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ASYLUM DETENTION IN THE NEW PACT ON MIGRATION AND ASYLUM: COMPATIBILITY WITH THE RIGHT TO LIBERTY

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ABSTRACT

In September 2020, the European Commission initiated a reform of the Common European Asylum System, titled the New Pact on Migration and Asylum. After its release, the proposal has received a significant amount of criticism from human rights organizations, legal scholars, and other entities. In particular, the extensive regulation on detaining asylum seekers has been questioned. The right to liberty is a fundamental human right protecting individuals against arbitrary detention measures taken by the state. In this context, this research examines the compatibility of the New Pact on Migration and Asylum and the right to liberty, specifically from the viewpoint of asylum detention. The hypothesis is that some of the proposal's provisions may constitute arbitrary detention and thus violate the right to liberty. The research reveals distinct conflicts between the proposal and sources of international law. Additionally, some areas require more regulation. This thesis aims to suggest amendment proposals to the New Pact on Migration and Asylum that would ensure asylum detention is only applied when it is justified and in line with international law. Resultingly, proposals for modification as well as amplification are presented. This study uses qualitative methods of comparative research and literature review.

Keywords: asylum detention, New Pact on Migration and Asylum, right to liberty, arbitrary detention

LIST OF ABBREVIATIONS

AMMR	Proposal for an Asylum and Migration Management Regulation
ATDs	Alternatives to Detention
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPR	Amended proposal for a Common Procedures Regulation
EASO	European Asylum Support Office
EESC	European Economic and Social Committee
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
FRA	European Union Agency for Fundamental Rights
Guidelines	Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention
HRC	Human Rights Committee
PMA	New Pact on Migration and Asylum
RC	The 1951 Convention and the 1967 Protocol relating to the Status of Refugees
RCD	Proposal for a Reception Conditions Directive
SBC	Schengen Borders Code
SCO	Safe country of origin
SR	Proposal for a Screening Regulation
TCN	Third-country national
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

On 23 September 2020 the European Commission presented a New Pact on Migration and Asylum (PMA) to kickstart a reform of the Common European Asylum System (CEAS). The CEAS is composed of many directives and regulations establishing common standards and cooperation within the European Union (EU) for protecting asylum seekers and ensuring they are treated equally in an open and fair system.[1] The system has gone through many reform phases over the years since its creation in 1999, when a special European Council meeting was held in Tampere, Finland.[2] In 2015, the European Union (EU) faced a mass migratory influx it had never experienced before with over 1.3 million people seeking asylum and migrating in the EU.[3] The refugee crisis arising mostly due to conflicts and violence in close-by regions revealed the poor and ineffective asylum system of Europe. Resultingly, asylum seekers ended up in clusters mostly residing in the southern EU member states.[4]

The PMA instruments extensively regulate the detention of asylum seekers. An asylum seeker is a third-country national or stateless person who has applied for international protection to which a final decision has not yet been taken.[5] Detention in the EU context means "confinement of an applicant for international protection by an EU member state within a particular place, where the applicant is deprived of their personal liberty".[6] The right to liberty is a fundamental human right, included in several international and regional conventions. Right to liberty refers to the physical liberty of the person, the purpose of which is to protect an individual against arbitrary

[1] *Common European Asylum System*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en, 1 February 2021.
[2] *Tampere European Council 15 and 16 October 1999 Presidency Conclusions*. European Parliament. Retrieved from https://www.europarl.europa.eu/summits/tam_en.htm#union, 11 April 2021.
[3] *Asylum and migration in the EU: facts and figures*. European Parliament. Retrieved from https://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures, 20 February 2021.
[4] *Irregular migrant, refugee arrivals in Europe top one million in 2015*. International Organization for Migration. Retrieved from https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom, 10.5.2021.
[5] *Asylum seeker*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/asylum-seeker_en, 3 May 2021.
[6] *Detention*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/detention_en, 11 April 2021.

deprivation of liberty.[7] Therefore, detention is not prohibited *per se*, but when it is arbitrary, it constitutes a violation of the right to liberty. Firstly, under the PMA, detention may be used when an asylum seeker's application for international protection is examined after they have arrived irregularly, i.e., not fulfilling the legal conditions of entry.[8] Secondly, asylum seekers may be detained when they are being transferred to the member state responsible to examine their application. Thirdly, detention may take place in the context of returning the asylum seeker to their country of origin after a rejected application. However, return-related detention is outside the scope of this research. This thesis focuses namely on asylum detention, often defined as administrative detention[9], instead of immigration detention as a whole. It has been widely established by researchers and scholars that detention has globally become a common practice in states' migration management policies and that asylum seekers are *de jure* and *de facto* highly detainable.[10] Detention is extensively used to respond to pressures on asylum systems, and as a means to prevent asylum seekers from crossing the borders.[11] In this context, it is essential for detention rules under the PMA to prevent arbitrary detention.

Deprivation of liberty and other forms of restrictions to freedom of movement in the immigration context have been discussed for decades and constantly spark new conversations among legal scholars and the public. Refugees have been subject to unjustified and unduly prolonged measures of detention[12] since at least the 1970s and discussions over violations of asylum seekers' human rights continue to stay relevant in the current day. The focus on the PMA is topical as it was put forward by the Commission only at the end of last year and ever since, its proposals have caught the attention of multiple academics, human rights groups and non-governmental organizations as well as other EU institutions such as the European Economic and Social Committee (EESC). Opinions by these parties have been quite critical and also mixed, including concerns over the systematic and unclearly justified detention practices the proposals might lead to. This study will investigate the grounds for asylum detention under the PMA and

[7] Jayawickrama, N. (2002). *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. *s.l.*: Cambridge University Press, 375.
[8] *Irregular migrant*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/irregular-migrant_en, 10 April 2021.
[9] Moreno-Lax, V. (2011). Beyond Saadi v UK: Why the unnecessary detention of asylum seekers is inadmissible under EU law. *Human Rights & International Legal Discourse*, 5(2), 166–206, 167.
[10] Costello, C., Mouzourakis, M. (2016). EU law and the detainability of asylum-seekers. *Refugee Survey Quarterly*, 35, 47–73.
[11] Matevžič, G. (2019). Crossing a Red Line: How EU countries undermine the right to liberty by expanding the use of detention of asylum seekers upon entry. *Hungarian Helsinki Committee*, 4.
[12] UNHCR. (2001). Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection. *Global Consultations on international protection*, 35.

whether they could constitute arbitrary detention and therefore, violate the freedom against arbitrary detention implied in the right to liberty. The current study aims to create amendment proposals to the PMA that would ensure asylum detention is only applied when it is duly justified and in accordance with international law obligations. The hypothesis present throughout the thesis is that some of the PMA provisions may constitute arbitrary detention and thus contradict the right to liberty.

This study uses qualitative methods of comparative research and literature review. The thesis analyzes and evaluates several academic sources comprising of articles and books as well as official EU publications and other sources. Data collection is focused on materials relating to EU asylum *acquis* and the right to liberty. To examine whether the grounds for detention in the PMA are justified, a juridical comparison is conducted between the proposed EU legislation and the international legislation of the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the 1951 Refugee Convention and its 1967 Protocol (jointly as RC). To further interpret the wording of the international human rights and refugee law, the research will also focus on the jurisdiction of the ECtHR, the United Nations Human Rights Committee (HRC) jurisprudence, and the Detention Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR).

Chapter I introduces the PMA and its main elements. The proposals by the Commission relevant to examine in the context of asylum detention are presented in detail. The Reception Conditions Directive lays out the grounds for detention which are further regulated by the Screening Regulation, Common Procedures Regulation, and the Asylum and Migration Management Regulation. Chapter II observes the right to liberty, particularly the relevant articles in the ECHR, ICCPR, and RC, and how the respective bodies have complemented the interpretation of those sources. The ECHR seems to offer the lowest level of protection for asylum seekers and the provisions in ICCPR and RC are quite concise. The HRC jurisprudence has specified the principles against arbitrary detention and the UNHCR Guidelines offer an extensive set of tools for detention to be considered in law and in practice. Chapter III then examines the compatibility of the PMA with the right to liberty, mainly from the viewpoint of unauthorized entry, border procedures, and transfer procedures, as well as the requirements of necessity and proportionality. The PMA seems to reflect the ECHR and mainly comply with the ICCPR and RC, however, the conducted analysis reveals distinct flaws of the proposal. Thus, the final chapter aims to suggest amendment proposals for the PMA. The study finishes with concluding remarks.

