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Melissa Steyn; Kudzaiishe Vanyoro

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EDITED BY
Giuseppe Campesi,
University of Bari Aldo Moro, Italy

REVIEWED BY
Liliana Lyra Jubilut,
Universidade Católica de Santos, Brazil
Adele Del Guercio,
University of Naples "L'Orientale", Italy

*CORRESPONDENCE
Idil Atak
✉ idil.atak@torontomu.ca

†These authors have contributed equally to this work and share first authorship

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Reviewing the reviews: the Global Compacts' added value in access to asylum procedures and immigration detention

Idil Atak[1*†], Maja Grundler[2†], Pauline Endres de Oliveira[3†], Jürgen Bast[4†], Elspeth Guild[5], Nicholas Maple[6,7], Kudakwashe Vanyoro[7,8], Janna Wessels[9] and Jona Zyfi[10]

[1]Lincoln Alexander School of Law, Toronto Metropolitan University, Toronto, ON, Canada, [2]Department of Law and Criminology, Royal Holloway, University of London, London, United Kingdom, [3]Faculty of Law, Humboldt University of Berlin, Berlin, Germany, [4]Faculty of Law, Justus Liebig-University Giessen, Giessen, Germany, [5]School of Law, Queen Mary, University of London, London, United Kingdom, [6]Refugee Law Initiative, School of Advanced Study, University of London, London, United Kingdom, [7]African Centre for Migration and Society (ACMS), The University of the Witwatersrand, Johannesburg, South Africa, [8]Department of Anthropology, University of the Witwatersrand, Johannesburg, South Africa, [9]Amsterdam Center for Migration and Refugee Law, Vrije Universiteit, Amsterdam, Netherlands, [10]Centre for Criminology and Sociolegal Studies, University of Toronto, Toronto, ON, Canada

The Global Compact for Migration and the Global Compact on Refugees are based on binding international law instruments whose provisions they complement with "best practice" standards related to the treatment of refugees and other migrants. Although the Compacts are non-binding, they provide for review mechanisms to promote compliance with Compact standards. Such oversight is important to achieve progress in implementing the Compacts' commitments. Yet, the current top-down and State-led review process does not offer an efficient platform for identifying cases of non-adherence to Compact standards. This article uses a case study approach to highlight instances of non-compliance with Compact standards in Canada, South Africa, and the European Union. We use a functionalist method of comparison to analyze State practice in these three regions in relation to (i) use of immigration detention and (ii) access to the asylum procedure, with access to healthcare as a cross-cutting issue. The article discusses how the Compacts' review mechanisms could be improved and their added value in terms of their impact on domestic migration policies. It argues that both Compact review and implementation can be improved through increased civil society participation.

KEYWORDS

Global Compacts, review mechanisms, asylum procedures, immigration detention, comparative law, migration law, refugee law, civil society

1 Introduction

The Global Compact for Safe, Orderly and Regular Migration (19 December 2018), and the Global Compact on Refugees (2018) (GCR) constitute a quantum leap in the development of international migration governance (in the broad understanding of the term, encompassing the condition of migrants seeking international protection) (Chetail, 2019, p. 295–339). After decades of political blockade by Western powers, both migration and asylum issues are being addressed (again) within the institutional framework of the United Nations (UN).

The Global Compacts' (GCs) legal meaning and normative power have been the subject of academic debate,[1] and legal scholars have considered in detail the impact of soft law instruments more generally (Martin, 1989; Goodman and Jinks, 2008; Simmons, 2009; Goldmann, 2012; Boyle, 2018). These non-binding instruments are based on binding international law whose provisions they complement, as well as non-normative "best practice" standards related to the treatment of refugees and other migrants (Chetail, 2020; Guild and Wieland, 2020). As such, we understand the GCs as instruments showing how soft law norms can provide practical guidelines for the implementation of hard law guarantees, such as access to asylum procedures and conditions of immigration detention, which are discussed in detail in this article. The Compacts' non-binding nature is a typical feature of the regimes of global governance that have emerged in various branches of international law since the 1990s (Krisch and Kingsbury, 2006; Kingsbury and Casini, 2009; von Bogdandy et al., 2010). In this regard, migration is a latecomer but not an outlier. Legally speaking, the soft law nature of a legal document means that a breach of "obligations" (or rather, commitments) laid down in its provisions does not trigger the State's responsibility according to the rules of international law, and that these provisions are not justiciable in domestic, regional, or international courts. Nevertheless, soft law may inform and shape the construction of binding rules of international law on which they are based, and it provides an independent yardstick for reviewing compliance with the specific commitments voluntarily assumed.

In this context, it is significant that both Compacts provide for accountability—or review—mechanisms, aimed at assessing the progress States have made in implementing the Compact commitments. The review mechanisms are intended to promote compliance with Compact standards in the shape of "concrete actions" (GCM, para. 14; on the GCM's review mechanism specifically, see Farahat and Bast, 2022) and "collective outcomes" (GCR, para. 107). The GCM foresees an "International Migration Review Forum" (IMRF) taking place every 4 years, beginning in 2022 which "shall serve as the primary intergovernmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact" (GCM, para. 49). In addition, biennial reports by the UN Secretary General (UNSG) and regional reviews are foreseen (GCM, paras. 46 and 50). Meanwhile, the GCR foresees reviewing progress through "the Global Refugee Forum (held every 4 years unless otherwise decided); high-level officials' meetings (held every 2 years between Forums); as well as annual reporting to the United Nations General Assembly by the United Nations High Commissioner for Refugees (UNHCR) (GCR, para. 101).

With the first round of reviews for each of the Compacts now complete, questions arise as to the review mechanisms' effectiveness in achieving progress with regard to the implementation of the GCs' standards and goals. Indeed, the top-down and state-led process allows States to portray the progress in implementing the Compact commitments as more significant and positive than it actually is (Lavenex, 2019; Farahat and Bast, 2022; Chetail, 2023). The reviews conducted to date raise the suspicion that their stated aim of achieving progress with regard to GC standards and objectives will remain mere lip service, a problem discussed in detail in Section 4 of this article.

This article discusses how the Compacts' review mechanisms could be improved to leverage the added value of the GCs and enhance their impact on domestic migration policies. Using a case study approach, we analyze two pertinent thematic issues in which the treatment of refugees and other migrants stands to be improved through the Compacts' provisions: (i) the use of immigration detention and (ii) access to the asylum procedure. We have chosen one thematic area (detention) which is explicitly addressed at least in one of the Compacts, with the GCM dedicating Objective 13 to the issue, as well as a thematic area (access to the asylum procedure), which is not explicitly discussed in either Compact, but is an issue fundamental to realizing other rights and commitments, particularly in the GCR. Against the backdrop of the COVID-19 pandemic, we have chosen access to healthcare as a cross-cutting issue relevant to both areas.

The research questions underpinning this article center around identifying and remedying States' non-compliance with Compact standards. The term "non-compliance" refers to legislation and State practice which do not comply with the GC' provisions as well as the legally binding human rights standards on which they are based. As outlined below, we identify concrete instances of non-compliance with GC standards. We then ask whether the review mechanisms and processes of the GCs have the potential to ultimately foster compliance with GC standards. Finding that the current review mechanisms are insufficient to remedy instances of non-compliance, we also ask which processes could be used to achieve progress in implementing GC standards, focusing on the role of civil society organizations in the review process.

2 Methodology and outline of the article

To answer our research questions, we adopt a comparative approach, analyzing law and practice on detention and access to the asylum procedure in three different jurisdictions: Canada, South Africa, and the European Union (EU). In doing so, this article contributes to a growing body of comparative migration law literature (for example Hinterberger et al., 2023).

