

Dr Yulia Ioffe (UCL) &
Professor Cathryn Costello (Sutherland School of Law, University College Dublin)*

Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195)

Objective 13

‘Use migration detention only as a measure of last resort and work towards alternatives.’

A. Introduction

The Global Compact for Safe, Orderly and Regular Migration (GCM) is a complex, non-binding instrument. It reflects, refracts, and potentially transforms binding international standards.¹ The GCM is a framework for international cooperation, setting aspirational goals rather than prescriptive standards. Nonetheless, it must be read in light of binding international law.

This contribution focuses on Objective 13 of the GCM, a commitment to ‘Use migration detention only as a measure of last resort and work towards alternatives.’ Like all the provisions of the GCM, it must be interpreted within the context of the overarching commitment to human rights of migrants and existing obligations under international law. The GCM, in general, aims to strike a balance between affirming human rights of migrants and recognizing states’ ‘sovereignty’ in the realm of migration, thereby replicating the foundational tension in this field. Objective 13 is generally regarded as progressive, clearly signalling the undesirability of detention, as exemplified in this analysis: ‘Because the GCM’s language on the right to liberty and security of person is strong and consistent with international law and standards, it will make the GCM a powerful tool to end these rights abuses.’²

In our analysis, while we share this overall favourable assessment of Objective 13, we also raise three concerns related to this provision: First, despite the GCM’s intention to adopt a ‘holistic’ and comprehensive approach to migration, the extent of states’ migration control prerogatives remains ambiguous, notably concerning the criminalization of irregular migration. This ambiguity raises questions about the sorts of detention regulated by GCM 13, and the permissible grounds of detention. We argue that the failure to limit the grounds of detention means that a crucial and necessary part of subjecting migration detention to the rule of law is omitted.³ Second, we analyse Objective 13’s text on detention of children, a matter where the interpretation of human rights standards is evolving, and where the negotiations of the GCM were most fraught. On one reading, the GCM seems to aim to preclude future progressive interpretations of international human rights law (IHRL). Finally, we examine the GCM’s framing of ‘alternatives to detention’ (ATDs) as practices to be ‘worked towards’. Given that evaluating alternatives is integral to determining the legal necessity of detention, we demonstrate that

* Cathryn Costello’s participation was supported by her *RefMig* project, a Horizon 2020 award funded by the European Research Council (grant number 716968).

¹ Vincent Chetail, ‘The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law’ (2020) 16 *International Journal of Law in Context* 253; Justin Gest, Ian M Kysel and Tom K Wong, ‘Protecting and Benchmarking Migrants’ Rights: An Analysis of the Global Compact for Safe, Orderly and Regular Migration’ (2019) 57 (6) *International Migration* 60.

² Gest, Kysel and Wong (n 1).

³ See further Cathryn Costello ‘Immigration Detention: The Grounds Beneath our Feet’ (2015) 68 *Current Legal Problems* 143.

ATDs are generally legally obligatory. Accordingly, we question the framing of these as desirable rather than mandatory. Additionally, we have reservations about the IOM's approach to ATDs, as well as its overall stance on immigration detention, especially given its role in overseeing the GCM.

In Part B of this chapter, we delve into the drafting history of Objective 13, highlighting the most significant changes made to the text during the negotiations. In Part C, we provide context for Objective 13 by outlining the existing obligations under international law with respect to immigration detention. In Part D, we explore the interplay between Objective 13 of the GCM and existing international law obligations. We conclude our analysis by assessing the potential benefits and challenges that Objective 13 presents in the ongoing pursuit for a human rights-centered approach to migration.

B. Drafting History of Objective 13

Objective 13 has been a subject of an intense debate in the course of the GCM negotiations. Indeed, a number of states abstained from voting in favour for final draft of the GCM at the UN General Assembly or voted against, expressly quoting the detention-related provisions of Objective 13.

Specifically, the Australian government abstained from signing the Compact because of the provisions on the use of immigration detention as a measure of 'last resort' and of alternatives to detention.⁴ According to the Australian government the Compact's detention provisions were inconsistent with Australian 'well-established policies' and would 'risk encouraging illegal entry to Australia and reverse Australia's hard-won successes in combating the people-smuggling trade'.⁵ The US voted against the final version of the GCM partly because the 'Compact's calls for eliminating or adjusting detention requirements for illegal aliens run counter to [US'] interest in establishing a well-managed immigration process that promotes the rule of law'.⁶ The Polish government rejected the Compact because it would be difficult to implement Objective 13 in Poland particularly the provisions on 'the decriminalization of irregular migration and national child detention standards'.⁷

Most of the provisions of the Zero Draft of Objective 13 have survived the negotiation process. However, there have been substantial changes introduced following the negotiations, both positive and negative, to the final version of the GCM. Overall, the provisions on immigration detention for *all* migrants have become more protective, as the requirements of proportionality, due process, shortest possible period time, and prioritization of non-custodial alternatives to immigration detention were

⁴ Paul Karp, 'Australia Refuses to Sign UN Migration Pact, Citing Risks to Turnbacks and Detention' *The Guardian* (21 November 2018) <<https://www.theguardian.com/australia-news/2018/nov/21/australia-refuses-to-sign-un-migration-pact-citing-risks-to-turnbacks-and-detention>> accessed 6 December 2022.

⁵ Senator the Hon Marise Payne, 'Global Compact for Migration: Joint Media Release' (*Minister for Foreign Affairs, Minister for Women*, 21 November 2018) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/global-compact-migration>> accessed 6 December 2022.

⁶ UNGA, 60th Plenary Meeting: Wednesday, 19 December 2018, 10 a.m. New York' UN Doc A/73/PV.60, 8 <<https://undocs.org/Home/Mobile?FinalSymbol=a%2F73%2Fpv.60&Language=E&DeviceType=Desktop&LangRequested=False>> accessed 12 February 2023.

⁷ United Nations, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (*UN: Meeting Coverage and Press Releases*, 19 December 2022) <<https://press.un.org/en/2018/ga12113.doc.htm>> accessed 6 December 2022; UNGA, '60th Plenary Meeting: Wednesday, 19 December 2018, 10 a.m. New York' UN Doc A/73/PV.60, 16 <<https://undocs.org/Home/Mobile?FinalSymbol=a%2F73%2Fpv.60&Language=E&DeviceType=Desktop&LangRequested=False>> accessed 12 February 2023.

emphasized in the final version of Objective 13.⁸ At the same time, these positive changes seem to be a concession for restricting the protection of children against immigration detention. In this section, we discuss the most substantial changes to each of the eight actions of Objective 13.

