The authority to admit and expel non-nationals is generally regarded as a key element of state sovereignty. To enforce such decisions, States often resort to administrative detention. EU Member States were initially reluctant to lose control over the legal exercise of physical force toward migrants. However, immigration detention is not only instrumental in enforcing a given policy aim but also a tool of migration policy in its own right, used for a variety of purposes.[151] Accordingly, regulating immigration detention is a necessary corollary of the EU's task of developing a common immigration policy according to Art. 79 TFEU.

Since the second phase of legislation in the field of migration policy, the EU has exercised its respective powers and developed a broad – albeit fragmented – regulatory framework in relation to administrative detention of migrants. Immigration detention is treated as an adjunct to the reception of asylum seekers (Reception Conditions Directive),[152] including the EU-wide mechanism for allocating asylum jurisdiction (Dublin Regulation),[153] and to the legislative act regulating the procedure on terminating illegal residence, including deportations (Return Directive).[154] Other related instruments touch on the issue of detention indirectly, such as the Schengen Borders Code[155] or, briefly, the Asylum Procedures Directive.[156] As a result, EU law has established a regulatory framework on detention that covers all relevant situations and, hence, has assumed for itself primary responsibility for Human Rights compliance in this field of European migration policy.

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151 Leerken and Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', 50 *British Journal of Criminology* (2010) 830.

152 Directive 2013/33/EU, recitals 15–20 and Art. 8–11.

153 Regulation 604/2013, recital 20 and Art. 28.

154 Directive 2008/115/EC, recitals 16–17 and Art. 15–17.

155 Regulation 2016/399, Art. 14, Annex V and VI: Border guards must prevent the entry of persons without a right to enter 'in accordance with national, Union and international law'.

156 Directive 2013/32/EU, Art. 26: a person shall not be detained for the sole reason that he or she is an applicant; speedy judicial review must be ensured; cross-reference to Reception Conditions Directive for grounds, conditions and guarantees.

2.1 Structural challenges and current trends

In public discourse, migration has increasingly been assimilated to security. Migrants, especially those who are undocumented or otherwise irregular, are presented as a danger to society. Detention policies have become emblematic in an attempt to show control and respond to the threat of terrorism as well as to mounting political pressures regarding border security.[157] There is also an increasing trend of EU Member States using detention as a deterrence policy with a view to managing the numbers of 'undesirable' migrants, by seeking to push those present in their territory to leave, and to deter future arrivals.[158] Thus, detention is portrayed as a legitimate response to protecting national interests and serves to further a variety of broader strategies of migration management. It is implemented toward migrants, including refugees and asylum seekers, at all stages of their migration process: upon seeking entry to a territory or pending deportation, removal or return from a territory,[159] but also during asylum procedures (e.g., the special form of detention pending transfer to another Dublin State).[160]

Detention, defined here as 'deprivation of liberty or confinement to a particular place'[161], can take place in a variety of locations – from specialized administrative facilities to prisons, airport transit zones, or remand

157 Sampson and Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales', 1 *Journal on Migration and Human Security* (2013) 97; see also Leerken and Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', 50 *British Journal of Criminology* (2010) 830, at 842–844; Ph. de Bruycker et al., *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation* (2015), at 19.

158 See, e.g. for Denmark, J. Suarez-Krabbe, J. Arce and A. Lindberg, *Stop Killing Us Slowly: A Research Report on the Motivation Enhancement Measures and Criminalization of Rejected Asylum Seekers in Denmark* (2018), available at http://refugees.dk/media/1757/stop-killing-us_uk.pdf.

159 A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants'* (2011), available at https://www.unhcr.org/4dc949c49.pdf.

160 Dublin detention is a special form of detention that 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; see Art. 28(2) Dublin III Regulation.

161 UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at 9, available at https://www.refworld.org/docid/503489533b8.html.

facilities.[162] States justify detention measures with practical considerations – such as having the migrant at the disposal of the authorities for identity checks or public health screenings at arrival – as well as enforcement-related motivations such as securing public order, or political objectives such as protecting host societies.[163]

The three key pieces of legislation at EU level that pertain to detention are subject to ongoing reform efforts,[164] which tend toward a tightening of the regime. Whereas in the context of the second phase of CEAS, the European Commission still displayed a fundamental rights approach to migration detention (albeit one met with skepticism by some Member States),[165] more recently the Commission has adopted a more restrictive and repressive approach that moves further away from an administrative law rationale and integrates the punitive logic of criminal law, captured by the term 'crimmigration'.[166]

We observe three key trends in which this plays out: (1) an increased use of immigration detention for a wider range of reasons, (2) a proliferation of area-based restrictions and other measures limiting migrants' freedom of movement short of detention, and (3) problematic conditions in immigration detention facilities. These trends naturally increase the tension between the expanding scope of EU migration policy and its commitment to Human Rights.

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162 Ph. de Bruycker et al., *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation* (2015), at 15.

163 G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (2010), at 247; Vohra, 'Detention of Irregular Migrants and Asylum Seekers', in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (2007) 49.

164 European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016; European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018; European Commission, Proposal for a recast Dublin Regulation, COM(2016) 270, 4 May 2016.

165 See Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' 35 *Refugee Survey Quarterly* (2016) 7, at 11.

166 Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015) 143; citing Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', 64 *Washington & Lee Law Review* (2007) 469.

Trend 1: More frequent and systematic use of detention for a wider range of reasons

We observe that Member States are more frequently and systematically resorting to immigration detention based on a wider range of grounds. This trend is buttressed by EU legislation and policy.

First, we observe an expansion of the reasons for detention. Although the relevant Directives establish lists of permissible detention grounds,[167] and recourse to detention is to some extent subject to political economies,[168] there is ample evidence indicating that the use of immigration detention is on the rise quantitatively, both for those seeking asylum and in the context of returns. For example, in Greece, immigration detention remains systematic and arbitrary, and some forms of detention lack a legal basis altogether.[169] Germany has expanded its use of detention with a view to deportation with the introduction of a new 'Orderly Return Act' adopted in 2019.[170] Denmark explicitly used detention as a deterrence measure when reopening old military camps and prisons to house rejected asylum seekers with a view to making life so 'intolerable' for them that they would leave Denmark 'voluntarily'.[171] Immigration detention affects not only asylum seekers or rejected asylum seekers but also migrants of any kind of status. A particularly egregious example is the Windrush scandal in the United Kingdom, then still an EU Member State. In the course of the so-called 'hostile environment policy', which involved administrative

167 Art. 8(3) Reception Conditions Directive; Art. 15(1) Return Directive.

168 Prior to 2015, in some Member States the number of migrants in detention went down sharply after the high costs and low effectiveness became clear (NL) or the judicial control became stricter (Germany). See I. Majcher M. Flynn and M. Grange, *Immigration Detention in the European Union: In the Shadow of the Crisis* (2020), at 1–4.

169 See Greek Refugee Council, *Administrative Detention in Greece: Field Observations (2018)* (2019), available at https://www.gcr.gr/media/k2/attachments/GCR_Ekthesi_Dioikitik_Kratisi_2019.pdf.

170 *Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht* (*Geordnete-Rückkehr-Gesetz*), 15 August 2019; for critique, see Pro Asyl, *Stellungnahme zur Sachverständigenanhörung des Ausschusses für Inneres und Heimat des Deutschen Bundestages am 03.06.2019*, 29 May 2019, available at https://www.proasyl.de/wp-content/uploads/PRO-ASYL_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf.

171 J. Suarez-Krabbe, J. Arce and A. Lindberg, *Stop Killing Us Slowly: A Research Report on the Motivation Enhancement Measures and Criminalization of Rejected Asylum Seekers in Denmark* (2018), available at http://refugees.dk/media/1757/stop-killing-us_uk.pdf.

and legislative measures to make staying in the UK as difficult as possible for people so as to induce them to 'voluntarily leave', dozens of people, many of whom had been born British subjects, were wrongly detained and deported.[172]

At EU level, reform efforts reinforce restrictive State practice, in particular with a view to a more expansive use of detention. Specifically, regarding pre-deportation detention, the Commission's 2018 proposal for a recast Return Directive would make the list of grounds for detention explicitly non-exhaustive. In addition, it would add a new, broadly framed ground for detaining irregular migrants, namely, the option to detain individuals posing a threat to public order or national security. It also proposes a non-exhaustive list of 'objective' criteria for determining the risk of absconding, which is one of the existing grounds for detention, as well as a new requirement of setting a maximum detention period of at least three months, with a view to giving States sufficient time to organize deportations.[173]

Second, we observe a wider and more arbitrary use of detention for asylum seekers upon entry specifically. This trend is reflected in EU as well as Member State policy. Examples of this development are national legislative reforms in countries such as Hungary and Poland to the effect that asylum procedures are conducted almost exclusively at the border, involving detention on a regular basis. The EU's policies echo the restrictive turn, as both the 'hotspot' approach[174] and the follow-up proposal

172 W. Williams, *Windrush Lessons Learned Review, Independent Review, Ordered by the House of Commons,* 19 March 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf.

173 European Commission, 'Fact Sheet: State of the Union 2018: Stronger EU rules on return: Questions and Answers', 12 September 2018, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_5713.

174 European Commission, A European Agenda On Migration, COM(2015) 240, 13 May 2015; European Commission, Explanatory note on the 'hotspot' approach, 15 July 2015, available at https://www.statewatch.org/media/documents/news/2015/jul/eu-com-hotsposts.pdf; S. Silverman, *The EU´s Hotspot Approach: Questionable Motivations and Unreachable Goals* (2018), available at https://www.e-ir.info/2018/04/17/the-eus-hotspot-approach-questionable-motivations-and-unreachable-goals/; Markard and Heuser, '"Hotspots" an den EU-Außengrenzen: Menschen- und europarechtswidrige Internierungslager', *Zeitschrift für Ausländerrecht (ZAR)* 165.

of 'controlled centres'[175] build on the detention of asylum seekers.[176] The increased use of so-called border procedures, which almost automatically entail liberty-restricting measures, is one of the major trends in European asylum policy (we shall return to this issue in sections 2.2.3 and 2.2.4, below).[177]

EU legislation paves the way for expanded use of detention for asylum seekers. For example, in the Reception Conditions Directive the permitted derogations from the required level of reception conditions seem to open up to the option that housing is provided in detention.[178] These provisions create a legal ambiguity that appears to allow Member States to lawfully

175 European Council, European Council meeting (28 June 2018): Conclusions, EUCO 9/18, at 6; European Commission, Migration: 'Controlled Centres' in EU Member States: Follow-up to the European Council Conclusions of 28 June 2018, available at https://ec.europa.eu/info/sites/default/files/controlled_centres_en.pdf; European Commission, Non-paper on 'controlled centres' in the EU: interim framework, 24 July 2018, available at https://ec.europa.eu/home-affairs/system/files/2020-09/20180724_non-paper-controlled-centres-eu-member-states_en.pdf; see F. Maiani, '*Regional Disembarkation Platforms' and 'Controlled Centres': Lifting The Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?* (2018), available at https://eumigrationlawblog.eu/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere/.

176 Campesi, 'Normalising The Hotspot Approach? An Analysis of the Commission's Most Recent Proposals', in S. Carrera, D. Curtin and A. Geddes (eds), *20 Year Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (2020) 93; Ziebritzki, 'The Integrated EU Hotspot Administration and the Question of the EU's Liability', in M. Kotzur et al. (eds) *The External Dimension of EU Migration and Asylum Policies* (2020) 253.

177 See European Parliament Research Service, *Asylum Procedures at the Border: European Implementation Assessment* (2020), at 74–95, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf.; European Commission, Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612, 23 September 2020; Amended proposal for an Asylum Procedures Regulation, COM(2020) 611, 23 September 2020.

178 Art. 18(1)(a) of the Directive allows housing in kind to be provided, among others, in 'premises used for the purpose of housing applicants during the examination of an application made at the border or in transit zones' or 'other premises adapted for housing applicants'; other provisions of the Directive refer to derogations from certain conditions in cases where 'the applicant is detained at a border post or in a transit zone' (see, e.g., Art. 10(5) and 11(6) Reception Conditions Directive).

detain asylum seekers at the external borders.[179] The proposal for a new Reception Conditions Directive does not address the expanding use of detention.[180] Instead, the proposal emphasizes the risk of absconding as a ground for detention. Under the current legislation, an asylum seeker not respecting a reporting obligation can already be considered as absconding.[181] 'Absconding' remains a fuzzy ground for detention. It could be interpreted sufficiently broadly to render the vast majority of irregular migrants and asylum seekers susceptible to detention.[182] For example, if payment of a smuggler is seen as an objective indicator of a risk of absconding, this would in principle allow for the detention of almost all asylum seekers. However, due to a lack of capacity in detention facilities not all individuals meeting such broad criteria could actually be put in detention. Therefore, there is a risk of arbitrariness, as it cannot be predicted whether a person will be detained or not. Such a wide degree of discretion in the context of the deprivation of liberty is highly problematic.

