

UNIVERSAL CITIZENS GLOBALLY, FOREIGN MIGRANTS DOMESTICALLY: DISPARITIES IN THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS BY ECUADOR

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1 Introduction

Ecuador has been a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW; the Convention) since 2002 and more recently an enthusiastic advocate of migrant rights, as manifested by its legal innovations; it therefore constitutes a good case study for examination of the Convention's implementation over 25 years since its adoption by the UN General Assembly on 18 December 1990.

Ecuador's ratification of the Convention in 2002 coincided with a time period in which the rights of migrant workers started to gain an important place in domestic public debate, mainly due to the large number of Ecuadorians leaving the country. In 1999 an economic crisis created an Ecuadorian diaspora and the ratification of treaties¹ to protect migrant

1 This chapter was completed prior to the enactment of the Organic Act on Human Mobility (*Ley Orgánica de Movilidad Humana*) in February 2017. While the chapter will focus exclusively on the ICRMW, Ecuador is a state party to several other human rights instruments that protect migrants' human rights, including general human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR); the American Convention on Human Rights (ACHR) and its Additional Protocol on Economic, Social and Cultural Rights; and specific treaties on labour rights, such as the ones approved by the ILO (No 97 and No 143 focus on migrant workers, however, ILO's treaties often lack a human rights perspective and focus mostly on documented workers). Ecuador is also a party to ILO Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, but has yet to accede ILO Convention No 143. Ecuador is also a state party to other treaties relevant for migrant workers' rights such as the optional protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants By Land, Sea and Air, among others. Finally, at a regional level, Ecuador and other countries participating in the Andean integration process have reached agreements that recognize the rights of migrant workers.

workers was a necessary, coherent, and popular step. According to Javier Arcentales:

Ecuador ratified the ICRMW bearing in mind those who had migrated, but at that moment it did not take into account this also implied committing to protecting the rights of immigrants within its jurisdiction ... In fact, Ecuador is known for signing and ratifying most international human rights treaties, without fully adopting the internal measures to give effect to and comply with the obligations it acquires internationally, as is the case with the ICRMW.²

The vast effects of the Ecuadorian diaspora, added to the radical and overarching measures adopted by Ecuador to protect its migrants abroad, have led academic literature to focus mostly on emigration from Ecuador, paying little attention to the situation of immigrants in Ecuador (with the exception of the situation of asylum seekers). However, by ratifying the Convention, Ecuador undertook to comply with its provisions and to take all the necessary measures to protect migrant workers' rights. As a consequence, the Convention's standards are to guide the laws and the judicial and administrative procedures and decisions within Ecuador. When Ecuador's laws and policies are analysed in light of the standards of the Convention, rather than the academic enthusiasm for its state-led transnationalism, the findings are not as encouraging.

I will start this analysis with an overview of the migration context in Ecuador, divided into sections describing Ecuador's laws and policies with regards to migrant workers leaving the country, living in the country, passing through the country and returning to the country. Next, I will make some general comments on Ecuador's laws and policies addressed to migrant workers. I will then look into the relationship between Ecuador and the Committee on Migrant Workers (CMW), the treaty body created to supervise compliance with the Convention, as well as into the role played by civil society using the Convention to advance the rights of migrant workers. To conclude, I will summarise my findings regarding the paradoxes in the implementation of the ICRMW by Ecuador.

2 Migration context in Ecuador

Ecuador was not a country with a significant amount of migratory movement until the twentieth century. Since 2000, large numbers of Ecuadorians have migrated to Spain, Italy, the United States and other countries looking for work opportunities. At the same time, migrant workers from the region, mostly neighbouring countries, started to cross the border into Ecuador. Economic migration from Peru, added to thousands of persons fleeing from generalised violence in Colombia,

2 Interview with Javier Arcentales, member of the national coalition for migration and refugee issues (20 November 2015).

resulted in a tripling of Ecuador's foreign population between 2000 and 2001. Nowadays, Ecuador is a country of origin, transit, destination and return of migrant workers. As Jokisch describes it:

Ecuador's geographical variety is nearly matched by its diverse migration patterns. Although it is a small Andean country of approximately 15.7 million people, Ecuador accounts for the largest Latin American nationality in Spain, the second largest in Italy, and one of the largest immigrant groups in metro New York. Ecuador also is an important migrant destination. The long-standing conflict in Colombia has driven tens of thousands of its citizens into Ecuador, making it the country in Latin America with the largest refugee population.³

These drastic changes in Ecuador's migration context gave rise to concern and public debate about the rights of migrant workers. Most of the public debate focused on the need to protect the rights of Ecuadorian migrants abroad as well as the families they left behind.

In 2008, Ecuador adopted its 20th Constitution. As the government noted in its second report to the CMW:

Seven of the nine titles in the Constitution include a total of 58 articles dealing with the movement of persons ... It goes on to state that no one shall be regarded as illegal on the basis of their migratory status ... It advocates the principle of universal citizenship, the free movement of all of the planet's inhabitants and the gradual elimination of the differentiation between nationals and aliens ...⁴

As a result of the universal citizenship principle espoused by Ecuador, which implied the elimination of all visas to enter the country, migration into Ecuador increased and diversified. While the majority of immigrants still arrive from neighbouring countries like Colombia and Peru, many arrive from Cuba and Haiti.⁵ Additionally, waves of migrants from Asia and Africa are also arriving, although mostly in transit looking to reach the United States or countries like Brazil.⁶ Political pressure caused by the increase in immigration led to a reversal of the decision to eliminate visas and other entry requirements.⁷ Currently, thousands of migrant workers and persons in need of international protection live in Ecuador under

3 BD Jokisch 'Ecuador: From mass emigration to return migration?' (2014).

4 Ecuador's Second Periodic Report to the CMW, CMW (26 January 2010), UN Doc CMW/C/ECU/2 (2010) paras 32-36.

5 Instituto Nacional de Estadística y Censos (INEC). Anuario de Entradas y Salidas Internacionales (2013) and Anuario de Entradas y Salidas Internacionales (2014).

6 See, L Feline Freier 'Migración contemporánea de África, Asia y el Caribe hacia Ecuador' in OIM Cuadernos Migratorios No 5: *Migrantes extracontinentales en América del Sur: Estudio de casos* (2013).

7 See, for example, a memorandum sent by several Congressmen demanding reforms to the migration law and citing Correa's order to end visa requirements as the source of the increase in crime and insecurity in Ecuador. National Assembly. Memorando PAN-FC-2010-165 (30 June 2010).

irregular migratory conditions that make them vulnerable to rights violations.⁸

The following sections will describe some of Ecuador's innovative constitutional precepts in more detail. While appreciating the importance of recognising rights and articulating aspirations in the Constitution, I will address the tension between the ICRMW, the norms included in the 2008 Constitution and the laws still governing the rights of migrant workers in Ecuador – some of which date from the 1970s – as well as the contrast between the constitutional text and reality.

2.1 Migrant workers leaving Ecuador

Ecuador is mainly a country of origin of migrant workers, with a number of waves of emigration occurring since the 1980s. Official estimates calculated around 2 500 000 Ecuadorians living outside the country in 2008, both regularly and irregularly, representing about 18 per cent of the national population and 38 per cent of the economically active population.⁹

The first wave of migration was caused by an economic crisis following the collapse in the price of oil in the 1980s. The second wave resulted from a major economic crisis that hit Ecuador around 1999 caused by a combination of low oil prices, floods, political instability, inflation and high unemployment and poverty rates. Data from the Department of Homeland Security in the United States show a steady increase of 'unauthorized immigrants' from Ecuador in the US from 110 000 in 2000 to 210 000 in 2010.¹⁰ Thousands of Ecuadorians who migrated to Spain benefited from a 2005 Spanish regularisation law¹¹ that granted legal status to nearly 200 000 Ecuadorians.¹²

Although emigration rates have slowed down in recent years as a result of the global financial economic crisis, the establishment of the Schengen visa to enter Europe, and harsher measures to stop immigration to Europe and the United States, a third wave of migration is imminent in light of the current financial crisis in the country. Budgetary dependency

8 Ecuadorinmediato. Ecuador reforzará controles a permanencia de extranjeros, miles están en situación irregular (29 August 2010) http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=180370&umt=ecuador_reforzara_controles_a_permanencia_extranjeros_miles_estan_en_situacion_irregular (accessed 31 October 2017).