I. NEW PACT ON MIGRATION AND ASYLUM

On 23 September 2020, the European Commission put forward a Communication on a New Pact on Migration and Asylum, a long-awaited step towards progress and change. In the press release, the Commission recognized that "the current system no longer works and for the past five years, the EU has not been able to fix it".[13] The PMA provides a comprehensive approach and has been described by the Commission as a fresh start on migration for the Union as a whole.[14] The system is to change tremendously, with the focus of creating a predictable and reliable migration management system. The new proposals continue to build on the progress already made since the previous reform efforts of the CEAS and thus, the Commission maintains the proposals to the agreements concluded for the Reception Conditions Directive (RCD)[15] and the Return Directive (RD)[16]. In this chapter, the content and main elements of the PMA and the framework of focus is presented, bearing in mind the purpose of this research to investigate the compatibility of the right to liberty and the PMA. Afterwards, the relevant proposals will be overviewed in detail.

1.1. Content of the PMA

The Commission's PMA consists of several documents, five of which are proposals for legislative instruments. Additionally, the instruments from the previous CEAS reform are included in the Pact. The most relevant legislation proposals for the current study are:

1. proposal for a Reception Conditions Directive (RCD),
2. proposal for a Screening Regulation (SR)[17]
3. amended proposal for a Common Procedures Regulation (CPR)[18]

[13] *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity.* European Commission. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706, 2 February 2021.
[14] Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final.
[15] Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final.
[16] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final.
[17] 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, COM(2020) 612 final.
[18] 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.

4. proposal for an Asylum and Migration Management Regulation (AMMR)[19]

Furthermore, the Commission withdraws the Dublin Regulation IV 2016 proposal completely and proposes to replace the existing Dublin III Regulation[20] with the AMMR.

1.1.1. Main elements of the PMA and limitations to research

Whereas the Commission's previous communication of 2016, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, was put forward to aid the crisis in the south of the EU, the PMA aims to create a long term and comprehensive approach to deal with various difficulties in areas of migration and asylum. The PMA has received quite a mixed variety of receptions by different entities. It has been criticized by multiple human rights associations and experts[21], professional scholars, as well as the EESC through its opinions[22]. The Pact is mainly built on broader use of border procedures and presents a pre-entry screening phase of asylum applicants.[23] Furthermore, its policy strongly relies on extensive return procedures for migrants.[24] The proposal is supported by the ideology of fast and effective procedures. The PMA does not provide a mandatory automatic system for sharing the responsibility of member states but instead continues to place great pressure on the countries of first entry, i.e., often the southern states of the EU.[25] The PMA also brings forward some welcomed positive changes, including decreased time of obtaining a long-term residence permit in efforts to better integrate non-EU nationals, as well as the expanded meaning of family members.[26] However, many have identified

[19] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final.
[20] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29.6.2013.
[21] *The Pact on Migration and Asylum*. Human Rights Watch. Retrieved from https://www.hrw.org/news/2020/10/08/pact-migration-and-asylum, 24 February 2021.
[22] *A New Pact on Migration and Asylum*. EESC. SOC/649-EESC-2020; *Screening regulation, amended proposal revising the asylum procedures regulation and the amended proposal revising the Eurodac regulation*. EESC. SOC/670-EESC-2020.
[23] Refugee Law Initiative. Wessels, J. (2021, Jan 5). The New Pact on Migration and Asylum: Human Rights challenges to border procedures. [Blog post]. Retrieved from https://rli.blogs.sas.ac.uk/2021/01/05/the-new-pact-on-migration-and-asylum-human-rights-challenges-to-border-procedures/, 28 January 2021.
[24] Bloj, R., Buzmaniuk, S. (2020). *Understanding the new migration and asylum pact*. Retrieved from https://www.robert-schuman.eu/en/european-issues/0577-understanding-the-new-pact-on-migration-and-asylum, 2 February 2021.
[25] *Screening regulation, amended proposal revising the asylum procedures regulation and the amended proposal revising the Eurodac regulation*. EESC. SOC/670-EESC-2020.
[26] *New Pact on Migration and Asylum – Building on the progress made since 2016: Questions and Answers.* European Commission. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1723, 24 February 2021.

the lack of freshness of the PMA and pointed out it mainly reintroduces much of the previous rules and regulations.

This thesis examines first and foremost the effects of the PMA on the deprivation of the right to liberty of asylum seekers which in practice means the detention of asylum applicants. The following subchapters will present the central proposals regulating the detention of asylum seekers. Firstly, the RCD is reviewed, as it lays out the grounds for detention. Secondly, the SR introducing a screening phase is examined. Thirdly, the CPR entailing border procedures is presented. Finally, the AMMR and its transfer procedures are investigated. These instruments will be displayed thoroughly to obtain a detailed understanding of their content, in efforts to navigate through the complexities of the system.

1.2. Reception Conditions Directive proposal

Under the RCD, detention means the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.[27] Article 8 of the RCD regulates detention and firstly states that member states shall not hold a person in detention for the sole reason that he or she is an applicant. However, when it proves necessary and on the basis of an individual assessment, member states may detain an applicant, if other less coercive measures cannot be applied effectively. According to Article 8(3) an applicant may be detained only:

a. in order to determine or verify their identity or nationality;
b. in order to determine the elements on which the application for international protection is based which could not be obtained in the absence of detention;
c. in order to ensure compliance with legal obligations imposed on the applicant when the applicant has not complied with such obligations and there is a risk of absconding;
d. in order to decide on the applicant's right to enter the territory in the context of a border procedure in accordance with the CPR;
e. to prepare the return of an applicant in accordance with the RD;
f. when protection of national security or public order so requires:

[27] COM(2016) 465 final, *supra nota* 15, art. 2(8).

g. in accordance with detention provisions for purpose of transfers in the former Dublin Regulation (to be replaced by the AMMR)

Furthermore, all the above grounds for detention shall be laid down in national law and member states shall ensure that the rules concerning alternatives to detention (ATDs), such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law. The essential grounds for detention to be investigated in this thesis are those established by Article 8(3)(a) for the screening procedure under the SR, Article 8(3)(d) for border procedures under the CPR, and Article 8(3)(g) for transfer procecures under the AMMR. This demarcation is justified because in practice these are the most commonly applied grounds for asylum detention.[28] This line of order of the grounds for detention shall also be used in the subsequent sections.

According to Article 9 of the proposal, detention shall be as short a period as possible and continue only for as long as its grounds are applicable. Notably, no maximum length of detention is established. Under the RCD, detention should be a measure of last resort and may only be applied after all non-custodial ATDs have been duly examined, and any ATD must respect the fundamental human rights of applicants.[29] The RCD establishes further guarantees for detained applicants as well as conditions of detention, but these are excluded from the current study primarily focusing on the grounds for detention.

1.3. The Screening Regulation proposal

The SR introduces a pre-entry phase consisting of a screening of health, identity, and security checks as well as registration of biometric data. During the screening, third-country nationals (TCNs) shall not be authorized to enter the state's territory, a concept further explored in section 3.1. The regulation applies to TCNs who have crossed the external border in an unauthorized manner, or have applied for international protection during border checks without fulfilling entry conditions, as well as to those disembarked after a search and rescue operation.[30] The screening

[28] Cornelisse, G. (2016). Territory, Procedures and Rights: Border Procedures in European Asylum Law. *Refugee Survey Quarterly*, 35(1), 74–90, 74; Wessels, J, Bast, J., von Harbou, F. (2020). Human Rights Challenges to European Migration Policy (REMAP study). (1st ed), 40.
[29] COM(2016) 465 final, *supra nota* 15, recital 26.
[30] COM(2020) 612 final, *supra nota* 17, art. 1.

shall apply to those persons regardless of whether they have applied for international protection.[31] When the screening takes place at the external border, it is required that the screening is conducted at locations situated "at or in proximity to the external borders" and within 5 days principally.[32]

Article 14 regulates the outcome of the screening procedure. When a TCN has not applied for international protection and their screening has not revealed that they fulfill entry conditions under the Schengen Borders Code (SBC)[33], they shall be referred to the competent authorities to apply the return procedure under the RD. TCNs who have applied for international protection shall be channeled towards the asylum procedure under the CPR which will be discussed in the subsequent section. Additionally, the screening will determine if the applicant will be forwarded to an accelerated examination, a border procedure or a normal asylum procedure. Furthermore, when a TCN is to be relocated under the mechanism established by the AMMR, the TCN is referred to the relevant authorities of the relocation member state. The system of transfers will be explained in section 1.5.

1.4. The Common Procedures Regulation proposal

The CPR aims to ensure harmonized common procedures and effective procedural guarantees for asylum seekers.[34] The main objective of the instrument is to ensure equally legal and efficient examination of claims for international protection, irrespective of in which member state the application is lodged. Its predecessor, the Asylum Procedures Directive, was recast in 2016 by the Commission. It caused friction among member states, mainly regarding the border procedures.[35] The amended CPR maintains much of the 2016 proposal but attaches border procedures into screening procedures in accordance with the SR. The pre-entry phase, comprised of the screening and border procedures, is based on the position that many applications for international protection are made at the external border or in a transit zone of a member state.[36]

[31] COM(2020) 612 final, *supra nota* 17, art. 3(1).
[32] COM(2020) 612 final, *supra nota* 17, art. 6.
[33] 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 77/1, 23.3.2016.
[34] *Reform of the Asylum Procedures Directive*. European Parliament. Retrieved from https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-asylum-procedures-directive, 5 March 2021.
[35] *Ibid*.
[36] COM(2020) 611 final, *supra nota* 18, recital 40.

