



CALL FOR REGIONAL STANDARD-SETTING ON THE HUMAN RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION AND MIGRANT DOMESTIC WORKERS

An Appeal to the Asia Pacific Forum of National Human Rights Institutions based on the Jakarta Process Review

Kuala Lumpur, 28-31 July 2008

According to the International Organization on Migration (IOM), there were an estimated 191 million migrants worldwide in 2005, of which 49.5% were women, and 15-20% (30-40 million) were estimated to be 'unauthorized' migrants. Both categories of migrant workers have long been extremely vulnerable to abuse and exploitation owing, firstly, to an absence of legal guarantees for their protection. Until this day, there remains to be no objective legal definition of migrants in an irregular situation, and there exists no ILO Convention expressly dealing with domestic workers, despite the existence of various ILO conventions which cite acceptable standards and remuneration that are applicable to domestic workers. This appeal is made to address this detrimental gap and to call upon national human rights institutions in the Asia Pacific region to take leadership in setting the standards which would provide the foundations for human rights protection of these two vulnerable groups of migrants.

In 2006, the Jakarta Process¹ commissioned a review which reframes the debate around migrants in an irregular situation and migrant domestic workers by calling for the recognition of human rights of these two migrant populations and by exploring the specific role of national human rights institutions in realizing such rights. This appeal is based on the concerns and recommendations documented in the Jakarta Process-initiated Review.

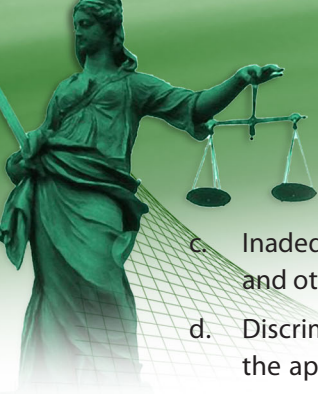
THE CONCERNS

The Jakarta Process Review has identified several key concerns and issues considered detrimental to the human rights of migrants in an irregular situation and migrant domestic workers which are related to existing legal, policy, and institutional frameworks.

Legal Framework

- a. Constitutional frameworks which restrict guaranteed rights for foreigners/aliens (including migrant workers) vis-à-vis citizens; or allow broad state prerogatives to limit both citizens and foreigners' rights ;
- b. The absence of legal recourse to challenge state measures or state abuses or excesses, which would limit judicial opportunities to contribute to the expansive interpretations of human rights standards especially for these migrant workers;

¹ The Jakarta Process is a regional meeting convened by the National Commission on Violence Against Women (Komnas Perempuan) in Jakarta in July 2006 bringing together civil society organizations, migrant workers associations, and national human rights institutions from eight Asian countries, as well as the UN Special Rapporteur on the Human Rights of Migrants. The meeting called for a review focusing on human rights protection systems in the Asian region for undocumented migrant workers and migrant domestic workers, with case studies of NHRIs in Indonesia, the Philippines, Malaysia and South Korea. The review was conducted by Eleanor Conda and Sharuna Verghis, in collaboration with a Steering Committee comprised of representatives from Migrant Forum Asia (Philippines); the Asia Pacific Forum on Women, Law, and Development (Thailand); ASEAN's Task Force on Migrant Workers (Singapore); Tenaganita (Malaysia); SBMI-Indonesian Migrant Trade Union (Indonesia); the Human Rights Commission of Sri Lanka; and the National Commission on Violence Against Women (Indonesia).



- c. Inadequate laws and policies for the protection and promotion of the economic, social, political and other human rights of migrant workers in an irregular situation and migrant domestic workers;
- d. Discrimination in laws against migrant workers in irregular status including their exclusion from the application of and protection under migrant worker-specific legislation;
- e. Discrimination in laws against migrant domestic workers such as non-recognition in labor laws as workers including their classification under these laws as e.g. "domestic servants"; different treatment of migrant domestic workers of particular nationalities under immigration; limitations in access to legal remedies in case of violations of rights;
- f. Weak enforcement or implementation of policies, laws and programs including those providing for labor standards, social protection, and prohibition against discrimination against these and other migrant workers,

Policy Framework

- a. Labour migration policies and programs that result in heightened risks to or direct violations of the rights of these two groups;
- b. Inadequate poverty alleviation or domestic job generation programs to afford workers viable alternative choices for employment;
- c. Discrimination in policies and practices in areas like medical examination requirements for unskilled migrant workers different from other migrant workers or other foreigners, or requirement for pregnancy tests for women migrant workers; or prohibition against marriages of migrant workers during employment; deny rights to be recognized as trade unions or as associations;
- d. Inadequate integration of gender perspectives in state policies and programs, including those for support services and assistance;
- e. Lack of or inadequate provision for measures (including temporary special measures) to ensure that migrant workers with an irregular status and migrant domestic workers substantively enjoy equality in rights in employment or in economic, political, social and other fields;
- f. Inadequate measures for an expansive approach to human rights protection and promotion of the two groups through different stages in labour migration namely pre-departure, recruitment, transit, employment, repatriation, and re-integration;
- g. Inadequate measures for a comprehensive and integrated approach - including in the monitoring and analysis of human rights situations and in the formulation and implementation of relevant laws, policies and programs, - that reflects the interrelatedness and indivisibility of human rights of migrant workers in an irregular situation and migrant domestic workers in various areas, e.g. social, political, civil, economic, and cultural;
- h. Lack of refugee protection regimes nationally and harmonization of asylum policies regionally, including development of regional mechanisms of burden sharing.