Trend 2: Increasing use of area-based restrictions not amounting to detention

In addition to the wider use of detention, the second trend we observe relates to the fact that States increasingly make use of area-based restrictions – that is, liberty-restricting measures that fall short of detention narrowly defined.

These measures involve a range of policies and practices reflecting different degrees of coerciveness.[183] They include designated residence (often coupled with conditionality for the provision of material reception conditions), as well as registration requirements, deposit of documents, bond/

179 M. Mouzourakis and K. Pollet, *Boundaries of Liberty: Asylum and* de facto *Detention in Europe (2018)*, at 15, available at https://www.asylumineurope.org/sites/default/files/shadow-reports/boundariesliberty.pdf.

180 European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016.

181 The CJEU established this in the *Jawo* case in the context of the Dublin procedure: CJEU, Case C-163/17, *Jawo* (EU:C:2019:218).

182 See on asylum seekers: Costello and Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers', 35 *Refugee Survey Quarterly* (2016) 47, at 65–70.

183 C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention: Perception of Asylum Seekers and Refugees in Toronto and Geneva* (2013), at 10–11, available at https://www.refworld.org/docid/51a6fec84.html.

bail or surety/guarantor, reporting requirements, case management/supervised release, electronic monitoring, and home curfew/house arrest.[184] We observe that Member States have increasingly put in place such liberty-restricting measures, either as alternative pathways to detention or in addition to detention.[185] This is warranted by the Reception Conditions Directive as it generally allows Member States to subject asylum seekers to geographical and residence restrictions, even without there being a ground for detention.[186] Such practices expand the scope and intensity of coercive measures vis-à-vis migrants.

The failure to respect such restrictive measures may lead to detention. In this case, they function as a pathway to detention. In this way, recourse to liberty restrictions as a general means of migration control actually facilitates detention (this aspect thus relates back to the developments described above). As a consequence, the legal constraints applicable to immigration detention are turned on their head – rather than being a measure of last resort, permissible on strictly circumscribed grounds, detention seems increasingly legitimized as a punitive measure per se, justified by the individual's failure to comply with an alternative.[187] Austria, for example, has introduced legislative reforms to codify systematic residence restrictions and a corollary power to detain those who fail to observe them.[188] In France, the '*assignations a residence*' (house arrest with reporting obligations) easily lead to findings of absconding, which in turn warrants detention.[189]

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184 UNCHR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at 40, available at https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html; C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention: Perception of Asylum Seekers and Refugees in Toronto and Geneva* (2013), at 6, available at https://www.refworld.org/docid/51a6fec84.html.

185 Asylum Information Database, *The Detention of Asylum Seekers in Europe: Constructed on Shaky Ground?* (2017), available at http://www.refworld.org/docid/595a23ef4.html.

186 Art. 7 Reception Condition Directive.

187 Asylum Information Database, *The Detention of Asylum Seekers in Europe: Constructed on Shaky Ground?* (2017), at 11.

188 Asylum Information Database, *Country Report: Austria* (2017), available at https://asylumineurope.org/wp-content/uploads/2018/03/report-download_aida_at_2017update.pdf.

189 La Cimade, *La Machine Infernale de l'Asile Européen: Dissuader et exclure: analyse des impacts d'une procédure sur les droits des personnes exilées en France* (2019),

This trend is also reflected at EU level. In its 2016 proposal for a recast Reception Conditions Directive, the Commission broadens the scope for Member States to impose residence restrictions on asylum seekers and even proposes *requiring* them to do so.[190] The rationale is explicitly stated in the accompanying Commission document:

> *[I]n order to tackle secondary movements and absconding of applicants, an additional detention ground has been added. In case an applicant has been assigned a specific place of residence but has not complied with this obligation, and where there is a continued risk that the applicant may abscond, the applicant may be detained in order to ensure the fulfilment of the obligation to reside in a specific place.*[191]

The new ground for detention foreseen in Art. 8(3)(c) of the proposal constructs a legal obligation to comply with residence restrictions.[192] This would enable Member States to bypass the requirement of satisfying the existing grounds for detention under the Reception Conditions Directive and the obligation to consider an alternative beforehand.[193]

Moreover, area-based restrictions are used to manage the migration process more broadly – for example, to prevent 'ghettoization' or to avoid overburdening individual municipalities. Such policies and practices involve measures aimed at restricting migrants' freedom of movement, but do not necessarily amount to detention. Rather, they are widening the network of available restrictions of migrants' liberty of movement, in addition to detention.

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available at https://www.lacimade.org/wp-content/uploads/2019/04/La_Cimade_Rapport_Dublin_2019.pdf.

190 Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016, Art. 7: The Commission proposes to include that Member States 'shall' decide on the residence of asylum seekers, instead of the current language on the basis of which Member States 'may' decide on that. The objective is to reduce reception-related incentives for secondary movements within the EU (on this subject, see Chapter 6).

191 Ibid., at 14.

192 Ibid., Art. 8(3)(c) reads: 'in order to ensure compliance with legal obligations imposed on the applicant through an individual decision in accordance with Art. 7(2) in cases where the applicant has not complied with such obligations and there is a risk of absconding of the applicant.'

193 European Council on Refugees and Exiles (ECRE), *Comments on the Commission proposal to recast the Reception Conditions Directive* (2016), at 12, available at https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf.

Various EU Member States[194] have such policies in place or are planning to implement them, both upon arrival (detention in camps on islands, on ships, in camps with restricted opening hours, in airports) and in the context of enforcing returns (camps in remote areas, on islands, in police stations and airports, etc.). Sometimes migrants are legally free to leave the assigned places but will lose essential benefits – such as access to status determination procedures or social assistance – if they actually do so. Examples of 'soft' restrictions of liberty include the 'AnkER Centres' in place in some German regional states,[195] which de facto require asylum seekers to stay in a reception facility. Such 'semi-carceral spaces'[196] provide limited space to move but are different from the clearly delineated practice of detention. Accordingly, these measures are not subject to the same legal requirements; often, there is not even a clear legal basis for imposing them.[197] The proposal from the Commission for an Asylum Procedures Regulation, as amended in September 2020, follows the same line. The Commission now proposes a more extensive use of integrated (asylum and return) procedures at the external borders, during which certain categories of asylum seekers shall be 'kept' at the borders or in transit zones in order to make return policies more effective.[198] For the first time, Member States would be obliged, according to an EU Regulation, to impose restrictions on movement of asylum seekers.

194 For example, Greece, Italy, Denmark as well as at the border between Hungary and Serbia.

195 ECRE, *The AnkER centres: Implications for asylum procedures, reception and return* (2019), available at https://www.asylumineurope.org/sites/default/files/anker_centres_report.pdf.

196 Term borrowed from E. Guild, C. Costello, M. Garlick and V. Moreno-Lax, *Enhancing the Common European Asylum System and Alternatives to Dublin* (2015), at 34–35.

197 L. Slingenberg, 'Evaluating "Life Steeped in Power": Non-Domination, the Rule of Law and Spatial Restrictions for Irregular Migrants', 12 *Hague Journal on the Rule of Law* (2020), https://doi.org/10.1007/s40803-020-00147-x.

198 European Commission, Amended proposal for a Regulation establishing a common procedure for international protection in the Union, COM/2020/611, 23 September 2020, Art. 41(13): 'During the examination of applications subject to a border procedure, the applicants shall be kept at or in proximity to the external border or transit zones.'

Trend 3: Persistent pattern of problematic conditions of detention

Whereas the first two trends related to the question of whether to detain, the third challenge relates to the question of *how* migrants are detained. We observe a persistent pattern of problematic conditions of detention in many Member States, both for migrants generally and for vulnerable groups specifically. It is important to recall in this context that immigration detention is a form of administrative detention – that is, migrants are detained for administrative purposes rather than because they committed a crime. Detention conditions should reflect this fact.

First, State practice displays a pattern of detention conditions that are often extremely poor. Particularly egregious examples are the failure to provide food for detained asylum seekers in Hungary[199] or appalling conditions in Spanish immigration detention facilities.[200] Health risks associated with living in overcrowded camps in Greece were highlighted by the COVID-19 pandemic.[201] Further problematic aspects are the absence of contact with the outside world, the impossibility of continuing to manage one's own affairs, loss of any employment, separation from family, and loss of power to decide one's diet, among others.[202] Many EU countries blurred the separation of administrative and criminal detention, such as Germany in 2019 with its 'Orderly Return Act'.[203]

Second, we observe that detention conditions are often particularly critical for migrants in situations of vulnerability, including children. Some

199 Hungarian Helsinki Committee, *Hungary Continues to Starve Detainees in the Transit Zones Information update by the Hungarian Helsinki Committee (HHC)*, 23 April 2019, available at https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf?utm_source=ECRE+Newsletters&utm_campaign=ad4260b76c-EMAIL_CAMPAIGN_2019_04_26_08_50&utm_medium=email&utm_term=0_3ec9497afd-ad4260b76c-420543949.

200 La Vanguardia, *101 internos del CIE de Aluche denuncian la vulneración de sus derechos*, 2 May 2019, available at https://www.lavanguardia.com/vida/20190502/461997644926/101-internos-del-cie-de-aluche-denuncian-la-vulneracion-de-sus-derechos.html?utm_source=ECRE+Newsletters&utm_campaign=ff2f249c45-EMAIL_CAMPAIGN_2019_05_10_12_46&utm_medium=email&utm_term=0_3ec9497afd-ff2f249c45-420543949.

201 See Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity', 32 *International Journal of Refugee Law* (2020) 374.

202 M.-B. Dembour, *When Humans Become Migrants* (2015), at 395–396.

203 *Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht* (*Geordnete-Rückkehr-Gesetz*), 15 August 2019.

Member States (e.g., Portugal[204] and Poland[205]) continue to detain children without the necessary protections in place. This, too, is apparently permitted by the relevant EU legislation. While the Reception Conditions Directive includes a special provision on the detention of vulnerable persons, it does not prescribe a screening procedure in order to identify them, and it permits the detention of children, albeit 'as a measure of last resort' and 'in exceptional circumstances' only (the latter in the case of unaccompanied minors).[206] In contrast, the provisions in the Return Directive relating to the special needs of vulnerable migrants in detention are minimal, being limited to requiring that 'particular attention shall be paid to the situation of vulnerable persons', and that 'emergency health care and essential treatment of illness shall be provided'.[207]

2.2 *Legal evaluation*

2.2.1 General framework: The rights to liberty, to freedom of movement, and to adequate treatment

The aim of this section is to develop the standards relevant to determine under which circumstances restrictions on the spatial movement of migrants constitute a Human Rights violation.

We have identified four interrelated layers of Human Rights standards as being particularly relevant in this regard. Human Rights law protects not only against detention unless duly justified (first layer) but also against other forms of arbitrary limitation of movement (second layer). In all situations in which migrants' liberty and freedom of movement is restricted, Human Rights law prohibits inhuman or degrading treatment (third layer), and it precludes other, less severe interferences with private life if they do not meet the requirements of the principle of proportionality (fourth layer). In other words, Human Rights law determines both the question of *whether* a person's spatial movement may be restricted (first

204 See, e.g., Asylum Information Database, *Country Report: Portugal* (2017), at 17, available at https://asylumineurope.org/wp-content/uploads/2017/12/report-download_aida_pt.pdf.

205 Cf. ECtHR, *Bilalova and others v. Poland*, Appl. no. 23685/14, Judgment of 26 March 2020.

206 Art. 11(2) and (3) Reception Conditions Directive, respectively.

207 Art. 16 Return Directive.

and second layer) and of *how* such restrictions may be carried out (third and fourth layer).

