Convention does not apply to programmes for certain special group of people, such as civil servants, war victims, or public assistance (article 10 (2)).

Moreover, the Convention requires the ratifying State to guarantee equal treatment not only within its territory but also outside its territory. Article 4 of the Convention provides that, “equality of treatment as regards the grant of benefits shall be provided without any condition of residence, [...]”. In that regard, if ratifying State provides social security benefits for its nationals (including members of their family or survivors) who are living abroad, then migrant workers who are the nationals of any other State for which this Convention is in force, shall also be granted social security benefits in the same circumstance<sup>166</sup>. In particular, with respect to old age, invalidity, survivors and employment injury benefits, as well as family benefits, the Convention requires Member State which has accepted the obligations of this Convention in respect of the branch or branches of social security concerned, to guarantee the export of such benefits to both its own nationals and to the nationals of any other country which has accepted the obligations of the Convention in respect of the same branch of benefits, when the persons concerned are living abroad (articles 5 & 6)<sup>167</sup>. However, such guarantee of export under the Convention does not include non-contributory benefits.

In addition to the principle of equality of treatment, C118 also established the rules on the application of the principles of maintenance of the acquired rights and the rights in course of acquisition. The Convention proposes ratifying States to reach bilateral or multilateral social security agreements between States concerned (article 8), and encourages them to *endeavor* to participate in social security programmes to address the maintenance of the acquired rights as well as rights in course of acquisition for all branches of social security which the Members concerned have accepted the obligations of the Convention (article 7 (1)). Further, the Convention suggests that such programmes shall particularly provide for the totalization of periods of insurance, employment or residence and of assimilated periods for the

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<sup>166</sup> Kulke, U., *supra* note 135. p. 11.

<sup>167</sup> Tamagno, E., 2008, *supra* note 168, p. 28.

purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits (article 7 (2)).

As of today, 38 countries have ratified C118, including the Philippines.

#### **4.4.3. Maintenance of Social Security Rights Convention, 1982 (No. 157)**

Built on the basis of the provisions contained in C118, the Maintenance of Social Security Rights Convention, 1982 (C157) establishes an international legal system for the protection of migrant workers' rights to social security.

Different from C118 however, which let each Member State choose to accept the obligations of any one or more branches of social security, C157 requests Member State to undertake the Convention's obligations of all branches of social security for which the State's legislation is in force (article 2 (2))<sup>168</sup>. Besides, the Convention applies to all types of social security programmes, both general and special, contributory and non-contributory (article 2 (3)), but not to special programmes for civil servants, war victims or the social or medical assistance programmes (article 2 (4)).

C157 introduces the rules which allow State parties to determine the applicable legislation for the persons concerned by mutual agreement for the purpose of "avoiding conflicts of laws and the undesirable consequences that might ensue for those concerned either through lack of protection, or as a result of undue plurality of contributions or other liabilities or of benefits," (article 5).

Moreover, in order for an effective administrative assistance, C157 introduces some specific rules facilitating Member States in the application of this Convention and their respective legislation. For instance, with regard to a claim made by a resident in the territory of a Member other than the competent Member, C157 requires Member State to assist the person concerned to forward his or her claim to the the authorities, institutions and jurisdictions referred to in the claim (article 13 (1)). And with respect to the award of the benefits to a beneficiary residing or temporarily residing in the territory of another Member, C157 suggests Members to reach agreements regarding the provider of the benefits, either by the institution liable for the payment, or through the intermediary of an institution designated by the Member State of Residence (articles 13 (3)).

Particularly, C157 supplements the provisions regarding the maintenance of rights in course of acquisition and of acquired rights in social security<sup>169</sup>. By ratifying C157, Member States shall endeavor to give effect to their obligations under the Convention concerning the maintenance of the rights in course of acquisition and of benefit abroad (article 4 (2)).

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<sup>168</sup> Ibid., p. 29.

<sup>169</sup> Ibid., p. 29.

As regards the maintenance of rights in course of acquisition, Part III of the Convention reiterates the provisions under C118 that, “each Member shall endeavour to participate with every other Member concerned in programmes for the maintenance of rights in course of acquisition,” (article 6). In addition, the Convention establishes rules for Member parties to implement the maintenance of rights in course of acquisition in their programmes. Article 7 (1) requests that such social security programmes must provide for the totalizing of periods of insurance, employment, occupational activity or residence that has been completed under the legislation of the Members concerned, “for the purposes of: (a) participation in voluntary insurance or optional continued insurance, where appropriate; (b) acquisition, maintenance or recovery of rights and, as the case may be, calculation of benefits.” Furthermore, article 8 (1) of the Convention requires Member parties to determine in the programmes of the formula of awarding as regards invalidity, old-age and survivors' benefits, as well as the pensions, in respect of occupational diseases.

With regard to the provision of benefits abroad, article 9 (1) of the Convention requests ratifying States to guarantee the export of contributory benefits, in particular with invalidity, old-age and survivors' cash benefits, pensions in respect of employment injuries and death grants, to beneficiaries who are nationals of a Member State or refugees or stateless persons. While in the case of non-contributory benefits, C157 suggests that State parties concerned shall reach bilateral or multilateral social security agreement to determine the conditions under which the provision of these benefits shall be guaranteed to beneficiaries (article 9 (3)).

As of today, only four countries have ratified C157, and the Philippines is one among these four countries.

#### **4.4.4. Right to Social Security in the ILO Conventions No. 97 and No. 143**

As discussed in the previous chapter, both C 97 and C143 require States to guarantee migrant workers with equal opportunity and treatment in relation to social security.

C97, like all the other ILO social security conventions, only deals with the social security rights of migrant workers who are in a regular migratory situation. The “social security” in C97 covers employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency that is covered by a social security programme under national laws or regulations. Article 6 (1) (b) of the Convention requires Member States to apply equal treatment to immigrants lawfully within its territory in respect of social security. Since each State have different arrangements for different situations, considering migrant workers’ migratory status, C97 particularly mentions that with regard to the maintenance of acquired rights and rights in the course of acquisition, States are able to make arrangement for migrant workers, as if it is appropriate. Besides, C97 indicates that Member States may have special arrangements



for the benefits paid out of public funds, and for allowances paid to persons, who do not satisfy conditions for a normal pension under non-contributory programmes<sup>170</sup>. But as if these arrangements are prescribed by laws and regulations, then they are appropriate (article 6(1)(b)(ii)).