‘(a) Use existing relevant human rights mechanisms to improve independent monitoring of migrant detention, ensuring that it is a measure of last resort, that human rights violations do not occur, and that States promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children;’

Paragraph (a) was expanded in the course of the negotiations. The final text of the GCM became more protective as compared to the Zero Draft. Specifically, Revised draft 1 added the notion of ‘community-based care arrangements’ as alternatives to detention. Revised draft 2 highlighted that such arrangements together with ‘non-custodial measures’ should be ‘favoured’. Revised drafts 2 and 3 also inserted the provision that these types of alternatives to detention are particularly important for ‘families and children’. However, the latter modification (emphasis on families and children) was made after states altered the language of paragraph (h) that avoided fundamentally committing to end the practice of child immigration detention,⁹ as discussed below. Revised draft 2 also underlined that monitoring of migrant detention must be conducted by an ‘independent’ body, which constitutes an essential safeguard against arbitrary detention.¹⁰

‘(b) Consolidate a comprehensive repository to disseminate best practices of human rights-based alternatives to detention in the context of international migration, including by facilitating regular exchanges and the development of initiatives based on successful practices among States, and between States and relevant stakeholders;’

Revised draft 2 clarified that the ‘repository to disseminate best practices of *human rights-based* alternatives to detention’ should be consolidated instead of the ‘database that promotes alternatives to detention’ mentioned in the Zero draft. Revised draft 3 explained that consolidation of this repository would include not only regular exchanges among states but also the ‘development of initiatives’ based on successful practices of alternatives to detention.

‘(c) Review and revise relevant legislation, policies and practices related to immigration detention to ensure that migrants are not detained arbitrarily, that decisions to detain are based on law, are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards, and that immigration detention is not promoted as a deterrent or used as a form of cruel, inhumane or degrading treatment of migrants, in accordance with international human rights law;’

The language of paragraph (c) was made significantly stronger in Revised draft 2, where it was added that states need not only review, but also ‘revise’ its legislation, policies, and practices regarding immigration detention. Revised draft 2 also introduced the requirement that detention cannot be arbitrary and should be proportionate, which remains the strongest points of Objective 13.

⁸ Justine N Stefanelli, ‘Objective 13: Use Immigration Detention Only as a Measure of Last Resort and Work Towards Alternatives’ in Elspeth Guild and Tugba Basaran (eds), *The UN’s Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft, Objective by Objective* (Refuge Law Initiative) 38.

⁹ Izabella Majcher, ‘Immigration Detention under the Global Compacts in the Light of Refugee Human Rights Law Standards’ (2019) 57 (6) *International Migration* 91, 96.

¹⁰ Stefanelli (n 8) 38.

At the same time, Revised draft 2 weakened the language of this paragraph. The previous versions of paragraph (c) included the prohibition to use administrative detention as punishment for migrants. Revised draft 2 substituted the prohibition of punishment with prohibitions of using administrative detention as a form of cruel, inhumane or degrading treatment to migrants. The threshold for cruel, inhumane or degrading treatment in international human rights law is very high, which means that not all immigration detention that is used as punishment will necessarily constitute cruel, inhumane or degrading treatment. As a result, the final version of paragraph (c) significantly narrows the scope of Objective 13, that excludes non-penalization for illegal entry or stay more broadly.

‘(d) Provide access to justice for all migrants in countries of transit and destination who are or may be subject to detention, including by facilitating access to free or affordable legal advice and assistance of a qualified and independent lawyer, as well as access to information and the right to regular review of a detention order;’

Revised draft 2 introduced a new paragraph concerning access to justice, absent in the previous version of Objective 13 (paragraph (d) of the final text). In Revised draft 2, paragraph (d) provides for the right to regular review of a detention order, the right to communicate with the legal representation, and that states should ‘ensure’ free or affordable legal advice and assistance. However, Revised draft 3 diluted the obligation regarding the provision of free or affordable legal advice, changing the language to suggest that states should ‘facilitat[e] access to free or affordable legal advice’ instead of ‘ensur[ing]’ it. While the final version of paragraph (d) still emphasizes the need for effective processes and mechanisms to establish access to free or affordable legal advice, the language of the provision has become weaker, as states are no longer mandated to ensure the proper functioning of such processes.¹¹

‘(e) Ensure that all migrants in detention are informed about the reasons for their detention, in a language they understand, and facilitate the exercise of their rights, including to communicate with the respective consular or diplomatic missions without delay, legal representatives and family members, in accordance with international law and due process guarantees;’

In Revised draft 2, paragraph (e) was expanded to include a provision that requires informing detainees about the reasons for their detention in a language understand. Additionally, Revised draft 2 highlighted the importance of not only facilitating the rights to communicate with consular or diplomatic missions, legal representatives, and family members in accordance with international law, but also in line with ‘due process guarantees’. Overall, Objective 13 demonstrates a strong commitment to due process requirements.¹²

‘(f) Reduce the negative and potentially lasting effects of detention on migrants by guaranteeing due process and proportionality, that it is for the shortest period of time, that it safeguards physical and mental integrity, and that, at a minimum, access to food, basic health care, legal orientation and assistance, information and communication as well as adequate accommodation is granted, in accordance with international human rights law;’

The stipulation regarding the access to ‘legal orientation and representation’ for immigration detainees was introduced in Revised draft 1. Subsequent drafts modified this requirement, changing it from

¹¹ Stefanelli (n 8) 39.

¹² Stefanelli (n 8) 39.

‘representation’ to ‘assistance’, potentially due to the presence of the term ‘legal representation’ in paragraph (e). The later drafts also made important changes that increased the standard of protection, including the incorporation of guarantees for ‘due process’ and the ‘proportionality’ of immigration detention. However, concurrently, Revised draft 2 removed the requirement that immigration detention should be ‘non-punitive’, echoing the approach of excluding non-penalization for illegal entry or stay from the scope of Objective 13, which was taken in paragraph (c).

‘(g) Ensure that all governmental authorities and private actors duly charged with administering immigration detention do so in a way consistent with human rights and are trained on non-discrimination and the prevention of arbitrary arrest and detention in the context of international migration, and are held accountable for violations or abuses of human rights;’

The drafting of paragraph (g) has seen minimal alterations. Revised draft 2 incorporated the condition that immigration detention should be administered ‘in a way consistent with human rights’. In the final version, an additional requirement was included, stating that administrators of immigration detention should undergo training, covering not only non-discrimination but also ‘prevention of arbitrary arrest and detention’.

‘(h) Protect and respect the rights and best interests of the child at all times, regardless of migration status, by ensuring availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements, that ensure access to education and health care, and respect the right to family life and family unity, and by working to end the practice of child detention in the context of international migration.’

