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## Irregular Migrations in Southeast Asia: Challenges for Protection and Migration

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# IRREGULAR MIGRATIONS IN SOUTHEAST ASIA: CHALLENGES FOR PROTECTION AND MIGRATION POLICY

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## Abstract

*The region of Southeast Asia is extremely diverse in terms of culture, language, ethnicity, economic development, forms of government and degrees of political freedom. Migration of all types has played and continues to play a crucial role in the political economy of the region and is central to the contemporary economies of all of the states within it. In terms of protection and migration policy analyses, Southeast Asia is often folded into the larger 'regions' of Asia, the Asia-Pacific, or a hybrid sub-region consisting of East and Southeast Asia, depending on the type of migration, and the policy issues under consideration. Given the diversity of migration dynamics in Southeast Asia that could be considered within this paper, this article focus primarily on challenges for protection and policies concerning irregular migration, both because of the growing economic importance and political impact of irregular migration.*

**Keywords** : Irregular migrations, Southeast Asia, challenges, protection, policy.

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## I. INTRODUCTION

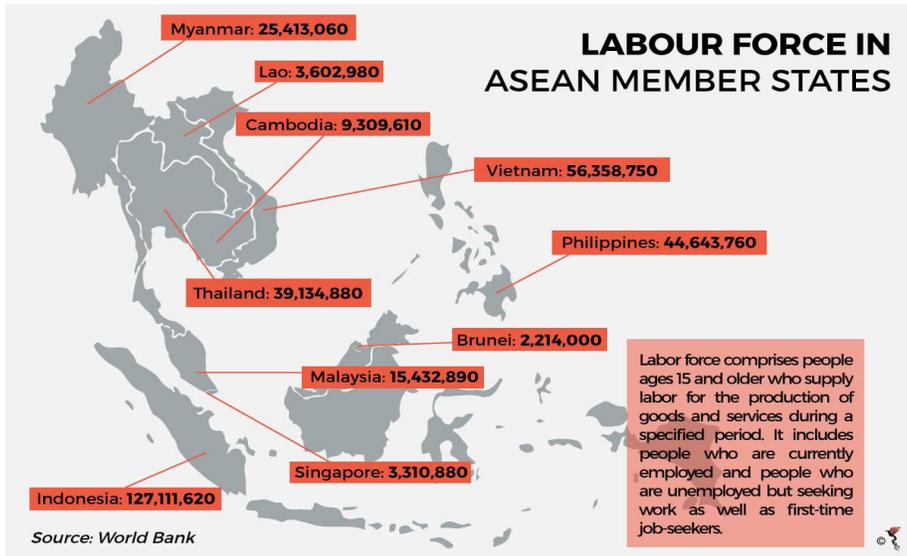
Southeast Asia or in particular ASEAN is an emerging entity that has potential to be one of the largest economies and markets in the world. It was reported<sup>1</sup> that “if ASEAN were one economy, it would be seventh largest in the world with a combined gross domestic product (GDP) of 2.4 trillion in 2013, it could be fourth largest by 2050 if growth trends continue. With over 600 million people, ASEAN’s potential market is larger than the European Union or North America, next to China and India. ASEAN is one of the most open economic regions in the world, with total merchandise exports of over \$1.2 trillion – nearly 54% of total ASEAN GDP and 7% of global exports.”<sup>2</sup> Its population and labor force varies throughout the member states. This can be shown with the information in figure 1 below.

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<sup>1</sup> Asian Development Bank, “ASEAN Economic Community: 12 Things to Know,” ADB, accessed on 18 December 2019, <http://www.adb.org/features/asean-economic-community-12-things-know>

<sup>2</sup> Stephen P. Groff, “ASEAN Integration and the Private Sector, Keynote Speech at the German-Business Association AEC: Integration, Connectivity and Financing: What Does Regional Integration in Southeast Asia Mean for the German Business Community?” ADB, accessed 23 December 2019. <http://www.adb.org/news/speeches/keynote-speech-asean-integration-and-private-sector-stephen-p-groff>. .

**Figure 1: Labour Force in ASEAN Member States<sup>3</sup>**



In a commentary published by the S. Rajaratnam School of International Studies, Senior Analyst with the Centre for Multilateralism Studies (CMS), Phidel Vineles, argues that the region – especially the ASEAN-5 (Singapore, Malaysia, Thailand, Indonesia, and the Philippines) – lack industry-ready skilled workers in spite of its vibrant demography. In Singapore, Vineles cites the nation’s dependence on foreign workers and a lack of innovation in the Singaporean education system as primary challenges to its labour force. Malaysia and Thailand, face similar challenges in equipping their respective workforces with engineering and science skills. Besides that, Indonesia and the Philippines have high youth unemployment rates due to a workforce that is ill-equipped with skills and knowledge needed by key industries. Brunei, which is moving away from oil dependence to a knowledge-based economy is finding it difficult to equip its labour force with necessary research and development skills. CLMV (Cambodia, Lao, Myanmar and Vietnam) economies, broadly lack coherent technical education which is necessary for industrial development.<sup>4</sup>

Due to the large number of labour force in ASEAN, it is undeniable that labour migration has significantly increased over the past decades. About

<sup>3</sup> Angaindrankumar Gnanasagaran, “Strengthening ASEAN’s labour force” The ASEAN Post, accessed 3 January 2020, <https://theaseanpost.com/article/strengthening-aseans-labour-force>.

<sup>4</sup> *Ibid.*

18.8 million ASEAN nationals are estimated to be living outside of their country of birth.<sup>5</sup> International migration is a structural feature of an interconnected Asia-Pacific region, and is one of the key factors shaping the region with profound social and economic impacts. Migratory movements change the composition of the population, labour force and society. In the context of the 2030 Agenda for Sustainable Development, ensuring that migration takes place in a safe, orderly, and regular fashion will be a key priority for countries of Asia and the Pacific. As such, migrants are both agents of sustainable development, and its beneficiaries.<sup>6</sup>

On top of that, an estimated one-third of migrant workers in the Asia-Pacific region have irregular status. A migrant with irregular status is one who entered a foreign country without going through the formal immigration process or without a valid work permit, or one who became irregular after entry. Porous borders, the often complex and costlier processes associated with legal migration and employment, and established migration routes, leave irregular migration the most viable option for many. In addition, restrictions on women's legal migration, often due to sectoral regulations and age limits, can push women into irregular migration. The term "illegal migrants" is often used, however while crossing a border without proper travel documents can break national laws, the act can never make an individual 'illegal'. Migrants often have little control over the complex factors that determine their status as these frequently come down to administrative circumstances, not necessarily the actions of migrants. Migrants can slip easily from regular to irregular status, often through no fault of their own. Typical examples include: workers entering legally but then having their visa, work permit or passport expire; regular migrants leaving their designated employer or being dismissed, and thus invalidating their work permit; and people who were trafficked into the country.<sup>7</sup>

An ASEAN declaration aiming to protect migrant workers was signed early as 2007. But migration has become a significant issue in official terms with the ASEAN Economic Community Blueprint 2025, agreed in 2015, which envisages reducing paperwork for work visas. However, the troubling fact remains that the focus of these deliberations falls more on facilitating the mi-

<sup>5</sup> United Nations Department of Economic and Social Affairs (UNDESA). "International migrant stock," UNDESA, accessed 4 January 2020, <https://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.asp>.

<sup>6</sup> The Economic and Social Commission for Asia and the Pacific (ESCAP). *Towards Safe, Orderly and Regular Migration in the Asia-Pacific Region Challenges and Opportunities* (Bangkok: United Nations, 2018), <https://www.unescap.org/sites/default/files/publications/Migration%20report.pdf>, accessed 31 December 2019.

<sup>7</sup> ILO, "Migration, irregular status and deportation An outline of international standards, regional trends and good practices," ILO, 2015, accessed 31 December 2019, [https://www.ilo.org/wcmsp5/groups/public/-/asia/---ro-bangkok/documents/genericdocument/wcms\\_322652.pdf](https://www.ilo.org/wcmsp5/groups/public/-/asia/---ro-bangkok/documents/genericdocument/wcms_322652.pdf).

gration of high-skilled migrants such as engineers and nurses and much less on the much larger numbers of low-skill workers, who end up as laborers and cleaners. Undocumented economic migrant in ASEAN experience myriad mistreatments including high charges paid to people smugglers, fraud by recruitment agencies, and nonpayment of salaries, low wages, long working hours, and poor workplaces safety standards. Worse, they sometimes suffer physical violence and illegal detention, trafficking, and sexual abuse. Female migrants, for example from Cambodia, Myanmar and the Philippines, are sometimes treated like modern-day slaves. The abundance of human rights violation cases involving domestic workers in ASEAN seem to highlight a lack of legal protection for the thousands of women. There are not enough regulatory officials and police to assess and prevent exploitation.<sup>8</sup>

This paper aims to discuss on the challenges towards a sound migration policy especially in terms of irregular migrants. As discussed, migrants can turn into an irregular migrant in a nick of time without them realizing it. So far as the unintended irregular migrant are concerned, their right should be protected. ASEAN is moving to become a community, but sadly, this matter of migration or in particular irregular migration has always been sensitive and never been tackled seriously. Therefore, the first part of the paper will discuss on the current labour migration in ASEAN as a whole. Then, the second part will then discuss on the contributing factors of how a migrant can become irregular, including but not limited to the definition and how to classify a migrant as irregular. Next, the current legislations and policies of each ASEAN member states on the labour migrant position as well as its position in ASEAN Community will be discussed in the third part of the paper and last but not least, this paper will provide recommendations to overcome the challenges in dealing with irregular migrants in the fourth part.

