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LEGAL PROTECTION OF MIGRANT WORKERS

I. INTRODUCTION

A. Background

1. Migration, which means movement of persons from one place to another, is an old phenomenon. Of late, the scale and the size of migration has grown remarkably. With around 175 million people currently residing in a country other than where they were born, the number of migrants in the world has more than doubled since 1975, with most living in Europe (56 million), Asia (50 million), and Northern America (41million)¹.

2. One of the important consequences of this expanding phenomenon of international migration is the fact that, migration is increasingly accepted as warranting international regulation. At the same time, International migration, which continues to play an important role in national, regional and global affairs, presents an area wherein two competing concerns meet. States that are concerned about their sovereignty are at the same time, have got the responsibilities to protect the human rights of migrant workers working in their territory. This dilemma is more pronounced in the case of illegal migrant workers or migrant workers in illegal situation who often remain at the periphery of legal protection. In many developing countries, the remittances received from migrants constitute a more important source of income than Official Development Assistance (ODA) or Foreign Direct Investment (FDI). In other words, the need to protect the human rights of migrant workers and the need to realize the benefits of international migration on economic, social and cultural counts is felt more necessary than ever.

1. Normative Human Rights Framework

3. The legal and normative framework affecting international migrants is found in a variety of instruments, which include global and regional legal instruments, non-binding agreements and Policy understandings. Though many threads of this fabric are not migration-specific, they do address the broader questions of individual rights, state responsibility and inter-state relations.

4. Protection of human rights is perhaps one of the domains in which international norms are relatively well articulated. Besides the Charter of United Nations, relevant provisions not necessarily directly related to migrant workers are found in Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Elimination of Racial Discrimination (1965) and Convention on the Elimination of All forms of Discrimination Against Women (1979). Besides these instruments the International labor Organization (ILO) has adopted 4 instruments that deal with the situation of migrant workers directly. Apart from these, the instrument that

¹. These figures from the wall chart, *International Migration 2002*, issued by the United Nations Population Division.

directly deals with the issue of migration is the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990).

5. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), which was adopted by the General Assembly in its resolution 45/158 of 18 December 1990, entered into force on 1 July 2003, following the deposit of the twentieth instrument of ratification by Guatemala.² Due to the reluctance of States to become parties it took more than 12 years for it to become operational and finally its entry into force is expected to substantially strengthen the efforts of the international community towards protecting the rights of migrant workers. The entry into force of this Convention marks an important event particularly because this is the only instrument at the international level exclusively on the issue of migration that has been developed with a human rights perspective.

6. The importance of the 1990 Convention hardly needs to be mentioned. This Convention seeks to protect the fundamental rights of both legal and illegal migrant workers, though certain rights are earmarked only for those who are in legal situation. It also includes important provisions pertaining to the prevention of irregular migration, the obligations of migrants and the role of inter-state cooperation in regulating the movement of persons in a sound and equitable manner. The fact that only a handful of States have become party to this Convention clearly indicates the necessity of States having to comply with their other human rights treaty obligations to make sure that protection is accorded to migrant workers adequately.

B. Issues for Focused Consideration

7. The report of the Global Commission on International Migration does not give its endorsement to the Migrant Workers Convention, which gives fundamental rights protection – against, for example, torture or discrimination – for irregular as well as regular migrants. Many states, including the European Union and other migrant-receiving states in the industrialized world, have refused to ratify saying that the Convention would give irregular migrants new rights, which they do not already enjoy under international law. When objecting states suggest that the MWC is “soft” on irregular migrants, they ignore provisions which require states to work together to “detect and eradicate” illegal migration flows, and which expressly exclude any right for irregular migrants to regularize their status.

a. Therefore Member States may focus towards identifying the problems that countries have in ratifying the UN Convention of 1990 to protect the human rights of migrant workers so as to enhance the development potentials of both the country of origin and the country of destination.

². At present there are 34 States parties to it. Nine AALCO Member States that have ratified/acceded to the Convention. They are: **Arab Republic of Egypt, Ghana, Libyan Arab Jamahriya, Philippines, Senegal, Sri Lanka, Syrian Arab Republic, Turkey and Uganda**. Further, three AALCO Member States are signatories to it. They are: **Bangladesh, Indonesia and Sierra Leone**.

b. Member States may focus on the need to address the issue of asylum and the rights of refugees alongside those of labour migrants who are often simply conceptualized as economic units of labour rather than human beings with rights, responsibilities, and aspirations.

c. What are the ways through which migration could be integrated into the development policy and planning?

d. To identify the ways and means to achieve the economic ambitions of the migrants in their countries of origin itself to reduce the appeal of migration.

C. General Comments

8. Recent developments in international law relating to migration are of very significance so far as migration management is concerned. The important achievement of the international community is the entry into force of the Migrant Workers Convention, 1990 and the coming into existence of the Committee on the Rights of the Migrant Workers entrusted with the task of overseeing the implementation of the Convention. On the other hand, there are other instruments also concerning migrants that came into force i.e., the Protocol against the Smuggling of Migrants by Land, Air and Sea, 2000³ and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000⁴. However, these Protocols are intended to be crime control instruments i.e., to control the illegal movement of migrants. Therefore, the task before the international community is to bring balance in their approach towards managing migration and see to it that the measures initiated against illegal movement of migrants do not violate the rights of migrants, which need to be protected from the human rights point of view.

9. The interface between migration and asylum is also a significant issue as many a time there are mixed flows of people making it difficult to categorize them under any particular category. Such situations require human rights approach to tackle the issue. People leaving their home countries because of disregard meted out to their economic and social rights have generally not been granted the same level of protection as those fleeing due to disrespect to their civil and political rights. The denial of civil and political rights is considered as a "violation", while the denial of economic and social rights is

³. This Protocol entered into force on 28 January 2004 and presently 64 States are parties to it. 12 Member States of AALCO signed it and 12 Member States ratified/acceded to it. The countries that have ratified/acceded are: Bahrain, Botswana, Cyprus, Gambia, Libyan Arab Jamahriya, Mauritius, Myanmar, Nigeria, Philippines, Senegal, South Africa and Turkey. The countries that have signed are: India, Indonesia, Japan, Lebanon, Republic of Korea, Saudi Arabia, Sierra Leone, Sri Lanka, Syrian Arab Republic, Thailand, Uganda, and Tanzania.

⁴. This Protocol came into force on 25 December 2003 and presently 76 States are parties to it. The 13 AALCO Member States those have ratified or acceded to it are: Arab Republic of Egypt, Bahrain, Botswana, Cyprus, Gambia, Libyan Arab Jamahria, Mauritius, Myanmar, Nigeria, Philippines, Senegal, South Africa and Turkey. 12 AALCO Member States have signed this protocol. They are: India, Indonesia, Japan, Lebanon, Republic of Korea, Saudi Arabia, Sierra Leone, Sri Lanka, Syrian Arab Republic, Thailand, Uganda and United Republic of Tanzania.

generally viewed as an "injustice".⁵ Therefore, there is a need to locate the issues of migration in the framework of rights-based approach to facilitate orderly migration.

