

Towards a Complete Prohibition on the Immigration Detention of Children

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ABSTRACT

The legal position on the immigration detention of children is unclear: is it permissible, subject to the *ultima ratio* (last resort) principle, or is it prohibited outright? International opinion is divided, with different human rights bodies favouring one or the other position. In November 2017, 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 issued a Joint General Comment in which they stated forthrightly that the immigration detention of children is prohibited and that the *ultima ratio* principle does not apply to the immigration context. This article situates the Joint General Comment in the broader context, interrogates its conceptual foundations and explores the extent to which it is likely to settle the debate. The key finding is that the position adopted in the Joint General Comment is correct but founded on a faulty premise and a misplaced emphasis. A more theoretically solid foundation for the prohibition on the immigration detention of children is advanced based on a teleological interpretation of the right of the child to liberty in the Convention on the Rights of the Child, with a particular focus on the concept of arbitrariness.

KEYWORDS: children, immigration detention, *ultima ratio* principle, best interests of the child principle, arbitrary detention, Joint General Comment on the human rights of children in the context of international migration in countries of origin, transit, destination and return, Article 37(b) Convention on the Rights of the Child

1. INTRODUCTION

The legal position relating to the immigration detention of children is in flux. What can be regarded as the most authoritative right relating to the issue is found in Article 37(b) of the Convention on the Rights of the Child (CRC),¹ which provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

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1 1989, 1577 UNTS 3.

However, when applied to the immigration detention context, this norm is ambiguous: is the immigration detention of children prohibited outright or permitted exceptionally pursuant to the *ultima ratio* (last resort) principle? Until recently, the international community (that is, the UN and regional human rights bodies) seemed to favour the latter interpretation. But a new view is coalescing around the former interpretation, namely, that immigration detention of children is prohibited *simpliciter*. This view finds its apogee in the recent Joint General Comment on the human rights of children in the context of international migration adopted by 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 ('Joint General Comment').² The position in the Joint General Comment is that the immigration detention of children is a violation of the right of the child to liberty and that the *ultima ratio* principle has no application to the immigration context. In this article I explore the evolution in thinking about the legality of the immigration detention of children. The process of reimagining legal norms is long and winding and I track the extent of convergence around the 'new' prohibition and the adherence to the 'old' *ultima ratio* principle. I posit that, if it is to become entrenched, the new position must be conceptually unassailable. Accordingly, I interrogate the theoretical basis for the contention that the immigration detention of children is prohibited. In particular I analyse the legal reasoning in the Joint General Comment and advance what I argue is a more conceptually robust foundation for the prohibition on the immigration detention of children, based on a teleological interpretation of Article 37(b) of the CRC.

The structure of this article is as follows. In [Section 2](#) I outline the positions of UN and regional human rights bodies on the question of the immigration detention of children prior to the adoption of the Joint General Comment at the end of 2017. Following a brief discussion of the ambiguities in the text of Article 37(b) of the CRC itself, I outline the previous jurisprudence of the Committee on the Rights of the Child ([A](#)); the positions of the other UN human rights treaty-monitoring bodies ([B](#)); the stances adopted by non-treaty UN human rights mechanisms ([C](#)); and the jurisprudential positions of the two regional courts that have pronounced on the issue—the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) ([D](#)). In [Section 3](#) I shift focus to the Joint General Comment. I explore whether the prohibition on the immigration detention of children advanced therein is likely to become an entrenched norm. For this to happen it must be built on a solid conceptual foundation. Following the chronology suggested by Article 37(b) of the CRC itself and employing a teleological approach to interpretation, I critically analyse the Joint General Comment's treatment of the concept of arbitrariness ([A](#)); of the rights of the child that risk being violated by immigration detention (which impacts on the understanding of the concept of arbitrariness) ([B](#)); and of the *ultima ratio*

2 Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017 ('Joint General Comment'). Another Joint General Comment was adopted by the Committees at the same time: see Joint General Comments Nos 3 and 22 on the general principles regarding the human rights of children in the context of international migration, 16 November 2017.

principle (C). In Section 4 I conclude with some remarks about the importance of conceptual clarity in this debate and its potential for resolving outstanding divergence.

2. EVOLUTION, CONFUSION, DIVERGENCE: DEVELOPMENTS PRIOR TO THE ADOPTION OF THE JOINT GENERAL COMMENT

Before exploring how international legal thinking on the immigration detention of children has evolved it is worth commenting on some of the unique features of Article 37(b) of the CRC. The right of the child to liberty contained in Article 37(b) of the CRC is unlike parallel provisions in other human rights instruments in a number of respects. Firstly, and this point is an oft-repeated criticism of the CRC, the right of the child to liberty is not located in its own discrete Article but is merged with the prohibition of torture and cruel, inhuman or degrading treatment or punishment, along with aspects of the right to life (Article 37(a)), with conditions of detention (Article 37(c)) and with the right to challenge the legality of detention (Article 37(d)).³ Meanwhile, due process guarantees and conditions of detention in the juvenile justice context are siloed in a separate Article (Article 40). Secondly, Article 37(b) does not explicitly establish the right of the child to liberty before outlining how the right can be justifiably limited. Rather, the paragraph is drafted as a limitation clause in which the right of the child to liberty is only implicit. Thirdly, in terms of limitation, in addition to the usual requirements that any deprivation of liberty is lawful and non-arbitrary, a further requirement is specified: that it is used only as a measure of last resort and for the shortest appropriate period of time. These unique features of the CRC may account for two common misconceptions in relation to the right of the immigrant child to liberty: that the irregular immigrant child automatically falls within the scope of the limitation on the (implicit) right of the child to liberty and that the key brake on limitation is contained in the *ultima ratio* principle. These misconceptions are evident in some of the approaches to the immigration detention of children at the international level, including in the previous jurisprudence of the Committee on the Rights of the Child.

A. Previous Jurisprudence of the Committee on the Rights of the Child

Prior to the recently adopted Joint General Comment the jurisprudence of the Committee on the Rights of the Child relating to the immigration detention of children could be found in a General Comment from 2005 and in its Concluding Observations to States Parties reports from 1993 to 2017.

(i) *General Comment No 6 on the treatment of unaccompanied and separated children outside their country of origin, 2005*

In its earliest General Comment to deal with the issue of immigration detention of children the Committee states:

3 See, for example, Gomien, 'Whose Right (And Whose Duty) Is It? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child' (1989–90) 7 *New York Law School Journal of Human Rights* 161.

In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. 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. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to be a matter of last resort and for the shortest appropriate period of time.⁴

Although the thrust of this statement is clearly against the immigration detention of children, it does contain several ambiguities.

Firstly, the non-detention of unaccompanied and separated children is presented as a 'general rule'. A general rule, by its very nature, falls short of a complete prohibition and suggests the existence of some justifiable limitations. We are told that immigration reasons (the child being unaccompanied or separated, their migratory or residence status or lack thereof) are not, on their own, grounds for justification. We are also told that detention may be exceptionally justified for 'other reasons' but are given no indication of what these reasons might be.

Furthermore, notwithstanding the reference to Article 37, the source of the general rule is not precisely identified. Since the *ultima ratio* principle, which is contained in the second sentence of Article 37(b), only applies whenever detention is exceptionally justified for other reasons (that is, other than immigration control), this cannot be the source of the general rule. It follows that the general rule must come from Article 37(b) first sentence, which prohibits unlawful or arbitrary deprivation of liberty. However, the Committee omits to offer any explanation of *why* the detention of unaccompanied or separated children is unlawful or arbitrary. As will be argued later, the *why* emerges only when Article 37(b) is interpreted teleologically, in the light of the other rights in the Convention and its overall object and purpose. However, the only attempt at a schematic interpretation of the provision is the rather bald reference to the principle of the best interests of the child.

Finally, the scope of the *ultima ratio* principle, which applies whenever detention is exceptionally justified for reasons other than immigration control, is not entirely clear. Typical reasons for the detention of immigrant children include criminal justice reasons (which may include immigration offences), national security reasons, child protection reasons, the lack of alternatives to detention for unaccompanied minors and children with families, the need to properly identify immigrants, age assessment and the need to temporarily accommodate immigrants before relocating them elsewhere (within or out of the State). To what extent do these relate to 'the child being unaccompanied or separated or their migratory or residence status or lack thereof, thereby falling outside the scope of the *ultima ratio* principle, and to what extent do they (also) constitute 'other reasons', thereby falling within the scope of the *ultima ratio* principle?

The issue of the non-justifiability of the detention of children for immigration reasons was reiterated more forcefully, but without resolving the above ambiguities, in

4 Committee on the Rights of the Child, General Comment No 6: The treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, at para 61.

the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration held by the Committee on the Rights of the Child. In its report and recommendations the Committee reveals:

Immigration detention and it being a clear violation of the Convention was a subject that was repeatedly discussed and underscored. It was emphasised that regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable.⁵

The language and tone signal a firming up of the Committee's approach to the immigration detention of children, and the discussions were undoubtedly a catalyst to the development of the more robust position on the issue adopted in the 2017 Joint General Comment. However, as the following subsection shows, the Committee remained somewhat unclear about why—and in some instances whether—immigration detention is a 'clear violation' of the Convention.

(ii) *Concluding Observations of the Committee on the Rights of the Child*

For the purposes of this research I analysed all Concluding Observations to States Parties periodic reports on the Convention between 1993 and 2017 in order to identify those Concluding Observations that deal, explicitly or implicitly, with immigration detention. Out of 526 Concluding Observations, 78 deal with immigration detention. I scrutinised these Concluding Observations in order to discern patterns or trends in the Committee's recommendations on the issue. I observed the following patterns or trends, each of which is discussed in turn:

1. The Committee considers that immigration detention should be prohibited outright.
2. The Committee considers that a standard other than outright prohibition governs immigration detention, such as the *ultima ratio* principle.
3. The Committee's message is mixed or unclear: the *ultima ratio* principle *and* the prohibition on immigration detention apply; the *ultima ratio* principle *or* the prohibition on immigration detention applies; States should cease detention *and* institute standards on detention.
4. The Committee uses euphemistic language to refer to immigration detention.
5. The Committee identifies detention as an issue of concern but makes no recommendation on its legality.

The Committee's most often repeated message is that immigration detention of children and their families should be prohibited outright. The Committee uses a number of different injunctions to impart this message including to 'prevent' detention, 'ensure' no detention, 'refrain from' detention, 'prohibit' detention, 'avoid' detention, 'take the necessary measures to end' detention, 'cease' detention, 'release from' detention, 'do not subject' to detention, 'put an end to' detention, 'end as a matter of priority' detention and, most emphatically, 'expeditiously and completely cease' detention. The

5 Committee on the Rights of the Child, Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration, 28 September 2012, at para 32.

Committee has clearly and unambiguously articulated this view in 33 Concluding Observations, including two Concluding Observations in which the Committee repeated the view more than once (in respect of the detention of asylum-seeking children and, separately, irregular migrant children).⁶ The incidence of this message has increased over time. Thus, in the decade 1993 to 2002 only five *per cent* on average of those Concluding Observations that dealt with immigration detention contained the injunction; in the decade 2003 to 2012 this rose to 25 *per cent*; and in the five-year period from 2013 to 2017 this rose to 68 *per cent*. Surprisingly, however, the idea that immigration detention of children should be prohibited was first articulated by the Committee as early as 1999.⁷

If this were the sum total of the Committee's pronouncements on immigration detention, one might safely concur with the Committee when it claims in the Joint General Comment (dealt with later) to 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.'⁸ However, the Committee's record—even its recent record—is more complicated than this.

