

# ASEAN Protection of the Rights of Migrant Workers: Evolving a Rights Regime for the Regional Protection of Labor

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## I. INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) is now coming together in a tighter form of regional integration.<sup>1</sup> Beginning 2015, freer

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1. Joshua Kurlantzick, ASEAN's Future and Asian Integration (A Working Paper Submitted to the International Institutions and Global Governance) 4, available at [http://www.cfr.org/content/publications/attachments/IIGG\\_WorkingPaper](http://www.cfr.org/content/publications/attachments/IIGG_WorkingPaper)

borders for trade, which have been previously negotiated, and interdependence, from a liberal standpoint, are slowly realized; both of which are aimed at an ASEAN that is people-centered.<sup>2</sup> Historically, Europe has led the charge for regional integration through the vision and efforts of Robert Schuman of France and Konrad Adenauer of Germany, both of whom “conceived of a new form of politics based on the supranational ‘community method’ rather than the traditional balance-of-power model.”<sup>3</sup> The Treaty on European Union,<sup>4</sup> or the “Maastricht Treaty,”<sup>5</sup> solidified the European community by providing social protocols for the promotion of employment,<sup>6</sup> improvement of living and working conditions,<sup>7</sup> adequate social protection,<sup>8</sup> social dialogue,<sup>9</sup> development of human resources to ensure a high and sustainable level of employment,<sup>10</sup> and integration of persons excluded from the labor market.<sup>11</sup> On top of these social protocols, citizens of the European Union (EU) were granted “the right to circulate and reside freely in the [c]ommunity.”<sup>12</sup> This is the state of migration granted by regional law in the EU.<sup>13</sup> Fraser Cameron noted that

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10\_Kurlantzick.pdf (last accessed Dec. 31, 2014). The article cited postulates that “the ASEAN has been the only organization [that has] consistently focused on regional integration, while others, including the Asia Pacific Economic Cooperation (APEC), have shifted their focus extensively and somewhat haphazardly.” *Id.*

2. See Surin Pitsuwan, former Secretary-General of the ASEAN, What Can the 2015 ASEAN Integration Bring to the Well-being of ASEAN People?, Remarks at Noyori Conference Hall, Nagoya University, Nagoya, Japan (Feb. 21, 2014).
3. Fraser Cameron, The European Union as a Model for Regional Integration, available at <http://www.cfr.org/world/european-union-model-regional-integration/p22935> (last accessed Dec. 31, 2014).
4. Treaty on European Union, *opened for signing* Feb. 7, 1992, 31 I.L.M. 253 (entered into force on Nov. 1, 1993) [hereinafter Maastricht Treaty].
5. *Id.*
6. *Id.* art. 151.
7. *Id.*
8. *Id.*
9. *Id.*
10. Maastricht Treaty, art. 151.
11. *Id.*
12. *Id.* art. 8 a.
13. *Id.*

[t]here have been several attempts to achieve regional integration outside of Europe — including the Association of South East Asian Nations [ ], African Union [ ], Gulf Cooperation Council [ ], and Mercosur in South America — but they have all failed to achieve anything resembling the progress of the EU.<sup>14</sup>

Cameron further observed that “[the] ASEAN is the most advanced of these efforts and [it] regularly sends delegations to Brussels to seek ideas from the EU experience; however, [the] ASEAN remains a strictly inter-governmental body and there is no indication of interest in sovereignty sharing.”<sup>15</sup> Despite being “advanced”<sup>16</sup> in regional integration efforts, with regard to free movement of people, the most that the ASEAN has achieved, aside from relaxed entry visas for its citizens, is the envisioning of a “common visa.”<sup>17</sup> Admittedly, any form of common citizenship or passport has yet to be embarked on.

The ASEAN has yet to develop a shared “hard law”<sup>18</sup> system in the region.<sup>19</sup> Most of the regional integrative framework has been “soft law.”<sup>20</sup> Push and pull factors keep the states from being isolated and, at the same time, from being fully integrated.<sup>21</sup> One strong push factor is the increasing inter-linkage of companies and firms in the region.<sup>22</sup> Japanese companies

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14. Cameron, *supra* note 3.

15. *Id.*

16. *Id.*

17. See Newsbytes Philippines, PH, three other Asean nations agree to work on common smart visa, *available at* <http://newsbytes.ph/2013/06/05/ph-three-other-asean-nations-agree-to-work-on-common-smart-visa> (last accessed Dec. 31, 2014). In 2013, the Philippines, Myanmar, and Cambodia raised the issue of having a common “smart visa” in the ASEAN for tourism to flourish in the region. This was also pursuant to a letter of intent the three countries signed on the occasion of the World Economic Forum held in Myanmar on 5 June 2013. *Id.*

18. See Kenneth W. Abbott & Duncan J. Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 422 (2001).

19. *Id.*

20. *Id.*

21. See Lynette M. Parker, The Ethics of Migration and Immigration: Key Questions for Policy Makers, *available at* [http://www.scu.edu/ethics/practicing/focusareas/global\\_ethics/migration.html](http://www.scu.edu/ethics/practicing/focusareas/global_ethics/migration.html) (last accessed Dec. 31, 2014).

22. Mitsuyo Ando & Fukunari Kimura, *The Formation of International Production and Distribution Networks in East Asia*, in INTERNATIONAL TRADE IN EAST ASIA 187 (Takatoshi Ito & Andrew K. Rose eds., 2005).

operate in ASEAN Member-States as if the region were one big country<sup>23</sup> — borders being substantial only when there are barriers to entry.<sup>24</sup> The great irony is that despite the advent of multilateralism and the growth of world trading systems, regions remain significant and continue to play greater roles in economic growth for nation-states — the ASEAN included.<sup>25</sup> It must be recognized that there is a rise in the number of regional frameworks for international trade and regional cooperative mechanisms — from political and security measures,<sup>26</sup> to food security,<sup>27</sup> disaster response,<sup>28</sup> and even to advanced issues in international property rights.<sup>29</sup> Regional production networks form part of informal linkages that have come up in recent regional integration literature.<sup>30</sup> It is no surprise that regional trade in services, through migrant labor, has also begun to increase with alarming opacity.<sup>31</sup>

One area of great contention in the region is the issue of the rights of migrant workers.<sup>32</sup> Under international law,<sup>33</sup> states have four general

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23. *Id.*

24. *Id.* at 204.

25. *Id.*

26. See Georgeina Whelan, Does the ARF Have a Role in ASEAN's Pursuit of Regional Security in the Next Decade?, *available at* [http://www.defence.gov.au/adc/docs/Publications2012/10\\_CDSS%20SAP.pdf](http://www.defence.gov.au/adc/docs/Publications2012/10_CDSS%20SAP.pdf) (last accessed Dec. 31, 2014). The ASEAN Regional Forum (ARF) is an extension of the ASEAN. *Id.*

27. See ASEAN Integrated Food Security Framework and Strategic Plan of Action on Food Security in the ASEAN Region, *adopted* Feb. 26, 2009 & Bruce J. Tolentino, ASEAN cooperation: Crucial to global food security, *available at* <http://irri.org/rice-today/asean-cooperation-crucial-to-global-food-security> (last accessed Dec. 31, 2014).

