


# **Ritualism versus Universalism: The Challenge of Establishing an Effective Rights-Based Labor Migration Regime in ASEAN**



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[ *Abstract* ]

Southeast Asia accounts for nearly a tenth of total worldwide cross-border movements of migrant workers. Cambodia, Indonesia, Laos, Myanmar, and Philippines make up the sending countries while Malaysia, Singapore, and Thailand are the major destinations. Migrant worker movements are predominantly in production process and low- to medium-skilled sectors. It is not unusual for irregular or undocumented movements to take place. In not a few instances, migrants work under harsh and exploitative conditions. In recent years, however, ASEAN has taken steps to manage labor migration at the regional level. The paper argues that ASEAN has not managed these cross-border labor flows as well as it should particularly in terms of protecting and promoting the human rights of migrants. It will be difficult to establish the genuine building blocks for a regional human rights mechanism unless there is a diffusion of alternative universal norms and standards to what ASEAN already embodies. As long as states resist any attempt to weaken or question or deligitimize their capacity to determine who gets to enter, stay, and leave their jurisdictions, it will be difficult to establish an effective migrant rights framework for the region.

**Keywords:** ASEAN, labor migration, migrant rights

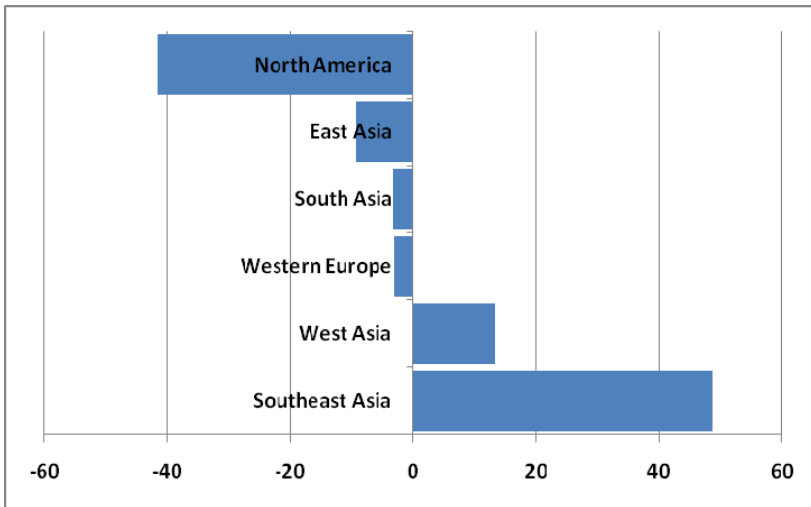
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## I . Introduction

A growing number of people from Southeast Asia are moving elsewhere across the globe for employment. The countries comprising the Association of Southeast Asian Nations (ASEAN) together account for nearly a tenth of the total cross-border movements of workers globally. But while Southeast Asia is a significant migrant source region, it has also become a major destination for labor migrants coming from within the region itself. Intraregional migration accounts for around two-thirds of all international migrants in Southeast Asia. In contrast, European citizens currently represent 40 percent of the total migrant population in the European Union (Castro-Martín and Cortina 2015: 114). Indeed, compared to other regional groupings in the world, Southeast Asia has seen a substantial increase in the share of intraregional migration between 1990 and 2017 as seen in the figure below.

<Figure 1> Change in the share of intraregional migration in selected world regions (1990 - 2017)



Source: Based on United Nations, Department of Economic and Social Affairs (UNDESA) Population Division (2017) Data. Trends in International Migrant Stock: The 2017 revision (United Nations database, POP/DB/MIG/Stock/Rev.2017). Accessed at [https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN\\_MigrantStockByOriginAndDestination\\_2017.xlsx](https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN_MigrantStockByOriginAndDestination_2017.xlsx) on April 20, 2019.

The high levels of intraregional migrant flows in Southeast Asia stem from the economic, social, and demographic dynamism and diversity of the region that creates opportunities and desires for labor to move across borders. Southeast Asia is a region of diversities and disparities—the main drivers of migration. For instance, in 2017, the annual gross domestic product (GDP) per capita at current prices among the region’s economies ranged from a low of from US\$ 1,229 (Myanmar) to a high of US\$ 57,722 (Singapore). Based on the data provided in the table below, it is clear that the economic prosperity and growth in some ASEAN countries have acted as magnets for migrants from nearby countries within the region.

<Figure 2>Selected Indicators among ASEAN Countries

Country	Total population	Annual population growth	GDP per capita at current prices	Proportion of Urban Population Living in Slums	Proportion of Population Living Below Poverty Line	Human Development Index	Unemployment Rate	Economic Growth Rate	Foreign direct investments inflow
	2017 in 000s	2017 in %	2017 US\$	2014 in %	2016 in %	2018	2017	2010-2015	US\$ million
Cambodia	15,717.7	1.7	1,421	55.1	14.0	0.582	ND	7.2	2,732
Indonesia	261,890.9	1.2	3,872	21.8	10.6	0.694	5.3	4.9	23,064
Lao PDR	6,752.8	2.0	2,531	31.4	23.2	0.601	ND	7.8	1,695
Malaysia	32,049.7	1.3	9,899	NA	0.4	0.802	3.4	5.3	9,447
Myanmar	53,388.0	0.9	1,229	41.0	32.1	0.578	2.1	7.4	4,002
Philippines	104,921.4	1.6	2,992	38.3	21.6	0.699	6.6	5.9	10,057
Singapore	5,612.3	0.1	57,722	NA	NA	0.932	3.0	4.0	62,017
Thailand	67,653.2	0.3	6,736	25.0	8.6	0.755	1.2	2.9	8,046
Viet Nam	93,671.6	1.1	2,390	27.2	7.0	0.694	2.0	5.9	14,100
<b>ASEAN</b>	<b>642,078.8</b>								

