Chapter 5: The International Labour Organization and Migrant Workers

Key questions

- What international labour standards are relevant to the rights of migrant workers?
- What protections do these standards provide to migrant workers?
- How is compliance with these standards monitored? Can complaints be made if a State breaches its obligations under these standards?

1. Introduction

The International Labour Organization (ILO) was established in 1919 following the First World War, predating the formation of the United Nations. Today it is a specialized agency of the UN with the aim of promoting rights at work, as encapsulated in the slogan: "Decent work for all men and women". This mission is based on an understanding of the inextricable relationship between labour rights, social justice and the conditions for "lasting peace, progress and prosperity".[1]

The ILO is the only UN body with an explicit constitutional mandate for the protection of workers in international labour migration.[2] This focus has been restated in the Declaration of Philadelphia, 1994[3] and the ILO Declaration on Fundamental Principles and Rights at Work, 1998 (see below).

This chapter provides information on the key ILO standards relevant to the rights of migrant workers. It also explains the structure of the ILO and its supervisory and complaints procedures.

Upholding core labour standards is essential for ensuring that the human rights of migrant workers are respected in practice. The right to decent work is a fundamental right that enables the realization of many other rights for migrant workers.

2. ILO standards and migrant workers

The ILO has adopted over 180 conventions addressing specific labour issues and concerns, including those that specifically address the rights of migrant workers. In

[1] "Mission and Objectives"; ILO; see: http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm.
[2] "MIGRANT: International Migration Branch"; ILO; see: http://www.ilo.org/public/english/protection/migrant/index.htm.
[3] Declaration concerning the aims and purposes of the International Labour Organizationtion; ILO Constitution, Annex.

addition to these legally binding conventions, the ILO has codified standards through non-binding guidelines in the form of "recommendations".

The ILO was also actively involved in the drafting of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It recognizes the definition of migrant workers that the Convention provides and acknowledges the Convention as one of the key framework instruments on the rights of migrant workers.[4]

2.1 ILO conventions and recommendations specific to migrant workers

The ILO has adopted two legally-binding instruments specifically on migrant workers:

- Migration for Employment Convention, 1949 (C- 97)
- Migrant Workers (Supplementary Provisions) Convention, 1975 (C-143).

These instruments promote the **principles of equal treatment, equality of opportunity and non-discrimination**. A total of 49 countries have ratified C-97 and 23 countries have ratified C-143.[5] Only two countries with NHRIs that are members of the APF – the Philippines and New Zealand – have ratified C-97; and only the Philippines has ratified C-143.

The **Migration for Employment Convention, 1949** provides a framework to regulate and provide protection to a "migrant for employment" at all stages of the migration process. Member States must provide assistance and information on departure, journey and entry, including medical assistance. They must also take steps to eliminate misleading propaganda on emigration and immigration and to prevent the expulsion of irregular migrants.

The Convention defines a migrant for employment as a person who migrates from one country to another with a view to being employed otherwise than on his or her own account and includes any person regularly admitted as a migrant for employment (article 11). It therefore applies to regular migrants (article 8) and is not applicable to frontier workers, seamen, short-term entry of members of the liberal professions and artistes, or to self-employed foreign migrants.

The Convention requires member States to accord equal treatment to regular migrant workers in relation to working conditions; membership of trade unions and enjoyment of the benefits of collective bargaining; accommodation; social security; employment taxes; and legal proceedings relating to the matters referred to in the Convention (article 6).

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[4] *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*; ILO; 2006; see: "Section V: Protection of Migrant Workers"; para. 9(b); *In Search of Decent Work – Migrant Worker's Rights: A Manual for Trade Unionists*; International Labour Office; 2008; p. 78.

[5] For a list of countries that have ratified these conventions, see the "Standards" section of "MIGRANT: International Migration Branch"; ILO; http://www.ilo.org/public/english/protection/migrant/areas/standards.htm.

The **Migrant Workers (Supplementary Provisions) Convention, 1975** sets out a comprehensive approach to address labour migration, starting with a commitment to the protection of basic human rights of all migrant workers (article 1). It provides minimum standards for the protection of migrant workers in both regular and irregular situations.

The Convention is the first international instrument to deal with problems arising from irregular migration. It seeks to suppress the clandestine migration and the illegal employment of migrants (article 3) and encourages the prosecution of "manpower trafficking" (article 5).[6]

The Convention requires member States to guarantee equality of opportunity and treatment for documented migrant workers and their families in respect to employment and occupation, social security, trade unions, cultural rights and individual and collective freedoms (article 10). However, this provision does not apply to frontier workers, short term entry of the liberal professions and artistes, seamen, trainees and persons coming for training or education and persons who come for specific duty assignments (article 11(2)).
In addition, the Convention stresses the importance of consulting representative organizations of employers and workers in relation to the laws, regulations and other measures provided for in the Convention which are designed to prevent and eliminate migration in abusive conditions.[7]

The **Migrant Workers Recommendation, 1975** calls for further elaboration and broadening of the standards set out in C-143, within the framework of a coherent policy on international migration for employment. It seeks to promote effective equality of opportunity and treatment with nationals for migrant workers lawfully within the territory of a member State in respect to vocation and employment training, security of employment, working conditions, trade union membership and remuneration for work of equal value, as well as living conditions, including housing, social services and access to education and health services (article 2).

The Recommendation encourages member States to provide the free choice of employment and geographical mobility for migrant workers who have resided lawfully in the country (article 6(a));109 to ensure the efficient resolution of cases where migrant workers with irregular status may be regularized, and where they cannot be regularized, to ensure equal treatment with regards to certain rights arising from past and present employment (article 8); to formulate social policy appropriate to the conditions and specific needs of migrant workers (article 9), to promote family reunification (article 13) and to provide assistance and information in adapting to the economic, social and cultural environment of the country of employment (article 24).

[6] The Convention does not specifically define the phrase "manpower trafficking" which, in summary, refers to trafficking for labour. For a comprehensive definition of trafficking in persons, which includes trafficking for the purposes of labour exploitation, see the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.
[7] 108 See article 7 in particular and, more generally, articles 2, 4 and 12.

