

# **ASEAN**

**BRIEFING TO THE  
COMMITTEE ON THE  
IMPLEMENTATION OF THE  
DECLARATION ON THE  
PROTECTION AND  
PROMOTION OF THE  
RIGHTS OF MIGRANT  
WORKERS**

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## INTRODUCTION

The Committee on the Implementation of the ASEAN<sup>1</sup> Declaration on the Protection and Promotion of the Rights of Migrant Workers (the Declaration)<sup>2</sup> will be meeting in Siem Reap, Cambodia from 5 to 10 May. In addition to ensuring the effective implementation of the commitments made under the Declaration, the Committee is tasked with facilitating the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers (the Instrument).<sup>3</sup>

In this briefing, Amnesty International provides the Committee with a **compilation of existing human rights obligations pertaining to the rights of migrant workers, which are incumbent upon at least some ASEAN member states by virtue of instruments that they have already ratified**. This is intended to support the Committee in clarifying the extent of the current regime for the respect, protection and promotion of the rights of migrant workers, upon which the future instrument will build.

In particular, the Declaration explicitly recalls the 1948 Universal Declaration of Human Rights (UDHR) as an international instrument applicable to all ASEAN member states, as well as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1989 Convention on the Rights of the Child (CRC), to which all ASEAN member states are parties.<sup>4</sup>

Additionally, all ASEAN member states are members of the International Labour Organization (ILO). Six ASEAN member states (Cambodia, Indonesia, Laos, Philippines, Thailand and Vietnam) are parties to: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); the 1966 International Covenant on Civil and Political Rights (ICCPR).

Finally, the Philippines ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); Cambodia has signed it. On 12 April 2012 the Indonesian Parliament approved ratification of the Convention.

**Amnesty International calls upon the Committee to ensure that the Instrument reflects the highest standards of respect, protection and promotion of the rights of migrant workers.**

## **GENERAL PRINCIPLES: NON-DISCRIMINATION**

All ASEAN member states, as members of the UN, are bound by its Charter, which repeatedly calls for “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.<sup>5</sup>

The right not to be discriminated against is enshrined in Article 2 of the UDHR, Article 2.2 of the ICESCR and Article 2.1 of the ICCPR. Article 7 of the UDHR and Article 26 of the ICCPR declare the right to equality before the law and equal protection of the law and the right to be protected against discrimination. Article 2 of the CRC imposes on all ASEAN member states the obligation to protect children from discrimination on the basis of the child’s or their parent’s national origin or status. The CEDAW details several aspects of the prohibition on discrimination against women and the obligation to ensure the equality of men and women.

Last but not least, the ASEAN Charter obliges all the Association’s member states to act, *inter alia*, “in accordance with the principle[s]” of “remaining actively engaged, outward-looking, inclusive and non-discriminatory.”<sup>6</sup>

The principle of non-discrimination generally prohibits discrimination between citizens and non-citizens.<sup>7</sup> It equally generally prohibits discrimination based on migration status, including discrimination against irregular migrants.<sup>8</sup>

**The organization urges the Committee to include provisions in the Instrument to clarify that any obligations it sets out must be implemented without discrimination.**

## **RIGHT TO FREEDOM OF ASSOCIATION AND RIGHT TO FORM AND JOIN TRADE UNIONS**

The rights to freedom of peaceful assembly and association are enshrined in Article 20 of the UDHR and Article 22 of the ICCPR. In particular, Article 23.4 of the UDHR, Article 8 of the ICESCR and Article 22 ICCPR declare the right to form and to join trade unions.

Four ASEAN member states are parties to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Convention No. 87) (Cambodia, Indonesia, Myanmar, Philippines). Five ASEAN member states are parties to the Right to Organise and Collective Bargaining Convention, 1949 (ILO Convention No. 98) (Cambodia, Indonesia, Malaysia, Philippines, Singapore). Additionally, the Governing Body of the ILO has identified freedom of association and the effective recognition of the right to collective bargaining as one of the fundamental principles and rights at work, which all ILO member states are bound to, even if they have not ratified the relevant Conventions.<sup>9</sup>

**Amnesty International therefore urges the Committee to include in the Instrument the right of all migrant workers to freedom of association, in particular the right to form and join trade unions and to collective bargaining.**

## **RIGHT TO BE PROTECTED FROM SLAVERY, SERVITUDE AND FORCED OR COMPULSORY LABOUR**

The right not to be held in slavery or servitude is included in Article 4 of the UDHR. Article 8 of the ICCPR declares the right not to be required to perform forced or compulsory labour.

