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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 *Sélina 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/>).