9 Ecuador's Second Periodic Report to the CMW (n 4 above) para 20.

10 B Baker & N Rytina 'Estimates of the unauthorized immigrant population residing in the United States: January 2012' (2013).

11 Spain: Real Decreto (Royal Decree) 2393/2004 (30 December 2004).

12 Jokisch details how from 2006 to 2013 more Ecuadorians acquired Spanish nationality (232 645) than any other immigrant group, and between 2008 and 2013 Spain's family unification policy allowed nearly 157 000 Ecuadorians to join family members in the country. See Jokisch (n 3 above).

on remittances may explain both the lack of public policies to discourage emigration and the state's emphasis on the right to migrate. According to state figures, as of 2005, remittances amounted to approximately US\$ 2 billion and were thus the second-largest item in the national balance of payments.¹³ By 2007, remittances reached 3140.9 million dollars, and by 2012 the number had fallen to a still considerable figure of 2 446.4 million dollars.¹⁴

Before the beginning of the millennium, migration policies adopted by Ecuador were scarce and isolated. This started to change around the year 2000. A National Plan on Ecuadorian Migrants in Foreign Countries (*Plan Nacional de Migrantes Ecuatorianos en el Exterior*) appeared in 2001, but the achievement of its goals was undermined by the allocation of insufficient financial and human resources. In 2002, a 'Migrant Workers Unit' began to work within the Ministry of Foreign Affairs in light of an agreement reached with Spain to select and assist workers in order to allow for their legal and safe migration to Spain, based on labour market necessities (over 5000 persons migrated temporarily to Spain under this programme between 2002 and 2009).¹⁵

Between 1998 and 2004 there were several unsuccessful proposals for a new migration law, all of them focusing on the protection of Ecuadorian emigrants. At the same time, however, civil society organisations advocating for migrant rights started to strengthen and were able to influence the development of public policies in the area of migrant rights. The signature and entry into force of the ICRMW around this time evidenced the development of a new approach to the protection of the rights of migrant workers.

In 2006, Ecuadorians living abroad participated in national elections for the first time and their situation was an important issue during the campaign. Rafael Correa, as a presidential candidate, promised to be 'the government of migrants'.¹⁶ Two months after assuming power in 2007 President Correa created the National Secretariat of Migrants (*Secretaría Nacional del Migrante* or SENAMI, its acronym in Spanish).¹⁷ The creation of this governmental body was a supposed breakthrough in Ecuador's approach towards the rights of migrant workers. To highlight its importance, this governmental department, mandated to develop and implement Ecuador's migration policies, was put on a ministerial level and its authorities answered directly to the President of Ecuador.

13 CMW/C/ECU/2 (n 4 above) para 22.

14 Banco Central del Ecuador *Evolución de las remesas: Evolución Anual* (2012).

15 Ministerio de Relaciones Exteriores y Movilidad Humana. Unidad de Trabajadores Migratorios. Convenio para la Regulación de Flujos Migratorios entre Ecuador y España. Información estadística.

16 President Correa's speeches, including his inaugural address can be found at <http://www.presidencia.gob.ec/discursos/> (accessed 31 October 2017).

17 Executive Decree No 150, Official Registry No 39 (12 March 2007).

The creation of SENAMI was presented by the government as one of its major achievements, and praised by some national and international actors. The elevation of SENAMI to ministerial level was welcomed by the CMW.¹⁸ At the same time, however, SENAMI has drawn criticism from a variety of sources since its very inception. Concern was expressed about the weakness of this institution, its NGO-like functioning, the overlapping of its functions with other governmental offices and its inability to coordinate with other institutions working on migrant rights. The CMW recommended that Ecuador:

[C]larify the mandates of the public administration institutions that deal with the various aspects of migration and to strengthen the National Secretariat for Migrants as the coordination mechanism with a view to improving the services provided to migrant workers and members of their families.¹⁹

Nevertheless, this governmental department focused its work on the protection of Ecuadorian migrants abroad as well as returning migrants, neglecting migrant workers in Ecuador. Without expressly recognising any of its failures, in June 2013 SENAMI was shut down and the Vice Ministry of Foreign Affairs absorbed its mandate.

The creation of an institution charged with the protection of migrants was not the only step taken by the government. For example, in December 2007 the government abolished the exit permit requirement for nationals and foreigners wishing to leave Ecuador – a measure that could also be read as a result of the recommendation of the CMW in light of article 8 of the Convention.²⁰ Another measure adopted early on by the government of Rafael Correa was the issuance, in December 2007, of a National Development Plan for Migration (2007-2010). The Plan was followed by the National Development Plans of 2009-2013 and 2013-2017 (named in Ecuador National Plan for Good Living or *Plan Nacional del Buen Vivir*), as well as by the National Agenda for Human Mobility 2013-2017.

Ecuador's development plans uphold the right to migrate and include policies aimed at fostering recognition and respect for sociocultural diversity; eliminating all forms of discrimination, including discrimination due to a person's status as a migrant; and protecting and promoting the rights of Ecuadorians living abroad. The adoption of the plans and agendas is an important step in the effort to reduce the gap between human rights on paper and in practice. Nevertheless, the plans are weak in mechanisms for the monitoring of progress and for evaluation of their achievement. As

18 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW (5 December 2007), UN Doc CMW/C/ECU/CO/1 (2007) para 6.

19 Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families CMW (15 December 2010), UN Doc CMW/C/ECU/CO/2 (2010) para 44.

20 CMW/C/ECU/CO/1 (n 18 above) para 22.

a result, the objectives of the plans and agenda wither because of lack of follow-through. Lack of participatory mechanisms for the planning as well as the monitoring and evaluation has also contributed to the limited impact of the plans. Moreover, a common characteristic of all of these action plans is their emphasis on the emigrant over other types of migrants in the design of the policies.

Beyond the plans, a milestone in Ecuador's policy towards migrants' rights was the adoption of the 2008 Constitution. Unlike the ICRMW, which refers to migrant workers who are documented or in a regular situation and differentiates them from those who are non-documented or in an irregular situation, the Constitution makes use of a different terminology: it refers to migration as 'human mobility', migrants as 'persons in situation of human mobility' and emigrants as 'Ecuadorians abroad'. Article 40 of the Constitution expressly mentions: 'no human being shall be identified or considered illegal in light of his or her migratory condition'. This recognition is a positive departure from the ICRMW and from traditional ways of conceptualising migration. Ecuador's Constitution further recognises the right to migrate as well as the progressive end of the 'foreigner' condition as a transforming element of unequal relations between nations, especially North-South relations (article 416). According to the Constitution, the state is entrusted with safeguarding the labour rights of Ecuadorian workers living abroad and with establishing arrangements with other countries for the regularisation of such workers (article 329).

While the ICRMW recognises that migrant workers shall be free to leave any state, including their state of origin, it also recognises possible restrictions to this right (article 8). Ecuador's Constitution is the first in the world to recognise the right to migrate, apparently without any limits. Authors like Ramirez view these constitutional changes as a theoretical, political and ethical proposal.²¹ Indeed, nearly ten years have passed since the adoption of the Constitution and so far these changes appear to be merely rhetorical and, in some cases, detrimental.

In fact, the effects of the diaspora and the emphasis on the right to migrate are starting to appear. For example, according to figures from the Deputy Minister of Human Mobility, in 2014 alone some 600 Ecuadorian unaccompanied children left the country to reunite with their families in the United States, a figure three times higher than that recorded in 2013. In 2015, Ecuador negotiated an agreement with Mexico in order to eliminate the visa requirement for Ecuadorians to enter Mexico. Such agreements deserve a careful analysis. Recent reports have documented that the United States government has provided political and financial

21 JP Ramírez Gallegos *La política migratoria en Ecuador. Rupturas, tensiones, continuidades y desafíos* (2013) 33-35.

support to the Mexican government for migration enforcement, especially following the 2014 'surge' of migrants, mostly unaccompanied children and families from Central America that arrived at the US southwest border.²² On this account, the Southern Border Programme has significantly increased migration enforcement operations, apprehensions and deportations of migrants, leading to human rights violations, kidnappings, extortion, robberies and abuses throughout Mexico. The possibility that the elimination of the visa requirement to Mexico encourages more Ecuadorians to travel to Mexico in order to then risk their lives in an attempt to enter the United States through irregular ways is something which cannot be easily dismissed.

