



STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE

Report of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families



**PARLIAMENT OF THE REPUBLIC OF
FIJI**
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Chairperson’s Foreword

I am pleased to present the Review Report of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The Standing Committee on Foreign Affairs and Defence, hereinafter referred to as the “Committee” is established under Section 109 (2) (e) of the Standing Orders (SO) of the Parliament of the Republic of Fiji.

The purpose of the review was to scrutinise the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, hereinafter referred to as the “Convention”. Parliament had referred the above Convention to the Standing Committee on Foreign Affairs and Defence at its sitting on 4th April, 2019.

The Committee when reviewing the Convention heard oral submissions and received written submissions from:

- Ministry of Employment, Productivity and Industrial Relations;
- Republic of Fiji Military Forces;
- Fiji Revenue Custom Services;
- Ministry of Foreign Affairs;
- Ministry of Defence and National Security;
- Office of the Solicitor General;
- Fiji Police Force;
- United Nations Office for the High Commissioner on Human Rights;
- Office of the Commissioner Northern Division;
- Ministry of Industry, Trade and Tourism;
- Office of the Director Public Prosecution (written submission only);
- International Committee of the Red Cross (written submission only); and
- Fiji Human Rights and Anti-Discrimination Commission (written submission only).

The Committee also extended invitations to the following offices and organizations but were unable to make submissions to the Committee for various reasons.

- Fiji Women Crisis Centre;
- Fiji Trade Unions Congress;
- Fiji Public Service Association;
- Pacific Conference of Churches;
- Fiji Media Industry Association;
- Department of Immigration; and

- Office of the Commissioner Western Division;

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 6th March 2019 the Convention has 54 States Parties.

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.

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.

Fiji has ratified seven of the nine core UN human rights treaties.

The Honourable Prime Minister (Ret) Rear Admiral Voreqe Bainimarama in an address to the UN General Assembly in New York in February this year 2019 has affirmed Fiji's commitment to ratifying the nine (9) core Human Rights Treaties.

The majority of the submitters support the full ratification of the Convention despite reservations from the Office of the Solicitor General, FRCS, Ministry of Employment, Productivity and Industrial Relations, Ministry of Defence and National Security, Ministry of Foreign Affairs and RFMF which are embodied at *Appendix A*.

The committee agrees that Fiji should fully ratify this Convention.

Despite the public announcements and advertisements of the Committee's public consultations, there were minimal contributions from members of the public in all regions visited.

The Committee commends the contributions by stakeholders that assisted it in the preparation of its report.

I take this opportunity to thank the members of my Committee for compiling this bipartisan report.

On behalf of the Standing Committee on Foreign Affairs and Defence, I submit this report to the Parliament.

A handwritten signature in black ink, appearing to read 'A. O'Connor', is positioned above a horizontal line.

Hon. Alexander O'Connor
Chairperson

Acronyms:

FPF	Fiji Police Force
MODNS	Ministry of Defence, National Security
RFMF	Republic of Fiji Military Forces
SDG	Sustainable Development Goal
SO	Standing Orders
OHCHR	United Nations High Commissioner for Human Rights

Recommendation

The Committee recommends that:

Fiji to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

1.0 Introduction

1.1 Background and Terms of Reference

The Committee had reviewed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Parliament had referred the above Convention to the Standing Committee on Foreign Affairs and Defence at its sitting on 4th April, 2019.

On 17th April to 6th May 2019, the Committee received submissions on the Convention at Parliament, Lautoka and Labasa.

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.

The Report is divided into three parts:

- I. **Part One** - focuses on the Committee recommendations
- II. **Part Two** - covers the Findings of the report to Parliament
- III. **Part Three** - covers the Conclusion

1.2 Committee Remit and Composition

Pursuant to Standing Orders 109(2) (e) that the Standing Committee on Foreign Affairs and Defence is mandated to look into matters related to Fiji's relations with other countries, development aid, foreign direct investment, oversight of the military and relations with multi-lateral organisation.

The members of the Standing Committee on Foreign Affairs and Defence are as follows:

- 1.2.1 Hon. Alexander O'Connor – Chairperson
- 1.2.2 Hon. Dr. Salik Govind - Deputy Chairperson
- 1.2.3 Hon. Pio Tikoduadua – Member
- 1.2.4 Hon. Selai Adimaitoga – Member
- 1.2.5 Hon. Anare Jale – Member

1.3 Procedure and Program

The Standing Committee on Foreign Affairs and Defence commenced its deliberation on the 15th of April 2019 and received a written and oral submission from stakeholders with the following attendees:

- Ministry of Employment, Productivity and Industrial Relations;
- Republic of Fiji Military Forces;
- Fiji Revenue Custom Services;
- Ministry of Foreign Affairs;
- Ministry of Defence and National Security;
- Office of the Solicitor General;
- Fiji Police Force;
- United Nations Office for the High Commissioner on Human Rights;
- Office of the Commissioner Northern Division;
- Office of the Director Public Prosecution (written submission only);
- International Committee of the Red Cross (written submission only);
- Ministry of Industry, Trade and Tourism.

2.0 Committee Deliberation and Analysis

2.1 Committee Findings

The Committee's findings are outlined below:

1. All submitters agreed that Fiji sign and ratify the Convention.

2.2 Benefits of Accession

IMPACT OF THE CONVENTION

The benefits of acceding to the Convention are as follows:

2.3 Fijian Constitution

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.

2.4 Employment Relations Act 2007

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

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.

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.

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.

2.5 Crimes Act 2009

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.

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.

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.

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.

2.6 Immigration Act 2003

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.

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.

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.

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.

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

2.7 Declaration at the Time of Accession

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.

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).

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.

Despite the observations above, the Committee is of the view that Fiji should ratify the Convention without reservation. The Committee also believes that ratifying the Convention in full will protect Fijian migrant workers overseas and their families. These Fijians contribute immensely to the growth of our national economy and the wellbeing of the state and our people through remittances.

