

Detention in the EU Pact proposals

Briefing paper

This project is funded by the European Union's Justice Programme (2014-2020). The content of this publication represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.



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I. Introduction

The new [EU Pact on Migration and Asylum](#) developed by the European Commission was communicated by the Commission to other EU institutions on 23 September 2020 as a “fresh start” on migration.¹ It is guided by two main pillars – “solidarity” and “responsibility” – and seeks a balance between them to reconcile EU Member States’ diverging interests and experiences. It lays out the Commission’s new approach through three main areas of action, namely i) a very strong external dimension centered around strengthened partnerships with countries of origin and transit, ii) →a robust management of European external borders, and iii) “firm but fair” internal rules of solidarity to offer certainty of permanent, constant and effective solidarity for States under pressure.

The Pact proposes a set of new legislation and amends existing proposals. The proposed Regulations will be directly applicable in EU Member states when adopted. Upon publication of the legislative proposals by the European Commission, the co-legislators – the European Parliament and the European Council - must agree on the text of the legislation, which is further discussed in a triologue (European Parliament, Council and Commission) and adopt it with a vote. This process can take several months or years.

The new Pact was presented in a [Communication](#) and a package of nine instruments:²

1. [Screening Regulation](#)
2. [Revised Asylum Procedures Regulation](#)
3. [Revised Eurodac Regulation](#)
4. [Asylum and Migration Management Regulation](#)
5. [Crisis and Force Majeure Regulation](#)
6. [Migration Preparedness and Crisis Blueprint](#)
7. [Recommendation on Resettlement and complementary pathways](#)
8. [Recommendation on Search and Rescue operations by private vessels](#)
9. [Guidance on the Facilitation Directive](#)

The Pact also includes a number of asylum and return reforms proposed by the Commission in 2016 and 2018 upon which negotiations among the European Parliament and Council have not been concluded yet, namely proposals on: i) [the Asylum Procedures Regulation](#) ii) [the EU Asylum Agency Regulation](#), iii) [the Reception Conditions Directive](#), iv) [the Qualification Directive](#), v) [the Union Resettlement Framework](#), and vi) [the Return Directive](#).

The new Pact on Migration and Asylum will address questions related to detention and in practice will have additional **impact on the enjoyment of the right to liberty of migrants and refugees**.

The Commission proposes establishing a mandatory “pre-entry phase” through the new Screening Regulation proposal and new border procedures as part of the amended Asylum Procedures Regulation proposal, both of which have implications for the right to liberty, protected under the European Convention of Human Rights (article 5); the International Covenant on Civil and Political Rights (article 9); and the European Union Charter of Fundamental Rights (article 6).

This briefing focuses on **the impact of the new proposals on immigration detention and deprivation of liberty**, looking specifically into the proposed EU Screening Regulation³ and the border procedures that would be established by the amended Asylum Procedures Regulation proposal.⁴

¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum, 23 September 2020, COM/2020/609 final https://ec.europa.eu/info/sites/default/files/1_en_act_part1_v7_1.pdf

² These are accompanied by a [working document](#) which outlines the evidence and experience underpinning the above instruments, as well as a [Roadmap](#) setting out an indicative timetable of initiatives to implement the Pact.

³ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0612&from=EN>

⁴ Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291268538&uri=COM:2020:611:FIN>

II. Detention in the EU Pact proposals

II.1. The EU Pact proposal: Screening Regulation

As part of the management of EU external borders, the Pact introduces mandatory screening of all arrivals at all borders to ensure fast identification of the correct procedure for people arriving at borders without fulfilling entry conditions. These entail thorough security, health and identity checks, fingerprinting and registration in the Eurodac database. Only the fingerprinting and registration are mandated by current EU law). These procedures would apply to all those rescued at sea, apprehended within the territory, or to those entering at a border and who request international protection despite not prima facie fulfilling entry conditions. One positive element of the proposal is an independent border monitoring mechanism to monitor violations of fundamental rights at EU borders (Article 7, Recital 23 of the proposal).

The [proposal for a Screening Regulation](#) suggests that migrants who do not satisfy the conditions for entry in the Schengen Borders Code (Articles 3 and 4)⁵ would be registered and screened to establish their identity and to carry out health and security checks, which may take up to **five days** (Article 6.3). In exceptional circumstances (“where a disproportionate number of third-country nationals needs to be subject to the screening at the same time, making it impossible in practice to conclude the screening within that time-limit”), this period **may be extended by another five days**.

