The Global Compacts and the Dilemma of Children in Immigration Detention

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THE GLOBAL COMPACTS

2018 is a significant year for the global community to converge on two global commitments together: the Global Compact on Refugees (Refugee Compact) and the Global Compact for Safe, Orderly and Regular Migration (Migration Compact). The seeds for these agreements were sown in 2016 when the world’s leaders adopted the New York Declaration for Refugees and Migrants, which called for the formulation of international frameworks for cooperation in these areas by 2018.

International cooperation on how to deal with refugees and migrants has become a critical and sensitive issue for all countries, especially as many are concurrently source, transit, and destination countries. The Refugee Compact covers trans-frontier flows, particularly by those pressured to leave for political reasons and related conflicts, while the Migration Compact encompasses other cases, including people who leave for economic reasons (such as migrant workers) and those who leave on account of environmental pressures (such as being displaced by the impacts of a disaster). The situation has become even more complex due to the proliferation of crimes wreaking havoc on persons on the move in the form of human trafficking and smuggling.

The driving force behind the two agreements is the principle advocated by the New York Declaration that ‘[m]igration should be a choice, not a necessity’ (para 43). Conceptually, it is not too difficult to outline the necessary components of an international framework, namely: prevention – to tackle the root causes behind the movements; protection – to offer protection and assistance to persons on the move; solutions – to offer various pathways to constructive outcomes, both short term and long term; cooperation – to strengthen international, regional, and national processes and commitments for collaboration geared to prevention, protection, and solutions; and participation – not only between States, but by other stakeholders as well, such as civil society, the private sector, and those on the move.

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However, the realities are much less reassuring due to the complicated relationship between State sovereignty, border controls, national security, mass movements, violence and terrorism, racism and xenophobia, and nationalistic agendas that reject multilateralism, on the one hand, and human rights and human security, on the other. There are also imbalances which give rise to a sense of injustice between developing and developed countries, particularly inequitable development patterns, compounded by pervasive poverty, and all-too-limited resource allocations in the quest for sharing the global–local responsibility.

What tangible elements might the two Global Compacts offer as a value-added for the world community, and what of their interface with the dilemma of children in immigration detention? The Refugee Compact commits to the Comprehensive Refugee Response Framework (CRRF) to help countries which host refugees, promote self-reliance of refugees, develop solutions involving third countries, and ensure that if refugees are to return to their country of origin, this will be done in safety and dignity. Importantly, it adds periodic follow-up meetings in the form of the Global Refugee Forum. In substance, the issue of reception, admission, and treatment of refugees is interlinked with respect for the universal principle of non-refoulement (which prohibits the forced removal of refugees to areas of danger); response to their needs; help for host countries and communities; and durable solutions, particularly through local settlement, third-country resettlement, and voluntary repatriation to the country of origin/habitual residence. The Framework is blessed with a longstanding international treaty in the form of the 1951 Refugee Convention, read together with its 1967 Protocol, to which some 148 States are parties.

The CRRF is already being implemented in a number of countries, particularly in Africa. The Refugee Compact will work towards a Programme of Action to facilitate cooperation on the basis of shared responsibility. On a welcome note, the World Bank has come on board to help provide financial backup for the package, and other stakeholders, such as the private sector, are being mobilized with a strategy of involving the ‘whole of society’. Given that the biggest refugee caseloads today originate from Asia, especially with millions of Syrians and Afghans on the move, and the fact that they are generated mostly by intense conflict situations, the issue of sustainable peace is inescapable. The recent outflow of over 700,000 Rohingyas from Myanmar to neighbouring countries, particularly Bangladesh, invites robust international–national cooperation to address the root causes of displacement and to shun a repatriation process in which the dignity and safety of refugees are not ensured. The role of the Office of the United Nations High Commissioner for Refugees (UNHCR) to ensure protection and assistance is all-important in this respect.