The CPR is to be seamlessly connected to the SR to make the procedures efficient and systematic. After the screening, TCNs are either transferred to the appropriate border procedure of asylum or return or are refused entry into the state territory.[37] A TCN is refused entry when they arrive at the external border and do not fulfill the entry conditions under the SBC, such as arriving without a valid travel document[38] and are not authorized to enter, for instance, on humanitarian grounds[39]. The objective of the border procedure is to quickly separate, already at the external borders and prior authorizing entry, between those in actual need of international protection and those without a right to stay.[40] When the border procedure is applied, member states would accommodate applicants at or close to the external border or transit zones in accordance with the RCD.[41] In practice, this leads to the use of detention facilities.

While the border procedure could be applied without recourse to detention, the member states should be able to apply the grounds for detention, in accordance with the RCD, to decide on the applicant's right to entry.[42] The duration of the border procedure should be as short as possible, but not exceed 12 weeks, including the decision of the first level of appeal.[43] After this deadline, the applicant would be authorized to enter the territory of the member state, even if a decision for international protection has not yet been issued. However, if the application of an asylum seeker already detained is rejected, the member states can continue the detention, for another 12 weeks, in order to prevent entry into the territory and carry out a return procedure in accordance with the RD.[44] On the other hand, an applicant who had not been detained receives a negative decision, may now be detained *inter alia* where there is a risk of absconding.[45] According to Article 35a CPR, where an application for international protection is rejected, member states shall issue a return decision as part of the rejection decision or, in a separate act. If the decisions are issued as separate acts, they shall be given together and at the same time.[46] This provision aims to create a seamless migration process and a more efficient return policy.[47] However, since return-related detention has been excluded from the study, the return procedures will not be examined further.

[37] *Ibid*.
[38] Regulation (EU) 2016/399, *supra nota* 33, art. 6(1).
[39] Regulation (EU) 2016/399, *supra nota* 33, art. 6(5).
[40] COM(2020) 611 final, *supra nota* 18, recital 40a.
[41] COM(2020) 611 final, *supra nota* 18, art. 41(13).
[42] COM(2020) 611 final, *supra nota* 18, recital 40f.
[43] COM(2020) 611 final, *supra nota* 18, recital 40e.
[44] COM(2020) 611 final, *supra nota* 18, recital 40i.
[45] *Ibid*.
[46] COM(2020) 611 final, *supra nota* 18, art. 35a.
[47] COM(2020) 611 final, *supra nota* 18, preamble.

According to Article 40 CPR, an accelerated examination procedure shall be applied *inter alia* when the applicant has presented false information or documents, is considered a danger to the national security or public order, or when a third country may be considered as a safe country of origin (SCO). The new proposal adds to the list that accelerated procedure shall be applied when an applicant is of nationality of a third country for which the proportion of decisions by the determining authority granting international protection is 20% or lower.[48] Such admissibility criteria will be examined later in section 3.2.2.

Article 41 regulates border procedures that take place *inter alia* following an application for international protection made at an external border or in a transit zone, and following a relocation under the AMMR.[49] Border procedure shall cease to apply when detention is used and the guarantees and conditions for detention as provided for in the RCD are not met or no longer met and the border procedure cannot be applied without detention.[50] The use of border procedures is observed in section 3.2.

1.5. The Asylum and Migration Management Regulation proposal

The AMMR is to replace the Dublin Regulation III and aims to put in place a common framework for asylum and migration management, widening its objective further from only establishing the member state responsible for examining an application for international protection.[51] The proposal introduces a new solidarity mechanism and includes provisions to strengthen the return of irregular migrants, through efficient cooperation with third countries.

The AMMR establishes the criteria and mechanisms to determine the member state responsible for the examination of an application for international protection. Under the AMMR, if an application is lodged in the inappropriate member state, the applicant is transferred to the member state responsible for the examination of the application. During these transfer procedures, applicants may be detained where there is a risk of absconding, on the basis of an individual assessment, and in so far as the detention is proportional and other less coercive

[48] COM(2020) 611 final, *supra nota* 18, art. 40(1)(i).
[49] COM(2020) 611 final, *supra nota* 18, art. 41(1).
[50] COM(2020) 611 final, *supra nota* 18, art. 41(9)(d).
[51] COM(2020) 610 final, *supra nota* 19, preamble.

alternative measures cannot be applied effectively.[52] Detention shall be as short as possible and for no longer than the time reasonably necessary to fulfill the required administrative procedures with due diligence until the transfer is carried out.[53] When a person is detained under the AMMR, the transfer shall be carried out as soon as possible and at the latest within four weeks, after which the detention should no longer apply.[54]

The proposal underlines the principle that a person should not be detained for the sole reason that they are seeking international protection.[55] Detention shall be subject to principles of necessity and proportionality, thereby only allowed as a measure of last resort.[56] Particularly, detention must be in accordance with Article 31 of the RC.[57] When persons are detained on the basis of the AMMR, the member states shall apply RCD on the guarantees and conditions governing the detention.[58] The use of the so-called Dublin detention will be further investigated later in this study in section 3.3. Next, the right to liberty as an international human right is discussed in chapter II.

[52] COM(2020) 610 final, *supra nota* 19, art. 34(2).
[53] COM(2020) 610 final, *supra nota* 19, art. 34(3).
[54] *Ibid*.
[55] COM(2020) 610 final, *supra nota* 19, recital 59.
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*

II. RIGHT TO LIBERTY

Right to liberty is a fundamental human right and its importance has been universally recognized in the Universal Declaration of Human Rights[59] (UDHR) Article 3, according to which everyone has the right to life, liberty, and security of person and also Article 9, stating that no one shall be subjected to arbitrary arrest, detention or exile. Additionally, the right is included in various international as well as regional conventions. The right to liberty is to be understood as the physical liberty of the person, the purpose of which is to protect an individual against arbitrary deprivation of liberty, i.e., detention measures taken by the state.[60] Freedom from arbitrary detention is considered customary law and has been recognized by the HRC as a *jus cogens* norm.[61] Most importantly, the EU as an intergovernmental organization is bound by international law, which has been widely accepted among the lawyers and judicial bodies of international law.[62] In the current study, the focus lays on administrative detention which is to be separated from criminal detention. Administrative detention is often defined as the detention of migrants without a punitive purpose.[63] This chapter introduces the wording of the right to liberty provisions contained in the ECHR, the ICCPR, and the RC and the interpretation of their content by the respective bodies.

2.1. Article 5 of ECHR

The ECHR[64] came into force on 3 September 1953 and was drafted by the Council of Europe (CoE). The convention has been amended several times with additional protocols. It was the first instrument to give legal and binding effect on a regional level to certain rights included in the UDHR. The convention also established the European Court of Human Rights (ECtHR) whose role is to examine applications initiated by either individuals or states regarding violations of the rights set out in the ECHR. EU law and the ECHR are quite firmly connected and the case law of

[59] Universal Declaration of Human Rights, UN General Assembly, 10 December 1948.
[60] Jayawickrama, N. (2002), *supra nota* 7, 375.
[61] Gwangdi, M. I., Garba, A. (2015). The Right to Liberty under International Human Rights Law: An Analysis. *Journal of Law, Policy and Globalization*, 37, 213–217, 213.
[62] Ahmed, T., de Jesús Butler, I. (2006) The European Union and Human Rights: An International Law Perspective. *European Journal of International Law,* 17(4), 771–801, 776.
[63] Ramos, J. R. (2020). The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis. *Revista Electrónica de Estudios Internacionales (REEI),* (39), 1–46, 3.
[64] European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950.

the Court of Justice of the European Union (CJEU) has grown to be similar to that of the ECtHR.[65] Furthermore, the Charter of Fundamental Rights of the European Union (EUCFR) is strongly constructed upon the ECHR. Such coexistence may explain why the grounds for detention under the PMA seem to reflect the wording of the ECHR, as will be shown below.

According to Article 5(1) ECHR, everyone has the right to liberty and security of person and no one shall be deprived of his (*sic*) liberty except in cases listed in the paragraph and which are in accordance with a procedure prescribed by law. The exception relevant at hand is Article 5(1)(f) relating to migration control, which allows deprivation of liberty in cases of lawful arrest or detention of a person to 1) prevent his effecting an unauthorized entry into the country or 2) of a person against whom action is being taken with a view to deportation or extradition. Deprivation of liberty needs to be separated from mere restrictions on movement which are regulated under freedom of movement in Article 2 of Protocol No. 4 to ECHR and when determining which applies, the Court has asserted the difference is "one of degree or intensity and not one of nature or substance".[66]

Asylum detention differs from return detention, as previously established. The four proposals presented in chapter II all regulate asylum detention as well as procedures taking place at borders of states, applying to prevent unauthorized entry, and are therefore clearly based on the wording of the first limb of Art. 5(1)(f). Thus the first limb will be studied next in view of asylum detention, and the second limb will not be further observed.

