



**South East Asia
National Human Rights Institutions Forum (SEANF)
Paper on Migrant Workers
2010**

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Executive Summary

The ASEAN leaders adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers at the 12th ASEAN Summit in January 2007, and set out in Article 22 of the Declaration that an “ASEAN instrument”, or agreement, be developed to regulate migration and protect migrant workers’ rights in the ASEAN member states. The ASEAN Foreign Ministers then agreed in July 2007 to establish the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers (ACMW), composed of representatives of each of the ASEAN governments, to negotiate the terms of the Instrument and serve as the core body to formulate policies for consideration by ASEAN on migrant workers.

The South East Asia National Human Rights Institutions Forum (SEANF) strongly believes that the human rights perspective should be at the center of the policy discussions and drafting of the ASEAN Instrument to protect the rights of migrant workers. With this paper, the SEANF lays out its position on the ASEAN Instrument and the work of the ACMW, and urges the ACMW to avail itself of our expertise on human rights issues.

In this policy paper, the SEANF shares our recommendations for the ASEAN Instrument. The SEANF also offers advice to the ASEAN Intergovernmental Commission on Human Rights (AICHR) for protecting and promoting the rights of migrant workers. Finally, we make national recommendations for each of the governments of the four countries (Indonesia, Malaysia, the Philippines and Thailand) whose NHRIs form the membership of the SEANF.

The SEANF states that the scope and coverage of the Instrument should address all issues relating to migrant workers. ASEAN should use the principle of “national treatment”, which is defined as non-discriminatory treatment that ensures migrant workers receive treatment no less favorable than the treatment accorded to nationals of the labour receiving state. This principle should be explicitly stated in the ASEAN Instrument in relation to wages and conditions of work for migrants, and respect to the terms and conditions of work contracts. All aspects of laws and regulations should be equally applied to migrant workers, with special attention to those relating to wages, labour, housing, social protection, access to grievance handling and legal procedures, and judicial redress insofar as they are not inconsistent with the contract of employment.

The SEANF believes that the Instrument should comply with all the major international human rights treaties and relevant ILO Conventions, thereby guaranteeing migrants' rights to freedom of movement, freedom of association and collective bargaining, right to work freely chosen, and freedom from forced labour and human trafficking. A strong section in the Instrument should focus on building strong regional anti-trafficking response through a network of national focal points that will prevent trafficking, prosecute traffickers, and protect, through a victim-centric approach, the interests of the victims.

The SEANF also proposes that the Instrument include rights for migrant workers based on international human rights standards like the CRC, CEDAW, ICESCR and ICCPR including freedom of thought and religion; right to health care and education; right to marriage and a family; adequate and hygienic housing; and access to legal assistance and redress through the judicial system. Among other policy recommendations, the SEANF also calls for special protections for migrant domestic workers and sanctity of workers documents to be kept by the workers. The SEANF also proposes that the drafters of the ASEAN Instrument also include other tools to protect and promote the rights of migrant workers, including model worker contracts, strict regulation of labour recruitment firms, one-stop service centers for approvals, and effective cooperation between states, and with ASEAN civil society organizations.

The SEANF seeks to cooperate on migrant issues with the ASEAN Inter-Governmental Commission on Human Rights (AICHR) and has a set of recommendations for AICHR's work in this area. The SEANF found that AICHR should use its authority to request information from member states about their migration policies and conduct a thematic study on abuses of human rights during the migration processes in the ASEAN region. AICHR should also launch a consultative process to build public awareness about human rights and migration.

For the four member states, some of the recommendations made by the SEANF are:

Indonesia

- To ratify the ICRMW (which Indonesia has already signed).
- Amend Law 39/2004 "Concerning Placement and Protection of Indonesian Workers", and review and revise all labour laws to bring them into line with ILO and UN standards.

- Bring the gender dimension into migrant policy in a more effective way
- Revise the MOU with Malaysia on treatment of migrant workers.
- End rights abuses in the labour recruitment programs in Indonesia, and crack-down on illegal recruiters.
- Develop more effective systems to monitor Indonesian migrant workers overseas by Indonesian Embassies and Komnas HAM.
- Launch a comprehensive community-level information campaign about rights and responsibility of Indonesian migrant workers overseas.

Malaysia

- Review laws and policies that are inconsistent with UN and ILO conventions.
- Amend labour laws to include “domestic work” under legal coverage.
- Grant the request from the Special Rapporteur on the Human Rights of Migrants to officially visit Malaysia.
- Right of freedom of association of legal migrant workers under domestic labour laws applicable to the nature of migrant workers’ employment.
- Launch a public campaign against employers’ seizure of worker documents.
- Reform labour sourcing or recruitment processes in Malaysia to eliminate abuses.
- Adopt a humane approach towards immigration offences to ensure justice and fairness.
- Assign medical staff to permanently be based at Immigration Detention Centers.
- Reform “Special Pass” procedures to make them more migrant-friendly and less expensive.

The Philippines

- Review laws protecting migrants and revise them to bring them into full compliance with UN and ILO Conventions.
- Oppose legislative efforts to amend the objectives of Republic Act No. 8042 to formally identify overseas employments as a means to sustain economic growth and achieve national development.
- Revoke Administrative Order (AO) 247 and focus the Philippines Overseas Employment Administration (POEA) to its original mission to protect migrant workers.

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- Urge a serious political commitment to immediately pass legislation to bring domestic work under the formal definition of employment in the labour laws.
- Establish and actively implement effective safeguard mechanisms for monitoring of efforts to promote and protect the human rights of migrant workers at all stages of the migration process.
- Establish greater coordination and accountability of the government agencies overseeing migration.
- Expand the personnel and support provided to Embassy officers handling migrant protection duties, including establishing shelters for migrants in distress in destination countries.
- Adopt mechanisms to ensure employment, business opportunities and family and community reintegration programs for returning migrant workers.
- Reform the Overseas Workers Welfare Administration (OWWA) Omnibus Policies.

Thailand

- Ensure laws and policies on migrant workers are in compliance with ILO and UN human rights standards.
- Positively respond to request for the official visit of the Special Rapporteur on the Human Rights of Migrants.
- Review the provincial declarations severely restricting the rights of migrant workers.
- Ensure migrant workers' right to movement and give more flexibility for migrant workers concerning the requirement that they must report the change of employers within 7 days.
- Provide guarantees for migrant workers to access the judicial process to seek legal and financial redress.
- Review articles 88 and 100 of the Labour Relations Act 1975 related to restrictions on migrant workers' rights to establish trade unions and serve as elected union leaders.
- Support the creation and operation of "social networks" of migrant worker organizations or associations that enable migrant workers to protect themselves.

- Ensure migrant workers' rights to family and birth certificates, right to education, and right to health and social service.
- Ensure that conditions of detention of irregular migrants comply with the Standard Minimum Rules of Places for the Treatment of Prisoners.
- Recognize "domestic work" as work covered by the labour laws.

I. Rationale for Engagement by the South East Asia National Human Rights Institutions Forum (SEANF) on Issues of Human Rights and Migration

With the adoption of the ASEAN Charter and the creation of the three ASEAN Community Councils and their associated blueprints, ASEAN is rapidly moving to fulfill its vision of full economic integration by 2015. The support of the people of ASEAN will be critical to the success of this integration, a fact recognized by H.E. Surin Pitsuwan who said upon taking up the office of ASEAN Secretary-General that *“...to be successful and meaningful in building the ASEAN Community our 560 million people must be part of this historic mission. This is, in fact, clearly stated in the ASEAN Charter.”*¹ The Charter calls for *“facilitated movement of business persons, professionals, talents, and labour”* yet the regional frameworks for regulating labour mobility and managing migration are still in nascent stages.

On January 13, 2007, at the 12th ASEAN Summit in Cebu, the Philippines, the ASEAN leaders adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, thereby establishing that treatment of migrant workers is a preeminent human rights challenge for ASEAN. Article 22 of the Declaration tasks the governments to *“develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN’s vision of a caring and sharing Community...”* The ASEAN Foreign Ministers subsequently agreed to set up an ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers (ACMW) to carry forward the regional work on migration. ACMW has created a Drafting Committee on the ASEAN Instrument for the Protection and Promotion of the Rights of Migrant Workers composed of representatives of four governments (Indonesia, Malaysia, the Philippines, and Thailand). The Drafting Committee is now working on a first draft of the ASEAN Instrument called for in Article 22 of the Declaration.