With regard to the Migration Compact, the role of the International Organization for Migration (IOM) – which is now a related organization of the United Nations (UN) – is catalytic in helping to concretize and implement the components of the Migration Compact. There is a major emphasis on safe, orderly and regular migration with key attention to protecting the rights of migrants; facilitating such migration; reducing forced and irregular migration; and tackling the issue of movement in the context of disasters, climate change, and environmental degradation. There are 23 Objectives and related commitments which call for an inter-agency and intersectional implementation based on a ‘whole-of-government’ and ‘whole-of-society’ approach. It is essential to
harness the cooperation of governments comprehensively, while being open to broader societal cooperation and multi-stakeholder partnerships.

Unlike the Refugee Compact, which is underpinned by a longstanding specific international treaty in the form of the Refugee Convention, it is true that the Migration Compact is not covered by a comprehensive specific treaty laying down the ground rules in migration. However, it will certainly not exist in a normative vacuum: there are already many human rights treaties which cover aspects of migration, such as the 1989 Convention on the Rights of the Child (CRC) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. There are also the Sustainable Development Goals 2015–2030 to which all countries are committed, stipulating protection and assistance for migrants (especially Goal 10), complemented by regional and other arrangements.

**CHILDREN IN IMMIGRATION DETENTION**

Interfacing with the Global Compacts is the distressing predicament of children who are detained in immigration gaols/centres/facilities when they seek to cross borders. That predicament is omnipresent, with situations emerging infectiously on different continents, in both developed and developing countries. It is interesting that there is little reference to the issue of children and their families in the Refugee Convention. In fact, it was left to the Final Act of the UN Conference that drafted the treaty, appended to the Refugee Convention, to state the principle of family unity and the protection of minors, albeit without much detail.

In reality, there are at least four groups of children who might be caught by the web of immigration law and find themselves in immigration detention. While some are with their parents, others are unaccompanied minors.

The first group is child victims of trafficking. On the one hand, many States’ national law and policy provides that such children are to be put into welfare centres and not detained. On the other hand, there may be a period during which their status (as trafficking victims) has not yet been proved and thus they are in a limbo status, resulting in temporary immigration detention.

The second group is constituted by asylum seekers or refugees who find themselves in large camps or encampments beyond urban areas. While they might be afforded temporary refuge by the host community, they might also be prosecuted for illegal immigration and end up in detention, especially if they venture outside the camps.

The third group consists of asylum seekers or refugees who end up in cities: urban cases. Where they have access to UNHCR, they may be screened and classified as ‘persons of concern’, deserving of protection and waiting for durable solutions.

The fourth group consists of migrant worker children and children who accompany migrant worker families, particularly those who are undocumented or in irregular situations.

Intriguingly, the issue of children in immigration detention is dealt with by the Migration Compact rather than the Refugee Compact, even though this is an issue pertinent to both. Of particular relevance is Objective 13 of the Migration Compact, which is headed: ‘Use immigration detention only as a measure of last resort and work towards alternatives’. It does not prohibit the detention of children absolutely, but contains the
aspirational commitment to ‘working to end the practice of child detention in the context of international migration’ (para 29(h)).

While the political compromise inherent in the Global Compacts is understandable to some extent, that commitment falls below the standard already applied by the Committee on the Rights of the Child, which now advocates resolutely against the immigration detention of children. That position was underlined vividly in the recent 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 (2017) 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. It provides:

5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.

7. In addition, both the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents’ migration status. Irregular entry and stay do not constitute crimes per se against persons, property or national security. Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.

8. The Committee on the Rights of the Child, in relation to unaccompanied and separated children, stated in 2005 that children should not be deprived of their liberty and that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof. [fns omitted]

En passant, the rationale behind immigration laws deserves further debate and scrutiny. Regrettably, immigration laws in many countries are interpreted and applied as criminal

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1 The full paragraph reads: ‘Protect and respect the rights and best interests of the child at all times, regardless of their 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 healthcare, and respect their right to family life and family unity, and by working to end the practice of child detention in the context of international migration.’
laws giving rise to the detention of those who fail to abide by them, whereas preferably, such laws should be an administrative framework for border management without criminal sanctions (and especially without the detention of children on the move). As a corollary, the rule should be that children must not be detained even when they enter a country without immigration papers, and should instead be dealt with by welfare measures and personnel in a gender- and child-sensitive manner.