2.8 Requirements for Implementation

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.

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. Once the Convention report is to be submitted within one year after the entry into force of the Convention, every five years thereafter and

2.9 Challenges

The Committee experienced minimal to zero-public participation in its consultations in Suva, Lautoka and Labasa. This could have been due to a number of reasons. Firstly, the communications from Parliament using public media were ineffective. Secondly, people may have been disinterested in the Convention. It is recommended that Parliament use smart communication methods through radio, television and social media to publicise its consultations program.

3.0 Oral and Written Evidence Received

The Committee received oral and written submissions from stakeholders and the public as listed on page 3 of this report and in Appendix a.

4.0 Gender Analysis

The convention is gender neutral and therefore benefits all genders.

5.0 Conclusion

The Standing Committee on Foreign Affairs and Defence has fulfilled its mandate approved by Parliament which was to examine the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee has conducted its review and concludes that the Convention will benefit the country upon ratification.

The report is bi-partisan and reflects the contributions and views from both sides of the Committee.

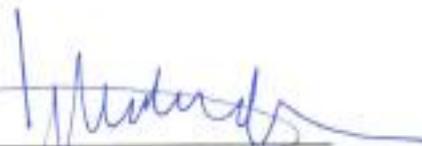
6.0 Members Signature



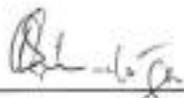
Hon. Alexander O'Connor
Chairperson



Hon. Dr. Salik Govind
Deputy Chairperson



Hon. Plo Tikoduadua
Member



Hon. Selai Adimaitoga
Member



Hon. Anarc Jale
Member

7.0 Appendices

Appendix	Date/Submission Received	Stakeholders
A.		Convention Discussions Matrix
B.	17.04.2019	Ministry of Employment, Productivity and Industrial Relations
C.		Ministry of Foreign Affairs
D.	18.04.2019	Fiji Revenue Custom Services
E.		Ministry of Defence and National Security
F.		UN Office of the High Commissioner of Human Rights
G.		Office of the Solicitor General
H.	23.04.2019	Republic of Fiji Military Force
I.	26.04.2019	Fiji Police Force
J.	1.05.2019	Office of the Commissioner Northern Division

Entities	Support/Reservations/NA	Comments
Ministry of Employment, Productivity and Industrial Relations	Wholly Support	Oral Submission
Ministry of Foreign Affairs	Wholly Support	Oral Submission
Fiji Revenue Custom Services	Reservations: Article 45-Double Taxation	Oral Submission
Ministry of Defence and National Security	Reservations: Article 5, considers migrant workers as either documented or non-documented migrants. And as such, the Convention requires that all migrant workers will have the general human rights as prescribed in the Bill of Rights in the Fijian Constitution. However, the Ministry feels that the Fijian Constitution in Section 6(3) limits that set of rights to natural and legal persons thus does not include non-documented persons. , and Article 29.	Oral Submission
	"Article 28 - the: 1. Right to Receive Urgent Medical Care; and 2. Right to Education or Equal access to education on the basis of equality of treatment with host nations and States. Part 6 of the Convention outlines the requirement of State parties to promote a sound, equitable, humane and lawful conditions and institutions in connection with international migrant workers and members of their families. The Convention has cost implications to the already limited Government resources in order to accommodate further rights that have been accorded to migrant workers as per the provisions of the Convention."	
	"Article 8(2) Reservation No.3 is limiting sovereignty. Article 8(2) of the Convention limits the rights of the State of Origin over their sovereignty whereby the Convention overrules State sovereignty on persons re-entering the border. Border control should always be left to this discussion of the State. The provision would imply that should a person, a migrant worker, banned from re-entering a State, would have to be given the right at any time to enter and remain in the State concerned. Article 8(2) does not include restriction exceptions as per Article 8(1) where exception exists to protect national security and public order"	
	"Article 18 (3) the possible increase in migrant travellers documented and non-documented, and	

	<p>limited employment of issues may give rise to social issues, such as prostitution and crimes syndicates. In addition, the values of our nation stand risk of being compromised in the name of social inclusion and tolerance, when accommodating the influx and wide array of values foreign to that of ours.</p> <p>The Ministry's role is to ensure the security of our nation's values and as such, highlights this concerning issue.</p> <p>The right to legal assistance; Article 18(3), briefly outlines the rights of migrant workers and their families to legal assistance of their choosing. Legal assistance may be limited to citizens only, however, this needs to be clarified with the Legal Aids Commission on whether migrant workers have access to Legal Aid assistance."</p>	
UN Office of the Commissioner on Human Rights	Wholly support	Oral Submission
Office of the Director Public Prosecution	<p>Reservation: Article 92 (1) note that Fiji's Crimes Act provides for the offence of people smuggling as well as its aggravated forms. Other protections for individuals are provided in legislation such as the Employment Relations Act and the Immigration Act. In addition, we are of the view that Fiji should not consider itself bound by the provisions of Article 92 (1) of the Convention and should make a declaration to that effect.</p>	Written Submission
Office of the Solicitor General	<p>Reservation: Article 92 (1) note that Fiji's Crimes Act provides for the offence of people smuggling as well as its aggravated forms. Other protections for individuals are provided in legislation such as the Employment Relations Act and the Immigration Act. In addition, we are of the view that Fiji should not consider itself bound by the provisions of Article 92 (1) of the Convention and should make a declaration to that effect.</p>	Oral Submission
Republic of Fiji Military Force	Wholly support	Oral Submission
International Committee of the Red Cross	NA	Written Submission
Fiji Police Force	Wholly support	Oral Submission
Divisional Planning Officer Northern	Fully Support	Oral Submission

Appendix B: Ministry of Employment, Productivity and Industrial Relations

Submission on Parliamentary Standing Committee for Foreign Affairs and Defence

International Convention on the Protection of Rights of all Migrant workers and members of their families

The Ministry of Employment, Productivity and Industrial Relations (MEPIR) fully supports the ratification of the United Nations Convention as it falls in line with International Labour Organization Convention 29 on Forced Labour which the Fijian Government ratified in April 1974. The Fijian government has also ratified ILO convention on Abolition of Forced Labour and the ILO Convention 81 on Labour Inspection, all these conventions are embedded within the Employment Relations Act (ERA) 2007. The Convention 81 ensures Labour Inspections to be conducted on all workers in Fiji at all workplaces and ensure minimum terms and conditions are applied. The Migrant workers are no exception and the Labour Inspection process covers them and ensures that employers provide them with employment contract with decent working conditions which accorded to any Fijian worker.