As described above, some of Ecuador's actions as a country of origin have exceeded its consular or diplomatic protection and assistance obligations established by the ICRMW.²³ However, in its development of law and policy concerning Ecuadorians who go abroad for work, Ecuador hardly makes any reference to its obligations under the ICRMW. When it comes to protecting migrant workers, Ecuador seems more excited to appear innovative than to honour its international commitments.

Given that other countries do not recognise all persons as universal citizens, instead of focusing on the right to migrate and launching campaigns to remind its citizens that 'we are all migrants', Ecuador should comply with its duty as a country of origin to inform migrant workers of their rights arising out of the ICRMW,²⁴ of the conditions of their admission, their rights and obligations under the law and practice of the state concerned,²⁵ and of the real conditions applicable to their admission, stay and remunerated activities in the state of employment.²⁶

The ICRMW was adopted in the knowledge that the human problems involved in migration are even more serious in the case of irregular migration. State parties have undertaken to take appropriate action in order to prevent and eliminate clandestine movements and trafficking in migrant workers. Under article 68 of the Convention, states must work to prevent illegal or clandestine movements and employment of migrant workers in an irregular situation. However, some of the measures adopted by Ecuador seem to encourage Ecuadorians to leave the country, even if this could end in illegal or clandestine movements of migrant workers, as well as of members of their families seeking to join them.

22 J Knippen et al *An uncertain path: Justice for crimes and human rights violations against migrants and refugees in Mexico* (2015).

23 ICRMW arts 16(7), 23 & 27(1)

24 ICRMW art 33(1)(a).

25 ICRMW art 33(1)(b).

26 ICRMW art 37.

2.2 Migrant workers living in Ecuador

While immigration of certain groups and nationalities can be traced back decades – even centuries – increasing numbers of migrants started to arrive and stay in Ecuador towards the end of the last century. Inflows arrived mostly from Ecuador's neighbouring countries Peru and Colombia. Migrant workers are attracted by the dollarised economy. In the case of Colombian citizens, although it is often difficult to identify or distinguish the reasons that motivate persons to migrate, most of them are forced to leave their country due to persecution and generalised violence, although not all seek or receive international protection. As the CMW itself has noted, there is in Ecuador:

[A] high number of persons in need of international protection, notably Colombians, who do not apply for asylum for a number of reasons (including the fear of being deported and stringent documentation requirements) and remain in a very vulnerable and marginalized situation.²⁷

According to the National Directorate of Migration, around 600 000 Colombians, 320 000 Peruvians, 25 000 US citizens and 279 000 individuals from other countries resided in Ecuador in the first decade of this century. However, these estimates are based mostly on the difference between those foreigners entering and those leaving the country through authorised means, and could be an underrepresentation of the actual figures. In fact, available studies seem to agree that most migrant workers from the Caribbean, Asia and Africa are merely in transit to other countries like the United States and Brazil.²⁸

According to IOM, by 2011 immigrants represented about 1,6 per cent of the economically active population of the country.²⁹ The majority of migrant workers work in the informal sector, irrespective of whether they entered or stayed in the country legally or illegally. Migrant workers commonly act as street sellers, domestic workers, or in the construction, mining and farming industries. They are vulnerable to labour rights violations, and lack stability and benefits such as social security. The increase in inflows of nationalities such as Haitians,³⁰ Cubans³¹ and migrants from some African and Asian countries occurred mostly after the elimination of the visa requirement to enter Ecuador and the approval of the 2008 Constitution defending the principles of universal citizenship, free

27 CMW/C/ECU/CO/1 (n 18 above) para 28.

28 The transit-zone phenomenon known as the 'Ecuador-Mexico-US corridor' has been researched by authors like S Alvarez Velasco *Confronting violence and border control along the Ecuador-Mexico-US zone of transit* (2015).

29 OIM *Perfil Migratorio del Ecuador 2011* (2012) 65.

30 El País 'La pequeña Haiti de Ecuador.'

31 Dirección Nacional de Promoción de la Defensoría del Pueblo de Ecuador *Informe temático: Migración cubana: Retos para un Ecuador incluyente* (2010).

movement of all of the world's inhabitants and the progressive end of the condition of foreignness (article 416).

Based on the concept of universal citizenship and the need for a human rights approach to human mobility, several measures were adopted to regulate the stay of migrants living in Ecuador. For example, between 2006 and 2010 Ecuador issued over 6 000 visas to Cuban citizens. Ecuador also issued a general amnesty for Haitians³² after the 2010 earthquake. A comprehensive programme to register Colombians in Ecuadorian territory in need of international protection was implemented in 2009. From 2009 to 2010 the so-called enhanced registry (*registro ampliado*) allowed for the documentation and protection of around 30 000 persons who had fled Colombia and were living irregularly in Ecuador. Furthermore, in 2008 the Ministry of Foreign Affairs issued a resolution according to which:

[B]y express order of the President of the Republic, starting on 20 June 2008, citizens of any nation will be able to enter Ecuador, without the need for a visa, as well as to stay in Ecuador for 90 days, in recognition of the principle of free movement of persons and with the aim of strengthening relations between Ecuador and all countries of the world, as well as to promote tourism.³³

On the same day, a resolution was issued to eliminate the requirement of visas for citizens of China³⁴ and in 2009 a regularisation programme was introduced aimed at Chinese citizens who were in irregular status in Ecuador.³⁵ As Ackerman points out, the decision was not only coherent with the principle of free movement of persons, but also with the country's economic goals.³⁶ While such measures could be read as compliance with the ICRMW obligation to eliminate situations where migrant workers are in an irregular situation within their territory,³⁷ the ICRMW was not mentioned as a basis for these decisions.

The ICRMW specifically acknowledges the importance and usefulness of bilateral and multilateral agreements in the protection of migrants' rights.³⁸ Bilateral agreements were entered with Peru and Venezuela to regulate labour migration between these countries and Ecuador. There are also several regional integration initiatives in place,

32 Executive Decree 248, Official Registry No 136 (24 February 2010); amendment to the Migration Law, Official Registry (S) 175 (20 April 2010). About 400 Haitians benefitted from this measure.

33 Ministerio de Relaciones Exteriores, Comercio e Integración, 'Eliminación de visas de turismo para ingresar al Ecuador' Press Release No 398 issued on 11 June 2008.

34 Ministerio de Relaciones Exteriores, Comercio e Integración 'Eliminación de visas para ciudadanos chinos' Press Release No 396 issued on 11 June 2008.

35 Consejo Consultivo de Política Migratoria, Resolution No 001-2009, Official Registry 38 (1 October 2009).

36 AS Ackerman *La ley, el orden y el caos: Construcción social del Estado y el inmigrante en Ecuador* (2014) 102.

37 ICRMW art 69(2).

38 ICRMW Preamble.

such as the Andean Passport³⁹ and the Andean Labour Migration Instrument.⁴⁰ The attempts to facilitate migratory movements between Andean countries, however, privilege the movement of businessmen and entrepreneurs. Additionally, one of the goals of Unasur, of which Ecuador has been a member since 2011, is cooperation in migration matters in order to achieve Latin-American integration. More recently, the Residence Agreement for Mercosur associated countries (Argentina, Brazil, Chile, Paraguay, Uruguay, Bolivia, Colombia and Peru) allows citizens of these countries to apply for temporary or permanent residence visas, known as Mercosur visas.⁴¹ While recognising the important labour mobility processes and the regulated migration programmes arranged by the Ecuadorian state, there is still a lack of comprehensive migration regularisation policy that is accessible to all migrant workers and members of their families in an irregular situation and satisfies the principle of non-discrimination, as the CMW has noted.⁴² Furthermore, despite all these efforts, Ecuador has been unable to eliminate employment of migrant workers in an irregular situation, as provided for by the ICRMW.⁴³ The estimates of irregular migrants working in the country are still high.