Sources  
 Basic ASEAN Statistics: <https://cdn.aseanstats.org/public/data/statistics/table1.xls>  
 HDI 2018: <http://hdr.undp.org/en/countries>  
 Poverty and Slums Data: <https://data.adb.org/dataset/basic-statistics-asia-and-pacific>  
 Unemployment Rate: <https://www.aseanstats.org/wp-content/uploads/2019/01/asyb-2018.pdf>

Insofar as the movement of labor is concerned, the latest figures show that the top five countries of origin for migrants in the ASEAN countries are: Myanmar (2.2 million), Indonesia (1.2 million), Malaysia (1.0 million), Laos (0.9 million), and Cambodia (0.8 million). Vietnam, Thailand, and the Philippines have considerably less intraregional migrants (ranging from a few thousand to several tens of thousands) although they do have much higher numbers of migrants elsewhere in Northeast Asia, West Asia, Australia, and North America (<http://www.asean.org/resources/category/asean-statistics>). Insofar as receiving countries are concerned, at least two countries in Southeast Asia (Malaysia and

Singapore) have the highest share of foreign migrants per capita in the region (Battistella 2002: 352).

Given the above extensive intraregional flows, Southeast Asia has come to embody its own regional migration system (Battistella 2002: 351). The three destination countries—Malaysia, Singapore, and Thailand—together host no less than 6.5 million labor migrants from other ASEAN member countries. Movements within and from the Southeast Asian region are predominantly for purposes of employment in production process and low- to medium-skilled categories and sectors (e.g., household servants, agricultural workers, construction, and factory work, etc.). In not a few instances, migrants work under harsh and exploitative conditions leading to concerns over the human rights of migrant workers in the region.

The persistence of these human rights concerns led the leaders of ASEAN to sign in 2007 the Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Declaration is seen as a culmination of earlier efforts to address migration- and migrant rights-related issues and concerns obtaining among the ASEAN member countries that are sending and receiving migrant workers. Ten years later, on November 14, 2017, the heads of state of ASEAN signed another document—The ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers—at the end of its thirty-first summit. The chair of ASEAN during that year, Philippines president Rodrigo Duterte, described the agreement as “a landmark document that reflects our promise to strengthen social protection, access to justice, humane and fair treatment, and access to health services of our region’s migrant workers” (ASEAN Secretariat 2017).

There have been numerous efforts undertaken in the Asia-Pacific region to protect and promote the rights and welfare of migrants coming from Southeast Asia and elsewhere. These efforts can be divided into two phases. During the first phase (up to 2004), individual ASEAN member countries took part in deliberations initiated by non-members that attempt to work out solutions to the problems faced by migrants, typically from a security and anti-crime standpoint. The second phase began in November 2004, at its tenth summit in Vientiane, when ASEAN itself issued its declaration

establishing a comprehensive blueprint for regional integration by 2020. One area identified in the Action Programme was on promoting human rights and within this area ASEAN had set the goal for the “Elaboration of an ASEAN instrument for the protection and promotion of the rights of migrant workers”—a brief mention but one that could be considered a new beginning for the Association eventually culminating in the two milestones of 2007 and 2017.

This paper examines the extent to which the 2007 Declaration and the 2017 Consensus can be seen as watershed moments for ASEAN in terms of crafting a migration regime for the region that emanates from a human rights perspective. Why did the leaders of ASEAN decide to sign the 2007 Declaration and the 2017 Consensus? What type of migration regime has persisted in the region? Given the characteristic features and realities of intraregional labor migration in Southeast Asia, can these regional agreements address the persistent and pervasive problems labor migrants face in the region? For a regional human rights framework on labor mobility to function, it would require (a) a common set of overarching goals, principles, and norms concerning labor migrants; (b) a specification of the fundamental rights attached to labor migrants; and (c) an effective mechanism for specifying, recognizing, and enforcing the legal obligations of state parties to respect those rights. Is ASEAN headed in the direction of a regional human rights-based migration regime as described above?

This paper argues that building an effective regional human rights-based mechanism on labor migration in ASEAN would be difficult given the state-centric and Westphalian nature of the Association and its constituent members. As long as states resist any attempt to weaken or question or deligitimize their capacity to determine who gets to enter, stay, and leave their jurisdictions and fully conform to universal human rights norms and standards, it will be difficult to establish an effective migrant rights framework for the region. Ultimately, ASEAN leaders are keen to adopt a more ritualistic approach to building an alternative migration regime for the region. This paper is divided into three brief sections. The first section describes the overall intraregional labor migration situation

in Southeast Asia. The second section analyzes the initiatives of ASEAN to promote the rights of migrant workers specific to the 2007 declaration and the 2017 consensus documents. The last section concludes.

The profound socio-economic impacts and implications that labor mobility has had on Southeast Asian development are palpable and undeniable. There is certainly a need to go beyond these impacts and reexamine the prospects for a comprehensive and effective human rights framework in Southeast Asia in the context of the growing extent and complexity of cross-border migrations in the region. Southeast Asia offers a setting for analyzing (a) human mobility and (b) the way this mobility is being managed (or not) at the regional level. There are countries in Southeast Asia that both send and receive people to a significant degree. National boundaries in the region have a tendency to be porous. Historically, social relations across Southeast Asia have been taking place since pre-colonial times even before the advent of such national boundaries.

Norms matter. They constitute integral descriptions of “collective expectations for the proper behavior of actors” that possess both “constitutive and regulative effects” in the sense that they “either define (or constitute) identities or prescribe (or regulate) behavior, or they do both” (Katzenstein 1995: 3). Norms are important for the power that they have (at least, potentially) to influence and shape the behavior of states especially when such norms that are diffused are considered universal and morally good, “and any divergence from such norms is deemed illegitimate and immoral in the eyes of the international community” (Auethavornpipat 2017: 3).