28. See ASEAN, ASEAN Ministerial Meeting on Disaster Management (AMMDM), *available at* <http://www.asean.org/communities/asean-socio-cultural-community/category/asean-ministerial-meeting-on-disaster-management-ammdm> (last accessed Dec. 31, 2014).

29. ASEAN Framework Agreement on Intellectual Property Cooperation, *opened for signing* Dec. 15, 1995.

30. Ando & Kimura, *supra* note 22, at 178.

31. Rosabel B. Guerrero, Regional Integration: the ASEAN Vision in 2020 (A Paper Submitted to the Irving Fisher Committee on Central Bank Statistics), *available at* <http://www.bis.org/ifc/publ/ifcb32c.pdf> (last accessed Dec. 31, 2014).

32. See Linda A. Lumayag, Migrant workers: Whose responsibility to protect?, *available at* <http://asiapacific.anu.edu.au/newmandala/2013/12/16/migrant->

elements, namely: people or a given population;<sup>34</sup> government of effective control;<sup>35</sup> sovereignty;<sup>36</sup> and territory.<sup>37</sup> Domestically speaking, human rights are a self-limitation on the power of states.<sup>38</sup> Regional human rights yield much to the authority granted by Member-States to the regional institutions.<sup>39</sup> The state authorities tend to shy away from tackling that issue in the ASEAN.<sup>40</sup> One would find it difficult to conceive of a system like the European Court of Human Rights in the ASEAN in the near future.<sup>41</sup> In addition to that perception is the growing tension between and among ASEAN Member-States in determining how to shape migration policies, especially with regard to work permits and issues of non-discrimination.<sup>42</sup> Migrant workers encounter various abuses, among them issues in labor standards such as being overworked, being underpaid, confronting complex debt systems, and facing discrimination in social services and healthcare,

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workers-whose-responsibility-to-protect/ (last accessed Dec. 31, 2014). *See also* GMA News Online, PNoy calls on ASEAN to protect migrant workers, end human trafficking, *available at* <http://www.gmanetwork.com/news/story/360587/pinoyabroad/news/pnoy-calls-on-asean-to-protect-migrant-workers-end-human-trafficking> (last accessed Dec. 31, 2014).

33. Montevideo Convention on the Rights and Duties of States art. 3, *opened for signature* Dec. 26, 1933, 165 L.N.T.S. 19.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. WIKTOR OSIATYŃSKI, HUMAN RIGHTS AND THEIR LIMITS 15 (2009 ed.).
39. Li-Ann Thio, *Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I Sleep*, 2 YALE HUM. RTS. & DEV. J. 1, 1 (1999).
40. *Id.*
41. *Id.* at 78.
42. *See generally* Supang Chantavanich, Thailand Policies towards Migrant Workers from Myanmar (A Paper Presented at the APMRN Conference at Fujian University, Fuzhou), *available at* <http://apmrn.anu.edu.au/conferences/8thAPMRNconference/19.Thai%20Policies%20towards%20migrant%20workers.pdf> (last accessed Dec. 31, 2014); Madison Park, 180,000 Cambodian migrant workers estimated to have fled Thailand, *available at* <http://www.cnn.com/2014/06/18/world/asia/cambodia-thailand-migrants-border/> (last accessed Dec. 31, 2014); & Michael Malay, *Singapore needs to address its treatment of migrant workers*, THE GUARDIAN, Apr. 21, 2014, *available at* <http://www.theguardian.com/global-development-professionals-network/2014/apr/21/singapore-address-treatment-migrant-workers> (last accessed Dec. 31, 2014).

among others.<sup>43</sup> These issues extend to grave human rights violations like human trafficking and situations similar to slavery.<sup>44</sup> Because of these issues, it is no surprise that legal literature regarding migration and human rights has seen an increase.<sup>45</sup> Just recently, studies have come to focus on patterns of protection and the growing chasm in international law regarding the rights of individuals who work beyond their national borders, including those who are deemed irregular migrants.<sup>46</sup> Forces that shape the global economy, like wage differences,<sup>47</sup> global division of labor,<sup>48</sup> rent-seeking behavior,<sup>49</sup> freer trade in goods and services,<sup>50</sup> among others, all contribute to a story that has reached global proportions and, thus, must be addressed not just domestically but, more importantly, multilaterally.<sup>51</sup>

## II. INTERNATIONAL RECOGNITION OF THE RIGHTS OF MIGRANT WORKERS

In the multilateral level, legalization has been making advances in the recognition of the rights of migrant workers, beginning with the efforts spearheaded by the International Labor Organization (ILO).<sup>52</sup> The ILO, a

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43. See Deutsche Welle, Amnesty: Migrant domestic workers face widespread abuse in Qatar, available at <http://www.dw.de/amnesty-migrant-domestic-workers-face-widespread-abuse-in-qatar/a-17584057> (last accessed Dec. 31, 2014) & Pete Pattison, *Revealed: Qatar's World Cup 'slaves,'* THE GUARDIAN, Sep. 25, 2013, available at <http://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves> (last accessed Dec. 31, 2014).

44. Pattison, *supra* note 43.

45. See generally MIGRATION AND HUMAN RIGHTS THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS (Ryszard Cholewinski, et al., eds., 2009) [hereinafter MIGRATION AND HUMAN RIGHTS].

46. Sachi Takaya, *Making irregular migrants insecure in Japan*, in IRREGULAR MIGRATION AND HUMAN SECURITY IN EAST ASIA 34-36 (Jiyoung Song & Alistair D. B. Cook eds., 2014).

47. See generally ANNE T. GALLAGHER, MIGRATION, HUMAN RIGHTS, AND DEVELOPMENT: A GLOBAL ANTHOLOGY (2013).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. International Labor Organization, Origins and history, available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last accessed Dec. 31, 2014).

lasting legacy of the League of Nations, has 185 Member-States as of 2013, making its reach very expansive in terms of territorial coverage.<sup>53</sup>

The ILO began the process of identifying international labor standards that should be normatively adopted by Member-States. To a great extent, the ILO has had a strong persuasive effect on Member-States. Forced or compulsory labor in all forms was sought to be suppressed.<sup>54</sup> The right to establish and to join organizations of the worker's choosing was also recognized.<sup>55</sup> The principle of "equal pay for equal work" came from the provision on equal remuneration for men and women for work of equal value.<sup>56</sup> Equal opportunity as a principle against discrimination, with respect to employment and occupation, was also recognized.<sup>57</sup> Through the ILO, Member-States were also asked to pursue an abolitionist policy on child labor,<sup>58</sup> to impose a minimum age requirement to protect the child,<sup>59</sup> to ensure compulsory schooling,<sup>60</sup> and to ensure protection against employment hazards for the young.<sup>61</sup>

Through several conventions, the ILO has sought to enforce human dignity.<sup>62</sup> The Forced Labor Convention,<sup>63</sup> the Freedom of Association

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53. *Id.*

54. See Convention concerning Forced or Compulsory Labor art. 1, *opened for signature* June 28, 1930, 39 U.N.T.S. 55 [hereinafter Forced Labor Convention].