C143 particularly extends the equal rights to migrant workers who are in an irregular situation. Considering that the right to social security is often made under conditions that migrant workers shall be lawfully employed or resident in the countries of employment, further considering that workers in an irregular situation are excluded from social security coverage even they have been employed and affiliated to social security, article 9 (1) of the Convention thus provides that migrant workers in an irregular situation shall also enjoy equality of treatment in respect of rights arising out of past employment as regards social security and other benefits. It aims to ensure that those workers' right to social security benefits shall not be nullified due to their migratory status<sup>171</sup>. However, in most of the cases migrant workers in an irregular situation do not participate into contributory social security programmes in the countries of employment. Thus the rights arising out of the past employment as referred in article 9 (1) of the Convention are considered only concerning benefits which are granted through non-contributory social security programmes and subjected to a minimum period of residence. Usually the granting of such benefits does not depend on direct financial participation by the persons concerned or on a qualifying period of occupational activity, therefore it can be interpreted that article 9(1) only refers to the rights which workers acquired by virtue of their period of employment and by fulfilling other qualifying conditions<sup>172</sup>.

It is noted that the rights for migrant workers to social security as contained in these two conventions only apply to the benefits within the countries of employment<sup>173</sup>.

#### **4.5. Concluding Remarks**

Equality of treatment is the central principle of all the conventions discussed in this chapter. According to these conventions, migrant workers shall have an equal access to social security and enjoy an equal treatment in respect of the benefits of social security in the countries of employment. However, these conventions do not address migrant workers' rights to social security in their home countries. Since a State has obligation to guarantee its nationals to have equal right to social security, thus, even in the case that the national has been or is a resident in the territory of another State, he or she shall also be entitled to the same right and treatment with regard to social security in the home country.

Migrant workers are people on the move, thus they are easily to lose their entitlements to social security benefits in the country of employment once

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<sup>170</sup> *Promoting Fair Migration*, *supra* note 87, para. 390, p.127.

<sup>171</sup> *Ibid.*, para. 309, p. 101.

<sup>172</sup> *Ibid.*, para. 308, p. 101.

<sup>173</sup> *Ibid.*, para. 393, p. 128.

they complete the work and leave that country. The ILO social security conventions particularly address such issues by establishing rules on the implementation of the maintenance of acquired rights and of rights in course of acquisition, as well as provision of benefit abroad. By ratifying these conventions and through participating to bilateral or multilateral social security agreement, States can effectively prevent migrant workers and their nationals from losing social security benefits during migration process, and thus make a concrete commitment for the fulfillment of all persons' rights to social security.

Looking at the region of ASEAN, by adopting the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007, ten ASEAN Member States undertake commitment to respect, protect and promote all migrant workers' fundamental rights. Today, with the influx of more intra-ASEAN migrant workers, are ASEAN Member States ready to provide them with an equitable right to social security benefits? With the establishment of a more inclusive and people oriented ASEAN Community in 2015, have all ASEAN people fulfilled their basic rights to social security within the regime of ASEAN region? The following chapter thus is examining to what the extent do intra-ASEAN migrant workers enjoy their right to social security during the migration process, and how ASEAN Member States commit to fulfill intra-ASEAN migrant workers' right with regard to social security benefits in policy and in practice.

## 5. Intra-ASEAN Migrant Workers' Rights to Social Security

### 5.1. ASEAN's Vision on ASEAN Peoples' Rights to Social Security

ASEAN has been taking efforts over the years for strengthening social protection for all ASEAN people, especially for the migrant workers within the region. The normative framework of ASEAN's vision on social welfare and protection have been significantly developed by adopting a number of regional instruments, including ASEAN Declaration on Migrant Workers (2007), ASEAN Charter (2008), the ASCC Blueprint (2009), the ASEAN Human Rights Declaration (2012) and the most recent achievement of the ASEAN Declaration on Strengthen Social Protection (2013).

As mentioned, in 2007 ten ASEAN States adopted the Declaration on the Protection and Promotion of the Rights of Migrant Workers, and one year later, the regional constituent instrument ASEAN Charter was ratified by the ASEAN States. In adopting these two regional instruments, ASEAN States commit to sharing responsibility to take effective measures on the protection and promotion of the rights of every ASEAN people, including intra-ASEAN migrant workers. The ASEAN Charter, requires States to enhance the well-being and livelihood of every ASEAN people by providing them with equitable access to opportunity for social welfare (article 1 (11)). With a view to strengthening and enhancing the quality of life and well being of migrant workers, the ASEAN Declaration on Migrant Workers requires Member States to undertake obligations by strengthening efforts to facilitate migrant workers' access to social welfare services within their countries, under the general principle of promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability.

ASEAN has three founding communities, namely political and security community, economic community, and socio-cultural community, and they are closely intertwined. Among them, the ASEAN Social-Cultural Community contributes to the achievement of a "people-centered" and "socially responsible" ASEAN Community by forging "a common identity" and building "a caring and sharing society which is inclusive and where the well-being, livelihood, and welfare of the peoples are enhanced."<sup>174</sup> In 2009, ASEAN leader adopted the ASCC Blueprint reaffirming the region's aspiration to enhance the quality of life of all ASEAN people through "cooperative activities that are people-oriented and environmentally friendly geared towards the promotion of sustainable development"<sup>175</sup>. Characterized by the spirit of cooperation and collective responsibility, the ASCC Blueprint calls on ASEAN States to work together to "ensure all ASEAN people are provided with social welfare and protection from the possible negative impacts of globalisation and integration by improving the quality, coverage

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<sup>174</sup> ASEAN Social-Cultural Community. Available from: < <http://www.asean.org/asean-socio-cultural/>>. [16 May, 2016]

<sup>175</sup> ASEAN, 2009, *ASEAN Socio-Cultural Community Blueprint*, para. 5, p. 1.

and sustainability of social protection and increasing the capacity of social risk management<sup>176</sup>.” In particular, the Blueprint requires States to intensify efforts on the protection and promotion of the social welfare for all migrant workers within the region and to take strategic measures to facilitate their access to the social welfare services<sup>177</sup>.

The Human Rights Declaration, adopted unanimously by leaders of ten ASEAN Member States in 2012, has detailed ASEAN States’ commitment to economic, social and cultural rights for every ASEAN person. “Every person shall have the right to social security including social insurance where available, which assists him or her to secure the means for a dignified and decent existence<sup>178</sup>”. Moreover, the Declaration addresses the necessity to provide special protection and assistance during motherhood and childhood.