## II. CURRENT LABOUR MIGRATION IN ASEAN.

Labour migration is an established feature of ASEAN labour markets. Intra-ASEAN migration is also rising, with 6.9 million intra-regional migrants accounting for two-thirds of the region's total international migrant stock<sup>9</sup>. Within ASEAN, the Philippines, Indonesia, Viet Nam, Myanmar, Cambodia and Lao PDR are net sending countries while Malaysia, Singapore, Thailand

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<sup>8</sup> Syed Munir Khasru, "Migration -- the forgotten part of ASEAN integration," *Nikkei*, 20 November 2018, accessed 1 January 2020, <https://asia.nikkei.com/Opinion/Migration-the-forgotten-part-of-ASEAN-integration>.

<sup>9</sup> United Nations Department of Economic and Social Affairs (UNDESA), *International Migration Report 2017* (ST/ESA/SER.A/403), accessed 2 January 2020, <https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017.pdf>.

and Brunei Darussalam are net-receiving countries. The ASEAN Community has established far-reaching initiatives towards regional integration built around three pillars: the ASEAN Political-Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community. ASEAN leaders have signed two instruments to establish a regional framework for cooperation on labor migration, namely the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007 (Cebu Declaration) and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, 2017. The key ASEAN body leading the implementation of these instruments is the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). A range of regional partners are involved in migration governance, including the ASEAN Confederation of Employers (ACE), ASEAN Trade Union Council (ATUC) and the Task Force on ASEAN Migrant Workers (TFAMW).<sup>10</sup>

During the last two decades, labour migration has emerged as a significant driver of economic growth and development in both countries of origin and destination within ASEAN. International labour migration in the region is triggered by two main factors: (1) disparities between countries in terms of economic and social development;<sup>11</sup> and (2) demographic differences among the populations of ASEAN nations, with a youthful and expanding labour force in many countries of origin and ageing populations and declining birth rates in destination countries affecting the supply and demand of labour.<sup>2</sup> As both factors are structural rather than cyclical in nature, labour migration is not likely to diminish in the medium term and can be expected to continue to expand.<sup>12</sup>

There are now estimated to be 20.2 million migrants originating from ASEAN nations, among whom nearly 6.9 million migrated to other countries within the region. Though much of intra-ASEAN migration is irregular and not fully captured by official data, the statistics available clearly show the number of migrants moving to other ASEAN countries has risen dramatically, increasing more than fivefold since 1990.<sup>13</sup>

<sup>10</sup> International Labour Organization, "TRIANGLE in ASEAN Quarterly Briefing Note," ILO, October-December 2018, accessed 3 January 2020, [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms\\_647658.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_647658.pdf).

<sup>11</sup> In particular, large wage differentials exist between ASEAN countries, with workers in Myanmar earning an average of US\$91 per month (MOLES and ILO, 2016) and those in Singapore earning US\$2,859 (MOM, 2016).

<sup>12</sup> International Labour Organization, *Profits and Poverty: The Economics of Forced Labour* (Geneva: ILO, 2014).

<sup>13</sup> United Nations Department of Economic and Social Affairs (UNDESA). "Trends in International Migrant Stock: The 2015 Revision," UNDESA, 2015, accessed 29 December 2019, <http://www.un.org/en/>

Labour mobility is caused by several factors, including: uneven socio-economic development and wage disparities among countries; labour and skills shortages in destination countries; and demographic factors. Labour migration data compiled by the ILO from among ASEAN Member States<sup>14</sup> (ILO, 2015a) show that: ASEAN has four net labour-receiving countries: Brunei Darussalam, Malaysia, Singapore, and Thailand: • Malaysia hosts the largest number of migrant workers. It hosted 2,250,322 migrant workers in 2013, 56.4 per cent (1,269,272) of whom were from ASEAN countries. • Thailand hosted 1,183,835 migrant workers in 2013, 88.2 per cent (1,044,323) of whom were from ASEAN countries. • Singapore hosted 1,321,600 migrant workers in 2013. Disaggregation according to country of origin is currently unavailable. Migrant workers make up one-third of the workforce in Singapore • in 2014, there were 52,161 migrant workers in Brunei Darussalam who make up a quarter of the country's labour force. Among these migrant workers were 31,784 Indonesians and Filipinos who compose 61 per cent of the total migrant worker population. Moreover, a substantial share of migrant workers are domestic workers. In 2015, there were 9,884 domestic workers in Brunei Darussalam, out of which 9,851 were migrant workers and 9,656 were female. On top of that, ASEAN has six net labour-sending countries: Cambodia, Indonesia, the Lao People's Democratic Republic, Myanmar, the Philippines, and Viet Nam: Intra-regional labour migration is especially significant for Myanmar and Cambodia, for whom 93.4 and 66.8 percent of workers respectively are deployed to other ASEAN Member States.<sup>15</sup>

Migration in the region of ASEAN shows a few general features. For instance, in Thailand there are quite a number of irregular migrant workers from neighboring countries. This is because Thailand offers a higher wage plus job opportunities in the service, agriculture and fishery sectors. In addition to that, Malaysia and Brunei relies heavily to irregular migrant workers mostly came from Indonesia and are working in the sector of farming and construction. On the other hand, Malaysia and Singapore relies to domestic workers from Indonesia and the Philippines. In discussing this matter, the entrance of foreign workers or irregular migrant workers does not necessarily strictly relate to the violation of Immigration law only, nevertheless it is also affected by the economy factor which have a very high demand for foreign workers, the high cost for hiring a foreign worker regularly, as well as the increasing role of informal

[development/desa/population/migration/data/estimates2/estimates15.shtml](http://www.ilo.org/asia/whatwedo/publications/WCMS_431613/lang--en/index.htm).

<sup>14</sup> International Labour Organization, "Analytical report on the International Labour Migration Statistics Database in ASEAN: Improving data collection for evidence-based policy-making (Bangkok)," ILO, 2015, accessed 27 December 2019, [http://www.ilo.org/asia/whatwedo/publications/WCMS\\_431613/lang--en/index.htm](http://www.ilo.org/asia/whatwedo/publications/WCMS_431613/lang--en/index.htm),

<sup>15</sup> International Labour Organization. 2017. "Progress of the implementation of recommendations adopted at the 3rd – 8th ASEAN Forums on Migrant Labour", Background paper to the 9th AFML.

sector. Apart from that, the decreasing number of natural border (Thailand and neighboring countries) plus the low cost to cross the border illegally is conducive for irregular migrants. The increase of global competition had contributed to the fact that companies working in a tight margin which encouraged them to use cheap irregular foreign workers. This situation does not only occur in developing country, but is also happening in developed countries.<sup>16</sup>

Based on the discussion, it is obvious that migrant movement in ASEAN is very active. It is fair to say that ASEAN member states relies on foreign workers/migrants among the member states themselves. This trend is accepted as helping the region development and directly supporting the regional integration. Nevertheless, the question arises on the protection of migrant. In the era of liberalization, does the protection of migrant in ASEAN are still denied and they are still regarded as irregular migrant?<sup>17</sup> Who are irregular migrants and what makes a regular migrant become irregular will be discussed in the next part of this paper.

### III. CONTRIBUTING FACTORS OF HOW A MIGRANT CAN BECOME IRREGULAR

Irregular migration takes place across the region, including movements of labour migrants and forced migrants in mixed flows, which are characterized by vulnerability of all, while smuggling and trafficking in persons also occurs. Irregular migration is often the result of restrictions on migration, and puts the lives and human rights of migrants at risk.<sup>18</sup>

In reality, distinctions between migrants in regular and irregular situations are rarely clear. The overwhelming majority of the world's migrants arrive to their host country in a regular manner and only later become 'irregular' due to administrative overstay. This may be due to no fault of the migrant herself, but instead to unclear or overly bureaucratic migration procedures, discrimination, or practical barriers such as high visa renewal costs, language barriers and lack of access to legal aid. Such overstay affects migrants from all countries and at all socio-economic and educational levels. Members of the same family may even hold a different status to each other, and such status can regularly change throughout the course of one's migration and/or stay. For the

<sup>16</sup> Guntur Sugiyarto, "Internal and international migration in Southeast Asia," in *Routledge Handbook of Southeast Asian Economics*, Ian Coxhead ed. (Routledge: 2015).

<sup>17</sup> Saidatul Nadia and Salawati, "Towards Achieving Liberalization in ASEAN Economic Community: Challenges in Protection of Migrant Workers in ASEAN," in *The ASEAN Community: Legal Issues* (Kuala Lumpur: UKM Press, 2018), 9.

