

GUATEMALA'S IMPLEMENTATION OF THE ICRMW: EMERGING EFFORTS

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1 Introduction

Guatemala signed the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, the Convention) in September 2000.¹ Ratification followed in March 2003, and the Convention entered into force on 1 July 2003 after Guatemala and El Salvador's ratification placed it beyond the required minimum of 20 ratifying states.² Additionally, on 11 September 2007 Guatemala accepted both the inter-state complaint mechanism under article 76 and the individual communications procedure established in article 77 of the Convention.³ Civil society saw this as a significant step toward a greater commitment to the ICRMW as well as a promise to begin fulfilling its obligations under the Convention.⁴

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1 United Nations Treaty Collection '13. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families' https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en (accessed 25 September 2015).

2 P Marquez 'Upholding the rights of migrant workers' *Catholic Bishops Conference of the Philippines (CBCP) News* <http://www.cbcpnews.com/cbcpnews/?p=22269> (accessed 28 September 2015).

3 United Nations 'UN Treaty Collection' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en#EndDec (accessed 4 March 2016).

4 Grupo Articulador De La Sociedad Civil Para La Elaboración Del Informe Alternativo 'Informe alternativo de Guatemala sobre la aplicación de la Convención Internacional sobre la Protección de los Derechos de todos los Trabajadores Migratorios y de sus Familiares' (October 2010) para 45 http://www2.ohchr.org/english/bodies/cmw/docs/ngos/MENAMIG_Guatemala_CMW14.pdf (accessed 23 September 2015). Grupo Articulador is a coalition group which includes the majority of organisations working on migrant worker rights issues in Guatemala. It developed and presented an alternative report to the Committee on Migrant Workers (CMW) ahead of the CMW's review of Guatemala in 2010.

This chapter first provides an overview of the migration phenomenon as it relates to Guatemala. Next, it briefly explores some reasons why Guatemala ratified the Convention. Finally, the main body of the chapter evaluates Guatemala's response to its obligations under the ICRMW since ratifying it in 2003. We find that while Guatemala has taken some important steps toward compliance with the Convention, there is still much to be accomplished to institutionalise and enforce the migrant workers' rights guaranteed under this international human rights instrument, both within and beyond its borders.

2 Context of Guatemalan migration

Guatemala is a part of what is known as the 'Northern Triangle', one of the three northern countries of Central America, which also includes Honduras and El Salvador. Guatemala is a country of migration – a place of origin, transit, destination and return. It forms part of the greatest migration flow in the world, namely that from Central America and Mexico to the United States. Guatemala's place within this major migration current makes particularly urgent its compliance with the ICRMW. Guatemala's ratification of the Convention obligates the country to address the problems faced by migrant workers within and beyond its borders. In other words, the country has a responsibility both to Guatemalan migrants – those who migrate to the United States and other destinations, who are in processes of return, who carry out temporary, circular and cross-border migration – and to migrants who come to Guatemala from other countries.

2.1 As a country of origin

According to the International Organisation for Migration (IOM), the rate of Guatemalan emigration increased from 10,5 per cent in 2002 to 11,4 per cent in 2012.⁵ Likewise, according to US Census data, the Guatemalan population in the US increased from 17 376 people in the 1970s to 225 739 in the 1990s,⁶ and further ascended to 372 487 by the 2000s.⁷ By 2010 the numbers of Guatemalans in the US had reached an estimated 1 044 209 people.⁸ Another estimate using US Census data from 2010 found a population of 830 824 Guatemalan migrants in the US, which makes the US the destination country of 87,54 per cent of all Guatemalan emigrants;

5 The data measures the rate of emigrants for every one hundred thousand inhabitants. International Organisation for Migration (IOM) 'Perfil Migratorio 2012, Guatemala' http://costarica.iom.int/public/pdf/Perfil_Migratorio_Guatemala_2012.pdf (accessed 4 May 2016).

6 CELADE-IMILA 1990 <http://www.cepal.org/celade/publica/bol65/planilla.xls> (accessed 30 October 2015).

7 United States Census Bureau 'The hispanic population: 2010' (3 May 2011) <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (accessed 30 October 2015).

8 US Census Bureau (n 7 above) 3.

other important destinations include Mexico (3,69 per cent), Belize (2,11 per cent) and Canada (1,93 per cent).⁹

Guatemalan migrant workers in the US include foreign temporary workers – principally those who participate in the H-2A visa temporary agricultural programme and those who participate in the H-2B visa temporary non-agricultural programme – along with irregular migrants. Article 5 of the Convention defines ‘irregular migrants’ as anyone who is not ‘authorized to enter, to stay and to engage in a remunerated activity in the State of employment.’ Beth Lyon notes that it ‘describe[s] a worker who lacks both employment authorization and presence authorization; no distinction is made between the two categories’.¹⁰ In 2014, the US Department of State counted 1 453 H-2A visas issued to Guatemalan workers for agricultural labour and 3 304 H-2B visas issued to Guatemalan workers for non-agricultural labour.¹¹ In addition to these workers entering on temporary visas, the Department of Homeland Security estimates that around 560 000 Guatemalans live in an irregular status in the US. Given that the US Department of Labour estimates that more than two-thirds of irregular migrants are economically active,¹² we can estimate that around 373 000 of the irregular Guatemalan migrants in the US are labour migrants.¹³

Statistics on Guatemalan labour migration to Mexico are limited, but what exists shows a significant flow of Guatemalan workers across the northern border for temporary work in agriculture, construction, livestock and services in the nearby Mexican states of Chiapas, Tabasco, Campeche and Quintana Roo.¹⁴ In 2008, the Mexican government implemented the Border Work Visa to replace the previous Temporary Agricultural Worker Visa.¹⁵ Statistics from the 2009 EMIF-Sur survey¹⁶ showed that only nine

- 9 J A Cervantes González ‘El Perfil de la población de origen guatemalteco en Estados Unidos’ (4 June 2014) <http://www.cemla-remesas.org/principios/pdf/PrincipiosRemesas-Guatemala-2014.pdf> (accessed 30 October 2015).
- 10 B Lyon ‘When more “security” equals less workplace safety: Reconsidering laws that disadvantage unauthorized workers’ (Spring 2004) 6 *University of Pennsylvania Journal of Business Law* 578.
- 11 US Department of State, Bureau of Consular Affairs ‘Non-immigrant visa issuances by visa class and by nationality: FY 1997-2014 NIV Detail Table’ <http://travel.state.gov/content/visas/english/law-and-policy/statistics/non-immigrant-visas.html> (accessed July 2015).
- 12 Lyon (n 10 above) 585.
- 13 B Baker & N Rytina ‘Estimates of the unauthorized immigrant population living in the United States: January 2012’ US Department of Homeland Security Population Estimates (March 2013) http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf (accessed June 2015).
- 14 A Constanza Ancheita Pagaza & G Bonnici ‘Instituto de Estudios y Divulgación Sobre Migración, AC ‘Quo Vadis? Reclutamiento y Contratación de Trabajadores Migrantes y Su Acceso a La Seguridad Social’ (2013) 102 <http://www.inedim.org/documentosypub/publicaciones/reclutamientoconportada.pdf> (accessed July 2015).
- 15 Ancheita Pagaza & Bonnici (n 14 above) 102, 105.
- 16 Encuestas sobre migración en las fronteras norte y sur de México (EMIF-Sur) is a set of data produced by the Mexican university Colegio de la Frontera Norte. See <http://www.colef.mx/emif/> (accessed June 2015).