(1) The right to liberty and security is one of the oldest and most fundamental Human Rights. The guarantee of *habeas corpus* applies to all human beings, regardless of immigration or other status.[208] The right is expressed in two provisions of the Universal Declaration of Human Rights of 1948: 'Everyone has the right to life, liberty and security of person' (Art. 3 UDHR) and 'No one shall be subjected to arbitrary arrest, detention or exile' (Art. 9 UDHR). The prohibition of arbitrary detention is a well-established rule of customary international law and is codified in a broad range of treaties.[209]

At the universal level, it has been included in Art. 9 of the ICCPR.[210] The jurisprudence of the Human Rights Committee (HR Committee, the treaty body entrusted with the supervision of ICCPR) has clarified that in order to comply with the requirements of lawfulness and non-arbitrariness, the principles of reasonableness, necessity, and proportionality apply.[211] While the detention of migrants is not prohibited per se, it must pursue a narrow and specific aim and be necessary and proportionate to reach this aim, taking into account the individual circumstances of the case at hand.[212] Illegal entry by migrants does not in itself justify their detention; additional factors particular to the individual are required, such as the likelihood of absconding or a risk of acts against national security.[213] Following the same line of reasoning, the UN Working Group on Arbitrary Detention, a subsidiary body of the UN, reiterates the principles of reasonableness, necessity, and proportionality in the light of the

208 As reaffirmed, for example, in HR Committee, General Comment No. 15: The Position of Aliens under the Covenant, HRI/GEN/1/Rev.1, at para. 1 and 7.

209 V. Chetail, *International Migration Law* (2019), at 133.

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

211 HR Committee, *Van Alphen v. the Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988, at para. 5.8; *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, at para. 9.2.

212 For a concise overview, see Allinson, Stefanelli and Weatherhead, 'Immigration Detention', in E. Guild, S. Grant and C. A. Groenendijk, *Human Rights of Migrants in the 21st Century* (2017) 27.

213 See. e.g., HR Committee, *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, at para. 9.4; *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3–9.4.

circumstances specific to the individual case.[214] The UN Working Group recalls that the 'standards restated in the present deliberation apply to all States in all situations, and factors such as the influx of large numbers of immigrants regardless of their status … cannot be used to justify departure from these standards'.[215]

Provisions similar to Art. 9 ICCPR can be found in other universal Human Rights treaties, such as Art. 16 of the Migrant Workers Convention (ICRMW) and Art. 37 of the Convention on the Rights of the Child (CRC).[216] The 'presumption of liberty' for migrants is also reflected in regional Human Rights law, including in Art. 6 of the African Charter on Human and People's Rights (ACHPR, 'Banjul Charter') and in Art. 7 of the American Convention on Human Rights (ACHR). The Inter-American Commission on Human Rights explicitly rejects a 'presumption of detention' for migrants[217] and acknowledges that the constraints on immigration detention must be even stricter than those governing pre-trial or other forms of preventive criminal detention.[218] This international consensus is confirmed in Objective 13 of the Global Compact for Migration: 'Use immigration detention only as a measure of last resort and work towards alternatives' (GCM, para. 29).[219]

To complete the picture of relevant guarantees in universal Human Rights law, reference is made to the 1951 Convention Relating to the Status of Refugees (Geneva Refugee Convention, GRC). Art. 31 GRC exempts refugees from penalties for illegal entry. This provides an additional source

214 Human Rights Council: Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants, A/HRC/39/45, at para. 14, 19–20 and 22–24.

215 Ibid., at para. 48.

216 E.g., Art. 16 ICRMW; Art. 37 CRC.

217 In the *Mariel Cubans* case, the Inter-American Commission on Human Rights criticized US practice leading to 'a presumption of detention rather than a presumption of liberty', which the Court regarded as 'fundamentally antithetical' to Art. I (liberty), XXV (protection against arbitrary arrest and detention) ADHR. See Gomez, 'The Inter-American System: Report No. 51/01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), Report No. 51/01, 4 April 2001 Inter-American Commission on Human Rights', 2 *Human Rights Law Review* (2002) 117; for an elaborate examination of the presumption of liberty in the Inter-American system, see M.-B. Dembour, *When Humans Become Migrants* (2015), at 369–401.

218 Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015) 143, at 171.

219 See also GCM, Objective 21, para. 37 ('Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration').

of protection against detention of asylum seekers upon entry. According to legal scholarship, depriving asylum seekers or refugees of their liberty for the mere reason of having entered or stayed illegally would amount to a penalty under Art. 31(1) GRC.[220] In addition, Art. 31(2) GRC entails a necessity requirement regarding refugees unlawfully in the country, but only if they come directly from a territory where their life was in danger. In its 2012 Revised Guidelines on Detention of Asylum Seekers, UNHCR confirmed the principle that asylum seekers should not be detained for the sole reason of seeking asylum and that detention is only permissible in exceptional circumstances, when it is reasonable, necessary, and proportionate in order to attain a limited range of objectives.[221]

In the European legal space, Art. 5 ECHR incorporates the right to liberty and security of the person. Rather than a generic prohibition of arbitrariness, however, it provides an exhaustive list of six situations of when detention may lawfully occur. In the context of immigration detention, the relevant provision is point (f) of Art. 5(1) ECHR, which reads: 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.

The original intent, in 1950, to draft an exhaustive list of detention grounds was to provide for more specific regulation than the generic clauses of the UDHR, but the ensuing case-law on Art. 5(1)(f) has some difficulties in keeping track with developments in universal Human Rights law. The ECtHR only reluctantly applies the principles of necessity and proportionality to cases of immigration detention. While the ECtHR has recognized in non-migration contexts that 'it does not suffice that the deprivation of liberty is executed in conformity with national law but it

220 Noll, 'Article 31 (Refugees unlawfully in the country of refuge/Réfugiés en situation irrégulière dans le pays d'accueil)', in A. Zimmermann (ed.), *Commentary on the 1951 Convention relating to the Status of Refugees* (2011) 1243, at para. 96; see also Goodwin-Gil, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalisation, Detention and Protection', in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 185, at 195–196; A. Grahl-Madsen, *The Status of Refugees in International Law* (1972), at 209; A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants'* (2011), at 11, available at https://www.unhcr.org/4dc949c49.pdf.

221 UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), available at https://www.refworld.org/docid/503489533b8.html.

must also be necessary in the circumstances',[222] the Court has accepted the practice of detention for bureaucratic convenience in the migration context.[223] In its *Saadi* judgment, the Grand Chamber explicitly held that necessity is not a requirement under Art. 5(1)(f) ECHR for the lawfulness of immigration detention upon entry.[224]

This line of reasoning was widely challenged in legal scholarship.[225] It also has outspoken critics within the Court[226] and the Council of Europe more widely. The Parliamentary Assembly of the Council of Europe has expressly criticized the *Saadi* judgment,[227] and the European Commissioner for Human Rights and the European Committee for the Prevention of Torture have expressed their opposition to the use of immigration detention as a first response and deterrent to migrants reaching Europe irregularly.[228] In its more recent case-law, albeit not decisively, the Strasbourg Court has been cautiously resiling from its previous position and

222 ECtHR, *Witold Litwa v. Poland*, Appl. no. 26629/95, Judgment of 4 April 2000, at para. 78.

223 ECtHR, *Chahal v. UK*, Appl. no. 22414/93, Judgment of 15 November 1996 (regarding pre-removal detention), and *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008 (regarding detention upon entry).

224 ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, at para. 72–74.

225 G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (2010); Moreno-Lax, 'Beyond Saadi v UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law', 5 *Human Rights and International Legal Discourse* (2011) 166; Costello, 'Human Rights & the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law', 19 *Indiana Journal of Global Legal Studies* (2012) 257; see also D. Wilsher, *Immigration Detention: Law*, *History*, *Politics* (2014).

226 In the *Saadi* case, by reference to international law documents, judges Rozakis, Tulkens, Kovler, Hajiyev, Spielman and Hiverlä formulated a joint partly dissenting opinion that ended on the oft-cited words 'Is it a crime to be foreigner? We do not think so', ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, dissent.

227 A. C. Mendonça, *The Detention of Asylum Seekers and Irregular Migrants in Europe*, 11 January 2010, available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12435&lang=en, at 14 and 20.

228 Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom on 5–8 February and 31 March–2 April 2008, as cited in London Detainee Support Group, *Detained Lives: The Real Cost of Indefinite Immigration Detention* (2009), at 11, available at https://detentionaction.org.uk/wp-content/uploads/2018/12/Detained-Lives-report1.pdf.

increasingly incorporates elements of a full proportionality test (including the element of necessity).[229]

To sum up the Human Rights standard regarding immigration detention, the prohibition of arbitrary detention is an absolute norm of customary international law. In the language of the UN Working Group on Arbitrary Detention, '[a]rbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers'.[230] In order not to be considered arbitrary, detention measures must adhere to the principles of reasonableness, necessity, and proportionality (i.e., in the doctrinal language of EU law, all elements of the principle of proportionality must be tested). Accordingly, the lower standard provided in the ECHR is superseded by the higher level of protection in universal Human Rights law.

In EU law, the latter standard is mirrored in Art. 6 EU-CFR, which replicates the plain wording of Art. 3 UDHR and Art. 9(1) ICCPR, without further qualifications or special provisions on immigration detention. Regardless of the general rule of interpretation established in the first sentence of Art. 52(3) EU-CFR, according to which the provisions of the EU Charter are presumed to have the same meaning as the corresponding provisions of the ECHR, we hold that the second sentence of Art. 52(3) EU-CFR applies. According to this clause, the above-mentioned rule of interpretation shall not prevent Union law providing more extensive protection. We argue that in respect of the prohibition of arbitrary detention, the relevant EU fundamental right in substance is consistent with the UN standard rather than with the *Saadi* case-law of the ECtHR. In any case, the EU is legally bound to follow the rules of customary international law that are an integral part of the EU legal order and are binding upon the institutions of the Union, including its legislative bodies.

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229 ECtHR, *Suso Musa v. Malta*, Appl. no. 42337/12, Judgment of 23 July 2013; *Yoh-Ekale Mwanje v. Belgium*, Appl. no. 10486/10, Judgment of 20 December 2011, at 124.

230 Human Rights Council: Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants, A/HRC/39/45, at para. 8; and see HR Committee, General Comment No. 35: Article 9 Liberty and Security of Person, CCPR/C/GC/35, at para. 66: 'The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by Art. 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.'

(2) Human Rights law also prohibits arbitrary limitations on the freedom of movement in the form of 'area-based restrictions'[231] even if they do not constitute detention. In its initial form, the relevant right can be found in Art. 13 UDHR, which provides that '[e]veryone has the right to freedom of movement and residence within the borders of each state'. The main difference in relation to the concept of detention is the wider geographical scope of the bordered space ('territory') to which the guarantee of mobility relates.

However, subsequent instruments incorporating this right have conditioned it on lawful stay of the protected person. Art. 12(1) ICCPR limits freedom of movement and choice of residence to those 'lawfully within the territory of a State'. A similar qualification is laid down in Art. 26 GRC, which requires a State to 'accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'. At the level of the Council of Europe, freedom of movement was added to the ECHR only in 1963 through Protocol No. 4, which entered in force in 1968. Likewise, Art. 2 of that Protocol grants freedom of movement to 'everyone lawfully within the territory of a State'.

In contrast to the prohibition of arbitrary detention, the right to intra-territorial mobility is not an absolute right. Once a person is lawfully within a State, restrictions on his or her right guaranteed by Art. 12(1) ICCPR, as well as any treatment different from that accorded to nationals, must be justified under the rules provided for by Art. 12(3) ICCPR. This provision restricts permissible limitations to those 'provided by law' and necessary to protect national security, public order, health or morals, or the rights and freedoms of others; such limitations must also be consistent with the other rights recognized in the ICCPR.[232] Thus, restrictions applied in the individual case must have a clear legal basis, serve one of the listed grounds, meet the test of necessity and the requirements of proportionality, and be governed by the need for consistency with the other rights recognized in the Covenant.[233] The ECHR has a comparable limitation clause in Art. 2(3) of Protocol No. 4 ECHR. In addition, Art. 2(4) Protocol No. 4

231 Todt, 'Area-based Restrictions to Maintain Public Order: The Distinction Between Freedom-restricting and Liberty-depriving Public Order Powers in the European Legal Sphere', 4 *European Human Rights Law Review* (2017) 376.

232 HR Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

233 Ibid., at para. 2 and 16.

ECHR permits restrictions in certain areas as justified by 'the public interest in a democratic society'. This wider scope of permissible restrictions is not warranted by the ICCPR.