The Ministry is also proposing that the ratification of these UN treaty will assist and ensure that Fijian Seasonal workers who are employed in countries like Australia and New Zealand are given the same treatment as any other worker and these workers will have access to the dispute resolution mechanisms within the country they are performing seasonal work. The Fijian seafarers who are employed in vessels going outside Fiji will also be assisted with the assistance of these conventions as they will be accorded equal treatment and

employment opportunity. This is also in line with the Maritime Labour Convention ratified by the Fijian Government on 10 October, 2014.

The Migrant workers children and their family members are also given adequate protection and care. The issue on non-discrimination of all workers including the migrant workers is covered within the Employment Relations (ERA) Act 2007. Any worker can raise grievance through the normal grievance procedure stipulated within the ERA.

The 2013 Fijian Constitution, under chapter 2 on bill of rights also provides rights on employment relations, right to work and just minimum wage, and right to education are some of the rights covered which assist all workers in Fiji including the Migrant workers.

The Migrant workers have access to the dispute settlement mechanism including reporting a case of employment grievance through the Mediation services of the Ministry and accessing the Compliance mechanism on claims of wages through the Labour Standard Services. The Migrant worker will also have the same right as any other worker in Fiji and can take their grievance up to the Employment Relations Tribunal or Employment Relations Court as stipulated within the Employment Relations Act 2007.

Appendix C: Ministry of Foreign Affairs

International Convention on the Protection of the Rights of all migrant workers and members of their families.

1. Background

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** ('Convention') sets the framework for the international protection of the rights of all migrant workers and members of their families. This includes respect for human rights, freedom of thought and religion, equality of treatment and commitment to stopping illegal activities designed to encourage illegal migration. The Convention was adopted in 1990, and it entered into force in 2003. Currently, fifty-four (54) States in total have signed the Convention.¹

The Convention defines a "migrant worker" as 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.

2. Scope of the Convention

The Convention applies 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.

The Convention applies during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

3. National Policies that cover Migrant Workers (FIJI)

These laws in unison provide for the protection of migrant workers:

- i. Fijian Constitution (Chapter 2 - Bill of Rights)
- ii. Employment Relations Act 2007

¹ Countries that have ratified the Convention are primarily countries of origin of migrants (such as Mexico, Morocco, and the Philippines). The Convention provides a significant platform for the protection of their citizens living abroad. Significantly, no migrant-receiving state in Western Europe or North America has ratified the Convention. Other important receiving countries, such as Australia, Arab states of the Persian Gulf, India and South Africa have not ratified the Convention.

- iii. Crimes Act 2009
- iv. Immigration Act 2003

4. Should FIJI ratify this Convention?

Yes, Fiji should ratify this Convention for the following reasons:

- As part of Fiji's Universal Periodic Review, the Fijian Government committed to ratifying all nine (9) core human rights instruments which this Convention is a part of. This pledge was also reiterated during Fiji's successful Human Rights Council campaign.
 - Fiji's accession to this core Human Rights Convention will promote cooperation and strengthen international relations with other States Parties who have acceded to or ratified the Convention. It will encourage other States, in particular the "migrant receiving" States to accede to or ratify this Convention, if they have not already done so.
 - Our people are a significant part of Fiji's foreign policy relations with other States, Fiji's accession to this Convention is a visible reflection of our aspirations to create a safe and sound international environment for Fijians who currently migrant workers in other State territories.
 - The Convention is consistent with Fiji's national policies for migrant workers who are in Fiji; as provided under the various legislations under the ambit of respective implementing Agencies.
-

Appendix D: Fiji Revenue Custom Services

Speaking Note 3

Briefing Paper on the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Presentation to the Standing Committee on Foreign Affairs and Defence

Background

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) was adopted by the United Nations General Assembly on 18 December 1990 and entered into force on 1st July 2003.
- It emphasizes the connection between migration and human rights, which is increasingly becoming a crucial policy topic worldwide.
- The Convention aims at protecting migrant workers and members of their families; its existence sets a moral standard, and serves as a guide and stimulus for the promotion of migrant rights in each country.
- 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 nationals.
- As of October 2018, 54 states have ratified the Convention

The Convention will oblige contracting States to recognize and guarantee all migrants with access to a minimum degree of protection, including rights of children and the family of the migrant workers.

The labor workforce is an essential element to the growth of any economy. The UN Convention would recognize that migrant workers, both temporary and permanent, are as deserving of recognition of their human rights as Fijians citizens. Its implementation would formalize Fiji's commitment to prevent the abuse and exploitation of migrant workers and would link Fiji to the international framework protecting migrant workers.

The UN Convention requires States Parties to implement measures to eliminate the employment of undocumented workers, prevent the dissemination of misleading information related to immigration, and impose effective sanctions against employers.

AIM

Article 48 has particular importance to FRCS. It states that a migrant worker shall not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances. Fiji imposes differing tax rates for non-residents, Article 48 may pose a significant issue.

