INTERNATIONAL MIGRATION PAPERS

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Rights of migrant workers in Asia: Any light at the end of the tunnel?

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Foreword

The *International Migration Papers* (IMP) is a working paper series designed to make quickly available current research of ILO's International Migration Programme on global migration trends, conditions of employment of migrants, and the impact of state policies on migration and the treatment of migrants. Some ten to fifteen such papers are published each year as working papers. It continues the *Migration for Employment* series started in 1975 under the World Employment Programme.

Its main objective is to contribute to an informed debate on how best to manage labour migration, taking into account the shared concerns of countries of origin and employment for generating full and productive employment of their nationals, while at the same time respecting the basic rights of individual migrant workers and members of their families.

In this paper Piyasiri Wickramasekara, Senior Migration Specialist, ILO, examines the issue of rights of migrant workers in Asia drawing upon a variety of sources. According to his analysis, the growing mobility of workers has not resulted in comparable improvements in treatment and conditions of work of migrant workers. The persistence of temporary labour migration regimes, commercialization of migration processes, and the limited opportunities for legal migration have led to detriment of worker rights in Asia. The first part of the paper highlights some definitional issues, and the context of Asian migration, which have a bearing on the protection of migrant worker rights. The second part briefly reviews the status of migrant rights in Asia. The third section provides an overview of the international instruments designed to provide for the protection of migrant workers, particularly the ILO instruments. The author highlights that even though many countries in Asia have not ratified ILO and UN migrant worker-specific Conventions, the basic human rights of migrant workers should be well covered by the core Conventions of the ILO and universal human rights instruments ratified by them. Yet poor enforcement and lack of access to justice and redress mechanisms are major obstacles to the realisation of these rights in practice. The paper reviews regional initiatives next. While there are some tendencies towards convergence on labour migration policies, the author finds that there is no clear ground for any complacency. In the final section, the author highlights some policy approaches to protection of worker rights against the backdrop of the Resolution on migrant workers in a global economy adopted at the ILO International Labour Conference, June 2004.

Geneva, December 2004

Manolo Abella
Chief
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1. INTRODUCTION[1]

International labour migration from Asia has risen to unprecedented levels in recent years. Demographic trends, accelerated globalization, widening economic disparities between countries, and political developments largely account for this movement. Yet, increased mobility has not necessarily been accompanied by improved working conditions or rights for migrant workers. Most Asian migrant workers, especially low skilled workers, do not enjoy basic human rights in the receiving countries, and experience widespread abuse and exploitation. Tightening immigration controls and commercialization of recruitment processes have further contributed towards the erosion of migrant rights in Asia. The objective of this paper is to review current trends, highlight the wide gaps between policy and practice, and propose some measures for improvement of the situation. The first part of the paper highlights some definitional issues, and the context of Asian migration, which have a bearing on the protection of migrant rights. The second part briefly reviews migrant rights issues in Asia. The third section provides an overview of the international instruments designed to provide for the protection of migrant workers, particularly the ILO instruments. Next the paper reviews commitments at global summits and regional initiatives. The paper highlights possible areas for policy intervention in the final section.

1.1 Notes on terminology: Migrants and migrant workers

The United Nations Population Division (UNPD 2002) estimated that in 2000, around 175 million people –described as migrants- were residing outside their country of birth or citizenship - three per cent of the world's population. But this includes not only migrant workers, but also their families and dependants, asylum seekers and refugees. The ILO estimates that only about 86 million of this number are migrant workers.[2] The ILO *Migration for Employment Convention (Revised), 1949 (No. 97*) in its Article 11, defines a "migrant for employment" as: *"…a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment."*[3] The Convention exempts frontier workers, seamen, short-term entry of members of the liberal professions and artists, from its application.[4]

The International Convention on Protection of the Rights of All Migrant Workers and Members of their Families (referred to as the UN Convention on migrant workers), 1990, uses a broader and more comprehensive definition which reads as*: "a person who is to be engaged, is engaged or has been engaged in remunerated activity in a State of which he or she is not a national"*.[5] This definition clearly recognizes that the loss of employment in a host country should not result

[1] The paper reflects the personal views of the author and not necessarily those of his employer, the International Labour Office. Parts of this paper draws upon some material in: Piyasiri Wickramasekara, Migrant workers in Asia and the Pacific: Issues in human rights and the principle of non-discrimination, Paper presented at the Asia-Pacific Regional Seminar of Experts in preparation for the World Conference on Racism, Xenophobia and Related Intolerance: Organized by the Office of the High Commissioner for Human Rights (OHCHR) and UN ESCAP, 5-7 September, 2000, Bangkok, Thailand. The analysis has been updated mostly to the mid-2004 situation.

[2] ILO (2004). A fair deal for migrant workers in the global economy, Report VI, International Labour Conference 2004, 92nd Session. Geneva, International Labour Office, Table 1.1.

[3] Article 11.1, ILO Convention No. 97

[4] Article 11.2, ILO Convention No. 97

[5] Article 2.1, International Convention on the Rights of Migrant Workers and Members of their Families, 1990; this Convention will be referred to as the UN Convention 1990 hereafter.

in loss of migrant worker status. The UN Convention (article 2) also includes the following workers not included in ILO Conventions: frontier workers; seafarers; seasonal workers; project-tied workers; workers on offshore installations; itinerant workers; specified-employment workers and self-employed workers.

Indeed current international human rights discourse has carried this development further by advocating the even broader term *"migrants"*. This marks a departure from addressing the issues of migrant rights under the rubric of *"protection of the rights of all migrant workers and their families"* to a concept of "*human rights of migrants"*.[6] In the light of changing and expanding dynamics of international migration today, concern over the adequacy and appropriateness of prevailing definitions has mounted. This is because certain important groups of migrants may not be captured under the term 'migrant workers'. More specifically, rights of victims of trafficking, undocumented migrants, short-term contract workers, etc., need to be explicitly included in discussions of human rights issues. The mandate of the Special Rapporteur on the Human Rights of Migrants – a position created in 1999 by the UN Commission on Human Rights - recognizes this issue when it requested the Special Rapporteur to *"examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are undocumented or in an irregular situation"*.[7] Another approach is to formulate the discussion in terms of rights of citizens and non-citizens (Weissbrodt 2003).

The UN Special Rapporteur on the human rights of migrants has remarked on the shortcomings of a definition, which looks to the reasons for migration as its point of reference (UN Commission on Human Rights 2002).

"Definitions that are related to the reasons why people leave their countries of origin are perhaps the least suitable kind of definition, except to the extent that they give access to legal protection and status in the host country, as in the case of refugees. In the light of the political, social, economic and environmental situation of many countries, it is increasingly difficult, if not impossible, to make a clear distinction between migrants who leave their countries because of political persecution, conflicts, economic problems, environmental degradation or a combination of these reasons and those who do so in search of conditions of survival or well-being that do not exist in their places of origin".

A number of persons who flee persecution, environmental devastation and civil conflict or generalized abuse of human rights are not recognized as refugees, or do not want to identify themselves as asylum seekers for usually obvious reasons. Accordingly distinctions today between refugees, asylum-seekers, migrant workers and other migrants are increasingly blurred. There is no universally accepted categorization system by which all migrants can be neatly defined and distinguished. Irregular or undocumented migrants by definition may not be easily recognized or acknowledged as migrant workers, and yet ILO estimates suggest that as many as 15-20 of migrant workers globally are in irregular status. The lack of legal status or recognition for these migrants makes them particularly vulnerable to abuse, exploitation and denial of their most basic human rights. The Office of the High Commissioner for Human Rights and the UN Special Rapporteur on Human Rights of Migrants, as well as NGOs and some governments, are keen to ensure that the discussion of human rights of migrants take these broader groups into account.

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[6] The author is grateful to Mr Patrick Taran for elaborating this point.
[7] See http://www.ohchr.org/english/issues/migration/rapporteur/

A working definition has been formulated by the UN Special Rapporteur on the Human Rights of Migrants to address the current gap in protection by international standards for these less well defined groups. She has adopted the following working definition of migrants in the light of protecting their human rights (UN Commission on Human Rights 2002).

(a) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State;
(b) Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, permanent resident or naturalized person or of similar status; and
(c) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements.

As this is an area still in the stages of debate, there exist no reliable estimates of the broader categories of migrants in Asia. Most of the discussions in Asia have dealt with 'migrant workers', and not with the broader groups as mentioned above. The present paper will therefore, mainly focus on migrants in the world of work – migrant workers - the subject of the ILO mandate.

1.2 Human rights and rights at work

Rights at work or labour rights are a subset of the full spectrum of human rights. The two ILO Conventions on migration (Migration for Employment, 1949 (No. 97) and the Migrant Workers Convention, 1975 (No. 143)) do not spell out fundamental human rights and migrant worker rights separately. Article 1 of the ILO Convention on Migrant Workers, 1975 (No. 143) in fact asserts that: *"Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers"* although it does not elaborate what these rights are. It has been argued that this does not imply an open-ended reference to the entire body of human rights codified in UN instruments (Bosniak, 1991). In contrast, the UN Convention distinguishes between basic human rights of all migrant workers and additional rights enjoyed by migrant workers in regular status. The Convention recognizes non-derogable human rights applicable to all workers (in regular and irregular status): the right to life (Art. 9), protection from torture or cruel, inhuman or degrading treatment or punishment (Art.10), freedom of thought, conscience and religion (Art. 12), the right to liberty and personal security and protection against arbitrary detention (Art. 16), freedom from slavery, servitude or forced or compulsory labour (Art. 11), and the right to procedural guarantees (Art. 18). [8]

The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session, on 18th June 1998, has provided a firm basis for identifying core labour rights which apply to all workers including migrant workers in irregular status: freedom of association, effective recognition of the right to collective bargaining, elimination of all forms of forced and compulsory labour, effective abolition of child labour, and elimination of discrimination in respect of employment and occupation. This is further discussed in section 4.3.1.

[8] See ICMC (2004). How to Strengthen Protection of Migrant Workers and Members of their Families with International Human Rights Treaties: A do-it-yourself kit, The International Catholic Migration Commission, Geneva, January 2004 http://www.icmc.net/docs/en/publications/advockit00

2. KEY FEATURES OF ASIAN LABOUR MIGRATION AND MIGRANT RIGHTS

The issue of labour migration from and within Asia has been the subject of considerable research in recent years. The following have contributed to the discussion: annual workshops of the Japan Institute of Labour[9] on the Labour Market and Migration in Asia in cooperation with ILO/OECD (proceedings published by OECD); annual yearbooks on migration by the Asian Migrant Centre (Hong Kong) and the Migrant Forum for Asia (Manila); the research programme of the Refugee and Migratory Movements Research Unit (RMMRU), University of Dhaka; the Asia Pacific Migration Research Network (APRMN), Wollongong University, Australia; the Institute of Southeast Asian Studies, Singapore; the Scalabrini Migration Centre, Manila; and the Asian Research Centre for Migration (ARCM), Chulalongkorn University, Bangkok; Department for International Development ((DFID 2003)((ISEAS 1995; Athukoralage, Manning et al. 2000; OECD and JIL 2002; APMRN 2003; Wickramasekara 2003, Ahn 2004). Some of these are simply narrow discussions of migration trends and flows and related economic aspects with scant attention to the broader social dimensions of migration and issues of migrant rights. Ahn (2004) has attempted to relate outmigration from South Asia to the issue of human rights.

2.1 Key features of Asian labour migration

I have discussed the specific features of Asian labour migration which have a bearing on rights of migrant workers is in an earlier paper (Wickramasekara, 2002). Box 2 provides a summary of these features.

The summary of conclusions of the ILO Regional Tripartite Meeting on Challenges to Labour Migration Policy and Management in Asia sums up the Asian situation well (ILO 2003a).

"While market forces are driving labour migration, there are several signs of market failures associated with its related processes. A number of risks have been associated with migration including racism and xenophobia, trafficking and forced labour, recruitment malpractices such as fraudulent job offers and exorbitant placement fees, debt bondage, sexual and physical harassment, employment in hazardous jobs, and under or non-payment of wages. Experience suggests that state intervention by sending and receiving countries through transparent, efficient, and appropriate regulatory institutions and measures are essential to the efficient and equitable working of the labour market. "

Despite the demonstrated significance of labour migration as a structural feature in Asian economies, it *"... remains an area where there is considerable suspicion, misinformation, bigotry, racism and lack of understanding. This will only be broken down through greater understanding of the migration process and its effects*" (Hugo 2003).

2.2 Categories of migrant workers in Asia most vulnerable to rights abuse

In an earlier paper, I have identified the following as the most vulnerable groups of workers in the Asian context (Wickramasekara 2002; ILO 2004b).

- *Women workers: domestic workers and entertainers*
- *Migrant workers in irregular status*

[9] Now renamed as the Japan Institute for Labour Policy and Training (JILPT).

- *Trafficked persons*

I shall only highlight a few recent developments in relation to the first two categories because of the extensive treatment in my previous paper, and subsequent literature.

Box 1: Features of Asian labour migration affecting migrant rights

- **Temporary labour migration regime**

Labour migration from and within Asia has mostly been on the basis of fixed term contracts, thereby permitting only temporary migration. The short duration of contracts (usually ranging from 1-3 years) does not provide much scope for the full recognition of migrant rights and their economic and social integration in receiving countries. Permanent or settler migration still takes place on a limited scale to Australia, Canada and New Zealand.

- **A skill profile dominated by semi-skilled and low-skilled workers in migration flows.**

The bulk of Asian migrants are semi-skilled and low-skilled workers who face numerous problems in protection in both sending and receiving countries. In general, skilled workers and professionals are accorded more favourable treatment as they migrate under special schemes or move with foreign capital.

- **High incidence of irregular migration flows.**

The most disturbing development from the viewpoint of protection of migrants' rights in Asia is the rising share of 'irregular migration' – commonly referred to as 'illegal', 'undocumented' or 'clandestine' migration. Since these workers have no legal status in the host countries, their rights are subject to frequent abuse. The main causes of irregular migration in the region are: restrictive immigration policies in labour-shortage receiving countries; extreme poverty and unemployment problems in countries of origin; bureaucratic systems and procedures which add to high costs of emigration; long and porous borders with controls of limited effectiveness; political suppression, persecution and armed conflict; malpractices of private recruitment agencies; and, activities of criminal gangs and traffickers.

- **Growing share of female migration**

Another pattern to emerge has been the increasing share of female workers migrating on their own for overseas employment. The majority of these women migrate for low wage occupations such as domestic work. Hong Kong SAR and Singapore represent the major destinations of domestic workers in Asia while a sizeable number also migrate to the Middle East, especially to Saudi Arabia and Kuwait. Entertainers also represent an important group of women migrants. In all destinations women migrants are one of the most vulnerable groups.

- **Increased trafficking of women and children.**

Another alarming aspect of labour migration from and within Asia is the increased trafficking of women and children across borders, often for commercial sex and other exploitative and abusive purposes. The Greater Mekong Subregion and the Indian subcontinent represent several transnational routes of trafficking. Thailand has become a major hub in this process of trafficking within the Mekong subregion. The working conditions of trafficked persons often amount to slavery, forced labour or debt bondage representing serious abuse of their basic human rights.

Source: Wickramasekara, P. (2002). Asian Labour Migration: Issues and Challenges in an Era of Globalization, International Migration Papers No 57, Geneva, International Migration Programme, International Labour Office.

2.2.1 Domestic migrant workers

The ILO (the Migration Programme and the Gender promotion Programme) has documented the situation of domestic migrant workers in several Middle Eastern countries – Bahrain, UAE, and

Lebanon (Jureidini 2002; Sabban 2002; Sabika al Najjar 2002). These studies highlight the continuing problems of virtual slavery-like conditions of domestic workers in Middle Eastern countries. These abuses are proverbial in the Middle East (Lebanon, Kuwait, Saudi Arabia, Jordan), and some are found even in Singapore and Hong Kong SAR where better labour administration systems prevail (Neetu Sakhrani 2002; Lap-Chew 2003; Asian Migrant Centre and Migrant Forum in Asia 2004). Human Rights Watch (2004a) has documented in detail the problems faced by Indonesian migrant workers in Malaysia.

The UN Special Rapporteur on human rights of migrant workers has examined the situation of domestic migrant workers in her January 2004 report, and highlighted the rampant abuses and exploitation suffered by them. Such factors have turned domestic work into a form of slavery. *"Many migrant domestic workers work in servitude or semi-slavery, given that they are exploited economically by, are totally dependent on and cannot find a way out of the working relationship."* (UN Commission on Human Rights 2004)

A major case that shocked Malaysia was that of Nirmala Bonat, a migrant domestic worker from Indonesia, who was found to have been subject to systematic and sustained physical and emotional abuse by her Malaysian employer over several months (Human Rights Watch 2004a). Many believe this to be the tip of the iceberg because few dare to complain against their employers or find an opportunity to complain due to a number of factors such as fear of losing the job, lack of access to protection mechanisms, fear of deportation, etc.