If adopted as proposed, the Regulation would necessarily involve deprivation of liberty, certainly for people newly arriving at the external EU borders, although detention is not explicitly mandated in the text. Rather, the proposal states that during the screening, people “**shall not be authorised to enter the territory of a Member State**” (Article 4.1). In Recital 12 of the Proposal, it is stressed that Member States are “required to apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening”, which “in individual cases **may include detention**”.

The proposal “leaves the determination in which situations the screening requires detention and the modalities thereof [...] to national law” (Explanatory memorandum, section 2). In its [Staff Working Document](#), the Commission writes that “during the screening, migrants would be *held* by competent national authorities (Recital 5.1.2).” This suggests that deprivation of liberty, of up to 10 days, is at least a likely and expected feature of the process.

II.2. The EU Pact proposal: Asylum Procedures Regulation

The [amended Asylum Procedures Regulation proposal](#) builds on the [2016 proposal](#).⁶ The Commission proposes two types of border procedures: border procedure for the examination of applications for international protection (the “asylum border procedure”, Article 41), and the border procedure for carrying out return (the “return border procedure” Article 41a).

According to the proposed Recital 40c: “(t)he purpose of the border procedure for asylum and return should be to quickly assess at the external borders **whether applications are unfounded or inadmissible and to swiftly return** those with no right to stay, while ensuring that those with well-founded claims are channeled into the regular procedure and provided quick access to international protection.”

According to Recital 40f in the amended proposal for an Asylum Procedures Regulation, “the border procedure for the examination of an application for international protection **can be applied without recourse to detention**.” Nevertheless, the Recital continues, “Member States should be able to **apply the grounds for detention during the border procedure** in accordance with the Reception Conditions Directive.”

The asylum border procedure would apply to asylum-seekers who are either “unlikely to be granted asylum”,⁷ whose claim is fraudulent or abusive, or considered a security risk.⁸ Such claims must be examined within 12 weeks, including, where applicable, a single appeal. After that period of time, applicants have a right to enter the territory. Where an appeal is lodged, this suspends any removal, but this suspensive effect will not be operative in five exceptional circumstances enumerated in article 54.3.¹⁰ Applicants subject to the border procedure shall **not be authorised to enter the territory** of the Member State (41.6) for up to 12 weeks while the claim is being examined.

⁵ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>

⁶ See ICJ, The ICJ comments on the proposed new EU Common Asylum procedure Regulation, 18 April 2017, <https://www.icj.org/the-icj-comments-on-the-proposed-new-eu-common-asylum-procedure-regulation/>

Unaccompanied children and families with children below the age of 12 should, according to the amended proposal, be exempted from border procedures.¹¹

If a decision is not taken within 12 weeks, the applicant must be granted entry to the territory and access to an ordinary asylum procedure. This means that the applicant might be detained up to twelve weeks in the border or transit zones. The Commission writes in its Staff Working Document that “the border procedure would be more flexible than it currently is, allowing for the holding of applicants not only at the border or in proximity to the border, but also at other locations, should capacity become stretched [emphasis added].”¹²

The amended Regulation proposal requires that a return order shall be issued simultaneously with a decision denying asylum in order to speed up existing practices and close loopholes between asylum and returns.¹³ Third-country nationals and stateless persons whose applications are **rejected** in the context of the asylum border procedure (referred to in Article 41) shall **not be authorised to enter the territory** of the Member State, but would enter a return border procedure, which is also limited to 12 weeks from the issuing of a return order by court (Article 41a.2).

Recital 40f mentions that if people are detained in the course of the border procedures, the provisions of the Reception Conditions Directive (RCD) should apply, “including the guarantees for detained applicants and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention.”¹⁴

According to Article 41.9.d, when the applicant cannot be detained or can no longer be detained, and the border procedure cannot be applied to the applicant concerned without detention, the competent authority shall **authorise the applicant to enter the territory** of the Member State.

⁷ Article 40 is amended as follows:

(a) in paragraph 1 the following point is added:

“(i) the applicant is of a nationality or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;”

(b) in paragraph 5, the following point is added:

“(c) the applicant is of a nationality or, in the case of stateless persons, a former habitual residence of a third country for which the proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;”

⁸ Article 41.3 of the amended proposal, referring to Article 40.1 of [the proposal from 2016 on Asylum Procedures Regulation](#).

⁹ Article 41.11 of the amended proposal

“The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. It shall encompass the decision referred to in paragraph 2 and 3 and any decision on an appeal if applicable and shall be completed within 12 weeks from when the application is registered. Following that period, the applicant shall be authorised to enter the Member State’s territory except when Article 41a(1) is applicable.”

¹⁰ New Article 54 grants automatic suspensive effect of the appeal with the following exceptions (Art 54.3):

(a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure;

(b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements];

(c) a decision which rejects an application as implicitly withdrawn;

(d) a decision which rejects a subsequent application as unfounded or manifestly unfounded;

(e) a decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation).