2.1.1. Case law of ECtHR

The grounds for detention encompass the principle that detention should not be arbitrary; however, there is no requirement that detention should be necessary or proportionate under ECHR law.[67] In fact, the Court has been quite transparent of its interpretation of the right to liberty leading to lower level of protection in the immigration context but has not justified it.[68] Furthermore, the Court concluded in *Saadi v. the United Kingdom*, that until a state has authorized entry, any entry is considered as unauthorized.[69] Moreover, since 2015 the Court has

[65] European Union Agency for Fundamental Rights and Council of Europe. (2020). *Handbook on European law relating to asylum, borders and immigration*. Luxembourg: Publications Office of the European Union, 26.
[66] Council of Europe. (2020). *Guide on Article 5 of the European Convention on Human Rights*, 8.
[67] *Ibid*., 29.
[68] Cornelisse, G. (2016), *supra nota* 28, 86.
[69] *Saadi v. the United Kingdom* [GC], no. 13229/03, § 65, ECHR 2008.

been adamant of its view that detention is permissible up to the decision on an asylum claim to prevent effecting an unauthorized entry, resulting in "detention for administrative convenience".[70] This is contrary to the much supported view that asylum seekers should be authorized to enter the territory after they have filed their application.[71] Furthermore, in *Z.A. and Others v. Russia,* the ECtHR has concluded that in cases of massive arrivals of asylum seekers at state borders, Article 5(1)(f) "does not prohibit deprivation of liberty in a transit zone for a limited period on grounds that such confinement is generally necessary to ensure the asylum seekers' presence pending the examination of their asylum claims or, moreover, on grounds that there is a need to examine the admissibility of asylum applications speedily".[72] The Court seems to lower human rights standards when there is a need to examine applications "speedily". Furthermore, it aims to broaden the scope of application of immigration detention by placing it in a separate branch in Article 5 and therefore offering less protection for immigrants in comparison to other groups of persons.[73] This rationale seems to allow deprivation of liberty automatically when authorization has not yet been issued and can definitely violate the principles of legal certainty and non-arbitrary detention, in the absence of individual assessment.[74]

2.2. Article 9 of ICCPR

The ICCPR entered into force on 23 March 1976.[75] It protects individuals' civil and political rights on a universal level. Article 9 reads that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention and no one shall be deprived of his (*sic*) liberty except on such grounds and in accordance with such procedure as are established by law. The Article provides for the right to information of reasons[76], *habeus corpus*[77], and right to compensation[78] for anyone in detention without a criminal charge, i.e., administrative detention. Furthermore, according to Article 2(3) ICCPR, each state party undertakes to ensure that any person whose rights or freedoms are violated shall have an effective remedy.

[70] Ramos, J. R. (2020), *supra nota* 63, 7.
[71] *Ibid*., 9.
[72] *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, § 163, 21 November 2019.
[73] Costello, C. (2015). Immigration Detention: The Grounds Beneath Our Feet. *Current Legal Problems*, 68(1), 143–177, 147.
[74] Moreno-Lax, V. (2011), *supra nota* 9, 181–182.
[75] International Covenant on Civil and Political Rights (ICCPR), UN General Assembly, 16 December 1966.
[76] *Ibid*., art. 9(2).
[77] *Ibid*., art. 9(4).
[78] *Ibid*., art. 9(5).

2.2.1. Interpretation by the Human Rights Committee

In order to understand the concise wording of Article 9 ICCPR, jurisprudence and other sources of HRC are reviewed. The covenant is monitored by the HRC whose role is to ensure the implementation by the state parties. Regular reports of implementation are submitted by the parties usually every four years.[79] Even though the HRC does not produce official and binding interpretations of the ICCPR, its monitoring practice and experience of applying the covenant have led to an increased value of its views.[80] The HRC has favored a more liberty-oriented interpretation of Article 9 in contrast to the interpretation by ECtHR of ECHR.[81] The HRC has concluded that detention in the context of immigration control is not arbitrary *per se*, but must be justified as reasonable, necessary, and proportionate.[82] Recalling the lack of necessity requirement under ECHR, the ICCPR can be said to offer stronger protection against arbitrary detention. In *F.J. et al v. Australia*, the HRC stated that detention could be authorized under national law but still be arbitrary, since other less intrusive measures had not been demonstrated by the state.[83] Moreover, the Committee stated in *A v. Australia* that mere illegal entry cannot stand for justification of detention.[84] Furthermore, detention must *inter alia* take into account less intrusive measures, such as ATDs.[85] Additionally, any necessary detention should not take place in prisons, but in appropriate and sanitary facilities.[86] On a side note, this seems to be contrary to RCD which allows member states to resort to prison facilities for detention purposes.[87] All in all, the HRC statements implicate a much more strict interpretation than that of ECtHR.

2.3. The Refugee Convention

The RC[88] determines when an asylum seeker becomes a refugee and is therefore recipient of special protection and conditions by the state granting asylum. The Treaty on the Functioning of the European Union (TFEU) Article 78(1) confirms the relevance of RC in EU asylum law,

[79] *Monitoring civil and political rights*. United Nations Human Rights Office of the High Commissioner. Retrieved from https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx, 5 March 2021.
[80] Ramos, J. R. (2020), *supra nota* 63, 10.
[81] *Ibid*.
[82] *General comment no. 35, Article 9 (Liberty and security of person).* UN Human Rights Committee. CCPR/C/GC/35, para. 18. Retrieved from https://www.refworld.org/docid/553e0f984.html, 25 March 2021.
[83] *F.J. et al v. Australia,* No. 2233/2013, UN Human Rights Committee (HRC), 2 May 2016, para. 10.4.
[84] *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9(2).
[85] HRC, *supra nota* 82.
[86] *Ibid*.
[87] COM(2016) 465 final, *supra nota* 15, art. 10.
[88] Convention Relating to the Status of Refugees, UN General Assembly, 28 July 1951; Protocol Relating to the Status of Refugees, UN General Assembly, 31 January 1967.

requiring its policy to comply with the convention. Quite many decades have passed since the drafting of the RC, after which migration issues have changed, resulting in different applications and interpretations of its norms across the world in the present day.[89] However, it is still widely recognized in the EU asylum law and has been ever since the Tampere Conclusions, where it was established that the CEAS was to fully and inclusively apply the RC.[90] Additionally, even though the member states in the EU have the sovereignty to control their external borders, they are legally bound to respect the RC, as international refugee law is superior to national immigration laws.[91]

Article 26 of the RC establishes freedom of movement to refugees lawfully in state territory, whereas Article 31 regulates refugees unlawfully in the country of refuge. According to Art. 31(1), the contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. In this context, the term "refugee" also includes those seeking asylum.[92] Further, according to Article 31(2), the contracting states shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. Therefore, a necessity test is included in the RC just as in ICCPR.

2.3.1. Interpretation by the United Nations High Commissioner for Refugees

There is no official monitoring body for the RC.[93] However, the interpretations of the UNHCR of the RC have great value to further harmonize the states' applications of its provisions, even though it is not an international legal body.[94] Additionally, the RC explicitly obliges state parties

[89] Noll, G. (2011). Article 31 (Refugees Unlawfully in the Country of Refugee/Réfugiés en Situation Irrégulière dans le Pays d'Áccueil). In: Zimmermann, A., Dörschner, J. and Machts, F. (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary* (1243–1276). New York, USA: Oxford University Press, 1268.
[90] European Parliament, *supra nota* 2, para 13.
[91] Dreyer, D. (2015). Human Rights Challenged by European Policy Responses to Irregular Migration. *Moving the Social*, 52, 49–86, 50.
[92] Noll, G. (2011), *supra nota* 89, 1253.
[93] Garlick, M. (2015). International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR. *Refugee Survey Quarterly*, 34(1), 107–130, 108.
[94] Ramos, J. R. (2020), *supra nota* 63, 10.

to cooperate with the UNHCR[95] and according to Article 8 of UNHCR Statute[96], the institution has supervisory jurisdiction over the convention.[97]

The UNHCR has issued Detention Guidelines[98] (Guidelines) on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention. The ten guidelines implement Article 31 RC and support the right to liberty of person and prohibition on arbitrary detention, concurrently recognizing both state sovereignty and the difficulties national asylum systems encounter by irregular migration.[99] Many of the guidelines are relevant in the current study on detention grounds. Firstly, seeking asylum should not be regarded as an unlawful act.[100] The right to liberty and freedom of movement apply to all persons, irrespective of their status.[101] Detention must be in accordance with and authorized by foreseeable and predictable laws.[102] Arbitrary detention is prohibited and to prevent it, detention needs to be necessary in the individual case, reasonable in all circumstances, proportionate to a legitimate purpose, and used as a last resort.[103] Illegal entry or stay of asylum seekers cannot automatically justify detention, and using detention as deterrence violates international norms.[104] Considering ATDs is required[105], discrimination is prohibited[106] and indefinite detention is arbitrary[107]. The Guidelines further lay out procedural safeguards and conditions of detention, and consider the special groups of asylum seekers as well as monitoring and inspection measures.[108]