Organizational Perspective

The positive results of signing the Convention are expected to reinforce FRCS's work towards Governments efforts to grow the economy by protecting its work force. The advantages of migrant workers are well established; and include:

- **Filling skills gaps:** fulfilling existing contracts and taking on more work through new skills and talent.
- **Knowledge sharing:** increasing access to international knowledge and supporting the upskilling of co-workers.
- **Expansion into new markets:** strengthening contacts in international markets and local networks through new language skills and cultural awareness.
- **Enrichment from different cultures:** creating a more diverse workforce with varied experience and ways of working; and specifically
- **Increase in taxation base** where more workers translates to more taxpayers.

Apart from the direct taxation of the salary or wages of the workforce, the consequential benefits of consumption taxes would be an added benefit to the economy. Workers whose rights are recognized and protected lead to the development of the existing workforce and other sectors such as tourism, agriculture, and professional services. Free flowing migrant work force would reduce our reliance on foreign expertise as well

Challenges

- Legislative changes would be required to have domestic laws consistent with the conventions. There are currently different tax rates for residents as opposed to non-residents who do not satisfy section 6 of the Income Tax Act – as per our rates of taxes and levies.
- Article 48 would pose a significant issue to Fiji. The Article requires non-discrimination in terms of tax or duty rates for migrant workers (who may be non-residents). This means that consistent application of tax rates would be applied regardless of resident status.
- This may have consequences on opportunities for local employment as Fiji will become an increasing favored destination due to a lesser tax to income threshold.

- In the alternative, migrant workers from Fiji who work in other countries (who have ratified the convention) would be awarded consistent tax practices as well providing the possibility of greater in-ward remittances.

Recommendation

- Consideration on Article 48 would be necessary as it requires deviation from our current practice of taxing non-residents at a different tax rate.

- END -

Appendix E: Ministry of Defence and National Security



MINISTRY OF DEFENCE & NATIONAL SECURITY

RESPONSES TO PROPOSED INTERNATIONAL TREATIES/CONVENTIONS

- **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families**
- **International Convention on the Protection of All Persons from Enforced Disappearance**
- **United Nations Convention on International Settlement Agreements Resulting from Mediation**



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

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

Ministry Perspective

The Ministry of Defence and National Security supports such a convention that enforces Human Rights of all individuals including Migrant Workers. However, the Ministry has reservations towards certain provisions as below.

Reservations

1. DEFINITION

Article 2 (1) of the Convention defines "**Migrant Workers**" as a person who is about to be, is engaged in and has been engaged in remunerated activity in a State which he or she is not a national.

Moreover, **Article 5** further considers **Migrant Workers** as either "**Documented**" or "**Non-Documented Migrants**" and as such the convention requires that all migrant workers will have the general human rights as prescribed in the Bill of Rights in the Fijian Constitution.

However, the Ministry feels that the Fijian Constitution in Section 6(3) limits that set of rights to natural and legal persons and thus does not include non-documented persons.

2. COST IMPLICATIONS TO GOVERNMENT WHEN ACCORDING THE CONVENTION PROVISIONED RIGHTS

The Convention has costly implications to limited Government resources in order to accommodate for the rights that have to be accorded to migrant workers as per the provisions of the Convention. These provisions include:-

- > (Article 28) Right to receive urgent medical care
- > (Article 30) Right to Education or equal access to education on the basis of equality of treatment with host nations/states.



- Part VI of the Convention outlines the requirement of State parties to promote sound, equitable, humane and lawful conditions and institutions in connection with international migration workers and members of their families.

However, the lack of special institutions or resources to provide the support required for migrant services will fall into the Governments priority and may be an additional burden for the nation. For example specialized counselling services, religious and cultural observation space would require funding and resource allocation.

The Ministry is of the view that according and providing the rights to migrant workers as per the Convention will have competing priorities to Government, seeing as equal rights accorded to natural and legal citizens/residents will have to be accorded to migrant workers (Un-documented) and their families too.

3. **LIMITING SOVEREIGNTY**

Article 8(2) of the Convention limits the right of the State of Origin over their sovereignty, whereby the convention overrules States sovereignty on persons re-entering the border. Border control should always be left to the discretion of a State.

The provision would imply that should a person(s) (Migrant Worker) banned from re-entering a State would have to be given the right at any time to enter and remain in the State concerned.

Article 8 (2) does not include the restriction exceptions as per Article 8 (1) where exceptions exist to protect national security and public order.

4. **POSSIBLE SOCIAL ISSUES**

The possible increase in migrant travelers (documented and non-documented) and limited employment issues may give rise to social issues such as Prostitution, Crime etc.

In addition, the values of our Nation stand risk of being compromised in the name of "social inclusion" and "tolerance" when accommodating the influx and wide array of values foreign to that of ours. The Ministry's role is to ensure the security of our Nations values and as such highlights this concerning issue.



5. Rights to Legal Assistance

Article 18 (3) (d) briefly outlines the rights of Migrant Workers and their families to legal assistance of their choosing. Legal Assistance may be limited to Citizens only, however, this needs to be clarified with the Legal Aid Commission whether Migrant Workers have access to Legal Aid Assistance.

6. RIGHTS TO NAME, BIRTH REGISTRATION & NATIONALITY

(Article 29) Right to a name, to registration of birth and to a nationality is vague and open-ended as it does not define what nationality the migrant worker's child will be given (i.e. that of the state of origin or state of employment).

If it is the State of Employment, the Ministry has reservations as it may be in contravention with Fiji Immigration legislation. However, the Ministry requests the same to be clarified by Solicitor-Generals Office. *

Recommendation

The Ministry supports the proposed convention, however, is of the view that the reservations addressed herein needs to be clarified and addressed accordingly prior to accession.

Appendix F: UN Office of the High Commissioner for Human Rights



Oral Briefing to the Standing Committee on Foreign Affairs and Defence On the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and

International Convention for the Protection All Persons from Enforced Disappearance

OHCHR Regional Office for the Pacific
Suva, Fiji
18 April 2019

I. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

CMW is adopted by the GA on 18 December 1990 and entered into force on 1 July 2003. Currently it has 54 States parties. No country from Pacific and the region has ratified the Convention. From South-East Asia, it is Sri Lanka, Bangladesh, Indonesia and Philippines that are party to CMW. It has 93 articles – 71 substantive articles, one of the longest human rights treaties. It is divided into EIGHT parts- Part I deals with scope and definition.