During 2010, the Drafting Committee may decide to hold national consultations and make several rounds of revisions to the draft Instrument, and in fact, the SEANF strongly urges the Committee to do so. The SEANF hopes that clear and continuous

¹ H.E. Surin Pitsuwan, Statement at ASEAN Secretary-General office transfer ceremony, Jakarta, Indonesia, January 7, 2008, downloaded at www.aseansec.org

progress can be made during 2010 towards an inclusive draft Instrument that can be considered by key regional officials in ASEAN, and the ASEAN member states.

The South East Asia National Human Rights Institutions Forum (SEANF) is the unified voice of the national human rights institutions in ASEAN. The SEANF is composed of Komisi Nasional Hak Asasi Manusia Indonesia (KOMNAS-HAM), Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM), Commission on Human Rights of the Philippines (CHRP), and the National Human Rights Commission of Thailand (NHRCT). The members of the SEANF are coincidentally from the same four nations whose government representatives are serving on the Drafting Committee. Two of the SEANF members (KOMNAS-HAM and CHRP) are from countries that primarily send migrant workers abroad, while the other two members (SUHAKAM and NHRCT) are from countries that chiefly receive migrant workers from other countries. The SEANF participated in highly fruitful exchanges between the representatives of governments and ASEAN civil society at the ASEAN Forum on Migration hosted by the Thai Ministry of Labour on July 30-31, 2009, in Bangkok.

The SEANF strongly believes that the human rights perspective should be at the center of the policy discussions and drafting of the ASEAN Instrument to protect the rights of migrant workers. With their expertise in human rights and thorough knowledge of the context of ASEAN and its nations, the SEANF members are uniquely positioned to constructively contribute to this policy dialogue. Therefore, the SEANF sincerely desires to play a central role in an ongoing process of consultation with the ACMW, representing the governments of ASEAN, and ASEAN civil society organizations.

The SEANF notes that Navanethem Pillay, the UN High Commissioner on Human Rights, has designated "human rights in the context of migration" as a global human rights priority by making it one of the thematic priorities in the OHCHR's work in the period 2010-2011. Specifically, the OHCHR plans to dedicate special focus to supporting the protection of migrants' economic, social and cultural rights, and combating abuses such as discrimination and exclusion, criminalization of irregular migrants and conditions of detention that violate their basic human rights². The High Commissioner is also strongly urging all member states to accede to the International

² United Nations High Commissioner on Human Rights, "Statement by Ms. Navanethem Pillay UN High Commissioner for Human Rights: Briefing to Member States on the Strategic Management Plan 2010-2011", November 17, 2009, p. 4

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). The SEANF strongly supports these initiatives of the UN High Commissioner.

In this policy paper, the SEANF will first share its recommendations for the ASEAN Instrument being drafted by the Drafting Committee.

Second, the SEANF will offer advice on ways for the newly established ASEAN Intergovernmental Commission on Human Rights (AICHR) to be effectively involved in protecting and promoting the rights of migrant workers.

Third, in its capacity as a Forum for its member NHRIs, the SEANF will propose national recommendations for each of the governments of the four countries (Indonesia, Malaysia, the Philippines and Thailand) in its membership.

Finally, the SEANF will put forward ideas and proposals for its own engagement on these issues with the Asia Pacific Forum of National Human Rights Institutions (APF). The SEANF commends the APF for deciding at its 14th Annual Meeting (held in Jordan) to establish a Working Group on Migration and hopes that this paper will serve as an important input for the Working Group's first meeting scheduled to take place in the first quarter of 2010.

II. Regional recommendations to the ACMW and the ACMW Drafting Committee on the ASEAN Instrument on Protection and Promotion of the Rights of Migrant Workers

The ASEAN Charter sets out that all ASEAN member states shall act in accordance with a set of principles, including *“respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”* and *“upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.”* The Charter further commits ASEAN governments to *“enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare, and justice”* and *“...enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms...”*

The SEANF’s recommendations are made in accordance with these laudable principles.

A. Coverage of Regional Instrument, Non-Discrimination and “National Treatment”

1. The SEANF strongly recommends that the Drafting Committee should ensure the scope and coverage of the ASEAN Instrument address all issues relating to migrant workers. The scope and coverage of the Instrument should be in line with Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).³ ASEAN should use the ICRMW standard, which is firmly in accordance with Article 1 of the Universal Declaration of Human Rights (UDHR) which proclaims *“All human beings are born free and equal in dignity and rights.”* For clarity, the ICRMW definition of a migrant worker is *“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”*⁴

³ Article 7: “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”

⁴ The SEANF has no objections to the use of the exemptions to the definition of “migrant worker” set out in Article 3 of the ICRMW.

2. The SEANF recommends that the ASEAN Instrument should cover and apply equally to the family members of migrant workers accompanying those workers in the labour receiving countries.
 - a. This recommendation reflects the SEANF's conviction that since all the ASEAN Member Governments ratified the International Convention on the Rights of the Child (CRC) they must act in accordance with the CRC requirement that all ratifying states "*shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...*" The CRC specifically lists "*national origin*" as one the criteria for non-discrimination. Furthermore, the SEANF notes that the Committee on the Rights of the Child adopted General Comment no. 6 which requires application of the CRC "*to each child within the State's territory and to all children subject to its jurisdiction... including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory.*" The Committee thereby finds that "*the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore...also be available to all children - including asylum seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.*"⁵
 - b. This recommendation also reflects the SEANF's view that since all ASEAN Member Governments have ratified the International Convention on the Elimination of Discrimination against Women (CEDAW), they should ensure women family members of migrant workers are covered by the Instrument.
3. The SEANF advocates for the concept of "national treatment" to be the core principle of the ASEAN Instrument. "National treatment" is non-discriminatory treatment that ensures migrant workers receive treatment no less favorable than the treatment accorded to nationals of the labour receiving state.

⁵ Committee on the Rights of the Child, "General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin", adopted 39th session, 17 May-3 June 2005.

4. The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers provides that “...*the receiving states will...promote fair and appropriate employment protection, payment of wages and adequate access to decent working and living conditions.*” The SEANF proposes that the principle of “national treatment” should be explicitly stated in the ASEAN Instrument in relation to wages and conditions of work for migrant workers, such as overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which are covered by national law and practice. Since all ASEAN Member States are members of the ILO, the SEANF notes that they are obligated to comply with the ILO Declaration on Fundamental Principles and Rights at Work which sets out as a core principle “*the elimination of discrimination in respect of employment and occupation...*”⁶
5. The SEANF recommends that the drafters of the ASEAN Instrument recognize explicitly that “national treatment” requires government protection of rights of migrant workers that will cumulatively serve to enable migrant workers to better protect themselves from exploitative situations. Among these rights are freedom of movement, freedom of association, right to receive and send communications, and the right to life including the right to a family, and the right to security of person. The SEANF observes the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly guarantees many of these rights.
6. The SEANF recommends that the regional ASEAN Instrument requires the elimination of all forms of discriminatory policies and practices against migrant workers and ensures that all aspects of laws and regulations on wages, labour, housing, social protection, access to grievance handling and legal procedures, and judicial redress, and other relevant anti-discrimination laws, are equally applied to all categories of migrants in adherence with the principle of “national treatment.”

⁶ International Organization (ILO), “ILO Declaration on Fundamental Principles and Rights at Work”, adopted 86th Session, International Conference, Geneva, Switzerland, June 1998.

B. Ratifying and upholding international human rights standards

7. The ASEAN Charter Article 2.2.[j] states that ASEAN shall *“uphold the UN charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.”*
8. Since all ASEAN member states have ratified the CRC and CEDAW, the SEANF advocates the ASEAN Instrument, and the national laws of ASEAN member states regarding migrant workers, should be fully harmonized with the provisions of the CRC and CEDAW.
9. The SEANF notes that six out of ten ASEAN member states have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).⁷ Given that a meaningful majority of ASEAN member states acceded to these important international human rights instruments and the ASEAN Charter’s requirements to respect for human rights, the SEANF recommends the ASEAN Instrument should be fully harmonized with the requirements of ICESCR and ICCPR.
10. The SEANF recommends that ASEAN governments should immediately ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and harmonize their laws and regulatory frameworks with the ICRMW’s standards. The SEANF urges the Drafting Committee of the ASEAN Instrument to ensure its provisions are in accordance with the ICRMW.
11. All ASEAN member states are also members of the International Labour Organization. The ILO Declaration of Fundamental Principles and Rights at Work adopted unanimously in 1998 notes that all member states of the ILO have *“endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia”* and therefore are bound by 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*

⁷ Among ASEAN member states, Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Vietnam have ratified both ICESCR and ICCPR, while Brunei Darussalam, Malaysia, Myanmar, and Singapore have not ratified either instrument.