Paragraph (h) was watered down during the negotiations. The Zero draft of the GCM expressly included a commitment to end child detention in the context of international migration.¹³ China, Russia, Australia, and Singapore, fiercely opposed the prohibition of child detention contained in the Zero draft. The EU, particularly Denmark and the UK, along with Canada, also resisted the language of ending child detention.¹⁴ Instead, they advocated for the last resort approach and alternatives for child detention. Consequently, in Revised draft 2, the commitment to end child detention was replaced with a commitment to *work* towards ending child detention in the context of international migration.¹⁵ This version of paragraph (h) also expanded on the concept of ‘providing alternatives to detention’, specifying that that states should ‘ensur[e] availability and accessibility of a viable range of alternatives to detention in non-custodial contexts’. This shift in language could suggest a reduction in the level of protection, as now states are tasked with making alternatives to detention available without necessarily being required to provide them. While the inclusion of ‘non-custodial contexts’ underscores the emphasis on avoiding migrant detention, this change in the text does not appear to fundamentally alter the essence of the provision, given that alternatives to detention are generally understood as non-custodial measures.¹⁶

¹³ ‘g) Uphold the protection and respect for the rights and best interests of the child at all times, regardless of their migration status, by ending the practice of child detention in the context of international migration,’ Global Compact for Safe, Orderly and Regular Migration: Zero Draft (5 February 2018) (hereafter Zero Draft).

¹⁴ Majcher (n 9) 96-97.

¹⁵ ‘h) Uphold the protection and respect for the rights and best interests of the child at all times, regardless of their migration status, ...and by working to end the practice of child detention in the context of international migration.’ Revised Draft of the Global Compact for Safe, Orderly, and Regular Migration (28 May 2018) (hereafter Draft Rev 2).

¹⁶ Cf. Angela Sherwood, Isabelle Lemay and Cathryn Costello, ‘IOM’s Immigration Detention Practices and Policies: Human Rights, Positive Obligations and Humanitarian Duties’, in *IOM Unbound? Obligations and*

Revised draft 2 additionally weakened the provision concerning family unity of children. Rather than affirming the commitment to ensure that children can ‘remain with their family members or legal guardians in non-custodial contexts, including community-based arrangements’, the current version stipulates that states should ‘respect’ children’s ‘right to family life and family unity’. The latter phrasing could potentially be interpreted as allowing children to be placed in detention in order to preserve family unity with their parents or other family members, although that reading would be difficult to reconcile with the human right to liberty.

C. Normative framework

Immigration detention in itself does not amount to a human rights violation. IHRL allows different types of detention, proscribing only detention that is deemed ‘arbitrary’ and not ‘lawful’.¹⁷ Immigration detention is governed by stringent conditions, as set forth in globally applicable international human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR), as well as regional human rights treaties. Regional human rights systems have adopted different approaches to immigration detention.¹⁸ While the European Court of Human Rights (ECtHR) has regarded immigration detention as a ‘necessary adjunct’ to the power of controlling admission, the Inter-American Court of Human Rights (IACtHR) emphasized the presumption of an individual’s liberty, irrespective of their migration status.¹⁹ IHRL on detention is often subject to criticism for permitting immigration detention without sufficient attention to the necessity of the detention in the individual cases, and relatedly, failing to demand sufficient individualized and compelling grounds for detention. This legal situation might be attributed to the fact that immigration detention is often assessed in isolation from principles developed to limit other forms of preventive and coercive detention.²⁰ Of great significance is the impact of the Convention on the Rights of the Child (CRC), which considerably limits the detention of children for migration-related purposes.²¹ Furthermore, it is important to recognize that IHRL not only prohibits arbitrary detention, but also unwarranted constraints on internal mobility and the right to leave any country, including one’s own.²²

Accountability of the International Organization for Migration in an Era of Expansion (Cambridge University Press 2023); Antje Missbach, ‘Substituting Immigration Detention Centres With “Open Prisons” in Indonesia: Alternatives to Detention as the Continuum of Unfreedom’ (2021) 25 *Citizenship Studies* 224.

¹⁷ Niels Petersen, ‘Liberty, Right to, International Protection’ *Max Planck Encyclopedia of Public International Law* (2019) 7 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e840>> accessed 24 January 2023; Manfred Nowak (ed), *U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd edn, NP Engel 2019) 211; Cecilia Medina, *The American Convention on Human Rights: Crucial Rights and Their Theory and Practice* (2nd edn, Intersentia 2016) 199; Rachel Murray, *The African Charter on Human and Peoples’ Rights: A Commentary* (OUP 2019) 186, 188.

¹⁸ See further, Cathryn Costello, ‘Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law’ (2012) 19 *Indiana Journal of Global Legal Studies* 257.

¹⁹ See e.g. *Amuur v France* App no 19776/92 (ECtHR 25 June 1995) para 41. Cf *Vélez Loor v Panama*, Inter-American Court of Human Rights Series C No 218 (23 November 2010)

²⁰ Costello, ‘Human Rights and the Elusive Universal Subject’ (n 18); Cathryn Costello, ‘Immigration Detention: The Grounds Beneath our Feet’ (2015) 68 *Current Legal Problems* 143.

²¹ UN CMW and CRC, ‘Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return’ (16 November 2016) UN Doc CMW/C/GC/4-CRC/C/GC/23 para 5. See further Ciara Smyth, ‘Towards a Complete Prohibition on the Immigration Detention of Children’ (2019) 19 *Human Rights Law Review* 1, 2.

²² International Covenant on Civilian and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 9 (1); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) Article 5; Protocol No. 4 to

As well as the international human rights treaties themselves, the UN treaty bodies (UNTBs) have offered authoritative interpretation. In 2014, the Human Rights Committee (HRC) adopted *General Comment No. 35 on Article 9 of the ICCPR*. On immigration detention, it reiterates the principles of lawfulness, necessity, proportionality, review of detention, detention conditions and the question of child detention.²³ As is discussed below in more detail, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the Rights of the Child (UNCRC) jointly issued a General Comment in 2017 on states' obligations regarding the human rights of children in the context of migration, effectively calling for an end to the detention of children.²⁴ In 2023, the CMW's *General Comment No. 5 on migrants' right to liberty and freedom from arbitrary detention* provided further guidance on Articles 16 and 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). This General Comment reiterates the requirements of lawfulness, necessity, proportionality, priority of ATDs, non-detention of migrant children and vulnerable individuals, review of detention, detention conditions, and monitoring of detention places. It also emphasizes the importance of adhering to these human rights principles in the implementation of the GCM.²⁵

Defining Detention

Detention is a deprivation of liberty, in contrast to a mere restriction thereon. As such, deprivation of liberty attracts stricter human rights scrutiny than restrictions on mobility and is generally governed by different provisions.²⁶ The distinction between a deprivation and restriction is one of 'degree or intensity.'²⁷ In migration-related contexts, states have often sought to argue that confinement does not amount to a deprivation of liberty, in some cases leading to divergent assessments regarding the existence of detention. The question of whether the ability to leave a place of confinement, as seen in the confinement of migrants in transit zones at airports and land borders, constitutes detention is particularly relevant. In the case of *Ammur v. France*, the ECHR clarified that such confinement was detention, while it reached a contrary conclusion regarding confinement at a land border in *Ilias & Ahmed v. Hungary*.²⁸ However, the EU Court later affirmed that such confinement was indeed detention,²⁹ a conclusion later confirmed by the ECtHR.³⁰ This caselaw illustrates the risks of an

the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1963, entered into force 1 November 1998) Art 2 (2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 Article 22 (2); Arab Charter on Human Rights (adopted 15 September 1994) Article 21.