The Guidelines recognizes three purposes for which detention may be necessary in an individual case, including public order, public health, or national security.[109] For the purpose of protecting public order, detention may be necessary in four instances. A specific asylum seeker strongly likely to abscond may be detained, for instance when they have a history of non-cooperation or

[95] 1951 Refugee Convention art. 35-36.
[96] Statute of the office of the United Nations High Commissioner for Refugees, UN General Assembly, 14 December 1950.
[97] Garlick, M. (2015), *supra nota* 93, 108.
[98] UNHCR. (2012). *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Accessible: http://www.unhcr.org/refworld/docid/503489533b8.html retrieved March 2021, 5 March 2021.
[99] *Ibid*., 6.
[100] *Ibid*., 12.
[101] *Ibid*., 13.
[102] *Ibid*., 14.
[103] *Ibid*., 15.
[104] *Ibid*., 19.
[105] *Ibid*., 22.
[106] *Ibid*., 25.
[107] *Ibid*., 26.
[108] *Ibid*., 27–40.
[109] *Ibid*., 16.

non-compliance.[110] Detention may be used in connection with accelerated procedures when claims are manifestly unfounded or clearly abusive, or for initial identity or security verification, simultaneously recognizing that asylum seekers are often compelled to arrive irregularly or illegally.[111] One fleeing from persecution cannot be expected to obtain all legal documents from national authorities, assuming the institutions providing the documents even exist. Moreover, traveling without appropriate documents further limits the number of passageways to legally enter the EU. Lastly, detention may be necessary to record in an interview the elements on which the application for international protection is based, which could not be obtained in the absence of detention.[112] The next and final chapter investigates the compatibility of the right to liberty and the PMA.

[110] *Ibid*., 16.
[111] *Ibid*., 17.
[112] *Ibid*., 18.

III. COMPATIBILITY OF THE NEW PACT ON MIGRATION AND ASYLUM AND THE RIGHT TO LIBERTY

As has been established in the previous chapter, freedom from arbitrary detention is a fundamental human right. When depriving a person's liberty, it needs to be necessary, prescribed by law, proportional as to its objectives, and only used when all alternative, less intrusive measures have been exhausted. This chapter will focus on the three most commonly used grounds for asylum detention under the PMA, identified in chapter I, and compare them to the international sources of law as presented in chapter II. The RCD provides for an exhaustive list of grounds for detention, however, including broadly phrased provisions.[113] For this reason, the grounds need further investigation. Firstly, the concept of unauthorized entry and other effects of the SR are discussed. Secondly, a more thorough overview of border procedures, as well as the admissibility criteria under the CPR, will take place. Thirdly, transfer procedures in the AMMR and their effect on the detention of asylum seekers are examined. Finally, this chapter indicates the next steps of the PMA and aims to offer amendment proposals.

3.1. Unauthorized entry and effects of the Screening Regulation proposal

The PMA is built on the notion of unauthorized entry. As previously mentioned, a pre-entry phase is introduced in the PMA. During this phase, which includes both screening and border procedures, TCNs are not considered to have entered into the state territory. Detention may be applied during the pre-entry phase.[114] Health, identity, and security checks in the screening procedure do not comprise a novelty[115] in EU asylum law as they have been in practice before, at least in some form, under the SBC.[116] The purpose of channeling persons towards the appropriate procedures, however, seems to reflect an updated perspective. By way of connecting different steps of the immigration process, a more efficient and intact system could be generated. Before observing the notion of unauthorized entry, some problems in the SR are considered.

[113] Tsourdi, E. (2016). Asylum Detention in EU Law: Falling between Two Stools? *Refugee Survey Quarterly*, 35, 7–28, 28.
[114] COM(2016) 465 final, *supra nota* 15, art. 8(3)(a), art. 8(3)(d).
[115] Jakulevičienė, L. (2020, Oct 27). Re-decoration of existing practices? Proposed screening procedures at the EU external borders. EU Immigration and Asylum Law and Policy. [Blog post]. Retrieved from http://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/, 10 March 2021.
[116] Regulation (EU) 2016/399, *supra nota* 33, art. 8.

3.1.1. Asylum seekers not a privileged group in the Screening Regulation proposal?

It has been argued that the SR abolishes the crucial separation between those seeking asylum and other migrants, as the procedures apply whether or not the TCN has applied for international protection.[117] This could result in a dangerously fine line between asylum seekers, internationally recognized as a privileged group of persons, and other immigrants. The EESC also questioned the proposal's respect for fundamental rights, particularly over procedural safeguards, in its recent opinion on the SR and expressed its concerns for turning boats at the Mediterranean into detention centers due to passivity by some member states.[118] In another opinion of the EESC, it criticized the pre-entry screening by noting the term "pre" means that "the person concerned goes to a closed detention centre and stays there, without any possibility of moving" until granted asylum or placed under a return procedure.[119] Asylum seekers are typically people fleeing from fear of persecution and therefore, should duly be given special treatment.[120] This higher level of protection is derived from the RC which recognizes people seeking protection as special when it comes to the right to enter and stay in the host countries.[121] Non-asylum seekers do not have the same level of protection under the RC, and that distinction should be included in the SR.

3.1.2. Unauthorized entry in light of ECHR, ICCPR, and RC

As presented in section 2.1.1., the ECHR allows for detention namely to prevent unauthorized entry. It was established that the reasoning of the ECtHR has resulted in detention practices for "administrative convenience", which has been strongly contested among legal scholars, as well as the Court judges themselves.[122] The legal standards of the ECtHR have precisely been separated to an inferior category for asylum seekers, in contrast to those provided by the ICCPR and the RC.[123] Moreover, the regional ECHR should be overridden by the universal human rights law offering stronger protection for asylum seekers.[124] It seems that the PMA was created to reflect the ECHR, with a legal framework built on the concept of unauthorized entry, and therefore following

[117] Jakulevičienė, L. (2020, Oct 27), *supra nota* 115.
[118] *A New Pact on Migration and Asylum*. EESC. SOC/649-EESC-2020.
[119] *Screening regulation, amended proposal revising the asylum procedures regulation and the amended proposal revising the Eurodac regulation*. EESC. SOC/670-EESC-2020.
[120] *Refugees, asylum-seekers and migrants*. Amnesty International. Retrieved from https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/, 12 May 2021.
[121] Jakulevičienė, L. (2020, Oct 27), *supra nota* 115.
[122] Wessels, J., Bast, J., von Harbou, F. (2020), *supra nota* 28, 50.
[123] Langford, P., Bryan, I. (2011). The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights. *Nordic Journal of International Law*, 80 (2), 193–218, 201.
[124] Wessels, J., Bast, J., von Harbou, F. (2020), *supra nota* 28, 57.

the inadequate human rights obligations.[125] In this context, it is important to examine the concept of unauthorized entry in the light of ICCPR and RC.

The HRC expressed in its General Comment no. 35 on Article 9 ICCPR that asylum seekers who unlawfully enter the state territory may be detained only for a brief period to document their entry, record their entry and clarify their identity, but detention furthering that would be arbitrary.[126] Detention could only be extended when there exists a likelihood of absconding or a threat to national security. The proposed screening procedure sets a maximum duration of 5 days, which could be covered by the standard of briefness established by the HRC.[127] Furthermore, as stated in the Guidelines, detention may be applied for initial identity or security verification, which the screening procedure may comply with. However, extensive use of prolonged and automatic detention on the basis of unauthorized entry during the border procedures seems to be in conflict with the stance of the HRC and the UNHCR Guidelines, due to the lack of individualized circumstances.

Article 31 RC prohibits the detention of asylum seekers upon illegal entry, but allows for restrictions on movements that are necessary and only applied until the asylum seeker's status is regularized. The UNHCR has taken the view that asylum seekers who have registered their asylum application would have their status regularized and be considered lawfully in the territory of a state and consequently, detention would not be permissible.[128] Therefore, unauthorized entry in border procedures followed by the restrictions on liberty may fall under the scope of "regularization of the status" in Article 31(2) RC and thus follow its rationale, but only when it is necessary and based on an individual assessment.[129] Wide and systematic use of detention without necessity and individuality is not in accordance with international refugee law. The view of UNHCR seems to be similar to that of HRC, but contrary to the case law of the ECtHR as well as the PMA provisions allowing for encompassing detention possibilities.

3.1.3. Present in the territory or not?

[125] Wessels, J. (2021, Jan 5), *supra nota* 23.
[126] HRC, *supra nota* 82.
[127] Wessels, J. (2021, Jan 5), *supra nota* 23.
[128] Ramos, J. R. (2020), *supra nota* 63, 9.
[129] Cornelisse, G., Reneman, M. (2020). *Border procedures in the Member States*. European Parliamentary Research Service (EPRS). Retrieved from https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf, 5 April 2021, 75.