10. There is no designated agency to protect the rights of migrants as it is provided in the case of refugees. The International Organization for Migration has a mandate to facilitate orderly migration, but it does not have a mandate to protect the rights of migrants. It is recognized that "an orderly migration programme that meets the interests of receiving States and the migrants could ease the current pressure placed on asylum systems by persons not in need of international protection".⁶ Interception measures adopted by States largely look at the problem of flow of people with crime control perspective neglecting the basic human rights of migrants. Recent developments at the international level also emphasize on the return of persons found not to be in need of international protection.⁷ Therefore, there is a need to initiate programmes at various levels for the orderly management of migration keeping in view the contribution made by migrants to the economies of the receiving States and also their basic human rights.

11. As observed earlier, the entry into force of the 1990 Migrant Workers Convention is an important event so far as migration is concerned. However, it is a regrettable fact that out of 34 States⁸ that have become parties to the Convention there is not even a single developed country. It remains a cause of concern because many a time migrants are attracted towards these countries where there are better economic opportunities. Therefore it merits to be underlined that there is a lot needs to be done in this direction to achieve the acceptance of the Convention obligations by the developed countries.

12. The role that national human rights institutions can play in the protection of the human rights of migrant workers requires to be mentioned here. At the national level, they can analyze the legislation, monitor its impact on the rights of migrants and formulate concrete recommendations. These institutions may strive to prevent abuses, arbitrary treatment and discrimination of migrants in the name of either the legislation or valid regulations.

13. The draft Agreement prepared by the Secretariat of the AALCO in collaboration with IOM has been a progressive achievement in seeking means and ways to protect migrant workers at regional level, in consonance with the existing international instruments. The revised draft Agreement is herewith attached for further consideration at the 46th Session by the Member States, seeking their co-operation towards elaborating a Model Co-operation Agreement on Matters Relating to the Protection of Migrant

⁵. See, "Composite Flows and the Relationship to Refugee Outflows, including Return of persons not in need of international protection, as well as facilitation of return in its global dimension," in UNHCR Standing Committee, 12th meeting: (EC/48/SC/CRP.29).

⁶. Discussion paper: reconciling migration control and refugee protection in the European Union - A UNHCR perspective, October 2000, p. 6.

⁷. Goal 2 Objective 7 of the Agenda for Protection of the UNHCR emphasize on this issue. Similarly, recent Conclusion no. 96 adopted by the ExCom of the UNHCR also talks about the return of persons found not to be in need of international protection.

⁸. The following States have become parties to the Convention. Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Arab Republic of Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Libyan Arab Jamahriya, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay.

Workers between States of Origin and States of Employment/Destination. Once adopted, it might be an important contribution by AALCO to the resolution of migration issues as well as to human rights law in a broader sense. Comments and inputs of Member States are extremely important for the early adoption of the Agreement. In this connection, Member Governments are again requested to communicate their comments and suggestions to the Secretariat as early as possible. It may be explored to organize an inter-sessional meeting between the developed and the developing countries with the cooperation of the IOM.

II. AALCO'S WORK ON THE TOPIC

14. The item entitled "Legal Protection of Migrant Workers" was included on the agenda of the AALCO on the reference made by the Government of Philippines at its 35th Session held in Manila in 1996. The Government of Philippines desired to bring to the attention of Member States, the issues and problems of migrant workers abroad. Since then the item has been on the agenda of the AALCO at its successive sessions.

15. The resolution adopted at the 36th Session (Tehran, 1997), directed the Secretariat to study the utility of drafting a model legislation on the legal protection of migrant workers within the framework of the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, International Labour Conventions and Recommendations and relevant resolutions of the General Assembly of the United Nations. This proposal was in accordance with the established practice of the AALCO to adopt legal instruments in the nature of principles, guidelines or model legislations to enable Member States to incorporate internationally recognized principles into their national legislations⁹.

16. The Member States were urged to transmit to the AALCO Secretariat their national legislations on migrant workers. Among the replies received¹⁰, the Government

⁹. Some of the legal instruments adopted by AALCO are as follows:

- (i) Texts of Articles containing the Principles concerning Extradition of Fugitive Offenders (Adopted by the Organization at its Fourth Session with Commentaries)
- (ii) Principles concerning Admission and Treatment of Aliens (Adopted by the Organization at its Fourth Session)
- (iii) Model Articles Embodying Principles relating to Elimination or Reduction of Dual or Multiple Nationality. (Adopted by the Organization at the Sixth Session)
- (iv) Optimum Utilization of the Resources of the Exclusive Economic Zone. Some suggestion in respect of National Fisheries Legislation (Adopted by the Organization at its 23rd Session)
- (v) Model for Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence abroad in Civil or Commercial Matters (Adopted by the Organization at its 23rd session)
- (vi) Model Agreement for Promotion and Protection of Investments (Adopted by the Organization at its 23rd Session)
- (vii) Bangkok Principles on Status and Treatment of Refugees (1966 and Revised Text in 2001)

¹⁰. Following Legislations were received from some Member States:

- 1. (i) The labour law of People's Republic of China
- (ii) Rules for the Administration of Employment of Foreigners in China
- 2. Labour Law No.28 of the year 1969 (Oil sector), Kuwait
- 3. Migrant workers act of Philippines, Republic Act No. 8042 " Act To Institute The Policies of Overseas Employment and Establish a higher Standard of Protection and Promotion of the

of Philippines reiterated the positive utility for Member States to have a draft model legislation aiming at the protection of migrant workers in consonance with international instruments, because upholding the rights of these workers would maximize their economic contribution to the host countries and minimize sources of friction and discord among sending and receiving States. The Government of Sri Lanka also felt that drafting a model legislation would help to formulate a framework for their protection in the labour recipient countries and would also generate greater awareness of the UN Convention among the recipient countries and help to accelerate the process of ratification of the 1990 UN Convention.

17. At the 37th Session (New Delhi 1998) a preliminary framework of a model legislation drawn up by the Secretariat was placed for consideration. At that session the Secretariat was again directed to seek written comments from Member States on the utility of drafting model legislation as well as on the proposal to constitute an open-ended Working Group for in-depth consideration of issues related to migrant workers. The Government of Singapore proposed that a detailed analysis be first conducted on the existing national legislation of Member States to determine common trends, in imposing burdens and privileges and protective mechanisms for workers, both migrant and indigenous. From the analysis and supporting documentation of national laws, the Secretariat might proceed, if Member States deem it appropriate, to propose a draft model law for evaluation and discussion. It was stressed that there should be no duplication of work in the issue, but if Member States determine that discussion on this topic should resume, a Working Group might need to be convened to analyse national legislation and to discuss and propose the appropriate language for the model legislation.

18. The item was again discussed during the 38th session (Accra, 1999) and the Secretary General was requested to consider convening an open-ended Working Group for in-depth consideration of issues related to migrant workers.