55. See Convention concerning Freedom of Association and Protection of the Right to Organize art. 2, *opened for signature* July 9, 1948, 68 U.N.T.S. 17 [hereinafter Freedom of Association Convention].

56. See Convention concerning Equal Remuneration for Men and Women for Work of Equal Value art. 2, *adopted* June 29, 1951, 165 U.N.T.S. 303 [hereinafter Equal Remuneration Convention].

57. See Convention concerning Discrimination in Respect of Employment and Occupation art. 2, *opened for signature* June 25, 1958, 362 U.N.T.S. 31 [hereinafter Discrimination in Employment and Occupation Convention].

58. See Convention concerning Minimum Age for Admission to Employment art. 1, *adopted* June 26, 1973, 1015 U.N.T.S. 297 [hereinafter Minimum Age Convention].

59. *Id.* art. 2, ¶ 1.

60. *Id.* art. 7, ¶ 2.

61. *Id.* art. 3, ¶¶ 1-3.

62. See generally ILO Declaration on Fundamental Principles and Rights at Work, *adopted* June 18, 1998, 37 I.L.M. 1233.

63. Forced Labor Convention, *supra* note 54.

and Protection of the Right to Organize Convention,<sup>64</sup> the Equal Remuneration Convention,<sup>65</sup> the Discrimination in Employment and Occupation Convention,<sup>66</sup> and the Minimum Age Convention<sup>67</sup> all point to a legally binding definition of what would be a just and humane concept of labor acceptable to the free world.

Summarizing the efforts of the ILO, some scholars note that there remains a need to catalyze new international norms on worker mobility through a real and successful “transnational social dialogue”<sup>68</sup> among all concerned sectors, namely the private sector, civic society, and governments.<sup>69</sup> Such transnational social dialogue would help enable the formation of stronger constituencies for lessening barriers to migration.<sup>70</sup> Steve Charnovitz concluded that the true contribution of the ILO to global governance is not giving non-governmental organizations (NGOs) influence in international law-making, but rather, in showing the way to bring the private actors together.<sup>71</sup>

Notable international legal documents that protect migrant workers’ rights stem from the main international human rights texts, such as the Universal Declaration of Human Rights (UDHR),<sup>72</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>73</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>74</sup> the Convention on the Elimination of All Forms of Discrimination Against

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64. Freedom of Association Convention, *supra* note 55.

65. Equal Remuneration Convention, *supra* note 56.

66. Discrimination in Employment and Occupation Convention, *supra* note 57.

67. Minimum Age Convention, *supra* note 58.

68. Steve Charnovitz, *Assessing the ILO’s Efforts to Develop Migration Law*, 30 LEGAL ISSUES OF ECON. INTEGRATION 193, 194 (2003) (citing Arthur C. Helton, People Movement: The Need for a World Migration Organization, *available at* <http://www.cfr.org/migration/people-movement-need-world-migration-organisation/p5950> (last accessed Dec. 31, 2014)).

69. *Id.*

70. *Id.*

71. *Id.* at 200.

72. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948).

73. See International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

74. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.



Women (CEDAW),<sup>75</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>76</sup> and the Convention on the Rights of the Child (CRC).<sup>77</sup>

Beginning in the 1990s, following the huge attraction of the international relations notion on liberalism and universalist legalization, the United Nations (U.N.) Member-States, particularly sending countries, have been arguing for a *rights-based* approach to the protection of migrant workers to expand the typical ILO approach.<sup>78</sup> The rights-based approach, specifically for migrant workers, was addressed when the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)<sup>79</sup> was held.<sup>80</sup> With the ratification of El Salvador and Guatemala, on 14 March 2003, and Mali, on 5 June 2003, the ICRMW<sup>81</sup> finally entered into force on 1 July 2003.<sup>82</sup>

Some scholars traced the origins of the ICRMW to an earlier point in time, specifically when the U.N. decided to codify these rights into one document, stating that

[t]he beginnings of the [ICRMW] may be traced to an episode that occurred in 1972. A sealed truck met with an accident while crossing the tunnel under Mount Blanc. Supposed to be carrying sewing machines, it was in fact transporting [28] workers from Mali, who were travelling from Tunisia to France through Italy and Switzerland. On the insistence of the representative from Kenya, the [U.N.] Economic and Social Council [ ] adopted a resolution in which the [Commission on Human Rights (CHR)] was requested to investigate the matter. At about the same time, the ILO

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75. See Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

76. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

77. See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

78. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, annex, 45, U.N. GAOR, 45th Sess., Supp. No. 49A, at 262, (Dec. 18, 1990) [hereinafter ICRMW]. The ICRMW incorporates the rights of a migrant worker in a single text while the rights and obligations of the migrant worker and state, respectively, as promulgated by the ILO are scattered over different texts. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

began addressing the issue of irregular migration and trafficking of workers. In the same year, the U.N. General Assembly discussed migration and asked the [CHR] to give priority to the examination of discrimination suffered by migrants. In doing so, the [U.N.] General Assembly was establishing a linkage between discrimination against migrants and racial discrimination. It was also inviting the ILO to continue the study on workforce trafficking. Thus, the issue of special concern for migrants entered the U.N. system with two different but related perspectives[, namely] the human rights perspective and the [labor] perspective[.]<sup>83</sup>

It was observed that the U.N. saw the need to go further than what the ILO has been providing at that time. Renato Graziano C. S. Battistella notes that

[t]he Secretary-General's report was presented in 1975 and did not include a recommendation to draft a new convention, but only to proceed to the harmonization of existing instruments concerning migrant workers. The report of the [s]ub-[c]ommission was also presented in 1975. As the juridical aspects on the topic were scattered throughout various instruments, and in some cases[, ] were not very specific, it seemed opportune to prepare a new convention or declaration to render more explicit the rights of migrants that were not sufficiently recognized. It was also indicated that such an exercise should have been the task of the U.N., rather than the ILO, as the ILO's approach was considered too concentrated on economic aspects.<sup>84</sup>

Battistella goes on, stating that

[i]n addition to the previously mentioned events that affected migration in those years, particular importance should be given to the difficult process of adopting ILO Convention No. 143 on irregular migration. In fact, various countries did not support that convention, but for different reasons[, namely that] some European countries were against the possibility of

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83. Renato Graziano C. S. Battistella, *Migration and Human Rights: The Uneasy Relationship*, in *MIGRATION AND HUMAN RIGHTS*, *supra* note 45, at 52 (citing G. Bertinetto, *International Regulations on Illegal Migration*, 21 INT'L MIGRATION 189, 189 (1983); E.S.C. Res. 1706 (LIII), (July 28, 1972); & G.A. Res. 2920 (XXVII), U.N. GAOR, 27th Sess., Supp. No. 30, 62, U.N. Doc. A/8730 (Nov. 15, 1972)).