Although official figures are inconsistent, difficult to gather, and do not take into account those who enter or leave the country through irregular channels, it is safe to say that migration into Ecuador increased as a result of these measures. However, the elimination of visa requirements in 2008 was immediately associated with an increase in insecurity in Ecuador. Political pressure led to revision of this measure, which remained in force for only two years. Furthermore, events such as the Angostura bombing by Colombian forces in Ecuadorian territory in March 2008 impacted Ecuador's policies towards migrants. The need to control borders and provide for security in the state began to prevail over the call for universal citizenship.

After determining the existence of a migratory influx coming from the Middle East and Africa, migration authorities re-established visa requirements for certain nationalities. In December 2009, Ecuador imposed a visa requirement on citizens of China. In September 2010, Afghanistan, Bangladesh, Eritrea, Ethiopia, Kenya, Nepal, Nigeria, Pakistan and Somalia joined the list,⁴⁴ with more countries continuing to be added. The presentation of an invitation letter started to be required of Cuban and Haitian citizens, and the requirement of proof of a clean

39 Andean Council of Foreign Ministers, Decision 504, Creation of the Andean Passport (22 June 2001).

40 Andean Council of Foreign Ministers, Decision 545, Creation of the Andean Passport (25 June 2003).

41 See Official Registry No 209 (21 March 2014) and Ministerial Agreement No 000031 (2 April 2014).

42 CMW/C/ECU/CO/2 (n 19 above) paras 33 and 34.

43 ICRMW art 68(2)

44 Ministerial Agreement 105 (3 September 2010).

criminal record (which had been abolished in the past) was reinstated⁴⁵ for Colombian citizens despite the CMW's view that the practice of asking a criminal record exclusively to Colombian migrants, may contribute to their stigmatisation and stereotyping.⁴⁶ As a result, despite initial measures adopted in furtherance of the principles of universal citizenship and unrestricted human mobility, important numbers of migrants – the majority of them Cubans, Haitians and Colombians – currently live in an irregular situation in Ecuador, facing exploitation and human rights violations. A similar regression from the same constitutional principles affected the situation of refugees.

The ambiguities of the universal citizenship concept can be found in the Constitution itself. Immediately after upholding the right to migrate and determining that no human being shall be considered illegal in light of his or her migration status, article 40 reveals that the emphasis of this declaration was always on Ecuadorians abroad: it establishes a series of measures that the state ought to undertake to support the rights of migrants living abroad regardless of the person's regular or irregular migrant status but remains silent with regard to measures to be adopted by the state aimed at protecting migrants in Ecuador, regardless of their migration status. Similarly, addressing migrant workers specifically, article 329.5 of the Constitution establishes that the state will ensure respect for labour rights of Ecuadorian migrant workers abroad and will promote agreements and covenants with other countries to achieve their regularisation. However, there is no equivalent provision for the protection of migrant workers in Ecuador.

Perhaps a more significant although somewhat disregarded measure was the recognition by the 2008 Constitution of political participation of Ecuadorian migrants, in compliance with articles 41 and 42 ICRMW. While they had already participated in the 2006 elections, the Constitution acknowledged them as important political actors beyond their right to vote. As a result, migrants currently have six seats representing them⁴⁷ in the National Assembly through which they could, in theory, advance legislation for the protection of migrants' rights.

Despite the adoption of the ICRMW and the ambitious changes included in the Constitution, legislation focusing on security and sovereignty is still in force. Ecuadorian legislation on migration issues can be traced back to the end of the nineteenth century. Historically, laws in Ecuador established who could enter or stay in the country based on the activities they perform as well as their physical characteristics. The

45 Executive Decree 667, Official Registry 397 (3 March 2011).

46 CMW/C/ECU/CO/1 (n 18 above) para 19.

47 Ecuadorians living abroad can elect representatives for the following regions: (i) United States and Canada; (ii) Europe, Asia and Oceania; (iii) Latin America, the Caribbean and Africa.

legislation in force at time of writing – *Ley de Extranjería* and *Ley de Migración* – dates from 1971. These laws still focus on controlling immigration to ensure that only those who can contribute to the economic, social and cultural development of the country are allowed in. As Ackerman points out, the legal categories in force still allow the state to exclude ‘the undesirable’ from residing in the country.⁴⁸ The current law expressly recognises that there is a national interest in regulating a *selective* immigration of foreigners.

In 2007⁴⁹ and 2010,⁵⁰ the CMW noted with concern that a number of provisions in the national legislation were at variance with the provisions of the Convention. However, selectivity, control, security and sovereignty, rather than human rights, are still guiding migration initiatives and policies in Ecuador. The case of Manuela Picq, a French-Brazilian academic who had been working as a professor for a private university in Ecuador illustrates how despite the ratification of the Convention and the adoption of a new Constitution, obsolete legislation is still applied by migration authorities and lawyers when deciding cases. Professor Picq was peacefully participating in anti-government protests in August 2015 when the police detained her. While in police custody, migration authorities cancelled her working visa,⁵¹ following which she was sent to a detention centre for irregular migrants until a judge could order her deportation. Four days later, the judge refused to deport her, in light of the inconsistencies between the police reports and the videos of her detention.⁵² However, her visa remained cancelled. She presented a constitutional claim to question the cancellation of her visa. Despite the fact that there was no evidence of a crime committed by Manuela Picq, the judge in charge of revising the cancellation of the visa was persuaded by the state’s argument that the laws do not provide for a specific procedure for the cancellation of her visa and that this matter is an exercise of the state’s discretion and sovereignty where human rights (including provisions of the Constitution, the ICRMW and others cited by her defence) were not relevant for such a decision.⁵³ Professor Picq had no option but to leave the country of universal citizenship after the state left her as an irregular migrant because of her participation in an anti-government protest. Manuela Picq has applied for other visas to return to Ecuador after this incident, but a final negative decision has been made by the Ecuador.⁵⁴

48 AS Ackerman (n 36 above) 23.

49 CMW/C/ECU/CO/1 (n 18 above) paras 8 & 9.

50 CMW/C/ECU/CO/2 (n 19 above) para 15.

51 Ministerio de Relaciones Exteriores y Movilidad Humana, Viceministerio de Movilidad Humana, Coordinación Zonal 9 de la Unidad de Migración, Oficio No 23 UM-C29-MREMH (14 August 2015).

52 Unidad Judicial Primera de Contravenciones del Cantón Quito (17 August 2015) Case No 17151-2015-00685.

53 Juicio Especial No 17203201512020 (25 August 2015).

54 Ministerio de Relaciones Exteriores y Movilidad Humana, Oficio No 3-8-08-CECU-RJ-2015 (18 September 2015).

Ramírez explains that the human rights focus of the Constitution does not immediately change the security and control focus that historically has guided the Ecuadorian state on migration matters.⁵⁵ While acknowledging that migration law, procedures and policies cannot be modified immediately to reflect the human rights focus of a new Constitution or to implement international obligations acquired under a treaty, over seven years had passed since the adoption of the Constitution and over 13 since ratification of the ICRMW before new legislation was finally proposed in July 2015.⁵⁶

Despite the CMW's recommendation to 'adopt as soon as possible the Human Mobility Act' in order to ensure in practice the rights and principles recognised by the Constitution and by the Convention,⁵⁷ the Organic Act on Human Mobility (*Ley Orgánica de Movilidad Humana*) is still a draft subject to modifications at time of writing. Some of its provisions are worth mentioning as illustrative of a broader tendency in Ecuador's approach to migration.

The proposed law draws upon the principles of universal citizenship, free human mobility and progressive end of the foreigner condition (article 4), and at the same time seeks to regulate the entry, transit and exit of individuals from the national territory and control their permanent or temporary stay in the country (article 3). In open contradiction with the universal citizenship ideal, the law lists those foreigners who shall not be permitted to enter or stay in Ecuadorian territory (article 28). Permanent residence is offered in a short list of cases that evidences the continuation of selective migration criteria (article 57). The law further identifies certain conduct as immigration offences and determines that such offences shall be brought before a judge of minor criminal offences (*juez de contravenciones*) and decided in light of a procedure established in the Criminal Code (articles 17 and 18). The prohibition of detention only protects victims of crimes against migrants, such as trafficking in persons (article 148).