The Convention provides that a "migrant" is a person engaged or remunerated in a State where the migrant is not a national, and this may include a foreign worker or an expatriate. Seasonal workers are also defined as a category of migrant workers although foreign investors and those who work for their own States in another jurisdiction are not migrant workers.

Part II non-discrimination (**meaning, migrant workers and members of their families, irrespective of their legal status, enjoy the same fundamental rights as nationals of the country**); Part III human rights of all migrant workers and member of their families (**does not create any new rights, they are entitled to same civil and political and economic, social and cultural rights, such as the rights to life, freedom from torture, slavery, servitude and forced labour, freedom of religion**).

Part IV deals with other rights of documented migrant workers (**freedom of movement in territory of State of employment and freedom to choose their residence, equality of treatment with nationals also in respect of access to education, vocational guidance and placement services, vocational training and retraining,**

access to housing including social housing schemes); Part V categories of migrant workers (**frontier worker, seasonal worker, seafarer, itinerant worker, project-tied worker, self-employed workers**); Part VI on promotion of sound migration policy; Part VII on final clauses and Part VIII general provisions.

CMW seeks to establish minimum standards of protection for migrant workers, both documented and undocumented, and members of their families. It recognizes migrant workers as human beings with human rights. CMW also recognizes that the contribution migrant workers make to host and home countries is dependent on legal recognition and protection of human rights of migrants.

The Convention includes members of the family: persons married to migrant workers or having a relationship that according to the applicable law produces effects equivalent to marriage; dependent children; other dependents as recognized by the law of the States concerned.

However, CMW does not relieve migrant workers from obligation to comply with laws and regulations of any State of transit and employment or obligation to respect the cultural identity of inhabitants of these States.

CMW does not cover refugees— but the Committee on the Rights of Migrants has made it clear that the exclusion of refugees is limited to recognized refugees only and not asylum-seekers who fulfill the Convention's definition of migrant worker; employees of a State or international organizations; students; investors; seafarers and workers on an offshore installation not admitted to engage in a remunerated activity in the State of employment.

Why Fiji should accede to CMW?

Fiji has committed that by 2020, it will ratify and become party to nine core international human rights treaties. On 26 February, Hon'ble Prime Minister of Fiji, while addressing High-Level Segment of the 40th Session of the Human Rights Council in Geneva, renewed Fiji's commitment to accede the remaining core international human rights treaties- that is now down to two- CMW and CED.

Fiji is the first Pacific Island State to be elected to the Human Rights Council and will serve until January 2021. In Geneva, Ambassador Khan as VicePresident of the Council (on behalf of the Asia-Pacific grouping) plays a key role in sensitizing the international community about the needs of Pacific Island States. As the Secretary-General's first Special Envoy for the Oceans, Ambassador Thomson is seeking to galvanize efforts to protect the world's seas.

Fiji is going to be reviewed under 3rd UPR cycle in 34th Session of the HRC UPR and focus will be on the implementation of the previous UPR recommendations. That means Fiji has to live up to its commitment made during 2nd UPR cycle with regard to ratification of treaties.

Also, Fiji has demonstrated a leadership at regional and global level in its fight against climate change. It has announced that it would accept climate refugees in future. Given the climate change and its negative impact on livelihoods and enjoyment of fundamental human rights, there is a high chance that Fiji might end up as receiving country of migrant workers not only as a country of origin as it increasingly looks so now.

Today, no one can deny the positive economic effects and dividends that migrant workers contribute. According to various reports, migrants spend 85% of earnings in their host communities and send back remaining 15% to the countries of their origin.

Globally, in 2017, migrants sent home approximately USD 600 billion in remittance- which is **3 times of all official development assistance**. Fiji is not exception to this as remittance has grown each year to the point where in 2018 - foreign remittances exceeded F\$0.5bn for the first time making foreign remittances Fiji's highest foreign exchange earner surpassing even tourism.

CMW Implications on Fiji

Reporting to the Committee on Migrant Workers as article 74 of CMW requires Fiji to report to the Committee within two years and after every four years or when the Committee so requests. But it should not be taken as a burden and reporting obligations can be fulfilled in a more efficient and coordinated manner if a standing mechanism on reporting and follow-up (NMRF) is established. Fiji, led by the Office of the Attorney General, is currently mulling over having such a mechanism in place. Last week, Fiji hosted a regional dialogue on NMRF led by Fiji's ambassador to Geneva Nazhat Shameem Khan.

Article 76 deals with inter-State communication. It is optional and the State party must declare the competency of the Committee for this article to be effective.

Article 77 deals with individual communication procedures. It is optional and the State party must declare the competency of the Committee for this article to be effective.

Domestication of CMW or amending or enacting laws to be compliant with CMW and its standards. Laws related to immigration, Employment Relation (Amendment) Act 2015.

The arrival of Chinese migrant workers to the Pacific is on rise and this has particularly increased in recent years as the speed of development/investment from China picks up.

The Employment Relations Tribunal recent decision in **Daniel Sanchez v The Sheraton** (16 January 2019) demonstrates that the employment contract is paramount and that Fiji's law relating to termination of employment will be applied to the employer. In brief, Mr Sanchez was from Mexico and recruited by an agent of the Sheraton resort on Denarau Island to work in a restaurant known as the Flying Fish Restaurant. Mr. Sanchez is a chef and was employed as a chef but then he was

terminated from his employment after just one month. The Employment Relations Tribunal awarded Mr. Sanchez \$37,760 for 5 months wages and relocation allowance - because the hotel/resort had not followed its own disciplinary procedures in terminating his employment.

Climate Change - while it is a global issue - for Fiji and the Pacific it is likely to increase pressure for good regulation of migrants due to increased migration within/around the Pacific. Fiji has already publicly stated that it is ready and willing to assist climate change refugees from the Pacific.