²³ UN HRC, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (16 December 2014) Un Doc CCPR/C/GC/35 para 18.

²⁴ UN CMW and CRC, 'Joint General Comment No 4/23' (n 21) paras 5-13.

²⁵ UN CMW, 'General Comment No 5: On Migrants' Rights to Liberty and Freedom from Arbitrary Detention' (23 September 2021) Un Doc CMW/C/GC/5 para 8.

²⁶ Eg ECHR: Restrictions on liberty of movement are governed by Article 2 of Protocol No. 4 (*De Tommaso v. Italy* App no 43395/09 (ECtHR GC, 23 February 2017) para 80; *Creangă v. Romania* App no 29226/03 (ECtHR GC 23 February 2012) para 92; *Engel and Others v. the Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (8 June 1976) para 58.

²⁷ *De Tommaso v Italy* (n 26) para 80; *Guzzardi v. Italy* App no 7367/76 (ECtHR 6 November 1980) para 93; *Rantsev v. Cyprus and Russia* App no 25965/04 (ECtHR 7 January 2010) para 314; *Stanev v. Bulgaria* App no 36760/06 (ECtHR GC, 17 January 2012) para 115.

²⁸ *Ilias and Ahmed v. Hungary* App no 47487/15 (ECtHR GC, 21 November 2019) para 250.

²⁹ C-924/19 PPU and C-925/19 PPU *FMS and Others* [2020] OJ C 240/26 paras 226-30.

³⁰ *R.R. and Others v Hungary* App no 36037/17 (ECtHR 5 July 2021) para 83; *W.O. and Others v. Hungary* App no 36896/18 (ECtHR 25 August 2022) para 15.

approach to detention that is overly context-sensitive, focusing on individual circumstances rather than the broader institutional and legal framework of the place of confinement.

Legality, Non-Arbitrariness and Necessity

IHRL demands that state actions must be carried out ‘in accordance with law’. This entails that detention must be governed by national law and adhere to relevant regional and international standards. Furthermore, this requirement also sets conditions for the quality of national law itself.³¹ As such, it requires a particular standard of predictability and clarity in the legal standards, and judicial supervision.³²

The meaning of arbitrariness has been a subject of diverging interpretations of international bodies.³³ At the heart of the debate on arbitrariness in the context of immigration detention is the question of whether assessing the necessity of immigration detention in a particular case is an integral component of the arbitrariness analysis. The prevailing view appears to consider necessity as an essential element of the arbitrariness analysis.³⁴ However, the ECtHR has not imposed a general necessity requirement for immigration detention,³⁵ except in cases involving children.³⁶

Grounds

To justify the detention in question based on an acceptable ground, IHRL typically requires states to show that the detention is necessary in the specific case or that it is at least reasonable or non-arbitrary in view of the pursued aim.³⁷ Importantly, detention must be subject to judicial review within domestic courts. In order to substantiate the necessity of detention, authorities must demonstrate that there are no alternative means that could accomplish the same aim, which involves a positive obligation to conduct such an assessment and even establish such policies and practices. This assessment entails the development of alternative means of ‘managing migration’, also known as ATDs (‘alternatives to detention’). While ATDs may be perceived as part of a strategy to minimize detention, some ATDs can be highly coercive and restrictive in practice, potentially leading to violations of other human rights, such as the rights to liberty and free movement, as many commentators noted.³⁸

³¹ See eg *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979) paras 46-49; *Silver v UK* App no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR, 25 March 1983) paras 87-88; *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) paras 66-68.

³² *Malone v UK* (n 31) paras 67-68; *Gillan and Quinton v UK* App no 4158/05 (ECtHR, 12 January 2010) paras 77-87.

³³ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 282.

³⁴ Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill 2010) 254-5, 262. See e.g. HRC, eg *A v Australia* (30 April 1997) Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993.

³⁵ William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 243; Cornelisse (n 34) 295. See, in particular, *Al Husin v Bosnia and Herzegovina* App no 3727/08 (ECtHR, 7 February 2012) para 61.

³⁶ *Smyth* (n 21) 17-18.

³⁷ There has been some academic debate about the absence of a necessity standard in the caselaw of the ECtHR, but it is explicitly part of the analysis by the HRC (see eg *A v Australia* (n 34) et seq) and other human rights courts. The ECtHR is arguably moving towards such a standard of assessment. See generally, Costello ‘Immigration Detention: The Grounds Beneath Our Feet’ (n 20).

³⁸ For critical assessments, see Alice Bloomfield, ‘Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?’ (2016) 35 (1) *Refugee Survey Quarterly* 29; Missbach (n 16).

Detention Conditions

IHRL also regulates detention conditions. IHRL requires that detention conditions be appropriate for immigration detention. Evidently, such conditions must not involve torture, inhuman or degrading treatment, in order to avoid a *jus cogens* violation.³⁹ Beyond this threshold of basic humanity, IHRL prescribes more demanding standards. For instance, in *Saadi v. United Kingdom*, the ECtHR established that the place and conditions of detention should be appropriate, particularly given that ‘the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country’.⁴⁰ Additionally, the length of the detention must not exceed what is reasonably required to achieve the intended purpose.⁴¹ Therefore, detention must never be indefinite, and the decision to continue detention should be based on an evaluation of its necessity for the stated official purpose. The ECtHR also has developed separate standards for detention conditions for children. Specifically, the ECtHR has consistently found a violation of Article 3 of the European Convention on Human Rights (ECHR) in cases of immigration detention of children on account of a combination of three factors: the child’s young age, the length of the detention, and the unsuitability of the premises for the accommodation of children.⁴²

Linkage to migration status

In the context of IHRL, the evaluation of any detention practice hinges on the assessment of migration status and nationality, especially concerning individuals deemed irregular in their entry and residence. In practice, some individuals may erroneously be labelled ‘irregular’ when they ought instead be recognized as having a right to stay, whether that right stems from international or domestic law. The overarching notion of ‘international protection’ transcends the refugee/migrant dichotomy.⁴³ Determining who is considered irregular and whether they should be detained to ‘prevent irregular entry’ (to use the phrasing of the ECtHR) or for deportation demands a careful assessment of various sources of law.