We use a functionalist method of comparison, applied in a "most different case design," i.e., a comparison of jurisdictions with "diverse political, economic, and legal conditions," which nevertheless have particular commonalities (Linos and Carlson, 2017, p. 230; on the functionalist method of comparison in the context of public law, see Kischel, 2015). Functionalist legal method focuses not directly on the legal rules themselves, but on their effects. Legal systems are compared based on their responses to

1 For example, in the context of the GCM's review mechanisms, Guild et al. (2019) have noted that "the expression of political commitment by States can have legal consequences" (p. 47), pointing to the Compact's potential role in the interpretation of binding treaties. Similarly, with regard to the GCR, Gammeltoft-Hansen (2018) argues that the Compact may serve to interpret existing treaties, while also helping to establish the Compact's norms with States who are non-signatories to the 1951 Refugee Convention, as well as the private sector, international organizations and non-governmental organizations (p. 607–8).

similar situations. According to the functionalist method, objects must also be understood in the context of their functional relation to society or a particular problem. The concept of function itself serves as a basis for comparison (Michaels, 2006, p. 343). "Functional equivalence in response to a particular problem is what renders otherwise often seemingly disparate legal rules, concepts and institutions comparable" (de Coninck, 2009, p. 2).

We recognize (and embrace) the fact that the research design involves countries both from the Global North and the Global South, as well as a supranational federation, i.e., a non-state territorial entity (on the justification of such an approach, and the methodological challenges involved, see Dann and Thiruvengadam, 2021, p. 1, 5–7). Notwithstanding the obvious differences between these three jurisdictions in terms of economic, cultural and legal contexts, all three have a powerful federal legislature that has availed itself of the legal tools of migration governance which emerged globally in the course of the 20th century (on the emergence of modern "immigration law" (*Aufenthaltsrecht*) as the primary means of migration governance, see Bast, 2021, p. 17–20). Moreover, the three jurisdictions are bound, directly or indirectly, by the same set of legal standards laid down in universal human rights treaties, including the 1951 Convention relating to the Status of Refugees. After all, they have endorsed the GCs,[2] that is to say, the EU and the States in question have declared their willingness to achieve the standards agreed on in the Compacts.

Yet, as we shall demonstrate below, similar types and levels of non-compliance with GC standards in the areas of immigration detention and access to the asylum procedure exist in all three jurisdictions. Based on that major finding, we conduct a qualitative content analysis of the GCs and their review mechanisms, more specifically, of the available reports and outcome documents of the reviews. The aim is to identify "broad patterns" in the documents (Hall and Wright, 2008, p. 66), which, in turn, allows us to formulate a conclusion about their ability to respond to the two thematic areas which are at the heart of this article.

Thus, this article proceeds in two steps. Section 3 examines tensions between the GCs' standards and commitments and existing law and policy in Canada, the EU and South Africa in the two key areas, identifying concrete examples of persistent, or even growing, non-compliance with Compact standards. In Section 4, the article then considers the review mechanisms foreseen in the GCs. The section considers the potential of the review mechanisms to address the tensions identified in Section 3. The article concludes by recommending that civil society organizations take a central role in future review processes, in cooperation with the so-called GC "champion countries." This would ensure that concrete instances of non-compliance with Compact standards are identified and that non-compliant States are named and shamed, as well as given concrete suggestions as to how to address shortcomings in GC implementation based on the Compacts' detailed provisions.

3 Case studies of non-compliance with compact standards: immigration detention and access to the asylum procedure in Canada, the EU and South Africa

3.1 Immigration detention

Immigration detention deprives migrants of their liberty, making access to basic services, healthcare, and procedural guarantees particularly challenging. Both the GCM and the GCR make it clear that immigration detention should not normally be used. The GCR calls for "development of non-custodial and community-based alternatives to detention, particularly for children" (GCR, para. 60) and for "alternatives to camps" (GCR, para. 54), which is relevant in the context of discussing detention since "closed refugee camps, or even camps operating under informal confinement policies, may operate as de facto places of detention" (Janmyr, 2013, p. 117). However, it is the GCM which is of particular relevance to immigration detention, as it specifically dedicates an Objective to the issue with the overall aim to make detention "a measure of last resort and work toward alternatives" (GCM, Objective 13; see also Majcher, 2022). Thus, the GCM reflects a global political vision to break the nexus between migration and detention.

In order to realize this goal, States are expected to draw from a range of actions set out in the GCM. These actions reflect the normative approach of the GCM, calling upon States to provide migrants with access to information and communication (GCM, para. 29e; see also para. 24c), as well as access to justice, including legal advice, access to information and regular review of a detention order (GCM, para. 29d). States have committed to guaranteeing due process and proportionality of immigration detention, including safeguards for mental and physical integrity (GCM, para. 29f). They undertake to protect and respect the rights and best interests of the child at all times, and ultimately, to work toward ending child detention related to migration (GCM, para. 29h). Accordingly, the actions foreseen by the GCM entail a range of oversight instruments to guarantee and strengthen this normative approach, such as putting in place independent monitoring of migrant detention (GCM, para. 29a); consolidating best practices of human-rights based alternatives to detention (GCM, para. 29b); reviewing and revising relevant legislation (GCM, para. 29c); and ensuring adequate training of governmental authorities and private actors (GCM, para. 29g).

The GCM also foresees safeguarding detainees' "physical and mental integrity" (GCM, para. 29f), so that particular attention must be paid to their access to healthcare. Indeed, refugees' and other migrants' health and the needs of those in vulnerable situations is a cross-cutting theme across both the GCR and GCM (GCM, paras. 23f and 31e; GCR, paras. 72 and 73).

3.1.1 The immigration detention regimes in Canada, the EU and South Africa

This section provides a comparative analysis of the immigration detention regimes in Canada, the EU and South Africa with a

2 It should be noted that the Czech Republic, Hungary and Poland voted against the GCM, whilst a number of other EU Member States, including Bulgaria, abstained from the vote (United Nations, 2018a); Hungary also voted against the GCR (United Nations, 2018b).

view to law, policy and practice. Considering the scope of this section, the aim is not to provide a detailed account of the different immigration detention regimes, but rather to identify areas where they are in tension or conflict with GC standards and objectives. As will be shown, despite legal safeguards, immigration detention has been implemented as a repressive measure to deter and punish "unwanted migrants" in all three jurisdictions. There are not only significant shortcomings with regard to complying with human rights standards set out in the GCM in all three jurisdictions under assessment, but the respective immigration detention regimes also counteract the overall objective of the GCM to make immigration detention a measure of last resort. To make this argument, the comparison will focus on two key issues identified as raising tensions and conflicts with GC standards in all three jurisdictions. Firstly, we examine the overall policy approach to immigration detention. Secondly, we consider the conditions of detention, both de facto and legally. While the first issue directly contradicts the GCM's political vision of breaking the nexus between detention and migration control, the second issue stands in contrast to basic human rights of refugees and other migrants as reflected in GCM and GCR standards.

3.1.1.1 The policy approach to immigration detention

From the mid 1990s, post-apartheid South Africa has embraced restrictive immigration and asylum policies. Indeed, the African National Congress government's primary response to immigration increases since 1994 has been the arrest, detention and deportation of undocumented migrants (Hiropoulos, 2017). Early on, this included indefinite migration-related detention without judicial review (Global Detention Project, 2021a). It was not until the Aliens Control Amendment Act 76 of 1995 that detention could be reviewed by a judge, although, in practice, such reviews rarely took place (South African Human Rights Commission, 1999). Today, national legal norms relating to migration-related detention and deportation are contained in various pieces of legislation, which set out the applicable procedures and safeguards.[3] For example, the Immigration Act (13 of 2002) in section 34(1)(d) makes it clear that people detained pending deportation can be held for no more than 30 days, though this can be extended by 90 additional days upon issuance of a court order which sets out "good and reasonable grounds" for the extension (Global Detention Project, 2021a). Meanwhile, section 35(2) of the Constitution, sets out protections against all forms of arbitrary detention, as well as the right to be brought before a court within 48 hours of arrest, while the 2002 Immigration Act in section 34(2) sets a 48-h-limit for the initial detention of migrants not destined for deportation. In addition, the Refugees Act 130 of 1998 in section 29(2) stipulates that the detention of children must be a "last resort and for the "shortest appropriate period of time." Sections 22 and 23 of the Refugees Act also imply that asylum-seekers in possession of a valid "asylum seeker visa" should not be detained.