A holistic response demands that the reference point for child protection, including children in immigration detention, must be the CRC and related standards – bearing in mind that the United States is now the only country not yet a party to the treaty. Under that instrument, a child is generally understood to be someone under the age of 18. There are four key principles pertaining to all children, including those on the move: their right to life, survival, and development; non-discrimination; the best interests of the child; and respect for the child’s views.

Particularly linked with the issue of immigration detention is article 37(b), which lays down the rule that the detention of children must only be a matter of last resort and for the shortest possible time. Paragraph 10 of the Joint General Comment above provides further clarification:

Article 37 (b) of the Convention of [sic] the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development. [fn omitted]

Therefore, given that many options are available to deal with children in a non-custodial manner, and bearing in mind the best interests of the child, it is axiomatic to avoid detaining children in immigration detention. An even more progressive approach is to prohibit the immigration detention of children altogether. This needs to be complemented by ensuring that children have access to identification, registration, and status determination procedures; that guardians are appointed for unaccompanied minors; that family unity is maintained wherever possible; that there is sustained child protection and assistance; that there are procedures for cross-referral to welfare agencies; that children have access to interdisciplinary teams, medical and recovery supports, and follow-up services; and that durable solutions are based on the principles of safety and dignity.

Humanizing the spectrum of immigration law, policy, and practice invites other reflections, as follows. First, a basic rationale of immigration law is that those who endeavour to cross borders are protected by their country of origin. Thus, in the case of border-crossers who arrive without a visa in countries where one is required, they can generally be refused entry and sent back to their country of origin, on the basis that they are still protected by that country. However, this rationale is not appropriate for
border-crossers who lack the protection of their country of origin, such as those fleeing persecution or conflict. Such people require international protection, and the principle of non-refoulement must be scrupulously observed. This is the situation in which asylum seekers and refugees find themselves.

Secondly, bearing in mind that immigration law should be seen as an administrative framework rather than part of criminal law, national immigration laws usually confer a discretion on the relevant Minister not to detain people. This margin of discretion should be exercised responsibly and responsively so as not to detain children and their families on the move.

Thirdly, it is critically important to promote inter-agency cooperation so as to shift children from immigration detention to welfare centres and community-based facilities. In real terms, this often means cross-referrals from the Home or Interior Ministry (which usually oversees the immigration department) to the Ministry of Social Welfare/Development. Strong networking is also needed across civil society, particularly among non-governmental organizations with expertise on children, to help shelter and assist children on the move.

Fourthly, what is to be done when children’s parents are placed into immigration detention? In some countries, young children are transferred with their mother to welfare shelters, while the older children (particularly male children) are kept with their father in immigration detention. The preferred practice, supported by the ‘best interests of the child’ principle, is that families remain together in welfare shelters rather than be placed in detention.

Fifthly, all countries generally have some form of child protection law linked with the CRC. This law, rather than immigration law, should be applied to immigrant children so as to confer maximum protection without discrimination. For those children who remain in detention, it is imperative to have outside monitoring so as to encourage good practices and prevent abuses. In this regard, access by countries’ national human rights institutions, such as a national human rights commission or ombudsman, is essential and should be strengthened. The courts can also step in to provide interim remedies, such as child protection orders, release subject to guarantees and bail, and longer-term remedies, including psychological care, so as to ensure that children are respected and protected on the basis of international human rights standards.

In sum, the global exhortation inviting enlightened leadership and practical implementation through shared responsibility must be to counter parochial policies based on cloistered nationalistic and populistic trends, blinded by the demonization of ‘the Other’. The Global Compacts are but initial stepping stones which must be complemented by the broader scaffolding of child rights, not only working to end the practice of children in immigration detention, but also prohibiting and eliminating this practice as a universal absolute.

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2 For example, this is the current situation in Thailand. Thailand is, however, exploring the possibility of a Memorandum of Understanding between key agencies to shift children from immigration detention to welfare shelters (even though it is not a party to the Refugee Convention).

3 For examples, see <https://www.crin.org>, exemplified by Thailand’s Child Protection Act 2003.