CHAPTER 5 PUTTING THINGS INTO PERSPECTIVE: THE ADDED VALUE OF THE ICRMW'S SUBSTANTIVE PROVISIONS

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1 Introduction

The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[1] has enjoyed comparatively little support and is lagging behind in numbers of ratifications in comparison to the other core UN human rights treaties. This relatively low rate of ratification has often been explained by reference to the claim that the Convention is superfluous in the international human rights framework, as the rights it protects are already enshrined at both international and national level.[2]

The aim of this chapter is to challenge this assumption and establish the added value of the ICRMW's substantive provisions by drawing on three clusters of rights: *entry and stay rights*, *health and social security rights*, and the overarching issue of *access to justice.* For the purpose of analysing the benefits of the Convention, we compare its provisions with other existing international law provisions and standards. References are also made to regional human rights systems, particularly that of the European Union (EU). This choice is motivated by the fact that no single EU member state has yet signed or ratified the Convention. Moreover, EU legislation contains provisions applicable to migrants and migrant workers that are binding on all EU member states: given the highly developed and complex nature of the human rights protection system in the EU, it is worth asking whether ratification of the ICRMW by EU member states would confer protection on migrants in the EU beyond what is currently available to them. A significant difference lies in the level of protection and freedoms guaranteed to EU citizens (ie nationals of any of the 28 EU member states) as opposed to so-called third country nationals (TCNs). Possibly, ratification of the Convention by EU member states would have

1 'Convention', 'ICRMW', or 'Migrant Workers Convention'.
2 E MacDonald & R Cholewinski *The Migrant Workers Convention in Europe* (2007) 60.

a greater de facto effect on raising the level of protection with respect to TCNs, who do not enjoy the high standards of rights protection available to EU nationals, arguably creating greater political tension on the EU level.

The first section deals with *entry and stay rights*, while the second analyses *health and social security rights.* These rights clusters were chosen to highlight two points: first, how varied the provisions of the ICRMW are regarding the potential life realities covered by its substantive articles; and second to show how, whilst a great variety of substantive rights find protection under the Convention, many of these rights, to a differing extent, are covered in other international-law provisions. The aim of the present contribution is to demonstrate, notwithstanding this reality, the added value(s) the Convention brings to the table, the areas where it simply duplicates existing rights, and the situations where it goes beyond other rights provisions, guaranteeing further protection for migrant workers and their families.

In a third section, the right to effective remedy is sketched and located in the context of access to justice and the realisation of rights on a national, regional and international level. Whilst this section intercepts partly with the one on *entry and stay rights* and that on *health and social security,* it shows the added value the Convention as a system or instrument has regarding people's access to justice in the sense of the enforcement of the rights provided for in the Convention.

2 Entry and stay of migrant workers and members of their families

The Convention applies to the entire migration process,[3] namely to:

> [P]reparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.[4]

This part of the contribution will look at the concepts of entry, stay and return of migrant workers and members of their families in a broad sense, so as to encompass all situations linked to and of potential impact on the different stages of the migration process.

3 P de Guchteneire & A Pécoud 'Introduction: The UN Convention on Migrant WorkersRights' in P de Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 8.

4 Art 1(2).

2.1 The Convention's comprehensive protection system

The Convention's structure requires the distinction between two subgroups of provisions on entry and stay, depending on their scope: while some, namely, articles 8-35 which make up Part III of the Convention, are applicable to all migrant workers, others, namely, articles 36-56 in Part IV, only concern migrants in a regular situation.[5]

Part III constructs a system of basic protection for all migrant workers, regardless of their administrative status. To start, article 8 enshrines the right of migrant workers and members of their families to leave any state, including their state of origin, as well as their right to return.[6] This right is fundamental to permit the movement of people and, therefore, of international labourers.[7] Article 22 details a safeguard enshrined in several instruments, namely the prohibition of collective expulsion of migrant workers, requiring a case-by-case approach and establishing precautions as to how expulsions should be carried out. It also states that the person subject to expulsion 'shall have a reasonable opportunity before or after departure to settle any claims or wages and other entitlements'.[8] In addition, expulsion 'shall not in itself prejudice any rights of a migrant worker … including the right to receive wages and other entitlements'.[9] By including this specific provision, the Convention underlines the value of migrants' work and reaffirms the specific feature of work-driven migration. In fact, expulsion in itself cannot constitute a valid reason to deprive migrant workers of their rights and wages.[10]

As a provision, article 33(1)(b) requires states to take all appropriate measures to guarantee the right to information regarding conditions of admission and other matters enabling migrant workers 'to comply with administrative or other formalities'. Placing 'specific responsibility'[11] on states vis-à-vis migrant workers, this has a twofold effect: besides promoting regular and informed migration for the benefit of both migrants and states,[12] it also acknowledges the particular challenges faced by

5 De Guchteneire & Pécoud (n 3 above) 8.
6 See restrictions in art 8(1).
7 D Stephens 'Establishing a positive right to migrate as a solution to food scarcity' (2014) 31 *Emory International Law Review* 186.
8 Art 22(6).
9 Art 22(9).
10 Art 56(2) provides migrant workers in a regular position with a supplementary safeguard, as they can never be expelled for the purpose of depriving them, or their family members, 'of the rights arising out of the authorization of residence and the work permit'.
11 M Grange *Strengthening protection of migrant workers and their families with international human rights treaties: A do-it-yourself kit* (2006) 47.
12 See L Bicocchi 'Rights of all migrant workers (Part III), Travaux Preparatoires' http://www.ohchr.org/EN/Issues/Migration/Pages/HumanRightsFramework.aspx (accessed 21 May 2015) 6.

migrants, as they may not be familiar with the culture of the country of employment.[13]

As for the rights granted only to migrant workers in a regular situation (Part IV), article 37 reiterates the right to information, specifying that it covers 'all conditions applicable to their admission ... their stay and the remunerated activities'. In contrast to article 33, this provision focuses on work-related issues, taking for granted that once migrants are in a regular situation they are already informed about how to comply with administrative matters.