Regional norms matter a great deal. They are norms collectively shared by its peoples and theoretically have the power to create conditions of conformity and convergence across the region (Auethavornpipat 2017). In the case of ASEAN, regional norms take the form of the shared positions of its state leaders and includes their recognition of what constitutes appropriate or normal (versus inappropriate) behavior. Through a process of contestation and debate, national/domestic norms give way to more universal norms that are consistent with international standards, paving the

way for convergence in terms of what member-states can or cannot do in the context of the Association and in relation to a particularly regional issue like labor migration.

However, what might be construed as efforts to foster convergence through contestation actually become attempts at conversion where, in some instances, external actors (like social movements) can exert pressure on state authorities to respect and abide by so-called universal norms and standards. Norms that are forced in this manner might induce certain states to respond with objection and resistance or acquiescence without genuine compliance.

Moreover, it must be pointed out that national/local norms are also important to consider especially in determining which international and regional norms get diffused (see Acharya 2004). Norm contestation can thus be affected by local beliefs and positions and may override any effort towards norm sharing at the regional level. In other words: it matters whose norms matter for ASEAN and begs the question of why certain regional norms are more acceptable than others. Some regional norms seem to be seen as established and accepted principles (such as non-interference in one's internal affairs) while others are approached with apprehension and even derision (as in the case of regularizing or accepting low-skilled migrants).

In other words, as a regional association composed of socio-economically and politically diverse members, ASEAN can be seen as a highly dynamic grouping that provides a rich context for its own intraregional labor migration flows.

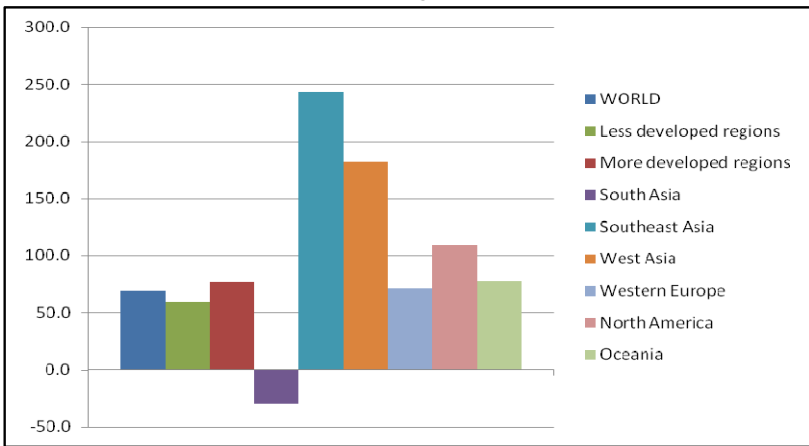
## **II. The Intraregional Labor Migration System in Southeast Asia**

As mentioned earlier, Southeast Asia makes up a regional migration system. More specifically, Southeast Asia constitutes “three subsystems of migration... the Malay Peninsula (including Singapore); the Brunei-Indonesia-Malaysia-Philippines East Asian Growth Area (BIMP-EAGA) [in which the role of Malaysia becomes crucial]; and the Northern ASEAN countries [with Thailand as the focal point]”

(Battistella 2002). In essence, this regional migration system revolves around three ASEAN countries - Singapore, Malaysia, and Thailand.

Between 1990 and 2017, the stock of international migrants globally increased by 70 percent and the stocks of migrants from South Asia actually declined over the same period. However, Southeast Asian migrant stocks increased almost 250 percent over the same period. As seen in the figure below, Southeast Asia experienced the highest percentage increase in its stock of international migrants between 1990 and 2017.

<Figure 3>Percentage Increase in International Migrant Stocks. World and Selected Regions (1990 and 2017)

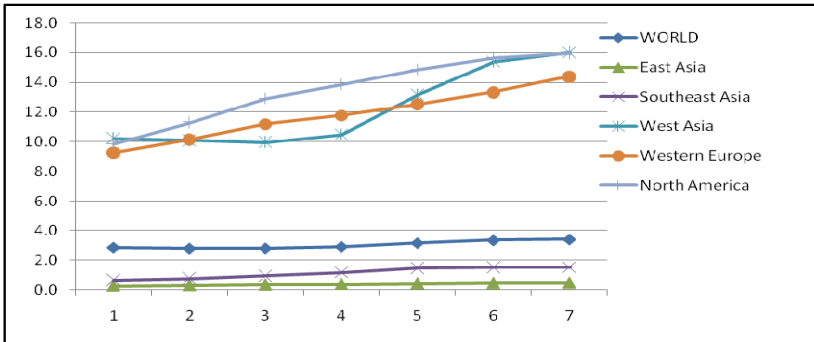


Source: United Nations, Department of Economic and Social Affairs. Population Division (2017). Trends in International Migrant Stock: The 2017 revision (United Nations database, POP/DB/MIG/Stock/Rev.2017). Accessed at [https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN\\_MigrantStockTotal\\_2017.xlsx](https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN_MigrantStockTotal_2017.xlsx) on April 20, 2019.

However, it should also be noted that Southeast Asia (along with East Asia) has a lower number of international migrants as a proportion of the total population compared to Western Europe, West Asia, and North America as seen in the figure below. Southeast Asia has yet to become a major global destination for international migrants like that of the countries comprising West Asia, Western Europe, and North America.