*principles concerning the fundamental rights which are... freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour ; the effective abolition of child labour ; and the elimination of discrimination in respect of employment and occupation.”*⁸ The SEANF therefore recommends that the ASEAN Instrument urge all the governments of ASEAN to ratify all eight core ILO Conventions⁹, and ensure that their national labour laws, especially those laws governing migrant workers, are harmonized with the standards contained in those core ILO Conventions.

12. The SEANF proposes that the ASEAN Instrument should ensure the member states of ASEAN to ratify ILO Conventions 97 and 143, the two key ILO conventions related to migration.

C. Right to freedom of movement

13. The SEANF observes Article 12 of the ICCPR that provides the right of freedom of movement to migrant workers¹⁰, and this right is reinforced by Article 39 of the ICRMW.¹¹ The SEANF holds that ASEAN member states should guarantee the rights of migrant workers to freedom of movement, especially the right to leave their workplace or worksite during times outside of their regular working hours, and urges the drafters of the ASEAN Instrument and the national member states to ensure this right is protected. Workers should not have their freedom of movement outside of working hours restricted as a condition of accepting employer-provided accommodation.

⁸ ILO Declaration on Fundamental Principles and Rights at Work, adopted at the 86th session of the International Labour Conference, Geneva, Switzerland, June 1998.

⁹ ILO Conventions 29, 87, 98, 100, 105, 111, 138, and 182.

¹⁰ Article 12 (1) of the ICCPR states “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

¹¹ Article 39 of the ICRMW says “Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.”

D. Right to freedom of association, and right to organize and collectively bargain

14. The SEANF recognizes that one of the best strategies to protect migrant workers is for governments to set out a framework of policies and practices which enable migrant workers to protect themselves. Accordingly, the SEANF calls upon the drafters of the ASEAN Instrument to ensure that migrant workers are guaranteed the right to freedom of association and collective bargaining in accordance with ILO Conventions 87 and 98. The SEANF notes that this will ensure the ASEAN Instrument conforms with the ICESCR Article 8(1)(a)¹² and ICCPR Article 22(1).¹³ SEANF however also notes that where domestic labour laws permit migrant workers to join local trade or labour unions on the same basis as citizens no restrictions should be placed upon migrant workers' exercise of such right.

E. Right to work freely chosen

15. The SEANF calls on the drafters of the ASEAN Instrument to ensure that migrant workers should be allowed to seek a new employer subject to the terms of the contract of employment, work permit and applicable laws of the countries concerned. The SEANF recognizes that striking a balance is important, but from the human rights perspective, employers should not be able to use their position as guarantors of workers' legal and employment status to abuse migrants' rights with impunity. Registration systems restricting workers to only the employer who brought them into the country fuel irregular migration because migrant workers with grievances (and facing debts from recruitment fees) will flee into the underground economy when they are not permitted to change their employer. The current global financial crisis contributes to the desperation of migrant workers moving into the informal economy when employers in receiving states terminate them before the end of their contracts.
16. The SEANF notes that by allowing migrant workers this right, the governments will bring labour market forces into alignment with better treatment of migrant

¹² ICESCR Article 8(1)(a) grants "the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests."

¹³ ICCPR article 22(1) states "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

workers. The good employers who follow the labour laws, and treat their migrant workers with dignity, will be rewarded when the most skilled migrant workers seek to work for them. Meanwhile, those employers who violate regulations and are abusive (and hence pose continual difficulties for government regulators) will have a difficult time recruiting and retaining migrant workers.

F. Freedom from forced labour / human trafficking

17. The SEANF recommends that ASEAN Instrument should call for all ASEAN member states to ratify the Palermo Protocol¹⁴ and bring their anti-trafficking laws into compliance with this international standard. The ASEAN Instrument should re-emphasize the importance of a “victim-centric” approach that considers the needs of the victim as paramount, and make clear the importance of dealing with the problem of human trafficking within the framework of migration management as well as criminal response.
18. The SEANF recognizes the trafficking of persons for forced labour and other purposes as a serious violation of the human rights of the migrant that effectively denies the original objective of the migrant, which is to seek a better life for themselves and their families. The SEANF urges the ACMW Drafting Committee to ensure the ASEAN Instrument includes a comprehensive section on principles against trafficking, and commitments to combat human trafficking in all its forms and for all end purposes. The SEANF further recommends that anti-trafficking interventions in the ASEAN Instrument should comply with the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking.
19. The SEANF applauds the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, adopted by the ASEAN leaders in Vientiane, Lao PDR, on November 29, 2004, which provides that all ASEAN member states will “undertake actions to respect and safeguard the dignity and human rights of genuine victims of trafficking in persons” and will “distinguish victims of

¹⁴ Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime

trafficking in persons from the perpetrators, and identify the countries of origin and nationalities of such victims and thereafter ensure that such victims are treated humanely and provided with such essential medical and other forms of assistance deemed appropriate by the respective receiving or recipient country, including prompt repatriation to their respective countries of origin.” The Declaration also requires the ASEAN member states to *“take measures to strengthen regional and international cooperation to prevent and combat trafficking in persons.”*

20. The SEANF recommends that the ASEAN Governments should immediately establish distinct national focal points for the purposes of establishing and maintaining case by case cooperation on human trafficking, in line with the intent of the ASEAN Declaration against Trafficking in Persons Particularly Women and Children that called for establishment of a *“regional focal network.”* Once the network is established, the ACMW should develop an action plan for collaboration with the network in order to build more effective regional cooperation against cross-border human trafficking.
21. The SEANF recognizes the close link between human trafficking and transnational crime, but notes that trafficking for labour and other purposes frequently occurs in the context of migration. Yet unfortunately, ASEAN has separated migration and trafficking into separate pillars ¹⁵, thereby creating challenges to effective coordination of migrant protection and anti-trafficking work. The SEANF therefore urges the ACMW to press ASEAN to find ways to recognize the connection of trafficking to migration in its structure and coordination efforts.
22. The SEANF recognizes that fully half of the members of ASEAN are already signatories ¹⁶ of the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) MOU which has established a comprehensive and sustained framework for cross-border cooperation between states to combat human trafficking. The SEANF recommends that the ASEAN Instrument call for the extension of the original COMMIT MOU to the rest of ASEAN. The SEANF urges

¹⁵ ASEAN places human trafficking in the Political-Security Community, while migration is included in the Socio-Cultural Community.

¹⁶ The five ASEAN members who signed COMMIT are Cambodia, Lao PDR, Myanmar, Thailand, and Vietnam. China also signed COMMIT but it is not an ASEAN member.

each of the five ASEAN member states that have not signed the COMMIT MOU ¹⁷ to publicly announce their willingness to sign and encourage other non signatories to agree.

- a. The SEANF commends the signatory nations of the COMMIT MOU for agreeing to a rights-based, victim-centric agreement to combat human trafficking. In particular, the SEANF observes that COMMIT signatories agreed that *“trafficking is intensified by discriminatory attitudes, practices, and policies based on gender, age, nationality, ethnicity, and social grouping.”* The signatories also affirmed the critical importance of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002) which specify a clear human rights centric approach to human trafficking.

G. Right to freedom of thought, conscience, and religion

23. The ASEAN Charter sets out in Article 2.2.I that one of its core operating principles shall be *“...respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.”* The SEANF recommends that the drafters of the ASEAN Instrument should ensure migrants have the right to peacefully practise their social, cultural and religious beliefs, and that ASEAN member states should not impose restrictions that obstruct the non-violent practice of those beliefs. The SEANF also notes these rights are guaranteed by Article 18 of the ICCPR and Article 12(1) of the ICRMW which provides that migrant workers and member of their families have *“the right to freedom of thought, conscience and religion.”* ¹⁸
24. The SEANF recognizes the sensitivity of ensuring positive interaction between migrant workers and receiving communities, and believes that the governments and other stakeholders (such as NHRIs, NGOs, and other civil society groups) should work together to promote social integration and inclusion of migrant

¹⁷ ASEAN Member States that have not signed the COMMIT MOU are Brunei Darussalam, Indonesia, Malaysia, the Philippines, and Singapore.

¹⁸ ICRMW article 12(1) continues *“This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.”*

workers into the society by facilitating public education awareness campaign regarding role and contributions of migrant workers to the economic and social development of receiving country; educating both the receiving communities and the migrant workers about cultural and language diversity of both sending and receiving countries; and facilitating community support networks for migrant workers.