In four Concluding Observations the Committee on the Rights of the Child has propounded a subtly different view, namely that *arbitrary* or *unlawful* detention of

6 Committee on the Rights of the Child, Concluding Observations regarding Denmark, 26 October 2017, CRC/C/DNK/CO/5; Concluding Observations regarding Ecuador, 2 October 2017, CRC/C/ECU/CO/5-6; Concluding Observations regarding the Republic of Moldova, 29 September 2017, CRC/C/MDA/4-5; Concluding Observations regarding Qatar, 22 June 2017, CRC/C/QAT/CO/3-4; Concluding Observations regarding Estonia, 8 March 2017, CRC/C/EST/CO/2-4; Concluding Observations regarding Bulgaria, 21 November 2016, CRC/C/BGR/CO/3-5; Concluding Observations regarding South Africa, 27 October 2016, CRC/C/ZAF/CO/2; Concluding Observations regarding Slovakia, 20 July 2016, CRC/C/SVK/CO/3-5; Concluding Observations regarding the United Kingdom, 12 July 2016, CRC/C/GBR/CO/5; Concluding Observations regarding France, 23 February 2016, CRC/C/FRA/CO/5; Concluding Observations regarding Mexico, 3 July 2015, CRC/C/MEX/CO/4-5; Concluding Observations regarding Poland, 30 October 2015, CRC/C/POL/CO/3-4; Concluding Observations regarding Honduras, 3 July 2015, CRC/C/HND/CO/4-5; Concluding Observations regarding Indonesia, 10 July 2014, CRC/C/IDN/CO/3-4; Concluding Observations regarding India, 7 July 2014, CRC/C/IND/CO/3-4; Concluding Observations regarding Poland, 25 February 2014, CRC/C/PRT/CO/3-4; Concluding Observations regarding Yemen, 25 February 2014, CRC/C/YEM/CO/4; Concluding Observations regarding China, 29 October 2013, CRC/C/CHN/CO/2-3; Concluding Observations regarding Israel, 4 July 2013, CRC/C/ISR/CO/2-4; Concluding Observations regarding Albania, 7 December 2012, CRC/C/ALB/CO/2-4; Concluding Observations regarding Algeria, 18 July 2012, CRC/C/DZA/CO/3-4; Concluding Observations regarding Thailand, 17 February 2012, CRC/C/THA/CO/3-4; Concluding Observations regarding the Republic of Korea, 2 February 2012, CRC/C/KOR/CO/3-4; Concluding Observations regarding the Czech Republic, 4 August 2011, CRC/C/CZE/CO/3-4; Concluding Observations regarding Egypt, 15 July 2011, CRC/C/EGY/CO/3-4; Concluding Observations regarding Ukraine, 21 April 2011, CRC/C/UKR/CO/3-4; Concluding Observations regarding Japan, 20 June 2010, CRC/C/JPN/CO/3; Concluding Observations regarding Belgium, 18 June 2010, CRC/C/BEL/CO/3-4; Concluding Observations regarding Mexico, 8 June 2006, CRC/C/MEX/CO/3; Concluding Observations regarding Lithuania, 17 March 2006, CRC/C/LTU/CO/2; Concluding Observations regarding Saudi Arabia, 17 March 2006, CRC/C/SAU/CO/2; Concluding Observations regarding the Czech Republic, 18 March 2003, CRC/C/15/Add.201; Concluding Observations regarding Austria, 7 May 1999, CRC/C/15/Add.98.

7 Committee on the Rights of the Child, Concluding Observations regarding Austria, *ibid*.

8 Joint General Comment, supra n 2 at para 5.

immigrant children should be prohibited.⁹ Unless it is accepted, as is propounded in this article, that all immigration detention of children is *ipso facto* arbitrary and unlawful, this suggests that not all immigration detention of children is prohibited. The Committee has also advanced the more obviously contrary view that immigration detention of children and their families is governed by the *ultima ratio* principle. The Committee has articulated this view in 12 Concluding Observations.¹⁰ For example, in its Concluding Observations to Germany in 2014 the Committee advised Germany to '[e]nsure that detention of asylum-seeking and migrant children is always used as a measure of last resort and for the shortest appropriate period of time, in compliance with Article 37(b) of the Convention, and that detention is made subject to time limits and judicial review'.¹¹ Furthermore, on one occasion the Committee advised a State Party to 'further *reduce* the use of aliens' detention of unaccompanied children and for families with children'¹² and on another to '*reconsider* the practice of detaining asylum-seeking children'.¹³ These soft admonitions suggest that immigration detention is undesirable but not actually prohibited. In sum, in 18 Concluding Observations the Committee has advanced, expressly or implicitly, a standard short of prohibition in relation to immigration detention.

There is also a significant number of Concluding Observations—nine to be precise—in which the Committee presents one or more mixed messages. The first mixed message is that children should be exempted from detention *AND* the *ultima ratio* principle applies.¹⁴ For example, in its Concluding Observations to Austria in 2012 the Committee notes that domestic legislation prohibits the placement of children under the age of 14 years in detention pending deportation and expresses concern that such age limit is too low. Then rather than establishing that immigration detention of all children should be prohibited, the Committee urges the State Party to ensure that

- 9 Committee on the Rights of the Child, Concluding Observations regarding Cameroon, 6 July 2017, CRC/C/CMR/CO-3-5; Concluding Observations regarding Morocco, 14 October 2014, CRC/C/MAR/-CO/3-4; Concluding Observations regarding Romania, 18 March 2003, CRC/C/15/Add. 199; Concluding Observations regarding Guinea, 10 May 1999, CRC/C/15/Add.100.
- 10 Committee on the Rights of the Child, Concluding Observations regarding Germany, 25 February 2014, CRC/C/DEU/CO/3-4; Concluding Observations regarding Finland, 3 August 2011, CRC/C/FIN/-CO/4; Concluding Observations regarding the United Kingdom, 20 October 2008, CRC/C/GBR/-CO/4; Concluding Observations regarding Malaysia, 25 June 2007, CRC/C/MYS/CO/1; Concluding Observations regarding Latvia, 28 June 2006, CRC/C/LVA/CO/2; Concluding Observations regarding Lebanon, 8 June 2006, CRC/C/LBN/CO/3; Concluding Observations regarding Australia, 20 October 2005, CRC/C/15/Add.268; Concluding Observations regarding the Netherlands, 26 February 2004, CRC/C/15/Add.227; Concluding Observations regarding Canada, 27 October 2003, CRC/C/15/Add. 215; Concluding Observations regarding Poland, 30 October 2002, CRC/C/15/Add. 194; Concluding Observations regarding Canada, 20 June 1995, CRC/C/15/Add. 37; Concluding Observations regarding Sweden, 18 February 1993, CRC/C/15/Add. 2.
- 11 Committee on the Rights of the Child, Concluding Observations regarding Germany, *ibid.* at para 69(d).
- 12 Committee on the Rights of the Child, Concluding Observations regarding the Netherlands, 27 March 2009, CRC/C/NLD/CO/3 at para 68 (emphasis added).
- 13 Committee on the Rights of the Child, Concluding Observations regarding Austria, 7 May 1999, CRC/C/15/Add.98 at para 27 (emphasis added).
- 14 Committee on the Rights of the Child, Concluding Observations regarding Latvia, 14 March 2016, CRC/C/LVA/CO/3-5; Concluding Observations regarding Hungary, 14 October 2014, CRC/C/HUN/-CO/3-5; Concluding Observations regarding Canada, 6 December 2012, CRC/C/CAN/CO/3-4; Concluding Observations regarding Austria, 3 December 2012, CRC/C/AUT/CO/3-4; Concluding Observations regarding the United Kingdom, 9 October 2002, CRC/C/15/Add. 188.

'children under the age of 14 are not placed in detention under any circumstances' and that 'children above 14 years [are detained] only as a measure of last resort when non-custodial alternatives to detention are unavailable'.¹⁵ The second mixed message is that children should be exempt from detention *or* the *ultima ratio* principle applies.¹⁶ Thus, in its Concluding Observations to Greece in 2012 the Committee advised the State Party to '[e]nsure that children, either separated or together with their families, who enter the country in an irregular manner, are not detained, or remain in detention only in very exceptional circumstances and for the shortest period of time necessary'.¹⁷ The third mixed message is that detention should be ceased *and* the State should improve judicial review of detention/standards of detention.¹⁸ For example, in its Concluding Observations to Latvia in 2016 the Committee recommends that the State Party review the asylum law 'to exempt asylum-seeking children from detention during the asylum-seeking procedure' and review the medical law 'to provide asylum-seeking children in detention with necessary advanced health treatment on an equal basis with other detained persons'.¹⁹

In four Concluding Observations the Committee has dealt with the issue of immigration detention rather cryptically, using euphemistic language for detention and sometimes even conflating the right to liberty with the right to freedom of movement. Thus, the Committee has advised Nauru, which operates off-shore detention facilities for irregular migrants who are intercepted at sea by Australia, to 'prioritize the immediate transfer of asylum-seeking children and their families out of the *Regional Processing Centre*'.²⁰ It has requested Poland to 'ensure that children temporarily placed in *emergency blocks* are not *held* together with juvenile offenders'.²¹ It has censured the Netherlands for the 'poor conditions in asylum reception centres where children are *not allowed to move freely*' and recommended that the State Party '[a]void *detaining* children and families in *reception centres with limited freedom of movement*'.²² Similarly, it has advised Panama to 'consider revising the current practice of *restricting the freedom of movement* of those Columbians under temporary protection, especially the young people'.²³

15 Committee on the Rights of the Child, Concluding Observations regarding Austria, *ibid.* at para 55.

16 Committee on the Rights of the Child, Concluding Observations regarding Greece, 13 August 2012, CRC/C/GRC/CO/2–3.

17 *Ibid.* at para 65.

18 Committee on the Rights of the Child, Concluding Observations regarding Latvia, 14 March 2016, CRC/C/LVA/CO/3–5; Concluding Observations regarding Malta, 18 June 2013, CRC/C/MLT/CO/2; Concluding Observations regarding Australia, 28 August 2012, CRC/C/AUS/CO/4.

19 Committee on the Rights of the Child, Concluding Observations regarding Latvia, *ibid.* at para 61.

20 Committee on the Rights of the Child, Concluding Observations regarding Nauru, 28 October 2016, CRC/C/NRU/CO/1 at para 53 (emphasis added).

21 Committee on the Rights of the Child, Concluding Observations regarding Poland, 30 October 2002, CRC/C/15/Add.194 at para 47(b) (emphasis added).

22 Committee on the Rights of the Child, Concluding Observations regarding the Netherlands, 16 July 2015, CRC/C/NLD/CO/4 at para 53 (emphasis added).

23 Committee on the Rights of the Child, Concluding Observations regarding Panama, 30 June 2004, CRC/C/15/Add. 233 at para 55 (emphasis added).

Finally and relatedly, in 14 Concluding Observations the Committee identifies immigration detention as a matter of concern but makes no recommendation in relation to the legality of the detention *per se*.²⁴ For example, in its Concluding Observations to the Dominican Republic in 2015 the Committee expresses concern that ‘inadequate access to identity documents for child refugees and asylum-seekers and/or their relatives puts them at risk of detention’ but, rather than tackling the detention issue, advises the State to remedy the identity document issue.²⁵ Similarly, in its Concluding Observations to Kyrgyzstan in 2000 the Committee notes that refugee documentation is provided only to the head of the household and that this causes problems for undocumented children when encountering the militia who subject them to fines and detention. The Committee’s recommendation is that ‘those detained are not . . . required to pay the costs of their detention’,²⁶ a woefully inadequate response to the detention of immigrant children by any standard.