Institutional Framework

- a. Lack of consistency in or inadequate capacity to integrate human rights perspectives and standards in the functioning of labour migration-related agencies and structures that may result in the impairment or violation of the rights of these two groups despite strong constitutional and legal guarantees of human rights;
- b. Absence of effective state bodies whose specific mandates and responsibilities span the range of migrant workers' human rights concerns from pre-departure to reintegration, and the weak coordination within and among the states' implementing bodies and structures concerned;

- c. Lack of effective and consistent human-rights based monitoring system in the implementation of concerned laws, policies and programs, including implementation of existing bilateral agreements and memoranda of understanding on labor;
- d. Inadequate or lack of institutionalized and effective consultation and accountability mechanisms

Countries' political environments may be such that public protests and dissent, including in relation to migrant workers' human rights issues, may be stifled and venues may be limited for public dialogues especially on labour migration policies and strategies, and on the human rights status of migrant domestic workers and migrant workers with irregular status. Additional challenges to advancing the human rights of these migrant workers are posed by societal contexts wherein racial or xenophobic sentiments exist, women are generally considered inferior in legal or de facto status, or stigma is attached and low regard is accorded to certain areas of work like domestic service. These factors need to be addressed in furthering the human rights of these migrant workers in particular.

THE APPEAL

National human rights institutions (NHRIs) have made manifest on several occasions including in the Zacateas Declaration (2004) and the Santa Cruz Declaration (2006) that they acknowledge their role and commit to take specific measures vis-à-vis migration and the human rights protection of migrant workers:

“14. NHRIs shall advocate for a human rights approach to migration and migration management. NHRIs underline that each State is responsible to guarantee respect for the human rights and fundamental freedoms of all persons regardless of their migration status,

15. NHRIs play an important role in ensuring efficient domestic legal protection of all migrants, including access to justice, non-discrimination and equal treatment, including full and effective protection in all areas of society” (Santa Cruz Declaration, 2006)

In the 2006 Declaration, the NHRIs have also identified a comprehensive list of areas in which they can intervene to promote and protect the human rights of all migrant workers.

The Asia Pacific Forum of National Human Rights Institutions (APF) play a significant role in providing a framework of functional cooperation for national human rights institutions in the Asia Pacific region and in coordinating the participation and collaboration of national human rights institutions in the United Nations and other international fora. Based on its findings, the Jakarta Process Review strongly encourages APF:

1. To play an influential role in leading regional standard setting on the rights of migrants in an irregular situation and migrant domestic workers, and in supporting NHRIs in strengthening their protection and promotion of the human rights of these workers. Some measures that it can consider are as follows:
 - 1.1. Explicitly include migrant workers in an irregular situation and migrant domestic workers among the more vulnerable groups whose human rights protection and promotion are prioritized in its policymaking and programming;
 - 1.2. Initiate, through the Advisory Committee of Jurists, the development of a legal framework document- taking into account evolving standards and precedents internationally and nationally that have the greatest human rights-protecting and promoting potential, in respect to migrant workers in an irregular situation and migrant domestic workers' rights;
 - 1.3. Develop guiding principles and provide substantive inputs in support of NHRI-members' advocacy for and promotion of the strongest possible standards for the human rights protection and promotion for migrant workers in an irregular situation and migrant domestic workers, at the national, regional and international levels;

- 1.4. Request members to include in their annual reports to the APF information on the status of human rights protection and promotion with regards migrant domestic workers and those in irregular situation;
 - 1.5. Organize regional colloquium on Developments in Regional and International Standards on human rights of migrant workers in an irregular situation and migrant domestic workers in support of the APF's agenda for strengthening human rights protection and promotion for these migrant workers;
 - 1.6. Facilitate on-going exchanges, intra and inter-regionally, among NHRIs and with other bodies such as the Inter-Parliamentary Union, regional bar associations, and other pertinent organizations, toward the development and promotion of the strongest possible standards of human rights protection and promotion for subject migrant workers.
2. For the APF and its NHRI-members to advocate for and promote the strongest possible standards for human rights protection and promotion of these two subject groups within the UN human rights system and other related international bodies; within the ASEAN or other regional formations with respect to APF members whose countries belong to these groupings; and in international and regional fora like on migration and development, anti-terrorism, human security, good governance, and so on, whose objectives and focus may implicate human rights especially of the migrant workers of particular concern in this Review.
 3. For APF to support its members in promoting integrative approaches that advance human rights protection and promotion of migrant workers in irregular situation and migrant domestic workers through such measures as:
 - 3.1. formulation of comprehensive and integrated plans of action;
 - 3.2. setting up of specialized structures and systems of coordination and monitoring within the institutions;
 - 3.3. allocation of adequate human and material resources to the implementation of the plans;
 - 3.4. capacity-strengthening to enhance understanding and skills among the NHRIs' membership, management and personnel, related to migrant workers' human rights particularly those in an irregular situation and in domestic work;
 - 3.5. strategic and institutionalized cooperation and partnership with key state agencies and structures; and,
 - 3.6. regular and institutionalized consultation and cooperation especially with the two subject migrant worker groups, migrant advocacy and support organizations, and other concerned sectors of civil society such as the media and bar associations to name a few.

**Secretariat of Jakarta Process
Komnas Perempuan**

Contact:

Komnas Perempuan (National Commission on Violence Against Women)
Jl. Latuharhary 4B, Menteng, Jakarta 10310, INDONESIA
(Ph.) +62 21 3903963, (F) +62 21 3903922