From Complementarity to Convergence: the UN Global Compact for Migration and the UN Migrant Workers Convention

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Abstract: The UN Global Compact for Migration (GCM) was adopted amidst much fanfare in 2018 and heralded as the first-ever UN global agreement on a common approach to international migration in all its dimensions. This claim is questionable, given the adoption in 1990 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), a core international human rights instrument and the most comprehensive international treaty in the field of migration and human rights. The near-complete silence on the ICRMW during negotiation and adoption of the Global Compact is a cause for concern from the perspective of migrants' rights protection. The GCM is a soft-law document, a non-legally binding agreement that articulates standards for the treatment of migration and migrants' rights that fall short of the requirements contained in the ICRMW.

In this article I compare the GCM, which may be viewed as an instrument calibrated to the advantage of the Global North, with the ICRMW, which I suggest may be viewed as a *de facto* instrument of the Global South. After highlighting the large degree of overlap and concordance between the two instruments (B.), I provide an overview of the risks of rights dilution that the GCM poses for migrants' rights (C.), and then explore the possibilities for ensuring that states implement the Compact in a way that avoids divergence with ICRMW standards (D.). Finally (E.), I identify the key role of the Committee on Migrant Workers (CMW), the body of independent experts charged with supervising application of the ICRMW, in translating the complementarity between the two documents into convergence in implementation. I illustrate how energetic efforts on the part of the CMW on specific fronts may work to effectively ameliorate the risks of rights dilution contained in the GCM and its implementation process.

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A. Introduction

The adoption by the international community of states of the UN Global Compact for Safe, Orderly and Regular Migration (GCM)[1] in December 2018 was greeted with much fanfare and hailed as a historic moment in the development of international cooperation on migration,[2] not least by the UN itself which identifies the Compact as "the first-ever UN global agreement on a common approach to international migration in all its dimensions."[3] The overarching goal of the Compact is, as its title indicates, the establishment of a cooperative multilateral framework to ensure that international migration occurs through legal channels in a manner that is safe and orderly. This is to be achieved through the realisation of the GCM's 23 Objectives and their related actions, 187 in total, which provide concrete examples of the measures states may take to realise the Objective in question.[4] Crucially, while no individual Objective is dedicated to human rights *per se*, the GCM's Objectives are to be fulfilled in line with ten guiding principles which include the effective protection of the human rights of all migrants, regardless of migration status (GCM, paras. 41 & 15).

A key weakness of the GCM, however, lies in its very nature. It is a soft-law document,[5] an aspirational, non-legally binding agreement with which states cannot be legally compelled to comply. States' preference for soft law as a vehicle for dealing with international migration is nothing new. There is widespread evidence and acknowledgment of states' tendency when it comes to addressing cross-border migration and migrants to use voluntary processes that produce informal norms such as best practice as a way of avoiding legally enforceable human rights obligations and oversight by international human rights bodies.[6] The soft-law nature of the GCM is of course one of the main reasons

1 UN General Assembly, GCM, 11 January 2019, UN Doc A/RES/73/195.

2 Eg, *Vincent Chetail*, International Migration Law, Oxford 2019, p. 331. The GCM self-describes as a milestone and a "historic step" in global multilateral efforts to address international migration. GCM, note 1, paras. 6 and 14.

3 Eg, United Nations, Intergovernmental Conference on the Global Compact for Migration, https://www.un.org/en/conf/migration/global-compact-for-safe-orderly-regular-migration.shtml (last accessed on 28 May 2021); United Nations, UN Refugees and Migrants, https://refugeesmigrants.un.or/igration-compact (last accessed on 28 May 2021).

4 Detailed discussion of the background to and content of the GCM is provided in *Chetail*, note 2, pp. 322–335.

5 Soft law may be defined as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects". *Linda Senden*, Soft Law in European Community Law, Portland, Oregon 2004. For discussion of the value and risks of soft law, see, eg, *Jan Klabbers*, The Undesirability of Soft Law, Nordic Journal of International Law 67 (1998), pp. 381–391; *Alan Boyle*, Soft law in international law-making, in: Malcolm Evans (ed.), International Law, 5th edn. Oxford 2018, pp. 119–137.

6 Eg, *Martin Geiger* / *Antoine Pécoud*, The Politics of International Migration Management, in: Martin Geiger / Antoine Pécoud (eds.), The Politics of International Migration Management, London

for the alacrity with which states supported it from the outset.[7] This popularity, however, along with its soft-law status, could ultimately work to the detriment of the protection of migrants' rights by overshadowing and undermining the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).[8] This is the core binding international human rights instrument that has been elaborated specifically for the purpose of securing the protection of the rights of international migrants.

In this article I will explore the similarities and tensions between the GCM and ICRMW with a view to outlining how they might be harnessed to complement each other and further strengthen the international system for the protection of migrants' rights, rather than leading to a dilution of that protection. I will compare the GCM against the ICRMW and the work done to interpret and apply the provisions of the ICRMW by its monitoring body, the Committee on Migrant Workers (CMW). Finally, I will indicate what might be done by and through the CMW to increase chances that the GCM is implemented in a way that is consistent with the ICRMW.

It is important to acknowledge at the outset the views that have been expressed concerning the uniquely low ratification record of the ICRMW and the far-reaching implications this has for the legitimacy, effectiveness and functioning of both the treaty and its monitoring body.[9] In the sections which follow, however, I argue for the growing impor-

2010, pp. 1–20; *Alan Desmond*, A Vexed Relationship: The ICRMW vis-à-vis the EU and its Member States, in: Alan Desmond (ed.), Shining New Light on the UN Migrant Workers Convention, Pretoria 2017, pp. 295–321. At the same time, however, it is important to acknowledge destination states' reliance on hard law instruments such as the 1951 Refugee Convention to maintain an unequal system of global refugee protection in support of "the developed world's migration control project". See *James Hathaway / Thomas Gammeltoft-Hansen*, Non-Refoulement in a World of Cooperative Deterrence, Columbia Journal of Transnational Law 53 (2015), p. 240.

7 Early hopes that the GCM would secure universal endorsement were dashed by increasingly shrill sovereignty-centred opposition emerging from September 2017 onwards. See *Alan Desmond*, Who's Afraid of the UN Global Compact for Migration?, RTE Brainstorm, 11 December 2018, https://www.rte.ie/brainstorm/2018/1210/1016278-whos-afraid-of-the-un-global-compact-for-migration/ (last accessed on 28 May 2021). Nonetheless the Compact was endorsed by 152 of the UN's 193 member states, with just five voting against it, 12 abstaining and 24 not turning up for the vote. Amongst those who had failed to vote, seven subsequently informed the UN Secretariat that they had intended to vote in favour. *UN General Assembly*, 60th plenary meeting, 19 December 2018, UN Doc A/73/PV.60, pp. 14–15.

8 1990, 2220 UNTS 3. The choice between soft law and hard law as a legal basis should not, of course, "allow governments and international institutions to escape normative requirements". See *Armin von Bogdandy / Matthias Goldmann / Ingo Venzke*, From Public International to International Public Law: Translating World Public Opinion into International Public Authority, European Journal of International Law 28 (2017), p. 133. This, however, is precisely the risk I identify as inhering in the adoption of the GCM.

