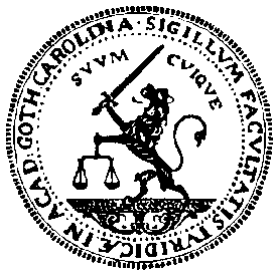

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Detention – The Silent Consequence of the EU's Pact on Migration and Asylum

An Examination of the Impact of the Proposed Pact on Migration and Asylum on the Use of Pre-Entry Detention of Asylum Seekers

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Vladislava Stoyanova

Term: Spring 2022

Contents

Summary

On the 23 September 2020 the European Commission launched the Pact on Migration and Asylum, introducing five legislative proposals, which *inter alia* aim at ensuring that only people with clear protection needs enter the European Union (EU). To reach this objective, the European Commission introduced a so-called pre-entry phase, consisting of firstly, the proposed screening procedure, a five-day procedure to quickly identify applicants that are in need of protection and those that can be returned, and secondly, a mandatory asylum border procedure for certain categories of applicants, including asylum seekers from countries with a recognition rate of 20% or lower. During these procedures, applicants shall not be legally authorized to enter the EU. Hence, implementing these procedures require measures to keep the applicants at the border to ensure their non-entry. These practices may amount to detention.

The aim of this thesis is to examine to what extent the Pact's proposed screening and asylum border procedure risk leading to an increased use of pre-entry detention contrary to the right to liberty in European human rights law and EU-law. To fulfill this aim, the thesis will provide an examination of the regulatory framework regarding the use of pre-entry detention in the EU and the main components of the proposed screening and asylum border procedure. Thereafter, an analysis of the procedures' contribution to an increased use of pre-entry detention will be undertaken by evaluating current practices at the external borders of the EU, including the hotspot approach. Finally, the proposed procedures' compliance with the right to liberty and EU-law will be examined.

This thesis finds that rather than addressing the current challenges experienced by Member States at the external borders of the EU, the proposed screening and asylum border procedures risk replicating them. In particular, the thesis finds gaps regarding the implementation of non-entry during these procedures, that risk increasing the use of pre-entry detention of asylum seekers. Consequently, both the proposed screening and asylum border procedure may lead to wide restrictions of the right to liberty, which cannot be considered to be in accordance with the notion that any restriction of this fundamental right should be narrowly constructed. Thus, the silent consequence of the Pact is, if adopted in its current form, the wide use of pre-entry detention of asylum seekers, contrary to the right to liberty.

Sammanfattning

Den 23 september 2020 lanserade EU-kommissionen den nya asyl- och migrationspakten, där fem nya lagförslag presenteras, som bland annat syftar till att förhindra att asylsökande utan tydliga asylskäl får resa in i Europeiska unionen (EU). För att uppnå det här målet föreslår EU-kommissionen att inrätta en fas före inresa, som kommer att bestå av en fem-dagar lång screening av alla tredjelandsmedborgare som befinner sig vid den yttre gränsen utan att uppfylla inresevillkoren och ett tolv-veckor långt gränsförfarande för bedömningen av asylansökningar. Gemensamt för screeningen och gränsförfarandet, är att de asylsökande juridisk sett inte får rätt att resa in i medlemsstaternas territorium, trots att de fysiskt sett kommer befinna sig på medlemsstaternas territorium. Därmed krävs åtgärder för att försäkra att de asylsökande hålls vid gränsområdet för att säkerställa att inreseförbudet upprätthålls. Dessa inskränkningar kan innebära förvarstagande av asylsökande.

Syftet med uppsatsen är att undersöka huruvida paktens screening och gränsförfarande, kommer att leda till ett ökat användande av förvar av asylsökande, i strid med rätten till frihet i europeiska mänskliga rättighetsinstrument och EU-rättsliga regleringar. För att uppnå uppsatsens syfte kommer regleringen inom EU av förvarstagande före inresa att undersökas, samt de viktigaste komponenterna av screening och gränsförfarandet att presenteras. Därefter kommer förslagen undersökas utifrån dess bidragande till ett ökat förvarstagande av asylsökande, utifrån medlemsstaternas nuvarande agerande vid yttre gränserna, inom ramen för bland annat den s.k. hotspot approach. Avslutningsvis, kommer uppsatsen att analysera i vilken utsträckning de föreslagna screening och gränsförfarandena kommer att överensstämma med rätten till frihet och EU-rätten.