In 2013, the adoption of ASEAN Declaration on Strengthening Social Protection by ten ASEAN Member States has further strengthened ASEAN’s commitment to build a sharing and caring ASEAN Community, by providing every ASEAN person, especially those vulnerable groups including migrant workers, with equitable access to opportunities for human development, social welfare and justice. Article 1 of the Declaration highlights the principle that “everyone, especially those who are poor, at risk, persons with disabilities, older people, out-of-school youth, children, migrant workers, and other vulnerable groups, are entitled to have equitable access to social protection that is a basic human right and based on a rights-based/needs-based, life-cycle approach and covering essential services as needed<sup>179</sup>”. Considering that most vulnerable ASEAN people, especially migrant workers, are poor and socially exclusive, the Declaration thus further advocates ASEAN States to strive to “promote the coverage, availability, comprehensiveness, quality, equitability, affordability and sustainability of various social protection services, including the expansion of social insurance to the informal sector<sup>180</sup>.” Moreover, ASEAN recognizes that social protection is a cross-cutting issue, thus its implementation requires coordinated and holistic approaches with the involvement of all the countries and sectors concerned. Therefore, the Declaration calls on States to further strive to “build and strengthen the networking and partnership within and among ASEAN Member States<sup>181</sup>.”

These regional instruments reflect the ten ASEAN Member States’ strong commitment to take effective measures for the realization of every ASEAN person’s right to social security and for the enjoyment of an equitable access to social welfare and social service as needed.

However, commitment in the statements is one thing, while in practice is another. The facts that international standards are hardly enforced within the

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<sup>176</sup> Ibid., para. 20, p. 6.

<sup>177</sup> Ibid., para. 28 (vii), p. 13.

<sup>178</sup> *ASEAN Human Rights Declaration*, supra note 127, Article 30 (1).

<sup>179</sup> *ASEAN Declaration on Strengthening Social Protection*, supra note 14, Article 1.

<sup>180</sup> Ibid., Article 12.

<sup>181</sup> Ibid., Article 21.

region of ASEAN, and the collective commitments by ASEAN States lack any legal effect, give reasons to question whether ASEAN leaders have lived up to their commitments. In practice, there is very likely to be a large gap between intra-ASEAN migrant workers' equal rights to social security in ASEAN leaders' statement and under ASEAN States' legislation. The following section, therefore, is mainly looking at the question: do intra-ASEAN migrant workers in fact have access to ASEAN States' social security?

## **5.2. Social Security Programmes of ASEAN Member States**

It is recalled from the previous chapter that there are five principal elements of the right to social security identified by the Committee on Economic, Social and Cultural Rights, namely 1) the availability of social security system; 2) the coverage of social risks and contingencies; 3) adequate in amount and duration; 4) accessibility; and 5) the relationship with other rights<sup>182</sup>. In examining intra-ASEAN migrant workers' right to social security in practice, it is necessary to check the availability of social security system in ten ASEAN States, the coverage of social risks and contingencies and the accessibility of public social security programmes in each ASEAN Member States. However, since social security system is operated in all ASEAN States, there is no need to specifically examine the *availability* of social security in each ASEAN State. Therefore, this section only examines the *coverage* of social contingencies and the *accessibility* of social security programmes.

### **5.2.1. The Coverage of Social Risks and Contingencies**

Considering that the nine branches of social security benefits as defined by C102 have been worldwide accepted, this section thus is examining the coverage of social risks and contingencies based on these nine branches of social security.

From Table 5-1, it can be seen that the legal coverage under each ASEAN State's legislation for the nine social security branches varies by country. Thailand, one of the main receiving countries in ASEAN, is the only one ASEAN State that has a comprehensive legal coverage for all nine social security branches. Viet Nam has social security programmes implemented in eight out of nine branches excepting family allowance. Lao PDR, Myanmar and the Philippines all have implemented statutory programmes covering seven branches of social risks, except family allowance and unemployment benefit. Singapore, which is one of the other main receiving countries, has social security programmes implemented in six branches, including old age, invalidity and survivors' benefits, work injury; medical care and family allowance. Brunei, Indonesia and Malaysia all provide protection for old age, invalidity and survivors' benefits, work injury and medical care. Cambodia, as of today, has only implemented one social insurance programme, for work

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<sup>182</sup> General Comment No. 19, *supra* note 148, pp. 4-9

injury benefits, although the social security strategies have been planned for years.

Nonetheless, the existence of statutory social security programmes does not ensure an equitable access to social security benefits for intra-ASEAN migrant workers. In order to assess intra-ASEAN migrant workers' access to social security in ASEAN States, it needs to know what types of social security programmes ASEAN States have implemented. The following part is therefore to have an overview of the types of social security programmes in the ten ASEAN States.

**Table 5-1:** Overview of the Coverage of Social Risks and Contingencies

Country	Old Age	Invalidity	Survivors	Medical Care	Sickness (cash)	Maternity (cash)	Work Injury	Family Allowance	Unemployment
Brunei	✓	✓	✓	Ω	Σ	Σ	✓	None	None
Cambodia	△	△	△	△	None	Σ	✓	None	Σ
Indonesia	✓	✓	✓	✓	Σ	Σ	✓	None	Σ
Lao PDR	✓	✓	✓	✓	✓	✓	✓	None	△
Malaysia	✓	✓	✓	Ω	Σ	Σ	✓	None	Σ
Myanmar	✓	✓	✓	✓	✓	✓	✓	△	△
Philippines	✓	✓	✓	✓	✓	✓	✓	None	Σ
Singapore	✓	✓	✓	✓	Σ	Σ	✓	✓	None
Thailand	✓	✓	✓	✓	✓	✓	✓	✓	✓
Viet Nam	✓	✓	✓	✓	✓	✓	✓	✓	None

✓ : at least one programme anchored in national legislation.

Ω: medical benefit in kind without statutory programme anchored in national legislation.

Σ: limited provisions via employer's liability under national labour code (includes company sick leave and severance pay provisions).

△: programme has yet to be implemented.

Source: Updated by the author of the thesis based on ILO, 2015, *The state of social protection in ASEAN at the dawn of integration*, Table A. Overview of national social security systems in ASEAN, p.xvi.

### 5.2.2. Types of Social Security Programmes

Generally the situation of social protection in each country is largely determined by economic development, social structures and conditions, qualifications and efficiency of government institutions as well as the networks and power structure of lobby organizations and interest groups<sup>183</sup>. Since the ten ASEAN States are currently at different stages of development, and also due to this region's diversified cultural and social background, as well as the existence of huge disparities in the living standards between developed and developing ASEAN countries, the present condition of social security systems in each ASEAN State differs vastly. Those economically more advanced countries, such as Brunei, Malaysia, and Singapore, have the most developed multi-tier social security system that covers workers in both formal sectors and private sectors. However in the developing countries, like Cambodia, Lao PDR, Myanmar, and Viet Nam, the existing social security programmes have very limited outreach and inadequate coverage, which led

<sup>183</sup> Cuddy, M., Suharto, E., Thamrin, J., Moran, E., 2006, The European Union's Programme for ASEAN: *Strengthening Social Protection Systems in ASEAN*, p. 18.

to a large proportion of population being unprotected or partially protected by the social security system<sup>184</sup>.

