

Shining new light on the UN MIGRANT WORKERS CONVENTION

edited by

Alan Desmond

Pretoria University Law Press

PULP

2017

Shining new light on the UN Migrant Workers Convention

Published by:

Pretoria University Law Press (PULP)

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Cover:

Yolanda Booyzen, Centre for Human Rights

ISBN: 978-1-920538-73-6

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ACKNOWLEDGMENTS

First and foremost, I am indebted to my parents and to my uncle, Con Desmond. For their encouragement and good counsel I wish to thank Graziano Battistella, Linda Bosniak, Paul De Guchteneire, Franck Düvell, Veronica Gomez, Stefanie Grant, Ray Jureidini, Magnus Killander, Michele LeVoy, Beth Lyon, Siobhán Mullally, Manus O'Callaghan, René Plaetevoet, Colin Rajah, Susan Slyomovics, Kristina Touzenis, Denise Venturi and Andrea Vilán. I would like in particular to thank Mariette Grange and Nicola Piper whose support for and participation in this project from the outset has been invaluable. Both have been a constant source of insightful ideas and sound suggestions. I am also extremely grateful to François Crépeau for so generously offering to write the foreword.

This book has its genesis in a conference I organised under the auspices of the Global Campus at the European Inter-University Centre for Human Rights and Democratisation (EIUC) in July 2014 at which a number of the contributors to the present volume delivered presentations. I am grateful to Valentina Abita of the Global Campus and to Florence Benoît-Rohmer, then Secretary-General of EIUC, for making that conference possible.

Each chapter in this collection underwent a double-blind peer review process involving evaluation by two external reviewers. I would therefore like to express my gratitude to the following individuals, each of whom reviewed at least one chapter:

Tanya Basok	David Keane
Wolfgang Benedek	Jan Klabbers
Laurie Berg	Magdalena Kmak
Marco Borraccetti	Sonia Morano-Foadi
Linda Bosniak	Ronaldo Munck
Vahan Bournazian	Lori Nessel
Elvira Dominguez-Redondo	Jan Niessen
Suzanne Egan	Pia Oberoi
Rolando Garcia Miron	Nicola Piper
Felipe Gómez Isa	Bernard Ryan
Mariette Grange	

Particular thanks go to Jan Klabbers who reviewed three chapters and to Mariette Grange and Nicola Piper who, in addition to contributing chapters of their own to the collection, also acted as reviewers for some of the pieces included.

The greatest debt of gratitude is, of course, owed to the authors of the 12 chapters which together make up this collection. It has been a pleasure to work with them and I am grateful for the initial alacrity with which they

accepted the invitation to contribute and their patience during the book's long gestation. I would also like to thank the individuals who produced work in draft form on the implementation of the ICRMW in Azerbaijan, Bosnia and Herzegovina, Morocco, Uganda, the Philippines and Uruguay. Time constraints meant that these draft chapters could not be included in this volume. I hope that this is a temporary setback and that they will see the light of day, sooner rather than later.

Last but not least, Lizette Hermann at Pretoria University Law Press shepherded the project through the entire production process. She has been a model of professionalism, good cheer and equanimity in the face of countless queries and endless emails.

I would like to dedicate this book to three individuals whose work in connection with migrants' rights and human rights more generally has been a source of inspiration, namely, Mariette Grange, Angela Melchiorre and Siobhán Mullally: mo mhíle buíochas libh.

Alan Desmond

Leicester, November 2017

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Mexico's commitment to the human rights of women migrant workers, published in 2016 by UN Women and IMUMI, <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2016/20-mexicos-commitment-to-the-human-rights-of-women-migrant-workers-2016-en.pdf?la=en&vs=3357>

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FOREWORD

The urgent need to recognise migrants' rights and dignity

Migrants in a precarious situation are voiceless in any host society, North and South, be they undocumented or temporary migrant workers with very restrictive visas or contracts.

They constantly exercise agency and make life-altering decisions on a regular basis – for some, simply taking the subway is a choice that can have huge consequences on the course of their life and that of people who depend on them for sustenance – but they have no access to the political stage in any host society.

And they rarely protest, contest, organise, unionise. Sticking their neck out to defend their rights may mean being detected as undocumented or identified as a trouble maker by the employer, and the consequence of either may be detention and deportation.

Migrants and their family and community have most often invested beyond their means in the migration project, in time, energy, money and physical or mental health. And migrants often undertake this migration project guided by a sense of duty or simply by love for their family: they must not fail them.

Anything that threatens this central objective in their lives is considered dangerous. Speaking up, protesting, fighting for their rights is dangerous. “Moving on” is most often a preferred strategy.

Two structural factors contribute to the marginalisation of such migrants.

The first structural factor is political. The best political system we have ever invented to govern ourselves – electoral democracy – is based on electoral incentive.

Without a vote, migrants provide none and politicians will not take them into account if this might trigger a negative electoral reaction. This is a structural limitation of electoral democracy as a political system: if one does not vote, one's human rights go unprotected.

The second structural factor is economic. While globalisation has enhanced the relocation of production to developing countries where labour is cheap and workers' protection standards are low, such relocation is not possible for large sectors of the economy, such as agriculture,

construction, hospitality, care giving, domestic work, fisheries or extraction, as well as informal work.

In consequence, temporary low-wage workers and undocumented migrants form a pliable workforce for these sectors of the economy, which would not be profitable in an open and regulated labour market in which citizens would request much higher wages for the same tasks. Industrialised countries have therefore created, on their own territory, production conditions similar to those in developing countries, with a view to subsidising these sectors through the reduction in labour costs.

Labour migration is taking place in a context of deregulation of work and labour markets. Salient characteristics of changes in work include precarisation of employment, increased informalisation of work and economic activity, as well as deteriorating work conditions. Competitive pressures provide an incentive for seeking and hiring labour compelled to accept lowered labour standards, more precarious statuses and 'flexible' employment conditions, in both Global North and Global South.

The absence of such migrants from public policy debates on migration policies means those debates are not informed by the experience of the persons these policies affect the most.

Much of public debates and policy activity is based on stereotypes, threats and fantasies, as was the case when policies about women were made by committees of men. Stereotypes and fantasies fuel the nationalist populist agenda and discourse, reinforcing negative public perceptions of migrants and increasing the pressure in favour of ever more repressive policies, in a very vicious downward spiral.

Yet, migrants have rights. Actually, in international human rights law as well as in many constitutional frameworks around the world, they have all the fundamental rights of any person, bar two: the right to vote and be elected, and the right to enter and stay in the country. This why human rights are human rights and not only citizens' rights.

However, obtaining that such rights be implemented by States, institutions and other people rests on having the power to force others to recognise one's rights. In history, marginalised groups have had to wrestle their rights from the hands of self-righteous majorities, through pushing politicians to alter their discourse and attitudes and to help defeat stereotypes and fantasies.

For political battles and legal battles to be launched and won, individuals and groups need to be empowered to fight for their rights and defend their dignity. One can note that, for many of such groups (women, indigenous peoples and persons with disabilities, to take only a few examples), although battles have been won, the war is not over and substantial equality is still elusive.

Unfortunately, unless and until such migrants gain some electoral traction, politicians are not going to pay much attention. We shall have to think, in some distant future probably, to provide voting rights to all long-term residents and not only to nationals: this could indeed change the tonality of many public debates on migration policies.

It was the ambition of the ICRMW to encapsulate the international legal regime applying to migrant workers and their families, and to provide them with a tool of empowerment that would help them gaining access to the legal and political recognition necessary for them to lead a dignified life, free of human rights and labour rights violations.

Conceptually, the Convention did not invent much, as it drew most of its inspiration from existing instruments applying to all, such as the UN human rights instruments and the ILO labour rights instruments. It was an attempt at synthesising the rights regime of migrant workers as it emerged from the already existing human rights and labour rights regimes.

It was certainly seeped in its time and some of its language and concepts appear dated today, as the human rights doctrine has considerably evolved and matured in the past thirty years. For example, a question one may ask almost thirty years after its negotiation is: why limit this convention to “migrant workers and members of their families” and not include all migrants?

But States which host most migrant workers have forcefully rejected it. In the words of a very pro-human-rights European ambassador to the UN in Geneva, “it is a dead duck”. In particular, although not only, host States have objected to the fact that the Convention specifies that undocumented migrants benefit from human rights guarantees. The statement that migrants are rights-holders is absolutely true, even self-evident, in law, but, in the toxic nationalist populist context which has developed over the past forty years, it is a statement which is politically unutterable on most political stages, if the politician is to survive the next electoral challenge.

Yet, despite its ridiculously slow ratification rate, this convention stands tall as a testament to how migrants should be defined, i.e. as human beings with rights and freedoms first and foremost. Their dignity requires – as does that of anyone – that they be lifted from precariousness, that they be empowered to defend their rights against exploitation and discrimination, that they be able to exercise options and make choices about their future and that of their family.

Constraining them to remain indefinitely locked up in constructed precarious statuses is an offense to human dignity that needs to be addressed. This is especially so considering how inspirational so many migrants’ stories are, due to their agency, courage and imagination, in sum the sheer grit they often demonstrate throughout their migration journey. What they are ready to endure for the sake of their families and communities is often extraordinary. In this sense, host States do not have

the moral high ground: migrants do. Far from being villains as portrayed too often in the media, they are considered heroes in the family lore of millions of households.

At a time when States have at last decided that the United Nations Organisation was an appropriate forum for discussing migration policies and are trying to negotiate for September 2018 a “Global Compact on Migration”, it is a mind-boggling paradox that the only universal instrument dedicated to migrants remains so forcefully resisted. Somehow, this does not bode well for what any Global Compact on Migration will look like.

This collection by a group of brilliant scholars brings forward a welcome analysis of the 1990 Convention, its qualities, its flaws, its interpretation and its future, as a key piece of our world’s human rights framework, a framework which remains, after all, the ultimate legitimization tool for all public policies, including migration policies.

François Crépeau

Montreal, 24 October 2017

INTRODUCTION: THE CONTINUING RELEVANCE OF THE UN ICRMW

Alan Desmond

Over 25 years have passed since the adoption, by the UN General Assembly on 18 December 1990, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹ (ICRMW, the Migrant Workers Convention, the Convention), the seventh in the group of core international human rights instruments which has since expanded to ten in number.² The ICRMW sets out the basic minimum standards of human rights protection to which a particularly vulnerable group of people, migrant workers and members of their families, are entitled. On the one hand, it represents a stunning achievement: hard-won agreement amongst the member states of the international community, under the auspices of the UN, on the minimum protections to which international migrants, regardless of their status, should be entitled. On the other hand, however, that achievement is undermined by the reluctance of those same states to be bound by the treaty. Indeed, the ICRMW is demonstrably the least successful of the core instruments in terms of ratification: it took 13 years for the Convention to attract the 20 ratifications necessary for it to enter into force in 2003 and it currently has just 51 state parties.

1 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 3.

2 For a full list of the ten core international human rights instruments and their monitoring bodies see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 15 June 2017). There is some inconsistency within the UN as to the exact number of core instruments. The website of the Office of the High Commissioner for Human Rights (OHCHR) contains references both to nine and ten core international human rights instruments. This chapter refers to ten core international instruments which are to be understood as the nine core human rights treaties adopted by the UN General Assembly between 1965 and 2006 as well as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (OP-CAT). The implementation by state parties of each of these ten instruments is overseen by a monitoring body composed of independent experts. While a number of the treaties have been supplemented by optional protocols, OP-CAT is the only such protocol with a dedicated monitoring body. This is presumably why it is at times numbered amongst the core instruments, as distinct from the other eight optional protocols whose implementation by state parties is overseen by the monitoring body supervising the treaty to which the optional protocol relates.

2 Introduction

A brief comparison with the ratification rate of other core instruments is telling. The International Convention for the Protection of All Persons from Enforced Disappearance, following ratification by 20 states, entered into force in December 2010, less than four years after it was opened for signature by all states. It currently has 57 state parties. The Convention on the Rights of Persons with Disabilities (CRPD) entered into force in May 2008, just over a year after it was opened for signature, and currently has 174 state parties. The Convention on the Rights of the Child (CRC), whose adoption by the UN General Assembly preceded that of the ICRMW by 13 months, entered into force in September 1990, less than a year after it was opened for signature. With 196 state parties, it enjoys almost universal ratification.

Despite its anomalous ratification rate, however, the ICRMW is arguably more relevant today than ever before. The number of international migrants, persons living in a country other than where they were born, was estimated to be 244 million or 3,3 per cent of the global population in 2015. This represents an appreciable increase on the 2,8 per cent share of the global population made up by international migrants in 2000.³ It means, to employ the language of the Preamble to the Convention, that 'the importance and extent of the migration phenomenon', which is often the cause of serious problems for migrant workers and for the members of their families, affects more people today than at any point in the past. The time which has elapsed since the adoption of the ICRMW in 1990 has done nothing to reduce the need for a comprehensive convention establishing basic norms to protect individuals who, outside of their state of origin, frequently find themselves in a situation of vulnerability. Indeed, during a 2015 event to mark the 25th anniversary of the Convention's adoption⁴ the UN High Commissioner for Human Rights underscored the fundamental importance of the ICRMW 'as a robust and agreed international legal framework for the rights of all migrant workers and their families in countries of origin, transit and destination' which 'was now more relevant than ever'.⁵

The steady rise in the number of international migrants has been matched by an increase in the attention being paid to migration and the human rights of migrants at the international level. Migration features, for example, in the 2030 Agenda for Sustainable Development,⁶ the successor

3 See UN DESA 'Population facts: Trends in international migration, 2015' (Factsheet No 2015/4 of the Population Division of the DESA of the UN Secretariat) <http://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationPopFacts20154.pdf> (accessed 15 June 2017).

4 'Current challenges in protecting the human rights of migrant workers, irregular migration flows in the Mediterranean, migrant workers in the Gulf, and undocumented children in the Americas' <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16398&LangID=E> (accessed 15 June 2017).

5 Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights (n 4 above).

6 Resolution 70/1: Transforming our world: The 2030 Agenda for Sustainable Development, GA (25 September 2015), UN Doc A/RES/70/1 (2015).

to the Millennium Development Goals which seeks to eradicate poverty by facilitating sustainable development. The 2030 Agenda acknowledges migrants' positive contribution to inclusive growth and sustainable development and notes that international migration is a multidimensional reality 'which requires coherent and comprehensive responses'.⁷ Amongst the Agenda's 169 targets are securing labour rights and safe working environments for all workers, including migrant workers, and the facilitation of orderly, regular, safe and responsible migration.⁸ The ICRMW, of course, provides a framework in Part VI for state parties to cooperate to promote sound, equitable, humane and lawful conditions for international migration but is not mentioned in the 2030 Agenda.

An equally striking example of the attention being paid to migration at the international level is the adoption by the UN General Assembly on 19 September 2016 of the New York Declaration for Refugees and Migrants.⁹ The Declaration set in train a process of intergovernmental negotiations which is intended to culminate in 2018 in the adoption of a Global Compact for safe, orderly and regular migration and a separate Global Compact on refugees. The Global Compact on migration is intended to create a framework for comprehensive international cooperation on migrants and human mobility and to deal with all aspects of international migration.¹⁰ While welcoming the priority afforded to human rights in the New York Declaration,¹¹ and notwithstanding its call for ratification of the ICRMW,¹² one is reminded of the celebrated observation that those who fail to remember the past are condemned to repeat it:¹³ it is difficult to understand the New York Declaration's initiation of intergovernmental consultations for the elaboration of a comprehensive compact on international migration when an internationally-agreed blueprint already exists. The ICRMW provides a framework in which to address most, if not all, of the elements envisaged for inclusion in the Global Compact such as greater international cooperation on migration matters and reduction of irregular migration.¹⁴ Might the explanation for this apparent repetition lie at least partly in a lack of awareness of the ICRMW and its contents?

Lack of awareness of the ICRMW may itself be both a symptom and cause of its low and slow rate of ratification, a feature of the Convention

7 2030 Agenda for Sustainable Development (n 6 above) para 29.

8 2030 Agenda for Sustainable Development (n 6 above) Targets 8.8 and 10.7.

9 Draft resolution referred to the high-level plenary meeting on addressing large movements of refugees and migrants, GA (13 September 2016) UN Doc A/71/L.1 (2016) (New York Declaration).

10 New York Declaration (n 9 above) Annex II para 2.

11 See E Guild & S Grant 'Migration governance in the UN: What is the global compact and what does it mean?' (2017) 252 *Queen Mary University of London, School of Law Legal Studies Research Paper* 4.

12 New York Declaration (n 9 above) para 48.

13 G Santayana *The life of reason: Introduction and reason in common sense* (1906) 284.

14 See New York Declaration (n 9 above) Annex II para 8.

which is reflected in, and perhaps largely the reason for, the relative paucity of literature devoted to this core human rights instrument. Less than a year after its adoption the Convention was the subject of a special issue of *The International Migration Review* (IMR).¹⁵ The winter 1991 volume of IMR included nearly 200 pages on the background, content and future prospects of the new addition to the repertoire of international human rights instruments. It was not until 2009, however, that a second multi-author collection was dedicated to the topic of the ICRMW, namely, *Migration and human rights: The United Nations Convention on Migrant Workers' Rights*.¹⁶ The latter work documents the history and content of the Convention and features regional and country studies on obstacles to and prospects for ratification of the Convention. The 18 years dividing these two landmark publications was not a completely barren landscape in terms of literature on the Convention. Ryszard Cholewinski's *Migrant workers in international human rights law: Their protection in countries of employment* in 1997 contained extensive analysis of the Convention and a number of important reports, articles and book chapters sought to understand and explain the comparatively low rate of ratification of the ICRMW.¹⁷ Since 2009 the literature produced on the topic of the ICRMW has been limited to journal articles, book chapters and reports:¹⁸ it remains the only one of the ten core instruments not yet to have generated a dedicated monograph. Similarly, there is little published work on the Committee on Migrant Workers (CMW), the body of independent experts which oversees the compliance of state parties with the ICRMW.¹⁹

15 'UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (1991) 25 *The International Migration Review Special Issue* 685.

16 De Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009).

17 See, by way of illustration, L Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention' in Bogusz et al (eds) *Irregular migration and human rights: Theoretical, European, and international perspectives* (2004) 311; E MacDonald & R Cholewinski *The Migrant Workers Convention in Europe: Obstacles to the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* (2007); S Vucetic 'Democracies and international human rights: Why is there no place for migrant workers?' (2007) 11 *International Journal of Human Rights* 403.

18 See, again by way of illustration, K Touzenis & A Sironi *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* Directorate-General for External Policies of the Union, Directorate B Policy Department Study (2013); B Ryan 'In defence of the Migrant Workers Convention: Standard setting for contemporary migration' in SS Juss (ed) *The Ashgate research companion to migration law, theory and policy* (2013); LA Nessel 'Human dignity or state sovereignty? The roadblocks to full realization of the UN Migrant Workers Convention' in V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014). There is also extended discussion of the Convention in M Ruhs *The price of rights: Regulating international labor migration* (2013).

19 The only two dedicated studies of the work of the CMW double are V Chetail 'The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' in P Alston & F Mégret (eds) *The United Nations and human rights: A critical appraisal* (forthcoming 2018); and C Edelenbos 'Committee on Migrant Workers and implementation of the ICRMW' in De Guchteneire et al (n 16 above) 100-121.

The gap in the literature on the ICRMW is thus of chasmic rather than interstitial proportions and cannot be satisfactorily redressed by a single publication. This collection therefore only partially compensates for the dearth of literature on the ICRMW. It aims to raise awareness of the ICRMW, particularly ahead of the conclusion of the Global Compact on migration and the implementation of the goals articulated in the Sustainable Development Agenda 2030. It shines new light on the Convention by illustrating its added value in the field of international human rights law and by examining its implementation in four state parties: as noted by Ryan, one way of clarifying the value of this human rights instrument is by focusing research on the states which have ratified it, rather than those who continue to abstain from ratification.²⁰ Beyond the value of the four country studies in terms of the light they shed on the implementation of the ICRMW, they each provide a richly informed and expertly detailed panorama of the broader migration situation of the country in question. The volume brings together experts from academia and practice, with the contributions of the latter informed by work on policy and advocacy in NGOs, international organisations and specialised agencies.

The 12 chapters in the volume are divided into four Parts. Part I examines the extent to which the fate of the Convention is determined by the political context, while illustrating the role that civil society can play in influencing that context. Part II describes the important place of the ICRMW in the international human rights law landscape. Part III contains an investigation of the Convention's implementation in four state parties. Part IV provides an update on issues surrounding the continuing failure to ratify in two significant destination regions, namely, the US and the EU. This introduction first provides a brief outline of the structure and content of the ICRMW before going on to attempt a summary of each of the volume's 12 chapters. It then highlights some of the main issues and themes which emerge from the contributions to the volume. It closes with a number of recommendations, gleaned from the 12 contributions, the implementation of which would go a long way towards increasing ratification of the Convention and compliance with its provisions as well as, ultimately, improving the lives of countless millions of migrants.

Structure and content of the Convention

Broadly speaking, the overall structure and underlying rationale of the ICRMW is similar to that of the other core international human rights treaties adopted since the late 1970s. Like the CRPD and the CRC, the ICRMW takes the rights set out in the International Bill of Human Rights, namely the Universal Declaration, the ICCPR and CESCR, and codifies

20 Ryan (n 18 above) 514.

them in relation to a particularly vulnerable category of persons, in this case migrant workers and members of their families.²¹ With 93 articles, divided into nine Parts, the ICRMW is the longest of the ten core instruments. It is a comprehensive document, covering the entire migration process from pre-departure in the country of origin, through travel in countries of transit, to entry and residence in the destination state and return to the country of origin.

The six articles in Part I set out the definitions of the terms used in the Convention, providing a broad definition of 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'. Part II, a single article, contains the non-discrimination clause. Part III, consisting of articles 8-35, is the longest and most controversial section of the Convention and is sometimes cited as an obstacle to ratification. It sets out the rights to be enjoyed by all migrants, regardless of their status. These include civil and political rights found in the ICCPR such as the right to life; freedom from torture; freedom from slavery; freedom from arbitrary arrest and detention; and freedom of expression. Part III also specifies the enjoyment by all migrants of a number of economic and social rights found in CESCR such as the rights to join trade unions; to medical care; and to education for their children.

Part III also elaborates upon a number of rights which are of particular importance for migrant workers and members of their families. States are obliged to inform migrants of their right to the consular protection and assistance of their states of origin when any right set out in the Convention is impaired, and particularly in the event of expulsion. Furthermore, article 22 of the Convention prohibits collective expulsion and provides that a migrant may only be expelled on the basis of a decision taken by the competent authority in accordance with law following an individualised assessment of the case. Article 22 affords a particularly robust catalogue of safeguards to migrants who are to be deported, going beyond the protection provided in instruments such as the ICCPR and regional measures such as the EU Return Directive.

States are also obliged to ensure, in so far as practicable, that migrant workers who are detained in a state of transit or employment for violation of provisions relating to migration shall be held separately from persons who have been convicted or detained pending trial. The Convention includes a prohibition on unlawful confiscation or destruction of a migrant's personal documents and recognises the right of migrants to

21 More detailed analysis of the provisions of the ICRMW can be found in, eg, chap four of R Cholewinski *Migrant workers in international human rights law: Their protection in countries of employment* (1997); L Bosniak 'Human rights, state sovereignty, and the protection of undocumented migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737; Touzenis & Sironi (n 18 above).

transfer their earnings and savings upon the termination of their stay in the state of employment.

The provisions set out in Part IV (articles 36-56) impose obligations on state parties to the Convention only vis-à-vis lawfully resident migrants. These include the right of migrants to form associations and trade unions for the promotion and protection of their economic, social, cultural and other interests;²² the right to move freely and choose residence in the state of employment; and the right of migrant workers to family reunification, though in this regard state parties are only obliged to ‘take measures that they deem appropriate and that fall within their competence’.

Migrant-specific protections codified in Part IV include the guidance that states, when considering whether to expel a migrant worker or family member, should take account ‘of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment’. Furthermore, lawfully present migrants are granted the right to transfer their earnings and savings, with a corresponding obligation upon states to take appropriate measures to facilitate such transfers.

Part V (articles 57-63) deals with the rights of migrant workers in specific categories of employment, such as frontier workers, seasonal workers and self-employed workers while Part VI (articles 64-71) sets out the ways in which state parties should ‘co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families’. This Part imposes obligations mainly, though not exclusively, on destination states. The requirements imposed by Part VI include exchange of information between the competent authorities in state parties as well as collaboration between states with a view to ‘preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation’. Underscoring the Convention’s distinction between regular and irregular migrants, Part VI requires state parties to co-operate in relation to the return home of the former ‘with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin’.

Part VII (articles 72-78) deals with the establishment and operation of the Committee on Migrant Workers, the body responsible for overseeing state parties’ compliance with the ICRMW through reviewing and commenting on periodic reports from states. These reports contain information on the measures undertaken to give effect to the provisions of the Convention as well as any difficulties affecting implementation of the Convention and details on migration flows in the reporting state. The Committee, composed of 14 independent experts, held its first session in

22 On the topic of irregular migrants and the right to form associations and trade unions in the state of employment, see the chapter by Cholewinski in this volume.

March 2004. Part VII empowers the Committee to receive complaints against state parties from individuals as well as from other state parties, subject to the explicit acceptance of ten state parties of this power. So far, however, just four countries have accepted the individual complaint mechanism and just two have accepted the inter-state complaint procedure.

Part VIII (articles 79-84) contains 'general provisions' which require state parties to provide an effective remedy to any individual whose rights under the Convention are impaired and to take the legislative and other measures necessary to give effect to the Convention. States are reassured, however, that nothing in the Convention will interfere with their right to establish the criteria governing admission of migrants. Part IX (articles 85-93) sets out the 'final provisions' which include the right of states to make reservations to specific obligations when ratifying, with the obvious prohibition firstly on lodging a reservation on the entirety of any of the nine Parts of the Convention and, secondly, any other reservation which would be incompatible with the object and purpose of the Convention.

Chapters in the present volume

Part I

Antoine Pécoud in his chapter on the politics of the ICRMW notes that the relative paucity of research into the Convention means that we can at best only partially understand why states do not ratify. He argues that to better comprehend the low rate of ratification we need to recognise the Convention's political nature and its function as a symbol in the global politics of migration. Underscoring the fact that ratification is not only a legal or economic issue, Pécoud argues that it is also an inherently political decision embedded in the power relations between the different actors involved and in the worldviews that inspire migration policymaking. While not discounting technical arguments which seek to account for non-ratification by reference to the legal obligations contained in the ICRMW or the additional costs it would entail for destination states, Pécoud suggests that such approaches tend to miss the point: the ICRMW is contested, perhaps above all else, for political reasons, both at the domestic and at the international levels.

One of the consequences of this understanding is to accept that there can be little expectation of ratification by destination states failing the extension to migrants of the right to vote in national elections or a determined show of solidarity by national electorates with migrants. While this may make for rather wistful mood music, Pécoud does strike a number of hopeful chords. He suggests that the focus on the ratification rate of the ICRMW underestimates its role in shaping the way migration is discussed by state and especially non-state actors and concludes with the suggestion

that the Convention could eventually come into its own as a symbol for fairer and more balanced approaches to international migration and global affairs.

In their chapter on the ICRMW and civil society, Simeone and Piper also point up the centrality of the political context to the genesis and current (mis)fortunes and use of the Convention. At the same time, however, they highlight the role that civil society can play in influencing the political context. They note that it was an absence of robust civil society activity in the years immediately following the Convention's adoption which at least partially explains the languid pace at which ratifications initially accumulated. Since the mid-1990s, however, there has been a burgeoning of civil society organisations, as evidenced by the exponential growth in the numbers of NGOs granted consultative status by ECOSOC, enabling them to formally participate in UN activities.

Simeone and Piper credit this proliferation of transnational advocacy networks for the current prevalence of human rights discourse in both domestic and international politics, a related feature of which has been the development of a migrants' rights movement committed to exposing the structural vulnerability of non-citizens. The authors point out that reaching the required number of 20 ratifications necessary for the ICRMW's entry into force would likely not have been achieved by 2003 without civil society, but acknowledge that advocacy around the Convention remains an uphill battle. Nonetheless, the ongoing need for civil society engagement with the ICRMW is beyond dispute. This is clear from the authors' observation, firstly, that international advocacy provides a platform for the exchange of ideas and produces new knowledge oriented towards alternative horizons and, secondly, that NGO monitoring is crucial to 'preserving the aspiration of human rights as a rationale for inclusion against an international ordering principle of differentiation and exclusion'.

Part II

In her chapter on the ICRMW as a protective tool in the context of immigration detention, a practice involving detention of individuals on account of their immigration status, Mariette Grange provides an overview of the increasing use of such detention as a tool of migration control. Grange reviews ICRMW provisions relevant to immigration detention in light of similar provisions in the ICCPR and CAT, thereby showing the added value of the ICRMW. She notes, however, that countries with the largest detention estates have a very high record of ratification of all core international human rights treaties except for the ICRMW. It is therefore an examination of the work of the Human Rights Committee (HRC), the body which monitors ICCPR, which most clearly reveals the lower level of legal safeguards afforded to immigration

detainees. The near-universal ratification rate of the ICCPR provides its treaty body with the opportunity HRC to review many aspects of immigration detention under different legal systems and in country situations with large-scale immigration detention, allowing it to ‘issue recommendations on practices such as mandatory detention – a rarer opportunity for the CMW – and the need to consider alternatives to detention’.

The rate and geographic spread of ICRMW ratification has a number of important consequences when it comes to implementation of the Convention’s norms relevant to immigration detention, a practice which has grown exponentially since the Convention’s adoption in 1990. The ‘absence of old industrialised countries and democracies’ from the current complement of state parties firstly means that the Convention’s detention-related provisions are not applied and developed in countries with the most complex systems of immigration detention and, secondly, translates into somewhat weaker expertise on this issue amongst the members of the CMW. Similarly, because most of the current state parties to the ICRMW do not have a strong tradition of accepting individual complaints procedures, the individual complaints mechanism provided for in article 77 remains unactivated, depriving the Committee of the opportunity to develop authoritative interpretations of the Convention’s provisions. This latter point is of course applicable beyond the discrete field of immigration detention.

Nonetheless, Grange concludes that as immigration detention continues apace, and amid repeated calls for ratification from various quarters,

the ICRMW and its monitoring mechanism remain a central piece in the international human rights toolkit for protection of the rights of migrant workers and members of their families in immigration detention.

In their chapter on the impact and use of the ICRMW in other UN fora, Grant and Lyon investigate how, if at all, during 2013-2015 other UN bodies have supported the ICRMW by recommending its ratification and/or by referring to it in their work. The authors find that UN human rights mechanisms consistently call for ratification of the Convention. They also find, perhaps not surprisingly, that in government-driven fora such as the Universal Periodic Review (UPR) and in the non-UN Global Forum on Migration and Development there is a clear cleavage in support for ratification between states in the Global South and the Global North.

While the treaty bodies overseeing the other core human rights instruments actively advocate the ratification of the ICRMW, Grant and Lyon find that they fail to seize opportunities to make substantive reference to the Convention or the work of the CMW. They provide the example of a 2014 recommendation from the HRC to Chile to desist from

confiscating travel documents which could have referenced the same recommendation issued to the same country three years earlier by CMW. While this is symptomatic of a more general failure amongst the treaty bodies to refer to each other's work, it is important to highlight that such cross-referencing could enhance coherence across the work of the different monitoring bodies and signal an endorsement of, in this case, the work of the CMW. The authors conclude with the suggestion that in this context the Convention 'is likely to benefit from the increasing trend towards cross referencing of the core treaties, for example through the UPR and the use of joint general comments'.

In their chapter on the added value of the ICRMW, Georgopoulou et al tackle the charge of superfluity levelled against the Convention on the basis that the rights it protects are already enshrined at both international and national level. The authors demonstrate the instrument's added value by drawing on three sets of rights contained in the Convention and comparing them with similar rights provisions in other regional and international human rights law instruments. They find that while sometimes the Convention simply duplicates existing rights enshrined in other instruments, there are also examples of it going beyond other rights provisions, guaranteeing further protection for those whose situation it was designed to address. They also note the value inherent in the specificity of the CMW's mandate which has allowed it to respond to the particularities of the lives of migrant workers and their families.

The authors find that the added value of the Convention lies at least in part in the fact that it represents a coherent mechanism for the protection of a broad category of migrants. It represents a compilation of the existing rights of migrant workers under international human rights law, to which it adds a number of additional guarantees as necessitated by the specific vulnerability of such workers and their families. It therefore represents 'the most holistic international human rights catalogue applicable to anyone leaving their country of origin to work in another country'.

In his chapter on the ILO, the ICRMW and the CMW, Cholewinski underscores the complementarities between international labour standards and human rights law in protecting migrant workers. While these are two distinct branches of law, they are not mutually exclusive and overlap in the specific consideration they have given to migrant workers. Cholewinski highlights the synergies between the ICRMW and the specific ILO instruments for protection of migrant workers, namely the Migration for Employment Convention (Revised), 1949 (No 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143), and their accompanying non-binding Recommendations.

Cholewinski underlines the importance of viewing these instruments 'along a historical continuum and as mutually reinforcing' and suggests that the fullest level of protection of migrant workers can only be achieved

with ratification and effective implementation of all three ‘as each instrument contains unique provisions which are not necessarily found in the other two’. He also provides evidence of the mutually reinforcing nature of the work of the ILO supervisory system and the CMW and shows how collaboration between the ILO and the CMW is important in ensuring coherence in international law between international human rights and labour standards.

Part III

The country studies in Part III highlight a number of specific problems hampering effective implementation of the ICRMW which might with advantage be taken up by the CMW during the state parties’ periodic review. Some of the country studies, particularly those on Mexico and Ecuador, evidence the fluid nature of migration flows and support the observation made by Pécoud in his chapter that the distinction between countries of origin, transit and destination holds less validity today than ever before.

In her chapter on the implementation of the ICRMW in Ecuador, Daniela Salazar describes the growth experienced by Ecuador since 2000 in both immigration and emigration and paints a picture of a state which on paper is keenly alive to the migration phenomenon and the vulnerabilities of both emigrants and immigrants. Ecuador’s 2008 Constitution enshrines the principles of universal citizenship and free movement, with article 40 of the Constitution expressly providing that no human being shall be identified or considered illegal in light of his or immigration status.

Salazar argues, however, that despite the discourse of universal citizenship, migration initiatives and policies in Ecuador are informed by the principles of selectivity, control, security and sovereignty, rather than human rights. She further notes that Ecuador’s migration-related plans and agendas lack mechanisms to effectively monitor progress and the achievement of their objectives goes unevaluated. Furthermore, as noted below, the emphasis is on the emigrant over other types of migrants. Indeed article 40 of the 2008 Constitution establishes measures for the state to undertake to support the rights of migrants living abroad regardless of their status but is silent with regard to measures to be adopted to protect migrants in Ecuador.

Ecuador ratified the ICRMW on 5 February 2002, just over a year before its entry into force. Despite the length of time available to it to comply with the Convention and its migration-friendly rhetoric, however, Salazar finds that the Convention is not being sufficiently taken into account in the formulation and implementation of laws and policies concerning the rights of migrant workers. This is evidenced by the

observations of the CMW in 2007 and 2010 that a number of provisions in national legislation were at variance with the Convention. Salazar also notes that the ICRMW is rarely cited during formulation of legislation or policies for migrants. Rarer still is judicial consideration of the Convention when determining if the Ecuadorian authorities have complied with their duty to protect migrants' rights. This points to a lack of awareness of the ICRMW in Ecuador, something which is compounded by Ecuador's failure to give effect to the CMW's recommendations concerning the provision of training on the content of the Convention.

Caron et al in their chapter on Guatemala provide a detailed account of that country's migration situation as well as the wider context in which immigration and emigration is taking place: widespread violence, endemic corruption, the rise of organised crime and drug trafficking have all contributed to emigration from Guatemala. Given such challenging circumstances, it can come as no surprise that compliance with the ICRMW has been fraught with difficulty.

Like Ecuador, Guatemala ratified the ICRMW shortly before the Convention's entry into force in 2003. The authors note, however, that the Guatemalan government has yet to establish strong mechanisms to address abuses against its nationals working abroad and point out that the country's legal framework is rife with pieces of legislation which violate the ICRMW. One obstacle to compliance with the Convention is the absence of a comprehensive, multidisciplinary and permanent public policy involving all stakeholders. This is an issue which might, with advantage, be raised by the CMW in its future dialogue with Guatemala.

The study of Guatemala illustrates how the ICRMW and its requirement that state parties submit periodic reports provide an opportunity for civil society to engage in a close scrutiny of states' immigration law framework. The authors suggest that it was Guatemala's non-compliance with the ICRMW which spurred civil society to develop an alternative report to the government one presented ahead of the 2010 review of Guatemala by the CMW so as to hold it accountable for its failure to meet its Convention obligations. This led to the emergence of the Grupo Articulador coalition which includes the majority of organisations working on migrant worker rights issues. The group continues to work for a comprehensive immigration law and advance other public policy proposals that protect migrant workers. This makes it clear that the Convention 'serves as an important point of reference, catalyst and tool to help Guatemalan civil society to press for change at both the national and international levels'.

In their chapter on Mexico, which in 1991 became the first state to sign the ICRMW, Díaz Prieto and Kuhner analyse the changes in legislation and policies made by Mexico to comply with the ICRMW with particular reference to the specific situation of women migrant workers. The authors

note the increasing feminisation of migration through and from Mexico to the US and point to the fact that while Mexico does not have a high level of immigration, the majority of Central American migrants in Mexico are women. The authors suggest that while implementation of CMW recommendations would help strengthen the protection of women migrant workers' rights in Mexico, the CMW should in fact make a greater number of recommendations specific to women migrants, the implementation of which would help to eliminate the rights violations that they face. Díaz Prieto and Kuhner take the view that 'specific and assertive recommendations on enforcement of ICRMW standards could give the Mexican government the necessary direction to better achieve effective implementation'.

The authors strike an optimistic note by suggesting that new laws, and reforms to existing laws, provide Mexico with an important regulatory framework to promote and guarantee the rights of migrant workers as recommended by the CMW and that in spite of some gaps the country has legislation which, if properly implemented, could effectively guarantee the rights of migrant workers. They note progress in the form of the government's *Special Programme on Migration* in 2014 which represents the first ever national migration policy that includes objectives and specific strategies that require inter-institutional cooperation but lament the fact that in practice policies have focused on detention rather than regularisation of migrant flows and that planned national policies to improve protection of migrant workers have in fact been neglected in favour of enforcement activities.

The study of Mexico illustrates a variety of problems undermining effective implementation of the ICRMW which are likely to be present in other state parties. There is a dearth of public information on migrants' access to rights and services which produces little hard evidence of *de facto* compliance with the ICRMW. Enforcement of laws and policies that promote women migrants' rights is vitiated by a weak rule of law, corruption, impunity, xenophobia and the lack of a gender perspective. Implementation is impeded by budgetary constraints and a lack of clear guidelines for state officials concerning protection of migrants' rights. The authors also emphasise that compliance with the ICRMW cannot be analysed in isolation from the economic and political interests of Mexico within a region that comprises Northern and Central America, and its complex position as a country of origin, transit and destination.

Piyasiri Wickramasekara's study of Sri Lanka's compliance with the ICRMW illustrates the extent to which the ICRMW is effectively ignored in the formulation and development of immigration law and policy by the state party in question. Despite the country's relatively early endorsement of the Convention – Sri Lanka became the seventh state party to the ICRMW when it acceded in 1996 – the reader is left with the impression that when immigration law is developed in a manner consonant with the

ICRMW it is by happy coincidence rather than by design. This raises questions over the level of awareness of the ICRMW amongst the relevant civil servants and other stakeholders or, just as disquietingly, may be taken as an indication of the seriousness with which some state parties treat the Convention and the spirit in which they approach the obligations it imposes on them.

One explanation for Sri Lanka's failure to effectively adhere to ICRMW obligations and CMW recommendations is the state's consistent focus on foreign employment of Sri Lankans. This, according to Wickramasekara, has ruled out any attention being paid in national migration policies to the status and protection of foreign migrant workers inside Sri Lanka. This does not mean, however, that Sri Lanka is a black hole when it comes to migrants' rights. Indeed, Wickramasekara points out that Sri Lanka has been a pioneer in Asia in spelling out a rights-based comprehensive National Labour Migration Policy based on the 2006 ILO Multilateral Framework on Labour Migration. Given the focus on foreign employment, however, it is little surprise that such activity revolves around Sri Lankan emigrants. The author draws attention to Sri Lanka's progress in regard to dissemination of information on migration in safe and dignified conditions. The Sri Lankan Bureau of Foreign Employment has carried out safe migration sensitisation programmes in collaboration with the ILO and a number of NGOs using its Safe Labour Migration Information Guide. Such initiatives can provide a useful blueprint for activities aimed at migrant workers in Sri Lanka and securing their protection in line with the ICRMW.

Part IV

Beth Lyon in her chapter on the US and the ICRMW describes that country's unusually contradictory relationship with the Migrant Workers Convention. Although it abstained from voting on the UN General Assembly's proposal in 1979 to create a Working Group to draft a convention to protect migrant workers and their families, the US went on to make hundreds of interventions over the ten years of negotiations that were to follow. On more than one occasion, the United States was instrumental in breaking impasses by proposing compromise language and participating in informal consultations. The country's failure to show any real interest in the ICRMW since its adoption in 1990 is part of a wider behavioural pattern whereby the US 'participates actively in human rights treaty development but does not readily join human rights treaties as a party subject to international monitoring'.

From a legal point of view, however, there is relatively little conflict between US law and the substantive protections of the Convention. Most of the passages that were once objectionable have since become part of US law. Any remaining conflicts 'would likely be buffered upon ratification

owing to the United States' typically aggressive practice of restrictions on ratification'. It is therefore not so much legal matters which have proved so inimical to the Convention's reception in the US, Lyon suggests, but concerns related to the country's low wage labour migration regulation.

Lyon laments the opportunities missed by non-ratification. She argues that signature and ratification of the ICRMW would help to re-frame the debate on migrant labour and refocus attention on non-enforcement solutions to irregular migration, ushering the US along a path toward a rational global approach to low wage labour migration. Ratification of the Convention would involve the country in a much-needed self-examination process but would not threaten longstanding policies.

In his chapter on the uneasy relationship between the EU and the Migrant Workers Convention, Desmond highlights the incongruity of the Convention's ratification record amongst EU member states in the context of the other core international human rights instruments while also illustrating how non-ratification is simultaneously consistent with EU member states' approach to multilateral instruments focused on the protection of migrants' rights. The author details the conflicting attitudes towards the Convention evinced by different EU institutions and argues that the failure of the Commission and the Council of the European Union to support the ICRMW, along with member states' non-ratification, opens the EU and its member states to accusations of hypocrisy in light of their recommendations to non-EU countries to ratify some of the other core human rights instruments.

The author suggests that changes in the EU legal landscape, particularly since the entry into force of the Treaty of Lisbon in 2009, have produced an EU legal order more conducive to the protection of migrants' rights and therefore offer a legally propitious context for ratification of the ICRMW. Increasing calls for EU member states to ratify, particularly during the UPR process, may provide the necessary pressure to encourage the Commission and Council to change tack vis-à-vis the Convention and/or to secure the support of handful of influential member states, both of which would be necessary to advance the issue of ratification.

Common issues and themes

The ICRMW and fragmentation and coherence in international migration law

At the close of the last millennium the Working Group of intergovernmental experts on the human rights of migrants, convened by the Commission on Human Rights, noted that international human rights law as it concerned migrants was 'dispersive and fragmentary',²³ while

more recently Chetail has cautioned that the proliferation of non-binding standards and consultative processes amongst a multiplicity of actors with different agendas may aggravate the fragmentation of international migration law norms.²⁴ Echoing such fears of inconsistency and incoherence, Grant and Lyon in their contribution to this volume note the increase since 1990 of the inclusion of migrants' rights in the work of all the treaty bodies, a positive development which nonetheless has also led to over-lapping jurisdictions and the risk of diverging interpretations.

A number of chapters in this collection, however, provide evidence of efforts and opportunities to ensure coherence and consistency in the development and application of international law concerning migrants' rights. In his chapter on the ILO, the ICRMW and the CMW, Cholewinski attests to the CMW's efforts to ensure more consistent approaches to interpretation of key rights and their application to all migrant workers, including those in irregular status. One of the ways the CMW does this is to read the rights set out in the ICRMW in light of the other core international human rights treaties and relevant ILO international labour standards. An example of this is the CMW's approach to article 26 of the ICRMW which confers the right to form trade unions only on migrant workers in a regular situation. The Committee has observed, however, that such a right applies to migrant workers in an irregular situation by virtue of article 2 of the ILO Freedom of Association and Protection of the Rights to Organise Convention, 1948 (No 87) and article 22(1) of the ICCPR. Article 26 may therefore create broader obligations for state parties to both the ICRMW and these instruments.²⁵

In a similar vein, Georgopoulou et al note that while article 28 of the ICRMW restricts migrants' right to medical care to urgent cases, the Committee has interpreted this provision in light of article 12 of CESCR and article 24 of the CRC to ascribe broader obligations to state parties, encompassing primary health care, immunisation against major infectious diseases and emergency obstetric care for migrant women, amongst others.²⁶ In Grange's chapter on immigration detention mention is made of recent CMW recommendations which follow other international and regional human rights mechanisms by pushing for alternatives to detention while, in their study on Mexico's compliance with the ICRMW, Díaz Prieto and Kuhner show how the CEDAW Committee's General Recommendation 26 on women migrant workers can usefully guide the

23 See 'Working Group of Intergovernmental Experts on the Human Rights of Migrants' CHR (9 March 1999), UN Doc E/CN.4/1999/80 (1999) para 103.

24 V Chetail 'The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law' in V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014) 9.

25 General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, CMW (28 August 2013), UN Doc CMW/C/CG/2 (2013) 17-18, para 65.

26 General Comment 2 (n 25 above) para 72.

CMW's interpretation of the ICRMW to strengthen women migrant workers' protection.

This trend towards interpreting the ICRMW in light of other human rights instruments chimes with the CMW's statement in its General Comment 2 that states' obligations under the Convention

must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party. Although separate and freestanding, these treaties are complementary and mutually reinforcing.²⁷

Such an approach will go some way to ensuring greater coherence in the development and application of international law on migrants' rights.

Firewalls

Although irregular migrants are formally entitled to a range of human rights under the ICRMW and other human rights instruments, as a practical matter they are often prevented from exercising their rights and entitlements by the fear that the necessary contact with the authorities will set in train a process leading to their deportation. One solution to this problem is that of the firewall. The idea that there should be a firewall between immigration law enforcement and human rights protection implies that the agents of immigration law enforcement should be barred from obtaining information concerning the immigration status of persons accessing public or social services and that such service providers should be similarly barred from sharing information about their clients' immigration status. This is an idea which has been the focus of increasing academic attention²⁸ and is touched upon in the chapters by Georgopoulou et al and Cholewinski.

Both chapters discuss the CMW's General Comment 2 on the rights of migrant workers in an irregular situation and members of their families. In their examination of the right of irregular migrants under article 28 of the ICRMW to access health care Georgopoulou et al note that the Committee expressly discourages states from requesting the medical records of migrant workers in an irregular situation and from 'conducting immigration enforcement operations on or near facilities providing medical care'.²⁹

In the context of employment rights, Cholewinski notes the Committee's emphasis on the need to maintain a firewall between the

27 General Comment 2 (n 25 above) para 7.

28 See for example, JH Carens *The ethics of immigration* (2013) 132-135; F Crépeau & B Hastie 'The case for 'firewall' protections for irregular migrants: Safeguarding fundamental rights' (2015) 17 *European Journal of Migration and Law* 157.

29 General Comment 2 (n 25 above) para 74.

activities of social and labour market institutions, such as labour inspection services, and immigration enforcement authorities. This approach corresponds with that taken by the Council of Europe's European Commission against Racism and Intolerance in 2016 in its General Policy Recommendation on safeguarding irregularly present migrants from discrimination. Similarly, a decade earlier, the ILO Committee of Experts in its General Survey on labour inspection pointed out that the main objective of the labour inspection system is to protect the rights and interests of all workers, and to improve their working conditions, rather than the enforcement of immigration law.

The independence of the members of the CMW

In accordance with article 72 of the ICRMW, the Convention's application in state parties is reviewed by a dedicated treaty monitoring body, the CMW, consisting of 14 experts 'of high moral standing, impartiality and recognized competence in the field covered by the Convention'. Each state party to the ICRMW may nominate one person from amongst its own nationals to membership of the Committee, with the 14 members being elected by secret ballot. Furthermore, the members of the CMW are to be elected and to serve in their personal capacity. A number of chapters, however, draw attention to the potential for a lack of impartiality and independence on the part of some members of the Committee.

Grange argues that many of the individuals nominated and elected to membership of the CMW hold positions closely linked to their countries' executive which runs counter to the need for the Committee's decisions to be made on the basis of independent expertise. Grange's argument finds support in a report discussed by Grant and Lyon which found that, as of 2012, nine of the 14 members (64 per cent) of the CMW had an executive branch affiliation, making it the treaty body with the highest percentage of such members.

A concrete example of such potential conflict of interest is provided by Salazar in her case study on Ecuador. She notes that the Ecuadorian member of the Committee 'acted as the highest national authority on migration matters within the Ministry of Foreign Affairs at the same time as she acted as a member of the Committee' and poses the question as to whether the Committee is in a position to objectively and fairly evaluate Ecuador's compliance with the Convention when one of its members is responsible for Ecuador's policies and actions with regards to migrant workers. At the very minimum, Salazar suggests, the Committee in such a

situation runs the risk of not being seen to be independent in the exercise of its functions.³⁰

Grant and Lyon suggest that the preponderance of government-affiliated individuals amongst the Committee's members may be explained by the fact that it is largely states in the Global South which have ratified the ICRMW. Given that treaty body members are unpaid, membership is more financially feasible for those in government service who can attend meetings in the course of their employment.

The outlier status of the ICRMW amongst the core international human rights instruments

A number of the chapters in this volume make clear the anomalous nature and experience of the ICRMW by comparison with the other core international human rights instruments. The relatively scant literature on the ICRMW and CMW, the disproportionately high percentage of CMW members with executive branch affiliations and the anomalous ratification record of the ICRMW when viewed in the context of the full range of ten core instruments have already been touched upon. In relation to the latter point, Desmond in his chapter highlights the Convention's deleterious distinction of being the only one of the core treaties not yet signed or ratified by any of the 28 member states of the EU.

The peculiarity characterising the trajectory of the Convention is, however, a feature which precedes its adoption in 1990 and the CMW's establishment in 2004. Simeone and Piper note that civil society has a strong tradition of mobilising support for international instruments and was involved in drafting the Universal Declaration, the 1951 Refugee Convention and many of the core human rights instruments. The development of the Convention, however, was by and large a state-led effort, initially involving only a few faith-based organisations.

In a similar vein, Pécoud argues that a key feature of the history of the ICRMW is the leading role played by non-Western states, to the extent that it is sometimes known as a 'G-77 treaty'. The active part played throughout the drafting process by the governments of Mexico and Morocco is unusual, Pécoud suggests, as international and diplomatic debates over human rights tend to be mostly pushed forward by Western developed countries. Pécoud sees migrants' rights as one of the only fields of human rights that enjoys greater support from the 'South' than from the

30 It should be noted, however, that the CMW's provisional rules of procedure provide that no member of the Committee shall participate in the examination of state party reports or the discussion and adoption of concluding observations if they involve the state party in respect of which she or he was elected to the Committee. See Provisional Rules of Procedure, Rule 32, CMW (7 May 2004), HRI/GEN/3/Rev.1/add.1 (2004).

‘North’, an issue to which we return in the section on self-interest as a motivation for ratification.

Self-interest as a motivation for ratification

Pécoud and Grange in their respective chapters suggest that many of the current state parties to the ICRMW were at least partially motivated to ratify by the scope it offered for protection of their own citizens who emigrate. In this respect Grange points to Part VI of the Convention on the Promotion of Humane and Lawful Conditions for International Migration which contains a number of provisions relating to protection of a state party’s own nationals, whether abroad, about to emigrate or returning. This, coupled with the fact that the ICRMW imposes obligations mainly – though by no means exclusively – on destination states, goes some way to explaining why ratification is more prevalent amongst countries which are, or at the time of ratification were, primarily states of destination.

Two of the country studies provide support for the contention that some states ratified the ICRMW with a view to securing protection for their emigrant citizens, resulting in a somewhat skewed understanding and implementation of the Convention. Wickramasekara reports that Sri Lanka’s accession to the ICRMW was done in the hope that the moral and legal force of the Convention would help to bring international attention to the abuse and exploitation of Sri Lankan migrant workers which could then be addressed through the institutional capacity of international human rights agencies, UN agencies and civil society. This concern with Sri Lankans employed abroad has continued and, according to Wickramasekara, ‘has ruled out any attention in national migration policies to the status of foreign migrant workers inside Sri Lanka and their protection, a major thrust of the ICRMW’.

Similarly, in her study of Ecuador Salazar highlights how that country’s concern in implementing the ICRMW has been directed to its emigrant citizens, with state action plans and activities focusing on the protection of Ecuadorian citizens abroad and those returning, while neglecting migrant workers in Ecuador. Even when it comes to Ecuadorian emigrants, however, the state’s endeavours seem to focus more on lofty proclamations of the universality of migrant status rather than on concrete efforts at ensuring, for example, that its citizens abroad are informed of the rights granted to them as migrant workers by the ICRMW.

Recommendations

- Since becoming a related UN agency in September 2016 and rebranding itself ‘the UN Migration Agency’, IOM should follow the

proposal of former UN Special Rapporteur François Crépeau that it become an institutional champion for the ICRMW, promoting compliance with Convention standards and ratification by non-state parties.

- More pressure should be put on state parties to promote the ICRMW and raise awareness of it amongst the lawyers, policymakers and state and local officials who play a role in the protection of migrants' rights and the implementation of immigration law and policy. One way of doing this would be to provide ICRMW-specific training to the relevant individuals. The pressure must come from the CMW and civil society.
- The treaty bodies overseeing the other nine core instruments should refer to the ICRMW and the work of the CMW when specialised migration issues arise that are addressed by the Convention and the CMW's Concluding Observations. This could result in an increase in the number of ratifications if states see that the obligations entailed by the ICRMW inhere in treaties by which they are already bound.
- Civil society should be meaningfully consulted by state parties when immigration law and policy is being formulated. Recommendations from the CMW in this direction would help to advance this goal.
- The CMW should continue cooperation with its fellow treaty bodies and other key stakeholders in the form of joint general comments and days of general discussion. This would establish the Committee as a key forum for the discussion of issues concerning migrants. It would also promote awareness of the Committee and the Convention as well as having the effect of advancing protection of migrants' rights through ensuring the ethos of the ICRMW informs as wide a range of initiatives concerning migrants as possible.

**PART I: OBSTACLES AND
OPPORTUNITIES**

Antoine Pécoud

1 Introduction

The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),¹ which was adopted over 25 years ago by the UN General Assembly,¹ remains one of the most neglected treaties in international human rights law. It is presented, by the Office of the UN High Commissioner for Human Rights, as one of the ‘core international human rights treaties’, which include better-known conventions like, for example, the 1966 Covenants,² the 1989 Convention on the Rights of the Child and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.³ Yet, compared to these treaties, the ICRMW is under-ratified: so far, only 51 states have ratified it and, most notably, no important Western destination country has done so.⁴ It is arguable, therefore, that the ICRMW has so far found it very difficult to achieve what it was meant to do, namely increase the protection of migrant workers’ rights by establishing widely-accepted standards in this subfield of human rights law.

This chapter argues that this situation can be interpreted as both puzzling and logical. It is puzzling, because Western liberal democracies traditionally support human rights, and because the ICRMW does not, contrary to widespread misperceptions, call for a new set of rights that

1 United Nations General Assembly Resolution 45/158.

2 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (CESCR).

3 See OHCHR ‘Human rights bodies’ <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 25 October 2017).

4 It should be noted that ‘important Western immigration countries’ is arguably an unclear category. For example, both Turkey and Argentina ratified the ICRMW, and could be defined as such. The fact remains, however, that the Convention has not been ratified by any EU country, or by Canada, Australia, New Zealand, the United States or Japan.

would otherwise not exist in domestic law or in other international human rights instruments. There are therefore no legal obstacles that could justify the reluctance to ratify and implement the Convention, at least in the well-established *Etat de droit* that are home to a large share of the world's migrant population. By contrast, from a cost-benefit perspective, it can also be understood as logical, because the rights of migrants are difficult to reconcile with market logics in destination countries, and because there are structural economic forces that make it almost impossible to reach multilateral agreements on migrant workers' rights. In particular, the socio-economic imbalances between origin and destination states make reciprocal arrangements almost impossible.

I will also argue, however, that this seemingly binary opposition should be challenged, and that the low ratification record should be understood as a fundamentally political matter. It is above all for political reasons, rather than for legal or socio-economic reasons, that the ICRMW suffers from such a low ratification record. This is for instance evident in the way the UN and other intergovernmental organisations address migration issues, as well as in the case of 'in-between' states, which are not clearly positioned on the origin/destination state divide: some of them ratified, while others which could have done so ultimately did not. In other words, while there are fundamental structural forces (of a legal or socio-economic nature) that explain why states may accept or reject the ICRMW, there are also more contingent political factors which play a role in shaping the current fortunes of the Convention. Importantly, this also means that future perspectives remain, to some extent, open and that an increase in the popularity of the ICRMW amongst states cannot be excluded.

2 History and content of the ICRMW

The rights of migrant workers were first addressed at the international level by the ILO. This organisation was created in 1919, at the time of the Versailles treaty and the establishment of the League of Nations, and its original Constitution already mentioned the 'protection of the interests of workers when employed in countries other than their own'. The ILO is characterised by its so-called tripartism, as it engages not only with governments, but also with unions and employers. The interest in migration was thus motivated by the objective of increasing labour standards, and by the ambition to lessen the downward pressure that results from competition between national and foreign workers; protecting migrant workers' rights was a strategy to protect all workers' rights.⁵

5 R Böhning 'The ILO and the new UN Convention on Migrant Workers: The past and future' (1991) 25 *International Migration Review* 698.

Throughout the 20th century, the ILO adopted conventions pertaining to labour migration, but with mixed success in terms of ratification.⁶

The objectives pursued by the ICRMW are very much in line with ILO's efforts and the UN Convention on this matter logically builds upon earlier treaties adopted by this specialised agency. This was not a smooth process, however, as the ILO believed that the issue should remain solely within its realm and was reportedly reluctant to cooperate with the UN.⁷ While incorporating a labour protection mandate, the ICRMW was also born out of a distinct human rights approach. As noted above, it is indeed one of the core international human rights law instruments, and reflects the need to more explicitly articulate the relation between the inclusive universality of human rights and the exclusive nature of state sovereignty; while human rights are to protect 'everybody' (whether citizens or migrants), it progressively became clear that non-nationals were not systematically perceived as part of this category.⁸

This explains why the ICRMW speaks of migrant *workers*. Today, this term is less frequent: while the ILO still speaks of migrants as workers,⁹ many other actors and observers speak of *migrant rights* or of *the human rights of migrants*,¹⁰ sometimes with an emphasis on certain categories of migrants (irregular migrants, trafficked migrants, migrant women, and so on). This is not just a matter of words, as this semantic change has political implications. The emphasis on migrant *workers* frames migration issues within an internationally-constructed perspective on labour protection; migrant workers' rights are then understood as a labour issue of importance to all, as the rights of national workers cannot be dissociated from the rights of their foreign fellow workers. This challenges the national divide between citizens and foreigners. By contrast, by omitting the word *worker*, the notion of *migrant rights* may be understood as placing more weight on the foreignness of migrants and on the almost ontological difference between them and citizens. Migrants are then portrayed as non-

6 See in particular Convention 97 in 1949 (Convention concerning Migration for Employment (Revised)) and Convention 143 in 1975 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers). For more on the role played by the ILO and its standards in the protection of migrant workers' rights, see the chapter by Cholewinski in this volume.

7 G Battistella 'Migration and human rights: The uneasy but essential relationship' in De Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009). The special role of the ILO in the protection of migrant workers' rights was recognised in the ICRMW, which foresees that this agency be consulted by the UN on these matters (see art 74). For further detail on the relationship between the ILO and the ICRMW, see the chapter by Cholewinski in this volume.

8 S Grant 'The recognition of migrants' rights within the UN human rights system: The first sixty years' in M Dembour & T Kelly (eds) *Are human rights for migrants?* (2011).

9 International Labour Organization *ILO multilateral framework on labour migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006).

10 Amnesty International *Living in the shadows: A primer on the human rights of migrants* (2006).

nationals or outsiders, who should benefit from universal human rights, but whose interests may nevertheless diverge from those of nationals.

At the same time, the emphasis on *human* rights (and not solely labour rights) is crucial in terms of the protection of migrants who are not active on the labour market, or whose presence is only partly related to their working capacity. The ICRMW refers to this category of people as ‘members of the families’ of migrant workers, but one can think of other ‘non-working’ categories of migrants, whose significance has increased in scholarly and policy debates since the Convention was adopted (this is the case of forced or trafficked migrants, for example). Nevertheless, and as discussed below, much of the current academic and policy discussions on the ICRMW focus precisely on the trade-off between the rights of nationals and non-nationals, with the former being opposed to the latter. This ‘national’ take on the topic militates against support for the ICRMW. As this chapter will argue, ratification of the Convention is less likely if citizens perceive this as the mere granting of rights to outsiders; this may easily generate hostile reactions along an ‘us and them’ divide. If, by contrast, the ICRMW is framed in an international labour perspective, and as an issue that benefits all workers by lessening the competition between them, ratification may appear as beneficial not only for foreigners, but also for citizens. Yet, this second internationalist perspective is, arguably, decreasingly popular, which does not favour the ICRMW.

This feature of the ICRMW, at the crossroads between labour protection and human rights, is important to understand the current situation. Broadly speaking, these different frameworks indeed mobilise different actors: labour protection is an issue mainly for unions, whereas human rights are predominantly supported by civil society organisations and NGOs.¹¹ Grange and d’Auchamp report that, whereas human rights NGOs traditionally play a key role in the drafting of human rights conventions, they were largely absent in the case of the ICRMW: the human rights of migrants were not a priority at the time, as the focus was on civil and political rights (rather than on social and economic rights); even the rights of refugees were perceived as a humanitarian (and not a human rights) topic.¹² This resulted in a lack of civil society support for the Convention at the time of its negotiation.¹³ As they further note, this also led to the strong presence of faith-based organisations, which were amongst the few to be interested in migration and remain, up until today,

11 There is a lively debate on the issue of labour rights as human rights which also involves political activism in terms of strategies and the type of organisation involved. There are in fact increasing examples of trade unions engaging in human rights discourse and human rights NGOs engaging with labour standards/labour rights. See N Piper (2015) ‘Democratising migration from the bottom up: The rise of the global migrant rights movement’ (2015) 12 *Globalizations* 788.

12 M Grange & M d’Auchamp ‘Role of civil society in campaigning for and using the ICRMW’ in De Guchteneire et al (n 7 above).

13 Since then, civil society activism has grown enormously. See the chapter by Simeone & Piper in this volume.

at the forefront of the campaign for the ICRMW and for migrants' rights in general.

Another key feature of the history of the ICRMW is the leading role of non-Western states, to the extent that it is sometimes known as a 'G-77 treaty'.¹⁴ At the diplomatic level, the governments of Mexico and Morocco were very active, throughout the drafting process. This is unusual, as international and diplomatic debates over human rights tend to be mostly pushed forward by Western developed countries. Indeed, migrants' rights is probably one of the only fields of human rights that enjoy greater support from the 'South' than from the 'North'. One of the reasons for this is that some key origin countries saw the ICRMW as a useful standard to protect their citizens abroad.¹⁵ This nevertheless raises the question of the universality of human rights, as it appears that those rights that are not backed by the North tend to be contested and not viewed as truly 'universal'. This being said, initial proposals by sending countries were strongly resisted, which gave a central role to a number of Western states in searching for more consensual formulations in the elaboration of the ICRMW.¹⁶

Content-wise, the ICRMW provides a more precise and specific interpretation of the way human rights should be applied to migrant workers. This is line with other similar treaties, which also target other potentially vulnerable groups (women, children and, more recently, persons with disabilities, for example). While it codifies some new rights specific to the condition of migrants (such as the right to transfer remittances or to have access to information on the migration process), it mostly relies upon already-existing rights, which were formulated in earlier international human rights instruments, but whose application to migrant workers had not been detailed in a specific way. Of particular relevance here is the ICRMW's explicit inclusion of undocumented migrants within its scope of application. This is one of the most controversial issues. Logically, undocumented migrants are human beings and, as such, are protected by international human rights law; the ICRMW puts this on paper, in a way that earlier treaties did not.¹⁷ This remains problematic, however, as destination states are required to guarantee the rights of people they may not have wanted to admit in the first place, and

14 N LaViolette 'The principal international human rights instruments to which Canada has not yet adhered' (2006) 24 *Windsor Yearbook of Access to Justice* 267.

15 On Mexico, for example, see G Díaz & G Kuhner 'Mexico's role in promoting an implementing the ICRMW' in De Guchteneire et al (n 7 above); on the Philippines, see N Piper, 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 7 above).

16 These were in particular the so-called MESCA countries: Finland, Greece, Italy, Norway, Portugal, Spain and Sweden.

17 L Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention' in B Bogusz et al (eds) *Irregular migration and human rights: Theoretical, European, and international perspectives* (2004).

whom they may want to remove, if necessary through coercive measures like detention or expulsion. States tend to find it difficult to respect migrants' rights when trying to remove undocumented migrants and, in practice, these measures regularly lead to human rights violations.¹⁸

After adoption by the UN General Assembly on 18 December 1990, the Convention was open to ratification by states. Twenty ratifications were necessary in order for the ICRMW to enter into force, with this threshold not being reached until 2003. By early 2017 it had been ratified by just 51 states. This low ratification record was not entirely expected. Immediately after adoption, it was believed within the UN that the ICRMW would enter into force in 1991 or 1992; even less optimistic observers believed that the MESCA-countries would ratify; other countries – Canada, Venezuela and Argentina – were also expected to do so.¹⁹

Overall, there has not been much research on the ICRMW. This means that any understanding as to why states do not ratify it is at best only partial. Nevertheless, debates amongst researchers, policymakers and civil society actors tend to be polarised around two diverging interpretations of this situation, which in turn correspond to two different views of what should be done. In a first interpretation, the ICRMW's low ratification record is viewed as a puzzling mistake that can and should be corrected. It results from an array of factors, of different nature, which somehow prevent the full recognition of the usefulness of the ICRMW and of the legitimacy of migrants' rights. By contrast, the second interpretation considers that states' refusal to ratify is logical given the structural economic and political forces that shape immigration policy. On this view, the ICRMW is a deeply flawed treaty, unable to increase or guarantee migrants' access to their rights. In what follows, I examine in greater details these two interpretations.

3 The 'puzzling' legal/technical interpretation

It has often been observed that the ICRMW is overall close to existing legal standards, especially in Western democracies. If states were to become interested in ratifying, they would find this relatively easy, because their own legislation already contains most of the rights foreseen by the ICRMW. This is documented by several case studies, which assess the compatibility of the ICRMW with the legal provisions that exist in other (already ratified) international treaties, as well as in domestic law. One of the most detailed analyses in this respect concerns Belgium which found

¹⁸ See for example S Vohra 'Detention of irregular migrants and asylum seekers' in Cholewinski et al (eds) *International migration law: Developing paradigms and key challenges* (2007).

¹⁹ For an early perspective on the ICRMW by observers closely associated with its elaboration, see S Hune & J Niessen 'The first UN Convention on Migrant Workers' (1991) 9 *Netherlands Quarterly of Human Rights* 130.

that 'Belgian national law is (in practice) highly compatible with the provisions of the Convention'.²⁰ Oger²¹ and Touzenis²² reach more or less the same conclusions for France and Italy. This conclusion is in line with the commitment to human rights that characterise Western countries, and with their good ratification record of other international human rights law treaties. Why, then, would Western advanced democracies prove so unwilling to ratify the ICRMW? How can we understand the low ratification record of the ICRMW in this context? According to the 'puzzling' interpretation, the answer lies in the misperceptions that surround the Convention, in the technical difficulties it raises, and in the fact that states have only recently come to recognise that migration is an issue for multilateral cooperation that requires international standards.

It is widely reported that the actual content of the ICRMW is the object of many misunderstandings. Governments would for instance often wrongly believe that ratification of the ICRMW would force them to change their legislation. According to MacDonald and Cholewinski,²³ this is the case in Europe, where states claim that they have legal objections to the ICRMW; but the same authors show that this argument does not hold up under closer examination as ratification would not bring major changes to their immigration policies. In Asia, Piper writes that the ICRMW is viewed as 'an instrument for liberal immigration policy', and that it would therefore challenge states' sovereign right to control and regulate migration.²⁴ From an advocacy perspective, the key issue then lies in correcting these mistaken beliefs. These misunderstandings can also be linked to the complexity of the ICRMW: arguably a long and detailed treaty, it addresses a wide range of issues, which encompass not only labour protection, but also health policy and the educational system for example. This raises technical obstacles, as ratification would require a high level of coordination amongst a broad range of state (and even non-state) actors. As Cholewinski noted twenty years ago, 'technical questions alone ... may prevent many states from speedily accepting [the ICRMW's] provisions'.²⁵ This complexity comes along with a high level of ignorance surrounding the ICRMW. Even amongst unions, NGOs and other migration-related actors and institutions, few people know it and even

20 D Vanheule et al 'The significance of the UN Migrant Workers' Convention of 18 December 1990 in the event of ratification by Belgium' (2005) 6 *European Journal of Migration and Law* 4 320.

21 H Oger 'The French political refusal on Europe's behalf' in De Guchteneire et al (n 7 above).

22 K Touzenis 'Migration and human rights in Italy: Prospects for the ICRMW' in De Guchteneire et al (n 7 above).

23 E MacDonald & R Cholewinski 'The ICRMW and the European Union' in De Guchteneire et al (n 7 above).

24 N Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 7 above) 176.

25 R Cholewinski *Migrant workers in international human rights law: Their protection in countries of employment* (1997) 201.

fewer are capable of mastering its complexity and assessing the issues raised by a potential ratification.

Time would constitute an important factor in this respect. In many countries, migration is (or is perceived as) a relatively new phenomenon, to the extent that governments still find it difficult to apprehend all its implications and to evaluate the consequences of ratifying a UN convention in this field. For example, despite important migration flows, many Asian states still view themselves as non-migration countries, and hardly see the need for designing a comprehensive immigration policy.²⁶ To some extent, this also applies to certain European countries, like Germany,²⁷ Poland or Norway for example.²⁸ This may be changing, however: more and more states are confronted with migration-related problems and are thus incited to recognise the key role played by immigration, and the need to think about a political strategy in this field – a process in which the ICRMW may prove useful.

There are a few indications that this may already be taking place, at least to a small extent. Even if not ratified, the ICRMW can indeed play a potentially useful role, either in inspiring policy reforms or in catalysing forces amongst migration-related actors. In the UK, for example, Ryan reported in 2009 that the Convention enjoyed the support of a range of non-state actors (unions, civil society), which use it as a standard in their input to policymaking processes; as a result, the ICRMW indirectly influenced political debates and policy reforms.²⁹ Other authors call for this process to start: in the United States, Lyon argues that while ratification itself is unlikely, at least opening a debate on the ICRMW could help push forward political debates on migration.³⁰ This points to the often-neglected catalysing function of the Convention. Given its wide-ranging scope and international nature, it has the potential to federate different actors in different countries, and serve as a rallying point.³¹ Debates on the ICRMW tend to focus on its ratification record, and to conclude that, if few states have ratified it, then it has failed to make a difference; while this is correct in many respects, it nevertheless underestimates its role in shaping the way migration is discussed by state and (especially) non-state actors. In a world in which migration is

26 Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 7 above).

27 F Hillman & A Klekowski von Koppenfels 'Migration and human rights in Germany' in De Guchteneire et al (n 7 above).

28 MacDonald & Cholewinski 'The ICRMW and the European Union' in De Guchteneire et al (n 7 above).

29 B Ryan 'Policy on the ICRMW in the United Kingdom' in De Guchteneire et al (n 7 above).

30 B Lyon 'The unsigned United Nations Migrant Workers Convention: An overlooked opportunity to change the brown collar migration paradigm' (2010) 42 *New York University Journal of International Law and Politics* 2. See also the chapter by Lyon in this volume.

31 Grange & d'Auchamp 'Role of civil society in campaigning for and using the ICRMW' in De Guchteneire et al (n 7 above).

increasingly debated, and by an increasing range of actors, this function of the ICRMW may be expected to become more and more relevant.

Taran elaborates this further by arguing that migration has long constituted a black hole in global governance.³² The mobility of labour is directly linked to economic globalisation, but lacks an international political framework that would make sure it takes place in a way that is both economically beneficial and respectful of states' commitments to human rights and moral values. Over the past decades, states have tried to establish so-called global governance mechanisms to address transnational issues, like trade or climate change. Migration has not been a priority here even if, again, this may be changing: interest in 'global migration governance' has increased since approximately 2000, with many international and multilateral initiatives.³³ The former UN Special Rapporteur on the human rights of migrants, François Crépeau, thus calls for a human rights-based 'regime' for international migration:

Migration is a complex phenomenon which affects most, if not all, States in the world and is closely linked to other global issues, such as development, health, environment and trade. States have created international frameworks for such other global issues, recognizing the advantages of regulation at the international level, but despite the existence of legal frameworks on migration issues, a comprehensive framework for migration governance is still lacking. Certain aspects of migration are more frequently discussed at the bilateral and multilateral levels, such as the connections between migration and development. However, given that migration is in essence a fundamentally human phenomenon, the Special Rapporteur notes the need for an international migration governance regime strongly focused on human rights.³⁴

The possible emergence of such an 'international migration governance regime' could be favourable to the ICRMW, as cooperation requires shared norms and standards – precisely what the Convention has to offer.

In sum, according to this first interpretation of the ICRMW's low ratification record, the core problems lie in the unpreparedness of states, which are unaware of its provisions and unable to implement it properly because of their lack of experience of migration. This would be bound to change, however, and the compatibility of the Convention with existing laws could eventually make it quite easy to ratify it – thereby correcting the odd difference between the ICRMW and other human rights conventions.

32 P Taran 'The need for a rights-based approach to migration in the age of globalization' in De Guchteneire et al (n 7 above).

33 One can for example mention the organisation of high-level international conferences on migration, like the UN High-Level Dialogue (in 2006, 2013 and probably 2019) or the Global Forum on Migration and Development (that takes place every year since 2007), see A Pécoud *Depoliticising migration: Global governance and international migration narratives* (2015).

34 Human rights of migrants: Note by the Secretary General, GA (7 August 2013), UN Doc A/68/283 (2013) 3-4.

4 The 'logical' cost-benefit interpretation

If one looks at the ICRMW from another angle, namely from a cost-benefit perspective, its low ratification record looks very different: it is no longer a strange mistake that can be corrected by the passage of time or awareness-raising efforts, but rather the consequence of fundamental imbalances in migration dynamics, which are deeply unresponsive to migrants' access to human rights and, unfortunately, unlikely to change in the near future.

The central assumption behind this cost-benefit perspective is that rights have a cost, and that states are unlikely to commit to migrants' rights if this does not yield benefits. The problem is that, in the current migration situation, ratification would entail costs and bring little benefit to destination countries. This is mainly due to the asymmetry between them and origin states: migrants move predominantly from relatively poor to relatively richer regions (whether at the regional or global level), which means that the ICRMW has unequal implications for the two sides of the migration equation. Even if it foresees obligations for the origin countries (like providing pre-migration information), it is mostly destination countries that have to implement its provisions. This leads to a lack of reciprocity: if both origin and destination states were to ratify, this would be beneficial for the former (whose citizens living abroad would enjoy more rights), but much less for the latter (which do not have many emigrants in need of protection abroad). If all states were both origin and destination countries, they would be equally concerned and ratification could support a mutual guarantee that would be of interest to all; but the nature of migration flows makes this an unlikely scenario.

This is a well-known problem when it comes to any kind of cooperation over migration issues, especially when compared to other fields of international cooperation like trade; as Hatton writes:

Migration is much more of a one-way street than is trade. While, in a multilateral context, trade balances have to add up roughly to zero, net migration balances do not. If rich and poor countries were gathered around the negotiating table, it is difficult to see how improved terms of access to the labour markets of the poor(er) countries could be of equal value to similar conditions of access granted by rich(er) countries in return. Indeed, even the poorer countries may have little incentive to come to the bargaining table. Those in poor countries who have the greatest incentive to support such negotiations are precisely those who wish to leave.³⁵

35 TJ Hatton 'Should we have a WTO for international migration?' (2007) 22 *Economic Policy* 339-364.

There is empirical evidence that supports this analysis. South Africa, for example, sees no reason to ratify a Convention that would benefit migrants from its poorer neighbours.³⁶ Piper also notes that, in Asia, this leads to a competition between origin states: poor countries are reluctant to ratify because this would signal a rights-consciousness that would jeopardise their relationships with rich destination countries (particularly the Gulf States).³⁷ In other words, the two sides of the migration process are not on an equal footing and, given the socio-economic and political imbalances between them, destination countries can afford to impose conditions on origin regions, which have very little bargaining power to impose respect for the ICRMW's provisions.

Another implication of this imbalance is that, from a supply and demand perspective, destination countries have access to an almost unlimited pool of potential migrants from poorer regions. They have therefore no incentive to offer rights, as migrants are likely to come anyway regardless of the level of protection they are afforded. This makes for an unfavourable context, which will change only in the case of a shortage of migrants. Indeed, this is what happens with skilled migrants, who are much less numerous and hence much more sought-after. Destination states are therefore obliged to grant them rights if they want to attract them. Another difference between low-skilled and skilled migrants is the unequal economic benefits they are expected to bring to the destination country: low-skilled migrants are typically thought to generate low profits, which makes an investment in granting them rights illogical; by contrast, skilled workers are believed to boost the economy, which justifies a generous right policy.

This lead Ruhs to argue that migrants' rights cannot be apprehended as a matter of universal legal standards; they should rather be understood as an economic variable in immigration policy.³⁸ States would then decide how many rights to grant the foreigners they welcome, depending upon their overall strategy. For example, a country can decide to welcome many migrants, but is then unlikely to grant them extended rights (as this would be too costly). Opening the doors to skilled (and thus economically profitable) migrants could, on the contrary, be accompanied by a generous rights policy. In this political economy logic, the Convention is bound to fail: it foresees a horizontal distribution of rights to *all* migrants, whatever their skill level or numbers, whereas access to rights would on the contrary depend upon market mechanisms – leading to vertical hierarchy between migrants and between the range of rights they enjoy. As Vucetic writes, the

36 J Crush et al 'Migrants' rights after apartheid: South African responses to the ICRMW' in De Guchteneire et al (n 7 above).

37 N Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' De Guchteneire et al (n 7 above).

38 M Ruhs *The price of rights: Regulating international labor migration* (2013).

ICRMW is unpopular because it 'stipulates too many rights for too many people'.³⁹

This argument is both scientific and normative. Ruhs claims that this trade-off between numbers and rights is empirically verifiable; for instance, European states are generous in terms of rights and therefore opt for tight immigration policy, whereas the opposite holds true for the Gulf States. Measuring such variables as 'rights' and 'openness' is not easy, however and, inevitably, such empirical findings can be contested, as changes in variables will lead to different outcomes.⁴⁰ Politically, the normative implication of this trade-off is that states should design temporary labour migration programmes, which would enable more migration, but with fewer rights than what a treaty like the ICRMW foresees. This would be in the interest of all, including of migrants, because more of them could then have access to employment opportunities abroad.⁴¹

This discussion amounts, in many respects, to the standard opposition between pragmatists (or realists) and idealists. While generous, those who support the ICRMW would actually harm migrants' interests by asking for high standards, which states are bound to resist. Real-world efforts in favour of migrants should then give up the Convention and limit migrants' rights to a core set of fundamental rights. The problem, of course, is that pragmatists' arguments tend to boil down to a vibrant plea for the status quo. Indeed, this political economy framework is useful to understand why migrants fail to enjoy rights. It is much less useful as a normative and programmatic agenda, because the very idea behind the ICRMW (and behind the entire human rights philosophy) is precisely to go beyond the distribution of rights on the sole basis of wealth and power.

5 The politics of the ICRMW

Both the 'puzzling' legal/technical and the 'logical' cost-benefit interpretations display weaknesses. The first one is a little optimistic: indeed, even states with both a well-established *Etat de droit* and with a long-standing migration history are reluctant to ratify the Convention;⁴² while arguments on the need for time and awareness-raising efforts were relevant at the time

39 S Vucetic 'Democracies and international human rights: Why is there no place for migrant workers?' (2007) 11 *International Journal of Human Rights* 4.

40 M Cummins & F Rodriguez 'Is there a numbers versus rights trade-off in immigration policy? What the data Say' (2010) 11 *Journal of Human Development and Capabilities* 2.

41 Such a recommendation fits into a broader and renewed interest in so-called guestworker systems, which used to be very popular in both the US and Western Europe until the early 1970s. As Castles notes, however, it is not clear why such programmes would prove more successful today than in the past. A key lesson from recent history is indeed that such programmes inevitably lead some migrants to overstay, in which case the issue of their status and rights becomes quite complex, see S Castles 'Guestworkers in Europe: A resurrection?' (2006) 40 *International Migration Review* 4.

42 This is the case for France and Canada for example.

when the ICRMW was drafted and adopted, they prove less convincing today, as the deep resistance of states to this treaty becomes clearer. The second interpretation is based on the questionable assumption that ratification of the ICRMW is costly because it would entail more rights for migrants: this makes sense in some destination states which lack a strong human rights tradition (like in Asia or in the Gulf); but it is less relevant in Western countries, in which – as noted above – existing laws already grant migrants the rights that are contained in the Convention. If the ICRMW does not entail a rights-expansiveness, then the cost-benefit argument no longer holds true and the whole political economy argument regarding why states do not ratify collapses. Moreover, the cost-benefit interpretation assumes that the ICRMW improves the rights of migrants only: as suggested in the first section of this chapter, this is not the only way to frame the issue; one can posit that, by lessening the competition between foreign and national workers, the Convention may be beneficial for a majority of workers, whether migrant or not.

This calls for recognising the political nature of the ICRMW, and its function as a symbol in the global politics of migration. Ratification is not only a legal or an economic issue; it is a political decision, based on a rights-consciousness and embedded in the power relations between the different actors involved, as well as in the worldviews that inspire migration policymaking. Technical arguments over the legal obligations contained in the ICRMW or the additional costs it would entail for destination states are certainly important, but tend to miss the point in this respect. In legal terms, the Convention may well not constitute an additional set of rights, particularly for those migrants who lawfully live in Northern countries with well-established *Etats de droit*; neither would it, therefore, lead to a real increase in the costs of labour migration. But these legal and political considerations do not exhaust the issue: indeed, the ICRMW is also (and, perhaps, above all) contested for political reasons, both at the domestic and at the international levels.

Inside destination states, it constitutes a symbol for the recognition of migrants' rights, which is bound to encounter resistance given the widespread anti-immigration feelings that exist almost everywhere. Non-ratification of the ICRMW can also be interpreted as a purely political (or electoral) problem. As foreigners, migrants are not citizens and (usually) do not vote; ratification would then happen only if migrants' interests are understood as close to citizens', or if electorates were to express a solidarity with migrants and to call upon their governments to grant them rights; but as long as this is not the case, there is no reason to expect destination states to ratify. By contrast, in origin countries, ratification is a strategy to protect citizens, especially those who live abroad, but also those who are left behind or who may emigrate at some point in the future. It follows that, as the ratification record of the ICRMW indicates, only origin states are likely to ratify.

But the politics of the ICRMW also works at the international level: by definition, migration is a phenomenon that concerns more than one country; even if destination states see it as an issue closely associated with their sovereignty, and address migration mostly in a unilateral way, it is difficult not to address this issue at the international level. But it is equally difficult for states not to disagree over this issue, and the ICRMW thus constitutes a battleground between the North and the South, between origin and destination countries. As noted above, it was strongly backed by origin countries. Many Western and European countries, by contrast, were reluctant to engage in normative standards regarding migrants' rights.⁴³ At the time, in the seventies, less-developed countries were hoping to push for a new economic order, especially after the 1973 oil crisis, and migrants' rights were understood as an issue that origin countries could try to impose upon destination states. It follows that, from the start, the ICRMW was the object of North-South disagreements. This divide is still visible: the fact that state parties are almost exclusively from the South shows that, more than forty years after the idea of an international convention on migrants' rights was first proposed, the issue remains highly contested.

This is, for example, exemplified by the question of irregular migration. Initial drafts of the Convention were rejected because they were seen as almost encouraging irregular migration, in a way that would benefit origin countries' economies exclusively.⁴⁴ The final draft is more consensual, but nevertheless grants rights to irregular migrants in a way that is much more explicit than in other human rights instruments. While the Convention establishes a distinction between regular and irregular migrants, with more rights for the former than the latter, it does not permit reservations that would exclude irregular migrants from the scope of the Convention (see article 88). From a labour protection or human rights perspective, this makes a lot of sense. But from the perspective of destination states, this can be interpreted as challenging their right to control and regulate migrants' movements, and as an indication that the ICRMW is predominantly based on origin countries' interests.⁴⁵ Even if, legally speaking, the ICRMW does not contain many new rights, its spirit would be biased in favour of one side of the migration process, leading to an automatic rejection by the other side.

This section further addresses the international politics of the ICRMW by looking at two issues: the work of the UN on migration and the recommendations by intergovernmental organisations; and the situation

43 G Battistella 'Migration and human rights: The uneasy but essential relationship' in De Guchteneire et al (n 7 above).

44 R Böhning 'The ILO and the new UN Convention on Migrant Workers: The past and future' (1991) 25 *International Migration Review* 4.

45 P van Krieken 'Migrants' rights and the law of the sea: Further efforts to ensure universal participation' (2007) 45 *International Migration* 1.

of 'in-between' countries that cut across the North-South divide and shed a particular light on the ICRMW.

5.1 The ambivalent role of the UN system

The attitude of the UN system towards the ICRMW is a clear indication of its political nature. On the one hand, the UN system has been crucial to make its adoption possible. Even if the Convention lacked the support of influential states from the beginning of the drafting process, it is very difficult for such a process to actually stop. Somehow, once it has started, it goes on. For governments, and especially for those in developed countries that find themselves in a minority in a setting like the UN General Assembly, it is not easy to justify why the drafting of a human rights treaty should be interrupted. As Battistella recalls, Western governments rather opted for letting the process run its course, while at the same time making quite clear that they would not feel bound by the Convention after adoption.⁴⁶ This attitude makes it possible for such a treaty to be adopted (even if not subsequently ratified). After adoption, the UN system helps the ICRMW to continue to exist, by routinely producing reports or statements that keep the topic alive in international discussions.

On the other hand, the UN has arguably failed to fully support the ICRMW. UN agencies, including the ILO, have historically done little to promote their respective conventions on migrant workers. The text of the ICRMW was reportedly not available publicly until 1996, six years after it was adopted.⁴⁷ Several observers also noted the unpreparedness of the UN after 1990 and its inability to back the ICRMW in the early years following its adoption.⁴⁸ Part of the problem lies in internal disagreements: as noted above, the ILO was initially in charge of migrant workers issues; it then proved reluctant to let the UN take over, and to put its expertise and resources at the disposal of the ICRMW. But the UN also faced more fundamental difficulties: the leading role played by origin states in the drafting process limited the support from powerful (and wealthy) governments, resulting in a lack of political support and financial resources.

This is quite visible in the evolution of intergovernmental debates over migration: over the past two decades, the dominant approach among the UN and other intergovernmental organisations (like the IOM) has become

46 G Battistella 'Migration and human rights: The uneasy but essential relationship' in De Guchteneire et al (n 7 above).

47 P Taran 'The need for a rights-based approach to migration in the age of globalization' De Guchteneire et al (n 7 above) 164.

48 See for example Taran (n 7 above) 164-65; Grange & d'Auchamp, 'Role of civil society in campaigning for and using the ICRMW' in De Guchteneire et al (n 7 above) 76-77; JB Grugel & N Piper 'Do rights promote development?' *Global Social Policy* (2009) 979.

more and more centred on the economic benefits of migration, as well as on the crime and security implications of unauthorised migration. This has resulted in an emphasis on the so-called 'migration and development' nexus, as well as on phenomena like human trafficking. The ICRMW is hardly mentioned in these discussions, and sometimes even viewed with explicit scepticism, as it would be at odds with this 'managerial' logic.⁴⁹ Moreover, many of today's international initiatives on migration (like the Global Forum on Migration and Development) are state-owned, reflecting governments' reluctance to give the UN too prominent a role therein. This also goes along with an emphasis on non-binding soft law instruments to regulate migration, rather than on hard international law treaties.⁵⁰ Finally, states have displayed a clear preference for bilateral or regional approaches to migration governance, rather than for genuinely multilateral initiatives.⁵¹

The picture is therefore ambivalent: without the ILO or the UN, there would be no international standards pertaining to migrant workers; but even amongst those organisations that are tasked with promoting and monitoring these legal instruments, there are deep political disagreements on how to apprehend migration, and on the emphasis that should be put on human rights. This lack of political support is a major obstacle to increased acceptance of the ICRMW and cannot be addressed without a better recognition of the political dimension of the Convention. Overall, UN and other international organisations tend to downplay the political sensitivity of migration-related issues by, for example, arguing that it can be addressed in a way that is beneficial for all, or that helping migrants is merely a humanitarian issue disconnected from economic and labour market forces. This has of course to do with the intergovernmental setting in which they work, which makes it difficult to address openly political and sensitive topics. But this also makes it impossible to recognise that migration policy is marked by core political (or even moral) issues that cannot be left unaddressed.⁵²

This points to the need for renewed political coalitions around the Convention. While advocates of migrants' rights (origin states, unions or NGOs) traditionally have limited bargaining power, they may nevertheless find it possible to promote the ICRMW, particularly by relying on the legitimacy of human rights in Western democratic culture and in

49 G Goodwin-Gill 'Migrant rights and managed migration' in V Chetail (ed) *Mondialisation, migration et droits de l'homme: Le droit international en question/ Globalisation, migration and human rights: International law under review* (2007).

50 S Grant 'GCIM Report: Defining an "ethical compass" for international migration policy' (2006) 44 *International Migration* 1; A Pécoud 'The UN Convention on Migrant Workers' Rights and international migration management' (2009) 23 *Global Society: Journal of Interdisciplinary International Relations* 3.

51 'Human rights of migrants: Note by the Secretary General' UN General Assembly (7 August 2013) UN Doc A/68/283 (2013).