Uppsatsens resultat visar på att förslagen snarare upprepar nuvarande problem vid EU:s yttre gränser istället för att lösa dessa. De oklarheter i förslagen gällande medlemsstaternas implementering av inreseförbudet för asylsökande som genomgår fasen före inresa, kan komma att leda till en ökad risk för användandet av förvar. Detta kan också medföra vida inskränkningar av rätten till frihet trots att inskränkningar av rätten till frihet ska tolkas restriktivt. Därmed finner uppsatsen att pakten, om den antas i sin nuvarande form, kommer orsaka ett ökat användande av förvar före inresa av asylsökande på ett sätt som inskränker rätten till frihet för asylsökande.

Preface

Thank you to the interesting people that I have met during these studies. You have all contributed to creating an inspiring environment that has motivated me to stay curious and keep learning. Thank you to *Asylrättsstudenterna*, the student organization that first introduced me to employing my legal knowledge and putting it into practice by providing legal aid to asylum seekers. These experiences have been a driving force to write this thesis.

Thank you to the staff and lecturers of the Human Rights Law Master's program, for your engagement and interesting viewpoints. Thank you to my supervisor Vladislava Stoyanova.

Thank you to my family that has been supporting me in all my endeavors. A special thank you to Sofia, for six years of friendship, for always being there and for sharing your interesting thoughts and perspectives in the writing of this thesis. It is truly a privilege to be you friend, every day.

Abbreviations

APD	Asylum Procedures Directive
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MPRIC	Multi-Purpose Reception and Identification Centers
NGO	Non-Governmental Organization
RCD	Reception Conditions Directive
Refugee Convention	Convention Relating to the Status of Refugees
RIC	Reception and Identification Centre
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

On the 23rd of September 2020 the European Commission launched the Pact on Migration and Asylum. The Pact consists of five legislative proposals and is presented as a fresh start to address migration. The European Commission argues that it will provide 'certainty, clarity and decent conditions for the men, women and children arriving in the EU'.[1] Thus, the Pact is envisioned to create a new durable framework to ensure that migration is managed in an effective and humane way, grounded in international law and European values.[2]

The Pact is seen as a solution to addressing what the European Commission labels as 'mixed flows', which refers to the fact that a great number of people reaching the external borders of the EU are not in need of protection. Therefore, the Pact aims at ensuring that only people with clear protection needs are allowed to enter the EU. This is also a strategy to avoid the onward movements within the EU, from states located at the external borders to states in the north-western parts of the EU.[3] The two proposals that particularly aim at addressing this problem are the proposed Screening Regulation and the proposed amended Asylum Procedures Regulation.[4] These two proposals introduce a pre-entry phase, which will first consist of a five-day screening phase, to be followed for certain categories of people, by an asylum border procedure and an asylum return procedure.[5] These procedures are to be implemented at the borders or in proximity to the borders. The persons undergoing these procedures will thus, be physically

[1] European Commission, 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, COM(2020) 609 final, 23 September 2020, p. 1.
[2] Ibid.
[3] European Commission, Commission Staff Working Document Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], SWD(2020) 207 final, 23 September 2020, p. 28–30, 71–74. Hereafter referred to as 'Staff Working Document'.
[4] European Commission, 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, 23 September 2020. Hereafter referred to as 'Proposed Screening Regulation'; European Commission, 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, 23 September 2020. Hereafter referred to as 'Proposed Asylum Procedures Regulation'.
[5] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 4.

present on the Member States' territories but unauthorized to legally enter the territory.[6] This legal construction has been labelled as the 'legal fiction of non-entry', where the applicant is legally considered not to have entered the state while at the same time being physically present on the territory.[7] Therefore, the persons undergoing these procedures will have to be accommodated at the external borders of the EU, which will require measures to ensure the non-entry of the applicants during the course of the procedures. This has raised serious concerns with regard to how this will be implemented without recourse to restrictions of the right to liberty by using pre-entry detention.[8]