While the aforementioned articles establish basic guarantees for the initial stages of migration, Part IV also contains provisions related to stay, termination of employment and return to countries of origin. In order to avoid protection gaps and prevent situations of irregularity, the Convention sets up a link between residence and employment,[14] stating that the authorisation to reside shall be granted 'for at least the same period of time'[15] as the authorisation to work. Along the same lines, articles 49(2) and 51 set up protection in case of dismissal from work, specifying that this does not affect, *per se*, the residence authorisation.[16] However, this standard applies differently to migrant workers who are 'allowed freely to choose their remunerated activity'[17] and those who are not. The former sub-group is enabled to retain residence authorisation 'at least for a period corresponding to that during which '[migrant workers] may be entitled to unemployment benefits'.[18] The latter, instead, might avoid falling into a situation of irregularity only if their authorisation is not dependent upon 'the specific remunerated activity for which they were admitted'.[19]

Avoiding situations of irregularity is also the goal pursued by article 50,[20] which considers the issue of residence permits for family members in case of death of the migrant worker or dissolution of marriage. The wording used is significant: states of employment shall 'favourably consider granting family members … an authorization to stay'.[21] Thus article 50 does not imply any obligation to actually grant such permission.

While Parts III and IV establish states' obligations vis-à-vis migrants and their families, Part VI considers labour migration in the broader inter-

13 K Spieß *The UN Migrant Workers Convention: An instrument to strengthen migrants' rights in Germany* (2007) 5-7.
14 Grange (n 11 above) 47.
15 Art 49(1).
16 The authorisation of residence is not automatically withdrawn by the 'mere fact of the termination' of the employment, article 49(2).
17 Art 49(2).
18 Art 49(3).
19 Art 51; However, the article recognises the right to 'seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work'.
20 Grange (n 11 above) 47.
21 Art 50(1).

state framework, aiming at promoting 'sound, equitable, humane and lawful conditions' for migrant workers and their families.[22] To this end, article 65 requires states to formulate and implement adequate policies for international migration of workers and to provide them with 'appropriate information'[23] on residence authorisations, also encouraging co-operation among states involved in the migration process.[24]

While the Preamble of the Convention spells out the role of human rights as an effective tool to curb the exploitation of irregular migrant workers, article 68 requires collaboration amongst states to prevent and deter irregular movements and irregular employment of migrant workers, particularly to discourage their exploitation.[25] The Convention does not specify the content of the measures to be taken; it can thus be argued that it 'potentially covers both control measures and pre-emptive policies'.[26] Moreover, although not providing for any right to regularisation, the Convention encourages states to adopt measures to avoid prolonged situations of irregularity,[27] suggesting also criteria to apply when considering regularisation.[28]

2.2 The international human rights framework on entry and stay

The right to leave any country, including that of origin, and the symmetrical right to return, are enshrined in several human rights instruments. They are stated in article 13(2) Universal Declaration of Human Rights (Universal Declaration) and reiterated by article 12 ICCPR; both provisions apply to 'everyone', without distinction between people travelling for example for reasons of tourism, and regular or irregular migrants.[29] Such provisions establish a general framework, which the Convention specifies in relation to migrant workers. Notably all these documents consider only the right to emigrate, not the right to immigrate and therefore to enter another state.[30] While this might be regarded as an asymmetry,[31] it ultimately can be rooted in the desire to ensure state sovereignty.

22 Grange (n 11 above) 22.
23 Art 65(1)(c).
24 Art 65(1)(b).
25 Art 68(1)(b) & (c).
26 B Ryan 'In defence of the Migrant Workers' Convention: Standard setting for contemporary migration' in SS Juss (ed) *The Ashgate research companion to migration law, theory and police* (2013) 500.
27 Art 69(1).
28 Grange (n 11 above) 50; Ryan (n 26 above) 500.
29 General Comment 27: Article 12 (Freedom of movement, HRC (2 November 1999), UN Doc CCPR/C/21/Rev.1/Add.9 (1999) paras 8-9.
30 L Berg 'At the border and between the cracks: The precarious position of irregular migrant workers under international human rights law' (2007) 8 *Melbourne Journal of International Law* 13.
31 Berg (n 30 above) 13.

When it comes to expulsion, article 13 of the International Covenant on Civil and Political Rights (ICCPR) affords protection only to 'lawfully' resident aliens. Therefore, its scope is narrower than that of article 22 of the Convention, which instead covers both regular and irregular migrants.[32]

Within the framework of the Council of Europe (CoE), migrant workers are considered by the European Social Charter (ESC) and the European Convention on the Legal Status of Migrant Workers (ECLSM).[33] However, both treaties apply only to migrant workers who are nationals of a contracting party;[34] moreover, the latter also requires migrants to be in a regular situation.[35] Such restrictions undermine the equal enjoyment of migrant workers' rights, widening the gap between workers coming from different areas of the world.

2.3 A closer look: The admission of migrant workers in the EU

The decision to analyse EU legislation concerning the entry and stay of migrant workers is motivated by the EU's competence in the field of migration.[36] Article 79 of the Treaty on the Functioning of the European Union (TFEU) serves as the basis to develop a common European immigration policy. As stated in the first paragraph of this article, such common policy is aimed at efficently managing migration flows as well as ensuring the fair treatment of TCNs. Notwithstanding this framework, while the EU has a common system of external border management and is moving towards a common asylum system, the same cannot be said for labour migration. Member states have shown reluctance towards the harmonisation of rules on access to the labour market, and are loath to cede sovereignty in this area.[37] This is illustrated by the fact that while recent years have seen the adoption of important labour migration directives (such as the 'Blue Card' directive, or directive 2014/36/EU on third-country seasonal workers), article 79(5) TFEU specifically provides for the right of member states to determine volumes of admission of TCNs coming from third countries for labour purposes.

