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Wessels, Janna

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Gaps in Human Rights Law? Detention and Area-Based Restrictions in the Proposed Border Procedures in the EU

Janna Wessels[1]

With the legislative proposals presented as the New Pact on Migration and Asylum on 23 September 2020, the European Commission sought to overcome the political impasse in reform efforts of the Common European Asylum System. A key element of this legislative package is the broader use of border procedures. The rationale is that by 'keeping' certain asylum seekers at the borders or in transit zones, return policies would become more effective. This paper undertakes a legal assessment of the proposed border procedures in light of legal obligations arising from the Human Rights to liberty and freedom movement. It argues that the qualification of asylum seekers' entry as unauthorised seemingly pushes into a gap in human rights law, allowing for detention and area-based restrictions. However, a reconstruction of the applicable human rights standards shows that the blanket use of such measures is in fact unlawful, such that the proposal will have to be amended in that regard.

In the European Union, the increased use of so-called border procedures is one of the major recent trends in terms of policy measures towards asylum seekers. Such procedures allow for asylum applications that are made by persons who arrive without a valid visa to be processed directly at the border or in transit zones.[2] While they are already part of the EU asylum acquis, the broader reliance on border procedures is a key element of current reform efforts since the European Commission's New Pact on Migration and Asylum.[3] Presented on 23 September 2020, this package of legislative proposals sought to overcome the political impasse in reform efforts towards a more 'well-managed' and 'effective' EU migration

[1] *Assistant Professor, Amsterdam Centre for Migration & Refugee Law (ACMRL), VU University Amsterdam, j.m.wessels@vu.nl.* The present paper draws on the research project REMAP (Human Rights Challenges to European Migration Policy). Many of the arguments presented here were developed together with the co-authors of the REMAP study, Jürgen Bast and Frederik von Harbou, see Bast/v. Harbou/Wessels, Human Rights Challenges to European Migration Policy. The REMAP Study, 2nd ed., Nomos and Hart, Baden-Baden/ Oxford 2022, available open access.

[2] EASO (2020) Border Procedures for Asylum Applications in EU+ Countries https://easo.europa.eu/sites/default/files/publications/Border-procedures-asylum-applications-2020.pdf.

[3] European Commission (2020) Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

policy.[4] It amends and expands earlier legislative proposals in an attempt to reconcile conflicting interests of different Member States. While it has not provided the intended impetus, at the time of writing, the proposals are still the basis of ongoing negotiations.[5] In June 2022, the European Parliament and the rotating Presidencies of the Council declared their plan to finish negotiating all the asylum and migration proposals currently on the table by February 2024, with the aim of having them enter into force by April 2024 at the latest.[6]

Among the legislative proposals of the New Pact is that for an Asylum Procedures Regulation, as amended in September 2020, in which the European Commission proposes a more extensive use of integrated border procedures.[7] The rationale is that by 'keeping' certain asylum seekers at the borders or in transit zones, return policies would become more effective. While the involvement of the co-legislators (the Council of the EU and the European Parliament) during the legislative procedure may still lead to significant changes, the proposals as tabled by the Commission have been critically assessed also in scholarship. Among others, it has been criticised that the proposal risks undermining legal safeguards,[8] that it only fleetingly engages with legal and practical deficiencies that have been shown to systematically surface in border procedures as they are currently implemented,[9] that it ignores the requirements of evidence-based and assessment-driven policy-making, as required by the EU's Better Regulation guidelines,[10] as well as commitments that EU Member States have made under the Global Compact for Migration,[11] and that it normalises the hotspot approach as a standard measure of migration management.[12]

The present article chooses a different angle. One of the points of disagreement as regards the proposed border procedures was highlighted by Greece, Spain, Malta and Italy in their joint comment on the proposal from November 2020, where they warned that

[4] European Commission (2020) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Brussels, 23.9.2020 COM(2020) 609 final, p 2-3, https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF

[5] As of January 2023, the background information on the EU asylum reform merely states that 'the EU is currently reviewing it', https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/. At the Justice and Home Affairs Council on 8-9 December 2022, the 'presidency also informed about recent positive developments related to the inter-institutional cooperation between the Council and the European Parliament, allowing to restart work on 5 legislative proposals under the Pact on migration and asylum', see https://www.consilium.europa.eu/en/meetings/jha/2022/12/08-09/.

[6] European Parliament, Legislative Train Schedule: A New Pact on Asylum and Migration and accompanying legal proposals (Articles 78 and 79 TFEU), https://www.europarl.europa.eu/legislative-train/theme-civil-liberties-justice-and-home-affairs-libe/file-a-new-pact-on-migration-and-asylum.

[7] European Commission (2020) Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291268538&uri=COM%3A2020%3A611%3AFIN

[8] Jens Vedsted-Hansen, 'Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?' in: Daniel Thym and Odysseus Academic Network (eds.) *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Baden-Baden: Nomos (2022) 99.

[9] Den Heijer, 'The Pitfalls of Border Procedures', 59 *Common Market Law Review* (2022) 641.

[10] Cornelisse and Reneman, 'Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?', 26 *European Law Journal* (2020) 181–198.

[11] Cornelisse and Marcelle Reneman, 'Border Procedures in the European Union: How the Pact Ignored the Compacts', 11 *Laws* (2022) 38.

[12] Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention', 7(2) *European Papers* (2022) 615.