The practices of Member States following the substantial increase of individuals seeking entry into the EU in 2015-2016, have been characterized by an intensification of containment of third-country nationals at the external borders of the European Union.[9] This has been evident at the Greek islands, through the adoption of the so-called hotspot approach. The hotspot approach refers to the introduction of Reception and Identification Centers (RICs) in Italy and Greece to provide special assistance to the frontline countries that were faced with a large number of arrivals in 2015. These hotspots have been characterized by overcrowding, deteriorating reception conditions and recorded human rights violations.[10] A continuing concern has been the large-scale use of both *de jure* detention and *de facto* detention. *De jure* detention, refers to detention in accordance with legal rules on detention and *de facto* detention refers to detention without any legal ground or decisions.[11] The development of the infamous Moria camp on the Lesvos Island in Greece, was an overcrowded RIC, that was designed for 3000 people but in 2019 held 14 000 people, including children, in inhumane conditions. Moria was labelled as one of the most worrying fundamental rights issues in the European Union and has been seen

[6] Proposed Screening Regulation, Article 4.1; Proposed Asylum Procedures Regulation, Article 41.6.
[7] European Parliament, European Parliament Resolution of 10 February 2021 on the Implementation of Article 43 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, 2021/C 465/05, 10 February 2021, para. 8.
[8] G Cornelisse, 'Border Control and the Right to Liberty in the Pact: A False Promise of Certainty, Clarity and Decent Conditions*'*, in D Thym, 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*, Nomos Verlagsgesellschaft mbH& Co.KG, Baden-Baden, 2022, p. 73.
[9] G Matevžič, '*Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers Upon Entry: Case Studies on Bulgaria, Greece, Hungary and Italy'*, Hungarian Helsinki Committee, 2019, p. 9. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/crossing_a_red_line.pdf, Accessed 20 April 2022.
[10] K Luyten, A Orav, '*Hotspots at EU External Borders: State of Play'*, Briefing, European Parliamentary Research Service, PE 652.090, 2020, p. 1.
[11] G Cornelisse, M Reneman, 'Border Procedures in the Commission's New Pact in Migration and Asylum: A Case of Politics Outplaying Rationality', *European Law Journal*, Volume 26, Issue 3–4, 2020, p. 194.

as a symbol of the failed migration policies of the EU.[12] The Moria camp was destroyed by a fire on the 8 September 2020, approximately two weeks before the European Commission launched the Pact on Migration and Asylum. Greece has since started building 'Closed Control Access Centers' funded by the EU, that have been described as one step closer to prisons.[13] In the light of the challenges facing the EU since 2015, this thesis aims at assessing the proposed screening and asylum border procedure, in terms of the risk for an increase of the use of detention.

1.1.1 Regulating Migration in the European Union

This section will give a brief overview of the development of the Common European Asylum System (CEAS), in order to contextualize the Pact on Migration and Asylum and the proposals therein. Regulating migration and asylum on an EU-level gained increased importance as EU integration developed, with the ultimate goal of creating a European Union without internal borders.[14] The need for regulating migration on an EU level was already acknowledged in 1974, but it was the adoption of the Treaty of Amsterdam in 1997 that brought migration and asylum within the competences of the European Community, due to the establishment of an Area of Freedom, Security and Justice.[15] Following this development, the European Council through its Tampere Conclusions in 1999 established the CEAS.[16]

Following the establishment of the CEAS, the EU had within five years adopted six major legal instruments regulating asylum and migration within the EU. Two regulations were established. Firstly, the Dublin Regulation, further cementing the principle of one Member State being responsible for the determination of an asylum claim and secondly, the Eurodac Regulation, implementing the objectives of the Dublin Regulation by comparing fingerprints of

