

THE UN ICRMW AND THE GCM: REDUNDANT DUPLICATION OR BALANCED INTEGRATION? RECOMMENDATIONS FOR VIETNAM*

Thuy Anh Nguyen¹

The Global Compact for Safe, Orderly and Regular Migration (GCM) and the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) are migration labour field documents. While the ICRMW is a hard law which binds party members, the GCM is a broadly attractive soft law. I use the overlap between the GCM and the ICRMW to illustrate how the transfer to what is basically an overt acceptance of soft law as the preferred choice for addressing migrant rights is largely consistent with states' past treatment of migrant rights. This paper undertakes a special analysis of how soft law and hard law could be redundant repetition or smooth symbiosis by highlighting some signs suggesting the advantages and disadvantages of these two documents. Vietnam exports a huge volume of migrant workers, almost all of whom live in Europe and other Asian countries. Ratification of the ICRMW and taking part in the process of GCM are significant for the protection of Vietnamese migrants' rights. This paper includes three parts, which (i) introduce the two documents, (ii) compare the ICRMW and GCM and describe their benefits and drawbacks, and (iii) suggest which document is suitable for the Vietnamese framework.

Keywords

Migrant worker, GCM, ICRMW, labour, Vietnam

1. Introduction

The comprehensive study of Alan Desmond “A new dawn for the human rights of international migrants? Protection of migrants’ rights in light of the UN’s SDGs and Global Compact for Migration” has pointed out the similarities and differences between the two legal documents GCM and ICRMW (Desmond 2020). Partly based on the findings of Desmond’s study, the author of this paper aims to analyse how the GCM and ICRMW have worked to protect migrant workers’ rights in Vietnam. In particular, in the context of Vietnam’s pursuit of sustainable labour, the protection of migrant workers’ rights is a very general issue in Vietnam. As of 1 January 2021, Vietnam has acceded to 25 labour rights conventions of the International Labour Organization (ILO), including 7/8 fundamental conventions. The most recent labour-related convention is ILO Convention 105 on the abolition of forced labour. However, in terms of upholding the rights of migrant workers, Vietnam has not taken significant steps to ratify treaties or sign bilateral agreements. The author focuses on the ICRMW Convention in the context

* DOI 10.21868/PGnG.2023.2.6.

¹ Thuy Anh Nguyen, PhD student, Marton Géza Doctoral School of Legal Studies, University of Debrecen.

of evaluating the proposal to ratify conventions on migrant workers. Furthermore, by evaluating the words and actions related to the GCM, the author is able to assess Vietnam's positive steps towards signing the ICRMW.

The GCM, endorsed by the UN General Assembly in December 2018, has been heralded as a milestone by the UN (Desmond 2020). While binding or “hard” law concerning relations between and among states comprises the rules of customary international law and treaties (Barrett 2020), the international arena has been home to a surge of “soft” law developments in recent decades (Basilien-Gainche 2020). Shaw (Shaw 2017, 85–88) indicated that important and convincing but eventually non-binding documents that are not subject to formal legal implementation are referred to as “soft law”. The acceptance of the need to make specific provisions for migrants in the international system of rights protection did ultimately generate a binding international treaty that would impose migrant-specific obligations on ratifying states. The ICRMW, however, failed to gain the same wide endorsement from the international community as other core human rights treaties (Desmond 2020). The paper begins with an analysis of the scope and objectives of the two documents on migrants’ rights at the international level. I then examine the argument as to why the GCM is supportive for the ICRMW. By outlining the overlap between the GCM and the ICRMW I explain how Vietnam approaches the Compact and the Treaty step by step.

2. GCM and the ICRMW: different but the same

The GCM covers all dimensions of international migration in a holistic and comprehensive manner. It is a non-binding document that respects states’ sovereign right to determine who enters and stays in their territory and demonstrates a commitment to international cooperation on migration. It presents a significant opportunity to improve the governance of migration, to address the challenges associated with today’s migration, and to strengthen the contribution of migrants and migration to sustainable development (IOM n.d.).

The GCM is framed consistently with Target 10.7 of the 2030 Agenda for Sustainable Development, in which member states committed to cooperate internationally to facilitate safe orderly, and regular migration, and its scope is defined in Annex II of the New York Declaration.² It is intended to:

- Address all aspects of international migration, including humanitarian, developmental, human rights-related, and other aspects;
- Make an important contribution to global governance and enhance coordination on international migration;
- Present a framework for comprehensive international cooperation on migrants and human mobility;
- Set out a range of actionable commitments, means of implementation, and a framework for follow-up and review among member states regarding international migration in all its dimensions;

² Resolution adopted by the General Assembly on 19 September 2016 to address the question of large movements of refugees and migrants.