19. In the year 2000 a fresh impetus was given to the work on this topic when the International Organization for Migration (IOM) and the AALCO entered into a Co-operation Agreement on the 6th of October 2000. One of the tangible outcomes of that Agreement was the organization of a one-day Special Meeting in conjunction with the 40th session of AALCO to discuss some legal problems and issues related to migration.

20. The deliberations on the topic at the Special Meeting recognized that globalization had created movements of population both legal and illegal, raising a number of problems and the solution lay in seeking enhanced regional as well as bilateral co-operation between countries of origin and destination and harmonization of their interests. It was emphasized that migration constitutes an important yet complex policy concern for many governments in the light of its relationship with social, economic, cultural, public health and security issues. Regarding migrant workers in particular, many States of origin and States of destination/employment are grappling with

Welfare of Migrant Workers, Their Families and Overseas Filipinos in Distress and for other Purposes”

4. Situation of Foreign and Migrant Worker in Qatar

5. Chapter 150 of Foreign Employment Agency Act, 1981 of Sri Lanka.

considerations, which could help secure comprehensive measures designed to bring effective and durable solutions to migration challenges, including those related to migrant workers.

21. While domestic measures related to migrant workers as adopted by States of Origin and States of Destination/Employment may be very effective, co-operation through bilateral and multilateral agreements can serve to establish an important framework for collaboration among these States. These agreements could facilitate labour migration processes, reduce abuses in recruitment, placement and employment and decrease incidents involving violations of the rights of migrant workers. Such bilateral and multilateral agreements could be especially useful in situations where the number of migrant workers going from a State of Origin to a State of Destination/Employment is particularly large.

22. Against this backdrop, Resolution SP/1 “Special Meeting on Some Legal Aspects of Migration” adopted on 24 June 2001 at the 40th Session of AALCO (New Delhi HQ) *inter alia* directed the Secretariat to explore the feasibility of drafting a “Model Agreement for Co-operation among Member States on Issues Related to Migrant Workers” and requested the Secretary General to consider the possibility of convening an open-ended Working Group for in-depth consideration of these issues.

23. Pursuant to that mandate the present draft Model Agreement was prepared by the AALCO Secretariat in collaboration with the IOM. The draft model agreement contains 20 articles and the preamble. The legislation received by the Secretariat from some Member States has been reflected in the draft Agreement. International Conventions concerned have also been taken in due consideration when the Agreement was drafted¹¹. Such an instrument could serve as a Model Regional Co-operation Agreement between Member States in matters concerning the protection of migrant workers and the management of migration. It could also help Member States to enact bilateral agreements.

24. There have been various developments at the international level regarding the protection of migrant workers and the orderly management of migration. Therefore, the present report contains, apart from emphasizing on the work of AALCO on model Agreement, recent developments at the international level on the issue of migration.

¹¹. Some of the international conventions which have been taken into account in the preparation of the Agreement:

- (1) The International Convention on the Protection of the Rights of All Migrant Members of Their Families;
- (2) International Labour Standards on Migrant Workers, including the Migration for Employment Convention (Revised) , 1949(No. 97), as supplemented by Recommendation No. 86;
- (3) The Migrant Workers (Supplementary Provisions) Convention 1975 (No.143);as supplemented by the Recommendation No 151;
- (4) The United Nations Convention Against Transnational Organised Crime, Annex II “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”, and Annex III “Protocol Against the Smuggling of Migrant Workers by Land, Sea and Air”, supplementing the Convention;
- (5) The Programme of Action Adopted at the International Conference on Population and Development, held in Cairo on 5-13 September 1994, Chapter X on International Migration and guidelines relating to labour migration activities in addition to the above-mentioned documents.

III. COMMITTEE ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

25. Like other important human rights treaties, the Migrant Workers Convention also contains a provision constituting the treaty body i.e., Committee to monitor the implementation of the Convention. As a follow up to the entry into force of the Convention, and in accordance with article 72, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has been established by the meeting of the States Parties held in December 2003. The Committee consists of ten experts of high moral standing and acknowledged impartiality and they serve in their personal capacity. The Membership of the Committee will rise to 14 when 41 countries have ratified it. The Committee's functions include; reporting mechanism¹² and the communications system. The communications system includes inter state communications¹³ and individual communications.¹⁴

A. Committee's Fourth Session (24 - 28 April 2006)

26. The Committee during its weeklong fourth session considered the initial periodic report of Mali, the first country report to be considered by the Committee. It also adopted a written contribution to the General Assembly's high-level dialogue on migration and development, to be held in September 2006. In its contribution to the General Assembly's high-level dialogue on migration and development, the Committee stated that migration had an impact on the development of countries of origin, of transit and of employment. It was the shared responsibility of all States to guarantee the human rights of migrant workers and members of their families. The Committee recommended that States shall as appropriate consult and cooperate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families.

¹². With a view to providing a mechanism to oversee the implementation of the Convention obligations, it establishes a reporting system by States Parties on their initiatives relating to issues concerning migration. Thus, in accordance with article 73 States parties accept the obligation to report on the steps they have taken to implement the Convention within a year of its entry into force and thereafter every five years. The reports are expected to focus on problems encountered in implementing the Convention, and to provide information on migration flows. After examining the reports, the Committee will communicate such comments and views, as it may consider appropriate to the State party concerned

¹³. In accordance with article 76 of the Convention, a State Party may recognize the competence of the Committee to receive and consider communications from one State party alleging another State Party's failure to fulfill its obligations under the Convention. However, submission and reception of such communication does not automatically apply in respect of all States Parties. Communications may be received only from such States Parties, which have recognized the competence of the Committee entrusting it with such task.

¹⁴. This system provides for the maintainability of complaints from individuals against his/her own government. Therefore, in accordance with article 77, a State party may recognize the competence of the Committee to receive and consider communications from or on behalf of individuals within that State's jurisdiction who claim that their rights under the Convention have been violated. However, such communications may be maintainable only if they are against a State party, which has recognized the competence of the Committee in this regard.

B. Committee's Fifth Session (30 October - 3 November 2006)

27. The Committee during its weeklong fifth session considered the initial report of Mexico and presented its concluding observations and recommendations on it. Also during the session, the Committee held a discussion on follow-up to the High Level Dialogue on International Migration and Development, which was held in September 2006 in New York, and on treaty body reform. In addition, it devoted a meeting to discussion of ways and means to promote the Convention, and to review the status of reporting. At that meeting the Committee decided to have a day of general discussion on the topic, tentatively to be held during the Committee's November session, and the secretariat was requested to provide an outline for its consideration. The Committee also decided to invite States parties to a meeting at the Committee's sixth session, in April 2007, to discuss several issues.

IV. GLOBAL COMMISSION ON INTERNATIONAL MIGRATION (GCIM)

28. The nature, scope and the scale of international migration has increased tremendously over the years. International migration which has got plenty of complexities involved in it, has given rise to many challenges being faced on the part of International Community.