Their continuing plight and vulnerability have given rise to a number of recent initiatives such as the *Regional Summit on Foreign Migrant Domestic Workers* 26-28 August, 2002 held in Colombo which adopted the Colombo Declaration (CARAM Asia 2002) and the ILO Programme Consultation Meeting on the *Protection of Domestic Workers Against the Threat of Forced Labour and Trafficking*, Hong Kong, January 2003. Yet the fact remains that these initiatives have had little tangible impact on the actual situation of the target group which is very difficult to reach because of their isolation in private households and the fact that domestic work is outside the scope of labour laws in many countries. The ILO Special Action Programme on Forced Labour is treating the issue as one of forced labour, and is currently implementing a project on *"Mobilizing Action for the Protection of Domestic Workers from Forced Labour and Trafficking"* covering Indonesia, the Philippines, Malaysia and Hong Kong SAR.

2.2.2 Migrant workers in irregular status and mass deportations

Like in the West, Asian countries are highly sensitive about the phenomenon of irregular migration, and rarely look at the root causes of irregular migration, or admit the contribution made by such workers to their economies. The reliance on migrant workers in irregular status year after year to satisfy long term structural labour market needs is hardly a sustainable option. It exposes workers in irregular status to extreme forms of exploitation and abuse. The ILO Asian Tripartite Meeting on Migration, 2003, pointed out: *"Despite major barriers to migration, irregular migration has grown in recent years in Asia due to, among others, restrictive labour migration policies which are not in line with labour market needs."*(ILO 2003a). As Joseph Uow (Uow 2003) has correctly pointed out in the context of Malaysia: "… *the fact of the matter is that Indonesian workers, whether legal or illegal, have long been, and will remain, a vital component of the Malaysian economy."*

I shall only highlight responses to irregular migration in some countries which have serious implications for human rights of workers[10]. For a long period of time, measures aimed at reducing the number of workers in irregular status have been confined to penalizing the migrants. The reaction even in developed countries has been to suppress irregular migration by way of increased policing and border security or making border crossing more risky (by driving would-be-migrants to take more risky paths) rather than addressing its root causes. Such policies have had limited success even in advanced economies as Cornelius Wayne (Wayne Cornelius 2004) has highlighted in his in-depth analysis of the US situation.

International instruments clearly state that mass deportations or expulsions of migrant workers (whether regular or irregular status) should be avoided because they result in gross violations of human rights, especially in detention and in transport. In the Bangkok Declaration on Irregular Migration adopted in 1999, major countries in Asia committed themselves to ensure that: *"Return should be performed in a humane and safe way*".

Yet this principle has not been followed in practice with large scale arrests, detention and deportation of workers by several receiving countries. "*Large-scale abuses, including deaths, torture, and the sexual abuse or rape of both migrant men and women, have been reported in the detention camps and in the process of detection."(MFA and MRI 2004).* The report by the NGO *Tenaganita* in 1995 - *Memorandum on Abuse*, *Torture, Dehumanized Treatment and Deaths of Migrant Workers at Detention Camps,"* – was an eye opener on the severe maltreatment of migrant workers being held in labour detention centers in Malaysia nationwide[11]. During the Asian financial crisis, Malaysia, the Republic of Korea and Thailand resorted to mass deportations of foreign workers to save jobs for locals.

Malaysia has further hardened its policy towards migrant workers, especially irregular workers, with amendments to immigration laws in 2002 (Asian Migrant Centre and Migrant Forum in Asia 2004). Corporal punishment of migrant workers in irregular status and their employers (in the form of caning as in Singapore) has been enforced. Though the Immigration Act provides for imprisonment and whipping for recruiters and employers for violations under the Act, yet not a single employer or recruiter has been imprisoned or whipped, while than 50,000 migrant workers have been sentenced to imprisonment for violating article 6 for illegal entry under the amended Immigration Act, and about 9000 migrants have so far been whipped (as of December 2003) (Tenaganita 2003).

At the same time, Malaysia has carried out mass deportation exercises of Bangladeshi, Indonesian and Filipino workers, and also imposed a total ban on the recruitment of Bangladeshi workers at one stage although this has been removed now. There has been deep concern in both Indonesia and the Philippines about the deportation procedures. The Philippine Foreign Secretary Blas Ople called the congestion at the detention facilities *'appalling',* and the Philippines formally protested to Malaysia on 27 August 2002 over reported mistreatment of Filipino migrants after three children died during deportation, accusing Malaysia of rounding up migrants into crowded

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[10] See Wickramasekara, P. (2005). Notes on Irregular Migration in Asia: Issues and Policies, presentation at the Parallel event on Human Rights of Undocumented Migrants, jointly organized by Migrants Rights International and the Platform for International Cooperation on Undocumented Migrants in Europe (PICUM), UN Commission on Human Rights, Geneva, 7th April, 2005..

[11] However, Ms. Irene Fernandez, the migrant rights' activist and authoress of the report, was convicted to 12 months imprisonment by a Malaysian court on October 16, 2003, following a protracted trial on grounds of criminal defamation.

detention facilities, sometimes without food and water. The Philippine Daily Inquirer put the total number of Filipino infant deaths during the deportations at 13. (Bill Guerin 2002).

Malaysia is now repeating the same policies even harsher. Following the lapse of an amnesty for workers in irregular status to leave the country in which about 400,000 workers took advantage, Malaysia has started a crackdown with arrests, detentions, flogging and deportations in early 2005. The most objectionable aspect of this operation is empowering vigilante groups to turn in or capture migrant workers for payment which can unleash gross violations of human rights. It provides further incentives to employers to turn in workers to avoid payment of due wages which is their right according to ILO Convention C143. Indonesia's Labour and Transmigration Minister Fahmi Idris claimed that 100,000 Indonesian illegal workers have not been paid wages, which is the reason why they refused to return home even in the face of a crackdown[12].

The introduction of regularization programmes and signing of MOUs for legal admission of workers are positive developments in this regard. Thailand implemented a regularization programme for undocumented migrant workers recognizing the need for a long term perspective in regard to labour migration in 2001. Given the practical problems experienced, the Thai government has now introduced a new registration scheme under which registered migrant are issued work permits for one year, and entered into MOUs with neighbouring countries to facilitate identification and registration. The Republic of Korea also has shown some flexibility in introducing an Employment Permit Scheme for the legal admission of low skilled workers after relying on trainees and migrant workers in irregular status for some time. Malaysia has also signed MOUs with a number of Asian labour sending countries for hiring of workers.

3. MIGRANT WORKER RIGHTS IN PRACTICE

The forthcoming ILO multilateral framework on labour migration will attempt to highlight key principles and guidelines drawn from ILO and other international instruments and international good practices. Böhning (1982) contains the first detailed statement of the relevant provisions of ILO instruments for international contract migration with special refernce to Asian migrant-sending countries. Skeldon (Skeldon 2000) and Villalba (Villalba 2000) have dealt with general patterns of discrimination against migrants in the Asian context. I shall only discuss aspects related to labour rights here.

3.1 Access to the labour market and employment

While it is not openly admitted, a number of labour receiving countries in Asia give preferential access to the labour market for workers from certain countries. For instance, the Taiwan province of China has been recruiting labour mainly from Southeast Asian countries of Indonesia, Thailand and the Philippines, and hardly any from South Asia under its admission policy for unskilled and semi-skilled workers. While this constitutes preferential treatment for certain countries, it does not fall within discrimination as defined by the ILO Convention No.111 unless further criteria such as sex, ethnicity, and race are used.

Japan is especially concerned about cultural homogeneity of its population which it feels, will be threatened by a large influx of foreign workers. Yet this is an untested hypothesis since the share of the foreign labour force has been extremely low in the case of Japan compared to other Asian countries such as Malaysia or Singapore. This policy is clearly illustrated by its decision to relax

[12] Malaysia begins migrant round-up, BBC NEWS story, 2005/03/01 http://news.bbc.co.uk/1/hi/world/asia-pacific/4306863.stm

the policy in respect of low skilled workers of Japanese descent from Latin America who are believed to be more acceptable on grounds of cultural homogeneity. Yet this policy has deprived employment opportunities for thousands of poor people from Asian countries. To quote from Skeldon (2000): *"Japan has resorted to an immigration policy that is part race-driven. It has looked to ethnic Japanese populations in Brazil and Peru for the recruitment of workers who look Japanese, even if they might not act like Japanese, on the assumption that they will both integrate and be accepted by the local population, more easily."*

Japan also has a long record of discrimination against ethnic Korean workers in job access. Box 1 provides an illustrative case cited by Kagawa (Kagawa 2001).

Australia has relaxed its policy towards admission of Asian immigrants in the past two decades or so. Yet Asian migrant workers face numerous difficulties in the Australian labour market including discrimination and non-recognition of qualifications. A recent paper by Anh and Miller (Anh T Le and Paul W Miller 2000) concludes:

"Among the overseas-born, those who were born in non English-speaking countries experienced a high unemployment rate (8 per cent) compared to those who were born in main English-speaking countries (5 per cent). Therefore, it appears that immigrants from non-English speaking countries are the most disadvantaged birthplace group in the labour market."

Junankar el al. (Junankar, Paul et al. 2001) carried out an econometric investigation of labour market discrimination against workers of Asian origin in Australia. They analyzed the probability of unemployment and the transition from unemployment to employment for Asians. This was done controlling for important factors like education, visa category, demographic profile and English language ability, which could lead to observed differences. On the basis of this analysis, they concluded: *".... we have found prima facie evidence for discrimination against Asian migrants which policy should address in the future. This discrimination may be because of employers not willing to adequately recognise qualifications of Asian migrants or due to pure discrimination." (p.24)*

Some Australian professional bodies have been under attack for their continued resistance to recognizing the qualifications earned by nationals of certain countries, especially Asians, which is claimed to be discriminatory. The Report of the Committee for the Review of Practices for the Employment of Medical Practitioners in the NSW Health System found many instances of racial discrimination against qualified medical personnel from non-white or non-English speaking countries (New South Wales Government 1998). The Australian Doctors Trained Overseas Association (ADTOA) has alleged that the practices of the Australian Medical Council and the Royal Australian College of Surgeons (RACS) amount to institutional racism and discrimination[13]. In a recent submission to the Australian Competition and Consumer Commission, ADTOA maintained that the RACS had a track record of discrimination and lack of transparency and credibility (Iredale 2001).

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[13] The ADTOA cites the case of a visiting white South African doctor, who was allowed to practice medicine even though he had failed an Australian Medical Council examination. (The Guardian, 1999).

Box 1
Case of employment discrimination of Korean student

In Japan, employers can make 'informal decisions to employ' applicants before the employment contract is concluded. According to the law, an employment contract is formed when the employer notifies the person of the informal decision to employ. While the employer has the right to rescind this informal decision before the applicant commences work, it should be done on valid grounds only. A court case in Japan has illustrated that the employer cannot withdraw its informal hire decision because of the applicant's nationality.

Kagawa (2001) cites the case of a Korean student living in Japan who had both a Japanese and a Korean name. When he applied for the job, he wrote his Japanese name on the curriculum vitae because he was afraid of discriminatory treatment. Once he received the informal decision to be hired, he informed the concerned Japanese company that he was a Korean student residing in Japan. The company then withdrew the employment offer. In court, the company insisted that it dismissed the applicant because he provided false career details. The court however, found that this decision to dismiss was made because the person was Korean, and judged that it was discriminatory treatment owing to nationality, which is prohibited under Article 3 of the Labour Standards Act. (Yokohoma district court, 19 June 1975)

Kagawa adds: *"Sadly, the employment discrimination against Koreans residing in Japan still takes place".*

Based on (Kagawa 2001)pp.103-104.

In most Asian countries, access to employment for migrant workers is subject to strict regulations, which control the sectors and conditions in which migrants may be employed. While international instruments stress the need to ensure maintenance of residency rights in case of incapacity to work, protection in case of redundancy and need for geographical and occupational mobility, these are commonly denied to temporary migrant workers by labour-receiving countries in Asia.[14] Provisions in this regard are much less generous in Asia than in Europe where migrant workers can change jobs after 3-5 years of employment. In Asia there is hardly any freedom and flexibility to choose one's employment. This is because virtually no country has accepted the principle that foreign workers should be guaranteed free access to the labour market after a certain temporary period of restriction (Abella 1999) Domestic workers in Hong Kong SAR are only given two weeks to find another employer in the case of job loss. Needless to say that this is an unrealistically short time for job search. Although unions and the ILO has raised this issue with the Hong Kong SAR, the government has consistently defended it as necessary to prevent abuse of the system. (Neetu Sakhrani 2002; ILO CEACR 2004).

Thailand has frequently defined economic sectors or geographical provinces, which can hire foreign workers. In general, skilled or professional workers enjoy better conditions in this respect. In Singapore, some categories of skilled workers can obtain permanent residence after some time and therefore, have free access to any employment. In Japan, permanent migrant workers may even apply for job positions which exert semi-state functions, provided their duties do not influence pubic policy making (Kagawa 2001).

[14] ILO instruments (Convention 143: Art. 14) recommend that a member state may grant free choice of employment and geographical mobility to a migrant worker after he has legally resided and been employed in the country for a certain period (usually not more than two years).

3.2 Restrictions on mobility and retention of identity documents

Asian workers migrating to the Gulf are also tied to employers because of the sponsorship or the kafeela system. Tying migrants to a particular employer, occupation or sector cannot be justified on human rights grounds or on economic grounds. The Bahrain Human Rights Society (2003) noted: *"Working under the actual sponsorship system transforms a worker to a forced servant who lives at the mercy of his employer, and in fear of forced deportation at any time."*

Thai workers to the Taiwan province of China cannot change their employers during the contract period – initially two years and now extended to three years. According to Wu Jingru (Wu Jingru 2000), the "Employment Services Act" and the "Regulations on Permits and Management of Employed Foreigners" clearly distinguish between the rights of blue-collar migrant workers and foreign nationals employed in white-collar positions, usually from OECD member countries. *"These rules not only manifest the prejudice held by Taiwan toward people who come from countries with poorer economies, but also display the discrimination in Taiwan toward different types of workers."* (Wu Jingru 2000).

The experience of Bangladeshi workers in Malaysia is particularly telling of stereotyping and victimisation. Box 2 summarises the situation mostly based on local sources.

Box 2: Stereotyping and discrimination? Bangladeshi workers in Malaysia

Bangladeshi workers in Malaysia have been the subject of considerable controversy fuelled by local media and politicians. Rights groups however, believe that the demands of Bangladeshi workers for better working conditions were the motivation behind the recent attacks by the Malaysian government upon Bangladeshi men for marrying local Malaysian women (Anil Netto 2001). Bangladeshis have been publicly accused by the media and politicians of resorting to "marriages of convenience" with locals simply to strengthen their case for leave to remain in Malaysia. Their marriages have furthermore been deemed disruptive to the social fabric of the society and discouraged at state level.

There was a major attack on Bangladeshi workers in 1997 by local youths in Johor Baru, the capital of the southern Malaysian state of Johor. The clash, it was alleged, was caused by antagonisms harboured by local youths against Bangladeshi men whom they accused of dating and having liaisons with local women. Kassim (Kassim 2002) reports: *"For days the national and local dailies and electronic media carried reports of the clash as well as opinions and debates regarding the issue and this, in turn, triggered other such incidents elsewhere in the Peninsula. "Bangla bashing" became the order of the day and the foreigners were blamed for these incidents".*

Malaysia in February 2001 barred the entry of Bangladeshi migrants, saying that too many were marrying Malaysian women in marriages of convenience in an effort to stay. Yet there was no concrete evidence cited of any such trend, and the whole issue had been blown out of proportion by the media and vested interests. The government decided to terminate the contracts of all Bangladeshi workers in Malaysia, amounting to some 80,000 and also impose a ban on further recruitment from Bangladesh. The ICFTU-APRO together with the MTUC (Malaysia) and ICFTU-BC (Bangladesh) held a press conference in Malaysia on 17 July 2002, and highlighted the trade union concerns, requesting the government to withdraw the decision as well as to respect the fundamental rights of the migrant workers. º

In 2003, Malaysia again signed an MOU for obtaining workers from Bangladesh, but on condition that Bangladeshi migrant workers do not marry Malaysians (Siddiqui 2004). Yet this measure apparently applies only to nationals from Bangladesh and not to those from other countries.

Access to multiple sectors of employment has also been impeded by the commercialisation of the recruitment industry and the dominant role of the private sector. This has led to considerable abuses such as contract substitution, sending workers for non-existent jobs and, drops in salaries and wages, among others. The widespread and illegal practice of confiscation of passports and identity papers by employers constitutes an added infringement to the freedom of employees. In 2001, the United Nations Working Group on Contemporary Forms of Slavery recommended that *'measures should be taken to prohibit and prevent confiscation of passports by making it a criminal offense.*" (Commission on Human Rights 2001)

The Bahrain Human Rights Society ((BHRS 2003) observed: *"Moreover, expatriate labourers live under the mercy of their sponsors who confiscate their passports from the minute of their arrival to the country. Thus, they cannot escape from the sponsors who have the right to arbitrarily deport them at any time."* Although this is against the law in many countries, there is hardly any enforcement by the authorities in the form of preventative or punitive action

For Taiwan (China), Jingru (Wu Jingru 2000) points out: *"Although the law clearly mandates that employers or brokers cannot for any reason confiscate the assets or belongings of migrant workers, at present over 95 percent of migrant workers are not allowed to hold their own passports, alien residence certificates (ARC), or savings account books. Employers and brokers use the pretext of "fear of escape" or "fear of loss" to hold the personal documents of migrant workers as collateral under the guise of safeguarding them."*

The initial regularization and registration process in Thailand also lacked credibility because employers kept the work permits with themselves against the law, exposing the workers to continued harassment by the police and corrupt officials (Therese M. Caouette and Mary E. Pack 2002). The Thai Government is introducing major changes to the registration and work permit scheme now.

