

**ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION**



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**THE LEGAL PROTECTION OF MIGRANT WORKERS**

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**Prepared by:**

**The AALCO Secretariat  
29-C, Rizal Marg,  
Diplomatic Enclave, Chanakyapuri  
New Delhi – 110021  
INDIA**

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# Legal Protection of Migrant Workers

## I. INTRODUCTION

### A. Background

1. The item entitled “Legal Protection of Migrant Workers” was included on the agenda of the AALCO upon the reference made by the Government of Philippines at its 35<sup>th</sup> Session held in Manila in 1996. Ever since, it has been a keenly debated topic at the successive sessions.

2. The resolution adopted at the 36<sup>th</sup> Session (Tehran, 1997) directed the AALCO 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 (the 1990, ICMW), international labour Conventions and Recommendations and relevant resolutions of the General Assembly of the United Nations. That proposal was in accordance with the established practice of 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 legislations<sup>1</sup>.

3. The Member States were urged to transmit to the AALCO Secretariat their national legislations if any, on the situation of migrant workers. Both the Government of Sri Lanka and the Government of Philippines responded by reiterating the immense significance of having a model on this issue. While the topic was kept on being debated at successive sessions, the year 2000 saw a fresh impetus being given to the topic when AALCO entered into a Cooperation Agreement with the International Organization for Migration (IOM). One of the important outcome of this was the organization of a one-day Special meeting in conjunction with the 40<sup>th</sup> Session of AALCO on the legal problems and issues related to migration. This meeting focused on the linkages between migration and development, the problem of illegal migrant workers in the context of the globalized era and the global structural inequalities that trigger the migration flows from the developing Countries to the developed Countries.

4. Against this backdrop, Resolution SP/1 “Special Meeting on Some Legal Aspects of Migration” adopted on 24<sup>th</sup> June 2001, at the 40<sup>th</sup> 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 an in-depth consideration of these issues. Pursuant to that mandate the present draft Model Agreement was prepared by the Secretariat in collaboration with IOM. This draft Model Agreement contains a preamble and 20 articles. The legislative inputs received from the Member States was incorporated.

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<sup>1</sup> To find out some of the legal instruments adopted by AALCO, See, AALCO Secretariat’s brief of previous years on the Legal Protection of Migrant Workers.

At the Forty-Seventh Session held at New Delhi in 2008, the item on the legal protection of migrant workers was not taken up.

5. We live in a time of unprecedented international movement. The contemporary phenomenon of globalization has provoked a growing discrepancy between the social reality of migration and its legal regulation. The social manifestations of globalization are an explosion of cheap and fast means of communication and some convergence of the values and expectations held by people. Goods and capital now circulate with greater ease than ever before, and peoples increasingly move across borders. In contrast, control over migration is generally regarded as one of the last bastions of the truly sovereign State.

6. The brief prepared for the Forty-Eighth Session of AALCO focuses on the human rights aspects of the legal protection available to migrant workers. This is on account of a number of reasons. The most important of them all is the reason that, development gains from migration for the countries involved and the protection of the rights of migrant workers are inseparable. Such development gains are significant not only to origin countries, but also to destination countries where migrant workers provide their labour. Migrant workers contribute to development in origin countries by, among other things, alleviating pressures on labour markets, sending remittances home, acquiring increased skills, and making investments, all of which help to alleviate poverty. In destination countries, they contribute to development by meeting the demand for workers, increasing the demand for goods and services, particularly where they receive decent wages, and contributing their entrepreneurial skills. In some of the most critical service areas for development and growth in origin and destination countries, women migrant workers predominate, for example, in nursing, domestic work, and care-giving. Protecting the rights of migrant workers has a positive effect on productivity, in that it results in fewer lost hours of work, reduces health care costs, and increases output.

7. Protecting the rights of migrant workers additionally benefits destination countries by preventing the development of an unprotected working underclass of migrants which harms national workers by undercutting their pay and working conditions. It is in the best interests of destination countries to prevent the emergence of migrant dependent economic sectors. It is in the interests of all involved to prevent irregular migration, which is an obstacle to the development benefits of migration, as those migrant workers in irregular status are most often excluded from labour and social rights.

## **II. The International Legal Regime on the Protection of the Rights of Migrant Workers**

8. The legal status of migrants in international law is linked to their condition as aliens. The so-called law of aliens - mostly unwritten - needs to be considered in any attempt at understanding the treatment afforded to migrants.

9. In Ancient Greece and Rome, a migrant was an alien, a foreigner, a stranger, if not an enemy: aliens barely had rights; they were legally inferior, being denied basic civil and political rights. While the Middle Ages saw aliens treated sometimes as slaves, the expansion of trade and fairs led to a marked improvement of the condition of aliens, in particular merchants who could obtain redress in case of violations of their privileges. This evolution contributed to the progressive codification of the institution of the diplomatic protection whereby a State may protect its nationals abroad and seek redress as if the harm had been inflicted upon the State itself. The disadvantage of this institution is of course that diplomatic protection can be activated only by the State and is not a right of the individual.