52 A Pécoud *Depoliticising migration: Global governance and international migration narratives* (2015).

supranational or international institutions (like the European Union, see below). As this discussion makes clear, there are few real obstacles to the ICRMW and, in developed countries, refusal to ratify a human rights treaty is potentially difficult to justify. As long as the issue is not raised, or raised with little insistence, it is possible to ignore it. This has been the case, as the Convention has long suffered from very low levels of awareness and visibility. This is changing however, and while the very topic of migrants' rights will remain politically contested and sensitive, there might be room for envisaging a brighter future for the ICRMW.⁵³

On a different note, this political approach to the ICRMW points to the fact that rights rarely exist in an abstract and absolute manner; they are always the object of bargains over the extent to which they are to be implemented, and therefore subject to ongoing political negotiations. It follows that, as Alba writes, 'much of the discussion of migrant abuse concerns rights not being enforced, rather than their absence on paper'.⁵⁴ Measuring rights is therefore difficult, as the real issue lies less in their formal existence than in their translation into practice, especially when it comes to undocumented migrants. In this respect, the Convention may not change the content of the rights available to migrants (at least not in Western developed countries); but it can have an impact on the context in which different actors (government, migrants, employers, unions, civil society) interact and negotiate over the way rights are made available. This makes clear that migrants' access to rights is a political issue, which depends upon the power relations between the actors that play a role therein.

5.2 In-between states

Another observation that can be made concerns the grey zone in which certain states find (or have found) themselves with respect to ratifying the ICRMW. While the Convention has been the object of disagreements between the North and the South, the composition of these two blocks is sometimes unclear and has changed over time. It follows that some states are not clearly on one side only and are characterised by an in-between nature that makes their relationship to the ICRMW more complex. This is not to say that the divide between origin and destination countries, or between developed and less-developed states, has disappeared; there are still very real diverging interests amongst countries when it comes to the global politics of migration. Rather, it is to suggest that those states that

53 A Desmond 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 39; N Piper & S Rother 'Let's argue about migration: Advancing a right(s) discourse via communicative opportunities' (2012) 33 *Third World Quarterly* 9.

54 F Alba 'Martin Ruhs' *The price of rights: Flexible accommodation vs all-encompassing norms?* (2015) 3 *Migration Studies* 2.

find themselves in this grey zone can shed light on situations of non-ratification that are complex and not attributable to a single factor.

One can first mention states that, while traditionally on the origin side of the migration process, have gradually become destination countries. The best example is probably Mexico, which was one of the chief advocates of the ICRMW from the very beginning and ratified it in 1999. As Díaz and Kuhner recall, this was part of a strategy to protect Mexican migrants in the United States. But Mexico is now also a destination and a transit country. This raises major challenges, but, as these authors further note, 'Mexico is in a position to show the international community that a state which both receives and sends migrants can ratify and comply with the Convention'.⁵⁵ More or less similar observations could be made in relation to other non-Western countries, like Morocco or Argentina.

What is perhaps less well-known is that several European countries used to be in a relatively similar situation. Southern European countries, in particular, were predominantly states of origin when the ICRMW was first conceived; when it was eventually adopted, they had moved to the destination side. Portugal and Italy, for example, had ratified both ILO Conventions by the early eighties. But in the nineties, their concerns were no longer centred on the protection of their emigrants; they had started to experience immigration, which changed their attitude towards the Convention.⁵⁶ It is even reported that they used their own experience to warn other countries that considered ratifying, especially in North Africa, arguing that sooner or later they would have to apply the ICRMW to their own immigrants – and that they should be cautious when committing to such standards.⁵⁷ According to several observers, Italy considered ratification quite seriously and did not see major obstacles to do so; the main problem rather seemed to have resided in its political instability, with frequent changes of governments and the difficulty of ensuring consistency in policy orientations.⁵⁸

In Portugal, the situation appeared to have been quite different, as the country is reported to have been discouraged from ratifying in the context of its accession to the EU (which took place in 1986). This is extremely difficult to document: in principle, there is no conflict between EU membership and ratification of an international human rights treaty, and EU discussions on this matter are highly unlikely to be formal or public. It remains, however, that several observers have noted the unsupportive role played by the EU: from the authors' personal experience, it appears that most of the people interested in the ICRMW have heard rumours

55 G Díaz & G Kuhner 'Mexico's role in promoting an implementing the ICRMW' in De Guchteneire et al (n 7 above) 241.

56 K Touzenis 'Migration and human rights in Italy: Prospects for the ICRMW' in De Guchteneire et al (n 7 above).

57 Graziano Battistella, interview, June 2015.

58 Mariette Grange, interview, March 2015.

according to which the EU would instruct new member states, or potential candidates for EU membership, not to ratify. Given the absence of in-depth research on this sensitive topic, it is difficult to assess the extent to which this assessment is correct. What is clear is that EU states function as a kind of benchmark: countries in the EU periphery attempt to change their policies and legislation according to European and EU standards, and are actively encouraged to do so through EU support or by intergovernmental bodies (like the ICMPD).⁵⁹ As a result, states which have recently joined the EU, or that aim at doing so, will not consider the ICRMW as a priority, and will prefer to emulate what other EU states do. Whether this means that some of these states genuinely wanted to ratify, but were kept from doing so because of EU pressure, cannot be said with any certainty.

What is certain, however, is that the process of European integration did not contribute to broader acceptance of the ICRMW. Migration became an issue for Europe at more or less the same time as the ICRMW was finalised and adopted. The 1985 Schengen treaty, in particular, paved the way for a borderless zone in the EU, while the 1999 Amsterdam treaty formally established migration as a matter of competence for the EU. While this did not create an EU immigration policy (which, to a large extent, does still not exist), it nevertheless made clear that the growing interdependencies between European states were inevitably going to impact migration dynamics; as MacDonald and Cholewinski observe, this made for a convenient 'EU alibi', as member states could justify the non-ratification of the ICRMW by pointing to the need of an European strategy on that matter.⁶⁰

6 Conclusion

The ICRMW has, from the start, been the object of heated debate. Of the ten core international human rights instruments, it is clearly the most controversial and contested. While it would be erroneous to consider that other human rights treaties are fully consensual,⁶¹ the unease with the ICRMW reflects a broader unease with migration at large, and with the role migrants should play in destination societies. It also reflects a

59 European influence can even be felt far away from its neighbourhood: Piper documents that Japan and the Republic of Korea, for example, tend to look at the attitude of European countries before developing their own strategy in terms of human rights and of the ratification of international standards. Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 7 above) 177.

60 MacDonald & Cholewinski 'The ICRMW and the European Union' in De Guchteneire et al (n 7 above). See also the chapter by Desmond in this volume.

61 Taran recalls that acceptance of the ICRMW was made further difficult because it was adopted at a time when human rights at large became more openly contested, particularly during the 1993 Vienna World Conference on Human Rights. Taran 'The need for a rights-based approach to migration in the age of globalization' in De Guchteneire et al (n 7 above) 157-60.

somewhat 'sedentary' assumption, according to which people should 'normally' remain in their own state,⁶² as well as the often implicit assumption that nationals are somehow more deserving than foreigners and should have priority access to human rights. These controversies over migrants' rights have, as argued in this chapter, done much harm to the ICRMW – to the extent that it remains, up until today, a much under-ratified and under-used legal instrument.

But the controversial nature of the ICRMW could also be viewed as a good thing. It indeed makes clear that migration, and the rights that should be granted to migrant workers, are political matters. One can argue at length about the legal and economic implications of ratifying the Convention; but as this chapter has tried to show, the core disagreement is of a political nature. Human rights are sometimes characterised by a kind of depoliticisation process, whereby everybody seems to generally agree as to their relevance (while not necessarily translating them into practice). This is not the case with the ICRMW, which represents one of the very few international codifications of human rights to be openly contested by even the most human rights-friendly countries. This has often remained implicit and unnoticed, as the low visibility of the Convention has meant that governments in destination states could avoid clearly positioning themselves.

But as this changes, the rights of migrant workers may become the new frontier for human rights, and for social and political progress at large. In a world in which many countries in the global South face persistent economic disadvantage and socio-political instability, migration is likely to remain a global trend, with a lasting impact on destination societies. The existing political responses to peoples' mobility, such as the neat distinction between 'economic' migrants and 'political' refugees, will prove increasingly inadequate, and more and more obviously so. This is not new, of course. But this 'age of migration'⁶³ will make the key questions raised by the ICRMW ever more acute: issues such as the rights of non-nationals; their role in the labour market; the recognition of their presence and needs; the responsibility of states and employers; and the need for international cooperation, will be more and more difficult to ignore. Importantly, and as early-twentieth century efforts by the ILO already demonstrated, these do not only concern foreigners or migrants, but all workers and members of both origin and destination societies. To a very large extent, the appropriate political framework to address these questions remains to be invented. There is no guarantee that it will emerge soon, nor is it certain that the Convention will play a role therein. But by envisaging a world in which migrant workers have full access to human

62 O Bakewell 'Keeping them in their place: The ambivalent relationship between development and migration in Africa' (2008) 29 *Third World Quarterly* 7.

63 S Castles et al *The age of migration: International population movements in the modern world* (2013).

rights, the ICRMW at least raises the right questions, and could eventually come into its own as a symbol for fairer and more balanced approaches to international migration and global affairs.

CHAPTER 2

MAKING RIGHTS IN TIMES OF CRISIS: CIVIL SOCIETY AND THE MIGRANT WORKERS CONVENTION

Lisa Simeone and Nicola Piper

1 Introduction

[I]t turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them ... [What was] supposedly inalienable, proved to be unenforceable.

Hannah Arendt, 1951¹

Judging by headlines in the popular press, we are living in ‘times of crisis’. Economic, political and environmental shocks are driving international migration on a scale not seen since the end of World War II, galvanising many of the same debates. This is no accident; institutional arrangements defining the landscape of migration policy today are largely the product of political and ideological struggles surrounding post-war reconstruction. The sociopolitical context in which these institutions operate has changed dramatically with the deepening of a globally networked economy. Yet throughout this period, controversies about racism and xenophobia, humanitarian obligation, and national sovereignty have had a tendency to reproduce similar dilemmas. For example, as Hannah Arendt famously observed, many of those who slip through the cracks between nation-states become legally invisible at the local level, however integral they may become to the communities in which they live and work.

Herself ‘stateless’ at the end of World War II, Arendt lived the bitter irony of an emergent world order in which human rights were a function of national citizenship. Even as the Universal Declaration of Human Rights (Universal Declaration) was being drafted, she expressed skepticism with regard to an international legal regime that guaranteed rights as a natural abstraction, arguing that such a conceptualisation

1 H Arendt ‘The decline of the nation-state and the end of the rights of man’ in *The origins of totalitarianism* (2004) 372.

obscures the active, historical process through which we create rights in public life. According to Arendt, refugees are ‘the most symptomatic group in contemporary politics’² because they make evident a contradiction that lies at the heart of the liberal nation-state itself, a universal rule of law authorised by ‘a people’ with a particular and necessarily exclusive membership.

The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general – without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself [sic] – *and* different in general, representing nothing but his [sic] own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.³

She considered the post-war refugee crisis not as the aberrant consequence of war, but a feature of national sovereignty itself, one that would continue to manifest itself through discrimination and criminalisation of migrants.

Today, migrants in many countries have effectively traded their citizenship rights at home for a job elsewhere. This may be because those rights have lost their meaning under intolerable conditions of war, poverty, environmental crisis, political repression, or discrimination. Others leave home to reunite with family, or to find a better job, education, or investment capital. Whatever the combination of factors that impels that drastic and often dangerous step, most international migrants will find work, wherever they land.⁴ As such, migrants are likely to be integral participants in multiple life-worlds, contributing through their labour, social networks and remittances to welfare and economic development both at home and abroad.⁵ This situation often receives tacit approval as long as it enhances local competitiveness and preserves the viability of other, better-paid jobs. On the other hand, fears of economic insecurity and terrorism have also fueled xenophobia in many countries, contributing to a volatile policy environment indifferent to both the contributions and the needs of non-citizens.

2 Arendt (n 1 above) 353.

3 Arendt (n 1 above) 383.

4 As of 2013, about 232 million people reside outside their country of birth. According to the ILO, most of these persons, or about 90 per cent – a population roughly the size of Brazil’s – are working or being supported by someone who is. ILO *International labour migration: A rights-based approach* (2010) 15-19. About 7 per cent of this total, or 15.7 million persons, are classified as refugees. UN Department of Economic and Social Affairs, Population Division *Trends in international migrant stock: The 2013 revision* United Nations database, POP/DB/MIG/Stock/Rev 2013. See www.unmigration.org. (accessed 25 October 2017).

5 Key sources on the formation of transnational communities include: L Basch et al *Nations unbound: Transnational projects, postcolonial predicaments and deterritorialized nation-states* (1994); A Ong *Flexible citizenship: The cultural logics of transnationality* (1999); and J Urry *Mobilities* (2007).

These developments manifest the ways in which globalisation both challenges and consolidates national sovereignty. Sociologists have brought attention to the ways in which differential pathways in the international circulation of money, goods, services, and people have contributed to a gradual mutation of state-centred border regimes. Increasingly, international mobilities traverse a global web of bordered spaces, with variable sites of enforcement governed by often contradictory norms and practices at multiple scales of jurisdiction.⁶ Within this increasingly fragmented institutional terrain, rearrangements of economic interest and legal authority streamline normative processes in ways that enhance efficiency at the expense of transparency.⁷ The encompassment of migration policy within security discourse reflects this trend, which is giving rise to autonomous systems largely beyond the reach of traditional democratic processes. On the other hand, these dynamics are also creating a transnational public sphere of civil society organisations, committed to preserving a space for participatory politics wherever critical decisions are being made.

If Arendt is right that the exclusion of the non-citizen has been a condition of possibility for national sovereignty, then attention to changes in the conceptualisation of that critical figure – as migrant or refugee, desirable worker or unwelcome invader – may illuminate transformations in the institution of citizenship.⁸ In this chapter, we pursue such an analysis with respect to the erratic trajectory of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). Like the 1951 Convention Related to the Status of Refugees, the ICRMW asserts an obligation by sovereign states to recognise a non-citizen's right to have rights. The earlier convention applies to an unrecognised foreigner's rights at entry and while under the protection of a state granting asylum; the latter applies to all non-

6 Sociologist Saskia Sassen calls this diffusion of border regulation 'transversal borderings'. See S Sassen 'Bordering capabilities versus borders: Implications for national borders' (2009) 30 *Michigan Journal of International Law* 567.

7 It may appear as though institutional fragmentation would undermine rather than enhance efficiency. As a number of observers have pointed out, however, tendentious interpretations of the 'rule of law' and a 'thinning out' of bureaucratic processes can facilitate discretionary decision-making in ways that serve short-term managerial objectives. See C Dauvergne 'Sovereignty, migration and the rule of law in global times' (2004) 67 *The Modern Law Review* 588-615. For more on the transformations of authority and scale within contemporary legal systems, see F von Benda-Beckmann et al (eds) *Rules of law and laws of ruling* (2008); P Schiff Berman 'The globalization of jurisdiction' 2002 151 *University of Pennsylvania Law Review* 311; and JDR Craid & S Michael Lynk *Globalization and the future of labour law* (2006).

8 An extensive legal scholarship on the denationalisation of citizenship has emerged in recent years. See L Bosniak 'Citizenship denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447; A Shachar *The birthright lottery: Citizenship and global economy* (2009); and W Boyd 'Ways of seeing in environmental law' (2010) 37 *Ecology Law Quarterly* 843. In the social sciences literature, see S Sassen (n 6 above); EF Isin *Being political: Genealogies of citizenship* (2002); S Bibler Coutin *Nations of emigrants: Shifting boundaries of citizenship in El Salvador and the United States* (2007); and T Nail *The figure of the Migrant* (2015).

citizens already residing in another country. Strictly speaking, their contents are complementary, mutually reinforcing, and consistent with a growing body of international law that recognises ‘the inherent dignity and the equal and inalienable rights of all members of the human family’.⁹ However, as nation-states struggle to assert boundaries in the midst of ongoing crises, real and perceived, resistance to both Conventions brings into stark relief the practical limitations of this formulation.

In the pages that follow, we consider current anxieties over refugee admissions and the role of migrant workers within the historical context of these landmark treaties. Separated by forty years of dramatic change, they represent different moments in the unfolding of the legal and political tensions at the heart of Arendt’s paradox, as colonial independence movements, the end of the Cold War, and changes in the organisation of capitalism generated new migrations and inflected political sensitivities regarding how to address them. Notwithstanding significant shifts in the human rights landscape, however, negotiations surrounding the drafting and promotion of the ICRMW have taken place on a preexisting field of legal qualifications that sabotage its reception by many states, even as certain features of the global environment have intensified its urgency and mobilised an international movement for migrants’ rights. Today, the legal distinction between refugee and migrant represents a fault line of political, institutional and ethical tensions that underlies the international law governing the treatment of non-citizens. Yet human rights, what historian Kenneth Cmiel called ‘that noble, yet slippery phrase’, are made not given; they circulate like a global currency representing changing aspirations of justice, expressing the local histories of universal claims.¹⁰ Thus, we argue that the heated debates over categorical definitions are less a matter of legal interpretation than of contradiction embedded within the law itself, which is never devoid of politics. Furthermore, in turning to the lessons of history to make sense of our current conundrum, we find that the ICRMW serves as a particularly revealing case study for considering how rights have become a compelling motivation for collective action.

2 Why must they move? The paradox of the deserving migrant

Whether it is considered the cause or the consequence of crisis, international migration tends to provoke state action in a political climate of uncertainty. In recent years, the US government has been taken to task for detaining undocumented minors and their guardians, while Mexico

9 Preamble, Universal Declaration of Human Rights.

10 K Cmiel ‘The recent history of human rights’ (2004) 109 *American Historical Review* 126–134.

cracks down against Central Americans along its own southern border;¹¹ the Dominican Republic implemented a court ruling denying birthright citizenship to children of Haitian descent,¹² and researchers investigating the abuse of migrant workers have been intimidated, harassed, and expelled from Thailand, Qatar and the United Arab Emirates.¹³ The Australian High Court has upheld the offshore detention of asylum seekers on the pacific island of Nauru,¹⁴ while the Florida state legislature debated a bill that would allow the governor to use military force to block refugees from entering or resettling in the state.¹⁵ Even in Europe, where the principle of *non-refoulement* has been most thoroughly incorporated into national and regional statutes,¹⁶ politicians espousing an agenda of nativist populism have gained ground throughout Europe,¹⁷ as a growing reluctance to grant asylum to ‘third-country nationals’¹⁸ erupts into open hostility.

Confronted with the most significant cross-border displacement of people since Arendt’s time, many Europeans express skepticism with respect to the viability of the Refugee Convention.¹⁹ The individuals seeking asylum are not only fleeing the war in Syria, they point out, but also the warlords of Somalia, the flooding in Bangladesh, devastation in Iraq and Afghanistan, and numerous other circumstances of varying severity. In fact, the vast majority of these asylum seekers do not qualify as

- 11 See *Jenny L Flores et al v Jeh Johnson et al* 2015 CD Cal CV 85-4544 DMG (AGRx); and ‘Mexico’s migration crackdown escalates dangers for Central Americans’ *The Guardian* 13 October 2015.
- 12 See JM Katz ‘In exile’ *New York Times Magazine* 13 January 2016; *Case of Expelled Dominicans and Haitians v Dominican Republic* IACHR (28 Aug 2014) Ser C 282(1) Official Summary; and K Culliton-González ‘Born in the Americas: Birthright citizenship and human rights’ (2012) 25 *Harvard Human Rights Journal* 127.
- 13 See ‘Human rights in Thailand: Andy Hall’s legal battle to defend migrant workers’ *The Guardian* 22 January 2016; ‘UK human rights researchers held in Qatar Freed’ *The Guardian* 9 September 2014; ‘NYU professor is barred by United Arab Emirates’ *New York Times* 16 March 2016.
- 14 ‘High court finds offshore detention lawful’ *The Sydney Morning Herald* 3 February 2016.
- 15 ‘Florida bills would give state power to block refugees’ *Naples Daily News* 22 January 2016.
- 16 ‘Non-refoulement’ is the legal term of art for the prohibition of expulsion or return: ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ Convention Relating to the Status of Refugees art 33(1). See European Union Agency for Fundamental Rights and Council of Europe *Handbook on European law relating to asylum, border and immigration* (2014).
- 17 See ‘The March of Europe’s Little Trumps’ *The Economist* 12 December 2015; RM Dancygier *Immigration and conflict in Europe* (2010).
- 18 See T Hatton ‘The rise and fall of asylum: What happened and why?’ (2009) 119 *The Economic Journal* 183. In Europe, the term ‘third-country national’ refers to individuals who are nationals of a country that is not a member state of the European Union.
- 19 UNHCR *Global trends report* (2015); Amnesty International ‘EU-Turkey Summit: EU and Turkish leaders deal death blow to the right to seek asylum’ 8 March 2016 <https://www.amnesty.org/en/latest/news/2016/03/eu-turkey-summit-reaction/> (accessed 1 June 2016).

'Convention refugees', although their moral claim for protection cannot be denied. To quote Alexander Betts:

[A]lthough states' obligations to those fleeing persecution are based on a relatively high degree of legal precision, those relating to states' obligations to people fleeing deprivations are based on legal imprecision.²⁰

The diversity of this 'mixed migration' brings to the fore the logical inconsistencies of a refugee protection regime founded on ambiguous criteria, exposing the parallel classifications of 'labour migrant' and 'refugee' as disparate categories that are neither mutually exclusive nor internally coherent.

Of course, the Refugee Convention was never intended to offer a comprehensive solution to the policy challenges of international migration. One of the earliest legally-binding treaties to follow the 1948 Universal Declaration, it requires only that states provide temporary protection to a relatively narrow category of persons who have already left their country, and can demonstrate a well-founded fear of persecution, should they return, for reasons of race, religion, nationality, political opinion, or membership of a particular social group.²¹ As the specialised agency concerned with rights at work, the International Labour Organisation (ILO) was tasked with representing the interests of migrants within global labour markets. The Migration for Employment Convention (Revised), 1949 (No 97) and the Migrant Workers Convention, 1975 (No 143) both set minimum standards for equality of treatment, and provide guidelines for preventing the abuse of migrant workers. By bringing these labour rights into the human rights framework, the architects of the 1990 ICRMW hoped to lend them a higher degree of visibility, sectoral scope and international prestige.²² Yet states have been reluctant to support any of these instruments,²³ and today the ICRMW is rarely raised – by advocates, journalists, or even human rights officials – as a point of

20 A Betts *Survival migration: Failed governance and the crisis of displacement* (2013) 2.

21 The 1951 Convention was drafted explicitly to address the post-war refugee crisis in Europe; the 1967 Protocol eliminated its temporal restriction beyond 1 January 1951, and extended its universal coverage for the majority of its signatories. See P Weis *The Refugee Convention, 1951: The Travaux Préparatoires analyzed with a Commentary by Dr Paul Weis* (1990).

22 As with UN treaties, ILO conventions allow states some flexibility in tailoring their commitments to their unique legal and administrative systems, and degree of development. However, while certain conventions may permit partial ratification, states cannot make reservations to their commitments. This has discouraged ratification of ILO conventions in some cases. Some states also object to ILO's tripartite structure, which allows unions to play a key role in the organisation's governance. See G Battistella 'Migration and human rights: The uneasy but essential relationship' in De Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009).

23 49 of 187 ILO member states have ratified Convention 97, and 23 have ratified Convention 143. To date, 51 states are party to the ICRMW: Albania, Argentina, Algeria, Azerbaijan, Bangladesh, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Congo, East Timor, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guyana, Guinea, Honduras, Indonesia, Jamaica, Kyrgyzstan,

reference.²⁴ Though the ICRMW arguably creates no new rights beyond those already codified in existing treaties, it has by far the lowest ratification rate of any of the core international human rights instruments, and has gained the support of only Argentina amongst major countries of immigration.²⁵ The Refugee Convention, on the other hand, is one of the most widely ratified treaties in the United Nations system.

This disparity in the legal authority of the two Conventions suggests that the symbolic recognition of rights does not always coincide with the instrumental rationalities that are key to the application of international norms. Some rights have a price that states are not willing to pay,²⁶ whatever their formal necessity according to the Universal Declaration. Over the past century, standards for equality of treatment have developed in dialectical tension with economic and political imperatives, giving rise to a legal infrastructure at the international level that is increasingly sensitive to patterns of exclusion based on race and ethnicity, gender, age and disability.²⁷ Because national governments remain the primary guarantors of rights, however, struggles for recognition are generally realised within the boundaries of the nation-state, where efforts to protect the rights of non-citizens have often had difficulty gaining the support of government or civil society actors concerned with protecting the interests of domestic constituencies.²⁸ Thus, although international migration policies are driven by interests at every level, they have historically represented a blind spot with regard to the formal guarantees of liberal democracy.²⁹

Lesotho, Libya, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Saint Vincent and the Grenadines, Syria, Tajikistan, Turkey, Uganda, Uruguay and Venezuela.

- 24 For example, two key human rights indexes barely mention the ICRMW, despite extensive discussion of the other core conventions. See HJ Steiner et al (eds) *International human rights in context: Law, politics, morals* (2008) where it appears twice in 1492 pages: in a list of Human Rights Treaties on 918 and in a table on 920; and L Henkin et al (eds) *Human rights* (2009), where it is completely absent, despite an extensive section entitled 'Refugees and extraterritorial application' 276-314.
- 25 It should be noted, however, that Burkina Faso, Ghana, Libya, Mexico, Mauritania, Morocco, Nigeria, Senegal and Turkey have become important states of transit and, in some cases, destination in recent years.
- 26 See M Ruhs *The price of rights: Regulating international migration* (2013).
- 27 For competing histories of the emergence of the contemporary human rights regime, see L Hunt *Inventing human rights: A history* (2008); and S Moyn *The last utopia* (2012).
- 28 See L Malkki 'Citizens of humanity: Internationalism and the imagined community of nations' (1994) 3 *Diaspora* 41; J Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2001) 38 *International Migration* 103; JA Bustamante 'Immigrants' vulnerability as subjects of human rights' (2002) 36 *International Migration Review* 333. N Piper 'Rights of foreign workers and the politics of migration in South-East and East Asia' (2004) 42 *International Migration* 71; and D Cole 'The idea of humanity: Human rights and immigrants' rights' (2006) 37 *Columbia Human Rights Law Review* 627.
- 29 For three very different developments of this idea, see JH Carens *The ethics of immigration* (2013); L Bosniak *The citizen and the alien: Dilemmas of contemporary membership* (2006); and B Honig *Democracy and the foreigner* (2001).

This particular vulnerability of migrant workers to invisibility and exploitation has been evident to scholars and reformers for over a century.³⁰ The heyday of industrial capitalism wrought its own globalisation effects across the globe, as technological innovations, colonial expansion, and social upheaval generated unprecedented flows of people, goods, and capital throughout the world. In 1889, pioneer migration scholar EG Ravenstein observed that:

Bad or oppressive laws, heavy taxation, an unattractive climate, uncongenial social surroundings, and even compulsion (slave trade, transportation), all have produced and are still producing currents of migration, but none of these currents can compare in volume with that which arises from the desire inherent in most men [sic] to 'better' themselves in material respects.³¹

Between 1860 and 1914, as many as 80 million rural Europeans moved to cities within Europe, and 52 million moved to the Americas, Asia or Oceania.³² Also significant in terms of sheer numbers during this period were an estimated 3.1 million Chinese and 1.3 million Indians, migrating to the Americas, Southeast Asia, and the Caribbean.³³ There were significant variations amongst the 'push' and 'pull' factors motivating these patterns of mobility, which often involved seasonal or temporary work, as well as the expansion or redirection of pre-existing labour markets.

Though the demand for workers and growing economic integration encouraged relatively open immigration regimes, techniques to identify and manage population movements were a preoccupation of emerging state bureaucracies throughout the 19th century. Parallel with the brutal importation of African slaves to the new world were regulated indenture and guestworker programmes, particularly for Asians recruited into the colonies. Particular histories gave rise to a variety of sociopolitical configurations across the global landscape. For example, despite continuous hostility towards foreign workers in France, weak labour politics contributed to a tradition of relatively open immigration policies and a fluctuating economic dependence on migrants,³⁴ while in Germany, the demand for surplus labour was met through regulations privileging certain ethnic groups.³⁵ Even the 'assisted laissez faire' invitations of settler societies such as the United States, South Africa and Australia were

30 See KJ Bade *Migration in European history* (2003); A McKeown 'Global migration, 1846-1940' (2004) 15 *Journal of World History* 155; and A Zolberg *A nation by design: Immigration policy in the fashioning of America* (2006).

31 EG Ravenstein 'The laws of migration' (1889) 52 *Journal of the Royal Statistical Society* 286.

32 See C Strikwerda 'Tides of migration, currents of history: The state, economy, and the transatlantic movement of labor in the Nineteenth and Twentieth Centuries' (1999) 44 *International Review of Social History* 367.

33 R Sanjek 'Rethinking migration, ancient to future' (2003) 3 *Global Networks* 315.

34 G Noiriel *The French melting pot: Immigration, citizenship and national identity* (1996).

35 Restrictions against Jewish and Polish migrants were frequently subverted by farmers and industrialists intent on reducing labour costs. See Bade (n 30 above).

accompanied by racial exclusions and expectations of national assimilation, reflecting public investment in social reproduction.³⁶

During the interwar period, the swelling of nationalism amidst interstate tensions initiated the adoption of identity documents, census technologies and an intensification of policing in most countries. This institutionalisation of state power implied the ethno-national branding of foreign-born populations through legal quotas, deportations and widespread stigma both in law and practice. Though the Treaty of Versailles created an intergovernmental infrastructure of peacekeeping and human rights institutions, the climate was not amenable to international coordination, and the League of Nations was hogtied from the start. In the Preamble to the ILO's 1919 Constitution, 'protection of the interests of workers when employed in countries other than their own' and 'recognition of the principle of equal remuneration for work of equal value' featured amongst the new organisation's key imperatives.³⁷ However, the ILO could not convince governments to address migration, and efforts by the International Federation of Trade Unions were no more successful. As argued by John Torpey, states seized a monopoly over 'the legitimate means of movement' in response to a growing international imperative to sort their own citizens – and exclude outsiders – in order to more effectively extract and mobilise resources within a congealing system of states.³⁸ As depicted vividly by Arendt, this process of consolidation culminated in the displacement of somewhere between 50 and 60 million refugees by the World War II, amounting to about 10 per cent of Europe's total population, as well as the murder of 11 million Jews, Gypsies, Slavs, homosexuals, people with disabilities and political dissidents.³⁹

Prior to the 1951 Convention, refugee policies were generally conceived in relation to labour mobility. According to Katy Long:

While the focus on migration was to some extent dictated by the lack of prospects for return or local integration, it also reflected a broader cultural understanding that placed economic poverty at the centre of a European plan for 'emigration as development.'⁴⁰

This 'broader cultural understanding' survived into the early years of the post-war period in the form of the Keynesian welfare state, which accompanied the expectation of full employment as a necessary feature of global prosperity. Seminal to this inclusive concept of rights was

36 See GL Neuman 'The lost century of American immigration law' (1993) 93 *Columbia Law Review* 1833; and M Ngai *Impossible subjects: Illegal aliens and the making of modern America* (2004).

37 ILO Constitution, Preamble.

38 J Torpey *The invention of the passport: Surveillance, citizenship, and the state* (2000).

39 See Bade (n 30 above) 204; M Mazower *Dark continent: Europe's twentieth century* (2000).

40 K Long 'When refugees stopped being migrants: Movement, labour and humanitarian protection' (2013) 1 *Migration Studies* 11.

TH Marshall's 1949 essay, 'Citizenship and social class', which considers social citizenship to be the crowning stage in the historical development of the modern state. Marshall identifies a first 'civic' phase with the 18th century revolutions establishing the individual right to property, personal liberty, and access to justice. The second stage enshrined 'political rights' through the expansion of the franchise to working men, former slaves and women over the course of the 19th and early 20th centuries. Marshall anticipated that the 'social rights' of the late 20th century would offer not only opportunities for economic improvement, but also a universal entitlement 'to a share in the full social heritage and to live the life of a civilized being according to the standards prevailing in the society'.⁴¹

This sensibility is evident in the 1948 Universal Declaration, which acknowledges the incapacity of a rights-bearing individual to exercise autonomy under circumstances of economic deprivation.⁴² However, as the United States and the Soviet Union locked horns over the ideological grounds of the post-war world order, skirmishes over the form, content, and institutional stewardship of international norms gradually entrenched a conceptual opposition between civil and economic rights as a matter of political common sense.⁴³ In the shadow of the Holocaust, the egalitarian provocation of the Eastern bloc demanded a counter-vision of altruism that remained faithful to the liberal ideals of social contract and possessive individualism.⁴⁴ Thus, the 1951 Convention is an artifact of highly partisan disputes over refugee resettlement, particularly with regard to Russians resisting repatriation.⁴⁵ Its narrow scope was designed to recognise a particular kind of individual claim against a particular kind of state.

Even with such limited applicability, however, the architects of the refugee protection regime had difficulty convincing states to support the principle of *non-refoulement*, which cut to the defining principle of modern sovereignty: the power to control access to national territory. Such reluctance reflected ambivalence, even at that early stage, towards social citizenship as a principle of international human rights. In the polarising climate of the Cold War, a model of civil society grounded on the contractual exchange of individual rights and obligations stood in uneasy

41 TH Marshall *Citizenship and social class and other essays* (1950) 78.

42 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' Art 25(1) Universal Declaration of Human Rights, 1948.

43 See Long (n 40 above); R Karatani 'How history separated refugee and migrant regimes: In search of their institutional origins' (2005) 17 *International Journal of Refugee Law* 517.

44 CB Macpherson *The political theory of possessive individualism: From Hobbes to Locke* (2011).

45 For a detailed account of the circumstances giving rise to the contemporary refugee protection regime, See G Loescher *Beyond charity: International cooperation and the global refugee crisis* (1993).

tension with solidarity-based notions of collective good. Capitalist democracies distanced themselves from communism by adopting a notion of the 'good society' that approached social welfare as an enhancement of mutual self-interest. This valorisation of political freedom over economic security represented a disavowal of the socialist tradition of social reform, according to which the deprivations of the few jeopardise the well-being of the whole. The humanitarian obligations of refugee protection were thereby construed as a burden to be assumed as a form of charity, rather than an essential commitment to international stability.

The contingencies of the past are easily interpreted as the inevitable foundations of a familiar present.⁴⁶ This is why it is important to point out that, even as certain conceptual oppositions were congealing into the post-war infrastructure, alternative scenarios were also circulating within the international community. The ILO, in particular, approached the internationalist aspiration of peace and human development as a problem of distribution.⁴⁷ In 1946, the first of a series of conferences was convened to position the agency as a supranational authority for the identification, transportation and settlement of migrants and refugees.⁴⁸ Following two years of laborious consultations, this plan, involving a host of UN and specialised agencies, was the centrepiece of an international conference in Naples, Italy. The conference, however, was a disaster, its vision of international oversight incompatible with an emergent world order that was oriented by national interest.

It soon became evident that leaders in the United States and Western Europe had another model in mind. Two weeks later, the US Congress appropriated ten million dollars to encourage emigration from Europe, provided that 'none of the funds made available pursuant to the proviso should be allocated to any international organization which was in its membership any Communist-dominated or Communist-controlled country'.⁴⁹ In Brussels at the end of that year, a Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME) was agreed upon by representatives of 28 non-Communist governments, with a much more limited mandate: one year of intergovernmental operations and transportation services on a cost-reimbursable basis. According to Reiko Karatani, the most important

46 For a classic meditation on modernity as a retrospective reading of the past, see R Koselleck *Futures past: On the semantics of historical time* (1979).

47 During the 114th Session of the ILO Governing Body, in March 1951, the Director-General remarked that '[a]ction to promote a more judicious distribution of the world population was in my view an effective means of fighting the causes of war ...' See Karatani (n 43 above) 523.

48 These deliberations produced the Migration for Employment Convention 97 of 1949 and Recommendation 86, and led to conversations with the UN Secretariat culminating in the endorsement by the Economic and Social Council (ECOSOC) of a blueprint for the international coordination of migration flows. Karatani (n 43 above) 524-25.

49 Karatani (n 43 above) 536.

difference between the operational frameworks of these two proposals was the autonomy provided for national immigration regimes.⁵⁰ This allowed for the continuation of business-as-usual with regard to the variability of international migration flows, accommodating the economic interdependencies, restrictionist tendencies, and flexibilities of the past within an international framework that privileged development over the protection of rights.

The formation of the UN and the institutionalisation of refugee protection under an Office of the High Commissioner for Refugees (UNHCR) mark a decisive turning point in the international recognition of civil and political rights. However, the status of migrant workers within the international system remained underdetermined, we argue, not because their rights' claims were in doubt, but because their presence as non-citizens was in large part driven by an economic rationality of supply and demand which could not be reconciled with the logic of individual entitlement. Quite the contrary, in fact; this period was equally marked by vigorous debates regarding how states might best achieve 'the affluent society'.⁵¹ As historian Mary Ann Glendon recounts, the Universal Declaration left room for choice amongst a range of means for realising this goal:

At the national level, welfare principles are sometimes framed as obligations of society and the state rather than entitlements of individuals. With hindsight, it is perhaps regrettable that the framers, in dealing with these provisions, did not adopt the obligation model. To couch the social security and welfare principles in terms of a common responsibility might have resonated better than rights in most of the world's cultures and would still have left room for experiments with different mixes of private and public approaches.⁵²

While some consensus was reached regarding aspirational standards of human dignity, the more contentious question of economic justice was deferred indefinitely towards a future of global peace and prosperity. Many leading economists were confident that this would come soon, provided

50 Karatani (n 43 above). 538. 'Experts summarised the PICMME as "a multilateral institution outside of the United Nations, with an American Director, and a board composed entirely of democratic nations friendly to the United States."' PICMME would go through a number of name changes as its mandate expanded, becoming the Intergovernmental Committee for European Migration (ICEM) in 1952, the Intergovernmental Committee for Migration (ICM) in 1980, and the International Organisation for Migration (IOM) in 1989.

51 See JK Galbraith *The affluent society* (1958). For a balanced account of postwar debates over 'self-adjusting markets' see E Helleiner *Forgotten foundations of Bretton Woods: International development and the making of the postwar order* (2014).

52 MA Glendon *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 189.

that states were free to manage their national economies with minimal interference.⁵³ According to convergence theory – and the sociology of modernisation on which it was based – wealthier countries shared certain features of sociopolitical organisation: the mass production and consumption of manufactured commodities, the rapid proliferation of media technologies, neocorporatism, and a social safety net. Variations in relative socioeconomic stability were considered the effect of inevitable business cycles that could be contained through built-in countercyclical policies such as unemployment insurance and currency stabilisation. Disparities between ‘first, second and third worlds’,⁵⁴ on the other hand, were explained in evolutionary terms as the effect of inadequate property and contract law, volatile class relations, and underdeveloped industrial infrastructure, all features which could be remedied by political reform and successive ‘stages of growth’.⁵⁵

Less widely recognised was the degree to which the terms of participation in global markets were skewed in favour of countries with a growing population that could afford to consume what it produced, a state of affairs made possible by a political compromise with labour and the externalisation of inflationary pressures.⁵⁶ Nor was there widespread awareness that the dramatic postwar expansion of the global economy was fueled by a steady stream of migrants into the labour-hungry sectors of the industrialised world. The rapid reconstruction of Europe under the Marshall Plan demanded colonial subjects and guestworkers from the Mediterranean and Eastern Europe; in the United States, Mexican *braceros* carried the agricultural sector; Canada and Australia took advantage of European refugees to fill labour shortages; while South African industrialisation relied on migrants from throughout southern and central Africa.⁵⁷ The inequalities in income and opportunities driving this ample labour supply were not mitigated by the independence of former colonies, which in most cases continued to depend on trade relations with the former metropole. Eventually, a counter-narrative emerged attributing the

53 WW Rostow *The stages of economic growth: A non-Communist manifesto* (1960); S Gindin & L Panitch *The making of global capitalism: The political economy of American empire* (2012).

54 P Worsley *The three worlds: Culture and world development* (1984).

55 B Jessop *The capitalist state* (1982).

56 R Gilpin *Global political economy: Understanding the international economic order* (2001) 365-66.

57 See R Hansen ‘Migration to Europe since 1945: Its history and its lessons’ in S Spencer (ed) *The politics of migration: Managing opportunity, conflict and change* (2003); DG Gutiérrez ‘Migration, emergent ethnicity, and the ‘third space’: The shifting politics of nationalism in Greater Mexico’ (1999) 86 *Journal of American History* 481; P Ongley & D Pearson ‘Post-1945 international migration: New Zealand, Australia and Canada compared’ (1995) 29 *International Migration Review* 765; and F Wilson ‘International migration in Southern Africa’ (1976) 10 *International Migration Review* 451.

modernisation standard of the 'convergence club' to the comparatively lower cost of natural and human resources from the Global South.⁵⁸

For roughly three prosperous decades, the Western countries produced enough wealth to accept limited numbers of asylum seekers without an overt guarantee of socio-economic benefit. In a sense, this might be considered a strategic exchange, insofar as the political advantages of asylum policies reinforced Cold War commitments.⁵⁹ These commitments were further codified in the segregation of 'social, economic, and cultural rights' from 'civil and political rights' into separate Covenants,⁶⁰ both drafted in 1954 and adopted in 1966, with extensive reservations in which states positioned themselves along the geopolitical divide. In 1967, a Protocol was adopted to expand the spatiotemporal reach of the Refugee Convention, if not its criteria for eligibility, permitting states to conduct foreign policy through targeted admissions. At the same time, governments continued to improve the legibility of social processes in order to facilitate both governance and control.⁶¹ Cold War sensitivities motivated the adoption of stringent border controls in late colonial and post-colonial territories such as South Asia, Malaysia and Hong Kong.⁶² In occupied Japan, a domestic labour surplus and entrenched discrimination, under perceived threat from the Korean War, led to the deportation and indefinite detention of more than two million long-term residents of Korean descent.⁶³

Thus, both refugee movements and labour migrations during *les trentes glorieuses*⁶⁴ were shaped by the increasing militarisation of relations between 'the West and the rest' under the pressure of disappointing

- 58 G Arrighi et al 'Industrial convergence, globalization, and the persistence of the North-South Divide' (2003) 38 *Studies in Comparative International Development* 3.
- 59 Receiving countries could use population flows 'to discredit both the government or country of origin and to bolster the image of countries granting them asylum.' In other situations, Cold Warriors could 'take advantage of refugee movements by arming and training some of the people concerned and using them to destabilize the government within their homeland'. J Mertus 'The state and the post-Cold War refugee regime: Models, new questions' (1998) 10 *International Journal of Refugee Law* 321, citing UNHCR *The world's refugees: In search of solutions* (1995) 30 37.
- 60 See A Kirkup & T Evans 'The myth of Western opposition to economic, social, and cultural rights? A reply to Whelan and Donnelly' (2009) 31 *Human Rights Quarterly* 221.
- 61 J Scott *Seeing like a state: How certain schemes to improve the human condition have failed* (1998).
- 62 T Mahmud 'Colonial cartographies, postcolonial borders, and enduring failures of international law: The unending wars along the Afghanistan-Pakistan frontier' (2011) 36 *Brooklyn Journal of International Law* 1; A Kuar 'Labor crossings in Southeast Asia: Linking historical and contemporary labor migration' (2009) 11 *New Zealand Journal of Asian Studies* 276; and A Mckeown *Melancholy order: Asian migration and the globalization of borders* (2008).
- 63 T Morris-Suzuki 'The wilder shores of power: Migration, border controls and democracy in postwar Japan' (2006) 86 *Thesis Eleven* 6.
- 64 The term coined by French demographer Jean Fourastié to describe the years between 1945 and 1975, during which the citizens of the world's industrial centers enjoyed high productivity, average wages, rates of consumption, and state-subsidised social benefits. See J Fourastié *Les trentes glorieuses, ou la révolution invisible de 1946 à 1975* (1979).

development outcomes. In 1965, the replacement of nationality-based entry quotas in the United States shifted the demographic mix decisively towards migrants from Latin America and Asia, where industrialisation and 'proxy wars' were disrupting local ways of life.⁶⁵ After generations of depending on undocumented workers to buffer labour market fluctuations, a mechanism was in place to grant legal recognition to those who could meet certain criteria. In 1969, the newly-formed Organisation of African Unity (OAU) adopted a refugee convention tailored to the post-colonial struggles roiling the region, expanding the definition of 'well-founded fear of persecution' to include persons displaced by 'external aggression, occupation, foreign domination or events seriously disturbing public order'.⁶⁶ Throughout the world, debates over the paradox of the deserving migrant were marked by political, class, and racial considerations, whatever the rationale for admission.

These cross-cutting grounds of difference generated friction within and between countries, giving rise to a multitude of political movements across the ideological spectrum. While most of this activity took place locally, it galvanised existing international networks to make emergency interventions and become involved in policy discussions at the international level. Less powerful states also adopted advocacy strategies within the UN, building coalitions within the General Assembly to push for more favourable aid programmes, terms of trade and foreign investment. The oil embargo of 1973 represented an opportunity for the Group of 77 – comprised of developing and newly independent post-colonial states, many with significant oil reserves – to make headway in these efforts. In 1974, the UN General Assembly adopted the Charter of the Economic Rights and Duties of All States, recognising structural inequalities in international markets – just as thirty years of industrial expansion came to an end, triggering new restrictions on labour migration.

3 Global governance or migration management? Why conventions matter

Rights are made in times of crisis, insofar as they are posited as a remedy for violence or exclusion. Understood in this way, rights are a creative response to a failure of law, when a critical mass of stakeholders finds that

65 See OA Westad *The global Cold War: Third world interventions and the making of our times* (2007).

66 Adopted by the Organisation of African Unity in 1969, the Convention Governing the Specific Aspects of Refugee Problems in Africa applies to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. The Convention acknowledged that most refugee movement is populous, not individual, and provided for permanent settlement, as well as burden-sharing amongst member states.

the existing normative framework is inadequate to the ethical challenge at hand. The human rights system was assembled during such a moment, and has been adapting ever since in response to transformations in the organisation and dynamics of power amongst states, economic actors and civil society. To point out the historical particularity of international norms is not to dismiss their significance or legitimacy, but to interrogate their common-sense appearance as first principles expressing a categorical imperative. Insofar as social norms operate as a set of received customs and beliefs, they assert a certain *a priori* authority with respect to the messiness of everyday life. Yet we argue that culture is better understood as a dynamic process of symbolic and material production, through which people collectively make meaningful worlds and the institutions that sustain them. As one such cultural expression, the law is constantly being contested and reinterpreted as a moral project that is also deeply political.⁶⁷

Thus, human rights work is as much practice as principle: formulated through a ritual performance of compromise, international norms can only be realised through the participation of a wide range of social actors. This perspective shares common ground with scholars who emphasise the cultural embeddedness of states within a 'world society', in which human rights principles are disseminated through communications amongst local institutions and through cross-border networks.⁶⁸ Some proponents of this approach emphasise the socialising effects of world public forums and inter-governmental organisations, pointing out that states participating in international meetings are more open to ratification.⁶⁹ Others working within this paradigm contend that support for international treaties ripens through less structured normative mechanisms, in response to a range of political pressures.⁷⁰ A key insight of this scholarship is the critical role of non-governmental organisations, activists and community leaders as critical knowledge brokers: translating transnational ideals into local strategies, articulating expectations, and pressuring states to 'deliver' on human rights obligations.⁷¹

67 See J Hoover 'Towards a politics for human rights: Ambiguous humanity and democratizing rights' (2013) 39 *Philosophy and Social Criticism* 935; and M Goodale 'Ethical theory as social practice' (2006) 108 *American Anthropologist* 25.

68 See K Tsutsui & CM Wotipka 'Global civil society and the international human rights movement: Participation in human rights international nongovernmental organizations' (2004) 83 *Social Forces* 587; and E Hafner-Burton et al 'International human rights law and the politics of legitimacy: Repressive states and human rights treaties' (2008) 23 *International Sociology* 115.

69 See J Boli & GM Thomas (eds) *Constructing world culture: International non-governmental organizations since 1875* (1999).

70 WM Cole 'Sovereignty relinquished? Explaining commitment to the international human rights covenants, 1966-1999' (2005) 70 *American Sociological Review* 472.

71 See S Engle Merry 'Transnational human rights and local activism: Mapping the middle' (2006) 108 *American Anthropologist* 38; and A Kuper (ed) *Global responsibilities: Who must deliver on human rights?* (2005); and A Riles *The network inside out* (2000).

NGOs have long mobilised support for international instruments, both through national representatives and as part of international networks.⁷² They were involved in drafting the Universal Declaration, the 1951 Refugee Convention, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. In each of these cases, advocacy at the UN was to a significant extent the outgrowth of social movements at the domestic level, where struggles over civil rights, gender equality and political oppression were drawing concessions from some governments, and brutal crackdowns from others. This was particularly the case in the United States, Latin America and Africa, where multiplier effects of parallel struggles across the world were mobilised, often to great effect, through international collaboration, but the focus was on changing law and practice at home.⁷³

The anomalous position of the migrant worker as a subject of rights, however, presented a unique set of challenges that marked the ICRMW from the start. First, local and national organisations were more likely to champion the rights of migrants as workers, women, children, persons of colour, or even refugees, than attend to the special problems associated with working as a migrant. While some activists were grappling with nationality and immigration-based discrimination during the 1970s, they were politically marginalised and had difficulty gaining the support of unions and civil rights groups. Most migrants' rights advocacy in the US and Europe took the form of community organising and legal representation, and there was little funding for travel to meetings.⁷⁴ Thus, the development of the Convention was by and large a state-led effort, initially involving only a few faith-based organisations.⁷⁵ Second, the conflicting interests being mediated by this Convention were not primarily located within the confines of the nation-state, but were themselves international, overlapping with sensitive questions of foreign policy and

72 Trade unions, and religious and women's organisations have maintained international infrastructures since the 19th century, and have been central to labour, abolitionist, suffrage, and public health movements, as well as the establishment of social protections within modern state bureaucracies. See M van der Linden 'The promise and challenges of global labor history' (2013) 82 *International Labor and Working-Class History* 57; LJ Rupp *Worlds of women: The making of an international women's movement* (1997); A Hochschild *King Leopold's Ghost: A story of greed, terror, and heroism in Colonial Africa* (1998); and A Rice et al *Liberating sojourn: Frederick Douglass and transatlantic reform* (1999).

73 See M Dudziak *Cold War civil rights: Race and the image of American democracy* (2000); A Escobar & SE Alvarez (eds) *The making of social movements in Latin America: Identity, strategy, and democracy* (1992); and JL & J Comaroff (eds) *Civil society and the political imagination in Africa* (1999).

74 See M Garcia *From the jaws of victory: The triumph and tragedy of Cesar Chavez and the Farm Worker Movement* (2014); and C Lloyd 'Anti-racism, social movements and civil society' in F Anthias & C Lloyd (eds) *Rethinking anti-racisms* (2002).

75 M Grange & M D'Auchamp 'Role of civil society in campaigning for and using the ICRMW' in De Guchteneire et al (n 22 above) 71-74.

trade. Third, those conflicting interests straddled a North-South divide fraught with socio-economic inequality and historical resentment, during a period of world-changing 'crises' and structural adjustments that would significantly increase international mobility.

Recommendations for a comprehensive migrants' rights treaty began to circulate through the UN system just as inflation was becoming apparent in Europe and North America, and attitudes were souring towards migrants.⁷⁶ In December 1978, the General Assembly passed a resolution initiating consultations with member states, and half of them would eventually participate at some stage in the drafting of the Convention. Yet Arendt's paradox would stymie the process for a decade.⁷⁷ The two countries to take the lead in mobilising this project, Mexico and Morocco, were both prominent members of the Group of 77, with significant expatriate populations working in two powerful countries, the United States and France. Their concerns with protecting the rights of nationals living abroad were resisted by Western countries facing industrial decline, which in many cases meant dismantling commitments to social citizenship for their own citizens. Beyond the condemnation of discrimination on one hand, and illegal entry on the other, these groups were locked in an uncomfortable symbiosis, as resource-poor countries became increasingly dependent on remittances, and employers in countries of destination exhibited a growing demand for cheap, flexible, undocumented labour.⁷⁸ Mediating this deadlock were Mediterranean and Scandinavian countries,⁷⁹ which confronted fewer migration pressures during that period.

The text that was adopted on 18 December 1990 marked a milestone in establishing fundamental rights for all migrant workers, yet limited family reunification, liberty of movement and participation in public affairs only to lawful permanent residents.⁸⁰ Many observers were dissatisfied with this compromise. In a special issue of *International Migration Review* published shortly afterward, migrants' rights advocate Linda Bosniak wrote that, despite fairly rigorous anti-discrimination standards, the lack of mandatory regularisation for unauthorised workers effectively undermines the employment rights that are otherwise guaranteed, due to the fear of deportation. 'In other words, under the terms

76 See R Böhning 'The ILO and the new UN Convention on Migrant Workers: The past and future' (1991) 25 *International Migration Review* 698; Battistella in De Guchteneire et al (n 22 above) 50-54.

77 A Pécoud & P de Guchteneire *An investigation of the obstacles to the UN Convention on Migrant Worker's Rights* (2004) 5-7.

78 Battistella in De Guchteneire et al (n 22 above) 47.

79 'MESCA' countries included Finland, Greece, Italy, Portugal, Spain and Sweden, later joined by Norway.

80 For a comprehensive overview of the ICRMW, see R Cholewinski *Migrant workers in international human rights law: Their protection in countries of employment* (1997).

of the Convention, the undocumented continue to enjoy institutionally sanctioned second- (or third-) class status.⁸¹ In the same issue, refugee advocate Peter van Krieken lamented that the inclusion of irregular migrants would doom the Convention to political failure.⁸² In yet another contribution, activists Jan Niessen and Patrick Taran emphasised that both the strengths and weakness of any international convention are realised through ratification and implementation, activities that require the vigilant participation of NGOs.⁸³ All three of these predictions would bear out during the ratification phase and beyond.

As anticipated by Niessen and Taran, without robust civil society involvement, ratifications in the early years following the adoption of the ICRMW accumulated at a disappointing pace. No intergovernmental agency made an effort to promote it, and it was initially even difficult to obtain a copy of the text itself.⁸⁴ By the mid-1990s, however, NGOs were exploding in number and strength at every level, impelled by new communications technologies and the fissures created by the downsizing state. Some were the beneficiaries of 'privatized' public services; others were stepping up to shoulder the burden of widening gaps in care and political representation. This surge in advocacy motivated ECOSOC to make consultative status available to national and regional NGOs in 1996, and between 1980 and 2010, the number of organisations able to participate formally in UN activities grew from 300 to 3000.⁸⁵ Indeed, the current prevalence of human rights discourse within both domestic and international politics can be attributed to this proliferation of transnational advocacy networks, what we have elsewhere called 'globalization from the bottom up'.⁸⁶

The same dynamics that expanded opportunities for participation in governance processes also accelerated and diversified international migration and with it, a migrants' rights movement committed to exposing the structural vulnerability of non-citizens.⁸⁷ The emergence of Asia as a leading site for the outsourcing of supply chains led to a particularly vital advocacy presence, bringing attention to the abusive recruitment practices, poor labour conditions, and sex trafficking that accompanied the

81 LS Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737.

82 P van Krieken 'Migrants' rights and the law of the sea: Further efforts to ensure universal participation' (2007) 45 *International Migration Review* 209.

83 J Niessen & PA Taran 'Using the new Migrant Workers' Rights Convention' (1991) 25 *International Migration Review* 859.

84 See P Taran 'Human rights of migrants: Challenges of the new decade' (2001) 38 *International Migration* 7.

85 Grange & D'Auchamp in De Guchteneire et al (n 22 above) 72.

86 N Piper & J Grugel 'Global migration governance, social movements and the difficulties of promoting migrant rights' in CU Schierup et al (eds) *Migration, precarisation and the democratic deficit in global governance* (2014).

87 J Grugel & N Piper *Critical perspectives on global governance: Rights and regulation in governing regimes* (2007).

celebrated growth of the 'Asian tigers'. The absence of any regional human rights mechanism encouraged activists to focus their efforts at the international level, where they joined forces with allies from other regions in a global ratification campaign.⁸⁸ NGOs translated the Convention into various languages, produced materials for targeted audiences, and established a website. They formed working groups and played a visible role in major global events, cultivating sophisticated relationships with a range of institutional actors.⁸⁹ These efforts led to the designation of a Special Rapporteur on the human rights of migrants, established in 1999, and the formation of a hybrid Steering Committee for ratification, composed of both NGOs and intergovernmental organisations. The Global Steering Committee published a campaigner's handbook that was circulated widely, and coordinated panel events on migration issues at national and regional levels.⁹⁰ It was largely due to these strategic efforts that the Convention entered into force in 2003, 13 years after its adoption.⁹¹

Unlike other Conventions, however, which have been widely accepted at this stage, advocacy surrounding the ICRMW remains an uphill battle. For a few years, it appeared as though the tide had turned, as both UN agencies and major multi-issue human rights organisations began committing resources to migrants' rights work. International Migrants Day became a rallying cry in countries where coalitions were just beginning to form,⁹² and national campaigns were launched throughout Europe, building particular momentum in Spain, Belgium, Italy and Ireland, countries of immigration that had sent workers abroad only a

88 N Piper 'Democratising migration from the bottom up: The rise of the global migrant rights movement' (2015) 12 *Globalizations* 788.

89 Representatives of migrants' rights organisations participated in the 1994 International Conference for Population and Development in Cairo; the 1995 World Summit on Social Development in Copenhagen and Fourth World Conference on Women in Beijing; and the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001.

90 Only nine states had ratified the ICRMW in the first eight years after adoption. The remaining 11 ratifications necessary for entry into force took place following the creation of the Steering Committee in 1998. G Gencianos 'International civil society cooperation on migrants' rights: Perspectives from an NGO network' (2004) 6 *European Journal of Migration and Law* 147.

91 In a study of the obstacles and opportunities for ratification of the ICRMW in the Asia Pacific, the first commissioned by UNESCO in a series of regional studies, Piper identified migrant associations as the actors most crucial to successful ratification. See N Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 22 above).

92 The UN General Assembly declared the day of the ICRMW's adoption, December 18, to be International Migrants' Day on 18 December 2000. An additional factor in assuring the rise in ratifications was the formation of the Global Migration Group, comprised of the heads of international agencies involved in migration-related activities (for a full list, see <http://www.globalmigrationgroup.org> (accessed 26 October 2017)). Set up in 2006 on the recommendation of the GCIM, this Group proactively engaged in the promotion of the ICRMW, a novelty on the part of the UN that had so far been rather reticent on spreading the news and relevance of this Convention. Following entry into force, the number of ratifications doubled in only six years. However, these were exclusively resource-poor origin states.

generation ago. Migration became a front-page issue around the world, and an increasingly pressing concern amongst a broader swath of governments and institutions, both public and private. Two high-profile consultations were announced by the UN: the Global Commission on International Migration (GCIM), a fact-finding panel of experts that convened between 2003 and 2005; and the High-Level Dialogue on Migration and Development in 2006, which would lead to the annual Global Forum for Migration and Development (GFMD).

This attention to the role of migration in the global economy was long overdue, yet it accompanied a gradual withdrawal from the goal of ratification.⁹³ The final GCIM report, for example, generally recommended better implementation of human rights instruments but fell short of championing the campaign. It also reported, erroneously, that ‘a number of countries have stated that they are unwilling to ratify the 1990 Convention because it provides migrants (especially those who have moved in an irregular manner) with rights that are not to be found in other treaties, and because it generally disallows differentiation between migrants who have moved in a regular or irregular manner’.⁹⁴ Similarly, in his report for the High-Level Dialogue, former UN Secretary-General Kofi Annan designated the ICRMW as a core human rights treaty without calling on states to ratify it.

The unpopularity of the Convention reflects the pattern, which has characterised the UN system since its inception, of addressing rights and economics as separate spheres of concern. Yet the success of NGOs in promoting migrants’ rights as a cross-cutting concern also suggests significant changes in processes of policy formation and governance. As NGOs insinuate themselves within decision-making and implementation processes, they become increasingly necessary to the maintenance of the system itself.⁹⁵ Thus, the awakening of interest in international migration over the last decade may also reflect this shift from state-centric governance towards network models of mutual responsibility. This trend can be discerned as early as 1998, in the ILO’s Declaration on Fundamental Principles and Rights at Work, which was widely criticised for lacking reference to a minimum wage. At the World Economic Forum in 1999, Secretary-General Kofi Annan announced the Global Compact, a wide-reaching effort to formalise voluntary private sector participation within the UN system. A Special Representative of the Secretary-General

93 See ‘International migration and development’ UN General Assembly (18 May 2006) UN Doc A/60/871 (2006).

94 GCIM *Migration in an interconnected world: New directions for action* (2005) 57.

95 PJ Taylor ‘The state as container: Territoriality in the modern world-system’ (1994) 18 *Progress in Human Geography* 151; B Anderson *Imagined communities* (1983); Rogers Brubaker *Nationalism reframed: Nationhood and the national question in the new Europe* (1996).

on Business and Human Rights was also appointed in 2005 to monitor progress.⁹⁶ Along these lines, labour migration researchers have increasingly focused on global supply chains, while international policies are focused on the ‘management’ of labour markets rather than the protection of workers. These developments indicate both the political influence of economic actors in the post-industrial West, and a desire for greater traction in the Global South, where the informal sector is predominant and governments are preoccupied with attracting international investment.

Within this increasingly privatised policy environment, advocacy activities, and the research describing them have also taken on the characteristics of business transactions. Advocates are described by scholars as ‘norm entrepreneurs’, who try to expand the human rights agenda by strategically mobilising claims within shifting fields of action.⁹⁷ Such claims may promote human rights standards for new social practices, or identify new bearers to already existing rights.⁹⁸ According to Martha Finnemore and Kathryn Sikkink, this is a process that evolves through stages. First, norms emerge, as norm entrepreneurs call attention to a new or unnoticed human rights violation, and persuade states to promote it. When a critical mass of states have been persuaded to adopt the norm, a ‘tipping point’ is reached, leading to a ‘norm cascade’, as other states are convinced or pressured into accepting it as well. In order for a norm to get to this stage, it usually must become institutionalised in rules and organisational practices, through which socialisation and peer pressure become the dominant mechanisms for ensuring compliance. The last stage is *internalisation*, which signifies that the norm is no longer controversial but has reached a taken-for-granted character, after which conformity can be assumed.⁹⁹ According to this theory, rights advocacy is most influential in the first stage of norm emergence, by calling attention to a specific problem through the strategic construction of cognitive frames. At the present stage, the Convention has not yet reached its tipping point, with only 51 ratifications and 38 signatures. Only a critical mass of major destination countries would trigger a norm cascade, yet none have yet committed their support except for Argentina.

Not surprisingly, research has found that new norms are more persuasive if they ‘fit’ rather than ‘clash’ with already existing ones.¹⁰⁰ For example, Keck and Sikkink have found that norms that are more likely to

96 International relations scholar John Ruggie served as the first Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. See his final report, ‘Guiding principles on business and human rights: Implementing the United Nations “protect, respect and remedy” Framework’ Human Rights Council (21 March 2011) UN Doc A/HRC/17/31 (2011).

97 S Tarrow *Power in movement: Social movements and contentious politics* (1994).

98 A Brysk *Human rights and private wrongs: Constructing global civil society* (2005) 3.

99 M Finnemore & K Sikkink ‘International norm dynamics and political change’ (1998) 52 *International Organization* 887.

100 A Björkdahl *From idea to norm: Promoting conflict prevention* (2002).

have an impact are those that are either concerned with preventing especially vulnerable groups from bodily harm, or those that promote legal equality of opportunity.¹⁰¹ Others claim that norms resonating with core ideologies are likely to be accepted.¹⁰² Tanya Basok builds on this observation in her distinction between *hegemonic* and *counter-hegemonic* human rights.¹⁰³ While the former are consistent with liberalism's focus on individual freedom, formal equality, and the integrity of the nation-state, and thus enjoy wide recognition, the latter challenge these core concepts and are hence subject to greater controversy and dispute. In her opinion, migrants' rights represent a counter-hegemonic discourse insofar as they extend recognition to undocumented non-citizens, thereby challenging the norm of sovereignty. This may present difficulties for advocacy groups, who for instrumental reasons may have to draw on arguments that do not fit their intentions in order to reassure states.¹⁰⁴

Some scholars are understandably pessimistic about the capacity for advocacy organisations to counteract the normative pressures of contemporary institutions. Sangeet Kamat argues that limitations to intervention are built into the category of 'civil society' itself, which implies a privatised notion of public interest through which democracy is being redefined as the plural expression of diverse constituencies, rather than a check on the unequal distribution of power.¹⁰⁵ Kamat describes the ways in which NGOs, forced by funders to adopt corporate modes of operation and subcontracted to provide state services, are discouraged from challenging transnational enterprises and the structure of the global economic system, while those that do so are effectively excluded from policy forums. She objects to the promotion of civil society participation by international institutions, on the one hand, and a lack of attention to their capacity to represent the public interest, on the other.

As a result, business and industry associations are now equally a part of 'NGO representation' in international policy forums, making it impossible for progressive NGOs to build a common alliance against corporate interests.¹⁰⁶

This dynamic of procedural absorption has in fact been observable during the annual meetings of the GFMD. This 'informal, non-binding, voluntary and government-led process' is limited to state and UN agency

101 Finnemore & Sikkink (n 99 above) 898.

102 A Brysk (n 98 above) 22.

103 T Basok 'Counter-hegemonic human rights discourses and migrant rights activism in the US and Canada' (2009) 50 *International Journal of Comparative Sociology* 179.

104 Basok (n 103 above) 185-188. This resonates with the way that Amnesty International introduces new issues on the human rights agenda, by initially associating it with approved human rights themes, then developing it into an issue on its own – always careful to keep its framing non-confrontational. See EB Rodio & HP Schmitz 'Beyond norms and interests: Understanding the evolution of transnational human rights activism' (2010) 14 *The International Journal of Human Rights* 442.

105 S Kamat 'The privatization of public interest: Theorizing NGO discourse in a neoliberal Era' (2004) 11 *Review of International Political Economy* 170.

106 Kamat (n 105 above) 165-66.

representatives. However, a parallel ‘Civil Society Days’ forum invites participants from all walks of ‘civil society’ life: private business, foundations, trade unions, diaspora associations, research institutes or think tanks, academia – and migrants’ rights activists. Yet some migrants’ rights activists, skeptical regarding the impact of this exercise, have nevertheless taken advantage of the global visibility of the event to organise a series of alternative parallel conferences – People’s Global Action on Migration, Development and Human Rights – at which they have voiced concerns regarding the emerging management and security-oriented framework that appears to be emerging from the GFMD process. Central to their critique has been the observation that, despite lip service, migrants’ rights have been subsumed by measures to maximise the economic benefits of migration. Furthermore, counter-terrorism and sophisticated technologies of surveillance have motivated the international coordination of policing in ways that permit the mobility of some populations while restricting it for others. Advocates are concerned that the goals of ‘orderly migration’ articulated within the discourse of ‘migration management’ entail an intensification of detention, deportation, and the legal segregation of temporary workers without full rights or possibilities for integration within the countries demanding their labour.¹⁰⁷ Pithily put by Zygmunt Bauman: ‘traveling for profit is encouraged; traveling for survival is condemned.’¹⁰⁸

4 Trading rights for survival? Sharing risk in a fractal world

From a contemporary standpoint, many of Arendt’s fears have proven quite prescient. She found most troubling the prospect of prosperous, post-war societies stratified by citizenship status, in which laws would not apply equally to everyone. She anticipated that global pressures would ensure a growing number of people that cannot claim membership in the political community. By depriving them of the ‘right to have rights’, modern social institutions risked undermining their own legitimacy, endangering the foundations of modern democracy itself.¹⁰⁹ Over the past 30 years, the socio-economic constellation of forces that we call globalisation has

107 These trends are evident worldwide. See L Amoore ‘Biometric borders: Governing mobilities in the war on terror’ (2006) 25 *Political Geography* 336; F Trauner & S Deimel ‘The impact of EU migration policies on African countries: The case of Mali’ (2013) 51 *International Migration* 20; and H Venters et al ‘Into the abyss: Mortality and morbidity among detained immigrants’ (2009) 31 *Human Rights Quarterly* 474.

108 Z Bauman *Society under siege* (2002) 84.

109 For a range of theoretical perspectives on the contemporary implications of Arendt’s argument, see G Agamben *Homo sacer* (1995); S Benhabib *The rights of others: Aliens, residents and citizens* (2004); and A Shachar ‘Citizenship and the “right to have rights”’ (2014) 18 *Citizenship Studies* 114.

shaped a world order of increasing interdependence and precariousness, altering the landscapes in which people live and work.¹¹⁰ Urban centres from Toronto to Sao Paulo, Dublin to Bangkok are teeming with men, women, and children from other countries, other worlds, and so are rural fields and factories, suburban homes, hotels and hospitals. Insofar as they carry the passport of their country of origin, most of today's migrants may not be stateless. However, current trends of global mobility imply a comparable scenario, in which many non-citizens are unable to exercise full political, social and cultural rights within the countries where they live.

NGO monitoring plays a critical role in preserving the aspiration of human rights as a rationale for inclusion against an international ordering principle of differentiation and exclusion. The latter trend is less conspiracy, we suggest, than an orchestrated attempt to deal with the overwhelming complexity of a world riven by the crises and contradictions of late capitalism. As the unimpeded circulation of finance and commodities becomes increasingly vital to the functioning of the global economy, so too does the regulation of human capital and the containment of threat, as part of an integrated strategy of risk-management that renders mobility an increasingly privileged asset under circumstances of persistent inequality.¹¹¹ Social movement scholars describe the role of activist networks in this 'rescaling' of public and private spheres, amplifying the effects of particular interventions by pooling resources and facilitating communications that can generate new solutions to existing problems.¹¹² Such forms of collective action are a key mechanism for voicing counter-hegemonic discourse, by providing opportunities to negotiate conflict through the identification of common interests.¹¹³ International advocacy not only provides a platform for the exchange of ideas; it also produces new knowledge oriented towards alternative horizons. Indeed, it demonstrates a form of citizenship that has broken free of the nation, through the practice of a trans-territorial politics operating both within and across forums of governance.

If civil society today is awash in neoliberal pluralism, on the one hand, which exchanges the critique of power for a celebration of diversity, and a nationalistic populism, on the other, which retreats into xenophobic nostalgia, perhaps some activists are building a third way, guided by a vision of participatory democracy that is as multiple, overlapping and

110 See S Castles et al *The age of migration: International population movements in the modern world* (2013); S Sassen *Territory, authority, and rights* (2006); and D Held et al *Global transformations: Politics, economics, and culture* (1999).

111 See N De Genova & N Peutz (eds) *The deportation regime: Sovereignty, space, and the freedom of movement* (2010); and R Shamir 'Without borders? Notes on globalization as a mobility regime' (2005) 23 *Sociological Theory* 197.

112 For a detailed review of the existing literature, see J Bendell & A Ellersiek 'Noble network: Advocacy for global justice and the "network effect"' (2009).

113 M Diani 'Introduction: Social movements, contentious actions, and social networks: From metaphor to substance?' in M Diani & D McAdam (eds) *Social movements and networks: Relational approaches to collective action* (2003) 1-18.

fractal as the world we live in. According to Linda Bosniak, Marshall's aspiration of social citizenship survives through such engagements, as ethical projects adapted to the reconfiguring powers of globalisation. Bosniak's argument is less a proposal than a statement of social fact: many migrants are already living this reality.

[A]s ties increase across national borders, people are increasingly taking on commitments and identities that exceed the bounds of the national society and its members. Globalization, in this account, reconstitutes us in the deepest personal ways; it has important imaginative and emotional and moral effects on all of us.¹¹⁴

This implies that the strange mix of enthusiasm, hostility and disregard inspired by the ICRMW reflects its unique capacity amongst UN treaties to surface the defining challenge to governance of our times.

114 Bosniak (n 8 above) 485.

**PART II: THE ICRMW IN
INTERNATIONAL HUMAN
RIGHTS LAW**

THE MIGRANT WORKERS CONVENTION: A LEGAL TOOL TO SAFEGUARD MIGRANTS AGAINST ARBITRARY DETENTION

Mariette Grange*

1 Introduction

Four of the ten core international human rights treaties focus on specific categories of human beings: women, children, migrant workers and members of their families and persons with disabilities.¹ Such ‘population-specific’ treaties (along gender and age lines, migration status and disability) embody the added value of consolidated sets of international norms around persons empowered as ‘subjects’ with rights and not viewed as ‘objects’ of protection. The principle of non-discrimination prominently features in all four ‘population-specific’ treaties.² As other such treaties, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW or the Convention) incorporates a number of fundamental civil and political rights derived from the Universal Declaration of Human Rights (Universal Declaration). One of the rights, that cuts across many of these treaties, is the right to

* Research methodology combines the author’s practical advocacy experience of campaigning for ratification of the ICRMW and monitoring of the CMW; personal interaction with CMW experts and Secretariat, intergovernmental officials, diplomats and non-governmental advocates; a review of academic and other literature; and desk research in the Office of the High Commissioner for Human Rights and Universal Human Rights Index databases. The author would like to thank Eve Lester and Izabella Majcher for their helpful comments on this chapter.

1 K Touzenis & A Sironi *Current challenges in the implementation of The UN International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families* European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, EXPO/B/DROI/2013/ (2013) 27 http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-DROI_ET%282013%29433715 (accessed 26 October 2017); and B Lyon ‘The unsigned United Nations Migrant Worker Rights Convention: An overlooked opportunity to change the “brown collar” migration paradigm’ (2010) 42 *New York University Journal of International Law and Politics* 389–482. http://works.bepress.com/beth_lyon/25 (accessed 26 October 2017).

2 S Marks & A Clapham *International human rights lexicon* (2005) 24–112–414; M Grange *Strengthening protection of migrant workers and their families with international human rights treaties – A do-it-yourself kit* (2006) 26.

liberty and security of person; a right compelling in itself and pivotal to access to and enjoyment of many other human rights.

Political memory seems almost wilfully short or at least selective about the fact that the movement of people, undertaken for a whole host of reasons, is a natural human phenomenon through which different corners of the earth have been populated for millennia. Demographers estimate, for example, that at least 65 million persons left Europe between 1820 and 1930 alone.³ Yet, over 25 years after the adoption of the ICRMW, rather than the starting point being acceptance of population movements as a natural phenomenon, such movements are increasingly scrutinised through ‘risk analysis’ models that trigger security responses, and sometimes even military-style naval operations, that focus on containing or putting a halt to migration flows rather than protecting the rights of those who are caught up in them. Notwithstanding selective political memory and contemporary preoccupations with ‘risk analyses’, immigration detention does not occur in a legal vacuum. International human rights and refugee law provide a clear legal framework for policies, practice and operations rolled out by sovereign states seeking to regulate access to, entry and residence within their national territories or other areas under their jurisdiction or effective control.

In recent decades the right to liberty and security of person has become particularly pertinent for non-citizens, not least migrant workers and members of their families.⁴ This is because the prevalence of laws authorising and regulating immigration-related detention has increased dramatically in many countries. Somewhat ironically, this has taken place since the adoption of the ICRMW in 1990, which directly addresses concerns about the treatment of non-citizens, including the prohibition on arbitrary detention. Immigration detention has spread against the backdrop of very low ratification of the ICRMW. Western countries where the largest detention estates have developed hold a very high record of ratification of all core international human rights treaties except the ICRMW. This exceptional context affects implementation of the norms relevant to immigration detention in the Convention. It undergirds the absence of jurisprudence emanating from the Committee on Migrant Workers (CMW) as the individual complaints procedure has not come into force.⁵ Most current state parties to the ICRMW do not have a strong tradition of accepting such procedures, failing which development of authoritative interpretations of humanrights treaties provisions is hampered.

3 WS & ES Woytinsky *World population and production, trends and outlook* (1953); P Ladame *Le rôle des migrations dans le monde libre* (1958) 88.

4 M Grange & I Majcher ‘Immigration detention under international human rights law: The legal framework and the litmus test of human rights treaty bodies monitoring’ in MJ Flynn & MB Flynn (eds) *Challenging immigration detention: Academics, activists and policy-makers* (2017) 269-71.

5 ICRMW art 77.

Section two begins with an overview of immigration detention including a definition and a brief survey of detention trends and expansion since adoption of the ICRMW. The third section reviews ICRMW provisions relevant to immigration detention in the light of similar provisions in other core human rights treaties, in particular the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This section adopts a chronological and incremental approach. A fourth section offers a brief analysis of how the CMW monitors implementation of provisions at country level set against related monitoring by the Human Rights Committee (HRC). A fifth section studies the impact of western non-ratification of the Convention on the scope and limitations of CMW monitoring and a sixth section outlines some strengths and limitations of the CMW *modus operandi* and monitoring.

2 Immigration detention: An expanding ‘non-punishment’

Immigration-related detention has been described as ‘the deprivation of liberty of non-citizens because of their immigration status’.⁶ Such ‘status’ detention means that foreign men, women and children are detained ‘not on account of what they have done, but on account of what they are’.⁷ Scholars have traced the emergence of centralised immigration laws, and of immigration detention, back to the nineteenth and early twentieth century. The perceived ‘imperative’ of immigration control is what gave rise to the interest of states in the practice of immigration detention.⁸

Immigration detention has evolved over time as an administrative detention measure. The United Nations Working Group on Arbitrary Detention (WGAD) has defined administrative detention as the:

[A]rrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants.⁹

Researchers and jurists further explain that, unlike criminal incarceration, immigration detention as an administrative form of state response to irregular migration ‘refers to deprivation of liberty ordered by the executive

6 M Flynn ‘An introduction to data construction on Immigration-related detention’ (2011) 1.

7 G Cornelisse ‘Immigration detention and the territoriality of universal rights’ in N de Genova & N Peutz (eds) *The deportation regime: Sovereignty, space, and the freedom of movement* (2010) 102.

8 D Wilsher *Immigration detention: Law, history, politics* (2012) 7.

9 Report of the Working Group on Arbitrary Detention, Working Group on Arbitrary Detention (18 January 2010), UN Doc A/HRC/13/30 (2010) para 77.

branch of government – rather than the judiciary – without charges or trial’.¹⁰ Under European human rights law – and in many other regions of the world – detention is authorised as a pre-removal measure prior to deportation and prior to readmission. International law requires that it be *non-punitive* in nature and expects immigration detainees to be held in non-penal settings. However, irregular migration is not a crime against persons, property or national security and as such should not be sanctioned with fines and imprisonment.¹¹

In recent years, many discussions and research projects have addressed the phenomenon of ‘criminalisation’ of migration. Arguably, this concept is used in two distinct contexts. On the one hand, the concept of criminalisation refers to the set of coercive measures that states deploy towards undocumented migrants, including immigration detention itself or deportation.¹² For instance, in 2008, the WGAD, reaffirmed its 1999 definition of:

[D]eprivation of liberty of aliens, asylum seekers or immigrants as ‘custody’ (*rétention*) and deemed that this *criminalisation* practice exceeded ‘the legitimate interest of States to control and regulate illegal immigration and lead[s] to unnecessary detention.’¹³

In 2010, the WGAD wrote that ‘immigration detention should gradually be abolished’ as ‘migrants in an irregular situation have not committed any crime’.¹⁴ Criminalisation of irregular migration was denounced by the CMW chair in a joint statement on International Migrants Day in 2013.¹⁵

On the other hand, the notion of criminalisation is also used to describe the phenomenon of applying criminal law to breaches of (administrative) immigration law. The most extreme example of this trend

10 C de Senarclens & I Majcher ‘Discipline and punish? Analysis of the purposes of immigration detention in Europe’ (2014) 11 *AmeriQuests* 1; International Commission of Jurists ICJ submission to the Working Group on Arbitrary Detention (2012) 10.

11 Report of the Special Rapporteur on the human rights of migrants, François Crépeau United Nations, HRC (2 April 2012), UN Doc A/HRC/20/24 (2012), para 13 <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx> (accessed 26 October 2017).

12 European Union Agency for Fundamental Rights ‘Criminalisation of migrants in an irregular situation and of persons engaging with them’ (2014) 4.

13 Report of the Working Group on Arbitrary Detention, HRC (10 January 2008), UN Doc A/HRC/7/4, (2008), para 53 <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx>.

14 Report of the Working Group on Arbitrary Detention (n 10 above) para 58.

15 ‘Annex III - Joint statement to mark International Migrants Day’ 18 December 2013, issued by François Crépeau, Special Rapporteur on the human rights of migrants; Abdelhamid El Jamri, Chair of the Committee and Felipe González, Rapporteur on the Rights of Migrants of the Inter-American Commission on Human Rights in Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Nineteenth session (9-13 September 2013) and Twentieth session (31-11 April 2014), CMW (23 May 2014), UN Doc A/69/48 (2014) 13.

is penalising irregular entry or stay with a prison sentence.¹⁶ It is beyond the scope of this chapter to detail ICRMW provisions relevant to rights and safeguards in criminal proceedings. Criminal law provisions in the ICRMW largely replicate due process standards applicable to nationals under the ICCPR. The analysis below focuses on the practice of administrative detention.

It is likely that the drafters of the ICRMW did not foresee that more than 25 years after its adoption immigration detention as a state response to unauthorised migration flows would affect hundreds of thousands of people around the world including women and children. Ironically, as detailed below, industrialised countries that have generally approached ICRMW as a taboo have increasingly used immigration detention as a key form of immigration control since the early 1990s. For example, Australia has had a policy of mandatory immigration detention since 1992; a policy later externalised through the controversial 'Pacific Solution' between 2001 and 2008, and then revived in November 2012 with resumed transfers of asylum-seekers who had arrived by boat to Nauru and to Manus Island in Papua New Guinea.¹⁷ Various forms of immigration detention akin to mandatory detention have also been observed over time in Angola, Italy, Japan, Malta and Mexico. Policymakers in Canada and New Zealand stepped up responses to unauthorised arrivals in ways that were clearly inspired by Australian mandatory detention policies.¹⁸

Expansion of immigration detention in the United States and the European Union (EU) dates back to the 1990s.¹⁹ Countries at the broader periphery of industrialised regions in Central and North America, Eastern Europe and North Africa as well as emerging economies across South East Asia have also developed or consolidated large immigration detention estates. Migration 'management', heavily focused on security aspects,²⁰ and border control externalisation policies spearheaded and sponsored by

16 M Provera 'The criminalisation of irregular migration in the European Union' Centre for European Policy Studies (2015) 2.

17 Parliament of Australia 'Offshore processing: Lessons from the "pacific solution"' (2014) http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/April/Offshore_processing (accessed 26 June 2015); UNHCR 'UNHCR monitoring visit to Manus Island' Papua New Guinea, 23-25 October 2013.

18 Global Detention Project 'Relevant country profiles' <http://www.globaldetentionproject.org/de/home.html> (accessed 26 June 2015).

19 M Flynn 'How and why immigration detention crossed the globe' (2014); M Provera *The detention of asylum seekers in the European Union and Australia* (2013) 94; C Rodier *Xénophobie business: À quoi servent les contrôles migratoires?* (2012) 52; M Bosworth & S Turnbull 'Immigration detention, punishment, and the criminalization of migration' in S Pickering & J Ham *The Routledge handbook on crime and international migration* (2014) 92.

20 Human Rights Council Report of the Special Rapporteur on the human rights of migrants, François Crépeau 'Regional study: Management of the external borders of the European Union and its impact on the human rights of migrants United Nations' HRC (24 April 2013), UN Doc A/HRC/23/46 (2013) para 37 <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx> (accessed 27 October 2017).

Western countries have often triggered or intensified ripple effects towards increased detention through their ‘neighbourhoods’ across land and maritime borders.²¹ Australia’s externalisation of its detention policy has been clearly spelt out:

Non-citizens without a valid visa, and those who do not comply with their visa conditions and have their visa cancelled, may be subject to detention and removal from Australia. ... Australia does not provide permanent protection to people who arrive illegally by boat. Anyone who attempts to travel to Australia illegally by boat will be turned back or transferred to a regional processing country. The Republic of Nauru and the Independent State of Papua New Guinea are currently designated as regional processing countries.²²

In the United States, support of Mexico’s immigration control policies is well documented. In a submission before an Inter-American Commission on Human Rights hearing on the ‘Human Rights Situation of Migrant and Refugee Children and Families in the United States’ human rights organisations described ‘the prodigious support for immigration control measures including interdictions, checkpoints, detention, and deportation’ deployed by multiple US agencies. They stated that:

The manner in which the US government has encouraged, supported and stood-up forces in the region engaged in intercepting, interdiction and deportation of persons without requisite safeguards are well outside the bounds of international law.²³

In parallel to the increasing prevalence of detention policies across the world there has also been an increase in the harshness of those policies.²⁴ In June 2015, a leaked letter from the EU Home Affairs Commissioner to EU interior ministers proposed temporary derogation from detention standards pursuant to a time-bound ‘emergency clause’ in the EU Return Directive as a way of strengthening its enforcement by frontline states of the EU. As Steve Peers explained, the Commissioner’s suggestion to temporarily derogate from the binding EU instrument on return by using ‘an obscure clause allowing for exceptions to the normal EU standards for detention of irregular migrants’ would have potentially harmful consequences. For example, under the proposal, unauthorised migrants

21 EU Neighbourhood Info Centre ‘The European Neighbourhood Policy (ENP)’ http://www.enpi-info.eu/main.php?id=344&id_type=2 (accessed 25 June 2015).

22 Department of Immigration and Border Protection ‘Community’ <http://www.immi.gov.au/About/Pages/detention/about-immigration-detention.aspx> <https://www.border.gov.au/australian-border-force-abf/protecting/community#Illegal%20maritime%20arrivals> (accessed 25 July 2017).

23 Jesuit Conference of the United States & the Washington Office on Latin America ‘US support and assistance for interdictions, interceptions, and border security measures in Mexico, Honduras, and Guatemala undermine access to international protection’ in *Human rights situation of Migrant and refugee children and families in the United States Materials Submitted in Support of Hearing before the Inter-American Commission on Human Rights* 153rd Ordinary Period of Sessions (27 October 2014) 9 & 15.

24 *MSS v Belgium and Greece* ECHR (21 January 2011) Application no 30696/09.

could 'not only be detained in ordinary prisons, but mixed in with the ordinary prison population of convicted criminals and those awaiting trial for serious crimes'.²⁵ The Commissioner's letter reads:

This clause offers a possibility for Member States not to apply three detention related provisions of the Directive, namely: the obligation to provide for a speedy initial judicial review of detention; the obligation to detain only in specialised facilities and the obligation to provide separate accommodation guaranteeing adequate privacy to families.²⁶

This would go against the standards set by the European Committee for the Prevention of Torture whereby: 'A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence.'²⁷

Even though Western states which practice immigration detention are not parties to the ICRMW, it is nevertheless important to emphasise their immigration detention policies because fifteen countries that are directly affected by their externalisation of migration control and other detention-related migration management and border control activities are state parties to the ICRMW. This represents one third of state parties to the ICRMW and includes six of the 16 countries in the EU neighbourhood framework: namely, Algeria, Azerbaijan, Egypt, Libya, Morocco and Syria as well as Turkey, an EU candidate country.²⁸ It also includes three state parties at Australia's periphery in South East Asia: Indonesia, Timor-Leste and Philippines; and Mexico, Belize, Guatemala, El Salvador and Honduras in the Americas.²⁹

3 ICRMW detention provisions: A chronological and incremental approach

When considering the significance of the ICRMW in the context of immigration detention, it is important to bear in mind that its provisions build on the bedrock of the International Bill of Human Rights – the Universal Declaration and the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights and their optional protocols – and forms an integral part of the international legal framework for the protection of the rights of people on the move.

25 S Peers 'Jailing migrant families together with convicted criminals: A desperate EU policy to deter irregular migration' (2015) <http://www.statewatch.org/news/2015/jun/eu-jailing-migrant-families.htm> (accessed 26 June 2015).

26 D Avramopoulos Brussels, 1 June 2015 Ares (2015) 2397724 n 4.

27 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment CPT Standards (2011) para 28.

28 ENP (n 21 above).

29 United Nations Treaty Collection 'Status of Treaties' <https://treaties.un.org/pages/ParticipationStatus.aspx> (accessed 25 June 2015).

In 1948 the Universal Declaration set out the general principles '[e]veryone has the right to life, liberty and security of person' and '[n]o one shall be subjected to arbitrary arrest, detention or exile'.³⁰ In 1966 the ICCPR dealt with the right to life in a separate provision and elaborated upon the right to liberty and security of person.³¹ It introduced safeguards against arbitrary arrest or detention and framed deprivation of liberty within broader legal parameters:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Fourteen years after the ICCPR's entry into force the General Assembly adopted the ICRMW without a vote and sanctioned the Convention's extension of the ICCPR's safeguards. The ICRMW extended provisions relating to the right to liberty and security for 'migrant workers and members of their families' in a substantive article.³²

Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.³³

The ICRMW echoes ICCPR safeguards on the legality of detention and it is the only core international human rights treaty to include protection against *collective* arbitrary arrests or detention.³⁴

In article 2, the ICRMW provides a very broad definition of migrant workers:

The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

It is important to bear this definition in mind when studying detention related to immigration status as it makes clear that the *quality* of migrant worker both pre-exists and outlasts the working experience. This wording also includes the transit phase of emigration which over the past decade has dramatically expanded as a source for immigration detention at the

30 Universal Declaration arts 3 & 9.

31 ICCPR arts 6 & 9(1).

32 ICRMW art 16(1)-(9).

33 ICRMW art 16(4).

34 Collective expulsion of aliens is prohibited under regional human rights treaties including Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art 4; American Convention on Human Rights art 22; African Charter on Human and People's Rights art 12 which reads: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

periphery of western industrialised states. It is also important to point out in this context that while refugees and asylum-seekers feature amongst the persons excluded from the scope of the Convention, the distinction between the treatment of asylum-seekers and of migrant workers in an irregular situation is, in practice, often opaque.

This chronology and other elements detailed below reflect not only the international evolution of legal thinking on deprivation of liberty over four decades from 1948 to 1990, but also shed light on the specificity of the protection needs of migrants highlighted in the ICRMW Preamble. In this context it must also be noted that ICRMW provisions related to immigration detention and rights in detention are included in ICRMW Part III which covers the human rights of *both* documented and undocumented migrant workers and members of their families.³⁵ While during the ICRMW drafting process a handful of countries viewed the extension of protection to undocumented migrants as problematic, a larger group supported it.³⁶

3.1 Procedural standards

The ICRMW, like other core international human rights treaties, does not provide a detailed description of what constitutes arbitrary detention. It does, however, deal at length with safeguards against such detention.

3.1.1 *Right to information: Free assistance of an interpreter*

The ICRMW clarifies conditions to be met so that migrants who are arrested can understand what is happening to them. It emphasises the need for states to ensure that information is provided in a language migrants understand on the reasons for arrest, on any charges against them and during related court proceedings on the lawfulness of detention and in criminal proceedings.³⁷ In contrast, ICCPR provisions on language apply to criminal proceedings only.³⁸ In the context of criminal charges, the ICRMW also guarantees the right to 'have free assistance of an interpreter if they cannot understand or speak the language in court' to migrant

35 ICRMW arts 16, 17 & 18.

36 The United States, Germany, Netherlands, Australia, France and India objected and a larger group including receiving and sending countries argued for it both 'as a matter of universal values and as an issue of instrumental expediency' as it would discourage exploitation of undocumented migrants; L Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention' *International Migration Review Special Issue: UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) 749; L Bilocchi 'Rights of all migrant workers (Part III of the Convention) *Travaux Préparatoires*' 5.

37 ICRMW arts 16(5) & 18(3)(a); B Opekin et al *Foundations of international migration law* (2012) 161.

38 ICCPR arts 14(3) & 14(3)(f).

workers and members of their families.³⁹ According to the *travaux préparatoires* for the ICRMW, an early US proposal, supported by Australia suggested adding ‘free of charge, if necessary’.