H. Health of migrant workers

25. Article 12 of the ICESCR establishes the right of *“everyone to enjoyment of the highest attainable standard of physical and mental health.”* The SEANF observes that the quality of health of a migrant worker does not just affect the worker, but also has implications on his or her ability to work and contribute to the economy of the receiving country, to earn and send money to his or her family still residing in the country of origin, and to return and reintegrate to the country of origin and enjoy a productive life. Therefore, the SEANF recommends that the health of migrant workers be protected and calls on the regional ASEAN Instrument to ensure that all migrant workers are provided with easily accessible and affordable quality health care.
26. The SEANF finds that CRC Article 24 requires that *“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”* Accordingly, the SEANF recommends that provisions must be made in the regional ASEAN instrument to ensure that ASEAN member states provide access to low cost, quality pediatric care for the children of all migrant workers.
27. The SEANF finds that Article 12(1) of CEDAW requires all ratifying states *“shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure...access to health care services, including those related to family planning.”* The SEANF therefore recommends that all ASEAN states ensure that migrant women workers are provided access to gender-sensitive reproductive health services, in addition to ensuring the protection of women workers’ health in the work place.

28. In accordance with the rights guaranteed by Article 11 (2) of CEDAW, the SEANF recommends that the regional ASEAN instrument clearly establish that pregnancy of a migrant woman worker may not be considered a legitimate reason for termination of work and/or deportation.

29. The ASEAN Commitments on HIV and AIDS, adopted by the ASEAN leaders on January 13, 2007, in Cebu, the Philippines, declares that the ASEAN Governments will *“put into place necessary legislation and regulations (including workplace policies and programmes) to ensure that persons living with HIV and affected groups are protected and are not subjected to stigma and discrimination, have equal access to health, social welfare and education services...”* The SEANF supports this call and recommends that the regional ASEAN Instrument and member states should ensure migrants are given access to proper HIV prevention, treatment, care and support services, including voluntary and confidential HIV counseling and testing in both countries of origin and destination.

I. Rights of migrant children

30. The SEANF strongly supports CRC’s core principle of giving first priority to the best interests of the child, and believes all interventions involving migrant children must follow this precept.

31. In line with Article 7 of the CRC, birth registration to children born of migrant workers should be considered a joint obligation of sending and receiving states, and such registration should be provided to the child regardless of the legal status of the parents.¹⁹ Where a receiving state’s laws do not provide for nationality on the sole basis of birth within its land, it is nevertheless responsible for documenting the birth of all migrant children in its national territory, and for compiling and sharing the data on said births with the sending countries. The SEANF recommends that all ASEAN states establish easy to access,

¹⁹ Article 7 of the CRC states: “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

inexpensive, and rapid procedures at their overseas Embassies and Consulates which accept birth registration documents of the receiving state (showing the child as being born from a migrant worker who is a citizen of the sending state) as the necessary evidence to verify nationality of a child. Those Embassies or Consulates should be authorized to issue official documentation to extend citizenship to the migrant child.

32. Article 28 of the CRC²⁰, sets out that labour receiving governments shall provide access to free education for the children of migrant workers at government schools. Receiving states which have acceded to CRC but asserts their sovereign right to hold reservations against the said Article should accept that education for the children of migrant workers is to be the obligation of the employer and should be stated in the contract of employment.

J. Right to marriage, family life

33. The SEANF observes that Article 23 of the ICCPR sets out an essential truth by declaring *“the family is the natural and fundamental group unit of society”* and the right of men and women to marry shall be recognized. The SEANF further views that CEDAW Article 16 lays out a requirement that *“State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...”* including the *“...right to enter into marriage.”* The Universal Declaration on Human Rights also adds in Article 16 that *“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.”* The SEANF recommends that the regional ASEAN Instrument guarantee the right of migrant workers to marry and formally register their marriage in the receiving country.

²⁰ Article 28 of the CRC requires that “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education...and...make them available and accessible to every child.”

K. Adequate housing for migrant workers

34. For reasons of both public health and human rights²¹, the SEANF recommends that the ASEAN Instrument should require employers of migrant workers to make free accommodation available to workers that is clean, hygienic, and safe, and provides sex segregated accommodation where required on safety grounds. Employers should also be responsible for regular maintenance of the housing provided. The SEANF notes such practice is in accord with Article 11(1) of the ICESCR that *“recognize(s) the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...”*
35. The SEANF further recommends that migrant workers shall be given the right to accept or refuse employer-provided accommodation, and if the worker exercises the right not to use employer provided accommodation, then the migrant workers should pay for the cost of the rental of his or her chosen accommodation. Employment should not be made conditional on acceptance of employer provided housing.
36. The SEANF calls on the drafters of the ASEAN Instrument to urge governments as far as possible to provide services to migrant workers such as proper sanitation, access to clean water and electricity, garbage collection, public transport, and public security in areas where they live. In line with the principle of “national treatment”, migrant workers’ accommodations should be monitored and inspected under the laws and regulations dealing with building safety and public health.

L. Humane approach on immigration offences

37. SEANF asserts that migrant workers who are found to violate immigration laws should be treated humanely. SEANF recommends that the drafters of the ASEAN Instrument should consider including a provision that encourages alternative measures that do not criminalize immigration offences and provide

²¹ ICESCR Article 11(1) establishes that “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

for administrative procedures regarding violations of immigration laws that are standard to all ASEAN countries.

38. The SEANF urges that penalties for a migrant worker remaining in an irregular or undocumented status in the territory of an ASEAN member State be made proportionate. Provisions of law that subject migrants to cruel, inhuman and degrading treatment should be reviewed immediately with the aim to reform.
39. The SEANF urges that if migrant workers are charged, they are given a prompt and fair trial, in which their procedural rights are guaranteed at all times, including immediate access to a lawyer of their choice.

M. Ending the seizure of migrant workers' identity documents by employers

40. The SEANF urges the drafters of ASEAN Instrument to place priority on protecting the right of migrant workers to hold their own passports and the original Government-issued work and personal documents. Unfortunately, at many stages (pre-departure, transit, and arrival and deployment) of the migration process, a variety of private actors (recruiters in sending countries, labour brokers in the receiving country, and employers) violate migrant workers' rights by seizing and holding their identity documents as a means of control. These actions make migrants unfairly vulnerable to arrest and deportation by authorities because the migrants cannot show proof of their legal status. The SEANF recommends that the ASEAN Instrument should contain provisions that require all ASEAN member states to set out severe legal penalties against any person who willfully destroys, mutilates or confiscates migrant workers' travel, work or personal identity documents issued by any Government agency from the labour sending or receiving country.

N. Special vulnerability of migrant domestic workers

41. The SEANF recommends that special attention is made in the ASEAN Instrument to the very serious abuses suffered by migrant women working in domestic service. Working in private homes, migrant domestic workers are subject to numerous violations of their rights including: seizure of their identification documents; restrictions on their rights to freedom of movement and association;

sexual harassment and other forms of physical and psychological abuses; long hours with no holiday leave or over-time pay; and withholding of wages or payment of sub-minimum wages. The SEANF notes that these practices violate core provisions of ICESCR, ICCPR, CEDAW, and core ILO Conventions.

42. The SEANF urges the ASEAN Instrument to ensure that “domestic work” is recognized by all ASEAN member states as a form of work covered by the national labour laws and therefore subject to all the protections and provisions of those laws and regulations. At a minimum, migrant domestic workers must have one day off every seven days and effective access to legal redress for violations of their rights.
43. The SEANF calls to the attention of ACMW Drafting Committee and the Governments that the ILO is seriously contemplating for 2010 to develop a specific new convention on protection of domestic workers. The SEANF therefore reiterates the importance of including domestic work in the coverage of any regional Instrument, and the national labour laws.

O. Access to justice

44. The SEANF notes that Article 14 of the ICCPR provides that “*All persons shall be equal before the courts and tribunals*” and further enjoins justice systems to make provisions for interpretation or translation and legal assistance.
45. The SEANF recommends that the drafters of the ASEAN Instrument include provisions calling for ASEAN member states to provide a channel for migrant workers to lodge complaints about ill treatment, human rights abuses, and violations of national laws.
46. Specifically, the SEANF recommends that legal aid be made available by relevant agencies to migrants in the communities where they live and work. Legal aid officers must be able to converse and receive information from migrants in their own language or through interpreters, have standing to represent migrant workers in the courts, and be authorized to facilitate settlements between the aggrieved migrant worker plaintiffs and defendants in line with the professed preferences of the plaintiffs.