10. By the end of the last century, aliens - or migrants - were accorded either national treatment or the international minimum standard of treatment. National treatment was not a panacea, in view of the uneven level of development of countries, and the inadequate treatment accorded by some countries to their nationals. The international minimum standard - articulated by the western powers in 1920 and subsequently by Borchard in 1940 contains substantive and procedural elements. The former includes "certain elementary privileges of human existence ... mainly rights to life and the elementary liberties connected with the earning of a living", while the latter is defined by "fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control". This minimum standard, in its substantive dimension at least, is still considered as providing basic rights to non-citizens.

11. The middle of this century has witnessed the emergence of the body of international human rights norms applicable to and, hence putting to rest - or freezing - the debate between advocates of the minimum standard and those of the national treatment. The law of aliens is however still of relevance, as many States are not yet party to the human rights instruments and their supervisory mechanisms are consequently not universally applied.

12. In more than 20 centuries, the alien or migrant has progressed through various steps a status of quasi-enemy, then a tolerated foreigner, then a progressive assimilation to a national, then the minimum standard of international law, and finally, in the early fifties, the applicability of international human rights instruments to aliens and nationals alike. Today, the legal instruments relating to human rights, and more particularly the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of the same date, have been developed in fulfillment of the idea of adherence to shared standards of justice as a condition for full membership in the modern international society. These conventions, usually referred to as the International Bill of Rights, are the starting point of any definition of the rights of migrants.

## **B. Universal General Instruments:**

13. The international community has developed several conventions, instruments, agreements and other documents providing for the rights to which such persons are

entitled. Although some of the rights contained in these texts apply to everyone by virtue of their fundamental nature, the application of some others largely depends on whether the person involved falls within one of the traditional categories discussed above, namely migrant, migrant worker, refugee or displaced person.

14. In promoting respect for the rights of migrant workers, particular emphasis is to be placed on international human rights law. Therefore, in submitting an overview of the sources of international law providing legal standards for the protection of migrant workers, focus is placed on human rights law and the body of law which concerns itself specifically with the rights of migrant workers: migrant workers law.

15. All migrant workers are human beings who possess fundamental and inalienable rights and freedoms. These rights have been universally acknowledged in international law instruments such as the *Universal Declaration of Human Rights*. Adopted by the United Nations General Assembly in 1948, the Declaration was intended as “a common standard of achievement for all peoples and nations”. Its thirty articles cover a wide range of human rights including the following:

- right to life, liberty and security of person (art. 3);
- prohibition of slavery or servitude (art.4);
- prohibition of torture or inhuman or degrading treatment or punishment (art. 5);
- prohibition on retroactive penal legislation (art.11);
- right to respect for private and family life, home and correspondence (art.12);
- right to leave any country and to return to one’s own country (art.13);
- right to freedom of thought, conscience and religion (art. 18);
- right to freedom of expression (art. 19).

Article 2 enunciates the fundamental principle of non-discrimination, which guarantees that every human being is entitled to the rights and freedoms set forth in the Declaration without distinction of sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or any other status.

16. In order to give legal force to the rights contained in the Declaration, the *International Covenant on Economic, Social and Cultural Rights* (ICESR) and the *International Covenant on Civil and Political Rights* (ICCPR) were adopted in 1966. These two Covenants, together with the Declaration, constitute the International Bill of Human Rights and contain provisions addressing the fundamental rights to which all individuals are entitled.

17. The Covenants have been widely ratified and the States Parties are obliged to implement their contents at the national level. While some of the provisions of the Covenants can only be implemented gradually, others which concern for instance the minimum protection of the fundamental human rights of individuals must be enforced with respect to all persons present on the State Party’s territory regardless of their status. Indeed, Article 2(2) of the ICCPR imposes upon a State Party the obligation to “guarantee that the rights enunciated in the present Covenant will be exercised without

discrimination of any kind as to race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status”.

18. Article 4(1) of the ICCPR provides that in “time of emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties ... may take measures derogating from their obligations.... to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law.” In practice, this would allow a distinction between nationals and aliens (although not on the basis of race, colour, sex, language or social origin). However, measures of derogation must be consistent with States’ other obligations under international law. It is furthermore well recognized under international human rights law that there can be no derogation from certain fundamental human rights guarantees. The Covenant specifically provides under Article 4(2) the rights from which there can be non-derogability. They are: (i) the right to life absent a final judgement rendered by a competent court, (ii) the right to be free from torture which has attained the status of *jus cogens*, (iii) the right not to be held in slavery, (iv) the right of persons deprived of their liberty to be treated with humanity, (v) the right not to be prosecuted under retroactive legislations, (vi) the right to be recognized as a person under the law and (vii) the right to freedom of thought and conscience.

19. The ICESR also provides for derogations. Article 2(3) of the ICESR permits a State party to derogate from its obligation to enforce the rights contained under the treaty but “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Unlike the ICCPR which contains provisions of such a fundamental nature that they must be guaranteed at all times, the ICESR concerns itself largely with rights which can be guaranteed only gradually. It is important to note that Article 2(3) of the ICCSR states that “developing countries may determine to what extent they would guarantee the economic rights recognized in the Covenant to non-nationals.”