B. The Other Treaty-Monitoring Bodies

If the treaty-monitoring body charged with interpreting the CRC is not entirely clear about the legal requirements governing immigration detention of children, how do the other treaty-monitoring bodies fare? Apart from the CRC, three other UN treaties contain a discrete right to liberty/prohibition on unlawful and arbitrary detention: the International Covenant on Civil and Political Rights (ICCPR),²⁷ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families²⁸ and the Convention on the Rights of Persons with Disabilities.²⁹ Only the Human Rights Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, however, have elaborated on the normative requirements of the right when it comes to the immigration detention of children.

24 Committee on the Rights of the Child, Concluding Observations regarding the Dominican Republic, 6 March 2015, CRC/C/DOM/CO/3–5; Concluding Observations regarding Thailand, 17 February 2012, CRC/C/THA/CO/3–4; Concluding Observations regarding Italy, 31 October 2011, CRC/C/ITA/CO/304, in which the Committee dealt separately with the detention of three different cohorts of immigrant children and failed in each case to tackle the legality issue; Concluding Observations regarding Spain, 3 November 2010, CRC/C/ESP/CO/3–4; Concluding Observations regarding France, 22 June 2009, CRC/C/FRA/CO/4; Concluding Observations regarding France, 30 June 2004, CRC/C/15/Add. 240; Concluding Observations regarding Italy, 18 March 2003, CRC/C/15/Add. 198; Concluding Observations regarding Ukraine, 9 October 2002, CRC/C/15/Add.191; Concluding Observations regarding Greece, 2 April 2002, CRC/C/15/Add.170; Concluding Observations regarding Lebanon, 21 March 2002, CRC/C/15/Add.169; Concluding Observations regarding Gambia, 6 November 2001, CRC/C/15/Add. 165; Concluding Observations regarding Kyrgyzstan, 9 August 2000, CRC/C/15/Add. 127; Concluding Observations regarding Australia, 21 October 1997, CRC/C/15/Add. 79; Concluding Observations regarding Germany, 27 November 1995, CRC/C/15/Add.43.

25 Committee on the Rights of the Child, Concluding Observations regarding the Dominican Republic, *ibid.* at para 62.

26 Committee on the Rights of the Child, Concluding Observations regarding Kyrgyzstan, *supra* n 24 at para 54.

27 1966, 999 UNTS 171; see Article 9(1).

28 2003, GA Resolution 45/158, 18 December 1990, A/RES/45/158; see Article 16(1) and 16(4).

29 24 January 2007, A/RES/61/106; see Article 14; Article 17 of the International Convention for the Protection of All Persons from Enforced Disappearance, UN GA Resolution 61/177, 20 December 2006, cross-references the right to liberty in other international human rights instruments.

The Human Rights Committee's general position regarding immigration detention is that it is not prohibited by the right to liberty in Article 9(1) of the ICCPR *per se*, but in order for the detention not to fall foul of the prohibition on arbitrariness, it must be 'justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time'.³⁰ In other words an individualised assessment of reasonableness, necessity and proportionality is required in every case—a requirement that rules out mandatory immigration detention. Its position on the immigration detention of children is a more nuanced version of this, based on the *ultima ratio* principle. Thus, in General Comment No 35 from 2014 the Committee states:

Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.³¹

However, in none of its individual communications relating to immigration detention of families including children—all of which pre-date the above General Comment—has the Committee explicitly referred to the *ultima ratio* formula. Rather, the Committee has tended to rely on its general requirement of an individualised assessment, adding that such assessment 'must also take into account the needs of children'.³² Even where the authors of the communication have advanced child-specific arguments, such as Article 24 of the ICCPR that requires States to adopt 'such measures of protection' as are necessary for children, the Committee has generally used its *lex generalis* line of reasoning to find a violation of Article 9(1) and then deemed it unnecessary to examine the other arguments.³³ There is one case concerning an unaccompanied minor from 2002 in which the Committee, having found no violation of Article 9(1), did go on to consider the Article 24 argument on its merits.³⁴ However, it held that

the detention of a minor is not *per se* a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three-and-a-half months entailed a failure by the State Party to grant him such measures of protection as are required by his status as a minor.³⁵

30 *F.K.A.G. et al. v Australia* (2094/2011), Views, 26 July 2013, CCPR/C/108/D/2094/2011 at para 9.3.

31 Human Rights Committee, General Comment No 35: Article 9 (liberty and security of person), 16 December 2014, CCPR/C/GC/35 at para 18.

32 *F.K.A.G. et al. v Australia*, *supra* n 30. See also *M.M.M. et al. v Australia* (2136/2012), Views, 25 July 2013, CCPR/C/108/D/2136/2012 at para 10.3.

33 *D. and E. and their two children v Australia* (1050/2002), Views, 9 August 2006, CCPR/87/D/1050/2002; *Baban v Australia* (1014/2001), Views, 18 September 2003, CCPR/C/78/D/1014/2001.

34 *Samba Jollah v The Netherlands* (794/1998), Views, 26 March 2002, CCPR/C/74/D/794/1998.

35 *Ibid.* at para 8.3.

This reasoning does not meet the requirements of even the *ultima ratio* principle; detention as a measure of last resort surely indicates more than one other resort, and three and a half months of detention is hardly the shortest appropriate period of time. Thus, in comparing the jurisprudence of the Human Rights Committee with its 2014 General Comment, it is clear that the Committee has evolved *to* but not *beyond* the *ultima ratio* principle.

As for the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, its position as revealed in the Joint General Comment is a refinement of its previous position. In its 2013 General Comment No 2 on the rights of migrant workers in an irregular situation and members of their families, its general (that is, non-child-specific) position on immigration detention approximates to the *ultima ratio* principle.³⁶ Thus, it states that immigration detention must be exceptional, based on an individualised assessment of necessity and proportionality, and give preference to less coercive measures. Against this backdrop, its position on the immigration detention of children is that '[c]hildren, and in particular unaccompanied or separated children, should never be detained solely for immigration purposes.'³⁷ This injunction, forthright on its face, suffers from the implicit suggestion that immigrant children may be detained if there is another reason (other than immigration control) to justify the detention. Furthermore, the particular mention of unaccompanied or separated children suggests a less than absolute prohibition of detention where accompanied children are concerned. In this regard the Joint General Comment provides a welcome clarification of the Committee's position.

Finally, as for the other treaty-monitoring bodies, it is submitted that the issue of the immigration detention of children does fall within the material scope of their parent treaties, notwithstanding the lack of a discrete right to liberty. Thus, the issue is germane to gender and racial discrimination, to enforced disappearances, to torture and other cruel, inhuman or degrading treatment or punishment and to other rights that fall within the remit of the treaty-monitoring bodies. It is disappointing therefore that only the Committee on the Elimination of Discrimination Against Women (CEDAW) has pronounced on the issue, stating that

children should not be detained with their mothers unless doing so is the only means of maintaining family unity and is determined to be in the best interest of the child. Alternatives to detention, including release with or without conditions, should be considered in each individual case and especially when separate facilities for women and/or families are not available.³⁸

36 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No 2: The rights of migrant workers in an irregular situation and members of their families, 28 August 2013.

37 Ibid. at para 33.

38 Committee on the Elimination of Discrimination against Women, General Recommendation No 32: The gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, at para 49. For its part the Committee on the Elimination of Racial Discrimination has stated in General Recommendation No 30: Discrimination against non-citizens, 1 October 2002, at para 19, that States must '[e]nsure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards'.

The notion that the detention of immigrant children is permissible where it is the only means of maintaining family unity is based on a narrow view of the right of the child to family life and no longer represents good law, as will be discussed later. In brief, the positions of those treaty-monitoring bodies that have pronounced on the issue of the immigration detention of children lag some way behind the concept of outright prohibition.

C. Other United Nations Human Rights Bodies

Apart from the treaty-monitoring bodies, a host of other UN human rights bodies have pronounced on the immigration detention of children, all expressing, to a greater or lesser extent, disapproval of the practice.³⁹ What is of interest is less the disapproval and more the understanding shown by the various bodies of the salient legal issues.

The United Nations High Commissioner for Refugees (UNHCR) has been engaging with the question of the immigration detention of children for some years. In its 2012 detention guidelines the UNHCR relies on the *ultima ratio* principle to conclude that children ‘should not *in principle* be detained at all.’⁴⁰ The idea of a principled, but implicitly not a hard law, opposition to the immigration detention of children is a common theme, as will emerge. In *Safe and Sound*, published jointly with UNICEF in 2014, the UNHCR, again relying on the *ultima ratio* principle, concludes that ‘detention should be used on an exceptional basis.’⁴¹ Also in 2014 the UNHCR produced a global strategy entitled *Beyond Detention* that aims, *inter alia*, to end the detention of children.⁴² In an options paper published pursuant to this strategy document, the UNHCR outlines options for governments on care arrangements and alternatives to detention for children and families.⁴³ It advises that a best interests assessment must always take place prior to a decision to detain a child. However, this suggests either that detention could conceivably be in the best interests of the child or that compliance with the procedural requirement to do a best interests assessment somehow validates the subsequent detention. As is discussed later, detention can never be in the best interests of the child since it violates a large number of the rights of the child; to argue otherwise is to accept that it could be in the best interests of the child to have his/her rights violated. Furthermore, as the best interests of the child are supposed to be a primary consideration in decision-making—overriding States’ general interest in immigration control—it is hard to see how detention could legitimately ensue.⁴⁴ As an aside it can be noted that the UNHCR’s Executive Committee, which is composed of States, noted in

39 For a full audit of the positions of international bodies, see Inter-Agency Group to End Child Immigration Detention, *Summary of normative standards and recommendations on ending child immigration detention* (2016).

40 UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention* (2012) at Guideline 9.2, para 51 (emphasis added).

41 UNHCR and UNICEF, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe* (2014) at 26.

42 UNHCR, *Beyond Detention, A global strategy to support governments to end the detention of asylum seekers and refugees* (2014).

43 UNHCR, *Options Paper 1: Options for government on care arrangements and alternatives to detention for children and families* (2014).

44 See Joint General Comment, *supra* n 2 at para 33; Committee on the Rights of the Child, *supra* n 4 at para 86.

its 2015 *Alternatives to Detention*, that '[e]nsuring the liberty and freedom of movement of children is always the preferred option.'⁴⁵ Again this suffers from the defect of presenting the right to liberty as an 'option' as opposed to a right. Nonetheless, in its 2017 *Position Regarding the Detention of Refugee and Migrant Children in the Migration Context*, UNHCR arrived at a clear and unequivocal position: 'UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interest.'⁴⁶

In 2010 the Office of the High Commissioner for Human Rights published the *Study on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration*.⁴⁷ It notes that the international law position is that the detention of children in the context of migration should 'generally be avoided'.⁴⁸ However, it goes on to say that '[w]here it is deemed to be absolutely necessary, children should only ever be detained as a measure of last resort, this detention must always be justified in law, and it must be for the shortest possible period of time.'⁴⁹ Here again we find another soft admonition followed by the espousal of the *ultima ratio* principle.