84. Battistella, *supra* note 83, at 52 (citing U.N. Secretary-General, *Report of the Secretary-General on The Welfare of Migrant Workers and Their Families*, 24th Session of the Commission for Social Development, U.N. Doc. E/CN.5/515 (Oct. 14, 1974) & U.N. Special Rapporteur on Migrant Workers, *Note by the Secretary-General and The U.N. Special Rapporteur on Migrant Workers on The Exploitation of Labour Through Illicit and Clandestine Trafficking*, U.N. Doc. E/CN.4/Sub.2/L.629 (July 4, 1975)).

migrants choosing a different occupation after two years of immigration[, that] some countries of origin (Mexico and Morocco in particular) were reluctant to engage in a reduction of irregular migration[.], and [that] even in the United States, irregular migration was convenient to the agricultural sector. As ILO Convention No. 143 did not achieve immediate widespread support, the door was open for the preparation of a U.N. convention.<sup>85</sup>

The process, thereafter, resulted in an

[i]nitiative to draft a convention on the protection of the rights of migrants [that] converged objectives and preoccupations of a humanitarian nature, which also concealed different economic concerns in countries of destination and origin of migrants. The real concern was irregular migration. By ensuring protection to irregular workers, countries of origin were[,] perhaps[,] aiming at diminishing the unlimited power of repatriation. Conversely, countries of destination were resisting providing protection in order to retain freedom of expulsion. In reality, economic interests were cutting the two sides transversally, as both origin and destination countries were profiting from irregular migration.<sup>86</sup>

The drafting took a long time. From the 1980s until its promulgation in the 1990s, the draft of the ICRMW passed many stages, and the drafters, convenors, and delegates in working groups changed and were substituted several times.<sup>87</sup>

The ILO submitted its initial objections to the U.N. draft stating that:

- (1) A convention on the rights of migrants drafted without the ILO constituted a duplication of efforts;<sup>88</sup>
- (2) The establishing of a supervising mechanism required additional means, with a waste of resources;<sup>89</sup>
- (3) The task to establish standards relating to workers should remain within the competence of the ILO;<sup>90</sup> and

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85. Battistella, *supra* note 83, at 54 (citing Roger Böhning, *The ILO and the New UN Convention on Migrant Workers: The Past and Future*, 25 INT'L MIGRATION REV. 698 (1991)).

86. *Id.*

87. *Id.*

88. *Id.* at 53–54 (citing U.N. Secretary-General, *Report of the Secretary-General and the Economic and Social Council on Measures to improve the situation and ensure the human rights and dignity of all migrant workers*, 34th Session of the U.N. General Assembly, U.N. Doc. A/34/535 (Oct. 18, 1979)).

89. *Id.*

- (4) The U.N. could focus only on those aspects that went beyond the competence of the ILO.<sup>91</sup>

The U.N. General Assembly did not get a majority consensus on this issue with a smattering of conscious objections. Approximately 10 years passed before a draft was passed by the U.N.<sup>92</sup>

What was clear was that the ICRMW provided an international legal framework for the protection of the rights of the migrant workers, including their families.<sup>93</sup> Furthermore, it took to heart the notion of protecting irregular migration.<sup>94</sup> The ICRMW is an important international legal document that codified the notions of many various states into a unified legal text, such as the definition of a migrant worker as “a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”<sup>95</sup> The ICRMW provided categories of migrant workers and members of their families,<sup>96</sup> established international standards of treatment through the elaboration of the particular human rights of migrant workers and members of their families,<sup>97</sup> and attempted to establish minimum standards of protection for migrant workers and their families that are universally acknowledged.<sup>98</sup>

The ICRMW made the provisions of the human rights texts that provided for specific protection for migrant workers and their families

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90. Battistella, *supra* note 83.

91. *Id.*

92. *Id.* at 55.

93. See ICRMW, *supra* note 78, art. 8, ¶ 1. The ICRMW declares that

[m]igrant workers and members of their families shall be free to leave any State, including their [s]tate of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health[,] or morals[,] or the rights and freedoms of others[,] and are consistent with the other rights recognized in the present part of the Convention.

*Id.*

94. See Ryszard Cholewinski, *International Labour Migration*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 296 (Brian Opeskin, et al. eds., 2012).

95. ICRMW, *supra* note 78, art. 2, ¶ 1.

96. See Siby Tharakan, *Protecting Migrant Workers*, 37 ECON. & POL. WEEKLY 5080, 5081 (2002).

97. *Id.*

98. *Id.*

beyond the territory of their nationality specifically applicable to all kinds of migrants, whether regular or irregular, by positive recognition of their rights against non-discrimination with regard to “sex, race, [color], language, religion,”<sup>99</sup> as well as “national, ethnic or social origin, nationality[,] ... or other status.”<sup>100</sup> It also provides them freedom of egress, not just in their destination country, but also in their country of origin,<sup>101</sup> the right to repatriate or to enter their country of origin,<sup>102</sup> the right to be protected from torture or cruel, inhuman, or degrading treatment or punishment,<sup>103</sup> the prohibition on slavery and forced or compulsory labor,<sup>104</sup> the freedom of thought, conscience, and religion,<sup>105</sup> and other related core human rights.<sup>106</sup>

In the Asia-Pacific region, only three states immediately ratified the convention, namely the Philippines, Sri Lanka, and East Timor.<sup>107</sup> Initially, Bangladesh, Cambodia, and Indonesia signed but did not ratify the ICRMW until a later time.<sup>108</sup> As advances in the liberalization of international trade occur, through multilateral and regional agreements, and during the continuing advent of globalization, the increasing presence of non-national workers in receiving states becomes a daunting reality. The ICRMW is just the beginning of rights-based international legal protection for migrant workers, albeit being a weak one at that. It took more than 10 years of negotiations for the ICRMW to take effect and the negotiations only prove how difficult it is for the State-parties to accede to the concerns raised.<sup>109</sup> With only 47 ratifying countries,<sup>110</sup> the ICRMW has much State opposition

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99. ICRMW, *supra* note 78, art. 7.

100. *Id.*

101. *Id.* art. 8, ¶ 1-2.

102. *Id.* art. 71, ¶ 1.

103. *Id.* art. 10.

104. *Id.* art. 11.

105. ICRMW, *supra* note 78, art. 12, ¶ 1.

106. *Id.*

107. See Nicola Piper, *Obstacles to, and opportunities for, ratification of the ICRMW in Asia*, in MIGRATION AND HUMAN RIGHTS, *supra* note 45 at 171.

108. *Id.* Bangladesh ratified the ICRMW in 1998 while both Indonesia and Cambodia ratified in 2004. *Id.*

109. See Lonnroth, Juhani, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT'L MIGRATION REV. 710, 712-36 (1991).

110. United Nations Treaty Collection, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)

to face. Ultimately, the ICRMW “underscores the age long conflict between the international norms of human rights and state sovereignty. Ultimately, the ‘rights of states’ clearly prevail over the ‘rights of migrants[,]’ with states retaining the right to set the conditions under which foreigners may enter and reside in their territory.”<sup>111</sup> The ASEAN has yet to make a pledge of commitment to the ICRMW while it builds its own human rights regime.