Nevertheless, the Department for Home Affairs (DHA) has frequently ignored the Immigration Act and the Constitution by detaining persons beyond the legally acceptable 48 h before their status has been ascertained (Amit, 2012; Global Detention Project, 2021a). In addition, the detention of minors remains a major concern, with the practice continuing, regardless of several court decisions challenging this approach (Global Detention Project, 2021a; see also Lawyers for Human Rights, 2020). Furthermore, reports have shown that police often ignore section 34(1) of the Refugees Act which protects newly arrived asylum-seekers from detention and apply provisions of the Immigration Act that authorize initial detention instead (Global Detention Project, 2021a). What is more, since the COVID-19 pandemic began in March 2020, South Africa has increased the arrest and detention of migrants for petty crimes and simultaneously the arrest, detention and deportation of undocumented migrants (Global Detention Project, 2021a). The justification given for these actions was an attempt to contain the spread of the virus, even though mass deportations are likely to spread the virus further (Maple et al., 2021).

Meanwhile, in Canada, a sudden spike in detention of refugees and other migrants occurring in 2017–8 has endured up until the COVID-19 pandemic,[4] though there has been a steady decrease in the overall number of persons in detention in Canada since 2012. Post 9/11, fear-mongering rhetoric and xenophobia against racialized minorities led to an instrumentalization of immigration detention in the context of migration control, going hand in hand with a rise in so-called "crimmigration" policies and the securitization of migration (Stumpf, 2006; Atak, 2019). The Canadian immigration detention system is governed through the Immigration and Refugee Protection Act 2001 (IRPA) (SC 2001, c 27) and its Regulations (Immigration and Refugee Protection Regulations (SOR/2002-227)). The detention regime applies not only to (rejected) asylum-seekers, but also to permanent residents and other migrants. Detention of foreign nationals, including children, can occur when reasonable grounds exist to believe one of the following: the foreign national is suspected of being a flight risk, or a danger to the public, their identity is not established, or detention is required to complete an examination (IRPA, section 55). Canada is also among the few countries that can detain and deport individuals based on vague anti-terrorism provisions (Atak and Crépeau, 2013). In addition, groups, including children aged 16 and 17, suspected of entering Canada through smuggling routes are subject to mandatory detention and have limited procedural rights with regards to detention review and appeal [IRPA, s. 55(3.1)]. At the same time, a key pillar of the Canadian detention framework is the duty to consider alternatives to detention before and during detention under the IRPA (CBSA, 2020), and detention of children is supposed to be "a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child" (IRPA, section 60). Nevertheless, Canada is still among the few countries with indefinite detention, including in relation to minors (Global Detention Project, 2021b).

3 Immigration Act (13 of 2002); Regulations to the Immigration Act; Regulations to the Refugee Act; Refugees Amendment Act 11 of 2017; Promotion of Administrative Justice Act (3 of 2000); (Constitution of the Republic of South Africa, 1996).

4 The Canada Border Services Agency (CBSA) attributed the increase to the removal of visa requirements for Mexican nationals in December 2016 and the steady irregular arrivals through the Canada-US border at Roxham Road (Smith, 2019).

The approach of instrumentalizing immigration detention as a measure of migration control and deterrence can also be observed in the legal context of the EU (Bast et al., 2022, p. 64–113). While immigration detention is an area traditionally regulated by EU Member States at national level, a regulatory framework on detention developed at the EU level as part of its common immigration policy on the basis of Article 79 of the Consolidated Version of the Treaty on the Functioning of the European Union (2012) (TFEU), as well as its common asylum policy based on Article 78 TFEU. Today, provisions on immigration detention at EU level can be found in the Return Directive (Directive 2008/115/EC) (Recitals 16–17 and Arts. 15–18), as well as in instruments of the Common European Asylum System, more specifically, in the Reception Conditions Directive (Directive 2013/33/EU; EURCD; Recitals 15–20 and Arts. 8–11), the Dublin Regulation (Regulation (EU) No. 604/2013; Recital 20 and Art. 28), and the Asylum Procedures Directive (Directive 2013/32/EU; EUAPD; Arts. 8 and 26). The EURCD clearly states that Member States shall not detain an individual for the sole reason that he or she is an applicant for international protection [Art. 8(1)].[5] The Directive sets out six grounds for detention in Article 8(3): verifying an applicant's identity or nationality; determining elements on which the application for international protection is based; deciding on the applicant's right to enter the territory; preparing an individual's return and carrying out the removal process; for reasons of national security or public order; and to effect a Dublin transfer.[6] While this is an exhaustive list, "the grounds are vague and numerous and remain open to interpretation" (Peers et al., 2015, p. 521).

As a result, the legal framework laid down at EU level has failed to prevent some Member States from applying "systematic and arbitrary" policies of detention or using it to coerce asylum-seekers into leaving "voluntarily" (Bast et al., 2022, p. 67). Indeed, similar to Canadian and South African practice, there has been a quantitative increase of the use of immigration detention in all stages of migration in EU Member States, from arrival at the EU territory to the stage of deportation or return (Bast et al., 2022, p. 67). Additionally, there is a trend of a wider use of immigration detention right upon the arrival of migrants in the EU, including (potential) asylum-seekers (Bast et al., 2022, p. 68). In the context of an ongoing securitization of migration, immigration detention policies are used to demonstrate control over migration, which is constructed as a security threat. These tendencies at national level are reinforced by the EU's "hotspot" approach (European Parliament, 2018), as well as restrictive reform processes at EU level (for example European Commission, 2016). Draft EU legislation prescribes the use of restrictions on the mobility of asylum-seekers in the context of so-called border procedures, which in many cases would entail de facto or de jure detention (Bast et al., 2022, p. 99–100). Another major issue is the continuous detention of children in some Member States (Children in Migration, 2019). This practice is not forbidden by EU law; the EURCD merely foresees the detention of children to be "a measure of last resort" and, in the case of unaccompanied minors, to take place only "in exceptional circumstances" [Arts. 11(2) and (3)].

3.1.1.2 Conditions of immigration detention

In South Africa, the national legal norms relating to immigration detention mentioned in the previous section contain important provisions with regard to the conditions of detention. For example, the Constitution in section 35(2)(e) mandates that detention facilities must conform to standards of human dignity, which include the ability to exercise, the provision of adequate accommodation, nutrition, reading material, and medical treatment (see also Hiropoulos, 2017). In addition, the "Minimum Standards of Detention" annexed to the Immigration Regulations, make it clear that detainees must have access to healthcare, sanitary installations, food and adequate accommodation, with detained children to be kept separated from unrelated adults.

Nevertheless, there are numerous issues and concerns around the de facto conditions of detention, particularly in the main immigration detention center in South Africa, the Lindela Repatriation Center. The center has been subject to accusations of corruption, overcrowding and abuse of detainees (Davies, 2022). Indeed, there have been instances of detainees dying following violence from detention center staff (Davies, 2022). Further, research by Lawyers for Human Rights (2020) observed how detainees were not getting sufficient meals and the standards of personal hygiene and medical treatment were unacceptable. Children are often detained together with unrelated adults (Global Detention Project, 2021b). What is more, during the COVID-19 pandemic, there were also suggestions that migrants were not always included in preventative measures used in prisons and detention centers (International Detention Coalition, 2020). Additionally, legal representatives' access to places of immigration detention was severely restricted during the COVID-19 pandemic (Maple et al., forthcoming).

Equally in Canada, the onset of the pandemic highlighted the acute risks of COVID-19 to those in detention. While a number of detainees were released in April 2020, some individuals who remained in detention were held in solitary confinement to prevent the virus from spreading (Global Detention Project, 2021b). Indeed, Canada makes use of solitary confinement irrespective of the pandemic and systematically utilizes maximum security provincial jails to hold immigration detainees, including those suffering from mental health issues (Nakache, 2011).[7] Research has demonstrated that mental healthcare and services in jails

5 An applicant for international protection is defined in Art. 2(c) of the EUAPD as "a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken."