While the court or tribunal may have the possibility to grant the person the right to remain (Art 54.4), which may be in some cases ex officio according to national law.

To request the right to remain (Art 54.5), the applicant would have 5 days, access to interpretation and upon request to free legal aid.

¹¹ Article 41.5: “The border procedure may only be applied to unaccompanied minors and to minors below the age of 12 and their family members in the cases referred to in Article 40(5)(b).”

Article 40(5) (b): “the applicant may for serious reasons be considered to be a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.”

¹² [Commission Staff Working Document](#), p. 72.

¹³ Recital 31a: „(...) Without prejudice to the right to an effective remedy, the return decision should either be part of the negative decision on an application for international protection or, if it is a separate act, be issued at the same time and together with the negative decision.” Article 35a: “(...) Where the return decision is issued as a separate act, it shall be issued at the same time and together with the decision rejecting the application for international protection.”

¹⁴ “While the border procedure for the examination of an application for international protection can be applied without recourse to detention, Member States should nevertheless be able to apply the grounds for detention during the border procedure in accordance with the provisions of the [Reception Conditions] Directive (EU) XXX/XXX in order to decide on the right of the applicant to enter the territory. If detention is used during such procedure, the provisions on detention of the [Reception Conditions] Directive (EU) XXX/XXX should apply, including the guarantees for detained applicants and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention.” See more in Articles 8, 9 and 10 of the amended proposal of the Reception Conditions Directive.

III. Analysis of relevant EU and international law

The right to liberty and security

Everyone has the **right to liberty and security** of person (article 5 [European Convention of Human Rights](#) (ECHR), article 6 [EU Charter of Fundamental Rights](#) (EU Charter) and article 9 [International Covenant on Civil and Political Rights](#) (ICCPR)). Deprivation of liberty (detention) imposed for the purposes of immigration control, either on entry to the country or pending deportation, must not be arbitrary and must be carried out in good faith pursuant to a legal basis.

The UN Human Rights Committee has set out clearly what are the obligations of all States Parties to the ICCPR in respect of immigration detention, in order for detention to be compliant with article 9 and not constitute an arbitrary deprivation of liberty:

“Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be **justified as reasonable, necessary and proportionate** in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention. 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.”¹⁵

Refugee law provides specifically for these protections in respect of the detention of **asylum seekers and refugees** must never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment ([Geneva Refugee Convention](#), article 31).¹⁶

According to the European Court of Human Rights (ECtHR), detention under Article 5.1.f ECHR for the purposes of controlling entry to or removal from the territory, must be compatible with the overall purpose of Article 5 ECHR to safeguard the right to liberty and to avoid arbitrariness.¹⁷ Detention to prevent unauthorized entry to the state is permitted under the ECHR for limited periods in accordance with law, with a view to determination of identity and presentation of an asylum claim.¹⁸

Both the ICCPR and the ECHR require that where detention is permitted at all, **the length of detention** must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.

The **time limits** set out for the screening procedure under the EU Pact proposals might arguably be considered modest (five days), to be potentially extended for another five days, while the border procedure can take up to 12 weeks. However, the jurisprudence of the ECtHR establishes that such detention may become disproportionate and therefore unlawful even for several hours or days, depending on the circumstances of the case.¹⁹ Five or ten days will not always be reasonable or necessary.

According to the Court of Justice of the European Union (CJEU) in a case of detention pending deportation, “detention is to be used only as a **last resort**, when it is determined to be necessary,

¹⁵ UN Human Rights Committee, General Comment 35 on article 9 (Liberty and Security of the Person), UN Doc CCPR/C/GC/35, para. 18, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC35-Article9LibertyandSecurityofperson.aspx>

¹⁶ UNHCR, The 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, entered into force 22 April 1954 (the Geneva Refugee Convention), as amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267, entered into force 4 October 1967 (the 1967 Protocol) <<https://www.unhcr.org/3b66c2aa10>>

¹⁷ *Saadi v. the United Kingdom*, ECtHR, Application no. 13229/03 [GC] Judgment 29 January 2008, paras. 64-66.

¹⁸ *Z.A. & Others v. Russia*, ECtHR, Application nos. 61411/15, 61420/15, 61427/15 and 3028/16 [GC] Judgment of 21 November 2019, paras. 160-163; *Ilias & Ahmed v. Hungary*, ECtHR, Application no. 47287/15 [GC] Judgment of 21 November 2019.