47. The SEANF calls on the drafters of the ASEAN Instrument to ensure respect for the principle that potential plaintiff(s), whether documented or undocumented, shall be guaranteed the right to file a legal case seeking justice and pursue the case to its conclusion without threat or fear of harassment, arrest or deportation. Migrant workers shall also have the right to petition all relevant courts to seek legal redress and shall not be denied access because they are migrant workers and/or lack legal status in the country.
48. The SEANF urges the drafters of the ASEAN Instrument to ensure that access to legal remedy is made available to migrant workers by both labour sending and receiving states.
49. Given the vulnerability of migrant workers to retaliation by employers, brokers and criminal gangs, the SEANF urges the drafters of the ASEAN Instrument to call for witness protection systems to be created and/or strengthened in all ASEAN states, with specific mention of migrant worker complaints to be included in the categories of cases for which witness protection applies. Where cases involve women migrant workers, the SEANF adds that trained women officers should play a leading role in protection for witnesses.

P. Gender dimensions of migration

50. The SEANF notes the continuing trend of feminization of migration for work in the ASEAN region and recommends the drafters of the ASEAN Instrument Framework to ensure that a gender-based rights perspective infuses all aspects of the Instrument. Gender-based analysis should be used in a thorough regional assessment of the situation of migration, leading to development of concrete measures to address the feminization of migration comprehensively in labour migration policies and protection of migrant worker rights. In these considerations, the SEANF urges the drafters of the ASEAN Instrument to consult closely on the obligations of ASEAN Member States under CEDAW.

Q. Migration management

The SEANF has serious concerns about the state of migration management in ASEAN at this time, and proposes a series of recommendations for consideration by the drafters of the ASEAN Instrument and the ASEAN member governments:

(1) Participation by civil society organizations

51. The SEANF finds that civil society organizations – such as NGOs, trade unions, community-based organizations, and associations of the migrants themselves – have a very important role in protecting migrant workers’ rights in both sending and receiving countries. ASEAN leaders have repeatedly stated the importance of the participation of the people of ASEAN in the organization’s deliberations. Therefore, the SEANF recommends the ACMW and the Drafting Committee of the ASEAN Instrument to include civil society representatives in their negotiations on the ASEAN Instrument, and conduct regular face-to-face consultations at the national and regional levels with civil society organizations assisting migrants.
52. The SEANF believes that the ASEAN Forum on Migrant Labour (AFM) is an important forum that should be continually held on at least an annual basis. However, the SEANF urges the drafters of the ASEAN Instrument and other representatives of the national governments to go beyond the AFM and conduct additional consultations with ASEAN civil society, especially during the year 2010 when much of the drafting work on the ASEAN Instrument will be done.
53. Since the ASEAN Instrument should be based on the daily realities of the problems and issues faced by migrant workers throughout ASEAN, the SEANF urges the drafters of the ASEAN Instrument and other representatives of the ASEAN member states to actively devise forums and other consultative opportunities (such as focus groups, seminars, etc.) where they can consult with actual migrant workers – both where they work and live in receiving states as well as upon return and reintegration to the labour sending state.

(2) Labour Recruitment

54. The SEANF finds that private labour recruitment firms and brokers in both sending and receiving countries are involved in charging unjustifiably high recruitment fees. A lack of transparency in the recruitment process contributes to failures of governance and instances of corruption among those charged with regulating these firms. The SEANF discovered that high recruitment fees result in worker traveling to labour receiving countries in a status akin to debt bondage where some or almost all of their salaries are diverted to repaying brokers' fees.
55. The SEANF finds such debt bondage arrangements lead to cases of labour trafficking in which migrant workers' human rights are systematically violated. These arrangements occur in many economic sectors, including but not limited to agriculture, construction, domestic work, entertainment and sex work, light and heavy manufacturing, marine fishing, and restaurants and service establishments. The SEANF recommends that the Drafting Committee include a regional agreement on cooperation to investigate, charge and punish labour recruitment agents and companies found to be involved in trafficking of persons for labour and all other end forms of human trafficking.
56. The SEANF calls on the Drafting Committee to set out in the ASEAN Instrument that recruitment of migrant workers occurs in a professional, transparent, and accountable manner. The process of granting labour recruitment licenses shall be seriously and strictly managed, with government officials conducting continuous monitoring of the activities of migrant recruitment enterprises and taking prompt action to withdraw licenses of those enterprises which violate the national law and/or regional agreement(s), or which are judged not to have the mandate and capacity to effectively carry out their recruitment activities. Information on the legal status of labour recruitment agencies, including their mandate, responsibilities and authority should be publicized by the governments and NGOs in all the sending and receiving countries where those recruitment firms operate.
57. The SEANF recommends that the drafters of the ASEAN Instrument support the development of a fully transparent and effective regional agreement (or series of effective bilateral agreements) that sets clear guidelines for recruitment

fees for migrant workers, and other related matters in labour recruitment, with the objective of rooting out corruption and illegal recruitment.

58. The SEANF urges the ASEAN Instrument to set out a regional system (working closely with civil society organizations) which will systematically expose the names of both individual recruiters and recruitment companies who are found to engage in these practices and/or consistently violate labour laws and regulations. Owners or operators of recruitment companies engaged in these practices shall be held accountable in the courts, and their companies blacklisted and effectively barred from any future involvement in labour recruiting in ASEAN.

(3) One-stop migration service centers

59. In both sending and receiving countries, the SEANF finds that labour recruitment and labour placement requirements are complicated, cumbersome, expensive and time consuming, and involve multiple steps and processes at different Ministries and agencies. A systemic lack of coordination among government offices handling migrant workers affairs perpetuates these poorly run systems which are subject to graft and bribe-taking.
60. The SEANF recommends that the ASEAN Instrument call for both sending and receiving governments to set up a “one-stop center”²² where all administrative and procedural matters regarding migrant worker registration can be handled. The one-stop center should be under the command of one Ministry, preferably the Ministry of Labour/Human Resources, with officials from other Ministries or offices placed at the one-stop center on a permanent basis to fulfill needed requirements. Applications and registration processes, health check-ups and job placement, training and skills development, data collection, issuance of documents, counseling and advisory services, legal assistance, and handling of worker grievances/dispute resolution are among some of the services that should be provided. A 24-hour helpline should be set up by the center, and personnel on the helpline and at the center should be professionally trained

²² The applied system should be integrated among related institutions which handle migrant workers issues. A complaint mechanism and unified legislation should be available.

on knowledge of migration management and human rights principles. The SEANF recommends that the center use technological advances, such as a website with a secure section, to allow remote checking of status of applications or registration and other steps in the migrant worker recruitment or deployment, and placement or monitoring processes.

(4) Effective cooperation between sending and receiving states

61. The SEANF recommends that there should be more effective collaboration between sending and receiving states in the protection of the rights of migrant workers. The SEANF calls for the ASEAN Instrument to ensure that human rights protections for migrant workers, such as those contained in the ICRMW, are incorporated into all bilateral and multilateral agreements on migration between ASEAN member states.

62. The SEANF recommends that the ASEAN Instrument call for creation of effective and practical cooperation between representatives of sending countries' Embassies who are based in labour receiving states, and representatives of the labour receiving government. Embassy staff should be given clear mandates and necessary resources to carry out their mission to protect the rights of their nationals working in the receiving country. Officials of the labour receiving government should be required to cooperate fully with the Embassy-based staff to monitor, investigate and take action against abuses of migrant workers' rights.

(5) Standard migrant worker employment contracts

63. While the SEANF recognizes that there are significant differences in labour markets between the ASEAN countries, we also believe there are certain human rights standards that should apply throughout ASEAN. To date, the SEANF observes the great difficulty is not enunciating these rights but rather having them effectively enforced. To bridge the gap between rhetoric and reality, the SEANF recommends that the drafters of the ASEAN Instrument should agree that there will be a common migrant worker employment contract that contains human rights guarantees. These guarantees should include freedom of association and right to collective bargaining under applicable Unions, basic occupational safety, provision for one days rest in a seven-day work-week,

payment of wages and overtime at legally stipulated rates, and other provisions in line with ICESCR Article 7 that establishes *“the right of everyone to the enjoyment of just and favorable conditions of work.”*

64. The SEANF further recognizes that some countries have already established standard contracts for migrant workers and hopes that lessons learned from these efforts will be used to inform the recommendation in aforementioned paragraph.

III. Recommendations to the ASEAN Intergovernmental Commission on Human Rights (AICHR)

The SEANF has formally welcomed the creation of the AICHR as a partner organization that *“represents a hope for progressive realization of human rights in the region.”* The SEANF has proposed the development of a Memorandum of Cooperation between SEANF and the AICHR.²³ The SEANF sincerely hopes that a mechanism for regular engagement between the AICHR and the NHRIs can be realized in the very near future.

