

MOVEMENT PROTECTION: OPPORTUNITY TO IMPROVE VIETNAM MIGRATION LAW

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Abstract

In recent years, two major issues that humanity has faced are forced migration and climate change. Climate change is affecting human life and, if not mitigated, will continue to lead to global warming, desertification, the rise of sea levels, the disappearance of islands, and the increased frequency and scale of climate-related natural disasters. Many Vietnamese workers overseas have had negative effects as a result of the COVID-19 pandemic and the war between Ukraine and Russia. Given the situation, Vietnam has been adopting laws and several programs to protect the rights of women migrant workers overseas and to provide secure employment prospects for workers who return home. However, Vietnam hasn't joined the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). This convention contains a considerable number of provisions for migrant workers. This paper analyses and describes the advantages and challenges of Vietnam as a member of the ICRMW Convention.

Keywords: *movement, protection, migrant workers, Vietnam Law, human rights.*

1. Introduction

Migrant workers in Vietnam are mainly export workers. Vietnam's labor export process is marked by three main stages (1975-1996, 1980-1991 and after 1994).

Robert E.B. Lucas¹ indicated that from 1975 to 1996, Vietnam had more 755 thousand refugees aboard. In addition, from 1980 to 1991, Vietnam had an agreement to send approximately 300 thousand workers to the Soviet bloc countries.

Following the collapse of the Soviet bloc and changing conditions inside Vietnam, workers from Vietnam are now looking elsewhere, particularly to Thailand and more recently to Taiwan.

The first and second phases are aimed at Eastern European bloc countries and the former Soviet Union. The third phase began in 1994 with the destination being East Asia, and the target audience were contract workers or interns.

Taiwan (China), Japan, Korea, Laos and Malaysia are the major labor receiving markets of Vietnam. Vietnam's export workers mainly in Malaysia, Taiwan and Korea.

In general, the above markets, although promising for Vietnamese workers, are only open to skilled workers. This is a big, globally competitive challenge for labor sending countries like Vietnam. Therefore, there are still many illegal migrant workers due to insufficient conditions to meet the requirements of the receiving country such

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¹ Lucas R. E. (2001). *Diaspora and Development: Highly Skilled Migrants from East Asia*. Boston: World Bank, p. 78.

as qualifications, language, etc.

There are two major concerns related to labor export abroad: one is the situation where the employer violates the workers' rights; and the second is that the employee breaks the contract.

Chia Siow Yue² emphasized that the reality of labor exploitation and mistreatment still exists for migrant workers in ASEAN, one of the important reasons being that many ASEAN countries, including labor exporting countries, have not yet ratified international treaties for protection of migrant workers. For instance, Vietnam has not joined the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - ICRMW. Among the fundamental causes of international migration, family reunification also occupies an important place, and protecting the rights of migrant workers and their families plays a very important role.

2. Migrant worker protection in Conventions

In the late 1930s, the International Labour Organization (ILO) issued several treaties regarding migrant workers. The first treaty in this area of the ILO is the Migration Convention on Employment. This convention was later amended by the Migrant Workers Convention (Convention No. 97 of 1949). Following this, in 1975, the ILO adopted Convention No. 143 on migrants in abusive environments and the promotion of equality of opportunity in the treatment of migrant workers.

The International Convention on the

Protection of the Rights of All Migrant Workers and Members of their Families (ICMRW)³ is a comprehensive international human rights mechanism adopted with the purpose of protecting the migrant workers and members of their families. However, as compared to other international human rights treaties, the ICMRW has been less recognized by States.

According to the available information⁴, until this date there are only 58 States which have ratified the Convention, 11 signatories, and 129 no action, and Vietnam has not joined. This low ratification record shows that most governments do not consider the rights of migrants as 'real' human rights that should be guaranteed by international law.

According to United Nation Migrant Worker Convention, such under-ratification is an expression of the conflict between globalization and the necessary mobility of labor across borders on the one hand and the need for protection and for a right-based approach toward the governance of migration on the other.