There are five types of social security programmes that are commonly implemented in ASEAN region, namely social insurance programme, provident fund programme, employment-liability programme, universal coverage programme, and social assistance programme (see Table 5-2).

- Social insurance programme: is also referred to as employment-related programme which is primarily financed by contributions from workers and employers. Generally, eligibility for a social insurance programme is based on the length of employment or self-employment, or on the existence of the employment relationship. The amount of benefits is largely related to the level of earnings before the insured contingencies caused earnings to cease<sup>185</sup>. In ASEAN, most of the developing countries, including Lao PDR, Myanmar, the Philippines, Thailand and Viet Nam have implemented social insurance programmes for either long term payments such as old age pensions, or short term periodic payments, such as medical care and work injury. Some ASEAN States, including Indonesia, Laos PDR, Malaysia, the Philippines, Thailand and Viet Nam, allow workers, especially the self-employed workers, to affiliate to the social insurance programmes voluntarily.
- Provident fund programme: is essentially compulsory savings programmes in which each employee invests regular contributions withheld from wages and often matched by employers' contributions. These contributions will later be repaid to the workers when the defined contingencies occur<sup>186</sup>. Provident fund programmes are commonly implemented by Brunei, Indonesia, Malaysia, Singapore for old age pensions; while Singapore and Malaysia have also in place provident fund programmes for medical care benefits. Typically, the programme covers public and private-sector employees and the benefits are usually paid in a lump sum with accrued interest. The social security provisions in some ASEAN States allow portability of long-term benefits or pay abroad. For instance, Singapore permits retirement benefits to be withdrawn in the case of permanently leaving Singapore; and in Malaysia, all provident fund benefits are payable abroad.
- Employment-liability programme: Some ASEAN countries, like Brunei, Singapore, Thailand, and Viet Nam, have labour codes that require employers to provide payment of work injury benefits directly to their employees. In Singapore, employers are also required to provide payment of sickness and maternity. Normally under

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<sup>184</sup> ILO, Social Protection, Available from: < <http://www.social-protection.org/gimi/gess/ShowCountryProfile.action?id=410> >. [18 May, 2016]

<sup>185</sup> ISSA, 2014, *Social Security Programs Throughout the World: Asia and the Pacific*, p. 2.

<sup>186</sup> *Ibid.*, p. 3.

employment-liability programme, specified benefits are paid off in a lump-sum grant.

- Universal coverage programme: is typically financed from general revenues. Brunei provides universal old age and invalidity pensions as well as universal medical cares to all residents. Thailand provides universal medical benefits to all Thai citizens who are not covered under any government health insurance programme. Both Brunei and Thailand have a second-tier earning related programmes incorporated with their universal coverage programmes.
- Social assistance programme: is also financed from general revenues. Malaysia, Thailand and Viet Nam all have integrated social assistance programmes with old age benefits. Viet Nam has social assistance programme also for family benefits. Generally, social assistance only applies to citizens or to persons with sufficient residency. For instance, Thailand provides social assistance only to Thai citizens.

**Table 5-2:** Overview of the Social Security Programmes in ASEAN

Country	Old Age	Invalidity	Survivors	Medical Care	Sickness (cash)	Maternity (cash)	Work Injury	Family Allowance	Unemployment
Brunei	provident Fund; Supplementary pension; Universal old-age pension	provident fund; universal disability pension;	provident fund; supplementary pension	universal system	N/A	N/A	employer-liability	None	None
Cambodia	None	None	None	None	None	None	social insurance	None	N/A
Indonesia	provident fund	provident fund	provident fund; social insurance	social insurance	N/A	cash benefits	social insurance	None	N/A
Lao PDR	social insurance	social insurance	social insurance	social insurance	social insurance	social insurance	social insurance	None	social insurance
Malaysia	provident fund; social assistance	provident fund; social insurance	provident fund; social insurance	provident fund	N/A	employer-liability	social insurance	None	N/A
Myanmar	social insurance	social insurance	social insurance	social insurance	social insurance	social insurance	social insurance	social insurance	N/A
Philippines	social insurance	social insurance	social insurance	social insurance	cash & medical benefit	cash & medical benefit	social insurance	None	N/A
Singapore	provident fund	provident fund	provident fund	provident fund; social assistance	employer-liability	employer-liability	employer-liability system	Workfare Income Supplement Scheme	None
Thailand	social insurance; social assistance	social insurance; social assistance	social insurance; social assistance	social insurance; universal system	social insurance	social insurance	employer-liability system	social insurance	social insurance
Viet Nam	social insurance; social assistance	social insurance; social assistance	social insurance	social insurance	social insurance	social insurance	social insurance; employer liability system	social assistance	None

N.A.: indicates information is not available.

Source: Information is collected and compiled by the author of the thesis based on the data from ISSA's *Social Security Programs Throughout the World: Asia and the Pacific*.

Available from: <<https://www.ssa.gov/policy/docs/progdesc/ssptw/>>. [20 May, 2016]

By the financing method of each type of social security programme, social insurance programme, provident fund programme, employment-liability programme can be categorized as contributory-based programme, while universal coverage programme, and social assistance programme are non-contributory-based programme. Theoretically, social security benefits which are provided by contributory-based programmes and paid in a lump-sum amount shall be able to be taken away with workers when they are leaving the country. For intra-ASEAN migrant workers, the feasibility of taking abroad social security benefits is built on the premise that they are under the coverage of social security system. The next part thus is examining the accessibility of social security programmes in ASEAN States.

### 5.2.3. Accessibility of Social Security

It can be seen from Table 5-2 that most ASEAN States have not yet implemented any social security programme for unemployment and family benefits, therefore this part is not examining the accessibility of these two



branches of social security. The main focus of this part is on the accessibility of a) old age pensions, including old-age benefits, invalidity benefits, and survivors' benefits; b) health care benefits, including medical benefits, sickness and maternity (cash) benefits; as well as c) employment injury benefits in the ten ASEAN States.