Finally, the strong emphasis on unauthorized entry in the PMA can be problematic due to apparent contradictions. Whereas asylum seekers need to be considered present in the territory for the purpose of complying with the principle of *non-refoulement*, at the same time asylum seekers are not considered to be present when detaining them on the grounds for preventing unauthorized entry.[130] Just as well in *Saadi v. United Kingdom*, the dissenting judges considered a paradox was in creation, where the applicant had been considered as lawfully, albeit temporarily, admitted in the state, but at the same time detained to prevent unauthorized entry.[131] Moreover, only recently in *N.D. and N.T. v. Spain*, the ECtHR confirmed that events taking place "at or in proximity to the external border" of a member state were in fact on that state's territory, since the member state practiced jurisdiction on the applicants.[132] The Court did not accept an exception to territorial jurisdiction when the national authorities had exercised jurisdiction. This view should be reflected in the screening procedures completed by national authorities in the pre-entry phase and therefore, the screening could be in conflict with the international rules on jurisdiction.[133] The Court's finding is in line with the clear perception of international refugee law imposing obligations on states even when actions take place offshore or when private operators are used in migration control.[134]

3.2. Border procedures and the admissibility criteria in the Common Procedures Regulation proposal

Detention may be resorted to during border procedures.[135] Border procedures are used to decide on applications for international protection being made at the border of an EU country or in a transit zone, prior to the applicant entering the territory.[136] Border procedures are therefore the second stage of the pre-entry phase, as discussed above. The previous sections concentrated on the notion of unauthorized entry relating to the pre-entry phase and therefore, this section will not reiterate its problematics but instead focus on the criticism towards border procedures in general, the use of admissibility criteria, and the implementation measures by member states.

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[130] Ramos, J. R. (2020), *supra nota* 63, 7.
[131] Moreno-Lax, V. (2011), *supra nota* 9, 182.
[132] *N.D. and N.T. Spain* [GC], nos. 8675/15 and 8697/15, § 181, 13 February 2020.
[133] Rijken, C. (2021, Jan 24). Screening at the borders of the EU: Challenging the territoriality principle! [Blog post]. Retrieved from https://www.humanrightshere.com/post/blog-series-eu-new-pact-on-migration-and-asylum-iii, 15 March 2021.
[134] Gammeltoft-Hansen, T. (2011). *Access to asylum: international refugee law and the globalisation of migration control.* (1st ed.) New York, USA: Cambridge University Press, 232.
[135] COM(2016) 465 final, *supra nota* 15, art. 8(3)(d).
[136] European Asylum Support Office. (2020). *Border Procedures for Asylum Applications in EU+ Countries*. Retrieved from https://www.easo.europa.eu/sites/default/files/publications/Border-procedures-asylum-applications-2020.pdf, 10 March 2021, 6.

Asylum seekers subject to border procedures may be detained as established in the CPR and under the RCD provisions. It is commonly recognized that asylum seekers are generally deprived of their liberty during a border procedure.[137]

3.2.1. Broader use of border procedures – problematics

Previously, the Commission has tried to limit the use of border procedures because of the acknowledged impact they have on the right to liberty.[138] However, the current CPR increases the practice of border procedures and makes them mandatory in a broad range of cases, such as when the applicant is from an SCO or a country with a 20% or lower Union-wide recognition rate.[139] In the implementation assessment conducted by the European Parliament, asylum border procedures were considered to result in multiple fundamental human rights violations, including to the right to liberty.[140] Border procedures facilitated the use of systematic and extended practices of *de facto* detention and moreover, the legal "fiction of non-entry" during border procedures may result in violations of the right to asylum and the principle of non-refoulement.[141] According to an assessment by the European Council on Refugees and Exiles (ECRE), the use of such procedures for determining whether asylum is issued by the state or not is considered to be quite controversial as they most likely lead to insufficient procedural safeguards.[142] As the length of detention in border procedures is extended significantly, deprivation of liberty becomes a legitimized norm, which is at odds with the universal presumption against the detention of asylum seekers and refugees.[143] Further, European Asylum Support Office's (EASO) recent report exposed a substantially lower, 7% recognition rate of applications under border procedures, compared to the total EU recognition rate (which includes regular procedures) of 33%.[144] According to ECRE, such distinction indicates the discriminatory and arbitrary nature of border procedures.[145]

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[137] Cornelisse, G. (2016), *supra nota* 28, 75.
[138] *Ibid*., 82.
[139] COM(2020) 611 final, *supra nota* 18, art. 41(3).
[140] Van Ballegooij, W., Eisele, K. (2020). *Asylum procedures at the border*. European Parliamentary Research Service (EPRS). Retrieved from https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf, 20 March 2021, 27.
[141] *Ibid*., 24.
[142] ECRE. (2019). *Border procedures: Not a Panacea*. Retrieved from https://www.ecre.org/wp-content/uploads/2019/07/Policy-Note-21.pdf, 20 March 2021, 1.
[143] *Ibid*., 2.
[144] European Asylum Support Office. (2020), *supra nota* 136, 8.
[145] ECRE. (2019), *supra nota* 142, 3.

3.2.2. Admissibility criteria in accelerated examination procedures

The CPR determines the scope of the asylum border procedures and declares that decisions in border procedures may be taken on the admissibility or on the merits of the application when an accelerated examination procedure is conducted. Such accelerated examination procedures include the use of admissibility criteria, such as the SCO concept and the 20% recognition rate. The former has been in use before the CPR, but the latter is a novelty found in Article 40(1)(i), as a new ground for applying the accelerated examination procedure. The more extensively such criteria and procedures are used, the more probable is the use of border procedures. Consequently, as the use of border procedures increases, so do detention measures, as their profound link to each other has been established above. When considered in the light of the freedom against deprivation of liberty, extensive resorting to admissibility criteria may significantly increase detention in the EU member states, an important matter that should be considered in the PMA.

Safe country concepts have been in use in Europe since the 1980s[146] and they take many forms[147], but the safe country of origin is the most relevant one in the current discussion. The practice has been under wide criticism, mainly questioning the concept of letting nationality alone create the assumption that asylum seekers' protection needs are fictitious.[148] SCO policies have been demonstrated to be used as deterrent measures to keep asylum seekers away, as tools to reduce the number of asylum seekers, and their use has caught the attention of multiple human rights groups.[149] However, there have been indications to show that SCO practices most often follow the rule of law.[150] Nevertheless, when SCO concepts are in use, they should also be used in favor of the asylum seekers, by the implementation of, for instance, unsafe country concepts, deemed to lower the threshold for granting asylum. It seems that such practices are not to be implemented anytime soon in the EU.[151]

An accelerated examination procedure may also be used when the applicant is of nationality of a third country for which the proportion of decisions granting international protection is on Union-wide average 20% or lower. A recognition rate is defined as "the number of positive decisions on

[146] Hunt, M. (2014). The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future. *International Journal of Refugee Law*, 26(4), 500–535, 504.
[147] *Ibid*., 502.
[148] *Ibid*., 500.
[149] *Ibid*., 528.
[150] Costello, C. (2016). Safe Country? Says Who? *International Journal of Refugee Law*, 28(4), 601–622, 621.
[151] *Ibid*., 622.

applications for international protection as a proportion of the total number of decisions issued for each stage of the procedure".[152] A study published in 2003 showcased the clear decorrelation between numbers of asylum applications and recognition rates, indicating that an increase of applications was often followed by a decrease in recognition rates.[153] Despite the time passed since the study, it is noteworthy to consider its results in the context of introducing a recognition rate as an admissibility criterion under the CPR. Nevertheless, the recognition rates entail the same problem as the SCO policies, when the nationality of an applicant is the determining factor, without taking into consideration individual characteristics. In the light of the requirement of individual assessment for detention in accordance with the ICCPR and RC, the wide practice of border procedures due to admissibility criteria may indirectly result in detention where the protection needs are not assessed on an individual level. Furthermore, the Guidelines allow for detention in accelerated procedures only when the claims are clearly abusive or manifestly unfounded. The present admissibility criteria do not seem to reflect that standard.