The ILO has a dedicated unit for labour migration, the International Migration Programme (MIGRANT), which promotes international standards and cooperation and provides technical assistance and capacity building to member States on labour migration and the promotion of migrant workers' rights.[8]

2.2 Core labour standards and other relevant conventions

All core ILO labour rights – known as the Fundamental Conventions of the ILO and enshrined in the **ILO Declaration on Fundamental Principles and Rights at Work** – apply in equal measure to all migrant workers.

Adopted in 1998, the Declaration states in its Preamble that the ILO "should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation".

Article 2 of the Declaration states that:

> all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.

The eight conventions considered "fundamental" by the ILO include:

- Forced Labour Convention, 1930 (C-29)
- Freedom of Association Convention, 1948 (C-87)
- Right to Organize and Collective Bargaining Convention, 1949 (C-98)
- Equal Remuneration Convention, 1951 (C-100)
- • Abolition of Forced Labour Convention, 1957 (C-105)
- Discrimination (Employment and Occupation) Convention, 1958 (C-111)
- Minimum Age Convention, 1973 (C-138)
- Worst Forms of Child Labour Convention, 1999 (C-182).

[8] "MIGRANT: International Migration Branch"; ILO; see: http://www.ilo.org/public/english/protection/migrant/index.htm.

There are other ILO standards that are directly relevant to rights of migrant workers.[9] Of particular importance are the Private Employment Agencies Convention, 1997 (C-181) and the Domestic Workers Convention, 2011 (C-189).

The **Private Employment Agencies Convention, 1997** provides guidance for designing a legal framework to address illegal recruitment practices and trafficking of human beings, especially women and children. It applies to all private employment agencies and all categories of workers, including migrant workers, but excludes the recruitment and placement of seafarers from its coverage (article 2(2)).

Some of the Convention‟s key provisions include:

- that member States ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability (article 5)

- the protection of worker‟s privacy in processing worker‟s data (article 6)

- that private employment agencies not charge directly or indirectly, in whole or in part, any fees or costs to workers (article 7)

- that member States provide adequate protection for, and prevent abuses of, migrant workers recruited or placed in its territory by private employment agencies, including laws or regulations which provide for penalties, including prohibition of private employment agencies which engage in fraudulent practices and abuses (article 8(1))

- that member States ensure that child labour is not used or supplied by private employment agencies (article 9)

- provisions for adequate mechanisms to deal with complaints, abuses and fraudulent practices of private employment agencies (article 10)

- adequate remedies including penalties for violations of the Convention (article 14(3)).

The **Domestic Workers Convention, 2011** – also known as the Convention Concerning Decent Work for Domestic Workers – is a landmark standard that aims to protect and improve the lives and working condition of domestic workers worldwide. The ILO estimates that there are around 53 to 100 million domestic workers, the vast majority of whom are women and girls.[10]

Migrant workers make up a large proportion of domestic workers and their earnings represent a significant proportion of remittances to developing countries. Migrant domestic workers can be at high risk of exploitation and abuses. Partly because domestic work is “invisible”, domestic workers are undervalued, overworked and unprotected. Migrant domestic workers can experience a range of human rights

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[9] For a list of other relevant standards, see the *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*; 2006; Annex I; pp. 33-34.

[10] *Global and regional estimates on domestic workers*; Domestic Work, Policy Brief No 4; ILO; 2011; pp. 6-9.

violations, ranging from excessive recruitment fees and confiscation of passports, through to forced labour, trafficking, sexual exploitation and rape.

In giving legal recognition to domestic work as “work”, the Convention grants protections to domestic workers that are commensurate to other workers, such as reasonable hours of work, weekly rest of at least 24 consecutive hours, limitations on in-kind payment and clear information on terms and conditions of employment. It also includes provisions regarding fundamental principles and rights at work, including freedom of association and the right to collective bargaining, and that a written work contract is provided before the migrant travels to the country of destination. Member States are also required to provide clear rules and regulations on private employment agencies to prevent fraudulent and abusive practices.

2.2 ILO Multilateral Framework on Labour Migration

The ILO Multilateral Framework on Labour Migration, adopted in March 2006, is a non-binding instrument that promotes a rights-based approach to labour migration and protection for migrant workers. It was developed in response to the absence of a multilateral process to govern labour migration and to mitigate some of the associated problems, such as the exploitation of migrants, the growth of irregular migration and the “brain drain” on developing countries.[11]

The framework contains comprehensive principles and guidelines in relation to labour migration and provides practical guidance to Governments. While the framework is non-binding, member States are urged to promote and respect the framework as a way of fostering coherence and consistency in migration policy at the national, regional and international level.

A key focus of the framework is to ensure equality for, and improve protection of, migrant workers and to prevent disadvantage or exploitation. It applies to all migrant workers and seeks to improve the circumstances of especially vulnerable groups. The framework emphasizes the special position of women, who make up half of all migrant workers and often migrate alone.

The framework provides non-binding principles and guidelines in eight areas:

- international cooperation on labour migration
- creation of global knowledge base
- effective management of labour migration
- protection of human rights of all migrant workers regardless of status
- prevention and protection against abusive migration practices
- promotion of orderly and equitable process of labour migration

[11] *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*; ILO; 2006; p. v.

- promotion of social integration and inclusion.

3. The ILO tripartite structure and its supervisory system

The ILO is unique among UN agencies in providing a forum for non-government actors to participate as independent social partners in discussing and resolving common issues.

The ILO structure consists of three main bodies:

- the International Labour Conference
- the Governing Body
- the International Labour Office.

These organs are represented equally by Governments, employer organizations and trade unions in their deliberations and decision-making processes.

The International Labour Conference acts like an international parliament of labour and is responsible for setting international labour standards and policies. The Governing Body is the executive arm, while the International Labour Office functions as the secretariat.

Each member State of the ILO sends four representatives to the International Labour Conference: two Government delegates, an employer delegate and a worker delegate. Each delegate has equal voting rights.[12]

The ILO regularly assesses the application of standards in member States and identifies how they could be better applied in law and practice. If there are difficulties in the application of standards, the ILO seeks to engage with, and provide technical assistance to, the countries concerned.