In EU law, the right to intra-territorial mobility tends to be overlooked, as it is not explicitly mirrored in one of the provisions of the EU-CFR. Applying the presumption of substantive homogeneity between EU fundamental rights and Human Rights, its sources nonetheless are incorporated into EU law as general principles in the sense of Art. 6(3) TEU. A distinction must be drawn here between the territory of each Member State, on the one hand, and Union territory as a whole (as defined in Art. 52(2) TEU and Art. 355 TFEU), on the other hand.[234] Given that all EU Member States are party to the ICCPR, the GRC and to Protocol No. 4 ECHR (except for Greece, which did not sign Protocol No. 4) we assume that the right to freedom of movement within the territory of each Member State is a general principle of EU law, subject to the qualifications and permissible restrictions laid down in these instruments. In respect of the freedom of movement within the territory of the EU as a whole, Art. 45(1) EU-CFR grants this right to all EU citizens. For third-country nationals, Art. 45(2) EU-CFR incorporates the proviso of legal residence, stating that '[f]reedom of movement may be granted … to nationals of third countries legally resident in the territory of a Member State'. This provision refers to the competence conferred on the Union by Art. 77, 78 and 79 TFEU. Consequently, the granting of this right depends on the EU institutions exercising those powers.[235] A discussion of the extent to which a positive obligation exists to exercise these powers is beyond the scope of this chapter (it may follow from the principle of non-discrimination; see Chapter 4).

Two main issues of construction arise from this overview. The first question is who is to be considered lawfully present on state territory. In principle, this matter is governed by national law, provided it complies with international obligations.[236] On the other hand, this cannot imply unlimited discretion on the part of the States. Since 'lawful stay' is a concept laid down in an instrument of international law, it can have an

234 On the legal concept of Union territory, see Bast, 'Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts', 76 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL)* (2017) 277.

235 See Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, on Art. 45 EU-CRC.

236 HR Committee, General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

autonomous meaning and is ultimately a matter for international interpretation.[237] According to legal scholarship, migrants whose right to stay is subject to determination or adjudication should be considered as lawfully on territory.[238] The same rationale applies to those migrants who are qualified as non-deportable, such as people with toleration status (*Duldung*) in Germany or Austria.[239] However, the right to freedom of movement does not apply to those who have entered or are present irregularly and do not have a pending request for regularization of their stay, or to those whose request has been rejected and who are not considered unreturnable.

The second issue relates to the delimitation of restrictions of movement – which are justifiable for a larger range of reasons – from deprivations of liberty that constitute detention. In that regard, the Strasbourg Court has stated that the difference is one of degree rather than substance.[240] The label of the measure is irrelevant; determination requires a factual assessment of the concrete situation (type, duration, effects, and manner of implementation).[241] This line of reasoning is significant in the context of this study in two respects. First, it implies that a measure that is not explicitly labeled as detention may nonetheless be subject to the stricter test provided by Art. 9 ICCPR and Art. 5 ECHR. Second, the so-called alternatives to detention are not exempted from observing Human Rights standards. Arguably, the closer a liberty-restricting measure comes to being a detention measure, the stricter these standards must be. We return to this issue in more detail below when discussing border procedures in European asylum law.

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237 L. Slingenberg, *The Reception of Asylum Seekers under International Law* (2014), at 110–111.

238 Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015), at 147 and 174.

239 See Report of the Special Rapporteur for the Human Rights of Migrants, Francois Crépeau, A/HRC/20/24, at para. 54; HR Committee, *Celepli v. Sweden*, CCPR/C/51/D/456/1991, at para. 9.2; for an extensive consideration on the meaning of lawful stay in the context of the Refugee Convention, see J. Hathaway, *The Rights of Refugees under International Law* (2nd ed. 2021), at 176–219.

240 See ECtHR, *Khlaifia and others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, at para. 64.

241 ECtHR, *Z.A. and others v. Russia*, Appl. no. 61411/15, 61420/15, 61427/15 and 3028/16, Judgment of 21 November 2019, at para. 138; *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Judgment of 21 November 2019, at para. 217–218; see Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' 35 *Refugee Survey Quarterly* (2016) 7, at 11.

(3) As to the conditions of detention or other forms of mobility restrictions, any deprivation of liberty must respect the detainee's dignity and cannot be in conflict with the prohibition of torture or inhuman or degrading treatment. That prohibition is laid down in numerous universal instruments, such as Art. 5 UDHR, Art. 7 ICCPR and Art. 1 and 16 CAT, as well as regional instruments such as Art. 3 ECHR, Art. 5 ACHR and Art. 5 ACHPR. The prohibition of torture and inhuman or degrading treatment or punishment is mirrored in Art. 4 EU-CFR. It is considered to be an absolute guarantee. If detention conditions are found to amount to such treatment, detention will automatically be unlawful.

In its case-law regarding Art. 3 ECHR in the context of detention,[242] the ECtHR has developed a number of important and detailed positive obligations of States. In order to establish whether the required level of severity has been reached, the Court considers the cumulative effect of detention conditions, ranging from sufficient and adequate living space, including sanitary products and meals, to medical care and assistance.[243] However, even though the Court has found violations in numerous cases, it has so far failed to derive general principles regarding the required standards. This has enabled some more controversial judgments in which the Court has found that the situation fell short of a violation of Art. 3 ECHR.[244]

(4) While Art. 3 ECHR (and its counterparts in universal Human Rights law) constitutes an absolute standard for detention conditions, other provisions of Human Rights law provide further limitations on such measures. They serve to fill a gap in protection where the threshold of severity that constitutes inhuman treatment is not exceeded.

Art. 10(1) ICCPR enshrines a right to humane treatment in detention. It states in positive terms: 'All persons deprived of their liberty shall be

242 See, e.g., ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/06, Grand Chamber Judgment of 21 January 2011, at para. 205–234; *S.Z. v. Greece*, Appl. no. 66702/13, Judgment of 21 June 2019, and *HA.A. v. Greece*, Appl. no. 58387/11, Judgment of 21 April 2016.

243 L. Slingenberg, *The Reception of Asylum Seekers under International Law* (2014), at 300–304 and 310.

244 Such as ECtHR, *J.R. and others v. Greece*, Appl. no. 22696/16, Judgment of 25 January 2018. For discussion concerning in particular Greece, see Vedsted-Hansen, 'Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?', in V. Chetail, Ph. de Bruycker, F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (2016) 317.

treated with humanity and with respect for the inherent dignity of the human person.' Case-law of the HR Committee demonstrates that breaches of this Article need not reach the threshold of inhuman treatment.[245] Art. 10(1) ICCPR does not have an explicit equivalent in other Human Rights instruments.

At the European regional level, the ECtHR combines the assessment of the lawfulness of detention with the adequacy of detention conditions, to a similar effect. The safeguard provided by Art. 5(1) ECHR is that the detention must be 'in accordance with law'. As the Strasbourg Court has established, lawfulness involves a requirement of non-arbitrariness, which amounts to a compendium of factors, including those relating to the place and duration of detention: 'the place and conditions of detention should be appropriate', bearing in mind that asylum seekers are not convicted of a criminal offense; and 'the length of the detention should not exceed that reasonably required for the purpose pursued'.[246] In other words, the Court clarified that there must be a link between the ground of permitted deprivation of liberty, on the one hand, and the place and conditions of detention, on the other hand.[247] It has repeatedly held that detaining children in closed centers designed for adults does not take account of their extreme vulnerability and that their detention is therefore disproportionate and unlawful under Art. 5(1)(f) ECHR.[248] Although the Court does not label it that way, this essentially constitutes a proportionality assessment, allowing the ECtHR to measure detention conditions not only in terms of Art. 3 ECHR (which precludes any balancing with the public interest pursued) but also in terms of a more flexible standard derived

245 HR Committee, *Penarrieta, Pura de Toro et al. v. Bolivia*, Communication No. 176/1984, CCPOR/C/31/D/176/1984; *Francesco Madafferi et al. v. Australia*, Communication No. 1011/2001, CCPR/C/81/D/1011/2001: the HR Committee found that the separation of a family pending removal causing financial and psychological difficulties would violate Art. 10(1) ICCPR.

246 ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, at para. 74. In addition, detention must be carried out in good faith and be closely connected to the purpose of preventing entry (or facilitating return).

247 ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, at para. 118; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006, at para. 102; *Muskhadzhiyeva and others v. Belgium*, Appl. no. 41442/07, Judgment of 19 January 2010, at para. 73.

248 ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, *Muskhadzhiyeva and others v. Belgium*, Appl. no. 41442/07, Judgment of 19 January 2010, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006.

from Art. 5(1)(f) ECHR. If detention conditions were adequate, the detention measure would not be disproportionate and thence would be lawful.

Restrictions on movement may also interfere with other Human Rights, in particular the right to private and family life. The most developed jurisprudence in this regard stems from the ECtHR case-law on Art. 8 ECHR (mirrored in Art. 7 EU-CFR; for details, see Chapter 5). According to the settled case-law, private life includes a person's physical and mental integrity and encompasses the development, without outside interference, of the personality of each individual in their relations with other human beings.[249] Liberty of movement is an indispensable condition for the free development of a person.[250] In several cases the ECtHR has held that detention constituted a disproportionate interference with Art. 8 ECHR if no particular flight risk has been established.[251] Even where there was an indication that a family might abscond, authorities were found to have violated Art. 8 ECHR due to a failure to provide sufficient reasons to justify detention for a lengthy period.[252]

Likewise, Art. 8 ECHR comes into play in the context of area-based restrictions. The Strasbourg Court considers Art. 2 of Protocol No. 4 ECHR and Art. 8 ECHR to be closely linked and regularly considers them together.[253] This is of particular relevance for irregular migrants: although they are excluded from the scope of Art. 2 Protocol No. 4 ECHR due to their unlawful presence, the protection granted under Art. 8 ECHR also extends to them. In a case involving the freedom to leave any country, laid down in Art. 2(2) Protocol No. 4 ECHR, the Court clarified: 'The fact that 'free-

249 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006, at para. 83, citing *Niemietz v. Germany*, Appl. no. 13710/88, Judgment of 16 December 1992, at para. 29; *Botta v. Italy*, Appl. no. 21439/93, Judgment of 24 February 1998, at para. 32; *Von Hannover v. Germany*, Appl. no. 59320/00, 24 June 2004, at para. 50.

250 HR Committee, General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, at para. 1.

251 ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, at para. 147–148, *A.B. and others v. France*, Appl. no. 11593/12, Judgment of 12 July 2016, at para. 155–156; *R.K. and others v. France*, Appl. no. 68264/14, Judgment of 12 July 2016, at para. 114 and 117.

252 ECtHR, *Bistieva and others v. Poland*, Appl. no. 75157/14, Judgment of 10 April 2018, at para. 88.

253 See, e.g., ECtHR, *Olivieira v. the Netherlands*, Appl. no. 33129/96, Judgment of 4 June 2002, at para. 67–69; *Garib v. the Netherlands*, Appl. no. 43494/09, Grand Chamber Judgment of 6 November 2017, at para. 140–141; see also, more extensively, in the preceding Chamber judgment of 23 February 2016: ECtHR, *Garib v. the Netherlands*, Appl. no. 43494/09, at para. 114–117.

dom of movement' is guaranteed as such under Article 2 of Protocol no. 4, which Turkey has signed but not ratified, is irrelevant given that one and the same fact may fall foul of more than one provision of the Convention and its Protocols' and found a violation of Art. 8 ECHR.[254] This reasoning can be extended to area-based restrictions not amounting to detention. In situations where Art. 2(1) of Protocol No. 4 does not apply, restrictions of movement may nonetheless violate other Convention rights, most notably the right to family and private life.[255] Accordingly, any type of area-based restriction for irregular migrants must be in accordance with Art. 8 ECHR.

The above standards to measure the conditions of detention or other forms of liberty-restricting measures imposed on migrants are mainly developed by judicial and quasi-judicial bodies based on broadly framed provisions in international treaties. They are necessarily of a casuistic nature, which makes it difficult for States (or the EU) to implement them in practice. In such situations, international soft law is of key importance to specifying the contents of Human Rights, without imposing obligations in its own right.

The first document to mention in this context is the developed set of standards contained in the Nelson Mandela Rules of 2016 adopted by the UN General Assembly in 2016, which concretizes the right to humane treatment in detention enshrined in Art. 10 ICCPR for the criminal law context.[256] The standards are a revised version of the Standard Minimum Rules for the Treatment of Prisoners, originally adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955. The Nelson Mandela Rules constitute the universally acknowledged minimum standard for the management of prison facilities and the treat-

254 The case involved restrictions of movement regarding a Turkish citizen by Turkey, preventing him from leaving Turkey to be with his family in Germany. Turkey had signed but not ratified Protocol No. 4; ECtHR, *Iletmis v. Turkey*, Appl. no. 29871/96, Judgment of 6 December 2005, at para. 50.

255 In this regard, see ECtHR, *Battista v. Italy*, Appl. no. 43978/09, Judgment of 2 December 2014, at para. 51–52, where the applicant complained against compulsory residence order under both Art. 2(1) Protocol No. 4 ECHR and Art. 8 ECHR. The Court held that the claim raised under Art. 8 ECHR was 'closely linked to the complaint under Article 2 of Protocol No. 4' and therefore needed not be assessed separately.