This proposal was strongly opposed by the representatives of Netherlands, Germany, Sweden, Senegal and Yugoslavia. They stated that ‘The question was also which authority would decide whether free interpretation was necessary, and the opinion was expressed that it would be difficult to assess who needed free interpretation and who did not.’ The text adopted in the second reading ignored the USA proposal and assured the right to the free assistance of an interpreter for migrants that cannot understand or speak the language used in court.⁴⁰

3.1.2 Challenging the lawfulness of detention: Right to compensation

When migrant workers or members of their families are ‘deprived of their liberty by arrest or detention’ – that is in administrative or penal processes – the ICRMW, like the ICCPR, requires that provision be made for challenging the lawfulness of detention before a court that may order their release if the detention is not lawful.⁴¹ Here again, in acknowledgment of migrants’ vulnerability, the ICRMW includes recourse to a free interpreter if necessary.

ICRMW provisions for an enforceable right to compensation in case of unlawful arrest or detention are similar to those of the ICCPR.⁴² This compensation provision was opposed by Nigeria and the United States⁴³ during the drafting process of the ICRMW:

During the negotiations, the United States occasionally expressed ambivalence about the Convention. In 1986, the US Working Group representative stated that a reservation to Convention article 16.9 would likely be registered ‘if and when the present Convention is submitted to the Senate’.⁴⁴

Unsurprisingly, upon ratification of the ICCPR in 1992 the United States made entitlement to compensation for victims of an unlawful arrest or detention or a miscarriage of justice ‘subject to the reasonable requirement of domestic law’.⁴⁵

39 ICRMW art 18(3)(f).

40 Biccocchi (n 36 above) 4.

41 ICRMW arts 16(8) & ICCPR 9(4).

42 ICRMW arts 16(9) & 18(6) under criminal law.

43 Biccocchi (n 36 above) 3.

44 Lyon (n 1 above) 407.

45 United Nations Treaty Collection Chapter IV Human Rights 4: International Covenant on Civil and Political Rights https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (accessed 9 November 2015).

3.1.3 Consular assistance

In line with the Vienna Convention on Consular Relations, a near-universally ratified early UN instrument,⁴⁶ the right to consular assistance is mentioned early in the Convention:

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.⁴⁷

The wording reflects the Vienna Convention's concern in article 36(1)(c) whereby 'consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he *expressly opposes such action*'. This wording implies that activation of consular protection is at the request of the detainees. This is less clear in the ICRMW.

Nonetheless, the ICRMW includes a more substantive set of provisions in relation to information on and access to consular assistance for migrant workers and members of their families 'arrested or committed to prison or custody pending trial or ... detained in any other manner'.⁴⁸ The wording covers both penal and administrative detention.

The ICRMW generally expands at greater length on the essential constituents of the right to liberty and security of migrant workers and members of their families than corresponding provisions in the ICCPR.⁴⁹ This addresses the particular 'situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin'.⁵⁰ CMW members emphasised the need for consular assistance quite soon after the Committee had begun to hold its sessions:

The Committee recommends that consular services respond more effectively to the need for protection of Egyptian migrant workers and members of their families, and, in particular, provide the necessary assistance to those in detention and promptly issue travel documents to all Egyptian migrant workers and members of their families who wish or have to return to Egypt. It

46 Vienna Convention on Consular Relations 1963 art 36.

47 ICRMW art 23.

48 ICRMW art 16(7).

49 ICRMW arts 16 & 17; ICCPR arts 9 & 10; JAR Nafziger & BC Bartel 'The Migrant Workers Convention: Its place in human rights law' (1991) 25 *International Migration Review* 771 782.

50 ICRMW Preamble.

also recommends that the mechanisms for receiving complaints from migrant workers be improved and generalized in all embassies and consulates.⁵¹

3.1.4 *Right to legal assistance*

Legal assistance is guaranteed by the ICRMW in relation to criminal proceedings on similar terms to the ICCPR.⁵² This includes free legal assistance.⁵³ However, ICRMW provisions on consular assistance include the possibility for migrants ‘arrested or committed to prison or custody pending trial or ... detained in any other manner’ through representatives of consular or diplomatic authorities ‘to make arrangements with them for his or her legal representation’.⁵⁴

3.2 **Conditions of detention**

ICRMW provisions on treatment in detention are much more substantive than related provisions in the ICCPR.⁵⁵ The ICRMW drafters, cognisant of migrants’ special vulnerability, addressed both administrative detention – a rarer occurrence for nationals – and criminal proceedings.⁵⁶ For instance, whenever a migrant is ‘deprived of his or her liberty’ ICRMW provides that state authorities should pay attention to potential problems encountered by family members especially spouses and minor children.⁵⁷ Migrants in detention are to enjoy the same rights as nationals in particular with respect to visits by members of their families – a provision not included in the ICCPR – and are protected against being made to bear any cost arising from detention.⁵⁸ There are occurrences of domestic law provisions for detainees to bear the cost of detention.⁵⁹ In some countries migrants placed in pre-deportation immigration detention have to bear the cost for transport back to their country of origin and at times face indefinite detention when they are unable to pay for those costs.⁶⁰

51 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families – EGYPT, CMW (25 May 2007), UN Doc CMW/C/EGY/CO/1 (2007) para 47.

52 ICRMW art 18(3)(b) & ICCPR art 14(3)(b).

53 ICRMW art 18(3)(d) & ICCPR art 14(3)(d).

54 ICRMW art 16(7)(b) & 16(7)(c).

55 ICRMW art 17 and ICCPR art 10.

56 ICRMW art 17(3).

57 ICRMW art 17(6).

58 ICRMW arts 17(5), 17(7) & 17(8).

59 ‘The detainees must cover the costs of their stay in the centre, unless they have no funds, in which case costs are covered by the state budget (Aliens Act 2006, Article 62)’ in Global detention project ‘Slovenia detention profile’ (2010).

60 Global detention project ‘Turkey detention profile’ (2014); ‘Lebanon detention profile’ (2014) and ‘Egypt detention profile’ (2014).

3.2.1 *Treatment in detention*

Similar to the ICCPR, the ICRMW foresees that ‘migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. In keeping with the specific needs of migrants, the ICRMW adds a reference to the need to respect ‘their cultural identity’. This would imply for instance that religious practices and food taboos should be taken into consideration.⁶¹

3.2.2 *Protection against torture and ill-treatment*

The Universal Declaration provision prohibiting torture or cruel, inhuman or degrading treatment or punishment was first elaborated on in binding form in the ICCPR, which framed it as a non-derogable right.⁶² The ICRMW recalls the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in 1984 in its Preamble and includes a specific provision to protect migrant workers and members of their families.⁶³

3.2.3 *Separation from convicted criminals*

The ICRMW also includes a specific provision relating to the segregation of accused persons from convicted criminals found in the ICCPR.⁶⁴ Furthermore, in recognition of the fact that, generally, immigration law violations are not treated as criminal offences, the ICRMW provides that migrants detained ‘for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial’.⁶⁵

According to the *travaux préparatoires* France and Germany expressed concern about the separation of migrant workers from other prisoners in the first reading of the draft which stated:

Any migrant worker or member of his or her family who is detained in a State of destination for infraction of the provisions concerning migration shall be housed in suitable accommodation (under judicial control) separate from the prisons or other centers of detention or imprisonment for offenders or criminals.⁶⁶

61 ICCPR art 10(1) & ICRMW art 17(1).

62 Universal Declaration art 5; ICCPR arts 4 & 7.

63 ICRMW art 10.

64 ICRMW art 17(2) & ICCPR art 10(2)(a).

65 ICRMW art 17(3).

66 Cf. A/C.3/42/1, para 26 & Cf. A/C.3/41/3, para 225 in Bicchieri (n 36 above) 3.

3.3 Vulnerable groups

The ICRMW does not apply to refugees and stateless persons whose protection is covered in other international treaties.⁶⁷ There is no reference to children in detention in the Convention, except in relation to problems that might arise for minor children as a consequence of deprivation of liberty of their parents.⁶⁸ Consideration of the best interests of the child is nowhere to be found. Although both the Convention on the Rights of the Child (CRC) and the ICRMW were adopted within thirteen months of each other, the CRC's substantive provisions protecting children against arbitrary detention and requesting that detention be 'a measure of last resort and for the shortest appropriate period of time' are not to be found in the ICRMW.⁶⁹ The same applies for the CRC procedural safeguards:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.⁷⁰

Separation of juveniles from adults due to their age and status is only foreseen in the ICRMW if they are accused or imprisoned.⁷¹ Some Scandinavian states involved in drafting the ICRMW – Sweden, Norway and Finland – insisted on the fact that the separation should not be obligatory.⁷² Women are not referred to explicitly in the ICRMW, *a fortiori* in relation to safeguards in detention. However, the document does use inclusive language and its provisions apply equally to men and women and extend special protection to family members:

Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.⁷³

3.4 Non-custodial measures

Following the terms of article 9(3) ICCPR, article 16(5) ICRMW further cautions about detention in custody while awaiting trial and foresees the

67 ICRMW art 3(d); 1951 Convention relating to the Status of Refugees & 1954 Convention relating to the Status of Stateless Persons.

68 ICRMW art 17(6).

69 CRC art 37.

70 CRC art 37(d).

71 ICRMW arts 17(2), 17(4).

72 Report of the open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, GA (10 October 1986), UN Doc A/C.3/41/3 (1986) para 228 <http://hr-travaux.law.virginia.edu/migrant-workers> (accessed 27 October 2017).

73 ICRMW art 17(6).

possibility of release ‘subject to guarantees’. This is a measure currently advocated for by many civil society national and international campaigns and promoted by human rights experts and mechanisms as an alternative preferable to detention.⁷⁴

4 Detention monitoring: The CMW and the HRC⁷⁵

4.1 CMW

The CMW, like other treaty monitoring bodies, is tasked with examining implementation of the relevant treaty at the national level. In order to do so, it examines reports submitted by state parties which include responses to a list of issues drawn up by the Committee in advance of examination of the report in public session, some of which relate to various aspects of detention. CMW members also use information received from civil society, national human rights institutions and relevant intergovernmental organisations to complement information submitted by states, in particular concerning practices.

As illustrated in Figure 1 and developed in Section 5, states which practice immigration detention on a larger scale – mostly western states – do *not* come under CMW scrutiny. In addition, it is likely that a number of countries of *origin* in the South with little or no inwards migration flows – such as the Philippines, Mali and Tajikistan – ratified the ICRMW with Part VI in mind.⁷⁶ Part VI contains a handful of provisions relating to *protection of a state party’s own nationals abroad*, about to migrate or upon return.

74 International Detention Coalition *There are alternatives: A handbook for preventing unnecessary immigration detention* (revised edition) (2014).

75 Immigration detention relevant CMW and HRC recommendations were initially identified in the Universal Human Rights Index (UHRI) database maintained by OHCHR. However four CMW sessions since mid-2013 were not recorded in UHRI as of November 2015 – from the 19th through to the 22nd session – and results were added to UHRI statistics by the author. All charts in this section have been created by the author.

76 Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

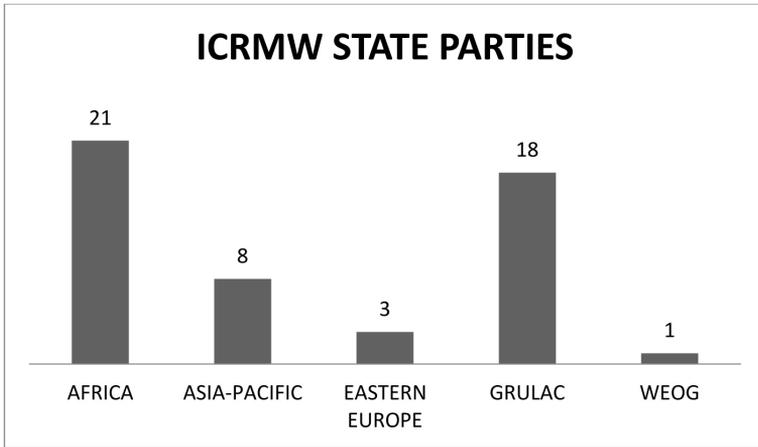


Figure 1: breakdown of the 51 ICRMW state parties by regional groups as of July 2017

Detention issues were raised for the first time by civil society during the second session of the CMW, before the Committee began examining state parties' reports in 2006.⁷⁷ Since then the CMW has examined 37 initial reports, 5 country situations in the absence of an initial report (non-reporting states), and twelve periodic reports during 26 sessions.⁷⁸ According to the UN Universal Human Rights Index (UHRI) database and the OHCHR Treaty Bodies database the Committee has issued some 60 recommendations related to immigration detention from 2006 to July 2017.⁷⁹

Upon closer analysis, CMW recommendations can be further broken down into some 85 discrete recommendations distributed along some broad thematic clusters. These include: the need for state parties to provide statistics on detention; conditions of detention (overcrowding, food, medical care and hygiene, investigation and sanctions for ill-treatment); length (indefinite, to shortest possible); respect of international and

77 See World Federation of Trade Unions in Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families Second Session Summary Record of the 15th Meeting, ICRMW (7 July 2005), UN Doc CMW/C/SR.15 (2005).

78 OHCHR 'Committee on migrant workers' <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx> (accessed 21 June 2015) and Sessions for CMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (accessed 29 July 2017).

79 This result was obtained through using the database advanced annotation searches in June 2015 and updated in July 2017 to construct searches with the following keywords: 'detention, detain, arrest, prison, and apprehended' cross-referenced with the 'migrants, migrant workers, non-citizens and refugees and asylum-seekers' filters by affected persons. A search using the 'right to liberty' filter only yielded half the final results analysed.

ICRMW norms and standards including safeguards against arbitrary detention (exceptional and last resort, case by case determination, due process, legal criteria); and procedural standards (access to information, legal aid, effective legal remedies, due process in judicial and administrative proceedings, appeal, complaints procedures). Other issues include legal (separation from convicted criminals) and gender segregation and administrative detention in dedicated facilities.

The highest number of CMW thematic detention-related recommendations deal with consular assistance *for nationals abroad* and concerns about detention *of nationals abroad*. Recommendations for detention as a last resort come second, followed by information on statistics. Third come recommendations on conditions of detention; and finally the need for immigration detention to be in line with ICRMW articles 16 and 17 and to respect international standards. State parties that have received the highest number of immigration detention-related recommendations include Turkey, Senegal, Mexico, Bosnia and Herzegovina, Ecuador and Belize.

Although the ICRMW does contain some provisions on consular assistance as detailed above, the predominance of recommendations on consular assistance is deeply paradoxical. The ICRMW does primarily focus on protection of civil, political, economic, social and cultural rights of migrant workers and members of their families to be extended by governments and authorities *in receiving or transit* countries. A geopolitical reading of the ICRMW ratification spread as illustrated in Figure 1, however, helps decipher why the CMW would more frequently emphasise consular assistance from the viewpoint of states of origin and not receiving states.

The ICRMW is a multilateral human rights treaty aimed at ‘protecting the rights’ of migrant workers and members of their families and not an instrument primarily aimed at diminishing or regulating migratory movements. Scholars have highlighted that some state parties such as Sri Lanka did expect the ICRMW to afford some protection to their own citizens abroad, including when they are detained:

There are no signs that migration has decreased since ratification and, there has been little use of the ICMR vis-à-vis receiving countries, by government representatives ... On the whole, despite ratification of the UN Convention, the general perception is that Sri Lankan migrants are frequently subjected to indecent working conditions, non-payment of wages, physical and psychological harassment and discriminatory practices.⁸⁰

80 I Robyn et al ‘Impact of ratifying the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Family: Case studies of the Philippines and Sri Lanka’ (2005) 10.

The monitoring work of the CMW is made difficult by an absence of statistics on the practice and scope of immigration detention as state parties rarely come forth with such data. There is also a marked tendency in various parts of the world to use euphemisms for immigration detention and places of detention which at times makes the practice invisible.⁸¹

Besides examination of state parties' reports, and building a set of detention-related questions in the list of issues given to state parties ahead of examination of reports, the CMW, like other human rights treaty bodies, has adopted two general comments. General Comment 2 (GC2) on the rights of migrant workers in an irregular situation and members of their families includes a substantive section on protection against arbitrary arrest and detention including issues of liberty and security and protection against inhumane treatment in detention.⁸² In keeping with human rights treaty bodies' practice, the CMW held a Day of General Discussion ahead of drafting GC2 which included a discussion on '[t]he criminalization of migrant workers in an irregular situation and members of their families, and their vulnerability to exploitation, abuse and arbitrary detention'.⁸³ As a result of the discussion the General Comment contains strong language against criminal sanctions for irregular migration:

Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.⁸⁴

Since the CMW expanded on detention safeguards in GC2 its members have recently adopted strong recommendations to decriminalise irregular migration and against detention of children:⁸⁵

The Committee recalls that irregular entrance into a country or expiration of authorization to stay is an administrative infraction, not a criminal offence. Consequently, such situation cannot imply a punitive sanction. The Committee recalls that children should never be detained on the basis of their or their parents' immigration status, and urges the State party to: (a) Remove from its legislation any provision that considers any irregular immigration situation as a criminal offence.⁸⁶

81 M Grange 'Smoke screens: Is there a correlation between migration euphemisms and the language of detention?' Global Detention Project Working Paper 5 (2013) 4.

82 CMW (28 August 2013), UN Doc CMW/C/GC/2 (2013) paras 23-48.

83 Committee on Migrant Workers 'Day of General Discussion on the rights of migrant workers in an irregular situation and members of their families' (2011).

84 General Comment 2 (n 82 above) para 24.

85 Grange & Majcher (n 4 above) 281-84.

86 Concluding Observations on Belize in the absence of a report, CMW (26 September 2014), UN Doc CMW/C/BLZ/CO/1 (2014) para 27; Observations finales concernant le rapport initial du Maroc, adoptées par le Comité à sa dix-neuvième session, CMW (8 October 2013), UN Doc CMW/C/MAR/CO/1 (2013) para 26; Concluding Observations on the second periodic report of El Salvador, CMW (2 May 2014), UN Doc CMW/C/SLV/CO/2 (2014).

4.2 HRC

According to the UHRI UN database the Human Rights Committee (HRC) adopted 80 recommendations related to immigration detention during the period from 2000 to 2016 and with 169 state parties (as opposed to some 60 for the CMW for a nine year period and only 51 state parties).⁸⁷ More than half of the HRC recommendations were directed to Western states although they only represent 19 per cent of state parties to the ICCPR.

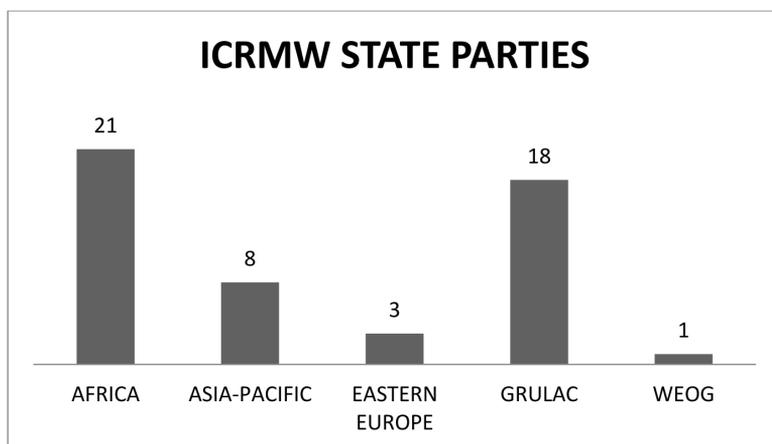


Figure 2: breakdown of 169 ICCPR state parties by regional groups as of July 2017⁸⁸

The highest number of HRC thematic recommendations in relation to immigration detention deal with much more hardcore safeguards than consular protection highlighted in CMW Conclusion Observations. The HRC primarily emphasises the need for alternatives to detention; detention as a last resort and for the shortest possible time; the need to reconsider mandatory detention and to revise immigration detention for non-immigration purposes (security, anti-terrorism); criteria for detention of asylum-seekers; and the use of dedicated facilities. State parties with the highest number of immigration-related recommendations include: Turkey, Malta, Australia, Austria, the Czech Republic, Finland, France, Greece, Canada and Ireland. Despite long established due process and procedural safeguards for nationals deprived of liberty in these countries HRC

87 Although the HRC began examining state parties report in 1977 UHRI only includes recommendations as of 2000.

88 The State of Palestine, a UN non-member observer state is a state party to the ICCPR, but does not belong to a UN regional group.

recommendations highlight the lower level of legal safeguards for immigration detainees. Due to the near universal ratification of the ICCPR, the HRC is able to review many aspects of immigration detention under different legal systems and in country situations with large-scale immigration detention and can issue recommendations on practices such as mandatory detention – a rarer opportunity for the CMW – and the need to consider alternatives to detention.

On the eve of the establishment of the CMW, civil society organisations carried out a mapping study of the treatment of migrants' rights issues across all treaty bodies' recommendations over a decade. Upon invitation from the UN Secretariat, the study was presented to the CMW's newly elected members during its second session in 2005, by way of an induction into migrants rights as the majority of members were not familiar with the work of UN treaty monitoring bodies. Unsurprisingly, the findings of the study for HRC and Committee against Torture (CAT) recommendations related to migrants mostly focused on detention issues:

Migrant-related issues in CAT conclusions are mostly to be found in concluding observations on European countries and in connection with detention and removal of foreigners in an irregular situation, often asylum-seekers but possibly also irregular migrants. The main concern of the Committee against Torture regarding migrant workers is the excessive use of force and discriminatory practices by the police, especially in detention prior to expulsion and during expulsion procedures. Those issues are common to most Committees, but they are more detailed under CAT which takes into account other aspects beyond police brutality when examining detention and removals. CAT's recommendations are also more specific.⁸⁹

As mentioned in the introductory section above, the individual communications procedure whereby the CMW could receive individual complaints after exhaustion of national remedies has not yet come into force.⁹⁰ This is a serious flaw if compared with HRC and CAT practice as it means that the CMW is deprived of the opportunity to issue authoritative interpretations of the ICRMW. The HRC has adopted landmark views on issues related to immigration detention including for instance with respect to defining what constitutes arbitrary detention. The HRC has ruled, for example, that detention for periods of over four years and two years was arbitrary even if entry had been illegal as the state could not provide justification for the continued detention without a review.⁹¹

89 ICMC & December 18 'The UN treaty monitoring bodies and migrant workers: A Samizdat' (2004) 15; I Slinckx 'Migrants' rights in UN human rights conventions' in De Guchteneire et al *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 130 & 135.

90 ICRMW art 77 provides for entry into force following a declaration by ten state parties that they recognise to competence of the CMW to receive individual complaints. As of July 2017 only El Salvador, Guatemala, Mexico and Uruguay have made this declaration.

91 *A v Australia* HRC Comm (30 April 1997) 560/1993; *C v Australia* HRC Comm (13 November 2002) 900/00.

The HRC has also ruled that continued indefinite detention and lack of legal safeguards allowing detainees to challenge effectively the grounds for their indefinite detention is not justified.⁹² CAT, in a communication that was not found admissible on grounds related to the authors of the communication, did however comment that Spain exerted jurisdiction including during detention of persons in Mauritania:

[It] maintained control over the persons on board the *Marine I* [ship] from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned.⁹³

This brief comparison of the CMW and HRC treatment of immigration detention demonstrates that although the ICRMW often includes more targeted safeguards to protect migrant workers in detention, implementation of these guarantees is limited in the absence of a higher rate of ratification. In this context, the HRC would seem to offer a stronger avenue for protecting the rights of migrants in detention. Considering that the ICCPR has 169 state parties and has generated 80 detention-related recommendations since the beginning of the millennium, the Covenant and its monitoring body clearly stand out as a pivotal protection tool for migrant workers in immigration detention.

5 Western non-ratification

The ICRMW was adopted without a vote and, according to one of the drafters, members of the drafting Working Group 'did not vote on any single issue':

Since the theoretical majority consisted of the developing countries of which the majority were states of origin, a majority vote might have produced results biased against the industrial countries of which the majority are countries of employment. This might have been counterproductive in terms of ratification and thereby also prevented an implementation of the provisions for the benefit of migrant workers residing in non-ratifying states.⁹⁴

Despite this optimistic reading Western states have not ratified the Convention. And if industrialised countries do not feel the need to protect

92 *J et al v Australia* HRC Comm (30 April 2016) 2233/2013.

93 *JHA v Spain* (Marine I) CAT (21 November 2008) CAT/C/41/D/323/2007.

94 J Lonnroth 'The International Convention on the Rights of All Migrant Workers and Members of Their Families in the context of international migration policies: An analysis of ten years of negotiation' (1991) 25 *The International Migration Review* 724.

migrant workers and members of their families, why would the rest of the world want to do so? This domino effect has been observed by scholars:

Usually, a lot of pressure is put on developing countries by western countries to become state parties to certain conventions but no pressure at all has been asserted with regard to this Convention (for the obvious reason: no western country has ratified).⁹⁵

Figures 3 and 4 are a graphic representation of the ugly duckling syndrome that designates the ICRMW as the weak link amongst non charter-based UN human rights mechanisms.

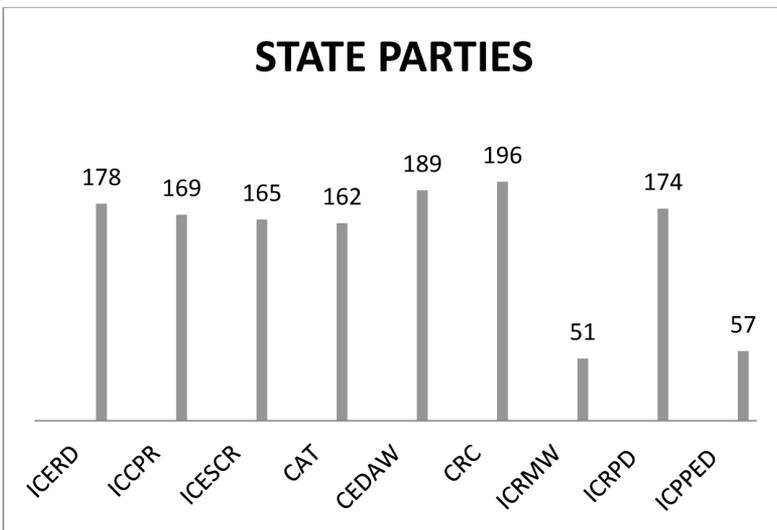


Figure 3: Ratification of core international human rights treaties as of July 2017

Although Western states allegedly object to Part III granting rights to all migrant workers – irrespective of their migration status – the rights listed in this part are already largely provided for in other core international human rights treaties they have already ratified. In particular, with respect to the right to liberty and security and physical integrity, most of the ICRMW articles were lifted from the ICCPR and the Convention against Torture. The political boycott on ratification by Western countries – compounded with risk and security geared migration management and externalisation of migration and asylum policies described above – has far

95 I Robyn et al (n 80 above) 49.

reaching consequences as safeguards in the ICRMW cannot be operationalised in countries that detain on a larger scale.

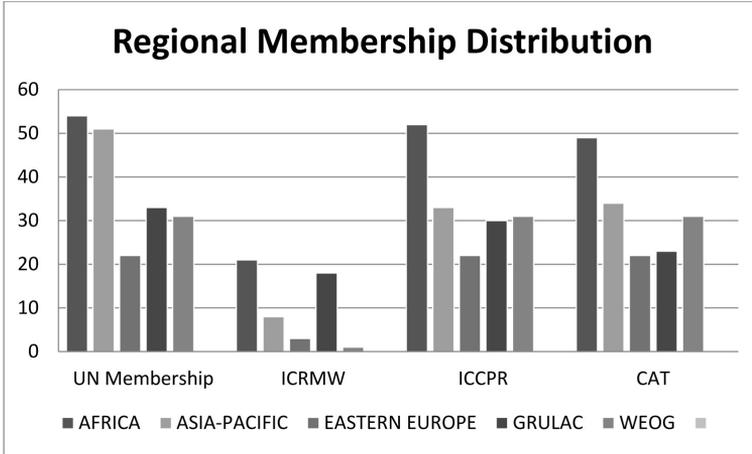


Figure 4: Regional Membership Distribution as of July 2017⁹⁶

Research into the official position of states shows that ignorance of the actual content of the ICRMW compounded by lack of political will are the main reason behind the lack of ratification.⁹⁷ Western refusal to be bound by the one core human rights treaty that might cause them embarrassment has led to accusations of double standards.⁹⁸

Western states' negative mind set about the ICRMW also impacts on development of CMW interpretation of norms relevant to immigration detention. Section 6 below studies the strength and limitations of CMW monitoring of the ICRMW. It includes a brief analysis of the effects of this non-ratification by industrialised countries on the monitoring and scope of implementation of the ICRMW by the relevant treaty monitoring body.

96 There are 193 UN members and two non-members (Holy See and Palestine). However this UN membership chart includes other non-members (typically small island states) that have ratified some of the core international human rights treaties. For instance, although not ratified by the United States the CRC has 196 state parties. Turkey is a member of both WEOG and Asia-Pacific, while Australia and New Zealand are members of the Western and Other Group as are Canada and the United States.

97 E Macdonald & R Cholewinski 'The ICRMW and the European Union' in De Guchteneire et al (n 89 above) 362-64.

98 M Grange & M d'Auchamp 'Role of civil society in campaigning for and using the ICRMW' in De Guchteneire et al (n 89 above) 78; Grange (n 2 above) 22.

6 Strengths and limitations of the CMW *modus operandi* and monitoring

As detailed above, similar to other ‘category’ human rights treaties, the ICRMW often pays particular attention to rights issues specific to the situation of migrant workers *and* members of their families. The CMW has begun to develop interpretations of ICRMW provisions on the basis of a decade of examination of state parties’ reports, in particular on protection against arbitrary arrest and detention in General Comment 2.

By contrast with the HRC, the CMW has had fewer opportunities to adopt authoritative positions and to develop and identify the scope and limits of ICRMW provisions including on immigration detention. However, as all ICRMW state parties have ratified the ICCPR, national legislators and policy makers, judges and lawyers still have the benefit of authoritative statements by the HRC on deprivation of liberty including its case law.⁹⁹ Compared to another ‘category’ treaty such as children, ICRMW drafters did not have the comfort of working on a human group that enjoyed near universal support, with the added strength of a major UN agency – UNICEF – putting its weight behind it. For instance, the ICRMW does not attempt to set limits on the length of detention while the CRC to some extent does.¹⁰⁰ Nor does the ICRMW define the types of places where migrants can be detained.

Some human right experts have argued that in administrative detention guarantees for immigration detainees are weakened. According to the United Nations Working Group on Arbitrary Detention:

In the majority of the cases of administrative detention with which the Working Group has dealt, the underlying national legislation does not provide for criminal charges or trial. Consequently, the administrative rather than judicial basis for this type of deprivation of liberty poses particular risks that such detention will be unjust, unreasonable, unnecessary or disproportionate with no possibility of judicial review.¹⁰¹

Wilsher supports this analysis and argues that the ‘inexorable move towards administrative detention’ has destroyed safeguards. He concludes:

The duration of detention is left to executive priorities, degrees of efficiency and fate. Due process is said not to be required because detention is not

99 General Comment 35, article 9 (Liberty and security of person), HRC (16 December 2014), UN Doc CCPR/C/GC/35 (2014) para 18; General Comment 15: The position of aliens under the Covenant, HRC (11 April 1986) para 7 & 9.

100 CRC art 37(b) provides that detention or imprisonment of a child should be for the shortest appropriate period of time.

101 Deliberation No 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, Working Group on Arbitrary Detention (24 December 2012), UN Doc A/HRC/22/44 (2012) para 70.

intended as a punishment. Such detention periods have, however, often far exceeded the standard sentence for any crime associated with border crossing.¹⁰²

In this context, within the broader dynamics of the strengthening of treaty bodies, a CMW general comment on detention, or even better a joint general comment across various human rights treaty monitoring bodies to capitalise on practice and jurisprudence would be very useful. It could emphasise the need for safeguards in relation to the duration and time limit on administrative detention. In particular, it would bridge some gaps in relation to weaknesses in the ICRMW in relation to the special safeguards to protect women migrants, build on the CRC Committee's strong position against detention of children¹⁰³ and the need for due process of law guarantees as part of the right to a fair trial.

Beyond the unique ratification pattern for the treaty it is tasked with monitoring, the CMW is hampered by another three negative factors. It is plagued by particularly heavy non-reporting dynamics. At the Committee's second session 23 initial reports by state parties were already overdue.¹⁰⁴ This is close to half of the countries which are parties to the Convention. In mid-2015 18 state parties had not yet submitted their initial report, including Turkey, the only western state to have ratified the Convention.¹⁰⁵ This low rate of compliance includes four state parties that have also *not* submitted their initial report to HRC¹⁰⁶ and seven which have omitted to submit their initial report to CAT.¹⁰⁷ A remaining group of ten state parties have failed to submit their initial report to the CMW only.¹⁰⁸ This poor reporting record by states with at times brittle democratic traditions negatively impacts on protection of the human rights of migrants.

Another serious limitation is that many CMW members nominated and elected by state parties hold positions closely linked to their countries' executive which runs counter to the need for independent expertise in decision making. At the first session of the CMW, in March 2004, Carla Edelenbos, then Secretary of the Committee, had to diplomatically remind

102 Wilsher (n 8 above) 349.

103 Concluding Observations on the Second Periodic Report of Malta, adopted by the Committee at its Sixty-Second Session (14 Jan-1 February 2013), CRC (18 June 2013), UN Doc CRC/C/MLT/CO/2 (2013) para 58(a).

104 International Catholic Migration Commission 'Committee on the Protection of the Rights of All Migrant Workers and Members of their Families 25- 29 April 2005 – 2nd session: Update on Advocacy activities for the promotion of the Convention' (2005) 2.

105 Office of the High Commissioner for Human Rights 'Late and non-reporting states' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx (accessed 21 June 2015).

106 Bangladesh, Cape Verde, Guinea, and Timor Leste.

107 Bangladesh, Cape Verde, Niger, Nigeria, Saint Vincent and the Grenadines, Seychelles and Timor-Leste.

108 Guyana, Honduras, Indonesia, Jamaica, Lesotho, Libya, Mauritania, Mozambique, Nicaragua, and Turkey.

CMW members that they had been elected and were serving *in their individual capacity*, as per ICRMW article 72(2)(b) and should therefore not address each other with the ‘distinguished representative of XX country’, standard form of address used in UN political bodies such as the General Assembly and the (then) Commission on Human Rights.¹⁰⁹

The absence of experts from the EU, the US, Canada and Asia/Pacific on the CMW prevents the universalisation of human rights values foreseen in the UN Charter and the Universal Declaration. As High Commissioner for Human Rights, Zeid Ra’ad Al Hussein advocated before the Human Rights Council:

The treatment of non-nationals must observe the minimum standards set by international law. Human rights are not reserved for citizens only, or for people with visas. They are the inalienable rights of every individual, regardless of his or her location and migration status. A tendency to promote law enforcement and security paradigms at the expense of human rights frameworks dehumanises irregular migrants, enabling a climate of violence against them and further depriving them of the full protection of the law.¹¹⁰

Finally, as observed above, the thrust of CMW recommendations to state parties in relation to immigration detention surprisingly focuses on consular assistance to nationals abroad. A number of state parties seem to have been guided by the need to protect their nationals abused and in particular held in detention abroad rather than to protect non-citizens on their territory, simply because they are mostly states of origin of migration flows.¹¹¹ The CMW at times reacts by making recommendations on detention of nationals of state parties in foreign countries (ie to Honduras in relation to detention of Hondurans migrants in Mexico and the United States, and to Tajikistan in relation to the Russian Federation).¹¹² Philippines, the first Asian country to ratify the ICRMW in 1995 did so in the wake of the adoption of landmark legislation to protect its migrant workers overseas, after a public outcry in reaction to perceived government failure to protect a Filipino domestic worker executed in Singapore. Nearly a decade later, in responses to the CMW examination of its second periodic report, the Philippines expressed regret that the Committee failed

109 Personal recollection of the author who participated in the first CMW sessions as an NGO observer.

110 Opening Statement by Zeid Ra’ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 27th Session (2014).

111 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families Tajikistan, CMW (16 May 2012), UN Doc CMW/C/TJK/CO/116 (2012) para 23(c); Concluding Observations of the Committee on the second periodic report of Mali, CMW (1 May 2014), UN Doc CMW/C/MLI/CO/2 (2014) para 27(a); Concluding Observations on the second periodic report of the Philippines, CMW (2 May 2014), UN Doc CMW/C/PHL/CO/2 (2014) para 31.

112 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families Tajikistan (n 111 above); Concluding Observations on the initial report of Honduras, CMW (3 October 2016) CMW/C/HND/CO/1 (2016) para 37.

to acknowledge its mechanisms to protect Filipinos outside of the country both during repatriation from emergency situations in Libya, Syria, Yemen and Egypt but also irregular migrants subject to expulsion orders or victims of the recent crackdown on undocumented workers in Saudi Arabia.¹¹³

As demonstrated above, one of the reasons why jurisprudence of the CMW is largely underdeveloped is because western countries have maintained a negative political mind set about the ICRMW from the outset. Combined with misunderstandings by countries of origin about the effects of ratification, this has generated a jurisprudential quasi-paralysis around the Convention and its implementation. Soon after adoption of the Convention, ICRMW provisions relating to liberty and rights during detention were described as ‘more elaborate ... more enumerated’ in the first substantive compendium on the Convention.¹¹⁴ This dimension has been overlooked by many European diplomats who have argued against ICRMW ratification objecting that other core human rights treaties adequately cover the protection needs of migrants and sometimes even claiming that the ICRMW grants new rights to undocumented migrants.¹¹⁵ This argument was never advanced against ratification of the CRC adopted thirteen months before the ICRMW and which enjoys near universal ratification including by all European states.¹¹⁶ More recently, over 700 recommendations for ratification of the ICRMW were made by UN member states since April 2008 within the Universal Peer Review (UPR) mechanism established under the Human Rights Council, 270 of which were directed to members of the United Nations Regional Group of Western states (WEOG).¹¹⁷ However the mindset against the ICRMW is such that Western states stop short of using the UPR to make ICRMW ratification recommendations to states from other regional groups. An exception is Turkey, both a member of WEOG and of the Asian Regional Group (and a state party to ICMRW since 2004) which has been making many recommendations for ICRMW ratification during UPR, including to many western states.

7 Conclusion

The ICRMW contains a comprehensive set of provisions to protect migrant workers placed in detention because of their immigration status.

113 Philippines Mission to the United Nations and other International Organisations, CMW (2 May 2014), UN Doc 0262/CJR (2014).

114 Annex International Migration Review *Special Issue: UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) 791.

115 M d'Auchamp 'Rights of migrant workers in Europe' (2011) 25.

116 The CRC has 196 state parties. Only one UN member state has signed but not ratified the CRC, namely, the United States of America.

117 UPR Info Database of Recommendations <https://www.upr-info.org/database/> (accessed 19 August 2017).

As befits a human rights instrument focused on a special category of persons rendered vulnerable because they are in transit or reside in a country other than their own, the ICRMW pays particular attention to the specificity of migrants. For instance, migrant workers in detention are to enjoy the same rights as nationals in particular with respect to visits by members of their families – a provision not included in the ICCPR – and are protected against being made to bear any cost arising from detention. Likewise, in both the criminal and administrative contexts, the ICRMW emphasises the need for immigration detainees to receive information in a language they understand on the reasons for arrest, on charges against them and during court proceedings on the lawfulness of arrest or detention.

However, the protection of members of the families of migrant workers and their specific rights in relation to immigration detention are not made explicit. Although migrant women represent close to half of international migrants since 1990, a gender approach has not been explicitly mainstreamed throughout the Convention *a fortiori* in relation to women placed in detention. The same applies for migrant children, whether unaccompanied or with their families. Nonetheless, following the adoption of General Comment 2, some recent recommendations by the CMW do follow other international and regional human rights mechanisms and push for alternatives to detention or even a prohibition on detention of children. Indeed, as this book goes to print, the CMW and CRC Committee are releasing a landmark joint General Comment which clearly prohibits immigration detention of children.

The full breadth of potential application of ICRMW safeguards during administrative detention of migrants remains to be tested as countries with the largest immigration detention estates evade scrutiny of their policies and practice through non-ratification of the Convention. The Committee tasked with supervision of implementation of the ICRMW thus finds itself in a quandary. On the one hand, as immigration detention is not a pressing issue in the majority of the 51 state parties to the Convention, and due to low reporting standards, the CMW cannot fully test the application nor interpret the breadth of immigration detention safeguards.

On the other hand, failure to achieve universal ratification and the absence of old industrialised countries and democracies on board the ICRMW translates into somewhat weaker expertise amongst the CMW members – nominated by current ICRMW state parties – with respect to the exercise of the right to liberty and related procedural safeguards. Although the CMW has begun adopting general comments, monitoring of implementation of the ICRMW suffers a quasi-jurisprudence vacuum as the individual complaints mechanism has not yet been activated.

In this context, both the Convention and the CMW have received considerably less scholarly and civil society attention than the other treaties and treaty monitoring bodies. Nonetheless, as immigration

detention spreads across all regions of the world, and amid renewed civil society coalitions and calls for ratification, in particular during the Human Rights Council's UPR,¹¹⁸ the ICRMW and its monitoring mechanism remain a central piece in the international human rights toolkit for protection of the rights of migrant workers and members of their families in immigration detention.

118 A Desmond 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 39.

*Stefanie Grant and Beth Lyon**

1 Introduction

The UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention, the Convention or ICRMW) broke ground in international law by articulating baseline treatment for all migrants. But as the Convention approaches its 30 year mark with only 51 state parties, it is an outlier amongst the ‘core’ UN human rights instruments.¹ This low level of ratification reflects difficulty in shifting the perception by many sovereign

* The authors are grateful to Giulia Barbone and Azadeh Erfani for their research assistance, and to Jane Connor, Pia Oberoi, Bradford Smith, and the reviewers, including Alan Desmond, for their insights and advice; any errors are the authors’ own. The chapter was completed prior to the intergovernmental consultations and negotiations, set in train by the New York Declaration of 19 September 2016, which are due to culminate in the adoption of a Global Compact on Migration in 2018.

1 The UN has adopted the term ‘core’ to describe these ten treaties. See United Nations Human Rights Office of the High Commissioner ‘The Core International Human Rights Instruments and their monitoring bodies’ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 29 August 2016). The ten treaties are: (1) International Convention on the Elimination of all forms of Racial Discrimination (CERD), Mar. 7, 1966, 660 UNTS 195 (entered into force 4 January 1969); (2) International Covenant on Civil and Political Rights (CCPR), Dec. 16, 1966, 999 UNTS 171 (entered into force 23 March 1976); (3) International Covenant on Economic, Social and Cultural Rights (CESCR), Dec. 16, 1966, 993 UNTS 3 (entered into force 3 January 1976); (4) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Dec. 18, 1979, 1249 UNTS 13 (entered into force 3 September 1981); (5) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 UNTS 85 (entered into force 26 June 1987); (6) Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 UNTS 3 (entered into force 2 September 1990); (7) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), Dec. 18, 1990, 2220 UNTS 3 (entered into force 1 July 2003); (8) Convention on the Rights of Persons with Disabilities (CRPD), Dec. 13, 2006, 2515 UNTS 3 (entered into force 3 May 2008); and (9) International Convention for the Protection of All Persons from Enforced Disappearance (CPED), Dec. 20, 2006, 2716 UNTS 3 (entered into force 23 December 2010); and (10) Optional Protocol of the Convention against Torture (OP-CAT), Dec. 18, 2002, 2375 UNTS 237 (entered into force 22 June 2006).

states of migrants as intruders/suplicants to one of migrants as rights-bearing subjects. The struggle to establish the ICRMW takes place in the context of vibrant activity around the growing number of international and regional human rights treaties focused on other vulnerable groups² and human rights concerns. In the United Nations alone, the High Commissioner for Human Rights, expert committees, individual experts, and other bodies work together with governments and civil society to monitor human rights treaty implementation and undertake related humanitarian work.³ The objective of this chapter is to provide an account of how some of these UN processes are interacting with the Convention.⁴ The chapter does not provide a full account of how UN processes have handled migration issues, but rather addresses the more technical issue of the integration of the ICRMW itself into the work of other bodies.

The chapter divides its analysis of the interactions between selected UN processes and the Migrant Workers Convention into two categories, substantive and institutional. In each category, the discussion includes both standing fora and special mechanisms of the UN. The standing fora examined are the UN Human Rights Council, and the treaty bodies for the nine other principal human rights treaties. We examine special procedures that involve an overlap with the Migrant Workers Convention, including the Special Rapporteurs on the Human Rights of Migrants and on Trafficking in Persons, especially women and children. We also consider some recent global governmental processes around migration outside the UN. A limited time frame had to be selected: the focus of the analysis is recent interactions (2013-2015), a scope that allowed for a closer survey of the substantial volume of work produced by these mechanisms during the period in question.

Since 1990, UN human rights treaty bodies have interpreted and reinterpreted their specific mandates to include all migrants.⁵ This has led

- 2 The phrases 'vulnerable people', 'vulnerable populations', and 'vulnerable communities' are common in international human rights policy. Indeed, so frequent is the use of the term 'vulnerable' that in our view it has become a term of art. Emerging criticism of the term raises the concern that using 'vulnerable' as an adjective describing subordinated people may invoke victimhood and therefore essentialises and disempowers the most deserving subjects of human rights. In this chapter, we continue to use these phrases despite these concerns, as we feel that at this juncture there is no discussion, let alone consensus, on a replacement term. In a number of instances where we use the term, it is a direct quotation.
- 3 For example, the UN Human Rights Council, the ten Committees monitoring the ten core human rights instruments, the International Labour Organization, agencies with combined humanitarian and protection mandates such as the UNICEF and the Office of the High Commissioner for Refugees, and the 'special procedures' of the Human Rights Council, through which experts promote human rights, currently through 39 thematic and 14 country-focused mandates. See Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General Human Rights Bodies and Mechanisms, HRC Council (29 January 2015), UN Doc A/HRC/28/41 (2015) 3, noting that as of January 2015, there were 77 mandate-holders.
- 4 For the purposes of this chapter, we see impact as supportive and normative references to the Convention.

to an increase in the inclusion of migrants' rights in the work of all the treaty bodies. But it has also led to over-lapping jurisdictions, the risk of diverging interpretations, and of different treaty bodies acting independently to monitor obligations relating to migrants' rights in their specific treaties.

The need for more co-ordination between treaty bodies is recognised as a problem facing the UN treaty body system as a whole.⁶ One consequence has been that even when specialised migration issues arise in states' reports that are addressed by the Convention, generally it is not invoked by treaty bodies; they do not typically cite to the Convention even regarding issues the Committee on Migrant Workers (CMW) has addressed in its own Concluding Observations. This trend is part of a broader pattern of lack of cross-referencing by the treaty bodies. In response, the CMW has advised that:

[A] State's obligation under the Convention must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party. Although separate and freestanding, these treaties are complementary and mutually reinforcing.⁷

A number of UN human rights experts and mechanisms do make reference to the Migrant Workers Convention, as has the High Commissioner for Human Rights. For example, in his 2013 report, Special Rapporteur on the human rights of migrants, François Crépeau noted that:

Only 46 States have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, it mainly restates rights that already follow from other treaties. All States have ratified at least one of the other core international human rights treaties and, owing to the non-discrimination principle, are thus obliged to respect the human rights of migrants, including those in an irregular situation.⁸

5 See generally S Grant 'Migrants' rights within the UN system: The first 60 years' in MD Dembour & T Kelly (eds) *Are human rights for migrants?* (2011).

6 The problem is not specific to the UN system. 'Overlapping, concurrent or competing claims to competence are common in the case of ... international expert bodies ... because each ... is the product of a treaty arrangement that defines its range of responsibilities and each is therefore independent of the other' Y Tyagi *The UN Human Rights Committee: Practice and procedure* (2011) 758. See Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, Report by the Secretariat, International Human Rights Instruments (22 March 2006), UN Doc HRI/MC/2006/2 (2006) para 23; E Tistoune 'The problem of overlapping among different treaty bodies' in P Alstn & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 383-401.

7 General Comment 2: On The Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW Committee (28 August 2013), UN Doc CMW/C/GC/2 (2013) para 7.

8 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, GA (7 August 2013), UN Doc A/68/283 (2013) para 29 (Crépeau Report).

Although this statement may have seemed to dismiss the Convention, in the same report the Special Rapporteur characterised the Convention as a ‘crucial measure in relation to the human rights of migrants’.⁹

In addition, the UN human rights mechanisms are virtually uniform in making consistent calls for ratification of the ICRMW. But in government-driven fora such as the Universal Periodic Review (UPR) and in the non-UN Global Forum on Migration and Development,¹⁰ support for ratification is sharply divided between proponent states in the Global South and opponents or sceptics in the Global North.

2 Substantive interaction: Overlapping protection and calls for ratification

We define substantive interaction as UN human rights monitoring bodies citing the Convention where relevant, either through invoking a substantive Convention provision when this protection overlaps with their own treaties, or by encouraging ratification of the Convention. The following analysis first describes areas of overlapping protection between the Convention and the other human rights treaties, reporting on the level of citation to the Convention in these instances and highlighting missed opportunities to use the Convention to underscore recommendations. We then track the same treaty bodies’ calls for ratification.

As compared with the UN’s nine other principal human rights treaties, one of the unique features of the ICRMW is that it combines very specific provisions to protect a particular population – documented migrant workers – with general provisions on both documented and more vulnerable undocumented migrants, and on categories of rights, that overlap with other human rights treaties. For example, Part III of the Convention, entitled Human Rights of All Migrant Workers and Members of their Families, contains 24 provisions that set forth protections which are well established in other treaties, ranging from freedom of conscience, liberty and security and protection from torture, to the right to leave and return to one’s own country and the right to respect for one’s cultural identity. Meanwhile, Part IV sets out additional rights which protect ‘Migrant Workers and Members of their Families who are Documented or in a Regular Situation’, such as equality of treatment with nationals in the matter of access to vocational services and housing.

9 2013 Crépeau Report (n 8 above) para 39.

10 These mechanisms differ in that the UPR is an intergovernmental review process of human rights issues within the Human Rights Council and the UN Global Forum on Migration and Development is an informal intergovernmental process without clear institutional footing, but we link them here because the normative statements of each body are shaped and limited by individual governments.

The historical reason for the overlap in Part III is that the delegates who drafted the treaty were divided over whether to accord rights to irregular or undocumented migrant workers.¹¹ The compromise they struck, after years of negotiations, was to devote 35 articles of the treaty to a near-full spectrum of fundamental human rights for all migrant workers and family members, including those lacking regular status, while giving additional protections for those with regular status. The 35 articles are strikingly similar to the provisions of the International Covenant on Civil and Political Rights (ICCPR). At the time it was drafted, these articles were filling a gap in the application of existing protections: some treaties had been understood to exclude irregular migrants – ‘non citizens’ – from specific provisions.¹²

Between 1990 and 2015, the UN, through its refugee agency, UNHCR, continued to develop the existing international refugee protection regime with new interpretations of refugee law to apply through domestic refugee law and policy.¹³ In the same period, although the UN has no agency with a protection mandate for migrants,¹⁴ it also – through the Commission on Human Rights and the Human Rights Council – began to give attention to migration as a human rights issue. However, some UN member states were unwilling to accept even the extant migrant rights treaties, namely the ILO Conventions and the ICRMW.¹⁵

- 11 See Office of the United Nations High Commissioner for Human Rights ‘Travaux Préparatoires: Rights of All Migrant Workers (Part III of the Convention)’ <http://www2.ohchr.org/english/issues/migration/taskforce/docs/draftinghistoryrev1.doc> (accessed 7 September 2016) 1-2; De Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers’ Rights* (2008).
- 12 See CERD (n 1 above) art 1(2). In 1980, a study prepared for the Sub Commission on the Prevention of Discrimination and Protection of Minorities concluded that ‘(t)he wording of international instruments as they relate to aliens is unclear and imprecise, “nationality” not being included in the non discrimination clauses’. The application of the provisions of international instruments to aliens was ‘unclear and uncertain’; existing means of implementation were ‘inadequate’. See International Provisions Protecting the Human Rights of Non-Citizens, Baroness Elles (August 1980), UN Doc E/CN.4/Sub.2/392/Rev.1 (1980) para 366 (30 & 20). The Inter Governmental Working Group of Experts characterised international human rights law for the protection of migrants’ rights as ‘dispersive and fragmentary’. See Working Group of Intergovernmental Experts on Human Rights of Migrants, CHR (9 March 1999), UN Doc E/CN.4/1999/80 (1999) para 103.
- 13 See, eg, United Nations High Commissioner for Refugees, Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR (23 October 2012), UN Doc HCR/GIP/12/09 (2012).
- 14 In July 2016, the International Organisation for Migration became a ‘Related Organization’ to the UN: IOM ‘IOM Becomes a Related Organization to the UN’ 25 July 2016 <http://www.iom.int/news/iom-becomes-related-organization-un> (accessed 13 October 2016).

Meanwhile, the human rights situation of migrants worsened as numbers rose in a globalising world where jobs could move freely, but workers could not legally cross borders, leading to large irregular movements. In 2004, the ILO reported that:

[F]or an unacceptably large proportion of migrants, working conditions are abusive and exploitative, and may be characterized by forced labour, low wages, poor working environment, a virtual absence of social protection, the denial of freedom of association and union rights, discrimination and xenophobia, as well as social exclusion, all of which rob workers of the potential benefits of working in another country. The development of labour institutions for the protection of migrant workers has lagged behind the growth of migration.¹⁶

Governments increasingly treated migration as an enforcement problem instead of developing meaningful low wage visa regimes to normalise and regulate migration flows and protect labour rights.¹⁷ During these 25 years, world attention focused on sex-and-labour-trafficking, smuggling, and child migration, creating a discourse of migrant-as-victim/survivor that generally failed to gain policy purchase in terms of rights protection. Instead, and especially after 2001, the enforcement-focused discourse of migrant-as-criminal, and even as terrorist, dominated the international policy agenda, exacerbating the humanitarian plight of migrants.¹⁸

As awareness grew both of the importance of migration as a transnational reality, and of human rights abuses against migrants, the UN took those limited steps that were politically possible on an issue on which states were reluctant – in some cases unwilling – to accept any multilateral intrusion into national sovereignty; most notable is the General Assembly’s High-Level Dialogue on International Migration and Development (see section 2.3 below). In 2003, after proposals for a UN-migration conference failed to find support amongst member states – fewer than half even replied to a questionnaire soliciting their views – the then Secretary-General Kofi Annan encouraged states to address the issue of

15 The ILO Conventions dedicated to migrants continued at low ratification rates during this period. See ILO ‘Migration for Employment Convention (Revised), 1949 (No 97)’ http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTUMENT_ID:312242 (accessed 14 September 2016) (38 state parties as of 1990); ILO ‘Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143)’ http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288 (accessed 14 September 2016) (14 state parties as of 1990). For an overview of the protection of migrant workers’ rights under ILO and UN treaties, see International Labour Office *Towards a fair deal for migrant workers in the global economy* (2004) chap 4.

16 HILO (n 15 above) para 126.

17 See, eg, F Crépeau ‘Foreword’ in L Berg (ed) *Migrant rights at work: Law’s precariousness at the intersection of immigration and labour* (2016) xiii-xvi (2016) (noting border control obsessions and populist-nationalist rants).

18 On forced migration and refugees, see generally E Fiddian-Quasmiyeh et al *The Oxford handbook of refugee and forced migration studies* (2014). Also A Betts *Global migration governance* (2011). See, too, Report of the Special Rapporteur on the human rights of migrants, GA (20 July 2016), UN Doc A/71/40767 (2016) paras 8-18.

international migration substantively, but outside the UN, through a Global Commission on International Migration.¹⁹ Annan invited the Commission to set a ‘strong ethical compass’ for policy makers, and to help ‘win broad acceptance for a normative framework that has human rights at its heart’. He described the ICRMW as ‘the bill of rights for migrant workers and their families in their new home countries’ and called for its ratification.²⁰ Although the Commission’s report recommended strengthening UN capacity for the protection of human rights, it did not follow Kofi Annan’s lead in recommending that states ratify the ICRMW.²¹

At the time when the Convention was adopted by the General Assembly in 1990, there was considerable uncertainty even amongst legal experts as to the degree to which human rights, although universal in principle, protected non-nationals, and particularly non-nationals who had no legal status, in practice.²² In one of the core treaties it even appeared that discrimination on the basis of nationality was allowed.²³ Faced with this apparent contradiction to universality, and with the assistance of an expert report to the Human Rights Commission,²⁴ treaty bodies asked themselves whether, and how far, their individual mandates applied to migrants. Between 2004 and 2009, they confirmed that states are generally bound by the treaties to protect *all* migrants, regardless of legal status.²⁵

The Commission on Human Rights also gave increased attention to migrant protection through the creation of special procedures for which the co-operation of states was required to operate effectively, but not their

19 Report of the Global Commission on International Migration ‘Migration in an interconnected world: New directions for action’ (Geneva, 2005). See K Newland ‘Migration’s unrealised potential: The Report of the Global Commission on International Migration’ (1 November 2005) <http://www.migrationpolicy.org/article/migrations-unrealized-potential-report-global-commission-international-migration> (accessed 13 October 2016); S Grant ‘GCIM: Defining an “ethical compass” for international migration policy’ (2006) 44 *International Migration* 13.

20 See UN Meeting Coverage and Press Releases ‘Secretary-General, in Lecture on international flows of humanity, says human rights must be at the heart of migration policies’ (21 November 2003), UN Doc SG/SM/9027 (2003). Kofi Annan, speaking at the launch of the Global Commission on International Migration: UN Information Service, ‘Win-win outcomes possible if approach to migration is rational, compassionate, Secretary-General Annan tells New Global Commission’ (10 December 2003), UN Doc SG/SM/9064 SOC/4632 (2003).

21 Former Secretary-General Ban Ki Moon consistently urged states to ratify the ICRMW; see eg, Report of the Secretary General ‘Promotion and protection of human rights, including ways and means to promote the human rights of migrants’ GA (7 August 2014), UN Doc A/69/277 (2014) paras 11 and 79(a).

22 See generally S Grant ‘Migrants’ rights within the UN system: The first 60 years’ in MD Dembour & T Kelly (eds) *Are human rights for migrants?* (2011).

23 CERD (n 1 above) art 1(2): ‘This Convention shall not apply to distinctions, exclusions, restrictions or preferences ... between citizens and non citizens’.

24 See D Weissbrodt *The human rights of non citizens* (2008) 37.

25 The texts adopted by the Treaty Bodies are cited below. Also, see, for example, M Satterthwaite ‘Crossing borders, claiming rights: Using human rights law to empower women migrant workers’ (2005) 8 *Yale Human Rights and Development Law Journal* 1.

approval of the experts' findings. The Commission established the Special Rapporteurship on the Human Rights of Migrants in 1999 and the Special Rapporteurship on Trafficking in persons, especially women and children, in 2004.²⁶ Beginning in 2006, the UN's new Human Rights Council with its innovative UPR process, created an important space for reviewing UN members' compliance with human rights law, providing a new opportunity to monitor migrants' rights.

As each of these processes moved forward, those involved had to determine whether and how to interact with the CMW. As each subsequent attempt to convince wealthy, destination states to ratify the Convention failed, some officials and advocates increasingly feared it was a legal and political dead-end, despite fifty years of relatively steady human rights treaty promulgation, ratification and monitoring of vulnerable populations in which migrants were represented, including as women and children. As the following description reflects, the weight and institutional momentum of that history kept explicit pessimism about the Convention's prospects largely out of official statements. Most public statements by inter-governmental agencies express nothing but support for the Convention.

2.1 Treaty bodies

2.1.1 Human Rights Committee

The ICCPR established the Human Rights Committee (HRC) in 1976. The ICCPR now has 169 state parties, 116 of which have accepted the Committee's jurisdiction to consider individual complaints. One of the oldest of the principal human rights treaties, the ICCPR was drafted to make enforceable the civil and political rights contained in the Universal Declaration of Human Rights. As originally drafted, the ICCPR contains language excluding irregular migrants from article 12(1) ('liberty of movement and freedom to choose [one's] residence').²⁷ The Convention also omits nationality – as opposed to 'national origin' – from its article 2(1) enumerated list of protected categories. However, in subsequent pronouncements, the Committee extended Covenant protections to irregular migrants. In its General Comment 15 (1986) on the position of aliens under the Covenant, the Committee clarified that all but two

26 The mandate of the Special Rapporteur on the human rights of migrants was created pursuant to Resolution 1999/44 of the Commission on Human Rights, while the mandate of the special Rapporteur on trafficking in persons, especially women and children was created pursuant to Resolution 2004/110.

27 The ICCPR limited those rights to those 'lawfully within the territory of a State'.

provisions of the Covenant must be guaranteed without discrimination as between non-nationals and citizens.²⁸ In 2004, it was more specific: the right must be available to 'all individuals, regardless of nationality... such as migrant workers ... who might find themselves in the territory or subject to the jurisdiction' of a state party.²⁹

In the two-year period under consideration, the Committee paid significant attention to the situation of migrants. Amongst its concerns were the failure to respect non-refoulement (Malta, Peru, and Angola),³⁰ the excessive detention or ill-treatment of detainees (Angola, Japan, Latvia, Malta, and the United States),³¹ failure to guarantee legal representation for unaccompanied children (Malta),³² ill-treatment of migrants in deportation (Japan and Angola),³³ confiscation of travel documents (Chile),³⁴ the need to increase access to health care (United States),³⁵ the need to train officials to screen for trafficking situations (United States),³⁶ the need to adopt affordable measures to hold employers to account for domestic worker abuse (Hong Kong and Macao, China), the need for Hong Kong, China to repeal a rule requiring departure within two weeks after job termination,³⁷ the need for Korea to guarantee the Covenant rights to migrants,³⁸ the need for Paraguay to provide protection

28 Article 25 limits the rights to political participation, public service and the vote to citizens, and art 13 provides due process rights to aliens in expulsion. See General Comment 15 on the position of aliens under the Covenant (Twenty-seventh session, 1986), *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRC (1994) UN Doc HRI/GEN/1/Rev.1 (1994) 18, paras 2 & 6.

29 General Comment 31 on the nature of the general legal obligation on state parties to the Covenant, CCPR Committee (29 March 2004), UN Doc CCPR/C/21/Rev.1/Add.13 (2004) 10.

30 See Concluding Observations on the Second Periodic Report of Malta, CCPR Committee (21 November 2014), UN Doc CCPR/C/MLT/CO/2 (2014). Concluding Observations on the Fifth Periodic Report of Peru, CCPR Committee (29 April 2013), UN Doc CCPR/C/PER/CO/5 (2013); Concluding Observations on the Initial Report of Angola, CCPR Committee (29 April 2013), UN Doc CCPR/C/AGO/CO/1 (2013).

31 As above; Concluding Observations on the Sixth Periodic Report of Japan, CCPR Committee (20 August 2014), UN Doc CCPR/C/JPN/CO/6 (2014); Concluding Observations on the Third Periodic Report of Latvia, CCPR Committee (11 April 2014), UN Doc CCPR/C/LVA/CO/3 (2014); Concluding Observations on the Fourth Periodic Report of the United States of America, CCPR Committee (23 April 2014), UN Doc CCPR/C/USA/CO/4 (2014).

32 As above.

33 See n 31 and n 32 above.

34 See Concluding Observations on the Sixth Periodic Report of Chile, CCPR Committee (13 August 2014), UN Doc CCPR/C/CHL/CO/6 (2014).

35 n 31 above.

36 As above.

37 See Concluding Observations on the Third Periodic Report of Hong Kong, China, CCPR Committee (29 April 2013), UN Doc CCPR/C/CHN-HKG/CO/3 (2013); For Macao, China, see Concluding Observations on the Initial Report of Macao, China, CCPR Committee (29 April 2013), UN Doc CCPR/C/CHN-MAC/CO/1 (2013).

38 See Concluding Observations on the Initial Report of the Republic of Korea, CRPD Committee (29 October 2014), UN Doc CRPD/C/KOR/CO/1 (2014).

and rehabilitation to trafficking survivors,³⁹ and the need to improve language education for ethnic minorities (Hong Kong, China).⁴⁰

Of the countries whose migrant rights record it considered, two (Paraguay and Peru) are parties to the ICRMW. Given those ratifications, citation to the ICRMW would here have been appropriate, but would have run counter to the HRC's general practice. As a general matter, the HRC does not cite to other treaties or treaty body jurisprudence.⁴¹ In none of the migrant-related Concluding Observations listed above did the HRC cite to another treaty. Nor does the HRC generally cite to any other Committee's jurisprudence. However, when it recommended that Hong Kong, China, provide language education for language minorities, the HRC noted it was 'reinforcing' a CERD recommendation made to the same country.⁴² The HRC might have similarly referenced the findings of the CMW when it recommended that Chile stop confiscating travel documents, as the CMW had made this recommendation to Chile three years before the HRC did so.⁴³

2.1.2 *Committee on Economic, Social and Cultural Rights*

Like the ICCPR, the International Covenant on Economic, Social and Cultural Rights (CESCR) was drafted to implement the Universal Declaration of Human Rights, and entered into force in 1976. A hundred-and-sixty-five countries have ratified CESCR, of which 22 have accepted the Committee's jurisdiction over individual complaints of breaches of the treaty. Also like the ICCPR, CESCR includes a provision limiting protection for migrants in some circumstances. Article 2(2) contains the Covenant's non-discrimination provision, which instructs member states to respect Covenant rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', but article 2(3) provides that '[d]eveloping countries ... may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.⁴⁴

Unlike the ICCPR, CESCR had no monitoring body until 1985, when the UN Economic and Social Council created the Committee on Economic, Social and Cultural Rights. The Committee has interpreted the

39 See Concluding Observations on the Third Periodic Report of Paraguay, CCPR Committee (29 April 2013), UN Doc CCPR/C/PRY/CO/3 (2013).

40 n 37 above.

41 The Committee monitors implementation of the ICCPR, but has no direct role in the implementation of any other international human rights treaty. See Tyagi (n 6 above) 758.

42 As above.

43 Consideration of Reports submitted by States Parties under art 74 of the Convention, CMW Committee (19 October 2011), UN Doc CMW/C/CHL/CO/1 (2011) 21.

44 CESCR, arts 2(2) and 2(3).

treaty to extend protection to all migrants, most notably in its 2009 General Comment 20: 'The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.'⁴⁵ As a result of its protection for all migrants, CESCR also sets a higher standard by filling at least two gaps in the ICRMW. Article 12 CESCR contains a right 'to the enjoyment of the highest attainable standard of physical and mental health', while the ICRMW guarantees only 'any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health'.⁴⁶ Similarly, the Migrant Workers Convention lacks a protection for the right to housing.⁴⁷

In other General Comments, the Committee further confirmed CESCR protections for migrants, including the right to protection of cultural identity,⁴⁸ and the right to participate in social security or at the least a refund of contributions.⁴⁹ Notably, in its General Comment 18 on the Right to Work, the Committee cited the Migrant Workers Convention, stating the principle of nondiscrimination as set out in article 2(2) CESCR and in article 7 ICRMW:

[S]hould apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.⁵⁰

In the two years under review, the Committee on ESCR did not make reference to the substantive provisions of the Convention, although it did give detailed consideration to relevant issues. For example, the Committee recommended a number of measures for Tajikistan to improve protection for its expatriate and returnee nationals, as well as their families.⁵¹ The Committee also raised concerns about access to justice for migrants in

45 General Comment 20 on non-discrimination in economic, social and cultural rights, CESCR Committee (2 July 2009), UN Doc E/C.12/GC/20 (2009) 30.

46 ICRMW (n 1 above) art 28. See also the contribution of Georgopoulou et al to this volume.

47 Cf CESCR (n 1 above) art 11(1).

48 General Comment 21 on the right of everyone to take part in cultural life, CESCR Committee (21 December 2009), UN Doc E/C.12/GC/21 (2009) E.6.

49 General Comment 19: The right to social security, CESCR Committee (4 February 2008), UN Doc E/C.12/GC/19 (2008).

50 General Comment 18 on the the right to work, CESCR Committee (6 February 2006), UN Doc E/C.12/GC/18 (2006) 18. One year earlier, in General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, CESCR Committee (13 May 2005), UN Doc E/C.12/2005/3 (2005) 10, the Committee had included migrant status in its non-discrimination statement but did not reference the Migrant Workers Convention.

51 Concluding Observations on the Combined Second and Third Periodic Reports of Tajikistan, CESCR Committee (25 March 2015), UN Doc E/C.12/TJK/CO/2-3 (2015) 22-24, 32 and 34.

Vietnam,⁵² the Czech Republic,⁵³ and Azerbaijan,⁵⁴ and raised equal worker protection for irregular migrants with Japan.⁵⁵

2.1.3 *Committee on the Elimination of Racial Discrimination*

The Committee on the Elimination of Racial Discrimination (CERD) monitors the International Convention on the Elimination of Racial Discrimination (ICERD), a 1966 treaty with 178 state parties, 57 of which have recognised CERD's competence to consider individual cases. In 2004, CERD issued General Recommendation 30 on discrimination against non-citizens,⁵⁶ replacing an earlier General Recommendation that had excepted distinctions by a state on the basis of nationality from the definition of discrimination on the basis of article 1(2).⁵⁷ This significant re-interpretation of its previous approach required that most measures taken against irregular migrants must be proportional to the achievement of a legitimate aim.⁵⁸

Between 2013 and 2015, CERD did not make substantive reference to specific provisions of the Migrant Workers Convention when it considered migrants' rights in particular countries, but it did routinely call for ratification of the Convention. Notably, in multiple concluding observations, CERD stated that the country whose record was under examination, 'bearing in mind the indivisibility of all human rights'⁵⁹ should ratify the Migrant Workers Convention, 'which has direct relevance to racial discrimination'.⁶⁰

52 Concluding Observations on the Second to Fourth Periodic Report of Viet Nam, CESCR Committee (15 December 2014), UN Doc E/C.12/VNM/CO/2-4 (2014).

53 Concluding Observations on the Second Periodic Report of the Czech Republic, CESCR Committee (23 June 2014), UN Doc E/C.12/CZE/CO/2 (2014).

54 Concluding Observations on the Third Periodic Report of Azerbaijan, CESCR Committee (5 June 2013), UN Doc E/C.12/AZE/CO/3 (2013) 21.

55 Concluding Observations on the Third Periodic Report of Japan, CESCR Committee (10 June 2013), UN Doc E/C.12/JPN/CO/3 (2013) 21.

56 General Recommendation 30, on discrimination against non-citizens, CERD Committee (Sixty-Fourth Session, 2004), UN Doc CERD/C/64/Misc.11/rev.3 (2004). Differences of treatment based on citizenship or immigration status will constitute discrimination if the criteria for different treatment, judged in the light of the objectives and purposes of the Convention, are not applied in pursuit of a legitimate aim or are not proportional to its achievement (para 4).

57 See CERD Committee (n 56 above) para 39.

58 General Recommendation 11 on Non-Citizens, CERD Committee (Sixty-Second Session, 1994), UN Doc A/48/18 at 112 (1994).

59 See, eg, Concluding Observations on the Nineteenth to Twenty-First Periodic Reports of Cameroon, CERD Committee (26 September 2014), UN Doc CERD/C/CMR/CO/19-21 (2014); Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan, CERD Committee (26 September 2014), UN Doc CERD/C/JPN/CO/7-9 (2014); Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, CERD Committee (25 September 2014), UN Doc CERD/C/USA/CO/7-9 (2014).

60 See, eg, Concluding Observations on the Combined Twentieth and Twenty-First Periodic Reports of Poland, CERD Committee (19 March 2014), UN Doc CERD/C/POL/CO/20-21 (2014); Concluding Observations on the Combined Eighth and Ninth

Of all the core treaty monitoring bodies other than the CMW, CERD was the most actively focused on migration issues during the two years under review. At the intersection of discrimination and migration, for example, CERD pressed for statistics-gathering on migrants (Cameroon,⁶¹ Japan,⁶² Kazakhstan,⁶³ Luxembourg),⁶⁴ action against racial profiling (United States),⁶⁵ protection from discrimination in education, housing and employment against migrants (Poland,⁶⁶ Cyprus),⁶⁷ and curbing hate speech by politicians (Russian Federation).⁶⁸ None of these countries has yet ratified the ICRMW, though one (Cameroon) has signed.⁶⁹

2.1.4 Committee on the Elimination of All Forms of Discrimination against Women

Adopted in 1979, the Convention on the Elimination of All Forms of Discrimination against Women counts 189 ratifying nations, 109 of which have acceded to the individual complaints jurisdiction of the treaty's monitoring body, also known as the CEDAW. In the two years of Concluding Observations under review, the CEDAW rarely cited to treaties beyond its jurisdictional treaty,⁷⁰ and did not cite to any substantive provisions of the ICRMW. It has, however, made many observations and recommendations relevant to the situation of migrant workers and their families. In reviewing gender concerns in state parties, the CEDAW has made observations and recommendations regarding a

Periodic Reports of Uzbekistan, CERD Committee (14 March 2014), UN Doc CERD/C/UZB/CO/8-9 (2014); Concluding Observations on the Fourteenth and Seventeenth Periodic Reports of Luxembourg, CERD Committee (13 March 2014), CERD/C/LUX/CO/14-17 (2014); Concluding Observations on the Twentieth to the Twenty-Second Periodic Reports of the Russian Federation, CERD Committee (17 April 2013), UN Doc CERD/C/RUS/CO/20-22 (2013).

61 CERD Committee (n 59 above) 6.

62 CERD Committee (n 59 above).

63 Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Kazakhstan, CERD Committee (14 March 2014), UN Doc CERD/C/KAZ/CO/6-7 (2014) 16.

64 CERD Committee (n 59 above) 6.

65 CERD Committee (n 59 above) 8, 18.

66 CERD Committee (n 60 above).

67 Concluding Observations on the Seventeenth to Twenty-Second Periodic Reports of Cyprus, CERD Committee 10 (23 September 2013), UN Doc CERD/C/CYP/CO/17-22 (2013).

68 CERD Committee (n 60 above) 12.

69 See United Nations Office of the High Commissioner for Human Rights 'Status of Ratification Interactive Dashboard' <http://indicators.ohchr.org/> (accessed 31 July 2016).

70 The CEDAW made a general reference in one Concluding Observation: 'the Committee notes with concern the many discriminatory provisions in laws, such as the minimum age of marriage for girls in the Family Law ... which are contrary to the Convention and other international human rights instruments.' Concluding Observations on the Initial Report of Qatar, CEDAW Committee (9 March 2014), UN Doc CERD/C/ AT/CO/1 (2014) para 15 (2014 CEDAW Concluding Observations on Qatar) (emphasis added).

number of issues concerning migrant women and girls. Amongst the Committee's concerns, for example, are health care (Greece,⁷¹ Qatar,⁷² Cambodia,⁷³ Andorra,⁷⁴ Dominican Republic),⁷⁵ including contraceptive services (Cyprus,⁷⁶ Hungary),⁷⁷ education (Greece,⁷⁸ Finland,⁷⁹ Denmark,⁸⁰ Austria),⁸¹ and trafficking (Cyprus,⁸² Dominican Republic,⁸³ Qatar,⁸⁴ Cameroon,⁸⁵ Lithuania,⁸⁶ Poland).⁸⁷ Of these Concluding Observations, two related to parties to the Migrant Workers Convention: Cambodia and Cameroon.⁸⁸

Over the years CEDAW has also issued several General Recommendations touching on the rights of migrant women and girls. Most notably, in its 2008 General Recommendation 26 on women migrant workers, the Committee analyses the situation of women migrant workers and makes recommendations for protecting their human rights. It focuses on situations of trafficking but does not exclude the concerns of other women migrant workers. In paragraph two of General Recommendation 26, CEDAW makes an interesting statement about the ICRMW:

- 71 Concluding Observations on the Seventh Periodic Report of Greece Adopted by the Committee at its Fifty Fourth Session, CEDAW Committee (26 March 2013), UN Doc CEDAW/C/GRC/CO/7 (2013) 32-33.
- 72 2014 CEDAW Concluding Observations on Qatar (n 70 above) para 48.
- 73 Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cambodia, CEDAW Committee (28 October 2013), UN Doc CEDAW/C/ KHM/CO/4-5 (2013) 38.
- 74 Concluding Observations on the Combined Second and Third Periodic Reports of Andorra, CEDAW Committee (27 October 2013), UN Doc CEDAW/C/AND/CO/2-3 (2013) 31-32.
- 75 Concluding Observations on the Combined Sixth and Seventh Periodic Reports of the Dominican Republic, CEDAW Committee (30 July 2013), UN Doc CEDAW/C/DOM/CO/6-7 (2013) 37.
- 76 Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Cyprus, CEDAW Committee (1 March 2013), UN Doc CEDAW/C/CYP/CO/6-7 (2013) 29-30.
- 77 Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Hungary, CEDAW Committee (26 March 2013), UN Doc CEDAW/C/HUN/CO/7-8 (2013) 31.
- 78 CEDAW Committee (n 71 above) 26-27.
- 79 Concluding Observations on the Seventh Periodic Report of Finland, CEDAW Committee (9 March 2014), UN Doc CEDAW/C/FIN/CO/7 (2014) 31.
- 80 Concluding Observations on the Eighth Periodic Report of Denmark, CEDAW Committee (10 March 2015), UN Doc CEDAW/C/DNK/CO/8 (2015) 34.
- 81 Concluding Observations on the Seventh and Eighth Periodic Reports of Austria, CEDAW Committee (22 March 2013), UN Doc CEDAW/C/AUT/CO/7-8 (2013) 33.
- 82 CEDAW Committee (n 76 above) 19-20.
- 83 CEDAW Committee (n 75 above) 26.
- 84 CEDAW Committee (n 70 above) 26.
- 85 Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cameroon, CEDAW Committee (9 March 2014), UN Doc CEDAW/C/CMR/CO/4-5 (2014) 20-21.
- 86 Concluding Observations on the Fifth Periodic Report of Lithuania, CEDAW Committee (24 July 2014), UN Doc CEDAW/C/LTU/CO/5 (2014) 27.
- 87 Concluding Observations on the Combined Seventh and Eighth Periodic Report of Poland, CEDAW Committee (14 November 2014), UN Doc CEDAW/C/ POL/CO/7-8 (2014) 27.
- 88 See Status of Ratification Interactive Dashboard (n 69 above).

This general recommendation intends to contribute to the fulfilment of the obligations of States parties to respect, protect and fulfil the human rights of women migrant workers, alongside the legal obligations contained in other treaties, the commitments made under the plans of action of world conferences and the important work of migration-focused treaty bodies, especially the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. While the Committee notes that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families protects individuals, including migrant women, on the basis of their migration status, the Convention on the Elimination of All Forms of Discrimination against Women protects all women, including migrant women, against sex- and gender-based discrimination.⁸⁹

Given that article 7 of the Migrant Workers Convention ensures the rights of the Convention shall be observed without discrimination on the basis of sex, there is evidently overlap between the ICRMW and General Recommendation 26. Indeed, the General Recommendation concludes with a statement encouraging state parties

to ratify all international instruments relevant to the protection of the human rights of migrant women workers, in particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁹⁰

2.1.5 Committee on the Rights of the Child

The 1989 Convention on the Rights of the Child is the most widely ratified of the ten principal human rights treaties, with 196 state parties and 34 subject to the individual complaints jurisdiction of the CRC. Article 22 of the Convention requires that refugee and unaccompanied children shall receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.⁹¹

In 2005, the Committee on the Rights of the Child issued General Comment 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin in which the Committee affirmed that ‘the rights stipulated in the Convention apply to all children, including migrant children’.⁹²

89 General Recommendation 26 on Women Migrant Workers, CEDAW Committee (5 December 2008), UN Doc CEDAW/C/2009/WP.1/R (2008) 9.

90 CEDAW Committee (n 89 above) 29.

91 CRC (n 1 above) art 22.

92 General Comment 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC Committee (1 September 2005), UN Doc CRC/GC/2005/6 (2005).

In recent years, the Committee has not cited to substantive provisions of the Migrant Workers Convention, but it has shown consistent concern for the situation of migrant children. Amongst other actions, the Committee has recommended that state parties keep statistics on migrant children (China,⁹³ Kuwait,⁹⁴ Russian Federation,⁹⁵ Portugal,⁹⁶ Paraguay),⁹⁷ register the birth of the children of migrants (China),⁹⁸ and ensure that governments take measures to secure maintenance from parents working abroad (Saint Lucia).⁹⁹ Of the states to have received these recommendations, only Paraguay is a party to the ICRMW.¹⁰⁰

2.1.6 *Committee against Torture*

The Committee against Torture (CAT) monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a 1984 treaty with 162 state parties, 83 of which have accepted the Committee's competence to consider individual complaints. The Convention against Torture contains a critically important provision for migrants, stating in article 3 that no country may deport a migrant – 'a person' – to a country where he or she would face torture. On the basis of this mandate, CAT takes a direct interest in and hears frequent individual complaints regarding due process in deportation, and individual deportation and extradition decisions. In the two years under review, CAT made no substantive reference to the ICRMW, but did urge state party attention to many torture-related migration issues, such as training of officials who enforce immigration laws (Cyprus,¹⁰¹ Lithuania,¹⁰²

93 Concluding Observations on the Combined Third and Fourth Periodic Reports of China, CRC Committee (29 October 2013), UN Doc CRC/C/CHN/CO-3-4 (2013) 18.

94 Concluding Observations on the Second Periodic Report of Kuwait, CRC Committee (29 October 2013), UN Doc CRC/C/KWT/CO/2 (2013) 18.

95 Concluding Observations on the Report Submitted by the Russian Federation under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, CRC Committee (25 February 2014), UN Doc CRC/C/OPAC/RUS/CO/1 (2014).

96 Concluding Observations on the Report Submitted by Portugal under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, CRC Committee (24 February 2014), UN Doc CRC/C/OPAC/PRT/CO/1 (2014).

97 Concluding Observations on the Initial Report of Paraguay Submitted by Portugal under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, CRC Committee (25 October 2013), UN Doc CRC/C/OPAC/PRY/CO/1 (2013) 12-13.

98 CRC Committee (n 93 above) 39-40.

99 Concluding Observations on the Combined Second to Fourth Periodic Reports of Saint Lucia, CRC Committee (8 July 2014), UN Doc CRC/C/LCA/CO/2-4 (2014).

100 See Status of Ratification Interactive Dashboard (n 69 above).

101 Concluding Observations on the Fourth Report of Cyprus, CAT Committee (16 June 2014), UN Doc CAT/C/CYP/CO/4 (2014) 11.

102 Concluding Observations on the Third Periodic Report of Lithuania, CAT Committee (17 June 2014), CAT/C/LTU/CO/3 (2014) 18.

Poland¹⁰³ and Ukraine)¹⁰⁴ and detention policies (Australia,¹⁰⁵ Croatia,¹⁰⁶ Lithuania,¹⁰⁷ Thailand¹⁰⁸ and the United States of America).¹⁰⁹

2.1.7 Committee on the Rights of Persons with Disabilities

Since it was adopted by the UN General Assembly in 2006, the Convention on the Rights of Persons with Disabilities has garnered 174 ratifications, including 91 declarations recognising its Committee's jurisdiction over individual complaints.¹¹⁰ In the two years under review, the Committee made no reference to the ICRMW nor spoke on migration issues.

2.1.8 Committee on Enforced Disappearances

The International Convention for the Protection of All Persons from Enforced Disappearance counts 57 ratifications and 21 acceptances of individual jurisdiction since its adoption by the General Assembly in 2006. The Committee on Enforced Disappearances has made no reference to the ICRMW, but in recent years has raised several concerns relating to migration. Amongst its recommendations are the need for training of migration officials (the Netherlands,¹¹¹ Mexico),¹¹² the need for due process in deportation (Spain),¹¹³ and to ensure the return of migrants' remains to their home countries when they die abroad (Mexico).¹¹⁴

103 Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Poland, CAT Committee (23 December 2013), UN Doc CAT/C/POL/CO/5-6 (2013) 14.

104 Concluding Observations on the Sixth Periodic Report of Ukraine, CRC Committee (12 December 2014), UN Doc CAT/C/UKR/CO/6 (2014).

105 Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia, CAT Committee (23 December 2014), UN Doc CAT/C/AUS/CO/4-5 (2014).

106 Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Croatia, CAT Committee (18 December 2014), UN Doc CAT/C/HRV/CO/4-5 (2014).

107 CAT Committee (n 102 above), 17.

108 Concluding Observations on the Initial Report of Thailand, CAT Committee (20 June 2014), UN Doc CAT/C/THA/CO/1 (2014).

109 Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, CAT Committee (19 December 2014), UN Doc CAT/C/USA/CO/3-5 (2014).

110 Though adopted by the UN General Assembly on 13 December 2006, the Convention was not opened for signature until 30 March 2007.

111 Concluding Observations on the Report Submitted by the Netherlands under Article 29, Paragraph 1 of the Convention, CED Convention (10 April 2014), UN Doc CED/C/NLD/CO/1 (2014).

112 Consideration of Reports Submitted by States Parties under Article 29, Paragraph 1, of the Convention, CED Convention (17 April 2014), UN Doc CED/C/MEX/1 (2014).

113 Concluding Observations on the Report Submitted by Spain under Article 29, Paragraph 1, of the Convention, CED Convention (12 December 2013), UN Doc CED/C/ESP/CO/1 (2013).

114 CPED Convention (n 1 above).

2.2 Additional monitoring bodies

2.2.1 *Special Rapporteur on the human rights of migrants*

In 1999, the UN Commission on Human Rights established the mandate of the Special Rapporteur on the human rights of migrants.¹¹⁵ Of all the special mechanisms, the Special Rapporteur's mandate is most closely aligned with the Migrant Workers Convention.¹¹⁶ The mandate was proposed in 1998 by an expert working group, mandated by the Commission on Human Rights to report on the human rights of migrants. The Working Group took vulnerability as its criterion. It recommended the creation of 'an international mechanism to deal with human rights issues affecting different groups of migrants'. The Working Group noted the 'lack of a consistent and focused approach to a vulnerable group', and that several important migrant groups, including certain categories of migrant workers, remained outside the scope of the ICRMW. Moreover, 'all the indications are that there will be additional delay before the Convention, and thus its monitoring mechanism, becomes operational'.¹¹⁷

The mandate was thus envisioned as complementary to the work of the treaty bodies, including the future CMW. The Special Rapporteur's mandate requires its holder to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of this vulnerable group, and sets out four main functions: to 'request and receive' information on rights violations; to make recommendations to prevent and remedy violations; to promote the 'effective application' of relevant international norms; and to recommend actions at the national and international levels to eliminate violations of migrants' rights.¹¹⁸

115 The Commission on Human Rights (HRC) Resolution 1999/44; since then, the mandate of the Special Rapporteur has been extended by Commission on Human Rights Resolutions 2002/62 and 2005/47 and Human Rights Council resolutions 8/10, 17/12 and 26/19. As the UN website notes: 'The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990.' OHCHR, 'Special Rapporteur on the human rights of migrants' <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> (accessed 18 December 2015).

116 See T Lesser 'The role of United Nations special procedures in protecting the human rights of migrants' (2009) 28 *Refugee Survey Quarterly* 139.

117 Reports of the Inter Governmental Working Group of Experts on the Human Rights of Migrants, UNCHR (10 March 1998), UN Doc E/CN.4/1998/76 (1998) para 48; Specific Groups and Individuals, Migrant Workers, Report of the Special Rapporteur, Ms Gabriela Rodríguez Pizarro, UNCHR (27 December 2004), UN Doc E/CN.4/2005/85 (2004) paras 123-24. See E/CN.4/1999/80 (n 12 above) para 123.

118 For the full text, see HRC Resolution 1999/44 (n 115 above) para 3.

The Special Rapporteur was also invited

within the framework of the Universal Declaration of Human Rights and all other international instruments, to request, receive and exchange information on violations of the human rights of migrants from Governments, treaty bodies ... special rapporteurs for various human rights questions ... and to respond effectively to such information.

The current mandate requests the Special Rapporteur 'to take into consideration relevant human rights instruments of the United Nations to promote and protect the human rights of migrants'.¹¹⁹

Thus the Convention is not specifically referred to in the mandate, except as a 'relevant human rights instrument', although there is indirect reference to the Committee on Migrant Workers as one of the treaty bodies. The mandate holder during the period under review, François Crépeau, did not see this as a limitation to discussion that the Convention can play a wider role. For example, noting the absence of any UN migration agency, and that IOM remained outside the UN, the 2015 Crépeau report commented that in order to 'include' IOM in the United Nations, it would amongst other measures,

need to be given a legal protection mandate and guided by the core international human treaties, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹²⁰

2.3 Support for Ratification

2.3.1 High Commissioner for Human Rights and the Office of the High Commissioner for Human Rights

The High Commissioner for Human Rights and the Office of the High Commissioner for Human Rights, whose mandate covers the full range of human rights,¹²¹ have supported the Convention, urging states to ratify. Speaking on International Migrants Day in 2011, High Commissioner Navi Pillay said:

More than 20 years ago, States recognized that migrants needed specific protection and brought the Convention into existence ... it is high time that these same States now unblock the political will to ratify and effectively implement this important treaty.

119 CHR Resolution 1999/44 (n 115 above) para 5; Resolution 26/19 paras 2 & 3.

120 2013 Crépeau Report (n 8 above) para 112.

121 See High Commissioner for the Promotion and Protection of All Human Rights, GA (20 December 1993), UN Doc A/RES/48/141 (1993), see 4(a) (including in the High Commissioner's mandate, '[t]o promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights').

In her speech, she noted that the Convention made clear ‘the link between migration and human rights’, recognised the ‘specific vulnerabilities of migrant workers’ and offered ‘guidance on national migration policies’.¹²²

The Office’s 2012-2013 Management Plan named migration as one of its six Strategic Priorities, and pledged to strengthen partnerships and outreach activities towards ratification of the Convention, ‘including through its multiple presences at regional and national levels’. To this end, the Office would ‘continue to engage with governments, parliamentarians, trade unions and civil society actors’, and the High Commissioner would raise the issue of ratification of the Convention during country visits and in relevant international fora.¹²³

OHCHR’s 2014 report ‘The Economic, Social and Cultural Rights of Migrants in an Irregular Status’ referred repeatedly to the Convention’s importance as both a normative instrument and as a guide for national migration policy making; the report drew attention to the value of Part VI as ‘explicitly’ providing ‘a framework for human rights-based policymaking on migration’:

For instance, State parties are enjoined to maintain appropriate services to deal with questions about international migration of workers and members of their families and formulate and implement policies on migration, exchange information with other State parties, provide information to employers and workers on policies, laws and regulations, and provide information and appropriate assistance to migrant workers and members of their families (art 65).

2.3.2 UN Human Rights Council Universal Periodic Review

The UN General Assembly established the Human Rights Council, and the Council’s UPR, in 2006. The Human Rights Council is the UN’s governmental forum for human rights, and the successor to the Commission on Human Rights. The UPR is an innovative process created to ensure a public government-to-government review of human rights. In the UPR cycle, the UPR Working Group solicits three written reports, one from the government whose performance is under review, and two from the Office of the High Commissioner for Human Rights, one reflecting input from UN agencies and the other reflecting civil society comments. Following a series of civil society-driven sessions, the Working Group holds a dialogue in which any country may put questions to

122 UN Human Rights, Office of the High Commissioner ‘Human rights are not a matter of charity’ (20 December 2011) <http://www.ohchr.org/EN/NewsEvents/Pages/HRAreNotMatterOfCharity.aspx> (accessed 13 October 2016).