- Be guided by the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda; and
- Be informed by the Declaration of the 2013 High-Level Dialogue on International Migration and Development.

The explicit incorporation of migration into global development policy marked by the adoption of the Sustainable Development Agenda in 2015 coincided with a migration and refugee “crisis” that fuelled the international community together under the auspices of the United Nations in 2016 (Piper 2017).

GCM maintains the long-standing and difficult distinction between migrants and refugees by noting that they are separate groups governed by separate legal frameworks despite acknowledging that refugees and migrants may share many common challenges and similar vulnerabilities and are entitled to the same universal human rights and fundamental freedoms (Crawley & Skleparis 2017). Motomura (Motomura 2020) indicated that the GCM is a strong endorsement of the status quo concerning states’ sovereign powers of migration control and the existing legal regimes. However, in addition to reflecting the status quo, the GCM also shows an obvious change in the protection of immigrant rights from the field of hard law to that of soft law.

The ICRMW is a United Nations multilateral treaty governing the protection of migrant workers and families. Adopted by consensus by the UN General Assembly in 1990, the UN ICRMW is one of the 10 core international human rights instruments and the most comprehensive international treaty in the field of migration and human rights. The overall structure and underlying rationale of the ICRMW are similar to those of the other core international human rights treaties adopted since the late 1970s (Desmond 2020).

Signed on 18 December 1990, it entered into force on 1 July 2003 after the threshold of 20 ratifying states was reached in March 2003. The Committee on Migrant Workers (CMW) monitors the implementation of the convention and is one of the seven UN-linked human rights treaty bodies. The convention applies as of October 2022 in 58 countries.

The ICRMW consists of nine parts: scope and definitions; non-discrimination with respect to rights; human rights of all migrant workers, other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation, Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families, Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families, Application of the Convention, General provisions and Final provisions. Like the Conventions on the Rights of the Child (CRC) (UN 1989) and Persons with Disabilities (CRPD) (UN 2006), the ICRMW takes the rights set out in the International Bill of Human Rights, namely the UDHR, ICCPR (UN 1966a), and ICESCR (UN 1966b) and codifies them in relation to a particularly vulnerable constituency, in this case, migrant workers and members of their families (Desmond 2020).

These documents refer to regulations about the rights of migrant workers and refugees with specific elements stemming from the disadvantages of foreign labour. The GCM was announced enthusiastically as a unique document with the support of countries all over the world. However, the GCM is not only one of the core international human rights instruments but also an important element of the international labour law

framework concerned with the rights of migrants. The international community, which spent 10 years negotiating the text of the ICRMW before adopting it in 1990, has proved remarkably reluctant to comply with the binding obligations in this treaty (Cholewinski 2020). This has made the ICRMW the single least successful of all the core UN human rights instruments (Desmond 2020).

However, none of the above alters the reality that the ICRMW is a statement of fundamental minimum standards of human rights protection to which all international migrants, regardless of their status, should be entitled. It is a detailed document that calls for cooperation between states (ICRMW, Arts. 45, 64, 65, 67, 68) and addresses every step of the migration process, from preparation for departure in the country of origin to travel through transit countries to entry and residence in the destination state and back to the country of origin (Desmond 2020). The GCM's claim to be "the first-ever UN global agreement on a common strategy to international migration in all its dimensions" is refuted by this information.

3. The balance of integration between ICRMW and GCM

3.1. Understanding ICRMW adoption

Although the original ideas for the ICRMW were motivated by worries about the violations of migrants' human rights, the Convention has its origins in labour protection. Indeed, some were of the view that there was no need for elaboration of a UN human rights treaty dedicated to migrant workers given the existence of the ILO, the specialised UN agency responsible for the world of work that had already adopted a number of migrant-specific conventions (Cholewinski 2020, 158). While the unhappiness of many developing countries with the ILO led to the choice of the UN as the venue for drafting what would become the ICRMW, the ILO provided input during the drafting process, and the Preamble to the ICRMW makes explicit reference to ILO experience, expertise, and conventions on migrant workers (Desmond 2020).

This naturally raises the issue of why, in 2018, the international community spent so much time, money, and effort negotiating and approving the GCM when there was already an internationally recognized framework for the human rights-compliant management of migration. Described as the best-kept secret in the UN (Cholewinski et al. 2009), the ICRMW was ignored by academic institutions as well as by governments. Lack of awareness of the ICRMW has been advanced as one of the reasons for its uniquely slow and low rate of ratification (Pécoud 2015).