In 2009 the Human Rights Council adopted a resolution on migration and the human rights of the child in which it reminds States that the arrest, imprisonment or detention of a child must be in conformity with the international obligations of the State and 'recalls in this context article 37 of the Convention on the Rights of the Child, which provides that such measures should be taken only as a last resort and for the shortest appropriate period of time'.⁵⁰ It goes on to 'encourage' States to consider alternatives to detention and to discourage the criminalisation of migration.⁵¹

A number of the Council's thematic mechanisms have also addressed the issue. In 2009 the Special Rapporteur on the Human Rights of Migrants issued a report that dealt with the protection of children in the context of migration.⁵² Dealing first with the immigration detention of unaccompanied minors, he recommends that unaccompanied children should not be detained because of migration-related conditions and that States include and prioritise alternatives to detention in their legislation. However, these pronouncements are somewhat undermined by his statement that '[a]ny detention order should justify the reasons for not applying alternative measures'.⁵³ On the question of detaining accompanied children he states that such detention cannot be

45 Executive Committee of the High Commissioner's Programme, *Alternatives to Detention*, 3 June 2015, EC/66/SC/CRP.12, at para 16.

46 UNHCR, *Position regarding the detention of refugee and migrant children in the migration context* (2017) at 1.

47 Office of the UN High Commissioner for Human Rights, *Study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration*, 5 July 2010, A/HRC/15/29.

48 Ibid. at para 52.

49 Ibid. at para 53.

50 Human Rights Council, *Human Rights of Migrants: Migration and the Human Rights of the Child*, 12 October 2009, A/HRC/RES/12/6, at para 4.

51 Ibid.

52 Bustamante, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/11/7, 14 May 2009, at II.

53 Ibid. at para 61.

justified on the basis of maintaining the family unit and that detention of children is never in their best interests. He concludes that ‘the *ideal* utilization of a rights-based approach would *imply* adopting alternative measures for the entire family’.⁵⁴ On the one hand, this reflects a more robust approach to the right of the child to family life than is evidenced, for example, in CEDAW’s relevant general recommendation, discussed earlier. But, on the other hand, the strength of this position is undermined by the reference to ideals and implications, with its suggestion of a best practice/soft-law approach. However, in 2016 the Special Rapporteur—now filled by a new mandate holder—recommends ‘expeditiously and completely ending the immigration detention of children and families’.⁵⁵

In 2010 the Working Group on Arbitrary Detention addressed the situation of immigration detention, finding that the detention of minors, and particularly unaccompanied minors, requires even further justification than that of adults.⁵⁶ Why it distinguishes between unaccompanied and accompanied minors is not explained. It queries how the detention of an unaccompanied minor could ever comply with the second sentence of Article 37(b) of the CRC given the availability of alternatives to detention. The *ultima ratio* principle is thus presented as the litmus test notwithstanding the Working Group’s scepticism about its correct use. However, by 2015 the Working Group had firmed up on its position, stating:

The deprivation of liberty of an unaccompanied or separated migrant or of an asylum-seeker, refugee or stateless child is prohibited. Detaining children because of their parents’ migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.⁵⁷

Similarly, in 2015 the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted a forceful and unequivocal position on the immigration detention of children.⁵⁸ He states:

Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment or punishment of migrant children.⁵⁹

54 Ibid. at para 62 (emphasis added).

55 Crépeau, *Report of the UN Special Rapporteur on the human rights of migrants, The Global Compact for safe, regular and orderly mobility*, 20 July 2016, A/71/40767, at para 36.

56 Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, 15 January 2010, A/HRC/13/30 (2010), at para 60.

57 Working Group on Arbitrary Detention, *United Nations basic principles and guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, 6 July 2015, A/HRC/30/37 at para 46.

58 Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68.

59 Ibid. at para 80.

Noting the 2014 Advisory Opinion of the IACtHR on migrant children (dealt with later) he concludes that ‘the principle of *ultima ratio* that applies to juvenile criminal justice is not applicable to immigration proceedings’ and that, accordingly, ‘States should expeditiously and completely cease the detention of children, with or without their parents, on the basis of their immigration status.’⁶⁰ While the legal correctness of the premise regarding the scope of the *ultima ratio* principle is challenged later in this paper, the conclusion arrived at is nonetheless unassailable. In 2016 the UN Special Rapporteur on Trafficking in Persons Especially Women and Children asserted that States hosting children who may have been or are at risk of being victims of trafficking should ‘[b]an administrative detention of children, in particular, but not only for violations of immigration law and regulations.’⁶¹

What is noticeable about the audit so far is that it reveals a distinct pattern: UN bodies that adopted a position prior to 2015 tend to favour the *ultima ratio* principle or a ‘soft’, incremental approach to prohibiting the immigration detention of children; UN bodies that adopted a position after 2015 tend to take a much more robust stance, advocating for a complete prohibition on the immigration detention of children. Nonetheless, post-2015 there remains some equivocation. For example, in 2017 the Human Rights Council Advisory Committee produced a report on a research-based study on the global issue of unaccompanied migrant children and adolescents and human rights.⁶² In a section on the main human rights violations faced by unaccompanied migrant children and adolescents no discrete mention is made of the right of the child to liberty notwithstanding a smattering of references to the phenomenon of immigration detention throughout the report.⁶³ Of its 18 recommendations, one is that States recognise that ‘detention of a child because of a parent’s immigration status is never in the child’s best interests,’⁶⁴ which leaves untouched the question of the detention of unaccompanied minors, and another is that the right to ‘non-detention’ be established as a human-rights indicator.⁶⁵

Also worth mentioning in this regard is the New York Declaration for Refugees and Migrants, adopted by the UN General Assembly in 2016.⁶⁶ The Declaration recognises that

detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a

60 Ibid.

61 Giammarinaro, ‘Report of the Special Rapporteur on trafficking in persons, especially women and children’, A/71/303, 5 August 2016, at para 71(d).

62 Human Rights Council Advisory Committee, *Global issue of unaccompanied migrant children and human rights, final report of the human rights council advisory committee*, 24 July 2017, A/HRC/36/51.

63 Ibid. at section IV, 10–12. It does state in fn 21 that ‘Pursuant to article 37 of the Convention on the Rights of the Child, migrant children should not be detained.’

64 Ibid. at para 114.

65 Ibid. at para 124.

66 UN GA Res 71/1, 19 September 2016, A/RES/71/1.

primary consideration, the best interest of the child, and we will work towards the ending of this practice.⁶⁷

The Declaration has led to the Global Compact for Safe, Orderly and Regular Migration adopted at an intergovernmental conference in December 2018 in which States pledge to work ‘to end the practice of child detention in the context of international migration.’⁶⁸ While no doubt laudable, these statements present the right of the child to liberty, which is, after all, a civil right entailing immediate obligations, as if it were a socio-economic right to be realised progressively over time, or worse, as a matter of soft law or best practice.⁶⁹ Evidently, the UN human rights bodies are not (yet) completely *ad idem* on the nature of the legal obligation governing the immigration detention of children.

D. The Approaches of Two Regional Courts

Nowhere is the contrast between adherence to the *ultima ratio* principle and the promotion of a complete ban on the immigration detention of children more apparent than in the positions of the two regional courts to have pronounced on the issue—the ECtHR and the IACtHR.

(i) The European Court of Human Rights

The right to liberty in the European Convention on Human Rights (ECHR) is contained in Article 5.⁷⁰ In contrast to Article 37(b) of the CRC and other articulations of the right to liberty in international human rights law, Article 5 of the ECHR does not contain any express prohibition of arbitrariness. It rather contains an exhaustive list of permissible grounds of detention, including ground (f)—the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. If the detention does not fall under one of the permissible grounds it is prohibited. But even where detention falls under one of the permissible grounds the Court will still review whether the detention is arbitrary, that is, unlawful, carried out in bad faith or through deception, for purposes other than the permitted stated purpose or where the place or conditions of detention are ‘inappropriate.’⁷¹ However, although the Court has ‘read down’ a proportionality requirement in respect of some of the grounds of detention

67 Ibid. at para 33.

68 Objective 13(h), Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Draft Outcome Document of the Conference, A/CONF.231/3, 10 and 11 December 2018.

69 Although the Committee on the Rights of the Child frequently asserts that there is no hierarchy of rights in the Convention, there is a difference in the nature of the legal obligation relating to civil and political rights, on the one hand, and socio-economic rights, on the other: see Article 4 CRC.

70 Article 5(1) of the European Convention for Human Rights and Fundamental Freedoms 1950, ETS 5, states: Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . .

(f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

71 *Saadi v United Kingdom* Application No 13229/03, Merits and Just Satisfaction, 29 January 2008, at paras 67 and 69.

foreseen by Article 5(1), it has traditionally declined to do so in respect of Article 5(1)(f).⁷² Thus, States are not required to show that the detention was necessary, reasonable or proportionate in the individual circumstances of the case.⁷³ Detention must be reasonably justified *in general terms*, detention with a view to deportation must proceed with 'due diligence'⁷⁴ and detention to prevent unauthorized entry must be closely connected to the purpose of preventing unauthorized entry and should not be unreasonably prolonged.⁷⁵ But no individualized assessment is required. This approach does not seem to permit any accommodation of the *ultima ratio* principle, much less a complete prohibition on the immigration detention of children.

However, an examination of the jurisprudence reveals that the ECtHR has progressively carved out an exception, first for unaccompanied minors, then for accompanied minors, to its established position. In a trilogy of early Belgian cases the Court found violations of Article 5(1) because of the place, conditions and length of immigration detention of children but without touching on the question of whether the detention was *necessary* in the circumstances of the case.⁷⁶ Since these cases do not speak to the legal issue under consideration here they are dealt with later.⁷⁷ However, in the case of *Rahimi v Greece*,⁷⁸ the Court's analysis took a new turn. This case involved the detention for just two days of a fifteen-year-old unaccompanied boy at an adult detention centre. The Court reiterated its established position that detention does not have to be reasonably considered necessary in the circumstances of the case but then went on to reprimand the Greek authorities for automatically applying the law on detention to the boy without taking into consideration his particular situation as an unaccompanied minor. Referring to Article 3 of the CRC relating to the best interests of the child, to the 'general consensus' that in all decisions concerning children their best interests must be paramount, and to Article 37 of the CRC that sets out the *ultima ratio* principle, the Court held that

in ordering the applicant's detention the national authorities never considered the question of his best interests as a child. Moreover, they failed to examine whether placing the applicant in a detention centre . . . was a measure of last resort and whether they could have substituted for it another, less radical, measure to ensure

72 In a number of cases, the Court did, expressly or impliedly, 'read down' a proportionality test into Article 5(1)(f): see *Jusic v Switzerland* Application No 4691/06, Merits and Just Satisfaction, 2 December 2010 at paras 71–73; *Raza v Bulgaria* Application No 31465/08, Merits and Just Satisfaction, 11 February 2010 at para 74. However, subsequent cases reaffirmed the Court's traditional stance that Article 5(1)(f) does not demand that detention be reasonably considered necessary: see, for example, *M and Others v Bulgaria* Application No 41416/08, Merits and Just Satisfaction, 26 July 2011 at para 61; *Rahimi v Greece* Application No 8687/08, Merits and Just Satisfaction, 5 April 2011 at para 107.

73 *Chahal v United Kingdom* Application No 22414/93, Merits and Just Satisfaction, 15 November 1996.

74 *Conka v Belgium* Application No 51564/99, Merits and Just Satisfaction, 5 February 2002.

75 *Saadi v United Kingdom*, supra n 71.