Consular Access

Paragraph (e) of GCM13 references the right to communicate with the respective consular or diplomatic missions without delay, which is the focus of Objective 14 and is also mentioned elsewhere in the Compact (Objectives 7, 8, 13, and 21).⁴⁴ International law recognizes the right to consular access. As stated in Article 36 of the 1963 Vienna Convention on Consular Relations, local authorities are obligated to inform all detained foreigners ‘without delay’ of their right to have their consulate notified

³⁹ International Law Commission, ‘Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*)’ UN Doc A/77/10 (2022) conclusion 23; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422, para 99.

⁴⁰ *Saadi v. UK* App no 13229/03 (ECtHR, 29 January 2008) para 74.

⁴¹ *Ibid.*

⁴² See eg *A.B. and Others v. France* App no 11593/12 (ECtHR, 12 July 2016) para 109; *R.R. and Others v Hungary*, App no 36037/17 (ECtHR, 2 March 2021) para 49.

⁴³ UNHCR, ‘Persons in Need of International Protection’ (June 2017) 1. See also generally Rebecca Hamlin, *Crossing: How We Label and React to People on the Move* (Stanford University Press 2021).

⁴⁴ Stefanie Grant, ‘GCM Commentary: Objective 14: Enhance Consular Protection, Assistance and Cooperation throughout the Migration Cycle’ (5 November 2018), <https://rli.blogs.sas.ac.uk/2018/11/05/gcm-commentary-objective-14/>

of their detention and to communicate with their consular representatives.⁴⁵ The ICRMW upholds the right to have recourse to the protection and assistance of the consular or diplomatic authorities of the state of origin.⁴⁶ Furthermore, the African Commission on Human and Peoples' Rights in its 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' has broadened this right allowing refugees or stateless persons, who understandably cannot contact their own governments, to communicate with an 'appropriate international organisation'.⁴⁷ Paragraph (e) of GCM13, however, does not mention the right to communicate with international organisations to migrants who might be asylum seekers or stateless persons.

The Relevance of International Refugee Law

International refugee law protects asylum seekers and refugees from penalization for irregular entry and stay,⁴⁸ and limits the detention of refugees, a provision that also applies to asylum seekers. The bifurcation of the Compacts along the refugee/migrant binary has several risks, notably that it fails to recognize that many refugees and protection seekers are caught up in excessive and arbitrary migration controls, in particular detention. It would be entirely counterproductive and legally inappropriate if the GCM was interpreted in a manner that excluded refugees and protection seekers from its ambit.⁴⁹ Moreover, as the pertinent provisions of the Refugee Convention apply to both asylum seekers and refugees, the norms in question are part of the corpus of international law that ought to be used to interpret the GCM and bind states in its implementation.

Criminalization of Migration

Over recent years, there has been a marked shift towards criminal and punitive approach in addressing irregular migration. Whereas irregular migration and presence were once treated as an administrative matter, they are now frequently criminalized in national laws. This is often accompanied by imposing additional offenses, such as failure to have or produce identity documentation. Beyond the aforementioned non-penalization of refugees and protection seekers prescribed by international refugee law, IHRL substantively limits states' 'right' to criminalize irregular entry and stay.⁵⁰

In IHRL, there is a general deference to the right of states to regulate the admission and residency of non-citizens.⁵¹ However, several international bodies, including the IACtHR, UN Special Rapporteurs, and other human rights bodies,⁵² have underscored the need to limit the recourse to criminal law in the

⁴⁵ See also *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004 (I), 48 par. 87; *Jadhav (India v. Pakistan)*, Judgment, ICJ Reports 2019, 418, paras 106-110.

⁴⁶ ICRMW, Article 23.

⁴⁷ African Commission, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) section M <<https://www.achpr.org/legalinstruments/detail?id=38>> accessed 13 February 2023.

⁴⁸ Cathryn Costello, Yulia Ioffe and Teresa Büchsel, 'Article 31 of the 1951 Convention relating to the Status of Refugees' (July 2017) UNHCR Legal and Protection Policy Research Series PPLA/2917/01; Cathryn Costello and Yulia Ioffe 'Non-Penalisation and Non-Criminalization' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *Oxford Handbook International Refugee Law* (Oxford University Press 2021).

⁴⁹ See further Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30 *International Journal of Refugee Law* 643.

⁵⁰ Costello and Ioffe 'Non-Penalisation and Non-Criminalization' (n 48) 917.

⁵¹ *Ibid* 928.

⁵² See e.g. *Vélez Loor v Panama*, Inter-American Court of Human Rights Series C No 218 (23 November 2010) para 169; UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*, UN doc A/65/222 (3 August 2010) para 19; Human Rights Council, *Report of the Special Rapporteur on the Human*

context of migration. For example, in *Vélez Looz v. Panama*, the IACtHR endorsed the UN Working Group on Arbitrary Detention's view⁵³ that criminalizing irregular entry surpasses the legitimate interests of states to manage and control irregular immigration, subsequently resulting in unnecessary detention.⁵⁴ The court further articulated stringent constraints on the punitive measures available to states, emphasizing that punitive actions should only be employed to protect fundamental legal rights from serious attacks.

Furthermore, the UN Special Rapporteur on trafficking in persons, especially women and children, recently affirmed that non-punishment of migrants, particularly victims of trafficking, for illegal entry or presence constitutes a general principle of law in the sense of article 38(1)(c) of the Statute of the International Court of Justice.⁵⁵ Recognising the principle of non-punishment as a general principle of law reinforces the legal protections extended to migrants, including victims or potential victims of trafficking.

Children

Article 37(b) of the CRC is distinct from provisions of other international human rights treaties in that it imposes two additional requirements for immigration detention beyond lawfulness and non-arbitrariness: the last resort and the shortest appropriate period of time.⁵⁶ The UNCRRC, a treaty-based monitoring body, has evolved its interpretation of this provision with respect to immigration detention over the past twenty years. In General Comment No 6, the Committee acknowledged that the detention of children for migration purposes could still occur provided it was 'exceptionally justified for other reasons' and aligned with the principle of child's best interests.⁵⁷ However, in Joint General Comment No 4/23, the Committee unequivocally declared that '[e]very child, at all times, has a fundamental right to liberty and *freedom from immigration detention*'.⁵⁸ The Committee's current stance stands in marked contrast to the position articulated in Objective 13 of the Compact, which is discussed further below. The Committee contends that immigration detention of children is always contrary to the child's best interests principle and mandates states to cease such detention immediately.⁵⁹ The Committee also

Rights of Migrants, François Crépeau, UN doc A/HRC/20/24 (2 April 2012) para 13; New York Declaration for Refugees and Migrants, paras 33, 56; CMW, 'General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families', UN doc CMW/C/GC/2 (28 August 2013) para 24; Council of Europe Commissioner for Human Rights, 'Criminalisation of Migration in Europe: Human Rights Implications' (4 February 2010) 1.