123 OHCHR Management Plan 2012-2013: Working for Results, ‘Migration’ http://www2.ohchr.org/english/ohchrreport2011/web_version/media/pdf/9_Migration.pdf (accessed 13 October 2016).

representatives of the country under review. The Working Group then generates a report containing a record of the dialogue and a series of recommendations, each ascribed to the country that generated it. The country under review may choose to accept or to 'note' (reject) each recommendation in a voluntary inter-sessional communication, and is expected to provide an update on implementation of the recommendations in the ensuing cycles of the UPR.

Since 2008, the year the UPR's processes began, most countries have been through the review cycle twice. As the process unfolds, the UPR is proving to be a site of significant advocacy for the Convention.¹²⁴ Of the countries that have not ratified the Convention, virtually every one to pass through the UPR has received one or more written recommendations to ratify, and many have been questioned about the Convention during the live dialogue. The countries most routinely pressing other states to ratify are Ecuador, the Philippines, Mexico, Indonesia, and Turkey, but at least 43 countries have made these recommendations, most but not all of which are ICRMW state parties or signatories.¹²⁵ These recommendations reflect an unprecedented level of public pressure on non-ratifying countries, not only to accede to the treaty, but also to give and justify their reasons for failing to do so. To date, wealthy countries frequently reject any ICRMW ratification recommendation without further explanation. If a justification for non-ratification is provided, countries typically assert that their domestic laws already provide – or improve upon – the Convention's protections.¹²⁶ Less frequently, governments reject recommendations that

124 See A Desmond 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 36. Discussion of the UPR was omitted from the previous portion of the article because the authors did not encounter instances of substantive cross-referencing to the ICRMW, even though concerns relating to migration frequently arise in UPR proceedings.

125 Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belarus, Bolivia, Burkina Faso, Cambodia, Cape Verde, Central African Republic, Chad, Chile, Cuba, Democratic Republic of Congo, Ecuador, Egypt, Ethiopia, Ghana, Guatemala, Honduras, Indonesia, Iran, Kyrgyzstan, Mali, Mexico, Morocco, Nicaragua, Nigeria, Pakistan, Paraguay, Peru, Philippines, Rwanda, Senegal, Sierra Leone, Sri Lanka, Sudan, Tajikistan, Trinidad & Tobago, Turkey, Uganda, and Uruguay. See Status of Ratification Interactive Dashboard (n 69 above).

126 For recent examples, see Report of the Human Rights Council on its Eighth Session, Vice-President and Rapporteur: Mr Alejandro Artucio, HRC Council (1 September 2008), UN Doc A/HRC/8/52 (2008) paras 314, 606, 877, 961, documenting various country rejections in 2008: inland ('rejects recommendation to ratify ICRMW because existing national and European law already conforms with basic rights of migrants'); Czech Republic ('does not consider signing the ICRMW because of existing national and international protections for migrants'); Ukraine ('rejected recommendation by Mexico to ratify ICRMW because of existing and proposed national laws and European law on migrant rights') and Romania ('because existing national and European law already protects migrants').

they ratify the Convention on the ground that the treaty *conflicts* with their domestic regimes.¹²⁷

2.3.3 Treaty bodies

As the review of their work has shown, although they make very little substantive reference to the Migrant Workers Convention, the human rights treaty monitoring bodies do actively advocate its ratification. During the two years under review, of the nine principal monitoring bodies apart from the CMW, one – the HRC – congratulated several state parties on having ratified the Migrant Workers Convention.¹²⁸ Another six monitoring bodies went further, recommending ratification of the Convention in their concluding observations. For example, in recent years the Committee on ESCR urged 16 of the state parties whose records it reviewed to ratify the ICRMW (Finland,¹²⁹ Slovenia,¹³⁰ Nepal,¹³¹ Serbia,¹³² Uzbekistan,¹³³ Denmark,¹³⁴ Austria,¹³⁵ Kuwait,¹³⁶ Belgium,¹³⁷

127 Artucio (n 126 above) para 775 (rejecting recommendation to ratify ICRMW ‘because of conflict with domestic laws’); Andorra’s 2010 statement in Report of the Working Group on the Universal Periodic Review Andorra: Addendum, Secretariat of the Human Rights Council (Sixteenth Session, 2011) UN Doc A/HRC/16/8/Add.1 (2011) 4 (rejecting ratification of ICRMW because, ‘despite great overlap with current national legal protections, Andorran law does not provide for any other categories of migrant workers (eg frontier or temporary workers) to benefit from the same rights as legally residing or Andorran workers’).

128 See Concluding Observations on Belize in the Absence of a Report, CCPR Committee (26 April 2013), UN Doc CCPR/C/BLZ/CO/1 (2013) 5(b) (Belize); Concluding Observations on the Third Periodic Report of the Plurinational State of Bolivia, CCPR Committee (6 December 2013), UN Doc CCPR/C/BOL/CO/3 (2013) 4(d) (Bolivia); Concluding Observations on the Initial Report of Indonesia (21 August 2013), UN Doc CCPR/C/IDN/CO/1 (2013) 4(a) (Indonesia); Concluding Observations on the Second Periodic Report of Kyrgyzstan, CCPR Committee (23 April 2014), UN Doc CCPR/C/KGZ/CO/2 (2014), B(d) (Kyrgyzstan); Concluding Observations on the Initial Report of Mauritania, CCPR Committee (21 November 2013), UN Doc CCPR/C/MRT/CO/1 (2013) 3(a) (Mauritania); Concluding Observations on the Initial Report of Mozambique, CCPR Committee (19 November 2013), UN Doc CCPR/C/MOZ/CO/1 (2013) 4 (Mozambique).

129 Concluding Observations on the Sixth Periodic Report of Finland, CESCR Committee (17 December 2014), UN Doc E/C.12/FIN/CO/6 (2014) 31.

130 Concluding Observations on the Second Periodic Report of Slovenia, CESCR Committee (15 December 2014), UN Doc E/C.12/SVN/CO/2 (2014) 31.

131 Concluding Observations on the Third Periodic Report of Nepal, CESCR Committee (12 December 2014), UN Doc E/C.12/NPL/CO/3 (2014) 30.

132 Concluding Observations on the Second Periodic Report of Serbia, CESCR Committee (10 July 2014), UN Doc E/C.12/SRB/CO/2 (2014) 37.

133 Concluding Observations on the Second Periodic Report of Uzbekistan, CESCR Committee (13 June 2014) UN Doc E/C.12/UZB/CO/2 (2014) 29.

134 Concluding Observations on the Fifth Periodic Report of Denmark, CESCR Committee (6 June 2013), UN Doc E/C.12/DNK/CO/5 (2013) 25.

135 Concluding Observations on the Fourth Periodic Report of Austria, CESCR Committee (13 December 2013), UN Doc E/C.12/AUT/CO/4 (2013) 26.

136 Concluding Observations on the Second Periodic Report of Kuwait, CESCR Committee (19 December 2013), UN Doc E/C.12/KWT/CO/2 (2013) 17 (recommending accession to ICRMW).

137 Concluding Observations Concerning the Fourth Periodic Report of Belgium, CESCR Committee (23 December 2013), UN Doc E/C.12/BEL/CO/4 (2013) 26.

Montenegro,¹³⁸ Romania,¹³⁹ Lithuania,¹⁴⁰ Monaco,¹⁴¹ Belarus,¹⁴² Iran,¹⁴³ Togo).¹⁴⁴ The CERD,¹⁴⁵ CRC,¹⁴⁶ CEDAW,¹⁴⁷ and CAT¹⁴⁸ are similarly proactive, urging ratification upon most, though not all, of the non-ratifying countries that come before them.

- 138 Concluding Observations on the Initial Report of Montenegro, CESCR Committee (15 December 2014), UN Doc E/C.12/MNE/CO/1 (2014) 27.
- 139 Concluding Observations on the Combined Third to Fifth Periodic Reports of Romania, CESCR Committee (9 December 2014), UN Doc E/C.12/ROU/CO/3-5 (2014) 27.
- 140 Concluding Observations on the Second Periodic Reports of Lithuania, CESCR Committee (24 June 2014), UN Doc E/C.12/LTU/CO/2 (2014) 28.
- 141 Concluding Observations Concerning the Second and Third Periodic Reports of Monaco, submitted as a single document, CESCR Committee (19 June 2014), UN Doc E/C.12/MCO/CO/2-3 (2014) 27.
- 142 Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Belarus, CESCR Committee (13 December 2013), UN Doc E/C.12/BLR/CO/4-6 (2013) 32.
- 143 Concluding Observations on the Second Periodic Report of the Islamic Republic of Iran, CESCR Committee (10 June 2013), UN Doc E/C.12/IRN/CO/2 (2013) 33.
- 144 Concluding Observations on the Initial Report of Togo, Adopted by the Committee at its Fiftieth Session, CESCR Committee (3 June 2013), UN Doc E/C.12/TGO/CO/1 (2013) 38.
- 145 See, eg, Concluding Observations on the Nineteenth to Twenty-First Periodic Reports of Cameroon, CERD Committee (26 September 2014), UN Doc CERD/C/CMR/CO/19-21 (2014) 20 (recommending Cameroon ratify the ICRMW); Concluding Observations on the Combined Nineteenth to Twenty-First Periodic Reports of Sweden, CERD Committee (23 September 2013), UN Doc CERD/C/SWE/CO/19-21 (2013) 22, *with* Concluding Observations on the Sixteenth to Nineteenth Periodic Reports of Belgium, CERD Committee (14 March 2014), UN Doc CERD/C/BEL/CO/16-19 (2014) (not urging ratification of the ICRMW, although Belgium is not yet a party to the ICRMW, and the document contains several concerns and recommendations relating to migrants).
- 146 See Concluding Observations on the Combined Third and Fourth Periodic Reports of China, CRC Committee (29 October 2013), UN Doc CRC/C/CHN/CO/3-4 (2013) 98; Concluding Observations on the Combined Third and Fourth Periodic Reports of Luxembourg, CRC Committee (29 October 2013), UN Doc CRC/C/LUX/CO/3-4 (2013) 52; *with* Concluding Observations on the Initial Report of China submitted under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, CRC Committee (29 October 2013), UN Doc CRC/C/OPAC/CHN/CO/1 (2013) (not urging ratification of the ICRMW, although China is not yet a party to the ICRMW and the document discusses the importance of registering migrant children, a right protected in ICRMW article 29).
- 147 See, eg, Concluding Observations on the Combined Sixth and Seventh Periodic Reports of the Democratic Republic of the Congo, CEDAW Committee (30 July 2013), UN Doc CEDAW/C/COD/CO/6-7 (2013) 45; Concluding Observations on the Combined Sixth and Seventh Periodic Reports of the Dominican Republic, CEDAW Committee (30 July 2013) UN Doc CEDAW/C/DOM/CO/6-7 (2013) 48, *with* Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, CEDAW Committee (30 July 2013), UN Doc CEDAW/C/GBR/CO/7 (2013) (not urging ratification of the ICRMW, although the United Kingdom of Great Britain and Northern Ireland is not yet a party to the ICRMW and the document contains discussion of immigrant women (par 56)).
- 148 See, eg, Concluding Observations on the Initial Report of the Holy See, CAT Committee (17 June 2014), UN Doc CAT/C/VAT/CO/1 (2014) Section C; Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia, CAT Committee (23 December 2014), UN Doc CAT/C/AUS/CO/4-5 (2014) Section C; *compare* Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, CAT Committee (19 December 2014), UN Doc AT/C/USA/CO/3-5 (2014) (not urging ratification of the ICRMW, although the United States of America is not yet a party to the ICRMW and the document contains several recommendations concerning migrants (sec C)).

2.3.4 *Special Rapporteurs*

As discussed above, while the Special Rapporteur on the human rights of migrants has described the Migrant Workers Convention as an instrument that overlaps with existing protections, he nevertheless recognises it as an important element in the migrant rights regime. In his recommendations to countries pursuant to country visits, the Special Rapporteur routinely urges non-state parties to ratify the Convention. For example, in a 2015 report on the management of Europe's external borders, he urged EU member states to 'reconsider' their 'general refusal' to ratify the ICRMW noted that their unwillingness to ratify the Convention 'reflects the intention to not be held accountable for human rights abuses against undocumented migrant workers'.¹⁴⁹

Another mechanism particularly relevant to migrants is the mandate of the Special Rapporteur on trafficking in persons, especially women and children. Although the ICRMW is not referred to in the Human Rights Council's resolution establishing the mandate,¹⁵⁰ on occasion the Special Rapporteur's reports do include calls for ratification of the Convention.¹⁵¹ For example, in 2010, the Special Rapporteur urged ratification of the Convention, stating '[t]he protection of the human rights of migrants is of paramount importance in preventing exploitation that leads to trafficking'.¹⁵²

2.3.5 *Recent processes around migration*

In 2006, the UN General Assembly convened a High-Level Dialogue on Migration and Development; that this was the first ever discussion of migration by the General Assembly demonstrates the unwillingness of states to undertake multilateral engagement with migration. This meeting led to bi-annual meetings of the Global Forum on Migration and

149 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: Follow up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants' HRC Council (8 May 2015), UN Doc A/HRC/29/36 (2015) paras 58 and 118. See also, for example, Report of the Special Rapporteur on the human rights of migrants: François Crépeau: Follow-up mission to Italy (2-6 December 2014), HRC Council (1 May 2015), UN Doc A/HRC/29/36/Add.2 (2015) Recommendation A.1(d); Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Addendum: Mission to Malta (6-10 December 2014), HRC Council (12 May 2015), UN Doc A/HRC/29/36/Add. 3 (2015) Recommendation A(1)(c).

150 Mandate of the Special Rapporteur on trafficking in persons, especially women and children, Human Rights Council (17 July 2014), UN Doc A/HRC/RES/26/8 (2014).

151 Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, GA (9 August 2010), UN Doc A/65/288 (2010) 68; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, Addendum, Mission to Italy, HRC Council (1 April 2014), UN Doc A/HRC/26/37/Add. 4 (2014)89(a).

152 Ezeilo (n 151 above) 68.

Development (GFMD), a 'voluntary, informal, government-led process open to all UN member states', but outside the UN. As of June 2017, ten GFMDs have taken place, punctuated by a second High-Level Dialogue in 2013. Each of these meetings featured country delegation deliberations and statements and included civil society participation. The reports summarising the earlier meetings reflect a pattern of strong support for ratification of the Convention on the part of civil society and 'a number of' country delegates.¹⁵³ Statements in support of the treaty are generally followed by softening or demurrals from 'other' delegates stressing alternative steps that should take priority over ratification, such as 'look[ing] at how countries implement migrants' rights *in practice*'.¹⁵⁴

At the 2010 GFMD, at least one delegate went even further, registering an oblique but unmistakable vote of no confidence for the Convention:

While some stressed the importance of states adopting existing treaties on protecting migrants, a view was expressed that there is a need to review UN conventions that have only been ratified by a few states.¹⁵⁵

In 2011, the civil society delegates' statement included its strongest language in support of the Migrant Workers Convention:

Although there is little consensus as yet as to the form that global governance might take, civil society agrees that whatever system develops must have an indisputable basis in normative frameworks. Such norms exist in the UN Migrant Workers Convention – not an exception but rather one of the ... core international human rights treaties. The reticence of developed countries in particular to ratify the UN Migrant Workers Convention is disingenuous to their own often better traditions of appreciating rights, and unhelpful with respect to other countries that need to ratify and respect the Convention.¹⁵⁶

More recently, governments favouring the Convention appear to have grown even more reticent in the GFMD context, while civil society actors continue their annual call for ratification. The Declaration of the 2013 High-Level Dialogue went so far as to

153 For example, Global Forum on Migration and Development First Meeting, Brussels, July 9-11, 2007: Summary Report, 16 ('a number of states'); Global Forum on Migration and Development, Third Meeting, Athens 2-5 November 2009: Integrating Migration Policies into Development Strategies for the Benefit of All: Report of the Proceedings, 27 ('a number of delegates').

154 Report of the Swedish Chairmanship of the Global Forum on Migration and Development 2013-2014: Unlocking the potential of migration for inclusive development, 46 (emphasis in original).

155 Fourth Meeting of the Global Forum on Migration and Development (GFMD): Puerto Vallarta, Mexico, 8-11 November 2010 'Partnerships for migration and human development: Shared prosperity – Shared responsibility' Report of the Proceedings, 17.

156 Fifth Meeting of the Global Forum on Migration and Development (GFMD): GFMD 2011 Concluding Debate, Geneva, Switzerland: 1-2 December 2011 'Taking action on migration and development – Coherence, capacity and cooperation' Report of the Proceedings, 2.

[n]ote the contribution of applicable international conventions, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, to the international system for the protection of migrants.¹⁵⁷

This lukewarm endorsement contrasts with the statement in the same Declaration encouraging states to ratify ‘relevant international instruments on preventing and combating trafficking in persons and smuggling of migrants’.¹⁵⁸ In 2016, the report from the Millennium Summit reflected a call from the Secretary-General mentioning the ICRMW and calling generally for ratification.¹⁵⁹ The final resolution of the UN General Assembly High Level Plenary on Addressing Large Movements of Refugees and Migrants called on states to ‘consider ratifying or acceding to’ the Convention.¹⁶⁰

3 Institutional interaction

As the preceding description reflected, most direct references to the Migrant Workers Convention are supportive, with the Global North’s negative attitudes manifesting themselves in more oblique ways.¹⁶¹ In spite of its slow ratification rate and low number of state parties, the Migrant Workers Convention functions institutionally much like the other human rights treaties. Administrative support for the CMW is comparable with that of other treaty monitoring bodies, although there would be incrementally more funding if the number of ratifications increased. However, it does not have the same level of agency support as, for example, the Committee on the Rights of the Child receives from UNICEF, although the ILO consistently participates in Committee deliberations. François Crépeau has floated the novel idea that IOM, now a related UN organisation, should act as a support agency, and ‘institutional champion’ to the ICRMW, with similar mutual benefits to those which flow from UNICEF’s support for the Committee of the Rights of the Child.¹⁶²

157 Declaration of the High-level Dialogue on International Migration and Development, GA (21 January 2014), UN Doc A/Res./68/4 15 (2014).

158 Declaration of the High-level Dialogue (n 157) 17.

159 Follow-up to the Outcome of the Millennium Summit ‘In Safety and Dignity: Addressing Large Movements of Refugees and Migrants’ Report of the Secretary-General, GA (21 April 2016), UN Doc A/70/59 (2016) para 88.

160 n 159 above, para 48.

161 For analysis of government attitudes toward the Convention, see A Pécoud ‘The politics of the UN Convention on Migrant Workers’ Rights’ in this volume.

162 Report of the Special Rapporteur on the human rights of migrants, GA (20 July 2016), UN Doc A/71/40767 (2016) para 120: ‘This little ratified Convention would benefit from an institutional champion able to muster adhesion to its principles. Such a responsibility would contribute to strengthening the human rights culture within IOM and provide it with an appropriate normative tool to measure its action and to negotiate projects with states. IOM would thus complement the important work of the United Nations Committee on Migrant Workers, in the same way that UNICEF and

A recent example of institutional interaction which is to be commended is the decision that a General Comment on child migrants is to be jointly authored by the Committee on the Rights of the Child and the CMW. This is a welcome development, and compares favourably with the CEDAW's sole authored 2008 General Recommendation on women migrant workers.

Like other human rights treaty monitoring bodies, the CMW is composed of individuals nominated by the ratifying countries. Each ICRMW state party may nominate one person for election 'from among its own nationals'¹⁶³ who is an expert 'of high moral standing, impartiality and recognized competence in the field covered by the Convention'.¹⁶⁴ The Committee is the only treaty body composed exclusively of members from the Global South, which reflects the failure of northern states to ratify.¹⁶⁵

A 2012 report from the Geneva Academy of International Humanitarian Law and Human Rights highlights another aspect of the CMW's composition: the number of members with links to government. The report, entitled 'The Independence of UN Human Rights Treaty Body Members', examines the professional background of treaty body members. The report quotes the Addis Ababa Guidelines for the Independence and Impartiality of the Treaty Body Members, adopted at a meeting of treaty body leaders in 2012: '(t)he independence and impartiality of treaty body members is compromised by the political nature of their affiliation with the executive branch of the State.'¹⁶⁶

As with other treaty bodies, the CMW members are elected and serve 'in their personal capacity.'¹⁶⁷ However, the report documents that, as of 2012, the CMW had the highest percentage of members with an executive branch affiliation: 9 out of 14 members – 64 per cent.¹⁶⁸ The average for all human rights treaty bodies was 32 per cent,¹⁶⁹ with the Human Rights Committee lowest at 5 per cent¹⁷⁰ and the CEDAW Committee the

the Committee on the rights of the child are complementing each other in the implementation of the Convention on the rights of the child.'

163 ICRMW (n 1 above) art 72(2)(a).

164 ICRMW (n 1 above) art 72(1)(b).

165 V Chetail 'The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' in P Alston & F Megret (eds) *The United Nations and human rights: A critical appraisal* (forthcoming 2018). For an earlier article, see C Edelenbos 'Committee on Migrant Workers and implementation of the ICRMW' in P De Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 100-121.

166 Geneva Academy of International Humanitarian Law and Human Rights 'The independence of UN Human Rights treaty body members' (December 2012) 42 (Treaty Body Independence Report).

167 ICRMW (n 1 above) art 72(2)(b).

168 Treaty Body Independence Report (n 166 above) 23.

169 Treaty Body Independence Report (n 166 above) 24.

170 Treaty Body Independence Report (n 166 above) 20.

second highest, with 52 per cent.¹⁷¹ Institutionally, monitoring of the Convention reflects some effects of the treaty's rejection by the Global North, with less agency support and a composition that skews toward government official participation.

The 2012 report did not speculate on the reasons why such a high number of CMW members came from the executive branches of their countries. One possible explanation is that treaty body members are unpaid, which is likely to have a number of indirect consequences, including making membership more financially feasible for those in government service, who can attend meetings in the course of their employment.

4 Conclusion

United Nations human rights experts and mechanisms widely and frequently acknowledge that the ICRMW provides the primary normative rights framework for migration. Frequently though not uniformly, UN mechanisms, the state parties to the Convention, and also non-state parties from the Global South, urge wider ratification of the treaty. All actors have been slower to embrace the treaty substantively, though here the Convention is likely to benefit from the increasing trend towards cross referencing of the core treaties, for example through the UPR and the use of joint general comments.

One recurring theme in the history of human rights law is the tension between national sovereignty and international standard-setting; this tension tends to increase where those in need of protection are not citizens. But, over time, states have generally recognised the value of international oversight systems. States increasingly accept oversight even of sensitive issues concerning migrants' rights under other, more widely ratified, human rights treaties. What were often presented as mutually exclusive treaty regimes, with the ICRMW being negatively contrasted with the other core treaties, tends now to be seen as positive, and as constituting – in the words of the CMW – a 'complementary and mutually reinforcing' system of legal protections. With time the Committee is becoming better positioned to articulate and advocate a human rights approach to migration. Its work is increasingly needed to provide both individual protection and a comprehensive framework for rights-based policy-making, as migration is pushed to a higher place on the UN and multilateral agendas.

171 Treaty Body Independence Report (n 166 above) 21.

CHAPTER 5

PUTTING THINGS INTO PERSPECTIVE: THE ADDED VALUE OF THE ICRMW'S SUBSTANTIVE PROVISIONS

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1 Introduction

The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹ has enjoyed comparatively little support and is lagging behind in numbers of ratifications in comparison to the other core UN human rights treaties. This relatively low rate of ratification has often been explained by reference to the claim that the Convention is superfluous in the international human rights framework, as the rights it protects are already enshrined at both international and national level.²

The aim of this chapter is to challenge this assumption and establish the added value of the ICRMW's substantive provisions by drawing on three clusters of rights: *entry and stay rights*, *health and social security rights*, and the overarching issue of *access to justice*. For the purpose of analysing the benefits of the Convention, we compare its provisions with other existing international law provisions and standards. References are also made to regional human rights systems, particularly that of the European Union (EU). This choice is motivated by the fact that no single EU member state has yet signed or ratified the Convention. Moreover, EU legislation contains provisions applicable to migrants and migrant workers that are binding on all EU member states: given the highly developed and complex nature of the human rights protection system in the EU, it is worth asking whether ratification of the ICRMW by EU member states would confer protection on migrants in the EU beyond what is currently available to them. A significant difference lies in the level of protection and freedoms guaranteed to EU citizens (ie nationals of any of the 28 EU member states) as opposed to so-called third country nationals (TCNs). Possibly, ratification of the Convention by EU member states would have

1 'Convention', 'ICRMW', or 'Migrant Workers Convention'.

2 E MacDonald & R Cholewinski *The Migrant Workers Convention in Europe* (2007) 60.

a greater de facto effect on raising the level of protection with respect to TCNs, who do not enjoy the high standards of rights protection available to EU nationals, arguably creating greater political tension on the EU level.

The first section deals with *entry and stay rights*, while the second analyses *health and social security rights*. These rights clusters were chosen to highlight two points: first, how varied the provisions of the ICRMW are regarding the potential life realities covered by its substantive articles; and second to show how, whilst a great variety of substantive rights find protection under the Convention, many of these rights, to a differing extent, are covered in other international-law provisions. The aim of the present contribution is to demonstrate, notwithstanding this reality, the added value(s) the Convention brings to the table, the areas where it simply duplicates existing rights, and the situations where it goes beyond other rights provisions, guaranteeing further protection for migrant workers and their families.

In a third section, the right to effective remedy is sketched and located in the context of access to justice and the realisation of rights on a national, regional and international level. Whilst this section intercepts partly with the one on *entry and stay rights* and that on *health and social security*, it shows the added value the Convention as a system or instrument has regarding people's access to justice in the sense of the enforcement of the rights provided for in the Convention.

2 Entry and stay of migrant workers and members of their families

The Convention applies to the entire migration process,³ namely to:

[P]reparation 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.⁴

This part of the contribution will look at the concepts of entry, stay and return of migrant workers and members of their families in a broad sense, so as to encompass all situations linked to and of potential impact on the different stages of the migration process.

3 P de Guchteneire & A Pécoud 'Introduction: The UN Convention on Migrant Workers Rights' in P de Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 8.

4 Art 1(2).

2.1 The Convention's comprehensive protection system

The Convention's structure requires the distinction between two subgroups of provisions on entry and stay, depending on their scope: while some, namely, articles 8-35 which make up Part III of the Convention, are applicable to all migrant workers, others, namely, articles 36-56 in Part IV, only concern migrants in a regular situation.⁵

Part III constructs a system of basic protection for all migrant workers, regardless of their administrative status. To start, article 8 enshrines the right of migrant workers and members of their families to leave any state, including their state of origin, as well as their right to return.⁶ This right is fundamental to permit the movement of people and, therefore, of international labourers.⁷ Article 22 details a safeguard enshrined in several instruments, namely the prohibition of collective expulsion of migrant workers, requiring a case-by-case approach and establishing precautions as to how expulsions should be carried out. It also states that the person subject to expulsion 'shall have a reasonable opportunity before or after departure to settle any claims or wages and other entitlements'.⁸ In addition, expulsion 'shall not in itself prejudice any rights of a migrant worker ... including the right to receive wages and other entitlements'.⁹ By including this specific provision, the Convention underlines the value of migrants' work and reaffirms the specific feature of work-driven migration. In fact, expulsion in itself cannot constitute a valid reason to deprive migrant workers of their rights and wages.¹⁰

As a provision, article 33(1)(b) requires states to take all appropriate measures to guarantee the right to information regarding conditions of admission and other matters enabling migrant workers 'to comply with administrative or other formalities'. Placing 'specific responsibility'¹¹ on states vis-à-vis migrant workers, this has a twofold effect: besides promoting regular and informed migration for the benefit of both migrants and states,¹² it also acknowledges the particular challenges faced by

5 De Guchteneire & Pécoud (n 3 above) 8.

6 See restrictions in art 8(1).

7 D Stephens 'Establishing a positive right to migrate as a solution to food scarcity' (2014) 31 *Emory International Law Review* 186.

8 Art 22(6).

9 Art 22(9).

10 Art 56(2) provides migrant workers in a regular position with a supplementary safeguard, as they can never be expelled for the purpose of depriving them, or their family members, 'of the rights arising out of the authorization of residence and the work permit'.

11 M Grange *Strengthening protection of migrant workers and their families with international human rights treaties: A do-it-yourself kit* (2006) 47.

12 See L Bilocchi 'Rights of all migrant workers (Part III), Travaux Préparatoires' <http://www.ohchr.org/EN/Issues/Migration/Pages/HumanRightsFramework.aspx> (accessed 21 May 2015) 6.

migrants, as they may not be familiar with the culture of the country of employment.¹³

As for the rights granted only to migrant workers in a regular situation (Part IV), article 37 reiterates the right to information, specifying that it covers 'all conditions applicable to their admission ... their stay and the remunerated activities'. In contrast to article 33, this provision focuses on work-related issues, taking for granted that once migrants are in a regular situation they are already informed about how to comply with administrative matters.

While the aforementioned articles establish basic guarantees for the initial stages of migration, Part IV also contains provisions related to stay, termination of employment and return to countries of origin. In order to avoid protection gaps and prevent situations of irregularity, the Convention sets up a link between residence and employment,¹⁴ stating that the authorisation to reside shall be granted 'for at least the same period of time'¹⁵ as the authorisation to work. Along the same lines, articles 49(2) and 51 set up protection in case of dismissal from work, specifying that this does not affect, *per se*, the residence authorisation.¹⁶ However, this standard applies differently to migrant workers who are 'allowed freely to choose their remunerated activity',¹⁷ and those who are not. The former sub-group is enabled to retain residence authorisation 'at least for a period corresponding to that during which '[migrant workers] may be entitled to unemployment benefits'.¹⁸ The latter, instead, might avoid falling into a situation of irregularity only if their authorisation is not dependent upon 'the specific remunerated activity for which they were admitted'.¹⁹

Avoiding situations of irregularity is also the goal pursued by article 50,²⁰ which considers the issue of residence permits for family members in case of death of the migrant worker or dissolution of marriage. The wording used is significant: states of employment shall 'favourably consider granting family members ... an authorization to stay'.²¹ Thus article 50 does not imply any obligation to actually grant such permission.

While Parts III and IV establish states' obligations vis-à-vis migrants and their families, Part VI considers labour migration in the broader inter-

13 K Spieß *The UN Migrant Workers Convention: An instrument to strengthen migrants' rights in Germany* (2007) 5-7.

14 Grange (n 11 above) 47.

15 Art 49(1).

16 The authorisation of residence is not automatically withdrawn by the 'mere fact of the termination' of the employment, article 49(2).

17 Art 49(2).

18 Art 49(3).

19 Art 51; However, the article recognises the right to 'seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work'.

20 Grange (n 11 above) 47.

21 Art 50(1).

state framework, aiming at promoting 'sound, equitable, humane and lawful conditions' for migrant workers and their families.²² To this end, article 65 requires states to formulate and implement adequate policies for international migration of workers and to provide them with 'appropriate information',²³ on residence authorisations, also encouraging co-operation among states involved in the migration process.²⁴

While the Preamble of the Convention spells out the role of human rights as an effective tool to curb the exploitation of irregular migrant workers, article 68 requires collaboration amongst states to prevent and deter irregular movements and irregular employment of migrant workers, particularly to discourage their exploitation.²⁵ The Convention does not specify the content of the measures to be taken; it can thus be argued that it 'potentially covers both control measures and pre-emptive policies'.²⁶ Moreover, although not providing for any right to regularisation, the Convention encourages states to adopt measures to avoid prolonged situations of irregularity,²⁷ suggesting also criteria to apply when considering regularisation.²⁸

2.2 The international human rights framework on entry and stay

The right to leave any country, including that of origin, and the symmetrical right to return, are enshrined in several human rights instruments. They are stated in article 13(2) Universal Declaration of Human Rights (Universal Declaration) and reiterated by article 12 ICCPR; both provisions apply to 'everyone', without distinction between people travelling for example for reasons of tourism, and regular or irregular migrants.²⁹ Such provisions establish a general framework, which the Convention specifies in relation to migrant workers. Notably all these documents consider only the right to emigrate, not the right to immigrate and therefore to enter another state.³⁰ While this might be regarded as an asymmetry,³¹ it ultimately can be rooted in the desire to ensure state sovereignty.

22 Grange (n 11 above) 22.

23 Art 65(1)(c).

24 Art 65(1)(b).

25 Art 68(1)(b) & (c).

26 B Ryan 'In defence of the Migrant Workers' Convention: Standard setting for contemporary migration' in SS Juss (ed) *The Ashgate research companion to migration law, theory and police* (2013) 500.

27 Art 69(1).

28 Grange (n 11 above) 50; Ryan (n 26 above) 500.

29 General Comment 27: Article 12 (Freedom of movement, HRC (2 November 1999), UN Doc CCPR/C/21/Rev.1/Add.9 (1999) paras 8-9.

30 L Berg 'At the border and between the cracks: The precarious position of irregular migrant workers under international human rights law' (2007) 8 *Melbourne Journal of International Law* 13.

31 Berg (n 30 above) 13.

When it comes to expulsion, article 13 of the International Covenant on Civil and Political Rights (ICCPR) affords protection only to 'lawfully' resident aliens. Therefore, its scope is narrower than that of article 22 of the Convention, which instead covers both regular and irregular migrants.³²

Within the framework of the Council of Europe (CoE), migrant workers are considered by the European Social Charter (ESC) and the European Convention on the Legal Status of Migrant Workers (ECLSM).³³ However, both treaties apply only to migrant workers who are nationals of a contracting party;³⁴ moreover, the latter also requires migrants to be in a regular situation.³⁵ Such restrictions undermine the equal enjoyment of migrant workers' rights, widening the gap between workers coming from different areas of the world.

2.3 A closer look: The admission of migrant workers in the EU

The decision to analyse EU legislation concerning the entry and stay of migrant workers is motivated by the EU's competence in the field of migration.³⁶ Article 79 of the Treaty on the Functioning of the European Union (TFEU) serves as the basis to develop a common European immigration policy. As stated in the first paragraph of this article, such common policy is aimed at efficiently managing migration flows as well as ensuring the fair treatment of TCNs. Notwithstanding this framework, while the EU has a common system of external border management and is moving towards a common asylum system, the same cannot be said for labour migration. Member states have shown reluctance towards the harmonisation of rules on access to the labour market, and are loath to cede sovereignty in this area.³⁷ This is illustrated by the fact that while recent years have seen the adoption of important labour migration directives (such as the 'Blue Card' directive, or directive 2014/36/EU on third-country seasonal workers), article 79(5) TFEU specifically provides for the right of member states to determine volumes of admission of TCNs coming from third countries for labour purposes.

32 Similar to art 8 of the UN, Declaration on the human rights of individuals who are not nationals of the country in which they live, GA (13 December 1985), UN Doc A/RES/40/144 (1985) which refers to the rights of aliens lawfully residing in the territory of a state.

33 P Boeles et al *European migration law* (2009) 226-227.

34 Recital 19 ESC and art 1(1) ECLSMW.

35 Art 1(1) ECLSMW refers to migrant workers who have been 'authorised' to reside, while para 2 reduces the scope by excluding certain categories, eg seasonal and frontiers workers.

36 M D'Auchamp *Rights of migrant workers in Europe* (2011) 15 ss; S Peers et al (eds) *EU immigration and asylum law (text and commentary): Second revised edition, volume 2: EU immigration law* (2012) 1-9 ss.

37 Boeles (n 33 above) 225.

EU directives on labour migration and the provisions of the Convention seem to have a different scope and purpose. In fact, the adoption of *ad hoc* directives shows how EU legislation on labour migration is aimed at regulating certain specific occurrences in the EU labour market, yet leaving EU member states the prerogative to determine the number of migrant workers admitted to their territories. Conversely, being a human rights treaty, the Convention aims to establish a set of rights pertaining to migrant workers as such.³⁸

2.4 Balancing states' sovereignty and migrant workers' rights

The trade-off between the management of international labour migration and the respect for migrant workers' human rights on the one hand and the consideration for states' sovereignty on the other hand is the *fil rouge* of this section of the present analysis.

Clearly, the Convention does not envisage any specific procedure regarding the admission of migrant workers, nor does it create any direct obligation on state parties to welcome migrant workers.³⁹ This is made explicit by article 79, stating that the Convention does not impair the right of each state party to establish the criteria governing admission of migrant workers and members of their families and it is further reiterated by articles 34 and 35: the former emphasises migrants' obligation to comply with 'laws and regulations', including those on administrative status, while the latter explicitly rejects any right to regularisation.

Matters of entry, transit, stay, return and regularisation are sensitive issues that relate to states' sovereignty and to their power to admit or refuse entry to their territory. Nevertheless, the Convention takes significant steps, particularly encouraging the promotion of 'sound and equitable conditions for international migration'⁴⁰ by reiterating general obligations and rights and tailoring them to the specific reality of migrant workers. Furthermore, article 69 may represent an effective tool with which to prompt member states to pursue avenues to further protect the rights of migrant workers, especially those belonging to particularly vulnerable groups of migrant workers. As this provision requires states to 'take appropriate measures' to ensure that the situation of irregularity does not continue,⁴¹ the Convention requires states to undertake suitable measures related to entry and stay of TCNs, the latter being the category of migrant workers who could find themselves in a situation of irregularity within the EU. As pointed out by Ryan, the Committee on Migrant Workers (CMW)

38 E MacDonald & R Cholewinski (n 2 above) 74.

39 D'Auchamp (n 36 above) 18.

40 Art 35.

41 Art 69(1).

has made clear the potential of the Convention in relation to regularisation and thus, to a broader extent, to entry and stay conditions.⁴²

3 Health and social security rights of migrant workers and members of their families

As explained above, the extent and nature of the rights granted by the ICRMW varies according to the categories of migrant workers concerned. The present section will first explore the Convention's provisions related to social security and health rights; and subsequently put them in the context of other existing international and regional mechanisms.

3.1 The Convention's health and social security rights system

3.1.1 All migrant workers regardless of administrative status

Article 27 of the Convention recognises the right to social security for all migrant workers, on an equal basis with the nationals of the state of employment. In line with the general non-discrimination clause in article 7, states bear the burden of proof for any different treatment of migrant workers.⁴³ Notwithstanding this general provision, the CMW has found multiple vulnerabilities arising from migrant workers' life realities. Migrant domestic workers, for example, are often excluded from national social security systems.⁴⁴ The Committee has noted that the:

[L]ack of social security benefits and of gender-sensitive health care coverage further increases the vulnerability of migrant domestic workers and their dependence on their employers.⁴⁵

The Committee further clarified that wherever migrant workers are granted benefits in domestic legislation, a deprivation of these benefits merely due to a lack of a reciprocity agreement between states is not possible.⁴⁶ However, article 27(2) acknowledges that the right to social security for migrant workers may not exist in some national legislation.⁴⁷ In this case, migrant workers should be entitled to reimbursement of the amounts they contributed to the national social security system while working in the country.⁴⁸ Seeking to expand the protection of migrant workers, the Committee interprets widely the notion of 'social security' in

42 Ryan (n 26 above).

43 General Comment 2 on the rights of migrant workers in an irregular situation, CMW (28 August 2013), CMW/C/GC/2 (2013) (CMW GC 2) para 67.

44 General Comment 1 on migrant domestic workers, CMW (23 February 2011), CMW/C/GC/1 (2011) (CMW GC 1) para 19.

45 CMW GC 1 para 24.

46 CMW GC 2 para 68.

47 D'Auchamp (n 36 above) 32.

48 CMW GC 2 para 69.

order to include 'social insurance' and 'existing non-contributory social benefits'⁴⁹ or even a right to 'emergency social security' in cases of extreme poverty and vulnerability.⁵⁰

As regards the right to medical care, it is restricted to urgent cases.⁵¹ However, interpreting this provision with provisions in some of the other core human rights instruments,⁵² the Committee attributes broader obligations to state parties, encompassing primary health care, immunisation against major infectious diseases and emergency obstetric care for migrant women, amongst others.⁵³

The mere fact of being in an irregular situation should not impede access to medical care for migrant workers.⁵⁴ Elaborating on this provision, the Committee makes a further distinction between health care provisions and immigration control, discouraging states from requiring medical records of migrant workers in an irregular situation or 'conducting immigration enforcement operations on or near facilities providing medical care'.⁵⁵ By making this suggestion, the Committee very directly addresses states' immigration control practices and the *de facto* obstacles capable of impairing the enjoyment of rights granted to migrant workers in an irregular situation.

3.1.2 *Migrant workers in a regular situation*

A more robust set of rights is granted to migrants in a regular migration status.⁵⁶ Regarding access to social and health services, equality of treatment with nationals of the state of employment is guaranteed, 'provided that the requirements for participation in the respective schemes are met'.⁵⁷ Some additional social security rights, such as protection against dismissal, unemployment benefits and access to public work schemes, are granted by article 54(1).

Moreover, the right to access to social and health services⁵⁸ applies equally to all categories of documented migrant workers mentioned in the Convention: frontier, seasonal, itinerant, project-tied, specified-

49 CMW GC 2 para 70.

50 CMW GC 2 para 71.

51 ICRMW art 28.

52 International Covenant on Economic, Social and Cultural Rights, GA (16 December 1966) (CESCR) art 12 & Convention on the Rights of the Child, GA (20 November 1989) (CRC) art 24.

53 CMW GC 2 para 72.

54 ICRMW art 28.

55 CMW GC 2 para 74.

56 L Nessel 'Human dignity or state sovereignty? The roadblocks to full realization of the UN Migrant Workers Convention' C in V Chetail & C Bauizou (eds) *Research handbook on international law and migration* (2014) 334.

57 ICRMW art 45(1)(c).

58 Art 43(1)(e) & 45(1)(c).

employment and self-employed migrant workers.⁵⁹ In relation to project-tied workers, particular emphasis is placed on state responsibility for ensuring their protection through at least one social-security system, either that of the state of origin or the state of temporary residence.⁶⁰

3.2 The international human rights framework on health and social security

The Committee has stated that ‘a State’s obligation under the Convention must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party’.⁶¹ Following this, there exists a wide range of relevant provisions in different international legal documents, including several of the other core UN human rights instruments,⁶² some conventions of the International Labour Organisation (ILO)⁶³ and a number of regional instruments, for example in Europe. In addition to these international legal instruments and the respective UN treaty bodies,⁶⁴ there are specific UN charter-based procedures⁶⁵ aimed at the protection of the rights of migrant workers.

3.2.1 UN legal instruments

CESCR in article 9 provides for the right of everyone to social security, including social insurance. This provision has been interpreted by the UN Committee on Economic, Social and Cultural rights (Committee on ESCR) as including ‘refugees, asylum-seekers, internally displaced persons, returnees, non-nationals ...’⁶⁶ Furthermore, especially for ‘migrant workers who have contributed to a social security scheme’, the Committee on ESCR suggests that they should be able either to benefit from that contribution or retrieve it, if they leave the country.⁶⁷

The right to the highest attainable standard of health is covered in article 12 CESCR. In this context the Committee on ESCR has affirmed that states are

59 ICRMW arts 57-63.

60 ICRMW art 61(3).

61 CMW GC 2, para 7.

62 CESCR; CRC; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA (18 December 1979); and International Convention on the Elimination of All Forms of Racial Discrimination, GA (21 December 1965) (CERD).

63 ILO Conventions Nos 97 & 118.

64 D Weissbrodt & J Rhodes ‘United Nations treaty bodies and migrant workers’ in V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014).

65 Eg the 5/1 procedure, the UN Special Rapporteur on the human rights of migrants and the UPR; see Weissbrodt & Rhodes (n 64 above) 305.

66 Committee on ESCR GC 19 para 31.

67 Committee on ESCR GC 19 para 36.

under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services.⁶⁸

Furthermore, the Committee on ESCR interprets the notion of 'other status', which appears at the end of the non-discrimination clause, as including 'non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'.⁶⁹ While the above interpretations might seem to be broadening the scope of the respective articles, the general notion of obligations under CESCER and their progressive realisation clause applies throughout,⁷⁰ potentially rendering the protection afforded to migrant workers, under CESCER, relatively weak and dependent on each state's capacities.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in article 1(2) provides 'for the possibility of differentiating between citizens and non-citizens'.⁷¹ However, the Committee on the Elimination of Racial Discrimination (CERD Committee) extends states' obligations so as to include the removal of 'obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health'.⁷² The obligation on state parties to CERD to combat discrimination against non-citizens, as interpreted by the CERD Committee, requires the active removal of obstacles, thereby going beyond the view of the Committee on ESCR that CESCER requires states to refrain from limiting equal access to health care.

Identifying women as a particularly vulnerable group, CEDAW protects women's right to health care under article 12. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) interprets this provision to require states to give 'special attention to the health needs and rights of women belonging also to vulnerable and disadvantaged groups, such as migrant women'.⁷³ Being arguably one of the most advanced interpretations given by this Committee, General Recommendation 26 on women migrant workers⁷⁴ 'has essentially recast

68 Committee on ESCR GC 14 para 34; see also De Guchteneire & Pécoud (n 3 above) 127. Please note that the authors of the present chapter disagree with the wording of this quote with respect to 'illegal immigrants'. We are of the firm belief that no individual is ever as such 'illegal'. More politically correct and legally accurate terms include 'undocumented migrants' and 'migrants in an irregular situation'.

69 Committee on ESCR GC 20 para 30; see also Weissbrodt & Rhodes (n 64 above) 320.

70 'Progressive realisation' under CESCER obliges states to, to the maximum of their available resources, comply with CESCER provisions. Although complemented by the non-retrogression clause, CESCER obligations on state parties remain relatively weak in comparison to the other core UN human rights treaties.

71 CERD Committee GC 30 para 1.

72 CERD Committee GC 30 para 29.

73 Weissbrodt & Rhodes (n 64 above) 324; see also CEDAW GC 24 para 6.

74 CEDAW Committee GC 26.

the CEDAW as a second Migrant Workers Convention that highlights protection that women migrant workers require due to their status as migrants and their gender'.⁷⁵

Protecting another particularly vulnerable group, namely children, CRC in article 24 ensures the right of every child to the 'enjoyment of the highest attainable standard of health'. According to the Committee on the Rights of the Child (CRC Committee), states should pay close attention to vulnerable children and respect the principle of non-discrimination when formulating health care and education policies.⁷⁶ 'This includes girls, children living in poverty ... children from migrant families ... refugee and asylumseeking children'.⁷⁷ This complements the ICRMW insofar as it specifically mentions children. The vulnerability of migrant children in relation to health issues has been stressed several times by the CRC Committee.⁷⁸ Furthermore, the right of every child to benefit from social security, including social insurance, is protected under article 26 CRC, where the wording of the article – 'every child' – implies the inclusion of migrant children.

In addition to the core UN human rights treaties, the ILO, with its main goal being the protection of workers around the world, provides for protection of migrant workers through its own conventions.⁷⁹

3.2.2 *Regional legal instruments on health and social security rights*

References to social security and health rights for migrant workers can be found in several regional human rights instruments: for example article 9 (right to social security) and article 10 (right to health for everyone) of the Additional Protocol to the American Convention on Human Rights (ACHR) in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), and article 16 (right to enjoy physical and mental health) of the African Charter on Human and Peoples' Rights (ACHPR).

This section focuses, however, on the system of protection in place in the CoE as well as in the EU. The former is covered by the ESC and the latter by the EU Charter on Fundamental Rights. Whilst extensively providing for social security and health rights, the ESC has very limited application. There is, however, a landmark decision of the European Committee of Social Rights (ECSR), which found a violation of the right of children and young persons to social, legal and economic protection.⁸⁰

75 Weissbrodt & Rhodes (n 64 above) 325.

76 Weissbrodt & Rhodes (n 64 above) 328; see also CRC Committee GC 7 para 24.

77 CRC Committee GC 7 para 24.

78 CRC Committee GCs 3, 6 & 7.

79 Eg ILO Conventions Nos 97, 118 and 143; for a more detailed account of the protection provided by ILO Conventions please see R Cholewinski's contribution in the present volume.

80 ESC art 17(1)(a).

Specifically addressing the right to have the health care these children need, the case concerned French national measures limiting the access of children of migrants in an irregular situation to health care provisions.⁸¹ In this context, the ECSR held that 'legislation or practice that denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter'.⁸²

At the EU level, the EU Charter recognises in article 34(2) an entitlement to 'social security benefits and social advantages' for those residing and moving legally within the EU. Article 35 acknowledges the right to health care for all, without distinction regarding migration or residence status and in a much broader way than in article 28 ICRMW, covering even preventive health care. Furthermore, a number of EU directives exist, providing, for instance, a right of documented migrants to social security entitlements,⁸³ a right to a healthy workplace and social security for highly skilled migrants⁸⁴ and documented third-country nationals employed seasonally,⁸⁵ and, in the only directive addressing undocumented migrants' rights, a right to emergency health care, in the context of returns procedures.⁸⁶

Summing up, this section provided an overview of other applicable provisions on migrant workers' health and social security rights in international and European law. As shown above, whilst all major international human rights documents arguably contain relevant sets of rights, it is usually the respective supervisory committees' interpretations, based on equal treatment and non-discrimination clauses that extend these rights to refugees, asylum-seekers and migrants. In light of the above, it can be said that the Convention, addressing directly migrant workers and their families, notably enhances protection, in combination with the interpretative work of the Committee, which is displaying an acute appreciation of the life realities of migrant workers, especially those with cumulative vulnerabilities. The specific mandate the Committee has, with respect to migrant workers and their families, will always have an added benefit when dealing with such specific social and legal phenomena as

81 De Guchteneire & Pécoud (n 3 above) 379; *International Federation for Human Rights (FIDH) v France* (8 September 2004) ECSR, Complaint No 14/2003.

82 *FIDH* (n 81 above) para 32.

83 Art 11(1)(d) Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, EC (25 November 2003), 2003/109/EC (2003).

84 Art 14(1)(a) & (e) Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, EC (25 May 2009), 2009/50/EC (2009).

85 Art 23(1)(a) & (d) Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues To Europe, EU (6 April 2016), COM/2016/0197.

86 Arts 14(1)(b) & 16(3) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, EC (16 December 2008), 2008/115/EC (2008).

labour migration. A number of examples above illustrate how the Committee has applied provisions to migrant workers' realities: highlighting domestic migrant workers' exclusions from social security, elaborating extensively on irregularity and health rights, and speaking up on the emergency healthcare provision, which is to be extended beyond the mere text. This leads to the conclusion that the added benefit very much lies in the mandate of the Committee and its understanding of the Convention as an inclusive, non-discriminatory human rights instrument.

4 Realising convention rights: Access to justice

The Convention offers a comprehensive system of interconnected rights of migrant workers and their families, some areas of which have been highlighted above, and requires state parties to establish a corresponding legal framework. It thus implicitly covers the first two requirements for access to justice. However without a further core element of access to justice, namely the right to an effective remedy, the *de facto* realisation of human rights, including those tailored to the reality of migrant workers, will not be possible. Succinctly put: '[f]or rights to have meaning, effective remedies must be available to redress violations.'⁸⁷ In the context of marginalised groups of society, who *per definitionem* are more prone to human rights violations,⁸⁸ and traditionally face higher obstacles to access to justice, this is all the more important. A prime example of this is the Committee's General Comment on migrant domestic workers. Acknowledging the multiple vulnerabilities faced by this particular group, the Committee noted that migrant domestic workers are often unable to seek remedies for violations by employers. This is particularly difficult or even impossible once people have left the country of employment, be it voluntarily, when fleeing abusive work relationships,⁸⁹ or by deportation. The General Comment on migrant workers in an irregular status underlines again the problem of multiple vulnerabilities and equally reflects the Committee's holistic approach to migrant workers' life realities and interconnected human rights. As such, access to justice for irregular migrant workers is considered to be limited as a consequence of their constant fear of being reported to authorities and subsequently deported, which in turn leaves them more vulnerable to exploitation and abuse.⁹⁰ Similar to the other core international human rights treaties, the Convention's remedy system is understood as being twofold: first, the Convention requires state parties to provide for a system of effective remedy on the national level (article 83), and second it gives competence

87 CRC Committee GC 5 para 24.

88 Eg CMW GC 1, para 7, mentioning migrant domestic workers being at heightened risk of abuse due to vulnerability based on their dependence and isolation, and the mention of women domestic workers facing even higher risks due to issues such as gender-based violence, or irregular migrants.

89 CMW GC 1 para 17.

90 CMW GC 2 para 2.

to the CMW to act as a remedy system on the international level (article 77).

4.1 Access to an effective remedy on the national level

The ICRMW prescribes in article 83 the right to an effective remedy. This right to a remedy should be in place irrespective of whether or not a violation of the Convention provision was committed by persons in an official capacity. The respective claims should be reviewed by a competent judicial, administrative, legislative or other authority provided for by law, thus indicating the existence of a correlating duty to establish a legal system, including institutions, that will be liable to deal with such claims. The Committee has noted that ideally the authority dealing with remedies should be a court.⁹¹ State parties further should 'develop the possibilities of judicial remedy'.⁹² Competent authorities should further ensure that remedies then are enforced.⁹³ To ensure access to justice for example for migrant domestic workers, the Committee has suggested that states designate a domestic workers' ombudsperson and has advised opening legal avenues of redress against employers who enjoy diplomatic immunity, as well as access to courts and legal mechanisms without having to fear consequently being deported,⁹⁴ thus taking into account the realities of migrant domestic workers who face abuse of their human rights and seek justice.

Vital to access to a remedy in practice is the general principle of non-discrimination as provided for in article 7 of the Convention. With respect to undocumented migrants, this was reiterated in the Inter-American Commission on Human Rights's (IAm Comm of HR) Advisory Opinion 18,⁹⁵ arguably the most inclusive account of the human rights of undocumented migrant workers. Whilst provisions of non-discrimination are, on the one hand, standard in international treaties such as the ICRMW, and on the other hand considered non-exhaustive as regards the grounds for discrimination enumerated, it is 'worth noting that the list in the Convention is broader than those found in other human rights conventions'⁹⁶ such as, for example, the ICCPR and CESC. The CMW has acknowledged the special vulnerability of migrant domestic workers. The difficulties they face in seeking redress for violations of, for instance, their labour rights or other violations suffered as a result of an abusive work

91 CMW GC 2 para 53.

92 Art 83(b).

93 Art 83(c).

94 CMW GC 1 paras 49 and 50.

95 Advisory opinion on juridical condition and rights of the undocumented migrants, IACrHR (17 September 2003) OC-18/03 (2003) para 126; in particular with respect to the principle of non-discrimination see also the submission of Mexico reproduced in part in Advisory Opinion 18.

96 The International Convention on Migrant Workers and its Committee, OHCHR, Fact Sheet 24 (2005) 5.

relationship are compounded by national provisions, which limit avenues for legal redress, or explicitly exclude domestic migrant workers.⁹⁷ Another scenario which *de facto* restricts access to domestic remedies for migrant domestic workers is the risk of facing deportation in case employment disputes are initiated,⁹⁸ thus highlighting the link between employment rights and questions of entry and stay as addressed above.

The Convention's wording of the obligation to provide for an effective remedy in relation to similar provisions in other international human rights treaties requires some scrutiny. Though most treaties provide for an effective remedy either explicitly or through interpretation by the respective treaty body, the extent of the remedy required differs. While the ICCPR has exactly the same wording as the ICRMW,⁹⁹ other treaties are more restrictive. CEDAW for example provides in article 2(b) that legislative or other measures and, if necessary, a sanctioning system should be adopted to prohibit all discrimination against women. Further, effective legal protection of women against discrimination should be established on an equal basis with men, and guaranteed through national tribunals and other bodies.¹⁰⁰ Article 6 of CERD provides for the obligation to ensure effective remedies to anyone in the jurisdiction of a state party, including the 'right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of discriminatory acts falling under the convention'.¹⁰¹ When it comes to CESCR there is no explicit mention of an obligation to establish a system of or right to remedies for rights violations. Nonetheless, it is possible to infer from article 2 the existence of a right to an effective remedy, which should be put into place by state parties to CESCR.¹⁰² Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on the other hand is very much specifically adjusted to the rights of victims of acts of torture, requiring that national legal systems ensure that each victim 'obtains redress and has an enforceable right to fair and adequate compensation'.¹⁰³ The Committee against Torture (CAT Committee) has, in paragraph 2 of its General Comment 3 on the implementation of article 14, explicitly stated that the term 'redress' as used in article 14 encompasses both the 'concepts of "effective remedy" and "reparation"'.¹⁰³

Effective remedy rights and obligations in regional human rights treaties are similar to those on the international level. The ACHR for

97 CMW GC 1 para 18.

98 CMW GC 1 paras 21 & 26(c).

99 ICCPR art 2(3).

100 CEDAW art 2(c).

101 CERD art 6.

102 See eg Charter Committee on Poverty Issues 'Right to effective remedies. Review of Canada's Fourth and Fifth Periodic Reports under the ICESCR' (May 2006) 33, according to which failure to guarantee effective remedies constitutes a violation of CESCR art 2.

103 CAT art 14(1).

example contains a very inclusive 'right to judicial protection' in its article 25, which should be 'simple and prompt ... or any other effective recourse'.¹⁰⁴ States have a correlating duty to ensure this right, to develop systems of judicial protection and to enforce remedies when granted.¹⁰⁵ The Inter-American Court of Human Rights (IACHR) has repeatedly highlighted the importance of this guarantee being 'one of the basic mainstays, not only of the American Convention, but also of the rule of law in a democratic society'.¹⁰⁶

The European Convention on Human Rights (ECHR) equally provides for a right to an effective remedy in article 13 ECHR. This provision is, however, narrower in scope than article 25 ACHR for two reasons. First, the understanding of remedy in the Inter-American system is 'strictly *judicial*',¹⁰⁷ meaning recourse to a court or tribunal, whereas article 13 ECHR demands an 'effective remedy before a national authority'.¹⁰⁸ Provided safeguards of independence, impartiality and procedure are in place, national authorities able to offer effective remedies are not limited to judicial bodies but may also be, for example, quasi-judicial or administrative bodies.¹⁰⁹ Second, the Inter-American understanding of a remedy is that of an autonomous right, making it independent of the violation of a substantive right under the ACHR; the right to recourse in fact is extended, spanning also to 'protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned'.¹¹⁰ Article 13 ECHR, on the contrary, is linked to the victim having an 'arguable' claim regarding a violation of one of the substantive provisions as protected under the ECHR.¹¹¹

The ACHPR on the other hand does not *expressis verbis* provide for a right to effective remedy, yet the jurisprudence of the African Commission has arguably developed this right in practice.¹¹² In addition, article 7(1) ACHPR sets forth that every individual has the 'right to have his cause heard', including the right to appeal 'to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.

Summing up, the obligations under the ICRMW at times duplicate what is provided for at the national and regional level with respect to

104 ACHR art 25(1).

105 ACHR art 25(2).

106 *Maritza Urrutia v Guatemala* IACHR (27 November 2003) Ser C/No 103, para 117; *Ivcher-Bronstein v Peru* IACHR (6 February 2001) para 135.

107 L Burgogue-Larsen & A Ubada De Torres *The Inter-American Court of Human Rights: Case law and commentary* (2011) 678.

108 Burgogue-Larsen & Ubada De Torres (n 107 above) 679.

109 Burgogue-Larsen & Ubada De Torres (n 107 above) 679, n 12.

110 Burgogue-Larsen & Ubada De Torres (n 107 above) 680-681.

111 O de Schutter *International human rights law* (2014) 813.

112 GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442.

access to justice and effective remedy requirements. However, in situations where its substantive provisions offer more protection than other instruments, as well as given that the Convention is the only international human rights treaty specifically addressing the human rights of migrant workers and their families, the provision is both novel and vital. This short comparative analysis demonstrates first, the overarching importance of the right to an effective remedy and correlative duties, and second the comprehensive way in which the Convention provides for such a right. This becomes ever more visible from a recent report on severe labour exploitation, where it was found that while access to justice is important to victims, being 'able to stay and to make a living'¹¹³ is the highest priority for migrant workers from third countries as well as those from within the EU. Closely intertwined with this prioritisation is the main reason for victims not reporting exploitation in the work place: fear of having to leave the country.¹¹⁴ In practice, this means that victims of human rights violations will frequently not seek redress for violations of their rights, report abuse or engage in any kind of activity that would put them at 'risk' of interaction with national authorities. Thus, fear of removal from the country of employment frequently undermines the realisation of human rights, and may for instance result in victims deciding not to seek remedies for abuses, or not to seek medical care or support notwithstanding a need to access medical services. This highlights the need for a comprehensive, integrated approach to migrants' rights which takes into account the entire reality of migrant workers' lives and includes effective enforcement mechanisms to ensure that rights are guaranteed in practice.

4.2 Access to international enforcement mechanisms

Another important provision in this context is article 77, providing for the competence of the CMW to receive and consider communications from individuals who claim to have suffered violation of their rights as set out in the Convention. The provision however requires ten state parties to accept the Committee's competence under article 77 in order for the individual complaint mechanism to enter into force. So far, however, only four states have submitted declarations of the sort.¹¹⁵

This though does not mean that migrant workers do not currently see their rights recognised in the work of other UN treaty bodies. On the contrary, the individual complaints mechanism under CEDAW is accessible for documented and undocumented women migrant workers,

113 Fundamental Rights Agency (FRA) 'Severe labour exploitation. Workers moving within or into the EU' (2015) 117.

114 FRA (n 113 above) 75.

115 By January 2017, El Salvador, Guatemala, Mexico and Uruguay had made declarations recognising the competence of the Committee to receive communications from or on behalf of individuals subject to their jurisdiction claiming violation of their individual rights as established by the Convention.

imposing relatively wide obligations on state parties. The CEDAW Committee reiterated this point in a decision in July 2013, stating that the:

*[O]bligations of States parties [should be] applied without discrimination both to citizens and non-citizens, including refugees, asylum seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory.*¹¹⁶

A tangible example of such state obligations is CEDAW's guarantee to expand domestic labour protection to women migrant workers which, according to Hainsfurther, will necessarily have a bearing on labour protection afforded to undocumented women migrant workers. While states have no obligation to provide employment for undocumented women migrant workers, CEDAW read in conjunction with Advisory Opinion 18, obliges states to, once they have entered into employment, guarantee labour rights.¹¹⁷ CEDAW applies to rights violations directly attributable to states as well as those resulting from acts of private actors, thus also including for instance recruitment agencies and private employers.¹¹⁸ Consequently, CEDAW offers safeguards for women migrant workers once a discriminatory element exists,¹¹⁹ be it through, inter alia, abusive private acts, states' failure to monitor recruitment and employment, or the denial of access to justice.¹²⁰

In addition to the CEDAW Committee's General Recommendation 26 on Women Migrant Workers adopted in 2008, as well as its numerous concluding observations dealing with the rights of women migrant workers,¹²¹ several UN treaty bodies have explicitly mentioned migrant workers in their concluding observations; for example with respect to the practice of withholding workers' identity documents, such as the HRC,¹²² the Committee on ESCR,¹²³ as well as the CERD Committee.¹²⁴ As regards individual complaints, treaty bodies less explicitly use the terminology 'migrant workers', though they do address their rights when breached. Examples include the CERD Committee, which found a violation of workplace rights in a case concerning dismissal of a pregnant

116 *YW v Denmark*, CEDAW Committee (2 March 2015) Communication No 51/2013 (emphasis added).

117 See J Hainsfurther 'A right-based approach: Using CEDAW to protect the human rights of migrant workers' (2008-2009) 24 *American University International Law Review* 844J

118 Hainsfurther (n 117 above) 873.

119 Hainsfurther (n 117 above) 859.

120 Hainsfurther (n 117 above) 874.

121 Hainsfurther (n 117 above) 860.

122 Concluding Observations on the Republic of Korea, HRC (28 November 2006), UN Doc CCPR/C/KOR/CO/3 (2006) para 12; Concluding Observations on Thailand, HRC (8 July 2005), UN Doc CCPR/CO/84/THA (2005) para 23.

123 Concluding Observations on Kuwait, Committee on ESCR (7 June 2004), UN Doc E/C.12/1/Add.98 (2004) para 17.

124 Concluding Observations on Lebanon, CERD Committee (1998) UN Doc A/53/18 paras 175 & 184; Concluding Observations on Italy, CERD Committee (16 May 2008), UN Doc CERD/C/ITA/CO/15 (2008) para 17.

woman migrant worker,¹²⁵ and the CAT Committee, which has, in a case against Sweden, paid attention to several steps of the labour migration and subsequent asylum process of a migrant worker and his family;¹²⁶ as well as a similar communication of the HRC concerning a variety of rights violations of members of a stateless family of Palestinian origin who, having lived and worked in Libya, alleged to have faced discriminatory treatment and abuse due to their ethnic and migration status.¹²⁷

The present use of international fora for the enforcement of migrant workers' rights shows two things: first, that there is a need for an international body that represents an additional layer of protection once national institutions and guarantees have proven to be ineffective or even absent; and second, that currently migrant workers' rights are being dealt with via UN treaty bodies other than the CMW. Consequently, in the occurrence of a violation, victims will try to access a competent body beyond the national level to seek access to justice for rights violations.

In this light, the entry into force of the Convention's individual complaint mechanism would be beneficial both to rights holders and states alike. A single competent body on the international level with a mandate to receive individual communications will create greater legal certainty for all: the migrant workers who will naturally be drawn to an institution that has specific expertise to deal with rights abuses suffered by him or her; as well as for concerned states, who will receive clear, consistent guidelines and recommendations, which, in turn, will make possible adequate, rights-based policy responses.

5 Conclusion

The need to assess whether and to what extent the Convention has a value per se has arisen from the criticism that has been made regarding its worth and usefulness in the context of the entire system applicable to the protection of migrant workers' rights.¹²⁸

The analysis carried out in the previous sections has shed light on the background to this debate and has provided arguments to support the proposition that not only has the Convention a value in itself, but it also has an added value that acquires even greater relevance when compared to other established international and regional instruments.

125 *Yilmaz-Dogan v the Netherlands* CERD Committee (29 September 1988) Communication No 1/1984.

126 *MAMA et al v Sweden* CAT Committee (23 May 2012) Communication No 391/2009.

127 *AMH El Hojouj JumNo 391/2 v Libya* HCR (21 July 2014) Communication No 1958/2010.

128 Ryan (n 26 above) 492.

As a matter of fact, the varied range of rights covered in this contribution shows that while each cluster of human rights has been enshrined as duties and rights in other existing provisions of international and regional human rights law, the Convention goes a step further. Notably, it is unique in the sense that it sets up a comprehensive system which does not merely link in different categories of rights, such as civil and political or economic, social and cultural rights, but rather it addresses a specific group which no other international human rights treaty deals with exclusively – the migrant worker and his or her family.

This in itself has an added value, namely, the creation of a coherent mechanism in order to protect a broad category of migrants, thus acknowledging its peculiar needs and inherent vulnerability. While some of the articles in the Convention may duplicate existing rights provisions, others complement the rights enshrined in other human rights instruments. The comprehensive and inclusive nature of the Convention results in a situation where first, the human rights of migrant workers are highlighted, and second, where states explicitly have corresponding duties.

Further, the detailed nature of the Convention has to be emphasised. Containing 93 articles, this document is the longest of the ten core international human rights instruments.¹²⁹ Whereas this may be raised as an obstacle to ratification in the sense that it would make implementation of the treaty challenging as it describes individuals' rights and correlative state duties, it simultaneously creates a balance between these two poles in a twofold way: First, the focus of the Convention is on the rights and welfare of migrant workers and their families, specifically taking a holistic view of the migrant experience, particularly as it covers all stages of the migration process and stresses the value of work as such as the driver of migration. Second, the Convention acknowledges the diversity of national legal frameworks and grants states a certain margin of appreciation, for instance by acknowledging the role of national legislation on certain issues and by phrasing some of its provisions as recommendations rather than obligations.

All these elements considered together contribute to determine the ultimate added value of the Convention that, in a nutshell, can be described as follows: a compilation of existing rights of migrant workers under international human rights law, welded together with a number of additional guarantees as necessitated by the specific vulnerability of migrant workers,¹³⁰ and supported by a specific institutional framework,

129 A Desmond 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 45.

130 D'Auchamp (n 36 above) 11.

to form the most holistic international human rights catalogue applicable to anyone leaving their country of origin to work in another country.

Acknowledging and upholding such value appears particularly relevant today. First, mobility, particularly for reasons of carrying out remunerated activities, continues to rise in our globalised and conflict-stricken world. Second, and paradoxically so, this comes at a time when migrants' rights are neglected and migration is very often addressed only as a 'problem' rather than an opportunity – both for states and individuals. It is this inherent added value that, after nearly 30 years, makes the Convention all the more worthy of the support and attention of civil society, academia and the political world.

Ryszard Cholewinski

1 Introduction

It is often said that legally binding standards and the institutional governance of international migration do not sit well together. When it comes to the admission of migrant workers into their territories and labour markets, governments generally prefer flexible policies that can be tailored in response to changing economic conditions. The existence of and need for binding international legal standards to regulate the conditions under which migration takes place and the treatment of migrants is therefore viewed with considerable suspicion and scepticism, and sometimes with downright hostility. This also reflects the preference by governments to engage in forums outside of the United Nations, which are state-led, voluntary, informal and non-binding, and which give limited space to non-state actors such as social partners, migrant associations and other civil society organisations.¹

This approach, however, gives far too much room to the role and importance of state sovereignty in the regulation of the movement of

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1 See JB Grugel & N Piper 'Global governance, economic migration and the difficulties of social activism' (2011) 26 *International Sociology* 435; Report by the Special Rapporteur on the human rights of migrants, François Crépeau: Global migration governance, GA (5 August 2013), UN Doc A/68/283 (2013)22 para 121: 'Migration governance is becoming increasingly informal, ad hoc, non-binding and state-led, falling largely outside the United Nations framework in such forums as the Global Forum on Migration and Development and regional consultative processes. This leads to a lack of accountability, monitoring and oversight and the absence of a relationship with the formal normative monitoring mechanisms established within the United Nations.' This is slowly changing, however, with the commitment by UN member states at the UN Summit to Address Large Movements of Refugees and Migrants in September 2016 to adopt a Global Compact for Safe, Orderly and Regular Migration under UN auspices in 2018. New York Declaration for Refugees and Migrants, GA (3 October 2016), UN Doc A/RES/71/1 (2016) para 63.

persons. Given its transnational nature, regulation of migration cannot solely be the concern of individual states, which can no longer be neatly divided into destination, transit and origin countries. According to the International Labour Organisation (ILO), the movement of persons, especially working women and men, is an integral characteristic of globalisation that is reshaping the world of work in profound ways.² International migration is now also recognised as a key feature of global development. In September 2015, the UN General Assembly adopted the 2030 Agenda for Sustainable Development,³ which is aimed at all countries, both developing and developed, and pledges to leave ‘no one behind’.⁴ While migration was not a part of the Millennium Development Goals (MDGs), adopted in 2000, it features in a number of places in the 2030 Agenda, thus affirming the important link between migration and global development.⁵ The Sustainable Development Goals (SDGs), in SDG 10 on reducing inequality within and amongst countries, contain the following target: ‘Facilitate orderly, regular, safe and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies’.⁶ While the contours of this target remain to be articulated more clearly, the meaning of the other key target referencing migration and specifically migrant workers, which is found in SDG 8 on promotion of ‘sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all’, is unequivocal: ‘Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment’.⁷ Implicit in the former target is the understanding that the admission of foreigners or migrants, including migrant workers, to the territory remains in the purview of states, although this has to be realised in a safe and regular way, including through planned and well-managed migration policies. ‘One-size fits all’ policies, however, are not the answer as these need to be tailored to the specific circumstances of migration, either to or from a country (or both), with reference to the sub-regional or regional context. On the other hand, protection of the labour rights of all workers, including migrant workers, in the latter target is viewed as the concern of

2 ILO Declaration on Social Justice for a Fair Globalization, 2008, International Labour Conference, 97th Session, adopted on 10 June 2008, Preamble, Recital 2. For the text, see http://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang-en/index.htm (accessed 26 June 2016).

3 Resolution 70/1: Transforming our world: The 2030 Agenda for sustainable development, GA (25 September 2015), UN Doc A/RES/70/1 (2015).

4 n 3 above, Preamble, Recital 2.

5 The 2030 Agenda Declaration recognises (n 3 above para 29): ‘[T]he positive contribution of migrants for inclusive growth and sustainable development’ and that ‘international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses’.

6 n 3 above, SDG Target 10.7.

7 n 3 above, SDG Target 8.8.

the entire international community, with the result that a level playing-field of minimum international standards is essential.

These minimum international standards have already been developed. They are found in international labour law and international human rights law, and in the specific instruments adopted to protect migrant workers and their families. Consequently, the application of flexible migration policies in accordance with changing economic conditions that do not give sufficient attention to the human and labour rights of migrant workers are the antithesis of global sustainable development in all of its dimensions. In this sense, the need to protect ‘the interests of workers when employed in countries other than their own’, as highlighted in the ILO Constitution almost 100 years ago,⁸ has come full circle. The Constitution also proclaimed that ‘universal and lasting peace can be established only if it is based upon social justice’⁹ and the Declaration of Philadelphia concerning the aims and purposes of the ILO, adopted in 1944 and annexed to the ILO Constitution, underscores that ‘labour is not a commodity’.¹⁰ When applied to the situation of migrant workers, these principles resonate very strongly with the 2030 Agenda for Sustainable Development, which pledges that ‘no one will be left behind’ and underscores in SDG 8 that economic growth and decent work are closely interrelated.¹¹

This chapter seeks to highlight the complementarities between international labour standards and human rights law in protecting migrant workers. These systems of law are not mutually exclusive and overlap in important areas. They have also both given specific consideration to migrant workers. As non-citizens with a restricted immigration status and often working in precarious and low-wage occupations, women and men migrant workers are particularly at risk of exploitative conditions and discrimination. The chapter assesses the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)¹² and its synergies with the specific instruments to protect migrant workers previously adopted by the ILO’s International Labour Conference, namely the Migration for Employment Convention (Revised), 1949 (No 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143), and their accompanying non-binding Recommendations Nos 86 and 151.¹³ It is important to view these

8 ILO Constitution, 1919 (as amended). For the text, see http://www.ilo.org/dyn/normlex/en/f?p=1000:62:3632631635012707::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (accessed 26 June 2016).

9 n 8 above, Preamble, Recital 1.

10 International Labour Conference, 26th Session, Declaration concerning the aims and purposes of the ILO, Philadelphia (10 May 1944); ILO Constitution (n 8 above) para 1(a).

11 2030 Agenda for Sustainable Development (n 3 above) Preamble Recital 2 and SDG 8.

12 GA (18 December 1990), UN Doc A/RES/45/158 (1990).

13 For the texts, see ILO NORMLEX – Information System on International Labour Standards <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO> (accessed 26 June 2016).

instruments along a historical continuum and as mutually reinforcing.¹⁴ While there are varying rates of state ratifications for each of these instruments, it is arguable that the fullest level of protection of migrant workers can only be achieved with ratification and effective implementation of all three,¹⁵ as each instrument contains unique provisions which are not necessarily found in the other two. Similarly, and as discussed below, the work of the ILO supervisory system and the ICRMW's supervisory body, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter 'the Committee'),¹⁶ is also mutually reinforcing. This is evident from the Committee's consideration of state party reports, the two General Comments it has adopted to date on migrant domestic workers and the rights of migrant workers in an irregular situation and members of their families, and the days of general discussion held by the Committee that have addressed the linkages between migration and development, the rights of migrant domestic workers, the rights of migrant workers in an irregular situation, the role of migration statistics, and labour exploitation of migrant workers.

2 International labour standards and human rights

While international labour law and international human rights law are two distinct branches of law, they are closely related and indeed overlap. The ILO fundamental principles and rights at work found in the eight core conventions of the ILO addressing trade union rights, abolition of forced labour, elimination of child labour and non-discrimination in employment and occupation¹⁷ are also reflected in the specific provisions of the core international human rights instruments, and particularly the Universal Declaration of Human Rights (Universal Declaration) and the two International Covenants on Civil and Political Rights (ICCPR) and

14 Indeed, 2015 was also the 40th anniversary of the adoption of Convention No 143, while 2014 was the 65th anniversary of the adoption of Convention No 97.

15 The ICRMW (n 12 above) has been ratified by 51 state parties, while 49 and 23 state parties have ratified Convention No 97 and Convention No 143 respectively, although only five countries (Albania, Bosnia and Herzegovina, Burkina Faso, Philippines, Tajikistan) have ratified all three Conventions.

16 For a comprehensive overview of the functions and work of the Committee, see V Chetail 'The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' in P Alston & F Megret (eds) *The United Nations and human rights: A critical appraisal* 2nd ed (forthcoming 2018). For an earlier article by the former Secretary to the Committee, see C Edelenbos 'Committee on Migrant Workers and implementation of the ICRMW' in P de Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 100-121.

17 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Forced Labour Convention, 1930 (No 29) and its 2014 Protocol; Abolition of Forced Labour Convention, 1957 (No 105); Minimum Age Convention, 1973 (No 138); Worst Forms of Child Labour Convention, 1999 (No 182); Equal Remuneration Convention, 1951 (No 100); Discrimination (Employment and Occupation) Convention, 1958 (No 111). The ILO Declaration on Fundamental Principles and Rights at Work, adopted

Economic, Social and Cultural Rights (CESCR).¹⁸ Indeed, when it comes to trade union rights, the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) is expressly referred to in the respective provisions of both Covenants.¹⁹

Moreover, the International Labour Conference has clearly underscored that ILO fundamental principles and rights at work are human rights.²⁰ Many of the other international labour standards can also be encapsulated in general human rights law, particularly economic and social rights, such as the rights to work, to enjoyment of just and favourable conditions of work, to social security, and to the enjoyment of the highest attainable standard of physical and mental health.²¹

This close interaction between human rights and labour rights was reiterated by the ILO Director-General in his statement on Human Rights Day on 10 December 2015:

The ILO continues to highlight the fundamental connection between human rights and labour rights and the realization of decent work for all: work carried out in conditions of freedom, equity, security and human dignity.

The provisions of the two Covenants echo the fundamental principles and rights at work concerning freedom from child labour and forced labour, freedom from discrimination at work and freedom of association and collective bargaining. They are enabling rights, underpinning fairness and justice in the world of work. The related ILO Conventions form an integral part of the United Nations' overall human rights framework.²²

These rights are clearly very relevant to the protection of migrant workers and the fair governance of labour migration. Indeed, when the

by the International Labour Conference at its 86th Session in June 1998, stipulates that 'all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions' (para 2). For the text of the Declaration, see <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (accessed 26 June 2016).

18 See respectively GA Resolution 217 A (III) (10 December 1948), UN Doc 999 UNTS 171; 999 UNTS 3.

19 See ICCPR (n 18 above) art 22(3) & CESCR (n 18 above) art 8(3).

20 International Labour Conference, 101st Session Resolution concerning the Recurrent Discussion on Fundamental Principles and Rights at Work Geneva (2012) Conclusions, para 5, reaffirming the particular significance of fundamental principles and rights at work 'both as human rights and enabling conditions for the achievement of the other ILO strategic objectives'. The Conclusions also acknowledged the fact that certain population groups, including migrant workers, 'are more exposed to violations of fundamental principles and rights at work than others' (para 11).

21 CESCR (n 18 above) arts 6, 7, 9 & 12 respectively.

22 'The fundamental connection between human rights and labour rights' Statement of the ILO Director-General on Human Rights Day (10 December 2015) http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_434604/lang-en/index.htm (accessed 26 June 2016).

independent ILO Committee of Experts on the Application of Conventions and Recommendation (hereafter 'Committee of Experts') conducted a General Survey on the eight ILO fundamental conventions in 2012, migrant workers were identified as one of the population groups subject to particular risks from violations of the rights in these instruments, especially violations relating to forced labour and equality of opportunity and treatment and non-discrimination.²³ Further attention is devoted to this question in the Committee of Experts' most recent General Survey on the ILO migrant worker instruments, which notes that the obligation to respect the 'basic human rights of all migrant workers' in article 1 of Convention No 143 includes, amongst other human rights, the 'fundamental rights at work as embodied in the eight ILO fundamental Conventions and reaffirmed in the ILO Declaration on Fundamental Principles and Rights at Work, 1998'.²⁴ Moreover, in examining the government reports on the application of the ILO fundamental Conventions, the Committee of Experts has also drawn attention to 'the particular vulnerability of women migrant workers, especially those employed in occupations such as domestic work, agriculture, manufacturing and the entertainment industry, to violations of their basic human rights'.²⁵

3 ILO Conventions on migrant workers and the ICRMW

The specific instruments adopted to govern labour migration and protect migrant workers each have their particular historical context. The adoption of both ILO Conventions was informed by turbulent events affecting Europe in particular. Convention No 97, which was a revised version of an earlier Convention adopted in 1939 (but never ratified),²⁶ has a 'the equality of treatment between national workers and migrant workers moving from countries with labour surpluses to those with labour shortages, a particular feature of much of western Europe in the aftermath of World War II. Convention No 97 was only concerned with migrant workers moving in accordance with the laws at the time, who constituted the bulk of such workers, and thus does not apply to migrant workers in irregular status. The context for the adoption of Convention No 143 was very different. The oil crisis of 1973 and the subsequent economic recession, resulting in a stop on labour migration to western Europe, gave rise to increased incidences of clandestine or irregular migration and

23 International Labour Conference, 101st Session, 'Giving globalization a human face' General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization (2012) paras 295 & 776-781.

24 International Labour Conference, 105th Session, 'Promoting fair migration' General Survey concerning the migrant workers instruments (2016) para 276.

25 ILO (n 24 above) para 280.

26 ILO Migration for Employment Convention, 1939 (No 66).

related abuses at the hands of human traffickers and migrant smugglers, although the difference between trafficking and smuggling, with the definition of 'trafficking in persons' focused on the purpose of exploitation, was only fully articulated in separate instruments adopted by the UN in 2000.²⁷ While strengthening the provisions on equal treatment for migrant workers in a regular situation,²⁸ Convention No 143 also seeks to address irregular migration, including through member obligations to respect the basic human rights of all migrant workers, including those in irregular status, and in collaboration with other Members.²⁹ Indeed, the context for the adoption of Convention No 143 is not too dissimilar from that leading up to the genesis of the ICRMW in the concern with the increasing violations of the human rights of all migrant workers, including those in irregular status, discrimination and lack of equality of treatment, and the need for inter-state co-operation to ensure sound, equitable, lawful and humane conditions in connection with the international migration of workers.³⁰ While both instruments apply to all migrant workers, the ICRMW provides a considerably more complete list of rights in Part III drawing on those found in the ICCPR and CESCR in particular, although there are some inconsistencies, especially in regard to trade union rights, which have since been clarified in the Committee's General Comment 2, discussed in Section 4.2 of the chapter below.

In terms of process, an important difference was that Convention No 143 was negotiated relatively quickly, while ICRMW took just over ten years to gestate because of lengthy and arduous negotiations resulting in its adoption by the General Assembly on 18 December 1990. Moreover, as with most of the other core international human rights instruments,³¹ 20 ratifications were required for its entry into force, with the result that the ICRMW only came into force around 13 years later in July 2003. In contrast, Convention No 143 came into effect much sooner (9 December

27 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, UN General Assembly Resolution 55/25 of 15 November 2000. Under the former Protocol, 'trafficking in persons' is defined as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs' (art 3(a)). The latter Protocol defines 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident' (art 3(a)).

28 Convention No 143 (n 13 above) Part II on Equality of Opportunity and Treatment.

29 n 13 above, arts 1 & 3 respectively.

30 ICRMW (n 12 above) Parts II, III, IV & VI.

31 With the exception of the ICCPR (n 18 above) and CESCR (n 18 above) in respect of which 35 ratifications were required for their entry into force.

1978) as only two ratifications are required for the entry into force of ILO conventions.

As observed in the literature relating to the drafting of the ICRMW, there was a lively debate whether it was even needed given that the ILO is the specialised UN agency responsible for the world of work with a mandate to establish minimum international norms in this area, as indeed has been noted above, and the risk of duplication or conflict with the ILO standards that had already been adopted,³² namely Conventions Nos 97 and 143 and their accompanying Recommendations. Nonetheless, it was argued by the UN expert appointed to study the migrant workers' question that the elaboration of future instruments relating to migrant workers should involve the UN 'to ensure that all humanitarian aspects of the problem are covered' and that the ILO had acknowledged that its competence to deal with human rights in general was limited.³³ The scope of ILO's mandate when it comes to the protection of migrant workers is insufficient to provide protection in its fullest sense, particularly in relation to social and cultural rights not directly linked to the workplace, such as rights to education, culture and housing. In this sense, therefore, a broader instrument was justified in light also of the tendency to supplement the International Bill of Rights³⁴ with specific instruments aimed at the protection of the human rights of certain categories of human beings who are seen as particularly vulnerable. Consequently, the decade between 1979 and 1989 saw the adoption of specific human rights treaties on the Elimination of All Forms of Discrimination against Women and the Rights of the Child.³⁵

While the wish to ensure the broadest protection possible for migrant workers justified therefore the negotiation of an instrument within the UN, the choice of this forum also had its disadvantages, which is reflected in a

- 32 M Hasenau 'Setting norms in the United Nations system: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in relation to ILO in standards on migrant workers' (1990) 28 *International Migration Review* 133; R Böhning 'The protection of migrant workers and international labour standards' (1988) 26 *International Migration* 133; R Böhning 'The ILO and the new UN Convention on Migrant Workers: The past and future' (1991) 25 *International Migration Review* 698. See also R Cholewinski *Migrant workers in international human rights law: Their protection in countries of employment* (1997) 141-142 and C Edelenbos 'Committee on migrant workers and implementation of the ICRMW' in De Guchteneire et al (n 16 above) 115.
- 33 Cholewinski (n 32 above) 140, citing Exploitation of labour through illicit and clandestine trafficking (Draft recommendations submitted by Mrs Halima Embarek Warzazi, Rapporteur), ECOSOC (9 September 1975) UN Doc E/CN.4.Sub.2/L.636 (1975) 1.
- 34 The term often used to describe the Universal Declaration (n 18 above), the ICCPR (n 18 above) and CESCR (n 18 above) as a package containing the principal human rights.
- 35 See respectively Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (18 December 1979), and the Convention on the Rights of the Child, 1577 UNTS 3 (20 November 1989). Subsequently, the Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (13 December 2006) was also adopted.

number of weaker provisions in the eventual text of the ICRMW adopted by the General Assembly in 1990 as compared with equivalent clauses in the two ILO Conventions.³⁶ International human rights treaties in the UN are negotiated between governments, while in the ILO representative employer and worker organisations also play an important role, alongside governments (represented by the labour ministries) in the negotiation and adoption of international labour standards. Consequently, the ICRMW reflects a compromise view of states, while ILO Conventions Nos 97 and 143 reflect a broader compromise between governments and social partners. While the ILO, in an observer capacity, played an important role in the negotiations on the text of the ICRMW, and was thus able to influence it, such a role is very different from the ‘decision-making’ or ‘voting’ function that employer and worker delegates had in deliberations over the two ILO Conventions concerning migrant workers.³⁷ This distinction needs to be kept in mind when considering the texts of the ICRMW vis-à-vis those of ILO Conventions Nos 97 and 143 and is also the reason why it is important that all three legally binding texts should be considered together.

4 ILO and the Committee on Migrant Workers: A mutually reinforcing relationship

Part VII of the ICRMW is concerned with its application in state parties and the treaty body established to achieve this, namely, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Given the close synergies between ILO’s work on migrant workers and the ICRMW, the ILO features explicitly in this part of the ICRMW addressing its supervision.³⁸ A sharing of information between the ILO supervisory system and the Committee is mandated in Part VII of

36 See eg in particular the provisions addressing trade union rights (arts 26 & 40), access to employment for documented migrant workers and members of their families (arts 52 & 53), and the important function of social dialogue which is largely absent from the ICRMW, with the exception of a reference in art 33(1)(b) to the possible role of trade unions and employers in dissemination of information to migrant workers.

37 Indeed, the influential role played by social partners and particularly trade unions in the standard-setting work of the ILO was one of the reasons why some developing countries wished to negotiate the Convention under UN auspices where they also have an ‘automatic majority’. See R Böhning ‘The ILO and the New UN Convention on Migrant Workers: The past and future’ (n 32 above) 700-701.

38 As noted by V Chetail ‘The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families’ in Alston & Mégret (n 16 above) 3, however, the Committee almost did not come into existence because a number of, mostly Western, countries took the view that the ILO should assume the supervisory function for the ICRMW. He cites (n 16 above, at n 12), the view of the United States which supported such a role for the ILO in the light of its ‘lengthy experience’ and its monitoring ‘machinery ... through a detailed reporting system and well-established system of direct contacts with member states’. Working Paper presented by the United States of America, UN Doc A/C.3/35/WG.1/CRP.6 (19 November 1980), para 11(d), Annex VI to the Report of the Open Working Group, UN Doc A/C.3/35/13 (25 November 1980).

the ICRMW, with the UN Secretary-General required to transmit the state reports submitted under the ICRMW and related information to the ILO Director-General.³⁹ The Committee is also obliged to invite the ILO to appoint officials to participate, in a consultative capacity, in the Committee's meetings.⁴⁰ This section of the chapter describes how this interaction between the ILO and Committee takes place in practice with reference to the consideration of state party reports, the preparation of general comments, days of general discussion as well as the organisation of other events by, or in collaboration with, the Committee.

4.1 Consideration of state party reports

While, as noted above, the UN Secretary-General is required to transmit state party reports and related information to the ILO Director-General, he also has the discretion, in consultation with the Committee to send such reports to other specialised agencies and organs of the UN as well as intergovernmental organisations, and to invite them to be present in meetings.⁴¹ In practice, the Committee holds a 'closed door' meeting with interested UN (normally ILO, the Office of the UN High Commissioner for Human Rights (OHCHR), the UN High Commissioner for Refugees (UNHCR), and the International Organisation for Migration (IOM), which became a related agency of the UN in September 2016) and requests them to provide any relevant information in respect of those state parties which have submitted reports or have been requested to submit them. In the case of the ILO, this information includes a compilation of recent observations or direct requests⁴² to those governments by the principal ILO supervisory body, the independent Committee of Experts, concerning labour migration and the protection of migrant workers in respect of relevant ILO instruments ratified by them. In addition to Conventions Nos 97 and 143, there may also be references to observations and direct

39 ICRMW (n 12 above) art 74(2): 'The Secretary-General of the United Nations shall, in due time before the opening of each regular session of the Committee, transmit to the Director-General of the International Labour Office copies of the reports submitted by states parties concerned and information relevant to the consideration of these reports, in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the present Convention that fall within the sphere of competence of the International Labour Organisation. The Committee shall consider in its deliberations such comments and materials as the Office may provide'.

40 ICRMW (n 12 above) art 74(5).

41 ICRMW (n 12 above) art 74(6). In practice, the reports and related information are made available, soon after they have been received, on the Committee's website <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx> (accessed 26 June 2016).