#### **A. Old Age Pensions: Old-age benefits, Invalidity Benefits, and Survivors' benefits**

Old age pensions are regarded as one of the best ways to ensure every person live long in dignity. According to Income Security Recommendation, 1944 (No. 67), old age pensions programmes shall provide basic income security for older people who lost income due to old age or invalidity, or due to the death of a breadwinner<sup>187</sup>. The rise of intra-regional labour migration and the rapid and continuous aging of population in the region of ASEAN, have raised the concern that whether intra-ASEAN migrant workers or their dependants are entitled with basic income security when they are growing old?

Almost all ASEAN States, excepting Cambodia, have old age, invalidity and survivors' social security programmes in force (see Table 5-3). Brunei, Indonesia, Malaysia and Singapore all have implemented provident fund programmes as the primary programme for old age income security. The provident fund programmes in these countries allow the insured person to withdraw all funds under his or her individual account at any age when the insured person decides to leave the country permanently. And no minimum qualifying period is required under these provident fund programmes. While, in Lao PDR, Myanmar, the Philippines, Thailand and Viet Nam, pension benefits are mainly paid through social insurance fund and with minimum qualifying period requirement. The minimum contribution periods vary by country, from at least 10 years' contribution in the Philippines to at least 15 years in Malaysia and Thailand. In the Philippines, the pension benefits can be paid in a lump sum and are thus able to be taken away with migrant workers when their work contracts have expired. However, due to insufficient information, it is not clear whether the pension benefits provided under the social insurance programmes of Lao PDR, Myanmar, Thailand and Viet Nam are portable or not.

Some ASEAN countries have in place more than one programme for pension benefits. For instance, in Brunei, apart from provident fund programme, a universal old-age programme is implemented ensuring all residents aged 60 to have periodical benefits in case of old age and invalidity. However, this universal programme has minimum residence requirement from at least 10 years immediately before claiming the pension to at least 30 years, depending on the birthplace of the resident. Further, Brunei provides a supplementary pension programme for citizens and permanent residents between the age of

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<sup>187</sup> ILO, 1944, *Income Security Recommendation, 1944 (No. 67)*, Article 1.

18 to 59 who are working in public- or private-sector<sup>188</sup>. Persons who are self-employed in Brunei are also able to affiliate to such supplementary programme. However, to qualify for this supplementary pension, the insured person is required to have at least 35 years of continuous contributions before retirement. And the pension may not be allowed to be drawn down before the retirement. For another instance, Malaysia has implemented three types of programmes for invalidity pensions. In addition to the provident fund programme which mainly covers private-sector employees and certain public-sector employees who are not covered by the separate public-sector system, Malaysia has also implemented insurance fund programme for the employees whose monthly incomes are less than or up to 3,000 ringgits (approximately US\$ 730); and social assistance for the needy elderly persons.

Nevertheless, foreign workers in some ASEAN States may not have access to public pension programmes. Brunei, Malaysia and Singapore have imposed restrictions on social security protection that limit coverage only to citizens and permanent residents. In Brunei and Singapore, for instance, all effective public pension programmes only apply to the citizens and permanent residents. Since most intra-ASEAN migrant workers are not permanent residents in Brunei and Singapore, and a large number of them are working temporarily, it is very likely that they do not have social security protection for the old age income in these two countries. In Malaysia, foreign workers are excluded from the coverage of social insurance programmes for the invalidity and survivors' benefits. And as there is no legislation requiring mandatory coverage of foreign workers under the Employees Provident Fund in Malaysia, migrant workers' rights to these social benefits are not guaranteed and many intra-ASEAN migrant workers may thus end up with no access to old age pensions.

Although some ASEAN countries do not directly exclude foreign workers from the coverage of social security programmes, due to limitation of their social security systems, they restrict mandatory coverage of social security programmes only to formal sector workers, which indirectly result a large number of intra-ASEAN migrant workers, especially those who work in the informal sectors left without any or with very limited protection of old age pensions. For instance, in Thailand, the informal sector is not covered by compulsory social insurance programmes. And the social insurance programmes for the formal sector exclude the agricultural, forestry, and fishery employees; and temporary and seasonal workers from their mandatory coverage. Although migrant workers are not directly excluded from the social insurance system in Thailand, due to the fact that a large number of intra-ASEAN migrants are employed temporarily in the informal sectors and in the agricultural, forestry and fishery sectors with irregular low income, and many of them are unable to afford social insurance under informal social security system, a lot of intra-ASEAN migrant workers are therefore not guaranteed to old-age pensions in Thailand. It is noted that in Thailand, the social insurance programmes for old age pensions do not cover Thai citizens who

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<sup>188</sup> Pension and Development Network, Brunei. Available from: <<http://www.pensiondevelopment.org/51/brunei.htm>>. [18 May, 2016]

are working abroad. Hundred thousands of Thai migrant workers thus may not have the entitlements of old age pensions when they return to Thailand.

Due to insufficient information, it is not clear if the social insurance programmes for old age pensions in Lao PDR, Myanmar and Viet Nam cover foreign workers or not. On a positive note, Viet Nam has adopted Viet Nam Social Insurance Law 2014, and as of January 1, 2018, all foreign workers lawfully working in Viet Nam will be covered by compulsory social insurance.

**Table 5-3:** Old age, Invalidity and Survivors Benefits, by Country and Key Provisions of Programmes

	Brunei	Indonesia	Lao PDR	Malaysia	Myanmar	Phillippines	Singapore	Thailand	Viet Nam
Type of program:									
Social insurance		•	•	•	•	•	•	•	•
Provident fund	•	•		•			•		
supplementary pension		•							
Universal	•								
Social assistance					•			•	•
Branches covered:									
Old age	•	•	•	•	•	•	•	•	•
Invalidity	•	•	•	•	•	•	•	•	•
Survivor	•	•	•	•	•	•	•	•	•
Coverage limited to nationals and/or permanent residents	Yes	Yes	Yes	No	No	N.A.	Yes	No	Yes
Export of benefits allowed	Yes	No	Yes	Yes	N.A.	N.A.	Yes	N.A.	No
Minimum qualifying period for eligibility	No	Yes	Yes	No	No	Yes	No	Yes	No

N.A.: indicates information is not available.

Source: updated by the author of the thesis based on the Table-2 made by Tamagno, E., 2008, p.32.

## B. Health Care Benefits: Medical Benefits, Sickness and Maternity (cash) Benefits

All ASEAN States have committed in ASEAN Declaration on Strengthening Social Protection to achieving universal health care by strengthening social security systems and extending coverage<sup>189</sup>. However, so far no health care programme is implemented in Cambodia.