> although the Commission's proposal does not explicitly include this possibility, we need to be sure that the final regulation of procedures at the border does not pave the way to undesirable effects. Setting-up large closed centers at the external borders is not acceptable. The management of asylum must fully respect Human Rights and the rights of asylum-seekers, which are to be reflected in the regulation of the relevant procedures.[13]

This article takes this concern as a starting point and assesses the proposed border procedures from the perspective of legal requirements from Human Rights law.[14] Although the proposal does indeed not prescribe closed asylum centres, it is clear that these border procedures would have to rely on restrictions of movement of asylum seekers at border or transit zones, which may in some – and maybe most – cases amount to detention. The article identifies the qualification of asylum seekers in the pre-entry phase as not lawfully on territory as the main legal "trick" that the proposal seeks to employ. It uses apparent gaps in the international Human Rights framework for those not lawfully on territory, with the aim of effectively containing asylum seekers during border procedures. However, by reconstructing the applicable human rights standards, the article argues that these gaps in fact do not exist: The Commission's proposal is constructed around the wrong Human Rights standard for detention and it fails to require necessary individual justifications for the impositions of area-based restrictions.

Before delving into the legal analysis, the paper briefly outlines relevant parts of the Commission's proposal on border procedures. It then proceeds to first discuss the Human Rights standards for detention of asylum seekers, before examining the imposition of other forms of area-based restrictions in light of human rights law.

1. The Commission's proposal on border procedures in a nutshell

The Commission proposes a complex procedure. A central element of the proposal is the introduction of a 'pre-entry phase' during which the asylum seekers' presence on the territory of EU Member States has not been authorised. The pre-entry phase consists of a screening procedure, which is regulated in its own Screening Regulation,[15] an asylum border procedure and a return border procedure. The image below represents a simplified overview.

[13] New Pact on Migration and Asylum: comments by Greece, Italy, Malta and Spain, available at https://s3.eu-central-1.amazonaws.com/euobs-media/d650e79d0caacdd94e0c1f9f8b0c00a5.odt , Joint document published by the EU Observer on 26 November 2020, see https://euobserver-com/migration/150196.

[14] See in particular Chapter 2, Ensuring Liberty and Freedom of Movement, of the REMAP study: J. Bast, F. von Harbou and J. Wessels, Human Rights Challenges to European Migration Policy. The REMAP Study, 2nd revised edition, Baden-Baden/Oxford: Nomos/Hart, 2022, doi.org/10.5771/9783748926740.

[15] European Commission (2020) Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final.

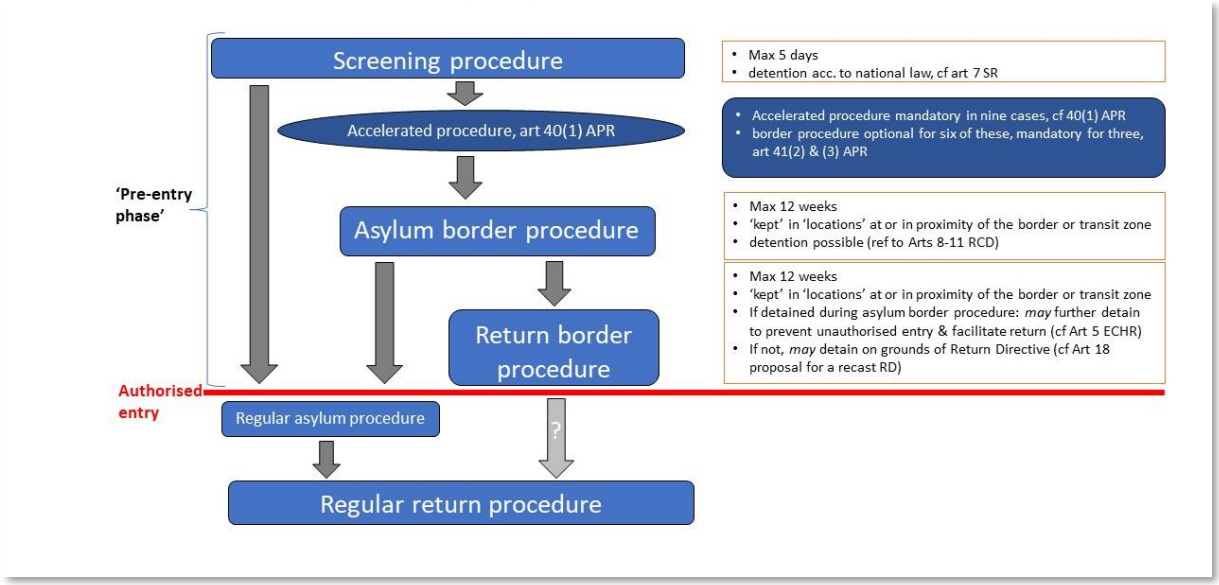

Figure 1 Visualisation of the proposed border procedures based on the legislative proposals from 23 September 2020

Various things happen during the screening relating to identification and recording of claims.[16] During the screening, a decision would also be taken on whether a claim will be assessed in the regular asylum procedure (and accordingly, the applicant would be authorised to enter the territory) or whether the merits of their claims are to be assessed within the accelerated procedure. According to Art 40(1) of the 2016 proposal for an Asylum Procedures Regulation, 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.[17]

This accelerated procedure may, but does not have to be, carried out in the form of a border procedure in all cases. However, according to Art 41(2) and (3) amended proposal APR, it is mandatory to use the border procedure for three of the grounds for the accelerated procedure: 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 most recent proposal, where the applicant comes from a country with a Union-wide recognition rate of 20% or lower (Art 40(1)(c), (f) and (i) amended proposal APR).