Bridget Anderson⁵ argues that the labour demand and supply are not generated independently. Instead, there is a dynamic and mutually conditioning relation between labour demand and supply. Employer demand for labour is malleable, aligning itself with supply, at the same time, labour supply adapts to the requirements of demand. Additionally, in many sectors increasing, employer demand for migrant workers can, to a significant degree, be explained by 'system effects' that produce certain types of domestic labour shortage.

² Yue C. S., *Demographic Change and International Labour Mobility in Southeast Asia- Issue, Policies and Implication for Cooperation*, in G. H. Young (ed.), *Labour Mobility in the Asia-Pacific Region*, ISEAS Publishing, 2008, p. 93.

³ Adopted by General Assembly resolution 45/158 on 18 December 1990.

⁴ <https://indicators.ohchr.org/>.

⁵ Bridget Anderson M. R., *Who needs migrant workers?*, Oxford University Press, 2012, p. 98.

Desmond⁶ notes that despite the diverse setbacks pertaining to its ratification, the ICMRW is perhaps more significant today than it ever was, as more and more people are on the move. With an increasing number of migrants worldwide and the relative rise of human rights violations toward migrants, the ICMRW represents a potentially relevant strategy to safeguard the human rights of migrants. In this context, this chapter aims at providing a general assessment of the ICMRW, identifying the major obstacles that prevent its ratification, and highlighting the diverse limitations toward its full implementation.

Antoine⁷ explains why ICMRW focus on the rights of migrant workers, not others' rights like irregular, migrants, trafficked migrants, migrant women. This is not just a matter of words, as this semantic change has political implications.

However, it is necessary to place a focus on human rights as well (rather than only labor rights) in order to safeguard immigrants who are not employed or whose presence is only partially related to their ability to work.

The ICMRW refers to this category of people as 'members of the families' of migrant workers, yet, one can think of other 'non-working' categories of migrants whose significance has increased in scholarly and policy debates since the Convention was adopted (for instance forced or trafficked migrants).

However, as will be addressed below, a significant portion of the present scholarly and policy arguments on the ICMRW centre on the trade-off between nationals' and non-nationals' rights, with the former being

opposed to the latter.

The Convention is less likely to be ratified, as this essay will argue, if citizens believe that it merely grants rights to outsiders. This might easily generate negative responses along a 'we and them' division.

Ratification can be seen as favourable not only for citizens, but also for foreigners if, on the other hand, the ICMRW is presented from the perspective of international labor and as a problem that benefits all workers by limiting competition amongst them.

Some authors⁸ report that NGOs which usually play an important role in building document of almost Conventions were largely absent in the case of the ICMRW. This Convention almost focus on social and economic rights while people think human rights aim to civil and political rights. This resulted in a lack of civil society support for the Convention.

3. The rights of migrant workers and members of their families are protected by the 1990 international convention

Content-wise, the ICMRW provides a more precise and specific interpretation of the way human rights should be applied to migrant workers which target other potentially vulnerable groups (women, children and, more recently, disabled people, for example).

While ICMRW codifies some new rights specific to condition of migrants (such as the right to transfer remittances or to have access to information on the migration

⁶ Desmond A., *Introduction: the continuing relevance of the UN ICMRW*, in Desmond A., *Shining new light on the UN Migrant Workers Convention*, Pretoria University Law Press, 2017, pp. 1-22.

⁷ Antoine P., *The Politics of the UN Convention on Migrant Workers' Rights*, in *Groningen Journal of International Law*, vol 5 (1): Migration and International Law, 2017, p. 59.

⁸ Mariette G., Marie D., *Role of Civil Society in Campaigning for and using the ICMRW*, in *Migration and Human Rights*, Cambridge University Press, 2009, p. 72.

process), one of the most important thing is that ICMRW covers the rights for undocumented migrants.

Logically, undocumented migrants are human beings and, as such, are protected by international human rights law; the ICMRW puts this on paper, in a way that earlier treaties did not. However, it is controversy when the destination States are required to guarantee the people they may not wanted to admit. States tend to find it very difficult to respect migrants' rights when trying to remove undocumented migrants and, in practice, these measures regularly lead to human rights violations⁹.