29. In the effort to define an appropriate response to this situation and acting on the encouragement of UN Secretary-General Kofi Annan in 2003, a Core Group of States established the Global Commission on International Migration (GCIM). The mandate of the GCIM is to provide the frame work for the formulation of a "coherent comprehensive and global response to the issue of international migration.". Created as an independent body and consisting of 19 people from different parts of the world with a variety of high level international experience, the Commission was specifically requested to promote a comprehensive debate among States and other actors with respect to migration; to analyse gaps in current policy approaches to migration; to examine the interface between migration and other global issues and to present appropriate recommendations, to the UN Secretary-General, Governments and stake holders.

30. With these objectives, the Commission met a wide variety of stakeholders in 2004 and 2005. This included 5 major regional hearings in the Asia-Pacific Region, the Mediterranean and Middle East, Europe, Africa and the Americas attended by Government officials at the local, national, regional and international levels, representatives of international and non-governmental organizations, trade unions and other civil society institutions as well as employers, corporate managers, academics and journalists. It also convened a series of thematic workshops with different stakeholders. Given the breadth of the issue of international migration, the Commission decided to focus only on those migration which are largest in scale and are of current importance to the international community. In other words, the report that the Commission has submitted to the UN Secretary General in October 2005, gives primary attention to issues of economic and social human rights in the light of the migration that takes place within the developing regions and from developing regions to industrialized states.

A. The salient features of the report

31. The report includes six principles and 33 more specific recommendations aimed at creating a comprehensive global framework in six broad areas: migrants in a globalizing labour market, migration and development, irregular migration, migrants in society, the human rights of migrants, and the governance of migration. Of the 33 recommendations, 25 are directed primarily at developed or receiving countries, 15 to sending countries, and eight to the international community. Many of these recommendations have been made previously, and some are included in earlier United Nations' system reports and declarations.

1. Complementary Approaches to Migrants' Rights

32. Realizing the fact that the 1990 Convention has not had too many takers, the GCIM stresses the need for adopting complementary approaches to the issue of migrant rights. This would include the obligation of States to fully implement all provisions of the human rights instruments to which they are a party. Thus, the Commission is of the view that it would go a long way in ensuring rights being accorded without discrimination to both citizens and migrants. It also recommends that States should implement the trafficking and smuggling protocols of UN Convention Against Transnational Organized Crime which came into force in 2003 and 2004 respectively, which seek to protect the rights of trafficked and smuggled migrants.

2. Irregular Migration

33. Conscious of the vulnerable conditions in which irregular migrants work and live, the Commission endorsed the view that entering a country in violation of its immigration laws does not deprive migrants of the fundamental human rights provided for in the legal instruments. Nor does the Commission believe that it relieves the states of their responsibilities to protect them.

3. Recommendations to States

34. The report suggests that States ought to provide a comprehensive and written statement of the rights and obligations to migrant workers on their arrival so that they will be informed of their entitlements. It urges all States, including both developed and developing countries, to discharge their responsibility to protect migrant rights by means of national legislation, policies and practices and by ensuring that they are in line with the international legal instruments to which they are party.

4. Migrant Smuggling and Trafficking in Persons

35. While emphasizing the legal distinction between human trafficking and migrant smuggling in the context of irregular migration that, the former is independent of victim consent and latter refers to consensual transactions where in the smuggler and the migrant agree to circumvent immigration control for mutually advantageous reasons, the

Commission recognizes the fact that a clear distinction between the two phenomena cannot be made in every case.

36. The Commission comes out with 3 complementary forms of actions that states need to take to address the problems of migrant smuggling and human trafficking effectively. They include, the prosecuting of perpetrators including those who recruit and harbour trafficked persons, reducing the demand for the services of smuggled and trafficked people and taking action against those who are engaged in migrant smuggling while simultaneously trying to protect the victims of these practices.

5. Inter-Agency Global Migration Facility

37. The United Nations is called upon to support these efforts by reforming its own institutional arrangements for dealing with international migration. GCIM lays out a two-phase reform process. In the long term, a fundamental overhaul will be required to bring together the disparate migration-related functions of the UN into a single organization. The Commission sets out various options for this single organization, but does not make recommendations on its mandate, size, or shape, a shortcoming that may have reflected an inability of the commissioners to reach consensus on the issue.

38. For the short term, GCIM recommends enhanced coordination among the existing UN international organizations with migration responsibilities via an Interagency Global Migration Facility that would coordinate policy planning and analysis in areas that cross the mandates of several institutions. This new facility would also engage in capacity-building efforts, consultations, data collection, and similar activities.

V. GLOBAL MIGRATION GROUP (GMG)

39. The GMG was established by the United Nations Secretary-General in early 2006 in response to a recommendation of the Global Commission on International Migration for the establishment of a high-level inter-institutional group of agencies involved in migration-related activities. The GMG was created by building on an existing inter-agency group with a more limited membership, the Geneva Migration Group, which was established in April 2003.

40. The GMG consists of 10 organizations that are actively involved in international migration and related issues: International Labour Organization (ILO), International Organization for Migration (IOM), United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Department of Economic and Social Affairs (UNDESA), United Nations Population Fund (UNFPA), Office of the United Nations High Commissioner for Human Rights (OHCHR), Office of the United Nations High Commissioner for Refugees (UNHCR), United Nations Office on Drugs and Crime (UNODC) and World Bank.

41. The GMG meets at regular intervals. The Chair is held on a rotating basis by the executive heads of its member organizations. The first meeting of the GMG took place on 9 May 2006 and was chaired by Secretary General of UNCTAD. All GMG members have contributed actively to preparations for the 2006 General Assembly High-level Dialogue on International Migration and Development.

A. Purpose

42. According to its Terms of Reference, the GMG's regular consultations are undertaken for the following purposes:

1. Establishing a comprehensive and coherent approach in the overall institutional response to international migration.
2. Providing direction and leadership in a system-wide context and promoting interest, dialogue and debate on migration-related issues, including trade and development aspects, with governments, employers' and workers' organizations and civil society.
3. Contributing to greater consistency in policy formulation and programme implementation.
4. Exchanging information and expertise to improve understanding, inter-agency cooperation and collaboration, to promote synergies and avoid duplication.
5. Identifying critical issues, opportunities, challenges, weaknesses, gaps and best practices.
6. Pooling efforts in and exchanging the results of research, data collection and analysis.
7. Developing common positions, responses and actions in addressing specific situations or themes.
8. Agreeing on common activities to develop and exchange thematic expertise among staff, especially in the field of capacity building and inter-agency transfers.
9. Reinforcing the human rights, labour rights, human security and criminal justice dimensions of migration governance and management, with a focus on the protection and well-being of migrants, including victims of trafficking.
10. Contributing to major initiatives of GMG members and the international community such as the 2006 General Assembly High-level Dialogue on International Migration and Development and the follow-up to the report of the Global Commission on International Migration.
11. Enhancing the efforts of individual States, regional bodies, regional and global consultative processes in the field of international migration.
12. Finding appropriate mechanisms for the GMG to interact with states.