During the asylum border procedure, Member States are to complete the asylum procedure of the applicant, including possible appeals, and come to a final decision. This may not take longer than 12 weeks. If their application is recognised, they are then legally authorised entry into the territory. If no final decision is reached after 12 weeks, applicants will be transferred into the regular asylum procedure, and thus also authorised entry. If the final decision is negative, they will be transferred into the Return Border Procedure, in order to facilitate their return. This procedure may also not take longer than 12

[16] For a critique see Lyra Jakulevičienė (2020) Re-decoration of existing practices? Proposed screening procedures at the EU external borders, EU Migration Law Blog, 27 October 2020, http://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/.

[17] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 13.7.2016 COM(2016) 467 final; and Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 23.9.2020 COM(2020) 611 final.

weeks – and although the proposal does not state this explicitly, it can be inferred that if the return has not been effectuated after those 12 weeks, the respective individuals would be transferred into the regular return procedure, and thus, presumably, also authorised entry. Taken together, this means that a person may be subject to a Border Procedure, and thus not authorised to enter the territory, for a total of six months.

During the time that the Commission proposal conceives of these persons as not lawfully on territory, Member States are obliged to contain them in the border region. According to Art 41(13) and Art 41a(2) amended proposal APR respectively, those subject to border procedures 'shall' be 'kept' in 'locations' 'at or in proximity of the border or transit zones'. The Commission proposal does not outline concrete measures as to how this is to be achieved. But it can be inferred that it must involve some kind of mobility restriction – in the very least in the form of area-based restrictions, which may or may not amount to detention.

It is here that the question arises whether the proposal may conflict with Human Rights law. The remainder of this paper discusses two such potential conflicts: It will first assess the question of whether and under what circumstances those individuals subject to border procedures may be detained, and then examine the question of the conditions for the imposition of other forms of area-based restrictions.

As a general matter, it is important to note that the qualification of entry as unauthorised does not prevent protection under Human Rights law. As soon as asylum seekers is under the jurisdiction of the EU Member State that conducts the border procedure, their obligations under Human Rights law apply. It does not matter under international law how the national legal system defines 'entry'. In the case of border procedures, during which persons are on Member State territory, there is no doubt that jurisdiction is established, such that they enjoy the protection of Human Rights by which this state is bound. The European Commission's proposal recognises this fact.

However, some Human Rights are limited in scope to those persons who have entered or are present *lawfully*. Importantly for present purposes, Art 5(1)(f) ECHR provides for detention in order to 'prevent unauthorised entry'. Similarly, the right to freedom of movement in Art 12 ICCPR and Art 2 Protocol 4 ECHR is reserved for '[e]veryone lawfully within the territory'. In this regard, the legal designation of entry as unlawful in EU law may indeed have legal consequences and, as the present paper will discuss, the Commission proposal on border procedures is constructed in an attempt to exploit these.

2. Facilitating detention

The first legal issue that arises in the context of the proposed border procedures concerns the applicable Human Rights standard for detention. It is important to note that the Commission's proposal merely obliges Member States to 'keep' asylum seekers in 'locations', 'at or in proximity to the external border or transit zones'. This does not necessarily have to involve measures amounting to detention. Accordingly, the proposal does not prescribe detention during the time when the border procedures are conducted – but it does not preclude detention either, for both the asylum and the return border procedure, as will be set out below.

2.1 The provisions relating to detention in the Commission's proposal

The following section looks at the proposed border procedures in turn. While a version of the *asylum* border procedure is already implemented in current EU legislation, and the proposed changes are of limited novelty, the *return* border procedure is a new addition to the asylum acquis. Both allow for detention while the procedures are carried out.

2.2.1 Limited novelty regarding the proposed *asylum* border procedure: mild changes to the current legislation regarding detention

Art 41 amended proposal APR, which lays down the asylum border procedure in the Commission's proposal, does not directly provide for detention. The only reference to detention can be found in Art 41(9)(d) amended proposal APR, which makes a broad, and somewhat indirect, reference to Articles 8-11 RCD, stating that Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

> detention is used in individual cases and the guarantees and conditions for detention as provided for in Articles 8 to 11 of Directive XXX/XXX/EU [Reception Conditions Directive] are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.

The bases for detention are laid down in Art 8 RCD, and in fact there is one ground for detention in the context of a border procedure in particular that is relevant. This is Art 8(3)(c) in the current version of the RCD, which was renumbered as Art 8(3)(d), and only barely amended, in the commission proposal for a recast RCD. Art 8(3)(d) Commission proposal for a recast RCD reads:

> An applicant may be detained only ... in order to decide, in the context of a border procedure in accordance with Article [41] of [the Procedures Regulation], on *the applicant's right to enter the territory*.[18]

This is of limited novelty with regard to the legislation in force. In the current version, 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.'[19] Under the current legislation, the EU asylum border procedures regime is scattered across various provisions in the Asylum Procedures Directive and the Reception Conditions Directive, which must be read together. A systematic reading of the somewhat opaque provision in Art. 8(3)(c) RCD reveals that 'procedure' refers to 'border procedures' as defined in the Art. 43 of the Asylum Procedures Directive. According to that provision, Member States may establish border procedures in order to determine the admissibility, and in some cases the substance, of an asylum claim.[20] Although Art. 43 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.[21] For example, some provisions of the Reception Conditions Directive refer to derogations in

[18] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down standards for the reception of applicants for international protection (recast), 13.7.2016, COM(2016) 465 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465&from=EN, emphasis added.