per cent of migrant workers interviewed in the southern border region possessed a valid work visa. Of the other 91 per cent of workers surveyed, 70 per cent had the Local Visitor visa, which does not authorise employment, while 21 per cent were irregular.¹⁷ Data collected by Mexico's government agency Instituto Nacional de Migración (INM) and reported in its 2011 Annual Statistics Bulletin shows that in 2011, 27 597 Guatemalans, along with 2 951 dependents, received the Border Worker Visa in the Mexican state of Chiapas. Meanwhile, the government issued 60 989 Local Visitor visas to Guatemalans in 2011.¹⁸ INM data shows that in 2014, the Mexican government issued 14 313 work permits to Guatemalan agricultural workers in Chiapas, a decrease from previous years due to changes in the agricultural sector.¹⁹ While studies have increased in recent years alongside the creation and evolution of visa systems for the southern border, there is still very limited data on the specific sectors of work and no statistics on visa renewals.²⁰

Additionally, Guatemalan labour migration is becoming more significant in Canada, particularly in agriculture. Guatemalan workers are beginning to replace Mexican workers in the state of Quebec, which some advocates attribute to efforts of resistance to Mexican worker organising efforts.²¹ In Canada, many low-wage Guatemalan workers are admitted through the Temporary Foreign Worker Programme (TFWP).²² The Canadian government reports that in 2012²³ it hosted 5 415 workers from Guatemala through Temporary Foreign Worker visas.²⁴ Meanwhile, the Guatemalan government reports that in 2014 the Canadian government

17 COLEF (n 16 above) 105.

18 COLEF (n 16 above) 106.

19 M Rojas Wiesner & H Angeles 'Trabajadores Agrícolas de Guatemala en Chiapas' *La Jornada del Campo* (suplemento Informativo de *La Jornada*) 18 July 2015 8.

20 Rojas Wiesner & Angeles (n 19 above) 106.

21 'Migrant workers: Who they are, where they're coming from' *CBC News* 7 February 2012 <http://www.cbc.ca/news/canada/migrant-workers-who-they-are-where-they-coming-from-1.1137930> (accessed June 2015).

22 Government of Canada '1.5. Temporary Foreign Worker Program work permit holders with a valid permit on December 31st by top 50 countries of citizenship, Footnote 6 2004 to 2013' <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/1-5.asp> (accessed June 2015). The TFWP allows Canadian employers to hire foreign nationals to fill temporary labour and skill shortages given a shortage of qualified Canadian citizens or legal permanent residents. TFWP includes 'agricultural stream' workers who can be from any country. Government of Canada 'Hiring agricultural workers' http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/index.shtml (accessed 9 October 2015) (accessed June 2015). Prior to 2002, agricultural workers came from just 13 countries including Mexico, Jamaica and the eastern Caribbean, through the Seasonal Agricultural Worker Program. *CBC News* (n 21 above).

23 This is the most recent year for which the Canadian government has publicly available statistics.

24 Employment and Social Development Canada 'Labour market opinions: Annual statistics – Top countries of citizenship according to the number of temporary foreign worker positions on positive Labour Market Opinions, by province/territory' http://www.esdc.gc.ca/eng/jobs/foreign_workers/lmo_statistics/annual-top-country.shtml#tab1 (accessed June 2015).

hosted 5 309 Guatemalan workers.²⁵ There are no official statistics on the number of unauthorised migrants in Canada in general or from Guatemala in particular. Some estimates suggest there may be a combined total of between 20 000 and 200 000 irregular migrants working in Canada.²⁶

2.2 Causes of Guatemalan migration

It is clear that the principal causes of migration continue to be economic ones: Guatemalans face challenges to improving their household income for such necessities as nutrition, housing, education and health; therefore, some migrate. The goal is to find employment and income in northern countries, in order to satisfy family needs and improve living conditions at home.²⁷ Critics of neoliberal globalisation frame this economic migration as non-voluntary and a consequence of the 'new capitalist architecture'; they argue that it is part of a process in which large multinational corporations appropriate strategic and profitable segments of peripheral economies, including natural and human resources.²⁸

For large numbers of Guatemalans, especially in the US, family reunification is another significant cause of migration. Along with other factors, this goal of family reunification catalysed a highly visible movement of unaccompanied minors in June of 2014, when a reported 11 479 children arrived at the border between Mexico and the US.²⁹ A 2014 United Nations High Commissioner for Refugees (UNHCR) report confirms that there was a number of causes behind the massive migration of unaccompanied minors, as Guatemala and the other Central American countries of the Northern Triangle are blighted by widespread violence due to high levels of criminality caused by the presence of gangs and organised

25 JA Rodriguez, Director of Migration Affairs, Ministry of Foreign Affairs. Gobierno de Guatemala Ministerio de Relaciones Exteriores 'The role of the State of Guatemala in regard to Temporary Migrant Workers' https://prezi.com/s5fmopdrxcv/desafios-de-la-proteccion-ingles/?utm_campaign=share&utm_medium=copy (accessed July 2015).

26 'Points-Based Immigration Systems: Canada.' <http://www.loc.gov/law/help/points-based-immigration/canada.php> (accessed June 2015). This is a relatively small percentage of the total population compared to the US estimate of 11.3 million irregular immigrants. J S Passel & D Vera Cohn 'Unauthorized immigrant population stable for half a decade' Pew Research Center (July 2015) <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/> (accessed October 2015).

27 See points 1, 2, and 3 of The Human Mobility Pastoral – Episcopal Conference of Guatemala 'El Fenomeno Migratorio En Guatemala, Desde El Corazon De La Iglesia Catolica' (1 September 2000) <http://www.iglesiaticolica.org.gt/20000901.pdf> (accessed 4 November 2015). The rates of general poverty of 53,7% and extreme poverty of 13,3% (2011) and the GINI index of 0.59 (2006), a measure of inequality, provide important context for Guatemalan migration.

28 H Márque Covarrubias & R Delgado Wise 'Una perspectiva del sur sobre capital global, migración forzada y desarrollo alternativo' (2011) 9 *Migración y Desarrollo* 4.

29 Inter-American Commission on Human Rights 'IACHR Expresses Deep Concern on the Situation of Children Migrants Arriving to the United States' (20 June 2014) http://www.oas.org/en/iachr/media_center/PReleases/2014/067.asp (accessed 30 October 2015).

crime.³⁰ These conditions push part of the populations of these countries to migrate to protect their lives and those of their families, while internal power forces within Guatemala undermine the country's ability to ameliorate widespread inequality and exclusion.

Two decades after a civil war and an unsatisfactory peace process, Guatemalan civil society has grown frustrated with the political system of representative democracy in its current incarnation. The Guatemalan political system has failed to achieve equilibrium of power in social relations due to corrupt practices and a clientelist relationship with the population during elections and in the public service.³¹ The presidency of Otto Pérez Molina is a stark example: elected on an anti-corruption platform in 2012, he was forced to resign by mass protests when he was outed as the 'leader of a vast fraud ring' in 2015.³² Along with the imposition of structural adjustment policies and other international treaties that reinforce the market economy, these conditions diminish and limit the possibilities of states to pursue a more distributive and inclusive model of democracy.³³ Other international and national phenomena have also affected the system, including the rise of organised crime and drug trafficking. Such phenomena jeopardise the security of citizens as crime syndicates take on a role in state and territorial control.³⁴

30 UNHCR Report 'Children on the run: Unaccompanied children leaving Central America and Mexico and the need for international protection' (2014) http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf (accessed September 2015).

31 According to data from the 'Barómetro de las Américas de Latin American Public Opinion' (LAPOP) from 2012, the main problems for the population in order of priority are the following: crime, the economy, poverty, unemployment and violence. According to the World Bank, Guatemala on average ranks 36 (on a scale from 0 to 100) on the selected indicators of governability (voice and accountability, government effectiveness, regulatory quality), which is within the lowest average scores of half of the countries. In State of the Region, Statistics of Central America (2014), Guatemala's corruption index is 32, with the country ranking 115 in 2015. Transparency International 'Corruption perceptions index 2014: Results' <http://www.transparency.org/cpi2014/results> (accessed October 2015).