Given the lack of consistent employment standards across different legal jurisdictions it is important for all jurisdictions to collaborate and ensure for migrant workers that they are aware of their rights before they arrive in the jurisdiction they want to work in. Ultimately, laws may provide some protection for migrant workers, but it should also be remembered that enforcing those legal rights can also be difficult. For example, the Sanchez case still took 4 years to reach a final determination.

Reservations

Reservations are unilateral statement made by a State by which it purports to exclude or modify the legal effect of a treaty provision in its application to that State. A reservation maybe entered when signing, ratifying, accepting, approving or acceding to a treaty.

However, the reservation is permitted only if i) it is not explicitly prohibited by

the treaty; ii) it is explicitly authorized by the treaty itself; or iii) the reservation is compatible with the object and purpose of the treaty.

Other States parties and signatories to the treaty may lodge objections to a State party's reservation.

Reservations may be withdrawn completely or partially by the State party at any time.

Q&A

ENDS

SUPPLEMENTARY SUBMISSIONS
TO THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE:
CONVENTION ON PROTECTION OF ALL PERSONS FROM ENFORCED
DISAPPEARANCE

OHCHR Regional Office for the Pacific
30 April 2019

The Standing Committee on Foreign Affairs and Defence has sought elaboration on the comments made by OHCHR.

Comment 1

‘Fiji will have to implement two things: they will have to enact national legislation which gives them the legal tools to apply this Convention.’

In the event, of Fiji agreeing to ratify the Convention on Protection of All Persons from Enforced Disappearance (hereinafter “the Convention”), it will need to review and amend its domestic legal framework from the lens of the Convention and other international human rights standards applicable to Fiji. Articles 3 to 25 of the Convention requires State Parties to fulfil their obligations to enact (make) legislation through the Parliament of Fiji, that gives the law enforcement agencies powers to apply the principles under the Convention and criminalize enforced disappearances according to required international standards. This will also enable Fiji to put in mechanisms for reporting, investigation, prosecution and sanction of State and non-State actors who commit enforced disappearances and provide redress to the victims.

Comment 2

“The Fiji 2013 Constitution and the laws, such as the Crimes Act and the Inquest Act do have a number of provisions by which protection is available from enforced disappearances, however, this is not enough.”

These comments, if elaborated, means that Fiji’s constitution and laws such as the Crimes Act 2010 and Inquest Act 1978 do have certain provisions by which protection is available to Fijians from enforced disappearances already in Fiji. These provisions are found specifically in Sections 9(3), 11 and 13 of the 2013 Constitution that expressly provides for “Freedom from cruel and degrading treatment” and for the “Rights of arrested and detained persons” and that “state of emergency” cannot justify enforced disappearances. The 2013 Constitution also provides that persons who consider their rights under the Bill of Rights impinged, may seek redress from the High Court.

Section 95 of the Crimes Act 2010 criminalizes enforced disappearance of persons and makes it a crime against humanity while prescribing a maximum penalty of 17 years imprisonment. Section 98 of the Crimes Act addresses the offence of enforced disappearance by imputing criminal liability and responsibility even in circumstances where the perpetrator's actions are done in accordance with the authorisation, support or acquiescence of the government or a political organisation which is consistent with the Convention.

The Inquest Act 1978 has a number of provisions that regulate the conduct and duties of police officers (Sections 3 and 4). When any person dies while in the custody of the police (Sections 7 and 8), or prison, or whilst in the custody of any public officer, or in any other place specified by the Minister by notice in the Gazette, the officer who has the custody of such person or the person in charge of such prison or such other place, as the case may be, shall forthwith give intimation of such death to a magistrate, and such magistrate or another shall hold an inquest into the cause of death and, for such purpose, may request a police officer to make the investigation and report (section 9).

The above are some of the provisions by which protection is available from enforced disappearances in Fiji. Despite a number of positive legal provisions, gaps remain in Fiji's current legislation.

The definition in the Crimes Act 2010 needs to be amended in line with the definition provided by article 2 of the Convention.

The widespread or systematic practice of enforced disappearance is another separate crime against humanity (article 5). It needs to be added as a separate crime in the Crimes Act 2010 of Fiji and not as an element of enforced disappearance.

The inclusion, under Section 95, of a person to be criminally responsible if he/ she orders, solicits or induces, attempts to commit or is an accomplice or participates in an enforced disappearance would address an existing gap. Under Article 6 of the Convention, States have an obligation to hold any person directly responsible in the commission of the crime individually criminally responsible. Superiors must also be held criminally responsible when the superior has knowledge of the crime, exercised responsibility and control over activities concerned with the crime or failed to take all necessary measures to prevent or punish the commission of a crime.

Accession to this Convention will help Fiji to further strengthen protection of the rights of victims. There are currently no provisions in the legislation of Fiji that provides the right to victims to know the truth regarding circumstances of enforced disappearance, progress and results of investigations and the fate of disappeared persons.

The Convention obligates states to take steps to establish, mechanisms to conduct investigations, locate victims and, in the case of death, locate, respect and return their mortal remains to relatives. Protocols are established to handle mortal remains of disappeared persons to their families in line with international standards.

Comment 3

“Fiji’s 2013 Constitution provides freedom from cruel and degrading treatment which is just one aspect of that”.

As stated in the preceding paragraphs, the 2013 constitution complements several aspects of the Convention. The Convention is foremost a legal instrument with a preventive character that fills the gaps between other human rights treaties and international criminal law. Although modelled on the Convention Against Torture, its application is much broader than CAT. The Convention on Protection of All Persons from Enforced Disappearances provides for the first time a universal right not to be subjected to enforced disappearances. Enforced disappearance is characterized by the specific aspect of denial – denying the abducted person's very existence, denying families information on their relatives. This aspect is recognized in the convention because it sees enforced disappearance as a violation in itself. It involves rights to victims as well and setting up mechanisms and enacting laws as part of the obligations of the State to protect people from enforced disappearances.

