

Never in the best interests of the child:

Risks of child detention in the
screening and border procedures
under the 2024 EU Migration Pact

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Briefing paper

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1. Introduction

The EU Pact on Migration and Asylum is composed of several legislative texts: the Screening Regulation,¹ the Asylum and Migration Management Regulation,² the Asylum Procedure Regulation,³ the Return Border Procedure Regulation,⁴ the Crisis Regulation,⁵ the Eurodac Regulation,⁶ the Reception Conditions Directive,⁷ the Qualification Regulation,⁸ and the Resettlement Framework Regulation.⁹ The process leading up to the adoption of these instruments started with the Commission's proposal in 2020. Political agreement on key texts, including the Screening Regulation and the Asylum Procedure Regulation, was reached between the Council and the Parliament in December 2023. The final texts were approved by the European Parliament on 10 April 2024, and formally adopted by the Council on 14 May 2024.¹⁰

¹ Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the 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 (2024) OJ L 2024/1356 [henceforth Screening Regulation].

² Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 (2024) OJ L 2024/1351.

³ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (2024) OJ L 2024/1348 [henceforth Asylum Procedure Regulation].

⁴ Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure and amending Regulation (EU) 2021/1148 [henceforth Return Border Procedure Regulation].

⁵ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/114 (2024) OJ L 2024/1359 [henceforth Crisis Regulation].

⁶ Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council (2024) OJ L 2024/1358.

⁷ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) (2024) OJ L 2024/1346 [henceforth Reception Conditions Directive].

⁸ Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council (2024) OJ L 2024/1347.

⁹ Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework and amending Regulation (EU) 2021/1147 (2024) OJ L 2024/1350.

¹⁰ On 12 June 2024, the European Commission adopted the Common Implementation Plan for the Pact on Migration and Asylum. The plan sets out the key actions and preparations required to implement the EU Pact by the end of the two-year transition period. The Implementation Plan groups the different obligations stemming from the EU Pact into ten interdependent building blocks of implementation, providing an overview of the content of the Pact as a whole. These blocks focus on various matters including the creation of a common migration and asylum information system, the implementation of a new system to manage arrivals focusing on fast screening, processing and return, and changes to the system of reception of arrivals, including enhanced "flexibility" and possibilities for Member States to restrict the movement of individuals (building blocks 1-3). They also aim to accelerate the decision-making process on asylum applications and exclude more applicants from the process on various grounds, to expedite return processes including by limiting appeals and subsequent asylum applications, to enforce "solidarity" in burden sharing among Member States including by reforming the Dublin-system and preventing movement within the EU for instance by requiring Member States to deprive asylum seekers of basic

As a whole, the EU Pact on Migration and Asylum is based on a stronger externalization of migration governance, namely preventing migrants and refugees from arriving in Europe in the first place, including in ways that violate human rights and States' international law obligations. It involves stricter control of borders; limiting the number and duration of asylum procedures, including through increased use of inadmissibility grounds and fast-track procedures; and facilitating the fast return of individuals whose claims for international protection have been refused. The EU Pact has been widely criticized by civil society, researchers and human rights defenders, among others, for hollowing out the right to seek and enjoy asylum from persecution and for leading to increased human rights violations and suffering at the EU's borders and beyond.¹¹

In June 2021, the International Commission of Jurists (ICJ) published a [briefing paper](#) on detention under the EU Pact, commenting on the initial versions of some of the Pact's draft legislative proposals,¹² focusing on the proposed texts of the Screening Regulation and the Asylum Procedure Regulation. In December 2023, the ICJ [condemned](#) various problematic aspects of the agreement reached by Member States on the five final instruments of the EU Pact to be adopted.

This briefing paper examines the EU Pact, focusing on the new screening and border procedures, in particular the asylum border procedure, and their detrimental impacts, especially concerning immigration detention and, in particular, children's deprivation of liberty. It calls on Member States to implement the Pact in a manner that prevents the immigration detention of children, as such detention violates international human rights law.

2. Detention of children in the screening and border procedures under the EU Pact

2.1. The screening procedure

The Screening Regulation (SR) introduces mandatory screening of all arrivals at external EU borders,¹³ and, in some cases, for persons found within EU territory,¹⁴ to ensure fast identification of the correct procedure for those seeking to enter or having entered the EU without fulfilling entry conditions. These procedures involve thorough security, health and identity checks, fingerprinting, and registration in the Eurodac database. During the

reception conditions in case of absconding, to activate new responsibility criteria, and to require Member States to plan and prepare for "crisis situations" (blocks 4-8). Finally, the Implementation Plan foresees the introduction of certain monitoring mechanisms and safeguards for fundamental rights, and the putting in place of measures purportedly for resettlement, inclusion, and integration, while highlighting "early self-reliance of beneficiaries" and the need to address "unauthorized movements of beneficiaries of international protection among Member States" (blocks 8-10). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [Common Implementation Plan for the Pact on Migration and Asylum](#) (2024) COM (2024) 251 final [henceforth Common Implementation Plan].

¹¹ See e.g. International Commission of Jurists, "[The EU agrees to compromise human rights of migrants and refugees](#)", 20 December 2023 (accessed 10 July 2024); PICUM et al., "[Over 50 NGOs pen eleventh-hour open letter to EU on human rights risks in Migration Pact](#)", 18 December 2023 (accessed 10 July 2024).

¹² International Commission of Jurists, "[Detention in the EU Pact proposals Briefing paper](#)", June 2021 (accessed 10 July 2024).

¹³ Screening Regulation, Article 5.

¹⁴ Screening Regulation, Article 7.

screening, Member States must “guarantee the availability” of persons subjected to screening to facilitate the process, meaning that the State must prevent them from absconding.¹⁵ To ensure the availability of persons during screening, the Regulation allows for detention under domestic law. In accordance with the principles of necessity and proportionality, detention for the purposes of the SR should, however, be applied only as a last resort. In addition, people deprived of their liberty pursuant to the SR must be granted access to an effective remedy and detention must be in accordance with the requirements of the Reception Conditions Directive¹⁶ and the Return Directive,¹⁷ including provisions on the procedure and conditions of detention.¹⁸

Concerningly, Article 6 of the SR states that third-country nationals subject to screening under Article 5 “shall not be authorized to enter the territory of a Member State”, despite the fact that such screening will, in practice, take place on the territory of the Member State carrying out the screening. This entails the introduction of a contested legal concept called “the legal fiction of non-entry” into EU law.¹⁹ This means that under the SR, and other EU Pact instruments discussed below, individuals who are physically present in a Member State’s territory are legally treated as if they are not, on the basis that their presence has not been authorized by a border official.²⁰ This construct is used by States to limit individuals’ access to their rights, for instance by detaining them on questionable legal grounds. Indeed, it appears that the use of detention is the main reason for the adoption of the legal fiction of non-entry under the EU Pact. Relying on this, States may, for instance, purport to detain applicants for international protection for the purposes of deciding “on their right to enter the territory”²¹ or “to prevent [them] effecting an unauthorised entry into the country”²² despite the individuals already being present in the territory.²³ While the legal fiction of non-entry has already been used by some EU Member

¹⁵ Screening Regulation, Article 6 and Recital 11.

