

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 Bicocchi (n 36 above) 4.

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

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

43 Bicocchi (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.

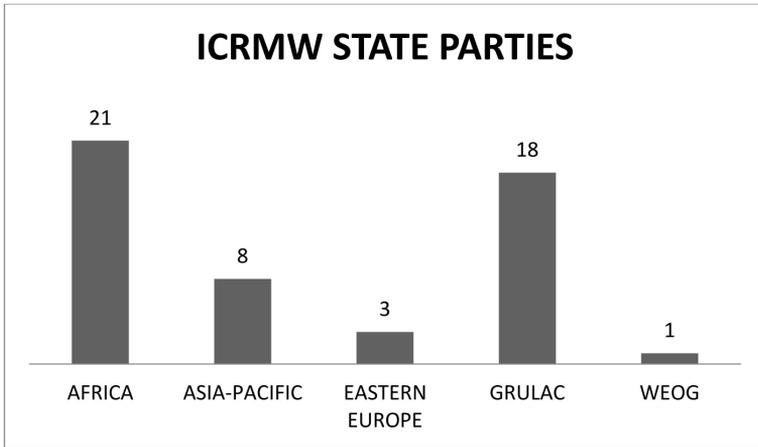


Figure 1: breakdown of the 51 ICRMW state parties by regional groups as of July 2017

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.

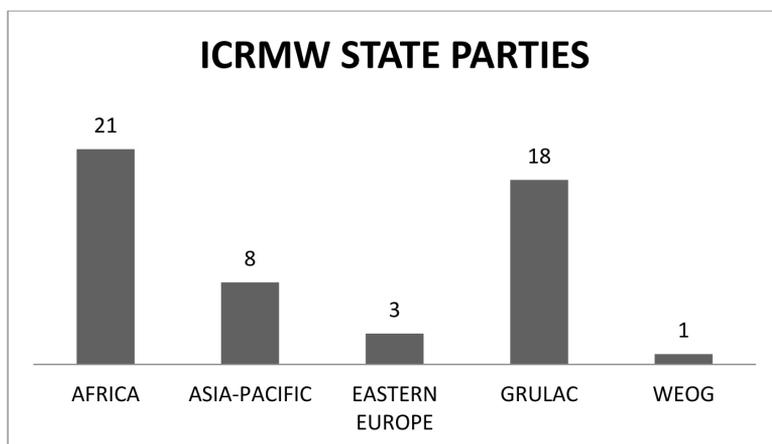


Figure 2: breakdown of 169 ICCPR state parties by regional groups as of July 2017⁸⁸

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.

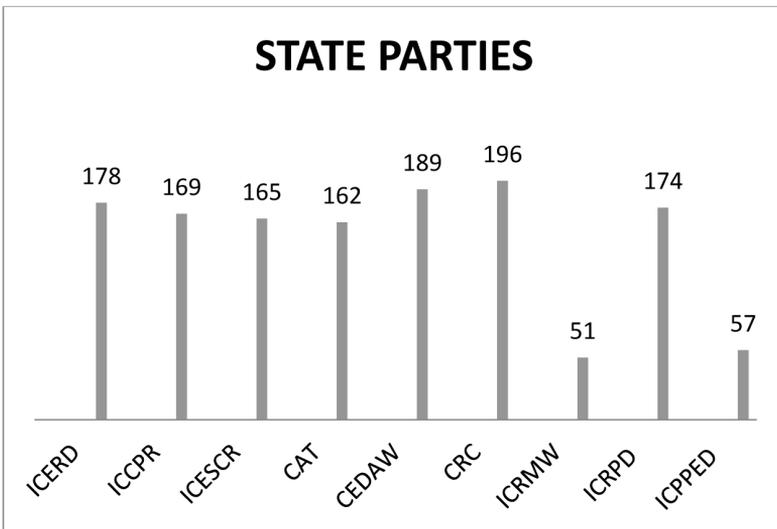


Figure 3: Ratification of core international human rights treaties as of July 2017

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.

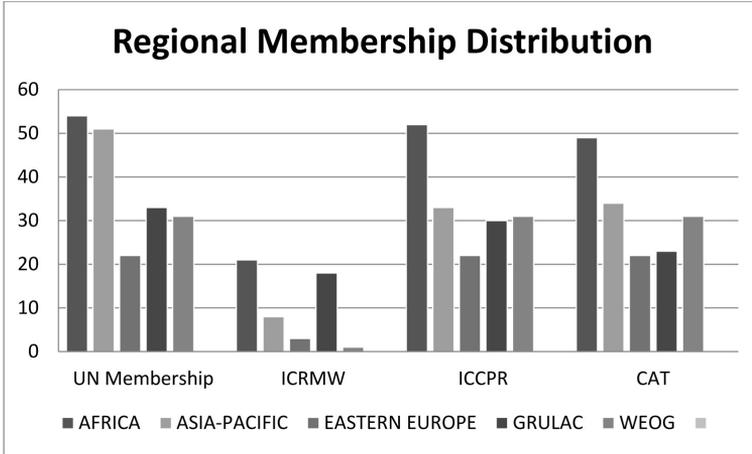


Figure 4: Regional Membership Distribution as of July 2017⁹⁶

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 ICRMW 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.