9 Eg, *Mariette Grange*, The Migrant Workers Convention: A legal tool to safeguard migrants against arbitrary detention, in: Alan Desmond (ed.), Shining New Light on the UN Migrant Workers Convention, Pretoria 2017, pp. 91 and 95–98; *Martin Ruhs*, The Price of Rights: Regulating International Labor Migration, Princeton 2013.

tance of the ICRMW, particularly for the Global South which has seen a sharp increase in international migration in recent years and where most of the states parties to the treaty are located. While states in the Global North may continue to set the agenda for international migration law and policy, it is states in the Global South that are increasingly acting as countries of transit and destination and not solely countries of origin.

B. The ICRMW and the GCM

Adopted by consensus by the UN General Assembly in 1990, the ICRMW is one of the core international human rights instruments[10] and the most comprehensive international treaty in the field of migration and human rights. The ICRMW is similar to other core international human rights treaties adopted since the late 1970s, such as the conventions on the rights of the child (CRC)[11] and persons with disabilities (CRPD),[12] in that it takes the rights set out in the two covenants of general application, the ICCPR[13] and ICESCR,[14] and codifies them in relation to a particularly vulnerable constituency, in this case, migrant workers and members of their families.

The ICRMW is an internationally negotiated statement of basic minimum standards of human rights protection to which international migrants, irrespective of status, should be entitled. It is a comprehensive document that mandates collaboration between states (Articles 45, 64, 65, 67, 68). The longest of the core human rights instruments, it covers the entire migration process from pre-departure in the country of origin, through travel in countries of transit, to entry and residence in the destination state and return to the country of origin. This calls into question the claim that the GCM is "the first-ever UN global agreement on a common approach to international migration in all its dimensions".[15]

There is a large degree of overlap between the ICRMW and the GCM. Concerned with the protection of migrants' rights, both documents seek to establish a comprehensive framework for a rights-based approach to international migration. They are each animated, *inter alia*, by the tension between states' obligations to protect migrants' rights and the element of state sovereignty involving migration control, and both documents acknowledge states' right to determine their national migration policy and establish the criteria governing admission of migrants (GCM, paras. 7, 15 & 27; ICRMW, Article 79). Similarly, both documents clearly distinguish between regular and irregular migrants (GCM, Objectives 7, 8, 9, 10 & 13; ICRMW, Parts III & IV), noting the particular difficulties faced by the latter.

10 For the full list see, OHCHR, The Core International Human Rights Instruments and their monitoring bodies, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (last accessed on 28 May 2021).

11 UN Convention on the Rights of the Child 1989, 1577 UNTS 3.

12 UN Convention on the Rights of Persons with Disabilities 2006, 2515 UNTS 3.

13 UN International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

14 UN International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

15 UN Refugees and Migrants, note 3.

Both documents, despite commonality in scope and content, may be viewed as serving the interests of distinct constituencies. The ICRMW is, on some levels, a *de facto* instrument of the Global South. Mexico and Morocco played a key role in advocating for and drafting the treaty, and most of its 56 states parties[16] are located in the Global South, a record at least partly attributable to a desire on the part of countries that tend to be a source of migrant labour to protect their citizens abroad and a lack of willingness on the part of traditional destination countries to accept human rights obligations vis-à-vis non-citizens, some of whom are unlawfully present.[17] The GCM, on the other hand, might be viewed as serving more the interests of the Global North.[18] During regional consultations on the GCM the Africa Group sought to prioritise the claims of unlawfully present migrants to remain in their host state as an alternative to expulsion.[19] Instead, the final draft of the GCM in Objective 21 includes strong language on states' obligations to re-admit their own citizens (GCM, para. 37), an issue of particular concern to destination states[20] whose expulsion goals are frequently stymied by lack of cooperation from countries of origin. Moreover, some have taken the view that the GCM will require more work on the part of developing countries.[21] A further possible advantage of the GCM for states in the Global North is the space it may create for further side-lining and side-stepping migrants' rights protection – a goal conspicuously signposted by non-ratification of the ICRMW in the Global North - an issue to which I turn next.

16 In addition, 12 states have signed the ICRMW but have not acceded or ratified.

17 *Antoine Pécoud*, The Politics of the UN Migrant Workers Convention, in: Alan Desmond (ed.), Shining New Light on the UN Migrant Workers Convention, Pretoria 2017, p. 28; *Nicole LaViolette*, The principal international human rights instruments to which Canada has not yet adhered, Windsor Yearbook of Access to Justice 24 (2006) pp. 303–306. Relevant also in this regard is the view that the *travaux préparatoires* and other pre-negotiation records suggest that the ICRMW "was largely made by developing states, for developing states." See *Srdjan Vucetic*, Democracies and International Human Rights: Why is There No Place for Migrant Workers?, International Journal of Human Rights 11 (2007), p. 418.

18 See, eg, *Tamás Molnár*, The EU shaping the Global Compact for Safe, Orderly and Regular Migration: the glass half full or half empty?, International Journal of Law in Context 16 (2020), p. 336 who suggests that during negotiation of the GCM, the EU successfully advocated for the interests and priorities of the Global North in an attempt to redraw the lines of multilateral migration governance.

19 *Olawale Maiyegun*, Role of Regional Consultative Processes in the lead up to the Negotiations of Global Compact on Migration: The Case of Africa, International Migration 57 (2019), pp. 263 and 267–268.

20 *Jan Wouters / Evelien Wauters*, The UN Global Compact or Safe, Orderly and Regular Migration: Some Reflections, KU Leuven 2019, pp. 8–9.

21 *Narin Idriz*, Why EU Member States Should Not Hesitate to Vote for the Global Compact for Migration, Asser Institute Blog, 29 November 2018, https://www.asser.nl/about-the-institute/asser-today/blog-why-eu-member-states-should-not-hesitate-to-vote-for-the-global-compact-for-migration/ (last accessed on 28 May 2021).

C. The GCM – an Avenue for Dilution of the Protection of Migrants' Rights?

Despite the large degree of overlap between the ICRMW and the GCM, there is a danger that rights of migrants enshrined in the former and the international system of human rights protection more broadly may come to be overshadowed and undermined by the international enthusiasm for the soft-law GCM.[22] The GCM falls short of the ICRMW in relation to some key human rights standards. One striking example is the complete absence from the GCM of the right to leave any country, "the most truly universal rule on migration".[23] Its omission from the Compact could be used by states to restrict this fundamental right.[24] Any criticism of such restriction directed at states during review of GCM implementation may be convincingly deflected by pointing to the non-inclusion of the right to leave in the Compact.