32 Similar to art 8 of the UN, Declaration on the human rights of individuals who are not nationals of the country in which they live, GA (13 December 1985), UN Doc A/RES/40/144 (1985) which refers to the rights of aliens lawfully residing in the territory of a state.

33 P Boeles et al *European migration law* (2009) 226-227.

34 Recital 19 ESC and art 1(1) ECLSMW.

35 Art 1(1) ECLSMW refers to migrant workers who have been 'authorised' to reside, while para 2 reduces the scope by excluding certain categories, eg seasonal and frontiers workers.

36 M D'Auchamp *Rights of migrant workers in Europe* (2011) 15 ss; S Peers et al (eds) *EU immigration and asylum law (text and commentary): Second revised edition, volume 2: EU immigration law* (2012) 1-9 ss.

37 Boeles (n 33 above) 225.

EU directives on labour migration and the provisions of the Convention seem to have a different scope and purpose. In fact, the adoption of *ad hoc* directives shows how EU legislation on labour migration is aimed at regulating certain specific occurrences in the EU labour market, yet leaving EU member states the prerogative to determine the number of migrant workers admitted to their territories. Conversely, being a human rights treaty, the Convention aims to establish a set of rights pertaining to migrant workers as such.[38]

2.4 Balancing states' sovereignty and migrant workers' rights

The trade-off between the management of international labour migration and the respect for migrant workers' human rights on the one hand and the consideration for states' sovereignty on the other hand is the *fil rouge* of this section of the present analysis.

Clearly, the Convention does not envisage any specific procedure regarding the admission of migrant workers, nor does it create any direct obligation on state parties to welcome migrant workers.[39] This is made explicit by article 79, stating that the Convention does not impair the right of each state party to establish the criteria governing admission of migrant workers and members of their families and it is further reiterated by articles 34 and 35: the former emphasises migrants' obligation to comply with 'laws and regulations', including those on administrative status, while the latter explicitly rejects any right to regularisation.

Matters of entry, transit, stay, return and regularisation are sensitive issues that relate to states' sovereignty and to their power to admit or refuse entry to their territory. Nevertheless, the Convention takes significant steps, particularly encouraging the promotion of 'sound and equitable conditions for international migration'[40] by reiterating general obligations and rights and tailoring them to the specific reality of migrant workers. Furthermore, article 69 may represent an effective tool with which to prompt member states to pursue avenues to further protect the rights of migrant workers, especially those belonging to particularly vulnerable groups of migrant workers. As this provision requires states to 'take appropriate measures' to ensure that the situation of irregularity does not continue,[41] the Convention requires states to undertake suitable measures related to entry and stay of TCNs, the latter being the category of migrant workers who could find themselves in a situation of irregularity within the EU. As pointed out by Ryan, the Committee on Migrant Workers (CMW)

38 E MacDonald & R Cholewinski (n 2 above) 74.
39 D'Auchamp (n 36 above) 18.
40 Art 35.
41 Art 69(1).

has made clear the potential of the Convention in relation to regularisation and thus, to a broader extent, to entry and stay conditions.[42]

3 Health and social security rights of migrant workers and members of their families

As explained above, the extent and nature of the rights granted by the ICRMW varies according to the categories of migrant workers concerned. The present section will first explore the Convention's provisions related to social security and health rights; and subsequently put them in the context of other existing international and regional mechanisms.

3.1 The Convention's health and social security rights system

3.1.1 All migrant workers regardless of administrative status

Article 27 of the Convention recognises the right to social security for all migrant workers, on an equal basis with the nationals of the state of employment. In line with the general non-discrimination clause in article 7, states bear the burden of proof for any different treatment of migrant workers.[43] Notwithstanding this general provision, the CMW has found multiple vulnerabilities arising from migrant workers' life realities. Migrant domestic workers, for example, are often excluded from national social security systems.[44] The Committee has noted that the:

> [L]ack of social security benefits and of gender-sensitive health care coverage further increases the vulnerability of migrant domestic workers and their dependence on their employers.[45]

The Committee further clarified that wherever migrant workers are granted benefits in domestic legislation, a deprivation of these benefits merely due to a lack of a reciprocity agreement between states is not possible.[46] However, article 27(2) acknowledges that the right to social security for migrant workers may not exist in some national legislation.[47] In this case, migrant workers should be entitled to reimbursement of the amounts they contributed to the national social security system while working in the country.[48] Seeking to expand the protection of migrant workers, the Committee interprets widely the notion of 'social security' in

42 Ryan (n 26 above).
43 General Comment 2 on the rights of migrant workers in an irregular situation, CMW (28 August 2013), CMW/C/GC/2 (2013) (CMW GC 2) para 67.
44 General Comment 1 on migrant domestic workers, CMW (23 February 2011), CMW/C/GC/1 (2011) (CMW GC 1) para 19.
45 CMW GC 1 para 24.
46 CMW GC 2 para 68.
47 D'Auchamp (n 36 above) 32.
48 CMW GC 2 para 69.

order to include 'social insurance' and 'existing non-contributory social benefits'[49] or even a right to 'emergency social security' in cases of extreme poverty and vulnerability.[50]

As regards the right to medical care, it is restricted to urgent cases.[51] However, interpreting this provision with provisions in some of the other core human rights instruments,[52] the Committee attributes broader obligations to state parties, encompassing primary health care, immunisation against major infectious diseases and emergency obstetric care for migrant women, amongst others.[53]

The mere fact of being in an irregular situation should not impede access to medical care for migrant workers.[54] Elaborating on this provision, the Committee makes a further distinction between health care provisions and immigration control, discouraging states from requiring medical records of migrant workers in an irregular situation or 'conducting immigration enforcement operations on or near facilities providing medical care'.[55] By making this suggestion, the Committee very directly addresses states' immigration control practices and the *de facto* obstacles capable of impairing the enjoyment of rights granted to migrant workers in an irregular situation.