The ILO has two kinds of supervisory mechanism:

- the regular system of supervision, which involves the "examination of periodic reports submitted by member States on the measures they have taken to implement the provisions of the ratified conventions"[13]
- special procedures, which includes "a representations procedure and a complaints procedure of general application, together with a special procedure for freedom of association".[14]

[12] ILO Constitution; article 4.
[13] "Applying and promoting international labour standards"; ILO; see: http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm?lang=en#RegularSupervision.
[14] Ibid.

3.1 Regular system of supervision

According to the ILO, "the regular system of supervision is based on the examination by two ILO bodies of reports on the application in law and practice sent by member States and on the observations on these matters sent by workers‟ organizations and employers‟ organizations."[15]

After ratification of ILO conventions, member States are required to submit their reports to the **Committee of Experts on the Application of Conventions and Recommendations** (CEACR), which is composed of 20 independent experts chosen from across geographic regions.

The reporting obligations of ILO member States include an:

- obligation to report on ratified conventions
- obligation to report on unratified conventions
- obligation to report on recommendations.[16]

Periodic reports submitted by governments are considered by the CEACR, which provides comments in the form of "observations" and "direct requests". Observations are comments on fundamental questions raised by the application of a particular convention, and which are published in the Annual Report, while direct requests are technical in nature and communicated directly to member States.

CEACR reports are submitted to the next session of the International Labour Conference and examined by the tripartite **Conference Committee on the Application of Standards**. The Conference Committee considers a selection of observations, invites the concerned Government to respond to the observations and then presents recommendations to the Government to address specific issues or to invite ILO missions or technical assistance. The findings of the Conference Committee are published in its report.

The ILO regular system of supervision has been credited with progress in reforming some labour laws and policies in some countries.[17] In recent years, member States have also been "more receptive to the Committee‟s comments" and "tending to implement them more fully".[18]

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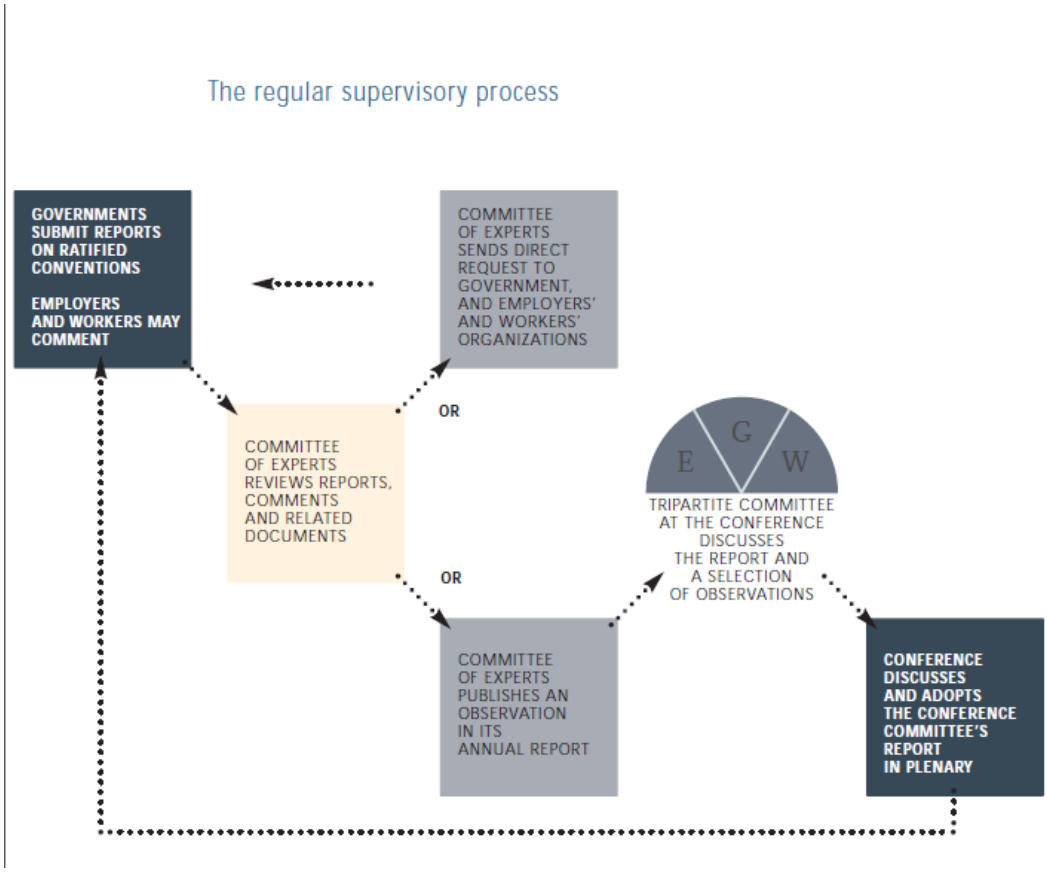
[15] "ILO supervisory sytem/mechanism"; ILO; see: http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm.

[16] ILO Constitution; articles 22, 19(5e) and 19(6d).

[17] *The Committee of Experts on the Application of Conventions and Recommendations: its dynamic and impact*; Eric Gravel and Chloé Charbonneau-Jobin; ILO; 2003. See also: „Facing up to the Complexities of the ILO‟s Core Labour Standards Agenda‟; Philip Alston; *European Journal of International Law*; June 2005; pp. 467-80.

[18] *The Committee of Experts on the Application of Conventions and Recommendations: its dynamic and impact*; Eric Gravel and Chloé Charbonneau-Jobin; ILO; 2003; p. 24.

ILO regular supervisory process[19]



3.2 Special procedures

The special procedures are engaged upon the submission of a "representation" or a complaint. They include:

- the procedure for representations on the application of ratified conventions
- the procedure for complaints over the application of ratified conventions
- the special procedure for complaints regarding freedom of association.

The **representation procedure** allows an industrial association of employers or workers to bring a "representation" or allegation to the ILO Governing Body against a member State for failure "to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party" (article 24, ILO Constitution). A tripartite Committee is set up by the Governing Body which examines the issues raised and the response of the Government concerned. If the Government response is not considered satisfactory, the Governing Body publishes both the representation and the response (article 25, ILO Constitution).