42 'Observations contain comments on fundamental questions raised by the application of a particular Convention by a state. These observations are published in the Committee's annual report. Direct requests relate to more technical questions or requests for further information. They are not published in the report but are communicated directly to the governments concerned'. See *Rules of the game: A brief introduction to international labour standards* rev ed (2014) 102. All the observations and direct requests are accessible from ILO NORMLEX (n 13 above).

requests concerning migrant workers under the eight ILO fundamental conventions, or other relevant instruments, such as the Domestic Workers Convention, 2011 (No 189) and the Private Employment Agencies Convention, 1999 (No 181), which contains important provisions relating to the recruitment of migrant workers,⁴³ or specific technical conventions such as those relating to social security⁴⁴ or others such as the Nursing Personnel Convention, 1977 (No 149). Information on pertinent technical co-operation projects implemented by the ILO in the countries concerned is also normally provided.⁴⁵

In recognition of the broader international framework for the protection of migrant workers, these instruments are also commonly referenced in the Concluding Observations prepared by the Committee after consideration of a state party's report. Indeed, in its first ever Concluding Observation, to Mali, in May 2006, the Committee called upon that country to accede to Conventions Nos 97 and 143.⁴⁶ Moreover, the Committee also calls upon the state parties concerned, if they have not already done so, to ratify the eight ILO fundamental rights conventions, Conventions Nos 181 and 189,⁴⁷ as well as other ILO Conventions.⁴⁸ However, references by the Committee in its Concluding Observations to

43 NORMLEX (n 13 above). Convention No 181, art 7(1), contains the important principle that recruitment fees or costs should not be charged to workers, including migrant workers ('Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers'), while art 8(1) obliges a member, 'after consulting the most representative organizations of employers and workers, [to] adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies'.

44 See in particular the ILO Equality of Treatment (Accident Compensation) Convention, 1925 (No 19), the Social Security (Minimum Standards) Convention, 1952 (No 102) and the Equality of Treatment (Social Security) Convention, 1962 (No 118).

45 Eg the ILO project on 'Enhancing the governance of labour migration and the protection of migrant workers' rights in Tunisia, Morocco, Egypt and Libya (2013-2016)' (IRAM), funded by the Swiss Agency for Development and Cooperation (SDC). For more information on the project, see http://www.ilo.org/global/topics/labour-migration/projects/WCMS_226517/lang-en/index.htm (accessed 26 June 2016).

46 Concluding Observations on the initial report of Mali, CMW (31 May 2006), UN Doc CMW/C/MLI/CO/1 (2006) 3, para 11. See also C Edelenbos 'Committee on Migrant Workers and implementation of the ICRMW' in De Guchteneire et al (n 16 above) 107.

47 See eg Concluding Observations on the initial report of Timor-Leste, CMW (8 October 2015), UN Doc CMW/C/TLS/CO/1 (2015) in which the Committee (3, para 16) recommends that the state party consider ratifying or acceding, as soon as possible, to ILO Conventions Nos 97, 143 and 189; Concluding Observations on the initial report of Guinea, CMW (8 October 2015), UN Doc CMW/C/GIN/CO/1 (2015), in which the Committee (2-3, para 12) encourages the state party to consider acceding, as soon as possible, to ILO Conventions Nos 97, 181 and 189 (Guinea has ratified Convention No 143). See also Concluding Observations on the initial report of Turkey, CMW (2 May 2016), UN Doc CMW/C/TUR/CO/1 (2016) in which the Committee (4, paras 19-20), recommends that Turkey consider ratifying ILO Conventions Nos 97, 143, 181 & 189.

48 Eg in Concluding Observations on Cabo Verde in the absence of a report, CMW (8 October 2015), UN Doc CMW/C/CPV/CO/1 (2015) and Concluding

the observations and direct requests of the ILO Committee of Experts have been much less frequent.⁴⁹ For example, the Committee referred explicitly to one of the direct requests of the Committee of Experts in its Concluding Observation on Bosnia and Herzegovina, in relation to article 33 of the ICRMW on the right of all migrant workers to information:

The Committee notes the existence of public employment services which provide information on migration. The Committee, however, notes (as did the ILO Committee of Experts on the Application of Conventions and Recommendations in its Direct request of 2008 in relation to the Migration for Employment Convention (Revised), 1949 (No 97)), that the existence of official information services in itself is not enough to guarantee that migrant workers are sufficiently and objectively informed on migration-related issues. The Committee reiterates the concern of the ILO Committee of Experts that there is inadequate protection for migrant workers from misleading information from intermediaries who might have an interest in encouraging migration in any form, regardless of the consequences for the workers involved.⁵⁰

4.2 General Comments

To date, and as noted in the Introduction, the Committee has adopted two General Comments on migrant domestic workers and the rights of migrant workers in an irregular situation and members of their families.⁵¹ In accordance with the obligation in article 74 of the ICRMW, ILO officials

Observations on the initial report of the Seychelles, CMW (14 September 2015), UN Doc CMW/C/SYC/CO/1 (2015); the Committee (3, paras 14-15 & 3, paras 12-13), respectively, also recommended that the state party consider acceding to the ILO Minimum Wage Fixing Convention, 1970 (No 131) and the Safety and Health in Construction Convention, 1988 (No 167). See also Concluding Observations on the initial report of Turkey (n 47 above) 4, paras 19-20 with regard to ILO Convention No 131.

- 49 See also V Chetail 'The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' in Alston & Megret (n 16 above) 19.
- 50 Concluding Observations on the initial report of Bosnia and Herzegovina, CMW (3 June 2009), UN Doc CMW/C/BIH/CO/1 (2009) 5, para 27. In 2009, the Committee also raised concerns about the legal position in the Philippines affording trade union rights for migrant workers lawfully residing and working in that country, but only if they are nationals of a country which grants the same or similar rights to Filipino workers. In this regard, the Committee reiterated a 2008 direct request by the ILO Committee of Experts in relation to the application by the Philippines of the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) calling on 'the state party [to] take the necessary measures, including legislative amendments to sections 269 and 272(b) of the Labour Code, to guarantee to all migrant workers and members of their families lawfully residing within the Philippines the right to join, form and to form part of the leadership of, associations and unions, in accordance with article 40 of the [ICRMW], as well as with ILO Convention No 87, not subject to reciprocity'. Concluding Observations on the initial report of the Philippines, CMW (22 May 2009), UN Doc CMW/C/PHL/CO/1 (22 May 2009) 7, para 34.
- 51 See respectively General Comment 1 on migrant domestic workers, CMW (23 February 2011), UN Doc CMW/C/GC/1 (2011) and General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, CMW (28 August 2013), UN Doc CMW/C/GC/2 (2013).

participated, in a consultative capacity, in the Committee's meetings and deliberations on the preparation of both General Comments, which raised delicate issues in respect of ILO's own standard-setting work. This collaboration between the ILO and the Committee was important to ensure coherence in international law between international human rights and labour standards.

General Comment 1 on migrant domestic workers had its genesis in a day of general discussion on migrant domestic workers that the Committee held in October 2009.⁵² It was published in February 2011, and so a few months before the adoption of the ILO Domestic Workers Convention, 2011 (No 189) and accompanying Recommendation No 201. While the Committee's deliberations over the rights of migrant domestic workers undoubtedly gave important attention to this issue, as noted by one commentator:

[T]he very timing of this General Comment No 1 could be debatable. [...] The hidden purpose was perhaps to influence the negotiation of the ILO convention – which contains specific provisions on domestic migrant workers – and arguably to increase the low visibility of the [Committee]. Because of the risk of adopting diverging standards, however, it would have been more cautious for the Committee to wait for the adoption of the ILO Convention before detailing its own interpretation in a general comment.⁵³

It was therefore important to ensure potential consistency between both instruments, which was particularly challenging for the ILO in light of the fact that no official draft of the Convention was available at the time and that negotiations over the text were still to take place during the 100th Session of the International Labour Conference.⁵⁴ The only official documents available were the law and practice report on 'Decent work for domestic workers' discussed at the 99th Session of the International Labour Conference in June 2010, which is cited by the Committee in the General Comment, and the Conference report of the Committee on Domestic Workers containing proposed conclusions with a view to the adoption of a Convention and a Recommendation.⁵⁵ These documents laid the groundwork for the negotiations on the text of Convention No 189 (and accompanying Recommendation No 201) during the 100th Session in 2011. General Comment 1 contains a working definition of 'domestic

52 See sec 4.3 below on 'Days of general discussion'.

53 Chetail (n 49 above) 15 (footnote omitted).

54 At around the same time, the ILO also worked closely with the European Union Agency for Fundamental Rights (FRA) to ensure a consistent approach in the preparation of FRA's report on 'Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States' (2011).

55 See respectively ILO, 99th Session, 'Decent work for domestic workers' Report IV(1) (2010) and ILO, 99th Session 'Report of the Committee on Domestic Workers: Proposed Conclusions' (2010) (124-132). For both reports, see <http://www.ilo.org/ilc/ILCSessions/99thSession/lang-en/index.htm> (accessed 26 June 2016).

worker', which was subsequently included in Convention No 189.⁵⁶ It also draws on the ILO evidence base by citing important data on the proportion of domestic work in total employment in both developed and industrialised countries.⁵⁷ While no global or regional estimates of migrant domestic workers were available at the time, such figures have since been released by the ILO, indicating that 11.5 million of the 67.1 million domestic workers in the world are international migrants (17,2 per cent of the total), and that women comprise 74,4 per cent or about 8.5 million of all migrant domestic workers.⁵⁸ Finally, the General Comment also draws attention to ILO fundamental conventions, and particularly those relating to the elimination of child labour⁵⁹ in outlining what kind of domestic work should not be performed by minors.⁶⁰

In adopting General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, the Committee wished to clarify the application of the ICRMW to this particularly vulnerable category of migrants. This entailed the sensitive task of considering the rights afforded by the ICRMW to this group in light of the other core international human rights treaties, in particular the ICCPR and CESCR, and relevant ILO international labour standards. In General Comment 2, the Committee underscores the particular importance of international labour standards and their application to migrant workers, including those in an irregular situation.

International labour standards adopted by the International Labour Conference of the [ILO] apply to migrant workers, including those in an irregular situation, unless otherwise stated. The fundamental principles and rights at work set out in the eight fundamental ILO Conventions apply to all migrant workers, irrespective of their nationality and migration status. The 1998 ILO Declaration on fundamental principles and rights at work and its

56 General Comment 1 (n 51 above) 2, para 5, in which the Committee notes that 'the term "domestic worker" generally refers to a person who performs work within an employment relationship in or for other people's private homes, whether or not residing in the household'. Convention No 189 (n 43 above and accompanying text), defines 'domestic work' as 'work performed in or for a household or households' and 'domestic worker' as 'any person engaged in domestic work within an employment relationship'. See arts 1(a) & (b) respectively.

57 Namely, that domestic work accounts for between 4 and 10 per cent of total employment (both female and male) in developing countries and between one and 2,5 per cent in industrialised countries. See General Comment 1 (n 51 above) 1, para 1, citing 'Decent work for domestic workers' (n 55 above) 6, para 20.

58 ILO 'Global estimates on migrant workers and migrant domestic workers: Results and methodology' (2015) xiii (Executive Summary) http://www.ilo.org/global/topics/labour-migration/publications/WCMS_436343/lang-en/index.htm (accessed 26 June 2016).

59 Conventions 138 & 182 (n 17 above).

60 General Comment 1 (n 51 above) 10-11, para 56: 'In line with the Convention on the Rights of the Child and relevant [ILO] instruments, states should ensure that migrant children do not perform any type of domestic work which is likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development. States shall refrain from adopting policies aimed at recruiting domestic migrant children.'

follow-up requires all ILO member states to promote and realize the principles concerning the fundamental rights enshrined in these Conventions. A number of other ILO standards of general application and those containing specific provisions on migrant workers in the areas of employment, labour inspection, social security, protection of wages, occupational safety and health, as well as in such sectors as agriculture, construction, hotels and restaurants, and domestic work, are of particular importance to migrant workers in an irregular situation. Lastly, in formulating national laws and policies concerning labour migration and the protection of migrant workers in an irregular situation, states are also guided by ILO Convention No 97 ... Convention No 143 ... and the accompanying Recommendations Nos 86 and 151.⁶¹

The most relevant ILO instrument to the protection of this group of migrant workers is Convention No 143, which explicitly addresses their rights in Part I, with article 1 obliging members 'to respect the basic human rights of all migrant workers', which, according to the ILO Committee of Experts, refer to 'the fundamental human rights contained in the international instruments adopted by the United Nations in this domain, some of which include the fundamental rights of workers'.⁶² In this regard, the ILO Committee of Experts gives particular attention to the provisions on fundamental principles and rights at work that apply to all migrant workers contained in the ICRMW⁶³ and underscores that 'all migrant workers' includes migrants in an irregular situation.⁶⁴ Given the synergies between the ICRMW and Part I of Convention No 143, Convention No 143 features in General Comment 2. For example, the Committee observes that the important obligation in article 22(6) of the ICRMW, which enables a migrant worker affected by an expulsion decision to have 'a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities' echoes article 9(1) of ILO Convention No 143.⁶⁵ The Committee underscores the need to ensure this right in practice and proposes helpfully that state parties apply the following three good practices to realise this: (i) 'grant migrant workers and their family members a reasonable period of time prior to their expulsion to claim wages and benefits'; (ii) 'consider time-bound or expedited legal proceedings to address such claims by migrant workers'; and (iii) 'conclude bilateral agreements so that migrant workers who return to their state of origin may have access to justice in the

61 General Comment 2 (n 51 above) 6-7, para 12.

62 'Promoting fair migration' (n 24 above) para 276. In the accompanying footnote, the Committee cites the Universal Declaration (n 18 above) and the nine core human rights instruments, in particular the ICCPR (n 18 above), CESCR (n 18 above) and the ICRMW (n 12 above).

63 'Promoting fair migration' (n 24 above) para 277.

64 'Promoting fair migration' (n 24 above) para 300.

65 Under art 9(1), migrant workers in an irregular situation and when their position cannot be regularised 'shall enjoy equality of treatment for [themselves] and [their] family in respect of rights arising out of past employment as regards remuneration, social security and other benefits'.

state of employment to file complaints about abuse and to claim unpaid wages and benefits'.⁶⁶

In addition to Convention No 143, General Comment 2 draws upon a number of other ILO instruments for guidance across rights' areas ranging from discrimination in employment, protection of the children of migrant workers in an irregular situation, maternity protection, the right to form and join trade unions, labour inspection, and social security rights. In consideration of article 25(1) of the ICRMW, which provides for equal treatment of migrant workers, irrespective of their immigration status, with nationals in respect of remuneration⁶⁷ and other conditions of work and terms of employment, the ILO Discrimination (Employment and Occupation) Convention, 1958 (No 111) is explicitly cited by the Committee. The 'minimum age of employment' is expressly identified as a 'term of employment' in article 25(1)(b), and the Committee observes, moreover, that this shall equally apply to migrant children and that the minimum age shall not be less than 15 years, in accordance with article 2 of the ILO Minimum Age Convention, 1973 (No 138).⁶⁸ It further notes that the conditions of work and terms of employment, listed in articles 25(1)(a) and (b), are not exhaustive and that 'the equal treatment principle also covers any other matter that, according to national law and practice, is considered a working condition or term of employment, such as maternity protection'.⁶⁹

General Comment 2 also addresses the delicate question of the scope of trade union rights for migrant workers in an irregular situation. Article 26 of the ICRMW protects the right of all migrant workers, including those in irregular status, *to join* trade unions and other associations protecting their interests, but it does not provide for protection of the right *to form* trade unions while this right is clearly enjoyed by migrant workers in a regular situation in Part IV of the ICRMW.⁷⁰ With reference to its General Comment 1, the Committee underscores that 'the right to organize and to engage in collective bargaining is essential for migrant workers to express their needs and defend their rights, in particular through trade unions'.⁷¹ Moreover, it notes that article 26, when read together with other

66 General Comment 2 (n 51 above) 15, para 55.

67 With regard to the right of all migrant workers to equality of treatment in respect of remuneration, the Committee emphasises (n 51 above) 17, para 63, that '[state parties] should take effective measures against non-payment of wages, delay in payment until departure, transfer of wages into accounts that are inaccessible to migrant workers, or payment of lower wages to migrant workers, especially those in an irregular situation, than to nationals'.

68 General Comment 2 (n 51 above) para 61.

69 n 51 above, para 62. See also the ILO Maternity Protection Convention, 2000 (No 183).

70 ICRMW (n 12 above) art 40(1) reads: 'Migrant workers and members of their families shall have *the right to form* associations and trade unions in the state of employment for the promotion and protection of their economic, social, cultural and other interests' (my emphasis).

71 General Comment 2 (n 51 above) 17, para 65.

international human rights instruments, may create broader obligations for state parties to both the ICRMW and these instruments. In this regard, the Committee observes that article 2 of the ILO Freedom of Association and Protection of the Rights to Organise Convention, 1948 (No 87)⁷² and article 22(1) of the ICCPR (which also refers explicitly to Convention No 87), both apply to migrant workers in an irregular situation.⁷³ Moreover, the Committee points out, with reference also to General Comment 1, that article 26 contains a number of related entitlements, such as the 'right to participate in meetings and activities, and to seek the assistance, of trade unions and any other associations established in accordance with law' and that state parties are therefore obliged to

ensure these rights, including the right to collective bargaining, encourage self-organisation among migrant workers, irrespective of their migration status, and provide them with information about relevant associations that can provide assistance.⁷⁴

With a view to guaranteeing that migrant workers in an irregular situation are able to enjoy their rights arising from employment, including past employment, as well as other social rights, the Committee underscores in General Comment 2, with reference to the ILO Labour Inspection Convention, 1947 (No 81), the need to maintain a 'firewall' between the activities of social and labour market institutions, such as labour inspection services, and immigration enforcement authorities:⁷⁵

[S]tates parties should also step up inspections of places where migrant workers are routinely employed and instruct labour inspectorates not to share data concerning the migration status of migrant workers with immigration authorities, as their primary duty is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, in accordance with [Article 3(1)(a) of ILO Convention No 81].⁷⁶

72 Article 2 of Convention No 87 (n 17 above) which applies to both workers' and employers' organisations is unequivocal: 'Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation' (my emphasis).

73 General Comment 2 (n 51 above) 17-18, para 65.

74 n 51 above, para 65.

75 In 'Promoting fair migration' (n 24 above) para 482, the ILO Committee of Experts refers to its 2006 General Survey on labour inspection in which it pointed out that 'cooperation between the labour inspectorate and immigration authorities should be carried out cautiously keeping in mind that the main objective of the labour inspection system is to protect the rights and interests of all workers, and to improve their working conditions, rather than the enforcement of immigration law. Where a large proportion of inspection activities relate to verifying the immigration status of migrant workers, this may mobilize considerable resources in terms of staff, time and material resources, to the detriment of those allocated to the inspection of conditions of work and deter them from making complaints'.

76 General Comment 2 (n 51 above) 17, para 63. The need for such 'firewalls' has also been recently underscored by the Council of Europe's European Commission against Racism and Intolerance (ECRI). See ECRI General Policy Recommendation 16 on

With regard to social security rights, article 27(1) of the ICRMW, which applies to all migrant workers, including those in irregular status, provides that the right of migrant workers to social security is subject to the applicable bilateral and multilateral treaties and that the competent authorities of the state of origin and state of employment can at any time establish the necessary arrangements to determine the modalities of the application of this norm. In this regard, the Committee refers to the ILO Multilateral Framework on Labour Migration, recommending that state parties to the ICRMW should consider:

[E]ntering into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, to regular migrant workers, and, as appropriate, to migrant workers in an irregular situation.⁷⁷

The Committee has also embarked on the preparation of a Joint General Comment with the Committee on the Rights of the Child on the human rights of children in the context of international migration, with the goal of contributing 'to improving the protection of the human rights of children [who] are, in the context of international migration, in a particular situation of vulnerability'.⁷⁸ This General Comment will aim to focus on the human rights situation of a number of categories of children in the context of migration, including children who migrate with their parents who are migrant workers, children born to parents who are migrant workers in transit and destination countries, and children left behind by their parents (or one of them) who have migrated to another country.⁷⁹ The proposed rights' themes to be covered by the General Comment include issues of particular concern to the ILO, such as equality and non-discrimination, the right to health, the right to social security, and the right

Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016 http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf (accessed 26 June 2016). The principle of firewalls in this Recommendation is expressed as follows: 'Taking into account that the practical protection of the human rights of all persons, including those irregularly present within the jurisdiction of member states, requires the strict separation of immigration control and enforcement activities from other state and private services; taking into account that this also requires the creation of firewalls to prevent, both in law and practice, state and private sector actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of the personal data of, or other information about, migrants suspected of irregular presence or work with the immigration authorities for purposes of immigration control and enforcement' (ECRI General Policy Recommendation 16, 7).

77 General Comment 2 (n 51 above) 18, para 68, citing ILO 'Multilateral framework on labour migration: Non-binding principles and guidelines for a rights-based approach to labour migration' (2006) 18, Guideline 9.9.

78 See CMW-CRC Joint General Comment on the Human Rights of Children in the Context of International Migration: Concept Note, 4 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR%2fCMW%20General%20Comment&Lang=en (accessed 26 June 2016).

79 CMW-CRC Joint General Comment (n 78 above).

to work and protection from forced labour, all forms of exploitation, and child labour.⁸⁰ Considering its role under article 74 of the ICRMW, the ILO, together with a number of other agencies,⁸¹ is also participating in the advisory group, which will support the Working Group comprising 4-5 representatives of each of the two Committees responsible for coordinating the process and overseeing the drafting of the General Comment.⁸²

4.3 Days of general discussion

The Committee has held a number of important days of general discussion with the purpose of drawing attention to the protection of the rights of migrant workers, including certain categories of migrant workers, in various contexts.⁸³

Two of these days of general discussion, on migrant domestic workers in October 2009 and the rights of migrant workers in an irregular situation and members of their families in September 2011, preceded the deliberations and adoption of the two General Comments discussed above.⁸⁴ ILO officials participated in both days and delivered presentations or remarks.⁸⁵ In a half day of general discussion on workplace exploitation and workplace protection commemorating the 10th anniversary of the entry into force of the ICRMW, held in April 2014,⁸⁶ an ILO official also

80 CMW-CRC Joint General Comment (n 78 above) 5-6.

81 CMW-CRC Joint General Comment (n 78 above) 6-7: OHCHR, United Nations Children's Fund (UNICEF), United Nations Educational, Scientific and Cultural Organisation (UNESCO), UNHCR, United Nations Population Fund (UNFPA), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and IOM.

82 CMW-CRC Joint General Comment (n 78 above) 6.

83 For more information, including the agendas and presentations, see <http://www.ohchr.org/EN/HRBodies/CMW/Pages/DiscussionDays.aspx> (accessed 26 June 2016).

84 Indeed, according to the former Secretary of the Committee, the day of general discussion on migrant domestic workers was held in light of the 2010 International Labour Conference discussion on the need for an instrument for the protection of domestic workers, thus confirming the earlier rationale for the General Comment subsequently adopted. See respectively C Edelenbos 'Committee on Migrant Workers and Implementation of the ICRMW' in De Guchteneire et al (n 16 above) 113 & Chetail (n 49 above) and accompanying text.

85 See respectively the presentation by K Landuyt on 'Migrant domestic workers: Coverage under existing international labour standards' <http://www.ohchr.org/EN/HRBodies/CMW/Pages/DGD2009.aspx> (accessed 26 June 2016) and the complementary remarks by R Cholewinski. For the reports of both days of discussion, see <http://www.ohchr.org/EN/HRBodies/CMW/Pages/DGD2009.aspx> (accessed 26 June 2016) and <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11393&LangID=E>.

86 See <http://www.ohchr.org/EN/HRBodies/CMW/Pages/DGD2014.aspx> (accessed 26 June 2016). Earlier, in April 2013, the Committee also held another half day of general discussion on the role of migration statistics for treaty reporting and migration policies. See <http://www.ohchr.org/EN/HRBodies/CMW/Pages/DGD2013.aspx> (accessed 26 June 2016).

gave the keynote address,⁸⁷ which was appropriate given that the issues discussed were of particular relevance and interest to the ILO's mandate. This discussion also included an intervention by the UN Special Rapporteur on the human rights of migrants,⁸⁸ who had previously presented a thematic report to the UN Human Rights Council on the labour exploitation of migrants.⁸⁹ This interaction between a UN Human Rights Council special procedures mandate holder with the Committee and the ILO demonstrates the importance of such days of discussion in building crucial synergies amongst key stakeholders and facilitating coherence in the objective of advancing protection of the rights of migrant workers.

In December 2005, the Committee also held an important half day of general discussion on 'Protecting the rights of all migrant workers as a tool to enhance development' to prepare for the first UN General Assembly High-level Dialogue on International Migration and Development in September 2006.⁹⁰ On the basis of the information and views expressed during this discussion, including by an ILO representative,⁹¹ the Committee adopted a written contribution, discussed subsequently in meetings in April 2006, to the High-level Dialogue, in which it emphasised the positive linkages between ensuring the protection of the rights of migrant workers and sustainable development in both countries of destination and origin.

87 See presentation of Michelle Leighton, Chief, Labour Migration Branch, ILO, <http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2014/MichelleLeighton.pdf> (accessed 26 June 2016).

88 See Presentation by François Crépeau, UN Special Rapporteur on the human rights of migrants, <http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2014/FrancoisCrepeau.pdf> (accessed 26 June 2016).

89 'Labour exploitation of migrants', Report of the Special Rapporteur on the human rights of migrants, François Crépeau, HRC (3 April 2014) UN doc A/HRC/26/35 (2014), <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf> (accessed 26 June 2016).

90 See the summary records of the 25th and 26th meetings of the Committee: CMW/C/SR.25 and CMW/C/SR.26.

91 In offering a summary of the day of discussion during the 26th meeting of the Committee (n 90 above) 7, para 30, the ILO representative, Mr Patrick Taran said that four main principles had emerged: 'Firstly, given that migrant workers were recognized as agents of development, both in their host countries and in their countries of origin, and as human beings and not commodities, the question of migration should be approached from a human rights perspective. Secondly, the contribution of migrants to the economic and social development of their host countries could be evaluated according to the standard of living, working conditions and level of integration of migrant workers ... Thirdly, the way in which migrant workers were treated had a considerable impact on the level and nature of their contribution to the creation of human capital and to the development of their countries of origin. Hence, not properly remunerating a migrant worker deprived not only the migrant worker of the means of subsistence but also his or her country of origin of a source of income. Fourthly, protecting the human rights of all migrants was a legal, political and ethical imperative, and promoting equality of treatment and integration was essential if migration was to contribute in a substantial and positive manner to economic and social development'.

The Committee believes that respect for the rights of all migrant workers and members of their families will strengthen the beneficial effects that migration has on development, both in countries of origin and in countries of employment. Protection of human rights and prevention of discrimination in the country of employment are essential factors to enhance the integration of migrant workers and members of their families, thus enabling them to better contribute to the socio-economic welfare of the country of employment. Adequately upholding economic and social rights in countries of origin will prevent migration from being a forced decision and will enhance the beneficial effects of migration on the development of the country of origin.⁹²

The Committee drew attention to a number of observations and recommendations concerning the need to ensure that migrant workers have access to reliable information on the migration process; adequate regulation of the activities of recruitment and placement agencies; equality in remuneration and conditions of employment; special attention to the protection of the rights of migrant workers, including those in irregular status, and their integration; adequate remedies and access to justice, particularly with a view to being able to claim unpaid wages and social security benefits after they have departed from the destination country; and facilitating migrants' contacts with their countries of origin and reintegration on their return, so as to maximise the contributions they can make to those countries.⁹³

While many of these questions have since been discussed during the principal outcome of that first High-level Dialogue, namely the Global Forum on Migration and Development (GFMD),⁹⁴ the tenth edition of which was held in Berlin in June 2017, it was not until the General Assembly Declaration of the Second High-level Dialogue on International Migration and Development, adopted in October 2013, that the international community explicitly recognised the clear linkages between migration, human rights and development.⁹⁵ In the Declaration, representatives of states and governments also reaffirmed 'the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status'.⁹⁶ With

92 Protecting the rights of all migrant workers as a tool to enhance development, Note by the Secretary-General, GA (3 July 2006) UN doc A/61/120 (2006) 3, para 4.

93 Protecting the rights of all migrant workers as a tool to enhance development (n 92 above) 3-7, paras 6-23.

94 See <http://www.gfmd.org/> (accessed 26 June 2016).

95 Declaration of the High-level Dialogue on International Migration and Development, UN General Assembly Resolution 68/4 of 3 October 2013, GA (21 January 2014), UN Doc A/RES/68/4 (2014). In para 1 of the Declaration, the representative states and governments: 'Recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, and in this regard recognize that international migration is a cross-cutting phenomenon that should be addressed in a coherent, comprehensive and balanced manner, integrating development with due regard for social, economic and environmental dimensions and respecting human rights'.

96 Declaration of the High-level Dialogue on International Migration and Development (n 95 above) para 10.

regard to the protection of migrant workers, they emphasised ‘the need to respect and promote international labour standards as appropriate, and respect the rights of migrants in their workplaces’ and ‘the need to establish appropriate measures for the protection of women migrant workers in all sectors, including those involved in domestic work’.⁹⁷

4.4 Other events

The ILO has been a key participant in other events organised by the Committee, not least those commemorating the 20th and 25th anniversaries of the adoption of the Convention. The 25th anniversary event was held on 8 September 2015 during the Committee’s 23rd Session at a time when the highest political attention was being given to migrants and refugees in the context of the so-called ‘refugee and migration crisis’ affecting various parts of the world and particularly the Mediterranean region.⁹⁸ It attracted a large number of participants representing governments, including those that have not ratified the ICRMW, intra-regional bodies such as the European Union (EU), international organisations, trade unions and civil society. The UN High Commissioner for Human Rights observed that the migration crises highlighted the fundamental importance of the ICRMW ‘as a robust and agreed international legal framework for the rights of all migrant workers and their families in countries of origin, transit and destination’ and that ‘after a quarter-century, the Convention was now more relevant than ever’ despite the relatively low number of ratifications. He added that:

[T]he juxtaposition of this landmark twenty-fifth anniversary with today’s dramatic and accelerating migration crises underscored the urgent need to begin a more honest discussion about the obstacles to ratification of the Convention.⁹⁹

In summing up the discussion, the ILO speaker underlined that:

[T]he way forward was a comprehensive approach to governance, based on three pillars: creating decent work at home; multilateral responses needed to be grounded on international standards and common values; and fair, safe

97 Declaration of the High-level Dialogue on International Migration and Development (n 95 above) paras 14 & 12 respectively.

98 The event was entitled ‘Current challenges in protecting the human rights of migrant workers, irregular migration flows in the Mediterranean, migrant workers in the Gulf, and undocumented children in the Americas’, and comprised two panel discussions: (i) ‘Current trends in violations of migrant workers’ human rights’ and (ii) ‘Challenges for states and promising developments in responding to these trends’. For a summary of the discussion, see <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16398&LangID=E> (accessed 15 June 2017 (accessed 26 June 2016)).

99 Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (n 98 above).

and regular channels of migration that met real labour market needs at all skill levels.¹⁰⁰

In September 2014, the ILO and the OHCHR also co-organised a side event on ‘Decent Work for Migrant Domestic Workers’ during the Committee’s 21st Session, in the framework of the EU-funded project ‘Global Action Programme on Migrant Domestic Workers’.¹⁰¹ The focus of the panel discussion was the exchange of good practices and to promote migrant domestic workers’ empowerment through improvement of their legal protection, access to justice and enhancement of their organisation and voice. Specific attention was also given to the relationship between relevant international standards, namely the ICRMW and ILO Conventions Nos 97, 143 and 189.

5 Conclusion

The fundamental connection between international human rights and labour standards is clearly evident when it comes to the protection of migrant workers and the governance of labour migration, both in the interplay between the ICRMW and ILO international labour standards, including the specific ILO instruments on migrant workers, and between the ILO supervisory system, in particular the ILO Committee of Experts, and the UN Committee of Migrant Workers, which is facilitated by ILO officials who participate in a consultative capacity in the work of the Committee.

Contrary to the concerns expressed by certain governments and ILO officials at the time of the drafting of the ICRMW,¹⁰² the interaction between ILO representatives and members of the Committee is resulting in a heightened understanding of the role of both systems in protecting migrant workers and improving the governance of labour migration, including in the identification of good practices that can be shared across regions and globally. It is also leading to improved synergies and more consistent approaches to interpretation of key rights’ areas, such as the rights to freedom of association and equality of treatment, and their application to all migrant workers, including those in irregular status.

Importantly, the Committee, through its deliberations on state party reports and General Comments, and particularly through its days of

100 Manuela Tomei, Director, Conditions of Work and Equality Department (WORKQUALITY), ILO (n 98 above).

101 For the press release, see http://www.ilo.org/global/docs/WCMS_310260/lang-en/index.htm (accessed 26 June 2016). For more information about the project, see http://www.ilo.org/global/topics/labour-migration/projects/WCMS_222567/lang-en/index.htm (accessed 26 June 2016).

102 See V Chetail (n 49 above) 18, who observes that ‘despite the concerns initially raised, the collaboration [between ILO representatives and members of the Committee] has proved to be particularly fruitful since the establishment of the [Committee]’.

general discussion and other relevant events, which are open to and inclusive of all interested stakeholders – such as governments, national human rights institutions, trade unions, the private sector, NGOs and migrant associations – presents an increasingly important forum allowing for a transparent and focused exchange on the interdependence of migration, human rights and development. This should be contrasted with the more rhetorical, less technical and often politicised discussions taking place within the GFMD and other largely intergovernmental spaces, where the relationship between migration, human rights and development and the role international standards can play in strengthening this relationship is often understated or subsumed by economic considerations. With the explicit integration of human rights and migration into the new global development agenda and the recognition of the protection of the labour rights of all workers, including migrant workers, as a target in SDG 8 on economic growth and decent work, undertaking efforts to reinvigorate the rights-based approach to migration and development would be most timely. The ICRMW and ILO international labour standards, together with their respective supervisory systems, have an important role to play in this endeavour.

**PART III: APPLICATION OF
THE ICRMW IN SELECTED
STATE PARTIES**

UNIVERSAL CITIZENS GLOBALLY, FOREIGN MIGRANTS DOMESTICALLY: DISPARITIES IN THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS BY ECUADOR

Daniela Salazar

1 Introduction

Ecuador has been a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW; the Convention) since 2002 and more recently an enthusiastic advocate of migrant rights, as manifested by its legal innovations; it therefore constitutes a good case study for examination of the Convention's implementation over 25 years since its adoption by the UN General Assembly on 18 December 1990.

Ecuador's ratification of the Convention in 2002 coincided with a time period in which the rights of migrant workers started to gain an important place in domestic public debate, mainly due to the large number of Ecuadorians leaving the country. In 1999 an economic crisis created an Ecuadorian diaspora and the ratification of treaties¹ to protect migrant

1 This chapter was completed prior to the enactment of the Organic Act on Human Mobility (*Ley Orgánica de Movilidad Humana*) in February 2017. While the chapter will focus exclusively on the ICRMW, Ecuador is a state party to several other human rights instruments that protect migrants' human rights, including general human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR); the American Convention on Human Rights (ACHR) and its Additional Protocol on Economic, Social and Cultural Rights; and specific treaties on labour rights, such as the ones approved by the ILO (No 97 and No 143 focus on migrant workers, however, ILO's treaties often lack a human rights perspective and focus mostly on documented workers). Ecuador is also a party to ILO Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, but has yet to accede ILO Convention No 143. Ecuador is also a state party to other treaties relevant for migrant workers' rights such as the optional protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants By Land, Sea and Air, among others. Finally, at a regional level, Ecuador and other countries participating in the Andean integration process have reached agreements that recognize the rights of migrant workers.

workers was a necessary, coherent, and popular step. According to Javier Arcentales:

Ecuador ratified the ICRMW bearing in mind those who had migrated, but at that moment it did not take into account this also implied committing to protecting the rights of immigrants within its jurisdiction ... In fact, Ecuador is known for signing and ratifying most international human rights treaties, without fully adopting the internal measures to give effect to and comply with the obligations it acquires internationally, as is the case with the ICRMW.²

The vast effects of the Ecuadorian diaspora, added to the radical and overarching measures adopted by Ecuador to protect its migrants abroad, have led academic literature to focus mostly on emigration from Ecuador, paying little attention to the situation of immigrants in Ecuador (with the exception of the situation of asylum seekers). However, by ratifying the Convention, Ecuador undertook to comply with its provisions and to take all the necessary measures to protect migrant workers' rights. As a consequence, the Convention's standards are to guide the laws and the judicial and administrative procedures and decisions within Ecuador. When Ecuador's laws and policies are analysed in light of the standards of the Convention, rather than the academic enthusiasm for its state-led transnationalism, the findings are not as encouraging.

I will start this analysis with an overview of the migration context in Ecuador, divided into sections describing Ecuador's laws and policies with regards to migrant workers leaving the country, living in the country, passing through the country and returning to the country. Next, I will make some general comments on Ecuador's laws and policies addressed to migrant workers. I will then look into the relationship between Ecuador and the Committee on Migrant Workers (CMW), the treaty body created to supervise compliance with the Convention, as well as into the role played by civil society using the Convention to advance the rights of migrant workers. To conclude, I will summarise my findings regarding the paradoxes in the implementation of the ICRMW by Ecuador.

2 Migration context in Ecuador

Ecuador was not a country with a significant amount of migratory movement until the twentieth century. Since 2000, large numbers of Ecuadorians have migrated to Spain, Italy, the United States and other countries looking for work opportunities. At the same time, migrant workers from the region, mostly neighbouring countries, started to cross the border into Ecuador. Economic migration from Peru, added to thousands of persons fleeing from generalised violence in Colombia,

2 Interview with Javier Arcentales, member of the national coalition for migration and refugee issues (20 November 2015).

resulted in a tripling of Ecuador's foreign population between 2000 and 2001. Nowadays, Ecuador is a country of origin, transit, destination and return of migrant workers. As Jokisch describes it:

Ecuador's geographical variety is nearly matched by its diverse migration patterns. Although it is a small Andean country of approximately 15.7 million people, Ecuador accounts for the largest Latin American nationality in Spain, the second largest in Italy, and one of the largest immigrant groups in metro New York. Ecuador also is an important migrant destination. The long-standing conflict in Colombia has driven tens of thousands of its citizens into Ecuador, making it the country in Latin America with the largest refugee population.³

These drastic changes in Ecuador's migration context gave rise to concern and public debate about the rights of migrant workers. Most of the public debate focused on the need to protect the rights of Ecuadorian migrants abroad as well as the families they left behind.

In 2008, Ecuador adopted its 20th Constitution. As the government noted in its second report to the CMW:

Seven of the nine titles in the Constitution include a total of 58 articles dealing with the movement of persons ... It goes on to state that no one shall be regarded as illegal on the basis of their migratory status ... It advocates the principle of universal citizenship, the free movement of all of the planet's inhabitants and the gradual elimination of the differentiation between nationals and aliens ...⁴

As a result of the universal citizenship principle espoused by Ecuador, which implied the elimination of all visas to enter the country, migration into Ecuador increased and diversified. While the majority of immigrants still arrive from neighbouring countries like Colombia and Peru, many arrive from Cuba and Haiti.⁵ Additionally, waves of migrants from Asia and Africa are also arriving, although mostly in transit looking to reach the United States or countries like Brazil.⁶ Political pressure caused by the increase in immigration led to a reversal of the decision to eliminate visas and other entry requirements.⁷ Currently, thousands of migrant workers and persons in need of international protection live in Ecuador under

3 BD Jokisch 'Ecuador: From mass emigration to return migration?' (2014).

4 Ecuador's Second Periodic Report to the CMW, CMW (26 January 2010), UN Doc CMW/C/ECU/2 (2010) paras 32-36.

5 Instituto Nacional de Estadística y Censos (INEC). Anuario de Entradas y Salidas Internacionales (2013) and Anuario de Entradas y Salidas Internacionales (2014).

6 See, L Feline Freier 'Migración contemporánea de África, Asia y el Caribe hacia Ecuador' in OIM Cuadernos Migratorios No 5: *Migrantes extracontinentales en América del Sur: Estudio de casos* (2013).

7 See, for example, a memorandum sent by several Congressmen demanding reforms to the migration law and citing Correa's order to end visa requirements as the source of the increase in crime and insecurity in Ecuador. National Assembly. Memorando PAN-FC-2010-165 (30 June 2010).

irregular migratory conditions that make them vulnerable to rights violations.⁸

The following sections will describe some of Ecuador's innovative constitutional precepts in more detail. While appreciating the importance of recognising rights and articulating aspirations in the Constitution, I will address the tension between the ICRMW, the norms included in the 2008 Constitution and the laws still governing the rights of migrant workers in Ecuador – some of which date from the 1970s – as well as the contrast between the constitutional text and reality.

2.1 Migrant workers leaving Ecuador

Ecuador is mainly a country of origin of migrant workers, with a number of waves of emigration occurring since the 1980s. Official estimates calculated around 2 500 000 Ecuadorians living outside the country in 2008, both regularly and irregularly, representing about 18 per cent of the national population and 38 per cent of the economically active population.⁹

The first wave of migration was caused by an economic crisis following the collapse in the price of oil in the 1980s. The second wave resulted from a major economic crisis that hit Ecuador around 1999 caused by a combination of low oil prices, floods, political instability, inflation and high unemployment and poverty rates. Data from the Department of Homeland Security in the United States show a steady increase of 'unauthorized immigrants' from Ecuador in the US from 110 000 in 2000 to 210 000 in 2010.¹⁰ Thousands of Ecuadorians who migrated to Spain benefited from a 2005 Spanish regularisation law¹¹ that granted legal status to nearly 200 000 Ecuadorians.¹²

Although emigration rates have slowed down in recent years as a result of the global financial economic crisis, the establishment of the Schengen visa to enter Europe, and harsher measures to stop immigration to Europe and the United States, a third wave of migration is imminent in light of the current financial crisis in the country. Budgetary dependency

8 Ecuadorinmediato. Ecuador reforzará controles a permanencia de extranjeros, miles están en situación irregular (29 August 2010) http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=180370&umt=ecuador_reforzara_controles_a_permanencia_extranjeros_miles_estan_en_situacion_irregular (accessed 31 October 2017).

9 Ecuador's Second Periodic Report to the CMW (n 4 above) para 20.

10 B Baker & N Rytina 'Estimates of the unauthorized immigrant population residing in the United States: January 2012' (2013).

11 Spain: Real Decreto (Royal Decree) 2393/2004 (30 December 2004).

12 Jokisch details how from 2006 to 2013 more Ecuadorians acquired Spanish nationality (232 645) than any other immigrant group, and between 2008 and 2013 Spain's family unification policy allowed nearly 157 000 Ecuadorians to join family members in the country. See Jokisch (n 3 above).

on remittances may explain both the lack of public policies to discourage emigration and the state's emphasis on the right to migrate. According to state figures, as of 2005, remittances amounted to approximately US\$ 2 billion and were thus the second-largest item in the national balance of payments.¹³ By 2007, remittances reached 3140.9 million dollars, and by 2012 the number had fallen to a still considerable figure of 2 446.4 million dollars.¹⁴

Before the beginning of the millennium, migration policies adopted by Ecuador were scarce and isolated. This started to change around the year 2000. A National Plan on Ecuadorian Migrants in Foreign Countries (*Plan Nacional de Migrantes Ecuatorianos en el Exterior*) appeared in 2001, but the achievement of its goals was undermined by the allocation of insufficient financial and human resources. In 2002, a 'Migrant Workers Unit' began to work within the Ministry of Foreign Affairs in light of an agreement reached with Spain to select and assist workers in order to allow for their legal and safe migration to Spain, based on labour market necessities (over 5000 persons migrated temporarily to Spain under this programme between 2002 and 2009).¹⁵

Between 1998 and 2004 there were several unsuccessful proposals for a new migration law, all of them focusing on the protection of Ecuadorian emigrants. At the same time, however, civil society organisations advocating for migrant rights started to strengthen and were able to influence the development of public policies in the area of migrant rights. The signature and entry into force of the ICRMW around this time evidenced the development of a new approach to the protection of the rights of migrant workers.

In 2006, Ecuadorians living abroad participated in national elections for the first time and their situation was an important issue during the campaign. Rafael Correa, as a presidential candidate, promised to be 'the government of migrants'.¹⁶ Two months after assuming power in 2007 President Correa created the National Secretariat of Migrants (*Secretaría Nacional del Migrante* or SENAMI, its acronym in Spanish).¹⁷ The creation of this governmental body was a supposed breakthrough in Ecuador's approach towards the rights of migrant workers. To highlight its importance, this governmental department, mandated to develop and implement Ecuador's migration policies, was put on a ministerial level and its authorities answered directly to the President of Ecuador.

13 CMW/C/ECU/2 (n 4 above) para 22.

14 Banco Central del Ecuador *Evolución de las remesas: Evolución Anual* (2012).

15 Ministerio de Relaciones Exteriores y Movilidad Humana. Unidad de Trabajadores Migratorios. Convenio para la Regulación de Flujos Migratorios entre Ecuador y España. Información estadística.

16 President Correa's speeches, including his inaugural address can be found at <http://www.presidencia.gob.ec/discursos/> (accessed 31 October 2017).

17 Executive Decree No 150, Official Registry No 39 (12 March 2007).

The creation of SENAMI was presented by the government as one of its major achievements, and praised by some national and international actors. The elevation of SENAMI to ministerial level was welcomed by the CMW.¹⁸ At the same time, however, SENAMI has drawn criticism from a variety of sources since its very inception. Concern was expressed about the weakness of this institution, its NGO-like functioning, the overlapping of its functions with other governmental offices and its inability to coordinate with other institutions working on migrant rights. The CMW recommended that Ecuador:

[C]larify the mandates of the public administration institutions that deal with the various aspects of migration and to strengthen the National Secretariat for Migrants as the coordination mechanism with a view to improving the services provided to migrant workers and members of their families.¹⁹

Nevertheless, this governmental department focused its work on the protection of Ecuadorian migrants abroad as well as returning migrants, neglecting migrant workers in Ecuador. Without expressly recognising any of its failures, in June 2013 SENAMI was shut down and the Vice Ministry of Foreign Affairs absorbed its mandate.

The creation of an institution charged with the protection of migrants was not the only step taken by the government. For example, in December 2007 the government abolished the exit permit requirement for nationals and foreigners wishing to leave Ecuador – a measure that could also be read as a result of the recommendation of the CMW in light of article 8 of the Convention.²⁰ Another measure adopted early on by the government of Rafael Correa was the issuance, in December 2007, of a National Development Plan for Migration (2007-2010). The Plan was followed by the National Development Plans of 2009-2013 and 2013-2017 (named in Ecuador National Plan for Good Living or *Plan Nacional del Buen Vivir*), as well as by the National Agenda for Human Mobility 2013-2017.

Ecuador's development plans uphold the right to migrate and include policies aimed at fostering recognition and respect for sociocultural diversity; eliminating all forms of discrimination, including discrimination due to a person's status as a migrant; and protecting and promoting the rights of Ecuadorians living abroad. The adoption of the plans and agendas is an important step in the effort to reduce the gap between human rights on paper and in practice. Nevertheless, the plans are weak in mechanisms for the monitoring of progress and for evaluation of their achievement. As

18 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW (5 December 2007), UN Doc CMW/C/ECU/CO/1 (2007) para 6.

19 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families CMW (15 December 2010), UN Doc CMW/C/ECU/CO/2 (2010) para 44.

20 CMW/C/ECU/CO/1 (n 18 above) para 22.

a result, the objectives of the plans and agenda wither because of lack of follow-through. Lack of participatory mechanisms for the planning as well as the monitoring and evaluation has also contributed to the limited impact of the plans. Moreover, a common characteristic of all of these action plans is their emphasis on the emigrant over other types of migrants in the design of the policies.

Beyond the plans, a milestone in Ecuador's policy towards migrants' rights was the adoption of the 2008 Constitution. Unlike the ICRMW, which refers to migrant workers who are documented or in a regular situation and differentiates them from those who are non-documented or in an irregular situation, the Constitution makes use of a different terminology: it refers to migration as 'human mobility', migrants as 'persons in situation of human mobility' and emigrants as 'Ecuadorians abroad'. Article 40 of the Constitution expressly mentions: 'no human being shall be identified or considered illegal in light of his or her migratory condition'. This recognition is a positive departure from the ICRMW and from traditional ways of conceptualising migration. Ecuador's Constitution further recognises the right to migrate as well as the progressive end of the 'foreigner' condition as a transforming element of unequal relations between nations, especially North-South relations (article 416). According to the Constitution, the state is entrusted with safeguarding the labour rights of Ecuadorian workers living abroad and with establishing arrangements with other countries for the regularisation of such workers (article 329).

While the ICRMW recognises that migrant workers shall be free to leave any state, including their state of origin, it also recognises possible restrictions to this right (article 8). Ecuador's Constitution is the first in the world to recognise the right to migrate, apparently without any limits. Authors like Ramirez view these constitutional changes as a theoretical, political and ethical proposal.²¹ Indeed, nearly ten years have passed since the adoption of the Constitution and so far these changes appear to be merely rhetorical and, in some cases, detrimental.

In fact, the effects of the diaspora and the emphasis on the right to migrate are starting to appear. For example, according to figures from the Deputy Minister of Human Mobility, in 2014 alone some 600 Ecuadorian unaccompanied children left the country to reunite with their families in the United States, a figure three times higher than that recorded in 2013. In 2015, Ecuador negotiated an agreement with Mexico in order to eliminate the visa requirement for Ecuadorians to enter Mexico. Such agreements deserve a careful analysis. Recent reports have documented that the United States government has provided political and financial

21 JP Ramírez Gallegos *La política migratoria en Ecuador. Rupturas, tensiones, continuidades y desafíos* (2013) 33-35.

support to the Mexican government for migration enforcement, especially following the 2014 'surge' of migrants, mostly unaccompanied children and families from Central America that arrived at the US southwest border.²² On this account, the Southern Border Programme has significantly increased migration enforcement operations, apprehensions and deportations of migrants, leading to human rights violations, kidnappings, extortion, robberies and abuses throughout Mexico. The possibility that the elimination of the visa requirement to Mexico encourages more Ecuadorians to travel to Mexico in order to then risk their lives in an attempt to enter the United States through irregular ways is something which cannot be easily dismissed.

As described above, some of Ecuador's actions as a country of origin have exceeded its consular or diplomatic protection and assistance obligations established by the ICRMW.²³ However, in its development of law and policy concerning Ecuadorians who go abroad for work, Ecuador hardly makes any reference to its obligations under the ICRMW. When it comes to protecting migrant workers, Ecuador seems more excited to appear innovative than to honour its international commitments.

Given that other countries do not recognise all persons as universal citizens, instead of focusing on the right to migrate and launching campaigns to remind its citizens that 'we are all migrants', Ecuador should comply with its duty as a country of origin to inform migrant workers of their rights arising out of the ICRMW,²⁴ of the conditions of their admission, their rights and obligations under the law and practice of the state concerned,²⁵ and of the real conditions applicable to their admission, stay and remunerated activities in the state of employment.²⁶

The ICRMW was adopted in the knowledge that the human problems involved in migration are even more serious in the case of irregular migration. State parties have undertaken to take appropriate action in order to prevent and eliminate clandestine movements and trafficking in migrant workers. Under article 68 of the Convention, states must work to prevent illegal or clandestine movements and employment of migrant workers in an irregular situation. However, some of the measures adopted by Ecuador seem to encourage Ecuadorians to leave the country, even if this could end in illegal or clandestine movements of migrant workers, as well as of members of their families seeking to join them.

22 J Knippen et al *An uncertain path: Justice for crimes and human rights violations against migrants and refugees in Mexico* (2015).

23 ICRMW arts 16(7), 23 & 27(1)

24 ICRMW art 33(1)(a).

25 ICRMW art 33(1)(b).

26 ICRMW art 37.

2.2 Migrant workers living in Ecuador

While immigration of certain groups and nationalities can be traced back decades – even centuries – increasing numbers of migrants started to arrive and stay in Ecuador towards the end of the last century. Inflows arrived mostly from Ecuador's neighbouring countries Peru and Colombia. Migrant workers are attracted by the dollarised economy. In the case of Colombian citizens, although it is often difficult to identify or distinguish the reasons that motivate persons to migrate, most of them are forced to leave their country due to persecution and generalised violence, although not all seek or receive international protection. As the CMW itself has noted, there is in Ecuador:

[A] high number of persons in need of international protection, notably Colombians, who do not apply for asylum for a number of reasons (including the fear of being deported and stringent documentation requirements) and remain in a very vulnerable and marginalized situation.²⁷

According to the National Directorate of Migration, around 600 000 Colombians, 320 000 Peruvians, 25 000 US citizens and 279 000 individuals from other countries resided in Ecuador in the first decade of this century. However, these estimates are based mostly on the difference between those foreigners entering and those leaving the country through authorised means, and could be an underrepresentation of the actual figures. In fact, available studies seem to agree that most migrant workers from the Caribbean, Asia and Africa are merely in transit to other countries like the United States and Brazil.²⁸

According to IOM, by 2011 immigrants represented about 1,6 per cent of the economically active population of the country.²⁹ The majority of migrant workers work in the informal sector, irrespective of whether they entered or stayed in the country legally or illegally. Migrant workers commonly act as street sellers, domestic workers, or in the construction, mining and farming industries. They are vulnerable to labour rights violations, and lack stability and benefits such as social security. The increase in inflows of nationalities such as Haitians,³⁰ Cubans³¹ and migrants from some African and Asian countries occurred mostly after the elimination of the visa requirement to enter Ecuador and the approval of the 2008 Constitution defending the principles of universal citizenship, free

27 CMW/C/ECU/CO/1 (n 18 above) para 28.

28 The transit-zone phenomenon known as the 'Ecuador-Mexico-US corridor' has been researched by authors like S Alvarez Velasco *Confronting violence and border control along the Ecuador-Mexico-US zone of transit* (2015).

29 OIM *Perfil Migratorio del Ecuador 2011* (2012) 65.

30 El País 'La pequeña Haiti de Ecuador.'

31 Dirección Nacional de Promoción de la Defensoría del Pueblo de Ecuador *Informe temático: Migración cubana: Retos para un Ecuador incluyente* (2010).

movement of all of the world's inhabitants and the progressive end of the condition of foreignness (article 416).

Based on the concept of universal citizenship and the need for a human rights approach to human mobility, several measures were adopted to regulate the stay of migrants living in Ecuador. For example, between 2006 and 2010 Ecuador issued over 6 000 visas to Cuban citizens. Ecuador also issued a general amnesty for Haitians³² after the 2010 earthquake. A comprehensive programme to register Colombians in Ecuadorian territory in need of international protection was implemented in 2009. From 2009 to 2010 the so-called enhanced registry (*registro ampliado*) allowed for the documentation and protection of around 30 000 persons who had fled Colombia and were living irregularly in Ecuador. Furthermore, in 2008 the Ministry of Foreign Affairs issued a resolution according to which:

[B]y express order of the President of the Republic, starting on 20 June 2008, citizens of any nation will be able to enter Ecuador, without the need for a visa, as well as to stay in Ecuador for 90 days, in recognition of the principle of free movement of persons and with the aim of strengthening relations between Ecuador and all countries of the world, as well as to promote tourism.³³

On the same day, a resolution was issued to eliminate the requirement of visas for citizens of China³⁴ and in 2009 a regularisation programme was introduced aimed at Chinese citizens who were in irregular status in Ecuador.³⁵ As Ackerman points out, the decision was not only coherent with the principle of free movement of persons, but also with the country's economic goals.³⁶ While such measures could be read as compliance with the ICRMW obligation to eliminate situations where migrant workers are in an irregular situation within their territory,³⁷ the ICRMW was not mentioned as a basis for these decisions.

The ICRMW specifically acknowledges the importance and usefulness of bilateral and multilateral agreements in the protection of migrants' rights.³⁸ Bilateral agreements were entered with Peru and Venezuela to regulate labour migration between these countries and Ecuador. There are also several regional integration initiatives in place,

32 Executive Decree 248, Official Registry No 136 (24 February 2010); amendment to the Migration Law, Official Registry (S) 175 (20 April 2010). About 400 Haitians benefitted from this measure.

33 Ministerio de Relaciones Exteriores, Comercio e Integración, 'Eliminación de visas de turismo para ingresar al Ecuador' Press Release No 398 issued on 11 June 2008.

34 Ministerio de Relaciones Exteriores, Comercio e Integración 'Eliminación de visas para ciudadanos chinos' Press Release No 396 issued on 11 June 2008.

35 Consejo Consultivo de Política Migratoria, Resolution No 001-2009, Official Registry 38 (1 October 2009).

36 AS Ackerman *La ley, el orden y el caos: Construcción social del Estado y el inmigrante en Ecuador* (2014) 102.

37 ICRMW art 69(2).

38 ICRMW Preamble.

such as the Andean Passport³⁹ and the Andean Labour Migration Instrument.⁴⁰ The attempts to facilitate migratory movements between Andean countries, however, privilege the movement of businessmen and entrepreneurs. Additionally, one of the goals of Unasur, of which Ecuador has been a member since 2011, is cooperation in migration matters in order to achieve Latin-American integration. More recently, the Residence Agreement for Mercosur associated countries (Argentina, Brazil, Chile, Paraguay, Uruguay, Bolivia, Colombia and Peru) allows citizens of these countries to apply for temporary or permanent residence visas, known as Mercosur visas.⁴¹ While recognising the important labour mobility processes and the regulated migration programmes arranged by the Ecuadorian state, there is still a lack of comprehensive migration regularisation policy that is accessible to all migrant workers and members of their families in an irregular situation and satisfies the principle of non-discrimination, as the CMW has noted.⁴² Furthermore, despite all these efforts, Ecuador has been unable to eliminate employment of migrant workers in an irregular situation, as provided for by the ICRMW.⁴³ The estimates of irregular migrants working in the country are still high.

Although official figures are inconsistent, difficult to gather, and do not take into account those who enter or leave the country through irregular channels, it is safe to say that migration into Ecuador increased as a result of these measures. However, the elimination of visa requirements in 2008 was immediately associated with an increase in insecurity in Ecuador. Political pressure led to revision of this measure, which remained in force for only two years. Furthermore, events such as the Angostura bombing by Colombian forces in Ecuadorian territory in March 2008 impacted Ecuador's policies towards migrants. The need to control borders and provide for security in the state began to prevail over the call for universal citizenship.

After determining the existence of a migratory influx coming from the Middle East and Africa, migration authorities re-established visa requirements for certain nationalities. In December 2009, Ecuador imposed a visa requirement on citizens of China. In September 2010, Afghanistan, Bangladesh, Eritrea, Ethiopia, Kenya, Nepal, Nigeria, Pakistan and Somalia joined the list,⁴⁴ with more countries continuing to be added. The presentation of an invitation letter started to be required of Cuban and Haitian citizens, and the requirement of proof of a clean

39 Andean Council of Foreign Ministers, Decision 504, Creation of the Andean Passport (22 June 2001).

40 Andean Council of Foreign Ministers, Decision 545, Creation of the Andean Passport (25 June 2003).

41 See Official Registry No 209 (21 March 2014) and Ministerial Agreement No 000031 (2 April 2014).

42 CMW/C/ECU/CO/2 (n 19 above) paras 33 and 34.

43 ICRMW art 68(2)

44 Ministerial Agreement 105 (3 September 2010).

criminal record (which had been abolished in the past) was reinstated⁴⁵ for Colombian citizens despite the CMW's view that the practice of asking a criminal record exclusively to Colombian migrants, may contribute to their stigmatisation and stereotyping.⁴⁶ As a result, despite initial measures adopted in furtherance of the principles of universal citizenship and unrestricted human mobility, important numbers of migrants – the majority of them Cubans, Haitians and Colombians – currently live in an irregular situation in Ecuador, facing exploitation and human rights violations. A similar regression from the same constitutional principles affected the situation of refugees.

The ambiguities of the universal citizenship concept can be found in the Constitution itself. Immediately after upholding the right to migrate and determining that no human being shall be considered illegal in light of his or her migration status, article 40 reveals that the emphasis of this declaration was always on Ecuadorians abroad: it establishes a series of measures that the state ought to undertake to support the rights of migrants living abroad regardless of the person's regular or irregular migrant status but remains silent with regard to measures to be adopted by the state aimed at protecting migrants in Ecuador, regardless of their migration status. Similarly, addressing migrant workers specifically, article 329.5 of the Constitution establishes that the state will ensure respect for labour rights of Ecuadorian migrant workers abroad and will promote agreements and covenants with other countries to achieve their regularisation. However, there is no equivalent provision for the protection of migrant workers in Ecuador.

Perhaps a more significant although somewhat disregarded measure was the recognition by the 2008 Constitution of political participation of Ecuadorian migrants, in compliance with articles 41 and 42 ICRMW. While they had already participated in the 2006 elections, the Constitution acknowledged them as important political actors beyond their right to vote. As a result, migrants currently have six seats representing them⁴⁷ in the National Assembly through which they could, in theory, advance legislation for the protection of migrants' rights.

Despite the adoption of the ICRMW and the ambitious changes included in the Constitution, legislation focusing on security and sovereignty is still in force. Ecuadorian legislation on migration issues can be traced back to the end of the nineteenth century. Historically, laws in Ecuador established who could enter or stay in the country based on the activities they perform as well as their physical characteristics. The

45 Executive Decree 667, Official Registry 397 (3 March 2011).

46 CMW/C/ECU/CO/1 (n 18 above) para 19.

47 Ecuadorians living abroad can elect representatives for the following regions: (i) United States and Canada; (ii) Europe, Asia and Oceania; (iii) Latin America, the Caribbean and Africa.

legislation in force at time of writing – *Ley de Extranjería* and *Ley de Migración* – dates from 1971. These laws still focus on controlling immigration to ensure that only those who can contribute to the economic, social and cultural development of the country are allowed in. As Ackerman points out, the legal categories in force still allow the state to exclude ‘the undesirable’ from residing in the country.⁴⁸ The current law expressly recognises that there is a national interest in regulating a *selective* immigration of foreigners.

In 2007⁴⁹ and 2010,⁵⁰ the CMW noted with concern that a number of provisions in the national legislation were at variance with the provisions of the Convention. However, selectivity, control, security and sovereignty, rather than human rights, are still guiding migration initiatives and policies in Ecuador. The case of Manuela Picq, a French-Brazilian academic who had been working as a professor for a private university in Ecuador illustrates how despite the ratification of the Convention and the adoption of a new Constitution, obsolete legislation is still applied by migration authorities and lawyers when deciding cases. Professor Picq was peacefully participating in anti-government protests in August 2015 when the police detained her. While in police custody, migration authorities cancelled her working visa,⁵¹ following which she was sent to a detention centre for irregular migrants until a judge could order her deportation. Four days later, the judge refused to deport her, in light of the inconsistencies between the police reports and the videos of her detention.⁵² However, her visa remained cancelled. She presented a constitutional claim to question the cancellation of her visa. Despite the fact that there was no evidence of a crime committed by Manuela Picq, the judge in charge of revising the cancellation of the visa was persuaded by the state’s argument that the laws do not provide for a specific procedure for the cancellation of her visa and that this matter is an exercise of the state’s discretion and sovereignty where human rights (including provisions of the Constitution, the ICRMW and others cited by her defence) were not relevant for such a decision.⁵³ Professor Picq had no option but to leave the country of universal citizenship after the state left her as an irregular migrant because of her participation in an anti-government protest. Manuela Picq has applied for other visas to return to Ecuador after this incident, but a final negative decision has been made by the Ecuador.⁵⁴

48 AS Ackerman (n 36 above) 23.

49 CMW/C/ECU/CO/1 (n 18 above) paras 8 & 9.

50 CMW/C/ECU/CO/2 (n 19 above) para 15.

51 Ministerio de Relaciones Exteriores y Movilidad Humana, Viceministerio de Movilidad Humana, Coordinación Zonal 9 de la Unidad de Migración, Oficio No 23 UM-C29-MREMH (14 August 2015).

52 Unidad Judicial Primera de Contravenciones del Cantón Quito (17 August 2015) Case No 17151-2015-00685.

53 Juicio Especial No 17203201512020 (25 August 2015).

54 Ministerio de Relaciones Exteriores y Movilidad Humana, Oficio No 3-8-08-CECU-RJ-2015 (18 September 2015).

Ramírez explains that the human rights focus of the Constitution does not immediately change the security and control focus that historically has guided the Ecuadorian state on migration matters.⁵⁵ While acknowledging that migration law, procedures and policies cannot be modified immediately to reflect the human rights focus of a new Constitution or to implement international obligations acquired under a treaty, over seven years had passed since the adoption of the Constitution and over 13 since ratification of the ICRMW before new legislation was finally proposed in July 2015.⁵⁶

Despite the CMW's recommendation to 'adopt as soon as possible the Human Mobility Act' in order to ensure in practice the rights and principles recognised by the Constitution and by the Convention,⁵⁷ the Organic Act on Human Mobility (*Ley Orgánica de Movilidad Humana*) is still a draft subject to modifications at time of writing. Some of its provisions are worth mentioning as illustrative of a broader tendency in Ecuador's approach to migration.

The proposed law draws upon the principles of universal citizenship, free human mobility and progressive end of the foreigner condition (article 4), and at the same time seeks to regulate the entry, transit and exit of individuals from the national territory and control their permanent or temporary stay in the country (article 3). In open contradiction with the universal citizenship ideal, the law lists those foreigners who shall not be permitted to enter or stay in Ecuadorian territory (article 28). Permanent residence is offered in a short list of cases that evidences the continuation of selective migration criteria (article 57). The law further identifies certain conduct as immigration offences and determines that such offences shall be brought before a judge of minor criminal offences (*juez de contravenciones*) and decided in light of a procedure established in the Criminal Code (articles 17 and 18). The prohibition of detention only protects victims of crimes against migrants, such as trafficking in persons (article 148).

With regards to migrant workers, the proposed Act does not mention migrants arriving in Ecuador as a motivation for issuing the law. Its language fails to recognise migrant workers and their families in its territory, establishing only that labour authorities shall ensure that public and private institutions guarantee the rights of 'foreign personnel' working in Ecuador (article 40). Meanwhile, those who have the 'migrant worker condition as defined by international instruments ratified by Ecuador' are recognised as emigrants (article 44). Throughout the law, measures to

55 Ramírez Gallegos (n 21 above) 49.

56 Draft Organic Act on Human Mobility (*Proyecto de Ley Orgánica de Movilidad Humana*), National Assembly, presented on 16 July 2015.

57 CMW/C/ECU/CO/2 (n 19 above) para 16.

protect the rights of migrant workers are focused on Ecuadorians working abroad.

According to the ICRMW, there are some minimum standards that state parties must observe in respect of migrant workers and members of their families, irrespective of their migration status. Furthermore, in light of article 7 of the ICRMW, state parties undertake to secure human rights to all migrant workers ‘without distinction of any kind’. Similarly, according to Ecuador’s Constitution, all individuals have access to all rights irrespective of their migration status. Article 28 of the Constitution provides that migrant workers and members of their families have the right to receive any medical care that is urgently required for the preservation of their life. Some important measures have been adopted by the state to ensure that foreigners can access health, education and other rights provided for in the Constitution. To mention an example, Ministerial Decision No 337/2008, guarantees access to pre-school, primary and secondary education for children, including adolescents, of migrant workers, regardless of their migration status.

However, such measures have only been partially successful due to rampant discriminatory practices affecting migrants in Ecuador. Although new laws –including criminal legislation – have been issued to penalise discriminatory practices, *de facto* discrimination is still the prevalent reality. As a result, undocumented migrant workers still face enormous barriers in accessing education, health, employment and housing. It is not infrequent to find cases like the one of José Benalcázar and Johana Leyton, a family of Afro-descendant asylum seekers from Colombia whose new-born died because hospital authorities claimed there were no more beds for Colombians and insisted that they return to Colombia (a country where they feared persecution).⁵⁸ As mentioned by Ackerman:

[A]lthough after 2008 there is an emphasis in the official discourse on non-discrimination of foreigners and their fair treatment – a discourse that implies the non-existence of desirable and non-desirable foreigners – the state’s goals in regional integration do not allow for the elimination of the concept of desirable and non-desirable foreigners.⁵⁹

While in comparison with other countries in Latin America the so-called ‘burden’ of foreigners over the total population is low (around 1 per cent), the sudden increase of hundreds of thousands of foreigners in the country, which peaked in the first decade of the century, clashed with Ecuadorians’ perceptions of their society. Despite the repeated recommendations of the

58 Defensoría del Pueblo, Trámite Defensorial Nro 271-2015-VC.

59 Ackerman (n 36 above) 98 (Not an official translation).

CMW,⁶⁰ a generally negative image of foreigners working in Ecuador is still prevalent amongst the majority of the population, the media and even the authorities, mainly in relation to Colombians, Peruvians, Cubans and Chinese whereby they are associated with lack of safety, violence, prostitution or access to employment to the detriment of Ecuadorians.⁶¹ The state has done little to prevent xenophobic practices and reactions, discriminatory attitudes and social stigmatisation. In fact, the state has itself adopted measures that contribute to stigma and stereotyping.⁶²

Particularly alarming is the recurrent use of racial profiling in immigration and law enforcement activities. Immigration and police authorities still have broad stop and search powers and use racial and socio-economic profiling to target Colombian, Cuban, Haitian and African persons who have entered or stayed irregularly. Women sex workers are particularly vulnerable to raids, deprivation of liberty and deportation measures.⁶³

The CMW has reiterated its recommendation to Ecuador to ensure that migration procedures, including deportation and expulsion, are in accordance with article 22 of the Convention and that they are exceptional procedures of an administrative nature and are not handled by the criminal justice system.⁶⁴ The new criminal code, issued in 2014, reformed articles 24 and 31 of the Migration Law to provide for detention of those awaiting deportation, thus criminalising migration. Deportation is only theoretically a non-criminal procedure; in practice, however, persons to be deported are criminalised, face long periods of detention, and are not guaranteed enough procedural safeguards, contrary to the provisions of the Convention and the recommendations of the CMW.

60 The CMW has reiterated its concern about the discriminatory attitudes and social stigmatisation from which migrant workers may suffer. CMW/C/ECU/CO/1 (n 18 above) para 19 and CMW/C/ECU/CO/2 (n 19 above) para 23. On lack of measures to combat any tendency to stereotype or stigmatise migrant workers, and the link between migrants and crime, see: Concluding Observations on the combined 20th to 22nd periodic reports of Ecuador, CERD (22 October 2012), UN Doc CERD/C/ECU/CO/20-22 (2012) paras 15 and 23. On intersectional discrimination, see: Concluding Observations on the combined eighth and ninth periodic reports of Ecuador, CEDAW (10 March 2015), UN Doc CEDAW/C/ECU/CO/8-9 (2015) para 10.

61 CMW/C/ECU/CO/2 (n 19 above) paras 23-26.

62 Such as the reinstatement of the requirement of a criminal record exclusively to Colombian migrants or the resolutions issued by the Civil Registry impose obstacles for the registration of children born in Ecuador when their parents are irregular migrants (Civil Registry Resolution No-DIGERCIC-DAJ-2010-000213 and Resolution No-DIGERCIC-DAJ-2010-000214 (16 July 2010).

63 Comisión Interinstitucional de Verificación *Informe de Verificación sobre las Condiciones de Detención de Personas Privadas de la Libertad en el Marco de Operativos de Identificación de Irregulares en la Ciudad De Quito* (2010). Cited in: IACHR *Hearing on the Situation of asylum seekers and refugees in Ecuador*, Information presented by the petitioners, 146 Period of Sessions (2012).

64 CMW/C/ECU/CO/2 (n 19 above) paras 29 and 30.

In spite of the constitutional provision providing that no human being is illegal, legal provisions in force give the police the power to prevent and punish clandestine migration.⁶⁵ In 2009, the Migration Act was amended⁶⁶ in order to regulate arrest, detention and prosecution of foreigners accused of committing crimes in Ecuador. Amendments to this law introduced in 2011⁶⁷ request foreigners to obtain state-issued documentation (*censo*), which allows the state to monitor foreigners living in Ecuador and to sanction those who do not comply with this requirement. Article 37 of the Migration Law punished those who try to re-enter the country after being deported and those who forge migration documentation with six months to three years of prison.⁶⁸ The new criminal code adopted in 2014 eliminated the provision of article 37 but provided for the expulsion and prohibition of return to the territory (for ten years) for all foreigners punished with sanctions of over five years of imprisonment (article 61). The contrast between constitutional principles designed to protect migrants' rights and the restrictive and criminalising measures adopted by the state have been characterised by authors like Arcentales as schizophrenic.⁶⁹

The aim of the new constitutional regime, according to authors like Ramírez, was to impede expulsion from Ecuadorian territory based on migrant status, as well as to prevent deprivation of liberty based on the lack of compliance with administrative requirements.⁷⁰ In reality, as a result of laws and practices that conflict with constitutional aspiration, thousands of exclusions, deportations and detention of migrants are still occurring in Ecuador, the country of universal citizenship.⁷¹

With regards to detention conditions, in 2011 the government started to host some migrants facing deportation at detention centres different from prisons for ordinary criminal offences. In Quito, they are detained at 'Hotel Carrión', which was adapted for this purpose. In this regard, article 17 of the ICRMW provides that any migrant worker who is detained for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial. While the separation of migrants from persons who are being criminally prosecuted is desirable and in accordance with the Convention,

65 Ley de Migración *Prevenir y reprimir la migración clandestina* (art 4 num III).

66 Law 0, Official Registry (S) 544 (9 March 2009).

67 Executive Decree 799, Official Registry 485 (6 July 2011).

68 Codificación de la Ley de Migración, Official Registry No 563 (12 April 2005).

69 J Arcentales 'Derechos de las Personas en Movilidad Humana en el año 2011' (2011) 115.

70 Ramírez Gallegos (n 21 above) 35.

71 See CMW/C/ECU/CO/2 (n 19 above) para 29; IACHR 'Hearing on the Situation of asylum seekers and refugees in Ecuador' Information presented by the petitioners, 146 Period of Sessions (2 November 2012) para 27; Coalición por las Migraciones y el Refugio, Defensoría del Pueblo, Casa de Movilidad Humana, INREDH & SJRM *Informe de verificación sobre las condiciones de detención de personas privadas de la libertad en el marco de operativos de identificación de irregulares, en la ciudad de Quito* (2010).

the mere existence of this detention centre is a step back from the free human mobility policy allegedly in force in the Ecuador. Furthermore, the detention conditions in this centre are extremely poor, prison-like and unsafe.⁷²

The lack of coherence between constitutional norms providing for universal citizenship and free human mobility, international treaties protecting migrant workers, and legislation permitting detention and deportation of individuals in irregular status is abundantly evident and troubling.

2.3 Migrant workers passing through Ecuador

Migration figures show significant numbers of migrants in transit through Ecuador. For example, in 2011 alone 2 545 Haitians entered Ecuador and 2 520 left the country. Most of them stayed in Ecuador awaiting visas to work in Brazil. Coyotes have also taken advantage of the flexible migration laws in Ecuador during the last years. As a result, thousands of migrants have used a new route that starts in Ecuador and uses Colombia to reach Central America, cross the Mexican border and end up in the United States. According to recent investigations,⁷³ migrants from all continents use this route, although a majority come from Cuba, Bangladesh, Nepal, India and China.

Ecuador is also a country of transit of human-trafficking victims.⁷⁴ A series of norms have been issued to combat this practice and protect its victims. Article 66, paragraph 29(b) of the Constitution prohibits slavery, exploitation, servitude, human trafficking and people smuggling in all their forms. Article 213 of the Criminal Code in force since 2014 punishes the illicit transit of migrants with seven to ten years of deprivation of liberty. In 2006, a National Plan against Human Trafficking⁷⁵ was issued. Awareness campaigns have been implemented and authorities have reported increased numbers of trafficking prosecutions and convictions and reported identifying a large number of trafficking victims. However, insufficient human, economic, and technical resources have been allocated to eradicate and punish this practice and to reduce demand for forced labour. Furthermore, the state's deportation practices addressed to sex workers fail to consider their possible status as victims of human trafficking. Trafficking victims are often criminalised and the state still

72 Professor Manuela Picq, who was detained in this 'hotel', denounced the prison conditions of migrants detained with her awaiting deportation. Her criticisms included indefinite detention, restrictions on visitations, limited yard time, and poor health conditions.

73 Discovery en Español Documentary 'Colombia: La nueva frontera' (2015).

74 US Department of State *Trafficking in persons report 2014: Ecuador* (2014) 161-162.

75 The full name of the Plan in Spanish is *Plan Nacional para Combatir la Trata de Personas, Tráfico Ilegal de Migrantes, Explotación Sexual Laboral y otros modos de Explotación de Mujeres, Niños, Niñas y Adolescentes, Pornografía Infantil y Corrupción de Menores*.

takes a punitive approach rather than a human rights-based approach to address their situation.⁷⁶

With regards to Ecuador's efforts to combat trafficking in persons, the CMW has expressed its concern about the lack of institutional coordination as well as shortcomings in the provision of protection and care for victims of trafficking. Additionally, it has expressed its concern about cases of deportation involving foreign victims of trafficking and recommended Ecuador to take further measures to combat trafficking in persons, including formulating a plan focusing exclusively on human trafficking; adopting laws and regulations to ensure implementation of legislation to combat human trafficking; developing training to strengthen the capacities of the police; collecting data in order to better combat trafficking in persons; ensuring that those responsible for trafficking in persons are tried and appropriately punished; and intensifying campaigns for the prevention of irregular migration.⁷⁷

Beyond human trafficking, under the ICRMW Ecuador as a state of transit, is required to work towards the prevention and elimination of illegal or clandestine movements, adopting measures such as detecting and eradicating illegal or clandestine movements of migrant workers and imposing sanctions on persons, groups or entities which organise, operate or assist in organising or operating such movements. However, despite reports documenting that Ecuador is a part of a clandestine route to the United States, the number of migrants passing through Ecuador with the aim of entering irregularly into the United States keeps growing. For example, since Ecuador is one of the only countries where Cubans are allowed to travel (provided they have an invitation letter), thousands of Cubans travel to Ecuador seeking to reach the United States. Thousands of them are currently stranded in Panama, Costa Rica and other Central American countries.⁷⁸

One cannot help but wonder: were the consequences of the open door policy sufficiently considered? Is Ecuador complying with its Convention obligations to consult and co-operate with other countries with a view to promoting sound, equitable and humane conditions in connection with international migration?⁷⁹ Is Ecuador paying due regard to the social, economic, cultural and other needs of migrant workers, as well as to the consequences of such migration for the communities concerned?⁸⁰

76 On human trafficking in Ecuador, see: E Buitrón *Estudio sobre el Estado de la Trata de Personas en Ecuador* (2011).

77 CMW/C/ECU/CO/2 (n 4 above) paras 49-51.

78 See: Panampost 'Tránsito de inmigrantes cubanos por Panamá aumentó 294% en 5 años' (17 September 2015); BBC 'Por qué hay 1.600 cubanos varados en Costa Rica?' (14 November 2015).

79 ICRMW art 64(1).

80 ICRMW art 64(1).

2.4 Migrant workers returning to Ecuador

The ICRMW requires state parties to co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers to the state of origin: (a) when they decide to return or (b) their authorisation of residence or employment expires or (c) when they are in the state of employment in an irregular situation.⁸¹ According to the Convention, state parties shall cooperate with other states with a view to facilitating the durable social and cultural reintegration in the state of origin only with regards to migrant workers in a regular situation.⁸² The Convention also confers on migrant workers the right to transfer their earnings, savings and personal effects and belongings. In keeping with these obligations, and even going beyond them, Ecuador's 2008 Constitution establishes the state duty to offer guarantees for voluntary return of migrants, irrespective of their situation as documented or undocumented workers, and regardless of the reasons for their return. Furthermore, according to the constitutional provisions, incentives are to be provided in order to encourage migrants to repatriate their savings and assets so that savings may be directed towards quality investments in production (article 338).

Ecuador's development plan, discussed above in section 2.1, upholds the right to a sustainable, voluntary return with dignity and seeks to create conditions that facilitate migrants' reintegration within the workforce and production sector upon their return to Ecuador. Specific programmes have been implemented to realise the plan's goals. The '*Bienvenid@s a Casa*' (Welcome Home) Plan, for example, is an assistance programme aimed at encouraging the voluntary return of Ecuadorian migrants. The plan includes measures to facilitate the return to Ecuador of migrants, their belongings and work equipment. The plan is paired with productivity incentives, loans and non-refundable funds for entrepreneurs such as the '*Fondo Cucayo*'. Through its return plans, the state recognised migrants as agents of development and sought to facilitate their trip back as well as their search for jobs and entrepreneurial activities to guarantee the sustainability of their return.

According to the 2010 census, one in every four Ecuadorians who migrated between 2001 and 2010 had returned. SENAMI reported that, since the beginning of 2008 to August 2011, 14 623 Ecuadorians returned home with the assistance of the Welcome Home Plan. More recent reports by the governmental news agency affirmed that more than 37 000 Ecuadorian migrants had returned home through the Welcome Home Plan. Other plans have also been implemented by the government to encourage the return of Ecuadorian migrant workers. For example, over a thousand Ecuadorian doctors have returned to the country as part of a

81 ICRMW art 67(1).

82 ICRMW art 67(2).

programme entitled 'Healthy Ecuador Plan' (*Plan Ecuador Saludable*).⁸³ In the paragraphs justifying the introduction of a new human mobility law, Assembly members mention approximately 70 000 returned Ecuadorians.⁸⁴

It is difficult to say whether the return of migrant workers has been a result of Ecuador's policies such as the '*Bienvenid@s a Casa*' plan, or of the global crisis combined with harsher migration control policies in destination countries. Ramírez believes that there have been more forced than voluntary returnees.⁸⁵ In fact, the National Directorate of Migration reported that between 2005 and 2011, 19 424 Ecuadorians were deported, with the United States, Mexico and Spain being the three main expelling states.

Clearly, different factors push migrants to return to Ecuador. Some return voluntarily or for family reasons while others are deported. The global financial crisis affecting countries like Spain also triggered the return of migrant workers. Harsher migration controls and policies have also resulted in the return of migrants. In any case, as pointed out by Margheritis with regards to Ecuador's initiatives aimed at promoting the return of migrants, although:

It is unclear if these efforts have enticed Ecuadorians who were not already planning to return ... the initiative marks a significant departure from previous administrations in focusing on the diaspora.⁸⁶

The voluntary repatriation programmes for migrant workers and members of their families implemented by Ecuador received the attention of the international community. However, especially after the elimination of the SENAMI and the budgetary cuts for such programmes, migrant workers who returned have reported complete abandonment by the government and are experiencing harsh living conditions in Ecuador.⁸⁷ The draft law on human mobility establishes the state's obligation to give priority attention to Ecuadorians who are forced to return as opposed to those who return voluntarily (article 68).⁸⁸

83 El Telégrafo 'El Plan Ecuador Saludable ha repatriado a 1.087 médicos ecuatorianos' (12 July 2015).

84 Draft Organic Act on Human Mobility (*Proyecto de Ley Orgánica de Movilidad Humana*), National Assembly, presented on 16 July 2015, Exposición de motivos.

85 Ramírez Gallegos (n 21 above) fn 3

86 A Margheritis 'Todos somos migrantes (We are all migrants): The paradoxes of innovative state-led transnationalism in Ecuador' (2011) 5 *International Political Sociology* 198.

87 See public television interview with Rafael Barba, representative of the association of returned migrants in Ecuador aired on 18 June 2015 <http://linkis.com/N7xii> (accessed 1 November 2017). See also El Diario 'Migrantes retornados aseguran que ofrecimientos del Plan Retorno no se han cumplido' (18 August 2015) <http://www.eldiario.ec/noticias-manabi-ecuador/365128-migrantes-retornados-aseguran-que-ofrecimientos-del-plan-retorno-no-se-han-cumplido/> (accessed 1 November 2017).

88 Draft Organic Act on Human Mobility (n 84 above).

Furthermore, as pointed out by Jokisch: 'The Correa administration's state-led transnationalism may have been designed more to continue the flow of remittances than to actually encourage permanent return migration'.⁸⁹ Along the same lines, Margheritis explains that the reliance of the Ecuadorian economy on remittances as a second source of foreign exchange, and the limited capacity to offer jobs and good wages to potential returnees, cast doubt on the viability and desirability of voluntary repatriation programmes.⁹⁰ When evaluating Ecuador, the CMW noted with interest the voluntary repatriation programmes for migrant workers and members of their families developed by Ecuador, but regretted the lack of involvement of those persons in drawing up such programmes.⁹¹

3 Ecuador before the Committee on Migrant Workers

The ICRMW was ratified by Ecuador in 2002. The Convention entered into force in 2003, after it was ratified by 20 states, since which time Ecuador should have effectively implemented the obligations established by the Convention, as well as the recommendations issued by the CMW. Since its establishment in 2004, the CMW has examined Ecuador twice. The third set of concluding observations will be issued following the submission of Ecuador's third report in May 2017.

In its concluding observations of 2007 and 2010, the Committee recognised the progress made by Ecuador in protecting the rights of its nationals abroad. At the same time, the Committee identified major challenges faced by Ecuador. The Committee's concluding observations also reiterated most of the recommendations included in its first concluding observations, evidencing Ecuador's lack of compliance with the Committees' initial evaluation of Ecuador. Similar recommendations have been issued by other UN human rights bodies, including conventional⁹² and extra conventional mechanisms.⁹³

89 Jokisch (n 3 above).

90 A Margheritis (n 86 above).

91 CMW/C/ECU/CO/2 (n 19 above) para 45.

92 See Concluding Observations of the Committee against Torture: Ecuador, CAT (7 December 2010), UN Doc CAT/C/ECU/CO/4-6 (2010), Recommendation 14; and Concluding Observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14-30 November 2012), CESCR (13 December 2012), UN Doc E/C.12/ECU/CO/3 (2012).

93 See Report to the Human Rights Commission in pursuance of resolution 2001/52: Addendum Mission to Ecuador UN Special Rapporteur on the human rights of migrants Gabriela Rodríguez Pizarro (18 February 2002), UN Doc E/CN.4/2002/94/Add.1 (2002). Also, Honduras and Iraq made recommendations to Ecuador during its last universal periodic review, which were accepted by the state during its examination: Report of the Working Group on the Universal Periodic Review: Ecuador, HRC (5 July 2012), UN Doc A/HRC/21/4 (2012) para 135.

While in its first evaluation the CMW welcomed the information that civil society organisations were involved in the preparation of the state's initial report,⁹⁴ in 2010 the CMW expressed its concern about the limited participation of civil society and non-governmental organisations in the implementation of the Convention, including in the drafting of reports. The Committee encouraged Ecuador to consider more active ways of systematically involving civil society and non-governmental organisations in the implementation of the Convention and the preparation of the reports.⁹⁵

Ecuadorian civil society's advocacy efforts during the Constituent Assembly⁹⁶ translated into drastic constitutional changes adopted by the state. But the collaboration between civil society and the government did not last long. For example, after several initiatives by civil society to collaborate with the state in the drafting of legislation coherent with the constitutional mandates as well as the international obligations under the ICRMW the proposed Organic Act on Human Mobility, now officially before the National Assembly, stemmed from the Ministry of Foreign Affairs and had very limited participation from civil society.⁹⁷

Civil society has played a fundamental role in documenting and highlighting the variety of issues affecting migrant workers in Ecuador. Their efforts to document the challenges faced by migrant workers and advocate for their rights are much more pronounced than in other humanrights areas in Ecuador. This is an enormous advantage that the state has not fully understood. Despite the fact that the Constitution mandates the state to coordinate its actions with civil society working on human mobility issues nationally and internationally (article 392) the government continues to neglect the views of civil society working on migration issues and has not recognised the role that civil society could play in promoting the effective implementation of the ICRMW.

Another matter that has hampered the work of the Committee is the lack of official figures and estimates on migration issues, according to Javier Arcentales, a member of the Coalition for Migration and Refugee Issues in Ecuador.⁹⁸ The CMW has systematically encouraged states to better understand the situation of migrants in their country through the collection and analysis of statistical data, noting that the absence of data means that public policies will fail to meet the needs of the intended

94 CMW/C/ECU/CO/1 (n 18 above) para 6(d).

95 CMW/C/ECU/CO/2 (n 19 above) paras 21 and 22.

96 The Constituent Assembly convened on 29 November 2007 to draft a new constitution, which was approved by the Assembly in July 2008 and by popular vote in September 2008.

97 Greater detail on the relationship between civil society and the government, described in this paragraph, is available here: *Coalición por las Migraciones y el Refugio Análisis del Proyecto de Ley de Movilidad Humana* (2015).

98 An initiative composed of civil society organisations and individual professionals who joined together in 2006 to promote and defend the rights of persons in human mobility.

beneficiaries.⁹⁹ With regards to Ecuador, the CMW has regretted the lack of information on the different criteria for evaluating the effective implementation of the Convention, particularly in relation to migrants in transit, migrant women, unaccompanied migrant children and cross-border and seasonal migrant workers.¹⁰⁰

The last census, carried out in 2010, is an important yet out-dated source. The information produced by SENAMI (when it still existed), and the Ministries of Labour, Foreign Affairs and Interior is scarce, inconsistent and incomplete. The Ministry of Interior produces the most up-to-date information; however, it only registers migration movements but its system is not able to provide information on whether some of those movements originate from the same person. Official figures do not show the complexity of reasons for migration, immigration, and transit and return. Furthermore, there are insufficient efforts to document and estimate irregular migration movements. Without these studies, any evaluation of the success of Ecuador's laws and policies addressing migrant workers is incomplete.

A point also needs to be made with regards to Ecuador's participation in the Committee. State parties to the ICRMW have consistently elected Ecuadorian citizens as members of the CMW. While the appointment of some diplomatic officers like Francisco Carrión-Mena, given his academic record, was not questioned, the most recent appointment has raised serious concerns. In June 2015, state parties to the ICRMW elected María Landázuri as a member of the Committee. Ms Landázuri acted as the highest national authority on migration matters within the Ministry of Foreign Affairs at the same time as she acted as a member of the Committee, which cast doubt on the independence of the Committee when reviewing the compliance of Ecuador under the ICRMW.

According to the Convention, members of the Committee shall both be elected and serve in their personal capacity.¹⁰¹ Is it possible for someone like Ms Landázuri to avoid conflict between her former official role as Ecuador's highest migration authority and a member of the Committee? In such a situation, when one of its members is responsible for Ecuador's policies and actions with regards to migrant workers, is the Committee in a position to objectively and fairly evaluate Ecuador's compliance with the Convention? Ms Landázuri signed, for example, memorandums¹⁰² denying Professor Manuela Picq a visa that would allow her to return to Ecuador. The grounds cited by Ms Landázuri to reject her application

99 In April 2013, the CMW discussed the role of migration statistics for treaty reporting and migration policies. Details on the discussion are available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13544&LangID=E#sthas.h.rQqkSNSU.dpuf> (accessed 1 November 2017).

100 CMW/C/ECU/CO/2 (n 19 above) paras 17-18.

101 ICRMW art 72(2)(b).

102 Memorandum No MREMH-VMH-2015-2299-M (17 September 2015).

were, at least, questionable. Will the CMW have the independence to issue recommendations to Ecuador in light of cases in which one of its members was personally involved? Despite internal criticism,¹⁰³ her election was considered by the Department of Foreign Affairs:

[A] recognition by the international community of the efforts carried out by the National Government in favour of Ecuadorian migrants abroad and foreign migrants in Ecuador, as well as Ecuador's leadership in the UN for the promotion and protection of all migrants in the world under the principle of universal citizenship.¹⁰⁴

The views of the Committee would have more impact if its members could be perceived to be independent experts. In Ecuador, this perception has been brought into question.