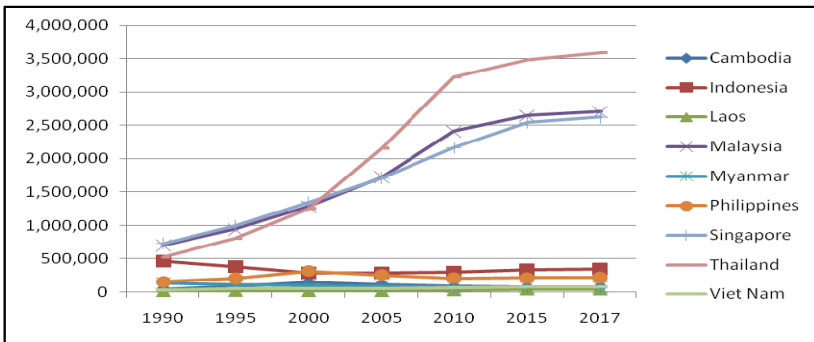
<Figure 4>International Migrant Stock as a Percentage of Total Population in Selected World Regions (1990-2017)



Source: United Nations, Department of Economic and Social Affairs. Population Division (2017). Trends in International Migrant Stock: The 2017 revision (United Nations database, POP/DB/MIG/Stock/Rev.2017). Accessed at [https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN\\_MigrantStockTotal\\_2017.xlsx](https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN_MigrantStockTotal_2017.xlsx) on April 20, 2019.

Nevertheless, between 1990 and 2017, three countries in Southeast Asia have seen a dramatic increase in their migrant stocks – Malaysia, Singapore, and Thailand – as shown in the figure below. This would indicate that the three countries are major receivers of migrants in Southeast Asia.

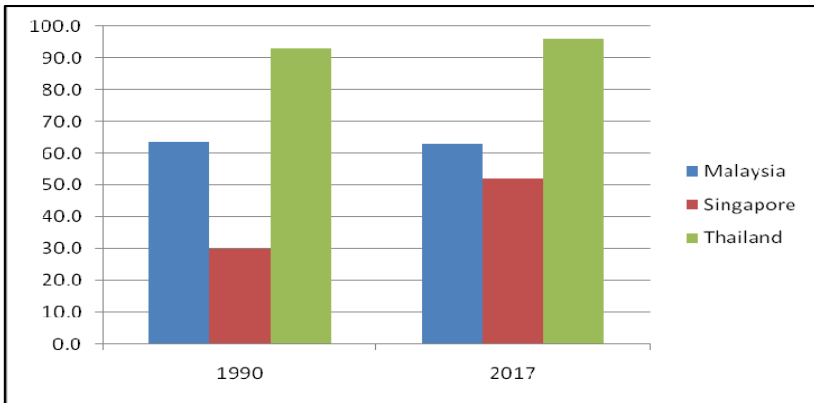
<Figure 5> International Migrant Stocks of Selected Countries in Southeast Asian (1990 to 2017)



Source: United Nations, Department of Economic and Social Affairs. Population Division (2017). Trends in International Migrant Stock: The 2017 revision (United Nations database, POP/DB/MIG/Stock/Rev.2017). Accessed at [https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN\\_MigrantStockTotal\\_2017.xlsx](https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN_MigrantStockTotal_2017.xlsx) on April 20, 2019.

What is the extent of these flows in the major receivers over the last two decades? The figure below shows that the intraregional migration taking place in the three major receiving countries has not increased fairly much over the last two decades. Rather, they have always been high except in the case of Singapore which had only 30 percent intraregional migrants in 1990 but this percentage had increased to around 50 percent by 2017.

<Figure 6>Percentage of Intraregional Migration in Malaysia, Singapore, and Thailand (1990 and 2017)



Source: United Nations, Department of Economic and Social Affairs. Population Division (2017). Trends in International Migrant Stock: The 2017 revision (United Nations database, POP/DB/MIG/Stock/Rev.2017). Accessed at [https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN\\_MigrantStockTotal\\_2017.xlsx](https://www.un.org/en/development/desa/population/migration/data/estimates2/data/UN_MigrantStockTotal_2017.xlsx) on April 20, 2019.

Where do these stocks of migrants come from? The three major migrant-receiving countries in Southeast Asia—Malaysia, Singapore, and Thailand—currently receive a substantial portion of their foreign migrants from certain countries in the region. Thailand receives the largest number of migrants from within Southeast Asia (around 3.5 million) of which nearly all are from Cambodia, Laos, and Myanmar. Malaysia has some 2.7 million foreign migrants, two thirds of which are from Southeast Asia with the vast majority coming from Indonesia, Myanmar, Philippines, Singapore, and Vietnam. Singapore has over 2.6 million foreign migrants, the majority of whom come from Indonesia, Malaysia, Philippines, and Thailand. What can be observed about these intraregional movements is that

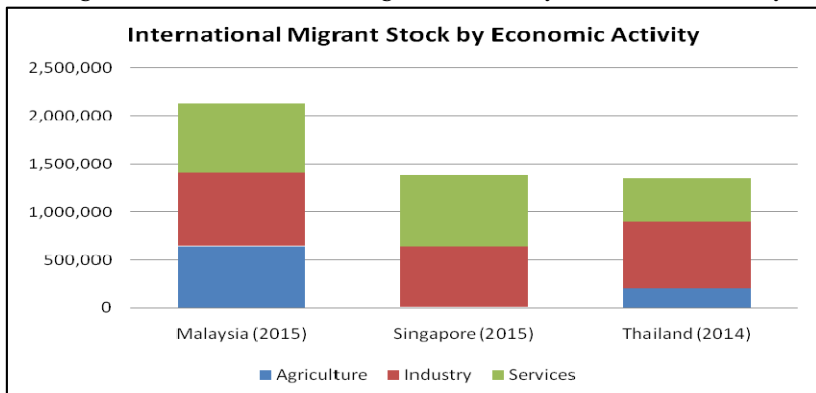
(a) there are countries that are predominantly migrant-sending (Indonesia, Myanmar, Philippines, and Vietnam) and (b) predominantly migrant-receiving areas (Thailand) as well as (c) countries that are both sending and receiving migrants (Singapore and Malaysia).

Interestingly, although it has a substantial number of migrants outside the country, the Philippines sends only a relatively low proportion of its migrants to Southeast Asia compared to the other predominantly sending countries like Myanmar, Laos, and Cambodia. Myanmar has the largest proportion of its migrants that are engaged in intraregional mobility, mostly going to Thailand and Malaysia.