A further indicative area of concern relates to protection of irregular migrant workers. Objective 6 on ensuring decent work includes an action to "provide migrant workers engaged in remunerated and contractual labour with the same labour rights and protections extended to all workers in the respective sector" (GCM, para. 22(i)). Reference to contractual work could of course be deployed as a pretext for exclusion of irregular migrant workers from, for example, equal treatment with regard to conditions of work, something which would be at odds with international human rights and labour standards.[25]

The risk that the GCM may result in attenuation of international standards for migrants is exacerbated by the soft-law nature of the GCM and the process in place for review of its implementation. Evaluation of progress on implementation is to be state-led (GCM, para. 48), with a global review of such progress to occur every four years, beginning in 2022, at the International Migration Review Forum (IMRF). This Forum will serve as the primary inter-governmental platform for states to discuss and share progress on implementation of all aspects of the Compact and each Forum will result in a Progress Declaration (GCM, para. 49). Follow-up and review of progress are to be supported by the establishment

22 For discussion of the risks posed to migrants' rights protection by the provenance of the GCM in a development framework, see, eg, *Elspeth Guild*, The UN Global Compact for Safe, Orderly and Regular Migration: to what extent are human rights and sustainable development mutually compatible in the field of migration?, International Journal of Law in Context 16 (2020), pp. 239–252. See also, on the risk of rights dilution, *Justin Gest / Ian Kysel / Tom Wong*, Protecting and benchmarking migrants' rights: an analysis of the Global Compact for Safe, Orderly and Regular Migration, International Migration 57 (2019), pp. 60–79.

23 *Vincent Chetail*, The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law, International Journal of Law in Context 16 (2020), p. 255.

24 This possibility is explored in *Guild*, note 22.

25 More detailed discussion of this point is undertaken in *Ryszard Cholewinski*, 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 (2020), pp. 313–314.

of a "groundbreaking"[26] new network, namely the United Nations Network on Migration (GCM, para. 45). The Network comprises around forty members of the UN system with migration related mandates and will rely on the International Organisation for Migration (IOM) as its co-ordinator and secretariat (GCM, para. 45(a)). Since 2016, the IOM has been a "related organisation" of the UN.[27]

The key role assigned to the IOM in the GCM provides cause for concern. The organisation lacks a human rights mandate and has been criticised in the past for displaying a greater appetite for supporting state activity in migration regulation than migrants' rights.[28] The 2013 recommendation of the UN Special Rapporteur on the human rights of migrants that in order for the IOM to be included in the UN its mandate should "be considerably revised, with a solid basis in the international human rights framework"[29] was not pursued. This perpetuates the risk that the IOM's involvement in the GCM review process will not act in any way as a bar to state implementation of the GCM that, while GCM-compliant, falls short of international standards. The informal exchange of best practice conducted during the non-binding IMRF may provide states with further incentives not to report to UN human rights treaty bodies[30] such as the CMW, or with justification during the dialogue with such bodies for failure to meet international standards in their treatment of migrants.[31]

D. The Vexed Fortunes of the ICRMW and its Continuing Value and Relevance

States' preference for soft law as a framework for dealing with international migration is one of the key explanations for the uniquely slow and low ratification record of the ICRMW.[32] Following its adoption by the UN General Assembly in 1990, it took nearly

26 *Michele Klein Solomon / Suzanne Sheldon*, The Global Compact for Migration: from the sustainable development goals to a comprehensive agreement on safe, orderly and regular migration, International Journal of Refugee Law 30 (2018), p. 589.

27 Resolution adopted by the General Assembly on 25 July 2016 (without reference to a Main Committee (A/70/L.57)), 70/296. Agreement concerning the Relationship between the United Nations and the International Organization for Migration, 5 August 2016, UN Doc A/RES/70/296.

28 More detailed critical discussion of the role of the IOM is provided in *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, International Journal of Law in Context 16 (2020), pp. 233–235.

29 UN Special Rapporteur on the human rights of migrants, Global Migration Governance, 7 August 2013, UN Doc A/68/283, para. 112.

30 There are long-standing problems with non-reporting by states to the UN human rights treaty monitoring bodies. See, eg, UN Secretariat, Timely, late and non-reporting by States parties to the human rights treaty bodies, 13 April 2015, HRI/MC/2015/5.

31 I outline in section E. how such risks may be addressed by the CMW.

32 Discussion of other reasons for states' aversion to this core human rights instrument is provided in, eg, *Alan Desmond*, The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review, European Journal of Migration and Law 17 (2015), esp. pp.

13 years for the ICRMW to gain the 20 ratifications required for it to enter into force. This stands in stark contrast to the CRC which, adopted by the UN General Assembly just over a year prior to the ICRMW, gained the 20 ratifications necessary for its entry into force within 10 months of its adoption and now has 196 ratifications. The ICRMW is currently the least widely ratified of the core international human rights instruments. With just 56 states parties, the ratification rate of this migrants' rights treaty has even been surpassed by the two most recent core instruments, the CRPD and the Treaty on Enforced Disappearances,[33] both adopted in 2006.

This singular ratification record has significant implications for the development and effective implementation of international human rights standards vis-à-vis migrants[34] and may give rise to questions concerning the legitimacy of the ICRMW and the work of its monitoring body, the CMW. It is, however, premature to write off the ICRMW. While the comparatively low number of ratifications cannot be denied, it should not be overstated: nearly 30 % of the world's states have now accepted the obligations contained in the ICRMW via ratification of the treaty. Indeed, all of the countries that make up the international community have accepted many of the standards enshrined in the ICRMW via ratification of other core human rights treaties whose provisions mirror the core rights codified in the ICRMW.[35]

The relevance of the ICRMW and its monitoring body to countries beyond the treaty's 56 states parties is evident from the statements and recommendations of numerous actors within the UN human rights system. The value of the Convention "as a robust and agreed international legal framework for the rights" of all migrants has been highlighted by the UN High Commissioner for Human Rights,[36] with the Commissioner, most of the UN human rights treaty bodies and the UN special rapporteurs on migrants and on trafficking in persons encouraging non-states parties to ratify the ICRMW.[37] Since the universal

48–49; *Euan MacDonald / Ryszard Cholewinski*, 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, Paris 2007. See, *a contrario*, *Hathaway / Gammeltoft-Hansen*, note 6 for discussion of destination states' strategy of continued adherence to hard law in the realm of international refugee law.

33 UN International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3.

34 *Grange*, note 9, pp. 91 and 95–98.

35 UN Special Rapporteur on the human rights of migrants, note 29, para. 29.

36 OHCHR, Opening Statement by Mr. Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights to a Panel to mark the 25th Anniversary of the Adoption of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 8 September 2015, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16397&LangID=E (last accessed on 28 May 2021).

37 *Grant / Lyon*, Indirect Success? The Impact and Use of the ICRMW in other UN Fora, in: Alan Desmond (ed.), Shining New Light on the UN Migrant Workers Convention, Pretoria 2017, pp. 119–124.

periodic review (UPR),[38] one of the UN Human Rights Council's flagship innovations, began operating in 2006, non-states parties to the ICRMW have received hundreds of recommendations to ratify.[39] While such recommendations are not legally enforceable, as an indicator of the concerns and views of recommending states they may be viewed as carrying a moral weight. The fact that most recommendations appear to be made by countries in the Global South[40] further re-enforces the impression of the ICRMW as a *de facto* instrument of that region of the world.

Some of the more recent work of the CMW makes particularly clear the relevance of the ICRMW and its Committee's work even to non-states parties. The CMW's two 2017 General Comments on the human rights of children in the context of international migration were adopted jointly with the UN Committee on the Rights of the Child.[41] This means that the General Comments' authoritative guidance is equally applicable to all 196 states parties to the CRC, extending the reach of the CMW's work beyond the 56 states parties to the ICRMW.