<sup>18</sup> *Ibid.*

minority of migrants who do arrive irregularly, it is important to note that such irregular arrival can be justified, for example in the case of irregularly arriving migrants seeking protection from refoulement.<sup>19</sup>

Migrants often have little control over the complex factors that determine their status as these frequently come down to administrative circumstances, not necessarily the actions of migrants. Migrants can slip easily from regular to irregular status, often through no fault of their own. Typical examples include: workers entering legally but then having their visa, work permit or passport expire; regular migrants leaving their designated employer or being dismissed, and thus invalidating their work permit; and people who were trafficked into the country. In destination countries, inflammatory language is often used about the scale and impact of irregular migration on economies and societies. The prevailing discourse associates irregularity with criminality, and views irregular migration as a security issue. Irregular migrants are frequently subject to harassment, arrest, detention and deportation and are at risk of forced labour and trafficking. Without legal status in their country of employment they have no or very few avenues for seeking legal redress if their rights are violated. Irregular migrants are particularly vulnerable to deportation, and large-scale deportation campaigns have been seen in a number of countries in Asia.<sup>20</sup>

In September 2013 Malaysia entered the final phase of the Regularization and Comprehensive Settlement of Foreign Workers and Illegal Immigrants Programme (6P), an arrest and deportation campaign targeting 500,000 undocumented migrants in Kuala Lumpur, Selangor, Penang and Johor. The operation also targeted employers of undocumented migrant workers. Many of those detained or arrested during the operation were migrant workers who were left in a 'legal limbo' as a result of government policies or practices that leave migrants undocumented. For example, migrant workers who failed to complete the full regularization process under the previous phases of the 6P Programme; and those whose passports and other documents were being held by immigration authorities or by their employers while applications were being processed. Refugees and asylum seekers may also be considered undocumented in Malaysia, and there was concern for their welfare and rights during the operation. The crackdown attracted widespread concern from human and migrants' rights activists and the international community. Of particular concern was that the mass deportations were in potential violation of the right to have individual case assessment and determination, as provided for in Article

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<sup>19</sup> OHCHR, "Differentiation Between Regular and Irregular," accessed 29 December 2019 <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/RegularAndIrregular.pdf>

<sup>20</sup> *Ibid.*

22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).<sup>21</sup>

On top of that, only a minority of irregular migrants to Thailand migrate through informal brokers. Most rely on friends, family, and their own prior experiences to facilitate border crossing. Thus, although international organizations often describe the dangers of informal movement with reference to the unscrupulous brokers who manage smuggling networks, these portrayals fail to recognize the extensive social networks, informal knowledge sharing, and form of social trust that shape informal movement.<sup>22</sup> Most aspiring migrants are not unwitting, isolated individuals who follow strangers into treacherous borderlands. In contrast, they often come of age within communities where migration is a norm, and they have access to a range of trusted friends and family members when organizing employment and movement. In these heavily networked communities, informal brokers are incentivized to be decent to those traveling with them. If not, migrants will use the services of someone else. For all of these reasons, irregular migration, although illegal, is not typically as dangerous as it is often depicted in international discourse. Second, many migrants who cross irregularly into Thailand gain a form of temporary legal status on arrival. During the past two decades, the Thai state has enacted more than a dozen amnesty programs for migrants who have entered illegally. These amnesty programs have offered millions of low-skilled migrants in Thailand temporary leave to remain and documentation allowing them to work in the country for specific periods of time. Although temporary documentation has been inconsistently offered and has been limited in terms of its protections, generally speaking irregular migrants who registered with amnesty programs have been safe from deportation, so long as they remain employed. Historically, crossing the border illegally and then obtaining temporary status have been significantly cheaper and easier than moving through regular migrant recruitment processes, which is one key reason why irregular migration persists in the region.<sup>23</sup>

In Indonesia, the system of migration management has shifted from a *laissez-faire* approach to a more state-managed system, with regulation of private enterprise providing migration services. Despite government attempts to control migration, regularize recruitment agencies and streamline the recruitment and placement of Indonesian labour in Malaysia, Indonesia has had to accommodate the growing migration pressure and commercial interests of

<sup>21</sup> *Ibid.*

<sup>22</sup> Gabriella Sanchez, "Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research." *Journal on Migration and Human Security* 5, no. 1 (2017): 9–27.

<sup>23</sup> Maryann Bylander, "Is Regular Migration Safer Migration? Insights from Thailand," *Journal on Migration and Human Security* 7, no. 1 (2019): 1-18.

employers and labour recruiters. The devolution of regulatory authority under decentralization of government after 2000 contributed to a lack of coordination and clarity regarding jurisdiction and responsibilities at local level. Policies implemented left ample room for the private sector to acquire a large part of the migration services market, thereby influencing volume and directionality of labour migration. The division between the public and private actors in this field is not clear-cut, and involves a mutual dependency, flexibility in roles and often the transgressing of regulations in pursuit of efficiency and profit<sup>24</sup>. As a result, significant numbers of migrants make use of unlicensed agents, actively looking for loopholes in regulations and resorting to illegal practices, including facilitating illegal border crossing and faking documents<sup>25</sup>. An important reason for irregular migration and continuous involvement of brokers are the intricate, costly and time-consuming requirements and regulations set-up by government.<sup>26</sup>

Due to the high costs, long duration and considerable complexity of navigating the existing bilateral channels for migration, many intra-ASEAN migrants are precariously employed in an irregular status. Regardless of the legal documents they hold, migrants employed in low-skilled work often face exploitation and abuse because of inadequate protection of labour rights during recruitment and employment.<sup>27</sup>

#### **IV. CURRENT LEGISLATIONS, POLICIES AND PROTECTION OF ASEAN MEMBER STATES TOWARDS IRREGULAR LABOUR MIGRANT AND ITS CHALLENGES**

##### **A. REGIONAL LEVEL**

ASEAN Consensus On the Protection and Promotion of the Rights of Migrant Workers in Article 4 identified the “undocumented migrant worker” as a person who fails to comply with the conditions provided for him or her to legally enter the Receiving State and to stay legally for the duration of employment pursuant to the applicable laws, regulations and policies of the Receiving State. This definition includes a migrant worker who has recently

<sup>24</sup> W. Palmer, “Public–Private Partnerships in the Administration and Control of Indonesian Temporary Migrant Labour in Hong Kong,” *Political Geography* 34 (2019): 1-9.

<sup>25</sup> M. Ford and L. Lyons, “Outsourcing Border Security: NGO Involvement in the Monitoring, Processing and Assistance of Indonesian Nationals Returning Illegally by Sea,” *Contemporary Southeast Asia* 35, no. 2 (2013): 215–234

<sup>26</sup> Ernst Spaan and Ton van Naerssen, “Migration decision-making and migration industry in the Indonesia–Malaysia corridor,” *Journal of Ethnic and Migration Studies* 44, no. 4 (2018): 680-695. DOI: 10.1080/1369183X.2017.1315523.

<sup>27</sup> Benjamin Harkins and Daniel Lindgren, “Labour Migration in the ASEAN Region: Assessing the Social and Economic Outcomes for Migrant Workers,” 2017, accessed 4 January 2020, <http://migratingoutofpoverty.dfid.gov.uk/files/file.php?name=harkins-labour-migration-in-asean-update.pdf&site=354>.

been in employment but is no longer legally employed in a remunerated activity. On top of that, this definition of an “undocumented migrant worker” is applied to Articles 56 and 57 of this consensus. Article 56 of the consensus connotes that for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented; Nothing shall be interpreted as implying the regularization of the situation of undocumented migrant workers while Article 57 indicates for ASEAN member states to take measures to prevent and curb the flow of undocumented migrant workers and explore cooperation and coordination among ASEAN Member States in providing assistance to those who are in need of protection subject to prevailing national laws, regulations and policies of ASEAN Member States.<sup>28</sup>

ASEAN leaders in 2007 had established the Cebu Declaration which discussed on the protection of migrant workers which in this particular declaration, it is an obligation of the member states to established a charter to ensure a decent working environment to protect the workers from all sort of abuse, plus the minimum wage for intra-ASEAN migrant was introduced. The Cebu Declaration emphasized for the ASEAN states to cater the fundamental rights of a migrant and their families, work together in handling the issue of irregular migrant and encourage the potential and dignity of migrant. Nevertheless, the Cebu Declaration is not binding and does not require the member states to change their national labour laws. In addition to that, Cebu Declaration emphasizes on the host country to ensure access to decent work for every citizen, in abiding the migration work force international provision by providing a legit contract of service. In addition to that, Cebu Declaration is a reminder to the receiving countries to provide protection of rights, welfare and dignity of migrant workers, including work protection and access to problem resolving system. Although with the existence of such declaration, the implementation status is still low and not binding. Implementation is always seen as a great challenge in every instrument in ASEAN.<sup>29</sup>

As far as the policy in regional level is concerned, the consensus made it clear that there are circumstances that may make a regular migrant became irregular without knowledge and intention of the migrant themselves. In relation to that, the consensus also demands the receiving state to provide protection for them but not necessarily change their status to a regular migrant due to this demand. In fact, the consensus also claim that this protection is subject

<sup>28</sup> ASEAN Secretariat, *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers* (Jakarta: ASEAN Secretariat, 2018).

<sup>29</sup> P. Martin and M. Abella, *Reaping the economic and social benefits of Labour mobility: ASEAN 2015* (Geneva: ILO, 2014).

to the national laws, regulations and policies of the ASEAN Member States. Thus, making this consensus as just a front page of toothless policies in the protection of irregular migrants.