[19] Art. 8(3)(c) Reception Conditions Directive, emphasis added.

[20] Art. 43(1) Asylum Procedures Directive.

[21] 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.

cases where 'the applicant is detained at a border post or in a transit zone'.[22] 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.[23] Here, too, the explicit reference to Arts 8-11 RCD in the proposed new Article setting out the asylum border procedure in Art 41(9)(d) amended proposal APR, is therefore a welcome clarification, but no change to the status quo.

Although the Commission proposal does not resolve the scattered nature of the provisions, it clarifies the references to the border procedure in Art 8(3) RCD and includes a broad reference to the RCD detention provisions in the proposal for an APR that clarifies that these would be the grounds for detention.[24] In both the current legislation and the proposed reform, however, the ground for detention remains the same, namely the prevention of unauthorised entry, as explicitly laid down as one of the grounds for detention in the Reception Conditions Directive.

2.1.2 Novel introduction of a *return* border procedure: Critical assessment of detention grounds

In addition to clarifying the stipulations for the asylum border procedure to some extent, the Commission proposal also introduces an additional novel element, namely the so-called "return border procedure", in Art 41a amended proposal APR. In the logic of the proposal, the return border procedure follows on directly from the asylum border procedure in case the claim is rejected, such that the (rejected) asylum seeker remains in the border region pending return.

As regards the provisions relating to detention during return border procedures, the Commission proposal distinguishes between two scenarios: those who were already detained during the asylum border procedure, and those who were not. For the former group, Art 41a(5) amended proposal APR states:

> Persons referred to in paragraph 1 [ie, persons subject to the return border procedure] who have been detained during the procedure referred to in Article 41 [ie, the asylum border procedure] and who no longer have a right to remain and are not allowed to remain *may continue to be detained for the purpose of preventing entry into the territory* of the Member State, *preparing the return or carrying out the removal process* (emphasis added).

Notably, there is no cross-reference to the Return Directive in this provision. The Return Directive clearly delineates, and limits, the purposes for which pre-removal detention may be imposed. The proposal for a recast Return Directive proposes two amendments that are relevant in this context: It defines and expands the notion of absconding (in Art 6 proposal for a recast Return Directive), and it expands the ground for pre-removal detention by adding threats to public policy or security as an additional ground as compared with the version currently in force (in Art 18 of that proposal). However, detention "for the purpose of preventing entry into the territory" while "preparing the return or carrying

[22] E.g., Art. 10(5) and Art. 11(6) Reception Conditions Directive.

[23] CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (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 European Court of Human Rights in *Ilias and Ahmed*, which controversially overruled a Chamber judgment to hold that asylum seekers were not detained in the transit zone: ECtHR, *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Grand Chamber Judgment of 21 November 2019.

[24] See European Commission, Proposal for a recast Asylum Procedures Directive, COM(2016) 465 final, 13 July 2016, Art. 8(3)(d).

out the removal process" is not foreseen. This situation is therefore arguably not covered by the grounds listed in Art 18 proposal for a recast Return Directive. The grounds listed there all require an individual assessment. In fact, it is unclear what the legal basis would be for people detained under Art 41a(5) APR proposal – the omission of a reference to the Return Directive, combined with the wording "may *continue to be detained* for the purpose of preventing entry", signals that although substantively, these people are now subject to pre-removal detention, the legal basis is still one that prevents unauthorised entry, in analogy with Art 8(3)(c) RCD (which would become Art 8(3)(d) in the proposal for a recast RCD).

In contrast, for those who were not detained during the asylum border procedure, Art 41a(6) amended proposal APR states:

> Persons referred to in paragraph 1 [ie, persons subject to the return border procedure] who no longer have a right to remain and are not allowed to remain, and *who were not detained during the procedure referred to in Article 41 [ie, the asylum border procedure]*, may be detained if there is a risk of absconding within the meaning of Directive XXX/XXX/EU [Return Directive], if they avoid or hamper the preparation of return or the removal process or they pose a risk to public policy, public security or national security (emphasis added).

In other words, if asylum seekers were *not* detained during the asylum border procedure *in order to prevent their unauthorised entry* based on Art 8(3)(d), then the proposal does not find it logical to detain *in order to prevent entry* at a later point, even if – while subject to the asylum border procedure – they were never authorised entry. Instead, Art 41a(6) amended proposal APR lists narrower grounds for detention, mirroring those that are foreseen in Art 18 of the proposal for a recast Return Directive (without, however, making a direct cross-reference to those provisions in the Return Directive, which would serve clarity – the only direct reference is to the definition of absconding from that Directive).[25] These grounds would likely extend to those who are subject to the border procedure on because they are assumed to have misled the authorities by withholding or presenting false evidence, or where they are considered a danger to national security. However, these grounds are arguably unsuitable specifically for those whose claims are processed in the border procedure because they come from a country of origin with a refugee recognition rate of 20% or lower.