¹⁶ Applicable to applicants for international protection. This highlights the importance of authorities acknowledging such applications and the status they afford immediately, to ensure that the correct framework is applied to the individual in question.

¹⁷ Applicable to third-country nationals who do not apply for international protection. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [henceforth the Return Directive]

¹⁸ Screening Regulation, Recital 11. See also Common Implementation Plan, p. 12, highlighting that measures to ensure individuals remain available during the screening and border procedures “could include protocols covering an assessment of measures to limit the risk of absconding, including alternatives to detention (which should be defined by law), notably for families with children, and possible use of detention.”

¹⁹ The legal fiction of non-entry is a legally contested claim by States in which a third-country national can physically arrive on the country’s territory but not “legally arrive” until they have been granted entry by an authorized border officer. The artificial nature of the legal fiction of non-entry is illustrated for instance by the EU Commission’s Common Implementation Plan, which on p. 11 states: “While during the screening and the border procedure, persons are not authorised to enter the EU territory, they have the right to remain.” See e.g. Dr Kelly Soderstrom, [ECRE Commentary: An Analysis of the Fiction of Non-entry as Appears in the Screening Regulation](#), 16 September 2022 (accessed 22 July 2024); Anita Orav and Nefeli Barlaoura, European Parliamentary Research Service, “[Briefing: Legal fiction of non-entry in EU asylum policy](#)”, April 2024.

²⁰ See in greater detail e.g. Anita Orav and Nefeli Barlaoura, European Parliamentary Research Service, “[Briefing: Legal fiction of non-entry in EU asylum policy](#)”, April 2024.

²¹ See e.g. Reception Conditions Directive, Article 10(4)(d).

²² See European Convention on Human Rights, Article 5(1)(f).

²³ The concept is applied by States to exercise control while restricting access to rights for third country nationals, restricting mobility, access to rights and asylum procedures, and creating a risk of *refoulement*. See further e.g. Dr Kelly Soderstrom, [ECRE Commentary: An Analysis of the Fiction of Non-entry as Appears in the Screening Regulation](#), 16 September 2022 (accessed 22 July 2024); Anita Orav and Nefeli Barlaoura, European Parliamentary Research Service, “[Briefing: Legal fiction of non-entry in EU asylum policy](#)”, April 2024, pp 2-3.

States in the asylum context,²⁴ the concept has not previously been recognized by all of them beyond the limited context of airport transit zones, making its inclusion in the Pact a concerning development.²⁵ Although it cannot create rightlessness, the fiction of non-entry effectively results in creating legal space for States to deprive migrants, refugees and asylum seekers of access to their rights upon entering State territory. This raises concerns about possible human rights violations, including the widespread and arbitrary use of deprivation of liberty of persons subjected to the screening and border procedures.

The SR does not exempt children from the screening procedure, and there is no explicit prohibition of detention of children. The Regulation is therefore applicable to children, who may be subject to detention on the basis of their own or their parents' "migration status."

Nevertheless, the SR includes specific guarantees for children subject to screening. First, Article 13 of the SR provides that the best interests of the child shall be a priority, in line with Article 24 of the Charter of Fundamental Rights of the European Union²⁶, and, second, that an adult family member shall accompany the child during the screening. In the case of unaccompanied minors, the State shall provide a representative or a person trained to safeguard the child's best interests and general well-being to assist them during the screening.²⁷ Importantly, Article 10.2 requires Member States to establish independent monitoring mechanisms to monitor compliance with EU and international law and with fundamental principles, including the principle of the best interests of the child, during the screening process.²⁸ Article 3 clarifies that, in applying the Regulation, Member States are bound by relevant EU and international law, including the Charter, the Geneva Refugee Convention and relevant human rights law.

To conclude, children of third-country nationality arriving at the external border of a Member State, disembarked in the territory of a Member State following a search and rescue operation, or found on the territory following their "irregular" entry, will be subject to screening procedures. These children risk being deprived of their liberty based on State authorities' position that detention is necessary to ensure that the child is subjected to the screening procedure and to "prevent their entry" into State territory. As a result, these children risk being detained for up to seven days.²⁹ Nonetheless, the Regulation clarifies

²⁴ Germany was one of the first EU countries to extend the use of the legal fiction of non-entry to land border crossings in 2018. It also interpreted the "transit zones" created at ports of entry and the to not be limited to specific areas but to follow the migrant or asylum seeker until their immigration status is determined by border and immigration authorities. Also, countries such as Austria, Belgium, France, Spain, Greece, Hungary and Portugal apply the legal fiction of non-entry to persons applying for international protection at their borders or in transit zones. Anita Orav and Nefeli Barlaoura, European Parliamentary Research Service, "[Briefing: Legal fiction of non-entry in EU asylum policy](#)", April 2024, pp 2-3.

²⁵ Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012 [henceforth EU Charter]. See also Recital 25 of the Screening Regulation.

²⁶ Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012 [henceforth EU Charter]. See also Recital 25 of the Screening Regulation.

²⁷ Paragraphs 3, 4, 5 and 6 of Article 2 focus on the case of unaccompanied minors and the requirements placed on their representatives, including that they be trained to safeguard the child's best interests and general wellbeing, have the necessary skills and expertise for the role, be independent from the persons and authorities carrying out the screening, and be in charge of a proportionate and limited number of unaccompanied minors to ensure that they are able to carry out their tasks effectively. The Regulation also provides for the right to information and clarifies that during the screening children shall be provided with the information in a child-friendly and age-appropriate manner and shall receive the support of personnel trained and qualified to deal with minors in cooperation with national child protection authorities, see Article 11.3.

²⁸ See also Asylum Procedure Regulation, recital no. 27.

²⁹ The screening may not last longer than seven days, which indirectly forms the upper limit for any detention under the Screening Regulation, Screening Regulation, Article 8.3. This limit is reduced to four

that when implementing the screening procedure, Member States must ensure a wide range of safeguards related to detention, including applying it only as a last resort and in accordance with the best interests of the child. That said, detention of children solely for the purposes of immigration control cannot be considered in their best interests and, as such, would violate their human rights and States' obligations under international law.