VI. MIGRATION - DEVELOPMENT NEXUS

43. The nexus between development and migration has been expressed in several international soft law instruments. For example, the Cairo Declaration on Population and Development (1994) which was adopted at the end of the UN International Conference on Population and Development notes that, "in its diverse types international migration is... affected by the development Process... [Paragraph 10.1]. It therefore invited governments of countries affected by international migration to "aid developing countries and countries with economies in transition in addressing the impact of migration". [Paragraph 10.6]. The Declaration also calls upon States to address the root causes of

migration especially those relating to poverty [Paragraph 10.2] Similarly Bangkok Declaration on Irregular migration (1999) States:

“As the cause of irregular migration are closely related to the issue of development, efforts should be made by the countries concerned to address all relevant factors, with a view to achieving sustained economic growth and sustainable development [Paragraph 5].

44. Donor countries, international organizations and NGOs are encouraged to continue assistance to developing countries, particularly the least developed Countries in the region aimed at poverty reduction and Social development as one means of reducing irregular migration... [Paragraph 7].

45. The obligation to address the root cause of migration is also envisaged in some resolutions adopted by the UN General Assembly. For example, the UNGA Resolution 41/70 of 3rd December 1986 endorsed the recommendations made in the report of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees. Similarly in 1996, the UNGA urged Member States and United Nations System “to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty”¹⁵. The nexus has also been expressed in specific international legal texts such as ILO Migrant workers (Supplementary Provisions) Convention (1975)¹⁶.

46. From the above analysis, it follows that underdevelopment and the violation of economic, social and cultural rights are the root causes of voluntary and forced migration. Migration can be an effective tool in the fight against poverty by enhancing income distribution, promoting development and productive work for growth. States do recognize the great potential that migration holds to contribute the growth, development and stability of economies and societies worldwide and that measures to realize this potential must be identified. Ensuring the effective protection of the human rights of migrant workers should be made a fundamental component of comprehensive and balanced migration management systems.

47. Migration is now an established feature of contemporary social and economic life, and Governments in all regions of the world are increasingly aware of the growing importance of its development potentials. However, migration management efforts at the multilateral level have not kept pace with the migration phenomenon. At the UN International Conference on Population and Development (Cairo Conference) held in 1994, the international community enunciated the scope of the challenges surrounding the management of international migration and sought for the first time to develop a comprehensive blue print for managing migration. Chapter X of the Programme of Action which was devoted to international migration mapped out a series of policy orientations covering inter alia, the rights and obligations of migrants, the development of orderly migration programs, the prevention of trafficking in migrants, the reduction of unwanted migration, the promotion of the development potential of migration and the need for cooperation between countries in successfully managing migration.

¹⁵ UNGAR 50/123

¹⁶ ILO Convention No: 143.

48. But there has not been a follow up action for at least two reasons. Firstly, given the perceived insurmountable differences in the perspectives and objectives of the developing and developed Countries. Secondly, States have a strong desire to maintain discretion and flexibility in the area of migration management since states value their ability to modify their migration policies to reflect changing needs and circumstances relating to matters such as labour market conditions, local demographic profiles, local skill levels and popular sentiment about migration and migrants. However, recently concluded High Level Dialogue on Migration and Development, convened by the United Nations General Assembly is an important development in this direction.

A. The High-Level Dialogue on Migration and Development

49. A milestone in the attempt to explore the development potentials of migration Process was the High-Level Dialogue on Migration and Development that was convened by the UNGA in 14-15 September 2006. The dialogue consisted of 4 Plenary Meetings during which delegations, inter-governmental organizations as well as the President of the General Assembly, the President of the ECOSOC and the Secretary-General of UN made Statements.

50. During the dialogue process, States expressed similar sentiments and made similar points along the lines of their earlier positions and the Secretary-General's report on migration and development. The overwhelming majority of States called for migration to be addressed in a comprehensive, holistic, coherent and concerted manner both at the national and international levels. Following is the summary of views expressed at the High Level Dialogue.

1. On the Importance of Regional Mechanisms

51. The majority of States recognized the important role of regional processes and stressed that any global approach should take into account these achievements and build on them rather than duplicate them. A number of regional processes were mentioned which include; the Euro-African Conference on Migration and Development held in July 2006, the African Union Proposal endorsed at the Banjul Summit in April 2006, the Bali Process on People smuggling, Trafficking in Persons and Related Transnational Crime and the South American Conference on Migration.

2. On the UN Convention on Migrant Workers 1990

52. Most States stressed the need to respect the human rights of migrants as one of the basic elements in a comprehensive strategy on migration and development. Though discussions on these matters did not reach a very substantive level, many countries expressed the need to ratify the 1990 UN Convention existing in this area so as to enhance the human rights protection of migrant workers.

3. The Role of International Organization for Migration

53. The International Organization for Migration (IOM) came out with two proposals. The first was in the form of "International Migration and Development Initiative"(IMDI)

which would facilitate matching labour supply with labour demand, in safe, legal, humane and orderly ways that maximize the societal and human development potential of global labour mobility. It also added that failure to work towards a better regulated international labour market will not only adversely affect global economic growth, it will also fuel irregular migration, and human trafficking – an abuse of human rights. Secondly it made a proposal to create a “Global Research Network on Development and Migration”. This would engage existing research networks, government ministries, NGOs and international organizations including any interested member of Geneva Migration Group (GMG). This enhanced capacity according to it, would assist the developing and developed countries to produce migration research and evaluations that are policy-relevant, timely and aimed at improving development outcomes.

4. On the Future Course of Action

54. In so far as the future course of action is concerned, almost all the countries supported the initiative of UN Secretary-General to establish a ‘Global Forum on Migration and Development’ which would consist of all the members of UNGA. Though the institutional setting in which this forum should function produced diverse opinions all the countries agreed to continue the dialogue on the issue. The government of Belgium volunteered to hold the first Session of this Global forum.

Annex

REVISED DRAFT MODEL REGIONAL CO-OPERATION AGREEMENT BETWEEN STATES OF ORIGIN AND STATES OF DESTINATION/EMPLOYMENT WITHIN AALCO MEMBER STATES¹

Preamble

Whereas the purpose of the Asian-African Legal Consultative Organization (hereinafter referred to as “AALCO”) is to serve as an advisory body to its Member-States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern,

Whereas AALCO desirous of contributing, within the general framework of its Statutes and Statutory Rules, to the effective accomplishment of those objectives which Member-States have in common, in the light of their respective responsibilities,

Recalling AALCO resolution SP/1 of 24 June 2001, whereby it “[d]irects the Secretariat to explore the feasibility of drafting a Model Agreement for cooperation among Member-States in issues related to Migrant Workers” and “[r]equests the Secretary General to consider the possibility of convening an open-ended working group for in-depth consideration of these issues”,

Recalling the commitment of States effectively to promote and protect the fundamental human rights of all migrant workers, in conformity with the Universal Declaration of Human Rights and the international instruments including the International Covenants on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, and other relevant human rights instruments, norms and standards,

Recalling the commitment of States to adhere to the provisions of International Labour Organization standards establishing labour principles protecting the rights of migrant workers under the Migration for Employment Convention (Revised), 1949 (No. 97), as supplemented by Recommendation No. 86; The Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143); as supplemented by Recommendation No. 151,

Considering the guidance offered by United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 through the international standards of treatment established for migrant workers thereunder.