It can be seen from Table 5-4, Brunei, Thailand, Singapore and Viet Nam have already achieved universal health coverage. In Brunei, for instance, the government provides all residents with access to medical benefits, including outpatient and inpatient care provided by registered physicians and in approved hospitals<sup>190</sup>. Singapore has achieved the universal coverage through a multi-tier approach. The employers are obliged to provide payment directly to workers' sickness and maternity benefits. The provident fund provides medical benefits to all fund members and their dependants. And the government provides social assistance to citizens and permanent residents who satisfying means and income tests. However, it is noted that even being covered under the same health care programme, permanent residents in

<sup>189</sup> ILO, 2015, *The State Of Social Protection in ASEAN at The Dawn Of Integration*, p. xvii.

<sup>190</sup> Social Security Programs Throughout the World, *Asia and the Pacific 2014*, supra note 192, p.63.

Singapore are entitled with less benefits than Singapore citizens. Thailand has achieved the universal health coverage through a universal coverage programme supplemented with a social insurance programme. The universal coverage programme provides medical benefits for all Thai citizens who are not covered under any government health insurance programme. In Thailand, workers in informal sectors are only able to access sickness benefits by voluntarily participating in informal-sector social insurance system. Since 2015, Viet Nam has achieved universal health care coverage through implementing a health insurance programme which covers all Vietnamese citizens for medical care benefits. Although other ASEAN States have not yet achieved universal coverage, specific targets have been set and prioritized on their development programmes: the Philippines (2016), Indonesia (2019), the Lao People's Democratic Republic (2020), and Myanmar (2030)<sup>191</sup>.

Nevertheless, migrant workers are not treated equally under the universal health care programmes. The universal coverage programmes in Brunei, Thailand, Singapore and Viet Nam only apply to their citizens and/or permanent residents. Most intra-ASEAN migrant workers thus do not have an equitable access to the public health care programmes in these countries. Singapore, for instance, provides nationalized health insurance plan to all citizen and permanent residents. While foreign workers who are not permanent residents in Singapore are not covered under the same public health insurance plan, despite that they are paying the same tax or paying more. Foreign workers instead, are provided with private health care insurance programmes. And these benefits provided for foreign workers are usually less than those provided for the citizens and the permanent residents. For another instance, in Brunei, the coverage of public medical care programme is limited only to citizens and permanent residents, and therefore most foreign workers are excluded from the public health care benefits.

In Malaysia, the Philippines and Thailand, foreign workers can voluntarily participate in social insurance programmes for medical, sickness and maternity benefits. In Thailand however, a large number of intra-ASEAN migrant workers working in the informal sectors, their access to health care benefits are not guaranteed as they are not covered under the compulsory social security programmes. In Viet Nam, foreign workers lawfully working in Viet Nam will be covered by compulsory health care insurance as of January 1, 2018. But it is noted that Vietnamese citizens working abroad under a fixed-term contract are not covered under the sickness and maternity benefits in Viet Nam.

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<sup>191</sup> Ibid., p. xvii.

**Table 5-4:** Medical Benefits, Sickness and Maternity (cash) Benefits, by Country and Key Provisions of Programmes

	Brunei	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
<b>Type of program:</b>									
Social insurance		•	•		•	•		•	•
Provident fund				•			•		
Employer liability				•			•		
Universal	•							•	
Social assistance							•		
<b>Branches covered:</b>									
Medical Care	•	•	•	•	•	•	•	•	•
Sickness (cash)			•		•	•	•	•	•
Maternity (cash)		•	•	•	•	•	•	•	•
Coverage limited to nationals and/or permanent residents	Yes	No	N.A.	Yes	N.A.	N.A.	Yes	No	Yes
Minimum qualifying period for eligibility	No	No	Yes	No	Yes	No	Yes	Yes	No

N.A.: indicates information is not available.

Source: updated and reconstructed by the author of the thesis base on Table 3&4 by Tamagno, E., 2008, pp.35&37

### C. Employment Injury Benefits

All ASEAN States, including Cambodia, have implemented social security programmes for workers' employment injury benefits. Six ASEAN Member States, Indonesia, Malaysia, Myanmar, the Philippines, Thailand, and Singapore have committed to ensure equality of treatment for both national workers and non-national workers as regards compensation for industry accidents by ratifying the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19).

However, a large number of intra-ASEAN migrant workers do not enjoy an equal treatment or do not have an equal employment protection in the country of employment. It is seen from Table 5-5 that Malaysia does not cover migrant workers under their general employment injury programmes. In Malaysia, the social insurance programme for employment injury benefits falls under the Social Security Organization which limits the coverage only for Malaysian citizens. Non-national workers instead are insured under an employer liability system, which requires every employer to insure all foreign workers under an approved insurance programme<sup>192</sup>. However, foreign workers under these private insurance programmes are usually provided with less benefits as for Malaysian citizens. In Brunei, labour law only protects employees who are citizens or permanent residents of Brunei. Thus most intra-ASEAN migrant workers who are non-permanent residents of Brunei, do not have an employment protection for the work injury compensation. In Singapore, employment injury programme is operated under employer liability system through a private carrier. Under the Work Injury Compensation Act 2009, employers are required to maintain adequate Work Injury Compensation insurance for all workers, including foreign workers. However, domestic workers are not included in Work Injury Compensation Act, thus most intra-ASEAN migrant domestic workers are not protected by law for work injury compensation in Singapore.

<sup>192</sup> Malaysia, 1952, *Amended Workmen's Compensation Act 1952*, Section 26(2).

**Table 5-5:** Employment Injury Benefits, by Country and Key Provisions of Programmes

	Brunei	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam	
Type of program:											
Social insurance		•	•	•	•	•	•		•	•	
Employer liability	•				•			•		•	
Coverage limited to nationals and/or permanent residents	Yes	N.A.	N.A.	N.A.	Yes	No	N.A.	No	No	N.A.	N.A.
Minimum qualifying period for eligibility	No	No	No	No	No	No	No	No	No	No	No

N.A.: indicates information is not available.

Source: Updated and reconstructed by the author of the thesis base on Table 5 by Tamagno, E., 2008, p.38

#### 5.2.4. Assessment of Intra-ASEAN Migrant Workers' Access to Social Security in ASEAN States

According to the analysis above, in some ASEAN States, intra-ASEAN migrant workers do not have access to social security programmes, if they are not permanent residents of that country; while in some other States, migrant workers are not directly excluded from the coverage of the social security systems, and therefore, in principle, intra-ASEAN migrant workers shall have access to social security benefits in these countries.