2.2. The border procedures

2.2.1. Asylum border procedure

The Asylum Procedures Regulation (APR) reforms the rules on international protection applications and increases the use of special procedures for their examination. In particular, it widens the use of accelerated asylum procedures,³⁰ allowing for faster assessment of applications, for instance in cases where these are considered unlikely to be successful. The APR also allows an increased use of asylum border procedures, which, in turn, are intended to keep applicants close to the external border, and purportedly prevent them from absconding, to facilitate their swift return should their applications be rejected.³¹ Asylum border procedures can be applied in various situations and are mandatory in some cases.³²

The asylum border procedure under the APR is a type of accelerated examination procedure for asylum applications,³³ which applies in a range of situations, including where the applicant is "considered to have misled the authorities",³⁴ is deemed to pose a "threat to national security"³⁵ or is a national of a country "for which the proportion of decisions by the determining authority granting international protection is... 20 % or lower".³⁶ During the asylum border procedure, the State shall require "the applicants to reside at or in proximity to the external border or transit zones as a general rule or in other designated locations within its territory".³⁷ The border procedure, therefore, empowers Member States to restrict the movement of applicants, purportedly to prevent them from absconding,

days when the third-party national is apprehended after an unauthorized crossing of the external border of a Member State, and to three days in the case of screening within state territory, Article 8.3. and 8.4.

³⁰ Asylum Procedure Regulation, Article 42. Such accelerated procedures shall be completed within 3 months to ensure "that the stay of applicants who do not qualify for international protection in the Union is not unduly prolonged", see Recitals 55 and 56, Article 35.3.

³¹ Asylum Procedure Regulation, Recital 64.

³² Asylum Procedure Regulation, Articles 43-45, Recital 64. For a more detailed overview of who can be subjected to border procedures, see Refugee Support Aegean (RSA), "[New Pact on Migration and Asylum](#)", July 2024, p. 28-29 (accessed 12 August 2024).

³³ Accelerated examination procedures are mandatory in ten situations provided for in Article 42.1 of the APR. It remains optional in the case of unaccompanied children and can only be applied under five grounds: Article 42.3 APR.

³⁴ Asylum Procedure Regulation, Article 45.1 referring to Article 42.1(c).

³⁵ Asylum Procedure Regulation, Article 45.1 referring to Article 42.1(f).

³⁶ Asylum Procedure Regulation, Article 45.1 referring to Article 42.1(j). The territorial scope of the border procedure is defined in article 43.1. and encompasses asylum applications made at the external border or in transit zones, individuals apprehended while irregularly crossing into the Member State, individuals disembarked after search and rescue operations, and individuals relocated from another Member State in which the border procedure was applied. As for the material scope of the procedure, Member States may apply the border procedure to the assessment of any inadmissibility grounds for an asylum claim (Article 44.1.a. APR). For assessments of the merits, the APR foresees a complex system of mandatory and optional application of the border procedure, see table provided in Refugee Support Aegean (RSA), "[New Pact on Migration and Asylum](#)", July 2024, p. 28-29 (accessed 12 August 2024).

³⁷ Asylum Procedure Regulation, Article 54.1.

sometimes to the extent that such restrictions may effectively amount to deprivation of liberty.³⁸

Like the SR, the APR employs the legal fiction of non-entry.³⁹ While being forced to undergo the asylum border procedure, applicants shall “not be allowed to enter the territory” of Member States, purportedly to prevent them from absconding,⁴⁰ incentivizing the use of detention and the creation of specific zones with closed centres or “border camps”, which, for all intents and purposes, are places where people are deprived of their liberty.⁴¹

Recital 69 of the APR, however, clarifies that:

a) the border procedure for the examination of an application for international protection can be applied without recourse to detention; and

b) where detention is deemed to be necessary to complete the procedure, it must be used in accordance with the requirements of the Reception Conditions Directive, “including the guarantees for detained applicants, conditions of detention, judicial control, and the fact that an individual assessment of [whether detention is necessary in] each case is necessary”.

Through the reference to the Reception Conditions Directive, the APR also clarifies that:

- (i) detention can only be used where other less coercive measures cannot be applied;
- (ii) detention cannot be automatic or based on nationality alone;⁴²
- (iii) detention shall be ordered in writing, be subject to swift and regular judicial review; and
- (iv) requirements on conditions of detention shall be fulfilled.⁴³

While the APR does not set specific time limits for detention, it requires that the asylum border procedure be completed as soon as possible and at the latest within 12 weeks from the registration of the application.⁴⁴ This time limit can be extended to 16 weeks where the border procedure is carried out after the applicant has been transferred from another Member State.⁴⁵ Detention for the purposes of the asylum border procedure may therefore last for three to four months.

Where children have undergone the screening process and have submitted applications for international protection, they may, like adults, be subjected to the asylum border procedure and be detained during the procedure. However, there are circumstances in which children must be exempted from the asylum border procedure. For instance, unaccompanied minors may only be subjected to the procedure when “there are

³⁸ On deprivation of liberty under international law, see further section III(i) below. The proposal for the APR also included a border procedure for removals, which in the final EU Pact has been separated into the Return Border Procedure Regulation (RBPR). See following section.

³⁹ On the legal fiction of non-entry, see section II(i) on pp 4-5 above.

⁴⁰ Asylum Procedure Regulation, Article 43. This applies also to the return border procedure, see Return Border Procedure Regulation, Article 4.1.

⁴¹ See further section III(i) below.

⁴² These aims include for instance “to determine the elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular where there is a risk of absconding”; and applying the asylum border procedure. Reception Conditions Directive, Article 10.4.

⁴³ See Reception Conditions Directive, Articles 11 and 12. Guarantees for children and other applicants with special reception needs is also regulated, see Article 13.

⁴⁴ Asylum Procedure Regulation, Article 51.2.