In some ways, this state of affairs could therefore function as an incentive for detention during the asylum border procedure, because only if a person *was* detained during the asylum border procedure will a State be allowed to continue to detain them during the return border procedure without an additional individual ground – the central ground for detention in the proposed border procedures is thus preventing unauthorised entry.

To sum up, there is quite some puzzling involved in order to put together the conditions under which a person may be detained during both the asylum and the return border procedures under the Commission's proposal, as well as to identify the relevant legal ground. But once this has been done, the next question that arises is whether the possibilities for detention as foreseen in the proposals would be in line with applicable human rights law.

[25] See European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018, at 34 (new Art.18): https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2018:634:FIN. See further: J. Bast, F. von Harbou and J. Wessels, Human Rights Challenges to European Migration Policy. The REMAP Study, 2nd revised edition, Baden-Baden/Oxford: Nomos/Hart (2022), doi.org/10.5771/9783748926740, Chapter 2.

2.2 Human rights law standards for immigration detention

The right to liberty and security is one of the oldest and most fundamental Human Rights.[26] The guarantee of *habeas corpus* applies to all human beings, regardless of immigration or other status.[27] The prohibition of arbitrary detention is a well-established rule of customary international law and is codified in a broad range of treaties.[28] In the Commission's proposal, the relevant provisions on which any such detention of persons subject to the border procedures would be based, are constructed around preventing unauthorised entry in accordance with the first leg of Art 5(1)(f) ECHR, as interpreted by the ECtHR's in its Saadi case law.[29] The following briefly sets out the legal standard for immigration detention that the European Court of Human Rights in Strasbourg has developed on the basis of that article.

2.2.1. The Strasbourg Court's Art 5 ECHR jurisprudence: detention to prevent unauthorised entry

Art. 5 ECHR incorporates the right to liberty and security of the person. Rather than a generic prohibition of arbitrariness, it provides an exhaustive list of six situations in which 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'.[30]

The original intent, in 1950, to draft an exhaustive list of detention grounds was to provide for more specific regulation than the generic non-arbitrariness clauses of the UDHR, but the ensuing case-law on Art. 5(1)(f) ECHR has moved in the opposite direction. 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 must also be necessary in the circumstances',[31] the Court has accepted the practice of detention for bureaucratic convenience in the migration context, both for pre-removal and pre-entry detention.[32] In a controversial line of case law, since the Grand Chamber judgment in Saadi v UK, the European Court of Human Rights has interpreted this provision to mean that an assessment of necessity in the individual case is not required under Art. 5(1)(f) ECHR for the lawfulness of immigration detention.[33]

[26] 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).
[27] As reaffirmed, for example, in HRC, General Comment No. 15: The Position of Aliens under the Covenant, HRI/GEN/1/Rev.1, at para. 1 and 7.
[28] V. Chetail, *International Migration Law*, Oxford: OUP (2019), at 133.
[29] ECtHR, *Saadi v. UK*, Appl. no. 13229/03, Grand Chamber Judgment of 29 January 2008.
[30] Art 5(1)(f) ECHR, emphasis added.
[31] ECtHR, *Witold Litwa v. Poland*, Appl. no. 26629/95, Judgment of 4 April 2000, at para. 78.
[32] ECtHR, *Chahal v. UK*, Appl. no. 22414/93, Judgment of 15 November 1996 (regarding pre-removal detention), and *Saadi v. UK*, Appl. no. 13229/03, Grand Chamber Judgment of 29 January 2008 (regarding detention upon entry).
[33] ECtHR, *Saadi v. UK*, Appl. no. 13229/03, Grand Chamber Judgment of 29 January 2008, at para. 72–74.

It is important to note that the ECtHR's Saadi line of reasoning was widely challenged in legal scholarship.[34] It also has outspoken critics within the Court[35] and the Council of Europe more widely. The Parliamentary Assembly of the Council of Europe has expressly criticized the Saadi judgment,[36] and the European Commissioner for Human Rights and the European Committee for the Prevention of Torture has expressed their opposition to the use of immigration detention as a first response and deterrent to migrants reaching Europe irregularly.[37] In its more recent case-law, albeit not decisively, the Strasbourg Court has been cautiously resiling from its previous position and increasingly incorporates elements of a full proportionality test (including the element of necessity).[38]

In the Commission proposals on border procedures, regardless of such critique, the wording of those provisions that would serve as grounds for detention for both the asylum border procedure and the return border procedure in the Commission proposal very much reflect the wording of Art 5(1)(f) ECHR with regards to preventing unauthorised entry. It appears that the proposal is modelled against that standard. In this context, the red line of unauthorised entry from the Commission proposal is relevant: If detention is to be possible during border procedures on the basis of Art 5(1)(f) ECHR, it is important that entry has not yet been declared as authorised.

This construction is noteworthy specifically with a view to the return border procedures. In principle, the second leg of Art 5(1)(f) ECHR, providing for detention 'of a person against whom action is being taken with a view to deportation or extradition', could have served for detention in return border procedures. The Strasbourg case law would have provided for pre-removal detention without a necessity test as well – as the case of Chahal and subsequent case law have established.[39] The reason for the fact that the proposal employs the first leg of Art 5(1)(f) ECHR, which is reflected in the Art 8(3) RCD, also for continued detention for rejected asylum seekers during return border procedures might be that the same interpretation for the second leg (ie, the Chahal case law), which allows for detention for action with a view to return, is not mirrored in EU legislation. Art. 15(1)(b) Return Directive (and Art. 18(1)(b) and (c) in the proposal for a recast Return Directive), lay down grounds for detention that require individual assessments, and which would not provide for detention for "action with a view to return" without additional individual reasons. The Commission was apparently reluctant to fall below the

[34] 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' (2011) 5(2) *Human Rights and International Legal Discourse* 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).