While the Convention's standards may once have justifiably been viewed as being of limited applicability to states in the Global South in real terms due to low levels of immigration experienced by those countries,[42] contemporary migration patterns mean that migrants' rights protection is an increasingly salient issue in the developing world: since 2005, South-South migration has grown faster than South-North migration, with nearly 40% of international migrants in 2019 originating from and residing in developing countries.[43] This means that states that were once primarily countries of origin are now also

38 Resolution 60/251 on the Human Rights Council, 15 March 2006, UN Doc A/RES/60/251. The Resolution mandated the Human Rights Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States".

39 *Grant / Lyon*, note 37, p. 121; *Alan Desmond*, note 32. The relevance of international legal standards to non-states parties is also discussed in *Lesley Wexler*, The Non-Legal Role of International Human Rights Law in Addressing Immigration, University of Chicago Legal Forum 1 (2007).

40 *Grant / Lyon*, note 37, p. 121; *Desmond*, note 32.

41 Joint General Comment 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (2017) CMW/C/GC/3-CRC/C/GC/22; Joint General Comment 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 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 (2017) CMW/C/GC/4-CRC/C/GC/23.

42 It is important in this context to underline that the UN ICRMW imposes duties on states of origin, as well as states of transit and destination. Therefore, even where states parties are primarily countries of origin, the ICRMW entails obligations vis-à-vis a state party's emigrating citizens.

43 UN DESA, Population Facts, 4 (2019) https://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationStock2019_PopFacts_2019-04.pdf (last accessed on 28 May 2021).

important countries of transit and destination, providing the CMW with rich opportunities to put flesh on the bones of the standards enshrined in the ICRMW through its Concluding Observations and General Comments.[44]

In the four sub-sections which follow, I briefly discuss some particularly topical features of the ICRMW and their deployment by the CMW for the advancement of migrants' rights protection. I compare them to the equivalent provisions of the GCM before going on in section E. to illustrate how the GCM might be read and implemented in a manner that is consistent with ICRMW standards, and the key role to be played by the CMW in securing such convergence.

I. Regularisation

Regularisation, the process whereby migrants who are unlawfully present in a host state are conferred with a legal status, is explicitly addressed in the ICRMW. Article 35 provides that while Part III of the Convention protects the rights of all migrants, regardless of migration status, it does not require regularisation or confer any right to a legal status. On the other hand, Article 69(1) obliges states parties to take "appropriate measures" to eliminate situations of irregular presence. The two main ways for states to ensure that migrants are not unlawfully present in their territory is to either expel them or confer a lawful status upon them. Article 69, however, is explicitly concerned with the latter option. Article 69(2) provides that whenever states "consider the possibility" of regularisation, they must give due consideration to circumstances surrounding migrants' entry, the duration of their stay and "other relevant considerations, in particular those relating to their family situation".

It is clear that Article 69 does not impose any strict obligation on states parties to the ICRMW to confer a legal status on migrants who are unlawfully present in their territory,[45] the only obligation being the requirement to take into account a non-exhaustive list of factors when making decisions in any eventual regularisation process. The absence of any strict regularisation obligation notwithstanding, the CMW has drawn on Article 69 to highlight the importance and possibilities for states to consider regularisation as a response to the presence of migrants in an irregular situation.[46]

44 See the discussion in *Chetail*, note 2, pp. 224–227, and section D. of the present paper.

45 *Linda Bosniak*, Human Rights, State Sovereignty, and the Protection of Undocumented Migrants under the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, International Migration Review 25 (1991), p. 762. Some commentators, however, have suggested that Article 69 imposes a "regularise or expel" obligation on states parties vis-à-vis irregular migrants. See *Paul de Guchteneire* / *Antoine Pécoud*, Introduction: The UN Convention on Migrant Workers' Rights, in: Paul De Guchteneire / Antoine Pécoud / Ryszard Cholewinski (eds.), Migration and Human Rights, Cambridge 2009, pp. 22–23.

46 See also the discussion in *Bernard Ryan*, In Defence of the Migrant Workers Convention: standard setting for contemporary migration, in: Satvinder Juss (ed.), The Ashgate Research Companion to Migration Law, Theory and Policy, Surrey 2013, pp. 491–515, esp. p. 512.

In four of the General Comments it has adopted so far, [47] the CMW has highlighted the role regularisation may play in allowing protection of migrants' rights to be secured in practice. In its first General Comment, which concerned migrants employed in private homes, the Committee highlighted the potential of regularisation as a way of addressing the "extreme vulnerability" of irregular migrant domestic workers.[48] General Comment 2, on the rights of irregular migrants, repeats the Committee's encouragement to states parties to consider regularisation, it being "the most effective measure to address the extreme vulnerability of migrant workers and members of their families in an irregular situation."[49] The CMW's third and fourth General Comments, adopted jointly with the Committee on the Rights of the Child, concern the rights of children and obligations of states in the context of international migration. The Committees invoke the principle of the best interests of the child to recommend that states put in place avenues for regularisation.[50]

The main function of the CMW is of course to issue Concluding Observations following its review of states' record of compliance with, and implementation of, the ICRMW. Since it first addressed the issue of regularisation in one of its Concluding Observations in 2007,[51] the CMW has expressed concern to individual states parties at a lack of regularisation options[52] and has recommended states to deploy regularisation as a means of addressing the situation of specific cohorts of irregular migrants[53] and high numbers of

47 For a critique of the CMW's first two General Comments, see *Vincent Chetail*, The Committee on the Human Rights of Migrant Workers, in: Frédéric Mégret / Philip Alston (eds.), The United Nations and Human Rights: A Critical Appraisal, 2nd edn. Oxford 2020. The CMW recently adopted a fifth General Comment, dedicated to the topic of immigration detention. See General Comment 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights, CMW, 23 September 2021, CMW/C/GC/5.

48 General Comment 1 on migrant domestic workers, CMW, 23 February 2011, CMW/C/GC/1, para. 52.

49 General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, CMW, 28 August 2013, CMW/C/CG/2, pp. 17–18, para. 16.

50 Joint General Comment 3, note 41, para. 44; Joint General Comment 4, note 41, paras. 29 and 35.

51 Concluding Observations on the initial report of Ecuador, 5 Dec 2007, CMW/C/ECU/CO/1, para. 6(c).

52 Concluding Observations on the initial report of Turkey, 31 May 2016, CMW/C/TUR/CO/1, para. 85; Concluding Observations on the third periodic report of Mexico, 27 September 2017, CMW/C/MEX/CO/3, para. 43; Concluding Observations on the second periodic report of Argentina, 4 Feb 2020, CMW/C/ARG/CO/2, para. 32.