## A. NATIONAL LEVEL – MEMBER STATES’ DOMESTIC LABOUR LAW

In ASEAN members, as in most other countries, migration policy is primarily handled at the national level, with few constraints imposed by international agreements. National governments decide on key elements of labour market openness including: visa policies; eligibility to work in certain sectors; and necessary qualifications and requirements. As well as pre-migration processes such as screening visa applications, post-migration policies are important, for instance on the protection of labour rights for foreign workers. Systems for dealing with migrant workers who overstay their permitted time and for managing irregular migrants are elements of an overall policy framework.<sup>30</sup>

Most of the ASEAN countries already have or are in the process of implementing a migration law and policies to tackle the human rights issue for migrant workers. Philippines are among the earliest to implement Temporary Foreign Worker Program (TFWP) together with work permit around 1970s and subsequently followed by Thailand and Indonesia in 1980s. They were then followed by Vietnam and Myanmar. Nevertheless, Laos and Cambodia needs to face the challenge in implementing this program due to the fact that they are so used with undocumented migrants. Cambodia needs to face the pressure of limited job opportunities compared to the big amount of workers and the high cost of a regular migrant.<sup>31</sup>

Meanwhile, Singapore was among the earliest receiving country that established TFWP with updated work permits to ensure that Singaporean control the job market. In addition to that, Thailand also used work permit system as according to Alien Employment Act and there is an attempt to implement TFWP. Nevertheless, sadly Malaysia up until today does not have any specific law regarding work migration. Brunei on the other hand is the only ASEAN receiving countries that does not use TFWP. Brunei’s general labor law is governed by the Constitution of Brunei Darussalam Employment Order 2009 (“Employment Order”),<sup>32</sup> which repealed the previous labor regulations under

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<sup>30</sup> Sarah Huelser and Adam Heal, “Moving Freely? Labour Mobility in ASEAN,” *Asia Pacific Research and Training Network on Trade, Policy Brief* no. 40 (June, 2014).

<sup>31</sup> IOM and United Nations, *International Migration in Thailand* (Bangkok: IOM, 2009).

<sup>32</sup> Labour Law 1954, ch. 1, § 2 (as amended 2002) (Brunei).

Brunei's Labour Act, Chapter 93 ("Labor Act").<sup>33</sup> The Employment Order contains provisions for contracts of service and apprenticeship, wages and hours of work, employment of women and children, and regulations for the employment of migrant workers.<sup>34</sup> Brunei also has old laws on its books directly relating to the core ILO standards regarding freedom of association.<sup>35</sup>

In receiving countries such as Singapore, Thailand and Malaysia, TFWP and work permit is governed by national employment law. This includes standard and basic necessities that are supposed to be given to migrant workers such as rest day, maximum hours of work, the level of salary reduction, as well as sick leave. In addition to that, migrant worker who came with a work permit is bound by the Employee Compensation Act. Nevertheless, the rights of a few group of workers such as the domestic workers are often being denied. Malaysia, for instance are reluctant to defined migrant workers under the definition of "worker" protected under provisions of law<sup>36</sup>.

Among the many strategies for managing unauthorised migration in ASEAN countries, particularly Malaysia and Thailand, workplace inspections and enforcement on errant employers are "not implemented with sufficient resolve".<sup>37</sup> This raises the question of how much the Malaysian state and society benefit from those "underground" workers. Malaysia needs the undocumented workers, who are necessary for performing menial jobs in plantations, factories and the service industry. Due to the high demand for labourers, irregular migration is often tolerated. Gurowitz captured Malaysia's perception on undocumented migrants, stating: "Malaysia needs these workers, but does not want them".<sup>38</sup>

Even though there are existing instrument such as TFWP and work permit which is seen as an advantage for the migrant workers to move around freely, but it is actually restricting the freedom of movement, complicate to change jobs, a barrier to migrate with family, and limit their capability to integrate

<sup>33</sup> Brunei, Employment Order 2009.

<sup>34</sup> *Ibid.*

<sup>35</sup> Brunei, Trade Unions Act 1961, ch. 128, <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/78241/102051/F798030527/BRN78241.pdf> (regulating trade unions' composition, rules, registration, funding, etc.). Foreign workers are excluded from this legislation, and the law forbids affiliation with international labor organizations without consent from the minister of home affairs and the Department of Labor. Human Rights and Labor, Country Reports on Human Rights Practices for 2013: Brunei, U.S. Dep't of State, Bureau of Democracy (2014), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220181#sthash.Fu0KcrsH.dpuf>, accessed on 1 January 2020.

<sup>36</sup> United Nations Women, *Managing Labour Migration in ASEAN: Concerns for Women in the ASEAN Region* (UN Women, 2013).

<sup>37</sup> Graziano Battistella, "Unauthorized Migrants as Global Workers in the ASEAN Region," *Southeast Asian Studies* 40, no. 3 (2002): 350–371.

<sup>38</sup> Low Choo Chin, "A strategy of Attrition through Enforcement: The Unmaking of Irregular Migration in Malaysia," *Journal of Current Southeast Asian Affairs* 2 (2017).

with citizens of receiving countries. All of this are gaps and challenges towards the commitment of the ASEAN member states according to international and regional standard of human rights on handling a migrant worker. By making work permit which binds the worker to a particular employer, the government had actually abolished the autonomy for a migrant worker to self-pick their desired employer and jobs. In addition to that, the establishment of permit such as this will provide a limitation to the migrant to manage their own status and mobility. For a documented migrant, they are eligible for protection if there are any abuse from the employer, but they usually obtain limited access to justice due to the employer's power to cancel their work permit. In Malaysia, migrant workers with cancelled permit and intended to claim for it have to apply for a special visa which may cost them around \$30 USD plus they are not allowed to work. This situation itself is a barrier for migrant workers to fight for their rights.<sup>39</sup>

Human rights are rights inherent to all human beings, whatever our nationality, migration status, sex, race, religion, language, or any other status. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights (UDHR) in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. Additionally, the core principles of equality and non-discrimination, which are enshrined in the International Bill of Human Rights, require non-discriminatory access to all civil, political, economic, social and cultural rights with only two limited exceptions as to the right to vote and take part in public affairs, and the right to freedom of movement within a country. All other human rights should be enjoyed equally and without discrimination by all people under the jurisdiction or effective control of the State, including migrants in irregular situations. Any differential treatment between nationals and non-nationals, or between non-nationals with different migration statuses, must be lawful, proportionate and pursue a legitimate aim. An attempt to define different classes of migrants with different classes of rights other than those explicitly allowed within the International Bill of Human Rights would be contrary to these core values of universality, equality and non-discrimination.<sup>40</sup>

One may be tempted to look at the problem of irregular migration as an enforcement problem. The experience of Malaysia in its running battle with irregular migrants demonstrates that this is not the case. It has been established that there are substantial "circular" irregular migrants in Malaysia. Malaysians have used many deterrents from traditional canning and deportation

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<sup>39</sup> IOM, *Migration and Development in Indonesia* (Jakarta: IOM Indonesia, 2010).

<sup>40</sup> *Ibid.*

and now considering using biometrics but found its irregular migrants growing at the same pace as regular migrants<sup>41</sup>. They are starting to wonder if existing punishment is deterrent enough. As a result, they saw their system become overburdened when they started to be serious about apprehending irregular migrants. The first problem was a huge backlog in the courts. The next was the overcrowding of their holding depots. They have realized that their system alone cannot match the intricate web of networks families and acquaintances that have been built through the years starting from the years when they didn't have explicit rules governing international migration in place. They have called for better cooperation from sending countries. Thailand used a different tack by using a series of registrations since early 1990s. The laudable intention was to legalize the stay of irregular migrants. But the good intentions of the policy have to deal with problems of implementation, including (a) employers unwilling to pay the registration fees; (b) low awareness; (c) the view that it is an inconsistent policy having a stop-go nature; (d) that it is ineffective in stopping the flow of irregular migrants; (e) corruption that has marred its implementation; and (f) that its continuing nature is testament that the earlier ones were not successful. On top of all these problems, some view this policy as not really about legalizing the stay of irregular migrants but as a continuing concession to employers who wants to employ them<sup>42</sup>

Singapore has little problem with irregular migration because of a combination of natural and administrative reasons, namely, (a) its small land size and well-patrolled borders and relative absence of informal sectors; (b) transparent and efficient implementation of immigration laws, work permit requirements and process, and (c) severe penalties for irregular migrants, their employers and human smugglers.<sup>43</sup> From the perspective of a sending country, international literature suggests that addressing irregular migration requires three sets of measures: addressing causes, strengthening protection, and enhancing international cooperation. The causes include extreme poverty, lack of employment opportunities, and high cost of legal migration, malpractice of private employment agencies and government enforcers, and trafficking.<sup>44</sup> These are mostly source country issues. Since irregular migrants are prone to abuse and exploitation this means greater protection for them. This is always a thorny issue considering their irregular status. Finally, irregular migration

<sup>41</sup> A. Kassim, A. and H. M. R. Zin. "Policy on Irregular Migrants in Malaysia: An Analysis of its Implementation and Effectiveness," *Technical report*, PIDS DP 2011-34 (2011).