In order to have a clear picture of intra-ASEAN migrant workers' access to social security in the ten ASEAN States, the author of the thesis is to apply the theory summarized by Holzmann, et al (2005), in the context of ASEAN and to the intra-ASEAN migrant workers.

Holzmann, et al (2005)<sup>193</sup> have categorized four main regimes as regards international migrant workers' access to social security in the countries of employment. Regime I: migrant workers' rights to social security benefits are guaranteed by bilateral agreements between host country and home country. Under this regime, migrant workers' acquired benefits are also ensured to be exported or pay abroad. Regime II: migrant workers are covered by the social security system in the country of employment. However, there is no bilateral agreement between home country and host country. Under this regime, migrant workers' rights to social security are mainly determined by the social security legislation in the country of employment. Regime III: migrant workers do not have access to long-term social security benefits in the country of employment, even on voluntarily basis; and there is no social security agreement between home and host country. And Regime IV: undocumented migrant workers have limited access to social protection and no bilateral social agreement between home and host country.

Based on these four regimes, Table 5-6 classifies intra-ASEAN migrant workers' access to social security in ten ASEAN States. Since so far there is no social security agreement among ASEAN States, no intra-ASEAN migrant workers would fall under regime I. The Philippines and Thailand host more

<sup>193</sup> Holzmann, R., Koettl, J. and Chernetsky, T., 2005, *Portability regimes of pension and health care benefits for international migrants: An analysis of issues and good practices*, Geneva: Global Commission on International Migration, p. 7.

than 3.6 million intra-ASEAN migrants (see Table 2-4). As migrant workers are not excluded from contributory-based social security programmes in these two countries, therefore in principle, intra-ASEAN migrant workers in the Philippines and Thailand fall under Regime II. In Indonesia and Malaysia, though there is no legislation requiring a mandatory coverage for migrant workers under social security programmes, migrant workers are able to participate in social security programmes voluntarily. Therefore, the 1.8 million intra-ASEAN migrants who are working in Indonesia and Malaysia can also be categorized under Regime II.

However, in Brunei, only citizens and permanent residents are protected by labour law. Migrant workers with no permanent residence are not covered under public social security programmes. Similarly, in Singapore, migrant workers are not covered under the provident fund programmes unless they are permanent residents. Thus the 1.3 million intra-ASEAN migrants living in Brunei and Singapore are highly likely to face the situation that they don't have any access to social security at all. Thus, they are categorized under Regime III.

Due to insufficient information, it is unclear whether migrant workers in Cambodia, Laos and Viet Nam are covered under the social security programmes now, therefore, intra-ASEAN migrant workers working in these three ASEAN countries are temporarily categorized under Others.

**Table 5-6:** Regime of intra-ASEAN Migrant Workers' Rights to Social Security

Country	Regime I	Regime II	Regime III	Regime IV	Others
Brunei			✓		
Cambodia					N.A.
Indonesia		✓			
Lao PDR					N.A.
Malaysia		✓			
Myanmar					
Philippines		✓			
Singapore				✓	
Thailand		✓			
Viet Nam					N.A.

N.A.: indicates information is not available

Source: Constructed by Author of the thesis based on Holzmann, et, al, p.7.

According to the outcome of this analysis, in principle, the social security systems in Indonesia, Malaysia, the Philippines and Thailand are favourable for intra-ASEAN migrant workers; while the public social security programmes implemented in Brunei and Singapore are inaccessible for most intra-ASEAN migrant workers. In reality, a large number of intra-ASEAN migrant workers are working in the informal sectors, which are not covered by most compulsory social security programmes in most ASEAN States. Therefore, the actual situation would be that a large number of intra-ASEAN migrant workers do not have any or have very limited access to social security in Indonesia, Malaysia, the Philippines, and Thailand. And the situation for

undocumented intra-ASEAN migrant workers would be even worse, as none of the ten ASEAN Member States has considered to extend the coverage of social security programmes to undocumented migrant workers.

### **5.3. Conclusion on Intra-ASEAN Migrant Workers' Rights to Social Security**

Through examining the coverage and accessibility of the effective social security programmes in the ten ASEAN States, it is concluded that there is a big gap between ASEAN leaders' commitment in the regional instruments, and intra-ASEAN migrant workers' actual rights and access to social security benefits in these ten States.

In the regional documents, ASEAN leaders committed to promoting the coverage and equitability of social security for every ASEAN person, especially for migrant workers. In reality, a number of restrictions mostly based on nationality, the length of stay and residence, certain contribution period, etc., are limiting intra-ASEAN migrant workers' access to social security programmes. Even though in some ASEAN States, migrant workers are entitled to social security benefits by law, they don't have an equitable access to the public social security programmes. Instead, most intra-ASEAN migrant workers are insured under private social security programmes, which usually provides them with less social security benefits.

ASEAN leaders have committed to enhancing ASEAN peoples' rights to social security through cooperation. However, as of today, no bilateral social security agreement has been signed among ASEAN States yet. Due to the lack of cooperation, a large number of intra-ASEAN migrant workers thus would not be eligible for pension benefits under social insurance system. Since the qualification of pension benefits under social insurance system usually requires a minimum contribution period ranging from 10 years to 15 years, without totalization agreements, these periods of time that migrant worker has contributed in other ASEAN countries are not counted as contribution period. In the end, this worker may end up with no pension income at all.

Further, it is noted here that although ASEAN leaders repeatedly declare to enhance every ASEAN person's right to social service, none of the ten ASEAN Member States address the social security rights of migrant workers in an irregular situation. The real situation now is that a large number of intra-ASEAN migrant workers are in an irregular situation and they are not covered by any social security system in any ASEAN States.



## 6. Conclusions and Recommendations

Labour migration and development are inextricably linked. The tremendous contribution made by migrant workers speeds up the development in the region of ASEAN. In the mean time the rapid economic growth attracts more people to move across the borders looking for better job opportunities in this region. It has been seen that current labour migration in ASEAN is dominated by intra-ASEAN migrant workers and largely occurs under temporary migration regimes and for less skilled work. However, it has been noted that intra-ASEAN migrant workers are among the least protected groups in ASEAN who have been victims of the worst forms of abuse and exploitation, and have been subjected to unequal treatment.

As discussed in this thesis, under the international human rights conventions and ILO labour conventions, the fundamental human rights and labour rights of intra-ASEAN migrant workers shall be respected and protected by all the countries involved during the whole migration process. Among all these rights, the right to social security is directly related to every migrant worker's financial wellbeing. Ensuring intra-ASEAN migrant workers an adequate access to social security benefits would be an effective long term protection and a powerful tool to improve the social inclusion and wellbeing of all ASEAN people.