Further domestic workers are the most vulnerable to forced labour or near slavery conditions. In the case of Saudi Arabia, the ILO Committee of Experts on the Applications of Conventions and Recommendations had raised the issue of confiscation of passports of domestic workers by Saudi employers which deprives them of their freedom of movement to leave the country or change their employment (Meyer 2003). The International Confederation of Arab Trade Unions (ICATU) also brought ILO's attention to the practice of retaining passports of migrant workers by Saudi employers in a communication in May 2000. The Saudi Government in its response of 6 November 2000 informed that it adopted, through Decision No. 166 of 12 July 2000 of the Council of Ministers, a "Regulation governing the relationship between employers and migrant workers". Section 3 of the Regulation, mentions that*: "migrant workers may keep their passports or the passports of members of their families and may be authorized to move within the Kingdom as long as they have a valid residence permit".* The Committee expected the Saudi Government to provide details regarding the sanctions which may be imposed in case of non-compliance, and further information on the dispute settlement mechanism, as provided for in section 6 of the Regulation. There is no information whether this measure has had any impact on the practice.

Another unfortunate trend which has developed in many Asian countries is the denial of entry to workers on the basis of HIV-AIDS tests in a number of countries. NGOs have pointed out that such tests are done for purposes of exclusion, and not for the benefit of migrants who are not even informed of the results. (Migrant Forum in Asia, Asian Migrant Centre et al. 2002). The amended (1998) Immigration Act of Singapore classifies non-citizens suffering from AIDS or who are HIV-positive as "prohibited immigrants". Despite the fact that UNAIDS policy on

testing states that it does not support mandatory testing of any group, approximately 60 countries have restrictions to keep out people who are HIV positive (ILO/AIDS and MIGRANT 2002).

3.3 Equal treatment in respect of remuneration and wages for performing the same work

The principle of non-discriminatory treatment is recognized in the labour legislation of most of the Asian labour-receiving countries, which provides for equal treatment and non-discrimination especially in the matter of remuneration. The Labour Standards Law in Japan for example stipulates that an employer shall not engage in discriminatory treatment with respect to wages, working hours, or other working conditions by reason of nationality, creed or social status of any worker. Interestingly, in Japan these provisions are equally applicable to migrant workers in irregular status by virtue of the Immigration Control and Refugee Recognition Act which requires all Japanese Labour Law Acts to extend their application to foreign nationals in both regular and irregular status.[15] Migrant workers are guaranteed the same minimum wage as national workers. Yet these legal provisions may not obtain in practice. Similarly in the Taiwan province and in the Republic of Korea, regularly admitted foreign workers are also guaranteed to have the same rights as national workers. In the Republic of Korea however, although the Labour Standards Act specifically bans discrimination on the grounds of nationality, wage differentials are common between nationals and migrant workers. For instance foreign workers, illegally employed, generally receive around 40 percent lower wages than nationals doing the same job. Trainees are paid only about 35 per cent of the average wage of Korean workers in manufacturing (Abella 1999).

In Thailand, Malaysia and Singapore, the government does not intervene in wage setting but wages set through collective bargaining are expected to be applied without distinction to both national and foreign workers. Yet workers in irregular status in Thailand receive only one third to one half the wages paid to Thai workers. There was no minimum wage stipulation even for registered foreign workers in Thailand under the previous regularisation schemes, and they continued to receive low wages although they were expected to be covered by Thai labour law. As a normal practice, the registration fee was normally passed on to the migrant workers, thereby further eroding their already low wages. Thailand has now introduced a new registration and work permit scheme which is expected to provide equal rights to registered migrant workers.

For Malaysia, Kassim (Kassim 2000) observes that: *"With the glut in foreign labour (both legal and illegal) in the country, and the restriction on them to join trade unions, employers are at liberty to depress their wages….. Many studies have shown that foreign workers are often short-changed on their pay, i.e. they are paid less than local workers or less than they are promised, given less annual increment than local workers or none at all, and are given less payment for overtime work or work on public holidays than the rate stipulated law .. ."*

Research on domestic workers in Hong Kong have revealed important wage differences among workers from different countries for domestic work (Asian Migrant Centre 2001). The study noted that domestic help was one of the currently stereotyped low-paid, low status jobs in Hong Kong. It added: *"These findings seem to show a racial pattern in the wage violations. ...the Indonesian FDH are the worst-affected by wage violations: almost 48% of them are underpaid. This problem is low among Thais (less than 4%), and almost unnoticeable among Filipinos (less*

[15] Kagawa, K. (2001). Legal Aspects of Social Integration of Migrant Foreigners in Japan. *International Migration in Asia: trends and policies*. OECD. Paris, OECD, Paris and Japan Institute of Labour, Tokyo.

than 1%)." The study concluded on the basis of its survey that there were statistically significant relationships between wage violations, statutory holiday and rest day violations, physical abuse and discriminatory encounters and the nationality of foreign domestic workers. By nationality, the Indonesians were the most seriously affected, suffering multiple forms of discrimination.

Trade unions have recently lodged a complaint with the ILO against the recent wage cut imposed on foreign domestic workers in Hong Kong SAR as discriminatory and not in compliance with ILO Convention 97 (Box 3).

Box 3: Foreign domestic workers and the Hong Kong SAR wage cut: A discriminatory practice?

The Trade Union Congress of the Philippines (TUCP) made a representation alleging non-observance by China of Convention No. 97 with respect to the Hong Kong, SAR. The complaint was about certain measures approved by the Hong Kong administration that were in violation of *Article 6 of the Convention* which provides for equality of treatment between migrant workers and nationals as regards remuneration, social security, employment taxes and access to legal proceedings. The specific measures included: (a) the reduction of the Minimum Allowance Wage (MAW) of foreign domestic workers by HK$400, effective April 2003; (b) the introduction of an employees' retraining levy by HK$400 imposed on employers of these workers, effective 1 October 2003; and (c) the possible exclusion of foreign domestic workers, who have not resided in Hong Kong SAR for at least seven years, from subsidized public health care services.

2. The ILO Governing Body concluded that the residence requirement of seven years for inclusion of foreign domestic helpers in public health care services would be too long and would contravene *Article 6(1)(b)* of the Convention. It urged the Government not to take this particular measure and to take all necessary steps to ensure that the social security provisions of the standard employment contract are strictly enforced.

3. Furthermore, the Governing Body had found that imposing an employees' retraining levy of HK$400 on the employers of all foreign workers and foreign domestic workers whose wages were already the lowest amongst migrant workers, while at the same time reducing the Minimum Allowable Wage (MAW) of these foreign domestic workers with the same amount, would not be equitable. The Governing Body urged the Government to review the above-described levy and minimum wage policies on foreign workers, especially foreign domestic workers, based on *Article 6* of the Convention 97. The Government has been asked to provide further information on: (a) the wages of local domestic helpers and of local employees in comparable jobs; (b) on any underpayment claims made by foreign domestic workers; and (c) on the impact of the measures taken by the Government to encourage these workers to forward complaints. The Committee urged the government to provide more data to reach definite conclusions as to whether *Article 6(1)(a)* of the Convention is fully applied in Hong Kong SAR.

4. The Governing Body asked that the Committee of Experts on the Application of Conventions and Recommendations to continue to examine this matter. The Committee is raising other points in a request addressed directly to the Government. (ILO CEACR 2005), p.173-174.

In the Middle East, there is a vast difference between wage levels of national workers and foreign migrant workers. The virtual segmentation of the labour market into national and non-national sectors leads to wage discrimination in all sectors. Wages of foreign workers bear little relation to the local labour market conditions, but seem to be determined by the labour market conditions of sending countries. The ILO study on Kuwait highlighted that the separation of immigrant from national labour allowed market forces in countries of origin to dominate as a determinant of wages of non-Kuwaitis (ILO 2002). The general finding was that non-Kuwaitis worked longer and for a lower wage than Kuwaitis within the same occupational category. The differences were greatest in the low-skill occupations, including agricultural workers, production workers, and service workers. There is wage discrimination among migrant workers according to nationality

for the same type of work. In general, Filipino workers command higher wages while South Asian workers, receive much lower wages. This hierarchy of wages according to nationality was observed at each skill level. Egyptians earned the most in both cases, followed by Pakistanis, Indians and Bangladeshis, in that order. The ILO study pointed out that these were broadly in line with the international differences in average earnings before leaving home.

This wage discrimination by nationality applies to domestic workers also as shown by the ILO Bahrain study (Sabika al Najjar 2002).

"In Bahrain, wages are determined according to the nationality of the female domestic workers instead of their experience. Although the nature of work and the workload is almost the same for all house workers, Filipinos, for example and Indonesians with some years of experience get BD 50 per month, while inexperienced Indonesians, Sri Lankans and Indians get BD 40 a month. Domestic workers from Bangladesh get the lowest salaries, BD 35 per month."

Abella (1999) has concluded that: *"In spite of all prohibitions discrimination in wages appears to be the practice in many countries".*

3.4 Non-payment or delayed payment of wages – a problem of serious proportions

The problem of the general decline in wages of migrant workers and wage discrimination has drawn attention away from another serious problem faced by all migrant workers – non-payment of wages or delayed payment of wages, and non-payment of overtime.

The case of wage arrears owing to China's internal migrant workers (who have close parallels with international migrant workers) is a stark illustration of the problem – data from the All-China Federation of Trade Unions reveal that there were 94 million migrant rural labourers in China whose employers owed them up to 100 billion yuan (US$12.1 billion) in unpaid wages (Shanghai Star 2004). Such default cases mostly occurred in labour-intensive industries as catering, manufacturing and construction (with 70 per cent of the cases).

According to Migration News ((Migration News 2004) some 2,000 striking Burmese migrants were deported by Thailand in December 2003 when they were protesting their employer's refusal to pay the minimum wage and the withholding of two years of back pay. This is a good example of the extreme fragility of migrant rights.

Domestic workers are especially vulnerable given their confinement to private households and relative isolation, non-coverage by national labour laws, and lack of access to any redress mechanisms. A common practice by employers to prevent domestic workers from running away or to cheat them out of their full salary is to give them their salary only at the end of the contract – usually two years in Malaysia and the Middle East. Human Rights Watch (2004a) found in a survey of 51 domestic workers in Malaysia that 26 did not receive their full salary, 12 received no salary at all, and most of the remaining were still working and hoping to get their salary after the two-year contract. Many of the returned domestic workers that Human Rights Watch (2004a) interviewed in Indonesia reported they never received their full salary. Their limited education also makes them susceptible to cheating of their dues. It is also a major problem because domestic workers mainly go abroad to support their families, through periodic remittances. The above practices rule out this family support.

A similar situation prevails in the middle east. According to an IOM Compendium (IOM 2003) non-payment of wages is among the most common problems experienced by many labour-sending countries in Asia in regard to protection including Indonesia, and the Philippines.[16] A study of migration law and practice in Jordan (Ta'amneh, 2003) pointed out that non-payment of salaries was among the most prevalent complaints by migrant labour. The study also pointed out that many abuse cases remain unreported or settled out of court, and therefore, not reflected in the statistics. The Bahrain Human Rights Society (2002) reports the situation in Bahrain:

"Domestic workers ... are not covered by labour law, and as a result are not covered by the social security scheme….. Some work more than 16 hours a day for salary that does not exceed in average BD 40 per month. In a number of cases this meagre salary is not paid. They don't even enjoy the holidays or weekly day off."

Payment of wages to the agent, (and not to the worker) is another device which cheats workers out of their due wages. An ILO mission to Mauritius was informed that the Chinese recruitment agents had not paid workers or their families for three years[17]. The Government of Mauritius has now adopted a system of direct payments to workers.

The Human Rights Watch in its study of Saudi Arabia (Human Rights Watch 2004b) found that migrant workers received low wages and were rarely paid overtime for excess hours although labour law mentions that overtime has to be paid for work in excess of 8 hours. It further observed that: "*In view of these prevailing wages, it is unconscionable that some employers withhold salaries and force workers to leave the kingdom without full reimbursement of their earned wages*."

Migrant workers also suffer when companies go bankrupt or make losses as their wages would not be paid or withheld. Zachariah et al. (2002) report similar problems faced by Kerala workers in the UAE. Even in Singapore where better labour administration systems prevail, companies default on the payment as seen in the recent protest by Indian migrant workers to claim 4 to 6 months salaries owned by their employer, Wan Soon Construction company. Although workers claimed wage arrears of S$4000 to S$6000, the Ministry of Manpower had negotiated for a S$600 settlement that is only a fraction of their dues plus a promise by the company to remit the rest later. (The Asian Labour News July 20, 2004).

The problems are compounded for migrant workers in irregular status who often become victims and generally have no means of redress. Detection and deportation prevent them from claiming any dues. It is reported that plantation owners in Malaysia collude with the police and inform them of workers in irregular status when their wages are due. *"Malaysian employers recruit many illegal migrants to harvest palm oil on their plantations, then ask security personnel to deport them after harvest season,"* Yunus Yamani, cited in: (Ridwan Max Sijabat 2004).

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[16] IOM 2003. Compendium on Labour Migration Policies and Practices in Major Asian Labour Sending Countries, Asian Labour Migration Ministerial Consultations, Sri Lanka, 1-3 April 2003.

[17] ILO mission report to Mauritius (internal report).

3.5 Freedom of Association and the Right to Organize

Freedom of association and the right to organise are fundamental human rights as recognized in both ILO and universal human rights instruments. The ILO Convention Concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) states in Article 2 that:

"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

Unfortunately only a few countries have ratified this Convention in Asia. Both ILO migrant worker Conventions (C97 and C143) make provision for these rights under the principle of equality of treatment.[18]

The ILO Global Report on freedom of association and right to organize (ILO 2004a) found a consistent pattern in that migrant workers and domestic workers faced serious barriers in regard to these fundamental rights. The 2000 Global Report, "Your voice at work", identified migrant workers as one of the groups often denied the right to organize both in law or in practice. Even when legal hurdles do not exist, migrant workers face particular difficulties due to lack of knowledge of their rights, fear of encountering problems with their employers or the police, etc. Isolation is an obstacle hindering domestic workers from forming unions, as it is difficult for domestic workers to be in contact with their peers. As a result, they are largely invisible and difficult for trade unions to reach. The personal nature of the employer-employee relationship and the worker's extreme dependence on the employer make it difficult for domestic workers to organize and claim their rights.

Restrictions on the right to organize based on nationality exist in varying degrees in the legislation of several countries. Some countries, such as Thailand, for example, make citizenship a precondition for establishing trade unions. In others, trade union affiliation of non-nationals is subject to conditions of residence. The Philippines operates a reciprocal arrangement whereby legally admitted foreign workers may establish and join organisations of their own choosing provided the same rights are accorded to Philippine workers in the country of origin of the foreign worker. Migrants also may consider it risky to join trade unions because of employer pressure and the threat of losing their jobs. In some cases, the restrictions on organization may be written into bilateral agreements. The Indonesian Country Report on migrant workers to the UN Special Rapporteur (CARAM Indonesia, KOPBUMI et al. 2002) mentions that the MOU between Malaysia and Indonesia prohibits any organization by Indonesian migrant workers.

Most countries allow and may even encourage foreign workers to join trade unions while some countries prohibit them from organizing their own unions and also impose restrictions on assuming positions of responsibility. The Malaysian Trade Unions Act (1959) permits non-citizens to join trade unions, although it bars them from becoming elected officials. The Government also has not allowed associations of migrant workers to protect their interests.

Hong Kong SAR is unique in that there exist several unions of domestic workers where approximately 240,000 women migrant domestic workers are organized in some 20 trade unions, which have the support of the Hong Kong Congress of Trade Unions. (ILO 2004a, p.44)

[18] Article 6.1(a)(ii), Convention 97 and Article 10, Convention 143.

Irregular status poses a dilemma for both workers and unions. Workers in irregular status would have major reservations about joining trade unions, which makes their presence known to the authorities carrying the threat of deportation.

A recent case in Thailand indicates the precarious position of even registered foreign workers who should receive protection from Thai labour law, and also should have the right to organize and bargain with the employers. On 23 June 2003, 420 legal Myanmar workers from the King Body Concept Co. Factory were dismissed and deported for submitting a complaint after a dispute over wages and working conditions. All these workers were legally registered and should have received the same rights and protection as Thai workers. Yet the Burmese workers earned only 55 baht per day, with 5 baht an hour for overtime work at the King Body Concept Factory when the minimum wage in Tak province is 133 baht per day, with 25 baht per hour for overtime work. The factory owner also withheld the original copy of the Myanmar workers' work permits, violating Thai immigration law. Even though a representative of the Ministry of Labour visited the factory to look into the matter, all the workers were sent to the immigration detention on June 23, 2003 and deported to Burma. According to the Asian Human Rights Commission (Asian Human Rights Commission 2003): *"This action, taken by the owner of the King Body Concept Co.'s garment factory and the Thai immigration against the Burmese workers, directly violate Thai law. According to the Thai law, it guarantees the period of 7 days for the workers to find new jobs and the employer should pay the workers two months minimum wages if they do not want employ the workers."*

3.6 Access to justice and due process

The complex situation of migrant workers and related protection issues require action on several fronts. In addition to coverage by legislation and its enforcement, there should be mechanisms to ensure justice. A universal problem faced by women and men migrant workers is denial of access to justice even when they are covered by national law or international human rights instruments. All workers including migrants should be able to participate effectively in the legal system including access to courts, appeals procedures, tribunals, and formal alternative dispute resolution mechanisms and also obtain assistance from non-legal advocacy and support including non-legal early intervention and preventative mechanisms, non-legal forms of redress and community based justice.