¹⁹ Two days: *Rahimi v. Greece*, ECtHR, Application no. 8687/08 [GC] Judgment of 5 April 2011; Nine hours: *Nolan and K. v. Russia*, ECtHR, Application no. 2512/04 [GC] Judgment of 12 February 2009.

reasonable and proportionate to a legitimate purpose.”²⁰

To establish the necessity and proportionality of detention in accordance with Article 9 ICCPR, it must be shown that other **less intrusive measures** have been considered and found to be insufficient.²¹ The greatest defect of this proposal is the blanket time of detention set for the entire category, rather than allowing for an individual assessment of what is necessary under the circumstances, including the possible effects of detention on health.

Procedural safeguards must be met in detention. The persons detained have the right to information on reasons for detention,²² right of access to and assistance of a lawyer,²³ the right to medical examination and medical treatment, the right to inform family members or others of detention, the right of access to UNHCR, and to consular access.

The asylum border procedure would apply to asylum-seekers who are either “**unlikely to be granted asylum**”, whose claim is fraudulent or abusive, or who are considered a security risk. The proposal relies on deciding who is “unlikely to be granted asylum” specifically on the nationality or formal habitual residency of the applicant, whether it was a “third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned (...).” There does not seem to be an individual assessment of this criteria in place, but rather a blanket application of this rule based on nationality, which is likely to lead to arbitrary inclusion in the border procedures and therefore arbitrary detention. As highlighted above, whether a person is entitled to international protection, can only be established based on an individual assessment of one’s asylum claim. Whatever the general recognition rate, one can still be a refugee in need of protection status because of their individual case. Equally in assessing whether the application is fraudulent, abusive or potentially a security risk, individualised assessment must be in place.

Detention of children

Migrant children should be first and foremost **treated as children**. Indeed, their extreme vulnerability – whether or not they are accompanied by their parents – is a decisive factor that takes precedence over considerations relating to the child’s immigration status, including in respect of detention.²⁴

As an overarching principle to all questions in relation to the treatment of children by States, the Convention on the Rights of the Child, to which all EU States are party, provides in Article 3 that the best interests of the child has primacy. According to the [Joint General Comment](#) of the Committee on Migrant Workers (CMW) and the Committee on the Rights of the Child No. 4 and No. 23, which clarifies State obligations under the Convention on the Rights of the Child and the Convention on Migrant Workers, children must never be detained because of their or their parents’ migration status. The UN Human Rights Council’s [Special Rapporteur on torture has also affirmed](#) that detention of children is never in the best interest of the child and that it often will constitute cruel, inhuman or degrading treatment.²⁶ The UN Human Rights Council’s Special Rapporteur on the Rights of Migrants has specifically deplored the detention of children and a lack of alternatives to detention available in EU countries.²⁷

According to the UN High Commissioner for Refugees (UNHCR)’s [position regarding detention of refugee and migrant children in migration context](#), the best interest of the child should always be the primary consideration and a child can never be detained because of their or their parents’ migration status. Alternatives to detention/care arrangements should always be explored.²⁸

²⁰ [J.N. v Staatsecretariat van Veiligheid en Justitie](#), CJEU, Case C-601/15 PPU, Judgment of 15 February 2016 [GC].

²¹ In [C v. Australia](#), the Human Rights Committee (HRC) found a violation of article 9.1 ICCPR on the basis that the State did not consider less intrusive means. [C v. Australia](#), HRC, CCPR/C/76/D/900/1999, 13 November 2002.

²² [Conka v Belgium](#), ECtHR, Application no. 51564/99, Judgment of 5 February 2002.

²³ [Suso Musa v. Malta](#), ECtHR, Application no. 42337/12, Judgment of 23 July 2013.

²⁴ [G.B. and others v. Turkey](#), ECtHR, Application no. 4633/15, Judgment of 17 October 2019, para. 101, with further references.

²⁵ CMW & CRC, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, [CMW/C/GC/4-CRC/C/GC/23](#), 16 November 2017, para. 5.

²⁶ Human Rights Council (HRC), Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, [A/HRC/28/68](#), 5 March 2015, para. 80.

²⁷ HRC, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau : regional study : management of the external borders of the European Union and its impact on the human rights of migrants, [A/HRC/23/46](#), 24 April 2013, paras. 48, 77.

²⁸ UNHCR, [UNHCR’s position regarding the detention of refugee and migrant children in the migration context](#), January 2017.