53 Concluding Observations on the initial report of Argentina, 2 November 2011, CMW/C/ARG/CO/1, para. 32(e); Concluding Observations on the third periodic report of Mexico, 27 September 2017, CMW/C/MEX/CO/3, paras. 33 and 34(g); Concluding observations on the second periodic report of Tajikistan, 9 May 2019, CMW/C/TJK/CO/2, para. 35(b).

irregular migrants.[54] It has commended states that have adopted regularisation measures,[55] and identified shortcomings in the regularisations undertaken by some states parties, along with recommendations for addressing such shortcomings.[56]

The promotion of regularisation by the CMW is in keeping with the object and purpose of the ICRMW. Although it has been criticised for conferring "second (or third-) class status" on irregular migrants,[57] the Convention is clearly animated by a particular concern for the human rights of irregular migrants. The Preamble notes that "the human problems involved in migration are even more serious in the case of irregular migration" with irregular migrants "frequently employed under less favourable conditions of work than other workers". The ICRMW thus in Part III explicitly stipulates a catalogue of safeguards to be enjoyed by all migrants regardless of status. In practice, however, the limited list of rights set out in Part III is difficult to secure for irregular migrants: their very lack of legal migration status often precludes any attempt by migrants to enforce their rights for fear that such a course of action may trigger their expulsion. Regularisation removes the risk of imminent deportation and puts migrants in a position to assert the rights they enjoy under the ICRMW. In this context, the CMW's promotion of regularisation[58] is entirely consistent with the spirit of the treaty and with the reality of migration in a world where global inequality and a demand for migrant labour in states with restrictive immigration policies produces tens of millions of irregular migrants.[59]

By contrast, the term regularisation is absent from the GCM. The Zero Draft did state that in order to achieve inclusion and social cohesion, as articulated in Objective

54 Eg, Concluding Observations on the initial report of Azerbaijan, 19 May 2009, CMW/C/AZE/CO/1, paras. 44–45.

55 Eg, Concluding Observations on the second report of Ecuador, 15 Dec 2010, CMW/C/ECU/CO/2, paras. 6–7; Concluding Observations on the initial report of Argentina, 2 November 2011, CMW/C/ARG/CO/1, paras. 5(b) and 6(a).

56 Eg, Concluding Observations on the initial report of Bolivia, 2 May 2008, CMW/C/BOL/CO/1, paras. 31–32; Concluding Observations on the second report of Ecuador, 15 Dec 2010, CMW/C/ECU/CO/2, paras. 33–34; Concluding Observations on the third report of Ecuador, 5 Oct 2017, CMW/C/ECU/CO/3, paras. 42–43; Concluding Observations on the initial report of Argentina, 2 November 2011, CMW/C/ARG/CO/1, paras. 33–34; Concluding Observations on the third periodic report of Mexico, 27 September 2017, CMW/C/MEX/CO/3, paras. 47–48; Concluding Observations on the second periodic report of Argentina, 4 Feb 2020, CMW/C/ARG/CO/2, paras. 52–53.

57 *Bosniak*, note 45, p. 759.

58 It is worth noting that other treaty bodies have also recommended regularisation as a way of ensuring that rights set out in the core international human rights instruments are available, not only in theory but also in practice, to irregular migrants. Eg, CERD, Concluding Observations on the fourth and fifth periodic reports of Kazakhstan, 6 April 2010, CERD/C/KAZ/CO/4-5, para. 16(a); CESCR, Concluding Observations on the seventh periodic report of Ukraine, 2 April 2020, E/C.12/UKR/CO/7, para. 25(a).

59 The US, for example, "has tolerated significant unauthorized migration to assure a supply of flexible, cheap labor, subject to discretionary, unpredictable, and inconsistent enforcement." *Hiroshi Motomura*, Immigration Outside the Law, Oxford 2014, p. 107.

16, instrumental actions included facilitation of access to regularisation options "as a means to promote migrants' integration into society and fully harness their contributions to sustainable development, as well as to reduce the stigmas that may be associated with irregular status".[60] This action was omitted from the final draft of the Compact due to its politically sensitive nature,[61] notwithstanding the view of the Africa Group during regional consultations that regularisation should be included.[62] Nonetheless, strong support for regularisation may be deduced from the text of the GCM.

The ultimate goal of the GCM, to bring about migration that is safe, orderly and regular, cannot be achieved without recourse to regularisation. Continued presence of populations of irregular migrants in states around the world will, by definition, defeat the objective of ensuring regular migration: irregular migrants are, for self-evident reasons, in an unsafe situation. Beyond the bare title and aim of the GCM, the text of the document itself clearly encourages recourse to regularisation to achieve effective protection of "the human rights of all migrants, regardless of their migration status" (GCM, para. 15). This is most sharply illustrated by Objective 7 on addressing and reducing vulnerabilities in migration. The non-exhaustive list of 12 actions guiding states' response to the needs of vulnerable migrants includes two key items that will underpin GCM-based policies around regularisation.

Firstly, states should develop "procedures that facilitate transitions from one status to another … so as to prevent migrants from falling into an irregular status". Secondly, states should provide irregular migrants with "an individual assessment that may lead to regular status, on a case by case basis and with clear and transparent criteria" especially where questions of family life are involved (GCM, para. 23(h) & (i)). States' implementation of these elements of the GCM might be helpfully informed by reference to the guidance on regularisation provided by the CMW.

II. Firewalls

A further important issue of particular relevance to irregular migrants where there is broad concordance between the ICRMW and GCM is that of firewalls. Use of a firewall in the context of irregular migration entails a guarantee that information concerning the immigration status of persons accessing public or social services will not be shared with

60 Global Compact for Safe Orderly and Regular Migration, Zero Draft, 5 February 2018, https://refugeesmigrants.un.or/ite/efaul/ile/80205_gcm_zero_draft_final.pdf (last accessed on 11 February 2021).

61 *François Crépeau*, Towards a Mobile and Diverse World: "Facilitating mobility" as a central objective of the Global Compact on Migration, International Journal of Refugee Law 30 (2018), p. 652.

62 *Maiyegun*, note 19.

those responsible for immigration law enforcement.[63] The aim here, of course, is to avoid situations where irregular migrants are in practice prevented from accessing rights to which they are formally entitled through fear that contact with public authorities or service providers may ultimately lead to their deportation. Meaningful implementation of firewalls between public services and immigration enforcement would, for example, allow irregular migrants to access health care and to enforce their labour rights without fear of detention and deportation.

While the ICRMW is silent on the issue of firewalls, the CMW has recognised that such a device is necessary in order to ensure that the rights set out in the treaty are practical and effective for irregular migrants, and not simply theoretical. In its second General Comment, on the rights of irregular migrants, the CMW explicitly prohibited any requirement for public health institutions, health care providers, schools and labour inspectorates to report or otherwise share data on service users' migration status with immigration authorities.[64] Similarly, it prohibited the conduct of immigration enforcement operations on or near school premises or facilities providing medical care.[65] In the same vein, the CMW's Joint General Comments with the Committee on the Rights of the Child call for the development of effective firewalls between public or private service providers and immigration enforcement authorities to ensure that irregular migration status does not operate to limit enjoyment of children's rights.[66]

More recently, the CMW has begun to address the issue of firewalls in its Concluding Observations. Since 2018 the Committee has recommended three states parties to put in place firewalls so as to remove the fear of arrest, detention and deportation that prevents irregular migrants from accessing basic services such as housing, health care and education.[67]

63 See, eg, *Joseph Carens*, The Ethics of Immigration, Oxford 2013, pp. 132–135; *François Crépeau* / *Bethany Hastie*, The Case for "Firewall" Protections for Irregular Migrants: Safeguarding Fundamental Rights, European Journal of Migration and Law 17 (2015); PICUM, Data Protection and the Firewall: Advancing Safe Reporting for People in an Irregular Situation, Brussels 2020.