3.1.2 Migrant workers in a regular situation

A more robust set of rights is granted to migrants in a regular migration status.[56] Regarding access to social and health services, equality of treatment with nationals of the state of employment is guaranteed, 'provided that the requirements for participation in the respective schemes are met'.[57] Some additional social security rights, such as protection against dismissal, unemployment benefits and access to public work schemes, are granted by article 54(1).

Moreover, the right to access to social and health services[58] applies equally to all categories of documented migrant workers mentioned in the Convention: frontier, seasonal, itinerant, project-tied, specified-

49 CMW GC 2 para 70.
50 CMW GC 2 para 71.
51 ICRMW art 28.
52 International Covenant on Economic, Social and Cultural Rights, GA (16 December 1966) (CESCR) art 12 & Convention on the Rights of the Child, GA (20 November 1989) (CRC) art 24.
53 CMW GC 2 para 72.
54 ICRMW art 28.
55 CMW GC 2 para 74.
56 L Nessel 'Human dignity or state sovereignty? The roadblocks to full realization of the UN Migrant Workers Convention' C in V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014) 334.
57 ICRMW art 45(1)(c).
58 Art 43(1)(e) & 45(1)(c).

employment and self-employed migrant workers.[59] In relation to project-tied workers, particular emphasis is placed on state responsibility for ensuring their protection through at least one social-security system, either that of the state of origin or the state of temporary residence.[60]

3.2 The international human rights framework on health and social security

The Committee has stated that 'a State's obligation under the Convention must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party'.[61] Following this, there exists a wide range of relevant provisions in different international legal documents, including several of the other core UN human rights instruments,[62] some conventions of the International Labour Organisation (ILO)[63] and a number of regional instruments, for example in Europe. In addition to these international legal instruments and the respective UN treaty bodies,[64] there are specific UN charter-based procedures[65] aimed at the protection of the rights of migrant workers.

3.2.1 UN legal instruments

CESCR in article 9 provides for the right of everyone to social security, including social insurance. This provision has been interpreted by the UN Committee on Economic, Social and Cultural rights (Committee on ESCR) as including 'refugees, asylum-seekers, internally displaced persons, returnees, non-nationals ...'[66] Furthermore, especially for 'migrant workers who have contributed to a social security scheme', the Committee on ESCR suggests that they should be able either to benefit from that contribution or retrieve it, if they leave the country.[67]

The right to the highest attainable standard of health is covered in article 12 CESCR. In this context the Committee on ESCR has affirmed that states are

59 ICRMW arts 57-63.
60 ICRMW art 61(3).
61 CMW GC 2, para 7.
62 CESCR; CRC; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA (18 December 1979); and International Convention on the Elimination of All Forms of Racial Discrimination, GA (21 December 1965) (CERD).
63 ILO Conventions Nos 97 & 118.
64 D Weissbrodt & J Rhodes 'United Nations treaty bodies and migrant workers' in V Chetail & C Bauloz (eds) *Research handbook on international law and migration* (2014).
65 Eg the 5/1 procedure, the UN Special Rapporteur on the human rights of migrants and the UPR; see Weissbrodt & Rhodes (n 64 above) 305.
66 Committee on ESCR GC 19 para 31.
67 Committee on ESCR GC 19 para 36.

> under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services.[68]

Furthermore, the Committee on ESCR interprets the notion of 'other status', which appears at the end of the non-discrimination clause, as including 'non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'.[69] While the above interpretations might seem to be broadening the scope of the respective articles, the general notion of obligations under CESCR and their progressive realisation clause applies throughout,[70] potentially rendering the protection afforded to migrant workers, under CESCR, relatively weak and dependent on each state's capacities.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in article 1(2) provides 'for the possibility of differentiating between citizens and non-citizens'.[71] However, the Committee on the Elimination of Racial Discrimination (CERD Committee) extends states' obligations so as to include the removal of 'obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health'.[72] The obligation on state parties to CERD to combat discrimination against non-citizens, as interpreted by the CERD Committee, requires the active removal of obstacles, thereby going beyond the view of the Committee on ESCR that CESCR requires states to refrain from limiting equal access to health care.

Identifying women as a particularly vulnerable group, CEDAW protects women's right to health care under article 12. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) interprets this provision to require states to give 'special attention to the health needs and rights of women belonging also to vulnerable and disadvantaged groups, such as migrant women'.[73] Being arguably one of the most advanced interpretations given by this Committee, General Recommendation 26 on women migrant workers[74] 'has essentially recast

68 Committee on ESCR GC 14 para 34; see also De Guchteneire & Pécoud (n 3 above) 127. Please note that the authors of the present chapter disagree with the wording of this quote with respect to 'illegal immigrants'. We are of the firm belief that no individual is ever as such 'illegal'. More politically correct and legally accurate terms include 'undocumented migrants' and 'migrants in an irregular situation'.

69 Committee on ESCR GC 20 para 30; see also Weissbrodt & Rhodes (n 64 above) 320.

70 'Progressive realisation' under CESCR obliges states to, to the maximum of their available resources, comply with CESCR provisions. Although complemented by the non-retrogression clause, CESCR obligations on state parties remain relatively weak in comparison to the other core UN human rights treaties.