In all actions relating to children, an assessment of the child's **best interests** must be undertaken separately and prior to a decision that will impact that child's life (article 3 Convention on the Rights of the Child (CRC)²⁹ and article 24.2 EU Charter). "States parties [to the CRC and CMW] should assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status. Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration."³⁰

The UN Committee on the Rights of the Child (CRC), the UN Special Rapporteur on the human rights of migrants³¹ and the Parliamentary Assembly of the Council of Europe (PACE)³² all make it clear that immigration detention of migrant children is per se **not in their best interest** and that detention of vulnerable individuals, including unaccompanied children is prohibited in international law.

States have a positive obligation to protect and take care of unaccompanied migrant children under Article 3 ECHR and Article 20 CRC.³³ The ECtHR has ruled that a detention measure imposed without any consideration as to the best interests of the child, with no proportionality assessment and no use of alternatives to detention, is unlawful.³⁴

Pursuant to its obligations under the CRC, States are required to appoint a competent guardian and a legal representative, if necessary, for asylum, administrative or judicial procedures. The child should also be duly registered with appropriate school authorities as soon as possible and an appropriate care arrangement should be provided.³⁵

The CRC establishes in its Article 1 that "a child means every human being below the age of eighteen years". Under Council of Europe (CoE) standards, most instruments relating to children adopt the CRC definition of a child. Examples include article 4(d) of the [Council of Europe Convention on Action against Trafficking in Human Beings](#)³⁶ and article 3(a) of the [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#) (Lanzarote Convention). Although the Commission proposes exempting unaccompanied children and families with children below the age of 12 from border procedures, children aged between 13 and 18 with their families are likely to be included in border procedures, which will almost inevitably involve detention.

Persons who claim to be children should be treated as such until proven otherwise.³⁸ The duty to act in the best interest of the child implies, in the situation of unaccompanied minors, a comprehensive assessment of the identity of the child in a child friendly manner (age, nationality, background, etc.). It must also be ensured that children in the age assessment procedure, that has to be speedy and carried out in a dignified manner, are granted the benefit of the doubt and presumptively treated as children unless and until proven otherwise.

²⁹ UNGA, Convention on the Rights of the Child, 20 November 1989, UNTS 1577, p. 3, <https://www.refworld.org/docid/3ae6b38f0.html>

³⁰ CMW, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families* and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, *CMW/C/GC/3-CRC/C/GC/22*, 16 November 2017, para. 32(e).

³¹ Office of the High Commissioner for Human Rights (OHCHR), *UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece*, Statement of 16 May 2016 <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E>

³² PACE, *Resolution 1707(2010) on Detention of asylum seekers and irregular migrants in Europe*, 28 January 2010 <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17813&lang=en>>; PACE, *Resolution 1810(2011) on Unaccompanied children in Europe: issues of arrival, stay and return*, 15 April 2011 <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17991&lang=en>>

³³ *Sh.D. and others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, ECtHR, Application No. 14165/16, Judgment of 13 September 2019, paras. 52-62; *Khan v. France*, ECtHR, Application No. 12267/16, Judgment of 28 February 2019; *Rahimi v. Greece*, ECtHR, 2011.

³⁴ *Rahimi v. Greece*, ECtHR, 2011.

³⁵ CRC, *General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, 1 September 2005, paras. 19-22; CMW & CRC, *Joint General Comment No. 4 & No. 23 (2017)*, paras. 11 and 17; International Organisation for Migration (IOM), *Unaccompanied Children on the Move – The work of the International Organization for Migration (IOM)*, 2011, pp. 16-20.

³⁶ CoE, *Convention on Action against Trafficking in Human Beings*, CETS No. 197, entered into force 1 February 2008, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197>

³⁷ CoE, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS No. 201, 25 October 2007, <https://rm.coe.int/1680084822>

³⁸ CMW & CRC, *Joint General Comment No. 4 & No. 23 (2017)*, paras. 5-13; CRC, *General Comment No. 6 (2005)* paras. 61-63; see also CRC, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, para. 32, <https://www.refworld.org/docid/51efb6fa4.html>; PACE, *Resolution 2020(2014) on The alternatives to immigration detention of children*, 3 October 2014, para. 9.4, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en>

Judicial review of the detention order

The right to challenge the lawfulness of detention judicially, protected by article 9.4 ICCPR and article 5.4 ECHR, is a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention.

This right is of vital importance to detained migrants, in particular where no clear individualized grounds for detention have been disclosed to the detainee or to his or her lawyer. Since the right to judicial review of detention must be real and effective rather than merely formal, its consequence is that systems of mandatory detention of migrants or classes of migrants are necessarily incompatible with international human rights standards.

For a judicial review to meet international human rights law, it must fulfil a number of requirements.