With regards to migrant workers, the proposed Act does not mention migrants arriving in Ecuador as a motivation for issuing the law. Its language fails to recognise migrant workers and their families in its territory, establishing only that labour authorities shall ensure that public and private institutions guarantee the rights of 'foreign personnel' working in Ecuador (article 40). Meanwhile, those who have the 'migrant worker condition as defined by international instruments ratified by Ecuador' are recognised as emigrants (article 44). Throughout the law, measures to

55 Ramírez Gallegos (n 21 above) 49.

56 Draft Organic Act on Human Mobility (*Proyecto de Ley Orgánica de Movilidad Humana*), National Assembly, presented on 16 July 2015.

57 CMW/C/ECU/CO/2 (n 19 above) para 16.

protect the rights of migrant workers are focused on Ecuadorians working abroad.

According to the ICRMW, there are some minimum standards that state parties must observe in respect of migrant workers and members of their families, irrespective of their migration status. Furthermore, in light of article 7 of the ICRMW, state parties undertake to secure human rights to all migrant workers ‘without distinction of any kind’. Similarly, according to Ecuador’s Constitution, all individuals have access to all rights irrespective of their migration status. Article 28 of the Constitution provides that migrant workers and members of their families have the right to receive any medical care that is urgently required for the preservation of their life. Some important measures have been adopted by the state to ensure that foreigners can access health, education and other rights provided for in the Constitution. To mention an example, Ministerial Decision No 337/2008, guarantees access to pre-school, primary and secondary education for children, including adolescents, of migrant workers, regardless of their migration status.

However, such measures have only been partially successful due to rampant discriminatory practices affecting migrants in Ecuador. Although new laws –including criminal legislation – have been issued to penalise discriminatory practices, *de facto* discrimination is still the prevalent reality. As a result, undocumented migrant workers still face enormous barriers in accessing education, health, employment and housing. It is not infrequent to find cases like the one of José Benalcázar and Johana Leyton, a family of Afro-descendant asylum seekers from Colombia whose new-born died because hospital authorities claimed there were no more beds for Colombians and insisted that they return to Colombia (a country where they feared persecution).⁵⁸ As mentioned by Ackerman:

[A]lthough after 2008 there is an emphasis in the official discourse on non-discrimination of foreigners and their fair treatment – a discourse that implies the non-existence of desirable and non-desirable foreigners – the state’s goals in regional integration do not allow for the elimination of the concept of desirable and non-desirable foreigners.⁵⁹

While in comparison with other countries in Latin America the so-called ‘burden’ of foreigners over the total population is low (around 1 per cent), the sudden increase of hundreds of thousands of foreigners in the country, which peaked in the first decade of the century, clashed with Ecuadorians’ perceptions of their society. Despite the repeated recommendations of the

58 Defensoría del Pueblo, Trámite Defensorial Nro 271-2015-VC.

59 Ackerman (n 36 above) 98 (Not an official translation).

CMW,⁶⁰ a generally negative image of foreigners working in Ecuador is still prevalent amongst the majority of the population, the media and even the authorities, mainly in relation to Colombians, Peruvians, Cubans and Chinese whereby they are associated with lack of safety, violence, prostitution or access to employment to the detriment of Ecuadorians.⁶¹ The state has done little to prevent xenophobic practices and reactions, discriminatory attitudes and social stigmatisation. In fact, the state has itself adopted measures that contribute to stigma and stereotyping.⁶²

Particularly alarming is the recurrent use of racial profiling in immigration and law enforcement activities. Immigration and police authorities still have broad stop and search powers and use racial and socio-economic profiling to target Colombian, Cuban, Haitian and African persons who have entered or stayed irregularly. Women sex workers are particularly vulnerable to raids, deprivation of liberty and deportation measures.⁶³

The CMW has reiterated its recommendation to Ecuador to ensure that migration procedures, including deportation and expulsion, are in accordance with article 22 of the Convention and that they are exceptional procedures of an administrative nature and are not handled by the criminal justice system.⁶⁴ The new criminal code, issued in 2014, reformed articles 24 and 31 of the Migration Law to provide for detention of those awaiting deportation, thus criminalising migration. Deportation is only theoretically a non-criminal procedure; in practice, however, persons to be deported are criminalised, face long periods of detention, and are not guaranteed enough procedural safeguards, contrary to the provisions of the Convention and the recommendations of the CMW.

60 The CMW has reiterated its concern about the discriminatory attitudes and social stigmatisation from which migrant workers may suffer. CMW/C/ECU/CO/1 (n 18 above) para 19 and CMW/C/ECU/CO/2 (n 19 above) para 23. On lack of measures to combat any tendency to stereotype or stigmatise migrant workers, and the link between migrants and crime, see: Concluding Observations on the combined 20th to 22nd periodic reports of Ecuador, CERD (22 October 2012), UN Doc CERD/C/ECU/CO/20-22 (2012) paras 15 and 23. On intersectional discrimination, see: Concluding Observations on the combined eighth and ninth periodic reports of Ecuador, CEDAW (10 March 2015), UN Doc CEDAW/C/ECU/CO/8-9 (2015) para 10.

61 CMW/C/ECU/CO/2 (n 19 above) paras 23-26.

62 Such as the reinstatement of the requirement of a criminal record exclusively to Colombian migrants or the resolutions issued by the Civil Registry impose obstacles for the registration of children born in Ecuador when their parents are irregular migrants (Civil Registry Resolution No-DIGERCIC-DAJ-2010-000213 and Resolution No-DIGERCIC-DAJ-2010-000214 (16 July 2010).

63 Comisión Interinstitucional de Verificación *Informe de Verificación sobre las Condiciones de Detención de Personas Privadas de la Libertad en el Marco de Operativos de Identificación de Irregulares en la Ciudad De Quito* (2010). Cited in: IACHR *Hearing on the Situation of asylum seekers and refugees in Ecuador*, Information presented by the petitioners, 146 Period of Sessions (2012).

64 CMW/C/ECU/CO/2 (n 19 above) paras 29 and 30.

In spite of the constitutional provision providing that no human being is illegal, legal provisions in force give the police the power to prevent and punish clandestine migration.⁶⁵ In 2009, the Migration Act was amended⁶⁶ in order to regulate arrest, detention and prosecution of foreigners accused of committing crimes in Ecuador. Amendments to this law introduced in 2011⁶⁷ request foreigners to obtain state-issued documentation (*censo*), which allows the state to monitor foreigners living in Ecuador and to sanction those who do not comply with this requirement. Article 37 of the Migration Law punished those who try to re-enter the country after being deported and those who forge migration documentation with six months to three years of prison.⁶⁸ The new criminal code adopted in 2014 eliminated the provision of article 37 but provided for the expulsion and prohibition of return to the territory (for ten years) for all foreigners punished with sanctions of over five years of imprisonment (article 61). The contrast between constitutional principles designed to protect migrants' rights and the restrictive and criminalising measures adopted by the state have been characterised by authors like Arcentales as schizophrenic.⁶⁹

The aim of the new constitutional regime, according to authors like Ramírez, was to impede expulsion from Ecuadorian territory based on migrant status, as well as to prevent deprivation of liberty based on the lack of compliance with administrative requirements.⁷⁰ In reality, as a result of laws and practices that conflict with constitutional aspiration, thousands of exclusions, deportations and detention of migrants are still occurring in Ecuador, the country of universal citizenship.⁷¹

With regards to detention conditions, in 2011 the government started to host some migrants facing deportation at detention centres different from prisons for ordinary criminal offences. In Quito, they are detained at 'Hotel Carrión', which was adapted for this purpose. In this regard, article 17 of the ICRMW provides that any migrant worker who is detained for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial. While the separation of migrants from persons who are being criminally prosecuted is desirable and in accordance with the Convention,

65 Ley de Migración *Prevenir y reprimir la migración clandestina* (art 4 num III).

66 Law 0, Official Registry (S) 544 (9 March 2009).

67 Executive Decree 799, Official Registry 485 (6 July 2011).

68 Codificación de la Ley de Migración, Official Registry No 563 (12 April 2005).

69 J Arcentales 'Derechos de las Personas en Movilidad Humana en el año 2011' (2011) 115.

70 Ramírez Gallegos (n 21 above) 35.

71 See CMW/C/ECU/CO/2 (n 19 above) para 29; IACHR 'Hearing on the Situation of asylum seekers and refugees in Ecuador' Information presented by the petitioners, 146 Period of Sessions (2 November 2012) para 27; Coalición por las Migraciones y el Refugio, Defensoría del Pueblo, Casa de Movilidad Humana, INREDH & SJRM *Informe de verificación sobre las condiciones de detención de personas privadas de la libertad en el marco de operativos de identificación de irregulares, en la ciudad de Quito* (2010).

the mere existence of this detention centre is a step back from the free human mobility policy allegedly in force in the Ecuador. Furthermore, the detention conditions in this centre are extremely poor, prison-like and unsafe.⁷²

The lack of coherence between constitutional norms providing for universal citizenship and free human mobility, international treaties protecting migrant workers, and legislation permitting detention and deportation of individuals in irregular status is abundantly evident and troubling.