71 CERD Committee GC 30 para 1.

72 CERD Committee GC 30 para 29.

73 Weissbrodt & Rhodes (n 64 above) 324; see also CEDAW GC 24 para 6.

74 CEDAW Committee GC 26.

the CEDAW as a second Migrant Workers Convention that highlights protection that women migrant workers require due to their status as migrants and their gender'.[75]

Protecting another particularly vulnerable group, namely children, CRC in article 24 ensures the right of every child to the 'enjoyment of the highest attainable standard of health'. According to the Committee on the Rights of the Child (CRC Committee), states should pay close attention to vulnerable children and respect the principle of non-discrimination when formulating health care and education policies:[76] 'This includes girls, children living in poverty ... children from migrant families ... refugee and asylumseeking children'.[77] This complements the ICRMW insofar as it specifically mentions children. The vulnerability of migrant children in relation to health issues has been stressed several times by the CRC Committee.[78] Furthermore, the right of every child to benefit from social security, including social insurance, is protected under article 26 CRC, where the wording of the article – 'every child' – implies the inclusion of migrant children.

In addition to the core UN human rights treaties, the ILO, with its main goal being the protection of workers around the world, provides for protection of migrant workers through its own conventions.[79]

3.2.2 Regional legal instruments on health and social security rights

References to social security and health rights for migrant workers can be found in several regional human rights instruments: for example article 9 (right to social security) and article 10 (right to health for everyone) of the Additional Protocol to the American Convention on Human Rights (ACHR) in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), and article 16 (right to enjoy physical and mental health) of the African Charter on Human and Peoples' Rights (ACHPR).

This section focuses, however, on the system of protection in place in the CoE as well as in the EU. The former is covered by the ESC and the latter by the EU Charter on Fundamental Rights. Whilst extensively providing for social security and health rights, the ESC has very limited application. There is, however, a landmark decision of the European Committee of Social Rights (ECSR), which found a violation of the right of children and young persons to social, legal and economic protection.[80]

75 Weissbrodt & Rhodes (n 64 above) 325.
76 Weissbrodt & Rhodes (n 64 above) 328; see also CRC Committee GC 7 para 24.
77 CRC Committee GC 7 para 24.
78 CRC Committee GCs 3, 6 & 7.
79 Eg ILO Conventions Nos 97, 118 and 143; for a more detailed account of the protection provided by ILO Conventions please see R Cholewinski's contribution in the present volume.
80 ESC art 17(1)(a).

Specifically addressing the right to have the health care these children need, the case concerned French national measures limiting the access of children of migrants in an irregular situation to health care provisions.[81] In this context, the ECSR held that 'legislation or practice that denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter'.[82]

At the EU level, the EU Charter recognises in article 34(2) an entitlement to 'social security benefits and social advantages' for those residing and moving legally within the EU. Article 35 acknowledges the right to health care for all, without distinction regarding migration or residence status and in a much broader way than in article 28 ICRMW, covering even preventive health care. Furthermore, a number of EU directives exist, providing, for instance, a right of documented migrants to social security entitlements,[83] a right to a healthy workplace and social security for highly skilled migrants[84] and documented third-country nationals employed seasonally;[85] and, in the only directive addressing undocumented migrants' rights, a right to emergency health care, in the context of returns procedures.[86]

Summing up, this section provided an overview of other applicable provisions on migrant workers' health and social security rights in international and European law. As shown above, whilst all major international human rights documents arguably contain relevant sets of rights, it is usually the respective supervisory committees' interpretations, based on equal treatment and non-discrimination clauses that extend these rights to refugees, asylum-seekers and migrants. In light of the above, it can be said that the Convention, addressing directly migrant workers and their families, notably enhances protection, in combination with the interpretative work of the Committee, which is displaying an acute appreciation of the life realities of migrant workers, especially those with cumulative vulnerabilities. The specific mandate the Committee has, with respect to migrant workers and their families, will always have an added benefit when dealing with such specific social and legal phenomena as

81 De Guchteneire & Pécoud (n 3 above) 379; *International Federation for Human Rights (FIDH) v France* (8 September 2004) ECSR, Complaint No 14/2003.

82 *FIDH* (n 81 above) para 32.

83 Art 11(1)(d) Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, EC (25 November 2003), 2003/109/EC (2003).

84 Art 14(1)(a) & (e) Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, EC (25 May 2009), 2009/50/EC (2009).

85 Art 23(1)(a) & (d) Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues To Europe, EU (6 April 2016), COM/2016/0197.

86 Arts 14(1)(b) & 16(3) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, EC (16 December 2008), 2008/115/EC (2008).

labour migration. A number of examples above illustrate how the Committee has applied provisions to migrant workers' realities: highlighting domestic migrant workers' exclusions from social security, elaborating extensively on irregularity and health rights, and speaking up on the emergency healthcare provision, which is to be extended beyond the mere text. This leads to the conclusion that the added benefit very much lies in the mandate of the Committee and its understanding of the Convention as an inclusive, non-discriminatory human rights instrument.

4 Realising convention rights: Access to justice

The Convention offers a comprehensive system of interconnected rights of migrant workers and their families, some areas of which have been highlighted above, and requires state parties to establish a corresponding legal framework. It thus implicitly covers the first two requirements for access to justice. However without a further core element of access to justice, namely the right to an effective remedy, the *de facto* realisation of human rights, including those tailored to the reality of migrant workers, will not be possible. Succinctly put: '[f]or rights to have meaning, effective remedies must be available to redress violations.'[87] In the context of marginalised groups of society, who *per definitionem* are more prone to human rights violations,[88] and traditionally face higher obstacles to access to justice, this is all the more important. A prime example of this is the Committee's General Comment on migrant domestic workers. Acknowledging the multiple vulnerabilities faced by this particular group, the Committee noted that migrant domestic workers are often unable to seek remedies for violations by employers. This is particularly difficult or even impossible once people have left the country of employment, be it voluntarily, when fleeing abusive work relationships,[89] or by deportation. The General Comment on migrant workers in an irregular status underlines again the problem of multiple vulnerabilities and equally reflects the Committee's holistic approach to migrant workers' life realities and interconnected human rights. As such, access to justice for irregular migrant workers is considered to be limited as a consequence of their constant fear of being reported to authorities and subsequently deported, which in turn leaves them more vulnerable to exploitation and abuse.[90] Similar to the other core international human rights treaties, the Convention's remedy system is understood as being twofold: first, the Convention requires state parties to provide for a system of effective remedy on the national level (article 83), and second it gives competence

87 CRC Committee GC 5 para 24.
88 Eg CMW GC 1, para 7, mentioning migrant domestic workers being at heightened risk of abuse due to vulnerability based on their dependence and isolation, and the mention of women domestic workers facing even higher risks due to issues such as gender-based violence, or irregular migrants.
89 CMW GC 1 para 17.
90 CMW GC 2 para 2.

to the CMW to act as a remedy system on the international level (article 77).