- The review must be clearly prescribed by law.
- The review of detention must be accessible to all persons detained, including children.³⁹
- The review must be done by an independent and impartial judicial body.⁴⁰
- The review must be of sufficient scope and have sufficient powers to be effective.⁴¹
- Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay⁴²
- The review must meet standards of due process.⁴³
- Unlawful detention includes detention that was lawful at its inception but has become unlawful because (...) the circumstances that justify the detention have changed.⁴⁴
- The review must be prompt.⁴⁵

Although judicial review is mentioned in the Explanatory memorandum of the amended proposal of the Asylum procedures Regulation, it is not explicitly mentioned in the text of the proposal and not even in the recitals. In the [2016 recast Reception Conditions Directive](#), speedy judicial review of the detention is covered, as well as detention of applicants for as short a period as possible (Article 9.1 RCD), and the current proposals should be aligned with those principles as well as with the above-mentioned international standards.

Detention conditions

Even where detention of migrants can be justified, international human rights law imposes further constraints on the place and regime of detention, the conditions of detention, and the social and medical services available to detainees. In addition, it imposes obligations to protect detainees from violence in detention.

Cruel, inhuman and degrading treatment is prohibited under the ICCPR, the Convention against Torture, the CRC, the ECHR and the European Charter. The prohibition does not allow for derogation or other limitation or restriction. Detained persons must be treated with humanity and respect for their dignity.⁴⁷ Regarding the place of detention, lack of appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment.⁴⁸

Economic pressures or difficulties caused by increased arrivals of migrants cannot justify a failure to comply with the prohibition on torture or other ill-treatment under Article 3 of the ECHR, article 7 of the ICCPR and the CAT, given its absolute nature which does not warrant derogations.⁴⁹ Even

³⁹ *Popov v. France*, ECtHR, Applications nos. 39472/07 and 39474/07, Judgment of 12 January 2012.

⁴⁰ HRC, *General Comment No. 35 - Article 9: Liberty and Security of person*, CCPR/C/GC/35, 16 December 2014, para. 45, <https://www.refworld.org/docid/553e0f984.html>

⁴¹ HRC, *General Comment No. 35*, para. 41.

⁴² HRC, *General Comment No. 35*, para. 47.

⁴³ *Bouamar v. Belgium*, ECtHR, Application No. 9106/80, Judgment of 27 June 1988, para. 60.

⁴⁴ HRC, *General Comment No. 35*, para. 43.

⁴⁵ *ZNS v. Turkey*, ECtHR, Application no. 21896/08, Judgment of 19 January 2010.

⁴⁶ UNGA, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), Resolution 39/46 of 10 December 1984, Article 16; *ICCPR*, Articles 7 and 10; *ECHR*, Article 3; UNGA, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Resolution 70/175 on 17 December 2015 (the Nelson Mandela Rules), Rule 1: "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times."

⁴⁷ *ICCPR* Article 10, *ECHR* Article 1 and *EU Charter* Article 4.

Khlaifa and others v Italy, ECtHR, Application no. 16483/12, Judgment of 15 December 2016, para. 184.

⁴⁸ CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2010, p 54.

⁴⁹ *M.S.S. v. Belgium and Greece*, ECtHR, Application no. 30696/09, Judgment of 21 January 2011.

treatment which is inflicted without the intention of humiliating or degrading the victim, and which stems, for example, from objective difficulties related to a migration crisis, may entail a violation of Article 3 of the Convention.⁵⁰

International standards provide further detailed requirements on personal space and overcrowding,⁵¹ access to healthcare,⁵² protection from ill-treatment including violence in detention,⁵³ and detention of persons with specific vulnerabilities.⁵⁴

The proposed Screening Regulation and the amended Asylum Procedures Regulation do not adequately, or in any way at all, regulate detention, and neither do they appropriately consider the detention conditions.

Jurisdiction and the application of human rights protection at borders

Under the ICCPR⁵⁵ and the ECHR, all States have an obligation to protect the rights of any person subject to their jurisdiction. The term "jurisdiction" has a wider reach than the national territory of the State – it applies to all persons who fall under the authority or the effective control of the State's authorities or of other people acting on its behalf, and to all extraterritorial zones, whether of a foreign State or not, in a range of contexts. It therefore applies at borders, in border zones, international zones of airports, wherever the state or its agents exercise authority or control, in law or in practice.

As confirmed recently by the ECtHR in its Grand Chamber decision in [ND and NT v. Spain](#) (para 110): "...(T)he special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (...). As a constitutional instrument of European public order (...), the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction."

Border procedures and safeguards

While certain border procedures are not per se as contrary to international human rights law, it remains good and best practice for asylum applications to be conducted on the territory. Whether or not such procedures are conducted at the border, they will still necessarily be undertaken under the jurisdiction of the Member States, with the consequences that the full guarantees provided for by international human rights and international refugee law binding on the State are applicable.