People in Southeast Asia move across borders typically in order to seek better employment opportunities. In the absence of any significant and long-standing conflicts and disasters in the region, it can be assumed that people who move from Southeast Asia are economic migrants or are people with principally economic motivations. Much of the migrant worker movements that take place in the ASEAN region are done by unskilled migrant workers employed primarily in low-paying jobs in construction, agriculture, and domestic service. Due to the historically porous borders in the region, a substantial portion of the movers are undocumented.

Looking at the three major receiving countries in the figure

<Figure 7> International Migrant Stock by Economic Activity

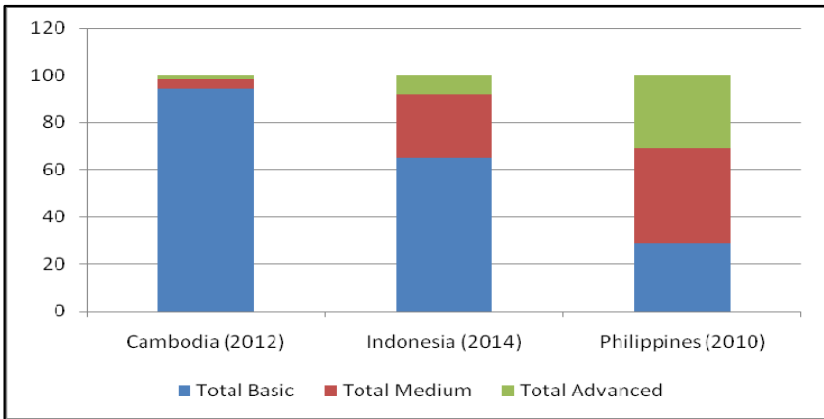


Source: International Labour Migration Statistics Database in ASEAN, International Labour Organization (ILO)

below, a substantial portion of the migrants in Malaysia, Singapore, and Thailand work in services (primarily doing domestic or household work) as well as in industry (typically in factories and other firms) and, in the cases of Malaysia and Thailand, in agriculture (usually in plantations and on fishing vessels).

The low-skilled character of intraregional migration flows in Southeast Asia is borne out by the level of education of migrants as shown in the figure below. Filipino migrants tend to be better educated than migrants from Indonesia and Cambodia who typically work in Malaysia, Singapore, and Thailand. This may explain why Filipinos are more likely to migrate outside the region rather than within it.

<Figure 8>Education Levels of Migrants from Cambodia (2012), Indonesia (2014), and the Philippines (2010)



Source: ILO Statistics

In general, migrant workers pass through two main channels. The first is by way of the legal and regular or documented means, which can be either through private recruitment intermediaries/ labor brokers or by government labor service agencies. Either way, this authorized channel is typically regulated by governments and would therefore cost more than the second channel, which is of an illicit or illegal nature. Migrants who engage the services of illicit brokers expect to pay less than the fees charged by legitimate private recruitment agencies or more in order to circumvent

government regulations. Either way, migrants who avail of the services of illicit labor brokers are at a higher risk of being abused and exploited.

Despite the risks and dangers associated with such illicit channels, Southeast Asia has become a major hub for illicit or irregular flows that can sometimes turn to syndicated human trafficking and smuggling. Such a situation is compounded by given geographical realities (i.e., contiguous borders) and by the fact that economic developments and opportunities in Southeast Asia are not evenly distributed giving rise to strong motivations to move. Likewise, advances in transportation development have now made international travel easier and cheaper for all making it possible for more people to travel greater distances faster and at less cost.

Unauthorized migration does not just occur as a demand-driven phenomenon. Rather, numerous geographic, demographic, and historical factors would account for unauthorized labor migrant flows in the region (Battistella 2002). The geographic contiguity between several countries in the region creates opportunities for people to move with greater ease. Moreover, the movements of peoples in the region have been historically taking place even before the formal political boundaries that presently exist were established. Likewise, the prevalence of extensive social networks among migrants has become an integral component of these unauthorized flows. It is difficult to ascertain the true extent of these unauthorized flows precisely because they are undocumented and considered illegal in some jurisdictions in the region.

Finally, it appears from the above discussion that the intraregional cross-border migration (of workers) affects different countries in Southeast Asia unevenly. More importantly, however, the character of intraregional migration in Southeast Asia largely involves low-skilled labor flows. Not to be forgotten are the economic contributions of migrants not only in their countries of origin but also in the countries of employment/destination. Current estimates indicate that intraregional migrants in Southeast Asia generate no less than US\$ 40 billion annually. This amount does not even include other economic contributions of migrants in their

countries of destination. It is certainly interesting to see how ASEAN is able to appreciate and respond to these persistent realities about intraregional migrant flows.

### **III. ASEAN Initiatives to Protect Migrants**

There have been numerous efforts undertaken in the Asia-Pacific region to protect and promote the rights and welfare of international migrants. Insofar as ASEAN is concerned, these efforts can be roughly divided into two periods. The first period (from 1990 to 2004) was a time when individual ASEAN member countries separately took part in deliberations mostly initiated by countries outside of ASEAN that attempt to work out solutions to the problems faced by migrants typically from a human security and anti-crime standpoint. The second period (from 2004 to the present) would be the time when ASEAN began to take a stronger concerted role as an Association in the area of protecting and promoting the rights of migrants at both within Southeast Asia and the wider Asia-Pacific region and beyond.