4.1 Access to an effective remedy on the national level

The ICRMW prescribes in article 83 the right to an effective remedy. This right to a remedy should be in place irrespective of whether or not a violation of the Convention provision was committed by persons in an official capacity. The respective claims should be reviewed by a competent judicial, administrative, legislative or other authority provided for by law, thus indicating the existence of a correlating duty to establish a legal system, including institutions, that will be liable to deal with such claims. The Committee has noted that ideally the authority dealing with remedies should be a court.[91] State parties further should 'develop the possibilities of judicial remedy'.[92] Competent authorities should further ensure that remedies then are enforced.[93] To ensure access to justice for example for migrant domestic workers, the Committee has suggested that states designate a domestic workers' ombudsperson and has advised opening legal avenues of redress against employers who enjoy diplomatic immunity, as well as access to courts and legal mechanisms without having to fear consequently being deported;[94] thus taking into account the realities of migrant domestic workers who face abuse of their human rights and seek justice.

Vital to access to a remedy in practice is the general principle of non-discrimination as provided for in article 7 of the Convention. With respect to undocumented migrants, this was reiterated in the Inter-American Commission on Human Rights's (IAm Comm of HR) Advisory Opinion 18,[95] arguably the most inclusive account of the human rights of undocumented migrant workers. Whilst provisions of non-discrimination are, on the one hand, standard in international treaties such as the ICRMW, and on the other hand considered non-exhaustive as regards the grounds for discrimination enumerated, it is 'worth noting that the list in the Convention is broader than those found in other human rights conventions'[96] such as, for example, the ICCPR and CESCR. The CMW has acknowledged the special vulnerability of migrant domestic workers. The difficulties they face in seeking redress for violations of, for instance, their labour rights or other violations suffered as a result of an abusive work

91 CMW GC 2 para 53.
92 Art 83(b).
93 Art 83(c).
94 CMW GC 1 paras 49 and 50.
95 Advisory opinion on juridical condition and rights of the undocumented migrants, IACrtHR (17 September 2003) OC-18/03 (2003) para 126; in particular with respect to the principle of non-discrimination see also the submission of Mexico reproduced in part in Advisory Opinion 18.
96 The International Convention on Migrant Workers and its Committee, OHCHR, Fact Sheet 24 (2005) 5.

relationship are compounded by national provisions, which limit avenues for legal redress, or explicitly exclude domestic migrant workers.[97] Another scenario which *de facto* restricts access to domestic remedies for migrant domestic workers is the risk of facing deportation in case employment disputes are initiated,[98] thus highlighting the link between employment rights and questions of entry and stay as addressed above.

The Convention's wording of the obligation to provide for an effective remedy in relation to similar provisions in other international human rights treaties requires some scrutiny. Though most treaties provide for an effective remedy either explicitly or through interpretation by the respective treaty body, the extent of the remedy required differs. While the ICCPR has exactly the same wording as the ICRMW,[99] other treaties are more restrictive. CEDAW for example provides in article 2(b) that legislative or other measures and, if necessary, a sanctioning system should be adopted to prohibit all discrimination against women. Further, effective legal protection of women against discrimination should be established on an equal basis with men, and guaranteed through national tribunals and other bodies.[100] Article 6 of CERD provides for the obligation to ensure effective remedies to anyone in the jurisdiction of a state party, including the 'right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of discriminatory acts falling under the convention'.[101] When it comes to CESCR there is no explicit mention of an obligation to establish a system of or right to remedies for rights violations. Nonetheless, it is possible to infer from article 2 the existence of a right to an effective remedy, which should be put into place by state parties to CESCR.[102] Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on the other hand is very much specifically adjusted to the rights of victims of acts of torture, requiring that national legal systems ensure that each victim 'obtains redress and has an enforceable right to fair and adequate compensation'.[103] The Committee against Torture (CAT Committee) has, in paragraph 2 of its General Comment 3 on the implementation of article 14, explicitly stated that the term 'redress' as used in article 14 encompasses both the 'concepts of "effective remedy" and "reparation"'.

Effective remedy rights and obligations in regional human rights treaties are similar to those on the international level. The ACHR for

97 CMW GC 1 para 18.
98 CMW GC 1 paras 21 & 26(c).
99 ICCPR art 2(3).
100 CEDAW art 2(c).
101 CERD art 6.
102 See eg Charter Committee on Poverty Issues 'Right to effective remedies. Review of Canada's Fourth and Fifth Periodic Reports under the ICESCR' (May 2006) 33, according to which failure to guarantee effective remedies constitutes a violation of CESCR art 2.
103 CAT art 14(1).

example contains a very inclusive 'right to judicial protection' in its article 25, which should be 'simple and prompt … or any other effective recourse'.[104] States have a correlating duty to ensure this right, to develop systems of judicial protection and to enforce remedies when granted.[105] The Inter-American Court of Human Rights (IACHR) has repeatedly highlighted the importance of this guarantee being 'one of the basic mainstays, not only of the American Convention, but also of the rule of law in a democratic society'.[106]

