

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

WRITTEN ANALYSIS

1.0 INTRODUCTION

- 1.1 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention) is an international human rights treaty adopted by the United Nations General Assembly for the rights of all migrant workers and protection of their families. The Convention was adopted on 18 December 1990 and came into force in 2003. As of 6 March 2019 the Convention has 54 States Parties.
- 1.2 The Convention constitutes a comprehensive international treaty regarding the protection of the rights of workers. It emphasises the connection between migration and human rights, sets a moral standard, and serves as a guide and stimulus for the promotion of migrant rights in each country. The primary objective of the Convention is to foster respect for migrants' human rights. The Convention does not create new rights for migrants but aims at guaranteeing equality of treatment, and the same working conditions, including in case of temporary work, for migrants and national workers. It also proposes that actions be taken against traffickers and employers of undocumented migrants.
- 1.3 It is prudent to note that in 2010, the Fijian Government in its Universal Periodic Review Report made a commitment towards ratifying all core human rights instruments within the next ten years. At the last reporting cycle of 2014 in Geneva, before the Human Rights Council, the Fijian Government reaffirmed its commitment to ratifying all core human rights instruments which the Convention is a part of.
- 1.4 Currently Fiji has ratified seven of the core nine human rights instruments.

2.0 SUMMARY OF THE CONVENTION

- 2.1 The Convention comprises of 93 articles and is divided into nine Parts which cover a broad range of aspects.
- 2.2 Part 1 of the Convention covers Articles 1 to 6 which provide for the scope and definitions of various terms used in the Convention.
- 2.3 Article 1 of the Convention states that the Convention is applicable to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
- 2.4 Articles 2 and 4 provide general principles and definitions *inter alia* for terms such as migrant worker, frontier worker, seafarer, work on an offshore installation, itinerant worker, project-tied worker, specified-employment worker, self-employed worker and members of the family.
- 2.5 It is prudent to note that Article 5 of the Convention makes a distinction between documented or regular migrants and non-documented or irregular migrants.
- 2.6 Part 2 of the Convention covers Article 7 which provides for non-discrimination with respect to rights under the Convention. Article 7 requires that migrant workers and their families be afforded the same human rights as any other person residing in the State Party without discrimination on the basis of sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
- 2.7 Part 3 of the Convention covers Articles 8 to 35 which provide for various rights accorded to migrant workers and to members of their families.
- 2.8 Some of these rights include the right to return to the State of origin, freedom of thought, conscience and religion, right to opinions, right to privacy, right to life, right to be free from inhumane or degrading treatment or punishment, right to liberty and security, right to be free from forced or compulsory labour, right to be treated humanely if deprived of liberty, right to be free from servitude, slavery and trafficking, right of equal access to justice, right to be free from collective

expulsion, right to recognition as a person before the law, right to remuneration not less favourable than that of nationals, right to join trade unions and the right of the child to education.

- 2.9 Part 4 of the Convention covers Articles 36 to 56 of the Convention which provides for other rights of migrant workers and members of their families who are documented or in a regular situation. Some of these rights include the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.
- 2.10 Part 5 of the Convention covers Articles 57 to 63 of the Convention which provides for specific rights for certain types of migrant workers and their families in particular for frontier workers, seasonal workers, itinerant workers, project tied workers, specified-employment workers, and self-employed workers that are documented and in a regular situation.
- 2.11 Part 6 of the Convention covers Articles 64 to 71 which advocates for State Parties to the Convention to consult and cooperate to ensure that migrant workers and their families are subjected to sound, equitable, humane and lawful conditions.
- 2.12 It is prudent to note that under Article 67 of the Convention, States Parties to the Convention concerned shall cooperate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorisation of residence or employment expires or when they are in the State of employment in an irregular situation.
- 2.13 Furthermore under Article 71 of the Convention, States Parties to the Convention must facilitate when necessary the repatriation to the State of origin the bodies of deceased migrant workers or members of their families. In relation to compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties must as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters will be carried out on the basis of applicable national