2.3 Migrant workers passing through Ecuador

Migration figures show significant numbers of migrants in transit through Ecuador. For example, in 2011 alone 2 545 Haitians entered Ecuador and 2 520 left the country. Most of them stayed in Ecuador awaiting visas to work in Brazil. Coyotes have also taken advantage of the flexible migration laws in Ecuador during the last years. As a result, thousands of migrants have used a new route that starts in Ecuador and uses Colombia to reach Central America, cross the Mexican border and end up in the United States. According to recent investigations,⁷³ migrants from all continents use this route, although a majority come from Cuba, Bangladesh, Nepal, India and China.

Ecuador is also a country of transit of human-trafficking victims.⁷⁴ A series of norms have been issued to combat this practice and protect its victims. Article 66, paragraph 29(b) of the Constitution prohibits slavery, exploitation, servitude, human trafficking and people smuggling in all their forms. Article 213 of the Criminal Code in force since 2014 punishes the illicit transit of migrants with seven to ten years of deprivation of liberty. In 2006, a National Plan against Human Trafficking⁷⁵ was issued. Awareness campaigns have been implemented and authorities have reported increased numbers of trafficking prosecutions and convictions and reported identifying a large number of trafficking victims. However, insufficient human, economic, and technical resources have been allocated to eradicate and punish this practice and to reduce demand for forced labour. Furthermore, the state's deportation practices addressed to sex workers fail to consider their possible status as victims of human trafficking. Trafficking victims are often criminalised and the state still

72 Professor Manuela Picq, who was detained in this 'hotel', denounced the prison conditions of migrants detained with her awaiting deportation. Her criticisms included indefinite detention, restrictions on visitations, limited yard time, and poor health conditions.

73 Discovery en Español Documentary 'Colombia: La nueva frontera' (2015).

74 US Department of State *Trafficking in persons report 2014: Ecuador* (2014) 161-162.

75 The full name of the Plan in Spanish is *Plan Nacional para Combatir la Trata de Personas, Tráfico Ilegal de Migrantes, Explotación Sexual Laboral y otros modos de Explotación de Mujeres, Niños, Niñas y Adolescentes, Pornografía Infantil y Corrupción de Menores*.

takes a punitive approach rather than a human rights-based approach to address their situation.⁷⁶

With regards to Ecuador's efforts to combat trafficking in persons, the CMW has expressed its concern about the lack of institutional coordination as well as shortcomings in the provision of protection and care for victims of trafficking. Additionally, it has expressed its concern about cases of deportation involving foreign victims of trafficking and recommended Ecuador to take further measures to combat trafficking in persons, including formulating a plan focusing exclusively on human trafficking; adopting laws and regulations to ensure implementation of legislation to combat human trafficking; developing training to strengthen the capacities of the police; collecting data in order to better combat trafficking in persons; ensuring that those responsible for trafficking in persons are tried and appropriately punished; and intensifying campaigns for the prevention of irregular migration.⁷⁷

Beyond human trafficking, under the ICRMW Ecuador as a state of transit, is required to work towards the prevention and elimination of illegal or clandestine movements, adopting measures such as detecting and eradicating illegal or clandestine movements of migrant workers and imposing sanctions on persons, groups or entities which organise, operate or assist in organising or operating such movements. However, despite reports documenting that Ecuador is a part of a clandestine route to the United States, the number of migrants passing through Ecuador with the aim of entering irregularly into the United States keeps growing. For example, since Ecuador is one of the only countries where Cubans are allowed to travel (provided they have an invitation letter), thousands of Cubans travel to Ecuador seeking to reach the United States. Thousands of them are currently stranded in Panama, Costa Rica and other Central American countries.⁷⁸

One cannot help but wonder: were the consequences of the open door policy sufficiently considered? Is Ecuador complying with its Convention obligations to consult and co-operate with other countries with a view to promoting sound, equitable and humane conditions in connection with international migration?⁷⁹ Is Ecuador paying due regard to the social, economic, cultural and other needs of migrant workers, as well as to the consequences of such migration for the communities concerned?⁸⁰

76 On human trafficking in Ecuador, see: E Buitrón *Estudio sobre el Estado de la Trata de Personas en Ecuador* (2011).

77 CMW/C/ECU/CO/2 (n 4 above) paras 49-51.

78 See: Panampost 'Tránsito de inmigrantes cubanos por Panamá aumentó 294% en 5 años' (17 September 2015); BBC 'Por qué hay 1.600 cubanos varados en Costa Rica?' (14 November 2015).

79 ICRMW art 64(1).

80 ICRMW art 64(1).

2.4 Migrant workers returning to Ecuador

The ICRMW requires state parties to co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers to the state of origin: (a) when they decide to return or (b) their authorisation of residence or employment expires or (c) when they are in the state of employment in an irregular situation.⁸¹ According to the Convention, state parties shall cooperate with other states with a view to facilitating the durable social and cultural reintegration in the state of origin only with regards to migrant workers in a regular situation.⁸² The Convention also confers on migrant workers the right to transfer their earnings, savings and personal effects and belongings. In keeping with these obligations, and even going beyond them, Ecuador's 2008 Constitution establishes the state duty to offer guarantees for voluntary return of migrants, irrespective of their situation as documented or undocumented workers, and regardless of the reasons for their return. Furthermore, according to the constitutional provisions, incentives are to be provided in order to encourage migrants to repatriate their savings and assets so that savings may be directed towards quality investments in production (article 338).

Ecuador's development plan, discussed above in section 2.1, upholds the right to a sustainable, voluntary return with dignity and seeks to create conditions that facilitate migrants' reintegration within the workforce and production sector upon their return to Ecuador. Specific programmes have been implemented to realise the plan's goals. The '*Bienvenid@s a Casa*' (Welcome Home) Plan, for example, is an assistance programme aimed at encouraging the voluntary return of Ecuadorian migrants. The plan includes measures to facilitate the return to Ecuador of migrants, their belongings and work equipment. The plan is paired with productivity incentives, loans and non-refundable funds for entrepreneurs such as the '*Fondo Cucayo*'. Through its return plans, the state recognised migrants as agents of development and sought to facilitate their trip back as well as their search for jobs and entrepreneurial activities to guarantee the sustainability of their return.

According to the 2010 census, one in every four Ecuadorians who migrated between 2001 and 2010 had returned. SENAMI reported that, since the beginning of 2008 to August 2011, 14 623 Ecuadorians returned home with the assistance of the Welcome Home Plan. More recent reports by the governmental news agency affirmed that more than 37 000 Ecuadorian migrants had returned home through the Welcome Home Plan. Other plans have also been implemented by the government to encourage the return of Ecuadorian migrant workers. For example, over a thousand Ecuadorian doctors have returned to the country as part of a

81 ICRMW art 67(1).

82 ICRMW art 67(2).

programme entitled 'Healthy Ecuador Plan' (*Plan Ecuador Saludable*).⁸³ In the paragraphs justifying the introduction of a new human mobility law, Assembly members mention approximately 70 000 returned Ecuadorians.⁸⁴

It is difficult to say whether the return of migrant workers has been a result of Ecuador's policies such as the '*Bienvenid@s a Casa*' plan, or of the global crisis combined with harsher migration control policies in destination countries. Ramírez believes that there have been more forced than voluntary returnees.⁸⁵ In fact, the National Directorate of Migration reported that between 2005 and 2011, 19 424 Ecuadorians were deported, with the United States, Mexico and Spain being the three main expelling states.