By adopting a "hard-nosed" political-economic viewpoint, it may be possible to better comprehend why many states have ignored the ICRMW (Pécoud 2015). Therefore, the ICRMW is an example of how the best can be opposed to the beneficial. Insisting on providing a broad variety of protections to all migrants, as the ICRMW does, would deter states from allowing the admission of more migrants because of the expense that would be incurred by the destination state. Whether states expand their entry policies is therefore a restricted rights regime: limiting specific rights that generate net costs for the host state to admit more low-skilled migrant workers (Desmond 2020). However, it disregards the reality that the majority of the world's states are already bound by the rights enumerated in the ICRMW because they are widely guaranteed to

migrants by the more widely ratified human rights instruments.

3.2. The value GCM adds to ICRMW

The aforementioned potential for the ICRMW to be used as a lobbying tool amongst non-state parties may lead to the Convention's being ratified more widely. Because of the GCM's soft-law status, it has some advantages as a signal for migrants over the ICRMW. The level of public awareness of the GCM has already surpassed that of the ICRMW. This will increase states' engagement and compliance efforts (Desmond 2020). The GCM's adoption was made possible by the inclusive character of the discussions and negotiations that preceded it (GCM, para. 10; Kraly & Hovy 2020), and its implementation process has been made possible by the Compact's inclusion of a wide range of actors. The GCM contains a non-exhaustive list of implementation partners, including migrant, diaspora, and faith-based organizations; local communities; the private sector; academia; the media; and, most importantly, migrants themselves. This list of partners is included despite the fact that the review process for evaluating implementation progress is to be led by the state (GCM, paras. 44, 48).

If it is true that the parties' lack of awareness is one of the factors hindering the GCM's ratification, the GCM may address this problem. While some may see the GCM's review mechanisms as too soft to exert any real influence on state behaviour, there is potential for loud "naming and shaming" (Hafner-Burton 2008) to push some states into line with standards in the GCM. Using the GCM is more likely given its better levels of awareness. States will find it more difficult to ignore it in the same way that has been so detrimental to the ICRMW and, ultimately, migrants themselves because of its visibility, non-binding nature, and buy-in across a variety of stakeholders. Desmond (Desmond 2020) indicated that the ICRMW will have chances to be used in shaping the contours of compliance with the requirements of the newer agreement, despite the GCM's effective silence on the subject and the CMW's lack of a formal role in the review of the Compact.

Almost 55 state parties to the convention are located in the Global South, and recent years have seen South–South worker migration exceed South–North migration (IOM 2017, 6). The GCM implementation process provides a forum for states in the Global South to highlight the relevance of the ICRMW to non-state parties in the Global North, as has been occurring during the UN's universal periodic review procedure since it began operating in 2008. The content of the GCM agreement is quite clear that the purpose is to "protect the rights of migrant workers", which is similar to the purpose of the ICRMW. However, this compact does not directly mention the ICRMW. This serves as a "metaphorical reminder" to countries that signing the ICRMW is still important and should be considered further instead of remaining silent. At the time of ratification, many of the nations bound by the ICRMW were mainly states of origin, but this is no longer the case. This means that nations that are now important migrant transit and destination states are subject to the Convention's required minimum and are required to report on their compliance with these obligations in their submissions to the CMW, the treaty body that supervises how state parties are implementing the ICRMW (Desmond 2020).

A further potential advantage of the GCM over the ICRMW is its reflection of important developments since the ICRMW's adoption. The GCM considers the Internet and climate change among recent global concerns. It takes into account the gender and child-rights approaches that are absent from the ICRMW's text. In terms of its modernity, it is certainly true that the GCM goes beyond the ICRMW.³ Kraly and Hovy (Kraly & Hovy 2020) showed that countries need to welcome the impetus brought by the GCM's Objective 1.

While the GCM shows states' resistance to legally binding multilateral migration agreements, it also asks for ratification of relevant national agreements relating to international labour migration, further complicating the situation [GCM, para. 22(a)]. Similar to this, the Compact makes numerous recommendations for the conclusion of bilateral, regional, and multilateral agreements between states on a variety of topics [e.g. GCM, paras. 30(c), 34(c)], though it does not express a preference for hard law or soft law. Hard law and soft law interact and supplement each other. There is no formal barrier to interaction between the GCM and the ICRMW: the GCM also simultaneously calls for the ratification of relevant international instruments related to international labour migration. The GCM makes a huge number of recommendations for the conclusion of bilateral, regional, and multilateral agreements on a range of issues (Desmond 2020).