256 UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 January 2016, A/RES/70/175, available at https://www.refworld.org/docid/5698a3a44.html. For the original version, see https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

ment of prisoners. The equivalent standards in the Council of Europe are the European Prison Rules.[257] While it is clear that the quality of immigration detention cannot be lower than that of criminal detention, the established criminal detention standards are neither directly applicable to nor adequate for immigration detainees. Therefore, at the level of the Council of Europe an attempt at codifying specific European Rules on Administrative Detention is currently in progress.[258] A first draft establishes rules of international law pertaining to administrative detention, including immigration detention, though its future normative status is unclear.[259]

2.2.2 Specific issue: Detention grounds

In view of the increasing use of immigration detention in Europe, a more detailed analysis of the permissible grounds for detention seems appropriate to evaluate whether the EU meets the minimum standards established by Human Rights law. Particular attention will be given to the jurisprudence developed by the HR Committee in respect of Art. 9 ICCPR, since this Covenant represents the level of protection incorporated in Art. 6 EU-CFR (see above, 2.2.1, subsection 1).

Current EU law regulates pre-removal detention and detention of asylum seekers in separate legal instruments. However, the CJEU has clarified that the notion of detention is the same across the Asylum Procedures Di-

257 Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 on the European Prison Rules, 11 January 2006, available at https://www.refworld.org/docid/43f3134810.html.

258 Council of Europe, Website 'Administrative Detention of Migrants', available at https://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants.

259 Council of Europe: European Committee on Legal Co-Operation (CDCJ), Codifying instrument of European rules on the administrative detention of migrants, 18 May 2017, available at https://rm.coe.int/european-rules-on-the-administrative-detention-of-migrants-draft-codif/1680714cc1. See also the European Committee for the Prevention of Torture 'Fact Sheet' detailing standards for immigration detention: Council of Europe Committee for the Prevention of Torture, Immigration detention: Factsheet (2017), available at https://www.refworld.org/docid/58ca84894.html. For an assessment and critique of the draft, see International Detention Coalition and ICJ, *European rules for the administrative detention of migrants Written submission to the European Committee on Legal Co-Operation of the Council of Europe* (2017), available at https://idcoalition.org/wp-content/uploads/2017/07/CouncilofEurope-ImmigrationDetentionRules-JointSubmission-ICJIDC-ENG-2017.pdf.

rective, the Reception Conditions Directive, and the Return Directive.[260] This is in line with international law, as the HR Committee does not distinguish either explicitly or in substance between pre-removal detention and detention upon entry. According to the HR Committee, detention of migrants is only permissible if there are circumstances specific to the individual that make it necessary and proportionate to resort to this ultimate measure. While the HR Committee does not develop a closed list of accepted detention grounds, it emerges from its case-law that an individualized risk of absconding[261] or a risk of acts against national security[262] can justify detention measures, provided that less coercive means of achieving the same ends are not available.[263] Although the language of the HR Committee ('reasons such as') concedes that, in principle, other detention grounds are not excluded, the HR Committee has consistently held that detention cannot be 'based on a mandatory rule for a broad category' of situations, but would have to be 'specific to the individual' and meet the strict necessity test.[264] Mere administrative convenience, sanctioning unlawful behavior on the part of the migrant concerned, or general aims of migration policy, such as deterring or educating other migrants, would not meet these standards. Accordingly, other grounds justifying detention have thus far not been accepted by the HR Committee.[265]

Applying these standards to EU legislation on immigration detention, the first thing to note is that any detention governed by EU law can only be imposed by Member State authorities when the decision meets the principle of proportionality, which is a constitutional requirement even in

260 In the *Röszke* case, the CJEU clarified that the notion of detention is the same, CJEU, Cases C-924/19 PPU and C-925/19 PPU, *FMS* (EU:C:2020:367), at para. 224.

261 HR Committee, *Jalloh v. the Netherlands*, Communication No. 794/1998, CCPR/C/74/D/794/1998, at para. 8.2.

262 HR Committee, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3–9.4.

263 HR Committee, *C. v. Australia*, Communication No. 900/1999, CCPR/C/74/D/900/1999, at para. 8.2.

264 HR Committee, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3.

265 See the HR Committee's own summary of its jurisprudence in General Comment No. 35: Liberty and Security of Person, CCPR/C/107/R.3, at para. 18. Note that in the early case of *A. v. Australia*, CCPR/C/59/D/560/1993, the HR Committee also accepted non-cooperation as a legitimate ground, but has never done so since and does not list non-cooperation as an example for accepted grounds in its General Comment No. 35.

the absence of a statutory provision to this effect. This doctrine is in line with the UN standard and partly compensates for the insufficient protection under Art. 5(1)(f) ECHR. However, the grounds justifying detention appear overly broad, so that they have the potential to undermine the strict standards required by Human Rights law. In the following discussion, we shall consider in detail the relevant legislation and the suggested proposal for its reform.

Detention with a view to deportation is specifically regulated in the Return Directive. The relevant provision in Art. 15(1) states:

> *Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process*, in particular when: *(a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.*[266]

The wording of this provision allows for differing views as to whether the listed grounds for detention are exhaustive. A literal reading would suggest that the Directive allows for the detention of third-country nationals 'only' when they are subject to return procedures for the two reasons listed in points (a) and (b). However, prefaced by the non-exhaustive 'in particular when' the reference to these grounds seems to imply that they serve as mere illustrations.[267] In line with the latter reading, some EU Member States have laid down further grounds for detention in their domestic legislation.[268] Hence, the wording is sufficiently vague to allow for alternative readings.[269] The CJEU has indicated in a series of judgments that the

266 Art. 15(1) Return Directive, emphasis added.

267 For an example of this reading, see FRA, Detention of third-country nationals in return procedures (2011), at 15 and 27.

268 Such as investigation of the person's identity (Belgium, Italy), acquisition of travel documents (Italy), unlawful entry (Denmark), or public health considerations (Spain), thus providing a significantly broader basis for detention; see European Parliament, The Return Directive 2008/115/EC: European Implementation Assessment (2020), at 90, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf.

269 The European Parliament in its Implementation Study is careful not to preclude that reading and somewhat reluctantly notes that '[b]y using the terms "in particular", Article 15(1) of the Directive *appears to* enumerate the two grounds in a non-exhaustive manner'; see ibid., at 90 (emphasis added).

list of grounds is limited to the two laid down in the provision.[270] In its 2020 judgment on the Hungarian transit zone Röszke (the '*Röszke* case'), the CJEU reiterated this reading and stated that Member States may only deprive an individual of their liberty on the basis of Art. 15(1) Return Directive if the deportation may be jeopardized by the behavior of the person concerned.[271]

In response to this ambiguity, the 2018 Commission proposal for a recast Return Directive aims to resolve the issue in favor of a non-exhaustive reading. The Commission not only proposes to strike out the word 'only' but also to expand the illustrative list of possible grounds, which would henceforth include 'the third-country national poses a risk to public policy, public security or national security'.[272] While detention on the basis of risks of 'acts against national security' is warranted by HR Committee jurisprudence, it is highly doubtful that this also extends to any risk to public policy. Public policy is a broadly framed concept covering a wide range of public interests, whereas the HR Committee explicitly requires that the factors justifying detention must be specific to the individual.[273] Even more importantly, the removal of the limiting 'only' while maintaining the illustrative 'in particular when' would emphasize a reading of the provision that detention for the purpose of removal is permitted to pursue policy aims of any kind. Such a reading would certainly not be in line with HR Committee jurisprudence.[274]

As regards asylum seekers, the permissible grounds for detention are unequivocally laid down exhaustively in Art. 8(3) Reception Conditions Directive:

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270 CJEU, Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi* (EU:C:2014:1320), at para. 61; Case C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim* (EU:C:2011:268), at para. 39; Case C-357/09 PPU, *Saïd Shamilovich Kadzoev (Huchbarov)* (EU:C:2009:741), at para. 70.

271 CJEU, Cases C-924/19 PPU and C-925/19 PPU, *FMS* (EU:C:2020:367), at para. 268–269.

272 European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018, at 34 (new Art. 18).

273 HR Committee, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3; HR Committee, General Comment No. 35: Liberty and Security of Person, CCPR/C/107/R.3, at para. 18.

274 See HR Committee, *A. v. Australia*, CCPR/C/59/D/560/1993, at para. 9.4; this extends to illegal stay, see subsequent jurisprudence on deportation detention, for example: *Jalloh v. the Netherlands*, Communication No. 794/1998, CCPR/C/74/D/794/1998, at para. 8.2.; *Madafferi v. Australia*, Communication No. 1011/2001, CCPR/C/81/1011/2001, at para. 9.2.

> *An applicant may be detained only:*
> *(a) in order to determine or verify his or her identity or nationality;*
> *(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;*
> *(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;*
> *(d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;*
> *(e) when protection of national security or public order so requires;*
> *(f) in accordance with Article 28 of 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.*[275]

Although formulated in an exhaustive manner, this list of grounds covers a wide range of situations that are subject to interpretation and raises a series of issues.

First, the two grounds that are generally accepted by the HR Committee – risk of absconding and acts against national security – are laid down in a convoluted manner. Rather than specifying the risk of absconding as a self-standing ground, as in the Return Directive, the provision in point (b) presents absconding merely as an example of situations in which determination of the actual need of protection supposedly requires detention. It is unclear which 'elements' that would be, especially in light of the fact that detention can in turn impede access to information that is required to evaluate an asylum claim. This appears to be contrary to the principle established by the HR Committee that determination of the

275 Art. 8(3) Reception Conditions Directive.

asylum claim should not take place in detention.[276] Similarly, the wording of the provision in point (e) appears broader than is warranted by the HR Committee. Not only has public order been added to national security, but the provision also does not specify that those considerations must relate to risks posed by acts of the individual concerned. It thus gives way to the interpretation that broader public order considerations could warrant detention of asylum seekers, a reading that would not be in line with international law to the extent that it requires individualized reasons specific to the person concerned.[277]

Second, while detention to determine or verify identity or nationality (see point (a)) may be in line with Human Rights law, it is only acceptable for a brief initial stage.[278] It must, therefore, be interpreted in that light. In contrast, detention to determine the right to enter (see point (c)) is contrary to Human Rights law. This issue will be discussed in more detail in the following section on border procedures (2.2.3).

Third, the remaining two grounds listed in the Reception Conditions Directive give rise to other concerns. Point (d) regulates a situation that could be subsumed under non-cooperation. While Human Rights law does not in principle preclude non-cooperation as a ground for detention, it appears disproportionate in this context absent a risk of absconding. Point (f) makes cross-reference to Dublin procedures. Art. 28(2) Dublin Regulation establishes that the ground for detention under the Regulation is a risk of absconding. It is not clear why a separate ground is necessary for Dublin cases, as the same safeguards should apply, and the risk of absconding laid down in the Reception Conditions Directive should also cover Dublin cases. Thus, neither of these grounds should be interpreted so as to expand the possible grounds for detention but should, rather, be read in the light of the notion of absconding.

Since detention based on a broader notion of non-cooperation – extending beyond a risk of absconding – would often be considered disproportionate, the two most pertinent grounds are the risk of acts against nation-

276 HR Committee, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3.

277 Moreover, acts against national security can be prosecuted under criminal law; their inclusion here reflects the 'crimmigration' trend that is so far not excluded by the HR Committee.

278 See the HR Committee jurisprudence, reported above, and also, e.g., UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at 17, para. 24, available at https://www.refworld.org/docid/503489533b8.html.

al security and absconding. As regards the former, such risks would rarely be found. In contrast, a risk of absconding could potentially be found for a large range and number of migrants. A careful definition as well as a thorough proportionality analysis are therefore required in order not to undermine the requirement of an individual assessment.