6 The Dublin Regulation determines the EU Member State responsible for deciding an application for international protection. This is based on a list of criteria, such as presence of family members in a Member State. In practice, however, the Member State responsible is usually the State of first entry into EU territory. Asylum-seekers can be transferred to the Member State responsible.

7 Although this practice is continuing in Canada, seven provinces (British Columbia, Nova Scotia, Alberta, Quebec, Ontario, New Brunswick and Manitoba) have respectively terminated the MOUs with the federal government which enabled the detention of migrants in provincial jails (Bureau, 2022).

are inadequate, unavailable and/or challenging for immigration detainees to access (International Human Rights Program, 2018). Overall, mental health conditions are viewed through a lens of danger and translated into risk factors, rather than vulnerability, making "the prospect of release or consideration of alternatives to detention improbable" (International Human Rights Program, 2018). More generally, in a 2020 report, the Canadian Red Cross Society stresses that immigration detainees face challenges in accessing medical services; receive insufficient information regarding their rights and responsibilities; have limited access to amenities, legal services and programming, especially in correctional facilities; and encounter obstacles in maintaining contact with families due to the lack of access to phones, internet and visits (Canadian Red Cross, 2020). Further, a common criticism of detention centers is the absence of meaningful oversight and accountability for the use and abuse of power (Zyfi and Macklin, 2022).

The issues observed in the immigration detention regimes in Canada and South Africa, which demonstrate a lack of access to procedural rights and problematic conditions of immigration detention, are mirrored in the legal context of the EU. Where the EU legislative framework leaves too much room for interpretation and discretionary practice of EU Member States, it fails to provide for sufficient standards to effectively safeguard procedural rights and guarantees of migrants in the context of immigration detention. For example, while with regard to individuals in pre-removal detention, legislation states that once a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned must be released immediately [Return Directive, Art. 15(4)], this provision is "not always respected in practice" (European Commission, 2013, p. 27). In addition, the separation of criminal and immigration detention as administrative detention is not always secured. Indeed, in some Member States, migrants have been detained alongside ordinary prisoners (European Commission, 2013, p. 27). Moreover, detention conditions have been found to be extremely poor in several EU Member States (Bast et al., 2022, p. 74–5). Besides health risks due to the hygienic situation in overcrowded facilities and camps, there are also shortcomings in providing for basic needs, such as food. Poor detention conditions are particularly problematic in the case of vulnerable migrants such as children, elderly people or people with special medical needs. Relevant EU legislation falls short of providing sufficiently specific standards in this regard. Even where provisions regarding the situation of vulnerable persons exist, such as in the EURCD, there are no provisions foreseeing a screening procedure for the timely identification of such individuals.

3.2 Access to the asylum procedure

Refugees' and other migrants' access to adequate procedures is strongly emphasized in both the GCM and the GCR. As a sine qua non condition for the rule of law, due process and access to justice, the principle of access to procedures is fundamental to all aspects of migration governance (GCM, para. 15). The need to avoid protection gaps for refugees is a recurrent theme throughout the GCR. Paragraphs 58–62 address mechanisms for fair and efficient determination of individual international protection claims. States are called upon to ensure that asylum-seekers do not find themselves in situations where they are unable to have a substantive examination of their refugee claim.

Similarly, the GCM in paragraph (27c) calls upon States to review and revise relevant national procedures for border screening, individual assessment and interview processes to ensure due process at international borders. In addition, in paragraph 28, States commit to increase legal certainty and predictability of migration procedures by developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment of all migrants for the purpose of identifying and facilitating access to the appropriate referral procedures, in accordance with international law.

3.2.1 Access to the asylum procedure in Canada, the EU and South Africa

In this section we undertake a comparative analysis of legislation and its practical implementation with relevance to access to the asylum procedure. Our aim is to underline common challenges faced by asylum-seekers in accessing adequate procedures. These challenges are manifold in the three jurisdictions compared and it is not within the scope of this article to discuss all of them. For example, as discussed in Section 3.1. above, asylum-seekers often face detention, which, in turn inhibits access to procedures.

We therefore focus on the overall policy approach with regard to access to registration of asylum claims. Subsequently, we consider the use of the safe-third country concept. Similar to immigration detention, these policies have been deployed by South Africa, Canada and the EU as exclusionary tools with the objective of limiting the rights and freedoms of asylum-seekers and restricting their mobility. Both issues create particular challenges for asylum-seekers in all three jurisdictions—while emphasizing that inability to access the asylum procedure results in problems accessing healthcare and other services. We draw attention to the gaps between the relevant commitments outlined in the GCs and current policy and practice in the jurisdictions under analysis.

3.2.1.1 The policy approach to access to the procedures: registration as a key issue

In South Africa, government officials at the borders (whether that is the police, the army or DHA officials) all assume collective responsibility to ensure that new asylum claims are acknowledged (Vigneswaran, 2008). Under the Regulations to the Refugee Act, section 7, individuals who wish to apply for asylum must make this intention known "at a port of entry, before entering the Republic". An asylum-seeker will be issued with a transit visa which provides temporary protection by legalizing his or her right to be in the country for 3 weeks or until formally lodging a claim at a refugee reception office (RRO) (Vigneswaran, 2008).

In 2020, the Refugees Amendment Act 33 of 2008 (RAA, 2008) entered into force, which, in turn, triggered the coming into force of the Refugees Amendment Act 12 of 2011 (RAA, 2011) and of the Refugees Amendment Act 11 of 2017 (RAA, 2017). The combination of these acts and accompanying Refugees Regulations

severely reduce access to the asylum system and deny asylum-seekers substantive rights that they previously held.[8] Key changes within the RAA (2008) and the RAA (2017) include the creation of new (and unrealistic) timeframes which are likely to prevent a significant number of individuals from seeking asylum in South Africa. Under the RAA (2017), it is now mandatory for asylum-seekers to hold an asylum transit visa, obtainable at a port of entry before they can apply for asylum. The visa is valid for 5 days, at which point the asylum-seeker may become an "illegal foreigner" if they have not yet applied for asylum [RAA, 2017, sections 4(1)(h) and 15(1)(a)]. Even the 14 days that the law previously prescribed were often not sufficient for asylum-seekers to make an application due to bureaucratic and administrative barriers (Amit, 2015; Handmaker and Nalule, 2021).

Further, gaining access to an RRO for a refugee status determination officer (RSDO) to issue an asylum-seeker permit is extremely complex. Section 21 of the 1998 Refugee Act makes it clear that applications must be made in person at an RRO, yet procedural requirements since the early 2000s have made this very difficult [Refugee Act (130 of 1998)]. First, both the Johannesburg and Pretoria RROs set up "appointment systems" whereby applicants are frequently given appointments up to 6 months to a year away (Ziegler, 2020). This left many asylum-seekers as "illegal foreigners" in the country until their appointments and thus liable to be arrested, detained and deported (Ziegler, 2020). Second, until the courts intervened, asylum-seekers regularly had to endure a "pre-screening" process in RRO car parks without any assistance (including effective access to legal advice), with RSDOs permitted to reject cases on the spot based on answers to a few questions (Ziegler, 2020). Third, between 2011 and 2020 only three RROs (out of six) were functioning properly, with others either shut or partially closed, despite numerous court orders demanding they reopen (Moyo et al., 2021).

Once an asylum-seeker lodges a claim, an RRO will issue them with a temporary asylum-seeker permit (Vigneswaran, 2008). Section 22 of the 1998 Refugees Act states all asylum-seekers are entitled to apply for and be granted a 6-month renewable asylum-seekers permit which legalizes their stay in the country. These "Section 22" permits can be renewed but are often only renewed for a few months or a few weeks at a time. Asylum claims are understood to be abandoned if the permits are not renewed, so that, as explained above, asylum-seekers without up-to-date permits run the risk of detention and deportation (Moyo et al., 2021). As such, very short time frames and administrative inertia are used to frustrate access to the asylum procedure.