⁵³ Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Working Group on Arbitrary Detention*, UN doc A/HRC/7/4 (10 January 2008) para 53.

⁵⁴ *Vélez Looz v Panama*, Inter-American Court of Human Rights Series C No 218 (23 November 2010) para 169.

⁵⁵ UNGA, *Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, Siobhan Mullaly*, UN doc A/HRC/47/34 (17 May 2021). See also Costello and Ioffe 'Non-Penalisation and Non-Criminalization' (n 48).

⁵⁶ John Tobin and Harry Hobbs, 'Article 37: Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1466; Smyth (n 21) 3.

⁵⁷ UNCRRC, 'General Comment No 6: Treatment of Unaccompanied and Separated Childred Outside Their Country of Origin' (1 September 2005) UN Doc CRC/GC/2005/6 para 61.

⁵⁸ UN CMW and CRC, 'Joint General Comment No 4/23' (n 21) para 5 (emphasis added). See also Smyth (n 21) 22.

⁵⁹ UN CMW and CRC, 'Joint General Comment No 4/23' (n 21) para 5

extends the ‘imperative requirement not to deprive the child of liberty’ to the child’s family, thereby prohibiting family immigration detention.⁶⁰

The Committee’s position rests on the view that immigration detention of children in *all* cases exceeds the requirement of necessity in the arbitrariness analysis.⁶¹ In evaluating necessity, the Committee takes into account the best interests of the child and the violations of all children’s rights that ensue as a result of immigration detention.⁶² Regarding the last resort principle, the Committee has concluded that it does not apply in the context of immigration detention (as opposed to juvenile criminal justice), as offences related to entry or stay ‘cannot under any circumstances have consequences similar to those derived from the commission of a crime’.⁶³

In addition to the UNCRC, many other international bodies have deemed immigration detention of children impermissible, primarily due to its failure to meet the necessity requirement. For instance, the IACtHR has determined that ‘the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order’.⁶⁴ The ECtHR similarly has found a violation of the right to liberty in most cases involving immigration detention of children.⁶⁵ The UN Special Rapporteur on Torture has argued that ‘it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children’.⁶⁶ Moreover, the UN Special Rapporteur on the human rights of migrants recommended ‘expeditiously and completely ending the immigration detention of children and families’.⁶⁷

D. Analysis

Definition and Scope of Immigration Detention

Objective 13 strongly endorses the presumption of the right to liberty, casting detention as a measure of ‘last resort’.⁶⁸ However, there remains an ambiguity regarding the material scope of Objective 13 as the term ‘immigration detention’ is not explicitly defined. While paragraph 29 states that the protections provided by Objective 13 apply ‘irrespective of whether detention occurs at the moment of entry, in transit or in proceedings of return, and regardless of the type of place where the detention occurs’, it

⁶⁰ Ibid para 11.

⁶¹ Ibid para 9; UN HRC, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez’ (5 March 2015) UN Doc A/HRC/28/68 para 80.

⁶² UN CMW and CRC, ‘Joint General Comment No 4/23’ (n 21) para 9.

⁶³ Ibid para 10, referring to UN CMW, ‘General Comment No 2: On the Rights of Migrant Workers in an Irregular Situation and Members of Their Families’ (28 August 2013) UN Doc CMW/C/GC/2 para 24.

⁶⁴ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, IACHR Series A No 21 (19 August 2014) para 154.

⁶⁵ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 12178/03 (ECtHR, 12 October 2006) paras 113-4; *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR, 19 January 2010) paras 73-75; *Kanagaratnam and Others v Belgium* App no 15297/09 (ECtHR, 13 December 2011) para 88; *Popov v France* App no 39472/07 and 39474/07 (ECtHR, 19 January 2012) paras 118-9.

⁶⁶ UN HRC, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (n 61) para 80.

⁶⁷ UNGA, ‘Report of the UN Special Rapporteur on the Human Rights of Migrants’ (20 July 2016) UN Doc A/71/40767 para 36.

⁶⁸ Chetail (n 1) 253.

falls short of specifying the criteria that determine whether a restrictive measure imposed on a migrant constitutes immigration detention.

As previously discussed, states often dispute whether confinement actually constitutes a deprivation of liberty. Therefore, a bright-line approach to defining detention is crucial to ensure adherence to the additional positive obligations to detainees, as well as the duty to permit human rights monitoring in all places of detention.⁶⁹ Such a clear definition of detention is also essential to prevent states from evading their obligations. However, the mere existence of a definition cannot, in and of itself, ensure that state will not attempt to manipulate the wording to sidestep their obligations. A useful definition of detention is provided by the Optional Protocol to the Convention Against Torture (OPCAT), which states: ‘deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.’⁷⁰

Similarly, the GCM is ambiguous with respect to the ‘immigration’ aspect of detention. While the term ‘immigration detention’ is typically understood to connote administrative detention for immigration-related reasons, migrants are also frequently detained on suspicion of or conviction for migration-related criminal offences. The Compact is ambivalent on this topic. The Objectives on smuggling (Objective 9) and trafficking (Objective 10) both include references to the duty of non-criminalization. On trafficking, the text observes that states should ‘avoid criminalization of migrants who are victims of trafficking in persons for trafficking-related offences’, and on smuggling that states: ‘further commit to ensure that migrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling, *notwithstanding* potential prosecution for other violations of national law.’⁷¹ The latter ‘notwithstanding’ clause suggests that states may still choose to criminalize other violations of ‘national’ (presumably immigration-related) laws. Objective 9, however, is based on the assumption that smuggling is simply a wrong to be suppressed, which contrasts with growing recognition that smuggling prohibitions are often overbroad.⁷² The GCM’s approach to victims of trafficking is more protective, where Objective 10 instructs to ensure victims of trafficking receive appropriate protection and assistance. Human trafficking and migrant smuggling are not specifically addressed in Objective 13.

Objective 11(f) (‘Manage borders in an integrated, secure and coordinated manner’) commits states to ‘[r]eview and revise relevant laws and regulations to determine whether *sanctions* are appropriate to address irregular entry or stay and, if so, to ensure that they are proportionate, equitable, non-discriminatory and fully consistent with due process and other obligations under international law.’⁷³ The mention of ‘sanctions’ could potentially encompass criminal sanctions.

⁶⁹ CAT Optional Protocol; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 2375 UNTS 237. Cf The UN Working Group on Arbitrary Detention was denied access by the Hungarian government to two border ‘transit zones’ in Rösztke and Tompa in 2018, since Hungarian government did not consider those ‘transit zones’ the places of detention. ECRE, ‘Unprecedented Suspension of UN- Hungary Visit as Detention Experts are Denied Access’ (23 November 2018) <<https://ecre.org/unprecedented-suspension-of-un-hungary-visit-as-detention-experts-are-denied-access/>> accessed 13 February 2023.