65. The SEANF strongly recommends that the AICHR consider creating a Subcommittee on Migrant Worker Rights to assist its work on the nexus between migration and human rights abuses in ASEAN. There are several important reasons why the SEANF believes migrant workers in ASEAN deserve such attention. First, migrant workers are one of the most vulnerable of the groups in ASEAN, being highly at risk for exploitation and abuse, and even human trafficking. There is a very strong need for effective human rights education and outreach to both intending migrant workers in the sending countries as well as migrants already toiling in workplaces in the labour receiving countries. Second, migration across borders is on the rise, meaning a growing number of persons are at risk to suffer abuses of their human rights. Third, because the movement is across borders, regional cooperation is important to forge joint initiatives and collaborations to target the cross-border systems/groups (such as corrupt labour recruiters, brokers, labour smugglers, and human traffickers responsible for many of the abuses. Finally, the success of ASEAN integration is at stake because the declining numbers of national workers in a number of labour receiving countries means that migration for work is a critical factor for fruitful economic integration.

66. The SEANF calls on the AICHR to use its mandate under Article 4.10 of the AICHR Terms of Reference (TOR) to immediately request information from the ASEAN member states about their activities, policies, regulations and laws to protect and promote the rights of migrant workers. The AICHR should set out a research

²³ ASEAN NHRIs Forum Position Paper Concerning the Political Declaration on the ASEAN Intergovernmental Commission on Human Rights, Submitted at the 3rd Consultation Meeting with the High Level Panel (HLP), 28 August 2009, Jakarta.

agenda to examine the policies and practices of ASEAN member states on migration and compare them with international human rights standards.

67. The SEANF calls on the AICHR to commission a study on the thematic issue of abuses of human rights during the migration process in ASEAN, using its mandate under Article 4.12 of its TOR. The study should make appropriate recommendations for further actions by AICHR and existing NHRIs.
68. The SEANF recommends that the AICHR should use its mandate under Article 4.11 of its TOR (enabling the AICHR to *“develop common approaches and positions on human rights matters of interest to ASEAN”*) to launch a consultative process with the four member NHRIs of the SEANF and representatives of ASEAN civil society. Article 4.9 in the mandate of AICHR also gives it the right *“to consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights.”* In this way, consultations may also be held with international agencies of the UN system, other Governments, international NGOs, and other organizations as needed.
69. In line with AICHR’s public awareness mandate under Article 4.3 of its TOR, the SEANF recommends that the AICHR should closely collaborate with the SEANF and civil society organizations to launch a major public awareness campaign on the human rights of migrant workers, targeting both major labour sending regions as well as areas of destination, where migrant workers are currently employed.

IV. Recommendations to the National Governments of Indonesia, Malaysia, the Philippines, and Thailand

A. Indonesia

The SEANF makes the following recommendations to the Government of Indonesia:

70. The SEANF calls on the Government of Indonesia to formally ratify the ICRMW, which it signed over five years ago, and bring its laws and regulations into compliance with this important international human rights instrument.
71. The SEANF calls on the Government to undertake an immediate review of all its laws related to migration, and make revisions to bring those laws into compliance with all the UN and ILO Conventions to which Indonesia is a party.
72. The SEANF urges the Government to focus special attention on amending the primary objective of Law 39/2004, Concerning Placement and Protection of Indonesian Workers, to protect and promote the rights of Indonesian migrant workers. Based on its examination of Law 39/2004, the SEANF found the law pays relatively little attention to setting out details for mechanisms to protect migrant workers. The SEANF notes that the Government is required by article 7(e) of Law 39/2004, Concerning Placement and Protection of Indonesian Workers in Foreign Countries, to “provide protection to Indonesian workers during the period of time prior to departure, during the period of employment, and during the post-placement period.” The SEANF therefore urges the Government to immediately prioritize the establishment of systems at each step of the migration process that can effectively guarantee protection of Indonesian migrant workers and ensure all stakeholders respect, at a minimum, the rights extended in article 8 of Law 39/2004 to all Indonesian workers.
73. Recognizing that the preponderance of Indonesian migrant workers going overseas are women, and reflecting on Indonesia’s obligations as a state that has ratified CEDAW, the SEANF urges the Government to adopt effective policies that recognize and address the gender dimensions of outward migrant from Indonesia.

74. The SEANF urges the Government to revise the bilateral MOU on sending of migrants to Malaysia, and ensure that all the revised provisions of the MOU are in line with international human rights standards and protections for migrant workers. The SEANF urges the Government of Indonesia to pay special attention to striking out the provision of the MOU which allows for Malaysian employers to hold Indonesian workers' travel documents. SEANF urges the drafters of the ASEAN Instrument to provide for restraint and redress among ASEAN Governments regarding physical abuses and ethnic discrimination against migrant workers in receiving states.
75. The SEANF recommends that the Government undertake all necessary policy reforms to compel recruitment of migrant workers in a professional, transparent, and accountable manner, and take strict action against firms that violate workers rights by seizing worker passports and documents, restricting movement, requiring unpaid "training periods", engaging in physical and sexual harassment, and collecting expensive recruitment fees. The Ministry of Manpower and Transmigration should significantly upgrade its monitoring of recruiting firms and revoke the licenses of those systematically violating the rights of intending migrants.
76. The SEANF urges the Government to severely crack down on un-registered and illegal labour recruiters who are exacting exorbitant fees that force migrant workers to take on significant debt burdens, falsifying documents, and confining and abusing intending migrants. The SEANF notes that the Government is required to take such actions by Law 39/2004, Concerning Placement and Protection of Indonesian Workers in Foreign Countries, yet enforcement actions need to be significantly stepped-up.
77. The SEANF urges the Government of Indonesia to merge all related institutions that handle migrant workers issue in Indonesia and encourages that new body to coordinate with National Human Rights Institution (Komnas HAM). Prior to the formation of the coordination body, the state institutions related to migrant workers must involve NHRI to conduct monitoring and law enforcement related to migrant worker issues. The SEANF urges the National Coordinating Body on migrant workers to meet more regularly in order to effectively exercise

its coordination mandate. The SEANF also calls on the Ministry of Manpower and Transmigration and the Ministry of Foreign Affairs to develop more effective mechanisms to monitor Indonesian migrant workers toiling in foreign countries, such as a database of workers, and ensure information contained in these systems is kept up to date.

78. In countries where there are significant numbers of Indonesian migrant workers, the SEANF urges the Government to establish (1) migrant assistance officers who are required to assist and protect migrant workers and (2) shelters to protect Indonesian migrants in crisis, staffed with personnel with appropriate counseling and other support skills. For this work, the Government should provide clear authority and adequate budgetary and personnel support.
79. The SEANF urges the Government to launch a comprehensive community-level information campaign to educate intending migrant workers (especially in areas of Indonesia which send many workers overseas) about their rights and responsibilities in foreign countries. The campaign should be planned and implemented in close collaboration with trade unions, NGOs and community-based organizations as well as National Human Rights Institutions.
80. The SEANF calls on the Government to earnestly develop and implement job creation, social protection, and decent work programs that will have the effect of promoting sufficient livelihoods that allow Indonesians to remain in their homes, thereby reducing the need for them to migrate.
81. The SEANF urges the National Government of Indonesia to enact local regulation started from province to village for preventing forced labour and human trafficking.

B. Malaysia

The SEANF makes the following recommendations to the Government of Malaysia:

82. The SEANF calls on the Government of Malaysia to undertake an immediate review of all its laws related to migration, and make revisions to bring those laws into compliance with all of the UN and ILO Conventions to which Malaysia is

a party. Suhakam echoes the recommendation of the Committee on the Elimination of Discrimination against Women that the Government should take immediate measures to ensure national laws comply with the provisions of CEDAW.²⁴ The Government should also immediately ratify ILO Conventions 87 (Freedom of Association) and 105 (Abolition of Forced Labour).

83. The SEANF recommends that the Government amend the labour laws to ensure domestic work is fully covered under labour protections in the law, in line with the recommendation of the Committee on the Elimination of Discrimination against Women in 2006.
84. The SEANF recommends that the Government respond positively to the request of the Special Rapporteur on the Human Rights of Migrants (made in 2006) to conduct a mission to the country and cooperate fully with the Rapporteur during the visit.
85. The SEANF recommends the Government to launch a public campaign against employers' seizure of migrant workers' passports because such practices are a clear violation of the Passport Act 1955. The SEANF urges the Government to enforce this law against employers and labour recruitment/outsourcing firms, starting with fines. For firms that are repeat offenders, the Government should revoke their license to hire foreign workers.
86. The MOHA policy of licensing labour outsourcing firms to bring migrant workers in Malaysia resulted in significant, ongoing abuses against migrants, and significant inefficiencies in the deployment of workers.²⁵ The SEANF recommends scrapping the system of labour outsourcing and replacing it with a system to be

²⁴ Committee on the Elimination of Discrimination Against Women, "Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia", 35th Session, 15 May – 2 June, 2006.