During the COVID-19 pandemic, the closure of RROs and DHA offices for long periods in 2020 and 2021 also meant many asylum-seekers and refugees were unable to obtain or renew documentation, which left them in precarious situations (Tesfai and de Gruchy, 2021). Indeed, there was no legal avenue for asylum-seekers who arrived in South Africa to lodge applications. Equally, as a transit visa is needed to obtain a "Section 22" permit, asylum-seekers who arrived during a lockdown were "effectively rendered irregular and liable to arrest and deportation" (Moyo et al., 2021). For refugees and asylum-seekers who were already in the country with documentation, the DHA granted blanket extensions for permits expiring on or after 15 March 2020. On 15 April 2021, an online system for renewal of documentation was set up, with refugees told to renew their documentation by 31 December 2021 (Washinyira, 2022). There were, however, widely reported technical and bureaucratic issues with the online system, meaning many refugees missed the deadline (Washinyira, 2022). Further, reports highlighted difficulties faced by this population when they attempted to utilize healthcare services (Benavides et al., 2020). Indeed, refugees and asylum-seekers were regularly turned away from these key services because their documents were not accepted (Benavides et al., 2020).

Canada has also adopted policies with a view to deterring and punishing some groups of asylum-seekers by limiting their access to procedures.[9] The "designated foreign nationals" (DFN) class [IRPA, section 20.1(2)], introduced in 2012, allows the Minister of Public Safety to designate individuals who arrive to Canada with the help of a smuggler in a group of two or more. Asylum claims made by DFNs are subject to accelerated procedures. DFNs are denied the right of appeal to the Refugee Appeal Division of the Immigration and Refugee Board (IRB) and the right to an automatic stay of removal upon applying for judicial review to the Federal Court. Additionally, the new refugee ineligibility ground added to the IRPA in section 101(1) in June 2019 is at odds with Canada's commitment under the GCs to ensure fair and efficient determination of individual international protection claims. The provision makes asylum-seekers ineligible for protection if they have made a previous refugee claim in a country that Canada has an information-sharing agreement with. Such agreements are currently in place with Australia, New Zealand, the United Kingdom (UK) and the United States (US) (Government of Canada, 2018). This ineligibility ground applies regardless of whether a decision was ever made on the previous claim. Asylum-seekers only have access to a pre-removal risk assessment (PRRA) which involves an evaluation of the risk they would face if removed from Canada. They are entitled to a hearing with a PRRA officer (IRPA, section 113.01). However, the PRRA is not an appropriate substitute for a full hearing at the IRB as it does not offer access to fair and efficient protection (Canadian Council for Refugees, 2019, p. 1–9). As a result, in most cases, asylum-seekers are returned to their country of nationality (i.e., the country of feared persecution) which puts them at risk of *refoulement*.

During the pandemic, despite the steep decline in the number of asylum claims due to border closures, asylum-seekers faced considerable delays for their eligibility determination. The Canada Border Services Agency (CBSA) and Immigration, Refugees, Citizenship Canada (IRCC), in charge of conducting eligibility

8 These came into force on 1 January 2020 and have repealed the 2000 regulations.

9 In Canada, a person can make a claim for refugee protection either at a port of entry when arriving in Canada or at an inland office. At a port of entry, a CBSA officer decides whether the claim is eligible to be referred to the Immigration and Refugee Board (IRB). At an inland office, it can be either a CBSA or an Immigration, Refugees and Citizenship Canada (IRCC) officer who decides on the claim's eligibility. Once the claim is deemed eligible, it is referred to the Refugee Protection Division (RPD) of the IRB which is in charge of refugee status determination (IRPA, sections 99-100).

interviews, were already experiencing a sizeable backlog before the pandemic.[10] Similarly, the backlog before the IRB had been amplified during the pandemic. Some asylum-seekers had to wait for 2 years for their hearing at the IRB. These delays forced asylum-seekers and their families to live in limbo for extended periods of time with limited access to resources and services (Triandafyllidou, 2021; Atak and Zyfi, 2022).

Meanwhile, in the EU, the EUAPD distinguishes between making, registering and lodging an asylum application (Article 6). After an applicant expresses the wish to apply for international protection to an authority, the application must be registered, i.e., a record of the applicant's intention to seek protection must be made. Article 6(2) EUAPD requires Member States to ensure that a person who makes an application for international protection has the opportunity to lodge it to designated authorities as soon as possible. Member States may set additional rules for the lodging of applications and may require, for instance, that lodging is to take place in person and/or at a designated place [Article 6(3) EUAPD]. If a person fails to lodge their application, the determining authority may discontinue the procedure [Articles 6(2) and 28 EUAPD]. Although the EUAPD allows the integration of the registration and lodging phases into one step, in several Member States (e.g., France, Germany, Austria, Spain) registration and lodging are distinct stages conducted by different entities (EASO, 2021, p. 12). Research has highlighted the divergent practices in Member States in terms of time limits for registering and lodging an asylum claim, designated locations on the territory and documentation provided to the applicants at different phases of the process (ECRE, 2020, p. 11). In addition, access to the asylum procedure may be subject to different rules depending on the point (e.g., airport, land border) and mode of the entry of the asylum-seeker (ECRE, 2020, p. 25). In the future, proposed restrictive reforms impacting asylum procedures, if implemented, will make registration even more difficult (Cornelisse and Reneman, 2022).

During the COVID-19 pandemic, many Member States suspended their registration procedures for asylum-seekers. This ranged from complete suspension in Belgium, Greece, or Poland, to almost complete suspension with some exceptions (in particular for the most vulnerable) in France and elsewhere (EASO, 2020). Further, not all Member States made accommodation for COVID-19 restrictions as regards the application of time limits for asylum claims and lodging full applications (EASO, 2020). This resulted in asylum-seekers being unable to comply with the conditions of their status. In addition, some Member States failed to put in place systems whereby asylum-seekers can renew the validity of their registration documents in order to lawfully remain (EASO, 2020). As such, the pandemic exacerbated existing challenges asylum-seekers face in registering their asylum claims.

Fragmentation of and delays in the asylum procedure also raise challenges in terms of reception conditions for asylum-seekers. Article 17 of EURCD clarifies that material reception conditions and healthcare must be available to applicants upon *making* an application for international protection. However, according to Article 5 EURCD, Member States may take as long as 15 days after the lodging of an application to inform applicants of benefits and reception conditions, while a document certifying the individual's status as an applicant for international protection, which is in practice often required to obtain reception conditions, needs only be issued within 3 days of lodging the application (Article 6 EURCD). Thus, although the GCR in paragraph 54 promotes immediate access to reception conditions and evidences States' commitment to scale up capacity in face of increased numbers of arrivals, the EURCD allows Member States to choose how to deliver reception conditions and may create obstacles for applicants in accessing healthcare and other services.

3.2.1.2 Use of the safe third country concept

All three of the jurisdictions under consideration have implemented the safe third country concept into their domestic law. The *non-refoulement* obligation is based on the principle that while refugees (and by extension asylum-seekers awaiting a decision) cannot be sent to a country where they would be at risk of persecution or torture, they can be sent to any "safe" country through which they have passed but where they have not sought asylum. This legal tool allows States to handle refugee claims and ensure responsibility-sharing among themselves. The Refugee Convention does not explicitly authorize nor prohibit reliance on safe (third) country concepts to determine refugee eligibility. It has generally been agreed that they are compatible with the Refugee Convention provided they ensure that refugees have access to a fair and effective protection and enjoy the rights set by the said Convention and in line with international human rights standards (UNHCR, 1996). However, as discussed below, these conditions are not met in the jurisdictions examined.

Thus, those asylum-seekers who manage to access South Africa's asylum procedure despite the difficulties described above are often faced with another challenge to having their protection claims determined. "Safe third country" and "first country of asylum" concepts have historically been used as grounds for the rejection of asylum applications in South Africa. Indeed, pre-screening procedures have allowed for the removal of asylum-seekers who have traveled through "safe" neighboring countries, without a full examination of their claims. Recently, the RAA (2017) amended section 4(1)(d) of the 1998 Refugee Act to now exclude any person who "enjoys the protection of any other country in which he or she is a recognized refugee, resident or citizen." By inserting "resident" into the original Refugee Act, the RAA (2017) adopts an extremely broad notion of "safe third country."