[12] N Nielsen, 'Greek Migrant Hotspot Now EU's Worst Rights Issue', EU Observer, 7 November 2019. Available at: https://euobserver.com/migration/146541, Last visited 25 April 2022.
[13] L Markham, 'A Disaster Waiting to Happen: Who Was Really Responsible for the Fire at the Moria Refugee Camp?', The Guardian, 21 April 2022. Available at: https://www.theguardian.com/world/2022/apr/21/disaster-waiting-to-happen-moria-refugee-camp-fire-greece-lesbos, Last visited 17 May 2022.
[14] V Chetail, The Common European Asylum System: *Bric-à-brac* or System?, in V Chetail, P De Bruycker, F Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, Brill Nijhoff, Leiden, 2016, p. 5.
[15] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 97/C 340/01, [OJ 340], Article 63; V Chetail (n 14), p. 5–10.
[16] European Council, Tampere European Council 15 and 16 October 1999 Presidency Conclusions, 1999.

applicants.[17] Thereafter, the Reception Conditions Directive, the Qualification Directive and the Asylum Procedures Directive were adopted.[18]

Following the adoption of the Treaty of Lisbon in 2007, which entered into force in 2009 the CEAS was further developed.[19] The CEAS had changed from being a common policy goal to a legal duty prescribed in Article 78.2 of the Treaty on the Functioning of the European Union (TFEU). The Treaty of Lisbon also established that the Charter of Fundamental Rights of the EU (the EU Charter) was legally binding and included the right to asylum under Article 18 of the Charter.[20] Following the changes brought by the Treaty of Lisbon, the CEAS entered a second phase of harmonization.[21] This included *inter alia* the adoption of the Recast Reception Conditions Directive (RCD) and Recast Asylum Procedures Directive (APD).[22] These are two of the currently in force legislative instruments regulating European migration law. The subject of this thesis, the assessment of the proposed Pact in the context of pre-entry detention, will be made in the context of the rules in these Directives.

The European Commission introduced proposals to reform the CEAS in 2016. One of the main objectives of this proposal was to address the differing reception conditions of the Member States, which the European Commission has identified as a factor that encourages secondary movements. Therefore, the 2016 proposal was based on the notion that there is a need for comprehensive harmonization of the Member States' practices, which will be achieved by

[17] Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanism for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National, 25 February 2003, [OJ L 50]; Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of "Eurodac" for the Comparison of Fingerprints for the Effective Implementation of the Dublin Convention, 15 December 2000, [OJ L 316].
[18] Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, 6 February 2003, [OJ L 31]; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, [OJ L 304]; Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 13 December 2005, [OJ L 326].
[19] Treaty of Lisbon Amending the Treaty on European Union and Treaty Establishing the European Community, 2007/C 306/01, 17 December 2007, [OJ C 306]. Hereafter referred to as the 'Treaty of Lisbon'.
[20] Treaty of Lisbon, Article 6; Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, [OJ C 326], Article 18. Hereafter referred to as 'EU Charter' and the 'Charter'.
[21] V Chetail (n 14), p. 17.
[22] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast), 28 June 2013, [OJ L 180]. Hereafter referred to as 'RCD'; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 29 June 2013 [OJ L 180]. Hereafter referred to as 'APD'.

replacing the APD and Qualification Directive with regulations.[23] Regulations are binding in their entirety and directly applicable in all Member States, whereas Directives are to be implemented by the national authorities.[24] This reform effort was however, unsuccessful. Therefore, the European Commission made new efforts to reform the CEAS by proposing the Pact on Migration and Asylum, which will be presented below.[25] The CEAS reform in 2016 proposed seven proposals and co-legislators reached broad political agreements on five of the seven proposals. This included amongst other, the recast of the Reception Conditions Directive. However, a common position was not reached on the reforms of the Dublin system and the Asylum Procedures Regulation.[26] Thus, when reading the proposals presented in the Pact it is important to keep in mind that the Pact includes the proposals made in 2016, such as the 2016 amended Asylum Procedures Regulation[27] and the 2016 proposal for a recast Reception Conditions Directive.[28]

1.1.2 The Pact on Migration and Asylum

The Pact on Migration and Asylum consists of a package of five different legislative proposals. This thesis will mainly focus on the examination of the proposed Screening Regulation, the proposed amended Asylum Procedures Regulation, and the proposed Crisis and Force Majeure Regulation. These proposals will thus briefly be explained below but will be examined in detail in Chapter 3 of this thesis. The five proposals are the following:

- The Asylum and Migration Management Regulation[29]
- Amended Eurodac Regulation[30]

[23] European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, 6 April 2016, p. 2–4.
[24] Consolidated Version of the Treaty of the Functioning of the European Union, 2012/C 326/01, 26 October 2012, [OJ 326), Article 288. Hereafter referred to as 'TFEU'.
[25] European Commission (n 1), p. 3.
[26] European Commission (n 3), p. 65.
[27] European Commission, 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(2016) 467 final, 13 July 2016. Hereafter referred to as '2016 Proposed Asylum Procedures Regulation'.
[28] European Commission, Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (recast), COM(2016) 465 final, 13 July 2016. Hereafter referred to as '2016 Proposed Reception Conditions Directive'.
[29] European Commission, Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU), XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23 September 2020. Hereafter referred to as 'RAMM Regulation'.
[30] European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation

- Screening Regulation[31]
- Amended Asylum Procedures Regulation[32]
- Crisis and Force Majeure Regulation[33]

Screening Regulation

The proposed Screening Regulation establishes a screening procedure that shall be applied for all third-country nationals that have effectuated an unauthorized entry at the external border, that have applied for international protection at the external border or have disembarked following a search and rescue operation. Moreover, the proposed screening procedure shall be applied to third-country nationals found within the territory of a Member State when there is an indication that they have entered the territory in an unauthorized manner.[34] The screening will comprise of an identity check, security check, preliminary vulnerability and health check as well as registration of biometrics.[35] Following the screening procedure the applicant will be referred to the appropriate procedure which consists of either return procedure, asylum procedure or an asylum border procedure.[36] The screening procedure is to be conducted within five days and may under certain circumstances be prolonged with an additional five days.[37] During the entirety of the screening procedure persons are not authorized to enter the territory of the Member State.[38] The Member States are to ensure the non-entry of applicants during the screening procedure and the use of detention will be regulated by national law.[39] This thesis will focus on how the screening procedure and the policy of non-entry will affect the right to liberty of the persons subjected to the screening procedure.

Amended Asylum Procedures Regulation

(EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final, 23 September 2020. Hereafter referred to as 'Proposed Amended Eurodac Regulation'.

[31] Proposed Screening Regulation.

[32] Proposed Asylum Procedures Regulation.

[33] European Commission, Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, COM(2020) 613 final, 23 September 2020. Hereafter referred to as 'Crisis and Force Majeure Regulation'.

[34] Proposed Screening Regulation, Article 1, 3, 4.

[35] Ibid, Article 6.6.

[36] Ibid, Article 14.

[37] Ibid, Article 6.3.

[38] Ibid, Article 4.

[39] Ibid, Explanatory Memorandum, p. 5.

The main novelty introduced by the amended Asylum Procedure Regulation is a mandatory asylum border procedures for three particular categories of third-country nationals.[40] These categories are when, 1) The applicant has misled the authorities, 2) The applicant can be considered a danger to national security or public order of the Member State, 3) When the applicant has the nationality of a third country where the proportion of positive decisions of applications for international protection are 20% or lower.[41] If the person's application is rejected in the context of the border procedure, applicants are to be channelled to a return border procedure.[42] Both the Asylum border procedure and the return border procedure have to be effectuated during a period of twelve weeks each.[43] During the totality of these procedures applicants are not be authorized to enter the territory of the Member States and are therefore to be kept at locations at the border or in proximity to the border.[44]

The Crisis and Force Majeure Regulation

The Crisis and Force Majeure Regulation will establish a system that introduces necessary tools for Member States to ensure that they can deal with situations of force majeure.[45] In terms of the scope of this thesis, the most relevant measure that is introduced through the Crisis and Force Majeure Regulation is the possibility for states to derogate from the time limit set for border procedures. Thus, in a force majeure situation Member States shall have the possibility to apply the asylum border procedure for an additional eight weeks and the return border procedure for an additional eight weeks.[46]