Many reasons have been given why the ICRMW was not easily passed. There was little motivation for governments to adopt the ICRMW.<sup>112</sup> The ILO was tasked to draft the ICRMW and not the U.N.<sup>113</sup> Destination countries already had enough protective mechanisms in place.<sup>114</sup> Labor migration was not a strong concern for domestic politics.<sup>115</sup> Technical issues arose, like which version should prevail should a conflict arise between the general human rights document and the migrant workers text, among others.<sup>116</sup> An additional concern was the increasing popularity of neo-liberalism that then United States President Ronald W. Reagan and then UK Prime Minister Margaret H. Thatcher were both promoting.<sup>117</sup> Neo-liberalism made the U.N. convention develop slower than other international legal documents.<sup>118</sup>

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(last accessed Dec. 31, 2014). Based on this website, 47 states have ratified the ICRMW. *Id.*

111. Robyn Iredale & Nicola Piper, Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective (A Report Published as Part of the UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants) 13, available at <http://www.cetim.ch/fr/documents/UNESCO-CMW-AsiePac1.pdf> (last accessed Dec. 31, 2014).

112. See Antoine Pécoud & Paul de Guchteneire, Migration, Human rights and the United Nations: An investigation into the obstacles to the UN Convention on Migrant Workers’ Rights, available at <http://portal.unesco.org/shs/en/files/6611/10962899451GCIM.pdf/GCIM.pdf> (last accessed Nov. 30 2014).

113. See Paul de Guchteneire & Antoine Pécoud, *Introduction: The UN Convention on Migrant Workers’ Rights*, in MIGRATION AND HUMAN RIGHTS, *supra* note 45, at 7 [hereinafter Guchteneire & Pécoud, *Introduction*].

114. *Id.* at 18.

115. *Id.* at 20.

116. *Id.* at 16.

117. *Id.* at 57.

118. *Id.*

The events of the 1990s, though, specifically the fall of the Berlin Wall, the increase in regional trade among the European countries, and the creation of the North American Free Trade Agreement among the US, Canada, and Mexico allowed room for development.<sup>119</sup> The globalization of economic activities, with the replacement of the General Agreements on Tariff and Trade by the World Trade Organization beginning 1995,<sup>120</sup> spurred international trade in services that has been unprecedented in human history.<sup>121</sup> With an increase in the trade of services, it would have been obvious that the rise of migration in the world would allow for many violations of the human rights of migrant workers, especially in countries that view human rights as a realistic concern and where there is a lack of an international legal framework. This was highlighted by no less than U.N. High Commissioner for Human Rights Navanethem “Navi” Pillay who said that human rights in the context of migration should be and ought to be a priority of the Office of the High Commissioner for Human Rights and, thus, was proclaimed one of the six thematic priorities from 2010–2011.<sup>122</sup> States seemingly remain the prime actors in this rights-based protection. As Douglas S. Massey observed, the state has increasingly found itself on defense against international migration as an increasing phenomenon in the last century.<sup>123</sup> Foreign workers increasingly face threats to their working conditions and human dignity not only from opportunistic employers, fixers, and private parties but also from the lack of State protection.<sup>124</sup> Citizenship becomes a class categorization that significantly creates a different state of protection for the rights of migrant workers.<sup>125</sup> Non-nationals who work like everyone else in another territory become subjects of many cases of

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119. Guchteneire & Pécoud, *Introduction*, *supra* note 113, at 222.

120. World Trade Organization, Overview, *available at* [http://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm) (last accessed Dec. 31, 2014).

121. *Id.*

122. Navanethem “Navi” Pillay, United Nations High Commissioner for Human Rights, United Nations, Address at the 16th Session of the UN Committee on Migrant Workers, Geneva, Switzerland (Apr. 16, 2012) (transcript *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12060&LangID=E> (last accessed Dec. 31, 2014)).

123. Douglas S. Massey, *International Migration at the Dawn of the Twenty-First Century: The Role of the State*, 25 *POPULATION & DEV. REV.* 303, 307 (1999).

124. Nicola Piper, *Rights of Foreign Workers and the Politics of Migration in South-East and East Asia*, 42 *INT’L MIGRATION* 71, 71–97 (2004).

125. Rochelle Ball & Nicola Piper, *Globalisation and regulation of citizenship — Filipino migrant workers in Japan*, 21 *POL. GEOGRAPHY* 1013, 1013–34 (2002).

abuse and degradation of human dignity.<sup>126</sup> As an ILO study highlighted, migrant workers “face diverse forms of harassment in the workplace and in the host society, ranging from non-payment of wages to insufficient medical facilities and death while on duty.”<sup>127</sup>

### III. EVOLVING A REGIONAL LEGAL FRAMEWORK

Several issues plague the full promotion of the rights of migrant workers in the region, namely:

- (1) The nature of regional law as soft law;
- (2) Economic policies that challenge the rights based framework;  
and
- (3) The challenge of institutionalization in a region experimenting with regional integration.

#### *A. Regional Law as Soft Law*

Regional laws on migrant workers have yet to reach a full hard law status outside the EU. In the Americas, an advisory opinion issued by the Inter-American Court of Human Rights held that the rights to equality and non-discriminatory treatment are *jus cogens* and are applicable to any resident of a state regardless of that resident’s immigration status.<sup>128</sup> The experience in the American regions is that the protection of documented migrant workers comes in the form of domestic legislations.<sup>129</sup> These include laws ensuring that migrant workers are not paid below federal minimum wages.<sup>130</sup> Reportedly, American authorities “often attribute the problems in enforcing these laws to [ ] lack of resources in enforcement.”<sup>131</sup> Private organizations like the North American Agreement on Labor Cooperation (NAALC)

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126. INTERNATIONAL ORGANIZATION FOR MIGRATION, INTERNATIONAL MIGRATION, HEALTH AND HUMAN RIGHTS 13 (2013).

127. PONG-SUL AHN, MIGRANT WORKERS AND HUMAN RIGHTS: OUT-MIGRATION FROM SOUTH ASIA 11 (2004). The samples conducted by Ahn from South Asia point to a growing trend of labor migration subjected to sub-optimal living conditions. *Id.*

128. Robert Russo, *A Cooperative Conundrum? The NAALC and Mexican Migrant Workers in the United States*, 17 LAW & BUS. REV. AM. 27 (2011) (citing Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A), No. 18/03 (Sep. 17, 2003)).