The asylum and return border procedures as proposed in the Asylum Procedures Regulation leave it entirely up to national law whether or not to use detention during the procedures.

The current proposal does not include any specific provisions on access to free legal assistance in the border procedure. These are included in the general provisions (Articles 14-18) as provided for in the 2016 Proposal of the Asylum Procedures Regulation. It is of concern that Member States would have the possibility to exclude the provision of free legal assistance and representation in the administrative and appeals procedure where "the application is considered as not having any tangible prospect of success" (Article 15(3)(b) and (c) and 15(5)(b) of the 2016 Proposal).⁵⁷

According to Recital 40f, if detention is used during such a procedure, the provisions on detention of the EU Reception Conditions Directive should apply, including the guarantees for detained applicants and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention. Recital 26 of the proposal RCD further specifies that detention should be a measure of last

⁵⁰ [Khlaifa and others v Italy](#), ECtHR, Application no. 16483/12, Judgment of 15 December 2016, para. 184.

⁵¹ [Aden Ahmed v. Malta](#), ECtHR, Application no. 55352/12, Judgment of 23 July 2013, para. 87

⁵² [Keenan v. United Kingdom](#), ECtHR, Application No. 27229/95, 3 April 2001, para. 111

⁵³ [Osman v. United Kingdom](#), ECtHR, Application No. 23452/94, Judgment of 28 October 1998; [O.M. v. Hungary](#), ECtHR, Application No. 9912/15, Judgment 5 July 2016.

⁵⁴ See [Thimothawes v. Belgium](#), ECtHR, Application No. 39061/11, Judgment of 18 September 2017; [Abdullahi Elmi and Aweys Abubakar v. Malta](#), ECtHR, Applications Nos. 25794/13 and 28151/13, Judgment of 22 November 2016.

⁵⁵ UN Human Rights Committee, *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, <https://www.refworld.org/docid/478b26ae2.html>, paragraph 10: "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."

⁵⁶ [ND and NT v. Spain](#), ECtHR, Applications nos. 8675/15 and 8697/15, Judgment of 13 February 2020.

⁵⁷ See ICJ's comments on the 2016 proposal related to Article 15: *Common Asylum Procedure Regulation ICJ comments on the current proposal of the Regulation*, April 2017, <https://www.icj.org/wp-content/uploads/2017/04/Europe-Common-Asylum-Procedure-Reg-Advocacy-Analysis-brief-2017-ENG.pdf>

resort and may only be applied after all non-custodial alternative measures to detention have been duly examined, which is however missing in the amended Asylum Procedures Regulation proposal.⁵⁷

Recent research indicates that border procedures and accelerated procedures in practice lead to more detention.⁵⁸ As experienced by migrants and refugees at the borders of certain Member States, and illustrated by a recent [study published by the European Parliament](#),⁵⁹ the conduct of asylum procedures in the border context, including in transit zones, entails significant risks of violating the EU and international law.

IV. Conclusions and Recommendations

If border procedures are to be codified in EU law as proposed in the EU Pact, prolonged immigration detention will inevitably result as a practice. And there is a high risk of systematic detention at the border in breach of international human rights and refugee law.

In order to comply with international law obligations, detention during the screening and border procedures must only be used as a measure of last resort, applicable only in well-defined situations and based on a case-by-case assessment of the situation, while privileging alternatives to detention. Furthermore, children and people in need of special procedural guarantees or special reception needs must not be detained.

IV.1. Recommendations: Screening Regulation

The proposed Screening Regulation *de facto* obliges EU Member States to detain people under the Regulation, while not regulating detention in any way. The adoption of the Regulation will very likely result in systematic practice of detention.

It relies solely on national legal provisions related to detention, while these differ widely among EU Member States, and their application and adherence to international human rights law and standards varies even more.

There is therefore a failure to clarify that human rights safeguards related to the lawfulness of detention, detention conditions, and specific safeguards for persons with particular vulnerabilities, must be complied with.

In light of these concerns, the ICJ opposes the proposed Regulation in the way it is currently drafted and recommends its withdrawal.