Similarly, in Canada, a controversial refugee ineligibility ground is found in the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (signed 5 December 2002, entered into force on 29 December 2004) (STCA). According to this agreement, refugee protection claims must be made by asylum seekers in the first safe country—the US or Canada—they pass through. Most third-country nationals in the US are thus barred from making an asylum claim in Canada. They are returned to the US, with the exception of those who have family members in Canada, are unaccompanied minors, have valid documents (visa or work permit) or qualify for public interest exceptions (STCA, Art 4.2). Asylum-seekers benefitting from these exceptions are nevertheless denied the right of appeal against a negative decision by the Refugee Protection Division of the IRB

10 Without the eligibility decision, an asylum request cannot be referred to the IRB and the claimant cannot apply for a work permit.

(Arbel, 2013). In March 2023, Canada and the US expanded the STCA implementation across their entire land border. As a result, asylum seekers who cross the border irregularly outside of official ports of entry are no longer permitted to file an asylum claim in Canada for 2 weeks after their entry. This expansion happened despite the Agreement being subject to fierce criticism for exposing asylum-seekers to arbitrary detention, gender-based discrimination and denial of access to a fair refugee process in the US (Canadian Council for Refugees 2020 FC 770, paras. 135 and 146). The Agreement is also known to compound the vulnerability of migrants by pushing them to irregular, and often dangerous, crossings of the US-Canada border.

EU law also provides the basis for the application of the safe third country concept. Article 38 EUAPD, in combination with Article 33(2)(3), allows Member States to declare the application of an individual from a safe third country inadmissible. Further, Article 31(8)(b) provides for the possibility of accelerated procedures for applicants from safe countries, further exacerbating the issues of access to international protection. EU law operates under the assumption that Member States can consider each other to be "safe countries" and transfer asylum-seekers under the Dublin Regulation (Recital 3), though this assumption has been called into question (see for example *MSS v Belgium and Greece*).[11] In addition, Member States are free to create their own lists of additional safe third countries, but are encouraged to take into account information by the European Union Agency for Asylum and UNHCR and to review these lists regularly, taking into account up-to-date information (EUAPD, Recital 46 and 48). In addition, the EU has sponsored its own safe third country arrangement, the EU-Turkey statement of 2016, concluded by its Member States (European Council, 2016), which has raised major human rights concerns (Bast et al., 2022).

3.3 Interim conclusion

As the comparative analysis above shows, concrete examples of tensions between GC commitments, on the one hand, and existing law and policy on the other, can be identified in the three jurisdictions compared. At present, both immigration detention practices and access to asylum procedures in Canada, the EU and South Africa are clearly at odds with the relevant standards contained in the GCs. The widespread use of immigration detention in all three jurisdictions directly contradicts the GCM's political vision of making immigration detention as a measure of last resort. What is more, the de facto conditions of detention are at odds with the GCM's detailed provisions. Similarly, access to the asylum procedure generally is hindered by the use of the safe third country concept in all three jurisdictions and access to registration of asylum claims is far from guaranteed, creating the very protection gaps the Compacts seek to avoid. A lack of access to healthcare is observable in both contexts, demonstrating disregard for refugees' and other migrants' health in direct contradiction to the Compacts.

11 *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011).

4 The potential of the GC review mechanisms to address the tensions between compact standards and existing law and policy

Having identified specific tensions between GC standards and law and policy in Canada, the EU and South Africa, this section examines whether the GCs' review mechanisms have the potential to address these shortcomings. It begins by considering the role of accountability mechanisms in soft law instruments generally, before analyzing the existing GC review mechanisms and their outcomes to date. While the previous section has highlighted shortcomings in Compact-compliance, this section focuses on shortcomings in the review process.

4.1 The transformative role of accountability mechanisms in soft law instruments

The GCs seek to produce "concrete actions" (GCM, para. 14) and "collective outcomes" (GCR, para. 107). As such, meaningful implementation and the review and monitoring thereof, are crucial to the Compacts' success. To assess the Compact review mechanisms' potential to address the thematic issues discussed in this article—detention and access to the asylum procedure—it is first necessary to understand how the GCs are constructed. Chetail (2020) succinctly explains this with reference to the GCM, though his description is equally apt in relation to the GCR:

> When assessed as a whole, the Compact looks like a kaleidoscope; it is made up of a complex mix of multi-faceted elements that are constantly changing and create different patterns depending on the angle of the relevant issue and the related objective. While shedding light on the multidimensional reality of migration, the patterns displayed by its objectives and actions are so varied and interconnected that the overall picture remains segmented and distorted. Like a kaleidoscope, the Compact breaks the vision down into a multitude of different but interrelated components of the same cross-cutting phenomenon.

In effect, both Compacts are so detailed and multifaceted that any review of their standards and aims will be an equally complex operation. To simplify matters, such a review could be conducted in two main ways. Firstly, by assessing States' compliance with the Compacts' overall aims and objectives, or with the actions foreseen to achieve these objectives, i.e., by starting with the aim and considering how States may work toward it. Secondly, reviews could address Compact-compliant behavior from the point of view of specific thematic angles, such as those discussed in this article, i.e., focus the review on instances of non-compliance with Compact standards and using the GCs' provisions to explore how the implementation gap may be narrowed.

Section 4.2 contains a more detailed exploration of the review processes to date. For now, it suffices to note that the style of

review foreseen for both Compacts is of the former variety. The review process is top-down and decidedly led by States, which implies "respect for their sovereignty including the principle of voluntarism" (Lavenex, 2019, p. 68). As Lavenex (2019) points out, "[i]n contrast to similarly open governance mechanisms such as…the Paris Agreement on Climate Change, there is no obligation to draft up ambitious and progressive national action plans. States will be relatively flexible to 'pick and choose' from the objectives they want to work on" (p. 69). Similarly, in pointing to the state-funded International Organization for Migration's (IOM) role in coordinating the GCM review process, Majcher (2022) sees a "risk is that the interpretation of the GCM objectives…will be informed by states' practices and preferences" (p. 8). Further, as Guild et al. (2019) note regarding the GCM review process, there is a lack of "plans for stringent monitoring against any form of consistent indicators" and the "infrequency of meetings [i.e., the four-year intervals between IMRFs, and indeed GRFs,] risks loss of momentum" (p. 55).

Against this background, it is not surprising that an effective GC compliance review, at the state/regional level, has been lacking in the jurisdictions we examined. To illustrate, despite being a strong supporter of the GCs and a GCM "champion country," Canada has not taken any steps to address the issues in relation to immigration detention and access to asylum procedures, discussed above. Canada rather utilizes the GCs as a platform to promote its positive image and foreign policy interests as a global leader in migration management in selected areas, particularly refugee resettlement. The Compacts have not been translated into concrete and deliberate action within Canada. The federal government has yet to undertake an overview of existing domestic policies and practices to assess their consistency with the GCs. Similarly, many pre-existing policies have not been reviewed to ensure the principles of the GCs are truly present (Atak et al., 2023; see below for the European regional GCM review).

While, based on the above findings, the existing review mechanisms do not sound particularly promising in terms of meaningfully delivering on the Compacts' aims, soft law instruments' review mechanisms can bring about real change. This is illustrated in detail by Thomas with regard to the 1975 Helsinki Final Act, a non-binding instrument which, through periodic review of its norms and continued engagement between State Parties, nevertheless brought about political change (Thomas, 2001). Following negotiations at the Conference on Security and Co-Operation in Europe (1975), States in Eastern and Western Europe signed the Helsinki Final Act (Thomas, 2001, p. 86). Thomas maps the developments in Eastern Europe following signing of the Act, emphasizing in particular how human rights which, as he argues, at the time, were perceived by the Soviet leadership as non-binding norms which they would not have to act on, developed into vehicles for political change through "independent political mobilization across the bloc, and even from abroad" (Thomas, 2001, p. 109). He demonstrates that this happened with the help of "an institutional mechanism to hold signatory States publicly accountable for their human rights record: the participating States would reconvene to review implementation of past commitments" (Thomas, 2001, p. 98–99). In large part, evidence of, and opposition to, human rights abuses presented at these review conferences came from the civil society of Eastern European States (Thomas, 2001, p. 119), while support came from human rights organizations abroad (Thomas, 2001, p. 149). Following "persistent shaming and lobbying efforts of a transnational network" (Thomas, 2001, p. 155), Soviet States eventually adopted political reforms which took into account the human rights of their citizens (Thomas, 2001, p. 221). Thomas (2001, p. 282) notes that such change requires

> the presence of local or domestic social forces committed to monitoring their government's implementation of the norms and upon the identity of the target State. International human rights norms have a greater domestic impact when sympathetic non-state actors are available to mobilize around the norms and frame them publicly in a manner conducive to change.