<sup>42</sup> S. Paitoonpong, "Different Stream, Different Needs, and Impact: Managing International Labor Migration in ASEAN: Thailand (Immigration)," *PIDS DP 2011-28* (2011)

<sup>43</sup> C. S. Yue, "Foreign Labor in Singapore: Trends, Policies, Impacts, and Challenges," *PIDS DP 2011-24* (2011)

<sup>44</sup> V. Hing, P. Lun and D. Phann, "Irregular Migration from Cambodia: Characteristics, Challenges, and Regulatory Approach," *PIDS DP 2011-26* (2011).

is a management problem that can only be effectively addressed by close cooperation between sending and receiving countries as the Malaysian experience is demonstrating. It is clear that irregular migration happens because of a combination of circumstances in sending and receiving countries. In sending countries, irregular migration happens because it is very costly both in terms of money and waiting time to go through regular migration processes. It requires USD 700 to migrate to Thailand while doing it the informal way will require much less such as USD 100 or even lower.<sup>45</sup> Very high fees (RM 10,000) charged by employment agents for Bangladeshi and Pakistani migrants.<sup>46</sup> Migrant in the Cambodian border continues to find the “broker” a viable alternative to legal deployment<sup>47</sup>. Similar situation can be expected of migrants into Malaysia. In destination countries, there are employers who are willing to employ them with good incentives to do so. Without protection, they can be paid even lower wages.

Yet many of the region’s migration policies remain blunt, ineffective and costly. In 2017, Thailand and Malaysia introduced measures to address undocumented migration. These interventions did not achieve their intended goals. In Malaysia, only a quarter of eligible undocumented migrants responded to an official registration campaign. Enforcement raids led to employers complaining about losing needed workers. Thailand issued a decree imposing stiff penalties for employers who hire undocumented workers. After thousands of workers fled the country, employers complained of labor shortages and the order was suspended.<sup>48</sup>

In discussing on the challenges of migrant workers in ASEAN, it is important to refer to the economic integration, which is currently known as the ASEAN Economic Community (AEC). In relation to that, it is an objective in AEC to provide free movement of labour that is only focusing on professional work force. It is a well-known issue that is being discussed on how the low skilled workers were not even put into consideration. As discussed before, movement of migrant workers among ASEAN member are mostly among the low skilled workers. Nevertheless, even so the number of low skilled workers are big, most of them are still being regarded as irregular migrant. Irregular migrants such as this usually obtain very limited rights to get fair wages, have to work in a very degrading environment, and often having no access to law in cases of abuse and exploitation as well as nuisance that may come from the

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Shetty and Testaverde, “Southeast Asia needs better labor migration policies Improving worker mobility benefits migrants and raises growth,” Nikkei, 22 March 2018, 31 December 2019, <https://asia.nikkei.com/Politics/Southeast-Asia-needs-better-labor-migration-policies>.

authority themselves. As for example, in 2012 the government of Thailand recorded a number of 905,573 migrant workers from Myanmar registered to work, but are still waiting for confirmation of citizenship which had caused them to be barred from receiving any social security, claim for any accident and are not free to move around Thailand. Even if their citizenship has been confirmed, there are no guarantees that their passport will be return to them. In Malaysia, legal channel for migrant workers has been added due to shortage of labour in certain sectors. But, there are still many migrants recorded as irregular. There are many reasons as to why there are still irregular migrants in Malaysia, despite the control, among them is weak borders control with the neighboring country; Indonesia and Thailand. Above all, the establishment of unreasonable policies is the main contributor to irregular migrants. It was reported that levy for jobs that needed foreign workers are low, making the employer that needed foreign workers to support the visa for low-levied jobs, even if the workers are needed for other kind of jobs. When the worker finally realized that the job they were offered required a higher level of skill, there will be dispute with the employer making them to leave the job and automatically making them as an irregular migrant<sup>49</sup>

While leaders of ASEAN spoke eloquently about mutual trade and investment at their summit in Singapore this month, they had little to say about another key flow in the region -- migration. Admittedly, they did express collective concern about the Rohingya people who become international refugees in fleeing Myanmar for Bangladesh and other countries. But for the most part they ignored the much bigger movements of other groups of people who daily cross their states' borders, mostly in search of a better life.

While members of the 10-member Association of Southeast Asian Nations have made big efforts to have advance mutual trade and investment flows to the benefit of their 640 million inhabitants, they have not been entirely inclusive in its march forward. Migrants, numbering around 6.5 million people, have largely been left out of the ASEAN integration process.<sup>50</sup>

Undocumented economic migrant in ASEAN experience myriad mistreatments including high charges paid to people smugglers, fraud by recruitment agencies, and nonpayment of salaries, low wages, long working hours, and poor workplaces safety standards. Worse, they sometimes suffer physical violence and illegal detention, trafficking, and sexual abuse. Female migrants, for example from Cambodia, Myanmar and the Philippines, are sometimes treated like modern-day slaves. The abundance of human rights violation cases

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<sup>49</sup> Martin and Abella, *Reaping the economic and social benefits*

<sup>50</sup> *Ibid.*

involving domestic workers in ASEAN seem to highlight a lack of legal protection for the thousands of women. There are not enough regulatory officials and police to assess and prevent exploitation.<sup>51</sup>

Apart from that, among other challenges in providing protection to migrant workers in AEC is regarding the exceptions in labour laws. Foreign domestic worker is among the largest group in ASEAN. Nevertheless, they are often being exempted from the provisions of labour laws, or even if they are not being exempted, they fail to enjoy an effective protection due to weak implementation. In Malaysia, almost 300,000 foreign domestic workers which are supposed to get protection under the Employment Act 1955 failed to get any protection as provided due to exceptions listed under the act (Part IX, XII, & XIII). From this, foreign domestic worker is not eligible to get basic labour rights including maternity and termination as well as annual and sick leave.<sup>52</sup> Similar situation also happened in Singapore where foreign domestic workers are not eligible to receive all benefits given to a worker, plus they are also exempted to get any redemption and are given limited protection in health insurance in accident cases. There was diplomatic pressure among the ASEAN member states due to the level of protection towards the foreign domestic worker. In 2009, the government of Indonesia had announced to revise on the sending of domestic workers to Malaysia due to rising number of abuse cases from the employer. The government of Indonesia then requested for another discussion regarding the bilateral agreement with the government of Malaysia and requested greater protection for Indonesian domestic workers<sup>53</sup>.

In addition to that, migrant workers often obtain unequal treatment from the ASEAN member states. Research shown that, a migrant worker received different payment for similar jobs in 2 different ASEAN states<sup>54</sup>. Nevertheless, because of the development gap in ASEAN states are obvious, discrimination among migrants is seen as a serious challenge to be settled. This difference may be abolished by setting the wage level, but almost all the ASEAN member states does not approve to make it a practice<sup>55</sup>

Therefore, it is obvious that the level of protection of migrant workers is not at a stage that can be proud of. When the ASEAN region is widely talking on integration, rights and protection of workers within the ASEAN region is not taken seriously. On top of that, migration was not even made easy among

<sup>51</sup> *Ibid.*

<sup>52</sup> Asia Pacific Forum on Women, Law and Development, *The right to unite: A handbook on domestic worker rights across Asia* (Chaing Mai: APWLD, 2010).

<sup>53</sup> Huelser and Heal, "Labour Mobility in ASEAN"

<sup>54</sup> G. Ofori, "Foreign Construction Workers in Singapore" *ILO Sectoral Activities Programme Working Paper*, no. 106 (1993).

<sup>55</sup> *Ibid.*

ASEAN citizens where in certain situation they are still regarded as irregular migrant. This situation is a challenge in realizing an integration such as the AEC. The protection of migrant workers is supposed to be put into serious consideration by the ASEAN member.

## V. ASEAN MEMBER STATES POLICIES ON MIGRANT WORKERS

ASEAN Member states have different labour migration management. This part of the paper will discuss on the policies for states that is highly connected to labour migrants in ASEAN.

### A. INDONESIA

Indonesia is known as a sending country. Most of Indonesia's migrant workers who work overseas are unskilled workers and more than half of whom were women<sup>56</sup>. Besides being a sending country, Indonesia is also a labour receiving country for Myanmar and the Philippines especially in the fisheries sector and restaurant<sup>57</sup>. Many Indonesia's worker are inadequately prepared and do not have the language abilities required in their countries of destination. As an outcome, numerous Indonesian migrants encounter exploitation, mistreatment and abuse from their employers and in addition from their employment agencies.<sup>58</sup>

Indonesia has launched instruments that was expected to secure migrant workers, i.e. Indonesian Government Act No. 39/2004 on the Placement and Protection of Overseas Indonesian Workers, which was trailed by the Instruction of the President of the Republic of Indonesia No. 6/2006 on Policy Ref-ormation of the System of Placement and Protection of Overseas Indonesian Workers. There are additional guidelines and directions launched by the Ministry of Manpower concerning Placement and Protection of International Migrant Workers. However, those were deficient to give ideal protection since a few Articles of the Act were assumed that they do not give appropriate and adequate insurance to the migrant workers. In this manner, many parties, predominantly NGOs and women's group concerned with the issue forcefully requested the government to reconsider the regulation, particularly Act No. 39/2004. The modification referred to the International Convention on the Pro-

<sup>56</sup> Aswatini Raharto and Mita Noveria, "Advoacy Groups for Indonesian Women Migrant Workers' Protection," *Jurnal Kependudukan Indonesia* 7, no. 1 (2012).