⁷⁰ Optional Protocol to the Convention Against Torture (n 69) Article 4(2).

⁷¹ Emphasis added.

⁷² Costello, ‘Refugees and (Other) Migrants’ (n 49).

⁷³ Emphasis added.

Paragraph (c) of Objective 13 explicitly stipulates that legislation, policies, and practices should be reviewed and revised to ensure that ‘immigration detention is not promoted as a deterrent’. Deterrence is one of the objectives of penal law, and using detention for this purpose would be considered punitive.⁷⁴ However, detention may also serve a punitive purpose and exhibit punitive character in other instances, such as when used for retribution. The absence of a comprehensive prohibition on using detention as a punishment for migrants’ illegal entry or stay in Objective 13 might potentially lead to a narrower understanding of states’ obligations to preserve the non-punitive character of immigration detention.⁷⁵

Apart from punitive detention, other penal measures imposed on migrants, such as ‘open’ reception centres, heavy fines, denial of social and economic rights, can be harmful and coercive. These other penal measures fall outside the scope of Objective 13, although international bodies interpret the non-penalization principle broadly to protect from all types of penal measures imposed on vulnerable migrants, including those who have been smuggled and victims of trafficking.⁷⁶

Accordingly, we conclude that the Compact does not take a clear position on the criminalization of irregular migration, regrettably in light of the serious ethical and legal concerns of this practice.⁷⁷ We find that the GCM does not explicitly forbid penalization for illegal entry or stay more generally. Objective 13 does not appear to encompass detention as a criminal sanction for offences arising out of criminalized irregular migration. While paragraphs (c) and (e) of the early drafts of Objective 13 contained prohibitions against using immigration detention as a form of punishment, the final version of GCM 13 is silent on this issue.

Necessity and Proportionality

As discussed above, the question of the requirements of necessity and proportionality in IHRL as regards immigration detention is a matter of some contention, notably under the ECHR. In that respect, the chapeau of Objective 13 entails a welcome clarification notably in employing the language of ‘last resort’ and ‘necessity, proportionality and individual assessments’. Linking these elements together is a powerful endorsement of the need for grounds for detention in the individual case, rather than any categorical assumption based on mode of arrival or migration status. Necessity is however absent from paragraph (c) that related to the commitment to review and revise legislation, policies and practices related to immigration detention.

Children

The GCM includes a commitment to the best interests of the child throughout its text.⁷⁸ It recognizes that migrant children deserve special protection as children in several aspects, except in the issue of immigration detention. Specifically, the GCM is based on ten interdependent guiding principles, one of

⁷⁴ Costello, Ioffe, Büchsel (n 48) 38.

⁷⁵ Majcher (n 9) 100.

⁷⁶ See fn 55.

⁷⁷ For arguments from criminal law theory against criminalization, see Cathryn Costello, ‘Victim or Perpetrator?: The Criminalised Migrant and the Idea of “Harm” in the Labour Market Context’ in Alan Boggand others (eds), *Criminality at Work* (Oxford University Press 2020) 309-326.

⁷⁸ GCM paras 15, 21(i), 23, 23(e), 23(f), 27(e), 29(h), 37(g). See also François Crépeau, ‘Towards a Mobile and Diverse World: “Facilitating Mobility” as a Central Objective of the Global Compact on Migration’ (2019) 30 *International Journal of Refugee Law* 650, 653.

which is a child-sensitive approach.⁷⁹ According to this approach, the GCM ‘promotes *existing* international legal obligations in relation to the rights of the child, and upholds the principle of the best interests of the child *at all times*’.⁸⁰ However, as discussed below, Objective 13 of the GCM excludes the obligation on immigration detention from these existing international legal obligations. Furthermore, Objective 7, which addresses vulnerable migrants, underscores the commitment to upholding ‘the best interests of the child at all times, as a primary consideration in situations where children are concerned’.⁸¹ This includes incorporating migrant children into national child protection systems⁸² and establishing specialized procedures for unaccompanied and separated children in areas such as identification, referral, care and family reunification, and access to health-care services.⁸³

While paragraph 29 of Objective 13 does not explicitly include commitments specifically addressing children, children are directly mentioned in the associated actions under paragraph (h). Paragraph (h) only goes so far as to the commitment to ‘working to end the practice of child detention in the context of international migration’ rather than outright calling for the abolition of immigration detention of children. Specifically, paragraph (h) of Objective 13 contains a general commitment to ‘protect and respect the rights and best interests of the child at all times, regardless of migration status’. This should be achieved in two ways: by providing alternatives to detention and working towards the end of immigration detention of children.

The current approach to interpretation of the best interests of the child is that detaining children solely based on their migration status or that of their parents ‘is never in their interests and is not justifiable’.⁸⁴ Immigration detention violates a wide range of children’s rights, such as the right to development, the right to freedom from cruel, inhuman or degrading treatment or punishment, the right to health, the right of the accompanied child to family life.⁸⁵ Therefore, such detention cannot be considered in the child’s best interests. It is accepted that when balanced against states’ general interest in controlling migration, the best interests of the child not to be detained prevail.⁸⁶ Consequently, to fulfil the commitment outlined in the first part of paragraph (h), namely to ‘protect and respect the rights and best interests of the child at all times, regardless of migration status’, states should completely cease detaining children in the context of immigration, as such detention contravenes the best interests of the child.

At the same time, the final part of paragraph (h) instructs states to *work* towards ending the practice of child detention, but it does not definitively prohibit immigration detention of children. This creates an internal contradiction within paragraph (h): it calls on states to protect the best interests of the child while allowing practices that violate those interests, namely immigration detention. Additionally, as Smyth correctly noted, the right of the child to liberty is a civil right that carries immediate obligations for states, rather than a socio-economic right to be realized progressively over time.⁸⁷ As such, the

⁷⁹ GCM para 15.

⁸⁰ GCM para 15 (h) (emphasis added).

⁸¹ GCM para 23.

⁸² GCM para 23(e).

⁸³ GCM para 23 (f).

⁸⁴ Committee on the Rights of the Child, ‘Report on the 2012 Day of General Discussion: “The Rights of All Children in the Context of International Migration”’ (28 September 2012) para 32; see also UN CMW and CRC, ‘Joint General Comment No 4/23’ (n 21) para 5; Working Group on Arbitrary Detention, ‘United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court’ (6 July 2015) UN Doc A/HRC/30/37 para 46.

⁸⁵ UN CMW and CRC, ‘Joint General Comment No 4/23’ (n 21) para 5.

⁸⁶ Smyth (n 21) 24.