Thus, according to Thomas, the successful implementation of the Helsinki Final Act came down to the documentation and lobbying efforts of civil society organizations. Crucial are the naming and shaming those States not complying with human rights norms, as well as a willingness by the international community to put diplomatic pressure on the non-compliant States in order to effect change (Thomas, 2001, p. 221). Drawing on the work of von Bogdandy and Goldman (2009), as well as von Bogdandy et al. (2010), Farahat and Bast (2022) refer to this process as "communicative power', resting on a "discourse of justification around consented governance goals established by the respective instruments" which "makes non-compliance politically or economically costly" (p. 5). They argue that for communicative power to be successful, regular reporting (including on shortcomings) is required, coordinated by an international institution or body and supported by civil society (Farahat and Bast, 2022, p. 5–7). These features were clearly present in the review of the Helsinki Final Act and, at first glance, they appear to be present for the reviews of the GCs as well, with the GCM and GCR's review mechanisms being coordinated by IOM and UNHCR, respectively, and emphasizing the importance of civil society participation in the process.[12] Yet, there are in fact various issues with the current review processes, as demonstrated in the next section.

4.2 The GC review mechanisms in practice

To date, progress and implementation with regard to the GCR has been reviewed at the 2019 Global Refugee Forum (GRF) (UNHCR, 2020b); the 2021 High-Level Officials Meeting (HLOM) (UNHCR, 2022); as well as UNHCR reports from 2019 (UNHCR, 2019); 2020 (UNHCR, 2020a); and 2021 (UNHCR, 2021). Review of the GCM, meanwhile, has taken place through the UNSG report of October 2020 (UNGA, 2020); the UNSG report of December 2021 (UNGA, 2021); the IMRF 2022 (UNGA, 2022); as well as regional reviews of the Asia-Pacific region (ESCAP, 2020); Europe (UNECE, 2020); Africa (UNECA, 2022); and Latin America and

12 Both Compacts speak of including "relevant stakeholders" in the review process (GCM, paras. 48 and 49b, 49d, 50 and 53; GCR, paras. 101, 103, 104, 106, 107).

the Caribbean (UNECLAC, 2022). The aim of this section is to examine how far these reviews have engaged with the thematic areas discussed in this article, to analyze the overall approach and pattern of the different reviews and to consider what this approach means in terms of future reviews' potential to address the thematic areas.

Generally, four points are particularly worth noting with regard to all reports and outcome documents: (1) there is a generally broad focus on issues discussed, bearing the risk of a "broad-brush" approach; (2) there is a focus on positive developments rather than pointing out problems and challenges; (3) there are inconsistencies in measuring accountability with regard to the GCR and the GCM respectively; and (4) there are unclear expectations on the inputs of civil society participating in the review processes.

We will begin with the broad nature of areas in focus of the reviews. For example, the GRF outcome document lists "burden- and responsibility-sharing, education, jobs and livelihoods, energy and infrastructure, protection, and solutions" as areas of focus (UNHCR, 2020b, p. 7). Meanwhile, the 2021 UNSG report focuses on migrant inclusion and integration, fostering regular migration and reducing vulnerabilities (UNGA, 2021, paras. 8–10). While all of these are important topics, it seems that the reviews so far have adopted a broad-brush approach to GC implementation, rather than drawing on the Compacts' detailed provisions. This approach does not assist in teasing out how particular problems of non-compliance with Compact standards can be addressed. Thus, the 2021 HLOM, for example, resulted in a number of recommendations, which are broad and general in nature. Two of these are, in fact, relevant to the themes discussed in this article: "Enhance access to international protection" and "Provide refugees with healthcare through strengthened national systems" (UNHCR, 2022, p. 6). While such recommendations, if translated into concrete action, are to be welcomed, the review process, to date, has done little to specify how States are expected to arrive at their pledges and implement the recommendations in a Compact-compliant manner.[13] The GCM regional review of Africa provides an exception to this, making a number of concrete suggestions for action (UNECA, 2022, paras. 22-5; 31-2; 38; 43). Nevertheless, as Farahat and Bast (2022) point out, "review of the GCM [and indeed the GCR] risks to be impaired by the broad range and variety of Objectives covered by the Compact[s]" (p. 11).

As such, the reviews, to date, do not engage with immigration detention, access to asylum procedures and access to healthcare (as a cross-cutting issue) in much detail. References to immigration detention can be found only in GCM review documents and are of a general nature, with the IMRF 2022 progress declaration stating that "[e]fforts are being made … to reduce immigration detention, including by implementing non-custodial alternatives to detention in the context of the COVID-19 pandemic" and that "[s]ome Member States have taken steps to end child immigration detention" (UNGA, 2022, para. 31). At the same time, the declaration notes that "[s]ome policies, practices and conditions associated with immigration detention … have affected the physical and mental health and wellbeing of migrants, as well as child development" (UNGA, 2022, para. 32). The declaration further highlights the intersection of detention with health, noting that during the COVID-19 pandemic, "public health considerations were used to justify detention" while "Member States also faced practical challenges in ensuring alternatives to detention" (UNGA, 2022, para. 36). These are the only instances of healthcare being mentioned in relation to the thematic areas discussed in this article, although access to healthcare in general is referred to across the review documents (for example ESCAP, 2020, p. 120–2; UNECE, 2020, p. 21; UNGA, 2020, para. 71; UNHCR, 2020b, p. 23; UNGA, 2021, para. 53; UNGA, 2022, paras. 40, 41, 46 and 47; UNECA, para. 31(b); UNECLAC, 2022, p. 52 and 56). Access to the asylum procedure, meanwhile, is barely discussed in the review documents. The GRF review documents do mention strengthening and simplifying of asylum systems and procedures (UNHCR, 2020b, p. 23; UNHCR, 2022, p. 12), but do not examine existing obstacles to accessing asylum. The European regional GCM review briefly mentions pushbacks as a denial of access to asylum (UNECE, 2020, p. 22), as well as "the importance of improved asylum determination procedures" (UNECE, 2020, p. 1). These sparse and general comments contrast starkly with the manifold instances of non-compliance with GC standards identified in all three thematic areas in Section 3 above.

Turning to the second issue identified, across the review documents there is a noticeable focus on positive developments, accompanied by a lack of pointing out problems in GC implementation. For example, despite noting that "the global protection environment remains deeply concerning" (UNHCR, 2020b, p. 3), the 2021 HLOM outcome document then goes on to focus on examples of progress achieved,[14] rather than clarifying which State practices, in particular, are reason for concern. Similarly, the 2021 UNSG report, which is among the more critical documents, points out, for example, how "thousands of migrants are [still] subject to great suffering and disappear or die during their migration journeys" (UNGA, 2021, para. 5), but nevertheless does not name the States and practices responsible for this state of affairs. For example, in assessing progress on immigration detention, the report highlights positive developments in Belgium, Mexico, and Thailand (UNGA, 2021, para. 29), but when criticizing practices such as "detaining more migrants for longer periods [and] using public health concerns to justify detention or unlawful deportation" (UNGA, 2021, para. 30), no particular States—such as Canada, EU countries or South Africa—are mentioned. The 2020 UNSG report, too, only names countries which have made positive progress in the area of immigration detention, citing efforts by the UK and Thailand (ESCAP, 2020, p. 86; UNGA, 2020, paras. 44 and 48). The same is true of the review of the Asia-Pacific region.