76 *Mayeka and Mitunga v Belgium* Application No 13178/03, Merits and Just Satisfaction, 12 October 2006; *Muskhadzhieva v Belgium* Application No 41442/07, Merits and Just Satisfaction, 19 January 2010; *Kanagaratnam and Others v Belgium* Application No 15297/09, Merits and Just Satisfaction, 13 December 2011.

77 See below at Section 3B((iii)).

78 Application No 8687/08, Merits and Just Satisfaction, 5 April 2011.

his expulsion. These elements lead the Court to doubt the authorities' good faith in implementing the detention.⁷⁹

The Court supported its finding of a violation of Article 5(1) by reference to the terrible detention conditions at the detention centre, but its main argument related to the question of necessity. The *Rahimi* precedent was extended to minors who are accompanied by their parents in *Popov v France*.⁸⁰ In *Popov*, a six-month-old baby and a three-year-old infant were detained with their parents in an immigration detention centre for 15 days. The Court found a violation of Article 5(1) in the case of the children but not the parents, illustrating that the Court differentiates in its approach to Article 5(1) depending on whether the applicants are children or adults.

Five subsequent cases against France, all delivered on the same day, take as their point of departure the fact that the administrative detention of a child will fall foul of Article 5(1) unless it is a measure of last resort. These cases are noteworthy because they have refined the jurisprudence on the question of *when* detention can be considered a measure of last resort. In *R.K. and Others v France*,⁸¹ *R.M. and Others v France*,⁸² *A.B. and Others v France*,⁸³ *R.C. and V.C. v France*⁸⁴ and *A.M. and Others v France*,⁸⁵ children ranging in age from four months to four years were detained with a parent or parents. In the first three cases the Court found a violation of Article 5(1)(f) because the State either failed to canvass any alternatives to detention or discounted the possibility of alternatives to detention on spurious grounds. For example, in *A.B.* the domestic authorities had rejected the possibility of an alternative to detention because the applicants had formally opposed their deportation, failed to leave the country voluntarily and failed to provide sufficient guarantees such as valid passports, a stable domicile or sufficient resources. Despite these factors, the Court was not persuaded that the domestic authorities had 'effectively researched' whether detention was a last resort with no viable alternatives. By contrast, in *R.C. and V.C. v France* and *A.M. and Others v France*, the Court found no violation of Article 5(1). *R.C. and V.C.* can be distinguished from all the other cases because the applicants' deportation arose out of the first applicant's criminal conviction. This may explain why the Court so readily agreed that there were no alternatives to detention. However, the judgment in *A.M.* is more difficult to understand. In *A.M.*, the Court accepted the domestic authorities' assessment that there were no alternatives to detention because of the first applicant's refusal to engage with the border police to organise her departure, her absence of an identity document and the precarious nature of her abode. Given the parallels with *A.B.* (above) it is difficult to understand why no violation of Article 5(1) was found.

These cases signal some unevenness on the question of when detention is a measure of last resort. However, they also reveal that the Court has evolved from a position not far short of permitting mandatory immigration detention (of adults) to the *ultima ratio*

79 Ibid. at para 109 (author's translation).

80 Application No 39472/07, Merits and Just Satisfaction, 19 January 2012.

81 Application No 68264/14, Merits and Just Satisfaction, 12 July 2016.

82 Application No 33201/11, Merits and Just Satisfaction, 12 July 2016.

83 Application No 11593/12, Merits and Just Satisfaction, 12 July 2016.

84 Application No 76491/14, Merits and Just Satisfaction, 12 July 2016.

85 Application No 24587/12, Merits and Just Satisfaction, 12 July 2016.

principle (when it comes to children). Nonetheless, the Court's evolved position stands in sharp contrast to that of the IACtHR.⁸⁶

(ii) *The Inter-American Court of Human Rights*

Article 7 of the American Convention on Human Rights (ACHR)⁸⁷ establishes that every person has the right to personal liberty and security and that no one shall be subject to arbitrary arrest or imprisonment. Unlike the ECtHR, the IACtHR has read a proportionality test into its assessment of arbitrariness in the immigration detention context. In the leading case of *Vélez Loor v Panama* the Court held that any legislation establishing measures of deprivation of liberty must not be arbitrary, meaning that such measures must (i) have a purpose compatible with the Convention; (ii) be appropriate for achieving the intended purpose; (iii) be necessary 'in the sense that they are absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists, in relation to the right involved, to achieve the intended purpose'; and (iv) be strictly proportionate 'so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or unreasonable compared to the advantages obtained from this restriction and the achievement of the intended purpose'.⁸⁸ The Court held that in principle immigration detention pursues a purpose compatible with the Convention, that is, 'to ensure that the individual attends the immigration proceeding or to guarantee the application of a deportation order'.⁸⁹ However, the other criteria require an individualised assessment:

Consequently, migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary.⁹⁰

This represents the Court's general (that is, non-child-specific) approach to immigration detention. Before proceeding to discuss the Court's application of this position to the immigration detention of children it is worth noting Article 19 of the Convention, which is a child-rights Article that has no equivalent in the ECHR and that provides that '[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State'.

In 2014 Argentina, Brazil, Paraguay and Uruguay requested the IACtHR to give an advisory opinion on the rights and guarantees of children in the context of migration

86 The ECtHR position can also be juxtaposed with the 'soft law' position of its parent body, the Council of Europe: see the Parliamentary Assembly of the Council of Europe's campaign to end the immigration detention of children, available at: website-pace.net/web/apce/children-in-detention [last accessed 19 December 2018]. See also the keynote speech by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe at a Conference hosted by the Czech Chairmanship of the Committee of Ministers of the Council of Europe in Prague on 25 September 2017, available at: [rm.coe.int/ref/CommDH/Speech\(2017\)5](http://rm.coe.int/ref/CommDH/Speech(2017)5) [last accessed 19 December 2018]. For an interesting analysis of ECtHR case law on immigration detention in broader international context, see Wilsher, *Immigration Detention, Law, History, Politics* (2012).

87 1969, OASTS 36.

88 *Case of Vélez Loor v Panama* IACtHR Series C 218 (2010), at para 166.

89 *Ibid.* at para 169.

90 *Ibid.* at para 171.

and/or in need of international protection.⁹¹ One of the specific questions on which the Court was asked to pronounce was, in light of Articles 7 and 19, *inter alia*, of the Convention:

[I]n what way should the principle of detention as a last resort precautionary measure be interpreted in the framework of immigration proceedings when children in the company of their parents are involved, and when there are children who are unaccompanied or separated from their parents?⁹²

The Court chose to interpret this question, which was ostensibly about the role of the *ultima ratio* principle in immigration detention proceedings, as based ‘on two premises founded on international human rights law and admitted by the jurisprudence of this Court’, namely the *ultima ratio* principle and the need to justify measures of deprivation of liberty for immigration-related reasons.⁹³

On the first issue the Court asserted that the *ultima ratio* principle—a principle of international human rights law, established in the CRC and developed by the Court in the juvenile justice context—requires that ‘the deprivation of liberty, either on remand or as a punishment, constitutes a measure of last resort that should be used, when appropriate, for the shortest appropriate period of time, since the purpose of criminal proceedings in the case of children is fundamentally pedagogical.’⁹⁴ Having associated the *ultima ratio* principle with the criminal justice context in this essential way, and opining that ‘offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime’, the Court held that the *ultima ratio* principle was not within the scope of the consultation.⁹⁵ Put differently, the *ultima ratio* principle is a creature of the juvenile justice arena, and its scope does not extend to immigration proceedings.

The Court then addressed the second issue—the need to justify measures of deprivation of liberty for immigration-related reasons. Relying on *Vélez Loor* the Court held that detention is legitimate where it is necessary to ensure the appearance of the person at immigration proceedings or to implement a deportation order, provided that it is for the shortest time possible and based on an individualised assessment. Applying these principles to children, the Court found that immigration detention ‘exceeds the requirements of necessity’ because it is not ‘absolutely essential’ to guarantee a child’s appearance or deportation and that there are other measures that are ‘less severe’ and that could be ‘appropriate to achieve such objective.’⁹⁶ Moreover, it found that the deprivation of liberty of a child in the immigration context could never be understood as a measure taken in the best interests of the child and that it was inconsistent with the right of the unaccompanied child to special protection and assistance and the right of the accompanied child to family life. Accordingly, the Court concluded that ‘the

91 OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* IACtHR, Series A 21 (2014).

92 Ibid. at para 3[3].

93 Ibid. at para 148.

94 Ibid. at para 149.

95 Ibid. at para 150.

96 Ibid. at para 154.

deprivation of liberty of a child migrant in an irregular situation, ordered on this basis alone, is arbitrary and, consequently, contrary to . . . the Convention.⁹⁷

Both of these lines of reasoning will be elaborated on and analysed below.

3. CLARIFICATION, RESOLUTION, CONVERGENCE? THE JOINT GENERAL COMMENT

The previous Section demonstrated that prior to the adoption of the Joint General Comment at the end of 2017, the international position on the immigration detention of children was not only dynamic, accelerating towards a complete prohibition, but also beset by confusion and some outright divergence in the form of a residual attachment to the *ultima ratio* principle. This Section turns to the Joint General Comment adopted by 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 at the end of 2017.⁹⁸ The Joint General Comment can be regarded as the apogee of the evolution (to date) towards a complete prohibition on the immigration detention of children. But is it doctrinally sound? In interrogating the legal argumentation in the Joint General Comment I follow the chronology in Article 37(b), which establishes the requirement that detention be lawful and non-arbitrary (first sentence) and that it comply with the *ultima ratio* principle (second sentence). Arguing for a teleological, rights-based approach to the Article, I critically analyse the Joint General Comment for its treatment of the concept of arbitrariness (A), of the rights of the child that risk being violated by immigration detention (which impacts on the understanding of the concept of arbitrariness) (B) and of the *ultima ratio* principle (C). I also refer to the other Joint General Comments (Nos 3 and 22) adopted by the Committees contemporaneously with the Joint General Comment and intended to be read and implemented with it where appropriate.⁹⁹

A. On the Concept of Arbitrariness

The first sentence of Article 37(b) of the CRC provides that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily’. Indeed, all right to liberty provisions in human rights law expressly (as here and in the ACHR) or implicitly (as in the case of the ECHR) prohibit arbitrary detention. Thus, while the right to liberty is not absolute, any limitation on the right to liberty must be justified as being non-arbitrary. Consistent with the general interpretation of arbitrariness of the IACtHR and the child-specific interpretation of arbitrariness of the ECtHR, the concept should be interpreted to include a necessity/proportionality test. This requires weighing the legitimate aim of immigration detention, on the one hand, against the effect on the individual’s right to liberty, on the other.¹⁰⁰

97 Ibid.

98 Joint General Comment, *supra* n 2.

99 Ibid.

100 Whether immigration detention has a legitimate aim is debatable but that debate is beyond the scope of this article: see further Nethery and Silverman (eds), *Immigration Detention, The Migration of a Policy and its Human Impact* (2015).

However, like all international treaties, Article 37(b) must be interpreted teleologically. According to Article 31(1) of the Vienna Convention on the Law of Treaties¹⁰¹ a treaty provision must be interpreted in good faith and its words ascribed their ordinary meaning in the particular context in light of the object and purpose of the treaty as a whole. The argument for teleology is strengthened in the case of the CRC because of the existence of four general principles—the principle of non-discrimination, the principle of the best interests of the child, the right of the child to life, survival and development and the right of the child to be heard—that must be assimilated into the interpretation and application of all other rights that lead to a non-hierarchical, integrated scheme of rights.¹⁰² Consequently, when assessing whether the aim of detention (immigration control/enforcement) is proportionate to its effect on the individual child, it is not just the right of the child to liberty that must be interrogated but all other rights of the child that are potentially violated by detention. The next subsection (B) draws out the rights mentioned in the Joint General Comment that risk being violated by immigration detention, noting that many of them are of a *sui generis* and/or *lex specialis* nature. The consequence of this uniqueness or specialism is that the effect of detention on the rights of the child is much more profound than on ‘general’ human rights. This dramatically tips the scales in the balancing exercise, rendering the immigration detention of children manifestly disproportionate and, in consequence, arbitrary.