Nine ASEAN member states are parties to the Forced Labour Convention, 1930 (ILO Convention No. 29) (Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam). Five ASEAN member states are parties to the Abolition of Forced Labour Convention, 1957 (ILO Convention No. 105) (Cambodia, Indonesia, Philippines, Singapore, Thailand). Additionally, the Governing Body of the ILO has identified the elimination of all forms of forced or compulsory labour as one of the fundamental principles and rights at work, which all ILO member states are bound to, even if they have not ratified the relevant Conventions.<sup>10</sup>

**Amnesty International urges the Committee to include in the Instrument the right of migrant workers to be protected from all forms of forced or compulsory labour.**

## **OTHER LABOUR RIGHTS**

The Declaration reiterates the obligations incumbent upon ASEAN (receiving) states to:

Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working... conditions for migrant workers (operational paragraph 8);

and to

Promote decent, humane, productive, dignified and remunerative employment for migrant workers (operational paragraph 15).

**Amnesty International recommends that the Committee includes in the Instruments provisions ensuring the respect, protection and promotion of the following rights:**

- **Right of children to be protected from economic exploitation** and from performing any work that is likely to be hazardous, to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development (Article 32 of the CRC). Nine ASEAN member states are parties to the Minimum Age Convention, 1973 (ILO Convention No. 138) and the Worst Form of Child Labour Convention, 1999 (ILO Convention No. 182) (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Viet Nam). Additionally, the Governing Body of the ILO

has identified the effective abolition of child labour as one of the fundamental principles and rights at work, which all ILO member states are bound to, even if they have not ratified the relevant Conventions.<sup>11</sup>

- **Right to work and to free choice of employment** (Article 23.1 of the UDHR and Article 6 of the ICESCR).
  
- **Right to equality of opportunity or treatment in employment or occupation.** In particular, right to equal pay for equal work without any discrimination (Article 23.2 UDHR and Article 7.a.i of the ICESCR). With respect to women, Article 11 of the CEDAW imposes on all ASEAN member states the obligation to respect, protect and promote the right of women:
  - to work on a basis of equality with men;
  - to free choice of profession and employment;
  - to the same employment opportunities available to men;
  - to equal remuneration and to equal treatment in respect of work of equal value;
  - to protection from dismissal on the grounds of pregnancy or of maternity leave.

Eight ASEAN member states are parties to the Equal Remuneration Convention, 1951 (ILO Convention No. 100) (Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Viet Nam). Five ASEAN member states are parties to the Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention No. 111) (Cambodia, Indonesia, Laos, Philippines, Viet Nam). Additionally, the Governing Body of the ILO has identified the elimination of discrimination in respect of employment and occupation as one of the fundamental principles and rights at work, which all ILO member states are bound to, even if they have not ratified the relevant Conventions.<sup>12</sup>
  
- **Right to just and favourable conditions of work** (Article 23.1 of the UDHR), **including the right to safe and healthy working conditions** (Article 7.b of the ICESCR). In particular, the right of women to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction (Article 11.1 of the CEDAW).
  
- **Right to just and favourable remuneration ensuring an existence worthy of human dignity** (Article 23.3 of the UDHR and Article 7.a.ii of the ICESCR).
  
- **The right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay** (Article 24 of the UDHR and Article 7.d of the ICESCR).



## **RIGHT TO AN ADEQUATE STANDARD OF LIVING**

The Declaration reiterates the obligation of (receiving) states to promote

“adequate access to decent... living conditions for migrant workers”  
(operational paragraph 8).

The right to a standard of living adequate for the health and well-being of an individual and their family, including adequate food, clothing and housing is enshrined in Article 25 of the UDHR and Article 11 of the ICESCR.

**Amnesty International urges the Committee to include in the Instrument provisions to ensure the respect, protection and promotion of this right.**

## **RIGHT TO PROTECTION AGAINST TRAFFICKING**

The Declaration states that sending states are obliged to:

Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and

Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies (operational paragraphs 13 and 14).