Article 1 **Statement of Purpose**

¹ The comments received from the Government of Malaysia have been incorporated in this draft Agreement

The purpose of this Co-operation Agreement¹ is to offer a suitable legal framework for purposes of co-operation in matters relating to migrant workers **and members of their families** concerned between States of Origin and States of Destination/Employment and to prevent and combat more effectively migration practices involving transnational crime including trafficking and smuggling while furthering the protection of the human rights of migrant workers.

Article 2 Definitions

For the purposes of this draft Co-operation Agreement the following definitions shall apply:

"Migrant workers"² shall refer to "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."

¹ The Government of Malaysia supports the idea of working towards developing up draft Model Agreement to address the issues relating to the protection of legal migrant workers. However, after the perusal of the provisions of the draft Model Agreement which was circulated to the Member States, Malaysia has strong reservations on some of the proposed provisions of the draft Model Agreement.

² (1) The applicable domestic laws governing migrant workers in Malaysia are – Employment Act 1955: Section 2 defines "foreign employee" as an employee who is not a citizen.

Immigration Act 1959/1963 – Section 2 provides that a "prohibited immigrant" means a person declared to be prohibited immigrant under section 8.

Section 8(3) provides a person who are members of the prohibited classes for the purposes of the Act. This includes – "(h) any person whose entry into Malaysia is, or at the time of his entry was, unlawful under this or any other written law for the time being in force."

(2) Malaysia recognized legal migrant workers to be foreign employees who would be subject to the Employment Act 1955 whilst any foreigner who enters Malaysia illegally would be treated as prohibited/illegal migrants and they must face the consequences of their illegal actions under the Immigration Act 1959/1963.

(3) Malaysia has reservations on the proposed definitions of "Migrant workers" as it appears to include both legal and illegal migrant workers. Although a distinction is made between **documented or undocumented migrant workers**, most of the provisions in the draft Model Agreement refer to migrant workers per se without making necessary distinction. In this sense, it appears that parties to this agreement may have to grant the rights provided in this Agreement regardless whether the migrant worker is a legal or illegal migrant worker.

(4) Malaysia has also reservations on the use of the terms "documented or undocumented migrant workers" to refer to persons who are essentially either legal or illegal migrant workers.

(5) Malaysia also reiterates that Malaysia only makes a distinction between legal and illegal migrant workers and does not recognizes any category of "irregular migrant workers".

(6) The proposed definition is thus acceptable **provided an express qualification is included in the Model Agreement that all references to "migrant workers" in the Model Agreement is limited to a legal migrant worker unless expressly stated otherwise.**

(7) Malaysia should seek clarification and proposed that the definition of "migrant workers" be limited to legal migrant workers.

“Members of their families” shall refer to “persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as to their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned”.

“State of Origin” shall refer to the State of which the migrant worker concerned is a national;

“State of Transit” shall refer to any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.”

" State of Destination/Employment" shall refer to the State to which the migrant worker migrates and at which s/he is to be engaged or has been engaged in a remunerated activity;

"The Parties" shall refer to the State(s) of Origin and the State(s) of Destination signatories of this present Co-operation Agreement;

"Documented migrant workers" shall refer to migrant workers who satisfy all the legal requirements to enter, stay and, if applicable, hold employment in the State of Destination/Employment;

"Undocumented or irregular migrant workers" shall refer to persons who do not fulfil the requirements established by the State of Destination/Employment to enter, stay or exercise an economic activity including persons whose asylum claims have been rejected;

"Transnational crime" shall refer to a crime committed in more than one State; or committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; or committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or is committed in one State but has substantial effects in another State;

“Smuggling of migrant workers” shall refer to the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State of which the person is not a national or a permanent resident";

“Trafficking in persons” shall refer to the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

(8) Further unless expressly provided otherwise, Malaysia construes all references to “migrant workers” in the Model Agreement as references to legal migrant workers.

Article 3
Protection of the Sovereignty of the Parties

1. AALCO Member States shall carry out their commitments under this Co-operation Agreement in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. **AALCO Member States shall have the sovereign right to formulate and apply their own legal framework and policies for migrants provided these policies should be consistent with applicable human rights instruments, norms and standards.**
3. Nothing in this Co-operation Agreement entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State under its domestic law.

Article 4
Criminalization

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, and/or violations of immigration laws and regulations, smuggling of migrant workers by land, sea and air, **trafficking in persons, illegal recruitment and abusive employment** conduct when committed by an actor with the knowledge that his/her participation will contribute to the achievement of a transnational crime involving migrant workers.

Article 5
Duties of the State of Origin

1. Migrant workers **and the members of their families** shall be free to leave any State, including their State of Origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordered public), public health or morals or the rights and freedoms of others and are consistent with relevant international conventions, treaties and instruments;
2. The State of Origin shall endeavour to ensure that migrant workers are fully informed in the State of Origin of all conditions applicable to their admission in the State of Destination/Employment. Such should include in particular, information concerning their stay and the remunerated activities in which they may engage and the authorities to which they may address themselves for any modification of those conditions;
3. The State of Origin shall endeavour to ensure that employment contracts of migrant workers incorporate conditions that are consistent with fair labour practices;

4. The State of Origin is urged to facilitate the return of migrant workers and their reintegration into their home communities;

5. Migrant workers shall have the right to be informed by the State of Origin concerning:

- (a) Their rights arising out of the present Co-operation Agreement;
- (b) The conditions of their admission in the State of Destination/Employment, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.
- (c) **Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present agreement are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.**

Article 6

Duties of the State of Destination/Employment

1. The State of Destination/Employment shall protect the **human rights inherent to all human beings and those recognized and protected by customary and conventional international human rights law**, especially those of women and children, and to treat them humanely, particularly with regard to assistance and protection while ensuring that the best interests of the children are the paramount consideration;

2. The State of Destination/Employment shall consider reviewing and, where necessary, revising discriminatory policies and practices against migrant workers with a view to create conditions that foster greater harmony and tolerance within societies;

3. The State of Destination/Employment shall examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of migrant workers, including obstacles and difficulties for the return of migrant workers who are undocumented or in an irregular situation, in conformity with international law;

4. The State of Destination/Employment shall take into account bilateral and regional negotiations which aim at addressing, inter alia, the return and reinstatement of migrant workers who are undocumented or in an irregular situation;

5. The State of Destination/Employment shall condemn all forms of racial discrimination and xenophobia related to access to employment, vocational training, housing, schooling, health services and social services, as well as services intended for use by the public, and play an active role in providing assistance to individual victims of racist acts, including migrant victims;

6. The State of Destination/Employment shall ensure respect and observance of the 1963 Vienna Convention on Consular Relations, with regard to the rights of migrant workers to communicate with a consular official of their own State in the case of detention;

7. The State of Destination/Employment that has not yet done so is encouraged to enact domestic legislation and to take further effective measures to combat:

- a) international trafficking and smuggling of migrant workers, while taking into particular account trafficking and smuggling that endangers the lives of migrant workers or entails different forms of servitude or exploitation, such as any form of debt bondage, slavery and sexual exploitation or forced labour; and
- b) to strengthen international cooperation to combat such trafficking and smuggling;

8. The State of Destination/Employment shall support family reunification and promote its integration into their national legislation in order to ensure the protection of the unity of the families of documented migrant workers.