4. The overlap between hard law and soft law

The ICRMW and the GCM bear similarities in terms of scope, content, and maybe structure. They are both concerned with the protection of migration and seek to generate a rights-based framework for international migration. The acknowledgement in both documents of states' sovereign entitlement to determine their national migration policy and establish the criteria governing admission of migrants captures the tension at the centre of any discussion of migrants' rights between obligations to protect those rights and states' sovereign entitlement to control migration (Desmond 2020). Both documents focus on the distinction between refugees and economic migrants as a legal certainty (GCM, para. 4; ICRMW Art. 3) and between regular and irregular migrants (GCM Objectives 7, 8, 9, 10, and 13; ICRMW, Parts III–IV).

Although both documents clear up the distinction between regular and irregular migrants, this has been a source of misunderstanding, misconceptions, and misrepresentation. States have claimed a variety of justifications for not ratifying the ICRMW, among them the argument that it would limit their ability to control who is allowed to enter and stay in their territory (MacDonald & Cholewinski 2007). As with the ICRMW, a number of states claim that they would not endorse the Global Compact, as it could violate their sovereignty and force them to admit migrants (Ministry of Foreign Affairs and Trade of Hungary 2018). In light of the GCM's aim to dispel misinformation about migration, it is ironic that some states seem to have withdrawn their support in response to national misinformation campaigns that deployed the Compact to allay public anxiety about the loss of border control and impending

³ Cholewinski (Cholewinski, 2020) also argues that the GCM is considerably broader in scope than legally binding migration-specific instruments such as the ICRMW.

“invasions” of migrants. Given the many similarities between the GCM and the ICRMW, it is somewhat puzzling that there has been so little discussion of the ICRMW before, during, and after the GCM’s end. A footnote in the GCM cites the ICRMW and “the other fundamental international human rights treaties”, which are said to be the foundation of the GCM (GCM para. 2).

Because of some overlap in analysing the distinction between regular and irregular migrants, the GCM did not include actions toward the ICRMW. The nearly complete silence surrounding the ICRMW after the conclusion of the GCM is enigmatic. It is obvious that numerous states are more interested in endorsing a soft law document than the ICRMW, a hard law that is legally binding on state parties. The ICRMW is mentioned once in the GCM, cited in a footnote with “the other core international human rights treaties”, and it makes no recommendations at all. This differs from the New York Declaration, which called on states to consider ratifying the ICRMW. This very fact also provides part of the answer as to why the international community ignored the existence of this Convention.

5. The process of implementing ICRMW and GCM in Vietnam

Migrant workers in Vietnam are mainly export workers. Vietnam’s export workers are mainly in Malaysia, Taiwan, and Korea. In general, the above markets, although promising for Vietnamese workers, are only open to skilled workers. This is a big, globally competitive challenge for labour-sending countries like Vietnam. Therefore, there are still many illegal migrant workers due to insufficient conditions to meet the receiving country’s requirements, such as qualifications, language, etc.

The reality of labour exploitation and mistreatment still exists for migrant workers in the Association of Southeast Asian Nations (ASEAN), one of the important reasons being that many ASEAN countries, including labour-exporting countries, have not yet joined treaties of international protection for migrant workers. Among these, Vietnam has not joined the ICRMW. Vietnam has no motivation to ratify this convention.

On the other hand, Vietnam considers the GCM as an important step forward in international cooperation on migration. Faced with concerns about existing difficulties, challenges, and risks that are increasing due to the impact of the COVID-19 pandemic, Vietnam suggested that countries and international organizations develop a specific plan. Vietnam has taken specific actions: it has promulgated a law on Vietnamese workers working abroad under contracts, and the Prime Minister has promulgated a plan to implement the GCM from 2020 to 2030, put into use the National Data Centre on population and consular protection activities for migrants, and effectively implement projects supporting the sustainable reintegration of returning migrant women and their families.

6. Conclusion

In general, the GCM agreement has had relatively specific impacts on Vietnam, as noted above. From an international perspective, the GCM acts as a metaphorical tool in “lobbying” for countries that have not ratified the ICRMW. The fact that Vietnam has not yet fully taken concrete action to ratify the ICRMW is not expected to change for a

long time, as Vietnam has taken positive steps towards the GCM compact. Although some redundant duplicate fields remain, both documents have earned specific successes. While the ICRMW is a treaty with legally binding principles concerning some international migrants, the CMR, as a soft mechanism, exists within a wider public and attracts the attention of a range of states which are not members to the ICRMW.

