

A THREE PAPER SERIES

ACCESS TO JUSTICE

PART III



CENTER FOR MIGRANT ADVOCACY

ACCESS TO JUSTICE: INTERNATIONAL COMMITMENTS

The Center for Migrant Advocacy thanks its intern, Elena Lopez, for putting together this report on access to justice of OFWs and their families.

This publication is the third part of a three paper series on Filipino migrant worker's access to justice.



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Introduction

What does the term “access to justice” signify? Its meaning can vary in seemingly subtle but important ways. According to the United Nations Development Programme, access to justice refers to “assisting poor and marginalized people to use formal and/or informal institutions in order to seek justice”.¹ An alternate definition is “the ability to receive, mobilize for, and be informed about social practices and procedures that reinforce certain ideals of accountability, fairness, equality, civil liberties, and human rights”.² Vivek Maru of the World Bank’s Justice Reform Group offers the narrower definition of “the ability of citizens and communities to make use of courts”.³ In this research paper, access to justice comprises of both concrete practices and more qualitative considerations. Above all, access to justice will be examined through a human rights lens.

An important characteristic of human rights is the indivisibility, interdependence and interrelatedness of all human rights, although in reality this characteristic is frequently ignored. The interdependence of all human rights is clear when it comes to human rights violations, as these abuses can be both a cause and a consequence of mutually reinforcing human rights violations. Access to justice is a fundamental right in itself and essential for the protection and promotion of all other civil, cultural, economic, political and social rights. For example, access to justice is essential to battling the root causes of poverty, as impoverished persons are more vulnerable to criminal and illegal acts such as economic exploitation; access to justice ensures that everyone, including the impoverished, can participate in justice systems and have tools for redress. Therefore, access to justice is one factor among many needed to provide the resources, capabilities, and power necessary to enjoy the entire range of human rights.

As of 2012, the Philippine Overseas Employment Administration has recorded nearly 2 million Overseas Filipino Workers coming from different regions within the Philippines and deployed throughout the globe.⁴ Unsurprisingly, this large population poses challenges for the Philippine government, and its bureaucratic agencies like the

¹ “Fast Facts,” *United Nations Development Programme*,

<http://www.undp.org/content/dam/undp/library/corporate/fast-facts/english/FF-Justice-and-Security.pdf>

² Susan P. Mains, “Access to Justice,” in *Encyclopedia of Gender and Society*, ed. Jodi O’Brien (Thousand Oaks, CA: SAGE Publications, Inc., 2009), 6.

³ Vivek Maru, “Access to Justice and Legal Empowerment: A Review of World Bank Practice,” *Hague Journal on the Rule of Law* 2, no. 2 (2010): 260.

⁴ “Table 2 – Number of Deployed Overseas Filipino Workers by Type: 2008-2012,” *Philippine Overseas Employment Administration*, http://www.poea.gov.ph/stats/2012_stats.pdf

Philippine Overseas Employment Administration (POEA) and the National Labor Relations Commission (NLRC), who are tasked with ensuring that each and every one of the migrant workers are treated with due respect and dignity, and are granted access to justice.

With all of this being said, this paper aims to present international commitments made by several states to improve migrant workers' access to justice. This is to provide a contextual basis as to how the fight for access to justice is fought in the country. Such is done to establish a framework for the implementation of legal redress mechanisms and institutions in the country for migrant workers' who have experienced abuse, exploitation and other inhumane treatment in their countries of destination.

HUMAN RIGHTS FRAMEWORK

In regard to human rights, states have taken on responsibility by committing themselves to respect, protect and fulfill rights related to access to justice. The Universal Declaration of Human Rights, adopted in 1948 by the international community, serves as the foundation of international human rights law. The Universal Declaration of Human Rights contains several articles related to issues of justice. Article 8 is perhaps the most relevant to access to justice and states "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."⁵ Other relevant rights include the right to equality before the courts and tribunal,⁶ the right to legal assistance,⁷ the right to equality and equal protection of the law,⁸ the right of non-discrimination,⁹ the right to recognition as a person before the law,¹⁰ and the right to seek and receive information.¹¹

Access to justice is also connected to human rights through Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR was signed and ratified by the Philippines and is part of the International Bill of Human Rights. The provisions of Article 14 outline States Parties' obligations to persons within its borders,

⁵ "The Universal Declaration of Human Rights," *United Nations*, <http://www.un.org/en/documents/udhr/index.shtml#a8>