²⁵ Since labour outsourcing firms profits depend on recruitment fees, they have an incentive to maximize the number of workers brought to Malaysia, even in cases where there is not sufficient work for those workers. Unscrupulous outsourcing firms have been found detaining workers in abysmal conditions, or abandoning them to become irregular workers. Labour outsourcing arrangements also allow actual enterprises employing the workers at their facilities to shirk responsibility for paying promised wages and benefits to migrant workers, since payments are the responsibility of the labour outsourcing firm.

operated by the Ministry of Human Resources (MOHR) that returns responsibility for recruitment to Government agencies using bilateral agreements.

87. The SEANF recommends that conditions of detention of irregular migrants must in all instances comply with internationally recognized human rights standards such as the Standard Minimum Rules of Places for the Treatment of Prisoners. In order to ensure professional standards are followed in detention centers, the Government should turn over management of the immigration detention centers to the Department of Corrections, supported by the Immigration Department, and continue the policy started in July 2009 to exclude RELA from these centers.
88. The SEANF recommends that the Government permanently assign medical personnel from the Ministry of Health to each of the immigration detention centers. These personnel should be based at the center, conduct daily health checks of the immigration detainees, and be on call twenty-four hours in case of medical emergencies.
89. The SEANF finds that it is vital for governments of both sending and receiving countries to collaborate closely in solving problems facing migrant workers in Malaysia. The SEANF recommends that all countries sending migrant workers to Malaysia must have an officer in their Embassy whose core duties include assisting migrant workers, and that s/he have appropriate resources and support to carry out this mandate. The SEANF calls on the Government of Malaysia to set out a regular consultation mechanism with these Embassies, convened not less than quarterly, and operated jointly by the MOHR and the MOFA.
90. The SEANF finds that the Government should develop a comprehensive legal and policy framework to regulate the recruitment, admission, placement, treatment, and repatriation of migrant workers. Inter-agency coordination needs significant improvement as oversight of various aspects of regulation of migrant workers is divided among Ministries and between Departments within Ministries. The SEANF recommends that in the short-term, a “One-Stop Center” for migrant workers should be established under the direction of the MOHR that will provide counseling and advisory/referral services to migrants, their employers, and other stakeholders. The SEANF also urges the Government

to significantly step up enforcement of the provisions of the Policy on Recruitment of Foreign Workers 1991, and take strong action against employers who violate the policy through contract substitution, unauthorized deductions of recruitment and other fees from workers' pay, and failure to provide clean and hygienic housing and food to workers.

91. The SEANF recommends that appropriate measures be in place to identify trafficking in persons amongst migrant workers, that the victims are protected and that perpetrators are brought to justice.

C. The Philippines

The SEANF makes the following recommendations to the Government of the Philippines:

92. The SEANF calls on the Government of the Philippines to undertake an immediate review of all its laws related to migration, and make revisions to bring those laws into compliance with the UN and ILO Conventions to which the Philippines is a party. Specifically, the SEANF recommends the harmonization and translation into domestic law of (1) the provisions of the ILO Conventions ratified by the Government and (2) the ICRMW, with a specific focus on amending the Republic Act 8042 (the Migrant Workers and Overseas Filipinos Act of 1995) to formally incorporate adherence to the ICRMW into national law.²⁶
93. The SEANF recommends that the Government oppose legislative efforts to amend the objectives of Republic Act No. 8042 to formally identify overseas employments as a means to sustain economic growth and achieve national development. Without an effective system of safeguards for migrant workers' human rights, the SEANF finds that promoting migration an economic

²⁶ In its review of the Philippines compliance with the ICRMW, the Committee on Migrant Workers recommended that it "... reiterates that the exercise of human rights is not based on the principle of reciprocity and recommends that the State party take necessary steps to align its domestic legislation with the Convention" and "...the State party review its migration policy in order to give primary importance to human rights of migrant workers, in line with the State party's own professed goals as set out in RA 8042." Committee On The Protection of the Rights Of All Migrant Workers And Members Of Their Families, CMW/C/PHL/CO/1, Tenth Session, 20 April – 1 May 2009, 22 May 2009.

growth strategy risks short-changing migrants' rights for the sake of short-term economic gains.

94. The SEANF is particularly alarmed that human rights considerations are being sidelined in Administrative Order (AO) 247 which places strong emphasis on export of workers to sustain national economic growth.²⁷ The SEANF recommends AO 247 be revoked, and the Philippines Overseas Employment Administration (POEA) be oriented back to its original mission to protect migrant workers by regulating against abuses by labour recruitment firms. The SEANF recommends the POEA to increase its vigilance and regulatory actions, including suspending and revoking the licenses of labour recruitment firms involved in illegal or abusive practices.
95. The SEANF urges the Government to make a serious political commitment to immediately pass legislation in Congress which will bring domestic work under the formal definition of employment in the labour laws. Several bills have already been filed in the Congress, and the SEANF believes it will be important for the final legislation to be developed in a participatory manner with politicians, civil society organizations, and associations of domestic workers. The SEANF believes the Government, by setting a positive example through passage of its own national legislation, will be in a much better position to advocate other ASEAN member states include domestic work in their own labour laws.
96. The SEANF finds that there are significant deficiencies in Government systems to protect human rights of migrant workers and assist them while overseas. Therefore, the SEANF recommends the Government conduct a full review of its labour migration policy, with the objective of revising the policies and practices to ensure primary importance is given to the human rights of migrant workers in reality as well as on paper.

²⁷ AO specifically orders the POEA to refocus its functions "from regulation to full-blast market development efforts, [and] the exploration of frontier, fertile job markets for Filipino expatriates."

97. The SEANF urges the Government to establish and actively implement effective safeguard mechanisms for monitoring efforts to promote and protect the human rights of migrant workers at all stages of the migration process. These mechanisms should collaborate closely with Philippine and international civil society organizations working with migrants, and operate on the basis of transparency and openness. The SEANF emphasizes that the Government must also provide the necessary personnel and budgetary resources for effective operation of these mechanisms.
98. The SEANF recommends that the Government proactively support overseas workers who assert their democratic rights to assemble, associate, and defend their rights, and engage with labour receiving governments to ensure these rights are protected.
99. The SEANF finds the lack of effective coordination between government agencies contributes significantly to problems facing migrant workers from the Philippines. The SEANF urges that the bureaucracy must be trimmed down and coordination and accountability of the government agencies must be established and institutionalized. One-stop service centers should be established on the understanding that they will not simply be an additional layer of the burgeoning bureaucracy. The SEANF recommends that any one stop center must ease the burdens of migrant workers by curbing corruption, lowering recruitment fees, and ensuring better service and relevant coordinated assistance.
100. The SEANF believes the important role of Philippine embassies in protecting migrant workers rights in receiving countries cannot be overemphasized. They serve as the front-liners in the protection of the rights of migrant workers. For this reason, the SEANF recommends an expansion of the numbers and the level of support provided to Embassy officers handling migrant protection duties. These officers should receive extensive training in human rights, legal assistance, case management, and knowledge of the laws, regulations and procedures affecting migrant workers in both the Philippines and the receiving country (especially those countries categorized as “highly problematic” by the relevant agencies of the Government). To ensure effective implementation,

the SEANF recommends the Government to perform regular performance audits of overseas government personnel and agencies dealing with migration issues.

101. The SEANF believes that there must be an effective system of outreach to migrants in trouble overseas, led by the Embassies and supported by all the key agencies working with migrants. The SEANF recommends that the Government establishes shelters for migrants in distress in destination countries, and notes that for security reasons, those shelters should preferably be within embassies and/or diplomatic outposts, such as a dedicated facility under the protection of the embassy. Shelters should have necessary personnel trained in a variety of skills related to human rights and victim support, with expertise in psychology, social work, legal assistance, and human rights advocacy. Support/outreach by shelter staff operating a hot-line should be implemented.
102. The SEANF finds that the efficiency, relevance and significance of Philippine government policies on reintegration remain in doubt. More than paper-programs, the SEANF urges adoption of realistic and effective mechanisms to ensure employment, business opportunities and family and community reintegration programs to the migrant workers. The SEANF concurs with the findings of the CMW in its review of the Philippines record on ICRMW that the existing reintegration programs must be strengthened and provided with sufficient budget resources to operate effectively, and innovative approaches developed in skills development, entrepreneurship training and micro-credit programs that ensure successful reintegration to the Philippines and obviate the need for future migration.
103. The SEANF agrees with the recommendation of the CMW about the critical importance of expanding human rights education and information campaigns for officials (such as consular officials, border police officers, social workers, judges and prosecutors) working with migrant workers, and for the migrant workers themselves. Migrant worker orientation and pre-departure seminars should employ the rights-based approach, and have clear objectives, country specific information, and nationwide reach. The SEANF recommends that education programs should be carried out with civil society organizations and representatives of the media, to ensure it reaches the grass-roots communities where intending migrant workers are located.