13 The HLOM 2021 outcome document does suggest a number of actions States can take to implement the recommendations, however, these are still quite general in nature. With regard to enhancing access to international protection, for example, the document lists actions such as providing asylum and access to territory, developing refugee and asylum laws, policies and providing expertise and resources to develop or strengthen national asylum systems (UNHCR, 2022, p. 25). Again, these are important actions to undertake, however, the document lacks concrete guidance on how to realize these aims.

14 For example, in areas such as resolving situation of statelessness or improving access to complementary pathways (UNHCR, 2022, p. 8-9).

Although it states that "[g]overnments in the region often use immigration detention to respond to irregular migration, justifying detention measures based on security narrative" (ESCAP, 2020, p. 108), it does not name the relevant governments, but does name those countries in which positive developments have occurred (ESCAP, 2020, p. 110). As Farahat and Bast (2022, p. 10) point out, States seem to have "cherry-picked those Objectives for reporting where they performed particularly well while ignoring other, more critical issues".

Thirdly, two different approaches can be observed in reviewing implementation of the GCM on the one hand and the GCR on the other, with regard to measuring progress. While the GCM reviews seem to adopt a largely qualitative and anecdotal approach, the GCR reviews focus largely on numbers and statistics. Indeed, the 2019 UNHCR report consists of an indicator framework "reflect[ing] key areas of the GCR" (UNHCR, 2019, p. 5). The relevant indicators are based on quantitative considerations for measuring progress, speaking of "volume," "numbers," and "proportion," such as the "volume of official development assistance provided to […] refugees" or the "proportion of refugees who have access to decent work" (UNHCR, 2019, p. 10; see also UNHCR, 2020b, p. 37; UNHCR, 2021, p. 5). Similarly, in its 2020 report, UNHCR speaks of the need to "quantify inequitable burden and responsibility-sharing and gaps in international cooperation" (UNHCR, 2020a, p. 2). The GCM review documents, meanwhile, tend to highlight what concrete measures individual countries have taken in order to move toward implementing the GCM's objectives, as described above, allowing States to focus only on positive outcomes. However, the purely quantitative approach adopted by UNHCR is also unhelpful as it reduces progress to action measurable in numbers, thus reinforcing the broad-brush approach to implementation discussed above.

Finally, another aspect the different review documents have in common is that while the participation of civil society organizations, as well as the need to include their views and to cooperate with them, are mentioned throughout, what exactly their input has consisted of is not made clear. Civil society participation *is* possible and has been facilitated at the UN level, including in the drafting process for the GCM (Rother, 2022a, p. 116–120; see also Rother and Steinhilper, 2019; Rother, 2022b), yet in the run-up to the IMRF, a coalition of civil society actors in an open letter expressed "concerns on the shrinking space for full, meaningful, self-organized civil society representation, and participation."[15] As Rother notes, "migrant civil society has to go back to the starting point again and again and struggle to be included" (Rother, 2022a, p. 70). This lack of meaningful civil society participation in the review process is problematic since, as the discussion in Section 4.1 has shown, civil society participation is of particular importance for a successful implementation of soft law instruments. What is more, it is civil society organizations who are best placed (and most likely) to be critical of shortcomings in GC implementation. As such, their voices are extremely important when seeking to achieve meaningful progress. Nevertheless, as Farahat and Bast (2022) note, "[w]hether Member States base their reports also on the findings of civil society actors … is entirely within their discretion" (p. 9).

In summary, the review documents to date look at the GCs' broad aims and objectives, tend to highlight mainly positive developments and give little detail on civil society contributions to the review process. In addition, while the GCR reviews rely largely on quantitative data to measure progress, the GCM reviews are based mainly on qualitative data. Neither of these methods of measuring progress is particularly convincing, with the former causing the review to focus only on indicators that can be quantified and the latter allowing States to cherry-pick positive examples, while omitting areas in which more work is needed. Overall, therefore, the current way the reviews function is not promising in terms of addressing the thematic areas which are the focus of this article. Indeed, the reviews to date have not discussed immigration detention, access to the asylum procedure and healthcare as a cross-cutting issue in much detail. This may be so because these areas are, first, fairly specific issues rather than broad areas within the remits of the GCs. Secondly, these are areas in which the jurisdictions discussed in this article do not have any positive developments to report. Further, the shortcomings identified in the areas of detention and access to the asylum procedure do not lend themselves to either a purely quantitative, or a purely qualitative assessment of progress achieved. Instead, what is needed is a detailed analysis of shortcomings, coupled with concrete suggestions on how these can be addressed. In this context, the problem of omitting civil society's contributions from the review documents becomes apparent, as these would serve to identify such shortcomings.

5 Concluding thoughts

Several authors have made suggestions as to how to improve the GC review mechanisms, including some of the present authors. Guild et al. (2019), for example, suggests linking monitoring of the GCM "to existing human rights mechanisms to maintain commitment and ensure resource availability", pointing out that this would also give civil society organizations and refugees and other migrants an opportunity to "challenge failing policies by states and to advocate for change" (p. 55). Farahat and Bast (2022), meanwhile, recommend "mandatory consultations with civil society actors and with local authorities" (p. 14) and "publication of comprehensive shadow reports by non-governmental organizations" (p. 15). Based on the analysis in this article, we agree with these recommendations to allocate a central role to civil society organizations. Similar to the transnational interest groups which successfully lobbied for implementation of the Helsinki Final Act, we envisage transnational civil society organizations taking ownership of thematic issues relevant to GC implementation.[16] As evident from our analysis in this article,

15 Letter to Amb. Abdulla Shahid, President of the General Assembly, United Nations (15 March 2022) https://csactioncommittee.org/wp-content/uploads/2022/03/Open-Letter.pdf.

16 In fact, such efforts exist already, for example by the Civil Society Action Committee. Available online at: https://csactioncommittee.org/background/ (accessed July 19, 2023) and the Global Coalition on Migration Friedrich-Ebert-Stiftung (2022), "Spotlight Report on Global Migration" https://spotlightreportmigration.org/wp-content/uploads/SRGM_EN.pdf.

refugees and other migrants bear the brunt of States' non-compliance with Compact standards. As such (migrant) civil society organizations will be best placed to identify areas of non-compliance which ought to be discussed and addressed during the review process. Thus, a more effective way to make use of the review mechanisms would be to identify areas of non-compliance with Compact standards and to make use of the Compacts' detailed provisions to suggest concrete actions States can take to narrow the implementation gap. Such a civil society-led review process would positively impact GC implementation as a whole, and compliance with GC standards in the areas of immigration detention, access to asylum procedures and access to healthcare (as a cross-cutting issue). It would ensure that instances of non-compliance are addressed openly and not swept under the carpet. As Majcher (2022) points out in relation to reviewing progress on immigration detention, where applicable, treaty bodies should be involved in the review process to ensure that GC implementation is in line with international law (p. 9, 12–17).

We recognize, of course, that much of the success of the Helsinki review process depended not only on naming and shaming those States not complying with human rights norms, but also on the international community's willingness to put diplomatic pressure on the non-compliant States. Thus, to create the necessary political pressure, we suggest that the so-called GC "champion countries" could take on a similar role to Western States in the Helsinki process in pushing for human rights standards.[17] This, however, would require these countries to acknowledge and address not only shortcomings in other countries, but also their own. Canada, as well as two EU Member States (Luxembourg and Portugal), are champion countries even though, as clearly shown in this article, instances of serious non-compliance with Compact standards can be identified in these countries. Farahat and Bast (2022) note that, worryingly, "it does not really make a difference for the qualification as a 'champion' whether a country scores highly … regarding the treatment of migrants" (p. 11). Thus, to further improve the GCs' review process, champion countries ought to have to "earn" their status as champions through meaningful progress toward Compact compliance. Overall, such progress can only be achieved if States are willing to take both civil society organizations' recommendations and the GCs' provisions seriously.

17 At the time of writing, there are 31 such champion countries, see https://migrationnetwork.un.org/champion-countries.

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Conflict of interest

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