The European Convention on Human Rights (ECHR) equally provides for a right to an effective remedy in article 13 ECHR. This provision is, however, narrower in scope than article 25 ACHR for two reasons. First, the understanding of remedy in the Inter-American system is 'strictly *judicial*',[107] meaning recourse to a court or tribunal, whereas article 13 ECHR demands an 'effective remedy before a national authority'.[108] Provided safeguards of independence, impartiality and procedure are in place, national authorities able to offer effective remedies are not limited to judicial bodies but may also be, for example, quasi-judicial or administrative bodies.[109] Second, the Inter-American understanding of a remedy is that of an autonomous right, making it independent of the violation of a substantive right under the ACHR; the right to recourse in fact is extended, spanning also to 'protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned'.[110] Article 13 ECHR, on the contrary, is linked to the victim having an 'arguable' claim regarding a violation of one of the substantive provisions as protected under the ECHR.[111]

The ACHPR on the other hand does not *expressis verbis* provide for a right to effective remedy, yet the jurisprudence of the African Commission has arguably developed this right in practice.[112] In addition, article 7(1) ACHPR sets forth that every individual has the 'right to have his cause heard', including the right to appeal 'to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.

Summing up, the obligations under the ICRMW at times duplicate what is provided for at the national and regional level with respect to

104 ACHR art 25(1).
105 ACHR art 25(2).
106 *Maritza Urrutia v Guatemala* IACHR (27 November 2003) Ser C/No 103, para 117; *Ivcher-Bronstein v Peru* IACHR (6 February 2001) para 135.
107 L Burgorgue-Larsen & A Ubeda De Torres *The Inter-American Court of Human Rights: Case law and commentary* (2011) 678.
108 Burgorgue-Larsen & Ubeda De Torres (n 107 above) 679.
109 Burgorgue-Larsen & Ubeda De Torres (n 107 above) 679, n 12.
110 Burgorgue-Larsen & Ubeda De Torres (n 107 above) 680-681.
111 O de Schutter *International human rights law* (2014) 813.
112 GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442.

access to justice and effective remedy requirements. However, in situations where its substantive provisions offer more protection than other instruments, as well as given that the Convention is the only international human rights treaty specifically addressing the human rights of migrant workers and their families, the provision is both novel and vital. This short comparative analysis demonstrates first, the overarching importance of the right to an effective remedy and correlative duties, and second the comprehensive way in which the Convention provides for such a right. This becomes ever more visible from a recent report on severe labour exploitation, where it was found that while access to justice is important to victims, being 'able to stay and to make a living'[113] is the highest priority for migrant workers from third countries as well as those from within the EU. Closely intertwined with this prioritisation is the main reason for victims not reporting exploitation in the work place: fear of having to leave the country.[114] In practice, this means that victims of human rights violations will frequently not seek redress for violations of their rights, report abuse or engage in any kind of activity that would put them at 'risk' of interaction with national authorities. Thus, fear of removal from the country of employment frequently undermines the realisation of human rights, and may for instance result in victims deciding not to seek remedies for abuses, or not to seek medical care or support notwithstanding a need to access medical services. This highlights the need for a comprehensive, integrated approach to migrants' rights which takes into account the entire reality of migrant workers' lives and includes effective enforcement mechanisms to ensure that rights are guaranteed in practice.

4.2 Access to international enforcement mechanisms

Another important provision in this context is article 77, providing for the competence of the CMW to receive and consider communications from individuals who claim to have suffered violation of their rights as set out in the Convention. The provision however requires ten state parties to accept the Committee's competence under article 77 in order for the individual complaint mechanism to enter into force. So far, however, only four states have submitted declarations of the sort.[115]

This though does not mean that migrant workers do not currently see their rights recognised in the work of other UN treaty bodies. On the contrary, the individual complaints mechanism under CEDAW is accessible for documented and undocumented women migrant workers,

113 Fundamental Rights Agency (FRA) 'Severe labour exploitation. Workers moving within or into the EU' (2015) 117.
114 FRA (n 113 above) 75.
115 By January 2017, El Salvador, Guatemala, Mexico and Uruguay had made declarations recognising the competence of the Committee to receive communications from or on behalf of individuals subject to their jurisdiction claiming violation of their individual rights as established by the Convention.

imposing relatively wide obligations on state parties. The CEDAW Committee reiterated this point in a decision in July 2013, stating that the:

> *[O]bligations of States parties [should be] applied without discrimination* both to citizens and non-citizens, including refugees, asylum seekers, *migrant workers* and stateless persons, *within their territory or effective control, even if not situated within the territory.*[116]

A tangible example of such state obligations is CEDAW's guarantee to expand domestic labour protection to women migrant workers which, according to Hainsfurther, will necessarily have a bearing on labour protection afforded to undocumented women migrant workers. While states have no obligation to provide employment for undocumented women migrant workers, CEDAW read in conjunction with Advisory Opinion 18, obliges states to, once they have entered into employment, guarantee labour rights.[117] CEDAW applies to rights violations directly attributable to states as well as those resulting from acts of private actors, thus also including for instance recruitment agencies and private employers.[118] Consequently, CEDAW offers safeguards for women migrant workers once a discriminatory element exists,[119] be it through, inter alia, abusive private acts, states' failure to monitor recruitment and employment, or the denial of access to justice.[120]

In addition to the CEDAW Committee's General Recommendation 26 on Women Migrant Workers adopted in 2008, as well as its numerous concluding observations dealing with the rights of women migrant workers,[121] several UN treaty bodies have explicitly mentioned migrant workers in their concluding observations; for example with respect to the practice of withholding workers' identity documents, such as the HRC,[122] the Committee on ESCR,[123] as well as the CERD Committee.[124] As regards individual complaints, treaty bodies less explicitly use the terminology 'migrant workers', though they do address their rights when breached. Examples include the CERD Committee, which found a violation of workplace rights in a case concerning dismissal of a pregnant