To what extent is the issue of arbitrariness addressed in the Joint General Comment? It opens with the statement that ‘[e]very child, at all times, has a fundamental right to liberty and freedom from immigration detention.’¹⁰³ On the one hand, the reference to the right of the child to liberty is helpful in a context in which Article 37(b) of the CRC itself omits to establish the right before moving to the question of limitation. But on the other hand, the Committees elide the right to liberty with freedom from immigration detention, thus missing the crucial point about arbitrariness, that is, that immigration detention violates the right of the child to liberty because it is arbitrary. As discussed below, the Joint General Comment does mention the impact of detention on many rights of the child. Here again, however, it fails to draw any connection between these rights and the question of arbitrariness. It hints at a proportionality requirement, opining that ‘[c]riminalising irregular entry and stay exceeds the legitimate interest of States Parties to control and regulate migration, and leads to arbitrary detention.’¹⁰⁴ And it states clearly that ‘[a]ny kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.’¹⁰⁵ But it does not squarely address the fact that immigration detention of children is arbitrary, *pace* the first sentence of Article 37(b), and *for this reason* is prohibited.

It is a pity, in this regard, that the Committees did not follow more closely the Advisory Opinion of the IACtHR.¹⁰⁶ It will be recalled that the Court found that the

101 1969, 1155 UNTS 331.

102 Committee on the Rights of the Child, General Comment No 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44, para 6), 27 November 2003, at para 12.

103 *Supra* n 2 at para 5.

104 *Ibid.* at para 7.

105 *Ibid.* at para 5.

106 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, *supra* n 91.

immigration detention of children is not absolutely essential since it can be replaced by measures that are less severe but that achieve the same aim and hence that it exceeds the requirement of necessity. Moreover, immigration detention is never in the best interests of the child and violates key rights of both unaccompanied or separated children and children accompanied by their parents. In respect of the first cohort, the Court noted the right of such children to special protection and assistance by the State pursuant to Article 20 of the CRC and the principle of the best interests of the child. In respect of the second cohort, the Court noted the child's right to family life, as developed in its jurisprudence. This right, it said, encompasses but exceeds the requirement of family unity. Accordingly, the right to family life requires the release from detention of the whole family (as opposed to the detention of the child with the parents to facilitate family unity). In sum, the Court found that 'the deprivation of liberty of a child migrant in an irregular situation, ordered on this basis alone, is *arbitrary* and, consequently, contrary to . . . the Convention.'¹⁰⁷ In essence the Court here adopted a teleological approach to the interpretation of the right of the child to liberty. Such an approach is developed further in the next Section.

B. On the Impact of Detention on Various Rights of the Child

As argued above, in order to ascertain whether the immigration detention of children is arbitrary, it is necessary to adopt a teleological, rights-based approach to the notion of arbitrariness. This requires drawing out how detention impacts or risks impacting on relevant rights of the child. The Joint General Comment does some important groundwork in this regard. It states 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.'¹⁰⁸ It goes on to mention the negative impact that immigration detention has on the following rights: the right to health, the right to development, the right to freedom from cruel, inhuman or degrading treatment or punishment, the right of the unaccompanied child to special protection and assistance by the State and the right of the accompanied child to family life. Understandably, the Committees did not have space within the confines of the Joint General Comment to elaborate on how, exactly, these rights are violated by immigration detention. However, it is only through an exploration of the impact of immigration detention on the unique substantive content of these rights that it becomes clear why it is that immigration detention of children is so damaging. Once this is made out it is a short step to the conclusion that immigration detention of children is always arbitrary. Accordingly, in this subsection I undertake the task of detailing how the various rights identified above risk being violated by immigration detention. I do so by relying on previous jurisprudence of the Committee on the Rights of the Child, including the other Joint General Comment (Nos 3 and 22) adopted with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹⁰⁹ Where appropriate I also seek guidance from relevant jurisprudence of the ECtHR, as the Court has had more

107 Ibid.

108 Joint General Comment, supra n 2 at para 5.

109 Joint General Comment, supra n 2.

opportunity than the Committee on the Rights of the Child to elaborate on how certain rights are impacted by immigration detention.

(i) *The principle of the best interests of the child*

Article 3(1) of the CRC establishes that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Since immigration detention is decided upon by an administrative authority, such as an immigration or police officer, and/or sanctioned by a court applying enabling legislation, it follows that it falls squarely within the scope of the principle. Accordingly, any decision about whether to detain an immigrant child must take the best interests of the child as a primary consideration. This raises the question of what the best interests concept means. While much will depend on the specific context and the unique circumstances of the child, the meaning of 'best interests' must be guided by relevant rights of the child.¹¹⁰ It follows that it is not possible to present a course of action as being in the best interests of the child if it runs counter to a relevant right of the child.¹¹¹ Since detention violates a large number of rights of the child, as will be demonstrated below, it follows that it cannot be presented as being in the best interests of the child. As to the weight attached to the principle, the best interests of the child must be 'a primary consideration', although not, notably, the paramount consideration.¹¹² The danger is that the State's interest in immigration control will habitually override the best interests of the child. Here the Committee on the Rights of the Child has provided useful guidance, stating that 'the child's interests have high priority and [are] not just one of several considerations. Therefore a larger weight must be attached (sic) to what serves the child best [than competing interests]'.¹¹³ Indeed, the Committee has indicated that only rights-based competing interests can be balanced against the best interests of the child and that 'non rights-based arguments, such as those relating to migration control, cannot override best interests considerations'.¹¹⁴ Accordingly, any decision to detain an

110 Thus, the Committee on the Rights of the Child has stated that 'assessment and determination [of the child and children's best interests] should be carried out with full respect for the rights contained in the Convention and Optional Protocols': see Committee on the Rights of the Child, General Comment No 14: The right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1), 29 May 2013, at para 32.

111 According to the Committee on the Rights of the Child, 'there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests': see *ibid.* at para 4; for a forceful rejection of the proposition that the best interests of the child could conceivably justify violating a right of the child, see Committee on the Rights of the Child, General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, 2 March 2007 at para 26; reiterated in the Committee on the Rights of the Child, General Comment No 13: Article 19, The right of the child to freedom from all forms of violence, 18 April 2011, at para 61.

112 This contrasts with the wording of the precursor to Article 3(1) CRC, namely Principle 2 of the UN Declaration on the Rights of the Child 1959, A/RES/1386(XIV), which refers to the best interests of the child as 'the paramount consideration'. It also contrasts with other, stronger formulations of the 'best interests' principle in the context of specific rights in the CRC and in other international legal instruments.

113 Committee on the Rights of the Child, *supra* n 110 at para 39.

114 Committee on the Rights of the Child, *supra* n 4 at para 86; and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comments Nos 3 and 22, *supra* n 2 at para 33.

immigrant child has either failed to assess the best interests of the child or failed to give appropriate weight to the best interests of the child.

Similar points pertain to the collective dimension of the best interests principle. This is what the Committee on the Rights of the Child refers to as the 'best interests of . . . children as a group or constituency [whereby] all law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle.'¹¹⁵ This requires a systematic child-rights proofing of prospective legislation and child-rights auditing of existing legislation, followed by the necessary amendments. A typical diversion adopted by legislators is to require individual decision-makers to make the best interests of the child a primary consideration in the application of the legislation.¹¹⁶ However, this requirement is vitiated where the legislation itself compels action that is contrary to the best interests of children and compromised where the legislation permits such action. Bearing in mind the points made above about the meaning and weight of the best interests principle, it follows that domestic legislation that provides for the immigration detention of children violates the principle, even where it subjects the application of such legislation to a best interests assessment.

(ii) *The right to health, the right to development and linkages to other rights*

Article 24(1) of the CRC establishes the right of the child to the enjoyment of the highest attainable standard of health. While this right requires States to provide mental and physical health care in the event of illness, it extends beyond the medical model of health to the so-called 'underlying determinants of health' such as food, nutrition, housing and environment. This holistic understanding of the right to health creates a bridge to the right of the child to an adequate standard of living, defined in Article 27(1) of the CRC as a standard of living adequate for the 'child's physical, mental spiritual, moral and social development'.¹¹⁷ The right of the child to development in Article 6(2) of the CRC—a *sui generis* right in international human rights law—is likewise closely connected with the right to an adequate standard of living. Thus, the Committee has stated that it expects States Parties 'to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'.¹¹⁸

In light of these linkages, it is appropriate to examine the right of the child to an adequate standard of living and whether detention is compatible with this right. It is instructive to compare the wording of Article 27(1), with its reference to a standard of living adequate for the 'child's physical, mental spiritual, moral and social development', with that of the (general) right to health in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹⁹ Article 11(1) of the ICESCR provides, *inter alia*, 'The States Parties to the present Covenant recognise the right of everyone to an

115 Committee on the Rights of the Child, General Comment No 7: Implementing child rights in early childhood, 20 September 2006, at para 13.

116 See Smyth, *European Asylum Law and the Rights of the Child* (2014).

117 See Committee on the Rights of the Child, General Comment No 15: The right of the child to the enjoyment of the highest attainable standard of health (Article 24), 17 April 2013.

118 Committee on the Rights of the Child, General Comment No 13, supra n 111 at para 62.

119 1966, 993 UNTS 3.

adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’

The reference to adequate food, clothing and housing establishes that the right to an adequate standard of living is aimed at fulfilling the most basic human needs. Accordingly, detention conditions that fulfil these basic human needs arguably meet the requirements of the (general) right to an adequate standard of living. By contrast, Article 27(1) of the CRC does not limit the right to the physical determinants of well-being. Thus, Eide observes that the right of the child to an adequate standard of living ‘goes beyond the purely material aspects of living such as food and housing. . . . It goes beyond the right of the child to survive by having the basic needs safeguarded. The child is entitled to enjoy conditions which facilitate its development into a fully capable and well-functioning adult person.’¹²⁰ It simply cannot be argued that deprivation of liberty is consistent with the right of the child to an adequate standard of living, even if detention conditions are reasonable. And in reality, immigration detention conditions are frequently unreasonable, as outlined in the subsection on inhuman and degrading treatment below.

Tracking back to the right to health, Article 24(1) of the CRC also requires the ‘rehabilitation of health’. This aspect of the right is novel in international human rights law, finding no corollary in the corresponding provision of the ICESCR.¹²¹ Its express mention in Article 24(1) of the CRC can be explained by the fact that childhood ill-health can affect a child’s development and consequently have long-term or permanent effects.¹²² The reference to ‘rehabilitation’ also links Article 24(1) to another novel provision in the CRC, Article 39, which provides:

States Parties shall take all appropriate measures to promote physical and psychological recovery and reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.¹²³

120 Eide, *A Commentary on the United Nations Convention on the Rights of the Child, Article 27 The Right to an Adequate Standard of Living* (2006) at 17.

121 Article 12 ICESCR. However, the body that monitors the ICESCR has interpreted the right to health in the ICESCR as including the right to rehabilitation: see Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12), 11 August 2000.