[19] "Committee of Experts on the Application of Conventions and Recommendations":ILO; see: http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

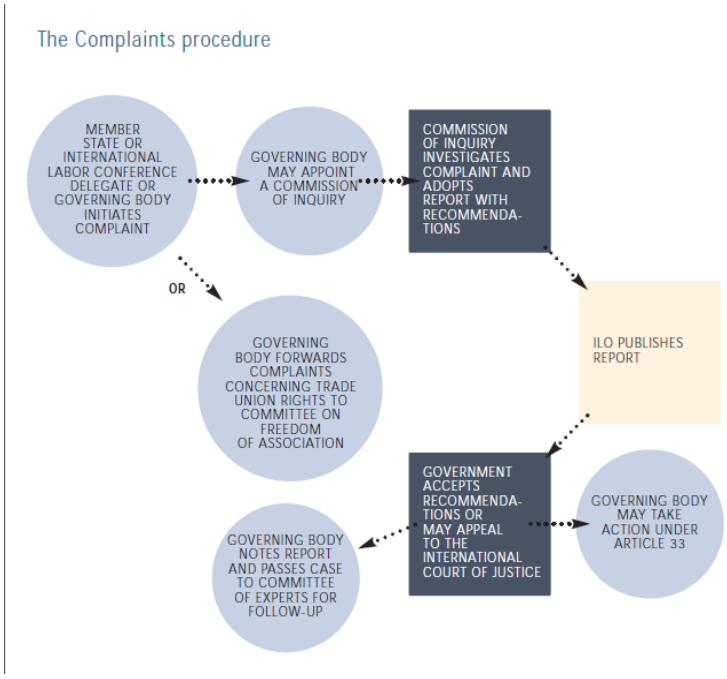
The representation must satisfy certain conditions before it can be examined by the Committee. Officers of the ILO Governing Body determine whether the representation has been submitted according to formal requirements and whether it establishes in what respects the Government is alleged to have failed to effectively observe a convention it has ratified.[20]

Under the **complaints procedure**, a member State, a delegate to the International Labour Conference or the ILO Governing Body on its own accord, may submit a complaint against another member State for failing to secure the effective observance of a convention ratified by both member States (article 26, ILO Constitution). The ILO Governing Body may refer the matter for examination to a Commission of Inquiry or forward complaints on violation of trade union rights to the Committee on Freedom of Association. Articles 26 to 34 of the ILO Constitution govern this procedure.
The Commission of Inquiry is the highest investigative level procedure at the ILO and is set up to deal with complaints involving persistent and serious violations and persistent refusal to address such violations by a Member.[21] Since 1996, there have been 11 enquiries set up by the ILO. The Commission of Inquiry conducts a full investigation of the complaint and prepares a report setting out all questions of facts and recommendations (articles 26 to 28, ILO Constitution).

The Government against which the complaint is made may accept the recommendations or refer the matter to the International Court of Justice (article 29, ILO Constitution). If the member State refuses to take action on the recommendations, the Governing Body may recommend to the International Labour Conference "such action as it may deem wise and expedient to secure compliance" (article 33, ILO Constitution). Article 33 has been used once, in 2000, when the ILO Governing Body asked the International Labour Conference to take measures against Myanmar to end the use of forced labour.

[20] For complete procedure and requirements, see: Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution; ILO; 1932 (modified 1938, 1980 and 2004).
[21] "Complaints"; ILO; http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm.

ILO complaints procedure[22]



In the 1950s, the ILO established supervisory procedure to ensure compliance with the fundamental principle of freedom of association and collective bargaining, enshrined in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C-87) and the Right to Organise and Collective Bargaining Convention, 1949 (C-98). The **special procedure on freedom of association** can apply to member States that have not ratified these conventions.

There are three competent bodies of the ILO that can hear complaints of alleged infringement of trade union rights:

- the Committee on Freedom of Association
- the Fact-Finding and Conciliation Commission on Freedom of Association
- the Governing Body itself.[23]

The **Fact-Finding and Conciliation Commission on Freedom of Association** was established in 1950, following discussions between the ILO and the United Nations Economic and Social Council (ECOSOC). All complaints received by the ECOSOC concerning allegations of infringement of trade union rights are referred to the ILO Governing Body and then to the Fact-Finding and Conciliation Commission. Generally, the procedure applies to member States of the ILO. Non-member States of the ILO may give their consent to the referral.

[22] Ibid.

[23] For further information, see: ILO Special procedures for examination in the International Labour Organization of complaints alleging violations of freedom of association; Annex I.

The Committee on Freedom of Association was created in 1951 with nine regular members and nine deputies, representing Governments, trade unions and employer groups in equal proportion. The Committee‟s mandate is to determine whether any given legislation or practice complies with the principles of freedom of association and collective bargaining set out in the relevant conventions and to examine whether the evidence is satisfactory to support the complaint. The Committee conducts the preliminary examination and prepares a report to the ILO Governing Body and recommends measures to address the situation. It can also seek the consent of the Government concerned to refer the complaint to the Fact-Finding and Conciliation Commission.

At any stage of the procedure, either during an examination or taking action on recommendations, **on-the-spot missions** can be undertaken by the ILO Director General or representative. This involves visiting the country concerned and making on-the-spot enquiries with a view to overcoming difficulties. On-the-spot missions are generally undertaken in the context of allegations of a particularly serious nature. They can be carried out only with the approval of the Committee and the consent of the concerned Government. This approach, which has been used successfully, is similar in purpose to “direct contacts” with Governments employed by the Fact-Finding and Conciliation Commission.

Complaints to the ILO special procedures can be lodged either directly with the ILO or through the UN. Complaints are deemed “receivable” only when submitted by a national organization directly interested in the matter, by international organizations of employers or workers having consultative status with the ILO, or other international organizations of employers or workers where the allegations relate to matters directly affecting their affiliated organizations. If the complaints are found to be substantiated, the ILO Governing Body can communicate with the concerned Government, publicize the matter or take other alternative actions.

Key points: Chapter 4

- All core ILO labour rights – enshrined in the ILO Declaration on Fundamental Principles and Rights at Work – apply equally to all migrant workers, regardless of their migration status.

- The ILO has developed labour standards specifically relating to the rights of migrant workers. Other ILO conventions relevant to migrant workers address the rights of domestic workers, the operation of private employment agencies, illegal recruitment practices and human trafficking.

- The ILO has established a regular system of supervision to monitor implementation of these standards. Complaints can also be brought to the ILO for an alleged failure to uphold labour standards.