64 General Comment 2, note 49, paras. 63, 74 and 77.

65 General Comment 2, note 49, paras. 74 and 77.

66 Joint General Comment 3, note 41, para. 17; Joint General Comment 4, note 41, paras. 42, 46, 52, 56 and 60.

67 Concluding observations on the second periodic report of Algeria, 25 May 2018, CMW/C/DZA/CO/2, para. 32(c); Concluding Observations on the initial report of Mozambique, 12 Sept 2018, CMW/C/MOZ/CO/2, para. 30(c); Concluding Observations on the second periodic report of Guatemala, 2 May 2019, CMW/C/GTM/CO/2, para. 29(f). A similar recommendation was made to Germany by the CESCR: Concluding Observations on the sixth periodic report of Germany, 27 November 2018, E/C.12/DEU/CO/6, para. 27.

Despite the increasing support for and promotion of firewalls amongst the UN's human rights mechanisms[68] and other bodies concerned with human rights and labour standards,[69] the GCM is *prima facie* silent on this matter. The term firewall is mentioned three times in the Zero Draft, in respect of Objective 6 on ensuring decent work, Objective 7 on addressing vulnerabilities in migration and Objective 15 on access to basic social services.[70] Such references were deleted before adoption of the final document.[71] There is, however, no inevitable incompatibility between use of firewalls and implementation of the GCM. Indeed, use of such a mechanism is arguably necessary to achieve the Compact's aim of reducing "the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights" (GCM, para. 12). More specifically, certain actions included in the Compact seem to necessitate firewalls. Ensuring that migrants exploited in the informal economy have access to reporting mechanisms "in a manner that does not exacerbate vulnerabilities of migrants that denounce such incidents" is a case in point (GCM, para. 22(j)). Similarly, Objective 15 on access to basic services includes an action to ensure that "cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services" (GCM, para. 31(b)). Objective 7 on reducing vulnerabilities in migration essentially invites all states to consider firewalls by reviewing "labour laws and work conditions to identify and effectively address workplace-related vulnerabilities and abuses of migrant workers" (GCM, para. 23(d)).

Read in light of the evolving international standards articulated in the work of the CMW, states' implementation of the GCM should clearly include appropriate use of firewalls to ensure the rights afforded to irregular migrants on paper are also available to them in practice.

III. Criminalisation

The phenomenon of criminalisation of migration has generated a rich body of scholarship and expert commentary.[72] Briefly stated, criminalisation is a broad concept that involves

68 Eg, UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, Visit to France, 3 March 2020, UN Doc A/HRC/43/43/Add.2, paras. 70 and 93(f).

69 Eg, European Commission against Racism and Intolerance, General Policy Recommendation 16 on Safeguarding Irregularly Present Migrants from Discrimination, Strasbourg 2016, pp. 7, 13, 15 and 19; ILO, Promoting Fair Migration, Geneva 2016, paras. 481–482.

70 Zero Draft, note 60.

71 For discussion of the EU's desire to omit any firewall-related commitments from the GCM, see *Molnár*, note 18, p. 335.

72 Eg, *Mark Provera*, The Criminalisation of Irregular Migration in the European Union, Brussels 2015; European Union Agency for Fundamental Rights, Criminalisation of migrants in an irregular situation and of persons engaging with them, Vienna 2014; *Valsamis Mitsilegas*, The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law, London 2015.

both the application of criminal law sanctions to immigration law breaches such as irregular entry and stay, as well as deployment against irregular migrants of administrative measures which mimic criminal ones, such as detention.[73] More recently, it has extended to include the application of criminal law against persons and organisations engaged in providing humanitarian assistance to irregular migrants.[74]

While the adoption of the ICRMW predates the emergence of criminalisation as a central feature of the contemporary international migration landscape, opposition to the criminalisation of migration is encoded in the treaty's DNA: it requires that persons detained for immigration violations be held, "in so far as practicable", separately from those in the criminal justice system (Article 17(3)). It furthermore promotes a migrant-friendly approach to the legitimate application of criminal law by encouraging states to take into account humanitarian considerations in imposing a sentence for a criminal offence committed by a migrant (Article 19).

The CMW has been forthright in its denunciation of the criminalisation of migration.[75] In its Concluding Observations it has recommended the decriminalisation of irregular entry[76] and irregular migration status[77] in specific states parties. In its General Comments, the CMW has been particularly trenchant in its opposition to criminalisation. In its General Comment 2, on irregular migrants' rights, the CMW spotlighted criminalisation as fuel for public perceptions of irregular migrants as "second-class individuals, or unfair competitors for jobs and social benefits" and consequent discrimination and xenophobia.[78] In a similar vein, the CMW takes the view that irregular entry or residence does not constitute a crime. While they "may constitute administrative offences, they are not crimes *per se* against persons, property or national security" and criminalisation of irregular entry therefore exceeds states parties' legitimate interest in controlling irregular migration.[79]

In the second of its joint general comments with the Committee on the Rights of the Child, the Committees emphasise that children should not be criminalised because of their

73 *Grange*, note 34, pp. 75–76; *Elspeth Guild*, Criminalisation of Migration in Europe: Human Rights Implications, Strasbourg 2009, p. 5.

74 *Sergio Carrera / Lina Vosyliute / Stephanie Smialowski / Jennifer Allso / Gabriella Sanchez*, Fit for purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update, Brussels 2018.

75 This approach has been supported by the UN High Commissioner for Human Rights. See OHCHR, note 36.

76 Eg, Concluding Observations on the initial report of Bangladesh, 22 May 2017, CMW/C/BGD/CO/1, paras. 29–30.

77 Eg, Concluding Observations on the initial report of Algeria, 19 May 2010, CMW/C/DZA/CO/1, paras. 18 and 21; Concluding Observations on the second periodic report of Algeria, 25 May 2018, CMW/C/DZA/CO/2, paras. 39(b) and 40(b); Concluding observations on the second periodic report of Tajikistan, 9 May 2019, CMW/C/TJK/CO/2, paras. 34 and 35(b).

78 General Comment 2, note 49, p. 3, para. 2.

79 General Comment 2, note 49, p. 9, para. 24.

or their parents' migration status.[80] They call on states to refrain from criminalising irregular migrant children who exercise their right to housing and private actors who facilitate exercise of this right.[81] Much of the CMW's criticism of criminalisation is repeated and distilled in its General Comment on immigration detention,[82] which notes that states parties to the ICRMW "have an obligation not to criminalize migration".[83]

The GCM, on the other hand, takes a less clear-cut approach to criminalisation. While it explicitly calls for migrant victims of trafficking and for provision of assistance "of an exclusively humanitarian nature" not to be criminalised (GCM, paras. 26(g) & 24(a)), its call for non-criminalisation of migrants who are "the object of smuggling" allows "potential prosecution for other violations of national law" (GCM, para. 25).[84] Similarly, while the Zero Draft committed states to ensuring that "national legislation reflects irregular entry as an administrative, not a criminal offence",[85] the GCM as adopted facilitates continued criminalisation by making the much vaguer commitment to "review and revise relevant laws and regulations to determine whether sanctions are appropriate to address irregular entry or stay" (GCM, para. 27(f)).