law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

- 2.14 Part 7 of the Convention covers Articles 72 to 78 which establishes the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee) and provides for rules of procedure. The Committee comprises of fourteen elected experts in the field covered by the Convention serving in their respective personal capacities.
- 2.15 Under Article 73 of the Convention, States Parties must submit to the Secretary-General of the United Nations (Secretary-General) for the Committee's consideration, reports on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the Convention. The report is to be submitted within a year after the entry into force of the Convention for the State Party concerned, every five years thereafter and whenever the Committee so requests. Following submissions, the Committee will examine the report and may provide the State Party with its comments or request supplementary information. States Parties will also be given opportunities to provide their observations to the comments made by the Committee.
- 2.16 It is prudent to note that under Article 77, States Parties to the Convention may at any time make a declaration under Article 77 that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration. Given that Fiji will not make the declaration that recognises the competence of the Committee, Fiji will not be bound to the provisions of Article 77 of the Convention.
- 2.17 Part 8 of the Convention covers Articles 79 to 84 and provides for general provisions.
- 2.18 Part 9 of the Convention covers Articles 85 to 93 and provides *inter alia* for procedures in relation to any entry into force for States ratifying or acceding to the Convention.

3.0 REQUIREMENTS FOR IMPLEMENTATION

- 3.1 The laws of Fiji currently incorporate the values and principles contained within the Constitution of the Republic of Fiji (Constitution), particularly in relation to the recognition of the dignity and human rights of all workers, regardless of their nationality. Specific details in relation to the ways in which the laws of Fiji complement the Convention are provided under Part 4 below.
- 3.2 In relation to the procedural aspects for implementation, the Convention will enter into force on the first day of the month following a period of 3 months from after the date of deposit of the instrument of accession. Under Article 73 of the Convention, States Party to the Convention undertake to submit a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention to the Secretary-General for consideration by the Committee. This report is to be submitted within one year after the entry into force of the Convention, every five years thereafter and when the Committee requests.

4.0 IMPACT OF THE CONVENTION

- 4.1 The benefits of acceding to the Convention are as follows:

Fijian Constitution

- 4.2 It will complement the provisions under the Bill of Rights under the Constitution. The Bill of Rights does not exclusively apply to Fijian citizens, given that section 6(3) of the Constitution specifically states that the Bill of Rights extends to all natural or legal persons in Fiji. As such it is implied that migrant workers whether documented in a regular situation or non-documented and in an irregular situation will be accorded all rights and freedoms set out under the Bill of Rights chapter in the Constitution.

Employment Relations Act 2007

- 4.3 The Convention will complement the provisions under the Employment Relations Act 2007 (Act).

- 4.4 The Act defines a worker as a person who is employed under a contract of service, and includes an apprentice, learner, domestic worker, part-time worker or casual worker. This definition captures all persons under a contract of service including migrant workers. Therefore, all the provisions of the Act apply to migrant workers equally which includes extensive protections from discrimination and unfair or unlawful terminations together with a grievance process to address grievances that may arise in the course of employment.
- 4.5 Section 75 of the Act also makes specific provision for equal employment opportunities by expressly prohibiting discrimination advanced on the basis of *inter alia* place of origin.
- 4.6 Section 78 of the Act further prohibits discrimination on the basis of place of origin *inter alia* specifically in the determination of rates of remuneration.
- 4.7 Given the above, the processes, entitlements and rights provided under the Act, similar to those enshrined in the Constitution, are substantially consistent with the rights that the Convention requires State Parties to implement for migrant workers which is a further positive indication of Fiji's compliance with the Convention.