⁸⁷ Smyth (n 21) 16.

wording of ‘working to end’ in paragraph (h) appears to reflect confusion among drafters about the nature of the legal obligation governing immigration detention of children.

Furthermore, paragraph (h) stipulates that alternatives to detention provided to children should respect the right to family life and family unity. The Compact also asserts that the right to family unity and family life should be upheld, including through the facilitation of a ‘family reunification’ procedures, as indicated in other objectives and actions.⁸⁸ Given the emphasized importance of family life and unity, some states might interpret paragraph (h) as permitting the detention of children together with their parents to avoid separating them, an argument that has been previously advanced by some states.⁸⁹

As discussed above, the final version of paragraph (h) does not align with the current approach to immigration detention of children adopted by international bodies, and it has faced substantial criticism from academics.⁹⁰ Objective 13 may hinder the endorsement of a prohibition on the immigration detention of children.

Alternatives to Detention

Alternatives to detention emerged as part of a global advocacy strategy to minimize immigration detention, stressing the availability of alternatives means to achieve migration control aims. A diverse range of policies and practices have been framed as ATDs, some highly coercive ones derived from criminal justice, such as bail and bond and electronic tagging. Against this backdrop, an approach to ATDs that distinguishes between the concept in its narrow and broad senses is important.⁹¹ A narrow approach refers to practices that are to be considered when there are grounds for detention in the individual case, and then as part of a necessity test, an alternative means of achieving the same ends is identified. Here, the ATD is assessed against the background justification for potential detention. However, in the policy discourse, often various forms of accommodation and support for migrants and refugees are framed as ATDs, even though there is no general justification for detention. In this broad sense, ATD discourse risks normalising detention and confinement, as it obscures the fact that if there is no justification for detention at all, nor for restrictions on internal mobility.

IOM notably refers to GCM Objective 13 as providing ‘an opportunity to continue working towards the expansion and systematization of alternatives to detention as the customary means of addressing irregular migration’.⁹² However, IOM often casts ATDs as a desirable option rather than an obligation and this approach remains unchanged since the GCM adoption.⁹³ IOM does not consistently present the pursuit of alternatives as a legal obligation. The language of ‘obligation’ is confined to a handful of documents, often implying that if detention is not justified, ATDs are mandated.⁹⁴ IOM typically describes ATDs as an option that states ‘should consider’ and which IOM seeks to ‘promote’.⁹⁵

⁸⁸ GCM 21(i), 23(f), 27(e), 28(d), 29(h), 32(c), 37(g)).

⁸⁹ See eg *Popov v. France* (n 65) para 82.

⁹⁰ Crépeau (n 78) 653; Kathleen Newland, ‘The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement’ (2019) 30 *International Journal of Refugee Law* 657, 659.

⁹¹ Cathryn Costello and Esra Kaytaz, ‘Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva’ (June 2013) UNHCR Legal and Protection Policy Research Series.

⁹² IOM, ‘Quick Guide on Alternatives to Detention’ (2019) 2.

⁹³ Sherwood, Isabelle Lemay and Cathryn Costello (n 16) 370.

⁹⁴ IOM, ‘Quick Guide on ATDs’ (n 92) 2.

⁹⁵ IOM, ‘Immigration Detention and Alternatives to Detention’ (Global Compact Thematic Paper: Detention and Alternatives to Detention); IOM, ‘Migration Detention and Alternatives to Detention’ (2020).

Against this background, some of the language of Objective 13 is helpful, notably the commitment to ‘promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements’, and to create a repository of best and successful practices of ‘human rights-based alternatives to detention in the context of international migration’. This paragraph should be read as an invitation to develop an evidence base on ATDs, and in particular the reference to ‘successful practices’ requires an articulation of the purpose of the practices in question and the importance of understanding the role of procedural justice in seeking to make practices ‘work’.⁹⁶

Monitoring, Judicial Control and Accountability

The monitoring of places of detention is an established human rights obligation, in particular under the OPCAT. In this context, Objective 13(a) appropriately highlights the significance of using ‘existing relevant human rights mechanisms to improve independent monitoring of migration detention.’ The linkage here with the existing human rights monitoring is helpful. It can be interpreted to encompass the monitoring of places of detention and judicial control of detention, as well as the monitoring of state practices via periodic reporting to UNTBs and Universal Periodic Review (UPR). Some innovative thinking could emerge reading this provision in light of Objective 16 on empowerment, particularly regarding the importance of enabling migrants themselves to challenge detention and confinement.

The reference to accountability for violations in paragraph (g) is of potential significance, especially when detention practices have become normalized or are delegated to private actors and international organizations (including IOM), where accountability may be more elusive. The IOM’s role in the GCM, particularly regarding monitoring immigration detention, is potentially problematic, given its past coercive operational practices and generally strong sovereigntist approach.⁹⁷

Conclusion

At its core, it is evident that the GCM13 seeks to balance the protection of migrant rights with state interests in controlling migration. However, this balance is riddled with ambiguities and tensions. While GCM13 promotes the presumption of the right to liberty and views detention as a last resort, the lack of a clear definition of ‘immigration detention’ creates room for potential infringement of migrants’ rights. Such an ambiguity provides states with a possible loophole to sidestep their obligations, casting doubt on the provision’s efficacy.

The Compact's stance on the criminalization of irregular migration is similarly vague. Objective 13, with its lack of explicit prohibition against using immigration detention as a punishment for illegal entry or stay, raises concerns about the potential punitive character of detention. This stands in contrast with the GCM's overarching objectives of promoting migration management that respects human rights of all migrants.

A notable contradiction is evident in the Compact's approach to child detention. While it explicitly emphasizes the best interests of the child, it stops short of prohibiting child detention in its entirety. This approach not only diverges from established international standards but also creates potential internal conflicts within the GCM itself. Alternatives to detention (ATDs) are also fraught with potential

⁹⁶ GCM para 29 (b).

⁹⁷ Sherwood, Isabelle Lemay and Cathryn Costello (n 16) 372-89.

misuse. The propensity to label coercive measures as ATDs, poses the risk of undermining the very ethos of alternatives – which is to prioritize human rights and dignity over stringent administrative measures.

Furthermore, the GCM's Objective 13 underscores the importance of monitoring immigration detention, echoing the established international human rights obligations. This invites states to integrate existing human rights monitoring mechanisms, but its realization hinges on the commitment of states to allow independent monitoring. Finally, the aspect of accountability is of profound importance. As detention practices continue to evolve and involve non-state actors, ensuring that accountability mechanisms are robust and responsive becomes even more critical.

In conclusion, the GCM offers a foundation upon which states can build more humane and rights-centered immigration detention practices. However, for its objectives to be genuinely impactful, clarity, commitment, and robust oversight are paramount.