⁶ "Article 14.1," *United Nations*, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷ "Article 11.1," *United Nations*, <http://www.un.org/en/documents/udhr/index.shtml#a11>

⁸ "Article 7," *United Nations*, <http://www.un.org/en/documents/udhr/index.shtml#a7>

⁹ "Article 2," *United Nations*, <http://www.un.org/en/documents/udhr/index.shtml#a2>

¹⁰ "Article 6," *United Nations*, <http://www.un.org/en/documents/udhr/index.shtml#a6>

¹¹ "Article 19.2," *United Nations*, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

regarding access to the judicial system. While Article 14's provisions are comprehensive, they are focused upon the formal institutions of justice within states parties. The provisions are specific but there are areas that arguably remain at the discretion of the State Party. For example, while provision 3(c) states that everyone is entitled to be tried without undue delay, there is no clarification on what constitutes an undue delay. This can lead a State Party to apply its own interpretation; however, according to the Statute of the International Court of Justice, customary international law is one of the sources of international law, meaning that there are international obligations arising from established state practice as opposed to formal written international treaties.¹²

Box 1 - Article 14 of ICCPR¹³

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

¹² "Article 38 of the Statute of the International Court of Justice," *International Court of Justice*, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II

¹³ "International Covenant on Civil and Political Rights," *United Nations Office of the High Commissioner for Human Rights*, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground 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 according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The right to an effective remedy is a cornerstone of human rights protection. It ensures that all individuals have a procedure through which they can enforce their rights and obtain redress. This is important because without any avenues for recourse human rights violations can continue unchecked; unfortunately, this remains the case in many jurisdictions. Yet, effective remedy includes more than just improving access to judicial and adjudicatory mechanisms. Remedies must be effective and legal, and the outcomes must be just and equitable. The right to an effective remedy also includes “reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”.¹⁴

Similarly, the right to equality before the law and the right to a fair trial consist of interrelated rules and practices. For example, there are rules concerning due process in several provisions of international human rights treaties, including article 14 of the ICCPR. States are bound by the principle of equality and non-discrimination to ensure that all individuals have equal access to judicial and adjudicatory mechanisms no matter their race, colour, sex, language, religion, political affiliation, national or social origin,

¹⁴ “Report of the Special Rapporteur on extreme poverty and human rights,” *United Nations*, p. 4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/458/06/PDF/N1245806.pdf?OpenElement>

property, birth or other status, social and economic status, and that all parties in judicial or legal proceedings are treated without any discrimination.

Therefore, in the face of these international laws, states have an obligation to protect and uphold human rights. Specifically regarding their obligation to uphold and promote access to justice, states are responsible for constructing a legal and institutional framework that will enable access to effective redress mechanisms, and ensure an impartial process for those seeking redress. Furthermore, access to justice requires that there be concrete, positive measures such as non-discriminatory laws and policies. The reality in many jurisdictions is that current laws and policies may discriminate against or have an excessive impact on certain groups within a society. This embedded discrimination severely undermines the universality of access to justice, as it creates insidious and pervasive barriers to members of certain groups.

Specifically in regards to the Philippines, respect for international laws is enshrined in the Constitution, as seen in the following: “The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations”.¹⁵ This is used as the basis for implementing international law domestically. According to the Philippine Supreme Court, “international law, regardless of its source, acquires a standing equivalent to domestic legislation”.¹⁶ While it is commendable that ratified conventions can automatically become domestic law in the Philippines, there can be problems of implementation when domestic law and international conventions overlap and contradict one another.

INTERNATIONAL LAWS ON LABOR

In as much as the domestic provisions are quite limited, a summary of the international laws on migrant workers authored by the United Nations (UN) and the International Labor Organization (ILO) shall be presented. The international laws shall be scrutinized to pinpoint the provisions they have with regard to: migrant workers and the promotion of their dignity, access to justice regardless of documented and irregular workers, and the creation of a standardized system to ensure safety and security of human rights regardless of ratified and non-ratifying countries.

¹⁵ 1987 Philippine Constitution, art. II, § 2.