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.



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SUVA, FIJI

Confidential

10 May 2019

By Hand Delivery

Honourable Mr Alex O'Connor
Chairperson
Standing Committee on Foreign Affairs and Defence
Parliament of the Republic of Fiji
Government Buildings
Suva

Attention: Mr Jacob Abraham

Dear Honourable Chairperson

Request for Legal Advice

1. We refer to the e-mail correspondence from Mr Jacob Abraham on behalf of the Standing Committee on Foreign Affairs and Defence in relation to clarification on the following conventions:
 - (a) Article 31 and of the International Convention for the Protection of All Persons from Enforced Disappearance ('ICPED'); and
 - (b) Article 92(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ('ICMW').

International Convention for the Protection of All Persons from Enforced Disappearance

2. Article 31 of ICPED provides for States Parties to make a declaration that they recognise the competence of the Committee (established under Article 26 of ICPED) at the time of ratification or any time thereafter.
3. This declaration allows for the Committee to receive and consider communications from or on individuals subject to its jurisdiction claiming to be victims of a violation by State Party of provisions of the Convention. If a State Party has not made the required declaration the Committee cannot admit any communications concerning that State Party.
4. In the Fijian context, section 13 of the Fijian Constitution, in particular, provides detained and arrested persons with rights that render enforced disappearances repugnant in cases of a normal detention and arrest, as detained and arrested persons have the right

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5. to be in communication with their legal representative, spouse, partner or next-of-kin and a religious counsellor or social worker. Section 13 further requires that arrested or detained persons be produced before a Court for review within 48 hours of arrest. Thus, in the instance of a normal detention or arrest, the offence of enforced disappearance would clearly constitute the infringement of a constitutional right giving rise to grounds for constitutional redress against the State.
6. Furthermore, section 9(3) of the Fijian Constitution specifically affords rights to persons detained in a state of emergency which requires that they be allowed communication with their spouse, partner or next-of-kin, legal representative, religious counsellor or social worker and medical practitioner. It further requires that they be produced before a Court for review within a month of their detainment and thereafter, at intervals not more than a month.
7. The effect of section 9(3) is that perpetrators cannot use a 'state of emergency' to justify an enforced disappearance given the specific rights captured therein. This essentially renders enforced disappearances in a state of emergency unconstitutional giving rise to grounds for constitutional redress against the State.
8. Furthermore, the offence of enforced disappearance of persons is established by section 95 of the Crimes Act 2009 ("Crimes Act") and prescribes a maximum penalty of 17 years imprisonment.
9. Consistent with the ICPED section 95 of the Crimes Act addresses the offence of enforced disappearance by imputing criminal liability and responsibility even in circumstances where the perpetrator's actions are done in accordance with the authorisation, support or acquiescence of the government or a political organisation. In further reinforcement of criminal responsibility and liability in such circumstances, consistent with the ICPED.
10. Given the above salient provisions in the Crimes Act and the Fijian Constitution, and our competent judicial system which provides an adequate mechanism for redress, we recommend that Fiji does not make the relevant declaration under Article 31 of ICPED.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

11. Article 92(1) of ICMW provides that any dispute between two or more States Parties concerning the interpretation or application of the ICMW 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.
12. Article 92(2) of ICWM however, allows for States Parties at the time of ratification or accession to the ICMW to declare that it does not consider itself bound by Article 92(1) of ICWM.

13. A declaration of this nature is not extraordinary as ICWM itself allows for States Parties not to be bound by Article 92(1). Some examples of States Parties that have made a declaration under Article 92(1) of ICWM can be found at <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&msgid=IV-13&arc=IND>
14. In the Fijian context, the Fijian Constitution has a robust bill of rights provision which provides all persons in Fiji the right to economic participation and the right to work. Furthermore, the Employment Relations Act 2007 ("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.
15. 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.
16. Given that the Fijian Constitution and the Act are in conformity with ICWM, and given that Fiji has competent judicial system, we recommend that any dispute in relation to the interpretation and application of any article of ICWM in the Fijian jurisdiction be adjudicated in Fiji before the Fijian Courts.
17. In light of the foregoing reasons, we advise as follows:
- (a) that at time of accession to ICPED, Fiji does not make the relevant declaration under Article 31; and
 - (b) that at the time of accession to ICMW, that Fiji declares that it does not consider itself bound by the provisions of Article 92(1) of ICMW.
18. Should you require further clarification, please contact the undersigned.

Thank you.

Yours sincerely



Seema Chand
Senior Legal Officer
for THE SOLICITOR-GENERAL

PRESENTATION TO THE PARLIAMENT STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE

Mr Chairman, and distinguished members of the Standing Committee on Foreign Affairs and Defence. A very good morning to you all. May I take this opportunity in conveying to you all the gratitude of the Commander, Republic of Fiji Military Forces for the kind invitation to appear and present to the Standing Committee, its views regarding three (3) International Conventions namely:

- (1) United Nations Convention on International Settlement Agreements Resulting from Mediation;
- (2) International Convention on the Protection of All Migrant Workers and Members of their Families; and
- (3) International Convention for the Protection of all Persons from Enforced Disappearance.

The three Conventions in question does not present any direct security implications. However, in adverse or unfavorable circumstances, it may develop into matters of national or international concerns. Although there are no presenting security implications on which we would have presented, however there are few other relevant issues which we intend to bring to the attention of the Committee.

Mr Chairman, I will address each Convention in turn.

(1) United Nations Convention on International Settlement Agreements Resulting from Mediation

Mr Chairman, undoubtedly, we all have witnessed a steady drift in resolving disputes through the prescriptions of Alternative Dispute Resolutions. What the Convention is advocating is a means of resolving commercial dispute outside the Court System. There are running debates as to the pros and cons associated with the Alternatives Dispute Resolution Process compared to the Adversarial or Court process. Arguments extend to the delay in resolving cases in court, rising cost associated with the litigations, and many other. The Mediation process provided in the Convention is an informal alternative to litigation or adversarial process.