20. Most of the guarantees contained in the Covenants are applicable to persons living in their country of nationality as well as to migrants, migrant workers, refugees and displaced persons. It seems established that chief amongst the factors triggering the movement of individuals away from their country of nationality are violations of their basic human rights. Unfortunately, individuals involved in the process of abandoning their country of nationality tend to be subjected to further human rights violations during the journey and become victims to yet more violations in the receiving country.

21. Other international human rights treaties offering guarantees of relevance to migrant workers include the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). This Convention promotes the end of torture and the infliction of other degrading treatment worldwide, and extends the principle of *non-refoulement* to apply to all cases where there are substantial reasons to believe that a person would be tortured if returned to his or her own country.

22. The *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) is the most authoritative and complete source of international law principles on racial discrimination. Article 1(1) of the Convention defines racial discrimination as

*any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.*

23. Under subparagraph 2 of Article 1 of this Convention, States Parties are allowed to apply distinctions, exclusions, restrictions or preferences between citizens and non-citizens. However, this provision cannot be interpreted as giving a State Party the authority to violate the rights of such persons. Subparagraph 3 of the same Article which concerns the domestic legislation of States Parties regarding nationality, citizenship or naturalization specifies that such legislation must not discriminate against any particular nationality. Article 5 of the Convention contains an enumeration of all the rights which must be enjoyed by all without distinction as to race, colour, or national or ethnic origin. The Convention does not guarantee these rights as such, rather, it provides that as far as these rights exist at the national level, they are to be enjoyed without discrimination.

24. It also needs to be realized here that the International Labour Organisation (ILO) has spearheaded various initiatives towards the establishment of international labour standards benefiting migrant workers. The ILO's efforts have resulted in the adoption of several Conventions and instruments on the rights of migrant workers. The principle ones are: (i) The *Convention (No. 97) Concerning Migration for Employment* of 1949 accompanied by *Recommendation (No. 86) Concerning Migration for Employment* of 1949 and (ii) the *Convention (No. 143) Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* of 1975, accompanied by *Recommendation (No. 151) Concerning Migrant Workers* of 1975.

25. The *Migration for Employment Convention* of 1949 focuses primarily on (i) the standards applicable in the recruitment of migrants for employment and (ii) the conditions of labour of migrants recruited for employment. Article 6 of this Convention provides specifically for the equal treatment of nationals and migrant workers lawfully within the territory of a State Party. Under subparagraph 1(a) of Article 6, migrant workers are to receive a treatment no less favourable than nationals with regard to remuneration, membership in trade unions and accommodation "in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities." Under subparagraph 1(b) of Article 6, migrant workers are entitled to various types of social security benefits including those relating to employment injury, sickness, maternity, old age and death. Although these benefits may be subject to "appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition" and "national laws or regulations of immigration countries", the important

factor remains that State Parties to this Convention are to allocate these rights to nationals and migrant workers without discrimination as to nationality, race religion or sex.

26. The *Convention* (No. 143) *Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* of 1975 aims at the elimination of illegal migration and illegal employment. Article 3 of this Convention imposes upon State Parties the obligation to “adopt all necessary measures (a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and (b) against the organizers of illicit or clandestine movements of migrants for employment. Article 8, subparagraph (1) of the Convention protects migrant workers from being considered in an illegal or irregular situation and losing their authorization of residence by loss of employment. Accordingly, subparagraph (2) entitles the migrant worker who has lost his employment to the same treatment as nationals with respect to guarantees of security of employment including the provision of alternative employment, relief work and retraining.

27. In addition to the provisions contained in the above mentioned ILO labour Conventions concerning the equal entitlement of migrant workers to certain social security benefits, the ILO has elaborated a Convention specifically applicable to the inequality of treatment suffered by migrant workers compared to nationals with regard to their entitlement to these benefits. It is the *Convention* (No. 118) *concerning Equality of Treatment of Nationals and Non-Nationals in Social Security* of 1962. In the area of social benefits, migrant workers also benefit from *Convention* (No. 157) *concerning the Establishment of an International System for the Maintenance of Rights in Social Security* of 1982. This second Convention is accompanied by *Recommendation* (No. 167) *concerning the Establishment of an International System for the Maintenance of Rights in Social Security* of 1982.

28. Article 2 of each of these two Conventions enumerates the specific social security benefits from which States Parties have to ensure that migrant workers benefit. The Convention for the Establishment of an International System for the Maintenance of Rights in Social Security specifically provides: (i) in Part II guidance for the implementation of the Convention at the domestic level with a view to avoiding conflict of laws, and (ii) in Part III for the participation of States Parties in schemes for the maintenance of rights in course of acquisition.

29. It is important to realize here the fact that, strictly speaking, the ILO is primarily concerned with the economic and social rights of workers pertaining to questions of labour. Questions concerned with immigration, expulsion, political rights, and rights to education and culture do not fall within the ILO's competence. However, the interdependence of civil and political rights with economic and social rights makes it difficult to separate questions of labour from the broader economic, social, cultural, and political context in which migrant workers and their families find themselves.

30. The regional human rights Conventions, namely, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *African Charter on Human*

*and Peoples' Rights* and the *American Convention on Human Rights* contain similar provisions to the ones discussed above, provide similar guarantees and apply to all persons equally within the territorial jurisdiction of the contracting States Parties.