104. The SEANF urges the Government to reform the Overseas Workers Welfare Administration (OWWA) Omnibus Policies that have effectively excluded as many as a million undocumented migrant workers, and ensure that all migrant workers overseas are covered. The SEANF also urges an effective and impartial investigation into the use of OWWA funds for projects which have apparently not benefited migrant workers, and reforms in the OWWA governance structure to ensure accountability of the administrators to the migrant workers whose contributions make up the OWWA fund.
105. The SEANF urges the Government to undertake research into the issues and problems facing irregular migrant workers from the Philippines in the Southeast Asia region and work collaboratively with other ASEAN member states to seek solutions that promote the protection of migrant workers' rights.

D. Thailand

The SEANF makes the following recommendations to the Government of Thailand:

106. The SEANF recommends the Government to review laws related to migration to ensure that they are in compliance with the Constitution and UN and ILO Conventions to which Thailand is a party. The Government is also recommended to expedite the process to become party to ILO Conventions 87 (Freedom of Association) and 98 (Right to Organize and Collectively Bargain).
107. The SEANF recommends the Government to respond positively to the request of the Special Rapporteur on the Human Rights of Migrants (made in 2009) to conduct a mission to the country.
108. To comply with the obligations under international human rights obligations to which Thailand is party, the SEANF recommends the Government to review the provincial declarations that excessively restrict the rights of migrant workers such as imposing broad curfews, restricting their freedom of movement by preventing them from driving cars and motorbikes, limiting their right to communication by outlawing use of mobile phones, including stringent restrictions on their right to freedoms of association and assembly.

109. The SEANF recommends the Government to review restrictions on migrant workers' right to movement prohibiting them from leaving outside of the areas where they are registered to work. The SEANF also recommends the Government to review the existing restrictions on the right of migrant workers to change employers, and extend the currently allowed transition period (which is only seven days, a period of time which is far too brief) for making a change of employers.
110. The SEANF recommends the Government to provide guarantees for migrant workers to access the judicial process to seek legal and financial redress, especially in instances where they allege that their employer had violated the law. Migrant workers should be permitted to remain and work in Thailand while their cases are being considered by Government officials and/or the civil or criminal courts. The SEANF also recommends the Government to provide legal assistance, and translators proficient in migrant languages, in order to encourage greater use of the legal system by migrant workers.
111. The SEANF recommends the Government to review articles 88 and 100 of the Labour Relations Act 1975 which restricts migrant workers' rights to establish trade unions and serve as elected union leaders.
112. The SEANF recommends the Government to support the creation and operation of "social networks" of migrant worker organizations or associations (supported by Thai trade unions and civil society organizations) which can facilitate efforts by migrant workers to protect themselves. The Government is also recommended to support civil society organizations and trade unions to monitor and highlight abusive employers and places of employment.
113. The SEANF notes that the existing nationality verification process for migrant workers is too complicated and too expensive for most migrant workers, resulting in pitfall for the abuse of influences and powers by labour brokers. The SEANF further observes that the government has recently opened the office in Ranong province for registration of migrant workers from Myanmar, which is a welcoming development. Nevertheless, the SEANF recommends the Government adopt safeguards that allow migrant workers (especially those from Myanmar) to seek asylum during the period which they cannot participate safely in the nationality verification process. The SEANF expresses concerns over the safety of

workers from Myanmar who travel back and forth to the border that they are not subject to arbitrary arrest and the abuse of power by corrupt government officials and private labour brokers. The SEANF, therefore, recommends the Government to set strict caps on the fees that can be charged by brokers for services related to the nationality verification exercise.

114. The SEANF also notes that while the rights of documented migrant workers are provided by law, but the problems exist in practice for migrant workers to access and enjoy their rights. They include the illegal confiscation of their property by corrupt officials and private individuals, refusals to provide to issue marriage certificates and birth certificates, refusals of local public school administrators to allow enrollment of migrant children for basic education. The SEANF recommends the Government to guarantee their basic rights including the enforcement of registered migrant workers' rights to family and birth status (in line with the CRC and CEDAW), right to education and right to health and social services, and take punitive action against officials found to arbitrarily use or abuse their authority.
115. The SEANF recommends the Government to improve conditions of detention of irregular migrants and ensure that they comply with internationally recognized human rights standards such as the Standard Minimum Rules of Places for the Treatment of Prisoners.
116. The SEANF recommends the Government to ensure that translation of related information on human rights standards, labour and other laws, public health, and other services into migrant's languages be widely distributed in order to improve their access to information and subsequently services provided for them, and the opportunity to exercise their rights.
117. The SEANF also recommends the Government to expand the outdated list of types of work migrants are permitted to do, and bring it into conformity with the current situation in Thailand. At this time, there are many registered migrant workers who are effectively considered illegal because they are currently working in sectors in which migrants are not authorized to work under the existing law and regulations.

118. The SEANF recommends the Government to formally add domestic work as a form of recognized employment under the labour laws, and urges the Government to pay particular attention to the difficult circumstances facing migrant domestic workers in Thailand. Among the key problems to be addressed are the lack of employment contracts, prevalence of sexual harassment as well as other physical and psychological abuse, failure to provide any holiday leave or over-time pay, payment of sub-minimum wages, forced working of long hours, seizure of worker's identification documents, restrictions on movement and association, and existence of child labourers working in domestic service.

119. In cases where migrant workers are considered for deportation, the SEANF believes the Government should give prominent consideration to the principles of human dignity and human rights of the migrant workers and ensure the physical safety of those being returned. The Government is strongly recommended to take all necessary steps to ensure that deportations do not separate migrant children from their parents.

V. Recommendations to the Asia-Pacific Forum of National Human Rights Institutions (APF)

120. The SEANF recommends the APF develop a multi-year program that aims to expand capacity-building and knowledge on protection of human rights in the context of migration for key stakeholders in the Asia-Pacific region. The APF has already made an excellent start on this process with the recently NHRIs-civil society dialogue conducted in Dili, Timor Leste, earlier in 2009. The SEANF recommends that program components include research into best practices and dissemination of lessons learned in protecting migrant workers from other parts of Asia and elsewhere in the world; technical advice and capacity building support for NHRIs; and continued policy dialogues bringing together NHRIs, civil society, representatives of regional organizations (like the ASEAN Secretariat), and national government officers.
121. The SEANF recommends that the APF Working Group on Migration play an important role in collecting information and developing analysis of cases of rights violations of migrant workers in ASEAN, and engage with both the SEANF and the AICHR to develop ideas on how to collaborate to resolve such complaints. The SEANF hopes that such exercises would not only result in justice for the migrant workers with grievances, but also illustrate ways forward for the AICHR in the future.
122. The SEANF pledges its continued support and cooperation in the efforts of the APF and its NHRI members to fully and completely implement the Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia, adopted November 10-12, 2008.

Acronyms

ACMW	ASEAN Committee on Migrant Workers
AICHR	ASEAN Intergovernmental Commission on Human Rights
AFM	ASEAN Forum on Migrant Labour
SEANF	South East Asia National Human Rights Institutions Forum
APF	Asia Pacific Forum of National Human Rights Institutions
ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of Discrimination Against Women
CHRP	Commission on Human Rights of the Philippines
COMMIT	Coordinated Mekong Ministerial Initiative against Trafficking
CRC	Convention on the Rights of the Child
ICC	International Coordinating Committee of NHRIs
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
KOMNAS-HAM	Komisi Nasional Hak Asasi Manusia Indonesia
MOHA	Ministry of Home Affairs (Malaysia)
MOHR	Ministry of Human Resources (Malaysia)
MOU	Memorandum of Understanding
NHRCT	National Human Rights Commission of Thailand
NHRI	National human rights institution
OWWA	Overseas Workers Welfare Administration (Philippines)
POEA	Philippines Overseas Employment Administration
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia
TOR	Terms of reference



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