¹⁶ Mark Richard D. Evidente, “The Interaction of Domestic and International Law: The Doctrine of Incorporation in Philippine Practice”, *Philippine Law Journal* 78, (2004): 402

The UN as a Mechanism to Ensure Standardization on Access to Justice

With respect to the domestic laws enacted by the Philippine government such as the Migrant Workers Act of 1995, and the Migrant Workers and Overseas Filipinos Act of 1995, there are also provisions created by the United Nations to further the promotion and security of the rights of all migrant workers. The United Nations Office of the High Commissioner of Human Rights (OHCHR) focuses mainly on the implementation of respecting the dignity of all humans transcending their respective national borders. This Office currently houses 16 different chapters on human rights, including the International Convention on Migrant Workers spearheaded by the Committee on Migrant Workers (CMW).

The International Convention's publication entitled the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is based on the provisions under the United Nations human rights treaties. The main function of the said Convention consists of standardizing the application of the State parties to their migrant workers and families, irrespective of their migratory status. This means that even undocumented or irregular migrant workers are recognized to prevent trafficking and to ensure the protection of their rights.

Currently, the Committee on Migrant Workers consists of 14 delegates representing different countries including the Philippines, represented by Mr. Jose S. Brillantes.¹⁷ With regard to member-states, 37 are signatories and 47 are parties as of December 2013.¹⁸ Ratifying countries include Asian countries such as the Philippines, Cambodia and Sri Lanka, along with numerous Middle Eastern, North African and South American countries such as Egypt, Nigeria, Peru, Turkey, and Uganda. This is in addition to many more countries from many more regions. Nonetheless, no destination country in Western Europe or North America has ratified the convention. The Philippines, Mexico, and Morocco have primarily ratified the Convention because they are migrant-originating countries that have been numerous cases wherein their overseas workers were mistreated and were victims of human trafficking.

With regard to the primary context where this Convention has been established, all 93 articles are designed to prevent such maltreatment from happening. The Convention features: the scope and definitions of a migrant worker, the provisions on non-discrimination with respect to rights, the definition and standardization of human rights of all migrants, the rights of migrants who are documented as well as irregular, the

¹⁷ "The International Convention on Migrant Workers and its Committee – Fact Sheet No. 24 (Rev.1)," *United Nations*, p. 10,

<http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>

¹⁸ "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families," *United Nations Treaty Collection*,

http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-13&chapter=4&lang=en

promotion of sound, equitable, humane and lawful conditions in connection with international migration, the application of the convention including the authority of the committees and their structure, as well as other general provisions. There have been countries that have declared specific articles incompatible with their domestic laws and cultures. As such, not all signatories follow all articles of the convention; this is especially true for some countries in the Middle East.

The implementation of the said provisions mainly relies on the Committee itself, which is composed of fourteen independent experts. In accordance with Article 72 of the Convention, independent experts are elected for a four-year term by State Parties to the Convention.¹⁹ States Parties are obliged to submit a regular report to the Committee every five years.

The Migrant Workers Convention places human rights in the context of migrant rights and reiterates that the basic rights of migrant workers should be standardized, adopted and applied by all signatory states. This also provides protection for their respective family members irrespective of their legal status (documented or irregular). However, the rights granted to documented migrants are different from those granted to irregular migrants.

The Convention features the rights of migrant workers and their family members divided with respect to documented and irregular migrant workers. The basic rights reiterated within the 1990 Convention are the following:

Box 2 – Migrant Workers Convention²⁰

I. Human Rights of Migrant Workers and Members of their Families

Basic Freedoms:

- Right to freedom of movement to and from their countries of origin (article 8);
- Right to life (article 9);
- Right to freedom from torture or cruel, inhuman or degrading treatment or punishment (article 10);
- Right to freedom from slavery, servitude or forced compulsory labor (article 11);

¹⁹ OHCHR. (n.d.). Committee on migrant workers: Membership. Available from <http://www2.ohchr.org/english/bodies/cmw/members.htm>

²⁰ "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families," *United Nations*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>

- Right to freedom of thought, expression, conscience and religion (articles 12 and 13);
- Right to privacy (article 14);
- Right to property (article 15);

Due process:

- Right to a fair and public hearing with all the guarantees of a due process (articles 16-20);
- Right to be provided with necessary legal assistance, interpreters and information in an understood language (article 16);
- Right to liberty and security and freedom from arbitrary arrest or detention (article 16);
- Right to be presumed innocent until proved guilty (article 19);
- Prohibition to be subject to measures of collective expulsion (article 22);
- Right to have recourse to diplomatic or consular assistance and protection (article 23);
- Right to recognition everywhere as a person before the law (article 24);
- Right to equality with nationals before the courts and tribunals (article 18);