International migrant worker instruments (ILO and UN) include the right to due process and the right to appeal against a decision of termination of their employment or deprivation of their resident status. The ILO Recommendation 151 states: *"The migrant worker should have the same right to legal assistance as national workers and have the possibility of being assisted by an interpreter"*. The ILO Resolution on migrant workers adopted at the 2004 International labour conference (ILO 2004c) called for identification of good practices for the creation of channels for migrant workers to lodge complaints and seek remedy without intimidation.

The UN Special Rapporteur has observed: *"The lack of watchdog mechanisms, and inadequate monitoring by the Government in the country of destination, the recruiting agencies and even consulates, mean that migrant domestic workers are cut off and abuses remain unseen. Consequently, many migrants' rights are violated and they end up working in abusive or even inhuman and degrading conditions, without protection or the possibility of obtaining an effective remedy."*(UN Commission on Human Rights 2004).

Some Asian countries have established specialized bodies such as national human rights commissions which have the mandate to examine cases of violations of human rights and discrimination. Cambodia, Lao PDR, the Republic of Korea and Thailand are among those who have established such commissions. In the Gulf region, Bahrain was the only country to establish human rights organisations (Bahrain Human Rights Society and the Bahrain Centre for Human Rights) which was indeed a good practice for the region. Unfortunately the Centre was closed down following a Ministry of Labour and Social Affairs order in September 2004 when it criticised the government.[19]

Yet there are major gaps between law and practice in most countries. Asian workers face enormous problems in destination countries because of language, culture and other differences and rarely obtain any legal assistance (Social Alert 2001).

There are virtually no redress mechanisms in the Middle East, and more often than not, it is the victim who gets punished. A U.S. State Department report on Kuwaiti labour abuses stated: *"Foreign-born domestic employees have the right to sue their employers for abuse, but few do so fearing judicial bias and deportation"*.[20] Barnes and Roane (Julian E. Barnes and Kit R. Roane 2003) add: *"In Kuwait, it is the abused maids who must fear the legal system"*. The situation of access to justice in the case of Saudi Arabia has been well-documented in the HRW report Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia (Human Rights Watch 2004b). It stated: *"The criminal justice system in Saudi Arabia does not meet basic international human rights standards of due process and fairness. This reality has wreaked havoc on the lives of migrant workers and their families."*

In regard to Lebanon, the ILO Committee of Experts raised the issues brought up by the World Confederation of Labour on the illegal abuse of migrant workers, particularly domestic workers, including non-payment of salaries, corporal punishment, sexual abuse and enforced sequestration and that both the employment relations and social status of these women leave them extremely vulnerable to exploitation and abuse, most of them falling under the category of "contract slavery". The Government of Lebanon has not made any reference to these observations in its report to the ILO (ILO CEACR 2004).

In the case of the UAE, the ILO Committee of Experts noted in its previous comments that the Labour Code currently in force excluded domestic workers and that, pursuant to section 5 of the draft Labour Code, the competent Minister would make an order specifying the rules governing the relationship between domestic servants and employees regarded as such by their employers. It had asked the Government to provide any ministerial order or any other legislative text to specify the rules governing the relationship between domestic workers and their employers.

In the case of Saudi Arabia, the Committee of Experts (ILO CEACR 2005) examined a statement made by the ICFTU on treatment of migrant workers and observed that although progress had been achieved in filing complaints, enforcement remained a problem with respect to complaints submitted by migrant workers. The ICFTU statement referred in particular to the inability or reluctance of Saudi authorities to enforce judgments against employers of migrant workers and to the fact that the overwhelming majority of migrant workers, many of them women, had no

[19] http://hrw.org/english/docs/2004/09/30/bahrai9422.htm

[20] Cited in Julian E. Barnes and Kit R. Roane (2003). Kuwait's troubled domestic relations: Philippine house maids flee abusive employers. *US News, March 13, 2003* http://www.usnews.com/usnews/news/iraq/articles/kuwait030313.htm.

knowledge of the relevant enforcement bodies, and no opportunity to access them or be informed of their rights. The Committee asked the Government to provide information on the measures taken or envisaged to inform migrant workers of their rights, to improve their access to the courts and other relevant bodies and to ensure the effective enforcement of judicial decisions regarding their complaints. It also asked for information on the number of complaints of discrimination based on race and sex received from male and female migrant workers and the remedies provided to these workers.

The practice of blood money (Diya) – awarded to the victim's relatives as compensation for the loss of life of a person- represents different pricing of human life according to nationality, religion, and sex. This is because under Shariah law as interpreted and applied in Gulf countries such as Saudi Arabia, crimes against Muslims receive harsher penalties than those against non-Muslims (U.S. Department of State 2000). A Muslim victim who loses his life is valued at 100,000 Saudi riyals[21]. A Christian would receive 50 per cent (50,000) riyals whereas persons of other religions, (e.g. Hindus and Buddhists) would receive the lowest amount – 6666.67 riyals – about seven per cent only. In the case of a woman victim, it is always half of the above amounts (U.S. Department of State 2000; Trofimov 2002). These provisions equally apply to migrant workers, and families of South Asian victims of Hindu or Buddhist religion receive the lowest amounts of compensation[22]. A well-known case is that of Sarah Balabagan from the Philippines who stabbed her UAE employer to death after being raped. Due to international pressure, her death sentence was commuted to one year in prison and a payment of US$41,000 as blood money to the victim's family.

3.7 Right to social security provisions

The ILO Conventions, – No. C. 97 (Art. 6(1)(b)) and No. C. 143 (Art. 10) – both provide that treatment no less favourable than that afforded to nationals must be exercised in respect of social security as well. Convention No. 97 ensures that liability in social security comprises legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities and any other contingency which, according to national laws or regulations is covered by a social security scheme, subject to specified limitations.

Europe has extensive legislation to provide social security rights to workers including migrants although many problems remain in relation to non-EU nationals (Paparella 2004). In Asia, only four countries (Bangladesh, India, Pakistan, Philippines) have ratified the ILO Equality of Treatment (Social Security) Convention, 1962 (No. 118) while only the Philippines has ratified the Maintenance of Social Security Rights Convention, 1982 (No. 157).

In most of Asia low-skilled foreign workers are excluded from social security systems. In the Middle East foreign workers who form the bulk of the work force are excluded from social security. Singapore has discontinued the provident fund system for unskilled foreign workers on the grounds of their temporary stay. In the Republic of Korea, foreign workers legally admitted (therefore skilled) must also be covered by social security. The employer and the worker each pay a half of the premium. Hirose ((Hirose 2003) has summarised the main problems in this regard: unequal treatment between nationals and non-nationals, national legislations resulted in

[21] Currently, one US dollar (December 2004) amounts to 3.75 riyals: therefore, the amount is equivalent to about US$26,667.

[22] According to some South Asian mission officials, relatives of victims back at home do not understand these complex provisions and accuse the missions of cheating of their dues.

unfavourable conditions for migrant workers, low compliance by employers and low awareness among workers, and problem of social security provision for migrant workers in irregular status. There is also no coordination in the development of national legislations on social security leading to incompatible or conflicting systems. Migrant workers also give low priority to social security due to lack of knowledge.

The ILO has been following up with the Government of Malaysia (ILO CEACR 2004) the anomaly created by the transfer of foreign workers in the private sector from the Employees Social Security Scheme (ESS) to the Workmen's Compensation Scheme in the Sabah State of Malaysia for some time. This contravenes Article 6, paragraph 1(b), of the Convention 97 (which Sabah has ratified) since migrant workers now appear to receive treatment less favourable than that applied to nationals. The Committee of Experts requested the Government will make every effort to provide detailed information and take the necessary action in order to ascertain that migrant workers do not receive treatment which is less favourable than that applied to nationals. Yet progress has been slow.

Policies on providing foreign workers with some insurance against work-related injuries and illness generally follow international principles (Abella 1999). In Japan the law provides for the required insurance benefits when a worker suffers injury, disease, physical disability, or death resulting from employment regardless of the worker's nationality and regardless of whether the worker's stay or work is legal or illegal. In the Republic of Korea, under the Industrial Accident Compensation Insurance Act, illegal and unregistered migrant workers can obtain protection against industrial accidents and against overdue payment under administrative guidance.

In most other countries, workers in irregular status have no entitlements to work injury and occupational safety problems.

3.8 The right to family reunification

The prevailing temporary migration regime in Asia and the Middle East has precluded claims to the right to family reunification. The contract labour system of fixed duration that evolved for unskilled and semi-skilled workers in the Middle East countries allowed visas only to the worker, and not for family members. This is the practice which prevails in Asian countries as well.

In practically all countries including the Middle East however, skilled foreign workers with an employment visa are allowed to bring in their families.

Those who might, under certain conditions be forced to move with their family may not in fact be able to avail of the right to family reunification by virtue of their irregular status. Still a considerable number of Myanmar workers in Thailand have moved with their families. Children of migrants face major problems in access to education and other facilities. The Asian Research Centre for Migration conducted a field survey on the outcome of the 1996 registration policy and found that in locations of large concentrations of migrant workers, there were large numbers of male and female children under the age of 18, including young children who were born in Thailand. These migrant children are considered to be illegal aliens living in Thailand without any birth certificates. The ARCM noted that contrary to the declared objectives of the new policy, the migrant child workers, who were already in difficult circumstances, had become subject to even greater intimidation, control and exploitation. (ARCM Undated.). The refusal of the Thai authorities to register children of migrant workers denies them access to education, and drives them to the worst forms of child labour (Meyer 2003). A recent report has urged the Thai

Government to honour its commitment to the Convention on the Rights of the Child to ensure the security and rights of migrant children, including their right to protection, basic education and health care (Therese M. Caouette and Mary E. Pack 2002).

4. INTERNATIONAL INSTRUMENTS FOR PROTECTION OF MIGRANT WORKERS AND THEIR HUMAN RIGHTS

In view of the numerous problems affecting rights of migrant workers in the Asian region, it would be useful to review the range and scope of international treaty laws and conventions to assist in protecting these rights. .

There are two types of international instruments:

a. Those specifically dealing with migrant workers;
b. International human rights instruments, which apply to all persons including migrant workers.

The first category of instruments benefits from having been specifically designed with the needs of migrants in mind. The content of any such instrument should therefore, reflect the modern realities of international migration and prescribe targeted measures for improving the entire migration process. Migrant specific instruments also have the advantage that they draw attention to migrants as a separate target group for policy purposes.

Both the ILO and the UN have developed international legal conventions, which offer specific protection for migrant workers. These are:

- ILO Conventions
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (United Nations).

4.1 ILO Conventions[23]

The ILO is the only UN agency with a constitutional mandate to protect migrant workers. Indeed the Preamble to its Constitution, states that one of the ILO goals is to protect *"the interests of workers when employed in countries other than their own"*. The recent ILO Declaration on Fundamental Principles and Rights at Work reasserts this position and recognizes the need for the ILO to provide “special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and “encourage international, regional and national efforts aimed at resolving their problems...”

Protection has mainly been effected through the establishment and supervision of international labour standards, as well as through technical cooperation and advisory services that are guided by these standards. The following are the major ILO standards of direct relevance to migrant workers:[24]

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[23]See Grimsmann (1999) and Bohning (1999).
[24] The full text of these standards can be accessed through the following link of the ILO website: http://www.ilo.org/public/english/protection/migrant/about/standards.htm

- the Migration for Employment Convention (Revised), 1949 (No. 97);
- the accompanying Migration for Employment Recommendation (Revised 1949), 1949 (No. 86);
- the Migrant Workers, (Supplementary Provisions) Convention[25], 1975; (No. 143);
- the accompanying Migrant Workers, Recommendation 1975. (No. 151);

These Conventions and Recommendations (as well as ILO's general standards that protect all workers including foreigners) are inspired by *"humanitarian concerns - the visible plight of ordinary workers and the particular dangers of illegal migration and employment - and by the notion of social justice, which embraces equality, dignity and security as well as participation in economic and social matters"* (Grimsmann 1999).

The Migration for Employment Convention, 1949 (No. 97) and the Migrant Workers Convention (No. 143) of 1975 are the main ILO instruments protecting migrant workers. The historical context is important because Convention 97 was developed against the backdrop of post-war Europe when the transfer of surplus labour for post-war reconstruction was a high priority (Bohning 2000).

As cited earlier in this paper, Convention No. 97, in its Article 11, defines a "migrant for employment as *"a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person* ***regularly*** *admitted as a migrant for employment."* [26]

Thus the scope of the Convention applies only to migrants who are legally entitled to enter the country of employment.

The Convention and accompanying (non-binding) Recommendation (No.86) together deal with practically all aspects of the work and life of migrant workers. In addition to provisions for protecting migrant rights, they also contain a series of practical suggestions for the setting up of services by migrant-sending or migrant-receiving countries. They cover all aspects related to the migration process and employment: recruitment, contract conditions, medical attention, customs privileges, assistance in settling into their new environment, language and vocational training, promotion at work, job security and alternative employment, freedom of movement, participation in the cultural life as well as maintenance of their own culture, transfer of earnings and savings, family reunification and visits, appeal against unjustified termination of employment or expulsion and assistance in coping with return. They also cover core human rights such as non-discrimination and freedom of association in addition to labour rights only. The Recommendation No.86 provides a "Model agreement on temporary and permanent migration for employment, including the migration of refugees and displaced persons" which continues to be still relevant.

The Migrant Workers (Supplementary provisions) Convention, 1975 (No.143) constitutes the international community's first attempt to tackle the questions of irregular migration movements and illegal employment that became acute at the beginning of the l970s (Bohning 1999). Like its forerunner, (C.97) Convention No.143 also covers a wide range of human and labour rights but it goes one step further by extending basic human rights protection to *all* migrant workers,

[25] The longer title is: Convention concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of the Migrant Workers.
[26] Highlighting inserted by the author.

particularly those non-nationals who are in an irregular situation as regards their entry, stay or economic activity. Article 1, Part I states that: *"...each Member for which this Convention is in force undertakes to respect the basic human rights of* ***all*** *migrant workers".*

The ILO Convention No. 143 consists of two parts: Part I covers all migrant workers and is particularly designed to protect those non-nationals who are in an irregular situation as regards their entry, stay or economic activity. Part II applies to regular workers only, and deals with the principle of equality of opportunity and treatment between nationals and migrant workers. States have the choice to exclude either Part I or Part II from their acceptance of the Convention.

Equality of opportunity and equal treatment

Conventions Nos. 97 and 143 (Part II) aim at ensuring non-discrimination and equality of treatment between national and migrant workers.

While both ILO Conventions accord a central place to the principle of equality of treatment, conditions of employment, social security and trade union membership, Convention 143 broadens the notion of equality to incorporate equal opportunity as well. .[27] In the case of Convention No. 143, this principle is contained in Part II of that Convention which applies only to migrants in a regular situation. Provisions in Part II of Convention 143 are very similar to those in Convention 97 (Article 6) and neither Convention extends the equality of treatment principle to migrants in irregular status. Article 10 of C143 states: *"Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security,* of *trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory"*..

The ILO Convention 143 provides for some restrictions on the principle of equality of treatment as regards access to employment. It allows states to make the free choice of employment subject to temporary restrictions during a prescribed period, which may not exceed two years (Art.14a). States can also restrict access of migrant workers to limited categories of employment or functions where this is necessary in the interest of the state (Art.14c).

The ILO Committee of Experts on the Applications of Conventions and Recommendations has sought information on the application of the equality principle from ratifying (Convention 97) Asian countries/states (Meyer 2003). The case of the Malaysian (Sabah) Government has already been mentioned. New Zealand has been requested to provide information on measures taken to ensure equality between women migrant workers and their male counterparts (foreign or local) in respect of working and living conditions, social security, work-related taxes, and access to the justice system; and measures taken to ensure equal access to social security for permanent residents, among other things. The Committee also has sought information from Hong Kong SAR on the wages and entitlement to health benefits for migrant domestic workers..

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[27] Art. 6 C.97 and Art.10, Part II, C.143.

Social security conventions

There are two Conventions (and one accompanying Recommendation) on social security rights which aim at equal treatment with national workers.

- The Equality of Treatment (Social Security) Convention, 1962 (No. 118);
- Maintenance of Social Security Rights Convention, 1982 (No. 157); and
- The accompanying Maintenance of Social Security Rights Recommendation, 1983 (No. 167).

The first Convention (C.118) advanced the "social welfare philosophy during the 1950s and 1960s extending it to migrant workers and members of their families". The ILO Convention No. 157 and the accompanying Recommendation represent *"a comprehensive attempt to cover migrant workers and their family members, particularly those who, due to the temporariness of their moves and employment, may not be able to benefit from acquired rights or rights in the course of acquisition"* (Bohning 1999).