Mr Chairman, the Convention in question has a caveat as to its applicability. The scope of its application is provided in Article 1. The restriction placed, in our opinion is adequate to discourage undesirable attempts to invoke the provisions.

Article 2 to 15 are working provisions of the Convention which adequately provides for the framework of the Mediation Process.

Article 16 is important, in that, it provides us an opportunity to withdraw – or exit if we agree to the ratification of the Convention. We submit, that the

Convention offers us an opportunity to have in place an alternative process in the resolution of commercial disputes. It provides an opportunity also to have amicable resolution. As such, in support, we submit that Committee seriously considers recommending the adaptation of the Convention on International Settlement Agreements Resulting from Mediation.

Mr Chairman

The Convention on the Protection of the Right of all Migrant Workers and members of their Families extends from the international principles and norms associated with Human Rights. The provisions of the Convention is in line with the recognitions rights provided in Chapter 2 of our Constitution.

Sir, we are of the opinion that there a numerous Fijian living abroad who fall under the definition of a ‘Migrant Worker’ as provided in Article 2. We have no data to support the ascertain, but believe that those affected by the provisions of the Conventions will be significant.

In our opinion, the Conventions main focus is the protection of migrant workers’ rights. We must, not confuse ourselves with ‘migration’, rather we are referring to our nationals or other nationals who are not citizens of the country but only engaged in an activity for a prescribed remuneration or wages.

Mr Chairman, the Convention prescribes very high standards for the States to adhere to. Although the standards are high, the protection of rights accorded to immigrant workers will help our nationals and equally to those migrant workers here in Fiji. This Convention origin is from the 9 core international human rights instruments i.e.:

- (1) 1923 Declaration of the Rights of child;
- (2) 1948 Universal Declaration of Human Rights;
- (3) 1975 Declaration of the Right of Disable Person;
- (4) 1986 Declaration on the Rights to Development;
- (5) 1993 Vienna Declaration and Programme of Action;
- (6) 1998 Declaration of Human Duties and Responsibilities;
- (7) 2001 Universal Declaration on Cultural Diversity;
- (8) 2007 Declaration of Rights of Indigenous Peoples; and
- (9) 2008 UN declaration on sexual orientation and gender identity.

From our reading, the Migrant Rights Convention does not advocate any new rights rather guidelines of how existing basic rights should apply to migrant persons. We note the creation of check and balances of the state and status of migrant workers.

Reservations

(1) Article 18 (6)

“When a migrant worker or a member of their families has, by a final decision, been convicted of a criminal crime and when subsequently his or her conviction has been reverse or he or she has been pardoned on the grounds that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated accordingly to law, unless it is proved that the non-disclosure of unknown fact in time is wholly or partly attributable to that person.”

This provision needs further scrutiny. The Attorney General’s Office assistance must sought regarding compensation – for person discharged of any criminal liability. This provision may recognize or give rise to a new understanding or application which individuals discharged of criminal liabilities were not enjoying before.

(2) Article 40

“Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for promotion and protection of their economic, social, cultural and other interest.

No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interest of national security, public order (order public) or the protection of the rights and freedoms of others.”

The issue of migrant workers forming association and trade Unions needs further scrutiny. Is such permissible under our current legal provisions? The AG’s office needs to provide guidance.

(3) Article 46

“Migrant workers and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreement and the obligation of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and house hold effects as well as the equipment necessary to engage in the remunerated activity for when they were admitted to the State of employment:

- (a) *Upon departure from the State of origin or State of habitual residence;*
- (b) *Upon initial admission to the State of employment;*
- (c) *Upon final departure from the State of employment; and*
- (d) *Upon final return to the State of habitual residence.*

The issue of exemption from import and export duties and taxes need further scrutiny. These provision may not conform to the standing provisions of our excise duties and taxes.

(4) Article 47

“Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and conformity with applicable international agreements.

States concerned shall take appropriate measures to facilitate such transfers.”

The issue of remittance needs more scrutiny. Our reading is that remittance are done in compliance with standing National Laws and Regulations.

(5) Article 49

“(2) Migrant worker who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.”

Again, considerations are to be made regarding ‘migrant workers’ changing employment and opting for another employment. The issue of visa status and work permit needs further scrutiny and discussion.

(6) 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 with the Statute of the Court.

Each State Party may at the time of ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

Any State Party that has made a declaration with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.”

The Committee must decide whether the provisions regarding “arbitration” is acceptable or that, arbitration is only involved after there is agreement of both parties. Also, we must decide whether or not the matter be referred to the International Court of Justice is acceptable.

Mr Chairman, we submit that the Committee considers the adaptation of the Convention on the Protection of the Rights of all Migrant Workers and Members of their families with the reservations presented.

Appendix I: Fiji Police Force



SCOPE



1. Should Fiji ratify the treaty or not?
2. Why should Fiji ratify / not ratify this treaty?
3. What would be the implications of ratification on you and your organisation?
4. Any other relevant points related to the treaty and the ratification process.



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

PURPOSE



International protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally

SHOULD FIJI RATIFY THIS CONVENTION



In our opinion, Fiji should ratify this treaty with the hope that other Country do the same for the interest of Fiji Citizens being Migrant Workers in those countries.

CONVENTION CONSISTENCY



- CONSTITUTION
- IMMIGRATION ACT
- EMPLOYMENT RELATIONS ACT
- CRIMES ACT

WHY SHOULD FIJI RATIFY THIS CONVENTION



1. The Convention ensures universally recognised protection of the rights of all migrant workers and members of their families.
2. The Convention links the migration and human rights principles.

WHY SHOULD FIJI RATIFY THIS CONVENTION



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Appendix J: Office of the Commissioner Northern Division