The Reception Conditions Directive and the Asylum Procedures Directive do not define the notion of 'absconding' at all, whereas the Return Directive and the Dublin Regulation currently merely state that risk of absconding means 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures and may abscond'.[279] The 'objective criteria' are not defined in the Return Directive or the Dublin Regulation.[280] Hence, the understanding of the concept and the criteria laid down in domestic laws vary between Member States.[281] In its non-binding 2008 Recommendation on Returns, the European Commission calls upon Member States to provide for eight criteria for establishing a risk of absconding in their legislation.[282] The 2018 proposal for a recast Return Directive projects a new article with an even more expansive notion, proposing a non-exhaustive list of sixteen criteria to establish a risk of absconding, four of which lead to a presumption of a risk of absconding.[283] Such broad and non-exhaustive lists – especially if they are only loosely connected with a person's propensity to flee – are contrary to Human Rights law, because they undermine the individual assessment required by the proportionality principle.[284] The risk of absconding as a ground for

279 Art. 3(7) Return Directive; see also Art. 2(n) Dublin Regulation: 'risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

280 In the *Jawo* case, in the context of the Dublin Regulation, the CJEU clarified that 'absconding' can be assumed when the individual does not remain at the accommodation allocated to them without informing the competent authorities of their absence, CJEU, Case C-163/17, *Jawo* (EU:C:2019:218), at para. 70.

281 European Parliament, The Return Directive 2008/115/EC: European Implementation Assessment (2020), at 86–88.

282 European Commission, Recommendation 2017/432 on making returns more effective when implementing the Directive 2008/115/EC, at para. 15–16.

283 European Commission, Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018, Art. 6.

284 European Parliament, The Return Directive 2008/115/EC: European Implementation Assessment (2020), at 89.

detention must be interpreted narrowly and is not amenable to legislative presumptions.[285] In the words of the HR Committee, a determination must carefully 'consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category'.[286] The legislative approach taken by the European Commission is therefore not consonant with Human Rights law.

The reform proposal for a recast Reception Conditions Directive also proposes to expand the grounds of detention. The Commission projects a new ground for detention under Art. 8(3) of this Directive, which explicitly lays down non-compliance with area-based restrictions as a pathway to detention. According to the proposed new Art. 8(3)(c), detention would be permissible 'in order to ensure compliance with legal obligations imposed on the applicant through an individual decision in accordance with Article 7(2) in cases where the applicant has not complied with such obligations and there is a risk of absconding of the applicant'.[287]

2.2.3 Specific issue: Border Procedures

The rise of so-called 'border procedures' to determine an asylum claim is a major trend in European migration policy. Next to concerns related to the principle of solidarity among the Member States, such procedures raise issues of Human Rights in view of the prohibition of arbitrary detention and other non-justified measures restricting liberty.[288]

The EU border procedures regime is scattered across various legal instruments, which must be read together. Art. 8(3)(c) of the Reception Conditions Directive provides that detention is permissible 'in order to *decide*, in the context of a procedure, on the *right to enter* the territory'.[289] A

285 Majcher and Strik, 'Legislating without Evidence: The Recast of the EU Return Directive', 23 *European Journal of Migration and Law (EJML)* (2021) 103, at 115–116.

286 HR Committee, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3.

287 European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016.

288 For a detailed legal assessment, see European Parliament Research Service, Asylum Procedures at the Border: European Implementation Assessment (2020), at 74–95, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf.

289 Art. 8(3)(c) Reception Conditions Directive (emphasis added).

systematic reading of this somewhat opaque provision reveals that 'procedure' refers to 'border procedures' as defined in the Art. 43 of the Asylum Procedures Directive.[290] According to this provision, Member States may establish border procedures in order to determine the admissibility, and in some cases the substance, of an asylum claim.[291] Although Art. 43 of the Asylum Procedures Directive itself makes no mention of detention, various other provisions of this Directive, read in conjunction with the Reception Conditions Directive, indicate that the EU legislature acknowledged that these procedures entail deprivation of liberty in most cases.[292] For example, some provisions of the Reception Conditions Directive refer to derogations in cases where 'the applicant is detained at a border post or in a transit zone'.[293] In the *Röszke* case, the CJEU explicitly endorsed this interpretation and stated that in light of Art. 8(3)(c) Reception Conditions Directive, Art. 43 Asylum Procedures Directive permits the detention of asylum seekers at the border for the purposes specified in that provision.[294]

The question arises as to whether detention of asylum seekers in the context of a border procedure is in line with Human Rights law. As outlined above (see section 2.2.1), Human Rights law does not preclude the detention of asylum seekers entering a State's territory unlawfully, but does narrowly circumscribe such detention. Such detention is permissible only for a brief initial period in order to *document* their entry, *record* their claims, and determine their identity if it is in doubt.[295] However, to detain

290 See also European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016, Art. 8(3)(d).

291 Art. 43(1) Asylum Procedures Directive.

292 G. Cornelisse, *The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights* (2016), available at https://research.vu.nl/ws/portalfiles/portal/1522197/Cornelisse-GDP-paper.pdf.

293 E.g., Art. 10(5) and Art. 11(6) Reception Conditions Directive.

294 CJEU, Cases C-924/19 PPU and C-925/19 PPU, *FMS* (EU:C:2020:367), at para. 237–239. This followed the finding that conditions at the transit zone did amount to detention, at para. 226–231; in contrast to the Grand Chamber of the ECtHR in *Ilias and Ahmed*, which controversially overruled a Chamber judgment to hold that asylum seekers were not detained in the Röszke transit zone: ECtHR, *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Grand Chamber Judgment of 21 November 2019. However, in *R.R. and others v. Hungary*, Appl. no. 36037/17, Judgment of 2 March 2021, the ECtHR distinguished the case from *Ilias and Ahmed* and held that the situation of the applicants amounted to a de facto deprivation of liberty.

295 HR Committee, *Bakhtiyari v. Australia*, Communication No. 1069/2002, CCPR/C/79/D/1069/2002, at para. 9.2–9.3. In line with HR Committee jurisprudence, the 2017 Michigan Guidelines also accept detention 'during the very

asylum seekers further while their claims are being processed would be arbitrary in the absence of particular reasons specific to the individual.[296] As established above (see section 2.2.2), only individualized reasons specific to the individual can justify detention, such as a risk of absconding or acts against national security. A pending determination on the right to enter is not a sufficient reason to justify detention beyond initial documentation and recording.

Due to the scattered nature of the regulation of border procedures, it is not entirely clear what constitutes the legal basis for the detention in this context. In the *Röszke* case, the CJEU referred to the 'purposes' laid down in Art. 43 Asylum Procedures Directive. These purposes are decisions on the admissibility of claims pursuant to Art. 33 Asylum Procedures Directive[297] or on the substance of an application for the situations listed in Art. 31(8) Asylum Procedures Directive.[298] Both the determination of admissibility pursuant to Art. 33(2) and the accelerated procedure foreseen by Art. 31(8) of the Asylum Procedures Directive require the assessment of core elements of the asylum claim. As established above, determination of the substance of claims is not a valid ground for detention of asylum seekers. Thus, detention in the context of border procedures cannot be based on the mere purposes stated in this Directive.

Alternatively, it may be argued that the basis for the detention of asylum seekers in the context of border procedures is not Art. 43 Asylum Procedures Directive, since that provision merely outlines the procedure. Rather, the relevant ground for detention of asylum seekers would be

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earliest moments after arrival' but only 'so long as such detention is prescribed by law and is shown to be the least intrusive means available to achieve a specific and important lawful purpose, such as documenting the refugee's arrival, recording the fact of a claim, or determining the refugee's identity if it is in doubt'; see University of Michigan Law School, *The Michigan Guidelines on Refugee Freedom of Movement* (2017), at 15, available at https://www.refworld.org/docid/592ee6614.html; similarly: UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at para. 24, available at https://www.refworld.org/docid/503489533b8.html.

296 HR Committee, *Tarlue v. Canada*, Communication No. 1551/2007, CCPR/C/95/D/1551/2007, at para. 3.3 and 7.6; *Mansour Ahani v. Canada*, Communication No. 1051/2002, CCPR/C/80/D/1051/2002, at para. 10.2; and see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at 18, para. 28, available at https://www.refworld.org/docid/503489533b8.html.

297 Art. 33(2) Asylum Procedures Directive.

298 Art. 31(8) Asylum Procedures Directive.

found in Art. 8(3)(c) Reception Conditions Directive. Art. 8(3)(c) states: 'An applicant may be detained … in order to decide, in the context of a [border] procedure, on the applicant's right to enter the territory'.[299] However, this reading also conflicts with Human Rights law. The determination of an applicant's claim is not a sufficient ground to justify detention absent specific and individual reasons. Art. 8 Reception Conditions Directive accounts for this to the extent that it subjects any decision to detain to necessity and proportionality in the individual case, as the CJEU acknowledged in the *Röszke* judgment.[300] Yet such individual assessment could only ever be the result of a proper procedure, which may or may not produce a lawful detention order, rather than the other way around. It follows that in the light of Human Rights law, point (c) of Art. 8(3) Reception Conditions Directive is devoid of meaning.

The question remains whether other grounds laid down in Art. 8 Reception Conditions might serve as a legal basis for detention in the context of border procedures. The most pertinent candidate is Art. 8(3)(a) Reception Conditions Directive, which establishes verification of identity as a detention ground. As long as detention based on this ground remains 'brief' and 'initial', this is warranted under Human Rights law. However, any detention that serves to assess the substance of the asylum claim is unlawful.

In sum, immigration detention can only legally take place if there are individual reasons specific to the person concerned, such as a risk of absconding (which corresponds with Art. 8(3) points (b) and (f) of the Reception Conditions Directive) or of acts against national security (corresponding with Art. 8(3) point (e) Reception Conditions Directive). This must be established in the individual case, including in the context of border procedures. Hence, in order for border procedures to be in line with international law, they cannot summarily resort to detention. In other words, border procedures may be an expedient element of the Common European Asylum System, but this policy choice does not justify quasi-automatic detention of entire classes of asylum seekers.

The remaining scope of application for border procedures is limited to area-based restrictions not amounting to detention.[301] Art. 43(3) Asylum

299 Art. 8(3)(c) Reception Conditions Directive.

300 CJEU, Cases C-924/19 PPU and C-925/19 PPU, *FMS* (EU:C:2020:367), at para. 259 and 266.

301 The CJEU made suggestions to that end in the *Röszke* case, see ibid., at para. 222 and 247.

Procedures Directive allows for 'normal' accommodation near the border or within a transit zone.[302] In parallel, Art. 18(1)(a) of the Reception Conditions Directive allows housing to be provided in kind, among others, in 'premises used for the purpose of housing applicants during the examination of an application made at the border or in transit zones'. In the *Röszke* case, the CJEU clarified that these are different from detention centres as referred to in Art. 10 Reception Conditions Directive and must not lead to deprivations of liberty in the meaning of Art. 5 ECHR.[303] To the extent that such housing is connected with limitations on freedom of movement, they must be duly justified (see next section).

The amended proposal for an Asylum Procedures Regulation of September 2020 appears to acknowledge that in order to be lawful, border procedures must not be accompanied by quasi-automatic detention. Art. 41 of the proposed Asylum Procedures Regulation would make the use of border procedures mandatory for certain types of those claims that are subject to the accelerated procedure, but does not prescribe detention. As per Art. 41(9)(d) of the proposed Regulation, Member States can make use of detention in line with the requirements set out in the Reception Conditions Directive or the Return Directive, as applicable. However, under the Reception Conditions Directive, the ground for detention would still be the self-referential Art. 8(3)(c)[304] – which is unlawful, as we have outlined above (in section 2.2.2).

Moreover, for the mandatory border procedures, Art. 41(13) of the proposed Asylum Procedures Regulation, as amended in 2020, states that: 'During the examination of applications subject to a border procedure, the applicants *shall be kept* at or in proximity to the external border or transit zones.'[305] The proposal uses the somewhat fuzzy wording that the applicant 'shall be kept' at the border. While this is not an established legal term, it is clear that the proposal avoids the term 'detention' – and therefore does not directly require detention either. Nevertheless, it is possible that those measures that Member States must impose on asylum seekers in order achieve the task of 'keeping them at the border' would *in fact* amount to detention nonetheless. As we developed in section 2.2.1,

302 Ibid., at para. 247.
303 Ibid., at para. 254.
304 Renumbered as Art. 8(3)(d) according to the proposal from the European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016.
305 European Commission, Amended proposal for an Asylum Procedures Regulation, COM(2020) 611, 23 September 2020 (emphasis added).

the distinction between detention in the strict sense (deprivation of liberty) and other restrictions on movement is gradual, not categorical; the classification by the legislator or the ordering authority is irrelevant. The distinction depends on the actual circumstances, including the duration, the threatened sanctions in the event of a violation, and the manner of implementation. Situations of *de facto* detention would regularly be unlawful for failing to be in line with material and procedural standards. However, the question of *de facto* detention would have to be determined in lengthy proceedings for each specific place and person. Suffice it to recall the Hungarian transit zone with conflicting and partly controversial outcomes from the two supranational European Courts. Therefore, it is to be expected that Member States would regularly claim that the measures they impose do not amount to detention. The provision allows the EU to rely on counterfactual expectations of an implementation by EU Member States in accordance with fundamental and Human Rights, specifically the prohibition of arbitrary detention. Furthermore, the Commission's Pontius Pilate approach clouds the fact that the restriction imposed by the new Art. 41(13) of the proposed Asylum Procedures Regulation would violate the EU's own obligation to respect fundamental and Human Rights, as we shall demonstrate in the following section.