3.2.3. Weak implementation by member states

Border procedures are profoundly criticized due to their inadequate implementation within EU member states. Scope of application, detention practices, time limits for procedures, and legal safeguards have great variance.[154] In practice, there are short time windows for decision-making and appeals and a lack of information and legal assistance for applicants.[155] Furthermore, the lack of publicly made data on the detention of asylum seekers at borders or in transit zones is substantial, including locations and length of detention, the grounds and procedural guarantees for detention, as well as use of less coercive alternatives.[156] Additionally, the use of EU agencies such as EASO for assisting member states to conduct border procedures has turned out to be ineffectual, for example in Greece, where an average time period for a border procedure was seven months.[157] These results have demonstrated the wide spread human rights violations especially in the southern states of the EU. Moreover, there has been a blurring of lines between deprivation of liberty and restrictions on freedom of movement, and additionally, there is often

[152] *Recognition rate (in procedures for international protection)*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/recognition-rate-procedures_en, 29 March 2021.
[153] Vink, M., Meijerink, F. (2003). Asylum Applications and Recognition Rates in EU Member States 1982–2001: A Quantitative Analysis. *Journal of Refugee Studies*, 16(3), 297–315, 310.
[154] Van Ballegooij, W., Eisele, K. (2020), *supra nota* 140, 26.
[155] *Ibid*., 24.
[156] Cornelisse, G., Reneman, M. (2020), *supra nota* 129, 74.
[157] ECRE. (2019), *supra nota* 142, 4.

no legal basis for either in domestic laws.[158] In practice, EU member states do not evaluate the use of less coercive measures before resorting to detention, which is at odds with the principles of necessity and proportionality.[159] Therefore, the automatic use of border procedures by some member states can be said to violate the existing EU secondary law, ICCPR, and the RC.[160] This state of affairs should be taken into consideration accordingly in the PMA proposals.

3.3. Transfer procedures in the AMMR

Detention may be used in the context of the so-called Dublin transfers.[161] The Dublin system includes the rules under which the member state responsible for the examination of an international protection application is determined. The Dublin rules have been under extreme criticism and have generally been described as one of the fundamental reasons for the chaos during the 2015 refugee crisis. The deadlock of the CEAS reform has in big part resulted from disagreements over the criteria under which the responsible member state for application examination is established, as well as the solidarity rules. With the emergence of the PMA, the current Dublin Regulation is to be withdrawn and replaced with the AMMR. However, many scholars have pointed out that the AMMR does not seem to have many novelties, but mainly reintroduces the provisions of the Dublin Regulation.[162] Nevertheless, detention due to transfers under the AMMR is very much in place, and it will be examined next.

3.3.1. Outline of the transfers

The AMMR has in force five criteria for determining the member state responsible for the examination of an asylum application: best interest of the child[163], family ties[164], residence documents or visas[165], diplomas or other qualifications[166] and country of first entry[167]. In most cases, the last criterion applies and the country of first entry of the asylum seeker would be

[158] Van Ballegooij, W., Eisele, K. (2020), *supra nota* 140, 26.
[159] *Ibid*.
[160] Cornelisse, G., Reneman, M. (2020), *supra nota* 129, 76.
[161] COM(2016) 465 final, *supra nota* 15, art. 8(3)(g).
[162] Maiani, F. (2020, Oct 20). A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact. [Blog post]. Retrieved from http://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/, 15 March 2021; Bloj, R., Buzmaniuk, S. (2020), *supra nota* 24.
[163] COM(2020) 610 final, *supra nota* 19, art. 15.
[164] COM(2020) 610 final, *supra nota* 19, art. 16-18.
[165] COM(2020) 610 final, *supra nota* 19, art. 19.
[166] COM(2020) 610 final, *supra nota* 19, art. 20.
[167] COM(2020) 610 final, *supra nota* 19, art. 21.

responsible to examine the application. However, many asylum seekers continue their passage through Europe which is defined as the secondary movement of migrants.[168] For that reason, the applicants are (physically) transferred to the EU member state who is considered to be responsible for examining the merits of an application following a Dublin procedure, thus a "Dublin transfer" is conducted.[169] Many asylum seekers or migrants move irregularly within Europe in search of better conditions than those provided by the most southern and eastern EU member states.[170] As a result, an asylum seeker may be detained when they irregularly enter a state other than that of first entry and lodge an application in that state.

3.3.2. Criticism of Dublin detention

Dublin detention has been described as "a special form of detention which should only serve the purpose of facilitating a transfer to the responsible Dublin state and falls within neither the categories of restrictions of liberty for asylum seekers nor detention in the context of return".[171] Such statements by scholars indicate the exceptional nature of Dublin detention since traditionally detention has been strongly affiliated only to either upon seeking entry or during return processes. The more Dublin transfers are conducted, the more detention measures are used in practice. Dublin transfers fall within the scope of arrangements of shared protective responsibility within the Member States, along with the above mentioned safe country concepts.[172] Furthermore, border procedures could be applied to applicants under the Dublin procedures, but only in cases with a significant risk of absconding.[173] However, with the AMMR, the term "significant risk of absconding" is replaced with only "risk of absconding"[174] which can be seen as yet another basis for a lowered threshold for detention. Moreover, categorizing asylum seekers under the Dublin procedures has been recognized to consistently expand the grounds for detention and ultimately lead to so-called criminalized migration.[175]

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[168] *Secondary movement of migrants*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/secondary-movement-migrants_en, 5 March 2021.
[169] *Dublin transfer*. European Commission. Retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/dublin-transfer_en, 5 March 2021.
[170] Könönen, J. (2020). Legal geographies of irregular migration: An outlook on immigration detention. *Population, Space and Place*, 26(5), 1–11, 7.
[171] Wessels, J., Bast, J., von Harbou, F. (2020), *supra nota* 28, 40.
[172] Ramos, J. R. (2020), *supra nota* 63, 13.
[173] Van Ballegooij, W., Eisele, K. (2020), *supra nota* 140, 34.
[174] COM(2020) 610 final, *supra nota* 19, art. 34(2).
[175] Bosworth, M., Vannier, M. (2020). Blurred lines: Detaining asylum seekers in Britain and France. *Journal of Sociology*, 56(1), 53–68, 63.

3.4. Necessity and proportionality

As it has been established, the HRC has created a framework of principles against arbitrary detention that include necessity, proportionality, reasonableness, and the use of less coercive measures. The UNHCR Guidelines establish a comprehensive set of standards recognizing these same standards, and Article 31 RC includes a necessity test. As stated above, the ECHR does not establish a necessity nor a proportionality requirement, nor is it required according to the ECtHR.

Under the AMMR, detention can be applied to secure transfer procedures only when there is a risk of absconding, after an individual assessment when it is proportional and other less coercive alternative measures cannot be applied as effectively.[176] The RCD provides similar wording, only adding that detention is justified when it proves necessary and that special care must be taken to ensure that length of detention is proportionate.[177] Further, RCD provides for an exhaustive list of grounds for detention.[178] Therefore, the PMA offers legal standards for necessity and proportionality, complying with the requirements by HRC and UNHCR. Actually, the PMA includes even more rigorous wording in its provisions than the ICCPR and RC.

However, some gaps can be seen in the proposals. Firstly, the RCD does not establish a maximum period of time for detention, leaving it to national legislation. According to a report by the European Union Agency for Fundamental Rights (FRA) in 2010, nine EU member states did not have legal time limits in place for detention.[179] According to the Guidelines, indefinite detention is arbitrary and maximum limits on detention should be established in law.[180] Moreover, EU law has been described to entail too many broadly phrased detention grounds resulting in poor legal guarantees in practice, despite the requirements of necessity and proportionality.[181] Specifically, the most important aspect to consider is the lack of regulation on ATDs, which is examined next.

[176] COM(2020) 610 final, *supra nota* 19, art. 34(2).
[177] COM(2016) 465 final, *supra nota* 15, preamble.
[178] COM(2016) 465 final, *supra nota* 15, art. 8.
[179] *Detention of third country nationals in return procedures*. FRA. Retrieved from https://fra.europa.eu/en/publication/2010/detention-third-country-nationals-return-procedures, 20 April 2021.
[180] UNHCR. (2012), *supra nota* 98, 26.
[181] De Bruycker, P., Tsourdi, E. L. (2016). The challenge of asylum detention to refugee protection. *Refugee Survey Quarterly*, 35, 1–6, 1.

3.4.1. Lack of comprehensive regulation on less intrusive measures

The provisions regulating detention in the PMA include the requirement to take into consideration measures that are less coercive before resorting to detention.[182] Such measures need to be stipulated in national law.[183] However, the PMA proposals do not offer uniform regulations for such measures, often called "alternatives to detention". According to the Guidelines, the principle of legal certainty requires adequate regulation of ATDs and it could be reasonable to provide uniform standards for their implementation, just as detention is stipulated, broadly by directly binding regulations in the EU. Moreover, according to FRA, almost all member states provide for the possibility of alternatives to detention, but in practice, they are not applied enough.[184] Large-scale use of detention in practice by member states seems to imply a compelling need for more comprehensive regulation.

3.5 Future of the New Pact

The draft PMA by the Commission has entered the discussions between the Council and the European Parliament. Due to the ongoing COVID-19 pandemic and the extreme divergence and polarization between EU member states, the negotiations will probably take longer than initially proposed and hoped for by the Commission.[185] It remains to be seen if the complexity of the system can be fixed and if the EU institutions will reach a consensus. Alternatively, it could result in an even wider gap between the EU asylum laws and their implementation by member states, as has been described of the reality after previous EU asylum regime development efforts in the past.[186] In the next section, amendment proposals for the PMA will be presented to ensure asylum detention would only be applied when duly justified and in accordance with international law obligations.