Further reading

International Labour Migration: A Rights-Based Approach; ILO; 2010

International Labour Standards on Migrant Workers' Rights: Guide for Policymakers and Practitioners in Asia and the Pacific, ILO; 2007
Migration and International Human Rights Law; Practitioner‟s Guide No. 6; International Commission of Jurists; 2011
Monitoring International Labor Standards; National Research Council; 2004
Protecting the Rights of Migrant Workers: A Shared Responsibility; ILO; 2009

Chapter 5: Regional mechanisms for the promotion and protection of the rights of migrant workers

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Key questions

- What regional human rights mechanisms have been established?
- How do regional human rights mechanisms promote and protect the rights of migrant workers?

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1. Introduction

In the 1970s, the UN endorsed the creation of regional human rights mechanisms to encourage cooperation among States in different geographical areas in order to more effectively promote and protect human rights. Regional mechanisms are seen as an important complement to existing international and national human rights systems.

Regional human rights mechanisms and instruments are particularly significant for migrant workers. Globalization has created certain conditions that limit the capacities of States to respond to economic and social issues. The issues facing migrant workers are transnational and cross-cutting in nature and, as such, migrant workers can be vulnerable to a range of abuses and discrimination in sending, transit, and receiving countries. Regional groupings can consist of countries that belong to one, two or all three of these categories.

Economic, political and geographic conditions account for a country's position in the migration process. Some countries may have a complex relationship with migrant workers due to their levels of economic development and their proximity to border countries where there are high outflows of migration. Therefore, regional cooperation and policy coordination among States can be vital for developing sustainable, long-term solutions that address the human rights issues experienced by migrant workers.

This chapter examines the different regional human rights mechanisms that have been established and their relevance to rights of migrant workers.

2. Regional human rights mechanisms

Regional human rights mechanisms and their corresponding instruments have gained importance as critical platforms in seeking redress for violations against migrant workers, developing common standards to protect migrant workers and securing cooperation and commitments from States to better promote and protect the rights of migrant workers.

The benefits of establishing a regional human rights mechanism include the potential to:

- narrow the gap between international and national human rights standards
- establish cooperation among countries with diverse human rights policies and practices
- impose mandatory obligations on member States
- provide a mechanism for monitoring compliance of States' human rights obligations.

Protection and promotion of migrant workers' rights at the regional level can either involve "soft law", which includes voluntary commitments and declarations, or legally binding instruments.

There are currently five regional human rights mechanisms with varying mandates.

Region	Main Human Rights Mechanism	Year Established	Main Charter
Africa	African Commission on Peoples and Human Rights	1987	African Charter on Human and Peoples' Rights (1981)
	African Court on Human and Peoples‟ Rights	1998	
Americas	Inter American Commission on Human Rights	1959	American Declaration of the Rights and Duties of Man (1948) Charter of the Organization of American States (1951) American Convention on Human Rights (1969)
	Inter American Court of Human Rights	1979	American Convention on Human Rights (1969)
Arab States	Arab Human Rights Committee	2009	Arab Charter on Human Rights (2004)
Europe	European Court of Human Rights	1959	European Convention for the Protection and Promotion of Human Rights and Fundamental Freedoms (1950)
	European Committee of Social Rights	2001	European Social Charter (1961)
			Charter of Fundamental Rights of the European Union (2000)
South East Asia	ASEAN Intergovernmental Commission on Human Rights	2009	ASEAN Charter (2007)

2.1 The European human rights system

The European human rights system is the oldest and the most comprehensive regional human rights system.[24]

Europe's principal human rights mechanisms operate through the Council of Europe (COE) to implement the European Convention for the Protection and Promotion of Human Rights and Fundamental Freedoms (the European Convention), 1950 and the European Social Charter, 1961.

The COE is comprised of a number of independent agencies which work together to promote and protect "human rights, democracy and the rule of law[25] across the region, including:

- the European Court of Human Rights
- the Commissioner for Human Rights
- the Parliamentary Assembly of the Council of Europe
- the Conference of International Non-Governmental Organizations.

2.1.1 The European Convention and the European Court of Human Rights

The European Convention has been ratified by all of the 47 member countries of the COE.[26] Every State party to the Convention has a legally enforceable duty to "secure the fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction".[27]

In guaranteeing these rights and freedoms, article 14 of the Convention includes a prohibition on discrimination based on "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" in relation to the substantial rights guaranteed by the Convention. The Convention is judicially administered by the European Court of Human Rights, which has the power to receive and rule on individual and State complaints of human rights violations. Migrant workers have successfully used certain provisions in the

[24] "A tongue but no teeth?": The emergence of a regional human rights mechanism in the Asia Pacific region"; Andrea Durbach, Catherine Renshaw and Andrew Byrnes; *Sydney Law Review*; Vol. 31; pp. 211-238.
[25] "The Council of Europe in Brief: Our Objectives"; Council of Europe; see: http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en.
[26] Albania, Czech Republic, Ireland, Netherlands, Spain, Andorra, Denmark, Italy, Norway, Sweden, Armenia, Estonia, Latvia, Poland, Austria, Finland, Liechtenstein, Portugal, ''The former Yugoslav Republic of Macedonia', Azerbaijan, France, Lithuania, Romania, Turkey, Belgium, Georgia, Luxembourg, Russian Federation, Ukraine, Bosnia and Herzegovina, Germany, Malta, San Marino, United Kingdom, Bulgaria, Greece, Moldova, Serbia, Croatia, Hungary, Monaco, Slovak Republic, Cyprus, Iceland, Montenegro and Slovenia. Ratification is a precondition of membership to the COE.
[27] "The Court in Brief"; European Court of Human Rights; see: http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/.