⁴⁵ Asylum Procedure Regulation, Article 51.3.

reasonable grounds to consider the applicant as a danger to the national security or public order of the Member State or the applicant had been forcibly expelled for serious reasons of national security or public order under national law”.⁴⁶ Exemptions from the procedure also apply when necessary support cannot be provided to applicants with special reception or procedural needs, including children; where there are relevant medical reasons for not applying the procedure; or where the guarantees and conditions for detention laid down in Articles 10 to 13 of the Reception Conditions Directive are not met, and the border procedure cannot be carried out without the use of detention.⁴⁷ To be effective, such limits on the use of border procedures require diligent vulnerability assessments to be carried out, in good faith, in order to identify special reception and procedural needs, as well as health concerns and other needs and issues as early as possible.⁴⁸

Where children are deprived of their liberty, the APR lays down requirements for such detention. These include standards on conditions of detention for children, such as education, opportunities for play, separate accommodation and facilities adapted to their needs.⁴⁹ Article 54.2 of the APR provides that “Member States shall ensure that families with minors reside in reception facilities appropriate to their needs [...] and shall ensure a standard of living adequate for the minor’s physical, mental, spiritual, moral and social development in full respect of Chapter IV” of the Reception Conditions Directive.⁵⁰ Where a Member State fails to comply with this requirement, the Commission shall recommend a temporary suspension of the use of border procedures for families with children.⁵¹ Like the SR, the APR also requires Member States to establish a complementary monitoring mechanism to oversee the asylum border procedure, including whether the rights and best interests of the child have been given effect.⁵²

Finally, Article 22 of the APR highlights that the best interests of the child shall be a priority in the application of the Regulation. Recital No. 69 specifies that:

“As a rule, minors should not be detained. Only in exceptional circumstances, as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively, inter alia non-custodial community-based placements, and after detention is assessed to be in their best interests in accordance with the [Reception Conditions Directive], should it be possible to detain minors.”⁵³

⁴⁶ Asylum Procedure Regulation, Article 53, which refers to Article 42.3(b).

⁴⁷ Asylum Procedure Regulation, Article 53, see also Article 21.2. The provisions of the Reception Condition Directive referred to include safeguards for children, including that they shall only be detained in exceptional circumstances, as a measure of last resort and after detention has been assessed to be in their best interest, see Article 13. When the border procedure is applied to children and their family members, their applications shall be given priority, Article 44.3.

⁴⁸ See e.g. Cathrine Warin and Valeria Ilareva, “[Vulnerability in the New Pact: an empty promise to protect, or an operational concept?](#)”, in Human Rights, New Pact on Migration and Asylum, Post 17 in the Series of the Odyssey Blog on the Pact on Migration and Asylum, 11 October 2024.

⁴⁹ See Reception Conditions Directive, Article 13.2-5; see also Asylum Procedure Regulation, Recital 69.

⁵⁰ Chapter IV, Provisions for applicants with special reception needs, including provisions on the conditions of detention for children and unaccompanied minors, Reception Conditions Directive

⁵¹ Asylum Procedure Regulation, Article 45.4.

⁵² Asylum Procedure Regulation, Article 43.4. The monitoring mechanism shall fulfil the same requirements of independence etc. as the mechanism under the Screening Regulation.

⁵³ See also Reception Conditions Directive, Article 13, which clarifies that detention cannot be applied to persons with special reception needs when it would put their health at risk, that children and their families shall as a rule not be detained and can be detained only in exceptional circumstances, as a measure of last resort, for the shortest possible period of time, and after detention is assessed to be in their best interests.

2.2.2. Return border procedure

In addition to the asylum border procedure, the EU Pact provides for a return border procedure, which is set out in the Return Border Procedure Regulation (RBPR). The return border procedure applies to applicants for international protection whose applications have been rejected under the asylum border procedure. The stated aim of the return border procedure is to prevent the movement and absconding of rejected asylum seekers, with the objective of facilitating their removal from the EU.⁵⁴ The return border procedure follows a logic similar to that of the asylum border procedure, giving rise to several of the same human rights concerns, such as the fiction of non-entry, Member States' power to restrict the movement of affected individuals, the prevention of absconding, and the incentivization of detention.⁵⁵

On the other hand, the return border procedure includes a number of safeguards, which, although less detailed and ambitious than those of the asylum border procedure, must be rigorously applied. Such safeguards include, for instance, States explicitly remaining bound by their international obligations, such as the primacy of the best interests of the child, the principle of *non-refoulement* and safeguards pending return.⁵⁶ Since the return border procedure applies to persons whose applications for international protection have been considered under the asylum border procedure and denied, the same exemptions, including those regarding children, apply.⁵⁷

Detention under the RBPR is also subject to safeguards in every case, such as:

- (i) being allowed only as a measure of last resort;
- (ii) only when alternative measures short of detention cannot be effectively implemented;
- (iii) for as short a time as possible;
- (iv) only if a reasonable prospect of removal exists;
- (v) in adequate conditions; and
- (vi) subject to procedural and judicial safeguards in accordance with the Return Directive.⁵⁸

When the authorities resort to detaining children under the RBPR, purportedly as a measure of last resort, children and their families must be provided with separate accommodation, while unaccompanied children must, as far as possible, be provided with accommodation that takes into account the needs of persons of their age.⁵⁹ All children in detention must have access to education and leisure activities appropriate to their age.⁶⁰

⁵⁴ Return Border Procedure Regulation, Recitals 2, 5, 7.

⁵⁵ See e.g. Return Border Procedure Regulation, Article 4.1, 4.2.

⁵⁶ Return Border Procedure Regulation, Recitals 4 and 5.

⁵⁷ This includes unaccompanied children, except when considered to pose a threat to national security or public order, and applicants with special reception or procedural needs, when the necessary support to fulfil those needs cannot be provided in the border procedure, See Return Border Procedure Regulation, Article 1.1.

⁵⁸ Return Border Procedure Regulation, Articles 5.1, 5.4, and Article 4.3 referring to Return Directive, Article 16. Detention shall be ordered in writing by legitimate administrative or judicial authorities and it shall be regularly reviewed, including through judicial review, see Return Border Procedure Regulation, Article 4.3 referring to Return Directive, Articles 15.2 to 15.4.

⁵⁹ Return Border Procedure Regulation, Article 4.3 referring to Return Directive, Articles 17.2, 17.4.

⁶⁰ Return Border Procedure Regulation, Article 4.3 referring to Return Directive, Article 17.3.

The return border procedure, including potential detention resorted to during the procedure, follows the asylum border procedure⁶¹ and may last up to 12 weeks, after which the return procedure, including potential detention, continues as provided for in the Return Directive.⁶² As a result, people may be detained under the screening, asylum border and return border procedures for up to a total of six to seven months.⁶³ This period may be further extended up to nine months in “situations of crisis or *force majeure*”, defined in the Crisis Regulation as including “an exceptional situation of mass arrivals”, “instrumentalisation” of migration “with the aim of destabilising the Union or a Member State”, and “abnormal and unforeseeable circumstances outside a Member State’s control, the consequences of which could not have been avoided”.⁶⁴ Moreover, applicants may also continue to be detained at the expiry of this period for a further period of several months under the Return Directive, up to a maximum of six months, including the period of detention served within the return border procedure.⁶⁵

In light of this, the procedures under the EU Pact risk leading to widespread and long-term detention of children, highlighting the importance of a good faith and rigorous application of the safeguards provided within the EU Pact and under international human rights law.