Article 7
Obligations and Limitations on the Rights of Migrant Workers
in the State of Destination/Employment³

1. Migrant workers shall comply with their obligations under the law and practice of the State of Destination/Employment particularly regarding administrative or other formalities relevant to their status in the State of employment;
2. Migrant workers shall respect the cultural identity of the inhabitants of the State of employment;
3. **Where separate authorization to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity. Migrant workers who in the State of Employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.**
4. Migrant workers shall comply with requirements of a State of employment which may:
 - a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of the State and provided for by national legislation;
 - b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory.
5. For migrant workers whose permission to work is limited in time, they shall comply with requirements of a State of employment which may:
 - a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the

³ (1) In relation to Article 7.5(a), it is noted that section 11 (2) of the Employment (Restriction) Act 1968 provides for the period of validity of the Employment permit to be 2 years.

(2) Clarification is required as to the intent of Article 7.5(a) i.e. if the intended effect is that the migrant worker may freely change his employment after the initial period of 2 years of employment. This would be contrary to Malaysian policy and law which regulates the sector for which the migrant workers are employed.

(3) In relation to Article 7.5(b), Malaysia may face difficulties in compiling with the second limb of para (b) as there is no such provision incorporated in the Employment Act 1955.

(4) Clarification may be required as to the intent and rationale for this requirement. The requirement of General Agreement on Trade and Services (GATS) in the liberalization of trade in services is duly noted.

purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;

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

6 Migrant workers shall comply with requirements of a State of employment which prescribes the conditions under migrant workers who have been admitted to take up employment may be authorized to engage in work on their own account. Account shall be taken of the period during which the migrant workers have already been lawfully in the State of Employment.

Article 8 **Non-Discrimination with Respect to Rights**

1. The State of Destination/Employment undertakes, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers within their territory or subject to their jurisdiction human rights 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.
2. Every migrant worker shall have the right to recognition everywhere as a person before the law.

Article 9 **Rights of Migrant Workers**

The following human rights of migrant workers shall be protected and promoted by law:

1. Migrant workers are entitled to the right to life;
2. No migrant worker shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
3. No migrant worker shall be held in slavery or servitude;
4. No migrant shall be required to perform forced or compulsory labour. This provision shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

5. Migrant workers shall have the right to freedom of thought, conscience and religion, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

6. Migrant workers shall have the right to freedom of expression. The exercise of this right carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, **for respect of the rights or reputation of others, for the protection of national security of the States concerned or of public order or public health or morals, for the purpose of preventing any propaganda for war or for the purpose of preventing any advocacy of national, racial or religious hatred.**

7. No migrant worker shall be arbitrarily deprived of property, whether owned individually or in association with others;

8. Migrant workers shall have the right to liberty and security of person, **and be entitled to effective protection by the State;**

9. Migrant workers shall not be subjected individually or collectively to arbitrary arrest or detention; except on such grounds and in accordance with such procedures as are established by law;

10. Migrant workers who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and the charges against them;

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

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

13. Migrant workers and members of their families shall have the right of liberty and security of person;

14. Migrant workers who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release;

15. Migrant workers shall have the right to equality with nationals of the State concerned before the courts and tribunals. They shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

16. Migrant workers convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law;

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

18. No migrant worker shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed;

19. No migrant worker shall be imprisoned merely on the ground of failure to fulfil a contractual obligation;

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

Article 10 **Freedom of Association of Migrant Workers**

1. The Parties recognize the right of migrant workers to take part in meetings and **including those working in the informal sector** activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject to the rules of the organization concerned. However, no worker may join more than one union.

2. A migrant worker may not join a union unless he has attained the age of 18 years and is certified of good repute and conduct by the authority responsible for issuing such certificate.⁴

⁴ (1) Malaysia has reservations on the proposed Article 10(2) since it is the employment policy of Malaysia, imposed through its immigration regulations, that foreign workers are not allowed to join Trade Unions.

(2) Malaysia also has reservations to this paragraph because section 26 of the Trade Unions Act 1959 allows a person below the age of 18 to join the trade union albeit with restricted rights unless he is still in education.

(3) Malaysia should seek clarification on the rationale of introducing an age limit of 18 on this matter.

(4) It is noted that under Article 32 of the Convention on the Rights of the Child, a child (as defined in the Convention) may seek employment provided certain safe guards are in place such as protection against economic exploitation, minimum age for admission to employment, appropriate regulation of the hours and conditions of employment and appropriate penalties or other sanctions to ensure effective compliance with the law.

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

Article 11 **The Right of Migrant Workers to Social Security**

1. Migrant workers **including those working in the informal sector** 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;

1. Where the applicable legislation does not allow migrant workers a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances; these provisions shall be in proportion to the level of social and economic development and the social affordability.

2. The working hours, rest and vacation, work safety and hygiene as well as social security of migrant workers shall follow the relevant provisions of the state.

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

Article 12 **Equality of Treatment of Migrant Workers Regarding** **Terms of Employment**

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other conditions of work, including, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of Employment.

Article 13 **Rights of Migrant Workers Regarding Identity Documents**

(5) The provision on child membership in trade union in the Trade Union Act 1959 is relevant for Malaysia because the Children and Young Persons (Employment) Act 1973 allows the employment of young **persons under the age of 16** under strictly regulated conditions. It follows therefore, that if a young person is entitled to work, he should accordingly have the right to join a trade union to protect his interest.

1. It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt.

2. IN NO CASE SHALL IT BE PERMITTED TO DESTROY THE PASSPORT OR EQUIVALENT DOCUMENT OF A MIGRANT WORKER OR A MEMBER OF HIS OR HER FAMILY.

Article 14
Rights of Migrant Workers Regarding
Collective Expulsion

1. Migrant workers shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually by the competent authority, unless compelling reasons of national security require otherwise;

2. Migrant workers may be expelled from the territory of a State of Employment only in pursuance of a decision taken by the competent authority in accordance with law;

3. In case of expulsion, the Migrant Worker concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities;

4. In case of expulsion of a migrant worker or a member of his or her family the cost of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel cost.

5. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her;

6. Migrant workers shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of Origin whenever the rights recognized under this Co-operation Agreement are impaired;

7. In considering whether to expel a foreign worker or member of his/her family account should be taken of humanitarian considerations and of the length of time the person concerned has already resided in the State of employment.