The most clear-cut failure of the GCM concerns one of the central pillars of criminalisation, namely migration detention, and specifically detention of migrant children, an issue discussed in the next section. The failure of the GCM to oppose criminalisation of migration *per se* is inconsistent with the spirit of much of the document. The Compact celebrates migration as "part of the human experience throughout history" and "a source of prosperity, innovation and sustainable development in our globalized world" (GCM, para. 8). In one of its potentially most far-reaching Objectives, it seeks to eliminate all forms of discrimination and to promote evidence-based public discourse to shape perceptions of migration (Objective 17). It might therefore have been expected to draw on the insight of the CMW that criminalisation of irregular migration fuels anti-immigration rhetoric and negative public perceptions.[86] Furthermore, a central consequence of criminalisation is an increase in migration that is classified as irregular. This is counter to the goal of the Compact to ensure that migration is safe, orderly and regular.

80 Joint General Comment 4, note 41, p. 3, para. 7.

81 Joint General Comment 4, note 41, p. 13, para. 52.

82 General Comment 5, note 47.

83 General Comment 5, note 47, para. 4.

84 It is clear from the explanations of vote in the General Assembly that many states which endorsed the GCM view it as their right to deal with irregular border crossings as criminal rather than administrative offences. See, eg, UN Doc A/73/PV.60, note 7, pp. 22 and 25.

85 Zero Draft, note 60, para. 23(d).

86 General Comment 2, note 49, p. 3, para. 2.

IV. Immigration Detention of Children

Immigration detention is a key element of the criminalisation of migration. While commentators have positively appraised Objective 13 on using immigration detention only as a measure of last resort and prioritising non-custodial alternatives to detention,[87] the GCM comes up short in its approach to immigration detention of children. There is much evidence to support the view that immigration detention has adverse effects on the psychological and emotional well-being of children[88] and while there are competing scholarly views as to its permissibility,[89] and inconsistency in the approach taken by UN human rights bodies,[90] the adoption of the GCM presented an opportune moment to solidify in international human rights law the complete prohibition on such detention articulated in the second of the two joint general comments adopted in 2017 by the CMW and Committee on the Rights of the Child.[91] This Joint General Comment has been characterised as the apogee of the evolution towards a complete prohibition on the immigration detention of children.[92]

The complete prohibition articulated by the two Committees[93] reflects earlier recommendations included in the Concluding Observations of the Committee on the Rights of the

87 *Chetail*, note 23, pp. 259–260; Detailed analysis of the GCM position on immigration detention in light of the standards elaborated in the ICRMW is provided in *Mariette Grange* / *Izabella Majcher*, Using detention to talk about the elephant in the room: the Global Compact for Migration and the significance of its neglect of the UN Migrant Workers Convention, International Journal of Law in Context 16 (2020), pp. 287–303. However, during regional consultations the Africa Group and the Group of Latin American and Caribbean (GRULAC) were consistent in their objection to all forms of migration detention including detention of children with their parents, but "did not really get their way". *Maiyegun*, note 19, pp. 268–269.

88 Eg, *Gillian Triggs*, The impact of detention on the health, wellbeing and development of children: findings from the second National Inquiry into Children in Immigration Detention, in: Mary Crock / Lenni Benson (eds.), Protecting Migrant Children: In Search of Best Practice, Cheltenham 2018, pp. 396–419; *Leeanne Torpey / Daniela Reale*, Time for a clear roadmap for states to end child immigration detention, Open Democracy, 1 March 2017, https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/time-for-clear-roadmap-for-states-to-end-child-immigratio/ (last accessed on 28 May 2021).

89 See, eg, the argument that immigration detention of children is prohibited outright in *Ciara Smyth*, Towards a Complete Prohibition on the Immigration Detention of Children, Human Rights Law Review 19 (2019), pp. 1–36. For the argument that it is permissible as a last resort, see *Gerald Neuman*, Detention As a Last Resort: The Implications of General Comment No. 35, in: Mary Crock / Lenni Benson (eds.), Protecting Migrant Children: In Search of Best Practice, Cheltenham 2018, pp. 381–395.

90 See *Smyth*, note 89.

91 Joint General Comment 4, note 41, para. 5.

92 *Smyth*, note 89, p. 21.

93 Insightful analysis of the Joint General Comment, and the treatment of immigration detention of children by other UN human rights treaty bodies, is provided in *Smyth*, note 89.

Child,[94] and has been repeated by the CMW in more recent Concluding Observations.[95] It might therefore have been expected that the GCM would reiterate this absolute prohibition. Indeed, the 2016 report of the UN Secretary General that called for the elaboration of the global compacts urged states to ensure that children, as a matter of principle, are never detained for purposes of immigration control[96] and a report submitted by the UN Secretary General to inform the elaboration of the GCM specifically recommended that states should focus on ending immigration detention of children.[97]

While the Zero Draft committed to "ending the practice of child detention in the context of international migration",[98] lack of consensus softened that commitment so that the GCM as adopted aspires to "working to end the practice of child detention in the context of international migration" (GCM, para. 29(h)). The GCM thus casts the child's right to liberty, a civil right entailing immediate obligations, "as if it were a socio-economic right to be realised progressively over time, or worse, as a matter of soft law or best practice."[99] Simultaneously, the GCM hampers the development of international human rights law, squandering a valuable opportunity to crystallise the "emerging consensus on the complete prohibition of immigration detention of children"[100] and perpetuating fragmentation and incoherence in relation to the elaboration of protection standards for some of the most acutely vulnerable individuals.

E. Towards Complementarity and Convergence

In order to remove the rights-dilution risks posed by the GCM, implementation of the Compact should be conducted in a manner that is compatible with the standards set out

94 Eg, in relation to refugee and asylum-seeking children, Concluding Observations on the initial report of Austria, 7 May 1999, CRC/C/15/Add.98, para. 27; Concluding Observations on the third and fourth periodic report of Thailand, 17 February 2012, CRC/C/THA/CO/3–4, para. 71; Concluding Observations on the third and fourth periodic report of the Republic of Korea, 2 February 2012, CRC/C/KOR/CO/3–4, paras. 66–67. As noted by *Smyth*, note 89, pp. 5–9, the Committee's Concluding Observations also include many less clear-cut recommendations to states parties concerning immigration detention of children.

95 Eg, Concluding Observations on the second periodic report of Algeria, 25 May 2018, CMW/C/DZA/CO/2, para. 40(d); Concluding Observations on the second periodic report of Guatemala, 2 May 2019, CMW/C/GTM/CO/2, para. 41; Concluding Observations on the initial report of Libya, 8 May 2019, CMW/C/LBY/CO/1, para. 39(c).

96 UN Secretary General, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, 21 April 2016, UN Doc A/70/59, para. 101(b)(ii).

97 UN Secretary General, Making Migration Work for All, 12 Dec 2017, UN Doc A/72/643, para. 59.

98 Zero Draft, note 60, para. 27(g).

99 *Smyth*, note 89, p. 16.