116 *YW v Denmark*, CEDAW Committee (2 March 2015) Communication No 51/2013 (emphasis added).
117 See J Hainsfurther 'A right-based approach: Using CEDAW to protect the human rights of migrant workers' (2008-2009) 24 American University International Law Review 844J
118 Hainsfurther (n 117 above) 873.
119 Hainsfurther (n 117 above) 859.
120 Hainsfurther (n 117 above) 874 .
121 Hainsfurther (n 117 above) 860.
122 Concluding Observations on the Republic of Korea, HRC (28 November 2006), UN Doc CCPR/C/KOR/CO/3 (2006) para 12; Concluding Observations on Thailand, HRC (8 July 2005), UN Doc CCPR/CO/84/THA (2005) para 23.
123 Concluding Observations on Kuwait, Committee on ESCR (7 June 2004), UN Doc E/C.12/1/Add.98 (2004) para 17.
124 Concluding Observations on Lebanon, CERD Committee (1998) UN Doc A/53/18 paras 175 & 184; Concluding Observations on Italy, CERD Committee (16 May 2008), UN Doc CERD/C/ITA/CO/15 (2008) para 17.

woman migrant worker,[125] and the CAT Committee, which has, in a case against Sweden, paid attention to several steps of the labour migration and subsequent asylum process of a migrant worker and his family;[126] as well as a similar communication of the HRC concerning a variety of rights violations of members of a stateless family of Palestinian origin who, having lived and worked in Libya, alleged to have faced discriminatory treatment and abuse due to their ethnic and migration status.[127]

The present use of international fora for the enforcement of migrant workers' rights shows two things: first, that there is a need for an international body that represents an additional layer of protection once national institutions and guarantees have proven to be ineffective or even absent; and second, that currently migrant workers' rights are being dealt with via UN treaty bodies other than the CMW. Consequently, in the occurrence of a violation, victims will try to access a competent body beyond the national level to seek access to justice for rights violations.

In this light, the entry into force of the Convention's individual complaint mechanism would be beneficial both to rights holders and states alike. A single competent body on the international level with a mandate to receive individual communications will create greater legal certainty for all: the migrant workers who will naturally be drawn to an institution that has specific expertise to deal with rights abuses suffered by him or her; as well as for concerned states, who will receive clear, consistent guidelines and recommendations, which, in turn, will make possible adequate, rights-based policy responses.

5 Conclusion

The need to assess whether and to what extent the Convention has a value per se has arisen from the criticism that has been made regarding its worth and usefulness in the context of the entire system applicable to the protection of migrant workers' rights.[128]

The analysis carried out in the previous sections has shed light on the background to this debate and has provided arguments to support the proposition that not only has the Convention a value in itself, but it also has an added value that acquires even greater relevance when compared to other established international and regional instruments.

125 *Yilmaz-Dogan v the Netherlands* CERD Committee (29 September 1988) Communication No 1/1984.
126 *MAMA et al v Swede*n CAT Committee (23 May 2012) Communication No 391/2009.
127 *AMH El Hojouj JumNo 391/2 v Libya* HCR (21 July 2014) Communication No 1958/2010.
128 Ryan (n 26 above) 492.

As a matter of fact, the varied range of rights covered in this contribution shows that while each cluster of human rights has been enshrined as duties and rights in other existing provisions of international and regional human rights law, the Convention goes a step further. Notably, it is unique in the sense that it sets up a comprehensive system which does not merely link in different categories of rights, such as civil and political or economic, social and cultural rights, but rather it addresses a specific group which no other international human rights treaty deals with exclusively – the migrant worker and his or her family.

This in itself has an added value, namely, the creation of a coherent mechanism in order to protect a broad category of migrants, thus acknowledging its peculiar needs and inherent vulnerability. While some of the articles in the Convention may duplicate existing rights provisions, others complement the rights enshrined in other human rights instruments. The comprehensive and inclusive nature of the Convention results in a situation where first, the human rights of migrant workers are highlighted, and second, where states explicitly have corresponding duties.

Further, the detailed nature of the Convention has to be emphasised. Containing 93 articles, this document is the longest of the ten core international human rights instruments.[129] Whereas this may be raised as an obstacle to ratification in the sense that it would make implementation of the treaty challenging as it describes individuals' rights and correlative state duties, it simultaneously creates a balance between these two poles in a twofold way: First, the focus of the Convention is on the rights and welfare of migrant workers and their families, specifically taking a holistic view of the migrant experience, particularly as it covers all stages of the migration process and stresses the value of work as such as the driver of migration. Second, the Convention acknowledges the diversity of national legal frameworks and grants states a certain margin of appreciation, for instance by acknowledging the role of national legislation on certain issues and by phrasing some of its provisions as recommendations rather than obligations.

All these elements considered together contribute to determine the ultimate added value of the Convention that, in a nutshell, can be described as follows: a compilation of existing rights of migrant workers under international human rights law, welded together with a number of additional guarantees as necessitated by the specific vulnerability of migrant workers,[130] and supported by a specific institutional framework,

129 A Desmond 'The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 45.

130 D'Auchamp (n 36 above) 11.

to form the most holistic international human rights catalogue applicable to anyone leaving their country of origin to work in another country.

Acknowledging and upholding such value appears particularly relevant today. First, mobility, particularly for reasons of carrying out remunerated activities, continues to rise in our globalised and conflict-stricken world. Second, and paradoxically so, this comes at a time when migrants' rights are neglected and migration is very often addressed only as a 'problem' rather than an opportunity – both for states and individuals. It is this inherent added value that, after nearly 30 years, makes the Convention all the more worthy of the support and attention of civil society, academia and the political world.