31. In nutshell, the human rights treaties provide many guarantees to all individuals whether present on or outside the territory of their State of nationality. However, since the human rights law treaties discussed above were not specifically adopted to protect the human rights of migrant workers, they do not contain provisions addressing the specific violations suffered by migrant workers in host countries. In an effort to afford additional protection to migrant workers, other international and regional instruments focusing exclusively on their human rights protection were developed and subsequently adopted.

## **B. The 1990 Migrant Workers Convention**

32. The most significant achievement in recent years with regard to the protection of the rights of migrant workers has been the adoption in 1990 by the General Assembly of the United Nations of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990, ICMW) This Convention reaffirms the basic human rights guarantees to which migrant workers and their families are entitled. This Convention stands as evidence of the need to reinforce the system of human rights protection benefiting this group of people. This Convention also provides States with a legal tool facilitating the development of a uniform system of domestic legislation and mutual agreements with respect to clandestine movement and trafficking in workers. Unlike the aforementioned Conventions the underlying goal of this particular Convention is to ensure that there are treaty provisions binding State Parties to enforce basic human rights protection of migrant workers and members of their families who may be in an undocumented or irregular situation.

33. The 1990 ICMW seeks to establish minimum standards that States parties should apply to migrant workers and members of their families, irrespective of their migratory status. The rationale behind the recognition of rights of undocumented migrant workers is also reaffirmed in the preamble, in which the States parties consider, inter alia, that irregular migrants are frequently exploited and face serious human rights violations and that appropriate action should be encouraged to prevent and eliminate clandestine movements and trafficking in migrant workers while at the same time ensuring the protection of their human rights. In the ensuing part of the brief we will analyze the salient features of the ICMW 1990 in the light of the rights and obligations that it confers on the migrant workers.

### **i. Scope and definitions**

34. Part I of the Convention contains the most comprehensive definition of migrant workers found in any international instrument concerned with migrants. Article 2 (1) defines a 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.”

35. Article 4 defines which persons constitute the members of the migrant worker's family as "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned."

36. Furthermore, article 5 specifies that migrant workers are considered to be documented or in a regular situation "if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party". Otherwise, they are considered to be non-documented or in an irregular situation.

37. Finally, in part V, the Convention innovates by defining the rights which apply to certain categories of migrant workers and their families, including frontier workers, seasonal workers, itinerant workers, migrants employed for a specific project and self-employed workers.

## **ii. The principle of non-discrimination**

38. Article 7 of the 1990 ICMW provides that States parties should respect and ensure the rights contained in the Convention without distinction of any kind such as 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. Article 1 also states that the Convention applies to all migrant workers and members of their families without distinction of any kind. Although the enumeration of the prohibited grounds of distinction is illustrative and not exhaustive, it is worth noting that the list in the Convention is broader than those found in other human rights conventions, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

## **iii. Human rights of all migrants**

39. Part III of the 1990 ICMW (arts. 8 to 35) grants a fairly broad series of rights to all migrant workers and members of their families, irrespective of their migratory status. Many of these articles specify the application to migrant workers of rights spelled out in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the other core human rights treaties. The Convention also includes a number of rights addressing specific protection needs and providing additional guarantees in the light of the particular vulnerability of migrant workers and members of their families. This section focuses on these provisions.

40. Article 15, for instance, protects migrant workers from the arbitrary deprivation of property, while article 21 contains safeguards against confiscation, destruction or attempts to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits and prohibits the destruction of

the passport or equivalent document of a migrant worker or a member of his or her family.

41. Also specific to the particular situation of migrant workers is article 22, which provides, *inter alia*, that migrant workers and members of their families shall not be subject to measures of collective expulsion and that they may be expelled from the territory of a State party only in pursuance of a decision taken by the competent authority in accordance with the law. Furthermore, article 20 (2) provides that no migrant worker or member of his/her family shall be expelled or deprived of his authorization of residence or work permit 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.

42. Article 23 spells out the right of migrant workers and members of their families to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin whenever the rights recognized under the Convention are impaired. Similarly, article 16 (7) gives arrested or detained migrant workers and members of their families the right to communicate with the consular or diplomatic authorities of their State of origin.

43. Migrant workers are frequently excluded from the scope of regulations covering working conditions and often denied the right to take part in trade union activities. Article 25 of the Convention establishes that 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 and terms of employment. Article 26 recognizes the right to take part in meetings and activities of trade unions and freely join them.

44. The living conditions of migrant workers are also often unsatisfactory. They face serious housing problems and, although they contribute to social security schemes, they and their families do not always enjoy the same benefits and access to social services as nationals of the host State. Article 27 of the Convention stipulates that, with respect to social security, migrant workers and members of their families shall enjoy 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.

45.. Article 28 grants migrant workers and members of their families the right to receive any medical care that is urgently required for the preservation of their life or avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. It is important to stress that such emergency medical care shall not be refused by reason of any irregularity with regard to their stay or employment.

46. Article 30 establishes that each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Furthermore, access to public preschool educational institutions or

schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

47. Article 31 of the Convention requests States parties to ensure respect for the cultural identity of migrant workers and members of their families and not to prevent them from maintaining their cultural links with their State of origin. Article 32 provides that, upon termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings as well as their personal effects and belongings.