2.2.3. Conclusion

Considering the above, the SR, the APR and the RBPR purport to allow the detention of children only in “exceptional situations”, and state that such detention should only be a measure of last resort and, purportedly, when detention has been assessed to be in the child’s best interests.

Under the EU Pact, any detention under the Regulations must comply with procedural and judicial control safeguards, as well as minimum detention conditions, including conditions adapted to children, and their special reception and health needs. When these detailed requirements are not fulfilled, detention is unlawful.

All Member States remain at all times bound by their obligations under other EU and international law instruments, which will be discussed in the following section.

In conclusion, the ICJ is gravely concerned that, in certain circumstances, the SR, the APR and the RBPR empower Member States to detain children for migration control purposes, including for extremely lengthy periods of time on the pretence that such detention is in compliance with children’s human rights and the best interests principle, when this is in fact not the case.

⁶¹ Asylum Procedure Regulation, Article 51.2; Return Border Procedure Regulation, Articles 1, 4, 5. The return border procedure may in turn last up to 12 weeks (18 weeks in the case of crisis). Return Border Procedure Regulation, article 4.2, article 6.1(a) and (b). If the return decision cannot be enforced within the maximum period for the border procedure, the return procedure shall be continued in accordance with the ‘regular’ return rules of the Return Directive, see Return Border Procedure Regulation, Article 4.4, allowing for further detention for the purpose of enforcing a removal decision, see Article 15 of the Directive.

⁶² Return Border Procedure Regulation, Recitals 7, 10, Article 4.2, 4.4. The period of detention under the return border procedure can in addition be extended to 18 weeks in crisis situations under the Crisis Regulation.

⁶³ Seven days for screening, 12 (or in the case of transfer 16) weeks for asylum border procedure, and 12 weeks for the return border procedure.

⁶⁴ Up to 1 week for screening, 12+6 weeks for the asylum border procedure, and 12+6 weeks for the return border procedure. See Crisis Regulation, Article 11.1; Return Border Procedure Regulation, Article 6.1.a and b. For definitions of crisis and force majeure situations, see Crisis Regulation, Articles 1.4 and 1.5.

⁶⁵ Return Directive, Article 15.5.; Return Border Procedure Regulation, Recital 11.

3. Analysis of relevant human and fundamental rights law

3.1. Deprivation of liberty in international law

Under international and EU law, everyone has the right to liberty and security of person.⁶⁶ Deprivation of liberty (detention) imposed for immigration control, whether upon entry to a country or pending deportation, must not be arbitrary and must be carried out in good faith pursuant to a legal basis.⁶⁷ According to the UN Human Rights Committee (UNHRC), detaining asylum seekers beyond a brief initial period to document their entry, record their claims and determine their identity, “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”.⁶⁸ The decision to detain must be made on a case-by-case basis, “take into account less invasive means of achieving the same ends” and “be subject to periodic re-evaluation and judicial review”.⁶⁹ According to the European Court of Human Rights (ECtHR), detention under Article 5(1)(f) of the European Convention on Human Rights (ECHR) to control entry to or removal from the territory, must be compatible with the overall purpose of Article 5 ECHR, namely to safeguard the right to liberty and to avoid arbitrariness.⁷⁰ To establish the necessity and proportionality of detention, it must be shown that other less intrusive measures have been considered and found to be insufficient.⁷¹ The Court of Justice of the European Union (CJEU), in a case concerning detention pending deportation, has stated that, “detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose.”⁷² In addition, refugee law clarifies these protections in respect of the detention of asylum seekers and refugees, emphasising that detention should never be automatic and should only be used as a last resort where there is evidence that lesser restrictions would be inadequate in the particular circumstances of the case. Finally, detention in the context of immigration control should never be used as a punishment.⁷³

Where detention is permitted, its duration must be as short as possible. The more detention is prolonged, the more likely it is to become arbitrary. The jurisprudence of the

⁶⁶ Article 5 of the European Convention of Human Rights (ECHR), Article 6 of the EU Charter of Fundamental Rights (EU Charter) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

⁶⁷ Human Rights Committee, General Comment no. 35, Article 9 Liberty and Security of Person, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.

⁶⁸ Human Rights Committee, General Comment no. 35, Article 9 Liberty and Security of Person, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.

⁶⁹ Human Rights Committee, General Comment no. 35, Article 9 Liberty and Security of Person, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.

⁷⁰ *Saadi v. the United Kingdom*, ECtHR, Application No. 13229/03 [GC] Judgment 29 January 2008, paras 64-66.

⁷¹ In *C. v. Australia*, the Human Rights Committee (UNHRC) found a violation of article 9.1 ICCPR on the basis that the State did not consider less intrusive means. *C. v. Australia*, UNHRC, CCPR/C/76/D/900/1999, 13 November 2002; UNHRC, General Comment no. 35, Article 9 Liberty and Security of Person, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.

⁷² See e.g. *Rahimi v. Greece*, ECtHR, Application No. 8687/08 [GC] Judgment of 5 April 2011; *Nolan and K. v. Russia*, ECtHR, Application No. 2512/04 [GC] Judgment of 12 February 2009.

⁷³ 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), Articles 26 and 31.

ECtHR establishes that detention may become disproportionate and therefore unlawful after only hours or days, depending on the circumstances of the case.⁷⁴

Moreover, procedural safeguards must be upheld in detention. Persons detained have the right to information regarding the reasons for their detention, to access and receive assistance from a lawyer, to medical examination and treatment, to inform family members or others of their detention, and to access the Office of the UN High Commissioner for Refugees (UNHCR) and consular services.⁷⁵ In addition, everyone has the right to challenge the lawfulness of their detention judicially.⁷⁶ Such judicial review must be real and effective rather than merely formal, meaning that systems of mandatory detention of migrants or classes of migrants without access to review are necessarily incompatible with international human rights standards.⁷⁷

Detained persons must be treated with humanity and respect for their dignity and must not be subjected to ill-treatment.⁷⁸ The lack of appropriate facilities for sleeping, eating, or hygiene could amount to ill-treatment.⁷⁹ 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, given its absolute nature, which does not permit derogations.⁸⁰ Even treatment inflicted without the intention of humiliating or degrading the victim, which may stem, for example, from objective difficulties related to over-extension of the migration management system or a crisis situation, may constitute a violation.⁸¹

Detention and deprivation of liberty have autonomous meanings under international law, meaning that a State's characterization of a situation does not preclude its classification as detention.⁸² Instead, the determination of whether detention exists must be based on the facts of the individual case. The Optional Protocol to the Convention Against Torture (OPCAT) defines deprivation of liberty as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority".⁸³

The UNHRC has affirmed that deprivation of liberty may include for instance police custody, house arrest, institutional custody of children and confinement to a restricted area of an airport.⁸⁴ The ECtHR has in a number of cases found situations to amount to deprivation of liberty, even when this was not officially recognized by the authorities, for instance in

⁷⁴ *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.