[35] 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', *Saadi v. UK*, Appl. no. 13229/03, Grand Chamber Judgment of 29 January 2008, dissent.

[36] Parliamentary Assembly of the Council of Europe (PACE), *The Detention of Asylum Seekers and Irregular Migrants in Europe*, Report by the Committee on Migration Refugees and Population, Rapporteur A. C. Mendonça, Doc 12105, 11 January 2010, available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12435&lang=en, Principle IV, para. 2, at 20.

[37] 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, Issues reviewed: Asylum and Immigration, CommDH(2008)23, Strasbourg 18 September 2008, available at https://www.coe.int/hy/web/commissioner/country-monitoring/united-kingdom/-/asset_publisher/wg6OoFIrCaX1/content/memorandum-to-the-united-kingdom-asylum-and-immigration?inheritRedirect=false.

[38] ECtHR, *Suso Musa v. Malta*, Appl. no. 42337/12, Judgment of 23 July 2013 and ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Appl. no. 10486/10, Judgment of 20 December 2011, at 124, are examples where the Court applies a proportionality test.

[39] ECtHR, *Chahal v. UK*, Appl. no. 22414/93, Judgment of 15 November 1996.

standards of the Return Directive, which does impose limits on the grounds for detention during return procedures, as outlined above.

In the conception of the Commission proposal, therefore, detention is constructed around preventing unauthorised entry, in line with the first leg of Art 5(1)(f) ECHR, as interpreted by the ECtHR's in its Saadi case law, and reflected in Art 8(3)(c) RCD (or Art. 8(3)(d) in the proposal for a recast RCD). However, this is a shaky foundation, because this jurisprudence is not in line with universal human rights law, as will be developed in the following step.

2.2.2 HRC jurisprudence: Unauthorised entry by migrants does not itself justify detention

In line with the vociferous critique of the Saadi line of jurisprudence, it is well-established that the Strasbourg Court's Art 5 ECHR standard is not in line with universal human rights law. At the universal level, the right to liberty has been included in Art. 9 of the ICCPR.[40] The jurisprudence of the Human Rights Committee (HRC, 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.[41] 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. Unauthorised 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.[42] Following the same line of reasoning, the UN Working Group on Arbitrary Detention reiterates the principles of reasonableness, necessity, and proportionality in the light of the circumstances specific to the individual case.[43] 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'.[44]

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).[45] 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[46] and

[40] 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.'

[41] HRC, *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.

[42] See. e.g., HRC, *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.

[43] HRC, Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45, at para. 14, 19–20 and 22–24.

[44] *Ibid.*, at para. 48.

[45] E.g., Art. 16 ICRMW; Art. 37 CRC.

[46] 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.

acknowledges that the constraints on immigration detention must be even stricter than those governing pre-trial or other forms of preventive criminal detention.[47] 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' (para. 29).[48]

So although Human Rights law does not preclude the detention of asylum seekers entering a State's territory unlawfully, it does narrowly circumscribe such detention. In both its jurisprudence on immigration detention[49] and its General Comments,[50] the Human Rights Committee has clarified that detention of asylum seekers 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.[51] But to detain asylum seekers further while their claims are being processed during border procedures would be arbitrary if there are no particular reasons specific to the individual.[52] 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. So importantly, unauthorised entry by migrants does not itself justify their detention.

The prohibition of arbitrary detention is also an absolute norm of customary international law. In the language of the 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'.[53] 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).

The EU is bound by this higher standard. In EU law, the right to liberty is laid down in Art. 6 EU-CFR, which replicates the plain wording of 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

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

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

[49] HR Committee, Jalloh v. the Netherlands, Communication No. 794/1998, CCPR/C/74/D/794/1998, at para. 8.2.; 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.; HR Committee, C. v. Australia, Communication No. 900/1999, CCPR/C/74/D/900/1999, at para. 8.2.

[50] General Comment No. 35: Liberty and Security of Person, CCPR/C/107/R.3, at para. 18; see also

[51] HRC, *Bakhtiyari v. Australia*, Communication No. 1069/2002, CCPR/C/79/D/1069/2002, at para. 9.2–9.3. In line with HRC jurisprudence, the 2017 Michigan Guidelines also accept detention 'during the very 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. Note that detention during the proposed screening procedure for a maximum of 5 days might be covered by this standard.

[52] HRC, *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.

[53] HRC, Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45, at para. 8; and see HRC, 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.'

to have the same scope and meaning as the corresponding provisions of the ECHR, in this instance, the second sentence of Art. 52(3) EU-CFR applies. According to this clause, the assumption of consonance with the ECHR shall not prevent Union law providing more extensive protection. Given that all Member States are signatories of the ICCPR, and in light of Art. 53 EU-CFR, stipulating that '[n]othing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by … international law … to which the Union, the Community or all the Member States are party', in respect of the prohibition of arbitrary detention, the relevant EU fundamental right must be construed in line with the jurisprudence of the HRC 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. Thus, the lower standard provided in the ECHR is superseded by the higher level of protection at the universal level.