32 Ministerio Público de Guatemala 'Juzgado envía a prisión preventiva a Otto Pérez Molina' (8 September 2015) <https://www.mp.gob.gt/2015/09/08/juzgado-envia-a-prision-preventiva-a-otto-perez-molina/> (accessed 6 November 2015); 'Otto Pérez Molina of Guatemala is jailed hours after resigning Presidency' *New York Times* 3 September 2015 http://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html?_r=0 (accessed 6 November 2015); 'Renuncia el presidente Otto Pérez' *Prensa Libre* 3 September 2015 <http://www.prensalibre.com/guatemala/politica/renuncia-el-presidente-otto-perez> (accessed 6 November 2015).

33 Márque Covarrubias & Delgado Wise (n 28 above) 36.

34 International Centre for Migrant Human Rights (CIDEHUM) and the Agency of the United Nations for Refugees (UNHCR/ACNUR) 'Desplazamiento forzado y necesidades de protección, generado por nuevas formas de violencia y criminalidad en Centroamérica' (May 2012). <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2012/8932.pdf?view=1> (accessed September 2015). The country's homicide rate is 34 per 100 000 (2013) with 20,8 per cent of the population having been a victim of delinquency in 2012 'Estado de la Región, Estadísticas de Centroamérica 2014'.

All of these factors have given rise to a forced migration from Guatemala that has been underway for more than three decades.³⁵ During the Guatemalan Civil War in the 1980s, close to 100 000 refugees fled to Mexico.³⁶ 1990 saw the start of another exodus, this time for economic reasons. Since 2000, the migration phenomenon from Guatemala has been multi-causal, including the growing exodus of unaccompanied children in the past several years.

2.3 As a destination country

Those who migrate to Guatemala are primarily, though by no means exclusively, Central Americans. A study based on the 2006 Encuesta Nacional de Condiciones de Vida (ENCOVI), a national survey of living conditions, counted 41 568 people of Central American origin residing in Guatemala, marking an increase from 25 137 such immigrants as reported by the 2002 census.³⁷ The latter statistic represented 49 per cent of all foreigners in 2002, and included 12 484 Salvadorans, 5 604 Nicaraguans, 5 977 Hondurans, 761 Costa Ricans, 600 individuals from Belize and 197 from Panama. According to the 2010 Shadow Report on the application of the ICRMW by the Grupo Articulador in Guatemala (hereinafter Shadow Report), many of these migrants are attempting to regularise their status and remain in the country.³⁸

2.4 As a country of return migration

In recent years, Guatemala has become a country of return due to the toughening of migration policies in the US and the increasing replication of this trend in Mexico, a second country seeing a rise in deportation of migrants from its territory.

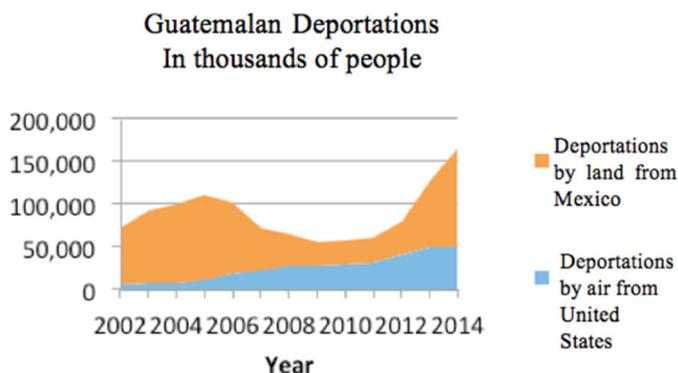
35 The IOM defines forced migration as: 'A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (eg movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)' <https://www.iom.int/key-migration-terms> (accessed 30 October 2015). The Human Mobility Pastoral of the Episcopal Conference of Guatemala sees this as forced migration (n 27 above) 1-2. The Migration Policy Institute notes that: 'The levels of coercion (eg, entire communities being forced to participate in the drug trade) and the extreme structural violence of Guatemalan society have been documented in studies by Guatemalan, Central American and US-based institutions, including the Migration Policy Institute's Regional Migration Study Group. Some Central American analysts refer to these factors as causing "forced displacement from violence and crime" or "forced migration."' <http://www.migrationpolicy.org/article/guatemalan-migration-times-civil-war-and-post-war-challenges> (accessed 30 October 2015).

36 Americas Watch Committee *Guatemalan Refugees in Mexico 1980-1984* (1984) 5 97-100.

37 Facultad Latinoamericana de Ciencias Sociales, San José de Costa Rica 'Migraciones y Derechos Laborales en Centroamérica: Características de las personas migrantes y de los mercados de trabajo' 2012, Coord.

38 Grupo Articulador De La Sociedad Civil Para La Elaboración Del Informe Alternativo (n 4 above).

Below are the statistics on deportations between 2002-2014:



Source: Department of Immigration, Guatemala, Department of Statistics, 2015

These statistics illustrate Mexico's emerging role in the politics and policies of detention and deportation. Tougher policies provoke greater violations of migrant rights, especially of those from Central America. This places these migrants in more vulnerable situations by forcing them to take new routes through Mexico, where they fall victim to organised crime gangs and suffer abuses of authority, theft, extortion and mistreatment.³⁹ In 2015, Mexico deported 70 493 Guatemalans⁴⁰ while only 69 Guatemalans submitted a complete application for refugee status and only 27 received recognition.⁴¹ These lopsided statistics suggest that Guatemalans are not getting access to these legal protections. The effect of an increase in deportation of Guatemalans is of course a growing phenomenon of repatriation to Guatemala, where returned migrants are more vulnerable than ever⁴² and in particular need of the protections afforded to them under the Convention.

The next section explores the context of Guatemala's ratification of the Convention, followed by an analysis of Guatemala's legal and institutional obligations in light of its signature and ratification of the Convention.

39 R Casillas 'La Migración de Algunos y la Inseguridad de todos, Análisis y recomendaciones para pasar de la Ficción al trato humanitario' Documentos de Trabajo N.2 ITAM & Socios de la Red de documentación de las Organizaciones defensoras de Migrantes (REDODEM) 2014.

40 Secretaría de Gobernación de México 'Estadísticas migratorias: Síntesis 2015' 4 http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Sintesis_Graficas/Sintesis_2015.pdf (accessed 4 May 2016).

41 Mexican Refugee Commission (COMAR) 'Estadísticas 2013-2017' 14 http://www.comar.gob.mx/work/models/COMAR/Resource/267/6/images/ESTADISTICAS_2013_A_1er_semestre_2017.pdf (accessed 1 August 2017).

42 United Nations High Commissioner for Refugees (n 34 above).

3 Why did Guatemala ratify the Convention?

Interviews with several key actors – including Ubaldo Villatoro,⁴³ governing board member of the National Board on Migration in Guatemala (MENAMIG) in 2003 and now an advisor to the Executive Secretary of the National Council for Assistance to Guatemalan Migrants (CONAMIGUA), and Erick Maldonado, the former Executive Secretary of CONAMIGUA, revealed no particular motive for signing or ratifying the Convention. Rather, these respondents suggested that Guatemala ultimately signed the ICRMW in response to international pressure, rather than as a considered policy decision to more effectively address migration issues.

Specifically, Maldonado indicated that other state and civil society actors had several major concerns about Guatemala and that these actors viewed Guatemala's signing of the Convention as a step toward addressing migration issues in a systematic way. According to Maldonado, the international community sees Guatemala as a country of origin, transit and destination for migrants. It observed the high levels of organised crime in Guatemala, including trafficking in drugs and other illicit substances, but also migrant smuggling and human trafficking. High levels of corruption and human rights violations aggravate the organised crime phenomenon, infiltrating public institutions like the Department of Migration and the National Civil Police rendering the situation for migrants more precarious.⁴⁴

Migration was already a significant issue in 2000, and civil society lobbied and publicly pressured the government to ratify the Convention. Both MENAMIG (founded in 1999) and the Human Mobility Pastoral pressed for ratification⁴⁵ and then became important advocates for continuing advancements in related legislation and norms.⁴⁶ The Catholic Church, through the Human Mobility Pastoral, also urged ratification of the Convention, as demonstrated in a statement in September 2000.⁴⁷

43 U Villatoro, Asociación de Apoyo Integral; member of the board of directors of MENAMIG in 2003; Executive Coordinator of MENAMIG 2006-2010; currently advisor to the Executive Secretary of CONAMIGUA, interviewed 23 September 2015.