48. Finally, according to article 33, migrant workers and members of their families shall have the right to be informed of their rights arising out of the Convention as well as of the conditions of their admission and their rights and obligations under the law and practice of the State concerned. These obligations are placed on the State of origin, the State of employment or the State of transit as the case may be. State parties shall take appropriate measures to disseminate the said information, which shall be provided free of charge and, as far as possible, in a language that the migrants and their families are able to understand.

49. The last article of this section, article 35, deserves particular mention. It states that “nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable conditions for international migration as provided in part VI of the present Convention.”

#### **iv. Other rights of migrant workers and members of their families who are documented or in a regular situation**

50. The 1990 ICMW assigns additional rights to migrant workers and members of their families who are documented or in a regular situation. These rights include the right to be fully informed by their States of origin and employment about conditions applicable to their admission and concerning their stay and the remunerated activities they may engage in (art. 37), the right to freely move in the territory of the State of employment and freely choose their residence there (art. 39), the right to form associations and trade unions (art. 40),<sup>6</sup> and to participate in public affairs of their State of origin, including voting and election (art. 41). Furthermore, documented migrant workers and members of their families enjoy the same opportunities and treatment as nationals in relation to various economic and social services (arts. 43 and 45), in the exercise of their remunerated activity (art. 55), in the choice of their remunerated activity (subject to some restrictions and conditions) (art. 52) and in respect of protection against dismissal and the enjoyment of unemployment benefits (art. 54).

51. An important guarantee for regular or documented migrant workers is contained in article 49. It stipulates that, where separate authorizations 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. Moreover, article 51 says that migrant workers who are not permitted 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 permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

52. Migrant workers and members of their families in a regular status also enjoy exemption from import and export taxes on their household and personal effects (art. 46) and shall not be liable to more onerous taxation than nationals in similar circumstances (art. 48). Article 47 provides that migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State.

53. While the Convention does not expressly speak of a *right* to family reunification, States parties are encouraged to facilitate family reunification and to protect the unity of the family (art. 44). Article 50 provides that, in the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay, taking into due account the length of time they have already resided in that State. Finally, documented migrant workers and members of their families enjoy additional guarantees against expulsion (art. 56).

### **C. The Committee On Migrant Workers**

54. The implementation of the 1990 ICMW rests with its States parties. Article 72 provides that this process is monitored by a committee—the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families—consisting of 10 experts to be elected by the States parties and serving in their personal capacity, the number rising to 14 when 41 States will have become parties to the Convention. Members of the Committee are elected by States parties by secret ballot, with due regard to fair geographical distribution, including both States of origin and States of employment of migrant workers, and to representation of the world’s main legal systems. Members serve in their personal capacity for a term of four years.

55. States parties accept the obligation under article 73 to report on the steps they have taken to implement the Convention within one year of its entry into force for the State concerned, and thereafter every five years. The reports also are expected to indicate problems encountered in implementing the Convention, and to provide information on migration flows. After examining the reports, the Committee will transmit such comments as it may consider appropriate to the State party concerned.

56. Close cooperation between the Committee and international agencies, in particular the International Labour Office, is foreseen in the Convention (art. 74 (2) and (5)). For instance, the Committee shall invite the Office to appoint representatives to

participate, in a consultative capacity, in its meetings, and shall consider in its deliberations such comments and materials as the Office may provide.

57. Under article 77, a State party may make a declaration recognizing 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. Such communications may be received only if they concern a State party which has so recognized the competence of the Committee. If the Committee is satisfied that the matter has not been, and is not being, examined by another procedure of international investigation or settlement, and that all domestic remedies have been exhausted, it may request written explanations and express its views after having considered all the available information. The individual communication procedure requires 10 declarations by States parties to enter into force.

58. In March 2004, the Committee on Migrant Workers held its inaugural session, during which it adopted its provisional rules of procedure. In October 2004, the Committee held informal meetings to develop guidelines for the preparation of States parties' initial reports. It formally adopted these guidelines at its second session, in April 2005.

### **III. CHALLENGES OF PROTECTING THE HUMAN RIGHTS OF MIGRANT WORKERS**

59. As we have seen, the 1990 ICMW comprises the most explicit articulation of application of universal human rights to the migrant workers. Opposition to application implementation of these norms reflects pressures to restrict rights and corresponding labour costs of an internationalised work force in order to ensure that it remains cheap, docile and easily removable when not needed. Given the primordial importance of the 1990 ICMW to the protection of the rights of migrant workers, one would expect that this instrument is embraced by a wide range of States. Unfortunately, the reality is far from it. The number of States Parties to it is as low as 41 as of March 2009<sup>2</sup>.

60. The very slow progress in ratifications of the 1990 ICMW, coupled with explicit disinterest in any of the migrant worker instruments, symbolize a broader resistance to recognition of application of human rights and labour standards to migrants, particularly undocumented migrants. Rights and social protection carry costs, an implication which confronts the logic of globalized economic competition. Opposition to wider ratification of this Convention reflects pressures to restrict rights and corresponding costs of labour in general, and foreign labour in particular, to ensure that it remains cheap, pliant, temporary and easily removable when not needed.