3.5.1. Amendment proposals

[182] COM(2016) 465 final, *supra nota* 15, art. 8(2).
[183] COM(2016) 465 final, *supra nota* 15, art. 8(4).
[184] *Alternatives to detention for asylum seekers and people in return procedures.* FRA. Retrieved from https://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures, 26 April 2021.
[185] Bloj, R., Buzmaniuk, S. (2020), *supra nota* 24.
[186] Trauner, F. (2016). Asylum policy: the EU's 'crises' and the looming policy regime failure. *Journal of European Integration*, 38(3), 311–325, 321.

Firstly, in accordance with the UNHCR Recommendations for the PMA, the use of ATDs needs to be "further explored".[187] According to UNHCR Options Paper 2, drawing from the Guidelines, ATDs need to be in place to make sure detention is only used as a last resort and to avoid arbitrary detention.[188] Many states resort to detention as a deterrence measure, even though it has not proved to be effective.[189] ATDs are tremendously more inexpensive than detention, and well cooperated with. States are likely to resort to ATDs due to their cost-effectiveness and advanced respect towards the human rights of refugees.[190] Both psychological and physical harm of asylum seekers are avoided with ATDs, and the relationships between asylum seekers and the host country may be developed towards trust and further cooperation.[191] For these reasons, the PMA should include much more extensive, binding, and uniform regulation on ATDs, especially due to the lack of their practice by member states.

Secondly, the PMA should follow other obligations of international law, such as the ICCPR and the RC, instead of the ECHR in relation to the concept of unauthorized entry. The PMA proposal should not follow the wording of Article 5 ECHR to develop a legal regime of systematic use of detention automatically based on unauthorized entry. Asylum seekers should be authorized entry as soon as their applications have been lodged and consequently, detention would cease to apply. The PMA should include specific provisions to build on the presumption of liberty instead. The EU asylum system should treat asylum seekers as presumptive refugees, and not the other way around, especially since such a significantly high percentage of asylum seekers are granted asylum annually in the EU.[192]

Thirdly, the use of border procedures should not be made mandatory, as the CPR has done with admissibility criteria, such as the SCO concepts or 20 % recognition rates. Border procedures should not be generally encouraged by law, as the Commission itself has concluded in the past.[193] Due to the established link between detention practices and border procedures, the latter should only be used as a last resort. Further, the SR should include provisions to ensure the

[187] *UNHCR Recommendations for the European Commission's proposed pact on migration and asylum*. UNHCR. Retrieved from https://www.unhcr.org/5e60d1847, 15 April 2021.
[188] *Options Paper 2: Options for governments on open reception and alternatives to detention*. UNHCR. Retrieved from https://www.unhcr.org/553f58719.pdf, 1 April 2021, 1.
[189] *Ibid*.
[190] Sampson, R., Mitchell, G. (2013). Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales. *Journal on Migration and Human Security*, 1(3), 97–121, 107.
[191] UNHCR, *supra nota* 188, 1.
[192] *Asylum statistics in Europe: Factsheet*. ECRE. Retrieved from https://www.ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf, 10 April 202, 1–2.
[193] Cornelisse, G. (2016), *supra nota* 28, 75.

screening procedure's maximum period of five days is truly adhered to in practice, in accordance with ICCPR and RC.

Finally, a maximum time limit of detention needs to be included in the PMA. The lack of stipulation, as well as the weak implementation of procedural safeguards by the member states, have demonstrated a need for more comprehensive and compelling regulations from the EU level. International law obliges states to establish a time limit to prevent prolonged or indefinite detention and the EU should use its competence to require it from EU member states directly.

CONCLUSION

The 2015 peak of asylum claims unveiled the ineffective migration and asylum system of the EU. Moreover, differences in national policies and legislation have complicated the process towards cooperation and development, prolonging the CEAS reform substantively. In September 2020, the PMA was introduced in efforts to provide for a fresh start. However, the Pact has been criticized for its inability to actually bring about change, and its lack of accomplishments in order to meet the necessary requirements to obtain comprehensiveness in the EU asylum *acquis*.

Under EU law, asylum seekers are extremely detainable. The PMA provides extensive grounds for detention. The grounds relevant in this study focusing on asylum detention, in particular, are those imposed on irregular entrants who are subject to screening procedures, asylum seekers in border procedures, and those being transferred under the Dublin regime. The grounds for detention are first laid out in the RCD and further specified in other regulations and directives, namely in SR for screening procedures, CPR for border procedures, and AMMR for transfer procedures.

Within international human rights obligations, the ECHR seems to offer the lowest level of protection for asylum seekers. Article 5(1)(f) includes no requirement of necessity for detention and additionally, the ECtHR has concluded that detention is permissible up to a final decision of an asylum claim. This is contrary to the view of HRC and UNHCR that asylum seekers should be authorized entry and no longer be detained after their asylum claim has been registered. Moreover, necessity requirements are provided by the HRC and RC. However, RC and ICCPR have been under criticism due to a lack of explicit regulation in regard to the right to liberty. Thus, the HRC and the UNHCR have developed decisions and tools to operate in the area of asylum. Especially the Guidelines and jurisprudence of HRC offer a comprehensive set of rules to ensure arbitrary detention is prevented in practice and in law.

The PMA is built on strong external border protection and preventing asylum seekers to enter the EU territory until permission is granted. The notion of unauthorized entry in the PMA as a form of catch-all ground for detention is derived from the ECHR, following Article 5(1)(f) wording to the tee. The rules under unauthorized entry may comply with the requirements under HRC and UNHCR, but only during initial identity and security checks and for a brief period of time. The

maximum five day period of coercive detention under the SR seems to be justified. However, under the auspices of the RC, asylum seekers should be authorized to enter after their claim has been registered, and resultingly, detention would end. Similarly, HRC has concluded that any detention furthering an initial period for documentation purposes would be considered arbitrary, if conducted without additional individualized grounds.

Additionally, the screening procedure seems to blur the lines between asylum seekers and other immigrants, which is problematic since asylum seekers are considered to be a privileged group with special needs, as recognized by the RC. Further, the territoriality principle needs to be carefully upheld when national authorities exercise jurisdiction on asylum seekers at or in proximity to external borders during screening and border procedures.

Moreover, asylum seekers are directed to border procedures in an ever-expanding array of situations. Border procedures have in the past been recognized as problematic because of their impact on increased detention, but the CPR nevertheless intensifies their use by making them mandatory when certain admissibility criteria apply. Thereby extensive use of border procedures is proposed, even though their inadequate implementation by member states has been well discovered. Additionally, transfer procedures form a special group of detainable asylum seekers, who are being deported under the Dublin criteria to determine the member state responsible to examine an international protection application. The AMMR brings no substantial differences into the criteria, which has been considered to be problematic and disappointing, as they are largely to blame for the CEAS reform deadlock in recent years.

The aim of this study was to create amendment proposals to the PMA that would ensure asylum detention is only applied when it is duly justified and in accordance with international law obligations. The PMA offers legal guarantees such as the requirements for necessity and proportionality in its provisions, containing more stringent standards prescribed in law than those provided by international human rights law. However, the PMA does not offer coherent regulation on ATDs to ensure better compliance by member states, abating the impact of the necessity requirement. The benefits of ATDs are significant, providing much stronger protection over asylum seekers' human rights. Therefore, the PMA should be modified to include binding regulation on ATDs. Also, asylum seekers should be authorized to enter the territory of the EU without delay when their claim for protection has been registered. Furthermore, border procedures should not be made mandatory in a broad range of cases and they should only be

applied as last resort due to their growing impact on asylum detention. Also, the maximum screening period needs to be strictly maintained in law and in practice. Finally, the PMA needs to set a time limit on the length of detention to comply with international law.

The hypothesis present throughout the thesis was that some of the PMA provisions could constitute arbitrary detention and thus violate the right to liberty. During this research process, the complexity of the CEAS system quickly transpired, as well as the challenges the PMA has and continues to be faced with. The fact that international law, particularly the conventions, do not offer more precise standards created elements of inconvenience. Fortunately, jurisprudence and different soft law instruments offered relief to create a more accurate framework. Perhaps, due to this state of affairs, the PMA has been able to take its present form. Nevertheless, there are clear conflicts between the proposal and international law obligations that have emerged during the analysis. Thus, the hypothesis proved to be correct in that some of the PMA provisions could contradict the right to liberty and result in arbitrary asylum detention in practice. Interestingly though, a lack of regulation seems to create an entirely different set of problems, resulting in a lower level of protection over the right to liberty of asylum seekers. It seems ambivalent to propose more extensive regulation when EU law can already be considered a complex regime. Nevertheless, the PMA should be modified as well as extended to ensure asylum seekers are not deprived of their liberty in an arbitrary manner.

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