Additionally, the Declaration states that ASEAN as a whole is committed to:

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

Amnesty International welcomes these commitments as positive steps towards the prevention and punishment of smuggling and trafficking. Article 6 of the CEDAW imposes on ASEAN member states the -obligation to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. Article 35 of the CRC imposes on all ASEAN member states the obligation to take all appropriate measures to prevent the abduction, sale or traffic in children. Six ASEAN member states ratified the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines); Thailand has signed it.

**Amnesty International further urges the Committee to include in the Instrument specific provisions for the respect, protection and promotion of the rights of victims of trafficking, including the right to seek and obtain justice and the right to be protected from further abuse, as detailed in the Recommended Principles and Guidelines on Human Rights and Human Trafficking<sup>13</sup>.**

Such rights have only partially been reflected in the 2004 ASEAN Declaration Against trafficking in Persons Particularly Women and Children, which declares that member states should, inter alia,

undertake actions to respect and safeguard the dignity and human rights of genuine victims of trafficking in persons.<sup>14</sup>

### **RIGHT TO FREEDOM FROM ARBITRARY ARREST AND DETENTION**

The Declaration states that (receiving) member states are obliged to:

Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations (operational paragraph 10).

This is one of the obligations incumbent upon ASEAN member states in order to ensure the respect, protection and promotion of the rights of people in detention, including those in migration detention. The right to freedom from arbitrary arrest and detention is enshrined in Article of the 9 UDHR and Article 9 of the ICCPR.

**Amnesty International urges the Committee to include in the Instrument provisions to ensure respect, protection and promotion of the right to liberty of migrants, including the right to be free from arbitrary arrest and detention.** In particular, any measures restricting the right to liberty of migrants should only be used when necessary and proportionate to achieving a legitimate objective under international law. Any decision to detain should comply with international law and standards pertaining to the lawfulness of detention, and should be based on an individualized assessment, including the individual's personal history and the risk of absconding. International law makes clear that state authorities must demonstrate in each individual case that detention is necessary and proportionate to the objective to be achieved. Automatic and prolonged detention clearly violates international law and standards.

Additionally, Amnesty International believes that the detention of children solely for immigration purposes, whether they are unaccompanied, separated or held together with their family members, can never be justified and represents a failure of the obligation to respect, protect and promote children's human rights.<sup>15</sup>

**Amnesty International urges the Committee to include in the Instrument provisions to prohibit the detention of children for immigration purposes.**

## **RIGHT TO AN EFFECTIVE REMEDY AND ACCESS TO JUSTICE**

The right to an effective remedy is enshrined in Article 8 of the UDHR, Article 2 of the ICCPR and Article 6 of CERD.

Amnesty International welcomes that, “acknowledging also the need to address cases of abuse and violence against migrant workers whenever such cases occur”, the Declaration states that (receiving) ASEAN member states are obliged to

Facilitate access to... remedies through information, training and education, access to justice... as appropriate and in accordance with the legislation of the receiving state (operational paragraph 7).

Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states (operational paragraph 9).

**The organization urges the Committee to include in the Instrument specific provisions to ensure that irregular migrants and migrants with an insecure status fully enjoy their right to an effective remedy and access to justice.** In particular, irregular migrants who suffer human rights abuses should have access to justice and be able to report and/or file legal complaints for the abuses suffered without fear of deportation or repatriation.<sup>16</sup> Migrants whose status is regular but insecure (because it is dependent on an employer, spouse or other family member) who suffer human rights abuses should have access to justice and be able to report and/or file legal complaints of the abuses suffered without fear of losing their status.

## **REGULARIZATION OF “CREATED” IRREGULAR MIGRANTS**

The Declaration recognizes:

the sovereignty of states in determining their own migration policy relating to migrant workers, including determining entry into their territory and under which conditions migrant workers may remain (preambular paragraph 6)

and clarifies that

Nothing in the present Declaration shall be interpreted as implying the regularisation of the situation of migrant workers who are undocumented (operational paragraph 4).

Amnesty International acknowledges that states have the right to secure their borders and regulate the entry of foreigners into their territory, but stresses that this right is limited by international law. Any law, policy or measure relating to border control or the regulation of entry and stay must respect, protect and promote the rights of migrants, asylum seekers and refugees. Any law, policy or measure relating to border control or the regulation of entry and stay that results in violations of international law or human rights goes well beyond the legitimate limits of state sovereignty.