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<sup>2</sup> At present there are Eight AALCO Members which have ratified/acceded this Convention. They are: **Arab Republic of Egypt, Ghana, Libyan Arab Jamahriya, Senegal, Srilanka, Syrian Arab Republic, Turkey, and Uganda.** Further three AALCO Member States are signatories to it. They are: **Bangladesh, Indonesia and Sierra Leone.**

61. The low level of adherence to the 1990 ICMW invariably forces one to raise a fundamental question. Whether it continues to be relevant in the context of today's migration challenges in terms of the contribution it can make to the protection of all migrant workers and members of their families. Or has the migration landscape of the early 21<sup>st</sup> century changed so much from previous decades that the Convention's relevance for protecting the human and labour rights of migrants is now diminished?

62. So what are the principal migration challenges today in terms of safeguarding the human rights of migrants? **Four** challenges could be easily identified (which does not constitute an exhaustive list by any means): two of which deal with the non-discriminatory treatment of particularly vulnerable groups of migrant workers, namely those in temporary and irregular situations); and the third is concerned with how the human and labour rights of migrant workers and their families are being addressed in policy fora and processes devoted to migration, and the role of the Convention vis-à-vis such fora and processes.

63. The **first challenge** relates to the increasing short-term nature of labour migration, which is also a response to the expansion of more flexible employment in certain sectors of economies and the resulting inherent precariousness of this work. It is a common feature of our globalized world that these are jobs, which are by and large low or semi-skilled in nature and increasingly performed by migrants. Coupled to this fact are the calls by policymakers to promote temporary labour migration (including the establishment of more temporary migrant worker programmes, largely on a bilateral basis), in the context of which migrant workers would be encouraged to return to their countries of origin. Does the Convention provide an adequate response to the specific rights' problems encountered by temporary migrant workers and the increasingly diverse contexts in which such persons migrate and work. It should be underlined that the Convention allows for few distinctions between temporary migrant workers and those migrants admitted to a country for employment on a longer term or even permanent basis. However, it does define a number of such groups, such as seasonal workers and project-tied workers, and devotes a whole part (Part V) to them, though permitting some reduction in the content of the rights' safeguards these workers may expect. Despite these limited exceptions, however, the overall thrust of the Convention is to provide temporary migrant workers with essentially the same treatment to that afforded national workers. *Importantly*, aside from identifying various categories of short-term migrant workers, the Convention does *not* distinguish between low-skilled, semi-skilled and highly skilled workers. *Migrant workers are treated as human beings and as workers and not in accordance with the skills they possess or the level of salary they can expect to earn.* Moreover, it was recognized by the Convention's drafters that lower skilled migrant workers were in more need of protection because this category of workers was more likely to find itself in dirty, dangerous and difficult jobs and thus be at greater risk of exploitation.

64. The provisions in the Convention are therefore largely directed at protecting more vulnerable groups of workers. (Indeed, that is why persons taking up residence as investors were excluded from its ambit). This important adherence to the principle of

equal treatment in respect of migrant workers at all skill levels should be contrasted with national policies being formulated today, which aim to attract the “the best and brightest” talent and afford highly skilled migrants more favourable working and living conditions than those provided to lower skilled migrant workers. Such an approach is also being transposed at the level of the European Union as seen in two recent proposed directives that would, if adopted in their present form, entrench differential treatment in terms of access to social rights and secure residence status between highly skilled migrants and less-skilled or semi-skilled migrants. In this respect, therefore, the Migrant Workers Convention could not be more relevant and serves as an important bulwark against the erosion of standards.

65. The **second challenge** is connected to (what may still *very much be a perception*) increasing irregular migration, which is not only a phenomenon occurring between developed and developing countries but in all parts of the world. It should be recalled here that the abusive conditions under which irregular migrants move were a catalyst for the adoption by the ILO’s International Labour Conference of Convention No. 143 (1975) protecting migrant workers (Part I) as well as the 1990 Migrant Workers Convention. It is generally accepted that irregular migrant workers are a particularly vulnerable group of migrants. While the causes of irregular migration are as numerous as the phenomenon is diverse, it has been strongly argued that control measures alone are insufficient to tackle irregular migration and that a comprehensive approach is required, including the need to adopt a package of more “constructive” measures.

66. The protection of the rights of this vulnerable group forms an integral aspect of such a comprehensive approach which also comprises the need to address informal labour markets where both national and migrant workers are found; provide more regular avenues for migrant workers to be able to meet the demand for labour in *all* sectors of a destination country’s economy; and give serious consideration to the regularization of those with irregular immigration status. In a world where migrants with irregular status are at greatest risk of exploitation and are more likely to be subject to human and labour rights’ violations, as well as victimization and marginalization in host societies (whether at the point of destination or while in transit), the explicit protection granted by the Convention to this vulnerable group is an important reminder that fundamental rights are non-negotiable and that an individual’s immigration status is irrelevant in this respect.