Convention, in particular the right to private and family life and the right to enjoyment of possessions.[28]

2.1.2 The European Social Charter

The European Social Charter (1961) supplements the European Convention on Human Rights on issues in relation to economic and social rights. It provides specific protection to migrant workers and their families who are nationals of States parties.
The Charter (revised in 1996) guarantees certain rights to all migrant workers who are nationals of a State party and their families when in territories of another party, in addition to other rights which specifically apply to migrant workers "lawfully within" the territory of States parties.[29]
It also establishes the European Committee of Social Rights to monitor State compliance through periodic reporting and by receiving collective complaints. Collective complaints may only be received against State parties which have accepted this procedure.[30]

2.1.3 The Commissioner for Human Rights

The Commissioner for Human Rights was established in 1999.[31] It has a promotional and monitoring role to "foster the effective observance of human rights and assist member states in the implementation of Council of Europe human rights standards".[32] Among its principal objectives, the Commissioner aims to collaborate with and provide support to national human rights institutions in the COE, and provides technical assistance for the establishment of new institutions. It may also intervene in proceedings of the European Court of Human Rights.

2.1.4 The Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe (the Assembly), along with the Committee of Ministers, form the statutory arms of the COE. The Assembly has adopted many recommendations and resolutions regarding migrants, including in 2011, Recommendation 1985 on undocumented migrant children in an irregular situation; Resolution 1821 on the interception and rescue at sea of asylum seekers, refugees and irregular migrants; and Resolution 1811 on protecting migrant women in the labour market.[33]

2.1.5 The Conference of International Non-Governmental Organizations

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[28] "The ICRMW and the European Union"; Euan MacDonald and Ryszard Cholewinski; *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed); United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p. 379.
[29] For example, see articles 18 and 19.
[30] To date, 15 States have accepted this procedure; see "Member States of the Council of Europe and the European Social Charter"; Council of Europe; http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp.
[31] Resolution 99 (50) on the Council of Europe Commission for Human Rights; adopted by the Committee of Ministers on 7 May 1999.
[32] "Commissioner for Human Rights: Mandate"; Council of Europe; see: http://www.coe.int/t/commissioner/Activities/mandate_en.asp.
[33] To search adopted texts of the Assembly, see "Adopted Texts"; Parliamentary Assembly of the Council of Europe (PACE); http://assembly.coe.int/ASP/Doc/XrefATListing_E.asp.

The Conference of International Non-Governmental Organizations (INGOs) enables the participation of civil society in the decision-making structures of the COE. INGOs applying for participatory status "must be particularly representative in the field(s) of their competence and at European level, share the Council of Europe‟s aims, and contribute actively to its work."[34]

2.1.6 The Tampere Conclusions 1999

The European Council, which is composed of Heads of States and responsible for setting the policy directions of the European Union (EU), has produced a policy declaration on the creation of a common EU asylum and migration policy. This policy is embodied in the conclusions of the EU Council Summit of 1999, known as the "Tampere Conclusions", and is part of the broader goal of creating an area of "freedom, security and justice".[35] It sets out a common approach to migration and asylum in the EU addressing four areas of collaboration: a common European asylum system; country partnerships; fair treatment of third country nationals (nationals from outside the EU); and migration management.

Paragraphs 18 and 21 of the Tampere Conclusions set out the policy of fair treatment of "third country nationals" who legally reside or have legal long-term residency in EU Member States. "Third country nationals" refers to nationals of countries who are not EU Member States, which includes certain categories of migrant workers. Fair treatment means giving third county nationals rights "as near as possible" to those enjoyed by EU citizens. The principle of "non-discrimination" should guide the treatment of non-EU citizens in relation to their enjoyment of a broad range of economic, social, and cultural rights.

2.2. The Inter-American human rights system

The Inter-American human rights system was established by the Organization of American States (OAS) to protect and defend human rights in the Americas. There are 35 Member States of the OAS.[36]

The main human rights instruments of the Inter-American human rights system are the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969). Today, the Declaration is generally considered to have gained the status of regional customary law, while the Convention imposes specific and legally binding obligations on Member States.[37]

Article 106 of the Charter of the Organization of American States, the constitutive instrument of the OAS, provided for the creation of the Inter-American Commission on Human Rights, "whose principal function shall be to promote the observance and

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[34] *The Conference of International Nongovernmental Organisations of the Council of Europe: History, Structures, Projects*; Conference of INGOs of the Council of Europe; p. 1.

[35] "Presidency Conclusions, Tampere European Council, 15 and16 October 2009: Introduction"; European Parliament; see: http://www.europarl.europa.eu/summits/tam_en.htm.

[36] At the time of writing, 24 of the 35 Organization of American States (OAS) Member States have ratified the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

[37] "The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection?"; Lea Shaver; *Washington University Global Studies Law Review*; Vol. 9 (2010); p. 643.

protection of human rights and to serve as a consultative organ of the Organization in these matters."

The Inter-American Court of Human Rights was established by the OAS in 1979, following the Convention's entry into force. The Court has adjudicatory and advisory functions. Only the Commission and States parties to the Convention can bring petitions or complaints before the Court.[38] Individual complaints are not allowed to be filed in the Court.

In a landmark Advisory Opinion requested by Mexico, the Court upheld the fundamental right of undocumented migrant workers to be protected from discrimination.[39] The Court reaffirmed that the principle of equality and non-discrimination has attained the status of *jus cogens*[40] norms and that States are bound to respect the principles regardless of their non-ratification of treaties.

2.2.1 Rapporteurship on Migrant Workers and Members of their Families

In 1996, the OAS established the Rapporteurship on Migrant Workers and Members of their Families. The Special Rapporteur has the mandate to promote awareness of the vulnerabilities of migrant workers and their families, to make recommendations to Member States, to prepare reports and studies on migrant workers and migration and to act promptly on petitions or communications of human rights violations occurring in Member States.

The Rapporteurship has identified the rights of migrant workers protected under the Inter-American human rights system, based on the case law of the Commission and the Court.[41] These rights, organized thematically, include:

- right to life, liberty, personal security, to equality and to a fair trial
- right to life, personal integrity, circulation, residence, and to special protection of children in the family
- right to life, to a fair trial, and to information about consular protection
- right to a fair trial and to judicial protection
- right to a fair trial and asylum
- right to a fair trial and to the protection of the family
- right to personal integrity, to a fair trial, to privacy, to property, to judicial protection, freedom of conscience and religion and of association
- right to personal liberty and to information on consular protection
- right to personal liberty, to a fair trial, and to information on consular protection
- right to personal liberty, to a fair trial, to movement and residence and to judicial protection

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[38] American Convention on Human Rights; 1969; article 61(1).