129. *Id.*

130. *Id.*

131. *Id.*



engaged non-governmental actors, such as individual workers and human rights groups, into international legal processes and to publicly acknowledge problems in national programs designed to deal with migrant workers.<sup>132</sup> But Robert Russo criticizes the NAALC process as an “inexcusably slow moving result of bureaucratic delays and political considerations.”<sup>133</sup> He further explains that in the Americas, the engagement of NGOs, like the NAALC, has resulted in

greater cooperation and inclusiveness among various NGOs and civil society groups, including previously marginalized groups[,] such as unofficial Mexican unions and Mexican migrant workers in the [U.S]. The cooperative process in dealing with migrant workers is most effective when used to approach a theoretical legal problem and is clearly inadequate in confronting ongoing violations of national labor laws. But the NAALC process, an exercise in ‘soft law-making,’ is clearly not up to the task of dealing with the ‘hard-law’ realities of ensuring a state party’s compliance with its own national labor laws.<sup>134</sup>

#### *B. Development Policies and the Rights of Migrant Workers*

Migration policies are not only a matter of a fluid economic transaction — there are regulations involved. These regulations have become recognized as conscious on the part of governments that capitalize on the need for migrant workers, as a sender as well as recipient. As Cheah Wui Ling wrote —

Many developing ASEAN States adopt [labor] migration not only as a solution to underemployment but also as a deliberate economic development policy that relies on the direct remittances of migrant workers. As a region, [the] ASEAN has recognized migration as a process that can ‘support [the] ASEAN economic cooperation.’ The [Philippine Government] has actively promoted [labor] emigration and income remittances as part of its economic development [program]. It has come to depend on overseas remittances that often exceed its gross national product. This utilitarian conceptualization, albeit styled in nationalistic terms and referring to these workers as ‘national heroes,’ has increasingly come under criticism for failing to take into consideration the social costs of emigration within developing States or the aspirations and agency of these migrant workers. It subordinates the human development of migrant workers to that of the sending country; many of the former taking jobs overseas for

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132. *Id.*

133. *Id.*

134. Russo, *supra* note 128.

which they are over-qualified and with no hope for self-improvement in the long-run.<sup>135</sup>

These may sound like lamentations but realities may not be far from what is described. The power to legalize, through the use of meaning, definitions, and paper processing, becomes an important avenue that determines not just a migrant's livelihood but a migrant's life. As Ling further noted,

[i]n most ASEAN States, illegal migrants are treated as criminals. In Malaysia and Singapore, both of which are major destination ASEAN States, mandatory caning is prescribed for illegal immigrants. This uncompromising approach towards illegal migration is echoed at the ASEAN regional level. The ASEAN Plan of Action for Cooperation on Immigration Matters calls for increased enforcement coordination such as the 'exchange of information on immigration matters, such as systems, operations[,] and on matters relating to irregular migration' and the 'effective protection of the integrity of travel documents, permits[,] and government control of the ingress [and] egress of people.' On the other hand, this same plan calls for a legal streamlining of other kinds of cross-border movement[,] such as 'intra-ASEAN commerce, tourism[,] and travel.'<sup>136</sup>

Ling further exhorted the regional policy makers to "refer to its creation of a differentiated citizenship for migrant workers that advocates for their

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135. Cheah Wui Ling, *Migrant Workers as Citizens within the ASEAN Landscape: International Law and the Singapore Experiment*, 8 CHINESE J. INT'L L. 210, 210-11 (2009) (citing Asian Development Bank, *Enhancing the Efficiency of Overseas Workers Remittances*, available at <http://www.adb.org/projects/37590-012/main> (last accessed Dec. 31, 2014); ASEAN, *ASEAN Plan of Action for Cooperation on Immigration Matters*, available at <http://www.asean.org/communities/asean-political-security-community/item/asean-plan-of-action-for-cooperation-on-immigration-matters> (last accessed Dec. 31, 2014) [hereinafter *ASEAN Plan of Action for Cooperation on Immigration Matters*]; MARIA DEANNA P. SANTOS, *HUMAN RIGHTS AND MIGRANT DOMESTIC WORK: A COMPARATIVE ANALYSIS OF THE SOCIO-LEGAL STATUS FILIPINA MIGRANT DOMESTIC WORKERS IN CANADA AND HONG KONG* 23-31 (2005); & Katherine Gibson, et al., *Beyond Heroes and Victims: Filipina Contract Migrants, Economic Activism and Class Transformations*, 3 INT'L FEMINIST J. POL. 365 (2001)).

136. Ling, *supra* note 135, at 212 (citing Michael Hor, *Illegal Immigration: Principle and Pragmatism in the Criminal Law*, 14 SING. ACAD. L.J. (2002) & ASEAN Plan of Action for Cooperation on Immigration Matters, *supra* note 135).

inclusion in the social, political[,] and cultural fabric of the host community.”<sup>137</sup> And even if they are soft and non-binding, these

international legal instruments[,] such as the U.N. Convention for Migrant Workers or the ILO Multilateral Framework ... provide important guidance to well-intentioned actors such as civil society groups. In doing so[,] and through the action of these same actors, ideas of citizenship and inclusion[,] originally constituted at the international plane[,] penetrate the local.<sup>138</sup>

Much is yet expected of ASEAN Member-States in terms of developing regional protective mechanisms. Domestic policies are not enough for the protection of migrant workers.

#### IV. REGIONAL INSTITUTIONALIZATION

When the ASEAN decided to focus on human rights cooperation, the notion agreed upon was that there would be no “teeth”<sup>139</sup> in regional institutionalization so that there would be “no biting.”<sup>140</sup> In recognition of strict separation of trade policy regionalization and human rights, the ASEAN has been observed to let human rights issues fall off from the agenda of regional integration.<sup>141</sup> Carolina G. Hernandez earlier observed that opportunities for institutionalists are present.<sup>142</sup> Later on, Hernandez also argued the same considering that the ASEAN was to have had a Charter in 2007.<sup>143</sup> Part of the draft of the ASEAN Charter submitted included an ASEAN Court of Justice (ACJ) and an ASEAN Regional Human Rights Body (AHRB).<sup>144</sup> In other words, the ASEAN will be allowed by Member-

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<sup>137</sup>. *Id.* at 231.

<sup>138</sup>. *Id.*

<sup>138</sup>. *Id.*

<sup>139</sup>. Termsak Chalermpanupap, 10 Facts about ASEAN Human Rights Cooperation, *available at* <http://www.asean.org/images/archive/HLP-Other-Doc-1.pdf> (last accessed Dec. 31, 2014). The article describes the ASEAN Human Rights Board as never having been intended to be any “independent watchdog.” *Id.*

<sup>140</sup>. *Id.*

<sup>141</sup>. Thio, *supra* note 39, at 1.

<sup>142</sup>. See CAROLINA G. HERNANDEZ, *ASEAN PERSPECTIVES ON HUMAN RIGHTS AND DEMOCRACY IN INTERNATIONAL RELATIONS* 3 (1995).

<sup>143</sup>. Carolina G. Hernandez, *Institution building through an ASEAN charter*, 9 PANORAMA: INSIGHTS INTO S.E. ASIAN & EUR. AFF. 9, 9-52 (2007) [hereinafter Hernandez, *Institution*].

<sup>144</sup>. *Id.* at 34-37.

States to form a regional mechanism to address disputes within and among States on regional human rights issues, with the State as the main actor that determines the powers granted the regional institutions.