Clearly, different factors push migrants to return to Ecuador. Some return voluntarily or for family reasons while others are deported. The global financial crisis affecting countries like Spain also triggered the return of migrant workers. Harsher migration controls and policies have also resulted in the return of migrants. In any case, as pointed out by Margheritis with regards to Ecuador's initiatives aimed at promoting the return of migrants, although:

It is unclear if these efforts have enticed Ecuadorians who were not already planning to return ... the initiative marks a significant departure from previous administrations in focusing on the diaspora.⁸⁶

The voluntary repatriation programmes for migrant workers and members of their families implemented by Ecuador received the attention of the international community. However, especially after the elimination of the SENAMI and the budgetary cuts for such programmes, migrant workers who returned have reported complete abandonment by the government and are experiencing harsh living conditions in Ecuador.⁸⁷ The draft law on human mobility establishes the state's obligation to give priority attention to Ecuadorians who are forced to return as opposed to those who return voluntarily (article 68).⁸⁸

83 El Telégrafo 'El Plan Ecuador Saludable ha repatriado a 1.087 médicos ecuatorianos' (12 July 2015).

84 Draft Organic Act on Human Mobility (*Proyecto de Ley Orgánica de Movilidad Humana*), National Assembly, presented on 16 July 2015, Exposición de motivos.

85 Ramírez Gallegos (n 21 above) fn 3

86 A Margheritis 'Todos somos migrantes (We are all migrants): The paradoxes of innovative state-led transnationalism in Ecuador' (2011) 5 *International Political Sociology* 198.

87 See public television interview with Rafael Barba, representative of the association of returned migrants in Ecuador aired on 18 June 2015 <http://linkis.com/N7xii> (accessed 1 November 2017). See also El Diario 'Migrantes retornados aseguran que ofrecimientos del Plan Retorno no se han cumplido' (18 August 2015) <http://www.eldiario.ec/noticias-manabi-ecuador/365128-migrantes-retornados-aseguran-que-ofrecimientos-del-plan-retorno-no-se-han-cumplido/> (accessed 1 November 2017).

88 Draft Organic Act on Human Mobility (n 84 above).

Furthermore, as pointed out by Jokisch: 'The Correa administration's state-led transnationalism may have been designed more to continue the flow of remittances than to actually encourage permanent return migration'.⁸⁹ Along the same lines, Margheritis explains that the reliance of the Ecuadorian economy on remittances as a second source of foreign exchange, and the limited capacity to offer jobs and good wages to potential returnees, cast doubt on the viability and desirability of voluntary repatriation programmes.⁹⁰ When evaluating Ecuador, the CMW noted with interest the voluntary repatriation programmes for migrant workers and members of their families developed by Ecuador, but regretted the lack of involvement of those persons in drawing up such programmes.⁹¹

3 Ecuador before the Committee on Migrant Workers

The ICRMW was ratified by Ecuador in 2002. The Convention entered into force in 2003, after it was ratified by 20 states, since which time Ecuador should have effectively implemented the obligations established by the Convention, as well as the recommendations issued by the CMW. Since its establishment in 2004, the CMW has examined Ecuador twice. The third set of concluding observations will be issued following the submission of Ecuador's third report in May 2017.

In its concluding observations of 2007 and 2010, the Committee recognised the progress made by Ecuador in protecting the rights of its nationals abroad. At the same time, the Committee identified major challenges faced by Ecuador. The Committee's concluding observations also reiterated most of the recommendations included in its first concluding observations, evidencing Ecuador's lack of compliance with the Committees' initial evaluation of Ecuador. Similar recommendations have been issued by other UN human rights bodies, including conventional⁹² and extra conventional mechanisms.⁹³

89 Jokisch (n 3 above).

90 A Margheritis (n 86 above).

91 CMW/C/ECU/CO/2 (n 19 above) para 45.

92 See Concluding Observations of the Committee against Torture: Ecuador, CAT (7 December 2010), UN Doc CAT/C/ECU/CO/4-6 (2010), Recommendation 14; and Concluding Observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14-30 November 2012), CESCR (13 December 2012), UN Doc E/C.12/ECU/CO/3 (2012).

93 See Report to the Human Rights Commission in pursuance of resolution 2001/52: Addendum Mission to Ecuador UN Special Rapporteur on the human rights of migrants Gabriela Rodríguez Pizarro (18 February 2002), UN Doc E/CN.4/2002/94/Add.1 (2002). Also, Honduras and Iraq made recommendations to Ecuador during its last universal periodic review, which were accepted by the state during its examination: Report of the Working Group on the Universal Periodic Review: Ecuador, HRC (5 July 2012), UN Doc A/HRC/21/4 (2012) para 135.

While in its first evaluation the CMW welcomed the information that civil society organisations were involved in the preparation of the state's initial report,⁹⁴ in 2010 the CMW expressed its concern about the limited participation of civil society and non-governmental organisations in the implementation of the Convention, including in the drafting of reports. The Committee encouraged Ecuador to consider more active ways of systematically involving civil society and non-governmental organisations in the implementation of the Convention and the preparation of the reports.⁹⁵

Ecuadorian civil society's advocacy efforts during the Constituent Assembly⁹⁶ translated into drastic constitutional changes adopted by the state. But the collaboration between civil society and the government did not last long. For example, after several initiatives by civil society to collaborate with the state in the drafting of legislation coherent with the constitutional mandates as well as the international obligations under the ICRMW the proposed Organic Act on Human Mobility, now officially before the National Assembly, stemmed from the Ministry of Foreign Affairs and had very limited participation from civil society.⁹⁷

Civil society has played a fundamental role in documenting and highlighting the variety of issues affecting migrant workers in Ecuador. Their efforts to document the challenges faced by migrant workers and advocate for their rights are much more pronounced than in other humanrights areas in Ecuador. This is an enormous advantage that the state has not fully understood. Despite the fact that the Constitution mandates the state to coordinate its actions with civil society working on human mobility issues nationally and internationally (article 392) the government continues to neglect the views of civil society working on migration issues and has not recognised the role that civil society could play in promoting the effective implementation of the ICRMW.

Another matter that has hampered the work of the Committee is the lack of official figures and estimates on migration issues, according to Javier Arcentales, a member of the Coalition for Migration and Refugee Issues in Ecuador.⁹⁸ The CMW has systematically encouraged states to better understand the situation of migrants in their country through the collection and analysis of statistical data, noting that the absence of data means that public policies will fail to meet the needs of the intended

94 CMW/C/ECU/CO/1 (n 18 above) para 6(d).

95 CMW/C/ECU/CO/2 (n 19 above) paras 21 and 22.

96 The Constituent Assembly convened on 29 November 2007 to draft a new constitution, which was approved by the Assembly in July 2008 and by popular vote in September 2008.

97 Greater detail on the relationship between civil society and the government, described in this paragraph, is available here: Coalición por las Migraciones y el Refugio *Análisis del Proyecto de Ley de Movilidad Humana* (2015).

98 An initiative composed of civil society organisations and individual professionals who joined together in 2006 to promote and defend the rights of persons in human mobility.

beneficiaries.⁹⁹ With regards to Ecuador, the CMW has regretted the lack of information on the different criteria for evaluating the effective implementation of the Convention, particularly in relation to migrants in transit, migrant women, unaccompanied migrant children and cross-border and seasonal migrant workers.¹⁰⁰

The last census, carried out in 2010, is an important yet out-dated source. The information produced by SENAMI (when it still existed), and the Ministries of Labour, Foreign Affairs and Interior is scarce, inconsistent and incomplete. The Ministry of Interior produces the most up-to-date information; however, it only registers migration movements but its system is not able to provide information on whether some of those movements originate from the same person. Official figures do not show the complexity of reasons for migration, immigration, and transit and return. Furthermore, there are insufficient efforts to document and estimate irregular migration movements. Without these studies, any evaluation of the success of Ecuador's laws and policies addressing migrant workers is incomplete.

A point also needs to be made with regards to Ecuador's participation in the Committee. State parties to the ICRMW have consistently elected Ecuadorian citizens as members of the CMW. While the appointment of some diplomatic officers like Francisco Carrión-Mena, given his academic record, was not questioned, the most recent appointment has raised serious concerns. In June 2015, state parties to the ICRMW elected María Landázuri as a member of the Committee. Ms Landázuri acted as the highest national authority on migration matters within the Ministry of Foreign Affairs at the same time as she acted as a member of the Committee, which cast doubt on the independence of the Committee when reviewing the compliance of Ecuador under the ICRMW.