67. It should be underlined that meeting both of these protection challenges must not ignore the specific plight of migrant women who face multiple discrimination in the migration process on account of their nationality, immigration or social status as well as gender. It has been contended that even though the 1990 ICMW is drafted in gender-neutral language, it does not devote sufficient attention to the specific situation of migrant women working in certain sectors of the economy, especially in domestic or household employment. The continued abuses suffered by these women migrants, who fulfill important but often undervalued tasks in host societies, and the frequent absence of formal protection in national labour legislation raises important questions as to the utility of the Convention in safeguarding the human and labour rights of this group of migrant workers, and which hopefully the Committee will be able to address. Indeed, I see that in

its first Concluding Observations the Committee has already started to devote attention to the situation of domestic workers.

68. The **third challenge** that needs to be addressed is closely related to the increased attention being devoted today to migration, and particularly migration for employment, in policy fora at all levels (national, bilateral, regional and global), reflected in the high priority given to this item on government agendas at both the national and (increasingly) the regional and global level. This is also connected to the recognition by (and indeed the growing consensus among) many countries that migration for employment can be a positive force contributing to the development of countries of origin as well as countries of destination; including in the developed industrialized world in the light of observed labour shortages and aging populations.

69. In this context, the human and labour rights of migrant workers and members of their families are being highlighted as an important issue of concern in attempts by the international community to strengthen the emerging consensus relating to the migration and development nexus and to move towards mutually beneficial and more concrete activities in this field.

70. A good example of the heightened sensitivity to human rights in such processes is evident in the Global Forum on Migration and Development (GFMD). In this regard, the 1990 ICMW offers important input in Part VI on the promotion of sound, equitable, humane and lawful conditions in connection with the international migration of workers and members of their families. This part imposes *legally binding obligations* on States parties to cooperate with a view to ensuring that labour migration takes place in a safe and humane manner and with due regard to human and labour rights. Importantly, all States parties, irrespective of whether they are principally destination, origin or transit countries, are bound by the provisions of Part VI. This section of the Convention therefore underscores that the protection of the human and labour rights of migrant workers and their families is a *joint venture and responsibility*.

71. The **fourth challenge** lies in the fact that in a still growing number of countries, migration management responsibilities have been shifted from labour ministries to interior or home affairs ministries, thus transforming contexts for policy elaboration and implementation from that of labour market regulation to that of policing and national security. Despite the vast extent that migration is about work, this shift separates administration of an increasingly sizable portion of the work force from the institution of the State most directly concerned with labour market regulation, conditions of work and other fundamental areas of its competence.

72. In these four selected areas, (which it should be stressed, are not exhaustive), the 1990 ICMW serves as a *reference point* for all countries (and *not only* for those which have ratified and are implementing it) as well as an important reminder of the *symbiosis* between policy formulation and application in the migration field and the protection of human rights.

#### **IV. MIGRANT MOVEMENTS IN THE CURRENT ERA:**

73. When considering international migration in the 21st century, it is important to bear in mind the oft-quoted aphorism of the philosopher George Santayana: “Those who cannot remember the past are condemned to repeat it.” Today’s international migrant flows did not emerge in a vacuum. They are intimately connected to broader processes of economic integration that for the past half century have been shrinking the globe. Places that are linked to one another by flows of goods, capital, commodities and information are also linked by flows of people, in a process that has come to be labeled “globalization.” What many fail to realize is that the current wave of globalization is not the first in human history. Indeed, to a remarkable extent the current era replicates an earlier period of globalization that crested during the first decade of the 20th century.

74. Globalization is having a profound impact on human displacement and mobility. As Peter Stalker’s ILO book put it, “The evidence points to a likely worsening of migration pressures in many parts of the world.... Processes integral to globalization have intensified the disruptive effects of modernization and capitalist development.” Many developing countries face serious social and economic dislocation associated with persistent poverty, growing unemployment, loss of traditional trading patterns, and what has been termed a “growing crisis of economic security.” A direct result is migration, as people leave insecure and destabilized homelands in search of survival and protection elsewhere.

75. Changing economic and demographic trends are combining to increase the demand for foreign labour in most industrialized countries. On the one hand, demographic trends are translating into aging populations, older median age work forces, more retired people dependent on fewer actively employed, and fewer entries into labour markets. On the other hand, the growth of dual labour markets under globalization is expanding the number of precarious jobs which national workers are reluctant to take. Small and medium size companies and labour-intensive economic sectors do not have the option of relocating operations abroad. Responses include downgrading of manufacturing processes, deregulation, and flexibilization of employment, with increased emphasis on cost-cutting measures and subcontracting. These measures expand the number of jobs at the bottom of the employment scale. Resulting employment needs are met only partially or not at all by available or unemployed national workers, for reasons of minimal pay, degrading and dangerous conditions, and low status.

76. The exploitability of migrant labour, particularly when it is legally unprotected, renders it an attractive instrument for maintaining competitiveness. This is, however, at the expense of formal protections of workplace safety, health, minimum wage and other standards. As the International Confederation of Free Trade Unions (ICFTU) highlights, organizing migrants and immigrants into unions or organizations to defend their interests and rights is often extremely difficult. When it is not considered illegal under national laws, organizing – especially of those without legal authorization for employment – is easily intimidated and disrupted by the threat or actual practice of deportation.