#### **3.1. 1990-2004**

One of the earliest initiatives taken by an ASEAN member-state was the one undertaken by the Philippines ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by the United Nations General Assembly on December 18, 1990. The 1990 UN Convention prescribes the fundamental rights of migrants and their families whether they are documented or undocumented. It likewise obligates state parties to observe these rights. Moreover, state parties are expected to promote “sound, equitable and humane conditions in connection with international migration of workers and members of their families” (Article 64). The Philippines became a signatory to the convention in 1993 and ratified it in 1995. It was the first country in Southeast Asia to do so. Cambodia and Indonesia became signatories in 2004. Aside from these three countries, however, no other ASEAN member-state has ratified the 1990 UN Convention

up to now. The 1990 UN Convention came into force in 2003.

Prior to 1993, the Philippines and several other ASEAN member-states had also ratified several international conventions and standards specific to workers as well as migrant workers and their families. Cambodia has ratified 13 international labor conventions; Indonesia 20; Laos 10; Malaysia 18; Myanmar 24; Philippines 38; Singapore 27; Thailand 19; and Vietnam 22.

At the conclusion of an international symposium on migration in Bangkok in April 1999, representatives from the governments of the ten countries of ASEAN along with Australia, Bangladesh, China, Japan, South Korea, New Zealand, Papua NewGuinea, and Sri Lanka, as well as Hong Kong, issued a declaration recognizing the complexity of international migration and acknowledged irregular migration as “a major economic, social, humanitarian, political, and security concern” for the region. The 1999 Bangkok Declaration stated that “irregular migration should be addressed in a comprehensive and balanced manner” and stated further that concerted efforts are required to institute orderly migration as a response to irregular migration. Although this was not a direct initiative of ASEAN, it did pave the way for further discussions and agreements on broad principles to take place in the region.

In 2002, the member-countries of ASEAN, along with 38 other countries as well as several international development agencies, joined the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime in order to raise regional awareness of the problems posed by human smuggling, trafficking in persons, and other related transnational crimes. Although it is seen more as an anti-crime initiative, the Bali Process recognized the need in the region to end the exploitation of migrants by promoting “safe, legal, and affordable migration pathways.”

On November 29, 2004, at its tenth summit in Vientiane, ASEAN issued a declaration establishing its comprehensive blueprint for regional integration by 2020. The Vientiane Action Program specified numerous key areas and goals for ASEAN to attain its Vision 2020. One area identified in the Action Programme was on promoting human rights and within this area, ASEAN had set the

goal for the “Elaboration of an ASEAN instrument for the protection and promotion of the rights of migrant workers.” Although it was only a minor bullet point on the program, this represented a turning point for ASEAN since the migrant rights protection issue had now been placed on the table of the Association’s plans for regional integration.

### **3.2. 2004 Onwards**

The second period is that time when ASEAN embarked on its own initiative for the region to protect and promote the rights of migrant workers. This second period is supported by two pillars. The first was put up in January 2007, when the leaders of ASEAN signed the ASEAN Declaration on the Rights of Migrant Workers in Cebu, Philippines. In it, ASEAN acknowledged the need to strengthen “measures on the protection and promotion of the rights of migrant workers,” as well as “the contributions of migrant workers to the society and economy” of the member-states (ASEAN 2007). The four-page declaration of 2007 mandated states in both receiving and sending areas to promote “the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN Member Countries.” Likewise, in the event that the migrants found themselves in undocumented situations, “through no fault of their own... [t]he receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve” their cases taking into account their “fundamental rights and dignity.” However, the declaration also made clear that the actions to be taken by the receiving states should not be construed as efforts to regularize the undocumented status of migrants.

Nevertheless, the 2007 Declaration embodied a set of concrete and specific measures that can still be seen as groundbreaking. The document outlined the shared commitments and obligations of all the major parties concerned—the sending and receiving states as well as ASEAN itself. Receiving states were obliged to:

- Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers;



- Work towards the achievement of harmony and tolerance between receiving states and migrant workers;
- Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfill the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties;
- Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
- Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and
- Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations.

Likewise, the 2007 Declaration mandated state authorities in sending areas to observe the following obligations:

- Enhance measures related to the promotion and protection of the rights of migrant workers;
- Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;
- Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and
- Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

Finally, the declaration also called for a set of commitments for ASEAN and these include the following:

- Promote decent, humane, productive, dignified and remunerative employment for migrant workers;
- Establish and implement human resource development programs and reintegration programs for migrant workers in their countries of origin;
- Take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities;
- Facilitate data-sharing on matters related to migrant workers, for the purpose of enhancing policies and programs concerning migrant workers in both sending and receiving states;
- Promote capacity building by sharing of information, best practices as well as opportunities and challenges encountered by ASEAN Member Countries in relation to protection and promotion of migrant workers' rights and welfare;
- Extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the Embassies and Consular Offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements;
- Encourage international organizations, ASEAN dialogue partners, and other countries to respect the principles and extend support and assistance to the implementation of the measures contained in this Declaration; and
- Task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.

In the immediate period after the January 2007 Summit Declaration, ASEAN embarked on what it does best – it created a

committee to draft the implementation plan in July 2007. The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers had two goals: (a) ensure the effective implementation of the commitments made under the January 2007 Declaration and (b) facilitate the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers. The Committee subsequently initiated the ASEAN Forum on Migrant Labour to consider and incorporate the views and suggestions of civil society organizations as well as other stakeholders including the private business sector. This multi-stakeholder forum provides an opportunity for non-state actors to engage and dialogue with governments on the issue of labor migration.

The Committee also convened a drafting team that would outline the specific rights to be covered by the instrument. The drafting team was initially composed of representatives of receiving (Malaysia and Singapore) and sending (Indonesia and Philippines) states. The state representatives comprising the drafting team held several meetings in 2009 but not much progress was made due to disagreements on several issues, most notably about whether or not the instrument is to be legally binding and whether or not it should include undocumented migrant workers, among others. In 2010, the membership in the drafting team was opened to all the ASEAN member states and by 2012, the team had managed to produce the “Zero Draft” or pre-draft of the instrument (<https://humanrightsinasean.info/asean-committee-migrant-workers/about.html>).