The legal doctrine¹⁰ has frequently noted that the ICMW generally complies with current legal norms, particularly in Western democracies. States would find it reasonably simple to ratify if they were inclined because the majority of the rights outlined in the ICMW are already covered by their own laws.

This convention is more noticed to Asia countries than suitable domestic law. One¹¹ of the most detailed analyses found that 'Belgian national law is (in practice) highly compatible with the provisions of the Convention'.

ICMRW calls for a new set of rights that they haven't existed before in domestic laws, therefore no legal obstacle that could justify the reluctance to ratify and implement the Convention. Antoine¹² wrote that from a cost-benefit perspective, the rights of migrants are difficult to reconcile with market logics in destination countries and there are structural economic forces that make it very difficult to reach multilateral

agreements on migrant workers' rights. In particular, the socio-economic imbalances between origin and destination States make reciprocal arrangements almost impossible.

It is true for Vietnam case that in Vietnam Labour Code has not enough article or agreements relevant to movement protection of export workers. There is a number of migrant workers aboard as low-skilled labour without degree of practical certificate. They are hired for domestic or health-care work and almost no guarantee from Government. Undocumented migrant workers are sent every year because they desire to move out their country for ensuring higher life standard with good salary. This is one of reasons why Vietnam has not ratified the ICMRW Convention.

One of the central contents of the 1990 International Convention is the rights of migrant workers as provided for in Parts III and IV of the Covenant. These rights can be divided into 2 basic groups:

civil and political rights group: no migrant worker or member of their family shall be subjected to torture, ill-treatment, inhumane or degrading treatment or punishment; no migrant workers or members of their families shall be enslaved, forced or forced to work;

economic, social and cultural rights group: all migrant workers and their families are entitled to health care; the right to an education equivalent to that of people in the country of origin; the right to ensure respect for the cultures and beliefs of migrant workers and members of their families and not to interfere in preventing them from maintaining cultural ties to their country of

⁹ Bosniak L. S., *State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention* in *International Migration Review*, 2023, p. 34.

¹⁰ Euan Macdonald, Cholewinski R., *The ICRMW and the European Union*, in *Migration and Human Rights*, Cambridge University Press, 2009, p. 158.

¹¹ Vanheule D. F., *The Signifiant of the UN Migrant Workers in European Journal of Migration and Law*, 285, 2004, p. 320.

¹² Antoine P., *op. cit.*, p. 90.

origin.

In addition, the 1990 International Convention also stipulates two groups of special rights for migrant workers: accommodation-related rights for migrants who have a legal place of residence in the host country and group of rights related to accommodation, especially for migrant workers.

With a comprehensive regulation of the rights of migrant workers, the 1990 International Convention attempted to establish the minimum standards that Member States should apply to migrant workers and Members. In addition, the 1990 International Convention also covers the protection of the rights of undocumented migrant workers, in which states recognize that workers with informal status often exploited and suffered serious human rights violations. The Convention recognizes that appropriate action should be encouraged to prevent and eliminate the illegal movement and entry of migrant workers, and to protect their human rights.

4. Challenges and Opportunity to improve Vietnam Immigration Law

Van Krieken¹³ wrote that the final draft of convention is more consensual but nevertheless grants rights to irregular migrants in a way that is much more explicit than in other human rights instruments.

While the Convention establishes a distinction between regular and irregular migrants, with more rights for the former than the latter, it does not permit reservations that would exclude irregular migrants from the scope of the Convention (Article 88). From a labour protection or human rights

perspective this makes a lot of sense. From the perspective of destination States, this can be interpreted as challenging their right to control and regulate migrants' movements and as an indication that the ICMRW is predominantly based on origin countries' interests.

Vietnam is one of the countries with a large foreign migrant workforce. According to data released by the ILO, every year about 80,000 Vietnamese workers go abroad to work. In total, there are currently about 400,000 Vietnamese workers working abroad, sending an amount of money about 2 billion USD to the country every year.