Convention on Private Employment Agencies No. 181 (1997)

Until 1997, the ILO favoured public and free employment services and discouraged, or asked to supervise, fee-charging private agencies. In June 1997, the International Labour Conference adopted the Private Employment Agencies Convention, 1997 (No. 181), supplemented by the Private Employment Agencies Recommendation, 1997 (No. 188), *"which recognized the legitimacy of bona fide private agencies carrying out their tasks, side by side and in cooperation with public employment services"* (Bohning, 1999). At present, this Convention has been ratified only by Japan among Asian countries.

One major obstacle to its ratification mentioned by countries is to its stipulation that no agencies should levy fees. For instance, Sri Lanka has maintained this position. [ILO, 1999 #1067]. The overcharging of fees is difficult to control given the excess demand over supply of jobs overseas. This makes it possible for fraudulent individuals to set up fly-by-night establishments which tend to fleece would be migrants.

ILO Review of international instruments [28]

These standards have been developed over the past 50 years and inspired national legislation, bilateral and multilateral treaties and Conventions including the 1990 UN Convention (Cholewinski 1997). Yet none of the major migrant-sending nor migrant-receiving countries in Asia have ratified these instruments, which implies that millions of migrant workers remain excluded from international protection. In Asia, only New Zealand and the state of Sabah (Malaysia) have ratified Convention 97 while no country has ratified Convention No. 143. The Convention No.97 also applies to Hong Kong SAR because it had been ratified by the UK in 1951. [29]

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[28] This draws upon ILO (1999). Migrant workers, Report III(1B). International Labour Conference, 87th session. Geneva, International Labour Office http://www.ilo.org/public/english/standards/relm/ilc/ilc87/r3-1b.htm.

[29] See http://www.justice.gov.hk/interlaw_e.htm#International%20Labour%20Conventions

Concern over these declining ratification rates globally prompted the ILO to carry out a general survey of the ILO instruments for the protection of migrant workers. The detailed report on the study presented to the 1999 International Labour Conference, cited the major obstacles to ratification by states as follows (ILO 1999):

- relative insignificance of migration/migrant workers in the country;
- absence of the necessary infrastructure to apply the Conventions and high cost of implementing the instruments;
- national economic problems and high unemployment rates prompting Governments to give preference to nationals over foreign labour;
- complexity of national immigration legislation and practice as well as the fact that its legislation on this subject is constantly evolving;
- the different context in which these Conventions were developed: contemporary migration movements are characterised by dominance of the private sector, feminisation of migration, increase in temporary migration, and growth in irregular migration.

The Committee of Experts noted that many countries, including those most affected by international migration, have some difficulty in ratifying very detailed instruments in this area, which attempt to regulate every aspect of the migration process and treatment of migrant workers. The Committee has also observed that some Member States are reluctant to ratify them because of comparatively minor divergences between precise wording of these instruments and their own legislation.

While these are valid concerns, the Committee (ILO 1999) felt convinced that the principles enshrined in these instruments were still valid, these being: *"control of migratory flows, cooperation between States, protection of migrants for employment and equality between nationals and migrants with regard to conditions of work."*

The Committee of Experts consequently proposed two options:

a) To maintain the status quo. This was considered realistic given that in terms of international migration, states are reluctant to ratify any international instrument, regardless of how loose and flexible they are. Moreover, the difficulties expressed by countries relate to the most important underlying principles of the instruments, which are difficult to compromise: equality of treatment between nationals and foreigners, maintenance of residency rights in case of incapacity to work, protection in case of redundancy and geographical and occupational mobility.

b) To revise Conventions Nos. 97 and 143 in order to bring them up to date and, in so far as is technically possible, to merge them into a single convention by the elaboration of a new convention, designed to bridge the gaps in the current instruments.

The latest review of instruments was carried out in the Office report for the ILC General discussion on migrant workers (ILO 2004b). It considered several different options.

a) Launch a proper promotional campaign, coupled with structured technical assistance for the ratification of Conventions Nos. 97 and 143 and the application of their Recommendations.

b) Addressing the gaps that have been identified in the current standards by adopting one or more complementary instruments in this area, for example, in the form of a protocol or guidelines.

c) Launch a promotional action with respect to all the relevant standards – including Conventions Nos. 97 and 143 – for comprehensive protection of migrant workers through a more effective application of these standards in national law and practice.

d) The full revision of Conventions Nos. 97 and 143 and the merging of these instruments into a single Convention, which would take account of present-day realities as recommended by the 1999 review. [30]

The General Discussion on Migrant Workers at the International Labour Conference 2004 took up the issue of ILO instruments. The Resolution adopted at the ILC 2004 mainly conforms to option one mentioned above, and called for wider ratification of ILO instruments coupled with technical assistance as a major component in the Plan of Action for the ILO and constituents. (ILO 2004c). It contains the following provisions.

- The Office shall undertake to identify the impediments to the ratification of these Conventions, taking into account that labour migration has evolved since their inception, and other relevant instruments have been developed at national, regional and international levels.
- The ILO may take appropriate steps to better promote the ratification of Conventions Nos. 97 and 143, and the application of the principles they contain pertaining to the protection of migrant workers. This initiative should also encompass other particularly relevant standards for migrant workers, including the fundamental ILO Conventions and ILO standards concerning private employment agencies, social security, protection of wages, labour inspection, and occupational safety and health.
- The Resolution also addressed the issue of gaps in current instruments. It recalled that ILO instruments apply to all workers, including migrant workers in irregular status, unless otherwise stated. For migrant workers in irregular status, it is important to ensure that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily. The Resolution also highlighted the need for considering the gender dimension and temporary migrant workers in the application of relevant international labour standards.
- It called for further research to be carried out on how to address some of the lacunae that have been identified in ILO standards on migrant workers, for example, through additional measures and guidelines for national legislation, policy and practice.
- It also called upon the ILO to periodically prepare and widely disseminate a report on the implementation of international labour standards relevant to migrant workers.

[30] ILO: *Report of the Committee on the Application of Standards*, International Labour Conference, 87th Session, Geneva, 1999, para. 174.

4.2 United Nations: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

According to Böhning (1991), the *"ink on ILO Convention No.143 had hardly dried"* when some developing countries (notably Mexico and Morocco) joined hands to launch the elaboration of a new Convention outside the ILO process.[31] The General Assembly of the United Nations adopted *the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* on 18 December 1990, following a lengthy drafting process involving about 11 years (Lonroth 1991). The final text of the International Convention *"... recognized and built upon the provisions contained in existing ILO Conventions, and in many ways went beyond them"* (ILO 1999). This Convention is now included among the seven core international human rights treaties of the United Nations.

This convention is of special significance for several reasons (Lonroth 1991; Cholewinski 1997; Taran 1999).

a. "It is the first universal codification of the rights of the migrant workers and their family members in a single instrument" (Lonroth 1991).

b. The convention builds upon existing international standards. It also *contains "the most comprehensive definition of 'migrant worker' formulated to date and clearly applies to all migrant workers and their families including those in an irregular situation"* (Cholewinski 1997). The United Nations Migrant Workers Convention extends rights to a number of groups previously not covered by the ILO conventions: frontier, itinerant, project-tied, specified employment and self-employed migrant workers.

c. It recognizes the responsibility of the international community, through the UN, to provide standards of protection to serve as a basis for national laws. This is because of the inadequate protection offered to migrant workers and members of their families by national legislation of receiving states or by their own states of origin.

d. It recognizes the fundamental human rights of irregular migrants, while at the same time aiming at the prevention of irregular migration, moving beyond the scope of ILO Convention No. 143. The International Convention is considered to be *"the most ambitious statement to date of international concern for the problematic condition of undocumented migrants"* (Bosniak 1991). It confers additional rights upon documented migrant workers although these are significantly constrained by its overriding commitment to state sovereignty (Bosniak, 1991).

It is a most positive development that the Convention has entered into force on 1 July 2003 with the tabling of the 20th ratification in 2003 – almost 13 years after its adoption by the United Nations. It has now been ratified by 30 States (as of March 2005). Yet as the Committee of Experts observed (ILO 1999): *"..... as is the case with the ILO instruments, the majority of States parties to this Convention are, on the whole, migrant-sending States which, while extremely important in terms of protection of migrants prior to departure and after return, hold little influence over the daily living and working conditions of the majority of migrant workers."*

[31] According to Böhning (1991), the developing countries were not happy about the provisions for curbing irregular migration contained in the Convention, as well as the social partner role in the ILO process.

However, Libya and Mexico to some extent can be regarded as migrant-receiving states among those ratifying.

Several analysts have noted a number of impediments to ratification of the International Convention (Hune and Niessen, 1994; Cholewinsky, 1997; Taran, 1999, The International Catholic Migration Commission, 2004 #1618}):

- complexity, comprehensive and detailed nature of the instrument which contains 94 articles of text;
- lack of initial publicity and limited promotion of the Convention;
- low priority accorded to migration issues by governments;
- misperception of the character of the Convention, particularly that it is seen as “an instrument for liberal immigration policies”, especially the provisions granting rights to irregular migrants;
- government perceptions on the non-applicability of the Convention to their respective goals and policies on immigration;
- issue of substantial financial costs to supervise and implement its numerous provisions;
- poor record of some states in adopting any international standards related to human rights and the non-acceptance by some states of measures acknowledging the rights of all migrants, particularly those in irregular or “illegal” status;
- current international economic and political situation, which has led to negative views on the benefits of migration.

Two major labour sending countries in the region – the Philippines and Sri Lanka – and Timor Leste have ratified the UN Convention. Bangladesh has signed but not ratified the Convention. A recent UNESCO sponsored study (Iredale and Piper 2004) has attempted to identify the reasons for low ratification of the UN Convention in Asia – an ambitious task for an academic study to fathom a complex and essentially political decision involving many actors. Box 3 summarises the major reasons identified in the study, which largely confirm the above points. Poor governance of migration, lack of capacity for effective implementation, and fear of losing markets are cited in the case of labour-sending countries. Given that the ILO Conventions on migrant workers have been in force much longer, it would have been more logical to study the reasons for not ratifying these instruments together rather than focussing only on the UN Convention. This was, of course, not the UNESCO mandate of the study. The ILO 1999 review of instruments (ILO 1999) had carried out an in-depth analysis of impediments to ratification of ILO instruments based on a global survey, which is not even referred to in the UNESCO study. The study does not mention the fact that New Zealand had ratified the ILO Migration for Employment Convention 97 of 1949 in 1950 although it obviously has a bearing on its signing a further migrant worker Convention. Similarly the Sabah State of Malaysia had ratified ILO Convention 97 in March 1964 under British rule, and this fact is not mentioned in the discussion of Malaysia’s case. It is also interesting to analyse why both the Philippines and Sri Lanka have ratified the much more complex UN instrument while not ratifying either of the ILO Conventions.

The *Palermo Convention Against Transnational Organized Crime* was adopted by the United Nations in December 2000 to fight organized crime. There are two important protocols relevant to protection of migrants.

a. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

This entered into force on 25 December 2003 and had 79 ratifications end of March 2005. In Asia, it has been ratified by Afghanistan, Myanmar, New Zealand, Philippines, and Lao PDR.

b. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
This entered into force on 28 January 2004, and with 66 ratifications end of March 2005. In Asia it has been ratified by Afghanistan, Australia, Bahrain, Lao PDR, Myanmar, New Zealand, Philippines, Thailand.

Governments which ratify these instruments therefore, commit to pass new laws and legislation criminalizing offences committed by organized groups, sharing information, speeding up and widening the reaches of extradition of members of criminal groups, protecting victims and cooperate for more effective law-enforcement. Both are now in force. In Asia, only a few countries have ratified both Protocols. This is indeed surprising given the substantial degree of convergence among countries on the issue of combatting the trafficking in persons.

Box 3: Reasons for low ratification of the UN Convention in Asia

- High level of collusion between government circles and those involved in the export business (recruitment agencies). The creation of an environment of 'good governance' is needed and this requires broad level reforms.
- Bangladesh and Indonesia: the ratification and the implementation processes are expensive undertakings and both countries' governmental budgets and staff assigned to such matters are very limited.
- For sending countries, the fear of being undercut by non-ratifying neighbours is a major obstacle - countries fear they will lose markets if they ratify (Bangladesh and Indonesia).
- Malaysia and Singapore: many ministries involved in the migration phenomenon seem to operate without clear coordination and cooperation, and with little transparency. Immigration departments, rather than labour ministries, generally handle migrant worker programs
- Republic of Korea: The Human Rights Commission suggests improvement of existing legislation and practices first to bring them into line with the UN Convention.
- For receiving countries: the major obstacles are of a political nature and require changes in national perspectives. The perception that they must admit the family members of labour migrants is widespread. Of even greater concern are issues surrounding irregular migrant workers

Summarised from (Robyn Iredale and Nicola Piper 2003)

4.3 Other general human rights instruments

4.3.1 Other ILO instruments

Attention should be drawn to the fundamental human rights Conventions of the ILO. The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session on 18th June 1998 states: *" All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which*

are the subject of those Conventions.[32] Box 4 lists the specific Conventions in which these standards are enshrined.

Box 4
Core Conventions of the ILO Declaration on Fundamental Principles and Rights at Work

1. the Forced Labour Convention, 1930 (No. 29)
2. the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
3. the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
4. the Equal Remuneration Convention, 1951 (No. 100)
5. the Abolition of Forced Labour Convention, 1957 (No. 105)
6. the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
7. the Minimum Age Convention 1993 (138)
8. the Worst Forms of Child Labour Convention, 1999 (No 182).

Annex 2 shows the status of ratification of these Conventions in the Asia-Pacific region, which is much higher when compared with migrant specific conventions. This is especially relevant in the case of labour-receiving countries in the Arab world, most of which are unlikely to ratify migrant worker conventions, and where serious rights violations take place.

Trafficking of women and children and related human rights abuses are covered by fundamental Conventions 29 and 105, which commit countries to abolish all forms of forced or compulsory labour, in addition to those specifically covering the abolition of child labour. For some countries such as those in the Middle East, these Conventions may offer a more promising avenue to combat problems of domestic workers whose conditions often amount to forced labour. In fact the ILO Committee of Experts has used these as an entry point for raising issues relating to domestic worker situation in some Gulf countries as noted earlier.

Most Conventions and Recommendations adopted by the International Labour Conference are of general application, that is, they cover all workers, irrespective of citizenship. There are, however a number of instruments which contain provisions relating to migrants, or the Committee of Experts has referred to the situation of migrant workers in supervising their application in recent years. A number of these Conventions, which also apply to migrant workers, are listed in box 5. Most of these apply to all employed migrants including those workers in irregular status.

4.3.2 Universal Human Rights Instruments of the United Nations

The United Nations similarly possesses instruments which while having no direct relevance to migrant workers, are of potential importance in terms of protecting them from discrimination and exploitation on grounds other than their non-national status. These Conventions include:

- *the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (1979);*

[32] See the webpage on the Declaration at the URL- http://www.ilo.org/public/english/standards/decl/

- *the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*
- *the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966);*
- *the International Covenant on Civil and Political Rights (ICCPR) (1966);*
- *the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and*

Box 5: Other important ILO Conventions applicable to migrant workers

- *Safety and Health in Agriculture Convention, 2001 (No. 184).*
- *Private Employment Agencies Convention, 1997 (No. 181)*
- *Protection of Wages Convention, 1949 (No. 95)*
- *Working Conditions (Hotels and Restaurants) Convention, 1991, (No. 172)*
- *Labour Inspection Convention, 1947 (No. 81),*
- *Plantations Convention, 1958 (No. 110)*
- *Equality of Treatment (Social Security) Convention, 1962 (No. 118)*
- *Maintenance of Social Security Rights Convention, 1982 (No. 157)*
- *Employment Policy Convention, 1964 (No. 122).*
- *Minimum Wage Fixing Convention, 1970 (No. 131)*
- *Occupational Safety and Health Convention, 1981 (No. 155),*
- *Occupational Health Services Convention, 1985 (No. 161),*
- *Safety and Health in Construction Convention, 1988 (No. 167)*

Source: (ILO 2004b)

- *the International Convention on the Rights of the Child (CRC) (1989).*

Again, the record of Asian countries is better in respect of ratification of universal human rights instruments (see Annex 3) than for migrant-specific instruments. The record is still relatively poor as compared to Africa, Europe and the Americas. As opposed to general human rights instruments, countries have ratified the more specific standards found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).

For instance, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is one of the most widely ratified of the United Nations human rights conventions and binds ratifying countries to outlaw discrimination on the grounds of race, colour, descent, or national or ethnic origin against all individuals within the jurisdiction of the State and to enact sanctions for activities based upon such discrimination. Yet the Convention does not outlaw discrimination on the grounds of nationality, a type of discrimination to which migrants by definition are extremely vulnerable. This is because it does not apply to "distinctions, exclusions, restrictions or preferences made by a State party ... between citizens and non-citizens". (ILO, 1999).