Having recognized the great contribution made by migrant workers and also having realized the essential importance of social security for every ASEAN person, in the last decade, ASEAN and its Member States have adopted a number of regional instruments to affirm their collective commitments to strengthen the protection of the rights of migrant workers and to build a sharing and caring ASEAN Community by providing every ASEAN person, especially those vulnerable groups including migrant workers, with equitable access to social security.

However, as it has been discussed in this thesis, although the leaders of the ten ASEAN Member States have made strong commitments to promote and protect migrant workers' rights to social security, in practice, due to a number of restrictions, a large number of intra-ASEAN migrant workers do not have any, or have very limited access to social security, either in the countries of employment or in their home countries

The main factors causing the gap between ASEAN leaders' commitment to ensure and fulfill every ASEAN person's right to social security in principle, and intra-ASEAN migrant workers' rights and access to social security in practice, as this thesis has found, can be summarized as follows:

- Due to the principle of non-interference, ASEAN Community is operating on the basis of understandings, and informal procedures, and is relying largely on patient consensus-building to arrive at informal understandings or loose agreements rather than within the framework of binding agreements arrived at through formal

processes<sup>194</sup>. Therefore, in the absence of regional binding instrument, ASEAN leaders' commitments are poorly enforced in practice;

- Although ASEAN has established the ASEAN Intergovernmental Commission on Human Rights in 2009 to promote and protect human rights within ASEAN regional context, it is an integral part of the ASEAN organizational structure, and the mandate of this organization is mainly to provide advisory services and technical assistance. As of today, there is no regional human rights body with law-making powers, nor judicial system within the region of ASEAN;
- Few ASEAN Member States have ratified the major international conventions and labour standards with regard to the protection of migrant workers' rights. As of today only Indonesia and the Philippines have ratified the ICMW and only the Philippines has ratified the two ILO Conventions No.97 and No. 143. With regarding to the ILO social security conventions, six ASEAN States have ratified the Convention No. 19. However, this convention solely relates to the industry accident compensations. Only the Philippines has ratified the other two comprehensive and detailed social security conventions No. 118 and No. 157;
- Social security coverage in most ASEAN States is still limited to the formal sectors. Workers in the informal sectors are either directly excluded from the mandatory coverage of social security programmes or are required to participate in the special social security programmes, which usually do not provide the same benefits as public social security programmes provide for the workers in the formal sectors. A large number of intra-ASEAN migrant workers who are working in the informal sectors, especially in the agricultural, forest, and fishery sectors, and in domestic work sector, may end up without having any access, or having very limited access to social security benefits, due to the reason that these sectors are usually not covered by compulsory social security programmes. As such, in the end the most vulnerable group of people have the least social protection.

2015 was a critical year in the history of ASEAN. In that year, the ASEAN Community was officially established. In ASEAN's post-2015 vision, the ASEAN community is anticipated to be an integrated, peaceful and stable community with shared prosperity<sup>195</sup>. And the ten ASEAN Members States have committed in the ASEAN Community Vision 2025 to realizing a "rules-based, people-oriented, people-centered ASEAN Community, where our peoples enjoy human rights and fundamental freedoms, higher equality of life and the benefits of community building our sense of togetherness and

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<sup>194</sup> Severino, R. C., 2001, *The ASEAN Way and The Rule Of Law*. Available from: <[http://asean.org/?static\\_post=the-asean-way-and-the-rule-of-law](http://asean.org/?static_post=the-asean-way-and-the-rule-of-law)>. [20 May, 2016]

<sup>195</sup> ASEAN, 2015, *ASEAN Community Vision 2025*, Article 2.

common identity, guided by the purposes and principles of the ASEAN Charter<sup>196</sup>”.

From the perspective of a post-2015 ASEAN Community, it is of essential importance for a rule based, people oriented and people centered ASEAN Community to take concrete measures to ensure every ASEAN person, including intra-ASEAN migrant worker to have an adequate and equitable access to social security. Therefore, this thesis proposes to ASEAN and its Member States to consider to strengthening protection for intra-ASEAN migrant workers’ rights to social security through a multi-pronged approach:

- To develop comprehensive social security programmes by expanding the coverage of social security to private sectors, informal sectors and self-employed persons. Also to promote the availability and equitability of social security programmes, so that people in the rural areas are also able to have access to social security;
- To enhance the accessibility and portability of social security benefits by signing bilateral and/or multilateral social security agreements. With the establishment of the ASEAN Economic Community, all ASEAN Member States have been involved in this regional economic integration. Since ASEAN is promoting and facilitating the free flow of high-skilled labour mobility, an increasing number of high-skilled workers from economically more advanced ASEAN States are expected to move to the less developed ASEAN States. In this regard, those receiving countries, such as Malaysia, Singapore, Thailand would be gradually turned into sending countries and in the mean time, those traditionally sending countries, such as Indonesia, the Philippines would be turned into receiving countries. In the long run, bilateral or multilateral social security agreements would not only provide social security protection for the intra-ASEAN migrant workers, it would also bring economic benefits to all the countries involved;
- To accede to and to ratify international human rights conventions and ILO labour standards. Commitments in the regional instruments without binding force are weak and empty. It is noted that one of the main mandates of the ASEAN Intergovernmental Commission on Human Rights is to encourage ASEAN Members States to accede to and ratify international human rights instruments. Therefore, the AICHR shall take more effective measures to make more ASEAN Member States ratify international conventions. It is noted that these international conventions not only provide comprehensive protection for the vulnerable groups, but also provide technical assistance for the ratifying States to build capacity and knowledge base.
- To provide minimum social security insurance for undocumented migrant workers. Reading article 9 (1) of the ILO Convention No. 143

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<sup>196</sup> Ibid., para. 4.

with the ILO Recommendation No. 151, migrant workers, irrespective of the legality of his or her stay, should be entitled benefits which may be due in respect of any employment injury suffered<sup>197</sup>. Although most international conventions and standards do not set up specific rules to deal with undocumented migrant workers' right to social security, it is essentially important for them to have access to minimum social security insurance, especially the employment injury benefits. It is noted that only the Philippines has ratified ILO Convention No. 143. However, considering a large number of intra-ASEAN migrant workers are undocumented, and also considering that undocumented migrant workers also contribute to the indirect tax, ASEAN and Member States shall consider providing minimum social security protection for this extremely vulnerable group.

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<sup>197</sup> ILO, 1975, *Migrant Workers Recommendation, 1975 (No. 151)*, para. 34 1 (b).

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