77. In this context it is worth recalling here the extreme vulnerability of irregular migrants. They are entitled to be treated humanely and with proper consideration to their often very extreme circumstances. Attempts have been made from time to time on the part of some trade unions often joined with others, in calling for the regularization of the status of such migrants and in mobilizing against enforced repatriation. But that does not detract from the need for countries to work together to ensure that where migration takes place, it does so legally, and in an orderly way and that public authorities assume their responsibilities. Thus, the effective management of migration with a rights-based approach is crucial to the effective protection of migrants' rights. Globalization fuels illegal migration in several ways and the present response is a worldwide 'crack down' on illegal migration. It needs to be remembered that contempt for illegal migration also affects refugee law and public and political discussions of refugees.

78. Increasingly private intermediaries are playing a role in the migration process. And often they undertake their broker role outside any effective regulatory framework. Here too, the risks of exploitation or straightforward fraud are high. The worker may be required to pay exorbitant fees, or find that all of the promises made on departure are quite different from the realities of his or her new job. Far from home, with nobody to turn to there are few hopes of redress. The tragic plight of some of the recent workers taken hostage in Iraq again has drawn attention to what amounts to modern day slavery.

79. The attempts to protect the rights of migrant workers has been going on for a long time. Important initiatives have been taken in the last decade, and especially since 2000, to strengthen the framework for protection. The 1990 ICMW has come into effect; the application of UN human rights treaties to migrants has become more robust; international and regional "rapporteurs" have been appointed to provide an impartial record of violations; trafficking and smuggling have been criminalized; and the protection of shipwrecked migrants has been strengthened. The Berne Initiative and the Global Commission on International Migration (GCIM) have encouraged multilateralism in migration policy making, and have defined rights protection as fundamental to migration management. In its 2006 High Level Dialogue, members of the UN General Assembly emphasized that all states, whether of origin, transit or destination, had the obligation to respect the rights of all migrants, and that rights protection in countries of origin was a key factor in making migration a choice not a necessity. Nonetheless, violation of the rights of migrants is widespread, and the "disjuncture" between theoretical protection and actual practice remains endemic.

80. This brings us to the need to see the problem of migration through the prism of human rights as opposed to any other developmental prism. True, the human rights approach will not be a cure-all for all the problems faced by the migrant workers, but certainly it would go a long way in ensuring the rights of migrant workers. The linkage between migration law and the human rights law was revealed by the International Organization for Migration {IOM} in the following words<sup>3</sup>:

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<sup>3</sup> International Organisation for Migration, *Overview of International Migration* (1995) at 44.

Migration law is largely rooted in human rights law. The instruments relating to human rights, and those which specify rights and standards of treatment for migrant workers, refugees and immigrants are significant in defining migration law.

## **V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT**

81. The history of human beings is the history of the movement of people. People resettle from place to place now for the same reasons that they have always done. They move out of hope, seeking more from life, a better opportunity for their children and a safer existence. In an ideal world, people would relocate because of choice, not fear.

82. In the current era of globalization, economic disparities are driving accelerated migration. Often the movement is forced by economic hardship; sometimes it is in response to new opportunities. Most often the reasons have been and are a mix of push and pull. Migration has always been driven by powerful economic and political forces. Conditions have rarely been easy, as individuals adapted to change and communities clashed or learned to live together. As the global economy drives global inequality, movement across borders inevitably increases. If legal ways are closed, people trying to survive and to support their families will cross fences or set sail on dangerous seas regardless of the risks.

83. No short-term solution, whether high-tech fences or changes in laws, will resolve the complex issues of migration driven by accelerating global economic interaction. Steps to “fix the system” must include not only medium-term reforms in laws and procedures, but also long-term actions that can counter growing global inequality. In the meantime, it is essential to find ways to protect the human rights and immediate interests of both newcomers and those who are threatened or feel threatened by the pace of change.

84. Even a well-designed and fair immigration system cannot work as long as the economy continues to increase the gap between rich and poor, both within and between countries. Bottom line, both immigrants and non-immigrants should mobilize for more jobs and more equality, rather than fighting over crumbs. Internationally, rich nations must pay their share to address the world’s problems, from poverty and lack of education to disease and climate change. Countries that are closely linked by the flow of migrants must coordinate their efforts to promote development and decrease inequality. We must build a world in which the decision to move to another country is driven by free choice rather than the pressure to survive.

85. Whatever the system, or whatever laws may have been violated, human beings are never “illegal.” International human rights law increasingly recognizes that countries have the obligation to guarantee basic rights to immigrants as well as citizens. These

include, at minimum, the rights of humane treatment and due process for all. Both countries of origin and countries receiving immigrants have the obligation to ensure that these rights are respected. Long-term security will not come from violating human rights, but from ensuring that they apply to all. In this connection it should be stressed here that we don't need more laws, Conventions or agreements, we just need governments to implement their existing obligations towards migrant workers. In this regard the long-held view of the AALCO that in addition to renewing the focus for sustainable and balanced development, migration has to be seen from a human rights angle, not from a security or commodity angle, needs to be remembered. For, the 'Declaration of Philadelphia' stated more than 60 years ago: "Labour is not a Commodity".