However, as I mentioned above, the GCM is concerned that the child-rights approach in the frame of migration is unacceptable. While the GCM appears to actively oppose the use of immigration detention, by failing to mention it, it supports the continued use of child immigration detention. This places the GCM in conflict with the position expressed by the CMW and the Committee on the Rights of the Child that the immigration detention of children should be completely prohibited. In addition to the ICRMW, Vietnam should take steps to ratify labour conventions such as ILO Convention No. 97 on Migrant Workers, 1949 (Convention No. 97), ILO Convention No. 143 on Migrants in Abusive Environments and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (Convention No. 143). Accession to conventions on the protection of the rights of migrant workers will help to reduce illegal immigration, as workers will be more confident of their rights and will be more motivated to work on authorised routes.

References

- Barrett, K. (2020). Customary International Law. *Oxford Research Encyclopedia of International Studies* <https://doi.org/10.1093/acrefore/9780190846626.013.531>
- Basilien-Gainche, M.-L. (2020). International Migration Law. *International Journal of Refugee Law*, 32(3): 561–564. <https://doi.org/10.1093/ijrl/eeaa034>
- Cholewinski, R. (2020). The ILO and the Global Compact for Safe, Orderly and Regular Migration: Labour Migration, Decent Work and Implementation of the Compact with Specific Reference to the Arab States Region. *International Journal of Law in Context*, 16(3): 304–320. <https://doi.org/10.1017/S1744552320000336>
- Cholewinski, R., Guchteneire, P. de, Guchteneire, P. F. A. & Pecoud, A. (2009). *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*. Cambridge University Press
- Crawley H. & Skleparis D. (2017). Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's Migration Crisis. <https://www.europenowjournal.org/partners/secureu/resources-and-tools/refugees-migrants-neither-both-categorical-fetishism-and-the-politics-of-bounding-in-europes-migration-crisis/> [accessed January 5, 2024]
- Desmond, A. (2020). A New Dawn for the Human Rights of International Migrants? Protection of Migrants' Rights in Light of the UN's SDGs and Global Compact for Migration. *International Journal of Law in Context*, 16(3): 222–238. <https://doi.org/10.1017/S1744552320000282>

- Hafner-Burton, E. M. (2008). Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem. *International Organization*, 62(4): 689–716. <https://doi.org/10.1017/S0020818308080247>
- International Organisation for Migration (IOM) (2017). Factsheet, IOM's Global Migration. Data Analysis Centre.
- International Organisation for Migration (IOM) (n.d.). Global Compact for Migration <https://www.iom.int/global-compact-migration> [accessed December 28, 2023]
- Kraly, E. P. & Hovy, B. (2020). Data and Research to Inform Global Policy: The global Compact for Safe, Orderly and Regular Migration. *Comparative Migration Studies*, 8(1) <https://doi.org/10.1186/s40878-019-0166-y>
- MacDonald, E. & Cholewinski, R. (2007). The Migrant Workers Convention in Europe. Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; EU/EEA Perspectives. *Unesco Migration Studies*. <https://unesdoc.unesco.org/ark:/48223/pf0000152537> [accessed January 4, 2024]
- Ministry of Foreign Affairs and Trade of Hungary (2018). The UN Global Compact for Migration is Endangering the Security of the Hungarian People. <https://2015-2019.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-un-global-compact-for-migration-is-endangering-the-security-of-the-hungarian-people> [accessed December 28, 2023]
- Motomura, H. (2020). The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age. *Cornell Law Review*, 105(2): 457–547.
- Pécoud, A. (2015). Liberté de circulation et gouvernance mondiale des migrations. *Éthique Publique*. 17(1) Article 1. <https://doi.org/10.4000/ethiquepublique.1749>
- Ruhs, M. (2013). *The Price of Rights: Regulating International Labor Migration*. Princeton: Princeton University Press, IX-254 pages. *Critique Internationale*, 64(3), 161–164. <https://doi.org/10.3917/crui.064.0161>
- Piper, N. (2017). Migration and the SDGs. *Global Social Policy*, 17(2): 231–238. <https://doi.org/10.1177/1468018117703443>
- Shaw, M. N. (2017). *International Law*. Cambridge: Cambridge University Press
- UN Convention on the Rights of the Child, 20 November 1989, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> [accessed January 10, 2024]
- UN Convention on the Rights of Persons with Disabilities, 12 December 2006, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> [accessed January 10, 2024]
- UN International Covenant on Civil and Political Rights, 16 December 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [accessed January 10, 2024]

- UN International Covenant on Economic, Social and Cultural Rights, 16 December 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [accessed January 10, 2024]