122 See Eide and Eide, *A Commentary on the United Nations Convention on the Rights of the Child, Article 24 The Right to Health* (2006).

123 This right finds no equivalent in international or regional human rights law. The closest equivalent is Article 14(1) of the Convention Against Torture that provides ‘Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible’. Also of note is the obligation—often couched in ‘soft’ or conditional terms—in international and regional law governing anti-trafficking to facilitate the rehabilitation of victims of trafficking: see, for example, Article 6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime 2000, 2237 UNTS 319.

Before elaborating on the substantive content of this right it is important to establish how immigrant children might come within its personal scope. Joint General Comment Nos 3 and 22 provide interesting guidance in this regard, noting:

While migration can provide opportunities to improve living conditions and escape from abuses, migration processes can pose risks, including physical harm, psychological trauma, marginalization, discrimination, xenophobia and sexual and economic exploitation, family separation, immigration raids and detention.¹²⁴

It is clear from this brief exposition of the types of harms that immigrant children routinely face that such children do potentially fall within the personal scope of the right to recovery and reintegration in Article 39.

As to its content, Article 39 is interesting because of the way it conceives of recovery and reintegration. Firstly, the psychological as well as physical recovery and reintegration of the child is required. Secondly, in line with the broad understanding of the right to health discussed above, Article 39 of the CRC adopts a holistic, as distinct from a strictly medical approach, to recovery and reintegration. Thus, States Parties are required to take all appropriate measures—including but not confined to medical ones—to promote recovery and reintegration. Moreover, the recovery and reintegration must take place in an environment that fosters the health, self-respect and dignity of the child. This holistic approach recognizes the fact that the psycho-social well-being of the child is as important to recovery and reintegration as medical intervention. It also recognizes the linkages between recovery and the right of the child to an adequate standard of living, that is, one that promotes self-respect and dignity. Immigration detention is blatantly incompatible with the right to recovery and reintegration; if anything, immigration detention is a risk factor likely to bring immigrant children within the personal scope of Article 39, if they were not already so.

(iii) *The right to freedom from torture and inhuman or degrading treatment or punishment*

Immigrant children are frequently detained in adult detention centres in conditions that have not been adapted to children. Furthermore, even when immigrant children are detained with family members in so-called ‘family zones’, conditions can be harsh and uncompromising. Article 37(a) of the CRC provides that ‘[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’. This parallels with Article 3 of the ECHR and in this regard the jurisprudence of the ECtHR is of interest.

A trilogy of cases against Belgium has paved the way on the issue of detaining children in adult detention centres. In *Mayeka and Mitunga v Belgium*¹²⁵ the Court held that the detention of a five-year-old unaccompanied minor for nearly two months in a closed centre for adults, without any coordinated or specialised care, constituted inhuman or degrading treatment contrary to Article 3. The Court noted that the applicant’s extreme vulnerability was the decisive factor and took precedence over the fact that she was an

¹²⁴ Joint General Comment, supra n 2 at para 40.

¹²⁵ Supra n 76.

illegal immigrant. According to the Court, '[s]he therefore indisputably comes within a class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measure to provide care and protection as part of its positive obligations under the Convention'.¹²⁶ The Court applied the same reasoning and reached the same conclusion in *Muskhadzhiyeva v Belgium*,¹²⁷ a case concerning the detention for one month of four children all under the age of six years, at least one of whom was shown to be suffering from serious post-traumatic stress disorder, in the same detention centre as in the *Mitunga* case, but accompanied by their mother. The Court declined to attach any significance to the fact that they were accompanied, reiterating the requirement for the State to fulfil its positive obligations under Article 3. The Court confirmed this decision and extended its scope in *Kanagaratnam and Others v Belgium*,¹²⁸ where three children were detained with their mother in the same detention centre as the previous two cases for four months. The Court was not persuaded by the Government's argument that the children were older than in *Muskhadzhiyeva* and that no evidence had been submitted regarding their psychological state. In view of the principle of the best interests of the child in Article 3(1) of the CRC, the Court held that the State should have operated on the assumption that the children were vulnerable *qua* children and because of their personal history as asylum-seekers.

The principle established in the Belgian cases—that children, whether accompanied or unaccompanied, should not be detained in unmodified adult detention centres—is now settled jurisprudence. Indeed the Court has gone further and found an Article 3 ECHR violation in respect of the detention of accompanied children in detention centres adapted for families. In *Popov v France*, previously mentioned, a six-month-old baby and a three-year-old infant were detained with their parents in the 'family zone' of a detention centre for 15 days.¹²⁹ The family zone amounted to a wing reserved for families and single women that nevertheless had barred and barbed windows, no facilities for leisure or education, no access to the open air, no children's furniture and few toys. Announcements were continually made over loudspeakers, the general atmosphere was described as anxious and stressed and the behaviour of the inmates characterised by promiscuity and tension. The Court held that the age of the children, coupled with the duration of their detention and the fact that the detention centre was badly adapted for children, meant that the Article 3 ECHR threshold was met in the case of the children.

Five recent cases against France, mentioned previously, confirmed and expanded on *Popov* because, as the Government was at pains to point out, the detention conditions were not as bad as in *Popov*. Four of the cases concerned one detention centre. In *R.K. and Others v France*,¹³⁰ *R.M. and Others v France*,¹³¹ *A.B. and Others v France*,¹³² and *R.C. and V.C. v France*,¹³³ children aged 15 months, 7 months, 4 years and 2 years,

126 Ibid. at para 55.

127 Supra n 76.

128 Ibid.

129 Supra n 80.

130 Supra n 81.

131 Supra n 82.

132 Supra n 83.

133 Supra n 84.

respectively, were detained with a parent or parents in a detention centre adapted for families. The Court accepted that the material conditions in the centre were adequate. However, the centre was located in an area zoned as unfit for habitation because of its close proximity to an international airport. The constant noise pollution, which meant that the children could not go into the outdoor play area, was aggravated by the fact that announcements were made over a loudspeaker. The Court considered that these conditions, although sources of stress and anxiety for a child, would not reach the Article 3 ECHR threshold were the detention for a brief duration. However, in the instant cases, in which the period of detention ranged from 7 to 18 days, the Court opined that 'beyond a brief period, the repetition and accumulation of these physical and emotional aggressors would necessarily have a harmful effect on a young child, surpassing the prescribed threshold'.¹³⁴ A similar finding was made in *A.M. and Others v France* in respect of a different detention centre that had a family zone with reasonably good material conditions.¹³⁵ However, from the communal part of the family zone it was possible to see and be seen by the inmates of the male zone, exposing the children in the case, aged two-and-a-half years and four months, to scenes of violence and distress. Accordingly, the Article 3 ECHR threshold was made out.

In sum, the ECtHR has now firmly established that detention of children, whether accompanied or unaccompanied, in an adult detention centre that has not been modified for children will reach the Article 3 ECHR threshold. Furthermore, a detention centre that has been nominally modified for families but with poor material conditions and a pervasive atmosphere of anxiety and stress may, depending on the age of the children and the length of the detention, reach the Article 3 ECHR threshold. This is also true for a detention centre modified for families and with reasonably good material conditions, but in which there are other factors liable to cause anxiety and stress to a child.

(iv) *The right of the unaccompanied child to special protection and assistance*

In the case of unaccompanied or separated children, their day-to-day protection and care cannot be met by their parents, as is usually the case, and hence must be met by the State acting in a surrogate capacity. Article 20 of the CRC provides that a child temporarily or permanently deprived of his or her family environment is entitled to special protection and assistance provided by the State (para 1), that the State must ensure alternative care for the child (para 2) and that modes of alternative care include foster placement, *kafalah* of Islamic law, adoption or, if necessary, institutional care (para 3).¹³⁶ Whatever the type of care arrangement identified for the child, it must serve to protect the child. This requirement derives from a schematic interpretation of Article 20; the right to alternative care in paragraphs 2 and 3 is a functional expression of the broader right to protection (and assistance) in paragraph 1. Indeed, the term 'protection' links Article 20 with a cluster of rights in the CRC that relate to child protection and the prevention of abuse. Article 19(1) is particularly important in this regard, providing:

134 This point was made in all the cases, for example, *R.K. and Others v France*, supra n 81 at para 71.

135 Supra n 85.

136 Institutional care is, however, increasingly regarded as being contrary to the best interests of the child: see Guidelines for the Alternative Care of Children, UN GA Res 64/142, 24 February 2010, A/RES/64/142.

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardians or any other person who has the care of the child.

It is now well-established that immigration detention is often synonymous with precisely these types of violence and, furthermore, is a risk factor for the trafficking of unaccompanied children.¹³⁷ Article 35 of the CRC is of relevance here. It requires States to take all appropriate measures to prevent the abduction of, the sale of or traffic in children. Article 22 of the CRC is also pertinent, establishing the right of the asylum-seeking and refugee child, whether accompanied or unaccompanied, to ‘appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and in other international human rights or humanitarian instruments to which the said States are Parties.’ Here ‘protection’ can be understood as the international protection to which asylum-seekers and refugees are entitled under the 1951 Convention relating to the Status of Refugees—a convention which itself discourages detention.¹³⁸ Accordingly, when the right of the unaccompanied child to special protection and assistance is interpreted schematically, it becomes clear that it is inconsistent with immigration detention. *A fortiori*, immigration detention cannot be understood as a valid form of alternative care.

(v) *The right of the accompanied child to family unity and family life*

In the case of accompanied children, day-to-day protection and care are generally provided by their parents, underscoring the importance of keeping the family together.¹³⁹ The right of the child to family unity is provided for in Article 9(1) of the CRC:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child’s place of residence.

The best interests of the child functions differently here than it does in Article 3 of the CRC; here the presumption is that family unity is in the best interests of the child. This presumption is rebutted where it is shown that separation is ‘necessary’ for the best interests of the child. The illustrative examples of when separation may be necessary

137 Centre for Gender and Refugee Studies, University of California Hastings and Migration and Asylum Programme, Justice and Human Rights Centre, National University of Lanús, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015).

138 See Article 31 of the Convention relating to the Status of Refugees 1951, 189 UNTS 137 and UNHCR’s evolving position on detention as discussed in Section 2.

139 See Pobjoy, *The Child in International Refugee Law* (2018) at 72–4.

for the best interests of the child—child abuse and custody arrangements when the parents are living separately—indicate that the reasons for separation are limited to those relating to the relationship between and personal circumstances of the child and his/her parents. Extraneous considerations relating to the State or the rights of others are immaterial.¹⁴⁰ This effectively means that children cannot be separated from their parents for the purpose of detaining the parents.

However, nor can the right to family life be fulfilled by detaining the children with the parents. Article 16(1) of the CRC provides ‘No child shall be subjected to arbitrary or unlawful interference with this or her privacy, family, home or correspondence’, a provision that mirrors Article 8 of the ECHR. The relevant Article 8 jurisprudence of the ECtHR has undergone an interesting trajectory in this regard. In *Muskhadzhiyeva v Belgium*,¹⁴¹ previously mentioned, where the children were detained in an adult detention centre with their mother, the Court found no violation of the right to family life in Article 8 of the ECHR because the family had been detained together. Thus, the right to family life was reduced by the Court to the rather narrow issue of family unity. By contrast, in *Popov v France*¹⁴² the Court departed from the narrow ‘family unity’ approach to the right to family life propounded in *Muskhadzhiyeva*. As previously noted, the Court in *Popov* found that the detention was contrary to Article 3 and Article 5(1) in the case of the children. Moreover, the Court also found a violation of Article 8 in respect of the whole family, holding that ‘the best interests of the child cannot be limited to maintaining family unity [rather] the authorities have to put in place all necessary measures to limit, in so far as possible, the detention of families accompanied by children and to effectively preserve the right to family life’.¹⁴³ Similarly, the Joint General Comment affirms that ‘[w]hen the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family’.¹⁴⁴ Accordingly, the right of the child to family life requires that States desist from detaining both adult and child family members.