However, based on the Art 5(1)(f) ECHR standard, and via the proposed Art 8(3)(d) APR (and the current Art 8(3)(c) APD), the proposal on border procedures would permit for the detention of groups of people for the purposes of assessing their claims – such as those coming from countries of origin which have a recognition rate lower than 20% – without particular reasons specific to the individual. To the extent that it provides for detention on the basis of Art 5(1)(f) ECHR, the Commission proposal on Border Procedures is unlawful. The conduct of a border procedure in and of itself is not a sufficient ground for detention. In order to comply with the EU's legal obligations, the EU co-legislators must amend the proposal.

But although the possibilities for detention as foreseen in the proposal for border procedures is problematic, they are comparatively well contained legally. This is less so the case for the pseudo-alternative to imprisonment – the imposition of area-based restrictions –, which the Commission proposal would declare permissible almost unconditionally. This point will be developed in the next section.

3. Imposing area-based restrictions

While detention is merely a possibility in the proposal for border procedures, the Commission proposal makes the use of area-based restrictions mandatory – Member States 'shall keep' persons subject to Border Procedures in locations at or in proximity of the border. This somewhat fuzzy wording is not an established legal term, though it is clear that the proposal avoids the term 'detention' – and therefore does not directly require detention either. It is at least conceivable that the measures that Member States adopt in that regard do not amount to detention. To be sure, area-based measures *can* amount to detention even if they are not labelled as such – in which case they would regularly be unlawful for failing to be in line with material and procedural standards. It is well-established that the distinction between deprivation of liberty amounting to detention and restrictions on movement which do not is one of degree rather than substance.[54] The question of whether restrictions actually amount to detention irrespective of their designation depends on the specific circumstances in each particular case[55] – for example, whether the building is physically locked is not decisive if the places and time spent away are subject to

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

[55] 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.

permissions, controls, and restrictions.[56] 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.[57] 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.[58] 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 – 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. And it is to be expected that Member States would regularly claim that the measures imposed are not detention. The difficulty that arises is the fact that the question of whether or not that is the case would have to be determined in lengthy proceedings as regards each specific place and person – as most recently, and with conflicting and partly controversial outcomes regarding the Hungarian transit zones. Here, the European Court of Human Rights held that the fact that asylum seekers could – physically, if not legally – re-enter Serbia by walking back across the border meant that accommodation in transit zones did not amount to detention, a view not shared by the Court of Justice of the European Union.[59] The fuzzy wording of the provision that Member States 'shall keep' applicants at the border, 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.

But the point to be made here is that Member States and/or the EU seem to assume that restrictions on the liberty of movement of migrants, and asylum-seekers specifically, are unproblematic once it is established that they do not amount to detention in the technical sense. This could be an unintended effect of the discussions surrounding so-called alternatives to detention. However, the crucial difference is that alternatives to detention are always a milder means in situations where a person could otherwise be detained. While the principle of proportionality requires the prior consideration of alternatives to detention before a decision to detain a migrant is taken, 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. Area-based restrictions explicitly apply when there is *no* ground for detention. Rather, they serve independent aims that, according to a specific legal basis, justify temporarily restricting the spatial movement of individuals to a certain area. They represent an interference with Human Rights in their own right and must be justified as such.

3.1 Provisions imposing area-based restrictions in the proposal on border procedures

To recapitulate the proposed measures regarding area-based restrictions as outlined above, Articles 41(2) and (3) amended proposal APR make border procedures mandatory in three scenarios: 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 where the applicant comes from a country with a Union-wide recognition rate of 20% or lower (Art 40(1)(c), (f) and (i) amended proposal APR).

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

[56] ECtHR*, Stanev v. Bulgaria*, Appl. no. 36760/06, Judgment of 17 January 2012, at para. 124.
[57] ECtHR, *Guzzardi v. Italy*, Appl. no. 7367/76, Judgment of 6 November 1980.
[58] ECtHR, *Raimondo v. Italy*, Appl. no. 12954/87, Judgment of 22 February 1994.
[59] ECtHR, Ilias and Ahmed v. Hungary, Appl. no. 47287/15, Judgment of 21 November 2019; and CJEU, Cases C-924/19 PPU and C-925/19 PPU, FMS (EU:C:2020:367).

applicants *shall be kept* at or in proximity to the external border or transit zones.'[60] 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. The Commission proposal does not provide guidance on how this obligation may be implemented, and does not foresee any procedural safeguards in that regard.

Restrictions on intra-territorial movement of migrants are already part of EU law. Art. 7 of the Reception Conditions Directive lays down the conditions under which Member States may limit the freedom of movement of asylum seekers. 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.

However, the Commission proposal on border procedures does not make cross-reference to this provision, or to other existing provisions, such as Art. 18(1)(a) Reception Conditions Directive and Art. 43(3) Asylum Procedures Directive, which also rely on the assumption that asylum seekers' movement is restricted to a certain area, in that case near the border or transit zone. The question that arises is whether the proposed provision in line with applicable human rights law.

3.2 Measures that do not amount to detention also constitute interferences with Human Rights

Human Rights law prohibits arbitrary limitations on the freedom of movement in the form of 'area-based restrictions'[61] 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. It has since also been laid down in Art. 12(1) ICCPR and Art. 2(4) Protocol No. 4 ECHR. In contrast to the prohibition of arbitrary detention, the right to intra-territorial mobility is not an absolute right. It permits for certain limitations and is conditioned on the lawful stay of the protected person. Each of these will now be addressed in turn.