Article 15
Special Protection for Female and
Juvenile Migrant Workers

1. The State of Destination/Employment shall provide female workers and juvenile migrant workers with special protection. “Juvenile Migrant Workers” hereby refer to migrant workers at the age of 16 but not 18 yet.
2. The State of Destination should take steps to ensure that no female migrant worker be employed in dangerous industries and trades harmful to the health and shall not be employed at night.
3. A female migrant worker shall obtain equal remuneration to that of a man provided she does the same work; subject to the restrictions provided for in paragraph (2) of this article.
4. No juvenile migrant of either sex under the age of 16 years shall be employed.⁵
5. Juvenile migrants should not be employed in the dangerous industries and trades as specified in the state of Destinations labour laws.
6. No juvenile migrants shall be employed at night i.e. from sunset to sunrise.

Article 16
Responsibilities of the Parties Regarding
Undocumented Migrant Workers

1. The Parties recognize the prerogative of every nation to exercise its sovereignty in establishing immigration regulations and conditions pertaining to entry and stay on its territory. In exercising such right every nation shall avoid racist or xenophobic actions and policies;
2. The Parties shall undertake the appropriate steps to ensure that potential migrant workers are aware of the legal conditions for entry, stay and employment in the State of Destination/Employment;
3. Without prejudice to international commitments in relation to the free movement of people, the Parties shall strengthen to the extent possible, such border controls as may be necessary to prevent and detect irregular migration and trafficking in persons;
4. The State of Destination/Employment shall endeavour to identify satisfactory solutions to the problems caused by undocumented migration through bilateral or multilateral negotiations;
5. The Parties shall endeavour to address the root causes of undocumented migration **including smuggling of persons** with a view to reduce substantially the number of undocumented migrant workers.

⁵ (1) The proposed paragraph would not be acceptable as it would be inconsistent with section 2 of the Children and Young Persons (Employment) Act 1973 which permits the employment of young persons under the age of 16 under strictly regulatory conditions.

6. The Parties shall undertake steps to prevent all international trafficking in and smuggling of migrant workers, especially for the purposes of prostitution; and ensure protection against racism, ethnocentrism and xenophobia;

7. The Parties shall consider adopting effective sanctions against persons who organize undocumented migration, exploit undocumented migrant workers or engage in trafficking and smuggling in undocumented migrant workers, especially persons who engage in the international traffic in women, youth and children;

8. The Parties that have not yet done so are encouraged to enact domestic legislation and to take further effective measures to combat international trafficking and smuggling of migrant workers, which should take into account, in particular, trafficking and smuggling that endangers the lives of migrant workers or entails different forms of servitude or exploitation, such as any form of debt bondage, slavery and sexual exploitation or forced labour, and to strengthen international cooperation to combat such trafficking and smuggling;

9. The Parties shall ensure prompt, thorough and transparent investigation of all cases of abuses and adequate assistance to victims, particularly those involving mysterious deaths, sexual abuse, trafficking, smuggling detention and mental illness.

Article 17
Responsibilities of the Parties Regarding Recruitment of
Migrant Workers through Employment Agencies

1. The Parties shall endeavour to supervise the activities of private recruitment agencies by means of appropriate national laws or regulations and in consultation with representative organizations of employers and workers.

2. These laws or regulations should provide adequate sanctions against abuses or malpractices such as:

- (a) advertising and soliciting applications for positions that, in reality, do not exist;
- (b) providing false information to the worker on the nature and terms and conditions of employment, and to the employer on the qualifications of the jobseekers;
- (c) using forged travel documents or misrepresenting the workers' personal details;
- (d) charging workers fees for recruitment services;
- (e) making a profit out of selling offers of employment or work visas to other recruitment agencies or to the jobseekers without actually performing any recruitment service;
- (f) forcing the migrant worker, upon arrival in the receiving State, to accept a contract of employment with conditions inferior to those contained in the contract which he or she signed prior to departure ("contract substitution");

- (g) withholding or confiscating passports or travel documents; and
- (h) stipulating in the employment contract provisions that deny fundamental rights, in particular freedom of association.

3. The Parties shall endeavour to determine the conditions for the granting of a licence, certificate or similar authorization to private agencies to engage in international recruitment operations as well as for its suspension, withdrawal or cancellation in the event of violation of relevant legislation.

Article 18 **Settlement of Disputes**

States Parties to the Co-operation Agreement shall endeavour to settle any dispute regarding the interpretation or application of this Co-operation Agreement through negotiation or any other method mutually agreeable to the parties.

Article 19 **Saving clause**

1. Nothing in this Co-operation Agreement shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained thereunder.

2. The measures set forth in this Co-operation Agreement shall be interpreted and applied in a manner that is not discriminatory to persons on the ground that they are irregular migrant workers or victims of trafficking in and smuggling of persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.⁶

⁶ (1) Malaysia has no legislation relating to refugees or asylum seekers. The Immigration Act 1959/1963 is the principal legislation that governs the entry and stay of any person into Malaysia.

(2) Malaysia is not a party to international conventions or agreements on refugees like the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

(3) It is noted that the 40th Session of the AALCO adopted the revised Bangkok Principles relating to the Treatment of Refugees. However, it is noted that the Bangkok Principles is a declaratory and non-binding document.

(4) As stated in relation to the definition of “Migrant Workers” in Article 2, Malaysia reiterates its stand that the protection accorded under the proposed Model Agreement should be strictly limited to legal migrant workers.

(5) Further, Malaysia reiterates that Malaysian law only differentiates between a legal and illegal migrant worker and does not recognize any category of “irregular”, “documented” or “undocumented” migrant workers.

(6) Malaysia also takes the position that any person who contravenes the Immigration Act 1959/1963 will primarily be considered an illegal migrant regardless of his or her claims to be a victim of trafficking or

Article 20

Signature

This Model Regional Co-operation Agreement is open for signature by all Member States of Asian African Legal Consultative Organization (AALCO).

General Comments of Malaysia

Thus, although Malaysia supports the proposal for a Model Agreement, it does so with reservations on some of the proposed provisions and on the terminology used. Malaysia therefore supports the proposal for an indepth study of the Draft Model Agreement that has been circulated to the Member States.

- Malaysia proposes that the Model Agreement be considered a non-binding guide in the drafting of such future agreements between AALCO Member States.
- Malaysia proposes that acceptance and adoption of the final text of the draft Model Agreement be left to the individual Member States subject to their domestic laws and policies.
- Malaysian Law already provides adequate and reasonable legal protection to legal migrant workers. Malaysia also deals with the issue of the migrant workers by bilateral government to government agreement.
- Malaysia notes the proposals to convene open-ended working groups to consider indepth issues relating to the legal protection of migrant workers and generally the issues relating to migrant workers. Malaysia would not be able to participate in the proposed open-ended working groups as it would require an extended commitment of man power, expertise and finances. However, Malaysia would consider participating at any workshops or seminars intended as a forum to address the issues relating to the issue of migrant workers.

smuggling. However, certain safe guards are provided for genuine victims of trafficking in persons, as defined under the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, provided they satisfy Malaysian criteria to be considered a “victim”.

(7) According to the Immigration Department, they are treated as victims only if they make a policy report on the matter.