⁷⁵ *Čonka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002; *Suso Musa v. Malta*, ECtHR, Application No. 42337/12, Judgment of 23 July 2013; Human Rights Committee, General Comment no. 35, Article 9 Liberty and Security of Person, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 46.

⁷⁶ Article 9.4 ICCPR and Article 5.4 ECHR.

⁷⁷ Human Rights Committee, General Comment no. 35, Article 9 Liberty and Security of Person, UN Doc. CCPR/C/GC/35, 16 December 2014, paras 39-42, 45-47.

⁷⁸ ICCPR Article 7 and 10, ECHR Article 1 and 3, and EU Charter Article 4; *Khlaifa and others v. Italy*, ECtHR, Application No. 16483/12, Judgment of 15 December 2016, para. 184.

⁷⁹ CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2010, page 54.

⁸⁰ Article 3 ECHR, Article 7 ICCPR and CAT; *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011.

⁸¹ *Khlaifa and others v. Italy*, ECtHR, Application No. 16483/12, Judgment of 15 December 2016, para. 184.

⁸² *Creangă v. Romania*, ECtHR, Application no. 29226/03, Judgment of 23 February 2012, para. 92.

⁸³ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4.2.

⁸⁴ Human Rights Committee, General Comment no. 35, Article 9 Liberty and Security of Person, para. 5.

cases of compulsory residence,⁸⁵ and where migrants have been held in airport transit zones,⁸⁶ land border transit zones, asylum “hotspot” facilities, on ships and in identification and registration facilities.⁸⁷ The CJEU has found that requiring applicants for international protection to permanently remain in a closed transit zone, within which movement is limited and which they cannot leave voluntarily, qualifies as detention.⁸⁸ Any deprivation of liberty must, irrespective of its name or classification under domestic law, fulfil the requirements under international law, including legality, necessity, proportionality and the necessary procedural and judicial safeguards.

3.2. Jurisdiction and the application of human rights protection at borders

Under the International Covenant on Civil and Political Rights (ICCPR)⁸⁹ and the ECHR⁹⁰, all States have an obligation to protect the rights of any person subject to their jurisdiction. The term “jurisdiction” extends beyond the national territory of the State – it applies to all persons who fall under the authority or effective control of the State’s authorities or of other individuals acting on their behalf, including in extraterritorial zones, and in a range of contexts. Therefore, jurisdiction applies at borders, in border zones, international zones of airports, and wherever the State or its agents exercise authority or control, in law or in practice.⁹¹ As confirmed by the ECtHR in its Grand Chamber decision in *N.D. and N.T. v. Spain*:

“[...] the 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.”⁹²

⁸⁵ See e.g. *Guzzardi v. Italy*, ECtHR, Application no. 7367/76, Judgement of 6 November 1980, para. 95; *De Tommaso v. Italy*, ECtHR, Application no. 43395/09, GC, Judgement of 23 February 2017, para. 79-89.

⁸⁶ See e.g. *Amuur v. France*, ECtHR, Application No. 19776/92, Judgment of 25 June 1996; *Nolan and K. v. Russia*, ECtHR, Application no. 2512/04, Judgement of 12 February 2009; *Riad and Idiab v. Belgium*, ECtHR, Application nos. 29787/03 and 29810/03, Judgement of 24 January 2008.

⁸⁷ *Khlaifia and Others v. Italy*, ECtHR, Application no. 16483/12, GC, Judgement of 15 December 2016, paras 65-72; *R.R. and Others v. Hungary*, ECtHR, Application no. 36037/17, Judgement of 2 March 2021, para. 83; *J.R. and Others v. Greece*, ECtHR, Application No. 22696/16, Judgment, 28 May 2018, paras 83-87.

⁸⁸ *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, 14 May 2020.

⁸⁹ 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, 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 shall 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.”

⁹⁰ Article 1 ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

⁹¹ See e.g. *Hirsi Jamaa and Others v. Italy*, ECtHR, Application No. 27765/09, Judgment of 23 February 2012; *Loizidou v. Turkey* (Preliminary Objections), Application no. 15318/89, Judgement of 23 March 1995; *Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, Judgement of 8 April 2004; *Hassan v. the United Kingdom*, Application no. 29750/09, Judgement of 16 September 2014.

⁹² *N.D. and N.T. v. Spain*, ECtHR, Applications nos. 8675/15 and 8697/15, GC, Judgment of 13 February 2020, para. 110.

While certain border procedures are not per se contrary to international human rights law, it remains highly desirable and good practice for asylum procedures to be conducted within the territory. Whether or not such procedures under the EU Pact are conducted at the border, they will still necessarily be undertaken under the jurisdiction of the Member States. As a result, the full guarantees provided for by international human rights law and international refugee law, binding on the State, are applicable.

3.3. Detention of children for immigration control purposes

Refugee, asylum seeking, stateless and migrant children should, first and foremost, be treated as children. Their extreme vulnerability – whether or not their parents accompany them – is a decisive factor that takes precedence over considerations relating to the child's immigration status, including with respect to detention.⁹³ In accordance with the Convention on the Rights of the Child (CRC) and the EU Charter of Fundamental Rights, in all actions concerning children, an assessment of the child's best interests must be undertaken separately and prior to any decision that will impact the child's life.⁹⁴ As stated in the Joint General Comment of the UN Committee on Migrant Workers and the UN Committee on the Rights of the Child No. 4 and No. 23, which clarifies State obligations under the CRC and the Convention on Migrant Workers (CMW):

*"The Committees... reiterate that the provisions in domestic and international legislation that are the most conducive to the realization of the rights of all children in the context of international migration shall apply in cases where standards differ."*⁹⁵

*"[T]he right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."*⁹⁶

Several human rights mechanisms and actors, including the UN Special Rapporteur on the Human Rights of Migrants and the Parliamentary Assembly of the Council of Europe (PACE), clearly state that the immigration detention of children is, *per se*, not in their best interests and that the detention of vulnerable individuals, including unaccompanied children, is prohibited under international law.⁹⁷ It is therefore clear that, under international law, children, including unaccompanied or separated children, may never be detained solely for immigration control purposes.