It remains to be seen up to now, however, whether a concrete “first draft” document will eventually come forth since the negotiations have now turned to coming up with a consensus among the member states on what portions of the pre-draft instrument are deemed acceptable. Some states (particularly those in receiving areas) are hesitant and resistive to efforts to grant more rights to migrants and others (in sending areas) are less so.

Nevertheless, suggestions have been forwarded to the ASEAN Forum by civil society organizations represented by the Task Force

on ASEAN Migrant Workers (TFAMW). Among their many recommendations is to make sure that the instrument be one that would be legally binding to all member states. Another recommendation is for member states to make sure their national laws are aligned with the provisions of the instrument and that such be in accordance with international principles and conventions that seek to protect and promote the rights of migrant workers and their families.

The second pillar for this period was put up in November 2017 with the signing of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers by ASEAN leaders in November 2017 in Manila. It has been described as a “breakthrough agreement” in protecting and promoting the rights of migrant workers (FES 2017) and seen as a step in the right direction towards safeguarding the welfare of migrants. The leaders of ASEAN considered the 2017 Consensus document as one that “will help establish a framework for cooperation on migrant workers in the region” (ASEAN 2017).

The 10-page 2017 Consensus document followed the same format as the 2007 declaration in terms of having a preamble (for which ASEAN documents are well-known) and a set of general principles and an enumeration of the obligations of both sending and receiving states as well as a prescribed set of commitments of ASEAN member states. What is peculiar with the 2017 Consensus document is that it specified both the “fundamental” and “specific” rights of migrants and their families.

The 2017 Consensus outlined the fundamental rights of migrants including the right to family visitations; the right of the migrants to hold their own passports and other personal and official documents; to have “the rights no less favourable than those applied to nationals of the Receiving States” in detention or prison; to have the right to file grievances with the relevant authorities; and to have the right to freedom of movement. Specific rights to migrant workers are also granted in the consensus document, particularly the right to fair (not equal) treatment (but not wages) and the right to join (not organize) trade union organizations. However, it is not known

why the document made a distinction between fundamental and specific rights.

Several observations need to be made about the consensus document. One is that much of the rights recognized in the document implicitly acknowledge long-standing problems faced by migrants such as the confiscation of their passports; denial of visitation rights; and the unequal treatment of migrants. This gives the impression that such problems are rampant practices throughout Southeast Asia. Moreover, the consensus document seems to accept the reality that undocumented migration exists and that the rights of migrants cannot go beyond the intention of the member-states to protect their borders.

Finally, the non-binding consensus document continues to uphold the principle of state sovereignty over migrants. This also gives the impression that ASEAN does not wish its members to conform to a single set of norms. Rather, it is ASEAN that must adapt to “prevailing national laws, regulations and policies of ASEAN Member States” (ASEAN 2017).

#### **IV. Conclusion**

As ASEAN now embarks on efforts to establish a regional community by promoting greater economic and social integration among its member-countries, greater opportunities will emerge for labor to move. However, barriers to the mobility of labor still persist in the region. It has been argued that lowering barriers to labor mobility in the region (such as “providing information to migrants about employment opportunities, offering migration orientation programs to improve employment experiences abroad, and linking migration admissions systems to labor market demand”) can actually benefit both sending and receiving countries (Testaverde, et al. 2017: xvi). Given their provisions, the 2007 Declaration and 2017 Consensus can be seen as efforts by ASEAN to reduce the barriers to labor mobility in the region.

However, both the 2007 Declaration and the 2017 Consensus

are essentially works-in-progress. Given the nature of ASEAN as a “talk shop” the future of these two documents continues to be in a state of flux. Even after a decade, the 2007 Declaration has yet to be invoked by any ASEAN member-state despite the continued prevalence of abuse and exploitation of migrants throughout much of Southeast Asia and beyond.

ASEAN may be headed in the right direction insofar as promoting a rights-based migration regime for the region is concerned. It is clear that both the 2007 Declaration and the 2017 Consensus are attempts by ASEAN to promote a rights-based framework on migration in the region and steps in the right direction. It would seem that the two documents taken together contain two of the three basic ingredients for a regional human rights framework: (a) a common set of overarching goals, principles, and norms concerning labor migrants and (b) a specification of the fundamental rights attached to labor migrants (from the perspectives of all parties concerned - sending, receiving, and ASEAN itself). However, ASEAN has yet to incorporate the third key ingredient which is to establish an effective mechanism for specifying, recognizing, and enforcing the legal obligations of state parties to respect those rights.

Moreover, it can also be said that such efforts actually constitute a form of regional ritualism and a façade for ASEAN to promote its credibility more rather than genuinely promote and uphold the rights of migrants in the region particularly in the three major receiving countries. It may well be that certain member states of ASEAN were motivated to engage the Declaration and Consensus documents out of a need to be seen as conforming to internationally-accepted norms and standards.

The ASEAN ways of informality, consensus, and non-interference also pose obstacles to concrete, effective, and timely action towards effectively protecting the rights of migrants. The member states of ASEAN observe a peculiar set of norms that can effectively proscribes the Association’s efforts to successfully deal with the problems of labor migrants in the region.

It can further be said that managing cross-border labor

mobility is one that ASEAN has collectively been unable to carry out as well as it should despite the existence of the 2007 Declaration and the 2017 Consensus and previous other initiatives (Shetty and Testaverde 2018). Critical gaps and divergences exist both in terms of institutional capacities, approaches, and norms as regards the protection and promotion of the rights of migrants in general and migrant workers in particular.

Additionally, there is also the concern that the Declaration and Consensus documents are unable to acknowledge the need to address the problem of irregular migration in the region. Irregular movements persist and are growing in numbers. Vulnerable groups remain. International migration cannot be understood simply as a one-dimensional process but a bundle of complex and multidimensional factors, drivers, and processes with social, economic, political, ecological, and technological implications.