<sup>57</sup> Jaya Arisman and Ratnawati Kusuma, *Protection of Human Rights and Labour Migration for Employment Purpose Across* (Jakarta: CSEAS, 2018).

<sup>58</sup> Asian Development Bank, "ASEAN Economic Community"

tection of the Rights of All Migrant Workers and Their Families (ICRMW). As in numerous different countries of origin, most by far of low-wage Indonesian migrant laborers are sent abroad by private enlistment offices and other related associations, managed by the Indonesian government.<sup>59</sup>

Indonesian government policy attempts to regulate recruitment agencies by means of placement regulations that consist of two components: (1) regulating the establishment of recruitment agencies; and (2) determining the duties and responsibilities of recruitment agencies in work placements for labour migrants. This happens because migration management in Indonesia relies upon private agencies. In another word migration policies are to regulate the way migrations are managed by private agencies<sup>60</sup>. Thirteen government institutions are involved in the protection of Indonesian labour migrants: the Ministry of Manpower; the Ministry of Foreign Affairs; the Ministry of Social Affairs; the Coordinating Ministry of Economic Affairs; the Coordinating Ministry of People's Welfare; the Ministry of Health; the Ministry of Communication; the Ministry of Home Affairs; the Directorate General of Immigration; the National Authority for the Placement and Protection of Indonesian Overseas Workers (BNP2TKI); the Indonesian National Police; and the National Body for Professional Certification and the Professional Certification Institute. This involvement has not always been the case, and the 39/2004 law has played an important role in the development of this configuration<sup>61</sup>.

One of the most problematic of the flow development of Indonesian migrant workers to work abroad identifies with exploitation during the working period in destination countries as well as in the recruitment process in the home country and repatriation. The inclusion of Indonesian female in working abroad, particularly as domestic workers, has pulled in significant debate. While there are examples of success stories, plainly these female migrant workers are presented to extensive dangers of exploitation and discrimination. This condition identifies with elements, such as lack of skills and education; lack of migrants'/potential migrants' knowledge of the legal processes of recruitment and placement of labour to work overseas; involvement of brokers in the recruitment and placement processes; Lack of national legal instruments related to the protection of female migrant workers; and Lack of commitment of the Indonesian government to ratifying international legal instruments on the protection of migrant workers, regardless of race or class, gender or the nature of their work. To address this issue, the Indonesia's legislature made

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<sup>59</sup> Arisman & Kusuma, *Protection of Human Rights*

<sup>60</sup> Palmira Permata Bachtiar, "The Governace of Indonesian Overseas Employment in the Context of Decentralization," *Discussion Paper Series* No. 2011-25, (2011), 1

<sup>61</sup> Stéphanie Barral, "Policy and institutional framework of Indonesia," *INTERACT Research Report* (2014)

approaches which are aimed to give better protection to its migrant workers, starting with the enrollment procedure and focusing on setting them up for their deployment abroad, until they return to Indonesia.<sup>62</sup>

## B. SINGAPORE

In 2016, Singapore had 1.393.000 migrant workers who represented 37.9 per cent of aggregate employment.<sup>63</sup> Singapore has an extensive foreign labour, around one-fourth of 5.61 million Singapore's total population are non-Singaporean.<sup>64</sup> Though, growth in non-resident population has slowed since 2013. In contrary, Singaporean national grew at a steady pace through births and immigration, while permanent resident population remained relatively stable. These labour migrants fall into three different classes: highly talented work allow holders (exiles) who gain at least SGD 2,500 (USD 1,790.81) every month; S-Pass holders, who procure a compensation of more than SGD 1,800 (USD 1,289.35) every month; and unskilled (brief) workers who gain not as much as SGD 1,800 (USD 1,289.35) every month.<sup>65</sup>

In Singapore, immigration measures are stricter for unskilled workers—their stay is temporary, they are not allowed to perform occupations not specified on their work permit, their families are not allowed to go with them to Singapore, they should attempt certain medical examinations, they are denied from wedding nationals and permanent residence of Singapore, and their employers must pay a foreign worker levy.<sup>66</sup>

In contrast to other Southeast Asian nations, there are generally a couple of irregular migrants in Singapore. The country's small geographic area empowers Singaporean experts to control the passage and exit of individuals more effectively than in nations with bigger and more permeable national fringes. Effective outskirt administration consolidated with stringent direction of the work advertisement has empowered Singapore as far as possible the quantity of unpredictable migrants<sup>67</sup>.

Singapore has a general Employment Act covering all unskilled and lower skilled workers, local and foreign, except for domestic workers and seamen

<sup>62</sup> Mary Kawar, *Gender and Migration: Why are Women more Vulnerable?* (Geneva: Graduate Institute Publications, 2004), 73. Accessed 29 December 2019, [http://graduateinstitute.ch/files/live/sites/iheid/files/sites/gene/shared/Genre\\_docs/2865\\_Actes2004/10-m.kawar.pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/gene/shared/Genre_docs/2865_Actes2004/10-m.kawar.pdf).

<sup>63</sup> Singapore MOM, "Foreign Workers Number and Employment," Ministry of Manpower, accessed 29 December 2019, available at <http://www.mom.gov.sg/documents-and-publications/foreign-workforce-numbers> and <http://stats.mom.gov.sg/Pages/Employment-Summary-Table.aspx>

<sup>64</sup> Population.sg, "Demographics," <http://www.population.sg/population-trends/demographics>

<sup>65</sup> IOM, *Labour Migration from Indonesia* (Jakarta: IOM, 2010), 53-60.

<sup>66</sup> Brenda Yeoh and Weiqiang Lin, "Singapore: Hungry for Foreign Workers at All Skill Levels", Migration Policy Institute, 2007, available at <http://www.migrationinformation.org/Profiles/display.cfm?ID=570>

<sup>67</sup> IOM, *Labour Migration from Indonesia*, 53-60.

who are explicitly excluded. The explanation for this is the different nature of working environments compared to that of a traditional factory/industrial workplace. There is no minimum wage for foreign workers as is also the case with locals. Wages are given according to productivity and determined by tripartite wage council. The wage levels of Foreign Domestic Workers are affected by direct demand and supply factors. Officially, a worker is not supposed to work for more than 44 hours. A safe working environment is to be ensured. Participation in a half-day health and safety course in the native language of the foreign workers is mandatory as far as the construction sector is concerned. Group medical insurance is to be purchased by employers for foreigners. Employers must also ensure a job before foreign recruitment. A foreign worker levy is imposed to bring the gap between foreign and local skill levels closer through training (but the latter is not provided to)<sup>68</sup>.

The Singaporean Government improves the management of labour migration because of the issues confronting foreign workers. To enhance the condition of migrant workers in Singapore, the government has created safety courses for foreign workers in the construction and maritime sectors; distributed posters on illegal employment for display in public places; and held outreach events, such as dormitory road shows. First-time foreign domestic workers are required to go to a compulsory Safety Awareness Course (SAC), which incorporates critical safety practices, gives contacts of phone numbers and helplines, and informs foreign domestic workers of their obligations, rights and protection under Singaporean law.<sup>69</sup>

### C. MALAYSIA

Malaysia is both a country of origin and destination for migrant workers and the main destination country for Indonesian migrant workers. Malaysian migration overseas is dominated by skilled workers and students studying abroad, while migration to Malaysia is characterized by lower or semi-skilled workers. Malaysia has a high demand for Indonesian migrant workers and is highly dependent on their contribution to its development and industrialization.<sup>70</sup>

The Malaysian Government categorizes labour migrants in three groups:

- a). Documented labour migrants - Enter legally and hold a temporary valid work visa (TEVP) issued by the Malaysian Department of Immigration; - Have the right to receive protection and benefits provided

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<sup>68</sup> Arisman & Kusuma, *Protection of Human Rights*

<sup>69</sup> IOM, *Labour Migration from Indonesia*, 57

<sup>70</sup> *Ibid.*, 41.

- by various Malaysian labour laws and regulations; and - Are usually employed in low-class work sectors and are unskilled.
- b). Expatriate workers- Hold a work permit; - Permitted to bring partner and family to Malaysia; and - Employed in higher managerial and executive positions and technical employment.
  - c). Irregular labour migrants - Violate immigration laws by entering and working in Malaysia without authorization; -Do not fulfill the requirements for protection under the law; and - are vulnerable to exploitation and mistreatment.

The dominant part of labour migrants in Malaysia are lower-skilled or semi-skilled, and primarily occupy jobs that are dangerous, dirty and degrading (also known as “3D” jobs) in sectors such as manufacturing, agriculture, construction and domestic work. These are jobs that a majority of Malaysian citizens do not want to perform at the current wage.<sup>71</sup>

Labour migration to Malaysia is regulated by The Ministry of Home Affairs which is responsible for managing immigration and citizenship matters and enforcing immigration laws in the country. The Immigration Department of Malaysia is the agency within the Ministry of Home Affairs with responsibility for processing requests for work permits and visas and approving admissions. The Ministry of Human Resources implements labour policies, enforces labour laws and oversees Malaysia’s workforce and skills training programme. Furthermore, the Foreign Workers’ Medical Examination Monitoring Agency (FOMEMA) is responsible for taking care of the medical examinations of foreign workers under the annual mandatory health screening program. The Malaysian Government imposes several restrictions on lower-skilled workers to ensure their eventual return to their country of origin. Lower- and semi-skilled migrants are not permitted to bring their family to Malaysia, they must carry their work permit with them at all times and are only permitted to remain for the duration of their contract which usually lasts two years. This period can, however, be extended with the consent of the employer and Malaysian immigration authorities<sup>72</sup>

Passports of migrant workers can legally be held by employers or agents, which place migrants in a very vulnerable position as they can lose their legal status if they run away from an abusive employer. A main issue with regards to migration management in Malaysia concerns migrants who have left abusive employers and need to stay in Malaysia while the case is pending. To remain in Malaysia, migrant workers must submit a request for a special visa

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<sup>71</sup> *Ibid.*, 42.