In addition, complex migration and labour regulations in receiving countries increase the risks that migrant workers who arrived in the country legally will fall into irregular status. The so-called “created” irregular migrants (migrants that fall in an irregular status as a result of bureaucratic failings, abuse by employers, or legal loopholes) include persons whose residence and/or work permits have expired due to long delays and excessive bureaucracy, onerous requirements for the renewal process, and/or inconsistencies in residence and work permit procedures.

Amnesty International therefore welcomes operational paragraph 2 of the Declaration, which states:

The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented.

**The organization urges the Committee to include in the Instrument specific provisions to ensure that individuals who were originally granted regular status do not fall into irregularity, through no fault of their own, as a result of bureaucratic failings, abuse by employers, or legal loopholes.**

### **RIGHTS OF REGULAR MIGRANTS: FAMILY REUNIFICATION**

Under Article 16 of the UDHR and Articles 17.1 and 23.2 of the ICCPR, states have an obligation to respect the right to found a family and refrain from arbitrary or unlawful interference with the family. In particular, Articles 9.1 and 10.1 of the CRC recognize the right to family reunification.<sup>17</sup>

**Amnesty International urges the Committee to include in the Instrument provisions which recognize the right to family reunification as a basis for granting visas to the family members (including parent/guardian/children relationships) of a person (or persons) who have a right to stay in the country, to ensure the family’s unity.**

**The right to family reunification should be guaranteed without discrimination.**<sup>18</sup> In particular, “[m]igrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them”.<sup>19</sup>

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<sup>1</sup> The Association of Southeast Asian Nations (ASEAN) is composed of: Brunei Darussalam, Cambodia, Indonesia, Lao PDR (Laos), Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

<sup>2</sup> ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted in Cebu, Philippines, on 13 January 2007, <http://www.aseansec.org/19264.htm>.

<sup>3</sup> Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Manila, 13 July 2007, <http://www.aseansec.org/20768.htm>.

<sup>4</sup> Declaration, second preambular paragraph.

<sup>5</sup> Charter of the United Nations, adopted and signed on 26 June 1945, entered into force 24 October 1945, Article 1(3). See similarly Articles 13(1)(b), 55(c) and 76(c).

<sup>6</sup> Charter of the Association of Southeast Asian Nations, signed on 20 November 2007, entered into force on 15 December 2008, Article 2(m), <http://www.aseansec.org/publications/ASEAN-Charter.pdf>.

<sup>7</sup> The UN Human Rights Committee clarified that: "Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the [ICCPR], as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike." Human Rights Committee, General Comment No 15: "The position of aliens under the Covenant", 4 November 1986, par2. Differential treatment can be allowed in some circumstances.

<sup>8</sup> The Committee on the Elimination of Racial Discrimination clarified: "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim." The Committee therefore recommended states to "Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status." Committee on the Elimination of Racial Discrimination, General Recommendation 30: "Discrimination against non-citizens", 12 March 2004, par4 and 7. Differential treatment can be allowed in some circumstances.

<sup>9</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its 86<sup>th</sup> session, 18 June 1998.

<sup>10</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its 86<sup>th</sup> session, 18 June 1998.

<sup>11</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its 86<sup>th</sup> session, 18 June 1998.

<sup>12</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its 86<sup>th</sup> session, 18 June 1998.

<sup>13</sup> Addendum to the report of the United Nations High Commissioner for Human Rights, UN Doc. E/2002/68/Add. 1, 20 May 2002.

<sup>14</sup> ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, adopted by the ASEAN Summit in Vientiane, 29 November 2004, par6; <http://www.aseansec.org/16793.htm>. This declaration is, unfortunately, confined “to the extent permitted by their [states’] respective domestic laws and policies”. *Ibid.*

<sup>15</sup> For a full discussion on immigration detention of children see: International Detention Coalition, *Captured Childhood*, March 2012, [http://idcoalition.org/wp-content/uploads/2012/03/Captured\\_Childhood-report.pdf](http://idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report.pdf)

<sup>16</sup> Committee on Migrant Workers, Contribution by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to the High-Level Dialogue on Migration and Development of the General Assembly, UN Doc. A/61/120, 3 July 2006, par15(f).

<sup>17</sup> CRC Art. 10. 1: “In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.”

<sup>18</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination : Denmark, UN Doc. CERD/C/60/CO/5, 21 May 2002, par14.

<sup>19</sup> CEDAW General Recommendation No. 21, Equality in marriage and family relations, 12 April 1994, par10.



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