According to the Convention, members of the Committee shall both be elected and serve in their personal capacity.¹⁰¹ Is it possible for someone like Ms Landázuri to avoid conflict between her former official role as Ecuador's highest migration authority and a member of the Committee? In such a situation, when one of its members is responsible for Ecuador's policies and actions with regards to migrant workers, is the Committee in a position to objectively and fairly evaluate Ecuador's compliance with the Convention? Ms Landázuri signed, for example, memorandums¹⁰² denying Professor Manuela Picq a visa that would allow her to return to Ecuador. The grounds cited by Ms Landázuri to reject her application

99 In April 2013, the CMW discussed the role of migration statistics for treaty reporting and migration policies. Details on the discussion are available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13544&LangID=E#sthas.h.rQqkSNSU.dpuf> (accessed 1 November 2017).

100 CMW/C/ECU/CO/2 (n 19 above) paras 17-18.

101 ICRMW art 72(2)(b).

102 Memorandum No MREMH-VMH-2015-2299-M (17 September 2015).

were, at least, questionable. Will the CMW have the independence to issue recommendations to Ecuador in light of cases in which one of its members was personally involved? Despite internal criticism,¹⁰³ her election was considered by the Department of Foreign Affairs:

[A] recognition by the international community of the efforts carried out by the National Government in favour of Ecuadorian migrants abroad and foreign migrants in Ecuador, as well as Ecuador's leadership in the UN for the promotion and protection of all migrants in the world under the principle of universal citizenship.¹⁰⁴

The views of the Committee would have more impact if its members could be perceived to be independent experts. In Ecuador, this perception has been brought into question.

Despite the fact that an Ecuadorian has always served on the CMW, Ecuador has yet to make the declarations under articles 76 and 77 of the Convention recognising the competence of the Committee to receive and consider inter-state complaints and communications from or on behalf of individuals within that state's jurisdiction who claim that their rights under the Convention have been violated. If Ecuador is to be a world leader when it comes to migration policy, as it maintains, it is difficult to understand why it has not accepted the competence of the Committee to receive communications alleging violations of the ICRMW.

4 Conclusion

The previous sections illustrate that the focus and priority of the state's actions have been the protection of Ecuadorian migrant workers abroad. In the design and implementation of its policies, Ecuador has emphasised the condition of emigrant over other types of migrant. The state has invested greater effort and more money in complying with self-imposed extraterritorial obligations than implementing its international obligations domestically. When it comes to protecting migrant workers, Ecuador is far from being a leading example on the implementation of the ICRMW. As noted by the CMW:

Ecuador, as a country of origin of migrant workers, has made progress in protecting the rights of its nationals abroad. However, as a country of transit

103 See Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo 'Órganos que supervisan tratados de derechos humanos deben constituirse con expertos de alto nivel' Public Statement, Communication No 772-CR-15 (15 May 2015) <http://mesadearticulacion.org/declaraciones/pidhdd-organos-que-supervisan-tratados-de-derechos-humanos-deben-constituirse-con-expertos-de-alto-nivel/> (accessed 1 November 2017).

104 Foreign Affairs Ministry 'Viceministra ecuatoriana María Landázuri formará parte del Comité para la Protección de los Derechos de todos los trabajadores migratorios y sus familias'.

and destination, it faces major challenges in regard to protection of the rights of migrant workers.¹⁰⁵

Some have pointed out that Ecuador has approved a Constitution that goes beyond the international obligations it assumed when it ratified the ICRMW in 2002, qualifying Ecuador's migration policy as a 'rupture' with the past as well as a 'rupture' in comparison with other countries.¹⁰⁶ It is arguable that the state's enthusiasm for innovation and creation of new migration paradigms has meant that the Convention has not been sufficiently taken into account in the formulation and implementation of laws and policies concerning the rights of migrant workers. Despite the privileged position of international human rights instruments in Ecuador's legal regime, as well as the possibility to directly apply its norms, the ICRMW is rarely cited at the time of formulating legislation or policies for migrants. Even rarer is the possibility of a judge taking the ICRMW into consideration when determining if the Ecuadorian authorities have complied with their duty to protect migrants' rights within. Lack of reference suggests a lack of awareness of the ICRMW in Ecuador, maybe as a consequence of the proliferation of human rights treaties ratified by Ecuador and the lack of dissemination of such treaties. Despite the CMW's recommendations,¹⁰⁷ no specific permanent programmes have been developed and carried out to provide training on the content of the Convention.

While many of Ecuador's Constitutional provisions might seem more favourable than those of the ICRMW, it might be more effective to honour the Convention's minimum standards first, before trying to innovate beyond such obligations. When it comes to the protection of rights, a more modest but pragmatic approach might be more effective than lofty rhetorical provisions.

Moreover, the state has failed to harmonise its migration legislation with its Convention obligations and constitutional principles. The human rights focus of the Constitution is in constant tension with the security focus of the legislation in force. Secondary legislation in Ecuador is out of date, security-focused and contradicts the provisions of both the ICRMW and the Constitution. Nevertheless, migration officers as well as judges and prosecutors make little use of the Convention or the Constitution and rely on the obsolete migration legislation instead, as the CMW has noted.¹⁰⁸ The new bill on human mobility proposed in 2015 still evidences the paradox between strong protection of migrants abroad and the limited protections available for migrants domestically. Far from honouring

105 CMW/C/ECU/CO/2 (n 19 above) para 3.

106 JP Ramírez Gallegos (n 21 above) 7.

107 CMW/C/ECU/CO/1 (n 18 above) para 18 and CMW/C/ECU/CO/2 (n 19 above) paras 19-20.

108 CMW/C/ECU/CO/1 (n 18 above) paras 8-9.

Ecuador's international obligations towards migrant workers, the proposed law still criminalises certain forms of migration.

Disparities between the recognition of migration as a constitutional right and procedures criminalising offences related to migration are difficult to explain. Not only has the government not revised secondary legislation that is not in conformity with the Constitution and international commitments, it has approved and proposed new legislation incompatible with the right to migrate protected by the Constitution and the rights of migrant workers guaranteed by the ICRMW. Domestic laws and policies towards migrant workers in Ecuador are evidently a reaction to circumstances (including political circumstances) more than the result of a long-term policy on migratory fluxes. When it came to approving a new Constitution, the idea of more rights for migrants prevailed. When the promotion of universal citizenship caused an increase in immigration, the government shifted back to a security focus and started to apply selective and discriminatory practices to determine who could enter and stay in Ecuador. The state continues to adopt measures to control immigration that are incompatible with the ICRMW and with a Constitution that purports to enshrine universal citizenship and free movement for all.

Differences between constitutional provisions and reality are also manifest. Universal citizenship, openness and non-discrimination are still a discourse not honoured in practice. The approach of the Convention might be more limited than the concept of universal citizenship, but also more realistic. When it comes to migration laws and policies, more cautious provisions could have more impact on the protection of the rights of migrant workers than innovative ones.

Before Ecuador can be viewed as a model when it comes to migration policies, we should evaluate how much its radical policies promoting the right to migrate, universal citizenship and the protection of migrants abroad have contributed to trafficking in persons and smuggling of migrants, thus contravening Ecuador's obligations under article 68 of the ICRMW. Moreover, Ecuador's laws and policies have been adopted without sufficient study of its reality as a country of origin, destination, transit and return of migrants. Improvement and transparency in data collection is indispensable not only to assess the implementation of the Convention in Ecuador, but also to improve the situation of migrant workers in and from Ecuador.

Finally, a universal citizenship concept cannot be implemented unilaterally. The state has unsuccessfully dedicated efforts and funds to disseminate this ideal and to influence migration policies at different international forums including the Andean Community, MERCOSUR,

UNASUR, the World Social Forum on Migrations, and the South American Conference on Migrations.¹⁰⁹ Such efforts and funds might be better allocated to protect migrant workers domestically. If the rights of migrant workers were a reality in Ecuador, the state would have more authority in international fora when trying to convince other countries to respect their obligations to protect the rights of migrant workers and their families.

109 Margheritis (n 86 above).