Crimes Act 2009

- 4.8 It will complement various provisions under the Crimes Act 2009 (Crimes Act). There are specific provisions under the Crimes Act which criminalise offences relevant to migrant workers particularly, where trafficking and smuggling of persons are concerned. The Crimes Act also specifically provides that subjecting persons to cruel, inhumane or degrading treatment are aggravating factors for these offences which will give rise to harsher penalties.
- 4.9 Section 122 of the Crimes Act provides for the offence of people smuggling and entails a maximum penalty of 10 years imprisonment or FJD 50,000 fine, or both.
- 4.10 Section 123 of the Crimes Act further provides for the offence of aggravated people smuggling which entails a high maximum penalty of 20 years imprisonment or FJD 100,000 fine, or both. The aggravating factors being an intention to exploit the victim, subjecting the victim to cruel, inhumane or degrading treatment, or engaging in conduct which gives rise to a danger of death or serious harm to the victim with reckless disregard for that danger.

- 4.11 Section 112 of the Crimes Act provides for the offence of trafficking in persons and entails a maximum penalty of 12 years imprisonment. Section 113 further provides for the aggravated offence of trafficking in persons which entails a higher maximum penalty of 20 years imprisonment. The aggravating factors being an intention to exploit the victim, subjecting the victim to cruel, inhumane or degrading treatment, or engaging in conduct which gives rise to a danger of death or serious harm to the victim with reckless disregard for that danger. Section 114 of the Crimes Act provides for the offence of trafficking in children which entails a maximum penalty of 25 years imprisonment.

Immigration Act 2003

- 4.12 Accession to the Convention will also complement the provisions under the Immigration Act 2003 (Immigration Act) which also provides for offences of human trafficking and person smuggling. In Part 5 of the Immigration Act there are a variety of other offences that are relevant to the Convention, which include the exploitation of persons not legally entitled to work, facilitating the stay of an unauthorised migrant and the provision of fraudulent travel or identity documents.
- 4.13 Specifically, in relation to the offence of exploiting persons not legally entitled to work, section 21 of the Immigration Act further seeks to criminalise any attempt by the employer to prevent or hinder the unlawful employee from seeking an entitlement under the laws of Fiji.
- 4.14 Sections 8 and 9 of the Immigration Act further provides for the process in which migrant workers may apply for work permits to allow them to be documented and in a regular situation. It also specifies categories of migrant workers that are exempted from requiring work permits which includes a member of the military forces of another country entering Fiji for an authorised military exercise, training or secondment, a person to whom immunities and privileges have been extended in Fiji under any written law relating to diplomatic or consular immunities and privileges, a person employed in the service of the Fijian Government or the government of any country or territory entering Fiji in the course of his duty.
- 4.15 Given the various provisions in the Constitution and our national laws, Fiji's accession to the Convention will further strengthen and complement the rights and freedoms of migrant workers and their families under the laws of Fiji.

- 4.16 Furthermore, accession to the Convention will promote cooperation and strengthen international relations with other State Parties who have acceded to or ratified the Convention.

5.0 DECLARATION AT THE TIME OF ACCESSION

- 5.1 It is prudent to note that under Part 9 of the Convention, Article 92(1) provides that 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 organisation 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.
- 5.2 However, Article 92(2) also provides that each State Party may at the time of signature or ratification of the Convention or accession thereto declare that it does not consider itself bound by Article 92(1).
- 5.3 Countries such as Algeria, Argentina, El Salvador, Guinea-Bissau, Morocco and Venezuela have made similar declarations at the time of ratification or accession. Algeria and Morocco's basis for declaring not to be bound by Article 92(1) of the Convention is that it considers that any such dispute should be submitted to arbitration only with the agreement of all the parties to the conflict. Venezuela on the other hand does not consider itself bound to resort to arbitration as a means of dispute resolution and does not recognise the binding jurisdiction of the International Court of Justice.
- 5.4 Given the legal implications of Article 92(1) of the Convention, it is recommended that Fiji makes the following declaration at the time of accession:

"The Republic of Fiji declares that it does not consider itself bound by the provisions of Article 92(1) of the Convention".

6.0 RECOMMENDATION

- 6.1 It is recommended that Fiji accede to the Convention and make the appropriate declaration under Article 92(2) at the time of accession to the Convention.