Not long after that, the ASEAN Charter<sup>145</sup> was signed in late 2007 and took effect in 2008.<sup>146</sup> Consent of Member-States remained the source of authority.<sup>147</sup> Liberalist-universalist views, such as the one held by Ambassador Rosario G. Manalo, that the ASEAN Charter was a soft “constitution,” which “codif[ies] all ASEAN norms, rules[,] and values that will guide actions of [M]ember[-]States,” also take into consideration the realist weaknesses of the Charter.<sup>148</sup> In this “constitutionalization” process, the ACJ and AHRB were not automatically institutionalized. The ACJ was shot down by drafters for fear of lack of state approval while the AHRB was to be renegotiated subsequently by the foreign ministers.<sup>149</sup> Even noted ASEAN human rights scholar, Vitit Muntarbhorn, cannot fully explain the statist primacy of the ASEAN.<sup>150</sup> As Muntarbhorn lamented, “[t]he rise of acceptance of international human rights depicts the need for a regional human rights regime where the functional role of institutions shall be to seek the monitoring as well as regional regime norm making” and the forward progress of the ASEAN in human rights remain a challenge.<sup>151</sup>

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145. See generally ASEAN Official Website, ASEAN Charter, available at <http://www.adb.org/projects/37590-012/main> (last accessed Dec. 31, 2014).

146. Hernandez, *Institution*, *supra* note 143, at 21.

147. *Id.* at 34.

148. Rosario Gonzalez Manalo, *Drafting ASEAN's Tomorrow: The Eminent Persons Group and the ASEAN Charter*, in *THE MAKING OF THE ASEAN CHARTER* 39 (Tommy Koh, et al., eds., 2009).

149. *Id.* at 21-22 & 32-33. The ASEAN Human Rights Body (AHRB) was subsequently codified in the ASEAN Charter as Article 14, which states that “[t]he [AHRB] shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.” ASEAN Charter, *supra* note 145, art. 14.

150. Vitit Muntarbhorn, Co-Chairperson of the Working Group, A Roadmap for an ASEAN Human Rights Mechanism, Address at the Third Workshop for an ASEAN Regional Mechanism on Human Rights, Bangkok, Thai. (May 28-29, 2003) available at <http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm> (last accessed Dec. 31, 2014).

151. *Id.*

After the Cha-Am Hua Hin (CAHN) Declaration on the Intergovernmental Commission on Human Rights<sup>152</sup> was signed on 23 October 2009, the ASEAN formed the ASEAN Intergovernmental Commission on Human Rights (AICHR) as a hopeful progress for the institutionalization of human rights not just in Southeast Asia but in the whole East Asian region.<sup>153</sup> The CAHN Declaration expressed “confidence that the ASEAN cooperation on human rights will continue to evolve and develop so that the AICHR will be the overarching institution responsible for the promotion and protection of human rights in the ASEAN.”<sup>154</sup>

With the CAHN Declaration, the AICHR became the functional institution on regional cooperation in human rights issues in the ASEAN, including migrant workers’ rights, in its “overarching” role.<sup>155</sup> More importantly, the CAHN Declaration explicitly recognized a consensus of allowing the institution to evolve and develop an evolutionary approach to regional human rights protection including the rights of migrant workers. This would allow room for an evolutionary process to come in and, perhaps, for ideas to influence behavior as constructivists perceive it to be. But that is, in itself, not enough because it may be argued that States have taken a realist-rationalist stance in regionalizing human rights cooperation — that no state shall be subject to litigation and that all processes shall be subject to a consensual dialogue after a screening process by the states themselves.

The primacy of state authority remains present, however, given that the “[Terms of Reference] of the AICHR shall be reviewed every five years after its entry into force to strengthen the mandate and functions of the AICHR in order to further develop mechanisms on both the protection and promotion of human rights.”<sup>156</sup> This “review and

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152. Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights ¶ 1, *adopted* Oct. 23, 2009 [hereinafter CAHN Declaration].

153. See Yasushi Katsuma, *ASEAN Intergovernmental Commission on Human Rights: Its Significance in the Context of International Human Rights Regimes*, 15 J. ASIA PAC. STUD. 165, 165–76 (2011) & ASEAN Intergovernmental Commission on Human Rights, ASEAN Intergovernmental Commission on Human Rights Launched by Leaders during the 15th ASEAN Summit, *available at* <http://aichr.org/press-release/press-statement-by-the-chair-of-the-asean-intergovernmental-commission-on-human-rights-on-the-first-meeting-of-the-asean-intergovernmental-commission-on-human-rights-3/> (last accessed Dec. 31, 2014).

154. CAHN Declaration, *supra* note 152, ¶ 8.

155. *Id.*

156. *Id.* ¶ 7.

subsequent reviews shall be undertaken by the ASEAN Foreign Ministers Meeting.”<sup>157</sup> Yayushi Katsuma noted how the ASEAN’s recent history, from the passage of the ASEAN Charter in 2007 to the move to institutionalize the AICHR in 2009, have made the sub-region more liberal for human rights norms harmonization and allowed the sub-region to catch up with the rest of universalist regimes.<sup>158</sup> States generally maintain their hold except in instances where international human rights have been recognized as limits.<sup>159</sup> Backdoor discussions on the drafting of the ASEAN Charter easily show how ASEAN Member-States have yet to delegate human rights coercive mechanisms to a regional body.<sup>160</sup> Hernandez once submitted that the ASEAN has yet to develop stronger institutions and that the codification or “charterification”<sup>161</sup> could somehow help in that regard.<sup>162</sup> The promulgation of the ASEAN Human Rights Declaration (AHRD),<sup>163</sup> which upholds universalism, will have significantly furthered this observation.<sup>164</sup> With the legalization of human rights, as embodied in the AHRD, and the institutionalization of the same, as embodied by the AICHR, this Author shares the hopes of Robin Ramcharan that, “the AICHR could envisage avenues for effective cooperation with the ASEAN mechanism on migrant workers and on the rights of women and children, the preventive diplomacy work of the [ASEAN Regional Forum], and the efforts of [ASEAN Inter Parliamentary Assembly] to bring ASEAN closer to its peoples.”<sup>165</sup>

There is an increasing level of human rights regime-building in the ASEAN with the advent of the AICHR and the recent promulgation of the

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157. *Id.*

158. Katsuma, *supra* note 153, at 170.

159. Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 139-67 (Volker Rittberger ed., 1993).

160. See Manalo, *supra* note 148, at 39.

161. Hernandez, *Institution*, *supra* note 143, at 10.

162. *Id.*

163. See The Conversation, ASEAN Human Rights Declaration: a step forward or a slide backwards?, available at <http://theconversation.com/asean-human-rights-declaration-a-step-forward-or-a-slide-backwards-10895> (last accessed Dec. 31, 2014).

164. *Id.*

165. See Robin Ramcharan, *ASEAN’s Human Rights Commission: Policy Considerations for Enhancing its Capacity to Protect Human Rights*, 3 UCL HUM. RTS. REV. 199, 235 (2010).