<sup>72</sup> Arisman & Kusuma, *Protection of Human Rights*

at a cost of MYR 100 (USD 30.10) per month. This permit does not allow for paid employment. The migrant workers must, therefore pay a monthly fee for the special visa and for room and board while being denied an income. This situation is often unsustainable for many migrant workers as court cases can drag out for months or even years. Many abused or exploited migrant workers therefore return to their countries of origin before they have had an opportunity to receive adequate compensation for their work or for the abuses they have endured.<sup>73</sup>

The Immigration Act gives the rules for admission and live duration of migrant workers in Malaysia and authorization has been commanded to the Immigration Department of the MOHA. To deal with a quick increment in the quantity of undocumented migrant workers within its border, the law was amended in August 2002 trying to control the stream of unpredictable migrant.<sup>74</sup>

The Government of Malaysia gives a restricted scope of administrations for migrant workers in Malaysia, with the dominant part of administrations given by civil society organizations and NGOs, including particular migrant community groups. Various changes are at present being considered by the Malaysian Government to give a more extensive system to protect foreign migrant workers. In collaboration with countries of origin, the Malaysian Government intends to give acceptance courses to migrant workers before their landing in Malaysia. This will construct the migrant workers' information of Malaysian culture and traditions, the abilities required for migrant workers to complete their employment, fundamental relational abilities and the material Malaysian laws. Also, a manual will be created for migrant workers, containing essential data relating to Malaysian labour and migration law, procedure for documenting complaints, and a list of contact details for labour office all through Malaysia.<sup>75</sup>

In terms of monitoring, the Malaysian Government intends to strengthen the manpower capacity of the government agencies responsible for the employment of migrant workers, to effectively enforce the law and strengthen statutory inspections to places of employment with a special focus on those employers who employ large numbers of migrant workers. In terms of data and information relating to labour migration, the Malaysian Government intends to enhance the collection of such information through the National

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<sup>73</sup> Asia Migrant Center, "Malaysia: Document and Status," accessed 29 January 2020, <https://www.asianmigrantcentre.org/malaysia>

<sup>74</sup> Vijayakumari Kanapathy, "Migrant Workers in Malaysia: An Overview," *Workshop Paper*, East Asian Cooperation Framework for Migrant Labour, Kuala Lumpur (2006).

<sup>75</sup> IOM, *Labour Migration from Indonesia*, 44.

Employment Return, e-Pampasan<sup>76</sup>, Labour Market Database and Electronic Labour Exchange<sup>77</sup> systems for effective monitoring, management and policy planning. Data and information in the Ministry of Home Affairs' labour migrants Biometric Data System will also be shared to improve the monitoring of employers with migrant workers.<sup>78</sup>

Prior to the enforcement of the tough laws, irregular migrants were granted amnesty to allow them to return to their countries without being prosecuted. However, the regularization and amnesty exercises were perceived as weakness on the part of the government to control irregular migration, and only encouraged foreigners to overstay and seek employment. This has prompted officials to declare that amnesty will no longer be granted. The tough sanctions were paralleled by polices to improve recruitment practices and equip prospective migrants with knowledge of their rights and responsibilities. After more than a decade of policy experiments, it has become apparent that unilateral efforts to address irregular migration were difficult, costly, may strained diplomatic ties with sending countries, and was no longer viable. There was thus a shift from a unilateral to a bilateral approach to labour imports. There was also greater inclination on the part of labour sending countries to strike labour accords with the receiving countries<sup>79</sup>.

#### D. THAILAND

Nowadays, The Alien Employment Act B.E. 25512 (AEA 2008) refers to the definition of migrant workers in Thailand. "Alien" or "foreigner" means a person who is not of Thai nationality and "working" (or "employment") means a work of physical strength or knowledge whether or not intended for wages or any other benefits, based on Section 5 of the Act. So, a migrant worker can be described as an alien or a foreigner who temporarily enters the Kingdom and works, legally or illegally<sup>80</sup>

There are distinctions between 'legal entry' and 'legal work in Thailand'. 'Legal entry' refers to migrants entering Thailand with a proper passport and

<sup>76</sup> e-Pampasan is a Malaysian Government online system to efficiently manage compensation for foreign workers

<sup>77</sup> ELX or Electronic Labour Exchange system (<http://www.elx.gov.my>) is an online system that provides a one-stop service related to the Malaysian job market, including information about vacancies and recruitment agencies

<sup>78</sup> Bridget Anderson, *Worker, helper, auntie, maid?: Working condition and attitudes experienced by migrant domestic workers in Thailand and Malaysia* (Bangkok: ILO, 2016).

<sup>79</sup> Vijayakumari Kanapathy, "Controlling irregular migration: The Malaysian experience," ILO Regional Office for Asia and the Pacific, Working Paper No 14, accessed 29 December 2019, available at <http://www.ilo.org/public/english/region/asro/bangkok/library/pub15.htm>

<sup>80</sup> Thailand, Alien Employment Act, B.E. 2251, Government Gazette, Vol. 125, Part 37 Kor, dated 22nd February B.E. 2551 (2008).

visa, which show a permission to stay with limited duration of stay. The Immigration Division of the Ministry of Interior is responsible for processing entry of foreigners to Thailand. ‘Legal work’ means that migrants who want to work in Thailand need to apply for a work permit from the Ministry of Labor. The work permit indicates type of the job, location of the workplace and duration of the permitted job.<sup>81</sup>

The Department of Employment (DoE) of the Ministry of Labour (MoL) on 16 August 2016 launched the “Royal Ordinance concerning Rules on Bringing Migrant Workers to work with Employers in the Kingdom B.E. 2559 (2016)”. The aims of this new legislation are to appropriately regulate the recruitment of migrant workers to work in Thailand, prevent smuggling of migrant workers coming to work in Thailand irregularly, and strengthen protection for all stakeholders to receive fair treatment based on international guidelines, procedure and standards. According to immigration policies, the Royal Ordinance specifies two modalities of recruiting migrant workers: 1) Direct recruitment by employers, which require payment of a deposit to the responsible governmental agencies according to the official rate; and 2) Recruitment through licensed recruiters with permission granted by this Royal Ordinance who are required to pay a deposit at a minimum rate of 5 million THB and must comply with official procedures to recruit migrant workers.<sup>82</sup>

Thailand’s immigration policy is based on two acts: Immigration Act 1979 and the Foreign Employment Act 1978. According to the 1979 Immigration Act, an immigrant who enters the country without visa and /or acts in breach of the immigration law becomes illegal and is subject to deportation and /or penalty by other sanctions. Nevertheless, under the implication of Section 17, an illegal migrant worker can be exempted from deportation if the registration process is undertaken. Article has been the basis for the registrations that define Thailand’s immigration policy. Migrants must obtain work permit and be eligible to work only under designated sectors while prohibiting activities such as general labor, farming, weaving and construction under the Foreign Employment Act 1978. However, Section 12 provides the authorities to allow migrants to work temporarily in some sectors as conditioned by cabinet decisions. A key concern in the policy is to prevent irregular migration and to encourage migrants to return home upon the end of their temporary work permit which was clearly stated in “The Bangkok Declaration on Irregular Migration” from International Symposium it hosted in 1999. Thailand’s La-

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<sup>81</sup> Aphichat Chamrathirong, “The ‘Regional Demographic Transition’ Towards Peace and Prosperity: A Case Study of Thailand and its Neighboring Countries,” accessed 29 December 2019, [https://www.migrationcenter.mahidol.ac.th/news\\_detail.php?id=39](https://www.migrationcenter.mahidol.ac.th/news_detail.php?id=39)

<sup>82</sup> Arisman & Kusuma, *Protection of Human Rights*

bor Protection Act, updated in 2008, does not discriminate between Thais and foreigners in terms of labor rights protection and just wages. According to current Ministry of Labor official statistics, minimum wage in Thailand varies from 203 baht per day in Bangkok to 104 baht per day in the rural provinces. Thailand has signed off on a number of international conventions and there are a range of laws in place which theoretically protect the rights of all migrants but, so manytimes, it does not translate into practice, even for those migrants who are legally registered with work permits.<sup>83</sup>

## E. PHILIPPINES

The history of migration in the Philippines with immigration and emigration within the region, should be traced back for hundred years. Due to American control from 1898 until the mid 1900's, "international migration" for Filipinos meant movement to the United States for much of the twentieth century. The first group of Filipino workers arrived in Hawaii in 1906, and more followed, expanding to California, Washington, Oregon, and Alaska. Most were single men. They took positions in agriculture, fisheries, and low-wage services such as restaurant and domestic work. It is reckoned that the total sum in the USA amounted to 150,000 between 1907 and 1930, most of whom were in Hawaii.<sup>84</sup>

In the Philippines, four government entities are responsible for labour migration – the Philippines Overseas Employment Administration (POEA); the Overseas Workers' Welfare Association (OWWA); the Department of Foreign Affairs; and the National Reintegration Center of Overseas Filipino Workers. As of 2010, the Philippine government had signed 49 bilateral labour agreements with 25 countries and territories also.<sup>85</sup>

In order to protect their migrant workers overseas, the Philippines government has mandated the establishment of the Office for the Undersecretary for Migrant Workers Affairs (OUMWA) at the Department of Foreign Affairs. Where there is a high number of a concentration of OFWs, the law mandates the setting up of a Filipino Workers Resource Center. The Philippines has 67 embassies, 23 consulates, four permanent missions, one extension office, and 38 Philippine Labour Overseas Offices that assist Filipinos living and working abroad. These offices act as receiving, registration and information centers that would be able to immediately respond to queries about Social Security

<sup>83</sup> Khen Suan Khai, "Thailand's Policy Towards Irregular Migration: Situation Analysis of Burmese Migrant Workers Under Thailand's Migration Policy," *MFU Connexion* 1, no. 1 (2012).