Despite the fact that an Ecuadorian has always served on the CMW, Ecuador has yet to make the declarations under articles 76 and 77 of the Convention recognising the competence of the Committee to receive and consider inter-state complaints and communications from or on behalf of individuals within that state's jurisdiction who claim that their rights under the Convention have been violated. If Ecuador is to be a world leader when it comes to migration policy, as it maintains, it is difficult to understand why it has not accepted the competence of the Committee to receive communications alleging violations of the ICRMW.

4 Conclusion

The previous sections illustrate that the focus and priority of the state's actions have been the protection of Ecuadorian migrant workers abroad. In the design and implementation of its policies, Ecuador has emphasised the condition of emigrant over other types of migrant. The state has invested greater effort and more money in complying with self-imposed extraterritorial obligations than implementing its international obligations domestically. When it comes to protecting migrant workers, Ecuador is far from being a leading example on the implementation of the ICRMW. As noted by the CMW:

Ecuador, as a country of origin of migrant workers, has made progress in protecting the rights of its nationals abroad. However, as a country of transit

103 See Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo 'Órganos que supervisan tratados de derechos humanos deben constituirse con expertos de alto nivel' Public Statement, Communication No 772-CR-15 (15 May 2015) <http://mesadearticulacion.org/declaraciones/pidhdd-organos-que-supervisan-tratados-de-derechos-humanos-deben-constituirse-con-expertos-de-alto-nivel/> (accessed 1 November 2017).

104 Foreign Affairs Ministry 'Viceministra ecuatoriana María Landázuri formará parte del Comité para la Protección de los Derechos de todos los trabajadores migratorios y sus familias'.

and destination, it faces major challenges in regard to protection of the rights of migrant workers.¹⁰⁵

Some have pointed out that Ecuador has approved a Constitution that goes beyond the international obligations it assumed when it ratified the ICRMW in 2002, qualifying Ecuador's migration policy as a 'rupture' with the past as well as a 'rupture' in comparison with other countries.¹⁰⁶ It is arguable that the state's enthusiasm for innovation and creation of new migration paradigms has meant that the Convention has not been sufficiently taken into account in the formulation and implementation of laws and policies concerning the rights of migrant workers. Despite the privileged position of international human rights instruments in Ecuador's legal regime, as well as the possibility to directly apply its norms, the ICRMW is rarely cited at the time of formulating legislation or policies for migrants. Even rarer is the possibility of a judge taking the ICRMW into consideration when determining if the Ecuadorian authorities have complied with their duty to protect migrants' rights within. Lack of reference suggests a lack of awareness of the ICRMW in Ecuador, maybe as a consequence of the proliferation of human rights treaties ratified by Ecuador and the lack of dissemination of such treaties. Despite the CMW's recommendations,¹⁰⁷ no specific permanent programmes have been developed and carried out to provide training on the content of the Convention.

While many of Ecuador's Constitutional provisions might seem more favourable than those of the ICRMW, it might be more effective to honour the Convention's minimum standards first, before trying to innovate beyond such obligations. When it comes to the protection of rights, a more modest but pragmatic approach might be more effective than lofty rhetorical provisions.

Moreover, the state has failed to harmonise its migration legislation with its Convention obligations and constitutional principles. The human rights focus of the Constitution is in constant tension with the security focus of the legislation in force. Secondary legislation in Ecuador is out of date, security-focused and contradicts the provisions of both the ICRMW and the Constitution. Nevertheless, migration officers as well as judges and prosecutors make little use of the Convention or the Constitution and rely on the obsolete migration legislation instead, as the CMW has noted.¹⁰⁸ The new bill on human mobility proposed in 2015 still evidences the paradox between strong protection of migrants abroad and the limited protections available for migrants domestically. Far from honouring

105 CMW/C/ECU/CO/2 (n 19 above) para 3.

106 JP Ramírez Gallegos (n 21 above) 7.

107 CMW/C/ECU/CO/1 (n 18 above) para 18 and CMW/C/ECU/CO/2 (n 19 above) paras 19-20.

108 CMW/C/ECU/CO/1 (n 18 above) paras 8-9.

Ecuador's international obligations towards migrant workers, the proposed law still criminalises certain forms of migration.

Disparities between the recognition of migration as a constitutional right and procedures criminalising offences related to migration are difficult to explain. Not only has the government not revised secondary legislation that is not in conformity with the Constitution and international commitments, it has approved and proposed new legislation incompatible with the right to migrate protected by the Constitution and the rights of migrant workers guaranteed by the ICRMW. Domestic laws and policies towards migrant workers in Ecuador are evidently a reaction to circumstances (including political circumstances) more than the result of a long-term policy on migratory fluxes. When it came to approving a new Constitution, the idea of more rights for migrants prevailed. When the promotion of universal citizenship caused an increase in immigration, the government shifted back to a security focus and started to apply selective and discriminatory practices to determine who could enter and stay in Ecuador. The state continues to adopt measures to control immigration that are incompatible with the ICRMW and with a Constitution that purports to enshrine universal citizenship and free movement for all.

Differences between constitutional provisions and reality are also manifest. Universal citizenship, openness and non-discrimination are still a discourse not honoured in practice. The approach of the Convention might be more limited than the concept of universal citizenship, but also more realistic. When it comes to migration laws and policies, more cautious provisions could have more impact on the protection of the rights of migrant workers than innovative ones.

Before Ecuador can be viewed as a model when it comes to migration policies, we should evaluate how much its radical policies promoting the right to migrate, universal citizenship and the protection of migrants abroad have contributed to trafficking in persons and smuggling of migrants, thus contravening Ecuador's obligations under article 68 of the ICRMW. Moreover, Ecuador's laws and policies have been adopted without sufficient study of its reality as a country of origin, destination, transit and return of migrants. Improvement and transparency in data collection is indispensable not only to assess the implementation of the Convention in Ecuador, but also to improve the situation of migrant workers in and from Ecuador.

Finally, a universal citizenship concept cannot be implemented unilaterally. The state has unsuccessfully dedicated efforts and funds to disseminate this ideal and to influence migration policies at different international forums including the Andean Community, MERCOSUR,

UNASUR, the World Social Forum on Migrations, and the South American Conference on Migrations.¹⁰⁹ Such efforts and funds might be better allocated to protect migrant workers domestically. If the rights of migrant workers were a reality in Ecuador, the state would have more authority in international fora when trying to convince other countries to respect their obligations to protect the rights of migrant workers and their families.

109 Margheritis (n 86 above).

CHAPTER 8

GUATEMALA'S IMPLEMENTATION OF THE ICRMW: EMERGING EFFORTS

*Cathleen Caron, Kathleen Griesbach, Ursula Roldan
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1 Introduction

Guatemala signed the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, the Convention) in September 2000.¹ Ratification followed in March 2003, and the Convention entered into force on 1 July 2003 after Guatemala and El Salvador's ratification placed it beyond the required minimum of 20 ratifying states.² Additionally, on 11 September 2007 Guatemala accepted both the inter-state complaint mechanism under article 76 and the individual communications procedure established in article 77 of the Convention.³ Civil society saw this as a significant step toward a greater commitment to the ICRMW as well as a promise to begin fulfilling its obligations under the Convention.⁴

* Additional research by Matthew Erle, Program Associate, Justice in Motion.

1 United Nations Treaty Collection '13. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families' https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en (accessed 25 September 2015).

2 P Marquez 'Upholding the rights of migrant workers' *Catholic Bishops Conference of the Philippines (CBCP) News* <http://www.cbcpnews.com/cbcpnews/?p=22269> (accessed 28 September 2015).

3 United Nations 'UN Treaty Collection' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en#EndDec (accessed 4 March 2016).

4 Grupo Articulador De La Sociedad Civil Para La Elaboración Del Informe Alternativo 'Informe alternativo de Guatemala sobre la aplicación de la Convención Internacional sobre la Protección de los Derechos de todos los Trabajadores Migratorios y de sus Familiares' (October 2010) para 45 http://www2.ohchr.org/english/bodies/cmw/docs/ngos/MENAMIG_Guatemala_CMW14.pdf (accessed 23 September 2015). Grupo Articulador is a coalition group which includes the majority of organisations working on migrant worker rights issues in Guatemala. It developed and presented an alternative report to the Committee on Migrant Workers (CMW) ahead of the CMW's review of Guatemala in 2010.

This chapter first provides an overview of the migration phenomenon as it relates to Guatemala. Next, it briefly explores some reasons why Guatemala ratified the Convention. Finally, the main body of the chapter evaluates Guatemala's response to its obligations under the ICRMW since ratifying it in 2003. We find that while Guatemala has taken some important steps toward compliance with the Convention, there is still much to be accomplished to institutionalise and enforce the migrant workers' rights guaranteed under this international human rights instrument, both within and beyond its borders.

2 Context of Guatemalan migration

Guatemala is a part of what is known as the 'Northern Triangle', one of the three northern countries of Central America, which also includes Honduras and El Salvador. Guatemala is a country of migration – a place of origin, transit, destination and return. It forms part of the greatest migration flow in the world, namely that from Central America and Mexico to the United States. Guatemala's place within this major migration current makes particularly urgent its compliance with the ICRMW. Guatemala's ratification of the Convention obligates the country to address the problems faced by migrant workers within and beyond its borders. In other words, the country has a responsibility both to Guatemalan migrants – those who migrate to the United States and other destinations, who are in processes of return, who carry out temporary, circular and cross-border migration – and to migrants who come to Guatemala from other countries.

2.1 As a country of origin

According to the International Organisation for Migration (IOM), the rate of Guatemalan emigration increased from 10,5 per cent in 2002 to 11,4 per cent in 2012.⁵ Likewise, according to US Census data, the Guatemalan population in the US increased from 17 376 people in the 1970s to 225 739 in the 1990s,⁶ and further ascended to 372 487 by the 2000s.⁷ By 2010 the numbers of Guatemalans in the US had reached an estimated 1 044 209 people.⁸ Another estimate using US Census data from 2010 found a population of 830 824 Guatemalan migrants in the US, which makes the US the destination country of 87,54 per cent of all Guatemalan emigrants;

5 The data measures the rate of emigrants for every one hundred thousand inhabitants. International Organisation for Migration (IOM) 'Perfil Migratorio 2012, Guatemala' http://costarica.iom.int/public/pdf/Perfil_Migratorio_Guatemala_2012.pdf (accessed 4 May 2016).

6 CELADE-IMILA 1990 <http://www.cepal.org/celade/publica/bol65/planilla.xls> (accessed 30 October 2015).

7 United States Census Bureau 'The hispanic population: 2010' (3 May 2011) <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (accessed 30 October 2015).

8 US Census Bureau (n 7 above) 3.

other important destinations include Mexico (3,69 per cent), Belize (2,11 per cent) and Canada (1,93 per cent).⁹

Guatemalan migrant workers in the US include foreign temporary workers – principally those who participate in the H-2A visa temporary agricultural programme and those who participate in the H-2B visa temporary non-agricultural programme – along with irregular migrants. Article 5 of the Convention defines ‘irregular migrants’ as anyone who is not ‘authorized to enter, to stay and to engage in a remunerated activity in the State of employment.’ Beth Lyon notes that it ‘describe[s] a worker who lacks both employment authorization and presence authorization; no distinction is made between the two categories’.¹⁰ In 2014, the US Department of State counted 1 453 H-2A visas issued to Guatemalan workers for agricultural labour and 3 304 H-2B visas issued to Guatemalan workers for non-agricultural labour.¹¹ In addition to these workers entering on temporary visas, the Department of Homeland Security estimates that around 560 000 Guatemalans live in an irregular status in the US. Given that the US Department of Labour estimates that more than two-thirds of irregular migrants are economically active,¹² we can estimate that around 373 000 of the irregular Guatemalan migrants in the US are labour migrants.¹³

Statistics on Guatemalan labour migration to Mexico are limited, but what exists shows a significant flow of Guatemalan workers across the northern border for temporary work in agriculture, construction, livestock and services in the nearby Mexican states of Chiapas, Tabasco, Campeche and Quintana Roo.¹⁴ In 2008, the Mexican government implemented the Border Work Visa to replace the previous Temporary Agricultural Worker Visa.¹⁵ Statistics from the 2009 EMIF-Sur survey¹⁶ showed that only nine

9 J A Cervantes González ‘El Perfil de la población de origen guatemalteco en Estados Unidos’ (4 June 2014) <http://www.cemla-remesas.org/principios/pdf/PrincipiosRemesas-Guatemala-2014.pdf> (accessed 30 October 2015).

10 B Lyon ‘When more “security” equals less workplace safety: Reconsidering laws that disadvantage unauthorized workers’ (Spring 2004) 6 *University of Pennsylvania Journal of Business Law* 578.

11 US Department of State, Bureau of Consular Affairs ‘Non-immigrant visa issuances by visa class and by nationality: FY 1997-2014 NIV Detail Table’ <http://travel.state.gov/content/visas/english/law-and-policy/statistics/non-immigrant-visas.html> (accessed July 2015).

12 Lyon (n 10 above) 585.

13 B Baker & N Rytina ‘Estimates of the unauthorized immigrant population living in the United States: January 2012’ US Department of Homeland Security Population Estimates (March 2013) http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf (accessed June 2015).

14 A Constanza Ancheita Pagaza & G Bonnici ‘Instituto de Estudios y Divulgación Sobre Migración, AC ‘Quo Vadis? Reclutamiento y Contratación de Trabajadores Migrantes y Su Acceso a La Seguridad Social’ (2013) 102 <http://www.inedim.org/documentosypub/publicaciones/reclutamientoconportada.pdf> (accessed July 2015).

15 Ancheita Pagaza & Bonnici (n 14 above) 102, 105.

16 Encuestas sobre migración en las fronteras norte y sur de México (EMIF-Sur) is a set of data produced by the Mexican university Colegio de la Frontera Norte. See <http://www.colef.mx/emif/> (accessed June 2015).

per cent of migrant workers interviewed in the southern border region possessed a valid work visa. Of the other 91 per cent of workers surveyed, 70 per cent had the Local Visitor visa, which does not authorise employment, while 21 per cent were irregular.¹⁷ Data collected by Mexico's government agency Instituto Nacional de Migración (INM) and reported in its 2011 Annual Statistics Bulletin shows that in 2011, 27 597 Guatemalans, along with 2 951 dependents, received the Border Worker Visa in the Mexican state of Chiapas. Meanwhile, the government issued 60 989 Local Visitor visas to Guatemalans in 2011.¹⁸ INM data shows that in 2014, the Mexican government issued 14 313 work permits to Guatemalan agricultural workers in Chiapas, a decrease from previous years due to changes in the agricultural sector.¹⁹ While studies have increased in recent years alongside the creation and evolution of visa systems for the southern border, there is still very limited data on the specific sectors of work and no statistics on visa renewals.²⁰

Additionally, Guatemalan labour migration is becoming more significant in Canada, particularly in agriculture. Guatemalan workers are beginning to replace Mexican workers in the state of Quebec, which some advocates attribute to efforts of resistance to Mexican worker organising efforts.²¹ In Canada, many low-wage Guatemalan workers are admitted through the Temporary Foreign Worker Programme (TFWP).²² The Canadian government reports that in 2012²³ it hosted 5 415 workers from Guatemala through Temporary Foreign Worker visas.²⁴ Meanwhile, the Guatemalan government reports that in 2014 the Canadian government

17 COLEF (n 16 above) 105.

18 COLEF (n 16 above) 106.

19 M Rojas Wiesner & H Angeles 'Trabajadores Agrícolas de Guatemala en Chiapas' *La Jornada del Campo* (suplemento Informativo de *La Jornada*) 18 July 2015 8.

20 Rojas Wiesner & Angeles (n 19 above) 106.

21 'Migrant workers: Who they are, where they're coming from' *CBC News* 7 February 2012 <http://www.cbc.ca/news/canada/migrant-workers-who-they-are-where-they-coming-from-1.1137930> (accessed June 2015).

22 Government of Canada '1.5. Temporary Foreign Worker Program work permit holders with a valid permit on December 31st by top 50 countries of citizenship, Footnote 6 2004 to 2013' <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/1-5.asp> (accessed June 2015). The TFWP allows Canadian employers to hire foreign nationals to fill temporary labour and skill shortages given a shortage of qualified Canadian citizens or legal permanent residents. TFWP includes 'agricultural stream' workers who can be from any country. Government of Canada 'Hiring agricultural workers' http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/index.shtml (accessed 9 October 2015) (accessed June 2015). Prior to 2002, agricultural workers came from just 13 countries including Mexico, Jamaica and the eastern Caribbean, through the Seasonal Agricultural Worker Program. *CBC News* (n 21 above).

23 This is the most recent year for which the Canadian government has publicly available statistics.

24 Employment and Social Development Canada 'Labour market opinions: Annual statistics – Top countries of citizenship according to the number of temporary foreign worker positions on positive Labour Market Opinions, by province/territory' http://www.esdc.gc.ca/eng/jobs/foreign_workers/lmo_statistics/annual-top-country.shtml#tab1 (accessed June 2015).

hosted 5 309 Guatemalan workers.²⁵ There are no official statistics on the number of unauthorised migrants in Canada in general or from Guatemala in particular. Some estimates suggest there may be a combined total of between 20 000 and 200 000 irregular migrants working in Canada.²⁶

2.2 Causes of Guatemalan migration

It is clear that the principal causes of migration continue to be economic ones: Guatemalans face challenges to improving their household income for such necessities as nutrition, housing, education and health; therefore, some migrate. The goal is to find employment and income in northern countries, in order to satisfy family needs and improve living conditions at home.²⁷ Critics of neoliberal globalisation frame this economic migration as non-voluntary and a consequence of the 'new capitalist architecture'; they argue that it is part of a process in which large multinational corporations appropriate strategic and profitable segments of peripheral economies, including natural and human resources.²⁸

For large numbers of Guatemalans, especially in the US, family reunification is another significant cause of migration. Along with other factors, this goal of family reunification catalysed a highly visible movement of unaccompanied minors in June of 2014, when a reported 11 479 children arrived at the border between Mexico and the US.²⁹ A 2014 United Nations High Commissioner for Refugees (UNHCR) report confirms that there was a number of causes behind the massive migration of unaccompanied minors, as Guatemala and the other Central American countries of the Northern Triangle are blighted by widespread violence due to high levels of criminality caused by the presence of gangs and organised

25 JA Rodriguez, Director of Migration Affairs, Ministry of Foreign Affairs. Gobierno de Guatemala Ministerio de Relaciones Exteriores 'The role of the State of Guatemala in regard to Temporary Migrant Workers' https://prezi.com/s5fmopdrxcv/desafios-de-la-proteccion-ingles/?utm_campaign=share&utm_medium=copy (accessed July 2015).

26 'Points-Based Immigration Systems: Canada.' <http://www.loc.gov/law/help/points-based-immigration/canada.php> (accessed June 2015). This is a relatively small percentage of the total population compared to the US estimate of 11.3 million irregular immigrants. J S Passel & D Vera Cohn 'Unauthorized immigrant population stable for half a decade' Pew Research Center (July 2015) <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/> (accessed October 2015).

27 See points 1, 2, and 3 of The Human Mobility Pastoral – Episcopal Conference of Guatemala 'El Fenomeno Migratorio En Guatemala, Desde El Corazon De La Iglesia Catolica' (1 September 2000) <http://www.iglesiaticolica.org.gt/20000901.pdf> (accessed 4 November 2015). The rates of general poverty of 53,7% and extreme poverty of 13,3% (2011) and the GINI index of 0.59 (2006), a measure of inequality, provide important context for Guatemalan migration.

28 H Márque Covarrubias & R Delgado Wise 'Una perspectiva del sur sobre capital global, migración forzada y desarrollo alternativo' (2011) 9 *Migración y Desarrollo* 4.

29 Inter-American Commission on Human Rights 'IACHR Expresses Deep Concern on the Situation of Children Migrants Arriving to the United States' (20 June 2014) http://www.oas.org/en/iachr/media_center/PReleases/2014/067.asp (accessed 30 October 2015).

crime.³⁰ These conditions push part of the populations of these countries to migrate to protect their lives and those of their families, while internal power forces within Guatemala undermine the country's ability to ameliorate widespread inequality and exclusion.

Two decades after a civil war and an unsatisfactory peace process, Guatemalan civil society has grown frustrated with the political system of representative democracy in its current incarnation. The Guatemalan political system has failed to achieve equilibrium of power in social relations due to corrupt practices and a clientelist relationship with the population during elections and in the public service.³¹ The presidency of Otto Pérez Molina is a stark example: elected on an anti-corruption platform in 2012, he was forced to resign by mass protests when he was outed as the 'leader of a vast fraud ring' in 2015.³² Along with the imposition of structural adjustment policies and other international treaties that reinforce the market economy, these conditions diminish and limit the possibilities of states to pursue a more distributive and inclusive model of democracy.³³ Other international and national phenomena have also affected the system, including the rise of organised crime and drug trafficking. Such phenomena jeopardise the security of citizens as crime syndicates take on a role in state and territorial control.³⁴

30 UNHCR Report 'Children on the run: Unaccompanied children leaving Central America and Mexico and the need for international protection' (2014) http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf (accessed September 2015).

31 According to data from the 'Barómetro de las Américas de Latin American Public Opinion' (LAPOP) from 2012, the main problems for the population in order of priority are the following: crime, the economy, poverty, unemployment and violence. According to the World Bank, Guatemala on average ranks 36 (on a scale from 0 to 100) on the selected indicators of governability (voice and accountability, government effectiveness, regulatory quality), which is within the lowest average scores of half of the countries. In State of the Region, Statistics of Central America (2014), Guatemala's corruption index is 32, with the country ranking 115 in 2015. Transparency International 'Corruption perceptions index 2014: Results' <http://www.transparency.org/cpi2014/results> (accessed October 2015).

32 Ministerio Público de Guatemala 'Juzgado envía a prisión preventiva a Otto Pérez Molina' (8 September 2015) <https://www.mp.gob.gt/2015/09/08/juzgado-envia-a-prision-preventiva-a-otto-perez-molina/> (accessed 6 November 2015); 'Otto Pérez Molina of Guatemala is jailed hours after resigning Presidency' *New York Times* 3 September 2015 http://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html?_r=0 (accessed 6 November 2015); 'Renuncia el presidente Otto Pérez' *Prensa Libre* 3 September 2015 <http://www.prensalibre.com/guatemala/politica/renuncia-el-presidente-otto-perez> (accessed 6 November 2015).

33 Márque Covarrubias & Delgado Wise (n 28 above) 36.

34 International Centre for Migrant Human Rights (CIDEHUM) and the Agency of the United Nations for Refugees (UNHCR/ACNUR) 'Desplazamiento forzado y necesidades de protección, generado por nuevas formas de violencia y criminalidad en Centroamérica' (May 2012). <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2012/8932.pdf?view=1> (accessed September 2015). The country's homicide rate is 34 per 100 000 (2013) with 20,8 per cent of the population having been a victim of delinquency in 2012 'Estado de la Región, Estadísticas de Centroamérica 2014'.

All of these factors have given rise to a forced migration from Guatemala that has been underway for more than three decades.³⁵ During the Guatemalan Civil War in the 1980s, close to 100 000 refugees fled to Mexico.³⁶ 1990 saw the start of another exodus, this time for economic reasons. Since 2000, the migration phenomenon from Guatemala has been multi-causal, including the growing exodus of unaccompanied children in the past several years.

2.3 As a destination country

Those who migrate to Guatemala are primarily, though by no means exclusively, Central Americans. A study based on the 2006 Encuesta Nacional de Condiciones de Vida (ENCOVI), a national survey of living conditions, counted 41 568 people of Central American origin residing in Guatemala, marking an increase from 25 137 such immigrants as reported by the 2002 census.³⁷ The latter statistic represented 49 per cent of all foreigners in 2002, and included 12 484 Salvadorans, 5 604 Nicaraguans, 5 977 Hondurans, 761 Costa Ricans, 600 individuals from Belize and 197 from Panama. According to the 2010 Shadow Report on the application of the ICRMW by the Grupo Articulador in Guatemala (hereinafter Shadow Report), many of these migrants are attempting to regularise their status and remain in the country.³⁸

2.4 As a country of return migration

In recent years, Guatemala has become a country of return due to the toughening of migration policies in the US and the increasing replication of this trend in Mexico, a second country seeing a rise in deportation of migrants from its territory.

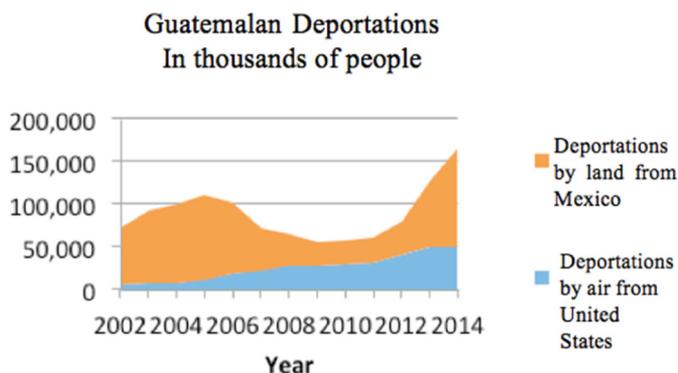
35 The IOM defines forced migration as: 'A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (eg movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)' <https://www.iom.int/key-migration-terms> (accessed 30 October 2015). The Human Mobility Pastoral of the Episcopal Conference of Guatemala sees this as forced migration (n 27 above) 1-2. The Migration Policy Institute notes that: 'The levels of coercion (eg, entire communities being forced to participate in the drug trade) and the extreme structural violence of Guatemalan society have been documented in studies by Guatemalan, Central American and US-based institutions, including the Migration Policy Institute's Regional Migration Study Group. Some Central American analysts refer to these factors as causing "forced displacement from violence and crime" or "forced migration."' <http://www.migrationpolicy.org/article/guatemalan-migration-times-civil-war-and-post-war-challenges> (accessed 30 October 2015).

36 Americas Watch Committee *Guatemalan Refugees in Mexico 1980-1984* (1984) 5 97-100.

37 Facultad Latinoamericana de Ciencias Sociales, San José de Costa Rica 'Migraciones y Derechos Laborales en Centroamérica: Características de las personas migrantes y de los mercados de trabajo' 2012, Coord.

38 Grupo Articulador De La Sociedad Civil Para La Elaboración Del Informe Alternativo (n 4 above).

Below are the statistics on deportations between 2002-2014:



Source: Department of Immigration, Guatemala, Department of Statistics, 2015

These statistics illustrate Mexico's emerging role in the politics and policies of detention and deportation. Tougher policies provoke greater violations of migrant rights, especially of those from Central America. This places these migrants in more vulnerable situations by forcing them to take new routes through Mexico, where they fall victim to organised crime gangs and suffer abuses of authority, theft, extortion and mistreatment.³⁹ In 2015, Mexico deported 70 493 Guatemalans⁴⁰ while only 69 Guatemalans submitted a complete application for refugee status and only 27 received recognition.⁴¹ These lopsided statistics suggest that Guatemalans are not getting access to these legal protections. The effect of an increase in deportation of Guatemalans is of course a growing phenomenon of repatriation to Guatemala, where returned migrants are more vulnerable than ever⁴² and in particular need of the protections afforded to them under the Convention.

The next section explores the context of Guatemala's ratification of the Convention, followed by an analysis of Guatemala's legal and institutional obligations in light of its signature and ratification of the Convention.

39 R Casillas 'La Migración de Algunos y la Inseguridad de todos, Análisis y recomendaciones para pasar de la Ficción al trato humanitario' Documentos de Trabajo N.2 ITAM & Socios de la Red de documentación de las Organizaciones defensoras de Migrantes (REDODEM) 2014.

40 Secretaría de Gobernación de México 'Estadísticas migratorias: Síntesis 2015' 4 http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Sintesis_Graficas/Sintesis_2015.pdf (accessed 4 May 2016).

41 Mexican Refugee Commission (COMAR) 'Estadísticas 2013-2017' 14 http://www.comar.gob.mx/work/models/COMAR/Resource/267/6/images/ESTADISTICAS_2013_A_1er_semestre_2017.pdf (accessed 1 August 2017).

42 United Nations High Commissioner for Refugees (n 34 above).

3 Why did Guatemala ratify the Convention?

Interviews with several key actors – including Ubaldo Villatoro,⁴³ governing board member of the National Board on Migration in Guatemala (MENAMIG) in 2003 and now an advisor to the Executive Secretary of the National Council for Assistance to Guatemalan Migrants (CONAMIGUA), and Erick Maldonado, the former Executive Secretary of CONAMIGUA, revealed no particular motive for signing or ratifying the Convention. Rather, these respondents suggested that Guatemala ultimately signed the ICRMW in response to international pressure, rather than as a considered policy decision to more effectively address migration issues.

Specifically, Maldonado indicated that other state and civil society actors had several major concerns about Guatemala and that these actors viewed Guatemala's signing of the Convention as a step toward addressing migration issues in a systematic way. According to Maldonado, the international community sees Guatemala as a country of origin, transit and destination for migrants. It observed the high levels of organised crime in Guatemala, including trafficking in drugs and other illicit substances, but also migrant smuggling and human trafficking. High levels of corruption and human rights violations aggravate the organised crime phenomenon, infiltrating public institutions like the Department of Migration and the National Civil Police rendering the situation for migrants more precarious.⁴⁴

Migration was already a significant issue in 2000, and civil society lobbied and publicly pressured the government to ratify the Convention. Both MENAMIG (founded in 1999) and the Human Mobility Pastoral pressed for ratification⁴⁵ and then became important advocates for continuing advancements in related legislation and norms.⁴⁶ The Catholic Church, through the Human Mobility Pastoral, also urged ratification of the Convention, as demonstrated in a statement in September 2000.⁴⁷

43 U Villatoro, Asociación de Apoyo Integral; member of the board of directors of MENAMIG in 2003; Executive Coordinator of MENAMIG 2006-2010; currently advisor to the Executive Secretary of CONAMIGUA, interviewed 23 September 2015.

44 Attorney Erick Maldonado, Advising Attorney of the Office of International Treaties of the Ministry on Foreign Relations of the Republic of Guatemala 2004-2006; Director of International Treaties of the Ministry on Foreign Relations of the Republic of Guatemala 2006-2007; General Director of Consular and Migratory Matters 2007-2010; Director of CONAMIGUA 2009-2011; Vice Chancellor of the Foreign Affairs Ministry 2011-present. Interviewed 5 August 2015. Presumably he refers to the increase in migration, the situation of worsening violence in the migrant journey, and the greatly expanded deportation regime in the US and Mexico; La Hora 'Migración: Trece años con una intervención fracasada' (13 November 2014) <http://lahora.gt/migracion-trece-anos-con-una-intervencion-fracasada/> (accessed 27 June 2015).

45 Maldonado (n 44 above).

46 Villatoro (n 43 above).

47 The Human Mobility Pastoral of the Episcopal Conference of Guatemala (n 35 above) 1.

4 Legal and institutional implementation of the Convention

International conventions like the ICRMW can in the end become a dead letter if signatories fail to tailor the country's legislation to meet their obligations, and if they lack the will to propose, pass and implement favourable policies for its implementation. Without these measures to ensure internal compliance, the ICRMW and other human rights conventions become an empty promise.

The sections below detail the degree to which Guatemala has moved toward implementation of the Convention since ratifying it, analysing compliance in a number of key areas. The Convention has important implications for each of these domains, and Guatemala's progress in complying with it should thus be measured in terms of its action (and inaction) within these domains.

4.1 Migration law and institutions

Guatemala has not yet reformed its migration laws or regulations to comply with its commitments under the Convention.⁴⁸ The state's failure to issue laws means that to date there exists no legal framework encompassing the majority of issues that affect this group of the population even when there has been broad consensus to do so.⁴⁹

According to Maldonado, progress on compliance with the Convention has floundered because there is no comprehensive, multidisciplinary and permanent public policy that involves all stakeholders. He notes that in the face of attempts to develop such a comprehensive public policy, the state itself was the main obstacle. The state has made only a few isolated efforts and then failed to coordinate across agencies. The objectives of the General Directorate of Migration (DGM), for example, are to 'guarantee and maintain efficient migration regulations', 'issue national identity documents' and to 'publicize the provisions of law' and ensure compliance.⁵⁰ CONAMIGUA, founded in

48 For example, existing regulations violate the Convention, such as Government Decision 528 – 2003 Reglamento de Autorización del Trabajo de Personas Extranjeras a Empleadores del Sector Privado; A R Morales Díaz 'Aplicación De La Ley De Migración En Guatemala En El Marco De La Convención Internacional Sobre La Protección De Los Derechos De Los Trabajadores Migratorios Y De Sus Familiares' unpublished PhD thesis, Universidad de San Carlos Guatemala, 2007 43-50.

49 'Iglesia solicita reforma a Ley Migratoria' *Prensa Libre* 28 August 2012 (accessed 6 November 2015); Grupo Articulador (see n 4 above) 13-14; Morales Díaz (n 48 above) 38-39.

50 The objectives of the DGM (Dirección General de Migración) focus on order and regulation. See <http://www.migracion.gob.gt/index.php/migracion/objetivos.html> (accessed 30 October 2015).

2007, describes itself as ‘the national body that brings together the authorities of the State of Guatemala responsible for the care and protection of the human rights and individual rights of Guatemalans abroad’.⁵¹

While its formation was an important step toward coordinating the efforts of various governmental institutions around migration,⁵² CONAMIGUA has not been able to respond to the demands and needs of the migration situation in Guatemala. This failure has been exacerbated by the corruption uncovered in institutions with responsibility for migration. Such corruption relates to issues of human trafficking, document fraud, illegal fees charged to migrants and extortion and calls into question their competency and commitment to assisting migrants.⁵³ For instance, the DGM was audited in 2001 because of the existence of illegal processes and corruption. However, after 13 years of audits, in 2014, the then President Otto Pérez Molina decided to lift this measure. Yet many of the problems that gave rise to that intervention persist today.⁵⁴

Maldonado also asserts that the context in which the Convention was approved differed greatly from present conditions; he implies that the state of Guatemala did not predict the changes or the dimensions that the migration phenomenon would today take on.⁵⁵ Thus, Maldonado argues that the country could not predict its failures to meet its responsibilities under the Convention. As an example, Guatemala submitted its first report to the Committee on Migrant Workers (CMW) in 2010, six years late.⁵⁶

51 In the original Spanish: Objetivo de CONAMIGUA: El Consejo Nacional de Atención al Migrante de Guatemala, CONAMIGUA es la instancia nacional que reúne a las autoridades del Estado de Guatemala, responsables de la atención y protección de los derechos humanos y garantías individuales del guatemalteco en el extranjero, con el objetivo de propiciar y fortalecer los mecanismos de coordinación interinstitucional y el cumplimiento de las funciones que se establecen en la ley y los compromisos del Estado de Guatemala derivados de convenios, tratados y otras obligaciones internacionales en el extranjero. CONAMIGUA ‘Folleto de Información Institucional’ <http://www.conamigua.gob.gt/download/FOLLETO%20DISTRIBUIDO%20EN%20FERIA%20CHAPINA%202013.pdf> (accessed 30 October 2015).

52 Act and regulations of CONAMIGUA, Decree No 46 – 2007 chap I, art 2 (2009). CONAMIGUA is the government entity that defines, coordinates, supervises and monitors the actions and activities of other governmental institutions and entities designed to protect, assist and provide assistance and aid to Guatemalan migrants and their families in Guatemala, as well as the migrants found in the Guatemalan territory.

53 Morales Díaz (see n 48 above) 26, 61; Grupo Articulador (n 4 above) para 12 & pp 47 & 50; CIDH (n 34 above) paras 341, 348, 349 & 350.

54 ‘Migración: Trece años con una intervención fracasada’ *La Hora* 13 November 2014 <http://lahora.gt/migracion-trece-anos-con-una-intervencion-fracasada/> (accessed 27 June 2015).

55 Maldonado (n 44 above). Presumably he refers to the increase in migration, the situation of worsening violence in the migrant journey, and the greatly expanded deportation regime in the US and Mexico.

56 The report was due on 1 July 2004 but was submitted six years later on 8 March 2010. The next state party report for Guatemala was due on 1 September 2016. The OHCHR website indicates a revised due date of 1 November 2018. See United Nations Human Rights ‘Reporting Status for Guatemala’ http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (accessed 1 August 2017).

Guatemala addressed the issue of legal compliance in its initial report (hereinafter Initial Report) to the CMW, claiming to have made institutional advances and progress and emphasising that the state has endorsed, approved and ratified diverse international treaties on this subject.⁵⁷ Yet despite the state's indications, the Grupo Articulador indicated in its Shadow Report that there are various shortcomings and legal gaps in the Guatemalan legal system. The report also noted that there are Guatemalan legal regulations that contravene the Convention. These include an onerous fee that employers must pay in order to employ migrants and a high cost of regularisation for irregular migrants.⁵⁸ The UN Special Rapporteur on the human rights of migrants noted that such legal gaps violate the human rights of the migrant population and pointed to the need to modify and tailor internal state norms.⁵⁹

It is worth mentioning that some legal initiatives aimed at improving the situation of migrants have been introduced in the Congress.⁶⁰ However, few of these initiatives have been approved, and others are still waiting to be submitted to review by the Plenary Session of Congress. This calls into question the level of interest and priority the issue of migration has on the national agenda.

4.2 Detention and expulsion of migrants from Guatemala

The Convention contains provisions regarding detention in articles 16 and 17 which refer to the integrity and personal liberty of migrants, along with the right to be free from physical or psychological harm. Article 22 of the Convention relates to the procedures for expulsion that states are to observe with articles 20, 23 and 56 also containing a number of procedural safeguards in the context of expulsion.

The Initial Report submitted by Guatemala in 2010, in accordance with article 73 of the Convention, signalled that the country would only carry out the expulsion of a migrant in the following two situations: a) when a migrant is found irregularly in the territory; and b) when he or she commits a crime and is convicted through a penal process, in which the state imposes deportation as a secondary penalty.⁶¹

57 'Initial Report - Guatemala' CMW (4 August 2010), UN Doc CMW/C/GTM/1 (2010) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CMW%2fC%2fGTM%2f1&Lang=en (accessed 7 March 2016).

58 Grupo Articulador (n 4 above) paras 2, 3, 4, 23 & 24.

59 Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante - Addendum - Mission to Guatemala (24 to 28 March 2008), HRC (18 March 2009), UN Doc A/HRC/11/7/Add.3 (2009) paras 6, 7, 24-29 & 50 <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx> (accessed 30 October 2015).

60 See legal initiatives nos 3759, 3765, 4126, 4388, 4560, 4572, 4734, 4851, 4861 & 4869.

61 Initial Report (n 57 above) paras 152, 187, 190-192.

Further, the Shadow Report found that there is no established timeframe for the deportation of immigrants. The Shadow Report also indicated that the state carried out collective expulsions in clear contravention of international standards.⁶² The UN Special Rapporteur on the human rights of migrants also expressed disquiet about this issue in a March 2008 report on his mission to Guatemala. Here he observed with concern the violation of migrants' rights to defence and due process in administrative procedures.⁶³ It is important to emphasise that these deficiencies have persisted over time; a 2002 Annual Report to the Inter-American Commission of Human Rights had pointed out the same problems.⁶⁴

Thus, after more than 12 years of the Convention being in force, Guatemala has not corrected all the legal deficiencies that came to the fore when it signed and ratified the ICRMW. Specifically, Guatemala is out of compliance with its obligations under articles 16(1), 16(4), 16(5), 17(1) and 22 because it does not legally regulate the maximum period for expelling migrants from the national territory. For instance, when the authorities encounter a migrant who has entered the country without authorisation, he or she is sent to a DGM shelter. These shelters are overcrowded and substandard.⁶⁵ The Special Rapporteur observes that Guatemalan law does not define a limit to how long a migrant may be held.⁶⁶ This practice clearly violates migrants' right to defence, due process, liberty and personal integrity. This kind of indefinite detention can produce tremendous psychological suffering and can be considered arbitrary detention – especially considering that their detention is not for a crime but for an administrative law violation.

This situation is worse for migrants with scarce resources who cannot pay to hire an attorney, since Guatemala lacks free legal assistance for migrants facing expulsion. The Institute of Public Criminal Defence of Guatemala only assists those who are tried for a crime, and their assistance is limited to determining criminal responsibility. There is also a lack of translators for migrants who do not speak Spanish.⁶⁷

4.3 Regularisation of the irregular migrant population

The specific process for regularisation of the irregular migrant population is not addressed directly in the ICRMW, but it does develop parameters in

62 Grupo Articulador (n 4 above) paras 27, 80, 81 & 86.

63 Bustamante (n 59 above) paras 30, 31, 49, 50 & 85.

64 IACHR *Informe Anual de la Comisión Interamericana de Derechos Humanos 2002, Capítulo VI: Estudios Especiales; Cuarto Informe de Progreso de la Relatoría sobre Trabajadores Migratorios y Miembros de sus Familias en el Hemisferio* (7 March 2003) paras 367, 368, 370, 371.

65 Morales Díaz (n 48 above) 48; Grupo Articulador (n 4 above) 29.

66 J Bustamante (n 59 above) para 50.

67 Bustamante (n 59 above) paras 30-31.

article 69(2) for the regularisation process that states should consider. With regard to irregular migrant workers, the Preamble recognises that they are frequently employed in less favourable working conditions and that respect for the human rights of all migrants would reduce their frequent abuse and exploitation by employers.

Guatemala indicated in its Initial Report of 2010 that it had carried out enforcement operations to detect establishments wherein irregular migrants work. The Report indicated that the country would proceed in two ways with respect to irregular migrants: (a) it would transfer these workers to shelters until their expulsion or (b) it would ensure their appearance before a competent judge in the event that they had committed a crime. The report also indicated that migrants could initiate the process to regularise their status within ten days, as allowed by the DGM.⁶⁸ However, the Grupo Articulador points out in its Shadow Report that the process established in the Migration Act and its related regulations entail complex, costly requirements with which the majority of irregular migrants cannot comply. Articles 93, 100 and 111 of the Migration Act and articles 33, 70, 71, 88, 96, 97 and 98 of the related regulation outline a process full of ambiguity, burdensome requirements and fees.⁶⁹

Currently there is no procedure within Guatemala which allows migrants a realistic opportunity to regularise their status. For every day a migrant is without legal status, they must pay a fine of \$1.30, which means that many irregular migrants have accumulated enormous fines.⁷⁰ To achieve a temporary residency, one must pay \$62 annually, a sum of money that most migrants can rarely afford.⁷¹ The situation is aggravated by the widespread abuse and corruption that has plagued the DGM and other institutions that regulate the process; the Shadow Report notes 'countless' cases of abuse by personnel, including retaining and destroying documents and charging illegal entry and exit fees.⁷²

Draft Act 4851, currently before the Guatemalan Congress, ostensibly seeks to fill the gap regarding regularisation.⁷³ Introduced in June 2014 by Representative Paul Briere, it would 'exempt migrants for fines based on their stay in the country, discount payments for migration documents, and eliminate the need for a guarantor'.⁷⁴ However, the proposal lacks

68 Initial Report (n 57 above) paras 152, 190, 240-243.

69 President of the Republic of Guatemala, Government Decision 529 – 99 Reglamento de la Ley de Migración art 88.

70 Migration Act art 95.

71 Migration Act art 88.

72 Grupo Articulador (n 4 above) para 79.

73 Congress of the Republic of Guatemala, Draft Act 4851: Ley de apoyo a la regularización migratoria de extranjeros en Guatemala (9 June 2014) <http://old.congreso.gob.gt/archivos/iniciativas/registro4851.pdf> (accessed 27 June 2015).

74 Congress of the Republic of Guatemala 'Diputado Jean Paul Briere Propone Ley De Apoyo A Extranjeros En Guatemala' (9 June 2014) <http://www.congreso.gob.gt/noticias.php?id=5617> (accessed 9 November 2015).

solutions to all of the barriers to regularisation currently faced by migrants. They will continue to suffer the same problems that currently affect the regularisation process: many demanding requirements and a complex and onerous process for migrants.⁷⁵ Consequently, it will do little to help most migrants regularise their status despite a stated intention to regularise all migrants who are currently in Guatemala.

4.4 Human trafficking

The only direct reference to trafficking is in the preamble of the Convention which notes that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights. Additionally, article 11 of the Convention states that no migrant should be subject to slavery or servitude or required to perform forced or compulsory labour.

The government's Initial Report, the Shadow Report and the UN Special Rapporteur all assessed Guatemala's effort to address human trafficking as a necessity to comply with the ICRMW. In its Initial Report, Guatemala cites the fight against 'Trafficking in human beings' as part of its compliance with article 11 of the Convention.⁷⁶ It states that it has adopted norms, created institutions and trained civil servants to combat trafficking and exploitation and comply with article 11.⁷⁷ In its discussion of article 11, the Shadow Report criticises these institutional reforms as shallow and weak.⁷⁸ The UN Special Rapporteur recognised the country's efforts to tackle this problem in his report on his mission to Guatemala while also expressing concerns that Guatemala has been unable to eliminate the criminal organisations responsible. He also evinced disquiet with how national authorities treat victims of these crimes.⁷⁹

Advances in this matter currently include the promulgation of the Act against Sexual Violence, Exploitation and Human Trafficking, the creation of the Inter-Institutional Commission to Combat Human Trafficking, the creation of the Section against trafficking crimes of the criminal investigation service of the federal police (Policia Nacional Civil), the creation of an ombudsman's position on the issue in the Human Rights Ombudsman's office and the delivery of workshops and trainings to civil servants and public employees. Despite these advances, however, there are serious deficiencies in how authorities treat victims of human trafficking when they find them during police operations. Typically, the victims are detained and sent to the DGM shelters where they receive no medical or

75 IOM (n 5 above) 72.

76 Initial Report (n 57 above) para 30.

77 Initial Report (n 57 above) paras 158, 162 & 167-174.

78 Grupo Articulador (n 4 above).

79 Bustamante (n 59 above); paras 75-89.

psychological attention to help them overcome their experience.⁸⁰ Another critical issue is the impunity that persists for this crime: out of fear or threats, victims do not report the perpetrators of such crimes or their accomplices. This frustrates the efforts for the authorities who try to investigate and prosecute such cases.⁸¹

Additionally, Guatemalan legislation does not provide a distinct immigration status for human trafficking survivors; rather, survivors must qualify for refugee status. These victims can apply for the relief before the start of the repatriation process, which would allow them to remain in the country in accordance with articles 16 and 17 of the Act against Sexual Violence, Exploitation and Human Trafficking⁸² and Government Decision 328 – 2001 (which refers to the Regulation for the Protection and Determination of the Status of the Refugee in the Territory of the State of Guatemala).⁸³ However, while Guatemala is a state party to the UN Convention on the Status of Refugees and has enacted Regulations for the Protection and Determination of the Status of Refugees in the State of Guatemala in compliance with its obligations under that Convention,⁸⁴ in practice those migrants seeking refugee status face numerous obstacles. Such obstacles include the lack of legal assistance for migrants, the lack of information about their rights, and the lack of translators. We see these obstacles reflected in the annual statistics published by the Ministry on Foreign Relations, which show that in 2014, for example, only 19 people benefited from this protection.⁸⁵ Guatemalan attorney Rosmery Yax of the The Human Mobility Pastoral notes that the majority of these refugee applicants are from outside of Central America. The numbers of persons granted refugee status is low because most of these applicants abandon the refugee process.⁸⁶

4.5 Labour rights

4.5.1 Migrant worker rights in Guatemala

The Convention codifies the labour rights of migrant workers and in so doing is guided by the principle of equality of treatment with citizens of the state party. Guatemala indicated in its Initial Report that once migrants

80 Grupo Articulador (n 4 above) 29.

81 Morales Díaz (n 48 above) 25.

82 Congress of the Republic of Guatemala, Decree 9 of 2009, Ley contra la Violencia Sexual, Explotación y Trata de Personas arts 16 & 17.

83 President of the Republic of Guatemala, Government Decision 328 – 2001, Reglamento para la protección y determinación del Estatuto de Refugiado en el Territorio del Estado de Guatemala.

84 Government Decision 383 – 2001 (n 83 above).

85 Ministerio de Relaciones Exteriores; Estadísticas de personas beneficiadas con el Estatuto de Refugiado (2014) <http://www.minex.gob.gt/Uploads/ER2014.csv> (accessed 27 June 2015).

86 R Yax interview with Ursula Roldán 1 September 2015.

have obtained a work permit, they have the same labour rights as Guatemalan nationals.⁸⁷

Without access to a procedure to regularise their legal status, migrant workers become more vulnerable to exploitation. Having an irregular status places migrant workers at greater risk of exploitation by employers who know that irregular workers are unlikely to approach authorities with a complaint about violations of their labour rights for fear of being detained and processed for expulsion. For its part, the Shadow Report emphasises the inequality and discrimination which characterise the Government's regulation of the granting of work permits to foreigners.⁸⁸

4.5.2 *Rights of Guatemalan migrants working abroad*

Several articles of the Convention require each state party to ensure *portable justice* for its migrant workers abroad along with ensuring justice for migrant workers at home. Portable justice, a term coined by Justice in Motion, includes the 'right to transnational access to justice and the accompanying access to information'⁸⁹ for migrant workers throughout their labour migration experience. Several articles of the Convention specifically oblige state parties to ensure portable justice for their migrant workers prior to their departure to work in another country, while working abroad and upon their return to Guatemala.

4.5.3 *Rights and obligations during recruitment*

In an August 2015 report, the Special Rapporteur on the human rights of migrants 'paid particular attention to recruitment practise as one of the key areas of work for his mandate' as he was 'concerned about the apparent growing prevalence of severe exploitation and abuse suffered by migrants at the hands of recruiters and subagents in countries of origin and destination'. He recommended that states 'develop country-level and regional policies tackling exploitative and abusive recruitment practices'.⁹⁰

As part of its obligations concerning recruitment, Guatemala is responsible under article 33 of the Convention for protecting its migrant workers *prior to* their departure to states of employment.⁹¹ Additionally, state parties are to take all appropriate measures to 'disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions'. This information is to be provided

87 Initial Report (n 57 above) para 241.

88 Government Decision 528 – 2003. See Grupo Articulador (n 4 above) para 24.

89 C Caron 'Global workers require global justice: The portability of justice challenge for migrants in the USA' (30 October 2005) http://www.globalworkers.org/sites/default/files/GWJA_Portability.pdf (accessed June 2017).

90 Report of the Special Rapporteur on the human rights of migrants, Mr François Crépeau, GA (11 August 2015), UN Doc A/70/310 (2015).

for free and in a language workers understand. Thus, under the Convention Guatemala is obliged to provide its citizens who are migrating to work in other countries with access to employment information prior to their departure. Under article 37, Guatemala is obliged to inform workers '[b]efore their departure, or at the latest at the time of their admission to the State of employment', of all conditions of their employment and their stay in the host country. However, the government has little to no pre-departure education initiatives in place to provide this essential information.⁹²

The Guatemalan government has yet to take several important measures to ensure its citizens migrating to work in other countries receive access to portable justice, as required under both the Convention and its own Labour Code. In addition to that stated above, article 34 of Guatemala's Labour Code, passed in 1961, 'Labour Contracts and Agreements', establishes the responsibility of the country to protect the rights of Guatemalan workers abroad. Article 34 charges the Guatemalan Ministry of Labour and Social Security (MINTRAB as it is known in Spanish) with regulating the recruitment and departure of international migrant workers and prohibits contractors from recruiting workers without the state's authorisation.⁹³ Article 34 requires, amongst other things, that recruiters maintain a permanent office in the capital for the duration of the contract, that they cover the costs of worker transport from the country of origin to place of foreign employment (and costs of transporting the worker's family if applicable), and that they provide workers with a contract which clearly states the costs that the recruiter will cover (which also must include any fees) and the work, housing and transport conditions. MINTRAB must also approve the contracts. Unfortunately, the Guatemalan government has never passed regulations to implement the law.

Furthermore, article 15 of the Convention states that, '[n]o migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others'. This mandate is defied by recruiters' common practice of confiscating workers' property titles prior to processing their work visas, and by the lack of systemic Guatemalan government intervention to prevent this illegal practice. Recruiters commonly seek to take control of workers' properties and land through a simple withholding, through the transfer of property

91 Article 33 ICRMW provides: 'Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning (a) Their rights arising out of the present Convention; (b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.'

92 Email from M Ramirez to C Caron on 30 September 2015.

93 Justice in Motion 'Reglas de Reclutamiento: Paises de Origen. Análisis Comparativo de Leyes de Reclutamiento Para Trabajadores en El Exterior en México, Guatemala, El Salvador, Honduras, y Guatemala' (2015) 11-13 http://justiceinmotion.org/s/RR-COO-28SP29_FINAL.pdf (accessed June 2017).

title, or through mutual contracts for the mortgage warranty that favour recruiters.⁹⁴ Workers have tremendous difficulty recovering their property titles upon their return to Guatemala following work in the United States. As a December 2013 *Prensa Libre* article explains, the Justice in Motion Defender Network documented ten cases of recruiters confiscating workers' property titles in return for the promise of migration to the US. Three of the ten workers whose properties were confiscated never retrieved their title upon returning to Guatemala. Advocates contend that recruiters take workers' property titles, in addition to withholding their passports, in order to dissuade workers from seeking legal remedies when their labour rights are violated.⁹⁵ The Guatemalan government has not intervened to eradicate this ongoing illegal practice that violates both article 34 of the Guatemalan Labour Code (which requires that the recruiter pay all costs of employment) and the ICRMW (specifically article 15). To comply with the Convention and with its own national laws, the Guatemalan government should take steps to address these illegal property title seizures, inform workers they have no obligation to turn over their property titles to recruiters, and take action against recruiters (in conjunction with the US government) to eliminate this practice in Guatemala.⁹⁶

Additionally, several recent cases of recruiter fraud also highlight the rampant abuse of migrant workers, which will continue unabated if Guatemala fails to abide by its obligations under the Convention and article 34 of its Labour Code. In April 2011, the Mexican newspaper *El Norte* reported that 100 Guatemalan nationals were defrauded of around 700 000 pesos (around 44 482 USD) when a fraudulent recruiter promised them visas for work first in Mexico and then in the United States, but failed to provide the visas. Jorge Luis Hernandez promised the workers a legal visa to work in the United States in exchange for a hefty fee, using fraudulent paperwork to pose as a legitimate recruiter under the name of 'Job Consultoría'. Fifteen of the workers eventually received a legitimate visa to work in the US through the advocacy of the Mexican human rights organisation Desarrollo Social sin Fronteras, which also filed a lawsuit against the fraudulent recruiter.⁹⁷ In another case, reported by a Defender Network member and Guatemalan employment attorney, a fake recruiter

94 'Confiscación de títulos de propiedad o posesión ... ya sea que se haga como una simple retención, enajenación de bienes (traspaso o transferencia de dominio de los bienes) y contratos de mutuo con garantía hipotecaria a favor de los reclutadores, por medio de los cuales buscan apoderarse de los inmuebles ...', see Justice in Motion 'Confiscación de Títulos de propiedad en Guatemala por parte de Reclutadores en Programas de Trabajadores Temporales con Visas H-2B' (2013) 16 http://justiceinmotion.org/s/Confiscacion-de-Titulos_Informe_Final.pdf (accessed June 2017).

95 'Estafas y abusos afectan a migrantes' *Prensa Libre* 7 December 2013.

96 Justice in Motion 'Confiscación de Títulos de Propiedad en Guatemala Por parte de reclutadores en programas de trabajadores temporales con visas H-2B. Resumen Ejecutivo' (July 2013) 7 http://justiceinmotion.org/s/ResumenEjecutivo_ConfiscaciondeTitulos.pdf (accessed June 2017).

97 A Rodriguez 'Denuncian fraude contra inmigrantes' *El norte* 12 April 2011 26, 431.

opened an office called 'Empleo Fácil de Guatemala' in the city of Quetzaltenango. He offered workers a visa and transportation to do agricultural work in Florida. He took 350 000 quetzales (around 459 USD) from each of 1 500 workers and had them sign a contract for six months of work beginning on 1 June 2011, but would not provide them with a copy. Shortly before they were planning to leave, workers went to the office to ask about the trip. The office was closed and their money gone, without the work they had been promised.⁹⁸

As seen with the confiscation of property titles, legitimate recruiters also frequently abuse the system and exploit vulnerable workers with illegal costs in violation of the Convention and the Guatemalan Labour Code. A criminal complaint filed in Guatemalan District Court in December 2010 accuses two recruiters in the municipality of Guanagazapa of fraud. The recruiters charged a large group of workers exorbitant fees to work in pine tree harvesting in the United States for a company called Express Forestry, beginning in October 2008. The fees were supposedly for the visa and transportation costs. One victim recounts that the recruiter made him pay 25000 000 quetzales (around 3280 USD), and that he had to take out a loan using his land as collateral to do so. Other workers were charged a range of high amounts. As per the December 2010 complaint, the workers had not received the job they were promised nor had they been refunded the 'down payment' they had paid,

despite the requirements we have personally carried out before the Escuintla Mediation Center where they summoned ... [one of the contractors] to try to come to a conciliatory agreement, in accordance with the subpoenas served in the month of June of the year 2010.

The criminal complaint requests that the prosecutor charge the two recruiters with the crime of personal fraud under article 263 of the criminal code.⁹⁹

On a positive note, the country is on the cusp of regulating recruiting agencies and the recruitment process more generally. In 2014, MINTRAB collaborated with recruitment agencies and advocacy organisations – the latter representing the interests of civil society – to produce a draft regulation.¹⁰⁰ Sponsored by the European Union's International and Ibero-American Foundation for Administration and Public Policies (FIAPP) and with participation from civil society stakeholders, the Guatemalan Government (including the Guatemalan Ministry of Foreign Relations and the Guatemalan Ministry of Labour and Social Security) produced a Pilot Project including a draft action protocol and operational

98 Email from A Palacios to C Caron on 4 February 2015.

99 Criminal Complaint filed 14 December 2010 in Fiscalía Distrital del Ministerio Público del Departamento de Escuintla. MV Escuintla: 7720 2000.

100 Justice in Motion (n 93 above) 11-13.

design along with an IT system for regulating Guatemalan labour migration.¹⁰¹ Until it actually implements the protocol and regulations, however, the country is out of compliance with the Convention and its mandate to protect its citizens who emigrate for work at every stage of the migration process.

In order to address some of the rampant issues around fraudulent recruitment practices, Justice in Motion held a training workshop in 2015. The workshop included the Guatemalan Department of Justice, the Department of Labour and the Ministry of Foreign Affairs personnel, and focused on providing them with tools to better respond to recruitment fraud and protect workers' rights.¹⁰² The training was part of a larger effort between Justice in Motion and United Food and Commercial Workers-Canada and the Guatemalan Government to respond to recruitment fraud. Other civil society initiatives are also beginning to bear fruit and are resulting in an increased interest from the Guatemalan state to take action.¹⁰³

4.5.4 *Rights while working abroad*

In addition to suffering abuses during recruitment in Guatemala (without the required government protections under the Convention), workers are vulnerable to abuses while working abroad. Most of the obligations to protect migrant workers in the country of employment are the responsibility of the countries of employment since they have the jurisdiction to protect persons in their own territories. However, the necessity and obligation of the countries of origin to protect their own nationals abroad is established in the Convention and furthermore, where the state party is not expressly implicated it can at least be argued to have co-responsibility.

These obligations on the country of origin to protect their nationals abroad include the right to be free from 'forced or compulsory labour', as described in article 11 of the Convention, which states that '[n]o migrant worker or member of his or her family shall be held in slavery or servitude'. Additionally, article 25(3) clarifies that state parties must take measures to

101 'Orderly and Safe Labour Migration in Guatemala' *FIIAPP* 3 November 2014 <http://www.fiiapp.org/en/noticias/migracion-laboral-ordenada-y-segura-en-guatemala/> (accessed July 2015). UE-ALC / EU-LAC 'Presentación del Proyecto Piloto Fortalecimiento Interinstitucional para la Migración Laboral Ordenada y Segura' <http://www.migracion-ue-alc.eu/index.php/es-ES/component/content/article/106-categorias-en-espanol/483-tallerpp-guatemala> (accessed July 2015).

102 Justice in Motion training to Guatemala government agencies 'US temporary work visas system: process, legal framework; and international recruitment' (2015) <http://www.globalworkers.org/guatemala-guatemala-june-3-2015> (accessed 2 October 2015).

103 Organisations involved in such efforts include the The Human Mobility Pastoral, Instituto Centroamericano de Estudios Sociales y Desarrollo (INCEDES), Instituto de Estudios y Divulgación sobre Migración, AC (INEDIM), and regional initiatives such as Iniciativa Regional sobre Movilidad Laboral (INILAB).

'ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment'. More clearly on point is article 23, which states that:

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired.

In the context of domestic migrant workers, the Special Rapporteur has stated that countries of origin 'should play an active role' in the countries of employment to protect their nationals. The report outlines specific measures the Rapporteur encourages the country of origin to play including training embassy staff to 'receive and address complaints, including through the provision of legal aid,' and to 'provide counselling and facilitate appropriate shelter' to workers 'fleeing from abusive employment circumstances'.¹⁰⁴ This holds Guatemalan consulates in states of employment at least partially responsible for protecting Guatemalan nationals' rights in states of employment.

In contradiction to its obligation under the Convention, the Guatemalan government has yet to establish strong mechanisms to address abuses against its nationals while they are working abroad. Guatemalan nationals in the US, Canada and Mexico, suffer rampant workers' rights abuses. As detailed in the Southern Poverty Law Center's 2013 report entitled 'Close to slavery: Guestworker programs in the United States', Guatemalan workers on temporary foreign worker visas face abuses and labour violations at the recruitment stage, in pay and transportation costs, through the threat of deportation, and even in situations of captivity.¹⁰⁵ Irregular Guatemalan workers face many of the same challenges as well as the heightened risk of deportation.¹⁰⁶ Several reports from United Food and Commercial Workers Canada detail abuses

104 General Comment 1 on migrant domestic workers, CMW (23 February 2011), UN Doc CMW/C/GC/1 (2011) <http://www.refworld.org/docid/4ed3553e2.html> (accessed 6 November 2015) 11-12.

105 Southern Poverty Law Center 'Close to slavery: Guest worker programs in the United States' (18 February 2013) 10, 15, 19, 27, 30 & 33 <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states> (accessed September 2015).

106 Southern Poverty Law Center 'Injustice on our plates' (2010) 4, 7 <https://www.splcenter.org/20101108/injustice-our-plates> (accessed September 2015).

of Guatemalan temporary workers in Canada.¹⁰⁷ Guatemalan workers in Mexico also can face extreme labour abuses.¹⁰⁸

The Guatemalan consulates in major cities in the United States and Canada have taken some steps to reach out to their nationals through the 'consulado móvil' programme, where the consulate officials go to heavily populated Guatemalan areas on the weekends and offer services.¹⁰⁹ However, clearly more is needed to protect the rights of vulnerable workers.

4.5.5 *Portable justice for abuses suffered abroad*

The ICRMW obligates Guatemala to protect its workers upon their return to Guatemala. Article 22(6) of the Convention requires Guatemala to protect the rights of Guatemalan migrant workers to wages rightfully earned in the state of employment:

In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

Article 22(9) emphasises migrant workers' right to portable justice after departure from the state of employment, stating that:

Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

As a state party to the Convention, then, Guatemala has a duty to implement measures at home to grant its citizens who emigrate for work access to portable justice for abuses suffered abroad. In a recent report, the Special Rapporteur stressed the need for portable justice when he urged state parties to conclude bilateral agreements to facilitate the filing of

107 United Food and Commercial Workers Canada 'The status of migrant farm workers in Canada 2011' (2011) 5, 9, 13 & 17 http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf (accessed September 2015); United Food and Commercial Workers Canada and the Agriculture Workers Alliance 'Report on the status of migrant workers in Canada 2010-2011' 15 & 23 http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf (accessed September 2015).

108 US Department of State 'Trafficking in Persons Report 2014' 271 <http://www.state.gov/documents/organization/226847.pdf> (accessed September 2015).

109 A listing of upcoming or recent 'consulado móvil' events is available on some city consulate websites. For example, the New York consulate lists consulados móviles: <http://www.consuladoguatemalanuevayork.org/consulados-moacuteviles.html> (accessed August 2015). See also the Guatemalan Embassy in Canada. http://www.canada.minex.gob.gt/Home/Visor_Pagina.aspx?PaginaID=148 (accessed September 2015).

claims for unpaid wages and benefits in the country of employment for migrants who return to the countries of origin.¹¹⁰

One civil society initiative that seeks portable justice for Guatemalan migrant workers is the Justice in Motion Defender Network, launched by Justice in Motion (then known as the Global Workers Justice Alliance) in April 2008. The Defender Network includes human rights organisations and individual advocates across countries of origin including Mexico, Guatemala, El Salvador, Nicaragua and Honduras. Advocates in the Defender Network work with advocates in countries of employment to facilitate employment law cases for migrant workers who have returned to their native countries.¹¹¹ While this is a significant and much needed civil society response to the lack of portable justice for workers who have returned to Guatemala, the Defender Network cannot compensate for long-overdue government action – required under the Convention and article 34 of the Guatemalan Labour Code – to ensure portable justice for Guatemalan migrant workers throughout their labour migration cycle.

5 Conclusion: The value of the Convention

This chapter has discussed the implications of the ICRMW for Guatemala as a state party. It reviewed the context of migration to and from Guatemala along with the conditions in which Guatemala signed and ratified the Convention, and then evaluated Guatemala's progress towards implementation in various key domains. What is revealed is that while promising steps have been taken toward introducing changes to comply with the Convention's obligations to protect specific rights of migrant workers, overall the state has failed to adequately implement the ICRMW and protect those rights. The progress made has been slow, and Guatemala has yet to put in place a legal framework that would protect migrants' rights as per the Convention, even though that framework seems to be slowly emerging with pressure and assistance from civil society and the international community.

In light of this rather grim reality of weak compliance, one may question the purpose of ratifying the Convention. Carol Girón is director of the Project on Childhood and Adolescence at Scalabrini Missionaries, the Human Mobility Commission of the Episcopal Conference of Catholic Bishops, which is one of the main organisations that advocates for migrant rights in Guatemala. Girón sees value in the Convention in spite of its appearance as almost a dead letter.¹¹² She argues that the Convention is an

110 General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, CMW (28 August 2013), UN Doc CMW/C/GC/215 (2013).

111 Justice in Motion 'The Defender Network' <http://justiceinmotion.org/the-work/> (accessed June 2017).

112 C Girón, personal interview with Scalabrini Missionaries 14 August 2015.

important point of reference that contributes to the defence of migrant rights and notes that it was Guatemala's non-compliance with the Convention which spurred civil society to develop an alternative report to the government one presented ahead of the 2010 CMW meeting in Geneva, so as to hold it accountable for its failure to meet its Convention obligations. From this process, the Grupo Articulador coalition emerged, which includes the majority of organisations working on migrant worker rights issues; the group uses social media and other advocacy tools and develops legal and public policy proposals. In 2011 it presented a document called 'Migrations: A commitment of the Guatemalan State 2012-2016', with the goal of pressuring political parties and presidential candidates running for election to incorporate migrant advocates' demands into their political platforms. This organisation has continued working to obtain a comprehensive immigration law and advance other public policy proposals that protect migrant workers. By galvanising civil society to produce shadow reports, create coalitions and mobilise more generally – apparent in the actions of the Grupo Articulador – the Convention thus serves as an important point of reference, catalyst and tool to help Guatemalan civil society to press for change at both the national and international levels.

MEXICO AND THE ICRMW: PROTECTING WOMEN MIGRANT WORKERS

Gabriela Díaz Prieto and Gretchen Kuhner

1 Introduction

Mexico was the first country to sign the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in 1991 and has been one of its foremost promoters since it was conceived in the late 1970s. While during the drafting of the ICRMW, Mexico's intention was to have an instrument to protect Mexican migrants in the US, today Mexico must also guarantee the rights of migrants who live and work in Mexico, as well as those who are in transit.¹ Part of this population is comprised of women who are impacted at each part of the migration process in different ways than men.

This chapter analyses the changes in legislation and policies that Mexico has undertaken to comply with the ICRMW, especially to address the specific situation of women migrant workers. While Mexico has made legislative and policy advances, it still falls short of compliance with ICRMW standards in practice. The corruption and impunity endemic in Mexico as a result of the weak rule of law mean that the country lacks an effective infrastructure for implementing policy and legislation. This, coupled with Mexico's geographical position as a route between Central America and the US, limits the robust application of the legislative framework. While the dearth of publicly available information prevents an accurate, detailed assessment of migrants' access to their rights and services in Mexico, the humanitarian crisis represented by the transit of Central American irregular migrants and asylum seekers through the country, and the dangerous and exploitative conditions that migrant workers, especially women, face on a daily basis, are evidence of the lack of compliance with the ICRMW. While fulfilment of recommendations

1 G Díaz Prieto & G Kuhner 'Mexico's role in promoting and implementing the ICRMW' in P de Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers Rights* (2009) 219.

made by the Committee on Migrant Workers (CMW) would help strengthen the protection of women migrant workers' rights in Mexico,² the CMW should make a greater number of recommendations concerning women migrant workers, the implementation of which would help to eliminate the rights violations that they face.

This chapter first describes the migration context and the particular problems that migrant women face in Mexico. Second, it analyses Mexico's compliance with the ICRMW in three areas: legislation, policy and practice. Third, it addresses the activity of the state and civil society in relation to the ICRMW and their interaction with the CMW. Finally, it concludes by identifying three conditions that the Committee could address to improve implementation of the ICRMW in Mexico with a view to strengthening protection for women migrant workers.

2 Background

Although Mexico was the first country to sign the ICRMW, eight years went by before it was ratified. The reason for this delay largely relates to a shift in government priorities due to the negotiations of the North American Free Trade Agreement (NAFTA) with the US and Canada. At the time, there was a concern that signing the Convention could potentially jeopardise the success of these negotiations.³

In order to encourage ratification of the ICRMW, Mexican civil society organisations carried out a national campaign that portrayed migrants as dignified workers. In addition, they developed a favourable relationship with the Mexican Senate, which proved important in ensuring that the ICRMW was ratified in 1999 with fewer reservations than proposed by the executive branch.⁴ As a result, the Convention was ratified with only one reservation which concerned article 22(4) of the ICRMW. Article 22(4) provides for the right of migrants to submit the reason they should not be expelled and to have their case reviewed, as well as the right to request suspension of the expulsion decision until such review is undertaken. This right was in conflict with article 33 of the

2 Mexico presented periodic reports to the CMW in 2005, 2010 and 2016, and has received recommendations in 2006 and 2011. Those specifically concerning barriers or rights violations faced by women migrant workers are: Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico, CMW (20 December 2006), UN Doc CMW/C/MEX/CO/1 (2006) paras 6, 26, 30, 32, 34, 36 & 38; and Draft Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico, CMW (6 April 2011), UN Doc CMW/C/MEX/CO/2 (2011) paras 24, 26, 32, 34, 38, 40, 46, 48, 50 & 53. The CMW is currently preparing its Concluding Observations in response to Mexico's 2016 report.

3 Díaz Prieto & Kuhner (n 1 above) 222.

4 F Venet 'La Convención para la protección de todos los trabajadores migrantes y sus familiares: posibilidades y límites en su aplicación' in *Primer curso de capacitación para organizaciones de la sociedad civil sobre protección de poblaciones migrantes* (1999) 270.

Mexican Constitution⁵ which at the time took legal precedence over international instruments.⁶ Indeed, in May 1999, the Supreme Court clarified that all international instruments should be considered secondary or immediately below the Constitution, but above federal law.⁷

Although the CMW requested Mexico to withdraw this reservation a number of times since 2006, it was not until 2011 that the Mexican Constitution was revised; integrating international human rights instruments into the national legal framework.⁸ This marked the beginning of a legal journey to comply with UN conventions ratified by Mexico and the recommendations made by the Committees assigned to monitor each instrument.⁹ Three years later, on 11 July 2014, Mexico finally withdrew the reservation to article 22(4), thereby allowing migrants to submit the reason they should not be expelled and to have their case reviewed by the competent authority.¹⁰ Other significant law reforms to comply with the ICRMW are analysed in section 5 of this chapter.

3 Migration context in Mexico

Mexico forms part of one of the most dynamic and complex migratory systems in the world, that of North America, which is one of the principal regions of destination for migrants.¹¹ Its proximity to the US poses a number of important challenges for Mexico.

On the one hand, 12 million Mexican-born people live in the US (equivalent to 10 per cent of the population in Mexico), and 51 per cent of them are undocumented. Both the economic crises as well as the increasingly restrictive US immigration policy have resulted in significant

5 Article 33 of the Mexican Constitution and art 125 of the General Population Act stipulated that the Executive had exclusive authority to expel from the National territory, immediately and without a judicial hearing, any foreigner whose residence in Mexico it deemed undesirable. Therefore, art 33 was contravened by the requirements of ICRMW art 22(4).

6 At that time, art 133 of the Mexican Constitution established legal precedence of the Constitution over international instruments. Díaz Prieto & Kuhner (n 1 above) 222.

7 Suprema Corte de Justicia de la Nación 'Tesis P. LXXVII/99' *Semanario Judicial de la Federación y su Gaceta* (1999) 46 http://www.equidad.scjn.gob.mx/biblioteca_virtual/jurisprudencia/nacional/jurisprudencia/27.pdf (accessed 15 March 2015)

8 Suprema Corte de Justicia de la Nación *SCJN determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional. Contradicción de Tesis 293/2011* (2013) <http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientointoasuntosrelevantespub.aspx?id=129659&seguimientoid=556> (accessed 22 February 2015).

9 For example, art 33 of the Mexican Constitution was modified in 2011 in order to guarantee the right of migrants to explain their reasons for objecting to their expulsion and to submit their case to the competent authority, as recommended by CMW.

10 While Mexico has recognised the competence of the CMW under art 77 to receive complaints from individuals, it has not recognised the competence of the CMW under art 76 to receive inter-state complaints, although the Committee has recommended Mexico to do so.

11 R Smith 'Dilemas y perspectivas del sistema migratorio de América del Norte' (2000) 50 *Comercio internacional* 289.

return migration to Mexico, consisting of both voluntary return (1.4 million people between 2005 and 2010) and 'repatriation' (2.8 million deportations from the US to Mexico between 2008 and 2013).¹²

On the other hand, Mexican territory is one of the main migratory corridors in the world. Each year approximately 400 000 undocumented migrants transit through Mexico on their way to the US, more than 90 per cent of whom are from Central America.¹³ The principal entry point to Mexico is the southern border with Guatemala, which lacks the infrastructure to ensure that international migration takes place through regular routes. According to the Ministry of the Interior, there are eleven official entry points and 370 informal transit points along the 1 149 km border. The latter facilitates 95 per cent of the irregular migration which takes place across Mexico's southern border.¹⁴

Twenty per cent of the 400 000 persons that annually cross Mexico in an irregular fashion are women.¹⁵ Although the total flow and women's participation in it diminished between 2006 and 2011, it started to grow in 2012 and reached a peak in 2014, with the migration of thousands of Central American families fleeing violence¹⁶ and lack of opportunities.¹⁷

This transnational movement of families has increased the presence of women and girl migrants in the migration flows and detention centres both in the US and Mexico.¹⁸ While the number of apprehensions of male migrants by the Southwest Sector Border Patrol in the US increased by 15 per cent between 2013 and 2014, the number of apprehensions of female migrants increased by 74 per cent between 2013 and 2014.¹⁹ In Mexico, there was a twofold increase in the number of women in detention (from

12 Secretaría de Gobernación *Programa Especial de Migración 2014-2018* (2014) 10. Multiple deportations of the same individual in a given year are counted as separate deportation 'events' for the purposes of these figures.

13 G Díaz Prieto & G Kuhner *Un viaje sin rastros. Mujeres migrantes que transitan por México en situación irregular* (2014) 16 & 47.

14 Secretaría de Gobernación (n 12 above) 21.

15 Díaz Prieto & Kuhner (n 13 above) 16.

16 UNHCR published in 2014 and 2015 two reports that thoroughly document the escalation of violence in Central America, the devastating effect it has on children and women, and their international protection needs. UNHCR *Children on the Run* (2014) <http://www.unhcr.org/56fc266f4.html> (accessed 19 April 2016) and UNHCR *Women on the Run* (2015) http://www.unhcrwashington.org/sites/default/files/Women%20on%20the%20Run%20Report_Full%20Report%20for%20Web%20Nov%202015.pdf (accessed 19 April 2016).

17 More than 68 000 families arrived to the US during FY 2014 and 40 000 during 2015. R Dominguez Villegas & V Rietig *Migrants deported from the United States and México to the Northern Triangle: A statistical and socioeconomic profile* (2015) Migration Policy Institute <http://www.migrationpolicy.org/research/migrants-deported-united-states-and-Mexico-northern-triangle-statistical-and-socioeconomic> (accessed 22 February 2016).

18 Dominguez Villegas & Rietig (n 17 above) 6.

19 United States Border Patrol 'US Border Patrol fiscal year 2013 sector profile' (2013) <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf> (accessed 22 February 2016); United States

13 975 in 2013 to 28 639 in 2014), whereas the number of men in detention increased by 36 per cent.²⁰ The apprehension of children in Mexico and the US grew by 150 per cent in this period (from 28 934 to 72 491), and the deportation of girls from Mexico tripled (from 1 800 in 2013 to 5 500 in 2014).²¹

In 2010, the discovery of the bodies of 72 migrants in San Fernando, Tamaulipas, led the international community to denounce the humanitarian crisis experienced by migrants who transit through Mexico. While such migrants run the risk of forced disappearance, homicide, abduction, physical and sexual violence and extortion, the vulnerability of migrants in transit, especially women and children, is heightened by the wider national context of corruption and lack of accountability.²²

In addition, in the southern states that border Guatemala and Belize, high levels of intra-regional migration occur based on historical and geographical ties, especially in Chiapas, where the border was established just a century ago. This state has a large number of migrants from those countries, mainly Guatemala, who live and work on different sides of the border, either as temporary workers or permanent residents.

It is important to note that Mexico does not have a high level of immigration. The number of foreign-born people living in Mexico is less than 1 per cent of the total population²³ while in 2012 immigrants in the US and Canada constituted 13 per cent and 19,8 per cent respectively.²⁴ However, the number of people born in Guatemala, Honduras, El Salvador and Nicaragua and residing in Mexico increased by 60,77 per cent between 2000 and 2010.²⁵ In particular, the Mexican censuses of 2000 and 2010 show that the majority of Central American migrants in Mexico are women.²⁶ This figure reflects the trend of intraregional migration in Central America, where women constitute 57 per cent of migrants.²⁷

Border Patrol 'US Border Patrol fiscal year 2014 sector profile' (2014) <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf> (accessed 22 February 2016).

20 Centro de Estudios Migratorios de la Secretaría de Gobernación 'Extranjeros presentados y devueltos' 2013; 2014 & 2015 http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros_presentados_y_devueltos (accessed 6 July 2015).

21 Dominguez Villegas & Rietig (n 17 above) 14 & 23.

22 Díaz Prieto & Kuhner (n 13 above).

23 INEGI 'Población nacida en otro país residente en México, 2000 y 2010' *Censos de población y vivienda* http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvin/egi/productos/censos/poblacion/2010/princi_result/cpv2010_principales_resultados_IV.pdf (accessed 22 February 2016).

24 OECD *International migration outlook 2014* (2014) 362-363.

25 INEGI (n 23 above).

26 UN Women & Instituto para las Mujeres en la Migración *Las trabajadoras migrantes centroamericanas en Chiapas. Recomendaciones de política pública para garantizar el ejercicio de sus derechos* (2015) 11.

27 J Mazza & E Sohnen 'On the other side of the fence: Changing dynamics of migration in the Americas' (2010) *Migration Information Source* Migration Policy Institute <http://www.migrationinformation.org/feature/display.cfm?ID=784> (accessed 22 February 2016).

While women migrants from Central America who work in Chiapas share some of the risks women in transit experience, they also face other kinds of rights' violations. They tend to be young women, in their productive and reproductive age, with high levels of illiteracy and little formal education. The majority are employed in low-wage jobs in the informal economy, in gendered employment sectors including street sales, domestic work, sex work and the entertainment industries.²⁸ Most of them do not have a work permit, which means that abuse and lack of access to rights is constant. The conditions of exploitation endured by women migrants who work in the agricultural *fincas*, as domestic workers and in the sex industry in Chiapas have recently been documented.²⁹

While it might be complex to differentiate between Central American transit migrants and immigrants living in Chiapas, there are elements that allow a distinction. The decision of Central American women who migrate to the US, and their chances of reaching their destination, are strongly influenced by a number of factors, including their economic situation; their labour experience in their country of origin; and importantly their access to a migration network (having family in the US) which allows them to pay for a long and perilous journey and to secure employment and housing in the destination country. On the other hand, Central American women who migrate to Chiapas value the perceived proximity to their families and the regular visits home that this facilitates.³⁰

4 Implementation of the Convention in Mexico

4.1 Impact on legislation

As mentioned above in section 2, in 2011 the Mexican Constitution was revised, integrating international human rights instruments into the national legal framework.³¹ In order to comply with UN conventions and the recommendations made by the Committees assigned to monitor each instrument, Mexico has initiated important efforts to align its legal framework with international human rights instruments, producing some positive changes for migrant worker protections. First, in 2011, the Law on Migration which sought to ensure compliance with ICRMW obligations

28 CEDAW's General Recommendation 26 acknowledges there is a male-centred culture of entertainment that has created a demand for woman as entertainers (para 8). The entertainment industry is the occupational sector that relates to sex, but does not include direct sexual activity with the paying client. In Tapachula, Chiapas, many Central American women work as table dancers as well as in 'centros botaneros', where their work consists of drinking and dancing with clients.

29 UN Women & Instituto para las Mujeres en la Migración (n 26 above) 9.

30 UN Women & Instituto para las Mujeres en la Migración (n 26 above) 11.

31 Suprema Corte de Justicia de la Nación (n 8 above).

was passed.³² In recent years, Mexico has approved new legislation related to the protection of refugees and asylum seekers; to prevent, punish and eradicate trafficking in persons; to promote assistance for victims of crime and human rights violations; and to guarantee access for women to a life free from violence. In addition, in 2012, the Federal Labour Law (LFT) was reformed, incorporating a gender perspective and strengthening workplace inspection.

These new laws, and reforms to existing laws, provide Mexico with an important regulatory framework to promote and guarantee the rights of migrant workers as recommended by the CMW. Some examples include:

- (a) The Migration Law (articles 11 and 12) complies with the recommendation of the CMW to guarantee access to justice for migrant workers and their families, regardless of their migration situation.³³ Article 52(v) of this law stipulates that migrant victims or witnesses of felony crimes shall receive immigration status for humanitarian reasons, issued by the National Migration Institute (INM). This migration document allows victims to reside and work in Mexico while they participate in legal procedures related to the crime.
- (b) The Migration Law (articles 9 and 12) complies with the CMW recommendation to ensure that the birth of children of migrant workers may be registered, regardless of the migration status of the parents.³⁴
- (c) The reforms of 2012 to the Federal Labour Law (article 994) and of 2014 to the Workplace Inspection Regulations (articles 18, 28 and 46) increased the penalties for employers and strengthened workplace inspections, in compliance with CMW recommendations,³⁵ to improve oversight of workplace conditions.
- (d) Article 8 of the Migration Law recognises the right to emergency health care for all migrants and the Health Regulation 046SSA2-2005 (2009) includes criteria for prevention and assistance in cases of domestic and sexual violence that include migrant women, irrespective of their migration status. In an attempt to ensure access to basic health services for migrants in transit, the Federal Health Ministry announced in January 2015 that all migrants can register for a federal health programme for a period of 90 days, an initiative that would help migrants moving throughout the country receive free health services at any local clinic.

32 F Alba & MA Castillo *New approaches to migration management in Mexico and Central America* (2012) <http://www.migrationpolicy.org/pubs/RMSG-MexCentAm-Migration.pdf> (accessed 22 February 2016).

33 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to Mexico, CMW (20 December 2006), UN Doc CMW/C/MEX/CO/1 (2006) para 6.

34 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to Mexico, CMW (3 May 2011), UN Doc CMW/C/MEX/CO/2 (2011) para 40. Some of the state-level civil registry codes have not been reformed to comply with the federal Migration Law and still contain articles that impede the birth registration of migrant workers' children www.imumi.com (accessed 22 February 2016).

35 CMW (n 33 above) para 38; CMW (n 34 above) para 48.

- (e) In December 2014, Mexico passed a federal law on the protection of children that includes a specific chapter on migrant children. The law provides that no child should be detained in any detention centre. Children who are brought into INM custody should be transferred to a shelter run by the Department of Family Protection for a 'Best Interest Determination'.

However, Mexican legislation still has areas that need to be reformed in order to improve legal protection for migrant workers. First, the Mexican labour legislation still needs to increase its protection of women workers' rights. For example, it does not guarantee decent working conditions for domestic workers, be they Mexican or migrants. An example of this is the provision in the Federal Labour Law for a 12 hour day without overtime (article 133). In addition, the Social Security Law does not require employers of domestic workers to register them with the social security system (article 12(I) and 13). Furthermore, the Federal Labour Law and the Social Security Law do not include occupational safety and health benefits for women working in the sex industry.

Other shortcomings in the Mexican legislation reflect the historical position of Mexico vis-à-vis foreigners, characterised as simultaneously desirable and inconvenient, especially for Mexican businessman.³⁶ For example, the Federal Labour Law (articles 354 and 357) permits foreign workers to participate in unions, but not within the leadership (article 372). Furthermore, the reality of the labour market in which the majority of immigrants in Mexico participate, particularly in the southern part of the country, is not addressed by the Migration Law³⁷ which:

- (a) Leads to indirect discrimination for migrant workers who apply for work authorisation as the requirements are linked to the formal economy (official employer offer, tax requirements, formal contracts and costs that are unrealistic for many workers from Central America).
- (b) Limits the possibility for migrant workers in an exploitative work environment to terminate an employment relationship as work authorisation is linked to an individual employer.
- (c) Limits the possibility for women in situations of domestic violence to obtain a residence permit independent of the spouse or to otherwise continue legal residence.³⁸

Finally, the US also has interests at stake. While the Migration Law allows federal migration agents to conduct migration enforcement activities throughout the country (in addition to the standard immigration controls

36 P Yankelevich *Deseables o inconvenientes? Las fronteras de la extranjería en el México posrevolucionario* (2011) 12.

37 Migration Law, arts 52-57 & 132-134; Regulations of the Migration Law, art 115; and Federal Labour Law, arts 8 & 16.

38 UN Women et al *Legislación mexicana y derechos de las trabajadoras migrantes. Un análisis del cumplimiento de la Convención sobre la Eliminación de todas las formas de Discriminación Contra la Mujer (CEDAW) y su Recomendación General no 26 en la legislación* (2014) 40.

for people entering by air, land and sea) including mobile checkpoints, the US has granted support to these activities through the Merida Initiative (2008-ongoing), an agreement between the US and Mexico with US investment.³⁹ Hence, migration agents are authorised to board buses and arbitrarily detain migrants based on discriminatory criteria such as skin colour, ethnicity, accents and smell. These practices have been denounced as unconstitutional because they violate non-discrimination clauses, the right to free transit and the right to privacy.⁴⁰

One of the objectives of the Mexican migration policy for the current federal administration (2013-2018) is to accomplish a total harmonisation with the international-legal framework, but regional economic and political interests make this more difficult. Nevertheless, in spite of the legislative gaps, Mexico has a strong legislation which, if properly implemented, could effectively guarantee the rights of migrant workers.⁴¹

4.2 Impact on policy

The Mexican government has established a number of mechanisms to protect and guarantee the rights of workers, including migrant workers. Most of the mechanisms to which migrant women have access are designed for the general population, such as the labour conciliation and arbitration courts. However, there are some initiatives that have been designed specifically for migrants, such as the Special Prosecutor's Offices for Crimes Committed against Migrants. These Offices, which have been opened in the states of Chiapas, Veracruz and Oaxaca, are in charge of preventing crime, increasing access to justice for migrants and intensifying investigations and prosecutions against perpetrators who target the migrant population.

Moreover, the government has demonstrated interest in complying with its international obligations to improve protection for migrant

39 CR Seelke & K Finklea *US Mexican security cooperation: The Mérida initiative and beyond* (2015) 7 & 16 <https://www.fas.org/sgp/crs/row/R41349.pdf> (accessed 22 February 2016).

40 CNDH *Recomendación General número 13/2006 sobre la práctica de verificaciones migratorias ilegales* (2006) http://www.cndh.org.mx/sites/all/doc/Recomendaciones/generales/RecGral_013.pdf (accessed 22 February 2016); Grupo de Trabajo sobre Política Migratoria 'Aportes al debate sobre la Ley de Migración: Posicionamiento del Grupo de Trabajo' 2011 <http://www.estudiosdemigracion.org/> (accessed 22 February 2016); CONAPRED *Proteger los derechos humanos de las personas migrantes: reto múltiple del Estado mexicano*, (2012) http://www.conapred.org.mx/documentos_cedoc/Dossier_Migr_2012_INACC.pdf (accessed 22 February 2016); i(dh)eas *Víctimas entre fronteras. La ausencia del Estado en la defensa de los derechos de las personas migrantes en México* (2013) 104; 'Detectan a migrantes por su olor a hierbita' *Reforma* 26 November 2013 3; Díaz Prieto & Kuhner (n 13 above) 24.

41 UN Women & Instituto para las Mujeres en la Migración (n 26 above) 19.

workers through national public policies elaborated for the period 2013-2018.⁴² The *National Development Plan* recognises the important economic and social contributions that migrants make and takes into consideration the gendered differences in these contributions. It also underscores that women migrants are more vulnerable to certain types of abuses in the migration process and that programmes designed to address these abuses must include a gender perspective.⁴³

As part of the national policy planning for the period 2013-2018, the government created the *Special Programme on Migration* in 2014. It constitutes the first ever national migration policy that includes objectives and specific strategies that require inter-institutional cooperation. While the national policy programming acknowledges the responsibility of Mexico as a country of origin and transit for Central American migrants and refugees, acceptance by Mexico that it is a country of destination and return is not reflected in its policies. This position is also evident in Mexico's reports to the CMW. For example, in 2011, the Mexican government stated that the lack of policies and programmes for women migrant workers was due to the fact that 'Mexico, unlike other regions like Europe and North America, is not a relevant receptor of feminine migration'.⁴⁴

On the other hand, the objectives and strategies of the *Special Programme on Migration 2014-2018* are extremely ambitious. For example, they provide for an alliance between the US, Mexico and Central America to promote regional development, cultural exchange and enhanced legal mechanisms for migration.⁴⁵ Although this objective implies the opportunity to address transit migration from a regional perspective, including solutions to guarantee human security for migrants and access to basic rights, in practice policies have focused on detention rather than regularisation of migrant flows.

Currently, this alliance is limited to the Merida Initiative, discussed above in section 4.1. The fourth pillar of the Initiative seeks to strengthen

42 This policy framework includes a *National Development Plan*, transversal programmes (gender, migration), as well as sectoral programmes for each Ministry. In these documents, the Executive Power establishes the objectives, priorities and strategies that outline the actions the government should follow throughout the period in question. For further information on the main action lines regarding women migrant workers in Mexico, see: UN Women & Instituto para las Mujeres en la Migración (n 26 above) 22-35. Action lines for women in transit are analysed in Díaz Prieto & Kuhner (n 13 above) 98-101.