44 Attorney Erick Maldonado, Advising Attorney of the Office of International Treaties of the Ministry on Foreign Relations of the Republic of Guatemala 2004-2006; Director of International Treaties of the Ministry on Foreign Relations of the Republic of Guatemala 2006-2007; General Director of Consular and Migratory Matters 2007-2010; Director of CONAMIGUA 2009-2011; Vice Chancellor of the Foreign Affairs Ministry 2011-present. Interviewed 5 August 2015. Presumably he refers to the increase in migration, the situation of worsening violence in the migrant journey, and the greatly expanded deportation regime in the US and Mexico; La Hora 'Migración: Trece años con una intervención fracasada' (13 November 2014) <http://lahora.gt/migracion-trece-anos-con-una-intervencion-fracasada/> (accessed 27 June 2015).

45 Maldonado (n 44 above).

46 Villatoro (n 43 above).

47 The Human Mobility Pastoral of the Episcopal Conference of Guatemala (n 35 above) 1.

4 Legal and institutional implementation of the Convention

International conventions like the ICRMW can in the end become a dead letter if signatories fail to tailor the country's legislation to meet their obligations, and if they lack the will to propose, pass and implement favourable policies for its implementation. Without these measures to ensure internal compliance, the ICRMW and other human rights conventions become an empty promise.

The sections below detail the degree to which Guatemala has moved toward implementation of the Convention since ratifying it, analysing compliance in a number of key areas. The Convention has important implications for each of these domains, and Guatemala's progress in complying with it should thus be measured in terms of its action (and inaction) within these domains.

4.1 Migration law and institutions

Guatemala has not yet reformed its migration laws or regulations to comply with its commitments under the Convention.⁴⁸ The state's failure to issue laws means that to date there exists no legal framework encompassing the majority of issues that affect this group of the population even when there has been broad consensus to do so.⁴⁹

According to Maldonado, progress on compliance with the Convention has floundered because there is no comprehensive, multidisciplinary and permanent public policy that involves all stakeholders. He notes that in the face of attempts to develop such a comprehensive public policy, the state itself was the main obstacle. The state has made only a few isolated efforts and then failed to coordinate across agencies. The objectives of the General Directorate of Migration (DGM), for example, are to 'guarantee and maintain efficient migration regulations', 'issue national identity documents' and to 'publicize the provisions of law' and ensure compliance.⁵⁰ CONAMIGUA, founded in

48 For example, existing regulations violate the Convention, such as Government Decision 528 – 2003 Reglamento de Autorización del Trabajo de Personas Extranjeras a Empleadores del Sector Privado; A R Morales Díaz 'Aplicación De La Ley De Migración En Guatemala En El Marco De La Convención Internacional Sobre La Protección De Los Derechos De Los Trabajadores Migratorios Y De Sus Familiares' unpublished PhD thesis, Universidad de San Carlos Guatemala, 2007 43-50.

49 'Iglesia solicita reforma a Ley Migratoria' *Prensa Libre* 28 August 2012 (accessed 6 November 2015); Grupo Articulador (see n 4 above) 13-14; Morales Díaz (n 48 above) 38-39.

50 The objectives of the DGM (Dirección General de Migración) focus on order and regulation. See <http://www.migracion.gob.gt/index.php/migracion/objetivos.html> (accessed 30 October 2015).

2007, describes itself as ‘the national body that brings together the authorities of the State of Guatemala responsible for the care and protection of the human rights and individual rights of Guatemalans abroad’.⁵¹

While its formation was an important step toward coordinating the efforts of various governmental institutions around migration,⁵² CONAMIGUA has not been able to respond to the demands and needs of the migration situation in Guatemala. This failure has been exacerbated by the corruption uncovered in institutions with responsibility for migration. Such corruption relates to issues of human trafficking, document fraud, illegal fees charged to migrants and extortion and calls into question their competency and commitment to assisting migrants.⁵³ For instance, the DGM was audited in 2001 because of the existence of illegal processes and corruption. However, after 13 years of audits, in 2014, the then President Otto Pérez Molina decided to lift this measure. Yet many of the problems that gave rise to that intervention persist today.⁵⁴

Maldonado also asserts that the context in which the Convention was approved differed greatly from present conditions; he implies that the state of Guatemala did not predict the changes or the dimensions that the migration phenomenon would today take on.⁵⁵ Thus, Maldonado argues that the country could not predict its failures to meet its responsibilities under the Convention. As an example, Guatemala submitted its first report to the Committee on Migrant Workers (CMW) in 2010, six years late.⁵⁶

51 In the original Spanish: Objetivo de CONAMIGUA: El Consejo Nacional de Atención al Migrante de Guatemala, CONAMIGUA es la instancia nacional que reúne a las autoridades del Estado de Guatemala, responsables de la atención y protección de los derechos humanos y garantías individuales del guatemalteco en el extranjero, con el objetivo de propiciar y fortalecer los mecanismos de coordinación interinstitucional y el cumplimiento de las funciones que se establecen en la ley y los compromisos del Estado de Guatemala derivados de convenios, tratados y otras obligaciones internacionales en el extranjero. CONAMIGUA ‘Folleto de Información Institucional’ <http://www.conamigua.gob.gt/download/FOLLETO%20DISTRIBUIDO%20EN%20FERIA%20CHAPINA%202013.pdf> (accessed 30 October 2015).

52 Act and regulations of CONAMIGUA, Decree No 46 – 2007 chap I, art 2 (2009). CONAMIGUA is the government entity that defines, coordinates, supervises and monitors the actions and activities of other governmental institutions and entities designed to protect, assist and provide assistance and aid to Guatemalan migrants and their families in Guatemala, as well as the migrants found in the Guatemalan territory.

53 Morales Díaz (see n 48 above) 26, 61; Grupo Articulador (n 4 above) para 12 & pp 47 & 50; CIDH (n 34 above) paras 341, 348, 349 & 350.

54 ‘Migración: Trece años con una intervención fracasada’ *La Hora* 13 November 2014 <http://lahora.gt/migracion-trece-anos-con-una-intervencion-fracasada/> (accessed 27 June 2015).

55 Maldonado (n 44 above). Presumably he refers to the increase in migration, the situation of worsening violence in the migrant journey, and the greatly expanded deportation regime in the US and Mexico.

56 The report was due on 1 July 2004 but was submitted six years later on 8 March 2010. The next state party report for Guatemala was due on 1 September 2016. The OHCHR website indicates a revised due date of 1 November 2018. See United Nations Human Rights ‘Reporting Status for Guatemala’ http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (accessed 1 August 2017).

Guatemala addressed the issue of legal compliance in its initial report (hereinafter Initial Report) to the CMW, claiming to have made institutional advances and progress and emphasising that the state has endorsed, approved and ratified diverse international treaties on this subject.⁵⁷ Yet despite the state's indications, the Grupo Articulador indicated in its Shadow Report that there are various shortcomings and legal gaps in the Guatemalan legal system. The report also noted that there are Guatemalan legal regulations that contravene the Convention. These include an onerous fee that employers must pay in order to employ migrants and a high cost of regularisation for irregular migrants.⁵⁸ The UN Special Rapporteur on the human rights of migrants noted that such legal gaps violate the human rights of the migrant population and pointed to the need to modify and tailor internal state norms.⁵⁹

It is worth mentioning that some legal initiatives aimed at improving the situation of migrants have been introduced in the Congress.⁶⁰ However, few of these initiatives have been approved, and others are still waiting to be submitted to review by the Plenary Session of Congress. This calls into question the level of interest and priority the issue of migration has on the national agenda.