AHRD.<sup>166</sup> Both the AICHR and the AHRD all point to an evolutionary process<sup>167</sup> — that the ASEAN has taken steps to promote the regional protection of human rights.<sup>168</sup> However, there is a lack of literature that shows how the ASEAN's efforts to address the human rights regime in the region are helping the rights of migrant workers. As regional observations have shown, the ASEAN, through the AICHR, has given rise to a regional system of governance for human rights with some potential drawbacks due to lack of institutionalized coercive measures.<sup>169</sup> What is clear is that the AICHR has helped spark the discussions on the need to increase human rights protective mechanisms in the region.<sup>170</sup> However, on the specific issue of the rights of migrant workers, the ASEAN has yet to show that it is speaking a “common language” when it comes to human rights. There are differences in recognition and ratification. As Battistella argued, for a truly rights-based governance in the region, there is a need for a “non-negotiable level of protection.”<sup>171</sup> Ramcharan proposes that for the ASEAN's human rights body to fully cater to marginalized sectors, especially migrant workers, “a system of thematic special rapporteurs or working groups” be established in the region.<sup>172</sup>

How will the AICHR then treat the Cebu Declaration on the Blueprint of the ASEAN Charter (Cebu Declaration)?<sup>173</sup> In relation to the Cebu Declaration, Ramcharan noted that

[the] ASEAN made an important move to address the issue of migrant workers on 13 January 2007, when its leaders signed the ASEAN

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166. Theoben Jerdan C. Orosa, *ASEAN Integration in Human Rights: Problems and Prospects for Legalization and Institutionalization*, 4 ASIAN REGIONAL INTEGRATION REV. 66, 69 (2012).

167. *Id.*

168. See Katsuma, *supra* note 153, at 165–76.

169. See HSIEN-LI TAN, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS: INSTITUTIONALISING HUMAN RIGHTS IN SOUTHEAST ASIA 256 (2011). See also Orosa, *supra* note 166, at 67.

170. See Orosa, *supra* note 166, at 69.

171. See Renato Graziano C. S. Battistella, *The Human Rights of Migrant Workers: Agenda for NGOs*, 27 ASIA PAC. MIGRATION J. 247, 247–57 (1993) & Renato Graziano C. S. Battistella, *The Rights of Migrants within ASEAN: Achievements and Gaps*, Address at the 18th ASEAN International Colloquium on Human Rights, Mandaluyong, Phil. (Nov. 2–13 2011).

172. Ramcharan, *supra* note 165, at 222.

173. Cebu Declaration on the Blueprint of the ASEAN Charter, *adopted* Jan. 13, 2007.

Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Declaration mandates ASEAN countries to promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers. An ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was established in July 2007.

In setting out obligations for states that send and receive migrant workers, the Declaration recalled [the] [M]ember[-]States['] obligations under the [UDHR] adopted and proclaimed by [the U.N.] General Assembly ... as well as other appropriate international instruments[,] which all the ASEAN Member Countries have acceded to, in order to safeguard the human rights and fundamental freedoms of individuals[,] such as the [CEDAW] and the [CRC].<sup>174</sup>

It is submitted that as part of the declarations that have been signed by ASEAN Member-States, though non-binding, the AICHR will have to rely on this text as part of its mandate. As stated by the AHRD, “[t]he rights of women, children, the elderly, persons with disabilities, *migrant workers*, and vulnerable and marginalised groups *are an inalienable, integral[,] and indivisible part of human rights and fundamental freedoms*.”<sup>175</sup> The AHRD, being part of the mandate of the AICHR, should, therefore, have room to intercede and, at the very least, conduct thematic studies on this issue.

There is much hope for the AICHR, and for the protection of the rights of migrant workers.

## V. CONCLUSION

Migrant workers, as employed individuals in a country or territory, perform work that is equal to, if not more challenging than, those of the individuals who are citizens there. The principal difference is the citizenship or nationality of the migrant worker. Labor standards and the international legal protection of labor has always been a dynamic field, from the hours of work to the principles of non-discrimination. They have evolved into a web of protection for workers whose main capital is their autonomous person. In this dynamic field, the evolution of legal protection should go beyond the distinction of citizenship. In a global system of trade, where production networks cross regions, labor should be protected in a similar fashion.

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<sup>174</sup> Ramcharan, *supra* note 165, at 223–24.

<sup>175</sup> ASEAN Human Rights Declaration gen. princ. 4, *adopted* Nov. 8, 2012 (emphasis supplied).



The future of an EU-style integration in the ASEAN seems bleak at the moment, but this should not stop private ordering to coalesce a tighter bond of networks in the region. This Article sought to understand the nature and processes involved in the production networks and their effects in regional integration. As East Asian markets recognize fragmentation of production, interlinks become more important. This provides impetus for more transnational transactions and advances the need for infrastructure, mechanisms, and regional rules for network support.

The ASEAN had an incremental progress in the promulgation of the AHRD.<sup>176</sup> Even the U.N. Human Rights Commissioner Navi Pillay had to make an express statement that “[t]he international human rights mechanisms will continue to hold ASEAN Member-States to their international obligations and encourage ASEAN to strengthen further its regional human rights framework.”<sup>177</sup> Behind the regional developments remain realist tendencies for ASEAN Member-States to insist on territoriality and state sovereignty.<sup>178</sup> Katsumata may have been right that when it is convenient for norms to be accepted, such as when it will place ASEAN Member-States on the same footing as first world countries, the norms will be imbibed.<sup>179</sup> In the ASEAN, however, the dynamics of sending and receiving countries play a major role — and a major barrier — to the recognition of the rights of migrant workers. The strong division between sending states, like the Philippines, Cambodia, and Indonesia, and the receiving countries, like Singapore, Thailand, and Malaysia create a divide among the ASEAN countries on the ratification of the ICRMW.

The Cebu Declaration has given some hope. If AICHR can implement the textual declaration and incorporate them in the policies and framework

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176. See Novan Iman Santosa & Yohanna Ririhena, *ASEAN leaders adopt lame-duck rights declaration*, THE JAKARTA POST, Nov. 19, 2012, available at <http://www2.thejakartapost.com/news/2012/11/19/asean-leaders-adopt-lame-duck-rights-declaration.html> (last accessed Dec. 31, 2014).

177. UN News Centre, UN official welcomes ASEAN commitment to human rights, but concerned over declaration wording, available at <http://www.un.org/apps/news/story.asp?NewsID=43536#.VBeb9mSrbgJ> (last accessed Nov. 30 2014).

178. Hernandez, *Institution*, *supra* note 143, at 34.

179. See Hiro Katsumata, Norms and Regional Institutions: Toward an East Asian Community (A Paper Presented at the International Studies Association Asia-Pacific Regional Section Inaugural Conference, Brisbane, Australia) 6, available at <http://www.uq.edu.au/isaasiapacific/content/HiroKatsumata5-6.pdf> (last accessed Dec. 31, 2014).

for the region, then migrant workers can have better extraterritorial protection.

The ASEAN can take its cue from the international legal documents that have been passed recognizing the import of migrant workers. Citizenship and territorial integrity are important; but equally important are the economic contributions of the migrant worker in any receiving country. For true regional integration to happen, the ASEAN would be better served by recognizing that free capital movements and freer trade can only happen when barriers to entry of goods have been lowered and the products protected as much as national products.<sup>180</sup> More so, and more importantly, those of the rights of migrant workers who work far from their own countries and families, seeking to serve employers in a foreign land and paying taxes to a foreign government, but are treated in a manner inconsistent with the logic of a shared regional economy.

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180. See Yung Chul Park & Shinji Takagai, *Managing Capital Flows in an Economic Community: The Case of ASEAN Capital Account Liberation*, 8 PUB. POL'Y REV. 299, 316-19 (2012).