<sup>84</sup> Maruja M. B. Asis, "The Philippines' Culture of Migration," Migration Information Source, January 2006, accessed 29 December 2019, <http://www.migrationinformation.org>

<sup>85</sup> Center for Migrant Advocacy - Phillipines, 2010

System program and operation.<sup>86</sup>

Although Philippine laws and government agencies provide support to Filipinos abroad, numerous cases of unfair treatment of migrant workers have been documented. These include nonpayment of wages and salaries, physical, mental, and sexual abuse, isolation and confinement in homes, lack of redress and legal representation. In many cases, the labour and social laws of the states of employment provide limited assistance and protection. The Center for Migrant Advocacy Philippines also mentioned that even though the Philippines government has signed many bilateral labour and social security agreements with other countries, often these agreements are poorly implemented and migrant workers do not really get the benefits promised. However, in some cases, social security provided to Filipino migrants in a host country is superior to that provided to Filipino's by the Philippines social security system.<sup>87</sup>

## F. MYANMMAR

As an effective migration management body, government of Myanmar lacks a comprehensive and holistic migration policy. In the past, the Overseas Employment Service (Employment and Training Department at the Ministry of Labour) facilitated regular deployment of Myanmar migrants overseas and migration was the responsibility of the Ministry of Foreign Affairs. However, generally regular migration relied on workers using expensive private recruitment companies and personal connections (i.e. 'legally' and formally) that are limited to higher skilled workers and/or to Korea, Malaysia and Singapore and generally.

Myanmar Immigration (Emergency Provisions) Act 1947 states in Article 3.2 that 'No citizen of Myanmar shall enter without a passport....' Article 13.1 states breach of this provision can result in 6 months to 5 years imprisonment or also a 1, 000 Kyats fine. This provision hinders basic freedom of movement and results in departure and return to Myanmar being conducted irregularly out of fear of punishment and undermining the rule of law. In addition, there has been no transparent Myanmar policy to receive arrested and deported irregular migrants from overseas, particularly from Thailand. Irregular workers fall into cycles of arrest, extortion, trafficking, debt bondage and deportation at borders as a result. Serious policy attention to this situation continues to be required. Myanmar's consular has assistance programmes to overseas migrants, particularly irregular workers, remains limited. Embassies have pre-

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<sup>86</sup> Andy Hall, *Migrant Workers' Right to Social Protection in ASEAN: Case Study of Indonesia, Philippines, Singapore and Thailand* (Singapore: Fridrich-Ebert-Stiftung, Office for Regional Cooperation in Asia, 2011).

<sup>87</sup> Arisman & Kusuma, *Protection of Human Rights*

viously prioritised collection of high rates of tax from regular migrants and denied consular assistance to irregular workers on the basis they left Myanmar in breach of immigration laws. Services for official documents or lost or stolen passports continue to be inefficient, non-existent or expensive. There has also been no clear policy from the Myanmar government and its embassies to prioritise protection of Myanmar migrants against the gross exploitation they often suffer or provide basic translation services to workers and non-governmental organisations assisting workers. Embassies are often implicated in the unregulated broker networks they approve for regularisation processes that place workers into positions of debt bondage and abuse also.<sup>88</sup>

## VI. CONCLUSION AND RECOMMENDATION

### A. CONCLUSION

For an institution like ASEAN, based on the mantra of noninterference, making common policies on a tricky issue like migration is challenging. But for the organization to mature and become more like the European Union, it must tackle hard topics, including migration. When it comes to economic migration, countries may differ on the technicalities such as job contracts and decide on accepting different numbers of immigrant workers. But there should be ASEAN-wide agreements on humanitarian aspects of labor migration including workplace safety, and ethical practices for recruiting, employing, paying and treating migrants.

Illegal labor migration thrives in the absence of clear and transparent rules and migration channels. Policies should be benchmarking policies against international standards such as those of the EU, which are particularly robust. Here we are not suggesting EU-style freedom of movement but a common EU-based framework for the human rights of migrants. Country-specific policies for low-skilled migrants should, over time, be harmonized. Where there is political resistance to granting naturalization to immigrants, then migrants' rights as resident noncitizens can be made more dignified. Wealthier host countries, such as Singapore, should lead the way. While ASEAN has primarily been an economic organization, it has already acknowledged the need for action on human rights with the creating of bodies such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Treating migrants ultimately benefits both the migrants and the host country. The free movement of workers boosts economic growth,

<sup>88</sup> Arisman & Kusuma, *Protection of Human Rights*

trade and the spread of innovation. Regions which fail to facilitate the well-managed movement of labor do not only jeopardize the dignity and even the lives of migrants, they also harm their own economic interests<sup>89</sup>.

Therefore, it is abundantly clear that the irregular migrants in ASEAN should be taken into serious consideration. All of the recommendation such as harmonizing laws and policies had always been suggested by many scholars, but the act must be done by the member states themselves. It has always been a national interest or sensitivity when it comes to irregular migrants, nevertheless it is about time that all member states of ASEAN buckle up and work together to solve this issue for a better migration flow in ASEAN as well as in ensuring the success of ASEAN in becoming a community.

## B. RECOMMENDATIONS

ASEAN is becoming an increasingly desirable destination for foreign direct investment and commerce. However, at this time underdeveloped labor laws and inadequate protection of workers in many member states prevent facilitation of this economic development. Currently in accomplishing the tasks required in commerce, there is much ebb and flow of legal and illegal workers among member states (usually between undeveloped and developed countries). While ASEAN is addressing the labor mobility issue by credentialing skilled and professional workers, there is still great need to clarify these workers' legal eligibility under the other areas of workplace regulation typically addressed by labor standards legislation. This looming problem is even larger for those millions of unskilled and undocumented workers crossing borders for work. External obligations on a number of ASEAN members arising from FTAs, such as from the TPP, place additional pressures on these countries to ratify ILO Conventions and upgrade their workers' domestic labor protections.<sup>90</sup>

To have an effective regional policymaking process, AMS have to agree and commit to shared goals – particularly in the case of sensitive issues, e.g. migration policy, handling refugees, and minorities issues. Aligning the process with SDG adoption will create synergy and reduce potential disputes because of the common goals of the Agenda for Sustainable Development. It is also important to synchronise the roles of national policy actions and regional cooperation.

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<sup>89</sup> *Ibid.*

<sup>90</sup> Ronald C. Brown, "ASEAN: Harmonizing Labor Standards for Global Integration," *Pacific Basin Law Journal* 33, no. 1 (2016).

As a region, ASEAN needs to speed up the harmonisation of rules and regulations, especially in focus areas, including the implementation of mutual recognition agreements, flexible labour exchange, knowledge exchange, social protection, and disaster risk management. For some AMS, bilateral or subregional agreements on certain issues may work to allow greater labour mobility and provide continuous social protection. The region also needs to establish protocols to handle cross-border communicable diseases, refugees, and forced migrants. In parallel with international regulatory cohesion, domestically, each AMS must put in place regulatory review mechanisms, based on dialogue between the private sector and regulators, to prevent companies from being burdened with implementing regulations that serve no clear purpose while still allowing regulators to provide the oversight and due diligence needed to protect the public.<sup>91</sup>

Both receiving and sending countries can consider changes. Destination countries can develop migration systems that are responsive to their economic needs and consistent with their domestic policies. Malaysia, for instance, can tailor its system of levies on foreign low-skilled workers to changing economic conditions across the region, particularly through more collaboration with employers as well as sending countries. With high levels of informal migration, Thailand can rationalize its entry procedures so that they take less time while rethinking measures such as levies that are difficult to enforce.<sup>92</sup>

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<sup>91</sup> Fauziah Zen, et. al. "Leave No One Behind," in *Transforming and Deepening the ASEAN Community*, F. Kimura, V. Anbumozhi, H. Nishimura, eds. (Jakarta: ERIA, 2019), 147-162.

<sup>92</sup> *Ibid.*

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