[39] Advisory Opinion OC-18/03 requested by the United Mexican States: Juridical Condition and Rights of the Undocumented Migrants; 17 September 2003.

[40] *Jus cogens* norms are defined as a set of "peremptory norms accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; Vienna Convention on the Law of Treaties, 1969; article 53. As such, *jus cogens* norms override any inconsistent provision in another treaty or customary law.

[41] "Rapporteurship on the Rights of Migrants"; Inter-American Commission on Human Rights; see http://www.cidh.org/Migrantes/migrants.caselaw.htm.

- right to liberty and protection from arbitrary arrest
- right to equality and to non-discrimination
- right to residence and movement and to due process of law
- right to nationality and to education.

2.2.2 Regional Inter-American arrangements to protect the rights of migrant workers

Two regional trade organisations in the Americas – the Common Market of the South (Mercusor) and the Andean Community (CAN) – have developed regional social and labour policies that apply to migrant workers. Mercusor is the largest trading bloc in South America[42] while CAN comprises four countries in Latin America.[43]

Mercosur has approved the following regional instruments that seek to protect the rights of migrant workers: the Mercosur Social-Labour Declaration; the Agreement on Residence for State Party Nationals of Mercosur; the Agreement on Visa Exemptions; and the Agreement on Social Security.

The Andean Labour Migration Instrument 2003 provides a comprehensive provision on the movement and rights of Andean migrant workers and members of their families. It provides for four categories of migrant workers – individually moving worker, company worker, seasonal worker and border worker (article 4) – and recognizes the principle of equal treatment and opportunities among migrant workers, regardless of the category to which they belong (article 10).

2.3 The African human rights system

The African regional human rights system is administered by the African Union (AU), which replaced the former Organisation of African Unity (OAU) in 2001. The AU has 54 member states.[44]

Similar to the Inter-American System, the African system consists of both the African Commission on Human and People's Rights and the African Court on Human and People's Rights, established by two principal human rights instruments.

2.3.1 The African Charter on Human and Peoples' Rights

In 1981, the OAU adopted the African Charter on Human and Peoples‟ Rights (the "Banjul Charter"), which entered into force in 1986. The Banjul Charter provides for the establishment of the African Commission on Human and People‟s Rights (article 30) and is the foundation human rights instrument in the African system.

The Commission is mandated to promote and protect both human rights and "peoples‟" (collective) rights, as defined in the Charter, and to interpret the provisions of the African

[42] Full members are Argentina, Brazil, Paraguay, Uruguay and Venezuela (still pending deliberations) while Associate Members are Chile, Bolivia, Colombia, Ecuador, and Peru. For more information see: http://www.mercosurtc.com/index.html.

[43] The Andean Community includes Bolivia, Colombia, Ecuador and Peru.

[44] At the time of writing, 53 of the 54 Member States of the African Union had ratified the Charter; see: "Ratification Table: African Charter on Human and Peoples‟ Rights"; African Union; http://www.achpr.org/instruments/achpr/ratification/.

Charter at the request of States parties, organs of the AU and individuals.[45] Under its protection mandate, the Commission can receive complaints from individuals, organizations and States against State parties to the Charter regarding violations of its provisions (articles 48, 49 and 55). The Charter further requires States parties to report to the Commission every two years on their implementation of the Convention.

Article 66 permits other standards and agreements to be adopted to supplement the rights protected in the Charter. In particular, the Protocol on the Rights of Women in Africa, 2003 (the "Maputo Protocol") and the African Charter on the Rights and Welfare of the Child, 1990 provide for the specific protection needs of women and children not adequately recognized in the main Charter.[46]

The Commission has also established additional mechanisms, including special rapporteurs and working groups, to address particular human rights concerns.
In 2004, the mandate of the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons was established, which includes research, promotional and advisory functions as well as the undertaking of fact-finding missions and investigations. In 2006, the Commission extended the Special Rapporteur‟s mandate to cover migration issues.[47]

In 1998, the Commission adopted a resolution on the Granting of Affiliate Status to NHRIs. To attain affiliate status, NHRIs of State parties to the Charter must conform to the Paris Principles. NHRIs with affiliate status can participate in public sessions of the Commission. They are also "required to assist the Commission in the promotion of the human rights at the country level" and must report regularly to the Commission on their activities.[48]

2.3.2 The Protocol to the Charter establishing an African Court on Human and Peoples' Rights

The Protocol to the Charter establishing an African Court on Human and People's Rights was adopted in 1998.[49]

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[45] *Celebrating the African Charter at 30: A Guide to the African Human Rights System*; African Commission on Human and Peoples‟ Rights, Centre for Human Rights, Faculty of Law, Pretoria University; South Africa; 2011; p. 17.

[46] *Celebrating the African Charter at 30: A Guide to the African Human Rights System*; African Commission on Human and Peoples‟ Rights, Centre for Human Rights, Faculty of Law, Pretoria University; South Africa; 2011; pp. 12-15. At the time of writing, 41 Member States had ratified the Charter on the Rights and Welfare of the Child and 28 had ratified the Maputo Protocol.

[47] "Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons"; African Commission on Human and Peoples‟ Rights; http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/.

[48] *Celebrating the African Charter at 30: A Guide to the African Human Rights System*; African Commission on Human and Peoples‟ Rights, Centre for Human Rights, Faculty of Law, Pretoria University; South Africa; 2011; pp. 41-42. This document also contains a list of NHRIs with affiliate status.

[49] At the time of writing, 26 Member States of the AU had ratified the Protocol: Algeria, Burkina Faso, Burundi, Cote d‟Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda; see "About the Court: A Brief History"; http://www.african-court.org/en/index.php/about-the-court/brief-history.

The African Court on Human and Peoples' Rights has jurisdiction to hear cases regarding the "interpretation and application" of the African Charter, the Protocol and "any other relevant human rights instrument ratified by the States concerned".[50]

2.4 The Arab human rights system

The Arab Charter on Human Rights, 2004 is the main regional human rights instrument adopted by the League of Arab States (LAS). At October 2009, 10 of the 22 LAS Member States had ratified the Charter.[51]

The first Arab Charter on Human Rights was adopted in 1994. However, on the recommendation of the Arab Commission on Human Rights, the Charter was substantially revised and, following ratification by seven Member States, the 2004 version came into force in 2008.