Cholewinsky (1999) points out that the International Covenant on Civil, Cultural and Political Rights is important because it contains a number of rights of concern to migrants in the Asia Pacific region, such as protection against arbitrary expulsion, freedom of association and a general right to equal treatment. According to him however, the two universal instruments having even greater relevance to the protection of migrant workers are the International Covenant

on Economic, Social and Cultural Rights, which has most affinity to ILO standards, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), given the large share of women migrant workers in the region. The Committee on Economic, Social and Cultural Rights, responsible for monitoring the implementation of the ICESCR, has made it clear that a minimum core content of these rights must be satisfied immediately, unless the economic conditions in the country concerned are so dire that the government cannot even meet such minimal obligations.

This leads to the rather positive conclusion drawn by Cholewinsky that "… *migrant workers are not devoid of international protection in the Asia Pacific. Although the countries in this region have generally not accepted specific standards safeguarding the rights of migrant workers, such as ILO Conventions Nos. 97 and 143 or the UN Convention, other important instruments are applicable* (Cholewinski 1999)." Still the issue is that mere ratification would not guarantee rights or protection of migrants unless it is accompanied by corresponding changes in legislation and effective enforcement, and mechanisms for access to justice as pointed out earlier. There is little doubt that Asian countries face a large unfinished agenda in this respect.

4.4 Obstacles to protection of migrant human rights

The Working Group of Intergovernmental Experts on the human rights of migrants has categorised obstacles to the full and effective protection of rights under three heads: institutional, social and economic obstacles (UN Commission on Human Rights 2002).

a) Institutional obstacles: absence or non-acceptance in domestic legislation of universal standards which explicitly recognize the human rights of migrants; failure to achieve widespread ratification of international instruments dealing with migrants' rights; vulnerability of migrants; human rights abuses related to deportations and inadequate training of officials in human rights matters.
b) Social obstacles: social exclusion and the concentration of migrant households in disadvantaged urban areas, which make access to education, health care or employment more difficult; segregation and hostility, stereotyping, xenophobia and racism.
c) Economic obstacles: low educational level of migrants; sector of employment which are on the fringes of the documented and undocumented sectors (prostitution, domestic women and short-term work) low educational level and, labour legislation that favours certain business.

The Working Group observed that*: "A large number of countries are unwilling to ratify the human rights standards of the United Nations and ILO. This unwillingness is the result of real people defending real interests with the backing of real power bases - the very people who are often responsible for the obstacles to the full application of these human rights standards.*" (UN Commission on Human Rights 2000).

The Working Group pointed out another dimension of the problem - the gap between the capacity of a State to respect human rights and its willingness to do so. *"It was not enough that a country simply ratify the relevant human rights instruments. It must also ensure their effective application. Even when a State had ratified a human rights convention, it might fail to implement it fully, either because it lacked the political will or because it did not have the necessary capacity."* Therefore external monitoring of the situation and diagnosis of the causes of non-implementation of standards are critically important.

4.5 Regional instruments

The present paper does not intend to cover regional instruments. What is important to note is that there are general human rights and migrant-specific instruments in other regions while there are none in the Asian region. Most progress has been made in the European Community under the Council of Europe (Niessen 1995; Cholewinski 1997). The instruments directly relevant to migrant workers are: the European charter on Human Rights (1950); the European Social Charter (1961); and, the European Convention on the Legal Status of Migrant Workers (1977). There is an extensive discussion of these instruments by Cholewinsky (Cholewinski 1997).

5. COMMITMENTS MADE AT GLOBAL SUMMITS AND CONFERENCES

5.1 Global summits and conferences

Several global conferences and summits in recent years have professed commitment to the cause of migrant rights. These are: the World Conference on Human Rights held in Vienna, 1993; the International Conference on Population and Development held in Cairo, 1994; the World Summit for Social Development held in Copenhagen in March 1995 and the Fourth World Conference on Women, held in Beijing in September 1995. Most Asian countries have committed themselves to the declarations and the programmes of action at these global summits, which contained specific guarantees for protection of migrant rights.

World Conference on Human Rights, Vienna, 1993. The World Conference on Human Rights convened in Vienna in June 1993, invited all states to ratify the UN Convention on the Protection of the Rights of all Migrant Workers and their Families. The Vienna Declaration and Programme of Action urged all countries to guarantee the protection of the human rights of all migrant workers and their families.

International Conference on Population and Development, Cairo, 1994. The International Conference on Population and Development accepted as a principle that *"countries should guarantee to all migrants all basic human rights, as included in the Universal Declaration of Human Rights*"(United Nations 1994). In the Programme of Action, the participating countries pledged to the following actions in respect of documented and undocumented migrants (United Nations 1994).

"Governments of both receiving countries and countries of origin should adopt effective sanctions against those who organize undocumented migration, exploit undocumented migrants or engage in trafficking in undocumented migrants, especially those who engage in any form of international traffic in women, youth and children. Governments of countries of origin, where the activities of agents or other intermediaries in the migration process are legal, should regulate such activities in order to prevent abuses, especially exploitation, prostitution and coercive adoption".

The World Summit for Social Development, Copenhagen, 1995. The World Summit for Social Development also (United Nations 1995a) focussed on the issue of international labour migration under core themes of both social integration and employment. It made a plea to countries to ensure that migrant workers benefit from the protection provided by relevant national and international instruments, take concrete and effective measures against the exploitation of migrant

workers, and encourage all countries to consider the ratification and full implementation of the relevant international instruments on migrant workers. It has urged the governments of receiving countries to consider extending to regular documented migrants and to members of their families treatment equal to that accorded to their own nationals with regard to the enjoyment of basic human rights, and access to all services. It has also addressed undocumented migration and urged governments of countries of origin, transit countries and countries of destination to cooperate in reducing the causes of undocumented migration, taking effective sanctions against the organisers of irregular migration and trafficking, safeguarding the basic human rights of undocumented migrants and preventing their exploitation. The Programme of Action has also recommended the adoption of effective sanctions by Governments of both receiving countries and countries of origin against those who organize undocumented migration, exploit undocumented migrants or engage in trafficking in undocumented migrants. A number of actions for achieving social integration of migrants and their families have been outlined.

Fourth World Conference on Women, Beijing, 1995. At the Fourth World Conference on Women, (United Nations 1995b) the issue of migrant women received considerable attention. The Platform for Action reiterated the fact at the Meeting that migrant women workers were among the most disadvantaged groups and that violence and exploitation of these workers were widely prevalent. The participating governments have therefore, committed themselves to ensuring the full realization of the human rights of all women migrants, including women migrant workers, their protection against violence and exploitation and facilitation of their full integration into the labour force. It called upon all actors in society - governments, employers, trade unions, community and youth organisations and non-governmental organisations to take appropriate action to promote their human rights and development. It also urged Governments to establish linguistically and culturally accessible services for migrant women and girls, including women migrant workers, who are victims of gender-based violence.

World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001(United Nations 2001) recognized the existence of xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, and stressed that policies towards migration should not be based on racism, racial discrimination, xenophobia and related intolerance.

It requested States to promote and protect fully and effectively the human rights and fundamental freedoms of all migrants, in conformity with the Universal Declaration of Human Rights and their obligations under international human rights instruments, regardless of the migrants' immigration status. It reaffirmed the responsibility of States to protect the human rights of migrants under their jurisdiction and called upon all States to review and, where necessary, revise any immigration policies, which are inconsistent with international human rights instruments, with a view to eliminating all discriminatory policies and practices against migrants.

It reaffirmed the necessity of eliminating racial discrimination against migrants, including migrant workers, in relation to issues such as employment, social services, including education and health, as well as access to justice, and that their treatment must be in accordance with international human rights instruments, free from racism, racial discrimination, xenophobia and related intolerance.

It urged States, in the light of the increased proportion of women migrants, to place special focus on gender issues, including gender discrimination, particularly when the multiple barriers faced

by migrant women intersect; detailed research should be undertaken not only in respect of human rights violations perpetrated against women migrants, but also on the contribution they make to the economies of their countries of origin and their host countries, and the findings should be included in reports to treaty bodies.

The Conference also called upon States to recognize the same economic opportunities and responsibilities to documented long-term migrants as to other members of society.

5.2 The General Discussion on Migrant Workers: International Labour Conference 2004

This General Discussion was the largest global discussion on international migration since the 1994 International Conference on Population and Development. The ILC was attended by 177 Member States at the ministerial level, and leadership of trade union and employer federations from the same countries. It was also an intensive and comprehensive discussion spread over two and a half weeks, covering global migration trends, impact on sending and receiving countries, conditions of work, international standards for regulation of migration, management of migration and technical cooperation, based on a comprehensive technical report prepared by the Office. [33]

The Resolution adopted at the International Labour Conference - *Resolution concerning a fair deal for migrant workers in a global economy* - calls upon the ILO and its constituents to carry out a plan of action in partnership with other relevant international organizations.[34] All Asian Member States and social partner representatives also endorsed this Resolution. The main components of the Plan are shown in Box 1.

Most elements of the Plan of Action relate to ongoing activities of the ILO: promotion of standards, capacity building and technical assistance, social dialogue, global employment agenda and knowledgebase development. The Conference is asking the Office to intensify its activities in these areas in the light of growing significance of international migration and the lack of a fair deal for migrant workers at present.

It is thus, clear that the most innovative element in the ILO Plan of Action is the proposal for a "*Non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards"*. The Resolution envisaged it to comprise international guidelines and principles drawn from best practices in origin and host countries wherever they can be found. As a set of non-binding guidelines for policy it will not be limited to only those principles where an international agreement can already be negotiated. It is envisaged to contain appropriately detailed descriptions of policies and laws that can serve as models for policy reform in some 20 specific areas, taking into account the need of countries for a flexible way in which to progressively align national policies with international principles. The ILO was mandated to develop the guidelines contained in this non-binding multilateral framework for consideration by the ILO Governing Body in November 2005, in consultation with Government

[33] ILO (2004). A fair deal for migrant workers in the global economy, Report VI, International Labour Conference 2004, 92nd Session. Geneva, International Labour Office
http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf

[34] ILO (2004). Resolution concerning a fair deal for migrant workers in the global economy, adopted at the 92nd session of the International Labour Conference. Geneva, in: Report of the Committee on Migrant Workers, Provisional Record 22, International Labour Conference, Ninety-second Session, International Labour Office, pp.55-64
http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/pr-22-pdf

members, the social partners and relevant experts. For the present discussion the most important point is that the multilateral framework will be "*a rights-based approach, in accordance with existing international labour standards and ILO principles"*

Box 1: Components of the Plan of Action on Migrant Workers

- Development of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards;
- Identification of relevant action to be taken for a wider application of international labour standards and other relevant instruments;
- Support for implementation of the ILO Global Employment Agenda at national level;
- Capacity building, awareness raising and technical assistance;
- Strengthening social dialogue;
- Improving the information and knowledge base on global trends in labour migration, conditions of migrant workers, and effective measures to protect their rights;
- Mechanisms to ensure ILO Governing Body follow-up of the plan of action and ILO participation in relevant international initiatives concerning migration

Summary

Thus, most countries in Asia have made multiple commitments under international treaties and covenants and global summits to protect the rights of migrant workers. Needless to say, the broad commitments and obligations made at these international fora have to go a long way before being mere lip-service or translated into concrete action at the national level. Their immediate contribution seems to lie in explicit recognition of the problem and awareness creation. Active lobbying by all social actors and agencies will be necessary to produce meaningful action.

One cannot but agree with the conclusion of the Committee of Experts in the General Survey of 1999 that much more needed to be done at the international level to address the situation of migrant workers and that mechanisms at both the national and international levels need to be introduced. The ILO multilateral framework on labour migration which is being developed now is expected to provide constituents including those of Asia principles and guidelines on a rights based approach to labour migration policy.

6. PROSPECTS FOR REGIONAL COOPERATION

In view of the growing problems of migration in the region, especially in the form of irregular migration and protection of the basic rights of migrant workers, there is definitely a case for

regional cooperation among countries of origin and destination. This will help address issues, which cannot normally be dealt with at the national level or through bilateral negotiations alone. Regional political associations such as the ASEAN have been notably reluctant to include migration issues in their agenda (Wickramasekara 1999).

The main barrier to regional cooperation on migration matters is of course, the issue of national sovereignty. Internationally, few countries are willing to compromise on their right to decide on immigration matters. Following the Asian economic crisis however, there seems to be greater readiness to discuss issues relating to labour migration at the regional level. A few initiatives are outlined below.

6.1 ILO-led initiatives

6.1.1 ILO Regional Tripartite Meeting on Challenges to Labour Migration Policy and Management in Asia, Bangkok, Thailand, 30 June – 2 July 2003

This was an important regional meeting with the participation of representatives from governments, employers' organizations and trade unions from 21 Asian and Pacific countries, international agencies and civil society organizations. There was a general consensus that the movement of labour is a positive factor benefiting both labour-sending and labour-receiving countries as it has become an important and continuing phenomenon associated with economic growth and development in Asia (ILO 2003a).

The conclusions adopted by the Meeting highlight the following:

- Cooperation among the social partners as well as with migrants themselves is important to the development of sound labour migration policies and programmes and their effective implementation.
- Transparent systems for licensing and monitoring private recruitment agencies, and use of effective sanctions against fraud and excessive placement fees.
- Irregular migration and trafficking need to be minimized. The meeting noted that it was necessary to go beyond the border control approach for more comprehensive strategies which include opening regular doors for legal admission of migrant workers in demand and information campaigns directed at prospective migrants as well as employers and options for long-staying irregular migrants to earn regular status through proof of good behaviour and productive employment.
- Cooperation between origin and destination states helps to maximize the potential benefits from migration. Therefore the use of bilateral or multilateral labour agreements , regional inter-governmental consultation processes and existing regional cooperation mechanisms such as ASEAN and SAARC have to be promoted.
- In view of special problems faced by women migrants, the Meeting urged the ILO to develop a strategy in consultation with the social partners for preventing discrimination, exploitation and abuse of women migrant workers.
- There is a need to promote programmes for the reintegration and re-employment of returning migrants at home.
- The Meeting agreed that LO's Declaration on Fundamental Principles and Rights at Work and the two ILO migrant worker conventions, C.97 and C.143, provide a framework for protecting the basic labour rights of all workers including migrant workers. The ILO should work with its tripartite constituents in the region to improve

understanding of the scope, content, and relevance of these instruments and to promote the ratification of the migrant workers' conventions.

6.1.2 ILO Asia-Pacific Regional Symposium for Trade Union Organizations on Migrant Workers, December 6-8, 1999, Petaling Jaya, Malaysia

The objective of this important initiative by the ILO Bureau for Workers' Activities was to brief unions on issues facing migrant workers in the region and to plan union policies and strategies to assist migrant workers. Migrant workers have traditionally been ignored or opposed by unions in both countries of origin and in receiving countries for various reasons. Globalization has brought about a change of perspective, since unions realize that migrants are not necessarily in direct competition for jobs with local workers and that increasing the standards for migrants will result in better standards also for national workers. This approach, however, requires a change of attitude among union members. Participating unions reaffirmed that migrant workers must be included in the concerns of the trade unions.

While the meeting recognized the various difficulties inherent in encouraging the migrant participation in trade unions and in providing services to the migrants, the participating unions agreed to recommit themselves to encourage migrant membership, and to provide protection to them. The major recommendations to the governments are: ratification of relevant ILO conventions related to migrant workers and the UN convention; adoption of bilateral and multilateral labour and social security agreements to ensure that migration occurs in an orderly and protected fashion; provision of equal treatment to migrants with regard to the right of association and collective bargaining, conditions of employment, social security, non-discrimination and the other rights as provided for in ILO conventions; provisions for the participation of trade unions in the making of policies, laws, regulations, and practices concerning migration.

The Symposium made a number of recommendations to trade union organizations in both sending and receiving countries. These pertain to: awareness raising; lobbying governments for ratification of international conventions; monitoring recruitment agencies and traffickers; provision of referral services to migrant workers; promotion of union membership; promote social and cultural integration of migrants; and, facilitating re-integration of returning migrants. An important achievement of the Workshop was the commitment made by participating unions to formulate and implement a plan of action for assisting migrant workers at the national level.

6.2 Trade union initiatives

The ICFTU-APRO Regional Consultation on Developing a Cooperating Mechanism for Promoting and Protecting the Rights of Migrant Workers, Jakarta – Indonesia, 19-21 March 2003

This is another important initiative by the regional trade union movement (ICFTU-APRO 2003). The conclusions of the meeting outlined the role of national trade union centres and the regional organization in supporting and protecting migrant workers (ICFTU-APRO 2003). According to meeting conclusions, the national trade union centres were expected to do the following: establish cells and focal points; exert pressure about violations of migrant workers' rights; promote membership of migrant workers; and establish communication with unions in employing countries, foreign missions, and migrant workers. The regional organization - ICFTU-APRO

committed itself to the following: document perceptions on migrant workers in receiving and sending countries; raise migrant issues at regional groupings – APEC, ASEM, ASEAN, SAARC, etc.; address human trafficking; serve as a bridge for information dissemination, sharing of experiences, and raising concerns of trade unions; and organize regular dialogues of the national centres. The meeting also accepted the role of ICFTU-APRO as a coordinating body and regional organization for protecting and promoting rights of migrant workers in the Asian and the pacific region.