ASEAN's regional integration initiatives have continuously placed emphasis on promoting capital, trade, and investment flows, but for the most part neglecting cross-border migration. Indeed, migration is seen as a "forgotten part of ASEAN integration" (Khasru 2018).

Regional governance mechanisms and norms are starting to emerge in Southeast Asia. However, the challenge is actually establishing migration management regime with an effective degree of national-regional coordination as well as consonance between various governmental agencies across national and regional jurisdictions. Not all ASEAN states may have the capacity or the willingness to engage in such undertakings. This is one reason why there's a high degree of uncertainty, ambiguity, or ad hoc-ness manifested in the migration policies of states be they destination or sending areas.

A rights-based regional migration architecture is such a daunting project because this kind of concerted response must not only consider commonalities and similarities (which are few) but also the differences and the specificities within each country (which are many) especially in terms of whether the country is predominantly a destination or source area. Situating the regional

management of migration in a rights-based context gives rise to certain complications. Not all parties may conform to the same human rights norms. It is difficult to harmonize such norms even as some level of broad understanding can be achieved.

On the one hand, the reality or current practice is that migration is left entirely in the hands of the market within a state-centric context (e.g., the issuance of visas and labor rights and citizenship rights, etc.). On the other hand, there is the ideal embedded in regional as well as global arrangements (e.g., UN and ILO conventions) that seem to dictate a system of managing migration, implying a departure from the state-centric perspective. The challenge is to be able to resolve this tension between the resistance of states to any attempt to weaken or question or delegitimize their capacity to determine who gets to enter, stay, and leave their jurisdictions, and the need to engender a working and sustainable rights-based infrastructure for human mobility in Southeast Asia under the ambit of ASEAN.

When it comes to migrant issues, the tendency within ASEAN appears to be to focus on the trees and miss the forest. Auethavornpipat (2017) observes that studies looking at ASEAN's initiatives in bringing about a rights-based regional framework in dealing with migrant workers tend to focus on the aspects of "gender, labour, and security perspectives," without considering "the broader impact of migrant worker rights on the process and nature of cooperation between ASEAN members" (Auethavornpipat 2017: ).

ASEAN member states' views on labor migration in Southeast Asia can be distinguished into two divergent viewpoints—the perspectives of receiving and sending states (see Battistella 2002). The positions of sending and receiving states vary in terms of the importance of low-skilled labor migration as well as the scope and nature of a regional agreement on labor migration (see Jailani 2015). Sending states derive much economic and social benefits from their migrants (who are predominantly in the low-skilled categories). For this reason, sending states would prefer that the migration regime for the region ought to focus not only on high-skilled and professional as well as technical workers, but should also incorporate low-skilled



migrant workers. Receiving countries, however, prefer to encourage the entry and circulation of high-skilled workers as opposed to low-skilled migrants. For obvious reasons, sending states would prefer an agreement that would protect the rights of both documented and undocumented migrants and their families.

Receiving states, however, would contend that extending coverage to undocumented migrants would amount to regularization of illegal migration—something that would be politically unpalatable. Similarly, extending social protections to the families of migrants would also be seen by authorities in the receiving areas as giving way to more long-term/permanent immigration flows that are associated with numerous socio-political issues, not the least of which would be strain that such flows would place on the social security systems of their countries. As much as possible, receiving states prefer that migrants (particularly the low-skilled ones) retain their temporary status ready to be dismissed as soon as the need for them diminishes. Finally, sending states prefer an agreement that would be legally binding on all state parties especially in those countries receiving migrants while receiving states prefer a non-binding agreement since having such legal obligations are likely to pose a constraint on their national laws and regulations. It is for this reason that a consensus is seen as a logical step in ASEAN.

However, far from reaching a consensus on norms concerning labor migration and migrants, there continues to be “considerable norm contestation” among the ASEAN member states insofar as the scope, nature, and direction of a regional migration regime is concerned (Auethavornpipat 2017: 1). ASEAN members continue to be divided in the ways that individual countries approach the issues and problems affecting labor migrants in the region. Auethavornpipat (2017) further argues that the norm contestation is made possible by the lack of clarity and precision in the way that these norms are defined and operationalized. Further, this contestation is driven by social and international forces and pressures such as from civil society as well as international agencies and even foreign powers like the United States and the European Union (Auethavornpipat 2017).

One can say about ASEAN's effort to establish a human rights architecture on the management of migration and for migrant workers as an attempt to channel the member states' sense of exceptionalism into a ritualism. The nature of ASEAN and its "ASEAN Way" would certainly mitigate any serious groundbreaking effort to make its member states "toe the line" of protecting and promoting the rights of foreigners. It would also be naïve to suggest that abuses happen because of the absence of any concrete human rights protocols or instruments. Invoking the ASEAN ways of informality, consensus, and non-interference certainly poses obstacles to concrete, effective, and timely action.

Likewise, there is an inherent tension between individual member states that are all oriented towards strengthening their borders (through stringent immigration/emigration controls, among others) and the trajectory of ASEAN as an intergovernmental and regional entity with its own conventions to implement and which can be seen as effectively tearing down these same restrictions.

On the one hand, the reality or current practice is that migration is left entirely in the hands of the nation-state and that it is largely a state-centric enterprise (e.g., the issuance of visas and labor rights and citizenship rights, etc.). On the one hand, the ideal embedded in international arrangements, conventions, and protocols implies the surrendering of sacred state prerogatives.

While both the Declaration and Consensus documents operate largely on the basis of agreements and arrangements between governments, the reality in the region, however, is that migration is largely managed privately. As well, initiatives that essentially are government best-efforts-based and premised on "the prevailing laws, regulations and policies of the respective states" undoubtedly have their limits on the capacity and willingness to genuinely and effectively address the human rights concerns of foreign migrants and their families in the region.

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