The rights of the child surveyed here—following the Joint General Comment—are all at risk of being violated by immigration detention. There may well be other rights, such as the right to non-discrimination and the right to education, which are incompatible with immigration detention, but a deeper inquiry is beyond the scope of the present article. Suffice to note that the rights surveyed here are either *sui generis* (that is, not found in ‘general’ human rights law and thus child-specific) or *lex specialis* (having a different material scope than their ‘general’ human rights counterpart). It is precisely the uniqueness of these rights that makes them incompatible with immigration detention because it renders the detention arbitrary.

140 See Bhabha and Young, ‘Not Adults in Miniature: Unaccompanied Child Asylum-Seekers and the New U.S. Guidelines’ (1999) 11 *International Journal of Refugee Law* 84.

141 *Supra* n 76.

142 *Supra* n 80.

143 *Ibid.* at para 147.

144 Joint General Comment, *supra* n 2 at para 11.

C. On the *Ultima Ratio* Principle

If the approach to Article 37(b) advanced in the previous two subsections is adopted, the *ultima ratio* principle becomes superfluous to requirements: immigration detention is arbitrary and therefore impermissible; the *ultima ratio* principle does not arise. However, perhaps because the legal argumentation in the Joint General Comment is not as clear as it might have been, the Committees were required to dispose of the *ultima ratio* principle. Not only is this unnecessary but the method of disposal is open to question, potentially undermining the Committees' broader position on the immigration detention of children.

In the Joint General Comment the Committees clarify the scope of and rationale for the *ultima ratio* principle, stating definitively that it does *not* apply to immigration detention:

Article 37(b) of the Convention of 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.¹⁴⁵

Furthermore, immigration detention is defined broadly as any setting in which a child is deprived of liberty for reasons relating to the child's or his/her parents' migration status, '*regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty.*'¹⁴⁶ Accordingly, compound (that is, mixed immigration and non-immigration) reasons for detention or detention of immigrant children for ostensibly non-immigration reasons (for example, child protection) are also prohibited and therefore fall outside the scope of the *ultima ratio* principle. This is a welcome advance on the direction contained in General Comment No 6.

However, there is a chink in the Committees' logic that they, rather uncritically, absorbed from the otherwise seminal 2014 Advisory Opinion of the IACtHR.¹⁴⁷ It will be recalled that the Court was asked to pronounce on how the principle of detention as a 'last resort precautionary measure' should be interpreted in the context of immigration proceedings involving accompanied and unaccompanied children.¹⁴⁸ In response, the Court placed the *ultima ratio* principle outside the scope of the question referred and essentially reinterpreted the question as being about the need to justify measures of deprivation of liberty for immigration-related reasons. The absolute correctness of the

145 Ibid. at para 10.

146 Ibid. at para 6.

147 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, *supra* n 91.

148 Ibid. at para 144.

Court's emphasis on the issue of justification has already been discussed. However, its disposal of the *ultima ratio* principle is less convincing. The Court opened its argument by noting that its own previous jurisprudence on the principle had been developed in the criminal justice context. It stated that the principle reflects the 'fundamentally pedagogical' purpose of criminal proceedings.¹⁴⁹ It concluded that since immigration offences cannot 'have the same or similar consequences to those derived from the commission of a crime' the *ultima ratio* principle has no application to immigration detention.¹⁵⁰ However, the fact that the Court developed its *ultima ratio* jurisprudence in the juvenile justice context does not mean that the principle is confined to that context. Moreover, the argument loses much of its strength outside the confines of the Inter-American system. In fact, when it comes to the CRC, the idea that the *ultima ratio* principle has such a restricted scope is not supported by the *travaux préparatoires* relating to Article 37(b) or by a schematic reading of the provision.

The text of Article 37(b) of the CRC was elaborated by an open-ended Working Group that met on the following four occasions: in 1980, 1986, 1988 and 1989.¹⁵¹ Between 1980 and 1988 the various drafts (originally numbered Article 20, then Article 19) dealt exclusively with the juvenile justice context and referred to the *ultima ratio* principle only intermittently. In 1989 a drafting sub-group proposed the innovative step of having a separate Article to deal with due process guarantees in the criminal justice context (draft Article 19 *bis*, eventual Article 40). Draft Article 19 now looked quite similar to Article 37 as adopted, with a second paragraph comprising two sentences that read as follows: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. Deprivation of liberty shall be used only as a measure of last resort and for the shortest possible period of time.'¹⁵² The rationale offered by the drafting group for this division of subject matter was in part to reflect the comments formulated by the Human Rights Committee in relation to the parallel right to liberty provision of the ICCPR—Article 9.¹⁵³ Notably, the Human Rights Committee stated in General Comment No 8:

Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States Parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to *all deprivations of liberty*, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, *immigration control* etc.¹⁵⁴

149 Ibid. at para 149.

150 Ibid. at para 150.

151 Detrick, *The United Nations Convention on the Rights of the Child, A Guide to the 'Travaux Préparatoires'* (1992).

152 E/CN.4/1989/WG.1/WP.67/Rev. 1.

153 Article 9(1) ICCPR reads: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

154 Human Rights Committee, General Comment No 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, at para 1 (emphasis added).

Thus, the Human Rights Committee's concern about a lacuna in the area of non-criminal deprivations of liberty was taken up by the drafting group as a reason for having a free-standing guarantee relating to all deprivations of liberty and a separate Article dealing exclusively with the juvenile justice context.

When the proposed text was remitted to the plenary Working Group some States were still preoccupied with the criminal justice application of Article 19(2). In particular, some States questioned whether juvenile punishment ought to be for the shortest possible period of time. Rather bizarrely, there followed a discussion, not about whether to excise juvenile punishment from the *ultima ratio* principle, as might have been expected given the concerns expressed, but about how to excise *other* deprivations of liberty from the principle. Thus, a number of States suggested that the reference to 'deprivation of liberty' in the second sentence of Article 19(2) was too broad 'since this term could also cover educational and other types of deprivation of liberty applied to minors besides detention, arrest or imprisonment'.¹⁵⁵ This view held sway; in the final text adopted by the 1989 Working Group, the concept of the deprivation of liberty was confined to the first sentence of Article 19(2) ('no child shall be deprived of his or her liberty unlawfully or arbitrarily'), with the second sentence restricted in scope to situations of arrest, detention and imprisonment ('The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time').¹⁵⁶

Unfortunately, there had been only a fleeting and inconclusive discussion of the meaning of the concepts of arrest, detention and imprisonment and no discussion of the meaning of deprivation of liberty, making it difficult to divine the precise intention of the drafters. Nonetheless, the differentiation between the set (deprivation of liberty) and the subset (arrest, detention or imprisonment) does suggest that not all deprivations of liberty fall within the scope of the *ultima ratio* principle. Thus, according to Van Bueren, 'States Parties to the CRC are therefore under a duty only to impose arrest, imprisonment and detention as a measure of last resort rather than all forms of deprivation of liberty'.¹⁵⁷ Nonetheless, it hardly needs to be argued that immigration detention falls within at least one, if not all three, of these concepts.

But even if it is accepted that the phrase 'arrest, detention or imprisonment' was intended to relate to the juvenile justice context it does not follow that the *ultima ratio* principle is confined to that context. Indeed, in his commentary on Article 37 Sax argues persuasively that it would not be compatible with the object and purpose of the CRC taken as a whole or subsequent soft-law developments on deprivation of liberty beyond the criminal justice context to exclude other forms of deprivation of liberty from the scope of the *ultima ratio* principle.¹⁵⁸ In this regard he opines that 'Article 37(b) second sentence should be interpreted in a way that specific forms of deprivation of liberty are expressly referred to as being guided by the "last resort/shortest period of time" principles, but only as a minimum, and not limited to arrest, detention and

155 Detrick, *supra* n 150 at 477, para 556.

156 E/CN.4/1989/29/Rev. 1 at 15.

157 Van Bueren, *The International Law on the Rights of the Child* (1998) at 209.

158 Schabas and Sax, *A Commentary on the United Nations Convention on the Rights of the Child: Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (2006).

imprisonment'.¹⁵⁹ It is clear that Sax is animated by the same concern as was the Human Rights Committee: to regulate non-criminal justice forms of detention, placing human rights limits on States' sovereign powers. In this regard it would have been anomalous if non-criminal justice forms of detention commanded lesser normative attention than the detention of persons accused or convicted of committing a crime.

Nevertheless, Sax's reasoning does miss an important difference in context. In the criminal justice context, the *ultima ratio* principle serves as a brake on the (justifiable) limitation on the right of the child to liberty. In the non-criminal justice context, where the existence of a (justifiable) limitation on the right of the child to liberty cannot be presumed, the *ultima ratio* principle may tempt decision-makers to leapfrog the justification leg of the analysis. In other words, the *a priori* question of whether the detention is unlawful or arbitrary may be missed or—as it was in the Joint General Comment—underplayed.

4. CONCLUSION

Until recently, the *ultima ratio* principle was the main barometer of whether the immigration detention of children was permissible. In the Joint General Comment 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 attempt to set the record straight on this. Perhaps trying to re-balance the trend towards 'crimmigration'—the 'mimetic process from criminal law to immigration law'—they confine the *ultima ratio* principle to the criminal justice context.¹⁶⁰ However, this does not withstand scrutiny. It is not that immigration detention of children falls outside the material scope of the *ultima ratio* principle; it is rather that a nuanced approach to the justification leg of the analysis reveals that immigration detention is arbitrary, potentially violating, as it does, numerous rights of the child. Accordingly, it is unnecessary to go beyond the question of arbitrariness (in Article 37(b) first sentence) to the question of whether the detention complies with the *ultima ratio* principle (in Article 37(b) second sentence). In this regard the Committees make both too much and too little of the seminal 2014 Advisory Opinion of the IACtHR.

It is important in the light of the uneven evolution, confusion and outright divergence in international practice to get the conceptual foundations of the prohibition on the immigration detention of children right. The focus on the question of arbitrariness is also important if the ECtHR, for example, is to be weaned from its dependency on the *ultima ratio* principle. In this regard, it is open to the ECtHR to depart from its established jurisprudence on the immigration detention of children by re-examining the question of arbitrariness—a staple in all its Article 5(1) jurisprudence—in the light of the rights of the child in the CRC that risk being violated by immigration detention. The principle of the best interests of the child, now regularly referred to by the Court in cases involving children, could serve as the conduit between the two conventions. Failure to adopt a complete prohibition on the immigration detention of children by the Court will retard the emergence of a new international standard, if not result in an

159 Ibid. at 85, para 131.

160 Bourbeau, 'Detention and Immigration: Practices, Crimmigration and Norms' [2018] *Migration Studies* (OnlineFirst, forthcoming).

outright schism. Finally, conceptual clarity is important in the light of the distance that many (not just Council of Europe) States will have to travel from their current practice to an outright ban on the immigration detention of children, such as is rightly advocated for in the Joint General Comment. One has only to think of the detention of immigrant children in the Greek ‘hotspots’, in North African transit countries or at the US border with Mexico to appreciate the urgent need for such a ban.