4.2 Detention and expulsion of migrants from Guatemala

The Convention contains provisions regarding detention in articles 16 and 17 which refer to the integrity and personal liberty of migrants, along with the right to be free from physical or psychological harm. Article 22 of the Convention relates to the procedures for expulsion that states are to observe with articles 20, 23 and 56 also containing a number of procedural safeguards in the context of expulsion.

The Initial Report submitted by Guatemala in 2010, in accordance with article 73 of the Convention, signalled that the country would only carry out the expulsion of a migrant in the following two situations: a) when a migrant is found irregularly in the territory; and b) when he or she commits a crime and is convicted through a penal process, in which the state imposes deportation as a secondary penalty.⁶¹

57 'Initial Report - Guatemala' CMW (4 August 2010), UN Doc CMW/C/GTM/1 (2010) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CMW%2fC%2fGTM%2f1&Lang=en (accessed 7 March 2016).

58 Grupo Articulador (n 4 above) paras 2, 3, 4, 23 & 24.

59 Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante - Addendum - Mission to Guatemala (24 to 28 March 2008), HRC (18 March 2009), UN Doc A/HRC/11/7/Add.3 (2009) paras 6, 7, 24-29 & 50 <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx> (accessed 30 October 2015).

60 See legal initiatives nos 3759, 3765, 4126, 4388, 4560, 4572, 4734, 4851, 4861 & 4869.

61 Initial Report (n 57 above) paras 152, 187, 190-192.

Further, the Shadow Report found that there is no established timeframe for the deportation of immigrants. The Shadow Report also indicated that the state carried out collective expulsions in clear contravention of international standards.⁶² The UN Special Rapporteur on the human rights of migrants also expressed disquiet about this issue in a March 2008 report on his mission to Guatemala. Here he observed with concern the violation of migrants' rights to defence and due process in administrative procedures.⁶³ It is important to emphasise that these deficiencies have persisted over time; a 2002 Annual Report to the Inter-American Commission of Human Rights had pointed out the same problems.⁶⁴

Thus, after more than 12 years of the Convention being in force, Guatemala has not corrected all the legal deficiencies that came to the fore when it signed and ratified the ICRMW. Specifically, Guatemala is out of compliance with its obligations under articles 16(1), 16(4), 16(5), 17(1) and 22 because it does not legally regulate the maximum period for expelling migrants from the national territory. For instance, when the authorities encounter a migrant who has entered the country without authorisation, he or she is sent to a DGM shelter. These shelters are overcrowded and substandard.⁶⁵ The Special Rapporteur observes that Guatemalan law does not define a limit to how long a migrant may be held.⁶⁶ This practice clearly violates migrants' right to defence, due process, liberty and personal integrity. This kind of indefinite detention can produce tremendous psychological suffering and can be considered arbitrary detention – especially considering that their detention is not for a crime but for an administrative law violation.

This situation is worse for migrants with scarce resources who cannot pay to hire an attorney, since Guatemala lacks free legal assistance for migrants facing expulsion. The Institute of Public Criminal Defence of Guatemala only assists those who are tried for a crime, and their assistance is limited to determining criminal responsibility. There is also a lack of translators for migrants who do not speak Spanish.⁶⁷

4.3 Regularisation of the irregular migrant population

The specific process for regularisation of the irregular migrant population is not addressed directly in the ICRMW, but it does develop parameters in

62 Grupo Articulador (n 4 above) paras 27, 80, 81 & 86.

63 Bustamante (n 59 above) paras 30, 31, 49, 50 & 85.

64 IACHR *Informe Anual de la Comisión Interamericana de Derechos Humanos 2002, Capítulo VI: Estudios Especiales; Cuarto Informe de Progreso de la Relatoría sobre Trabajadores Migratorios y Miembros de sus Familias en el Hemisferio* (7 March 2003) paras 367, 368, 370, 371.

65 Morales Díaz (n 48 above) 48; Grupo Articulador (n 4 above) 29.

66 J Bustamante (n 59 above) para 50.

67 Bustamante (n 59 above) paras 30-31.

article 69(2) for the regularisation process that states should consider. With regard to irregular migrant workers, the Preamble recognises that they are frequently employed in less favourable working conditions and that respect for the human rights of all migrants would reduce their frequent abuse and exploitation by employers.

Guatemala indicated in its Initial Report of 2010 that it had carried out enforcement operations to detect establishments wherein irregular migrants work. The Report indicated that the country would proceed in two ways with respect to irregular migrants: (a) it would transfer these workers to shelters until their expulsion or (b) it would ensure their appearance before a competent judge in the event that they had committed a crime. The report also indicated that migrants could initiate the process to regularise their status within ten days, as allowed by the DGM.⁶⁸ However, the Grupo Articulador points out in its Shadow Report that the process established in the Migration Act and its related regulations entail complex, costly requirements with which the majority of irregular migrants cannot comply. Articles 93, 100 and 111 of the Migration Act and articles 33, 70, 71, 88, 96, 97 and 98 of the related regulation outline a process full of ambiguity, burdensome requirements and fees.⁶⁹

Currently there is no procedure within Guatemala which allows migrants a realistic opportunity to regularise their status. For every day a migrant is without legal status, they must pay a fine of \$1.30, which means that many irregular migrants have accumulated enormous fines.⁷⁰ To achieve a temporary residency, one must pay \$62 annually, a sum of money that most migrants can rarely afford.⁷¹ The situation is aggravated by the widespread abuse and corruption that has plagued the DGM and other institutions that regulate the process; the Shadow Report notes 'countless' cases of abuse by personnel, including retaining and destroying documents and charging illegal entry and exit fees.⁷²

Draft Act 4851, currently before the Guatemalan Congress, ostensibly seeks to fill the gap regarding regularisation.⁷³ Introduced in June 2014 by Representative Paul Briere, it would 'exempt migrants for fines based on their stay in the country, discount payments for migration documents, and eliminate the need for a guarantor'.⁷⁴ However, the proposal lacks

68 Initial Report (n 57 above) paras 152, 190, 240-243.

69 President of the Republic of Guatemala, Government Decision 529 – 99 Reglamento de la Ley de Migración art 88.

70 Migration Act art 95.

71 Migration Act art 88.

72 Grupo Articulador (n 4 above) para 79.

73 Congress of the Republic of Guatemala, Draft Act 4851: Ley de apoyo a la regularización migratoria de extranjeros en Guatemala (9 June 2014) <http://old.congreso.gob.gt/archivos/iniciativas/registro4851.pdf> (accessed 27 June 2015).

74 Congress of the Republic of Guatemala 'Diputado Jean Paul Briere Propone Ley De Apoyo A Extranjeros En Guatemala' (9 June 2014) <http://www.congreso.gob.gt/noticias.php?id=5617> (accessed 9 November 2015).

solutions to all of the barriers to regularisation currently faced by migrants. They will continue to suffer the same problems that currently affect the regularisation process: many demanding requirements and a complex and onerous process for migrants.⁷⁵ Consequently, it will do little to help most migrants regularise their status despite a stated intention to regularise all migrants who are currently in Guatemala.

4.4 Human trafficking

The only direct reference to trafficking is in the preamble of the Convention which notes that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights. Additionally, article 11 of the Convention states that no migrant should be subject to slavery or servitude or required to perform forced or compulsory labour.