The Charter provided for the establishment of the Arab Human Rights Committee to oversee the implementation of the Charter, which was first formed in 2009. It also provided for the protection of certain collective rights, including the right to self-determination (article 2(1)), and for individual rights.

In addition, the Charter also established the Committee's supervisory functions through a system of periodic reporting by States parties.

The application of several important Charter rights, however, are restricted to individuals with citizenship, including the right to work (article 34), the right to free basic health-care services and access to medical facilities without discrimination (article 39(1)) and the right to free education at the primary and basic levels (article 41(2)).[52]

Significantly, the Charter also recognizes the overriding application of international standards ratified by States parties:

> Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set force in the international and regional human rights instruments which the states parties have adopted or ratified.[53]

3 Emerging regional frameworks for migrant workers in Asia

There is currently no Asia-wide regional human rights mechanism. However, at the sub-regional level, there are evolving processes that seek to promote and protect human rights and, specifically, the rights of migrant workers. Migrant workers are high on the policy agenda of many Governments in Asia because of the significant contribution that they make to the economic and social development of countries in the region.

3.1 The Association of Southeast Asian Nations

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[50] See: "About the Court: A Brief History"; http://www.african-court.org/en/index.php/about-the-court/brief-history.

[51] *The Arab Charter on Human Rights and the League of Arab States: An Update*; Mervat Rishmawi; *Human Rights Law Review*; Vol 10:1 (2010); p. 172.

[52] Ibid; p. 171.

[53] Article 43; see the English translation of the Arab Charter on Human Rights, 2004 provided by the University of Minnesota Human Rights Library; http://www1.umn.edu/humanrts/instree/loas2005.html.

The Association of Southeast Asian Nations (ASEAN) has taken up the issue of migrant workers' rights in recent years. The ten-member ASEAN156 has developed a roadmap for an ASEAN community by 2015 which seeks to create a single market characterized by the free movement of capital, goods, services and skilled labour.[54]

The ASEAN Charter (2007), which invested the ASEAN Community with its legal and institutional framework, declares that the promotion and protection of human rights and fundamental freedoms is one of its purposes (article 1 (7)). The Charter also provides for the creation of an ASEAN human rights body (article 14), the first regional human rights mechanism in Asia region.

The ASEAN Intergovernmental Commission on Human Rights is a consultative body established in 2009. Under its Terms of Reference, the main purposes of the Commission include the promotion and protection of human rights and fundamental freedoms (article 1.1) and upholding international human rights standards as set out in the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action and international human rights instruments to which ASEAN Member States are parties (article 1.6).

In undertaking its work, the Commission has a mandate to:

- enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information (article 4.3)
- promote capacity building for the effective implementation of international human rights treaty obligations undertaken by Member States (article 4.4)
- encourage ratification of international human rights instruments (article 4.5)
- obtain information from Member States on the promotion and protection of human rights (article 4.10)
- prepare studies on thematic issues of human rights in ASEAN (article 4.12)

The Commission has declared migrant workers as one of its priority thematic areas.

Each Member State nominates a representative to serve on the Commission. There are also opportunities for NHRIs and civil society organizations to engage with the Commission on the rights of migrant workers. For example, under its Terms of Reference, the Commission can engage in "dialogue and consultation" with civil society organisations and with "other national, regional and international institutions and entities concerned with the promotion and protection of human rights" (articles 4.8 and 4.9). ASEAN also established the ASEAN Commission on the Protection and Promotion of Rights of Women and Children in 2010, which considers issues relevant to migrant women and children.

3.2 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

In 2007, the same year that the ASEAN Charter was signed, Member States approved the promulgation of an ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.

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[54] See: *Roadmap for an ASEAN Community 2009-2015*; Association of Southeast Asian Nations (ASEAN) Secretariat; 2009.

The Declaration calls on countries of origin and destination to promote the full potential and dignity of migrant workers; to cooperate to resolve cases of migrant workers who become undocumented due tono fault of their own; and to take into account the fundamental rights of migrant workers and their families already residing in the destination country.

The Declaration also requires ASEAN countries to promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers. It sets out further specific obligations on countries of origin and destination, as well as obligations pertaining to ASEAN.

Though non-binding, the Declaration is considered an important development in protecting the rights of migrant workers in the region and was established after years of lobbying by civil society organizations, including migrant organizations, trade unions and human rights networks.

The Declaration also provides for the development of an ASEAN framework instrument on the protection and promotion of migrant workers.

Member States previously promulgated the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children in 2004.

3.3 South Asian Association for Regional Cooperation

Established in 1985, the South Asian Association for Regional Cooperation (SAARC) is an organization of eight Member States158 dedicated to economic, technological, social and cultural cooperation and emphasizing collective self reliance.

As the SAARC Charter sets out, the organization aims “to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials”.[55]

There is currently no regional instrument specific to migrant workers in South Asia. However, SAARC approved two instruments in 2002: the SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution; and the SAARC Convention for the Promotion of Welfare of Children.
There is also an initiative to establish a SAARC Task Force on Labour Migration by civil society groups.

Key points: Chapter 5

- Regional human rights mechanisms have been established in Africa, the Americas, the Arab States, Europe and South-East Asia.
- Promotion and protection of the rights of migrant workers at the regional level can involve “soft law” or legally binding instruments.

- Regional human rights courts have been established in Africa, the Americas and Europe, which can receive and rule on individual complaints. A number of

[55] 1985; article 1(b).

judgments have addressed the rights of migrant workers and members of their families.

Further reading

Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers; Professional Training Series No. 9; OHCHR, in cooperation with the International Bar Association; 2003; see Chapter 3: “The Major Regional Human Rights Instruments and the Mechanisms for their Implementation”

Migration and Human Rights: The United Nations Convention on Migrant Worker Rights; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009

Migration without Borders: Essays on the Free Movement of People; Paul de Guchteneire and Antoine Pecoud (ed), United Nations Educational, Scientific and Cultural Organization / Berghahn Books; 2007

“Regional Cooperation on Labour Rights and Migrant Workers‟ Rights: South America Compared”; Sonja Schröder, Maria Cristina Macovei and Phillipe de Lombaerde, article prepared for *Revista Educación Superior y Sociedad*; August 2010