100 UN Special Rapporteur on the human rights of migrants, Ending immigration detention of children and providing adequate care and reception for them, 20 July 2020, UN Doc A/75/183, para. 79.

in the ICRMW, as developed by the CMW. This is of course a tall order, but it is both a defensible and realisable demand. The GCM "rests on" the core international human rights treaties, including the ICRMW, and is emphatic in its commitment to implementation in a manner that is consistent with international law rights and obligations (GCM, paras. 2 & 41). While the ICRMW has so far been ratified by just over a quarter of the states that make up the international community, it nonetheless represents an international consensus[101] on the minimum human rights standards that are to be enjoyed by international migrants. Its continuing and fundamental importance as a tool to address contemporary migration has been recognised at the highest levels of the UN human rights machinery.[102]

Implementation of the GCM in a manner that is consistent with the ICRMW is also achievable in practical terms. Crucially, the GCM includes a non-regression clause when it comes to human rights (GCM, para. 15) and although there is no explicit reference in the GCM to states' freedom to introduce or maintain standards more favourable than those articulated in the Compact, there is no legal barrier to states doing so. Despite the divergences between the ICRMW and GCM discussed above, it is possible to interpret restrictive provisions in a manner that is compatible with stronger human rights obligations and protections and to ensure non-regression. Such an approach is epitomised in the way in which the CMW has read Article 26 ICRMW in light of other international human rights and labour treaties to highlight irregular migrants' right to form trade unions, despite the ICRMW's reservation of this right to lawfully present migrant workers.[103]

How, then, might states be encouraged to consider the ICRMW when implementing the GCM? The active involvement of civil society and migrants themselves will of course be key,[104] but there is much that the CMW itself can do in this regard. Firstly, it should be alert to any attempts by states parties to employ implementation of the GCM as a means of eschewing or lowering ICRMW standards. To mitigate this risk, the Committee should include as a standing item in its Concluding Observations a recommendation that states parties engage with the GCM implementation process in a manner that is consistent with

101 Indeed, the ICRMW on one reading has a greater claim to universal international endorsement than the GCM given the adoption of the former by consensus, with the latter being endorsed by only 152 of the UN's 193 member states in the UN General Assembly. See UN Doc A/73/PV.60, note 7.

102 OHCHR, note 36.

103 General Comment 2, note 49, pp. 17–18, para. 65. This means that the right to form trade unions reserved to lawfully present migrants by Article 40 ICRMW must be extended to irregular migrants by states which have ratified treaties that confer the right to trade union formation on irregular migrants.

104 There is an explicit requirement for the voices of these actors to be heard during GCM implementation. The agreement is to be implemented "in cooperation and partnership with migrants, civil society, migrant and diaspora organizations…" (GCM, para. 44). The involvement of extra-governmental actors is a common feature of soft-law initiatives. See *Joost Pauwelyn / Ramses A. Wessel / Jan Wouters*, When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, European Journal of International Law 25 (2014), pp. 733–63.

their ICRMW obligations. Furthermore, the CMW might recommend that states parties themselves promote wider ratification of the ICRMW during the GCM implementation review process as a complement to their obligation to report to the CMW on their efforts to disseminate and promote the Convention.[105]

Such efforts by the CMW would be consistent with long-standing and ongoing promotion endeavours on the part of the Committee.[106] Greater reference to the ICRMW, even in the absence of wider ratification, is necessary in order to ensure coherence in the interpretation and application of international human rights and labour standards vis-à-vis non-citizens. In this context, the CMW would do well to hold a Day of General Discussion devoted to the relationship between the GCM and ICRMW.[107] Previous Days of Discussion have proven fruitful, providing an important forum for an exchange of views by key stakeholders including governments, NGOs, and UN human rights mandate holders. Such events may facilitate a coherence of approach to international standards as they pertain to migrants. They focus attention not only on the issue under discussion but also increase the visibility of the CMW and ICRMW.[108]

One further measure is worth highlighting as essential to ensuring effective and meaningful ICRMW input into the GCM review and implementation processes. The CMW should be part of the Executive Committee of the UN Network on Migration, the group established to "ensure effective and coherent" support for implementation and review of the GCM (GCM, para. 45). Given the position of the CMW as the guardian of the UN human rights treaty customised for the protection of migrants, and given the mandate of the Network to "fully draw from the technical expertise and experience of relevant entities within the United Nations system" (GCM, para. 45(b)), it is difficult to understand the CMW's absence from the Network's eight-member Executive Committee that sets strategic priorities to support states to effectively implement the GCM.[109] It is equally difficult to understand the CMW's non-membership of the Network's three Core and six Thematic Working Groups. These Working Groups support states and other stakeholders

105 See Provisional Guidelines regarding the form and contents of initial reports to be submitted by states parties under article 73 of the ICRMW, 6 May 2005, HRI/GEN/2/Rev.2/Add.1, para. 3(d); and Guidelines for the periodic reports to be submitted by states parties under Article 73 of the Convention, 22 May 2008, CMW/C/2008/1, para. 3(c).

106 Eg, CMW Informal Meeting Geneva, 11 to 15 October 2004, CMW/C/2004/L.4, paras. 7–11; Report of the CMW Thirty-first session, 2–11 September 2019, UN Doc A/75/48, paras. 26–48.

107 The Committee has already indicated that it may adopt a General Comment encompassing a comparative analysis of the ICRMW and the GCM: Report of CMW, Thirty-first session, note 106, para. 28.

108 Detail on the value of the Committee's days of general discussion is provided in *Ryszard Cholewinski*, Working Together to Protect Migrant Workers: ILO, The UN Convention and its Committee, in: Alan Desmond (ed.), Shining New Light on the UN Migrant Workers Convention, Pretoria 2017, pp. 169–174.

109 United Nations Network on Migration https://migrationnetwork.un.org/executive-committee (last accessed on 28 May 2021).

in the implementation, follow-up and review of the GCM in key defined areas including the development of alternatives to detention, elaboration of national GCM implementation plans, and access to public services for all migrants regardless of status. While CMW participation in meetings organised by the Network is important,[110] it cannot compensate for lack of CMW membership in the Network's Executive Committee and Working Groups. Non-membership creates space for implementation of the GCM that diverges with the standards elaborated in the ICRMW, as interpreted by the CMW.

F. Conclusion

The elaboration and adoption of the GCM, borne of public and political concern with migration in the middle of the last decade, was a landmark development in international co-operation on migration. It is a development, however, that from the perspective of migrants' rights protection contains at least as many risks for backsliding as it does opportunities for advancement. The risks have their basis in three inter-related features of the GCM: its general popularity with and endorsement by states; its soft-law nature; and the clear way in which some of the standards it articulates fall short of the requirements imposed on states by international human rights and labour law.

In this article I have outlined how these risks of rights dilution may be ameliorated by reference to the ICRMW and the work of its monitoring body, the CMW. I highlighted the large degree of overlap and concordance between the GCM and ICRMW, emphasising the GCM's non-regression clause and the self-evident but important point that there is no legal barrier to interpretation and implementation of lower (or absent) GCM standards in line with higher international standards contained in the ICRMW and developed by the CMW. I mapped out a roster of activity to be undertaken by the CMW to avoid the risk that implementation of the GCM diverges with the requirements of the ICRMW. The work of the CMW is of course most directly relevant to the 56 states parties to the ICRMW. Nonetheless, its position as custodian of the UN treaty tailor-made for the protection of migrants' rights means that its voice should be heard loud and clear in UN efforts to support states in their efforts to effectively comply with what is the most important international agreement concerning migrants' rights since the adoption of the ICRMW in 1990.

110 Report of CMW, Thirty-first session, note 106, paras. 26 and 48.