The government's Initial Report, the Shadow Report and the UN Special Rapporteur all assessed Guatemala's effort to address human trafficking as a necessity to comply with the ICRMW. In its Initial Report, Guatemala cites the fight against 'Trafficking in human beings' as part of its compliance with article 11 of the Convention.⁷⁶ It states that it has adopted norms, created institutions and trained civil servants to combat trafficking and exploitation and comply with article 11.⁷⁷ In its discussion of article 11, the Shadow Report criticises these institutional reforms as shallow and weak.⁷⁸ The UN Special Rapporteur recognised the country's efforts to tackle this problem in his report on his mission to Guatemala while also expressing concerns that Guatemala has been unable to eliminate the criminal organisations responsible. He also evinced disquiet with how national authorities treat victims of these crimes.⁷⁹

Advances in this matter currently include the promulgation of the Act against Sexual Violence, Exploitation and Human Trafficking, the creation of the Inter-Institutional Commission to Combat Human Trafficking, the creation of the Section against trafficking crimes of the criminal investigation service of the federal police (Policia Nacional Civil), the creation of an ombudsman's position on the issue in the Human Rights Ombudsman's office and the delivery of workshops and trainings to civil servants and public employees. Despite these advances, however, there are serious deficiencies in how authorities treat victims of human trafficking when they find them during police operations. Typically, the victims are detained and sent to the DGM shelters where they receive no medical or

75 IOM (n 5 above) 72.

76 Initial Report (n 57 above) para 30.

77 Initial Report (n 57 above) paras 158, 162 & 167-174.

78 Grupo Articulador (n 4 above).

79 Bustamante (n 59 above); paras 75-89.

psychological attention to help them overcome their experience.⁸⁰ Another critical issue is the impunity that persists for this crime: out of fear or threats, victims do not report the perpetrators of such crimes or their accomplices. This frustrates the efforts for the authorities who try to investigate and prosecute such cases.⁸¹

Additionally, Guatemalan legislation does not provide a distinct immigration status for human trafficking survivors; rather, survivors must qualify for refugee status. These victims can apply for the relief before the start of the repatriation process, which would allow them to remain in the country in accordance with articles 16 and 17 of the Act against Sexual Violence, Exploitation and Human Trafficking⁸² and Government Decision 328 – 2001 (which refers to the Regulation for the Protection and Determination of the Status of the Refugee in the Territory of the State of Guatemala).⁸³ However, while Guatemala is a state party to the UN Convention on the Status of Refugees and has enacted Regulations for the Protection and Determination of the Status of Refugees in the State of Guatemala in compliance with its obligations under that Convention,⁸⁴ in practice those migrants seeking refugee status face numerous obstacles. Such obstacles include the lack of legal assistance for migrants, the lack of information about their rights, and the lack of translators. We see these obstacles reflected in the annual statistics published by the Ministry on Foreign Relations, which show that in 2014, for example, only 19 people benefited from this protection.⁸⁵ Guatemalan attorney Rosmery Yax of the The Human Mobility Pastoral notes that the majority of these refugee applicants are from outside of Central America. The numbers of persons granted refugee status is low because most of these applicants abandon the refugee process.⁸⁶

4.5 Labour rights

4.5.1 Migrant worker rights in Guatemala

The Convention codifies the labour rights of migrant workers and in so doing is guided by the principle of equality of treatment with citizens of the state party. Guatemala indicated in its Initial Report that once migrants

80 Grupo Articulador (n 4 above) 29.

81 Morales Díaz (n 48 above) 25.

82 Congress of the Republic of Guatemala, Decree 9 of 2009, Ley contra la Violencia Sexual, Explotación y Trata de Personas arts 16 & 17.

83 President of the Republic of Guatemala, Government Decision 328 – 2001, Reglamento para la protección y determinación del Estatuto de Refugiado en el Territorio del Estado de Guatemala.

84 Government Decision 383 – 2001 (n 83 above).

85 Ministerio de Relaciones Exteriores; Estadísticas de personas beneficiadas con el Estatuto de Refugiado (2014) <http://www.minex.gob.gt/Uploads/ER2014.csv> (accessed 27 June 2015).

86 R Yax interview with Ursula Roldán 1 September 2015.

have obtained a work permit, they have the same labour rights as Guatemalan nationals.⁸⁷

Without access to a procedure to regularise their legal status, migrant workers become more vulnerable to exploitation. Having an irregular status places migrant workers at greater risk of exploitation by employers who know that irregular workers are unlikely to approach authorities with a complaint about violations of their labour rights for fear of being detained and processed for expulsion. For its part, the Shadow Report emphasises the inequality and discrimination which characterise the Government's regulation of the granting of work permits to foreigners.⁸⁸

4.5.2 *Rights of Guatemalan migrants working abroad*

Several articles of the Convention require each state party to ensure *portable justice* for its migrant workers abroad along with ensuring justice for migrant workers at home. Portable justice, a term coined by Justice in Motion, includes the 'right to transnational access to justice and the accompanying access to information'⁸⁹ for migrant workers throughout their labour migration experience. Several articles of the Convention specifically oblige state parties to ensure portable justice for their migrant workers prior to their departure to work in another country, while working abroad and upon their return to Guatemala.

4.5.3 *Rights and obligations during recruitment*

In an August 2015 report, the Special Rapporteur on the human rights of migrants 'paid particular attention to recruitment practise as one of the key areas of work for his mandate' as he was 'concerned about the apparent growing prevalence of severe exploitation and abuse suffered by migrants at the hands of recruiters and subagents in countries of origin and destination'. He recommended that states 'develop country-level and regional policies tackling exploitative and abusive recruitment practices'.⁹⁰

As part of its obligations concerning recruitment, Guatemala is responsible under article 33 of the Convention for protecting its migrant workers *prior to* their departure to states of employment.⁹¹ Additionally, state parties are to take all appropriate measures to 'disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions'. This information is to be provided

87 Initial Report (n 57 above) para 241.

88 Government Decision 528 – 2003. See Grupo Articulador (n 4 above) para 24.

89 C Caron 'Global workers require global justice: The portability of justice challenge for migrants in the USA' (30 October 2005) http://www.globalworkers.org/sites/default/files/GWJA_Portability.pdf (accessed June 2017).

90 Report of the Special Rapporteur on the human rights of migrants, Mr François Crépeau, GA (11 August 2015), UN Doc A/70/310 (2015).

for free and in a language workers understand. Thus, under the Convention Guatemala is obliged to provide its citizens who are migrating to work in other countries with access to employment information prior to their departure. Under article 37, Guatemala is obliged to inform workers '[b]efore their departure, or at the latest at the time of their admission to the State of employment', of all conditions of their employment and their stay in the host country. However, the government has little to no pre-departure education initiatives in place to provide this essential information.⁹²

The Guatemalan government has yet to take several important measures to ensure its citizens migrating to work in other countries receive access to portable justice, as required under both the Convention and its own Labour Code. In addition to that stated above, article 34 of Guatemala's Labour Code, passed in 1961, 'Labour Contracts and Agreements', establishes the responsibility of the country to protect the rights of Guatemalan workers abroad. Article 34 charges the Guatemalan Ministry of Labour and Social Security (MINTRAB as it is known in Spanish) with regulating the recruitment and departure of international migrant workers and prohibits contractors from recruiting workers without the state's authorisation.⁹³ Article 34 requires, amongst other things, that recruiters maintain a permanent office in the capital for the duration of the contract, that they cover the costs of worker transport from the country of origin to place of foreign employment (and costs of transporting the worker's family if applicable), and that they provide workers with a contract which clearly states the costs that the recruiter will cover (which also must include any fees) and the work, housing and transport conditions. MINTRAB must also approve the contracts. Unfortunately, the Guatemalan government has never passed regulations to implement the law.

Furthermore, article 15 of the Convention states that, '[n]o migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others'. This mandate is defied by recruiters' common practice of confiscating workers' property titles prior to processing their work visas, and by the lack of systemic Guatemalan government intervention to prevent this illegal practice. Recruiters commonly seek to take control of workers' properties and land through a simple withholding, through the transfer of property

91 Article 33 ICRMW provides: 'Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning (a) Their rights arising out of the present Convention; (b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.'