43 Secretaría de Hacienda y Crédito Público *Plan Nacional de Desarrollo 2013-2018* (2013) 96.

44 Respuestas presentadas por escrito por el gobierno de la República de México a la lista de cuestiones (CMW/C/MEX/Q/2) recibidas por el Comité para la protección de los derechos de todos los trabajadores migratorios y de sus familiares en relación con el examen del segundo informe periódico de México, Gobierno de México (15 March 2011), UN Doc CMW/C/MEX/Q/2/Add.1 (2011) para 243.

45 Action Line 2.3.7. Secretaría de Gobernación (n 12 above) 37.

Mexico's southern border.⁴⁶ Additionally, Mexico has adopted a Southern Border Programme (2014-2015) to reduce irregular migration to the US.⁴⁷ The results of this collaboration are dramatic and disquieting: while irregular migration on the US border decreased by half in 2015,⁴⁸ detention of Central Americans in Mexico during 2015 increased by 70 per cent.⁴⁹ Due to the limited capacity of the INM and the Commission for Refugee Assistance (COMAR) to screen for cases that require international protection, the policy has led to violation of protection standards for migrant families and children during detention and deportation procedures, and human rights violations against migrants have increased.⁵⁰ Civil society organisations and the media have documented the violence caused by the intensified migration enforcement practices.⁵¹ The planned national policies to improve protection of migrant workers have in fact been neglected in favour of enforcement activities.

4.3 Implementation of the migration policy

Although Mexico has a solid legal framework, the lack of implementation of national policies related to migrants' rights is exposed by the humanitarian crisis of Central American irregular migrants and refugees in transit through Mexico, as well as the dangerous and abusive conditions that migrant workers, especially women, face on a daily basis. An evaluation of migrant workers' access to basic rights and services, and of the impact of government programmes on migrants' living, work and transit conditions, is hampered by a lack of publicly available information.⁵² For example, in 2010 the CMW requested information

46 In 2015, the US Congress provided \$79 million above the Administration's request of \$115 million for the Mérida Initiative to be used for helping Mexico secure its southern border and implement justice sector reforms. Seelke & Finklea (n 39 above) 7 & 16.

47 On 7 July 2014, President Peña Nieto announced a new Southern Border Plan. The plan increased security at 12 ports of entry with Guatemala and Belize and along known migration routes. Under this plan, migration agents have worked with the military and the police to increase immigration enforcement efforts. CR Seelke *Mexico's recent immigration enforcement efforts* Report IF10215 (2015) <http://pennyhill.com/jmsfileseller/docs//IF10215.pdf> (accessed 22 February 2016).

48 The number of apprehensions of Salvadorans, Guatemalans and Hondurans by the US reduced from 239 000 in 2014 to 110 000 in 2015. Domínguez Villegas & Rietig (n 17 above) 22.

49 Domínguez Villegas & Rietig (n 17 above) 1.

50 UNHCR *Arrancados de Raíz* (2014) <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/Publicaciones/2014/9828> (accessed 22 February 2016); Georgetown Law Human Rights Institute Fact-Finding Project *The cost of stemming the tide: How immigration enforcement practices in Southern Mexico limit migrant Children's access to international protection* (2015) http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf (accessed 22 February 2016).

51 Animal Político & CIDE *Programa Frontera Sur: Una cacería de migrantes* (2015) April 28 <http://www.animalpolitico.com/caceriademigrantes/index.html> (accessed 22 February 2016).

52 UN Women & Instituto para las Mujeres en la Migración (n 26 above) 24.

regarding the number of disputes before conciliation and arbitration boards and the courts concerning unfair dismissal, employment-related complaints and compensation for injury suffered by foreign workers in an irregular situation.⁵³ The Mexican government was unable to provide this type of information because the labour court system does not record the nationality (or the migration status) of claimants.⁵⁴ Information disaggregated by sex regarding claimants in labour cases is also unavailable. As a result, in 2011, the CMW recommended that Mexico establish a national migration system that takes into account the different aspects of the Convention in order to improve the characterisation of the migration flows and stocks and the design of public policies.⁵⁵

While the national migration information system is included in the national policy for 2013-2018, the government has not complied with the recommendation in practice. Without a migration information system, the government will be unable to design and evaluate policies aimed at improving migrants' access to rights and services. Lack of information also undermines efforts to improve accountability, reduce corruption and impunity and strengthen the rule of law. As a result, the third report, presented in 2016, ten years following Mexico's first report to the CMW, showed few substantive advances in the implementation of the Convention.

The majority of the observations made by the CMW in 2006 and 2011 still remain relevant, particularly recommendations to guarantee:

- (a) Access to regular, safe and dignified migration for women migrant workers in transit,⁵⁶ as well as those who live and work in Mexico, in order to protect their rights.⁵⁷
- (b) Conditions for decent work for agricultural migrant workers and migrant domestic workers by increasing workplace inspections,⁵⁸ the right to unionise and the right to participate in union management.⁵⁹
- (c) Access to justice and reparation for women migrant workers who are victims of labour exploitation, crimes or human rights violations, as well as sanctions for those responsible,⁶⁰ including state actors.⁶¹

53 List of issues to be taken up in connection with the consideration of the second periodic report of Mexico (CMW/C/MEX/2), CMW (28 December 2010), UN Doc CMW/C/MEX/Q/2 (2010) para 22

54 Written replies by the Government of Mexico to the List of Issues (CMW/C/MEX/Q/1) raised by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families in connection with the consideration of the Initial Report of Mexico (CMW/C/MEX/1), Government of Mexico (5 October 2006), UN Doc CMW/C/MEX/Q/1/Add.1 (2006) para 242.

55 CMW (n 34 above) para 18.

56 CMW (n 34 above) para 50.

57 CMW (n 33 above) para 34; CMW (n 34 above) para 53.

58 CMW (n 33 above) paras 34 & 38; CMW (n 34 above) paras 38 & 48.

59 CMW (n 33 above) para 36; CMW (n 34 above) para 46.

60 CMW (n 33 above) paras 6, 26, 30 & 34; CMW (n 34 above) paras 26, 34, 38, 48 & 50.

61 CMW (n 33 above) para 32; CMW (n 34 above) paras 30 & 32.

- (d) The right to non-discriminatory treatment, especially based on ethnic origin and gender.⁶²

In order to comply with the ICRMW, the Mexican government needs to mainstream gender policy and design evidence-based policies, programmes and actions. Policy should recognise women migrants as agents of development, instead of stigmatising, criminalising or solely identifying them as victims. Affirmative actions should also be implemented. For example, the migration documentation process currently discriminates against women agricultural migrant workers. While men are contracted by their *finca* employers and documented with a work permit, women are not recognised as equal workers by their spouses and employers. They are excluded from contract agreements by their husbands and it suits employers not to include them on the employee list they hand to the migration authorities for registration, as this allows them to contract women informally, thereby reducing expenses. The outcome is that many women are registered by migration authorities as ‘partners’ (or not registered at all), and contracted informally, without access to a work permit and its benefits. A measure designed to document agricultural migrant workers with a work permit would help to guarantee their labour rights.⁶³

There are other ways in which Mexico could improve opportunities to migrate with a work permit while complying with the ICRMW. One way would be to address contradictions between the migration legal framework and other laws. For example, the requirements contained in the Migration Law for a domestic worker to obtain migration status with work authorisation contradict the regulations of the Federal Labour Law as well as the reality on the ground.⁶⁴ As a result, even though a third of Central American women who reside in the southern state of Chiapas are domestic workers and 70 per cent of Guatemalan cross-border workers are employed in domestic work, between January 2011 and July 2014 the INM in Chiapas only issued 153 employer permits to contract foreign domestic workers.⁶⁵ The domestic work market in Tapachula, which sits on the border with Guatemala and is the largest city in the state of Chiapas, consists mainly of indigenous Guatemalan women because they are

62 CMW (n 34 above) paras 24, 40 & 53.

63 UN Women et al *Guía breve para desarrollar legislación migratoria con perspectiva de género* (2015) 26.

64 While the Federal Labour Law allows an informal contract with a domestic worker, the migration legislation requires the employer to present a work offer to the INM in order to request a work permit for a foreigner. Moreover, under the migration law the INM can pay visits to the employer’s house to verify working conditions, while the Federal Labour Law does not consider this type of inspection.

65 UN Women et al (n 63 above) 18.

stereotyped as women who are ‘good with children’ and who ‘withstand hard labour’, although they are also judged as ‘thieves’.⁶⁶ These prejudices and stereotypes exacerbate the discrimination and exploitation that they experience. At the same, they constitute barriers of access to other rights such as justice.

Efforts to reduce impunity for human rights violations against migrants are central to compliance with the ICRMW. Although many human rights violations are committed by civilians, authorities are indifferent or lack training to address the issue.⁶⁷ In addition, the lack of repercussions promotes impunity for human rights violations against migrants. In order to reduce impunity, various factors should be addressed: Mexican authorities should be held accountable, institutions strengthened, and existing laws and policies implemented.

Weak public institutions and the scarcity of resources to strengthen capacity contribute to migrants’ rights violations. A clear example of the state’s inability to guarantee workers’ rights includes the security and hygiene regulations in the agricultural camps in Chiapas, and the reduced human and financial resources allocated to labour inspection, arbitration and conciliation.⁶⁸ Chiapas, a state with more than 5 million inhabitants has only two workplace inspectors.⁶⁹ There are three offices of Workers’ Conciliation and Arbitration, and the one in Tapachula has 16 employees. In order to file an employment complaint, migrant workers from all over the state must present their complaint in this office, which is often more than 500 km from their worksite.⁷⁰

Mexico also fails to comply with its obligation to protect child migrants due to a lack of human and financial resources. Child migrants should not be detained in detention centres, yet the Office on Family Protection (DIF), charged with housing migrant children, lacks the basic infrastructure and budget needed to protect them, with the result that the majority does not have access to its services.⁷¹ With three offices and 15 officials throughout the country, the COMAR lacks capacity to screen

66 T Cruz Salazar ‘Racismo cultural y representaciones de inmigrantes centroamericanas en Chiapas’ (2011) 6 *Migraciones Internacionales* 133; Centro de Derechos Humanos Fray Matías de Córdova AC *Por el reconocimiento a la contribución significativa de las trabajadoras del hogar en la economía global. Situación de las y los trabajadores del hogar en la ciudad de Tapachula, Chiapas* (2012) 3.

67 I(dh)cas (n 40 above) 108.

68 UN Women & Instituto para las Mujeres en la Migración (n 26 above) 34.

69 A Romero Gudiño ‘Inspección federal del trabajo en México’ (2008) 6 *Revista Latinoamericana de Derecho Social* 113.

70 Interview with a public officer of the Tapachula Labour Conciliation and Arbitration 2nd Special Court on 21 October 2014.

71 D Lorente & G Morales ‘Introducción a los capítulos sobre niños en el contexto de la migración en México – dos fronteras: una sola niñez’ in K Musalo & P Ceriani (eds) *Niñez y migración en Centro y Norteamérica: causas, políticas, práctica y desafíos* (2015); MD París y R Zenteno *Detención y devolución de niños, niñas y adolescentes (NNA) migrantes no acompañados* (2015).

child migrants for international protection needs.⁷² During 2014, it only granted refugee status to 12 of the more than 23 000 children who were detained and deported from Mexico. This is of particular concern considering that the Office of the High Commissioner for Refugees (UNHCR) presented evidence that more than 50 per cent of the children fleeing from Central America have international protection needs.⁷³

Therefore, it is important that the Mexican government takes measures to guarantee the effective implementation of the existing legal framework. There is a need to properly train government officials and to provide specific procedures so as to reduce the level of discretion which officials enjoy when making decisions relating to migrants.⁷⁴ In the case of access to justice, the Migration Law establishes that migrant victims of crime should receive migration status for humanitarian reasons in order to continue with their criminal case. However, there is no mechanism to identify victims and no information is available to concerning the criteria the INM uses to issue these documents, how many people apply and what the rate of successful and rejected applications is. In order to avoid granting humanitarian protection, the INM often issues voluntary departure letters that require migrants to leave the country within 15 days rather than granting a year to follow up with their criminal cases as victims.⁷⁵ In 2014, for example, Mexico issued just 332 documents for humanitarian reasons.⁷⁶

Other barriers to migrants' rights could be addressed by better training of government officials. For example, Central American women migrant workers' access to rights and services (particularly health, legalisation, identity, education and programmes for their children) are not explicitly excluded by the law. Rather, access is impeded through confusing interactions with civil servants, including those who are in charge of implementing government programmes.⁷⁷

5 Mexican civil society and the ICRMW

Civil society organisations in Mexico have been committed to the ICRMW since the international campaigns for its signature and

72 Even though asylum applications grew 17% in 2014, COMAR's budget increased only 4% in 2015. Seelke (n 47 above) 7; 'México recibe 67% más solicitudes de refugio, pero sólo tiene 15 oficiales para atender 2 mil casos' *Animal Político* México 19 June 2015 <http://www.animalpolitico.com/2015/06/mexico-recibe-67-mas-de-solicitudes-de-refugio-pero-solo-tiene-15-oficiales-de-comar-para-atender-2-mil-casos/> (accessed 22 February 2016).

73 UNHCR (n 50 above) 32.

74 UN Women & Instituto para las Mujeres en la Migración (n 26 above) 22-35.

75 Insyde *Diagnóstico del Instituto Nacional de Migración. Hacia un sistema de rendición de cuentas en pro de los derechos de las personas migrantes en México* (2013) 252-256.

76 Georgetown Law Human Rights Institute Fact-Finding Project (n 50 above) 51.

77 L Carte 'Everyday restriction: Central American Women and the state in the Mexico-Guatemala Border City of Tapachula' (2014) 48 *International Migration Review* 113.

ratification. It is therefore not surprising that they have elaborated and presented alternative reports in 2005 and 2011 which were drawn on by the CMW in its concluding observations to Mexico. Civil society organisations have worked for effective implementation of the Convention, not only through long-term advocacy work for migration legislation,⁷⁸ but by active participation in the design of the national policy programming exercise during 2013 that led to strategies and action lines to guarantee migrant workers' rights.⁷⁹ They have also contributed through their participation in the INM's Citizen Council and their assessments of the main institutions involved.⁸⁰ Finally, they have produced guides and protocols to inform and improve public service, especially to identify international protection needs and secure access to justice for migrants,⁸¹ and to guarantee women migrants' rights in compliance with CEDAW and the ICRMW.⁸²

6 Opportunities to enhance the protection of women migrants in Mexico through the CMW

Three conditions need to be met in order to more effectively implement the ICRMW in Mexico:

6.1 Strengthen migrant worker protection through enhancing the relationship between the ICRMW and other international instruments

The ICRMW extends human rights to migrants without distinction as to sex. However, it does not address the specific gendered needs of women in the migration process.⁸³ For example, the Convention does not adequately respond to the change in the nature of international migration whereby growing numbers of women migrate for economic reasons such as the

78 Grupo de Trabajo sobre Política Migratoria (n 40 above) '<http://www.estudiosdemigracion.org/> (accessed 22 February 2016).

79 Colectivo Plan Nacional de Desarrollo-Migración *Las propuestas del Colectivo-PND migración y su relación con el Plan Nacional de Desarrollo 2013-2018 y lineamientos de la Secretaría de Hacienda y Crédito Público* (2013) http://www.imumi.org/pnd/recursos/propuestas_colectivo_pnd_migracion.pdf (accessed 22 February 2016).

80 Insyde (n 75 above).

81 Sin Fronteras *Protocolo de actuación para quienes imparten justicia en casos que afectan a personas migrantes y sujetas de protección internacional* (2013) <http://www.amij.org.mx/protocolos/Protocolo%20Migrantes.pdf> (accessed 22 February 2016); Sin Fronteras *Guía práctica para identificar a personas con necesidades de protección especial* (2014) http://www.sinfronteras.org.mx/attachments/Cartilla_SolicitantesPI_WEB.pdf (accessed 22 February 2016).

82 The Institute for Women in Migration (Instituto para las Mujeres en la Migración) & UN Women developed a series of documents with guidelines and recommendations to promote women migrant workers' rights through legislation and policy. Most of the documents are cited throughout the chapter and are listed in the References section.

83 S Jolly & H Reeves *Gender and migration: Overview report* (2005) <http://www.bridge.ids.ac.uk/reports/cep-mig-or.pdf> (accessed 22 February 2016).

demand for caregivers in destination countries, and make an increasing contribution in their countries of origin and destination.⁸⁴ It does not suitably address the human rights violations that women migrants face during different migration processes, including the costs of undocumented migration, that are higher for women than for men, or situations of trafficking, sexual exploitation, physical violence and sexual harassment.⁸⁵ Finally, the ICRMW does not take into account access to sexual and reproductive health services. Therefore, CEDAW and its General Recommendation 26 on Women Migrant Workers (CEDAW GR 26) can usefully guide the CMW's interpretation of the ICRMW to strengthen women migrant workers' protection.⁸⁶

The approach of CEDAW GR 26 of addressing the particular human rights concerns of women migrant workers throughout the migration cycle was taken by the CMW in its General Comment 1 on Migrant Domestic Workers (2011).⁸⁷ Subsequently, this Comment and gender perspective guided the CMW's 2011 observations to Mexico to end discrimination against migrant workers and members of their families based on ethnic origin and gender (para 24), and by enforcing access to justice for women migrant workers, especially domestic workers (para 38). These observations would be enhanced by a closer adherence to the spirit and substance of CEDAW GR 26. For example, under GR 26, states should ensure that contracts for women migrant workers are legally valid, when this is not always true for agricultural women migrant workers in the *fincas* of Chiapas. In addition, states should enforce access to redress for human rights violations at all stages of the migration cycle and, for example, provide shelters for abused women migrant workers who wish to leave exploitative employers.

84 UN Women et al (n 38 above) 23.

85 Conceptual Note *Promoción y protección de los derechos de las mujeres trabajadoras migrantes en el mundo. Alianzas para la migración y el desarrollo humano: Prosperidad compartida – responsabilidad compartida* High level conference previous to GFMD IV Meeting, organised by UNIFEM (part of UN Women) and the Mexican Government, Mexico, 7 & 8 September 2010.

86 A Petrozziello *Género en marcha. Trabajando el nexo migración-desarrollo desde una perspectiva de género* (2013) 193. UN Women has systematised women migrant protections in Mexico under several instruments (ICRMW, General Comment 1 on Migrant Domestic Workers, CEDAW and its General Recommendation 26 on Migrant Workers. UN Women et al *Compromisos de México con los derechos humanos de las trabajadoras migrantes* (2016) 18.

87 The CMW included a section on gender perspective in its General Comment 1 on Migrant Domestic Workers, based on CEDAW's General Recommendation 26 on Women Migrant Workers. Both instruments, in alliance with ILO Convention No 189 on Domestic Workers, strengthen protection of women migrants' rights. General Comment 1 on migrant domestic workers, CMW (23 February 2011), UN Doc CMW/C/GC/1 (2011) http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm (accessed 9 March 2016).

6.2 Increase CMW attention to specific issues related to women migrant workers

In its Shadow Report of 2005, the Mexican Migration Forum emphasised the need to issue migration documentation independent of an employer or spouse, in order to prevent different forms of abuse and violence. However, the CMW has not made a pronouncement regarding discrimination that women migrant workers face in the labour market, gender-based violence in the workplace, the restrictions on their freedom of movement or the limitations on their access to health, education and family unity.

To address this, the CMW should request specific information regarding indicators, disaggregated by sex and nationality, to evaluate Mexico's implementation of its public policy. Finally, the Committee could include the following recommendations for Mexico:

- (a) Ratify the International Labour Organisation (ILO) Convention 189 on Domestic Workers to strengthen protection for women migrant domestic workers.
- (b) Bring labour and social security laws into compliance with international instruments, particularly in the case of domestic workers.
- (c) Implement clear procedures to provide assistance to undocumented women migrant workers in the area of sexual and reproductive health, and train healthcare providers on migration and human rights, in order to eliminate discriminatory practices.
- (d) Strengthen the INM's capacity to protect the rights of migrants by establishing evaluation mechanisms to detect migrants who have special needs such as victims of kidnapping and trafficking in persons, refugees, unaccompanied and repatriated child migrants; refer them to appropriate government offices such as COMAR, National System for Family Development (DIF), the Attorney General (PGR) and the Executive Commission for Victim Support; and facilitate their access to justice.
- (e) Increase types and number of visas for migrants from Guatemala, El Salvador and Honduras that allow documented travel through Mexico. This would be in line with Mexico's commitment in the *Special Programme on Migration 2014-2018* to create an alliance with the US and Central American countries to promote regular migration.⁸⁸

6.3 Take into account the specific needs that women migrants face upon returning to Mexico, as well as those who remain in communities of origin

Finally, it is important to point out that while the Committee has made recommendations regarding migrant workers in transit and those who live and work in Mexico, it has not taken a stance regarding migrant workers and their families who have returned to Mexico, often as a result of forced return from the US. A million and a half Mexicans were removed from the US to Mexico between 2009-2013.⁸⁹ Mexico should guarantee access to health and education services for the US-born children of Mexicans upon return. It is equally important to address the concerns around family separation when the children of returnees remain in the US. In addition, the Committee has not yet made observations regarding the issues faced by the spouses and family members left behind in the communities of origin in Mexico, and the relevance of their investment of remittances in development projects in their communities.

7 Conclusion

Mexico was a leading advocate for the elaboration of the ICRMW. Over the course of the last 15 years, the country has made significant legal changes in order to comply with the ICRMW, but implementation of this legal framework remains a challenge. The dearth of public information on migrants' access to rights and services means that there is little hard evidence of *de facto* compliance with the ICRMW. On a general level, the enforcement of laws and policies that promote women migrants' rights is limited by a weak rule of law, corruption, impunity, xenophobia and the lack of a gender perspective. Furthermore, implementation is impeded by budgetary constraints and a lack of clear guidelines for state officials concerning protection of migrants' rights. Lastly, effective compliance with the ICRMW cannot be analysed in isolation from the economic and political interests of Mexico within the region that comprises North and Central America, and its complex position as a country of origin, transit and destination. While civil society is working on tools and guidelines to promote implementation of the ICRMW, the role of the CMW and its observations are central. Specific and assertive recommendations on enforcement of ICRMW standards could give the Mexican government the necessary direction to better achieve effective implementation. Finally, international acknowledgement of the migrant and refugee crisis in the region, faced mainly by women and children, and recommendations from

89 US Department on Homeland Security *2013 Yearbook on Immigration Statistics* (2014) 107 http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf (accessed 22 February 2016).

the Committee encouraging Mexico to work towards a solution, are of the utmost importance.

Piyasiri Wickramasekara

1 Introduction

Sri Lanka is primarily an origin country of labour migration. The oil boom in the Gulf States in the early 1970s marked the beginning of significant outflows of migrant workers from Sri Lanka. The contribution of labour migration to the Sri Lankan economy is substantial. Migrant remittances are now the major source of foreign exchange. In 2014 the total value of remittances reached US\$7 billion, amounting to 9,6 per cent of GDP, and 62 per cent of export earnings. Annual reported outflows of migrant workers have ranged between 250 000 to 300 000 in the five years up to 2015.¹ The total outflow of 300 413 workers in 2014 represents 3,5 per cent of the employed population. While there are no estimates of the number of foreign migrant workers in Sri Lanka, the United Nations has estimated 38 700 persons as international migrants in the country in 2015,² which is only 0,2 per cent of the population.

The objective of this Chapter is to review the status of adherence in law and practice to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) which Sri Lanka acceded to on 11 March 1996. It first outlines the migration context in Sri Lanka. Section 3 traces the background to accession of the ICRMW. Section 4 highlights various policy and institutional initiatives of Sri Lanka relating to migration and their contribution to implementation of the ICRMW. Following a discussion of interactions between the government and civil society with the Committee on Migrant Workers (CMW) in Section 5, the Chapter raises a number of major issues relating to compliance with the Convention. The final section draws some conclusions.

1 SLBFE 'Annual statistical report of foreign employment 2013: Sri Lanka Bureau of Foreign Employment' (2015).

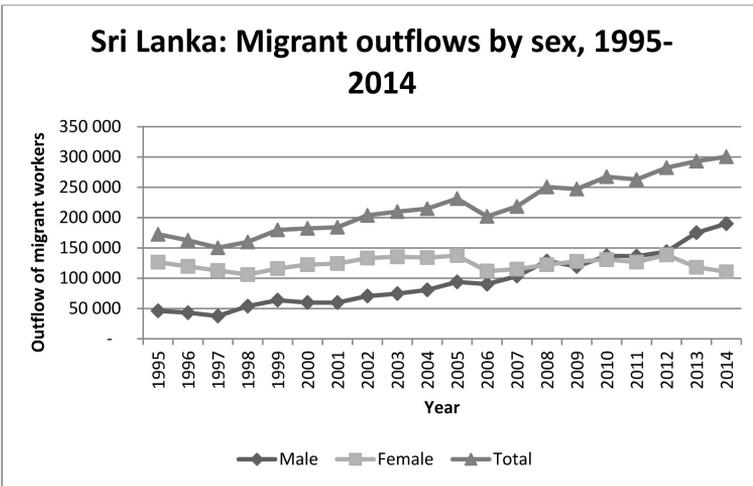
2 UN DESA 'International migration report 2015: Highlights' (2016) 30.

2 Migration context of Sri Lanka

Sri Lanka’s overseas migration pattern has gone through several stages over the years.³ The first outflows in the 1960s and 1970s related mainly to the migration of skilled persons on a permanent basis, but the Gulf boom in the early 1970s created a large demand for low skilled workers on temporary contracts. The outflow gathered high momentum following liberalisation of travel with the introduction of open economy policies in 1977. The main challenge foreseen at the time was the regulation of the growing number of recruitment agencies.⁴ Sri Lanka enacted the Sri Lanka Bureau of Foreign Employment Act in 1985 and established the Sri Lanka Bureau of Foreign Employment (SLBFE) as a one stop-shop to deal with administration of overseas employment.

Since 1995, the annual numbers departing for overseas employment have been above 150 000. Figure 1 shows the outflows by sex from 1995 to 2014. It also shows the changing shares of males and females in total outflows.

Figure 1: Outflows by sex from 1995 to 2014



Annual migrant outflow data⁵ show a marked decline in the share of female migrants, especially domestic workers, in recent years. The share of

3 P Wickramasekara 'International migration and employment in the post-reforms economy of Sri Lanka' (2010).
 4 D Soysa 'Early days of SLBFE' paper prepared for the ILO Regional Office for Asia and the Pacific' (unpublished & undated).
 5 These statistics are collected by the SLBFE through registration of migrant workers. It uses the term 'housemaids' to refer to female migrant domestic workers.

female migrant workers fell from 55 per cent to 37 per cent of total outflows during 2006-2014. Over the same period, the share of female domestic workers (termed as 'housemaids' in SLBFE statistics) in total annual reported departures has fallen from 49,4 per cent to 29,5 per cent. This marked decline is in line with government policy to discourage emigration of low skilled female workers, especially domestic workers, through several measures: raising minimum age limits according to destinations, imposition of a security deposit requirement for direct recruitments, introduction of a Family Background Report to determine eligibility for emigration of female workers with children less than five years, and the mandatory NVQ3 qualification (National Vocational Qualification) for female domestic workers.⁶ These figures probably underestimate actual flows since some women seem to have left the country through other means such as visit visas. These features also lead to a number of challenges related to vulnerability and protection needs, high migration costs, low remuneration and resulting low remittances.

The main features of Sri Lanka's migration profile are: migration mostly on temporary contract basis; high share of low skilled workers including domestic workers; concentration of flows to Gulf Cooperation Council (GCC) destinations; the dominant role of the private recruitment industry in placements; and high share of female migration (although declining) compared to other South Asian countries. The GCC countries account for almost 90 per cent of recorded outflows from Sri Lanka, which indicates that the vulnerability of migrant populations is high given the proverbial poor governance and protection levels in the subregion. Private employment agencies still account for 60 per cent of outflows again posing formidable challenges in their regulation to minimise malpractices.

3 Evolution of policy, institutions and legislation relating to migration

The continued focus on foreign employment of national workers has ruled out any attention in national migration policies to the status of foreign migrant workers inside Sri Lanka and their protection, a major thrust of the ICRMW.

Table 1 provides an overview of major changes in policies and institutions on labour migration. It shows that the mandate on labour migration had remained with the Ministry of Labour for a considerable time with a dedicated Ministry taking over the functions only in 2007.

6 MFEPW 'Performance report 2014: Ministry of Foreign Employment Promotion and Welfare' (2014).

The SLBFE, the main agency responsible for overseas employment administration, was established by the SLBFE Act 21 of 1985, the primary legislation that deals with foreign employment, amended by Acts 4 of 1994 and 56 of 2009. From the outset, the SLBFE operated under the supervision of the Ministry of Labour until 2007 when it was transferred to the newly created Ministry of Foreign Employment Promotion and Welfare (MFEPW). Most MFEPW programmes are administered by the SLBFE. This change of ministries has both positive and negative aspects. The advantage is that a dedicated ministry can devote greater attention to migration. The disadvantage is that labour migration is separated from labour, employment and decent work policies in the process. With ministries other than labour taking over this role, there is also limited scope for involvement of social partners and civil society in migration policy – a recommended good practice in international instruments.⁷

Table 1: Chronology of migration policy, institutions and legislation in Sri Lanka

Year	Event
Mid-1970s	Temporary contract labour migration to the Middle East from Sri Lanka commences.
1980	Ministry of Labour in charge of migration. Foreign Employment Agency Act 32 of 1980 to regulate recruitment agents.
1983	The Ministry creates foreign employment wing.
1985	Sri Lanka Bureau of Foreign Employment (SLBFE) Act 21 of 1985 adopted, and the SLBFE created in the same year.
1994	Revision of the 1985 SLBFE Act – Act 4 of 1994.
1996	Sri Lanka accedes to the ICRMW on 11 March 1996.
2007	A new Ministry of Foreign Employment Promotion and Welfare (MFEPW).
2008/2009	Sri Lanka's first report to the Committee on Migrant Workers (CMW) and its review
2008/2009	National Labour Migration Policy formulated and endorsed by Cabinet.
2009	Revision of 1985 SLBFE Act – Act 56 of 2009.

7 P Wickramasekara 'Labour migration in South Asia: A review of issues, policies and practices' International Migration Papers No 108 (2011).

2010	MFEPW abolished and foreign employment mandate transferred to Ministry of External Affairs.
2010	National Advisory Committee on Labour Migration formed.
November 2010	Ministry of Foreign Employment Promotion and Welfare (MFEPW) established as a separate ministry.
2010-2015	An ILO technical cooperation project to support the implementation of the National Labour Migration Policy supported by Swiss Development Cooperation Agency operational.
2013	Second periodic report to CMW postponed at request of Sri Lanka government.
2011-2016	Sri Lanka Employment Migration Authority Act being drafted and discussed by MFEPW to replace SLBFE Act.
2014	Introduction of a mandatory family background report for women migrating as domestic workers.
2015	MFEPW renamed as Ministry of Foreign Employment (MFE).
2016	Second periodic report of Sri Lanka to the CMW submitted on 3 May 2016. Discussion and review of the Second Periodic Report, August/September 2016.

A few observations can be made on developments since the 1990s:

- (a) Frequent changes of ministry portfolios dealing with foreign employment have made continuity of policies difficult.
- (b) There is no evidence of any major change to migration legislation, especially after accession to the ICRMW in 1996. The revisions reflected in Act 56 of 2009 were motivated by factors other than making it consistent with the ICRMW.
- (c) Sri Lanka has been a pioneer in Asia in spelling out a rights based comprehensive National Labour Migration Policy⁸ based on the 2006 ILO Multilateral Framework on labour Migration.⁹
- (d) The Government has highlighted '[s]killed, safe migration' as the major focus of policy.¹⁰ This has led to measures which try to reduce the share of low-skilled workers, especially female domestic workers, who go abroad. The recognition that the state is unable to prevent the abuse and exploitation of women workers overseas effectively, and the fact that children left behind are subject to various abuses are the main reasons for this policy. Raising of the minimum age for domestic workers depending

8 See MFEPW 'National Labour Migration Policy for Sri Lanka' (2008).

9 ILO 'The ILO multilateral framework on labour migration: Non-binding principles and guidelines for a rights-based approach to labour migration' (2006).

10 MFEPW (n 8 above).

on destinations and the introduction of a family background report for women with children less than five years' old are some of the measures which have been adopted.

4 Background to Sri Lanka's accession to the ICRMW

Sri Lanka acceded to the ICRMW on 11 March 1996. It is important to note that it was a bold decision to have a one-step accession rather than a two-step process of signature and ratification.¹¹ While accession normally takes place after a Convention enters into force, Sri Lanka acceded to the ICRMW seven years before it came into force in July 2003.

There is very limited information on the background to the accession to the ICRMW in March 1996. It is also a formidable task to trace this background 20 years after accession. An interview with Mr Prasad Kariyawasam, member and former Chair of the CMW revealed that the main motive was the perceived need to protect Sri Lanka's migrant workers. A former senior diplomat of Sri Lanka was able to shed more light on the issue. In his view, the reluctance on the part of the migrant receiving countries of the Middle East to entertain bilateral approaches to take up issues of internationally recognised rights of Sri Lankan migrant workers was a compelling reason for Sri Lanka to seek multilateral means to address the issue by ratifying the ICRMW. By acceding to the ICRMW, the Sri Lankan government hoped that the moral/legal force and the institutional capability of the Convention would help to get international attention focused on abuse and exploitation of Sri Lankan migrant workers through activities of international human rights agencies, UN agencies and civil society.

Iredale and Piper in their analysis of obstacles to ratification of the Convention in the Asia-Pacific region have not elaborated on the reasons why Sri Lanka acceded to it.¹² Their second report for UNESCO on the impact of the ICRMW in the Philippines and Sri Lanka touched briefly upon the issue.¹³ Their general observations primarily based on interviews with government officials and NGOs are as follows:

- 11 This distinction has been overlooked in the study by Iredale et al which refers to ratification of the ICRMW rather than accession by Sri Lanka, which is technically not correct. See Iredale et al 'Impact of ratifying the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Family: Case studies of the Philippines and Sri Lanka' (2005). While the legal effect is the same, ratification is possible only after the initial step of signature. See United Nations *Treaty handbook* (2012).
- 12 Iredale et al 'Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective' (2003).
- 13 Iredale et al (n 11 above).

- (a) The lead role in the accession was probably taken by the Ministry of Foreign Affairs rather than the line ministry – the Ministry of Labour.
- (b) The decision to accede was not driven by a ‘vibrant civil society movement’.
- (c) They surmise that the decision was instigated by the UN in New York and carried out by the government in power, based on the interviews conducted by them.

Iredale et al state:

It is suspected by some NGOs that this was more a routine ratification on the part of the Sri Lankan government rather than a political commitment to protect migrant workers.¹⁴

The present author interviewed key informants consisting of current and former officials of the Ministry of External Affairs (now Ministry of Foreign Affairs), the Ministry of Labour and the Sri Lanka Bureau of Foreign Employment. The author also consulted some records of the Sri Lanka archives relating to the period immediately before accession, but was not able to find any references to the process. Accession to a complex instrument such as the ICRMW consisting of 93 articles of text would have required intensive review and informed discussions. Direct accession also probably restricted the scope for public discussions or debates which would have been possible during the normal time gap between a signature and the eventual ratification, as in Bangladesh. Sri Lanka did not understand the full gravity of responsibilities of accession at the time as admitted by the former Chairman of the CMW.¹⁵

It is surprising that Sri Lanka’s first report to the CMW does not mention any reasons or the background to the accession which would have helped in understanding the process of implementation. It simply stated that Sri Lanka as a state party sought to ensure minimum international guarantees relating to the human rights of migrant workers and their families. It added an unrelated observation: ‘However, “major labour” recipient countries are yet to become parties to this Convention’.¹⁶

What is also often overlooked is that Sri Lanka made ‘declarations’ against four articles of the ICRMW upon accession when it deposited the instrument. These mainly relate to rights of mobility, child rights and equal treatment of foreign workers.¹⁷ While a declaration may simply state the existing national laws and practices, some of these could be considered reservations if they limit or modify the obligations undertaken by the state

14 Iredale et al (n 11 above) 34.

15 Cited in Iredale et al (n 11 above).

16 Initial report of Sri Lanka, CMW (23 April 2008), UN Doc CMW/C/LKA/1 (2008) 5.

17 Arts 8(2), 29, 49 and 54.

party.¹⁸ Further research is necessary to see how the Sri Lankan government has implemented these articles in practice.

5 Impact of the Convention on law and practice relating to migration and migrant workers in Sri Lanka

This section reviews the major pieces of legislation and policies relating to migration in Sri Lanka, and any links with the ICRMW. The need for revision of the law in line with the ICRMW had been highlighted in several important documents. The National Labour Migration Policy of 2008, for example, stated:

One of the main gaps in the legislation is that the law has yet to be amended following the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹⁹

The Sri Lankan government in its initial report to the CMW maintained that existing legislation provided many of the standards and guarantees of the Convention. The fact remains, however, that the Constitution of Sri Lanka guarantees certain rights, including protection against discrimination and the right of peaceful assembly, freedom of association, freedom to form and join a trade union, freedom to engage in any lawful occupation, or profession, and freedom of movement to citizens only. This violates several provisions of the ICRMW such as articles 7, 26, 39 and 40, amongst others.²⁰

The CMW was not convinced of the guarantees provided by the existing legislation and expressed its regret

that the State party has not taken any measures to ensure that its legislation is in conformity with the Convention' and recommended Sri Lanka 'to take all necessary measures for prompt harmonization of its legislation with the provisions of the Convention.'²¹

The section on migrant workers in the Sri Lanka National Action Plan for the Protection and Promotion of Human Rights, 2011-2016 identified the major issue in giving effect to the ICRMW as follows: 'Lack of adequate

18 *Treaty handbook* (n 11 above). The author is grateful to Mr Bradford Smith, Secretary of the CMW, Office of the High Commissioner for Human Rights, Geneva, for this clarification.

19 MFEPW (n 8 above) 49.

20 Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Addendum – Mission to Sri Lanka, HRC (2 April 2015), UN Doc A/HRC/29/36/Add.1 (2015); S Ranaraja *Review of national legislation and regulations on migration for foreign employment and their implementation* (2010).

21 Concluding Observations on the Initial Report of Sri Lanka, CMW (14 December 2009), UN Doc CMW/C/LKA/1 (2009) 3.

national laws and policies to give direct effect to the UN Convention on the Rights of All Migrant Workers and their Families'.²²

5.1 Sri Lanka Bureau of Foreign Employment Act 21 of 1985 and its amendments

The major piece of legislation governing migration in Sri Lanka, the SLBFE Act, was enacted in 1985 – eleven years before the country's accession to the ICRMW. The main issue to be discussed then is whether the SLBFE Act has been revised to reflect the provisions of the acceded ICRMW. It is worth pointing out, and indeed it is to the credit of Sri Lankan legislators, that some of the provisions of the Convention had been addressed to some extent in the 1985 Act: information provision, pre-departure training, and regulation of recruitment agencies, international cooperation and consular services, and reintegration measures for returnees.²³

The aforementioned National Labour Migration Policy of 2008 highlighted a number of areas to bring the SLBFE Act into conformity with the ICRMW:

Among these are: translation and dissemination of the Convention to would-be-migrants; making available the services of a legal counsel at the Sri Lankan embassies abroad; educating or informing would-be-migrants in more detail of the social, cultural, and economic conditions and to explain the (labour and other) laws and customs of the host country; ensuring that the employment contract is made available to the workers in his/her own language; making available free interpretation in the language of the migrant workers when needed in the host country; ensuring the voting rights of the migrant workers; providing the necessary training to would-be migrants; regulating the private agencies more rigorously and to minimize trafficking and irregular migration.²⁴

While some of the above measures have been implemented in varying degrees, the overall impact of the Act on governance of labour migration and protection of migrant workers and their families seems rather limited. The Act was revised in 1994 and 2009, but an analysis of the legislative texts shows that the purpose was not to address Sri Lanka's compliance with the ICRMW following its accession.

22 HRCSL 'Sri Lanka national action plan for the protection and promotion of human rights, 2011-2016' (2011) 94.

23 MFEPW (n 8 above).

24 MFEPW (n 8 above) 47.

5.1.1 *Sri Lanka Bureau of Foreign Employment (Amendment) Act 4 of 1994*

Under the amending Act 4 of 1994, the SLBFE was declared as a scheduled institution under the Bribery Act with a view to preventing corruption and bribery. It also formalised the fee structure to be paid by migrant workers and its distribution.²⁵ This was important because the SLBFE was expected to be a self-sustaining entity with no direct budget support. The amended Act also provided for the Minister to determine and adjust the fee structure from time to time through gazette notification. The Act spelled out fines and imprisonment terms for violations of the Act by migrant workers or licensed agents. The thrust of these measures, therefore, was not to promote protection of workers, but to ensure smooth operation of SLBFE and its programmes.²⁶

5.1.2 *SLBFE amendment Act 56 of 2009*

This amendment took place after the formulation of the National Labour Migration Policy with the SLBFE also participating as a key stakeholder in that policy's development process. But the revision to the Act was carried out by the SLBFE on its own as a parallel process with hardly any consultation with stakeholders.²⁷ Surprisingly the revisions also failed to take into account the policy guidelines and the action plan contained in the National Labour Migration Policy. Nor was there any attempt to make it compliant with the provisions of the ICRMW.²⁸

The primary amendments in the revised Act provided for:

- (a) the authority of the SLBFE to examine documents to detect persons going for overseas employment without registration;
- (b) the receipt by the SLBFE of social security levies from employers abroad;
- (c) restrictions on publication of job advertisements by private employment agencies without SLBFE approval;
- (d) recruitment agencies to recover expenses directly from workers where no commission is received from the foreign employer or agent with SLBFE approval. At the same time, SLBFE reserved the right to review whether commissions/fees were reasonable;

25 The fee is distributed as follows: 70% to the recruitment agencies, 10% to the Workers' Welfare Fund and 20% to the SLBFE for its operational expenses.

26 Ranaraja (n 20 above).

27 Migrant Forum Lanka (MFL) 'Submission to the UN Committee on Migrant Workers (CMW) by Migrant Forum Lanka on the situation of international outbound labour migration in Sri Lanka' (2013).

28 The author was directly involved as an ILO advisor in the formulation of the National Labour Migration Policy, and used informal contacts with the SLBFE at the time to request sharing of the amended draft Act with the ILO and national stakeholders for review. The SLBFE, however, ignored the request.

- (e) wide ranging powers for officers of the SLBFE to arrest errant job agents as the Act recognised SLBFE officers to be public officers under the Penal Code and the Criminal Procedure Code immune from lawsuit; and
- (f) membership of the Association of Licensed Foreign Employment (ALFEA) to be voluntary for licensed agents. The SLBFE apparently was not happy with the monopoly status of ALFEA and wanted to reduce its powers.²⁹ This, however, undermined the coordinating role of ALFEA as its membership was reduced. Moreover, the revision did not modify other references to ALFEA in the Act leading to some inconsistency about its expected role.

Thus, the 2009 amendment has given wide ranging powers to the SLBFE, and has also undermined the coordinating function of ALFEA. It is difficult to argue that these were done for the sake of better protection and welfare of migrant workers or to bring the law into line with the ICRMW.³⁰ Indeed there was no reference at all to the ICRMW in the revised Act.

5.1.3 Proposed Sri Lanka Employment Migration Authority Act of 2011 (MFEPW, 2012)

The Ministry of Foreign Employment Promotion and Welfare finalised a draft bill to convert SLBFE into the Sri Lanka Employment Migration Authority to be submitted to the Cabinet of Ministers and Chief Legal Draftsman in 2012.³¹ It aims to provide an overarching role for the Ministry in regard to overseas employment and inward migration, and replace the SLBFE with an authority. The Legal Draftsman, however, referred the draft Act back to the Ministry asking for major revisions which has again been delayed due to political changes in early 2016. The new Secretary of the Ministry has now appointed a committee to look into the revision.

The 2012 draft Act covers all aspects of the migration process, and provides for the establishment of a number of institutions: the Sri Lanka Employment Migration Authority, a national advisory council on employment migration, a Sri Lanka Employment Migrants Foundation (Rata Viruwo), an Overseas Sri Lankan Foundation, a foreign employment promotion fund, a Workers Welfare Fund, and a migrant information database.

29 Personal communication to the author by a former Additional General Manager of the SLBFE.

30 Ranaraja (n 20 above).

31 MFEPW (2012). The author had access to a draft version of the Act dated 21 March 2012, but not to any further revised version. The general observations made here pertain to the above version, and may not represent the contents of the latest draft. The government had made a copy of the draft Act available to the Special Rapporteur on the human rights of migrants during his visit in 2014, Crépeau (n 20 above).

The objectives of the draft Act are arguably too long, running to 37 items. There seems to be some confusion between objectives and functions in this context. The SLBFE Act had only 19 objectives which itself was too long.³² The draft Act contains detailed provisions which would have been better placed as regulations and decrees under the Act. Moreover, the draft Act seems to overlap partly with the mandates of other ministries such as the Ministry of Labour and the Ministry of Health, a problem pointed out by the Legal Draftsman's Department.³³ One positive aspect was extension of legal coverage to foreign migrant workers, but this has subsequently been dropped.³⁴

The main problem with the Act is that the protection objectives and consistency with the ICRMW seem to be given secondary importance with governance and regulation and diaspora concerns being predominant. The basic thrust is to convert the SLBFE into an authority with comprehensive powers and functions. The draft does not refer to the ICRMW or any other international instrument or to the recommendation of the CMW asking that Sri Lanka take all necessary measures for prompt harmonisation of its legislation with the provisions of the Convention.³⁵ A contrast can be made with the title of the Bangladesh Overseas Employment and Migrants Act 2013. The latter Act specifically mentions the objectives of safe and fair migration, ensuring rights and welfare of migrant workers, and making provisions in conformity with the ICRMW and other international labour and human rights conventions and treaties ratified by the People's Republic of Bangladesh. This is sadly lacking in the proposed Act.

The inclusion of inward migration (immigration or immigrant workers inside Sri Lanka) does not seem to accord them rights spelled out in the ICRMW provisions, but focusses on registration and regulation of foreign workers. All these have led the UN Special Rapporteur on the human rights of migrants to urge 'the Sri Lankan authorities to revise the draft Act to ensure a human rights-based approach to migration'.³⁶

5.2 National Labour Migration Policy, 2008

The National Labour Migration Policy for Sri Lanka is regarded as a pioneering effort in Asia in spelling out a full-fledged policy and following a rights-based approach to labour migration based on international migrant-worker instruments including the ICRMW, ILO migrant-worker

32 Sri Lanka Bureau of Foreign Employment Act 21 of 1985.

33 Discussions with the ILO Office for Sri Lanka and the Maldives.

34 As above.

35 n 21 above.

36 Crépeau (n 20 above) 6.

conventions³⁷ and the ILO Multilateral Framework on Labour Migration.³⁸ The policy statement clearly provides:

The State undertakes primary responsibility for the protection of migrant workers and their families. Based on the obligations listed in the ratified International Convention on the Protection of the Rights of All Migrant Workers and their Families, the State is committed to furthering the rights and protections of Sri Lankans migrating for employment.³⁹

Another example of good practice was the formulation of the National Labour Migration Policy through a tripartite plus participatory process involving all stakeholders concerned with migration in Sri Lanka. The stated vision of the Policy is 'to advance opportunities for all men and women to engage in migration for decent and productive employment in conditions of freedom, dignity, security and equity'. The Policy's three objectives are:

- (a) Better governance and regulation of labour migration;
- (b) Providing effective protection and services to migrant workers and their families left behind; and
- (c) Mobilising development contributions of labour migration.

The National Labour Migration Policy also contains an Action Plan for implementation of the policy elements. The draft Policy was validated at a national tripartite consultation in October 2008 with the Ministry of Foreign Employment Promotion and Welfare adopting the policy document and obtaining the approval of the Cabinet of Sri Lanka in April 2009. Both the Ministry of Foreign Employment and the SLBFE have incorporated the National Labour Migration Policy into their policies and programmes. The SLBFE corporate action plan has been reorganised under the three Policy objectives of governance, protection and development.⁴⁰ Yet both the Ministry and the SLBFE have failed to place copies of the Policy – the key document governing their policies and programmes – on their websites.

One limitation has been that no separate budget was allocated to carrying forward the Action Plan of the National Labour Migration Policy. The ILO has been assisting the implementation of Policy through support to the Sri Lanka government and civil society through two technical cooperation projects funded by the Swiss Agency for

37 ILO Convention on Migration for Employment, 1949 (No 97); ILO Convention on Migrant Workers (Supplementary Provisions), 1975 (No 143).

38 ILO (n 9 above).

39 MFEPW (n 8 above) 19.

40 Interview with Mr KODD Fernando, General Manager, SLBFE.

Development Cooperation from 2011-2015.⁴¹ This has enabled Sri Lanka to meet some of the obligations of the ICRMW such as free provision of information, strengthening of consular facilities, and reintegration support, amongst others.

Although the number of foreign migrant workers inside Sri Lanka is believed to be small, a major gap in the National Labour Migration Policy is that it does not cover them at all. There are unconfirmed reports that the revised draft Sri Lanka Employment Migration Authority Act no longer covers 'inward migration'.⁴² There is no information whether the current ongoing revisions to the draft Act have reconsidered inclusion of foreign workers under its coverage.

5.3 The National Action Plan for the Promotion and Protection of Human Rights 2011-2016, Human Rights Commission of Sri Lanka

'Rights of migrant workers' are one of the eight priority areas identified by the Human Rights Commission of Sri Lanka (HRCSL), and incorporated into the Action Plan for 2011-2016.⁴³ The ICRMW is one of the 15 focus areas of the Action Plan with the goal of giving effect to the Convention at the national level. The Plan rightly recognises 'Lack of adequate national laws and policies to give direct effect to the UN Convention on the Rights of All Migrant Workers and their Families' and proposes three actions:

- (a) Review existing laws and policies and identify necessary changes to bring them in line with the ICRMW;
- (b) Based on the review, amend national level laws and policies; and
- (c) Translate the Convention into the official languages of Sri Lanka and disseminate widely.

The key responsible agencies for implementation of these activities have been identified as the MFEPW and the Ministry of Justice. All three actions foreseen in 2011 to be completed within a time frame of one and a half years had not been implemented by mid-2016. There is no evidence of a comprehensive review of existing laws and policies and needed changes – the first activity. As shown earlier, a draft Act is currently in limbo, and

41 The title of the Project is: 'Promoting decent work through good governance, protection and empowerment of migrant workers: Ensuring the effective implementation of the Sri Lanka National Labour Migration Policy – Phase I and Phase II'.

42 Discussions with the ILO Office for Sri Lanka and the Maldives.

43 n 22 above.

in any case the objective was not to bring it in line with the ICRMW. As regards translations and dissemination of the text of the ICRMW, the HRCSL website shows that only the English version is still available.⁴⁴ This means that even 20 years after accession, the Convention has not been officially translated and disseminated to major stakeholders by the state party in question. The Action Plan of HRCSL is elaborate, but the author's interview with the HRCSL did not bring out any evidence that it is seriously carrying out any follow up of the migrant rights component or coordinating with the relevant government agencies and other stakeholders.

6 Engagement of the state and civil society with the Committee on Migrant Workers

6.1 State interaction with the CMW

As noted above, Sri Lanka acceded to the Convention seven years before it came into force, and its initial report was due in 2004, but was submitted only in 2008. The delay in submission was probably motivated by some uncertainty about the format and content of the report, and the Government's desire to buy more time for preparation of the initial report. Sri Lanka's second periodic report was due on 1 July 2009, and the CMW requested Sri Lanka to submit it not later than 1 November 2011.⁴⁵ But it was postponed at Sri Lanka's request to 2016 – again a delay of more than four years! The second periodic report was eventually submitted by the government on 3 May 2016.⁴⁶

Following its review of Sri Lanka's initial report the CMW came up with a list of issues for further clarification⁴⁷ to which the Government made a written reply.⁴⁸ Following discussions and consultations with other stakeholders, the CMW issued its Concluding Observations which covered a wide range of issues: need for harmonisation of legislation with the provisions of the Convention; ratification of ILO migrant worker conventions (no 97 and no 143) and the two Protocols on trafficking in persons and smuggling of migrants; training in and dissemination of the Convention; application of all rights without discrimination to foreign migrant workers inside the country; protecting and empowering women migrant workers; strengthening consular functions for protection of

44 See <http://hrcls.lk/english/document-center/library/international/> (accessed 30 November 2016).

45 n 21 above.

46 'Second periodic report of Sri Lanka' (2016).

47 'List of issues to be taken up in connection with the consideration of the initial report of Sri Lanka' (2009).

48 'Written replies by the Government of Sri Lanka to the list of issues (CMW/C/LKA/Q/1) to be taken up in connection with the consideration of the initial report of Sri Lanka' (2009).

migrant workers; voting rights for national workers abroad; measures for protection of workers in countries of destination; social security agreements with countries of destination; regulation of recruitment agencies; effective reintegration of returnees; study impact of migration on children; and prevention of human trafficking and irregular migration. The state party was expected to widely disseminate the Concluding Observations, and also report on progress in the second periodic report.⁴⁹

The CMW has identified a detailed list of issues to be addressed in Sri Lanka's second report.⁵⁰ These cover mostly the issues raised in the Concluding Observations in 2009: comprehensive migration statistics; comprehensive information on measures for the protection and equal treatment of women migrant domestic workers; regulation and monitoring of recruitment agencies; reintegration of returnee workers; and the insurance schemes and the role of the Welfare Fund. Another issue raised is whether the state party had taken any steps towards ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, and ILO Convention No 189 (2011) concerning decent work for domestic workers. The List of Issues did not, however, refer to the need for ratification of the two ILO migrant worker conventions raised in the Concluding Observations in 2009 issued in response to Sri Lanka's initial report. Neither did it refer to the obvious relevance of the CMW General Comment 1 of 2001 on migrant domestic workers or General Comment 2 on the rights of migrant workers in an irregular situation.

A number of positive developments which partly address the issues raised in the 2009 Concluding Observations and the List of Issues prior to the submission of Sri Lanka's second periodic report can be mentioned.

- (a) The Government has developed a 'Safe Labour Migration Information Guide' (SLMIG) with support from the ILO/Swiss Development Cooperation Agency (SDC) migration project.
- (b) The Government ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children on 15 June 2015.
- (c) A Code of Ethical Conduct for Licensed Foreign Employment Agencies/Licensees has been developed⁵¹ and private employment agencies have been given required orientation by the SLBFE.

49 n 21 above.

50 'List of issues prior to the submission of the second periodic report of Sri Lanka' (2013).

51 SLBFE 'Code of Ethical Conduct for Licensed Foreign Employment Agencies/Licensees' (2013).

- (d) A Sub Policy and National Action Plan on Return and Reintegration of Migrant Workers was adopted in December 2015.⁵²
- (e) Complaints mechanisms have been improved with development of a centralised grievance mechanism and proposed special mediation courts.
- (f) Availability of a decentralised cadre of development officers including migration development officers who can provide support to potential migrants, departing migrant workers and returning migrant workers and their families at the local level.
- (g) Decentralisation of SLBFE to the provincial and district levels, and establishment of Migrant Resource Centres to provide one stop services at the local level.
- (h) Special social security scheme for domestic work submitted to the Cabinet for approval.
- (i) Promotion of consular functions to service migrant workers through introduction of a Manual for Labour Sections of Diplomatic Missions⁵³ and related training to diplomatic staff.
- (j) Agreement on domestic worker recruitment between the Ministry of Foreign Employment Promotion and Welfare and the Ministry of Labour of the Kingdom of Saudi Arabia, which contains a number of good practices relating to periods of leave, working hours, right to communication, and non-retention of passports.

The government is yet to take action on some of the issues raised by the CMW in the above reports. At the same time, abuses and exploitation of workers in overseas destinations continue as highlighted in the 2016 Shadow Reports by civil society to the 25th Session of the CMW.⁵⁴ Female workers are especially vulnerable being outside the labour law in many countries. More than three-quarters of total complaints made by Sri Lankan workers during 2011-2014 have been made by women workers.⁵⁵ This is more than likely an underestimate given that not all workers suffering abuse choose to lodge a complaint.

The CMW requested the government to disseminate the

concluding observations widely, including to public agencies and the judiciary, non-governmental organizations and other members of civil society,

52 MFE 'Sri Lanka: Sub-policy and national action plan on return and reintegration of migrant workers' (2015).

53 MFEPW 'Operational manual for Labour Sections of Sri Lankan diplomatic missions in destination countries' (2013).

54 'Sri Lanka NGO Shadow Report: Submitted by Action Network for Migrant Workers (ACTFORM) and the Women and Media Collective (WMC)' (2016); GMPA (2016); Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016); NCC in collaboration with Intervention Movement Against Discrimination and Racism (IMADR) and Migrant News Lanka (MNL) 'A response to the Second Periodic Report (SPR) of Sri Lanka' (2016).

55 SLBFE 'Annual Statistical Report of Foreign Employment 2013' (2015).

and to take steps to make them known to Sri Lankan migrants abroad and foreign migrant workers residing or in transit in the Sri Lanka.⁵⁶

The author, however, could not trace any evidence of such dissemination by the Government.

Interviews conducted by the author in early 2016 showed that both the Ministry of Foreign Affairs and the MFE were aware of the need to submit the second periodic report in 2016, but there was no indication that the government had started on the process. Despite the substantial time made available, the actual second periodic report was prepared in a hurry (judging by the contents) without any broad-based consultation with other stakeholders, and submitted on 3 May 2016 to meet the deadline of the CMW.⁵⁷ The report is in the form of specific answers to each issue listed by the CMW in 2013, but it does not directly address the specific issues or sub-issues raised by the CMW. For example, there is no explanation of the progress made in harmonising legislation with the ICRMW.

While the government has ratified the Trafficking Protocol, it is equally important to ratify the Protocol against the Smuggling of Migrants by Land, Sea and Air in view of recent large scale boat movements especially to Australia – most of these represent smuggling attempts rather than trafficking in persons. The Government has also failed to make progress in regard to the ratification of the two ILO migrant worker conventions (nos 97 and 143) as recommended by the CMW in 2009. Given that a substantial share of domestic workers are internal workers, there is no immediate prospect for ratification of the Convention which requires bringing them under domestic labour law, and expanding labour inspection services.⁵⁸

Another issue relevant to the Government–CMW interaction is recognition of the competence of the Committee by the state party in regard to the inter-state complaint mechanism (article 76) and the individual complaints procedure (article 77). This has been raised by the CMW in both the 2009 Concluding Observations and the List of Issues prior to the submission of Sri Lanka's second periodic report. Only four state parties (Mexico, Guatemala, El Salvador and Uruguay) have made the declarations provided for in article 77 recognising the competence of the Committee to receive communications from individuals. These mechanisms have therefore not yet come into force in the absence of the minimum ten declarations. Therefore, Sri Lanka falls into the majority of

56 n 21 above, 10.

57 n 46 above.

58 Interview with Senior Asst Secretary (Foreign Relations), Ministry of Labour and Trade Union Relations. See also Esufally 'Sri Lanka: Domestic workers – An analysis of the legal and policy framework, decent work for domestic workers report no 1' (2015).

state parties who have not recognised the competence of the CMW in regard to both articles 76 and 77.

There is a related precedent in Sri Lanka in regard to the Optional Protocol to the International Covenant on Civil and Political Rights (ratified by Sri Lanka in 1997), which makes it unlikely that Sri Lanka would make a declaration recognising the competence of the CMW under articles 76 and 77. The Sri Lanka Supreme Court ruled in 2006 that the UN Human Rights Committee had no judicial power under the Sri Lankan Constitution in the case of *Singarasa v Attorney General*⁵⁹ in relation to the aforementioned Optional Protocol. The Supreme Court maintained that Sri Lanka was a 'dualist state' in which treaty law does not automatically become law in the internal legal order of Sri Lanka, unless such treaty is transformed into the domestic law.⁶⁰ The Supreme Court ruled in this case that while the accession of Sri Lanka to the ICCPR bound the state at international law, it created no additional rights as recognised in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation. The Supreme Court also highlighted that the accession by the President of Sri Lanka to the First Optional Protocol to the ICCPR, which allows individuals to address complaints of violations of ICCPR rights to the Human Rights Committee, was unconstitutional. This interpretation has, however, been subject to contention.⁶¹

6.2 Interaction of civil society with the Committee on Migrant Workers

As noted above, civil society did not play any major role in the ICRMW accession decision unlike in the case of Bangladesh. In Sri Lanka, advocacy on migrant issues is carried out by a number of trade unions and non-governmental organisations. The Migrant Service Centre under the trade union Ceylon Workers Congress and the Migrant Workers Front under the National Trade Union Federation (NTUF) represent trade union initiatives.⁶² The Action Network for Migrant Workers (ACTFORM) formed by the Women and Media Collective, the Law and Society Trust, and the Migrant Forum Lanka represent major non-governmental organisations working on migrant issues and rights. There are also international NGOs such as the Solidarity Centre and CARITAS with national level offices. There are, however, no national level associations of migrant workers themselves. The MFEPW promoted a migrant workers foundation called 'Rata Viruwo' (which means 'Expatriate Heroes') – a grass roots level network – which had the potential

59 *Singarasa v Attorney General* C Spl (LA) No 182/99; SCM (15th September 2006).

60 DL Mendis 'An analysis of the Singarasa Case' *The Island* 27 October 2006.

61 Mendis (n 60 above); K Pinto-Jayawardena 'Will international treaties protect human rights in Sri Lanka?' (2013) 2 *Advancing Together* 4.

62 See Gunawardena (2014) for a detailed review of trade union action related to migrant workers in Sri Lanka.

to represent migrant workers, but it is no longer supported by MFE due to its perceived excessive politicisation.

Both the trade union movement and NGOs were active in the discussion preceding Sri Lanka's initial report to the CMW. Civil society also submitted a Shadow Report on the implementation of the ICRMW by Sri Lanka. It highlighted some of the more serious violations of the rights of Sri Lankan migrant workers overseas:

[A]buse and exploitation of migrants, violations of their terms of employment, lack of facilities to exercise their voting rights, right to freedom of movement, the role of consular and diplomatic missions, institutional mechanisms set up to deal with migrant workers, access to training and access to information.⁶³

Regarding consultation with civil society, NGOs in their 2009 Shadow Report clarified their point of view:

Informal networking takes place between the SLBFE and civil society at seminars and training programmes organised both by the state and non state sector. Co-operation between civil society and the state is piecemeal and sporadic with no formal mechanism in existence to promote such cooperation.⁶⁴

A communication by Migrant Forum Lanka to the CMW in 2013 also referred to lack of adequate visibility in legislative amendments and policies:

There is a severe lack of adequate visibility and publicity given to the processes of legislative amendments and drafting of policies, as well as implementation of activities promoting the rights of migrant workers and their families. Even though the state has initially consulted a few selected members of civil society and local stakeholders in the latest process of amending the SLBFE Act 56 of 2009, none of the stakeholders were informed about the final draft amendments to the law.⁶⁵

The CMW has encouraged Sri Lanka to involve civil society organisations in the preparation of its second periodic report.⁶⁶ The List of Issues prior to the submission of Sri Lanka's second periodic report asked for information on 'the mechanisms put in place by the State party to consult and involve migrants, migrant rights groups and other relevant NGOs in the design and implementation of policies on migration'.⁶⁷

63 ACTFORM & WMC 'Sri Lanka NGO Shadow Report on the International Convention on the Protection of the Rights of All Migrant Workers' and their Families' (2008) 5.

64 ACTFORM & WMC (n 63 above) 26.

65 MFL (n 27 above) 2-3.

66 n 21 above, 9; n 50 above.

67 n 50 above, 1.

It also raised the pertinent question whether migrant rights groups are represented on the Board of Directors of the Sri Lanka Bureau of Foreign Employment (SLBFE) and if not, to describe how the state party ensures that their voices are adequately represented in the SLBFE. It is an obvious anomaly that four members of ALFEA are represented on the SLBFE Board while neither unions nor NGOs/migrant associations are represented. Since the SLBFE is entrusted with regulation of recruitment agencies, this leads to an obvious conflict of interest. This issue has not been addressed in the 2012 revision or the draft Sri Lanka Employment Migration Authority Act, which surprisingly contains no single reference to NGOs, civil society or social partners. The Joint CSO submission to the 2016 CMW proposed the inclusion of representatives of civil society mandatory for the Board of Directors of SLBFE.⁶⁸

One mechanism for interaction is in the National Advisory Committee on Labour Migration established in 2010 by the Ministry of Foreign Employment Promotion and Welfare. It is a follow up to the National Labour Migration Policy recommendation, and has provision for representatives of two NGO representatives and a trade union. The National Advisory Committee is chaired by the Minister. Although it is scheduled to meet twice a month, actual meetings have been less frequent. For example, the Committee had not met even once by August 2016, following the regime change in January 2016. This makes the following statement in 2016 in Sri Lanka's second periodic report highly misleading:

'Since the National Advisory Committee on Labour Migration comprises all key stakeholders including NGOs, voice of the migrant workers is adequately represented at decision & policy making level'.⁶⁹ It is only an advisory body which has no decision making powers. The shadow report of the National Christian Council of Sri Lanka has described the Advisory Committee as a 'very loose, unrecognized body lacking any power for action'.⁷⁰

The author's attempt to consult civil society organisations in connection with the present study did not succeed due to lack of any response or cooperation from those contacted such as the Action Network for Migrant Workers (ACTFORM) and the Women and Media Collective. This made it difficult to get first-hand information on civil society perspectives on the current situation. While the CMW expected civil society to work together with the government on the second report, local civil society groups seem to have focussed on their shadow reports⁷¹ without any coordination among themselves.

68 Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above).

69 n 46 above, 9.

70 NCC (n 54 above) 8.

71 Sri Lanka NGO Shadow Report 2016 (n 54 above); Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above); NCC (n 54 above).

7 Major areas of concern

7.1 Provision of information

Article 33 of the ICRMW provides for the right of migrant workers to be informed by the state of origin, the state of employment or the state of transit, as the case may be, concerning: their rights arising out of the Convention; and the conditions of their admission, their rights and obligations under the law and practice of the state concerned and such other matters as will enable them to comply with administrative or other formalities in that state. Such information should be provided free to workers and members of their families.

The NGO Shadow Report to the CMW in 2008 highlighted gaps in this context:

No specific measures are being taken by government to disseminate and promote the Convention. The SLBFE and its branch offices take on the role of disseminating information to prospective migrants as part of their mandate.⁷²

One obvious gap is the virtual absence of publicity given to the Convention. The Safe Labour Migration Information Guide of the SLBFE does not make any reference to the ICRMW.⁷³ Moreover, there is no evidence that the ICRMW and the related General Comment 1 on migrant domestic workers and General Comment 2 on the rights of migrant workers in an irregular situation have been translated into Sinhala and Tamil for dissemination. It is important to translate the ICRMW and the two General Comments into the two national languages for wide dissemination to stakeholders and especially migrant workers and their families. Indeed, even the English version of the ICRMW has not been placed on the website of the key agencies: the Ministry of Foreign Employment, Ministry of Foreign Affairs and the SLBFE.

Sri Lanka has made more progress in regard to dissemination of information on migration in safe and dignified conditions. The SLBFE has carried out safe migration sensitisation programmes in collaboration with the ILO and a number of NGOs using its SLMIG. The emphasis has been on training of Migration Development Officers (MDOs) as potential trainers who are based in the field at divisional secretariat level. In turn MDOs conduct awareness sessions for prospective migrants. Other government officers (not mandated with migration issues) also use their field visits as a means to convey advice and information on safe migration to community members. Thus, safe migration information is now said to

⁷² ACTFORM & WMC (n 63 above) 26.

⁷³ GMPA (2016).

be mainstreamed in discussions on women's development, child rights promotion, and livelihoods and welfare (Samurdhi) at the village level.⁷⁴ The SLMIG has now gone through a second edition based on feedback from field officers. An international NGO, Helvetas Swiss Intercooperation, is also collaborating by implementing a project on safe labour migration at the grassroots level in Sri Lanka on behalf of the Swiss Agency for Development and Cooperation.⁷⁵ The SLMIG does not, however, contain any information on the ICRMW and how migrant workers can benefit from it. Whether briefing on the ICRMW is incorporated into the training courses for MDOs is also not known.

7.2 Voting rights of migrant workers

The CMW had raised the issue of voting rights for migrant workers in its 2009 Concluding Observations and also the List of Issues to be addressed in Sri Lanka's second periodic report. In this context it is worth noting that the Chairman of the National Workers Congress wrote to the Elections Commissioner on 4 January 2010 on voting rights for migrant workers and other Sri Lankans resident abroad stating that:

At a time when Sri Lankan authorities are making every effort to enlist support of the Sri Lankan Diaspora living abroad to participate in nation building, it also becomes a national responsibility to enlist non resident Sri Lankans in the political process.⁷⁶

The Action Plan of the Human Rights Commission of Sri Lanka addresses this issue under focus area 11.1, specifically as the right to vote ensuring franchise of migrant workers and the responsibility given to the Commissioner of Elections Department to make recommendations to the state.⁷⁷ A further Action Plan was foreseen to conduct a study on the absentee balloting systems in other countries and make proposals on a suitable system to be adopted by Sri Lanka. However, there is no indication that such a study has been conducted for use by Sri Lanka. The Action Plan aimed for according this right by 2016 through postal voting rights or other mechanism,⁷⁸ which was hardly feasible in the absence of any follow up action on the part of HRCSL.

74 Information supplied by Ms Swairee Rupasinghe, ILO Office, Colombo.

75 HELVETAS 'Safe and beneficial labour migration for Sri Lankan migrant workers' (2014).

76 MSC-NWC 'Migrant news letter' (2010) 12.

77 n 22 above.

78 P Mahanamahewa 'Migrant workers' voting rights' *Sri Lanka Daily Mirror* 6 January 2015.

While the MFE at present is considering voting rights as a priority, the Minister of Foreign Employment has mentioned that voting rights for Sri Lankan migrant workers would be possible within the next five years.⁷⁹ According to Sri Lanka's second periodic report, no progress had been made as of May 2016.

7.3 Consular support

The ICRMW emphasises the role of consular officials in providing services to migrant workers. Sri Lanka has had a long tradition of appointing labour attachés to important destination countries to serve migrant workers. Recently the government has introduced a manual for Labour Sections of Diplomatic Missions⁸⁰ and provided related training to diplomatic staff. However, the training has not been repeated for new staff. Strangely this handbook refers only to the Vienna Convention and does not contain a reference to the ICRMW. There is no information whether separate orientation is provided on the ICRMW. The SLMIG provides information on contacts abroad for migrant workers. Some of the missions operate safe houses for runaway migrant workers especially female domestic workers. What is missing, however, is a one country team approach like that provided by the Philippines. The latter has also promoted migrant resource centres at embassies including hotlines and legal support.

It is also worth pointing out that civil society has been critical that some of the appointments to the overseas diplomatic missions are primarily political and not based on merit. This significantly undermines the support that can be provided to migrant workers.⁸¹

7.4 Irregular migration

Sri Lanka has made irregular migration a criminal offence which is not consistent with the ICRMW. As the Special Rapporteur on the human rights of migrants has pointed out, it should be treated as an administrative offence.⁸² There are no accurate estimates of irregular migration from Sri Lanka or into Sri Lanka. The total numbers of Sri Lankan citizens in irregular status in EU member states had increased from 3530 to 4475 between 2009 and 2011. The numbers ordered to leave also increased between the two years with over 5 500 ordered to leave in 2011. The largest numbers (though numerically small) were in the UK followed by

79 I Mudugamuwa 'Voting rights for Sri Lankan migrant workers' *Daily News* 8 October 2015 <http://www.dailynews.lk/?q=2015/10/08/local/voting-rights-sri-lankan-migrant-workers> (accessed 3 November 2017).

80 MFEPW (n 53 above).

81 Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above).

82 Crépeau (n 20 above).

Germany, France, and Greece in 2011.⁸³ Sri Lanka has entered into a readmission agreement with the EU in 2004 although specific protocols have taken much longer to develop.

Following the termination of conflict in 2009, there has been a surge in irregular movements to Australia by boats, especially by members of the Tamil community. Most of the irregular movements to a wide range of countries took place during the conflict period to escape from the fighting as well as to seek better economic opportunities. It is difficult to understand the surge in irregular movements, especially towards Australia, following restoration of peace. As the Sri Lankan government has rightly pointed out, the lack of economic opportunities and livelihood is common to all communities in Sri Lanka, and is not confined to any specific ethnic group. Traffickers and smugglers are probably able to operate more freely now, and provide false information to encourage people to leave.⁸⁴ The Australian High Commission quoted the figure of 1346 Sri Lankans having landed in Australia illegally in the first six months of 2012. According to the High Commission, persons arriving illegally by boat from Sri Lanka had been much lower in previous years – 211 (2011), 536 (2010) and 736 (2009).⁸⁵ Sri Lanka has entered into a readmission agreement with Australia, and is under an obligation to deter irregular movements from the country.

Returned asylum seekers are taken into custody and must appear in court, and are usually fined for the offence of leaving the country illegally. In early May 2016, for example, a group of 12 persons returned by Australia from Cocos Island were arrested and taken into custody by Sri Lankan police.⁸⁶ The Special Rapporteur also has highlighted the detention of migrants in irregular status for long periods by Sri Lankan authorities in 2014. He has recommended the decriminalisation of irregular departures from Sri Lanka, and refraining from detaining returned Sri Lankans who have migrated irregularly. There is no evidence that this recommendation has been followed up by the authorities.

7.5 Protecting migrant workers through bilateral agreements and MOUs and regional consultative processes.

Sri Lanka has managed to sign a number of bilateral MOUs with GCC countries and Jordan. None of these MOUs, however, refer to international instruments and only a very few mention protection of rights

83 P Wickramasekara 'Much ado about nothing: Reflections on irregular migration' (2013).

84 Wickramasekara (n 83 above).

85 Sources cited in Wickramasekara (n 83 above).

86 B Doherty 'Asylum seekers deported from Cocos Islands arrested by Sri Lankan police' *The Guardian* 7 May 2016

of migrant workers as an objective.⁸⁷ Research by the author has highlighted the lack of transparency, omission of critical issues such as recruitment and confiscation of passports, and lack of effective follow-up and enforcement as major issues to be addressed in the context of such MOUs.⁸⁸

The CMW in its 2009 Concluding Observations urged the government to:

Continue its efforts to negotiate bilateral agreements on labour migration with major labour-receiving countries in order to secure protection of the rights of migrant workers and to progressively and verifiably mainstream relevant and appropriate provisions of the Convention into these agreements.⁸⁹

In practice however, this depends on the cooperation of destination countries, none of which have ratified international migrant worker conventions.

Sri Lanka participates in two regional consultative processes: the Colombo Process of ministerial consultations of countries of origin where it acted as the Chair from 2013-2017 and the Abu Dhabi Dialogue which includes both Asian origin countries and GCC countries and carries more weight. The Colombo Process has made only modest achievements over the years, and the focus of the Abu Dhabi Dialogue is on less controversial issues such as skills recognition, pre-departure orientation and recruitment practices.⁹⁰ The author did not find any reference to the ICRMW in their recent declarations or reports of meetings.

8 Conclusion

The above analysis highlights the large unfinished agenda in ensuring that migration for decent and productive employment occurs in conditions of freedom, equality, security and human dignity as envisaged in the National Labour Migration Policy of 2008. While Sri Lanka has developed a mature migration administration system over the last three to four decades, it is faced with a number of major constraints, namely, its role as an origin country, the predominance of low skilled migration, concentration of migration flows into GCC countries, control of the

87 LK Ruhunage 'Consolidated Report on Assessing Labour Migration related Bilateral Agreements (BLAs), Memorandum of Understandings (MOUs) and other similar arrangements in the Asian region' (2014).

88 P Wickramasekara 'Bilateral Agreements and Memoranda of Understanding on migration of low skilled workers: A review' (2015).

89 n 21 above, 7.

90 P Wickramasekara 'South Asian migration to the Gulf: A safety valve or a development strategy?' (2015) *Migration and Development* 1.

migratory process largely by the private sector and lack of rapid local economic development.

It is clear that Sri Lanka has so far not made any serious attempt to harmonise national legislation with the ICRMW. The Sri Lanka National Action Plan for the Protection and Promotion of Human Rights, 2011-2016, spelled out actions for amending national laws and policies to bring them in line with the Convention, but it has failed to deliver on this target. There is broad consensus in civil society reports relating to Sri Lanka's second periodic review by the CMW that the standards of the ICRMW should be incorporated into national legislation.⁹¹

One redeeming feature is that a rights based approach was followed in the elaboration of the National Labour Migration Policy⁹² with protection and empowerment of migrant workers being one of the three main pillars of the policy and related action plan. With the support of international organisations such as the ILO, important strides have been made in the implementation of policies relating to major areas of concern. The ILO has also tried to promote ILO migrant worker conventions as well as adherence to the ICRMW.⁹³ Sri Lanka is also more conscious of the gaps between policy, law and practice in regard to labour migration issues through its interaction with the CMW, amongst others.

Priorities for improvement of law and practice would lie in several areas. The revision of the SLBFE Act should be undertaken with emphasis on aligning it with the provisions of the ICRMW and focusing on protection of women and men migrant workers as the main objective. A major restructuring of the SLBFE would be useful to make it more focused on protection issues and service delivery to migrant workers and their families. Discriminatory measures against women migrants such as the Family Background Report needs to be urgently reviewed and replaced with credible alternatives. It is encouraging to note that the Minister has announced reviewing the Family Background Report with a view to its abolition.⁹⁴ Serious attention needs to be given to reviewing the situation of foreign workers in Sri Lanka and adopting relevant legislation for their protection.

At the same time, development strategy and policy in Sri Lanka should also focus on generating decent work opportunities, especially for women

91 Sri Lanka NGO Shadow Report (n 54 above); GMPA (2016); Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above).

92 MFEPW (n 8 above).

93 The Colombo ILO Office organised a National Tripartite Workshop on International Instruments for the Protection of Migrant Workers: Sri Lanka, Colombo on 26 July 2004 to promote the two ILO Conventions and the ICRMW where the author acted as a resource person. The ILO/SDC technical cooperation projects have pointed out the need for compliance with the ICRMW in several interventions.

94 C Dissanayake 'Ministry to abolish FBR from female migrant workers' *The Ceylon Daily News* 25 December 2015.

migrant workers, inside the country to ensure that migration takes place by choice rather than need.

**PART IV: RELEVANCE
NOTWITHSTANDING
NON-RATIFICATION**

*Beth Lyon**

1 Introduction

The United States has never seriously considered signing the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, Migrant Workers Convention, the Convention).¹ Despite the country's close involvement with negotiating the Convention, the United States has shown no interest in the treaty since promulgation. By side-stepping a human rights approach, the US misses a chance to coherently administer low wage labour migration.

In the United States, all sides agree that irregular immigration is undesirable, yet the country is deeply divided on the solution. The groups wishing to discourage immigration typically advocate for tighter visa quotas, stricter border controls and more aggressive deportation measures.² On the other hand, most migrants' rights advocates seek

* Clinical Professor of Law, Cornell Law School. This chapter contains passages from an earlier piece entitled 'The unsigned United Nations Migrant Worker Rights Convention: An overlooked opportunity to change the "brown collar" migration paradigm' (2010) 42 *New York University Journal of International Law and Policy* 389. The New York University Journal of International Law and Policy gave permission for this use of the 2010 article. Any errors are my own, but I am grateful to Alan Desmond, Nicola Piper, two anonymous reviewers, and research assistants Daniel Finnegan and Giulia Barbone for their invaluable comments and support. I also thank Cornell Law School for its financial support in the process of drafting this chapter.

1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA (18 December 1990), UN Doc A/RES/45/158 (1990).

2 See Republican Platform 2016 (18 July 2016) [https://prod-cdn.static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn.static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) 25-26, 42 (accessed 10 January 2017) (opposing amnesty and endorsing, inter alia, building a southern border wall, expedited removal for 'criminal aliens', and mandatory minimum five year sentence for re-entry); Federation for American Immigration Reform 'Immigration priorities for the 2017 presidential transition: A special report from the Federation for American Immigration Reform' http://www.fairus.org/DocServer/research-pub/FAIR_2017PresidentialTransitionDocument.pdf (accessed 10 January 2017).

legalisation and better workplace protections for all low wage workers, including those who are unauthorised migrants.³ Moderates of both wings favour temporary worker programmes as a way to control migration, though they differ over the optimal size and entry and work conditions of the temporary workforce. Compromise has proved near impossible through years of policy debate. The result is a series of superficial policy shifts that fail to address the underlying issues, producing an immigration regime that seems to be rudderless, offering only unenforceable and increasingly harsh laws.

In 1990, after ten years of negotiation that involved all regions of the world,⁴ the UN General Assembly adopted the ICRMW. To the surprise of the negotiators, the Convention was not widely ratified.⁵ The major countries of migrant employment that initially participated in negotiating the Convention set it aside,⁶ and it languished for thirteen years before accruing the 20 ratifications it needed to enter into force.⁷ The treaty now has 38 signatories and 51 state parties.⁸

None of the current parties to the treaty is considered to be a country of major migrant employment, although some (Argentina, Belize, Libya and Venezuela) have significantly greater numbers of migrants per capita than other countries in their respective regions.⁹ Only three of the parties

- 3 Democrats 'Immigration Reform' <https://www.democrats.org/issues/immigration-reform> (accessed 10 January 2017) (pledging to work for 'comprehensive immigration reform' that 'keeps families together'); American Immigration Lawyers Association 'Featured issue: Earned legalization' (2 April 2014) <http://www.aila.org/advo-media/issues/immigration-reform/earned-legalization> (accessed 10 January 2017); American Immigration Lawyers Association 'AILA: The time is now to move away from the negative rhetoric and commit to real immigration reform' (9 November 2016) <http://www.aila.org/advo-media/press-releases/2016/aila-move-away-from-the-negative-rhetoric> (accessed 11 January 2017); National Immigration Law Center 'The POWER Act: Protect our workers from Exploitation and Retaliation Act' (October 2015) <https://www.nilc.org/wp-content/uploads/2015/12/power-act-2015-10-26.pdf> (accessed 10 January 2017).
- 4 See LS Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers' Convention' in B Bogusz et al (eds) *Irregular migration and human rights: Theoretical, European and international perspectives* (2004) 311, 312 & n 6.
- 5 See, generally, A Pécoud & P de Guchteneire 'Migration, human rights and the United Nations: An investigation into the obstacles to the UN Convention on Migrant Workers' Rights' (2006) 24 *Windsor Yearbook of Access to Justice* 241 244.
- 6 See Pécoud & Guchteneire (n 5 above) 242.
- 7 See United Nations Treaty Collection 'Status of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsdg_no=IV-13&chapter=4&clang=en (accessed 5 February 2017) (ICRMW Ratification Record); see also ICRMW, art 87(1).
- 8 ICRMW Ratification Record (n 7 above).
- 9 See UN Department of Economic and Social Affairs 'International migration 2015' <http://www.un.org/en/development/desa/population/migration/publications/wall-chart/docs/MigrationWallChart2015.pdf> (accessed 10 January 2017) (showing Argentina and Venezuela host 4,8% and 4,5% respectively, as compared with a South American regional average of 1,4%, Belize has 15% per capita as compared with the regional Central American average of 1,2%, and Libya has 12,3% compared with the regional Northern Africa average of 1%).

to the treaty are high-income countries: Chile, Seychelles, and Uruguay.¹⁰ The three lowest-income OECD countries, Chile, Mexico, and Turkey, are parties to the Convention.¹¹ There is some movement toward ratification in the industrialised world. The European Parliament,¹² the European Economic and Social Committee,¹³ and the Organisation of American States¹⁴ have all favourably reported on the ICRMW and called on the countries in those regions to ratify it. However, there are obstacles to immediate ratification by countries of employment, including prominently the ‘fear to be among the first’¹⁵ and domestic anti-immigrant sentiment.¹⁶ Even as the Convention slowly accrues country-of-origin ratifications, advocates and officials in many countries of employment are undertaking pre-ratification studies of the treaty vis-à-vis domestic law and the difficult politics of immigration.

Meanwhile, the US has not yet assessed the Migrant Workers Convention in a substantive way. The United States’ delay in engaging the Convention fits the country’s past human rights treaty ratification processes. When it does consider the ICRMW, the US is likely to heavily restrict ratification of the Convention, just as it has in ratifying previous human rights treaties. This chapter describes the United States’ substantive objections during the treaty negotiations, and points out that most of the passages that were objectionable at the time were or have since become part of US law.

2 Brushing the dust off the UN Migrant Workers Convention

Many industrialised countries of employment, or destination countries, including the United States, participated actively in the Migrant Workers

- 10 See The World Bank ‘High income’ <http://data.worldbank.org/income-level/high-income?view=chart> (accessed 8 January 2017).
- 11 See OECD ‘List of OECD Member Countries – Ratification of the Convention on the OECD’ <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> (accessed 12 January 2017); Index Mundi ‘Country Comparison – GDP – Per Capita (PPP)’ <http://www.indexmundi.com/g/r.aspx?v=67> (accessed 12 January 2017).
- 12 See Resolution on the EU’s Rights, Priorities and Recommendations for the 58th Session of the UN Commission on Human Rights in Geneva, CHR (31 January 2002), Eur Parl Doc P5-TA (2003)0034 5.
- 13 Opinion on the International Convention of Migrants, EESE (30 June 2004), SOC/173 (2004). For detailed discussion of the EU context, see the chapter by Desmond in this volume.
- 14 See The human rights of all migrant workers and their families, AG (4 June 2002), AG/RES 1898 (XXXII-O/02) (2002) (Resolution adopted at the fourth plenary session held on 4 June 2002).
- 15 See N Piper & R Iredale ‘Identification of the obstacles to the signing of the United Nations Convention on the Protection of the Rights of All Migrant Workers 1990: The Asia-Pacific perspective’ (2004) Asia Pacific Migration Research Network (Working Paper 14) 8; Pécoud & Guchteneire (n 5 above) 258.
- 16 See Pécoud & Guchteneire (n 5 above) 259-61.

Convention's ten-year drafting process. Twenty five years later, not one of these countries has signed or ratified the Convention.¹⁷ During those 25 years, the United States has ratified six other human rights treaties.¹⁸

2.1 The Migrant Workers Convention has passed through few stages of the US multilateral treaty-making process

Article II of the US Constitution sets forth the basic requirements of the US ratification process: '[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ...'¹⁹ The framers' intent was for the Senate to be closely involved in all stages of the treaty-making process.²⁰ However, the Senate's role in the treaty-making process changed as the body expanded and the number of international agreements became too great to make close involvement in negotiation practicable.²¹ According to a Congressional Research Service Handbook on the treaty-making process,

the Senate role [in treaty formation] now is primarily to pass judgment on whether completed treaties should be ratified by the United States. The Senate's advice and consent is asked on the question of Presidential ratification.²²

The Handbook describes modern multilateral treaty-making²³ as a ten-step process:²⁴ (1) the Secretary of State authorises negotiation; (2) the US representative negotiates with representatives of other country or countries; (3) negotiators agree on terms and, upon authorisation of the Secretary of State, the US representative signs the treaty; (4) the President may submit the treaty to Senate; (5) the Senate Foreign Relations

17 See ICRMW Ratification Record (n 7 above); see also The Migrant Workers Convention, art 87(1). Note that the USSR, listed in n 25 as a country-of-employment-participant in the negotiations, has since dissolved, but its major successor nation, Russia, has not ratified the ICRMW.

18 The United States has ratified the following six international human rights treaties since 1990: (1) in 1992 the International Covenant on Civil and Political Rights (ICCPR); (2) in 1994 the International Convention on the Elimination of all forms of Racial Discrimination (CERD); (3) in 1994 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); (4) in 1999 the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; (5) in 2002 the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; and (6) in 2002 the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

19 US Const art II, § 2, cl. 2.

20 See Congressional Research Service 106th Congress *Treaties and other international agreements: The role of the United States Senate: A study prepared for the Committee on Foreign Relations, United States Senate* (2001) 2-3.

21 As above.

22 Congressional Research Service (n 20 above) 3.

23 Different processes apply to Executive Agreements and bilateral treaties. See Congressional Research Service (n 20 above) 21-26, 8-9, 10.

24 Congressional Research Service (n 20 above) 8-9.

Committee considers the treaty and decides whether to report it favourably to the Senate; (6) the whole Senate may consider the treaty, and a 2/3 majority may vote to approve a resolution of ratification, and the Senate may 'approve it as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval';²⁵ (7) after renegotiating any terms brought into question by the ratification resolution, the President may sign the instrument of ratification; (8) the President may deposit the instrument of ratification with the designated depository, whereupon (9) the treaty enters into force according to its terms, and thereby becomes binding under international law; and (10) the President proclaims entry into force, providing domestic notification of the new law.

2.1.1 Steps one and two: Active executive engagement in negotiation

Professor Louis Henkin invoked the flying buttress as a metaphor of the United States' relationship to the international human rights treaty regime – in the words of Professor Margaret McGuinness, 'the US supports the cathedral of international human rights from the outside, rather than as a pillar from within the system'.²⁶ One reason for this image is that the United States historically participates actively in human rights treaty development but does not readily join human rights treaties as a party subject to international monitoring.

Through Eleanor Roosevelt, the United States was instrumental in steering the Universal Declaration of Human Rights (Universal Declaration)²⁷ to successful completion.²⁸ Subsequently the United States continued to play an active role in negotiating major human rights treaties.²⁹ In fact, past US executives carried out negotiations on human rights treaties over the objections of the Senate and established domestic actors. For example, the United States was heavily involved in negotiating the ICCPR despite domestic outrage over the socialist nature of the rights it contained.³⁰ US participation in negotiations leading to the International Criminal Court similarly suffered from the opposition of the Department of Defence.³¹ Negotiation of the Migrant Workers

25 n 20 above, 3.

26 ME McGuinness 'Sanchez-Llamas, American human rights exceptionalism and the VCCR norm portal' (2007) 11 *Lewis & Clark Law Review* 47–52 (citing L Henkin 'Rights: American and human' (1979) *Columbia Law Review* 405–421).

27 Universal Declaration of Human Rights, GA Res 217A (12 December 1948), UN Doc A/810 (1948).

28 See NH Kaufman *Human rights treaties and the Senate: A history of opposition* (1990) 66–67.

29 See, eg, LA Rehof *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women* (1993); S Detrick (ed) *The United Nations Convention on the Rights of the Child: A guide to the 'Travaux Préparatoires'* (1992).

30 See Kaufman (n 28 above) 69–93.

31 J Stork 'International Criminal Court' (1998) 4 *Foreign Policy in Focus* 1–3.

Convention appears to have had a less controversial domestic backdrop, however, and the United States engaged in the process.

In 1979, the UN General Assembly created a Working Group to draft a convention to protect migrant workers and their families.³² Although the United States abstained from this vote,³³ the formal reports of the Working Group reflect hundreds of interventions by the United States over the ten years of negotiations.³⁴ On more than one occasion, the United States was instrumental in breaking impasses by proposing compromise language, participating in informal consultations,³⁵ and registering its underlying understanding of particular provisions.³⁶

During the negotiations, the United States occasionally expressed ambivalence about the Convention. In 1986, the US Working Group representative stated that a reservation to Convention article 16(9) would likely be registered 'if and when the present Convention is submitted to the Senate'.³⁷ In 1987, the US Representative

stated that his Government was not yet convinced of the need for a convention on the human rights of migrant workers, and that if such a need were demonstrated, such a convention should be negotiated in [the] ILO.³⁸

At the same time, the negotiation history reveals a United States that was committed to the goals of the Convention. For example, the United States

32 Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers, GA (17 December 1979), UN Doc A/RES/34/172 (1979) 3.