In the case of accompanied children, their right to family life and unity entails, as a rule, that they should not be separated from their parents and family members.⁹⁸ This has

⁹³ *G.B. and others v. Turkey*, ECtHR, Application No. 4633/15, Judgment of 17 October 2019, para. 101, with further references; 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. 11 [henceforth Joint General Comment No. 3/22]

⁹⁴ Article 3 CRC, and article 24.2 EU Charter.

⁹⁵ Joint General Comment No. 3/22, para. 20.

⁹⁶ Joint General Comment No. 3/22, para. 28.

⁹⁷ 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; PACE, Resolution 1707(2010) on Detention of asylum seekers and irregular migrants in Europe, 28 January 2010; PACE, Resolution 1810(2011) on Unaccompanied children in Europe: issues of arrival, stay and return, 15 April 2011.

⁹⁸ See Convention on the Rights of the Child, articles 5, 9, 16.

sometimes been used to argue that, although children cannot themselves be detained solely for immigration control purposes, they could be detained together with their parents in order to preserve family unity, when this is assessed to be in the child's best interests. This argument is however not tenable under international human rights law, as clarified by, for instance, the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers, which have explicitly stated that **children must never be detained because of either their or their parents' migration status**: "Every child, at all times, has a fundamental right to liberty and freedom from immigration detention."⁹⁹ In addition, "both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice."¹⁰⁰

*"When 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."*¹⁰¹

In the recent cases of *E.B. on behalf of E.H. et al. v. Belgium*,¹⁰² and *K.K. and R.H. on behalf of A.M.K. and S.K. v. Belgium*,¹⁰³ the Committee on the Rights of the Child found that the detention of children in closed family detention centres for immigration control purposes constitutes a violation of the prohibition of ill-treatment under Article 37 of the CRC, read alone and in conjunction with the best interests principle.¹⁰⁴

The UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment has also affirmed that the detention of children in the context of administrative immigration enforcement, "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".¹⁰⁵ The UN High Commissioner for Refugees (UNHCR) maintains 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 interests. Appropriate care arrangements and community-based programmes* need to be in place to ensure adequate reception of children and their families".¹⁰⁶ "[O]verall, an ethic of care, and not [of] enforcement, needs to govern the actions taken" in relation to

⁹⁹ 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 [henceforth Joint General Comment No. 4/23]

¹⁰⁰ Joint General Comment No. 4/23, para. 5.

¹⁰¹ Joint General Comment No. 4/23, para. 11.

¹⁰² Committee on the Rights of the Child, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication [No. 55/2018](#) (2022) CRC/C/89/D/55/2018.

¹⁰³ Committee on the Rights of the Child, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication [No. 73/2019](#) (2022) CRC/C/89/D/73/2019.

¹⁰⁴ 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

¹⁰⁵ Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/28/68, 5 March 2015, para. 80.

¹⁰⁶ UNHCR, UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, p. 2. Emphasis in original.

children.¹⁰⁷ The Special Rapporteur on the Human Rights of Migrants has also deplored the detention of children for immigration purposes and the lack of alternatives to detention available in EU countries.¹⁰⁸ Following the adoption of the EU Pact, several UN human rights experts, including Special Rapporteurs and members of UN Committees, specifically called on EU Member States to prohibit child immigration detention, expressing concern that such detention is always a violation of children's human rights and never in their best interests.¹⁰⁹ Detaining children for immigration control purposes is therefore prohibited under international human rights law.

If children are nevertheless detained for immigration control purposes, in order to respect the prohibition of torture, States must, at the very least, only use detention as a measure of absolute last resort, limit it to the strict minimum, and adapt detention conditions to the children's age and needs, including by providing them with humane, safe conditions appropriate for children.¹¹⁰ For instance, in the recent case of *A.D. v. Malta*,¹¹¹ the European Court of Human Rights (ECtHR) found several violations of the European Convention on Human Rights (ECHR),¹¹² recalling that children in migration situations are very vulnerable individuals with special needs and that their vulnerability takes precedence over considerations relating to their immigration status.¹¹³ The Court held that the conditions in which the applicant, a child asylum seeker at the time, was living were inadequate to their needs in light of his vulnerabilities as a presumed minor with health problems and amounted to inhuman and degrading treatment in violation of Article 3 ECHR.¹¹⁴ In addition, the State had failed to act in good faith and to carefully consider the necessity of detaining children in an immigration context, thereby failing to comply with the requirement that the detention of a minor must always be a measure of last resort.¹¹⁵ In *R.M. and Others v. Poland*,¹¹⁶ the Court found a violation of the right to liberty and security (ECHR Article 5) based on the detention of a mother and her three children pending their removal to Russia. Considering the seven months of detention, the Court noted that the measure could not be considered to have been used as a last resort and that there was a lack of due diligence to limit the detention of the children to the strict minimum.¹¹⁷

The CRC, in Article 1, defines a child as "every human being below the age of eighteen years". This definition is adopted by most other international instruments.¹¹⁸ Under international law, it must be ensured that children be granted the benefit of the doubt and

¹⁰⁷ UNHCR, UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, p. 1.

¹⁰⁸ François Crépeau, Report of the Special Rapporteur on the Human Rights of Migrants: 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.

¹⁰⁹ UN OHCHR, "[Child immigration detention must be prohibited following adoption of EU migration and asylum pact, UN experts say](#)", press release, 2 May 2024.

¹¹⁰ *Darboe and Camara v. Italy*, ECtHR, Application No. 5797/17, Judgment of 21 October 2022; *A.C. and M.C. v. France*, ECtHR, Application No. 4289/21, Judgment of 4 August 2023.

¹¹¹ *A.D. v. Malta*, ECtHR, Application No. 12427/22, Judgment of 17 October 2023.

¹¹² More specifically articles 3, 5.1, 5.4, and 13 ECHR.

¹¹³ *A.D. v. Malta*, paras 115-118.

¹¹⁴ *A.D. v. Malta*, para. 135.

¹¹⁵ *A.D. v. Malta*, para. 190.

¹¹⁶ *R.M. and Others v. Poland*, ECtHR, Application No. 11247/18, Judgment of 9 February 2023.

¹¹⁷ *R.M. and Others v. Poland*, para. 28. See also *Rahimi v. Greece*, ECtHR, Application no. 8687/08, Judgment of 5 April 2011.