92 Email from M Ramirez to C Caron on 30 September 2015.

93 Justice in Motion 'Reglas de Reclutamiento: Paises de Origen. Análisis Comparativo de Leyes de Reclutamiento Para Trabajadores en El Exterior en México, Guatemala, El Salvador, Honduras, y Guatemala' (2015) 11-13 http://justiceinmotion.org/s/RR-COO-28SP29_FINAL.pdf (accessed June 2017).

title, or through mutual contracts for the mortgage warranty that favour recruiters.⁹⁴ Workers have tremendous difficulty recovering their property titles upon their return to Guatemala following work in the United States. As a December 2013 *Prensa Libre* article explains, the Justice in Motion Defender Network documented ten cases of recruiters confiscating workers' property titles in return for the promise of migration to the US. Three of the ten workers whose properties were confiscated never retrieved their title upon returning to Guatemala. Advocates contend that recruiters take workers' property titles, in addition to withholding their passports, in order to dissuade workers from seeking legal remedies when their labour rights are violated.⁹⁵ The Guatemalan government has not intervened to eradicate this ongoing illegal practice that violates both article 34 of the Guatemalan Labour Code (which requires that the recruiter pay all costs of employment) and the ICRMW (specifically article 15). To comply with the Convention and with its own national laws, the Guatemalan government should take steps to address these illegal property title seizures, inform workers they have no obligation to turn over their property titles to recruiters, and take action against recruiters (in conjunction with the US government) to eliminate this practice in Guatemala.⁹⁶

Additionally, several recent cases of recruiter fraud also highlight the rampant abuse of migrant workers, which will continue unabated if Guatemala fails to abide by its obligations under the Convention and article 34 of its Labour Code. In April 2011, the Mexican newspaper *El Norte* reported that 100 Guatemalan nationals were defrauded of around 700 000 pesos (around 44 482 USD) when a fraudulent recruiter promised them visas for work first in Mexico and then in the United States, but failed to provide the visas. Jorge Luis Hernandez promised the workers a legal visa to work in the United States in exchange for a hefty fee, using fraudulent paperwork to pose as a legitimate recruiter under the name of 'Job Consultoría'. Fifteen of the workers eventually received a legitimate visa to work in the US through the advocacy of the Mexican human rights organisation Desarrollo Social sin Fronteras, which also filed a lawsuit against the fraudulent recruiter.⁹⁷ In another case, reported by a Defender Network member and Guatemalan employment attorney, a fake recruiter

94 'Confiscación de títulos de propiedad o posesión ... ya sea que se haga como una simple retención, enajenación de bienes (traspaso o transferencia de dominio de los bienes) y contratos de mutuo con garantía hipotecaria a favor de los reclutadores, por medio de los cuales buscan apoderarse de los inmuebles ...', see Justice in Motion 'Confiscación de Títulos de propiedad en Guatemala por parte de Reclutadores en Programas de Trabajadores Temporales con Visas H-2B' (2013) 16 http://justiceinmotion.org/s/Confiscacion-de-Titulos_Informe_Final.pdf (accessed June 2017).

95 'Estafas y abusos afectan a migrantes' *Prensa Libre* 7 December 2013.

96 Justice in Motion 'Confiscación de Títulos de Propiedad en Guatemala Por parte de reclutadores en programas de trabajadores temporales con visas H-2B. Resumen Ejecutivo' (July 2013) 7 http://justiceinmotion.org/s/ResumenEjecutivo_ConfiscaciondeTitulos.pdf (accessed June 2017).

97 A Rodriguez 'Denuncian fraude contra inmigrantes' *El norte* 12 April 2011 26, 431.

opened an office called 'Empleo Fácil de Guatemala' in the city of Quetzaltenango. He offered workers a visa and transportation to do agricultural work in Florida. He took 350 000 quetzales (around 459 USD) from each of 1 500 workers and had them sign a contract for six months of work beginning on 1 June 2011, but would not provide them with a copy. Shortly before they were planning to leave, workers went to the office to ask about the trip. The office was closed and their money gone, without the work they had been promised.⁹⁸

As seen with the confiscation of property titles, legitimate recruiters also frequently abuse the system and exploit vulnerable workers with illegal costs in violation of the Convention and the Guatemalan Labour Code. A criminal complaint filed in Guatemalan District Court in December 2010 accuses two recruiters in the municipality of Guanagazapa of fraud. The recruiters charged a large group of workers exorbitant fees to work in pine tree harvesting in the United States for a company called Express Forestry, beginning in October 2008. The fees were supposedly for the visa and transportation costs. One victim recounts that the recruiter made him pay 25000 000 quetzales (around 3280 USD), and that he had to take out a loan using his land as collateral to do so. Other workers were charged a range of high amounts. As per the December 2010 complaint, the workers had not received the job they were promised nor had they been refunded the 'down payment' they had paid,

despite the requirements we have personally carried out before the Escuintla Mediation Center where they summoned ... [one of the contractors] to try to come to a conciliatory agreement, in accordance with the subpoenas served in the month of June of the year 2010.

The criminal complaint requests that the prosecutor charge the two recruiters with the crime of personal fraud under article 263 of the criminal code.⁹⁹

On a positive note, the country is on the cusp of regulating recruiting agencies and the recruitment process more generally. In 2014, MINTRAB collaborated with recruitment agencies and advocacy organisations – the latter representing the interests of civil society – to produce a draft regulation.¹⁰⁰ Sponsored by the European Union's International and Ibero-American Foundation for Administration and Public Policies (FIAPP) and with participation from civil society stakeholders, the Guatemalan Government (including the Guatemalan Ministry of Foreign Relations and the Guatemalan Ministry of Labour and Social Security) produced a Pilot Project including a draft action protocol and operational

98 Email from A Palacios to C Caron on 4 February 2015.

99 Criminal Complaint filed 14 December 2010 in Fiscalía Distrital del Ministerio Público del Departamento de Escuintla. MV Escuintla: 7720 2000.

100 Justice in Motion (n 93 above) 11-13.

design along with an IT system for regulating Guatemalan labour migration.¹⁰¹ Until it actually implements the protocol and regulations, however, the country is out of compliance with the Convention and its mandate to protect its citizens who emigrate for work at every stage of the migration process.

In order to address some of the rampant issues around fraudulent recruitment practices, Justice in Motion held a training workshop in 2015. The workshop included the Guatemalan Department of Justice, the Department of Labour and the Ministry of Foreign Affairs personnel, and focused on providing them with tools to better respond to recruitment fraud and protect workers' rights.¹⁰² The training was part of a larger effort between Justice in Motion and United Food and Commercial Workers-Canada and the Guatemalan Government to respond to recruitment fraud. Other civil society initiatives are also beginning to bear fruit and are resulting in an increased interest from the Guatemalan state to take action.¹⁰³

4.5.4 *Rights while working abroad*

In addition to suffering abuses during recruitment in Guatemala (without the required government protections under the Convention), workers are vulnerable to abuses while working abroad. Most of the obligations to protect migrant workers in the country of employment are the responsibility of the countries of employment since they have the jurisdiction to protect persons in their own territories. However, the necessity and obligation of the countries of origin to protect their own nationals abroad is established in the Convention and furthermore, where the state party is not expressly implicated it can at least be argued to have co-responsibility.

These obligations on the country of origin to protect their nationals abroad include the right to be free from 'forced or compulsory labour', as described in article 11 of the Convention, which states that '[n]o migrant worker or member of his or her family shall be held in slavery or servitude'. Additionally, article 25(3) clarifies that state parties must take measures to

101 'Orderly and Safe Labour Migration in Guatemala' *FIIAPP* 3 November 2014 <http://www.fiiapp.org/en/noticias/migracion-laboral-ordenada-y-segura-en-guatemala/> (accessed July 2015). UE-ALC / EU-LAC 'Presentación del Proyecto Piloto Fortalecimiento Interinstitucional para la Migración Laboral Ordenada y Segura' <http://www.migracion-ue-alc.eu/index.php/es-ES/component/content/article/106-categorias-en-espanol/483-tallerpp-guatemala> (accessed July 2015).