Employment:

- Right of equal treatment with nationals in respect to remuneration and other conditions of work such as overtime, holidays, etc. (article 25);
- Right to join freely any trade union (article 26);

Right to enjoy the same treatment as nationals regarding social security benefits in so far as they fulfill the legislation requirements (articles 27);

- Right to emergency medical care (article 28);

Family and Children of Migrant Workers:

- Right to a name, registration of birth and nationality (article 29);

- Right of access to education (article 30);

Cultural and Economic Rights:

- Right to preserve a cultural identity (article 31);
- Right to transfer earnings and savings upon the termination of their stay in the State of employment (article 32);

Information:

- Right to information by the State of origin, State of employment, or the State of transit of their rights arising from the present Convention, the conditions of their admission, and their rights and obligations in those States (article 33);

II. Other Rights of Migrant Workers and Members of their Families Who Are Documented or in a Regular Situation:

Migrant workers and members of their families who are documented or in a regular situation shall enjoy the rights set forth below in addition to those already mentioned. In such a way, the Convention seeks to discourage illegal migration.

Temporary Absences:

- Right to be temporarily absent, for reasons of family needs and obligations, without effect on their authorization to stay or work (article 38);

Freedom of Movement:

- Right to liberty of movement in the territory of the State of employment (article 39);

Employment:

- Right to form associations and trade unions in the State of employment (article 40);
- The right to equality of treatment with nationals in respect of protection against dismissal, unemployment benefits and access to alternative employment (article 54);
- In case of violations of work contracts by the employer, the right to address his/her case to the competent authorities of the State of employment.

Political Rights:

- Right to participate in the public affairs of the State of origin, in accordance with its legislation (article 41);
- Right to vote and to be elected in the State of origin, in accordance with its legislation (article 41);

Cultural and Economic Rights:

- Right to enjoy from export and import taxes (article 46).
- The right to equality of treatment with nationals of the State of employment, including access to educational, vocational and social services (article 43);

Information:

- Right to information, including all conditions concerning their stay and their remunerated activities (article 37);

Aside from the annual reports given by signatory States to the committee, the objectives of the UN International Law for Migrant Workers are as follows: to promote the recognition and respect for the rights of all migrant workers and members of their families, to advocate for universal ratification and effective implementation of the UN International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, to facilitate the efforts of migrant associations and other non-governmental organizations in advocating for migrants rights, and to monitor trends and developments in the situation of migrants' rights and welfare. A main feature of this Committee is to provide avenues for the initiatives of non-government organizations.

It has been evident that although the 1990 Convention and the ratification of the Philippines was intended to spark improvement and development with regard to the prosperity of the migrant workers' human rights, this has not been the case. It is because either: i) there should be a universal collaboration between the international law and the signatories' domestic laws or, ii) the domestic laws of the Philippines should be in light of the international law, and not the other way around. Nonetheless, whatever the scenario is, cases of maltreatment will most likely not halt based on the numerous declarations of the Convention by migrant-receiving countries. Many destination countries, such as those in the Middle East and Africa, have demonstrated this. Another problem imposed by the Convention is that it lacks provisions for non-ratifying countries.

The ILO as a Mechanism to Ensure Standardization on Access to Justice

The ILO primarily promotes cooperation between government agencies and workers' organizations within the framework of social and economic progress. The 2004 International Labor Conference is a non-binding multilateral framework for migrant workers in the global economy. An important feature of the ILO is the imposition of labor standards for the international community. The ILO monitors countries that have ratified as well as those countries that have not ratified.

Member States submit periodic reports regarding their own measures of implementation. If problems arise, the ILO will provide assistance to Member States through social dialogue and technical assistance. Member states may also file a complaint against another Member State regarding the general application of an ILO convention if both have ratified the Convention in question. Additionally, associations of employers or workers that have consultative status with the ILO may make formal complaints in regards to the ILO Convention on Freedom of Association.

There are two ILO committees that examine the periodic reports submitted by Member States: (1) the Committee of Experts on the Application of Conventions and Recommendations and, (2) the International Labor Conference's Tripartite Committee on the Application of Conventions and Recommendations. The former examines the implementation of member states through governments' submission of reports of practicing law and application of the eight fundamental ratifications. The latter is an annual review composed of government representatives, employers and worker delegations.