While these commitments are certainly important in the protection of migrant worker interests, it is obviously too early to assess their actual implementation. Except in countries such as the Philippines and the Republic of Korea, the national trade union movements have a long way to go in launching any effective programmes for migrant workers. For instance, the trade union movement in Thailand hardly takes any interest or initiative in protection foreign workers. Ford (Ford 2004) has highlighted the growing role of migrant worker associations which are addressing some of the gaps.

6.3 NGO action

Another encouraging sign in Asia is the continued involvement and active role played by the NGO movement in Asia in protecting and supporting migrant workers, especially the vulnerable groups such as women domestic workers and trafficked persons.

The role of the NGO movement is important for several reasons. (Social Alert 2001). First they are able to reach migrants who do not come under the protection of national laws. Trade Unions and other non-government organizations in many destination countries have been providing critical support to migrant workers. The support provided by the NGOs may include provision of social services, organization, advocacy, training, education, information and counseling services. In countries such as Thailand where the trade union movement is fragmented and their agendas have limited support for migrant workers, NGOs can fill in the void. In general, NGO discourse has been concerned with empowerment of migrant workers through various strategies (Ofreneo and Samonte 2005).

In some countries they may represent the only voice for exploited migrants such as those trafficked and workers in irregular status. They have been assisting women migrant workers, especially trafficked victims, workers in irregular status, domestic migrant workers. The role of Tanagenita in Malaysia in upholding rights of migrant workers, especially those in irregular status is well-known. Japan has many NGO groups spread throughout the country who are committed to protecting the rights of migrants such as abused women migrants, and promoted awareness of migrant workers' rights. Church based NGOs are actively involved in the protection of the human rights of the migrant workers in Taiwan province of China and the Republic of Korea (Social Alert 2001).

While there are numerous NGOs working on migrant worker issues at national and regional levels, a clear process towards coordinated action has been observed with the Migrant Forum Asia and the Migrants Rights Centre (Hong Kong) taking a central place. The Migrant Forum Asia (MFA) represents a coordinating council of major NGOs in Asia representing a network of migrant support and advocacy groups in both labour-sending and receiving countries of Asia (Ally Sajida 2003; Alcid Mary 2004; Ford 2004) Established in 1994, it has since evolved to become a regional body that proactively promotes the rights of Asian migrant workers and their families regardless of immigration status through advocacy. Lisa law (Law 2003) has

documented the growing use of the internet and networking over cyberspace effectively by the MFA in it s campaign for the rights of migrant workers.

Increasing linkages between trade unions and NGOs for effective results is another encouraging trend. The campaign against the wage cut of domestic workers in Hong Kong SAR represents an effective alliance between the trade union movement and the NGOs. Ford (Ford 2004) has made an evaluation of Indonesian labour NGOs and their linkages with the union movement. The Hong Kong SAR is another example.

Lobbying and advocacy for better rights for migrant workers is another area where NGOs have been active. NGOs have been at the forefront of the campaign for Lobbying at the 2001 World Conference against Racism, Discrimination, Xenophobia and Related Forms of Discrimination. The NGO movement has been active in the international campaign for the ratification of the UN Convention on the Rights of Migrants and Members of their Families. The MFA is the regional partner of the Geneva-based Migrant Rights International for the successful global campaign for the ratification of the above convention, although success in Asia seems to be limited. The December 18 (Migrant Worker Day) celebrations also have emerged as another rallying point for Asian NGOs. In contrast to the trade union movement, the NGOs have not been active in promoting the cause of the ILO Conventions on migrant workers.

NGOs also have helped in better dissemination of the situation of migrant workers through studies and research. The Asian Migrant Yearbook (Asian Migrant Centre and Migrant Forum in Asia 2004) has emerged as a comprehensive source of information on migrant issues and rights in Asia, usually not covered in other literature.

At the same time, there are several problems faced by the NGO movement. Some governments curtail their activities as evidenced by the experience of Tanagenita in Malaysia. They also have resource constraints, especially in organizing concerted action at regional levels. At the same time, some NGOs may cause further fragmentation and duplication in their outreach to migrant workers as in the case of Indonesia.

6.4 Inter-governmental initiatives

6.4.1 International Symposium on Migration: Towards Regional Cooperation on Irregular/Undocumented Migration, Bangkok, 1999.

This Symposium, held at ministerial level, was organized by the Government of Thailand in cooperation with IOM and UNHCR during 21-23 April 1999. It was a step in the right direction for evolving greater regional cooperation on regional migration issues and concerns, particularly irregular migration. The major outcome was the signing of the Bangkok Declaration on Irregular Migration by participating countries (Thailand Ministry of Foreign Affairs 1999)[35].

This Declaration is an important step for several reasons:

- It recognizes irregular/undocumented migration as a regional issue and accepts the need for evolving a regional mechanism to deal with the issue;

[35] See the text of the Declaration at the following Web address: http://www.iom.int/migrationweb/meetings/Bangkok/Bangkok_Declaration_Irr_Migration.htm.

- It acknowledges that regular and irregular migration are closely inter-related;
- It recognizes the seriousness of trafficking of women and children and the need for regional cooperation in combating it;
- It gives importance to improving migration information; information sharing is identified as a key objective;
- It underpins the need for capacity building of government machinery for improving migration administration.

It stated: *"The countries of origin, transit and destination are encouraged to strengthen their channels of dialogue at appropriate levels, with a view to exchanging information and promoting cooperation for resolving the problem of illegal migration and trafficking in human beings"*.

Concrete achievements resulting from the symposium have however been limited up to now. A direct follow up to a recommendation of the Bangkok Declaration was the organization of a training programme for increasing the capacity of government officials involved in migration and overseas labour administration. This was the International Migration Policy and Law Course for Asia and the Pacific that was held during 22-27 November 1999 in Bangkok where Government officials from 18 South and East Asian and Pacific countries participated. The focus of the seminar was on migration management, migration policy development, human rights of migrants, and cooperation in the region. A summary statement on migration issues and the programme were issued at the end of the event. (IMP 2000).

Subsequent developments in Malaysia and Thailand relating to the treatment of workers in irregular status run contrary to most of the principles highlighted in the Declaration adopted by the countries. Little progress seems to have been achieved in relation to the anticipated regional mechanism as well.

6.4.2 Inter-Governmental Asia-Pacific Consultations on Refugees Displaced Persons and Migrants (APC).[36]

The inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC) – a regional consultative process - was established in 1996 with the aim of promoting dialogue and exploring opportunities for greater regional co-operation on matters relating to population movements, including refugees, displaced persons and migrants. The initial scope of discussions centred on refugees and displaced persons, and later the scope of the agenda was expanded to include migration reflecting its importance in the region. IOM became a partner of UNHCR in organizing APC meetings from that time forward.

The APC concentrates on population movements in the region and therefore, offers a much broader scope for discussion. It is also attended by a larger group of countries.[37] It is described as a process and not as a decision-making body, and therefore, APC believes that countries in the region are more prepared to participate and deliberate on issues of concern. This network is still confined to governments, and does not involve other partners - workers, employers or non-

[36] The APC has a website http://www.apcprocess.net/ but with restricted access.

[37] Participating governments include: Australia; Bangladesh; Bhutan; Brunei Darussalam; Cambodia; China; Fiji; Hong Kong SAR; India; Indonesia; Japan; Kiribati; Republic of Korea; Laos; Malaysia; Micronesia; Mongolia; Myanmar; Nauru; Nepal; New Caledonia; New Zealand; Pakistan; Papua New Guinea; The Philippines; Samoa; Singapore; Solomon Islands; Sri Lanka; Timor Leste; Thailand and Vietnam.

governmental organizations. Government participation is voluntary and discussions are informal and non-binding on States.

The APC Secretariat was initially based in Bangkok, followed by Manila. From February 2003, Australia has assumed the duties of the APC Chair until a decision was made on the future directions of the APC. Following Fiji's role as Chair from February until December 2004, the People's Republic of China, has now taken over as Coordination of APC.

According to IOM, the APC has been instrumental in promoting regional consultations such as the Bangkok meeting on irregular migration and Bali meetings on trafficking (Knight 2003). Yet given that APC is informal, not transparent, and confined to governments only, and that the main thrust is on curbing irregular migration, it is unrealistic to expect the APC process to play any significant role in addressing human rights of migrants in the region.

6.4.3 The Bali Process

The Bali process also represents an intergovernmental consultative process on people smuggling and trafficking. The Regional Ministerial Conferences on People Smuggling, Trafficking in Persons and Related Transnational Crime held in February 2002 and April 2003 brought together Ministers and other senior officials from some 38 countries in the region to exchange information and discuss the need for a multi-lateral approach to address transnational crime, especially trafficking and smuggling in persons which has become "more sophisticated, complex, organized, and flexible". The Conference recognized that labour market opportunities were a major cause contributing to the global increase in smuggling and trafficking in persons calling for the development of cooperative measures in this area. The Bali process is much more transparent than the APC process described above.

The participating governments mainly agreed to intelligence sharing, improve law agency co-operation, establish better border and visa systems and implement a strategy to send illegal migrants home. Two ad hoc Experts' Working Groups were established to focus on: I) information exchange; and, II) policy, legislation and law enforcement issues. The focus of the Bali process is primarily on reducing the incidence of smuggling and trafficking through more effective sharing of information and through improved legislation and law enforcement activities, and not on general protection and human rights issues of migrant workers.[38]

6.4.4 Labour migration ministerial consultations for countries of origin in Asia

Since 2003, Asian labour sending countries have established a consultative mechanism supported by the IOM. The first consultation was in Colombo, Sri Lanka in April 2003. The second consultation took place during 22-24 September 2004 in Manila hosted by the Philippines government, and with the participation of labour ministers and senior officials from 10 countries: Bangladesh, China, India, Indonesia, Nepal, Pakistan, Philippines, Sri Lanka, Thailand, and Vietnam. It is a state-driven process focussing on operational problems of labour migration relating to support services, overseas employment administration, and benefits from migration. While the focus on labour migration is a welcome point of departure from the above mentioned intergovernmental initiatives, there are obvious limitations to an approach involving only labour sending countries. .

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[38] See the Bali Process website for more information. http://www.baliprocess.net/main.asp

The IOM compiled good practices relating to regulatory framework of recruitment agencies, and pre-departure orientation services and welfare funds for the second consultation.[39] These mainly recount what governments are currently doing, and do not reflect good practices according to criteria enshrined in international instruments relating to migrant workers. For instance, the paper on good practices relating to the regulatory frameworks of recruitment does not even mention the ILO Private Employment Agencies Convention, 1997 (No.181) or the related Recommendation (R.188). The two ILO migrant-worker Conventions and the related Recommendations (which are non-binding) spell out good practices relating to each stage of the labour migration process from pre-departure to return. Similarly, the summary of statements and recommendations of the Ministers of this Second Consultation does not make any reference to migrant worker instruments including ILO Conventions.[40]

6.5 Regional Groupings and migration: ASEAN and SAARC

The Association of South East Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC) are the two major subregional groupings within Asia. Although migration and mobility issues should be among priority issues in ASEAN with its longer history and the launching of the Asean Free Trade Area – AFTA, there has been little discussion of labour mobility or migrant worker issues in meetings of labour ministers. The 5th ASEAN Summit in 1995 in Bangkok identified immigration as an area where cooperation could be further strengthened to support ASEAN economic cooperation.

The 4th meeting of ASEAN DGICM in 2000 adopted the ASEAN Plan of Action on Immigration Matters. *"The objective of the Plan of Action is to forge and strengthen immigration cooperation with a view to establish an effective network to promote the modernisation of immigration facilities, systems and operations, upgrade human resource capabilities and the capacities of immigration officials to support the economic aspirations of ASEAN and support in combating transnational crime especially in trafficking in persons."*[41]

It is clear from the above that the Plan of Action for Cooperation on Immigration Matters mainly relates to strengthening immigration systems and security concerns. Nevertheless it also mentioned supporting the implementation of the ASEAN Investment Area (AIA) by facilitating the freer movement of skilled labour and professionals across borders.

An ASEAN Declaration against Trafficking in Persons, Particularly Women and Children has been endorsed by ASEAN immigration focal points for the consideration of the ASEAN Standing Committee. The ASEAN Plan Of Action To Combat Transnational Crime covers trafficking in persons as well.

The adoption of SAARC (South Asian Association for Regional Cooperation) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution on January 5, 2002 at the Eleventh SAARC Summit held in Kathmandu is a significant initiative in combating

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[39] See the background report prepared for the meeting: IOM (2005). Labour Migration in Asia : Protection of Migrant Workers, Support Services and Enhancing Development Benefits. Geneva, International Organization for Migration, http://www.iom.int//DOCUMENTS/PUBLICATION/EN/Labour_Mig_Asia_ebk.pdf

[40] Second Labour Migration Ministerial Consultations for Countries of Origin in Asia: Summary of Statements and Recommendations of the Ministers, IOM.

[41] DGICM: Directors-General of Immigration Departments and Heads of Consular Divisions of ASEAN Ministries of Foreign Affairs http://www.aseansec.org/16572.htm.

and preventing trafficking in South Asia. It is an important step forward in the fight to preventing and combating trafficking, especially since it recognizes the need for extraterritorial application of jurisdiction; and extradition laws including a provision that the Convention shall be effective and the States Parties to the Convention will be bound to prosecute or extradite offenders in the absence of extradition treaties between the concerned states.

The Forum for Women, Law and Development (FWLD 2002(?)) has pointed out some problems with the SAARC Convention. The definition provided in the Convention is very narrow and focuses only on prostitution. It does not address trafficking from a broader perspective and has limited its application to prostitution. Further, the Convention lacks a strong treaty body and perspective on the rights of victims. Also the Convention does not clarify the recipient country's accountability in rescue, rehabilitation, repatriation and reintegration of affected persons.

7. RIGHTS OF MIGRANT WORKERS: CONVERGENCE AND DIVERGENCE AND THE WAY FORWARD

It is now time to take stock of preceding analysis and speculate on emerging developments. The overall implications of recent developments for rights of migrant workers are far from clear, and there seems to be little reason for complacency.

7.1 Areas of convergence and divergence

Among areas of broad convergence, there seems to be growing acceptance of labour migration as a structural feature in economies of the region. Most countries have also pledged at global conferences to respect the basic rights of migrant workers. The ILO Declaration is binding on all member States, and contains important provisions for prevention of the violation of the fundamental labour rights of migrant workers. The trade union movement is playing a more active role in promoting and protecting migrant rights. Countries are increasingly recognizing the value of bilateral and regional cooperation. There is a proliferation of MOUs on labour migration in the region, with Malaysia, the Republic of Korea and Thailand taking the lead. A broad consensus on combatting trafficking and smuggling of human beings has emerged as evidenced by various regional initiatives such as the Bali process.

At the same time, areas of divergence seem to persist. Immigration polices in receiving countries of the region still do not reflect the labour market needs or the contribution of foreign workers or labour market needs. While the demand for migrant labour is often structural, most Asian countries would still like to see continuation of temporary migration leading to truncation of worker rights. Many countries pay only lip service to the commitments made at global and regional summits, and rarely take action to prevent continuing abuse and exploitation of migrant workers at home or abroad. Some countries, particularly those with a large migrant workforce, are hardening their stance towards migrant workers in irregular status. At the same time, they continue to rely on these workers for meeting labour market needs year after year without any consideration for the need to regularize their status. The Gulf countries would like to see a reduction of their reliance on foreign workers, mainly from Asia, while a number of Asian sending economies would like to promote labour deployment to the Gulf countries. There has been no ratification of ILO migrant worker Conventions in the region for the last four decades.

7.2 The way forward

The ILO Action Plan on migrant workers adopted at the International Labour Conference of June 2004 can be used as a general framework for addressing many of the problems found in this region.

- *Basing credible migration policies on recognition of contributions of labour migration*

Trends in Asia clearly indicate that migration is likely to increase in the future rather than decrease, and it is by no means a transient or temporary phenomenon. Therefore, labour-receiving countries should attempt to formulate migration policies based on longer run considerations of labour market needs and transparent admission policies consistent with international standards. The receiving country governments have to inform the public about the contribution of migrant workers to the prosperity of their countries, and build community acceptance of migrant workers. (Hugo 2003). More avenues for legal labour migration have to be opened up. The experiences of the Republic of Korea and Thailand show some positive moves in this respect. Expansion of legal avenues for labour migration will go a long way towards reducing irregular migration flows and associated rights abuses.

At the same time, migrant-sending countries should attempt to reduce undue dependence on overseas employment through efforts to reduce emigration pressures at home in the long term ILO Employment Policy (Supplementary Provisions) Recommendation, 1985 (No. 169) calls on member States to create more employment opportunities and better conditions of work in countries of emigration so as to reduce the need to migrate to find employment. One component of the ILC Plan of Action on migrant workers is support for implementation of the ILO Global Employment Agenda at national level to create decent jobs locally.

- *Role of sending countries: issue of governance*

The preceding analysis has brought out clearly that migrant workers are subject to high exploitation in the sending countries themselves. Cumbersome bureaucratic procedures, official corruption, and malpractices of recruitment agencies all play a part in the process driving would-be migrants to more risky channels, and heavy debt burdens, thereby handicapping them from the inception of the process. There is well-documented evidence of the harassment and exploitation of returning migrant workers as the Indonesian experience clearly shows (CARAM Indonesia, KOPBUMI et al. 2002). Therefore, sending country governments can adopt a number of measures to minimize these such as simplification of bureaucratic procedures, awareness and information campaigns, and effective regulation of recruitment agencies coupled with stiff penalties for violators.