If the Regulation is nevertheless ultimately retained as presently elaborated, **safeguards to protect human rights in immigration detention must be specifically added to the Regulation.**

At minimum the following safeguards relating to detention should be included:

- **Each deprivation of liberty accompanying screening must expressly be required to meet the conditions of lawfulness, necessity and proportionality**
- **It should be specified that detention may be only used as last resort, only where less coercive measures cannot be applied**
- It should be specified that detention should be subject to time limitations and for the shortest possible period
- **Detention must be subject to procedural guarantees** (including the right to information on reasons of detention, access to and assistance of a lawyer, right to an interpreter)

⁵⁸ An EP study showed recently that border procedures usually involve detention: a refusal of entry of applicants for international protection is inherently accompanied with restrictions on their liberty. The legal qualification of a stay at the border or at the transit zone (detention or restriction of movement) raises complex issues of fact and law, as is also apparent from the case law from the CJEU and the ECtHR. The qualification of similar situations differs considerably per Member State. As a consequence, the protection of fundamental rights and procedural guarantees, such as judicial review of the lawfulness of a deprivation of liberty, are not enjoyed uniformly by applicants across the EU. The duration and conditions of detention in border procedures also differ considerably across the Member States.

⁵⁹ European Parliament, *Asylum procedures at the border European Implementation Assessment*, November 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU\(2020\)654201_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf)

- **Judicial review of the detention must be available at all times throughout the detention**, including in respect of both the lawfulness of the detention and of the conditions of detention, and must be real and effective
 - **It should be specified that detention must be in adequate facilities** in line with international human rights standards (prohibition of cruel, inhuman and degrading treatment, treatment with humanity and respect for dignity, appropriate facilities, personal space, access to health care, protection from ill-treatment and violence)
 - **Member State authorities should be required to take the needs of persons with specific vulnerabilities into consideration, including persons with disabilities**
 - **It should be made clear that children – defined as anyone below the age of 18 – must not be detained.** Age assessment should be carried out in a speedy and dignified manner and the benefit of the doubt should be employed. For all children alternatives to detention should be sought and used.
- **The Regulation should also make it clear that even in border zones or transit zones, the State’s human rights law obligations remain fully applicable.**

IV.2. Recommendations: Asylum Procedures Regulation

It is not clear in the proposal on the Asylum Procedures Regulation how the refusal of entry of applicants relates to their right to personal liberty. Detention is not regulated adequately in the amended proposal. It is only mentioned in Recital (40f) that should detention be applied, the provisions of the Reception Conditions Directive should apply, and it should include guarantees for detained applicants, and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention.

The asylum border procedure may in practice merge or overlap with the pre-entry screening procedure and the return border procedure. If this happens, there may be a serious risk of deviating from crucial procedural safeguards for asylum seekers. As it is almost inevitable that the border procedures will involve detention, a further consequence may be the creation of specific zones with closed centres or ‘border camps’ amounting to *de facto* detention.

The ICJ recalls that asylum seekers are lawfully subject to detention in only a few very limited types of situations and as a measure of last resort. Asylum seekers should not be detained purely for reasons of immigration policy nor for seeking international protection. Detention during the determination of responsibility or when awaiting a transfer should not be permissible.

Differential treatment of some groups of children – in the case of the proposed Regulation, of children aged below 12 and above – does not have a basis in international law, which requires that all children should be treated with dignity, in respect of their best interests and their rights, and should not be detained.

The decision to apply the asylum border procedure to asylum seekers who are “unlikely to be granted asylum”, fraudulent or abusive or considered a security risk is likely to lead to arbitrary inclusion of people in the border procedures and therefore to arbitrary detention. At minimum, an individual assessment in each case must be put in place, to determine whether this criterion is met.

The ICJ recommends:

The Regulation should make it clear that people in need of special procedural guarantees or having special reception needs, including all children and their family members, should be exempt from border procedures and should not be detained.

The Regulation should make it clear who would be subject to detention, and it should specify the following safeguards:

- **Each deprivation of liberty must expressly be required to meet the conditions of lawfulness, necessity and proportionality**
- **It should be specified that detention may be only used as last resort, only where less coercive measures cannot be applied**
- It should be specified that detention should be subject to time limitations and for the shortest possible period

- **Detention must be subject to procedural guarantees** (including the right to information on reasons of detention, access to and assistance of a lawyer, right to an interpreter)
- **Judicial review of the detention must be available at all times throughout the detention**, including in respect of both the lawfulness of the detention and of the conditions of detention, and must be real and effective
- **It should be specified that detention must be in adequate facilities** in line with international human rights standards (prohibition of cruel, inhuman and degrading treatment, treatment with humanity and respect for dignity, appropriate facilities, personal space, access to health care, protection from ill-treatment and violence)
- **Member State authorities should be required to take the needs of persons with specific vulnerabilities into consideration, including persons with disabilities**
- **It should be made clear that children – defined as anyone below the age of 18 – must not be detained.** Age assessment should be carried out in a speedy and dignified manner and the benefit of the doubt should be employed. For all children alternatives to detention should be sought and used.



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