33 United Nations Bibliographic Information System 'Voting Record for A/RES/34/172' <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=147W47X4410Q2.129573&menu=search&aspect=power&npp=50&tipp=20&spp=20&profile=voting&ri=&index=.VM&term=res+34%2F172&matchoptbox=0%7C0&oper=AND&x=0&y=0&aspect=power&index=.VW&term=&matchoptbox=0%7C0&oper=AND&index=.AD&term=&matchoptbox=0%7C0&oper=AND&index=BIB&term=&matchoptbox=0%7C0&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort> (accessed 20 December 2009).

34 See, eg, Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group, ECOSOC (25 November 1980), UN Doc A/C.3/35/13 (1980) annex VI; Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group, ECOSOC (23 November 1981), UN Doc A/C.3/36/10 (1981) 31; Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, ECOSOC (10 October 1986), UN Doc A/C.3/41/3 (1986) hereinafter (October 1986 Working Group Report).

35 See, eg, Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group, ECOSOC (23 November 1981), UN Doc A/C.3/36/10 (1981) 31.

36 See, eg, Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, ECOSOC (21 June 1990), UN Doc A/C.3/45/1 (1990) 34.

37 October 1986 Working Group Report (n 34 above) 226.

38 Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, ECOSOC (22 June 1987), UN Doc A/C.3/42/1 (1987) 326.

introduced and successfully advocated for Convention coverage of foreign investors, thereby creating a new category of protection under the treaty.³⁹ The United States also sought successfully to broaden the Convention's protection of migrants' associational rights.⁴⁰ In the June 1989 Working Group session, the first in which the Bush administration participated, the US Representative made a statement that was taken to be a change of position by the United States. The Representative urged that the Working Group take the time to iron out the final details of the Convention before submitting it to the General Assembly.⁴¹ In his remarks, the US Representative stated that '[m]y delegation is pleased that the Working Group has made substantial progress this session towards completing the Convention'.⁴² The representatives of several other countries immediately associated themselves with this intervention.⁴³ According to the reported reaction of the Moroccan Representative,

the statement by the United States was very useful, especially since in the Third Committee the United States delegation had always voted against the resolution of the draft Convention that the Working Group was in the process of drafting.⁴⁴

Working Group Vice-Chairman Juhani Lönnroth observed that, during the negotiations between 1979 and 1989:

There was a rather widespread belief that the United States would not sign and ratify the Convention in the immediate future. But it was equally evident that the United States wished to make the draft meet high legal standards and to make its content as close to its interests as possible in order to create prerequisites for an eventual ratification at some later stage.⁴⁵

It is not clear whether the US delegation's positive contributions over the course of the treaty-drafting process reflected a change of heart by the Reagan administration, or merely due diligence to conduct the negotiations in a meaningful way.

39 See Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, ECOSOC (15 October 1985), UN Doc A/C.3/40/6 (1985) 104-111.

40 See ECOSOC Report (n 38 above) 236.

41 See Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, ECOSOC (19 June 1989), UN Doc A/C.3/44/1 (1989) 307.

42 n 41 above, 307.

43 n 41 above, 308-09.

44 n 41 above, 311.

45 J Lönnroth 'The International Convention on the Rights of All Migrant Workers and Members of Their Families in the context of international migration policies: An analysis of ten years of negotiation' (1991) 25 *International Migration Review* 710-734.

2.1.2 *Steps three and four: Delayed executive signature and submission to Senate, and the slow move from the 'flying buttress' to the 'pillar from within'*

The United States' delay between promulgation and signature of the Migrant Workers Convention is not unusual. Step three in the generic treaty process laid out above, 'negotiators agree on terms and, upon authorization of the Secretary of State, the US representative signs the treaty,' appears to anticipate that an executive, fresh from negotiating the terms of a treaty and voting for its promulgation, will sign the document.⁴⁶ However, in the case of human rights treaties, the more common occurrence is a significant delay between promulgation and US signature. Thus the vast majority of human rights treaties are shepherded through the ratification process by an executive that did not negotiate them.

According to a Department of State Treaty Analyst writing in 2008, the executive branch has given 'no serious consideration' to signing either the ICRMW, or the ILO Conventions that deal with migrant workers.⁴⁷ Interviews with domestic and international government officials and advocates reveal that the Migrant Workers Convention receives virtually no attention in the United States from either civil society or government because of the assumption that any attempt to define immigrants as rights holders is a political non-starter.⁴⁸

In the case of the Convention on the Elimination of Discrimination against Women, in 1980 20 members of the House of Representatives introduced a resolution urging the President to sign the treaty.⁴⁹ Meanwhile, the Migrant Workers Convention has received virtually no public attention from the Senate.⁵⁰ Even the UN Economic and Social Council, when it commissioned a series of studies on the Convention's prospects for ratification in a variety of countries, did not examine the United States.⁵¹

2.1.3 *Delayed Senate approval*

From the earliest days of the human rights treaty regime, the Senate has struggled with whether and how to incorporate international norms into domestic law.⁵² Even when the content of a treaty appears to be

46 See n 20 and n 23 above and accompanying text.

47 E-mail from J Sherer on 24 January 2008.

48 E-mail from J Sherer (n 47 above); E-mail from A Pécoud on 1 October 2008.

49 See H Res 738 (96th) (1980): A resolution relating to the United Nations Mid-Decade Conference for Women.

50 In a search of the Congressional Record, I found only one mention of the Migrant Workers Convention, a reference in a written statement by the International Council of Voluntary Agencies entered by Senator Ted Kennedy in 1992 138 Cong Rec S 106, 111 (22 January 1992).

51 See E-mail from A Pécoud (n 48 above).

unobjectionable, for example in the case of the Genocide Convention, concerns about loss of sovereignty seem to hold particular sway in the realm of human rights treaty ratification.⁵³ According to Professor Natalie Kaufman, 'the actual content of the treaties is not viewed as the primary determinant of the current situation. Perception is important, not content.'⁵⁴ Given the sensitive nature of immigration policy, it is likely that a convention on migrant workers' rights would also encounter opposition and lengthy debates.

2.1.4 Restrictions on ratification

It is common for the United States to aggressively seek to limit the consequences of human rights treaty ratification on the domestic legal system.⁵⁵ Restrictions on ratification, in the form of reservations, understandings, and declarations (RUDs), serve this function.⁵⁶ When the earliest human rights treaties were promulgated, the question of the appropriate way to handle these restrictions was unsettled.⁵⁷ The international community had to strike a balance between universality, in the form of widespread ratification, and the integrity of the treaty.⁵⁸ Therefore, state parties may make unilateral reservations to human rights treaties. This is permitted only when reservations do not contravene the 'object and purpose' of the treaty,⁵⁹ a norm that has proven to be virtually ineffective as a barrier to unilateral reservations on ratification.⁶⁰

In its ratification of human rights treaties, the United States has taken this practice further than with respect to any other type of treaty.⁶¹ In fact, it has regularly applied a set of restrictions based on what the late Senator Jesse Helms termed the 'sovereignty package'.⁶² Over the years, the 'sovereignty package', as applied in the context of human rights treaties, has evolved to include the following restrictions: an 'understanding' that assures federal and state government cooperation to ensure compliance

52 See Kaufman (n 28 above) 2. The US Senate Subcommittee on Human Rights and the law held a hearing on this issue, which was long overdue. For the archived webcast, see US Senate Committee on the Judiciary 'The law of the land: US implementation of human rights treaties' <http://judiciary.senate.gov/hearings/hearing.cfm?id=4224> (accessed 16 December 2009).

53 Written statement by the International Council of Voluntary Agencies (n 50 above) 287-88; see also Kaufman (n 28 above) 184-193.

54 Kaufman (n 28 above) 181.

55 See E Neumayer 'Qualified ratification: Explaining reservations to international human rights treaties' (2007) 36 *Journal of Legal Studies* 397 404 (calling the United States a 'notorious example' of the use of RUDs).

56 As above.

57 See L Lijnzaad *Reservations to un-human rights treaties: Ratify and ruin?* (1995) 15.

58 See Lijnzaad (n 57 above) 23.

59 Lijnzaad (n 57 above) 28-29.

60 Lijnzaad (n 57 above) 95.

61 Congressional Research Service (n 20 above) 286.

62 Kaufman (n 28 above) 187.

with the treaty,⁶³ a declaration that the terms of the treaty are not 'self-executing', or not enforceable in domestic court, until they have been implemented in domestic legislation,⁶⁴ and an understanding that 'nothing in [the treaty] establishes a basis for jurisdiction by any international tribunal, including the International Criminal Court'.⁶⁵ The 'sovereignty package' is controversial internationally. The US ratification restrictions have garnered formal protests from other state parties to human rights treaties,⁶⁶ sparked inter-governmental policy statements designed to limit restrictions,⁶⁷ and elicited widespread censure from domestic constituencies.⁶⁸ While the question of whether non-self-execution can be read into a treaty that was not ratified on that explicit understanding has been the subject of debate and litigation,⁶⁹ US courts do enforce explicit non-self-execution ratification restrictions.⁷⁰

63 United Nations Treaty Collection 'Status of International Covenant on Civil and Political Rights' <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (accessed 6 November 2016); United Nations Treaty Collection 'Status of International Convention on the Elimination of All Forms of Racial Discrimination' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-2&chapter=4&clang=_en (accessed 5 November 2016); United Nations Treaty Collection 'Status of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11-b&chapter=4&clang=_en (accessed 6 November 2016).

64 As above.

65 Status of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (n 63 above). Note also that two ratifications involved what Senator Helms termed the 'sovereignty proviso', conditions included in the Senate resolution ratifying the Genocide Convention but not included in the Convention against Torture instrument of ratification deposited by the President. Congressional Research Service (n 20 above) 134-35. The 'sovereignty proviso' stated that the President would not deposit the instrument of ratification until he had notified 'all present and prospective ratifying parties ... that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.' Congressional Research Service (n 20 above) 134, 287.

66 See, eg, Status of International Covenant on Civil and Political Rights (n 63 above); United Nations Treaty Collection 'Status of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&clang=_en (accessed 20 December 2009).

67 C Redgwell 'US reservations to human rights treaties: All for one and none for all?' in M Byers & G Nolte (eds) *United States hegemony and the foundations of international law* (2003) 392, 397-98.

68 Eg, Press Release, American Civil Liberties Union and Human Rights Watch Report on US Violations of International Human Rights Covenant 'Groups call on Clinton administration to correct abuses, ensure that international standards can be invoked in US courts' (14 December 1993) http://www.skepticfiles.org/aclu/12_14_93.htm (accessed 5 November 2016).

69 The Supreme Court has read such a treaty to be non-self-executing and thus unenforceable in US courts. See *Medellin v Texas* 552 US 491, 505 (2008) (quoting *Igartúa-De La Rosa v United States* 417 F 3d 145, 150 (1st Cir 2005)). For scholarship on this issue, see MS Flaherty 'History right?: Historical scholarship, original understanding, and treaties as "supreme law of the land"' (1999) 99 *Columbia Law Review* 2095; CM Vázquez 'Laughing at treaties' (1999) 99 *Columbia Law Review* 2154; CM Vázquez 'Treaties as law of the land: The supremacy clause and the judicial enforcement of treaties' (2008) 122 *Harvard Law Review* 600.

70 CA Bradley 'Our dualist Constitution, and the internationalist conception' (1999) 51 *Stanford Law Review* 529-539-40.

In addition to the aforementioned understandings and declarations, the United States imposes additional restrictions it calls reservations, restricting its commitment to substantive provisions of human rights treaties that conflict – or potentially conflict – with domestic law. For example, in its ratification of the ICCPR, the United States reserved the right to execute convicted criminals for crimes committed below the age of 18⁷¹ to shield the United States from the ICCPR's prohibition on the juvenile death penalty.⁷² The US practice of participating in treaty negotiation while delaying and severely restricting ratification has earned it the label of a 'double standard state'.⁷³

2.1.5 Domestic law assessment of the Migrant Workers Convention

The provisions of the Convention that apply to undocumented migrants are, to a great extent, a recitation of international norms to which the United States has already acceded by virtue of previous treaty ratifications.⁷⁴ In fact, 23 provisions of the ICRMW⁷⁵ merely echo the language of treaties the US has ratified.⁷⁶ An additional two provisions, which do not correspond to protections already ratified by the United States, adopt the language of the Universal Declaration,⁷⁷ a document that the United States helped to draft⁷⁸ and in favour of which the country voted in 1948.⁷⁹ Moreover, each of these two provisions – protection from arbitrary deprivation of property and the right to secondary education for undocumented migrant children, is firmly established in US domestic

71 Status of International Covenant on Civil and Political Rights (n 63 above).

72 ICCPR, art 6(5). See generally Congressional Research Service (n 20 above) 291. For arguments against restrictions on ratification in general see L Henkin, 'The Covenant on Civil and Political Rights' in RB Lillick (ed) *US ratification of the human rights treaties: With or without reservations?* (1985) 22.

73 See Neumayer (n 55 above).

74 JAR Nafziger & BC Bartel 'The Migrant Workers Convention: Its place in human rights law' (1991) 25 *International Migration Review* 771 781-82.

75 See Nafziger & Bartel (n 74 above) 789-99; see also ICRMW, art 10 (corresponding to CAT art 16); art 16 (corresponding to CAT art 14).

76 See Nafziger & Bartel (n 74 above) 789-99.

77 See ICRMW, art 15 (corresponding to Universal Declaration art 17); ICRMW, art 30 (corresponding to Universal Declaration art 26).

78 See MA Glendon *A world made new: Eleanor Roosevelt and the creation of the Universal Declaration on Human Rights* (2000).

79 For information and background on the voting of states regarding the Universal Declaration, see generally Glendon (n 78 above) 143-72. Note that the Universal Declaration of Human Rights is a declaration, not a treaty, and therefore is not as a whole formally binding on the United States. See H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 287 290. Some provisions of the Declaration, such as the prohibition on torture contained in art 5, are now accepted by the US as binding on this country through the international law devices of customary international law. See Hannum 306; *Filartiga v Pena-Irala* 630 F 2d 876, 879 (2d Cir 1980). However, arts 17 & 26 of the Universal Declaration are not amongst these provisions. Nevertheless, the United States' endorsement of the Declaration lends weight to the argument that the above-mentioned parallel articles in the Migrant Workers Convention (arts 15 and 30) are not foreign to the United States. See generally Restatement (Third) of the Foreign Relations Law of the United States § 701 (1987).

law.⁸⁰ Thus, a significant portion of the ICRMW overlaps with the United States' existing obligations.

The Senate and Administration are likely to be most protective of their immigration enforcement prerogatives. However, the Convention does not mandate legalisation. In fact, article 35 of the Convention clarifies that the treaty does not require governments to offer regularisation to undocumented migrants, though article 69 does set out factors to be taken into account when state parties consider the possibility of regularisation and article 22 places due process restrictions on individual expulsion decisions.

A sensitive area of immigration policy involves the visa eligibility of migrant workers' families. Article 38 requires states of employment to 'make every effort to authorize [legally present] migrant workers and [family members] to be temporarily absent without effect upon their authorization to stay or to work'.⁸¹ With regard to workers who are lawful permanent residents (LPR), the United States makes precisely that provision, permitting LPR-status migrants to undertake temporary visits abroad without running any risk of jeopardising their status.⁸² With regard to temporary entrants, however, no such provision for temporary travel is made, potentially creating a *de jure* conflict between article 38 and US law.

Some Convention articles offer substantive immigration protections to legally present workers aimed at protecting family reunification. Article 44(2) directs that state parties

take measures that they deem appropriate and that fall within their competence to facilitate the reunification of [authorized] migrant workers with their spouses [or equivalents] ... as well as with their minor dependent unmarried children,

and directs that 'on humanitarian grounds, [state parties] shall favourably consider granting equal treatment to other family members of migrant workers'.⁸³ As to the first requirement, the language 'take measures that they deem appropriate' prevents this clause from conflicting with domestic law. However, the second phrase requires examining whether those family reunification protections that are in place are being extended to 'other family members'. This, too, is a weak requirement, using the mandating language of 'shall favourably consider', but if that language were interpreted to be binding, the US domestic immigration system would present a *de jure* conflict with article 44 as well. There are numerous instances in US law of more favourable treatment for nuclear as opposed

80 US Const amend V; *Phyller v Doe* 457 US 202 (1982).

81 ICRMW, art 38(1).

82 See 8 U.S.C. §1101(a)(27)(A) (2009); *Chavez-Ramirez v INS* 792 F 2d 932 (9th Cir 1986).

83 ICRMW, art 44.

to extended, or 'other' family members.⁸⁴ Similarly, if 'favourably consider' is interpreted to be binding, article 50(1) raises a *de jure* conflict. Article 50(1) requires states to 'favourably consider' granting family members of deceased or divorced migrant workers authorisation to stay and to take into account the length of time already spent in that state.⁸⁵ These provisions, though arguably weakly worded, raise potential conflicts that would likely require either a change in US law to guarantee conformity or spark a restriction on ratification.⁸⁶ Moving toward modifying US law on this point would better comport with the United States' obligation under ICCPR article 23(1) to treat the family as 'the natural and fundamental group unit of society[,] entitled to protection by society and the State'.⁸⁷

Thus US ratification of the ICRMW would likely be conditioned on a set of reservations, understandings and declarations, by way of an initial package proposed by the Executive upon signature, followed by Senate stipulation upon authorisation to ratify, and formalised by the final act of ratification by the President. These limitations would likely include the longstanding generic reservations, such as the federal/state understanding and the non-self-execution declaration, as well as a series of substantive reservations and declarations addressing both clear and potential substantive conflicts between the Convention and domestic law.

In future fuller assessments of the Convention, additional differences between US law and the Convention will be identified. In the context of such differences, however, it is important to underline that US ratification of human rights treaties typically includes a declaration that the treaty provisions are not 'self-executing'. This means that restrictions on ratification will likely prevent judicial reconciliation of *de jure* conflicts, because at first courts will not have jurisdiction over implementation of the treaty. The non-self-executing restriction on ratification would prevent any provision from being invoked in US domestic courts unless the legislature has 'executed' that provision in domestic legislation. This provision, along with the various substantive restrictions that are likely to limit ratification, appears to block domestic law from any real change in the absence of legislative implementation.⁸⁸ Ratification of the Convention would involve the country in a much-needed self-examination process but would

84 Eg. TA Aleinikoff et al *Immigration and citizenship: Process and policy* (2003) 277-80.

85 ICRMW, art 50(1).

86 For example, the death of an immigration family petitioner, before the petition has been approved, as well as in most other situations, automatically revokes the petition and strips the family member of the petitioner of the right to status in the United States. See *Abboud v INS* 140 F 3d 843, 849 (9th Cir 1998); *Dodig v INS* 9 F 3d 1418 (9th Cir 1993).

87 ICCPR, art 23(1).

88 See Vázquez 'Treaties as law of the land' (n 69 above) 695; CM Vázquez 'Judicial enforcement of treaties: Self-execution and related doctrines' (2006) 100 *American Society of International Law Proceedings* 439 439. See generally RB Lillich (ed) *US ratification of the human rights treaties: With or without reservations?* (1981).

not threaten longstanding policies. As noted above, this limited domestic role for ratified human rights treaties was not the original vision for the UN human rights treaty regime, but it is the likely short-term domestic legal effect of ratification of the Migrant Workers Convention in the US.

2.2 US signature is unlikely, though the United States recently agreed to take ‘deliberative action’

For the first 21 years after promulgation of the Migrant Workers Convention, the US government rarely, if ever, publicly discussed it. Informal indications were that the Convention was extremely low on the list of ratification priorities. Despite President Obama’s signature of the UN Convention on the Rights of Persons with Disabilities,⁸⁹ his pledge to ratify several other international human rights treaties,⁹⁰ his statements on the urgency of poverty alleviation in the Global South,⁹¹ and some steps to improving conditions for migrant workers, his administration’s few statements on the ICRMW were uniformly negative.

The US had occasion to reaffirm its intentions with regard to the Convention when it passed through the UN’s Universal Periodic Review (UPR) process in 2010-2011 and again in 2015. Participating states urged the United States to ratify a number of human rights treaties, and many included the Migrant Workers Convention in the list.⁹² Egypt, Turkey, and Guatemala made freestanding recommendations on the ICRMW alone, emphasising its importance over other unratified treaties.⁹³ From the responses of the US representatives emerge three tiers of support for unratified human rights treaties. A handful of conventions received the strongest positive indications. These were the treaties the representatives

89 See The White House Office of the Press Secretary ‘Remarks by the President on Signing of UN Convention on the Rights of Persons with Disabilities Proclamation’ (24 July 2009) http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing/ (accessed 5 November 2016).

90 ‘Obama pledge on treaties a complex undertaking’ *San Francisco Chronicle* 1 December 2008 A1.

91 ‘Obama’s \$845 billion UN plan forwarded to US Senate floor: “Global Poverty Act” to cost each citizen \$2,500 or more’ *WorldNetDaily* 28 July 2008 <http://www.wnd.com/index.php?pageId=70308> (accessed 5 November 2016).

92 Report of the Working Group on the Universal Periodic Review*: United States of America, HRC (4 January 2011), UN Doc A/HRC/16/11 (2011) paras 92.1 (Bolivarian Republic of Venezuela), 92.6 (Sudan); 92.15 (Haiti) (2011 UPR USA Working Group Report); Report of the Working Group on the Universal Periodic Review* United States of America, HRC (20 July 2015), UN Doc A/HRC/30/12 (2015) paras 176.25 (Indonesia), 176.28 (Cabo Verde), 176.33 (Ghana), 176.53 (Honduras), 176.54 (Chile), 176.59 (Guatemala) (2015 UPR USA Working Group Report).

93 2011 UPR USA Working Group Report (n 92 above) paras 92.29 (Egypt), 92.30 (Turkey), 92.31 (Guatemala); 2015 UPR USA Working Group Report (n 92 above) para 176.59 (Guatemala).

identified as those for which ‘the Administration is most committed to pursuing ratification’.⁹⁴ Without any qualifying language, the US expressed ‘support’ for the recommendations urging ratification of these instruments: the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the ILO Convention concerning Discrimination in Respect of Employment and Occupation (ILO Convention No 111).⁹⁵ At the second tier of support appears the Convention on the Rights of the Child (CRC). The US responded to the recommendations to ratify the CRC by indicating support expressed with the qualifier, ‘as we support its goals and intend to review how we could move toward its ratification.’⁹⁶ At the lowest tier of support fall several treaties,⁹⁷ including the Migrant Workers Convention. The US consistently responded to recommendations to ratify the ICRMW with ‘we cannot support’,⁹⁸ ‘we do not support’,⁹⁹ or that the recommendation ‘does not enjoy our support.’¹⁰⁰

There has, however, been one development that signaled a more nuanced US approach to the Migrant Workers Convention. In 2015, a few countries recommended that the US ‘consider’ ratifying particular treaties, including the ICRMW.¹⁰¹ The US responded: ‘we support recommendations urging deliberative actions on treaties or domestic institutions, such as that we “consider” them’.¹⁰² At the UPR session wrapping up the 2015 US review, the representative of the Philippines welcomed the United States’ acceptance of its recommendation to consider the ICRMW.¹⁰³ It remains to be seen what a commitment to ‘consider’ and to take ‘deliberative action’ means for US review of the Convention. With the advent of a Trump administration, the promised deliberative action seems unlikely.

94 Report of the Working Group on the Universal Periodic Review United States of America Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, HRC (8 March 2011), UN Doc A/HRC/16/11/Add.1 (2011) para 29 (hereinafter 2011 US UPR Response).

95 2011 US UPR Response (n 94 above) para 28.

96 2011 US UPR Response (n 94 above) para 28; Report of the Working Group on the Universal Periodic Review*: United States of America: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, HRC (14 September 2015), UN Doc A/HRC/30/12/Add.1 (2015) para 20 (hereinafter 2015 US UPR Response).

97 Other explicitly disfavoured treaties included the ICCPR, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED), the Optional Protocol to the ICCPR, the American Convention on Human Rights, the Rome Statute of the International Criminal Court, and the ILO Convention on Domestic Workers (No 189).

98 2011 US UPR Response (n 94 above) para 29.

99 2015 US UPR Response (n 96 above) para 22.

100 2011 US UPR Response (n 94 above) para 30.

101 2015 UPR USA Working Group Report (n 92 above) paras 176.55 (Burkina Faso), 176.60 (Philippines).

102 2015 US UPR Response (n 96 above) para 28.

103 UN Web TV ‘USA UPR adoption – 22nd Session of Universal Periodic Review’ (15 May 2015) <http://webtv.un.org/search/usa-upr-adoption-22nd-session-of-universal-periodic-review/4238252840001?term=upr&languages=&sort=date> (accessed 6 November 2016).

3 Lost opportunity to rationalise low wage labour migration policies

By failing to sign or assess the Migrant Workers Convention, the United States misses an important opportunity to protect one of the country's most subordinated populations. By exposing more US citizens to the notion that migrant workers are the subjects of a human rights treaty, engaging with the Convention might contribute to shifting the political climate toward policy reform. Ratification would also improve the United States' reputation abroad, increasing its world leadership vis-à-vis the Global South, improving the US-Mexico relationship, and enabling the United States to shape the development of the emerging international law standards on migrant workers. Working with the Convention would also help the United States identify best practices and further badly needed cross-agency examination of this country's fragmented temporary worker programme.

In the words of Professor Oona Hathaway, 'treaties shape behavior not simply by influencing tangible benefits and not simply because they create legitimate legal obligations, but also by providing nations with a powerful expressive tool'.¹⁰⁴ The United States desperately needs expressive tools for addressing migration. By restricting opportunities for legal low wage labour migration and failing to enforce employer sanctions, the United States has developed the world's largest per capita undocumented migrant population, one of the world's most deadly peacetime borders, and the most poverty-stricken low-income workforce in the industrialised world. Most agree, on humanitarian, labour, fiscal, international relations and security grounds, that these are urgent problems. Yet, except for policies of increased enforcement, domestic policy reform proposals have failed politically. Signature and ratification of the ICRMW would help to re-frame the debate on migrant labour and refocus attention on non-enforcement solutions to irregular migration, urging the United States along a path toward a rational global approach to low wage labour migration.

4 Conclusion

The United States has always had an unusually contradictory relationship with the Migrant Workers Convention. At the UN ECOSOC level, the United States routinely opposed promulgation of the treaty. However, once the Working Group tasked with drafting the Convention convened, the United States participated actively in negotiations, even on occasion

104 OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935 2020.

lending its influence to breaking impasses and moving negotiations forward. Once negotiations concluded, however, the United States has given no serious consideration to signing the Convention. Most recently, while participating in the UPR, the US opposed calls for it to ratify the treaty, though it did respond favourably to one request to deliberate on the possibility of ratification. There is relatively little conflict between US law and the substantive protections of the Convention, and what conflicts may exist would likely be buffered upon ratification owing to the United States' typically aggressive practice of restrictions on ratification. Even with its general history of slow human rights treaty ratification, the United States' treatment of the ICRMW stands out as particularly delayed, owing not to concerns about law, but to the politicised nature of the country's low wage labour migration regulation. The politics of immigration continue to result in widespread suffering that could be lessened if the US legislature adopted a human rights framework in assessing its policy priorities. Engaging with the Migrant Workers Convention would be an important step toward recasting this fraught policy area.

*Alan Desmond**

1 Introduction

Since the adoption by consensus of the United Nations (UN) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)¹ by the UN General Assembly on 18 December 1990, the issue of international migration has grown in prominence.² This makes all the more remarkable the fact that the ICRMW has enjoyed a mixed reception at the level of the EU institutions while being for all practical purposes ignored by the governments of EU

* This chapter draws on earlier work by the author, namely, 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 39; and 'The development of a common EU migration policy and the rights of irregular migrants: A progress narrative?' (2016) 16 *Human Rights Law Review* 247.

1 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA (18 December 1990), UN Doc A/RES/45/158 (1990) 3.

2 This is evidenced by, inter alia, the appointment in 2015 by the Secretary-General of the Council of Europe of a Special Representative on migration and refugees; the appointment in 2004 by the African Commission on Human and Peoples' Rights of a Special Rapporteur on refugees, asylum Seekers, migrants and internally displaced persons; the addition in 1999 by the then UN Commission on Human Rights (now the Human Rights Council) of the UN Special Rapporteur on the human rights of migrants to its system of special procedures; and the appointment by the UN Secretary-General in 2006 of a Special Representative on international migration and development. For other UN-related developments indicative of the increasing attention being paid by states and intergovernmental/regional organisations to international migration see paras 12-26 of the Report by the Special Rapporteur on the human rights of migrants, François Crépeau: 'Global migration governance', GA (7 August 2013), UN Doc A/68/283 (2013). The number of international migrants, persons living in a country other than where they were born, was estimated to be 244 million or 3,3 per cent of the global population in 2015. This represents an appreciable increase on the 2,8 per cent share of the global population made up by international migrants in 2000. See *Population facts: Trends in international migration 2015 (Factsheet No 2015/4 of the Population Division of the DESA of the UN Secretariat)* <http://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationPopFacts20154.pdf> (accessed 15 June 2017).

member states. Indeed, the ICRMW stands out as the only one of the ten core international human rights instruments³ not yet signed or ratified by any of the 28 EU member states (EU28).⁴ Against this background, this chapter will do three things. The second section will demonstrate that the failure of EU member states to ratify is in keeping with a wider reluctance amongst states to confer legally enforceable rights on migrants through binding multilateral agreements in the realm of migration. While this might help us to better understand non-ratification on the part of the EU28, the third section will illustrate how difficult it is to understand some of the EU attitudes towards the Convention by exposing the gross hypocrisy in the failure of the European Commission and the Council of the European Union to endorse ratification by member states. The fourth section will argue that despite the poor fortunes experienced by the Convention in the EU so far, the human rights advances which have been brought about by the entry into force of the Treaty of Lisbon in 2009 have created an EU legal landscape more propitious to ratification of the ICRMW.

It is worth highlighting at the outset that when discussing migration in the EU context we are talking about non-EU citizens or, to use the technical term, third-country nationals (TCNs). EU citizens who move from one EU country to another enjoy a robust catalogue of rights by virtue of their EU citizenship and the rules on freedom of movement

- 3 There is some inconsistency within the UN as to the exact number of core instruments. The website of the Office of the High Commissioner for Human Rights (OHCHR) contains references both to nine and ten core international human rights instruments. This chapter refers to ten core international instruments which are to be understood as the nine core human rights treaties adopted by the UN General Assembly between 1965 and 2006 as well as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (OP-CAT). The implementation by state parties of each of these ten instruments is overseen by a monitoring body composed of independent experts. While a number of the treaties have been supplemented by optional protocols, OP-CAT is the only such protocol with a dedicated monitoring body. This is presumably why it is at times numbered amongst the core instruments, as distinct from the other eight optional protocols whose implementation by state parties is overseen by the monitoring body supervising the treaty to which the optional protocol relates. For a full list of the ten core international human rights instruments and their monitoring bodies see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 15 June 2017).
- 4 All of the ten core instruments are open for signature by states. Signature does not impose positive legal obligations on a state, but indicates the state's intention to express its consent to be bound by the treaty at a later date. A state expresses its consent to be bound by ratifying the treaty which occurs when an instrument of ratification is deposited with the UN Secretary-General at UN headquarters in New York. In the period between signature and ratification, which is not subject to any time limit, a state may seek approval for the treaty at the domestic level and may amend domestic policy and legislation to ensure they comply with the treaty. There are currently 15 states which are signatories to the ICRMW but have not yet ratified. An instrument of accession is an instrument of ratification which has been deposited without having been preceded by signature. Of the 51 state parties to the ICRMW, 23 signed and ratified while 28 acceded. For further information see UN *Treaty handbook* (2012).

within the EU which go beyond the minimum standards elaborated in the ICRMW.⁵ Ratification of the ICRMW by an EU member state would therefore primarily be to the benefit of non-EU migrants in the ratifying state. It is also worth pointing out that the EU as a regional organisation cannot ratify the ICRMW as ratification is open only to states. As we will see presently, however, the EU has a key role to play in determining whether its constituent states take action in respect of the ICRMW. Any discussion concerning the ICRMW and the EU merits mention of the fact that the Convention may be seen as a European text. This may come as a surprising assertion, given that European states were unenthusiastic about the idea of a UN convention on migrant workers' rights to begin with, viewing UN involvement in this field as inappropriate in light of the ILO's existing instruments and established role in the field of labour standards.⁶ Indeed, disdain for a new UN instrument was also evident when western European states rejected the first draft of the Convention submitted to the General Assembly working group as a 'blank cheque for continued illegal migration'.⁷ Subsequently, however, a number of Mediterranean and Scandinavian countries – Finland, Greece, Italy, Portugal, Spain, Sweden and later Norway – came together in an informal group known as MESCA which provided the working group with an alternative outline of the Convention which became the definitive structure. It is therefore perhaps unsurprising that, while the interest of some of the MESCA states in the proposed Convention was no doubt prompted by the fact that they were at the time primarily countries of origin rather than destination, the ICRMW has been characterised by one expert who participated in the drafting process as 'fundamentally a European text, although modified by the long negotiation process'.⁸

The failure so far of any of the EU28 to ratify the ICRMW is, in practical terms, to the detriment of migrants. The EU is an important

- 5 See for example Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L158/77, OJ L 158, 30.4.2004, 77-123.
- 6 S Grant 'The recognition of migrants' rights within the UN Human Rights System: The first sixty years' in M Dembour and T Kelly (eds) *Are human rights for migrants?* (2011) 35.
- 7 R Böhning 'The ILO and the new UN Convention on Migrant Workers: The past and future' (1991) 25 *International Migration Review* 701.
- 8 G Battistella 'Migration and human rights: The uneasy but essential relationship' in P de Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 55. The 'long negotiation process' of the ICRMW is not, however, the longest negotiation process involving core international human rights instruments. Both ICCPR and CÉSCR were adopted in 1966 after 14 years of negotiations.

destination for a significant number of migrants.⁹ Non-application of the ICRMW to EU member states means that the migration law, policy and practice of those states is not subject to close examination by a body of independent experts dedicated to clarifying the practical requirements of an instrument setting out the minimum international standards of human rights protection for migrant workers and their families. This is also to the detriment of the functioning of the Committee on Migrant Workers (CMW),¹⁰ the body which monitors compliance by state parties with the ICRMW, as the Committee is deprived of the insight and input of independent experts from an important migrant destination region with a highly developed system of human rights protection. Similarly, because of the volume of migrants in the EU and the fact that most EU member states have robust democratic institutions and vibrant civil society activity, non-ratification by the EU28 means that examples of rights' violations from this important migrant destination region are not referred to the Committee, with the Committee consequently not in a position to issue guidance and clarify standards for states which are in a comparatively strong position to implement such guidance. This clearly impacts the development and application of international human rights law as it applies to migrants.

Endorsement of the ICRMW by the European Commission and Council of the European Union and its ratification by EU member states would also be of great symbolic significance. It would send a clear message that the ratifying state takes the issue of migrants' rights seriously, that human rights are not only for the citizens of the EU, but for all people regardless of their country of origin or status in the destination country. Apart from the practical impact on migration law and policy that ratification might have, it could also help to change the public narrative around migration, something which is as important as laws and policies in ensuring the realisation of human rights in practice.

- 9 It is estimated that in 2015, 2.7 million TCNs migrated to the EU. On 1 January 2016, the number of people living in the EU28 who were citizens of non-member countries was 20.7 million, while the number of people living in the EU28 who had been born outside of the EU was 35.1 million. For more detailed information see Eurostat: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics (accessed 15 June 2017).
- 10 The literature on the Committee on Migrant Workers is sparse. The only detailed studies are C Edelenbos 'Committee on Migrant Workers and implementation of the ICRMW' in De Guchteneire et al (n 8 above) 100-121; and V Chetail 'The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' in P Alston & F Mégret (eds) *The United Nations and human rights: A critical appraisal* (forthcoming, 2018).

2 State aversion to binding multilateral commitments concerning migration and migrants' rights

Investigations into the non-ratification of the ICRMW in the EU have pointed to a lack of awareness of the Convention as a significant problem¹¹ and, in addition, have yielded a wide variety of state objections to the instrument.¹² These include the financial and administrative burden that ratification would impose on a state; the incompatibility of certain provisions of the Convention with a state's legal and constitutional framework; the redundancy of the Convention in light of the protection of migrants' rights provided by national legislation and the regional and international instruments to which a state is party; and the competence of the EU in migration matters which, it is claimed, precludes ratification of the Convention by any one individual EU member state. This latter claim will be dealt with in detail presently.

Another oft-rehearsed objection is that ratification of the Convention would result in a significant encroachment on the sovereignty of states, tying states' hands when it comes to deciding who may enter their territory. It is important to note in this regard that article 79 of the Convention provides explicitly that nothing in the document shall affect the right of each state party 'to establish the criteria governing admission of migrant workers and members of their families'. Thus while the Convention is largely concerned with migrants' rights, it cannot be interpreted as usurping the power of state parties to regulate the admission of non-nationals. The potentially most fatal accusation levelled at the Convention is that by failing to distinguish between lawfully and unlawfully present migrants¹³ it incentivises irregular migration. This is also the laziest charge, as the most cursory reading of the text makes clear that only certain fundamental rights, outlined in Part III of the text, are accorded to all migrants. The Convention thus makes a very clear distinction between these two categories of migrants.

- 11 It is difficult to resist the impression that there is a certain reticence on the part of the UN itself vis-à-vis promotion and awareness-raising of the Convention. This is evidenced, albeit anecdotally, by the fact that the ICRMW is the only one of the ten core international human rights instruments for which there is no material in the UN historic archives of the Audiovisual Library of International Law <http://legal.un.org/avl/ha/humanrights.html> (accessed 15 June 2017).
- 12 See for example E MacDonald & R Cholewinski *The Migrant Workers Convention in Europe: Obstacles to the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA perspectives* (2007).
- 13 Most recently and egregiously repeated in para 13, Council of the European Union 'Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus' (2013) <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012415%202013%20INIT> (accessed 15 June 2017).

The wealth of foregoing ostensible obstacles notwithstanding, studies undertaken suggest that the principal barrier to ratification of the Convention is a lack of political will.¹⁴ With many perceived obstacles a result of misconception or misrepresentation, there are few real legal obstacles to ratification which, in any case, could be neatly dealt with by means of a reservation or minor changes to domestic legislation. Lack of political will to ratify is not, however, confined to the ICRMW. There is something about migrants, and migrant workers in particular, that makes states reluctant to consent to binding multilateral legal standards which focus on protecting their rights. EU member states evince this reluctance regardless of the venue from which such standards originate.

The EU28 aversion to binding multilateral commitments concerning migrants' rights is evident from their approach to the conventions elaborated under the auspices of the Council of Europe,¹⁵ a regional intergovernmental organisation established in the aftermath of World War II to promote democracy, human rights and the rule of law which numbers all EU states amongst its 47 members. The Council of Europe has produced over 200 treaties,¹⁶ a number of which specifically concern the conferral of rights on migrant workers and often require equality of treatment between migrants and host state citizens. These migrant-focused documents have almost invariably failed to secure any meaningful degree of support amongst states. The European Convention on Establishment,¹⁷ which deals with entry, residence and employment rights, was opened for signature in 1955 but has been ratified by only ten EU member states¹⁸ as well as two other Council of Europe members. The European Convention

14 K Touzenis & A Sironi *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (2013) 4 [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET\(2013\)433715_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET(2013)433715_EN.pdf) (accessed 15 June 2017); M D'Auchamp *Rights of migrant workers in Europe* (2011) 6 http://www.europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf (accessed 15 June 2017).

15 The Council of Europe is a distinct entity from the EU. Established in 1949, its institutional structure comprises a committee of ministers and a parliamentary assembly. Unlike the EU, the statute of the Council of Europe does not provide for the creation of a federation or union. Through the conclusion of a wide range of important multilateral conventions it has fostered collaboration and closer links on economic and social matters between its members. Its aim of unifying the continent in the aftermath of World War II was impeded by the advent of the Cold War, but since 1989 it has expanded its membership to include the countries of central and Eastern Europe. Its flagship institution is the European Court of Human Rights. For further information see B Wassenberg *History of the Council of Europe* (2013).

16 For the full list see <http://www.coe.int/en/web/conventions/full-list> (accessed 15 June 2017). While Council of Europe conventions are prepared within the institutional framework of that organisation, the majority of its treaties are open for accession by non-member states.

17 European Convention on Establishment (ETS No 19) 529 UNTS 141, entered into force 23 February 1965.

18 Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Sweden and the United Kingdom. It has also been signed by Austria and France. For further information see <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/019> (accessed 15 June 2017).

on Social Security,¹⁹ opened for signature in 1972, has been ratified by eight states, seven of which hold EU membership.²⁰ The European Convention on the Legal Status of Migrant Workers,²¹ opened for signature in 1977, has 11 state parties, of which six are EU member states.²² A feature of these conventions which limits their application and simultaneously, one might imagine, makes ratification more palatable, is the fact that they oblige contracting states to apply the conventions only in respect of individuals who are citizens of other states which have ratified them. The more recent Convention on the Participation of Foreigners in Public Life at Local Level,²³ opened for signature in 1992, differs from the aforementioned treaties in that it applies to all lawfully resident migrants in a contracting state, regardless of whether their country of origin has also ratified. It has, however, attracted a similarly low number of ratifications: just nine countries, including six EU member states,²⁴ have deposited instruments of ratification with the Secretary-General of the Council of Europe.

The Council of Europe Convention on Action against Trafficking in Human Beings,²⁵ which since being opened for signature in 2005 has been ratified by all EU member states and by all remaining member states of the Council of Europe apart from Russia,²⁶ might be viewed not so much as an exception to the rule as a reflection of greater willingness on the part of states to cooperate in relation to individuals viewed as helpless victims of great injustice.²⁷ Their manifest vulnerability allows them to be perceived as more deserving of protection than individuals who move across borders

- 19 European Convention on Social Security (ETS No 78) 1710 UNTS 6, entered into force 1 March 1977.
- 20 Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal and Spain. It has also been signed by Czech Republic, France, Greece and Ireland. For further information see: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/078> (accessed 15 June 2017).
- 21 European Convention on the Legal Status of Migrant Workers (ETS No 93) 1496 UNTS 3, entered into force 1 May 1983.
- 22 France, Italy, Netherlands, Portugal, Spain and Sweden. It has also been signed by Belgium, Germany, Greece and Luxembourg. For further information see <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/093> (accessed 15 June 2017).
- 23 Convention on the Participation of Foreigners in Public Life at Local Level (ETS No 144) 2044 UNTS 737, entered into force 1 May 1997.
- 24 Czech Republic, Denmark, Finland, Italy, Netherlands and Sweden. In addition, the Convention has been signed by Cyprus, Lithuania, Slovenia and the United Kingdom. For further information see <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144> (accessed 15 June 2017).
- 25 Council of Europe Convention on Action against Trafficking in Human Beings (CETS No 197) 2569 UNTS 33, entered into force 16 May 2005.
- 26 Russia has not yet signed. Belarus, a non-member state of the Council of Europe, ratified on 1 March 2014. For further information see <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197> (accessed 15 June 2017).
- 27 This may also at least partly explain the high rate of ratification of the Convention relating to the Status of Refugees 189 UNTS 150, entered into force 22 April 1954, and its 1967 Protocol, which has 146 state parties.

of their own free will²⁸ in search of better employment and living opportunities. A further factor explaining the ratification readiness of states vis-à-vis anti-trafficking instruments²⁹ may be the migration control and law enforcement aspect as these instruments also aim at preventing trafficking and prosecuting traffickers.

In light of the foregoing it can come as little surprise that, rather than any migrant-specific treaty, the Council of Europe instrument which has been of greatest benefit to the protection of migrants' rights is the European Convention on Human Rights (ECHR),³⁰ a bill of rights of general application which sets out the minimum level of human rights protection that member states of the Council of Europe must provide. The function of the European Court of Human Rights (ECtHR) in adjudicating on alleged violations of the ECHR represents the most effective system of legal remedy under any human rights treaty.³¹ Even here, however, state resistance to recognition and protection of migrants' rights is evident in the ECtHR's development of its case law. The right of migrants to take a case³² alleging a violation of one or more of the rights set out in the ECHR stems from article 1 which provides that state parties must secure the rights in the Convention to everyone within their jurisdiction. While the ECtHR

- 28 The extent to which those moving across international borders in search of employment can be said to be acting of their own free will is of course open to question. See for example M Ngai *Impossible subjects: Illegal aliens and the making of modern America* (2004) and S Sassen *Losing control? Sovereignty in an age of globalization* (1996) who shows that migrants' presence in a host state is often produced by specific economic, colonial, military and other ties between different countries. Similarly, in the context of irregular migration, the European Commission has conceded that the demand for irregular labour migration is created by employers, thus implicitly recognising that irregular migrants are themselves in many cases only partially responsible for their irregular status. See 'Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration' (2001) 23.
- 29 Like the Council of Europe Convention on Action against Trafficking in Human Beings, the UN Palermo Protocol has also been widely ratified and currently has 170 state parties. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 15 November 2000, 2237 UNTS 319; Doc A/55/383, entered into force 25 December 2003.
- 30 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No 5) 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, 11 and 14 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, 1 November 1998 and 1 June 2010 respectively.
- 31 While initially states ratifying the ECHR could opt not to recognise the right of individuals to apply to the ECtHR, the right of individual petition has been compulsory since 1998. See Article 34 of Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, (ETS No 155) 2061 UNTS 7, entered into force 1 November 1998. It is also relevant in this regard that since 1993 ratification of the ECHR is a requirement for countries seeking to join the EU in accordance with the 'Copenhagen criteria' agreed by the European Council. See 'European Council in Copenhagen 21-22 June 1993 Conclusions of the Presidency' SN 180/1/93 REV 1 para 7(A)(iii).
- 32 As is the case with other human rights treaties, an individual complaint may be successfully submitted to the monitoring body, in this case the ECtHR, subject to a number of admissibility criteria including the exhaustion of domestic remedies. See art 35 ECHR.

has delivered a number of important and groundbreaking rulings in defence of migrants' rights,³³ Marie-Bénédicte Dembour has recently shown how the ECtHR in its rulings concerning migrants seems to be at pains not to upset states.³⁴ The Court's deference to states' right to exercise migration control has led it to treat migrants first and foremost as aliens subject to state control,³⁵ with their ECHR rights being relegated to the status of exceptions³⁶ to the rule of state power to regulate the entry, residence and expulsion of migrants. State aversion to being bound to respect migrants' rights finds expression, if not endorsement, even in the jurisprudence of international judicial fora.

State suspicion of binding multilateral agreements concerned with conferring rights on migrants similarly obtains in relation to treaties elaborated under the auspices of the International Labour Organisation (ILO), an agency established in 1919 to set labour standards and promote decent work which numbers all of the EU28 amongst its 187 member states.³⁷ The ILO has a constitutional mandate for codifying standards concerning migrant workers,³⁸ and the role of ILO Conventions in the governance of labour migration and the protection of migrant workers is exemplified by the Migration for Employment Convention³⁹ and the Migrant Workers (Supplementary Provisions) Convention.⁴⁰ The former, adopted by the General Conference of the ILO in 1949, currently counts ten EU member states⁴¹ amongst its 49 state parties while the latter, adopted in 1975, has gained 23 ratifications including a mere five from EU states.⁴²

Instead of embracing legally binding standards which confer enforceable rights on migrants, states prefer to deal with international

33 See for example *Cruz Varas & Others v Sweden*, ECHR (20 March 1991) 15576/89; *Chahal v The United Kingdom*, ECHR (15 November 1996) 22414/93; *Hirsi Jamaa & Others v Italy*, ECHR (23 February 2012) 27765/09.

34 M Dembour *When humans become migrants: Study of the European Court of Human Rights with an Inter-American counterpoint* (2015) 507.

35 Dembour (n 34 above) 5.

36 Dembour (n 34 above) 119.

37 For an in-depth analysis of the ILO and its relationship with the ICRMW, see the chapter by Cholewinski in this volume.

38 See Preamble to the Constitution of the ILO, Recital 2.

39 Convention concerning Migration for Employment (Revised) 1949 (No 97), entered into force 22 January 1952.

40 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No 143), entered into force 9 December 1978.

41 Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, the United Kingdom. For further information see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO (accessed 15 June 2017).

42 Cyprus, Italy, Portugal, Slovenia and Sweden. For further information see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO (accessed 15 June 2017).

migration through informal dialogue and voluntary, non-binding processes.⁴³ Multilateral discussion of international migration thus currently occurs within two complementary fora.⁴⁴ The Global Migration Group, comprising 22 entities belonging to the UN system, was established by the UN Secretary-General in 2006 with the somewhat supine-sounding purpose of achieving an improved UN response to the issue of international migration and of promoting wider application of the relevant migration-related norms and instruments.⁴⁵ The Global Forum on Migration and Development is an annual state-led consultative process established in 2007 following state opposition to the creation within the UN of a forum for discussion of migration.⁴⁶ Its focus on the economic development aspects of migration has given rise to criticism concerning a lack of attention to the human rights of migrants.⁴⁷

More recently, the adoption by the UN General Assembly of the New York Declaration for Refugees and Migrants⁴⁸ in response to large movements of people across international borders has set in motion a process of negotiations which is intended to culminate in 2018 in the adoption of a Global Compact for safe, orderly and regular migration and a separate Global Compact on refugees. Given that even in relation to migrants in vulnerable situations the Declaration commits states to 'consider developing non-binding guiding principles and voluntary guidelines',⁴⁹ it seems safe to assume that the compact for regular migration will not see states signing up to binding legal obligations vis-à-vis migrants' rights. In light of a general preference amongst states for dealing with international migration in informal venues which produce non-binding outcomes⁵⁰ and the associated reluctance of states to assume binding legal obligations through ratification of multilateral treaties elaborated expressly for the purpose of securing migrants' rights, it can come as little surprise that the ICRMW has so far failed to gain a single signature or ratification amongst the 28 member states of the EU.

43 See generally Crépeau (n 2 above).

44 V Chetail 'The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law' in V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014) 5.

45 See the website of the Global Migration Group <http://www.globalmigrationgroup.org/> (accessed 15 June 2017).

46 Crépeau (n 2 above) para 22. See also the website of the GFMD <http://www.gfmd.org/> (accessed 15 June 2017).

47 Crépeau (n 2 above) para 50.

48 Draft resolution referred to the high-level plenary meeting on addressing large movements of refugees and migrants, GA (13 September 2016), UN Doc A/71/L.1 (2016) (New York Declaration).

49 New York Declaration (n 48 above) para 52.

50 Chetail has suggested that the proliferation of non-binding standards and consultative processes amongst a multiplicity of actors with different agendas may aggravate the fragmentation of international migration law norms. Chetail (n 44 above) 9.

3 Human rights double standards

This section argues that the inaction of the EU28 in relation to the ICRMW is inconsistent with the support shown by those same states for other core human rights instruments. It also contends that there is a similar incoherence in the EU's recommendations to third countries to ratify human rights treaties while failing to encourage ratification of the ICRMW by its own constituent member states. Although ratification has been expressly endorsed by some EU entities, there is currently a crucial lack of support for such a step from two of the key EU institutions, namely, the European Commission and the Council of the European Union.

Broadly speaking, the overall structure and underlying rationale of the ICRMW is similar to that of the other core international human rights treaties. Like the Convention on the Rights of Persons with Disabilities (CRPD)⁵¹ and the Convention on the Rights of the Child (CRC),⁵² the ICRMW takes the rights set out in the two covenants, the International Covenant on Civil and Political Rights (ICCPR)⁵³ and the International Covenant on Economic, Social and Cultural Rights (CESCR),⁵⁴ and codifies and elaborates on them in relation to a particularly vulnerable category of persons, in this case migrant workers and members of their families.⁵⁵ There is, however, no similarity between the ICRMW and the other core treaties when it comes to the rate of ratification by states. While the failure of the EU28 to sign or ratify the ICRMW might seem unremarkable in the context of treaties concerning migrants' rights, it begins to appear surprising when we widen our purview of inquiry to include ratification by EU states of the other core human rights instruments. Every single EU state has ratified the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁶ ICCPR, CESCR, the Convention on the Elimination of All Forms of Discrimination against Women,⁵⁷ the Convention against Torture and

51 Convention on the Rights of Persons with Disabilities 2515 UNTS 3, entered into force 3 May 2008. 174 state parties.

52 United Nations Convention on the Rights of the Child 1577 UNTS 3, entered into force 3 September 1990. 196 state parties.

53 International Covenant on Civil and Political Rights 999 UNTS 171, entered into force 23 March 1976. 169 state parties.

54 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, entered into force 3 January 1976. 165 state parties.

55 More detailed analysis of the provisions of the Convention can be found in, eg, R Cholewinski *Migrant workers in international human rights law: Their protection in countries of employment* (1997) chap 4; L Bosniak 'Human rights, state sovereignty, and the protection of undocumented migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737; K Touzenis & A Sironi (n 14 above).

56 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195, entered into force 4 January 1969. 178 state parties.

57 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 entered into force 3 September 1981. 189 state parties.

Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁵⁸ and the CRC. All member states have either signed or ratified the OP-CAT⁵⁹ and the CRPD. The International Convention for the Protection of All Persons from Enforced Disappearance has been signed or ratified by all but four EU member states.⁶⁰ Of all the core instruments, it is comparison with the CRC which most sharply brings the fate of the ICRMW into focus. Adopted by the UN General Assembly in November 1989, one year and one month before adoption of the ICRMW, the CRC had been ratified by all states currently holding EU membership by March 1995. While the CRC entered into force in September 1990, less than a year after it was opened for signature, it was not until 2003 that the ICRMW gained the 20 ratifications required for its entry into force. In the intervening 13 years the ICRMW has attracted an additional 31 ratifications to bring the total number of state parties to 51, a figure which pales in comparison to the 196 state parties to the CRC.

The attitude towards the ICRMW at the EU level goes some way to explaining this egregious exception to the trend amongst the EU28 to ratify the core instruments. The EU, however, speaks with many voices and its attitude to the ICRMW differs across different EU institutions and bodies. The European Parliament, one of the seven institutions of the EU,⁶¹ has been vociferous and consistent in its endorsement of the Convention. In a resolution on human rights in the EU in 1998 it reproached member states for not yet having ratified the Convention and urged them to do so, repeating the call on at least eight subsequent occasions,⁶² most recently in 2009 in a resolution on the situation of fundamental rights in the EU.⁶³ In 2013 the Parliament proposed an amendment to the text of the seasonal workers directive,⁶⁴ seeking to insert a paragraph into the Preamble stating

58 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, entered into force 26 June 1987. 162 state parties.

59 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237, entered into force 22 June 2006. 83 state parties.

60 International Convention for the Protection of All Persons from Enforced Disappearance 2716 UNTS 3, entered into force 23 December 2010. 57 state parties. The EU member states which have yet to take action in respect of this treaty are Estonia, Hungary, Latvia and the United Kingdom.

61 Article 13 of the Treaty on European Union provides that the institutional framework of the EU comprises seven institutions, namely, the European Parliament; the European Council; the Council of the European Union (often just called 'the Council'); the European Commission; the Court of Justice of the European Union; the European Central Bank; the Court of Auditors.

62 December 18, *The UN Migrant Workers Convention: Steps towards ratification in Europe* (2007) 22 available at: <http://www.epim.info/wp-content/uploads/2011/02/The-UN-Migrant-Workers-Convention-steps-towards-ratification-in-Europe.pdf> (accessed 15 June 2017).

63 European Parliament Resolution on the situation of fundamental rights in the European Union 2004-2008 P6_TA(2009)0019 (2009) para 158, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0019&language=EN&ring=A6-2008-0479> (accessed 15 June 2017).

64 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.

that the ICRMW guides states in ensuring that migrants' rights are respected when policies relating to the migration of labour are drawn up and implemented.⁶⁵ The amendment was not, however, taken up. Support for ratification has also been expressed by two consultative bodies of the EU, namely the Committee of the Regions and the European Economic and Social Committee, with the latter going so far as to issue an own-initiative opinion in 2004 devoted specifically to the issue of ratification of the Convention. The Opinion concluded by calling on the European Commission and the Council of the European Union to undertake the necessary political initiatives to ensure that member states ratify within 24 months and that the EU ratify as soon as it is in a position to sign international agreements.⁶⁶ The Parliamentary Assembly of the Council of Europe has also called on the member states of the Council of Europe to ratify the ICRMW,⁶⁷ a point worthy of note given that the EU28 are all members of the Council of Europe.

It is perhaps surprising in light of its current stance that in 1994 the European Commission, the executive arm of the EU, urged member states to ratify the 'unique' Convention as a way of ensuring the full protection of the human rights of irregular migrants, such a rights-based approach being necessary to ensure the credibility of restrictive policies concerning irregular migration.⁶⁸ According to the Commission ratification would also ensure that the rights accorded to migrants in the EU correspond to the highest international norms and would give eloquent testimony to the value attached by the EU to improving the situation of migrant workers and their families.⁶⁹ In the intervening two decades, however, the Commission has not seen fit to repeat this recommendation, providing evidence instead that it now takes a less positive view of the Convention.⁷⁰ The Commission's statement in 2013, for example, that the ICRMW makes insufficient distinction between the economic and social rights of regular and irregular migrant workers⁷¹ was repeated by the Council of the European Union in its Conclusions⁷² ahead of the UN General Assembly's second High-Level Dialogue on International Migration and Development, an unconvincing assertion which drew a reaction from the

65 Council of the European Union, Interinstitutional File: 2010/0210 (COD), 15033/13, 25 October 2013.

66 EESC Opinion on the International Convention on Migrants (Own-initiative opinion) (2004) 7, para 6.2.

67 Recommendation No 1737 of 17 March 2006 of the Parliamentary Assembly of the Council of Europe.

68 European Commission, Communication to the Council and the European Parliament on Immigration and Asylum Policies (1994) 29, paras 109-110.

69 European Commission (n 68 above) 35, para 132.

70 See H Oger 'The French political refusal on Europe's behalf' in De Guchteneire et al (n 8 above) 319.

71 European Commission, Communication on Maximising the Development Impact of Migration: The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus (2013) 6.

72 Council of the European Union (n 13 above) para 13.

Committee on Migrant Workers⁷³ as well as the International and European Trade Union Confederations.⁷⁴

More recently, in April 2014, a question submitted to the Commission from a member of the European Parliament (MEP) asked whether the Commission took the view that member states should ratify the ICRMW and whether it would be beneficial for the EU to adopt the principles and rights outlined in the Convention as a frame of reference for a common migration policy. In her response the then Commissioner for Home Affairs, Cecilia Malmström, stated that ratification by member states would require prior authorisation by the EU for those elements that affect EU competences.⁷⁵ Just over a year later, in June 2015, a similar question from two MEPs inquiring whether the Commission knew why member states had not signed the ICRMW elicited an altogether different response from Dimitris Avramopoulos, the Commissioner for Migration, Home Affairs and Citizenship. The Commissioner stated baldly that signature and ratification of the Convention is a matter of national competence.⁷⁶ These contradictory responses from the Commission concerning the Convention suggest either a hostile intent or an overarching indifference towards this core human rights instrument.

Given that one of the many reasons advanced by states in justification of non-ratification is EU competence in the field of migration and asylum, it is worth addressing in some detail the issue of prior authorisation highlighted by Commissioner Malmström. The complicated nature of the political and legislative decision-making structure at the EU level, and the opacity lent to that structure by nomenclatural niceties which mask important differences between various actors, means that invocation of a

73 The Committee wrote to the Permanent Delegation of the European Union to the United Nations Office and other international organisations in Geneva by letter dated 22 August 2013 in relation to the matter. In its letter, the Committee expressed concern over the statement and emphasised that the Convention is firmly grounded in the principles and standards of the wider human rights framework, that it seeks to establish minimum standards that state parties should apply to migrant workers and members of their families, irrespective of their migratory status, and that it does not create new rights or establish additional rights for migrant workers. The Committee highlighted that many of the rights found in the Convention are also found in the ICCPR, CESCR and other core human rights treaties to which member states of the European Union are already party. The letter also requested a meeting. E-mail from the Secretary of the Committee on 24 June 2016.

74 Letter sent by E-mail to Mr Herman Van Rompuy, President, European Council 1 October 2013, Ref: Comments on the Council's Conclusions on the 2013 UN High-Level Dialogue on Migration development and on broadening the development-migration nexus adopted in Brussels on 19 July 2013. See http://www.etuc.org/sites/www.etuc.org/files/011013_President_Van_Rompuy.pdf (accessed 15 June 2017).

75 Question for written answer to the Commission, 10 April 2014. Reply 4 July 2014. 12.11.2014, OJ C 399/1. Also available via the website of the European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-004511&language=EN> (accessed 15 June 2017).

76 Question for written answer to the Commission, 18 June 2015. Reply 28 September 2015. Available on the website of the European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-009955&language=EN> (accessed 15 June 2017).

requirement for prior authorisation can have the presumably desired effect of bringing any non-EU specialist up short. Is it true that unilateral ratification by one member state is a non-starter in light of EU migration competence and that, instead, a coordinated approach to ratification is required at the EU level? If this is the case, are there any insurmountable obstacles to obtaining prior authorisation from the EU?

The Treaty on the Functioning of the EU (TFEU), one of the two treaties on which the EU is founded,⁷⁷ provides that the EU has exclusive competence for the conclusion of an international agreement to the extent that such conclusion may affect common EU rules or alter their scope.⁷⁸ Furthermore, the Court of Justice of the EU (CJEU) has held that when the subject matter of an agreement falls partly within the competence of the EU and partly within that of the member states, the EU institutions and member states must cooperate both in the process of ratification and in implementation of the obligations that ratification brings about.⁷⁹ If it follows from these treaty and judicial requirements that prior authorisation from the EU is necessary for member states to ratify the ICRMW, such authorisation would seem to be a question of political will as there appears to be no legal obstacle to the EU providing authorisation. Indeed, such endorsement was recently given in the case of the 2011 ILO Convention concerning domestic workers,⁸⁰ half of whom are migrants.⁸¹

In 2013, in light of the EU's commitment to the decent work agenda and to improving labour standards worldwide, the Commission proposed⁸² that the Council of the European Union⁸³ authorise member states to ratify the ILO Convention.⁸⁴ The proposal stated that while most of the Convention's rules on decent work were already part of EU law, authorisation to ratify was necessary as the Convention's provisions on migrant domestic workers potentially affect an area falling exclusively within EU competence, namely, the free movement of workers. Following

77 The other foundational treaty is the Treaty on European Union (TEU), also referred to as the Treaty of Maastricht after the city in the Netherlands in which it was drafted in 1991 and signed in 1992. See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C 202, 7.6.2016, 1-388.

78 Art 3(2) TFEU.

79 Opinion 2/91 of the ECJ of 19 March 1993 relating to the Chemicals Convention No 170, ECR 1993-I, paras 36 & 38.

80 Convention concerning decent work for domestic workers, 2011 (No 189), entered into force 5 September 2013. 24 state parties.

81 This figure of 50% is attributed to Eurostat in the European Parliament Draft Recommendation on the draft Council decision authorising member states to ratify the Convention concerning decent work for domestic workers (2013). This information is not currently available from the Eurostat website.

82 The Commission has the right of initiative to propose laws for adoption by the European Parliament and the Council of the European Union. See art 17(2) TEU.

83 The Council of the European Union comprises government ministers from each EU member state. Together with the European Parliament, it negotiates and adopts laws on the basis of proposals from the European Commission.

84 Proposal for a Council Decision authorising member states to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) (2013).

endorsement of the Commission proposal by the European Parliament⁸⁵ the Council of the European Union issued a decision authorising ratification in January 2014.⁸⁶ Shortly afterwards, Commissioner Malmström urged all member states to ratify.⁸⁷ So far six member states have ratified.⁸⁸ It is difficult to reconcile the demonstrable support of the Commission and the Council of the European Union for the ILO Convention with their aversion to the ICRMW. Might it be due to the former instrument's application of protection standards to a group that includes but is not limited to migrants? There is certainly no legal reason why the EU could not follow the same process in the case of the ICRMW. It is also worth noting that two states, Germany and Italy, had ratified the ILO Convention before authorisation was given by the Council of the European Union. Why, one might therefore ask, should member states await prior authorisation before ratifying the ICRMW?

The lack of support from the Commission and the Council of the European Union for this core human rights instrument sits uneasily with the statement in the TEU that the EU is founded on values including respect for human rights, with the EU's aim being to promote these values.⁸⁹ How does the inaction of these key EU institutions around the ICRMW square with the EU's treaty obligation to contribute to the strict observance and development of international law?⁹⁰ This inaction appears hypocritical when we take into consideration EU efforts to promote human rights beyond its borders. In 2012 the EU adopted its Strategic Framework and Action Plan on Human Rights and Democracy⁹¹ the goal of which was to integrate and promote human rights in all EU external actions. An attempt to meet the EU's treaty obligation to advance democracy, the rule of law and the universality and indivisibility of human rights, the Strategic Framework set out general principles and commitments while the Action Plan enumerated concrete actions that would be pursued in realisation of the general principles.

Of particular relevance in the context of the ICRMW is the fact that the Strategic Framework pledged EU commitment to the universality of human rights and called on all states to ratify and implement the key

85 European Parliament Draft Recommendation (n 81 above).

86 Council Decision of 28 January 2014 authorising member states to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) (2014).

87 Cecilia Malmström EU Home Affairs Commissioner 'Unlocking the potential of migration for inclusive development' (15 May 2014) http://europa.eu/rapid/press-release_SPEECH-14-380_en.htm (accessed 15 June 2017).

88 Belgium, Finland, Germany, Ireland, Italy, Portugal. For further information see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460:NO (accessed 15 June 2017).

89 Arts 2 and 3(1) TEU.

90 Art 3(5) TEU.

91 Council of the European Union 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (2012) 1-2 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed 15 June 2017).

international human rights treaties, with the Action Plan seeking to promote universal adherence to human rights through intensification of efforts to promote ratification of key international human rights treaties.⁹² Responsibility for this action item was given to the Commission, the member states and the European External Action Service.⁹³ It is difficult to understand how the EU or its member states can plausibly advise other states to ratify any of the core international human rights instruments while the ICRMW goes unsigned and unratified by the entire EU. This, however, is exactly what is happening. To give just one example amongst the very many available, Saudi Arabia has received recommendations from eight of the EU28 to ratify some of the core instruments including the ICCPR and CESCPR during the universal periodic review (UPR),⁹⁴ the Human Rights Council mechanism established in 2008 during which the human rights record of each UN member state is open to review by all other states.⁹⁵ While the 2012 Action Plan expired in 2014, it has been followed by an Action Plan for 2015-2019⁹⁶ which seeks to continue efforts to realise the programme outlined in the 2012 Strategic Framework. One of the action items in the Action Plan for 2015-2019 involves supporting an initiative to achieve global ratification and implementation of CAT by 2024. How such an initiative can be expected to have any credibility in light of EU28 inaction on the ICRMW is unclear.

Such inaction also suggests a certain incongruity in the context of the EU position vis-à-vis the UN's UPR mechanism. The EU regularly expresses its commitment to the UPR, urging all countries to cooperate effectively.⁹⁷ Since the UPR began operating in 2008 each EU country has received a minimum of three recommendations from member states of the UN to ratify or consider ratification of the ICRMW, with the EU28 collectively receiving a combined total of more than 230 recommendations

92 Council of the European Union (n 91 above) Action II(4)(a).

93 The European External Action Service, formally established in 2011 following entry into force of the Treaty of Lisbon in 2009, is the diplomatic service of the EU. It assists the High Representative for Foreign Affairs and Security Policy to implement the EU's Common Foreign and Security Policy.

94 Report of the Working Group on the Universal Periodic Review Saudi Arabia, HRC (26 December 2013), UN Doc A/HRC/25/3 (2013).

95 The Human Rights Council was created by the UN General Assembly 'Resolution 60/251 of 15 March 2006 on the Human Rights Council' (2006). The Resolution also mandated the Human Rights Council to 'undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States'.

96 Council of the European Union, Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019 (2015).

97 A recent example is to be found in the 'Council Conclusions on EU priorities at UN Human Rights Fora' in 2016 which highlighted the EU's view of the importance of the UPR and included a call to all countries to fully engage with and commit to the UPR (2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/02/15-fac-un-human-rights-fora/> (accessed 15 June 2017).

concerning this core human rights instrument.⁹⁸ Recommendations made during the UPR are not legally binding on the recipient state and they may be either accepted or rejected.⁹⁹ Recommendations to ratify the ICRMW are generally rejected by the EU28. Given the EU's consistent expression of firm support for the UPR, one might expect that the sheer regularity and volume of recommendations to the EU28 relating to the ICRMW from states across the globe during the UPR would require some positive action from the EU or its member states in respect of the ICRMW if they are to live up to the EU's demand that all countries fully engage with this important mechanism for human rights promotion and protection.

4 The EU legal landscape after the Treaty of Lisbon: More conducive to ratification of the ICRMW?

This section argues that recent years have witnessed a number of important human rights advances in the field of EU law which make ratification of the ICRMW more feasible, though not necessarily more likely. It involves an examination of the evolving role and competence of the EU in the field of migration law and policy and how the Convention may or may not fit within the framework of such law and policy.

The key legal development in the slow construction of a common EU migration policy was the entry into force of the Treaty of Amsterdam in 1999. The Treaty brought the Schengen *acquis* within the remit of the EU¹⁰⁰ and conferred (shared) competence on the EU over asylum and migration. The Treaty of Amsterdam articulated the aim of establishing progressively an area of freedom, security and justice (AFSJ)¹⁰¹ and it facilitated development of a common migration policy by making a

98 For a detailed examination of ICRMW-related recommendations made during the UPR to EU member states, see A Desmond 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 39.

99 The UN resolutions establishing and amending the UPR do not discuss state responses to recommendations in terms of acceptance and rejection, but rather provide that states may accept or note recommendations. Noted recommendations are those which do not enjoy the support of the state undergoing UPR, but may still be implemented and monitored. The terminology of acceptance and rejection is used by states.

100 The Schengen area is a free movement zone comprising Iceland, Norway, Switzerland and all EU member states with the exception of Ireland, the United Kingdom, Bulgaria, Croatia, Cyprus and Romania. The Schengen *acquis*, the rules governing the Schengen area, were initially developed on an intergovernmental basis outside of the framework of the EU, but became a matter of EU competence by virtue of a protocol to the Treaty of Amsterdam: Protocol No 2 integrating the Schengen *acquis* into the framework of the European Union, [1997] OJ C340/93. For an overview of the *acquis*, see the annex to the aforementioned Protocol No 2.

101 Art 61 of the then EC Treaty.

number of areas, including irregular migration, subject to measures adopted by the Council of the European Union.¹⁰²

EU competence over asylum and migration matters was, however, subject for a transitional period of five years to a number of limitations which significantly constrained the development of a common EU policy and perpetuated the prioritisation of migration control over respect for the rights of migrants which had characterised intergovernmental cooperation in this field prior to the Treaty of Amsterdam.¹⁰³ As well as the opt-outs secured by Ireland, the UK and Denmark, the jurisdiction of the CJEU was restricted to consideration of preliminary references from national courts or tribunals of final instance, the roles of the Commission and the European Parliament were circumscribed and the Council was required to act unanimously.

The practical realisation of the mandate in the Treaty of Amsterdam to create an AFSJ was discussed in two important policy documents, namely the Vienna Action Plan¹⁰⁴ and the Tampere Conclusions.¹⁰⁵ The Tampere Conclusions, the first multi-annual programme setting out policy goals and guidelines for creating an AFSJ noted the need to ensure fair treatment of TCNs, but such treatment was discussed in the context of lawfully present TCNs. Both the Vienna Action Plan and the Tampere Conclusions evinced a preoccupation with prevention and reduction of irregular migration which was to be achieved through, inter alia, a coherent EU policy on readmission and return,¹⁰⁶ further harmonisation of member states' laws on carriers' liability¹⁰⁷ and closer cooperation between member states' border control services.¹⁰⁸

It is therefore perhaps not surprising that the common migration policy which has developed since 1999 within the framework of the Tampere Conclusions and subsequent multi-annual programmes¹⁰⁹ has been criticised for treating irregular migration largely as a security issue, with insufficient attention paid to irregular migrants' rights,¹¹⁰ and for a less

102 Art 63(3)(b) of the then EC Treaty.

103 See generally R Cholewinski 'The EU *acquis* on irregular migration ten years on: Still reinforcing security at the expense of rights?' in E Guild & P Minderhoud (eds) *The first decade of EU migration and asylum law* (2012) 127-178.

104 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (1999).

105 Presidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU 10-1999.

106 Action Plan (n 104 above) para 36(c)(ii).

107 Action Plan (n 104 above) para 36(d)(iv).

108 Presidency Conclusions (n 105 above) para 24.

109 The Hague Programme strengthening freedom, security and justice in the European Union (OJ 2005 C 19/1); The Stockholm Programme: An open and secure Europe serving and protecting the citizens (OJ 2010 C 115/1); European Council, Conclusions of the Meeting on 26/27 June 2014 in Ypres, doc EUCO 79/14.

110 R Cholewinski 'The EU *acquis* on irregular migration ten years on: Still reinforcing security at the expense of rights?' in Guild & Minderhoud (n 103 above) 128.

than full-blooded vindication of the human rights of lawfully resident TCNs.¹¹¹ The security and law enforcement approach to irregular migration is strikingly exemplified by the adoption by the JHA Council in 2010 of 29 measures to reinforce protection of the external borders and address irregular migration.¹¹²

The entry into force of the Treaty of Lisbon in December 2009 effected a number of important institutional and legislative changes which are of particular relevance for the AFSJ and the field of migration and asylum. The Council of the European Union is no longer required to act unanimously in this field and the ordinary legislative procedure has been extended beyond measures concerning asylum and borders to include legal and labour migration,¹¹³ transforming the European Parliament into co-legislator. In addition, the CJEU can now give preliminary rulings to any national court or tribunal on the validity of acts in the AFSJ by EU institutions.¹¹⁴ The Treaty of Lisbon also imposed an obligation on the EU to accede to the ECHR¹¹⁵ and made the Charter of Fundamental Rights legally binding on the EU.¹¹⁶ These are changes which advance the development of common migration law and policy, as well as enhancing the recognition and vindication of migrants' rights and increasing the chances of a rights-based approach being taken to legislation in the field of migration.

The twin developments of the post-Lisbon competence of all national judges to seek preliminary rulings from the CJEU¹¹⁷ and the urgent procedure for preliminary rulings agreed in 2008¹¹⁸ have already occasioned changes in the field of irregular migration which indicate that the paucity of questions referred by national judges on migration matters prior to the entry into force of the Treaty of Lisbon may be a trend that has been consigned to the past.¹¹⁹ The combined total of such questions in the

111 The extent to which the goal of fair treatment of lawfully-resident TCNs has been realised is itself questionable. See generally, L Halleskov Storgaard 'The Long-Term Residents Directive: A fulfilment of the Tampere objective of near-equality?' in Guild & Minderhoud (n 103 above) 299-327.

112 Commission Staff Working Document on the fulfilment of the 29 measures for reinforcing the protection of the external borders and combating illegal immigration adopted at the Justice and Home Affairs Council meeting, held on Brussels on 25 and 26 February 2010 (2010).

113 Arts 77-79 TFEU.

114 Arts 19 and 267 TFEU.

115 Art 6(2) TEU.

116 Art 6(1) TEU.

117 Art 267 TFEU.

118 Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice [2008] OJ L24/42, and amendments to the Rules of Procedure of the Court of Justice adopted by the Court on 15 January 2008 [2008] OJ L24/39. The Council called on the Court to apply the urgent preliminary ruling procedure in situations involving deprivation of liberty, Statement [2008] OJ L24/44.

119 For more on this issue see D Acosta Arcarazo & A Geddes 'The development, application and implications of an EU rule of law in the area of migration policy' (2013) 51 *Journal of Common Market Studies* 179-193; S Peers 'Justice and home affairs law since the Treaty of Lisbon: A fairy-tale ending?' in D Acosta Arcarazo &

five years pre-Lisbon was six,¹²⁰ with almost the same number again being referred in the first year after the entry into force of the Treaty,¹²¹ and 17 preliminary references concerning migration matters being made in 2011.¹²² This spike in the number of preliminary references concerning migration issues provides the CJEU with more opportunities to flesh out the substance of the human rights protections enjoyed by migrants in EU law.¹²³ The rulings delivered in response to such preliminary references contribute to the development of common EU law and policy in the migration realm.

Another impact of the Treaty of Lisbon, that of extending the competence of the comparatively migrant-friendly European Parliament as co-legislator to include measures on labour and legal migration, has also yielded important results from the perspective of the protection of migrants' rights. Despite the criticisms sustained by the Parliament for its endorsement of the Return Directive,¹²⁴ its involvement in the legislative process did ensure some important safeguards against expulsion¹²⁵ and it has since shown its willingness to take an independent stand where it views EU measures as coming up short from a human rights perspective.¹²⁶ Indeed, the involvement of the Parliament in the negotiations over the Seasonal Workers Directive¹²⁷ ensured the inclusion of important safeguards from exploitation for seasonal workers as well as equal treatment with nationals in a number of areas.¹²⁸

119 C Murphy (eds) *EU security and justice law: After Lisbon and Stockholm* (2014) 17-37.

120 Acosta Arcarazo & Geddes (n 119 above) 180.

121 Acosta Arcarazo & Geddes (n 119 above) 181.

122 Acosta Arcarazo & Geddes (n 119 above) 181.

123 For a discussion of the human rights protection framework for irregular migrants emerging from the jurisprudence of the CJEU see A Desmond 'The development of a common EU migration policy and the rights of irregular migrants: A progress narrative?' (2016) 16 *Human Rights Law Review* 247. See also the recent ruling of the CJEU finding that the Return Directive prevents a TCN who has not yet been subject to a return procedure being imprisoned solely for entering a member state illegally across an internal border of the Schengen area. C-47/15 Judgment of the Court (Grand Chamber) of 7 June 2016 *Sélima Affum v Préfet du Pas-de-Calais* and Procureur général de la Cour d'appel de Douai.

124 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals [2008] OJ L348/98. The Return Directive is the most significant piece of EU legislation adopted in the realm of irregular migration.

125 A Baldaccini 'The return and removal of irregular migrants under EU law: An analysis of the Returns Directive' (2009) 11 *European Journal of Migration and Law* 2.

126 R Clancy 'EU rejects single permit draft as potentially violating fundamental rights' 22 December 2010, Expatforum.com <http://www.expatforum.com/articles/eu-rejects-single-permit-draft-as-potentially-violating-fundamental-rights.html> (accessed 15 June 2017).

127 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.

128 J Fudge & P Herzfeld Olsson 'The EU Seasonal Workers Directive: When immigration controls meet labour rights' (2014) 16 *European Journal of Migration and Law* 439.

4.1 The Charter and accession of the European Union to the European Convention on Human Rights

Adopted by the Parliament, Council and Commission in 2000 and proclaimed in 2007, the Charter of Fundamental Rights gained binding legal effect with the entry into force of the Treaty of Lisbon in December 2009.¹²⁹ The Charter has been described as a Bill of Rights for EU citizens, which has transformed the relationship between the individual and the state due to the fact that it provides a set of rights and entitlements while being neither nation-state constitution nor international human rights treaty.¹³⁰ Enjoyment of the rights codified in the Charter is not, however, restricted exclusively to EU citizens. While there are some limitations in the Charter concerning the rights of migrants in an irregular situation,¹³¹ only one of the Charter's seven Chapters, namely, Chapter V on Citizens' Rights, contains provisions with a citizenship limitation and even then that Chapter's provision on the right to good administration is applicable to all persons, and not just citizens.¹³²

The scope of the Charter is not the only feature of the document which endows it with the potential to make a significant impact in the field of migration. While it is not intended to expand EU competence or the scope of EU law,¹³³ the Charter has been characterised by the Presidents of the ECtHR and the CJEU as the reference text and starting point for the CJEU's assessment of the rights it contains,¹³⁴ and it recognises a number of migration-related rights not explicitly enumerated in the ECHR such as the right to asylum,¹³⁵ the rights of the child¹³⁶ and the right to an effective remedy against all decisions of national authorities applying EU migration measures.¹³⁷ The Charter thus reveals the extent to which many aspects of EU migration law are now rights-based and no longer discretionary.¹³⁸

The Charter, however, sets out a minimum level of rights protection and expressly permits the EU and individual member states to provide greater rights protections than those contained in the Charter and the ECHR.¹³⁹ Where the Charter sets out rights which correspond to rights guaranteed by the ECHR, the meaning and scope of such rights are to be

129 Art 6(1) TEU.

130 E Guild *The European Union after the Treaty of Lisbon: Fundamental rights and EU citizenship* (2010) 1.

131 For example art 34 of the Charter on social security and social assistance.

132 Art 41 of the Charter.

133 Art 51(2) of the Charter.

134 Joint Communication from Presidents Costa and Skouris, press release No 75 issued by the Registrar of the ECtHR (2011).

135 Art 18 of the Charter.

136 Art 24 of the Charter.

137 Art 47 of the Charter.

138 S Peers 'Immigration, asylum and the European Union Charter of Fundamental Rights' in Guild & Minderhoud (n 103 above) 468.

139 Arts 52(3) and 53 of the Charter.

the same as those laid down by the ECHR.¹⁴⁰ Thus, for example, article 4 of the Charter which corresponds to article 3 ECHR is to be interpreted and applied in line with article 4 principles and jurisprudence.

Over the past decade the status of the ECHR in the EU legal order has been bolstered, with the CJEU holding that the ECHR is an integral part of the general principles of law whose observance the Court ensures,¹⁴¹ and the Charter suggesting the use of the ECHR as a minimum standard of protection.¹⁴² The Treaty of Lisbon further entrenched the position of the ECHR in the EU legal order by obliging the EU to accede to the Convention.¹⁴³ Although the Opinion of the CJEU on the incompatibility of the accession agreement with the Treaty on European Union seems to have brought to nought the accession obligation,¹⁴⁴ the EU if it does eventually accede will be in the same position as member states vis-à-vis the ECHR, with the rights enshrined therein becoming binding on the EU and its institutions, and individuals, including migrants, enjoying the right to bring a complaint about infringement of ECHR rights by the EU before the ECtHR.¹⁴⁵

Given the growing importance of ECtHR case law in the EU legal order following the entry into force of the Treaty of Lisbon and the Charter, the evolving case law of the ECtHR concerning migrants' rights may be used to further advance the protection of such migrants' rights within the EU legal framework.¹⁴⁶ In particular, the recent cases of the ECtHR finding that deportation from the EU of irregular migrants would constitute a violation of the right to respect for private life and family life enshrined in article 8 ECHR¹⁴⁷ may come into play to the advantage of migrants in CJEU rulings on article 7 of the Charter and in decisions taken by member states pursuant to the Return Directive to return or regularise

140 Art 52(3) of the Charter.

141 C-540/03 *European Parliament v Council* [2006] ECR I-5769.

142 Art 52(3) of the Charter.

143 Art 6(2) TEU.

144 See *Opinion of the CJEU that the agreement on the accession of the EU to the ECHR is not compatible with Article 6(2) TEU or with Protocol 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms Opinion 2/13 of the Court* (18 December 2014).

145 Accession by the European Union to the European Convention on Human Rights: Answers to frequently asked questions (1 June 2010) http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf (accessed 15 June 2017).

146 The ICRMW has been cited three times by the ECtHR. Each citation was made by Judge Pinto De Albuquerque in a separate, concurring opinion in rulings delivered by the Grand Chamber in which the respondent state had been found to have violated the ECHR. See *Hirsi Jamaa* (n 33 above) concurring opinion of Judge Pinto De Albuquerque; *De Souza Ribeiro v France*, ECHR (13 December 2012) 22689/07, concurring opinion of Judge Pinto De Albuquerque joined by Judge Vučinić; *Biao v Denmark*, ECHR (24 May 2016) 38590/10, concurring opinion of Judge Pinto De Albuquerque.

147 For example *Rodrigues da Silva & Hoogkamer v The Netherlands*, ECHR (31 January 2006) 50435/99; *Butt v Norway*, ECHR (4 December 2012) 47017/09; *Kaplan & Others v Norway*, ECHR (24 July 2014) 32504/11; *Jeunesse v The Netherlands*, ECHR (3 October 2014) 12738/10.

unlawfully present TCNs. Such arguably rising human rights protection standards for migrants may serve to undermine objections to ratification of the ICRMW proceeding from claims that it would increase financial and administrative burdens and that some provisions would be incompatible with states' legal frameworks.

4.2 EU migration law and the ICRMW

The EU's common migration policy and the UN's ICRMW have been described as being animated by the same dual concern with, on the one hand, ensuring fair treatment of migrants and, on the other hand, managing migration flows.¹⁴⁸ The preoccupation of the ICRMW with codifying the rights of migrants stands in sharp contrast with the focus of EU activity in the migration field on codifying rules for the regulation of TCNs' entry to and movement in the EU.¹⁴⁹ But does this divergence of priorities mean that the ICRMW is irretrievably incompatible with EU migration law and policy, thereby precluding ratification by EU member states?

There are clearly aspects of EU migration law which fall short of ICRMW standards. One striking instance of this divergence is the principle of equality of treatment between migrants and citizens which, so central to the ICRMW,¹⁵⁰ has been considerably attenuated in the development of a common EU migration policy.¹⁵¹ Article 11 of the Long-Term Residence Directive,¹⁵² for example, specifies a number of areas such as education and employment where long-term resident TCNs should enjoy equal treatment with citizens and also provides for the restriction of equality of treatment to certain core benefits. Article 11 of the Long-Term Residence Directive finds its equivalent in article 45 of the ICRMW which is far more migrant-friendly. The equal treatment principle in article 45 is not only less subject to restrictions, but article 45 applies to all lawfully resident TCNs, and not just those who are long-term residents.

At the same time, however, there are aspects of EU migration law which are more generous than what would be required by the ICRMW.¹⁵³ The obligation to facilitate family reunification imposed on member states by the Family Reunification Directive¹⁵⁴ goes beyond the minimum

148 E MacDonald & R Cholewinski 'The ICRMW and the European Union' in De Guchteneire et al (n 8 above) 375.

149 As above.

150 See arts 18, 25, 28, 30, 43, 44, 45, 54 and 55 of the Convention.

151 For more detailed discussion of the dilution of the equal treatment principle in this context, see MacDonald & Cholewinski (n 148 above) 373-77.

152 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23 January 2004, 44-53.

153 For more detail on this, see K Touzenis & A Sironi (n 14 above) 14-19.

154 Council Directive 2003/86/EC reunification of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003.

required by article 44 of the Convention. Similarly, article 35 of the Charter recognises the right of *everyone* to preventive health care and medical treatment, while article 28 of the Convention requires that irregular migrants have access only to emergency medical care.

Finally, it would seem that there are also areas where the Convention chimes concordantly with EU migration law. Article 69 of the ICRMW requires state parties to take appropriate measures to eliminate situations where migrant workers and members of their families are irregularly present. While this provision can be read as potentially imposing a regularisation obligation on states,¹⁵⁵ it arguably goes no further than the requirement of the Return Directive to expel or regularise unlawfully present migrants. The aspiration of the Directive to eliminate the presence of irregular migrants in the EU is evident in the obligation on member states issue a return decision to any TCN staying without authorisation.¹⁵⁶ Indeed, the Commission has observed that the effect of the Directive is to ensure that a person is either legally present in the EU or is issued with a return decision.¹⁵⁷

5 Conclusion

The failure of any of the 28 member states of the EU to sign or ratify the ICRMW is symptomatic of a wider reluctance amongst states to accept legally binding obligations in the form of multilateral agreements focused on the protection of migrants' rights. Such failure is, however, jarring when viewed in the context of the ratification of other core international human rights instruments. Despite the recent negative and contradictory statements from the Commission and the Council of the European Union concerning the ICRMW, there is reason to believe that the inaction of the EU28 vis-à-vis the Convention could change.

As illustrated above, there are aspects of EU migration law which are either consistent with or more migrant-friendly than the ICRMW. The fact that EU migration law is in some key areas less generous than ICRMW standards in the rights it grants TCNs is not in and of itself a definitive barrier to ratification by member states as there is no legal impediment to going beyond the minimum standards required by EU legislation in this field. Furthermore, the creation by the Treaty of Lisbon of an EU legal landscape, dominated by instruments such as the Charter and the ECHR,

155 B Ryan 'Policy on the ICRMW in the United Kingdom' in De Guchteneire et al (n 8 above) 284-85.

156 Art 6(1), Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008.

157 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Communication on Migration (2011) 9.

in which the human rights of migrants can be more easily vindicated, cannot but be a positive development from the point of view of efforts to advance the issue of ratification at the EU level. Objections around administrative and financial burdens and claims of unacceptable encroachment on states' sovereignty hold ever less water as the common EU migration space that has been evolving since 1999 accords an ever more robust catalogue of rights to all migrants. Is it overly optimistic to suggest that never before, from a legal point of view, have conditions in the EU been so favourable to ratification of the Convention and the legal costs of ratification to member states so low?

If the EU is to have any credibility as a human rights actor on the global stage it is essential that the Commission and the Council of the European Union adopt a more informed and favourable approach towards the ICRMW. EU support and activity in relation to the ILO Convention concerning decent work for domestic workers makes it clear that there are no insurmountable legal obstacles to EU-level endorsement of ratification. Even in the absence of such endorsement, the ratification of the Convention on domestic workers by Germany and Italy before authorisation had been issued by the Council makes clear that unilateral ratification is possible. Invocation of EU competence in the field of migration as a bar to unilateral ratification does, however, vividly illustrate its power to influence the ratification rate of the ICRMW, both inside and outside the EU. While the results of studies showing that the EU could play a crucial role in encouraging ratification among member states¹⁵⁸ will come as little surprise, the strong message of support for this core human rights instrument which ratification by member states would send may be heeded by countries beyond the EU's borders.¹⁵⁹ Asian states, for example, often wait for Western countries to take the lead when it comes to ratifying international conventions.¹⁶⁰ This serves to underline the importance of securing the support of the Commission and the Council of the European Union for the ICRMW, in addition to that already expressed by the European Parliament and bodies such as the Committee of the Regions and the European Economic and Social Committee.

In order to secure the additional endorsement of the Council and the Commission and ensure positive EU action vis-à-vis the ICRMW, it would be necessary to have the support of at least a handful of influential member states.¹⁶¹ This, in turn, would more readily be brought about by concentrated advocacy on the part of civil society. In this regard signs of renewed civil society activity around the issue of the ICRMW in recent

158 MacDonal & Cholewinski (n 12 above) 20 & 28.

159 MacDonal & Cholewinski (n 12 above) 19-20.

160 N Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 8 above) 177.

161 MacDonal & Cholewinski (n 148 above) 387.

years, is to be welcomed.¹⁶² Similarly, the persistence with which non-EU countries recommend the EU28 to take action in relation to the ICRMW could be employed both to galvanise wider civil society engagement in the issue of ratification and as leverage in the hands of civil society to prompt member state movement towards ratification. The more time that passes without EU support for this core human rights instrument, the less likely it will be that member states will ratify.

162 See for example the activities of Migrants Matter, a group established by postgraduate human rights students in Venice in 2013 to raise awareness of the ICRMW and advocate for its ratification by EU member states (www.migrantsmatter.org) and Step It Up, a global campaign launched by the Migrant Forum in Asia network and affiliated civil society organisations, the Committee on Migrant Workers and the ILO to highlight the significance of the ICRMW in the run up to the 25th anniversary of its adoption on 18 December 2015 (<http://cmw25.org/>).

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