2.2.4 Specific issue: Area-based restrictions

EU law permits restrictions on intra-territorial movement of migrants in various instances. Art. 7 of the Reception Conditions Directive lays down the conditions under which Member States may limit the freedom of movement of asylum seekers. Other provisions, such as Art. 18(1)(a) Reception Conditions Directive[306] and Art. 43(3) Asylum Procedures Directive[307] also rely on the assumption that asylum seekers' movement is restricted to a certain area, in that case near the border or transit zone. Such area-based restrictions must be distinguished from so-called alternatives to detention (ATDs). While the principle of proportionality requires the prior consideration of alternatives to detention before a decision to detain a migrant is taken (as discussed above, section 2.2.2), area-based restrictions are not meant to serve as a less onerous measure in response to a situation that, as a rule, would justify issuing a detention order. Rather,

306 Art. 18(1)(a) Reception Conditions Directive.
307 Art. 43(3) Asylum Procedures Directive.

they serve independent aims that, according to a specific legal basis, justify temporarily restricting the spatial movement of individuals to a certain area.

The central provision for this type of measure as regards asylum seekers is Art. 7 Reception Conditions Directive on 'Residence and Freedom of Movement'.[308] It reads, in the relevant parts:

> *1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.*
> *2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.*
> *3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.*

A series of issues arise when analyzing these provisions in light of Human Rights. The measures foreseen in Art. 7 of the Reception Conditions Directive must pass the test of conformity with Art. 12 ICCPR and Art. 2 of Protocol No. 4 ECHR (and the corresponding fundamental right). Note that, according to Art. 9(1) of the Asylum Procedures Directive, asylum seekers are allowed to remain in the Member State pending a decision on their asylum claim, irrespective of a potentially illegal entry. They are, therefore, 'lawfully within the territory' for the purposes of Art. 12 ICCPR and Art. 2 of Protocol No. 4 ECHR.[309] Were asylum seekers conceived as not being covered by the scope of these guarantees, area-based restrictions on their mobility would have to be tested against Art. 8 ECHR (see above, section 2.2.1).

First, we recall that restrictive measures taken on the basis of Art. 7 of the Reception Conditions Directive – or rather, of national legislation transposing its provisions – may, depending on their degree, intensity, and cumulative impact, nonetheless amount to a deprivation of liberty within the meaning of Art. 9 ICCPR and Art. 5 ECHR. The question of whether

308 Art. 7 Reception Conditions Directive.

309 Art. 9(1) Asylum Procedures Directive; on this point, see Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015) 143, at 147 and 174.

restrictions actually amount to detention irrespective of their designation depends on the specific circumstances in each particular case[310] – for example, whether the building is physically locked is not decisive if the places and time spent away are subject to permissions, controls, and restrictions.[311] Likewise, being held on a small island under strict supervision and curfew, including the requirement to report to the police twice a day, and only being permitted to contact the outside world under supervision, would also amount to deprivation of liberty for the purposes of Art. 5 ECHR.[312] In contrast, night curfew coupled with reporting obligations on certain days and the requirement to inform the police when leaving the house was found to be a mere restriction of movement rather than deprivation of liberty.[313] In light of these criteria, it depends on the specific circumstances whether measures that Member States put in place to restrict the movement of asylum seekers based on Art. 7 Reception Conditions Directive – such as house arrest in France with reporting obligations, restriction of movement to an island in Greece, or accommodation in a remote village in Austria – amount to unlawful deprivation of liberty.

Second, Art. 12 ICCPR and Art. 2 of Protocol No. 4 ECHR require area-based restrictions to be 'provided by law' and 'in accordance with law', respectively. Art. 7(1) and (2) Reception Conditions Directive does not explicitly mention this requirement. Only the decision to make provision of material reception conditions subject to actual residence is constrained by a procedure 'established by national law' (Art. 7(3) of the Directive). However, the requirement of a legal basis in an act of general application can be deduced from general principles of EU law and, more specifically, from the legal regime developed by the CJEU for a proper transposition of directives in accordance with Art. 288(3) TFEU.[314] Notably, this legal regime does not provide for so-called reversed direct effect of directives: absent a sufficient legal basis in national law, the provisions of the Reception Conditions Directive cannot be held against an asylum seeker, that is, it cannot serve as an independent legal basis for a restrictive measure.

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310 ECtHR, *Amuur v. France*, Appl. no. 19776/92, Judgment of 25 June 1996; the Court qualified holding persons in the transit zone of an international airport as detention, even though they were 'legally free to leave' toward third countries.

311 ECtHR, *Stanev v. Bulgaria*, Appl. no. 36760/06, Judgment of 17 January 2012, at para. 124.

312 ECtHR, *Guzzardi v. Italy*, Appl. no. 7367/76, Judgment of 6 November 1980.

313 ECtHR, *Raimondo v. Italy*, Appl. no. 12954/87, Judgment of 22 February 1994.

314 See Bast, 'Legal Instruments and Judicial Protection', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2009) 345, at 355 et seq.

Third, Art. 7(2) Reception Conditions Directive provides that 'Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection'. This wide scope for the grounds that may justify area-based restrictions raises questions in light of Art. 12(3) ICCPR and Art. 2(3) and (4) of Protocol No. 4 ECHR. According to Art. 12(3) ICCPR, restrictions on the right to freedom of movement must be necessary for the protection of national security, public order, public health or morals, or the rights and freedoms of others. Art. 2(3) Protocol No. 4 ECHR is drafted in a similar way. However, the additional limitation foreseen in Art. 2(4) Protocol No. 4 ECHR, permitting area-based restrictions justified by 'the public interest', is not included in Art. 12(3) ICCPR.

This difference is particularly significant in the context of Art. 7(2) of the Reception Condition Directive. The broad notion of 'public interest' might well cover measures taken for mere bureaucratic convenience that would not qualify for the maintenance of *ordre public*. Arguably, the 'swift processing and effective monitoring' of asylum claims that is explicitly mentioned in Art. 7(2) is but one example, although a swift and fair asylum procedure is also in the interest of bona fide asylum seekers. However, measures that are only supported by public interests, and not by the grounds mentioned in Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR, would violate Human Rights law in two respects. First, the Member States are bound to respect their international obligations under the ICCPR in addition to their obligations under the ECHR. Second, the Strasbourg Court has established a narrow reading of the scope of Art. 2(4) Protocol No. 4 ECHR. According to its case-law, the fourth paragraph does not apply to measures directed at particular individuals or groups of individuals – which must be considered in light of the third paragraph, with its narrower scope – but only to measures of general applicability that are limited to discrete areas of a country.[315] Hence, Member States cannot refer to Art. 2(4) Protocol No. 4 ECHR when implementing Art. 7(2) of the Directive. In light of the above jurisprudence, freedom of movement of legally present migrants may only be limited by national security or public order considerations in a stricter sense, as laid down in Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR.

315 On this distinction in a non-migration case, see ECtHR, Appl. no. 43494/09, *Garib v. the Netherlands*, Judgment of 6 November 2017, at para. 110.

Accordingly, Art. 7(2) of the Reception Condition Directive seemingly permits Member State certain action that is actually unlawful under Human Rights law and EU fundamental rights. This is not merely another example of 'underinclusive legislation', which would be technically lawful according to the jurisprudence of the CJEU when its provisions are sufficiently flexible to incorporate EU fundamental rights (see above, introductory chapter). Rather, in cases such as Art. 7(2) of the Reception Condition Directive, in which the literal transposition of the provision of a Directive would constitute a violation of fundamental rights, this provision must itself be regarded as unlawful.

The reform proposals tabled in 2020 by the European Commission would even expand the use of area-based restrictions. In the specific context of border procedures, the amended proposal for an Asylum Procedures Regulation[316] would make the use of border procedures mandatory for certain types of claims,[317] while Art. 41(13) requires Member States to 'keep' these claimants near the border or transit zones, that is, to implement area-based restrictions. According to Art. 41(2) and (3) of the amended proposal, the use of border procedures would be mandatory for three grounds: Where the applicant is assumed to have misled the authorities by withholding or presenting false evidence, where the applicant is considered a danger to national security and, importantly, according to a new ground added in the 2020 proposal, where the applicant comes from a country with a Union-wide recognition rate of 20 % or lower.[318] Once the determination is made, during a screening procedure or otherwise, that one of these grounds is present, the imposition of an area-based restriction is the immediate and automatic effect according to the Regulation. On the basis of our legal evaluation conducted above, such a provision of EU law would be unlawful for two reasons. First, the grounds laid down in Art. 41(2) and (3) of the amended proposal clearly exceed what is accepted under Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR (and the corresponding EU fundamental right). In particular the statistical chances of an asylum claim to be successful does not relate to any of the public

316 Amended proposal for an Asylum Procedures Regulation, COM(2020) 611, 23 September 2020.

317 According to Art 40(1) of the proposal, as amended in 2020, Member States are obliged to apply the accelerated procedure on nine specified grounds that are related to what are considered prima facie manifestly unfounded claims. The accelerated procedure may, but does not have to be, carried out in the form of a border procedure in all cases.

318 Art. 40(1)(c), (f) and (i) of the amended proposal.

order considerations mentioned in these clauses. Second, even if the more lenient test under Art. 8(2) ECHR were applicable due to a presumed 'unlawful' presence of the asylum seekers concerned, the automatic imposition of restriction on the freedom of movement would fail to be 'necessary in a democratic society' (and comply with the corresponding principle of proportionality in EU law). Restrictions on movement that are based on abstractly formulated criteria, that establish irrebuttable presumptions to the detriment of migrants, are inadmissible. In line with Human Rights law, regardless of whether such measures would in fact amount to detention, their blanket imposition without a proportionality assessment on a case-by-case basis is manifestly unlawful.

2.2.5 Specific issue: Detention conditions

(1) The outline of the legal framework has revealed a lack of normative standards on adequate conditions for administrative immigration detention (see above, section 2.2.1). This also holds true in EU legislation. The regulation of detention conditions for asylum seekers (Art. 10 Reception Conditions Directive) and for persons who are subject to return procedures (Art. 16 Return Directive) is rather sparse. Although the requirements laid down in the Reception Conditions Directive are somewhat more detailed than those in the Return Directive, neither provides detailed guidance on how a detention centre is to be designed and what facilities it should provide.[319] Both instruments limit the standards for conditions essentially to one article, and under both instruments many exceptions and derogations are possible.[320]

This is a clear case of underinclusive legislation at the EU level with regard to those standards that do exist in Human Rights law to prevent inhuman or degrading treatment in detention. The European Commission has noted this gap and reminded Member States in its 2017 Recommendation regarding a 'Return Handbook' that Member States must respect the absolute minimum that is required by Art. 4 EU-CFR, even when

319 A. Achermann, J. Künzli and B. von Rütte, *European Immigration Detention Rules: Feasibility Study* (2013), at 20, available at https://www.unine.ch/files/live/sites/ius-migration/files/Publikationslisten/EIDR%20Feasibility%20Study%20MC.pdf.

320 For example, Art. 16(1)(1) Return Directive, and Art. 10(1)(3) Reception Conditions Directive.

the Return Directive does not regulate certain material detention conditions.[321] The Commission makes reference to a series of relevant guidelines and standards. This illustrates that not even the absolute minimum is sufficiently regulated in EU legislation regarding immigration detention.

As outlined above, inadequate conditions in immigration detention can also lead to a breach of Art. 5(1)(f) ECHR or other provisions of Human Rights law, in particular Art. 8 ECHR. In this regard, detention conditions must reflect the administrative character of the measure. Detention is imposed in order to achieve the specific aim of a person not leaving, but otherwise detention conditions should not be of punitive character and be as close as possible to living normally such that other harms are curbed as much as possible. To reflect this, and while other specific legislation is lacking, the provisions on reception conditions of asylum seekers could provisionally serve as a general standard. To this end, the Reception Conditions Directive could be made applicable to all migrants in detention. This would at least ensure compliance with the basic principle of proportionality in most cases, regardless of the requirement also to assess this principle in the individual case.