102 Justice in Motion training to Guatemala government agencies 'US temporary work visas system: process, legal framework; and international recruitment' (2015) <http://www.globalworkers.org/guatemala-guatemala-june-3-2015> (accessed 2 October 2015).

103 Organisations involved in such efforts include the The Human Mobility Pastoral, Instituto Centroamericano de Estudios Sociales y Desarrollo (INCEDES), Instituto de Estudios y Divulgación sobre Migración, AC (INEDIM), and regional initiatives such as Iniciativa Regional sobre Movilidad Laboral (INILAB).

'ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment'. More clearly on point is article 23, which states that:

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired.

In the context of domestic migrant workers, the Special Rapporteur has stated that countries of origin 'should play an active role' in the countries of employment to protect their nationals. The report outlines specific measures the Rapporteur encourages the country of origin to play including training embassy staff to 'receive and address complaints, including through the provision of legal aid,' and to 'provide counselling and facilitate appropriate shelter' to workers 'fleeing from abusive employment circumstances'.¹⁰⁴ This holds Guatemalan consulates in states of employment at least partially responsible for protecting Guatemalan nationals' rights in states of employment.

In contradiction to its obligation under the Convention, the Guatemalan government has yet to establish strong mechanisms to address abuses against its nationals while they are working abroad. Guatemalan nationals in the US, Canada and Mexico, suffer rampant workers' rights abuses. As detailed in the Southern Poverty Law Center's 2013 report entitled 'Close to slavery: Guestworker programs in the United States', Guatemalan workers on temporary foreign worker visas face abuses and labour violations at the recruitment stage, in pay and transportation costs, through the threat of deportation, and even in situations of captivity.¹⁰⁵ Irregular Guatemalan workers face many of the same challenges as well as the heightened risk of deportation.¹⁰⁶ Several reports from United Food and Commercial Workers Canada detail abuses

104 General Comment 1 on migrant domestic workers, CMW (23 February 2011), UN Doc CMW/C/GC/1 (2011) <http://www.refworld.org/docid/4ed3553e2.html> (accessed 6 November 2015) 11-12.

105 Southern Poverty Law Center 'Close to slavery: Guest worker programs in the United States' (18 February 2013) 10, 15, 19, 27, 30 & 33 <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states> (accessed September 2015).

106 Southern Poverty Law Center 'Injustice on our plates' (2010) 4, 7 <https://www.splcenter.org/20101108/injustice-our-plates> (accessed September 2015).

of Guatemalan temporary workers in Canada.¹⁰⁷ Guatemalan workers in Mexico also can face extreme labour abuses.¹⁰⁸

The Guatemalan consulates in major cities in the United States and Canada have taken some steps to reach out to their nationals through the 'consulado móvil' programme, where the consulate officials go to heavily populated Guatemalan areas on the weekends and offer services.¹⁰⁹ However, clearly more is needed to protect the rights of vulnerable workers.

4.5.5 *Portable justice for abuses suffered abroad*

The ICRMW obligates Guatemala to protect its workers upon their return to Guatemala. Article 22(6) of the Convention requires Guatemala to protect the rights of Guatemalan migrant workers to wages rightfully earned in the state of employment:

In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

Article 22(9) emphasises migrant workers' right to portable justice after departure from the state of employment, stating that:

Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

As a state party to the Convention, then, Guatemala has a duty to implement measures at home to grant its citizens who emigrate for work access to portable justice for abuses suffered abroad. In a recent report, the Special Rapporteur stressed the need for portable justice when he urged state parties to conclude bilateral agreements to facilitate the filing of

107 United Food and Commercial Workers Canada 'The status of migrant farm workers in Canada 2011' (2011) 5, 9, 13 & 17 http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf (accessed September 2015); United Food and Commercial Workers Canada and the Agriculture Workers Alliance 'Report on the status of migrant workers in Canada 2010-2011' 15 & 23 http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf (accessed September 2015).

108 US Department of State 'Trafficking in Persons Report 2014' 271 <http://www.state.gov/documents/organization/226847.pdf> (accessed September 2015).

109 A listing of upcoming or recent 'consulado móvil' events is available on some city consulate websites. For example, the New York consulate lists consulados móviles: <http://www.consuladoguatemalanuevayork.org/consulados-moacuteviles.html> (accessed August 2015). See also the Guatemalan Embassy in Canada. http://www.canada.minex.gob.gt/Home/Visor_Pagina.aspx?PaginaID=148 (accessed September 2015).

claims for unpaid wages and benefits in the country of employment for migrants who return to the countries of origin.¹¹⁰

One civil society initiative that seeks portable justice for Guatemalan migrant workers is the Justice in Motion Defender Network, launched by Justice in Motion (then known as the Global Workers Justice Alliance) in April 2008. The Defender Network includes human rights organisations and individual advocates across countries of origin including Mexico, Guatemala, El Salvador, Nicaragua and Honduras. Advocates in the Defender Network work with advocates in countries of employment to facilitate employment law cases for migrant workers who have returned to their native countries.¹¹¹ While this is a significant and much needed civil society response to the lack of portable justice for workers who have returned to Guatemala, the Defender Network cannot compensate for long-overdue government action – required under the Convention and article 34 of the Guatemalan Labour Code – to ensure portable justice for Guatemalan migrant workers throughout their labour migration cycle.

5 Conclusion: The value of the Convention

This chapter has discussed the implications of the ICRMW for Guatemala as a state party. It reviewed the context of migration to and from Guatemala along with the conditions in which Guatemala signed and ratified the Convention, and then evaluated Guatemala's progress towards implementation in various key domains. What is revealed is that while promising steps have been taken toward introducing changes to comply with the Convention's obligations to protect specific rights of migrant workers, overall the state has failed to adequately implement the ICRMW and protect those rights. The progress made has been slow, and Guatemala has yet to put in place a legal framework that would protect migrants' rights as per the Convention, even though that framework seems to be slowly emerging with pressure and assistance from civil society and the international community.

In light of this rather grim reality of weak compliance, one may question the purpose of ratifying the Convention. Carol Girón is director of the Project on Childhood and Adolescence at Scalabrini Missionaries, the Human Mobility Commission of the Episcopal Conference of Catholic Bishops, which is one of the main organisations that advocates for migrant rights in Guatemala. Girón sees value in the Convention in spite of its appearance as almost a dead letter.¹¹² She argues that the Convention is an

110 General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, CMW (28 August 2013), UN Doc CMW/C/GC/215 (2013).

111 Justice in Motion 'The Defender Network' <http://justiceinmotion.org/the-work/> (accessed June 2017).

112 C Girón, personal interview with Scalabrini Missionaries 14 August 2015.

important point of reference that contributes to the defence of migrant rights and notes that it was Guatemala's non-compliance with the Convention which spurred civil society to develop an alternative report to the government one presented ahead of the 2010 CMW meeting in Geneva, so as to hold it accountable for its failure to meet its Convention obligations. From this process, the Grupo Articulador coalition emerged, which includes the majority of organisations working on migrant worker rights issues; the group uses social media and other advocacy tools and develops legal and public policy proposals. In 2011 it presented a document called 'Migrations: A commitment of the Guatemalan State 2012-2016', with the goal of pressuring political parties and presidential candidates running for election to incorporate migrant advocates' demands into their political platforms. This organisation has continued working to obtain a comprehensive immigration law and advance other public policy proposals that protect migrant workers. By galvanising civil society to produce shadow reports, create coalitions and mobilise more generally – apparent in the actions of the Grupo Articulador – the Convention thus serves as an important point of reference, catalyst and tool to help Guatemalan civil society to press for change at both the national and international levels.