Reality shows that Vietnamese migrant workers play an important role in the economy financial resources of the country. In order to manage Vietnamese migrant workers abroad, many legal regulations have been issued.

However, in order to effectively manage and protect the rights of migrant workers, one of the important issues is the mechanism to bind the responsibilities of the relevant countries through a multilateral international commitment because Vietnam has migrant workers abroad, conversely many countries also have migrant workers in Vietnam¹⁴.

For Vietnam, the optimal solution to this problem is to join multilateral international conventions related to the protection of the rights of migrant workers, of which the 1990 International Convention is a fully governing convention and comprehensive.

Joining the Convention helps Vietnam to complete a number of gaps in the law on migrant workers as follows.

- *completing the definition of migrant*

¹³ Van Krieken P., *Migrants' Rights and the Law of the Sea: Further Efforts to Ensure Universal Participation*, in *International Migration*, 2007, p. 74.

¹⁴ Durst Jurdit, *Introduction. Cultural Migrants? The Consequences of Educational Mobility and Changing Social Class Among First-in-Family Graduates in Hungary*.

workers: A full and official definition of migrant workers will make an important contribution to clearly defining the scope of subjects considered as Vietnamese migrant workers abroad that need to be covered. Therefore, Vietnam has a plan of ensure and response to the object that needs protection because the Vietnamese are abroad;

- *the reality of migrant workers abroad*: the number of Vietnamese people working abroad is quite large, workers working abroad significantly contribute to the economic development of Vietnam through remittances sent back home. However, Vietnamese workers working abroad still face risks and challenges such as high costs, fraud in the recruitment process, and some forms of labor rights violations even the problem of illegal migrant workers and very limited access to a complaint mechanism.

The issue of concretizing necessary mechanisms to protect the rights of Vietnamese workers abroad, especially specific communication channels in emergency situations. The process of handling the case of 39 illegal Vietnamese workers in the UK¹⁵ as well as many other cases has shown the need to establish an international coordination mechanism to intervene quickly when problems arise toward issues related to migrant workers occur in practice.

The ICJ will be the competent international court for solving potential conflicts, under Article 92:

'Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the

*date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court'*¹⁶.

However, there are some challenges for enjoying the 1990 International Convention:

a) the conflict of laws between the application of the Convention and the domestic law: application of the Convention, pursuant to Article 6 of the International Treaty Law;

b) conflict in analysing 'migrant workers': under Vietnam Labour Law, Article 3 of 152/2020/ND-CP does not mention about the nationality of migrant workers, while Article 2 of the ICRMW regulates that: 'The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. Therefore, when joining the 1990 International Convention, in case workers have two nationalities of Vietnam and the country which they will come to work, there will be conflicts in the interpretation of the language. If Vietnam joins this Agreement, Vietnam need adjust definition of 'migrant worker' in the domestic law.

5. Conclusion

With the basic contents as analysed above, it is clear that the 1990 International Convention is one of the most humane legislative achievements of the international community, contributing to the protection of migrant workers worldwide. The progressive provisions of the 1990

¹⁵ <https://www.theguardian.com/law/2020/dec/21/essex-lorry-deaths-vietnamese-trafficking-victims-died-uk-has-anything-changed>. Access on 2nd May, 2024.

¹⁶ <https://www.un.org/en/about-us/un-charter/chapter-14>. Access on 2nd May, 2024.

International Convention should be rapidly applied to all countries of origin and host of migrant workers and should also be rapidly assimilated and internalized. Besides, it is codified into national legislation to improve its applicability to practical cases. For Vietnam, when the number of Vietnamese migrant workers abroad is larger than the number of foreign migrant workers in

Vietnam, it is clear that the accession to the 1990 International Convention will bring many advantages to Vietnam in the future of labor protection.

Furthermore, the 1990 convention also mentions the minimum right of illegal migrant worker protection – something that is not covered in other migrant worker conventions.

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