In addition, there is a need for further concretization. The codification process of the European Rules for Administrative Detention is potentially promising in this regard. However, reports indicate that the process is stagnating just as, somewhat ironically, the EU is blocking the adoption of a Council of Europe resolution on the standards.[322] Moreover, the draft contains little detail on the design and operation of an immigration detention center and on how migrants are to be treated.[323] Rather, the parts of the Rules on the conditions and treatment in detention largely

321 European Commission, Recommendation 2017/2338 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, at para. 149.

322 See Deutscher Bundestag, Bericht der Bundesregierung über die Tätigkeit des Europarats im Zeitraum vom 1. Januar bis 31. Dezember 2018, BT Drucksache 19/9444, 5. April 2019, at 16: '[CDCJ] has continued its work on a codification of existing legal standards in centers for the administrative detention of migrants. The work has been halted shortly before the finalization by interventions lodged by the EU Commission at a late stage. The Committee of Ministers of the Council of Europe is currently examining in what form the work can be taken up again in 2019 and finalized' (trans. by the authors).

323 Council of Europe: European Committee on Legal Co-Operation (CDCJ), Codifying instrument of European rules on the administrative detention of migrants, 18 May 2017, available at https://rm.coe.int/european-rules-on-the-administrative-detention-of-migrants-draft-codif/1680714cc1.

replicate the text of the European Prison Rules, without contextualization or adaptation.[324] Here, a more proactive role of the EU and its Member States would be required from the viewpoint of Human Rights.

(2) Detention of any kind represents a context of particular vulnerability to maltreatment that requires an effective monitoring mechanism. Art. 16(4) Return Directive provides for monitoring but allows for the visits in detention facilities to be conditioned on prior authorization. The Reception Conditions Directive does not specifically foresee a monitoring mechanism. According to Art. 10(3) and (4) Reception Conditions Directive, only UNHCR and NGOs have (in principle) unlimited access to detained asylum seekers. In order to ensure Human Rights compliance, a monitoring mechanism is needed not only for detention centers but also for reception centers and other places of area-based restriction, such as confinement on islands.[325] Such monitoring should be carried out by bodies that also inspect prisons – for example, by national prison monitoring bodies such as the national preventive mechanisms established under the Optional Protocol to CAT.[326]

(3) The Return Directive allows for the detention of children 'as a measure of last resort and for the shortest appropriate period of time' (Art. 17) as well as of persons in situations of vulnerability and with special needs (Art. 16(3) Return Directive). Similarly, the Reception Conditions Directive allows for the detention of both children and persons in situations of vulnerability. The 2017 Commission Recommendation on making returns

324 L. McGregor, *An Appraisal of the Council of Europe's Draft European Rules on the Conditions of Administrative Detention of Migrants*, 19 July 2017, available at https://www.ejiltalk.org/an-appraisal-of-the-council-of-europes-draft-european-rules-on-the-conditions-of-administrative-detention-of-migrants/.

325 E. Guild, M. Garlick and V. Moreno-Lax, *Study on Enhancing the Common European Asylum System and Alternatives to Dublin* (2015), available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf, at para. 30–38. See also the guide for monitoring immigration detention prepared by the Association for the Prevention of Torture (ATP), the International Detention Coalition (IDC) and UNHCR, Monitoring Immigration Detention: Practical Manual (2014), available at https://idcoalition.org/wp-content/uploads/2015/06/Monitoring-Immigration-Detention-Practical-Manual.pdf.

326 Ph. de Bruycker et al., *Alternatives to Immigration and Asylum Detention: Time for Implementation* (2015), at 21.

more effective even states that Member States should not preclude the detention of minors in their legislation.[327]

This raises the issue as to what extent, and under what conditions, the placement in detention of particularly vulnerable migrants can be justified in international law. In Human Rights law as it stands, we were not able to identify a general prohibition of detaining certain classes of persons entirely. The UN Convention on the Rights of the Child establishes that detention of a minor should be a measure of last resort, but it does not explicitly prohibit the practice.[328] The same holds true under the UN Convention on the Rights of Persons with Disabilities; while this document has been specifically designed to address the protection of disabled persons, it does not prohibit resorting to detention.[329] Consequently, establishing a general prohibition to detain certain classes of particularly vulnerable migrants would be the task of domestic legislatures, including the EU.

However, as repeatedly stated, detention must be necessary and proportionate in each case. The individual's specific vulnerability is an important element that needs to be duly considered. Taking into account the administrative purpose of a measure, through a correct reading of the principles of necessity and proportionality, a vulnerable person should be placed under a non-custodial measure from the outset of the procedure.[330] In this light, the Working Group on Arbitrary Detention argues that immigration detention of migrants in situations of vulnerability or at risk, such as unaccompanied children, families with minor children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture, and/or other serious violent crimes, 'must not take place'.[331] Similarly, for children specifically, the UN Special Rapporteur on the Human Rights of Migrants has argued that children should never be detained for

327 European Commission, Recommendation 2017/432 on making returns more effective when implementing the Directive 2008/115/EC, at para. 14.

328 See Art. 37(c) CRC.

329 See Art. 14 of the Convention on the Rights of Persons with Disabilities (relating to liberty and security).

330 Pétin, 'Exploring the Role of Vulnerability in Immigration Detention', 35 *Refugee Survey Quarterly* (2016) 91, at 98.

331 Human Rights Council: Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants, A/HRC/39/45, at para. 41; see also Report of the Working Group on Arbitrary Detention, Mission to Malta 2009, A/HRC/13/30/Add.2, at para. 79(f), and Report of the Working Group on Arbitrary Detention, Mission to Malaysia 2011, A/HRC/16/47/Add.2, at para. 119.

immigration purposes, nor can detention ever be justified as being in a child's best interests,[332] a view that is shared by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child.[333] The ECtHR has also regularly found detention of children to be disproportionate in relevant cases that came before it.[334] In sum, although detention is not categorically prohibited, the requirements of necessity and proportionality renders immigration detention of people in situations of vulnerability, in particular children, almost always unlawful.

Finally, in order to identify migrants in situations of vulnerability, and to prevent their potentially unlawful detention, a screening procedure is required. Some situations of particular vulnerability are more or less obvious, such as old age or physical disability, but others are not, such as mental disorders, or trauma resulting from torture or rape. Identification is a core element without which the provisions aimed at special treatment of persons in situations of vulnerability would lose any meaning.[335]

While Art. 11 of the Reception Conditions Directive includes a special provision on the detention of vulnerable persons, it does not specifically prescribe a screening procedure in order to identify them.[336] Art. 21 and 22 of this Directive require an assessment of special reception needs, and Art. 24(1) of the Asylum Procedures Directive requires an assessment of a need for special procedural guarantees. But the details and design of such mechanisms are not specified in either instrument. The sole prerequisite is the need for a vulnerability assessment.[337] It is unclear whether

332 Report of the Special Rapporteur on the human rights of migrants: Focus Return (2018), at 10.

333 See joint General Comment No. 3 (2017) of the CMW and No. 22 (2017) of the CRC on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22; joint General Comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23.

334 For an analysis, see Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children', 19 *Human Rights Law Review* (2019) 1, at 16–19.

335 Jakuleviciene, 'Vulnerable Persons as a New Sub-Group of Asylum Seekers?', in V. Chetail, Ph. de Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (2016) 353, at 353–373.

336 Art. 11 Reception Conditions Directive.

337 Art. 22 and recital 29 of Reception Conditions Directive, in conjunction with Art. 24 Asylum Procedures Directive.

identification should be a separate step in the asylum procedure and what minimal requirements would suffice to fulfill this obligation. In contrast, the Return Directive makes no mention of any vulnerability assessment procedure at all. Art. 16 of the Return Directive is limited to requiring that 'particular attention shall be paid to the situation of vulnerable persons', and that 'emergency health care and essential treatment of illness shall be provided'. There is thus no explicit legal requirement for a screening procedure in order to identify persons in situations of vulnerability among those who are subject to pre-removal detention based on the Return Directive.

2.3 Recommendations

Recommendation 1: Enact horizontal provisions on detention grounds

We recommend that in order to prevent the disproportionate and expansive use of detention, the EU should regulate the grounds for detention of migrants in a horizontal provision that applies across all instruments. Taking the cue from the exhaustive list in the Reception Conditions Directive and the CJEU's rulings regarding the Return Directive, the provision should exhaustively list the possible grounds for detention. Considering the relevant jurisprudence of the HR Committee, the permissible grounds for detention should be limited to a risk of absconding and a risk of acts against national security. We suggest the following wording:

> *Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may keep in detention, for the shortest time possible, a third-country national who is the subject of migration procedures only when strictly necessary in order to prevent (a) absconding or (b) acts against national security. In each individual case, Member States must demonstrate that the detention is necessary in order to meet this aim.*

These two grounds should each be carefully circumscribed and exhaustively defined in EU law in order to ensure that expanding interpretation does not undermine the requirement of an individual assessment. This provision should apply to instances of the detention in the EU related to asylum and immigration matters, including but not limited to the Return Directive, the Reception Conditions Directive, and the Dublin Regulation. The necessary powers of the EU legislature follow from a combined use of the legal bases provided in Art. 78(2) and Art. 79(2) TFEU.

Recommendation 2: Prohibit 'border procedures' based on detention

The EU should abstain from enabling the use of detention as part of border procedures to assess asylum claims. Upholding the current policy that relies on detention for border procedures would violate Human Rights law and, hence, Art. 6 EU-CFR. Accordingly, we recommend deleting Art. 8(3)(c) Asylum Procedures Directive. Accelerated asylum procedures at the external borders of the EU are not per se unlawful, but they must not be accompanied by quasi-automatic detention absent a specific reason to detain a particular individual.

Pending such amendment, EU Member States are obliged, by virtue of Art. 9 ICCPR and their corresponding obligations under EU law, to refrain from detaining asylum seekers upon entry beyond a brief initial stage to register and record their claim. In order to achieve the purposes laid down in Art. 43(1) Asylum Procedures Directive, Member States may only resort to well-justified area-based restrictions, as referred to in Art. 43(3) Asylum Procedures Directive.

Accordingly, the Commission should withdraw its proposal for an Asylum Procedures Regulation, as amended in 2020, since it proposes to expand the use of border procedures and maintains ambiguous wording as regards the question of whether this involves detention.[338] We rather recommend that in its reform efforts regarding border procedures, the EU should explicitly prohibit the use of detention specifically related to asylum claims.

Recommendation 3: Specify legal safeguards for area-based restrictions

We recommend that Art. 7(2) Reception Conditions Directive be revised. First, it should explicitly require a legal basis in national law for any type of area-based restriction imposed on asylum seekers. Second, the permissible grounds for area-based restriction laid down in Art. 7(2) Reception Conditions Directive must be amended, as 'public interest' and 'swift processing and effective monitoring' of asylum applications are not sufficient to justify area-based restrictions. In order to align with EU fundamental rights, read in the light of Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR, the revised Reception Conditions Directive should provide for

338 See Art. 41 and 41a of the Amended proposal for an Asylum Procedures Regulation, COM(2020) 611, 23 September 2019.

area-based restrictions only on grounds of national security or for the maintenance of public order.

The same limitations and safeguards should apply to all types of area-based restrictions, including in the context of border procedures, as referred to in Art. 18(1)(a) Reception Conditions Directive and Art. 43(3) Asylum Procedures Directive. The Commission must withdraw its proposal for a mandatory use of area-based restrictions (Art. 41(13) amended proposal for an Asylum Procedures Regulation) since it violates Human Rights and fundamental rights.

Recommendation 4: Ensure adequate conditions in immigration detention and reception centers

We recommend that the EU proactively advance the process of further developing soft law on the conditions of immigration detention. To this end, it should constructively contribute to the process at the Council of Europe with the aim of implementing a Human Rights-based approach to defining the adequate conditions for administrative detention. The EU should define its own position on the draft European Immigration Detention Rules in the form of a decision, which would also be binding upon the negotiating stance of the Member States in all fields governed by EU law, including immigration detention.

In the meantime, we recommend that the general provisions on reception conditions laid down in the Reception Conditions Directive be made applicable to all migrants in detention.

In order to ensure compliance with these standards, we further recommend that the EU require Member States to implement a monitoring mechanism for places of administrative detention and reception centers, including the possibility of inspections without notice.

Recommendation 5: Prohibit detention of persons in situations of particular vulnerability

We recommend that the EU legislature explicitly prohibit the administrative detention of migrants in situations of particular vulnerability, including but not limited to children, in order to comply with the principle of proportionality by way of legislative balancing.

In order to be able to effectively implement this prohibition, this should be coupled with the requirement for Member States to implement an identification mechanism for situations of vulnerability prior to any order to detain, and at regular intervals during detention.