Sending countries can also establish good examples and practice by ratifying ILO and UN Conventions relating to migrant workers and enacting legislation consistent with the spirit of these instruments. This places them in a better moral position in negotiations with receiving countries. The ILC Plan of Action (ILO 2004c) has provided clear guidelines in this respect. All sections of society should join in the attempt to promote the ratification of these instruments.

The role of private recruitment agencies is at the centre of the issue of governance. An ILO Committee of Experts (ILO 1997) formulated guidelines for special protective measures for migrants recruited by private agents for employment overseas. The Private Employment Agencies

Convention, 1997 (No.181) elaborates principles and guidelines for their operation. Public employment services in both sending and receiving countries should also play a greater role working in cooperation with private employment agencies. States should also undertake close supervision of the activities of private recruitment by means of appropriate national laws or regulations and in consultation with employers and workers, and impose adequate sanctions and punitive action against abuses or malpractices. The ILC Resolution has asked for identification of guidelines and best practices in the area of *"licensing and supervision of recruitment and contracting agencies for migrant workers in accordance with ILO Convention No. 181 and Recommendation No. 188, with the provision of clear and enforceable contracts by those agencies"*.

- *Greater cooperation among countries*

States have to pursue bilateral and regional consultations given the very nature of international migration processes. Abella (Abella and Lonroth 1995) has clearly shown that orderly migration policies are possible only when there is cooperation between sending and receiving countries. There is however, marked reluctance among countries in the region to enter into agreements even of limited scope, which leaves the field open for abuses by market forces. Regional forums such as the ASEAN and the SAARC have been reluctant to include labour mobility issues in their agendas. Best practices from other regions should be studied for possible adaptation.

Gulf countries also have active programmes for reducing the dependence on foreign workers. This should be done gradually and in consultation with major labour-sending countries to minimize the possible adverse impact of such measures on the latter.

- *Key role of social partners*

Both employer and worker groups have supported the ILO Action Plan on Migrant Workers adopted at the ILC, 2004. They should play an active role in monitoring the implementation of this Action Plan as well as the multilateral framework to be developed later in the year. Trade unions have pledged support to protection of the rights of migrant workers at several regional forums.: ILO Asia-Pacific Regional Symposium for Trade Union Organizations on Migrant Workers and the ICFTU-APRO Regional Consultation on Developing a Cooperating Mechanism for Promoting and Protecting the Rights of Migrant Workers, 2003 (ICFTU-APRO 2003) are important inthis respect. The latter Consultation asked ICFTU-APRO to take a lead role in coordinating trade union action for protecting and promoting rights of migrant workers in the Asian and the pacific region.

Employers also need to share social responsibility for the plight of migrant workers and provide them equal treatment in respect of pay and working conditions. Employers' organisations can o exert pressure on the recruitment industry to prevent abuses, and adopt ethical practices and appropriate codes of conduct. Employers' and workers' organisations in sending and receiving countries should attempt networking of their activities in serving migrant workers. It is particularly important if they can establish contacts with Gulf employer associations in the absence of scope for union action. At the same time, formation of associations of migrant workers should be encouraged so that they can provide self-help support services, among other things.

- *NGOs and strategic partnerships*

I have already outlined the important role played by NGOs in support to particularly vulnerable workers, and in lobbying for migrant rights. The Migrant Forum Asia and the Asian Migrant Centre

are continuing to play a coordinating role in this respect. The increasing partnerships with the trade union movement is another encouraging sign as seen in the Hong Kong SAR wage issue.

- *Ensuring access to justice*

The problem of rights is compounded by the virtual absence of any channels for access to justice and remedies. The ILC Resolution called on the ILO to identify good practices in improving labour inspection and creation of channels for migrant workers to lodge complaints and seek remedy without intimidation. Labour inspection services are woefully inadequate in most countries to cover establishments using foreign workers. Migrant workers also have limited to access to other channels. Receiving states in the Middle East, particularly the GCC countries, pose a more difficult situation because of the absence of bilateral labour agreements, trade unions, broad based NGOs, watchdog mechanisms or other means of redress, and language barriers. A multi-pronged approach with focus on more general human rights instruments, and civil society organizations may be called for.

- *Protection of women migrant workers, particularly domestic workers.*

This is another area of convergence of international opinion - that domestic work places women workers in conditions of forced labour akin to virtual slavery, and requires urgent action. Unfortunately many receiving countries still fail to recognize the gravity of the issue, and do not try to bring domestic work into the framework of national labour law. Important recent initiatives such as ILO research on national legislation regarding domestic work (Ramirez-Machado 2002), *the Colombo Declaration* adopted by the *Regional Summit on Domestic Workers* (CARAM Asia 2002) and the Hong Kong *Consultation Meeting on the Protection of Domestic Workers Against the Threat of Forced Labour and Trafficking* have provided valuable information and guidelines on the protection of domestic workers. To address the issue, a number of strategies should be used including fighting forced labour since a number of Gulf countries have ratified the ILO forced labour conventions and also are bound by the ILO Declaration and the related core conventions. At the same time, concerned stakeholders such as workers' organizations, women's organizations, NGOs, and human rights agencies can join hands in dealing with this issue and raise public awareness in the receiving countries.

- *Better information on opportunities, risks and rights*

Sending countries should promote public information campaigns on conditions in receiving countries, the risks and dangers of irregular migration and the phenomenon of migrant trafficking and related abuses. Similarly, information on the rights of migrants and available instruments and redress mechanisms should be disseminated to all parties in both sending and receiving countries.

The ILO Gender Promotion Programme has developed an information guide consisting of six booklets for preventing discrimination, exploitation and abuse of women migrant workers covering the entire migration and return process (ILO 2003b). Constituents can use it as a practical guide on policies and programmes to prevent and protect women and girls from being trafficked and exploited.

- *Adaptation of the ILO Plan of Action and the multilateral framework on a rights-based approach to labour migration to Asia.*

All ILO member states and social partners in the Asian region endorsed the ILO Plan of Action on migrant workers and the development of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards. It is important to adapt this Plan and the framework to the specific needs of the Asian region if countries are serious about the protection of the rights of migrant workers. Regular tripartite consultations would be needed to monitor the progress made on the implementation of this Plan of Action.

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Annex I: Ratifications International Instruments on Migration/Migrant Workers: As of 31 March 2005

ILO Migration for Employment Convention, 1949 (No.97)

ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143)

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

STATUS:
ILO Convention 97: 43 ratifications
ILO Convention 143 18 ratifications
1990 International Convention: State Parties: 30; Non-ratified signatories: 25

50 States have ratified one or both of the ILO conventions.
71 States have ratified one or more of these three instruments.

State	Ratification ILO C-97	Ratification ILO C-143	Ratification or accession (a) 1990 Convention	Signature 1990 Convention
Albania	2 March 2005			
Algeria	19 Oct 1962		21 April 2005a	
Argentina				10 Aug 2004
Azerbaijan			11 Jan 1999a	
Bahamas	25 May 1976			
Bangladesh				7 Oct 1998
Barbados	8 May 1967			
Belgium	27 July 1953			
Belize	15 Dec. 1983		14 Nov 2001a	
Benin		11June 1980		
Bolivia			12 Oct 2000a	
Bosnia &-Herzegovina	2 June 1993	2 June 1993	13 Dec 1996a	
Brazil	18 June 1965			
Burkina Faso	9 June 1961	9 Dec. 1977	26 Nov 2003	15 Nov 2001
Cambodia				27 Sept. 2004
Cameroon	3 Sept. 1962	4 July 1978		
Cape Verde			16 Sept 1997a	
Chile			21 March 2005	24 Sept 1993
Colombia			24 May 1995	
Comoros				22 Sept 2000
Cuba	29 April 1952			
Cyprus	23 Sept. 1960	28 June 1977		
Dominica	28 Feb. 1983			
Ecuador	5 April 1978		6 Feb 2002a	
El Salvador			14 March 2003	13 Sept. 2002
Egypt			19 Feb 1993a	

France	29 March 1953			
Gabon				15 Dec. 2004
Germany	22 June 1959			
Ghana			7 Sept 2000a	7 Sept 2000
Granada	9 July 1952			
Guatemala	13 Feb 1952		14 March 2003	7 Sept 2000
Guinea		5 June 1978	7 Sept 2000a	
Guinea-Bissau				12 Sept 2000
Guyana	8 June 1966			
Hong Kong (China Special Admin. Region)*	22 Jan 1951*			
Indonesia				22 Sept 2004
Israel	30 Mar 1953			
Italy	22 Oct 1952	23 June 1981		
Jamaica	22 June 1962			
Kenya	30 Nov 1965	9 April 1979		
Kyrgyz Republic			29 Sept. 2003a	
Lesotho				24 Sept 2004
Liberia				22 Sept 2004
Libyan Arab Jamahiriya			18 June 2004a	
Madagascar	14 June 2001			
Malawi	22 Mar 1965			
Malaysia (Sabah)	3 March 1964			
Mali			5 June 2003a	
Mauritius	2 Dec 1969			
Mexico			8 Mar 1999	22 May 1991
Morocco			21 June 1993	15 Aug 1991
Netherlands	20 May 1952			
New Zealand	10 Nov 1950			
Nigeria	17 Feb 1955			
Norway	17 Feb 1955	24 Jan 1979		
Paraguay				13 Sept 2000
Peru				22 Sept 2004
Philippines			5 July 1995	15 Nov 1993
Portugal	12 Dec 1978	12 Dec 1978		
Saint Lucia	14 May 1980			
San Marino		23 May 1985		
Sao Tome & Principe				6 Sept 2000
Senegal			9 June 1999a	
Serbia and Montenegro				11 Nov 2004
Seychelles			15 Dec 1994a	
Sierra Leone				15 Sept 2000
Slovenia	29 May 1992	29 May 1992		
Spain	21 March 1967			
Sri Lanka			11 Mar 1996a	

Sweden		28 Dec 1982		
Syria			2 June 2005	
Tajikistan			8 Jan 2002	7 Sept 2000
Tanzania (Zanzibar)	22June 1966			
The former Yugoslav Republic of Macedonia	17 Nov 1991	17 Nov 1991		
Trinidad & Tobago	24 May 1963			
Timor Leste			30 January 2004a	
Togo		8 Nov 1983		15 Nov 2001
Turkey			27 Sept 2004	13 Jan 1999
Uganda		31 March 1978	14 Nov 1995a	
United Kingdom	22 Jan 1951			
Uruguay	18 March 1953		15 Feb 2001a	
Venezuela	9 June 1963	9 June 1963		
Yugoslavia	2 Dec 1964	2 Dec 1964		
Zambia	2 Dec 1964			

*Hong Kong is a Special Administrative Region of China. China notified regarding the continued application of ILO Convention 97 in Hong Kong on 1 July 1997, date of return under Chinese sovereignty.

Signature is a preliminary step to ratification for International (UN) Conventions. **Accession** is an "all in one" adoption of the Convention equivalent to **ratification**, both signifying that the Convention standards are incorporated into national law and the country has become a Contracting or State Party to the Convention.

Full texts and related information on the ILO Conventions are found on the ILO website, at www.ilo.org/ilolex

A status chart, the text of the Convention, and Human Rights Commission resolutions and reports related to migrants human rights are available on the website of the UN High Commissioner for Human Rights, at, www.unhchr.ch

Source: International Migration Programme, ILO (Compilation by Mr. Patrick Taran, Senior Migration Specialist).

Annex 2: Ratifications of the ILO Fundamental human rights Conventions by countries in Asia & Pacific (as of 16.07.2005)

	Freedom of association and collective bargaining		Elimination of forced and compulsory labour		Elimination of discrimination in respect of employment and occupation		Abolition of child labour	
Country	Conv. 87	Conv. 98	Conv. 29	Conv. 105	Conv. 100	Conv. 111	Conv. 138	Conv. 182
Afghanistan				X	X	X		
Australia	X	X	X	X	X	X		
Bahrain			X	X		X		X
Bangladesh	X	X	X	X	X	X		X
Cambodia	X	X	X	X	X	X	X	
China					X		X	X
Fiji	X	X	X	X	X	X	X	X
India			X	X	X	X		
Indonesia	X	X	X	X	X	X	X	X
The Islamic Republic of Iran			X	X	X	X		X
Iraq		X	X	X	X	X	X	X
Japan	X	X	X		X		X	X
Jordan		X	X	X	X	X	X	X
Kazakhstan	X	X	X	X	X	X	X	X
Kiribati	X	X	X	X				
Korea, Republic of					X	X	X	X
Kuwait	X		X	X		X	X	X
Kyrgyzstan	X	X	X	X	X	X	X	
Lao People's Democratic Republic			X				X	X
Lebanon		X	X	X	X	X	X	

Country	Conv. 87	Conv. 98	Conv. 29	Conv. 105	Conv. 100	Conv. 111	Conv. 138	Conv. 182
Malaysia		X	X	D	X		X	X
Mongolia	X	X	X	X	X	X	X	X
Myanmar	X		X					
Nepal		X	X		X	X	X	X
New Zealand			X	X	X	X		X
Oman			X					X
Pakistan	X	X	X	X	X	X		X
Papua New Guinea	X	X	X	X	X	X	X	X
Philippines	X	X		X	X	X	X	X
Qatar			X			X		X
Samoa								
Saudi Arabia			X	X	X	X		X
Singapore		X	X	D	X			X
Solomon Islands			X					
Sri Lanka	X	X	X	X	X	X	X	X
Syrian Arab Republic	X	X	X	X	X	X	X	X
Tajikistan	X	X	X	X	X	X	X	
Thailand			X	X	X			X
Timor Leste, Democratic Republic of								
Turkmenistan	X	X	X	X	X	X		
United Arab Emirates			X	X	X	X	X	X
Uzbekistan		X	X	X	X	X		
Vanautu								
Viet Nam					X	X	X	X
Yemen	X	X	X	X	X	X	X	X
Total of 42	**20**	**25**	**37**	**29**	**33**	**31**	**24**	**30**

Source: International Labour Standards, ILOLEX (16.07.2005); http://www.ilo.org/ilolex/english/docs/declAS.htm

Annex 3: Status of Ratifications of the Principal International Human Rights Treaties (As of 28-03-03)

STATE	**ICCPR** (1)	**ICESCR** (2)	**CAT** (3)	**ICERD** (4)	**CEDAW** (5)	**CRC** (6)	**MWC** (7)	**OPT** (8)	**OPT2** (9)
Afghanistan	X	X	X	X	X	X			
Australia	X	X	X	X	X	X		X	X
Bahrain			X	X		X			
Bangladesh	X	X	X	X	X	X	S		
Brunei Darussalam						X			
Bhutan				X	X	X			
Cambodia	X	X	X	X	X	X			
China	S	X	X	X	X	X			
Democratic People's Republic of Korea	X	X			X	X			
Fiji				X	X	X			
India	X	X	S	X	X	X			
Indonesia			X	X	X	X			
The Islamic Republic of Iran	X	X		X	X	X		X	X
Iraq	X	X		X	X	X			
Japan	X	X	X	X	X	X			
Jordan	X	X	X	X	X	X			
Kazakhstan	X	X	X	X	X	X			
Kiribati					X	X			
Korea, Republic of	X	X	X	X	X	X		X	
Kuwait	X	X	X	X	X	X			
Kyrgyzstan	X	X	X	X	X	X		X	
Lao PDR	X	X		X	X	X		X	
Lebanon	X	X	X	X	X	X			
Malaysia					X	X			
Mongolia	X	X		X	X	X		X	X

STATE	ICCPR	ICESCR	CAT	ICERD	CEDAW	CRC	MWC	OPT	OPT2
Myanmar					X	X			
Nepal	X	X	X	X	X	X		X	X
New Zealand	X	X	X	X	X	X		X	X
Oman				X		X		X	X
Pakistan				X	X	X		S	S
Papua New Guinea				X	X	X			
Philippines	X	X	X	X	X	X	X	X	X
Qatar			X	X		X		X	X
Saudi Arabia			X	X	X	X			
Singapore					X	X			
Solomon Islands		X		X	X	X			
Sri Lanka	X	X	X	X	X	X	X	X	
Syrian Arab Republic	X	X	X	X	X	X	X		
Tajikistan	X	X	X	X	X	X	X	X	
Thailand	X	X			X	X			
Turkmenistan	X	X	X	X	X	X		X	X
United Arab Emirates				X	X	X			
Uzbekistan	X	X	X	X	X	X		X	
Viet Nam	X	X		X	X	X			
Yemen	X	X	X	X	X	X			

- *Col. (1) - the International Covenant on Civil and Political Rights (ICCPR) –(1966); Col. (2) - the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); Col. (3)- the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); Col. (4)- the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Col. (5)- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (1979); Col. (6)- the International Convention on the Rights of the Child (ICR) (1989); Col. (7) the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC); Col. (8)- the Optional Protocol to the ICCPR (OPT) ; Col. (9)- the Second Optional Protocol to the ICCPR (OPT2);*

Note: X= ratification: Office of the United Nations High Commissioner for Human Rights

Website address: http://www.unhc*hr.ch/

Based on http://www.ohchr.org/english/bodies/docs/RatificationStatus.pd

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