¹¹⁸ See e.g. Article 4(d) of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 3(a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).

presumptively treated as children unless and until proven otherwise, and that any age assessment procedure be carried out speedily and in a dignified manner.¹¹⁹

4. Conclusions and Recommendations

In light of the adoption of the EU Migration and Asylum Pact, the ICJ is concerned about the potential consequences of the implementation of the Pact's provisions. Even prior to the adoption of the EU Pact, research indicated that border procedures and accelerated procedures, in practice, led to increased detention.¹²⁰ Thus, the ICJ is profoundly concerned that the EU Pact will lead to a further increase in the use of detention procedures. The conduct of screening and asylum procedures in the border context, including in transit zones, and the resort to the legal fiction of non-entry entail a significant risk of violations of EU and international law.

With the stated intention of preventing persons subjected to both screening and border procedures from absconding and from legally "entering" State territory, the EU Pact requires Member States to "ensure the availability" of third-country nationals for the EU Screening, Asylum Procedure and Return Border Procedure Regulations. As a result, the EU Pact incentivizes the use of immigration detention, including for children. Such detention may become protracted, lasting for extended periods of time and in conditions not adapted to children's needs, amounting to violations of children's human rights. It must be emphasized, however, that, States are prohibited from resorting to detention for the purposes of immigration control in most circumstances and, when they do resort to it, detention must comply with safeguards that ensure respect for the right to liberty, including those provided for in the EU Pact.

It is therefore crucial that all safeguards are implemented in domestic law and practice, that they be applied carefully and in good faith, and that the best interests of the child be given primary importance in all decisions affecting children. As highlighted by several international actors, immigration detention is never in the best interests of the child, and States should therefore not resort to using it.

In addition, the ICJ recalls that EU Member States are and remain bound by their obligations as parties to international human rights treaties, such as the ECHR, ICCPR, CRC, and by the EU Charter of Fundamental Rights.¹²¹ In implementing and applying the EU Pact, States must therefore act in accordance with these obligations, including:

- (i) the prohibition of detention of children solely for immigration purposes;

¹¹⁹ Joint General Comment No. 4/23, paras 3-4; PACE, Resolution 2020 (2014), The alternatives to immigration detention of children, 3 October 2014, para. 9.4.; *A.D. v. Malta*, paras 74 and 190.

¹²⁰ A study by the European Parliament showed that the border procedures in use before the entry into force of the EU Pact in practice 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 in domestic law differs considerably between Member States. 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. European Parliament, "[Asylum procedures at the border European Implementation Assessment](#)", November 2020 (accessed 12 August 2024).

¹²¹ See e.g. EU Charter of Fundamental Rights, Article 6 (Right to liberty and security), Article 18 (Right to asylum), Article 19 (Protection in the event of removal, expulsion or extradition).

- (ii) the requirement to apply the benefit of the doubt in determining whether someone should be treated as a child;
- (iii) the principle of family unity;
- (iv) the requirements on the protection and care for children;
- (v) the right to apply for and enjoy asylum from persecution; and
- (vi) all other relevant international human rights and refugee law standards.

Children should be treated primarily as children throughout the migration and asylum process, regarded as holders of rights, rather than as objects of migration enforcement, and provided with real alternatives to detention, such as case management, alternative care arrangements and community-based solutions, throughout their migration or asylum process.

In light of the above-mentioned concerns, the ICJ recommends the following:

1. EU Member States should revise the EU Pact to ban immigration detention of children

Member States should revise all provisions of the EU Pact that may lead to the detention of children to ensure that no child is detained for immigration control purposes, whether based on their or their parents' immigration status.

Pending this review, the ICJ recommends the following interim measures:

EU Member States should explicitly prohibit the immigration detention of children in their national legislation, ensuring that no one under the age of 18 is detained solely for immigration purposes. In addition,

- Member States must commit to respecting and protecting the human rights of children whether migrants, asylum seekers, refugees or stateless children, in accordance with their obligations under international law, including by ensuring that they implement EU law in a manner that protects and safeguards human and children's rights;
- The government and relevant authorities should ensure that the best interests of the child are the primary consideration in all decisions affecting children in the implementation and application of the EU Pact;
- Considering the risk of detention, Member State authorities should not subject children to any border procedures, assuming that the necessary support required by Article 53(2)(b) and (c) of the APR is not available for children in the procedure;
- The authorities should ensure that, where necessary, age assessment be carried out in a speedy and dignified manner and that the benefit of the doubt be applied;
- The authorities should ensure that real alternatives to detention, such as alternative care arrangements and community-based solutions, be sought and used for all children in line with the best interests of the child; and
- The authorities should ensure that personnel engaged in implementing the EU Pact be trained on human rights, including children's rights.

2. Should some EU Member States nevertheless resort to detaining children for immigration purposes, in violation of international human rights law, they must, at a minimum, ensure compliance with the EU Pact and international law safeguards guaranteeing the protection of human rights in immigration detention

The government and other relevant authorities must ensure that, at a minimum, the following safeguards relating to immigration detention be established in national law and practice and applied in all cases of detention:

- Each decision leading to the deprivation of liberty of a child under the EU Pact must expressly set out how detention in the circumstances of each child meets the conditions of lawfulness, necessity, and proportionality;
- The decision to detain under the EU Pact must only be taken in exceptional circumstances and as a last resort, only where less coercive measures cannot be taken in the specific case and where the best interests of the child have been duly assessed;
- Detention must be subject to time limitations and applied only for the shortest possible period;
- Detention must be subject to procedural guarantees, including the right to information on the reasons for detention in a child-friendly manner, the right to access to and assistance of a lawyer, the right to an interpreter, and the right to be heard;
- Judicial review of the detention must be available throughout the period of detention and be conducted in a child-friendly manner, including in respect of both the lawfulness of the detention and the conditions of detention, ensuring that the review is real and effective;
- Detention must take place in adequate facilities in line with international human rights law and standards, including law and standards pertaining to the rights of the child, and must uphold the prohibition of cruel, inhuman or degrading treatment or punishment. Children in detention must be treated with humanity and respect for their dignity and family unity. They must be held in appropriate and child-friendly facilities, guaranteeing their personal space, access to health care, protection from ill-treatment and violence, access to education and the right to play; and
- The needs and rights of persons with specific vulnerabilities, including persons and children with disabilities, must be taken into consideration and vulnerability assessments must be conducted in good faith. Where the rights of individuals with specific needs cannot be fulfilled in detention, they must not be detained.

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November 2024 (for an updated list, please visit www.icj.org/commission)

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