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.[62] 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

[60] European Commission, Amended proposal for an Asylum Procedures Regulation, COM(2020) 611, 23 September 2020 (emphasis added).

[61] 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.

[62] HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

freedoms of others; such limitations must also be consistent with the other rights recognized in the ICPPR.[63] Thus, restrictions applied in the individual case must have 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.[64] The ECHR has a comparable limitation clause in Art. 2(3) of Protocol No. 4 ECHR. In addition, Art. 2(4) Protocol No. 4 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. Moreover, 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.[65] Hence, 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.

However, the grounds laid down in Art. 41(2) and (3) of the amended proposal APR 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 order considerations mentioned in these clauses. Notably, Art 7(2) of the Reception Conditions Directive, which, in both in its current version and it the proposed amendment allows for area-based restrictions of asylum seekers based on public interest considerations, is therefore unlawful and cannot be used as a model for area-based restrictions under border procedures.

Another qualification of the right to freedom of movement is that most 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 Refugee Convention, 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, Art. 2 of Protocol 4 grants freedom of movement to 'everyone lawfully within the territory of a State'.

This is another area where the question of having crossed the red line of authorised entry as proposed by the Commission may become legally relevant. Whether or not asylum seekers would be lawfully staying for the purposes of Human Rights law during the border procedures is subject to legal debate. In principle, this matter is governed by national law, provided it is in compliance with international obligations.[66] 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 autonomous meaning and is ultimately a matter for international interpretation.[67] It can be argued that migrants whose right to stay is subject to determination or adjudication should be considered as lawfully on territory – this would apply to those subject to the asylum border procedure.[68] The same rationale applies to those migrants who are qualified as non-deportable, such as people with toleration status (*Duldung*) in

[63] HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.
[64] *Ibid.*, at para. 2 and 16.
[65] 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.
[66] HRC, General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.
[67] L. Slingenberg, *The Reception of Asylum Seekers under International Law* (2014), at 110–111.
[68] Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015), at 147 and 174.

Germany or Austria.[69] 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, which would arguably the case for those subject to the return border procedure.

But the point to be made here is that even for those who are *not* lawfully within the territory, area-based restrictions must be justified – in this case under the right to private life as laid down in Art 8 ECHR. This is because 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). 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.[70] Liberty of movement is an indispensable condition for the free development of a person.[71] The Strasbourg Court considers Art. 2 of Protocol No. 4 ECHR and Art. 8 ECHR to be closely linked and regularly considers them together.[72] This is of particular relevance for rejected asylum seekers: 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 'freedom 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.[73] 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.[74] Art 8 ECHR is not conditioned on lawful stay, and the Strasbourg Court has clarified that Art 8 ECHR applies irrespective of migration or other status, so also to those not lawfully present.[75]

Accordingly, any type of area-based restriction for irregular migrants must be in accordance with Art. 8 ECHR, and with Art 2 Protocol 4 ECHR for those lawfully staying. In the case of the proposed border procedures, 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

[69] See Report of the Special Rapporteur for the Human Rights of Migrants, Francois Crépeau, A/HRC/20/24, at para. 54; HRC, *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* (2005), at 173.

[70] 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.

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

[72] 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.

[73] 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.

[74] 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.

[75] ECtHR, *Jeunesse v. the Netherlands*, Appl. no. 12738/10, Grand Chamber Judgment of 3 October 2014.

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. The proposal should therefore be amended accordingly.

4. Conclusion: human rights law prohibits the blanket use of detention and area-based restrictions during border procedures

In its reform efforts for a more well-managed and effective migration policy, the European Commission is faced with the difficult task of reconciling diverging interests of EU Member States with legal obligations under Human Rights law.

In response, the Commission proposed what in some ways appears to be a much more delicate and legally refined EU version of the heavily criticised (and unlawful) Australian 'excision' policy.[76] To be sure, the Commission proposal does not deny the applicability of Human Rights law to asylum seekers subject to border procedures generally. But the proposal seeks to rely on a perceived gap in the international Human Rights framework by qualifying the entry of asylum seekers in the pre-entry phase as unauthorised. On that basis, it operates on the assumption that it is lawful to detain in order to 'prevent unlawful entry', as well as to impose area-based restrictions for those without 'lawful stay'. As the above analysis showed however, the blanket use of such measures is never justified. The detention standard as developed by the Strasbourg Court on the basis of Art 5(1)(f) ECHR is superseded by the universal standard as developed by the HRC on the basis of Art 12 ICCPR, by which the EU is bound. Likewise, while it may be debated whether asylum seekers subject to the proposed border procedures would be lawfully present, such that the freedom of movement as laid down in Art 2 Protocol 4 ECHR applies, in any case it is clear that such measures would have to provide for a proportionality assessment on a case-by-case basis in order to be in line with Art 8 ECHR.

To conclude, while the qualification of the asylum seekers' entry as unauthorised seemingly pushes into a gap in human rights law, the proposal overlooks the correct human rights standard for detention as well as the fact that blanket impositions of area-based restrictions are not permissible. In order for border procedures to be lawful, the co-legislators will have to amend the proposal in these regards.

[76] Vogl, 'Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border' 38(1) *University of New South Wales Law Journal* 114.