1.2 Purpose and Research Questions

The purpose of this thesis is to examine the changes that the Pact on Migration and Asylum will lead to in the context of pre-entry detention of asylum seekers. The Pact introduces a screening procedure and an asylum border procedure. During these procedures applicants are not to be authorized to enter the Member State's territory, thus raising questions with regard to how applicants are to be kept at the borders without recourse to detention.[47] This is of particular importance as the Pact has been presented as a measure to ensure that there shall be 'no more

[40] Proposed Asylum Procedures Regulation, Article 41.3.
[41] 2016 Proposed Asylum Procedures Regulation, Article 40.1.i, 41.3.
[42] Proposed Asylum Procedures Regulation, Article 41.a.
[43] Ibid, Article 41.11, 41.a.2.
[44] Ibid, Article 41, 41.a.
[45] Proposed Crisis and Force Majeure Regulation, Explanatory Memorandum, p.1.
[46] Ibid, Article 4, 5.
[47] Proposed Screening Regulation, Article 4.1; Proposed Asylum Procedures Regulation, Article 41.6.

Morias' in the EU.[48] In the light of the Pact's promise to provide solutions to situations of large scale detention in border areas, this thesis will examine the effect of the proposed pact in the context of pre-entry detention and whether the proposed screening and asylum border procedure will adhere to European human rights safeguards and EU-law. The following research question will be answered in order to fulfill this purpose:

To what extent could the Pact's proposed screening and asylum border procedure, lead to an increased use of pre-entry detention of asylum seekers, contrary to the right to liberty as prescribed by European human rights law and EU-law?

In order to answer the overarching research question the following sub-questions will be answered.

1. What are the human rights law and EU-law safeguards enshrined in the European Convention of Human rights, the EU Charter, and the Reception Conditions Directive in the context of pre-entry detention of asylum seekers?

2. What are the underlying premises of the Pact that are relevant for the use of pre-entry detention? What relevant procedures does the Pact on Migration and Asylum introduce in the context of pre-entry detention and how will they function?

3. How does the proposed screening procedure and asylum border procedure contribute to a risk for an increased use of detention of asylum seekers in the EU?

4. To what extent can the proposed screening and asylum border procedure, with regard to pre-entry detention of asylum seekers, be considered to comply with the right to liberty?

[48] Y Johansson, European Commissioner for Home Affairs, 'Opening Statement by Ylva Johansson on the Need for an Immediate and Humanitarian EU Response to the Current Situation in the Refugee Camp in Moria', Extract from Plenary Session of the European Parliament, 17 September 2020, 1.24 min. Available at: https://audiovisual.ec.europa.eu/en/video/I-194734, Accessed 12 February 2022.

1.3 Method

In order to fulfill the purpose of this thesis, to assess the proposed Pact on Migration and Asylum's effect on the risk for an increased use of pre-entry detention of asylum seekers and to what extent this complies with the right to liberty the thesis firstly, uses the legal doctrinal method. The legal doctrinal method can be described as a method to give a systematic exposure of the principles, rules and concepts governing a particular legal field. The method used to systematize the legal rules within a legal field includes the examination of the relevant legal sources in order to establish the current meaning of the law. [49] In the second chapter of this thesis there has been a reliance on the legal doctrinal method in order to establish the scope of the right to liberty in the context of the European Convention of Human Rights (ECHR)[50] and the EU Charter. This has included a consultation of the most relevant legal sources, in particular the case law of the European Court of Human Rights (ECtHR) as well as legal doctrine by established writers in the field of migration in order to gain a deeper understanding of the judgements.

The third, fourth and fifth chapter of this thesis do not have the same reliance on the legal doctrinal method as these chapters focus on firstly, concretizing the legal proposals of the Pact, the effects of the proposals in terms of detention and the compliance of the proposals with the current understanding of the right to liberty. Since these chapters rely on a legal proposal, there is an apparent knowledge gap that prevents the conducting of a comprehensive legal doctrinal method. This is due to the fact that one of the features of the legal doctrinal method is that it systematizes the *present* law and changes to the present law through new developments in case law.[51] In examining legal proposals all classic doctrinal sources are not available, in particular case law. However, the legal doctrinal method is used to a certain extent in order to clarify the meaning of the law by consulting the proposed legal instruments as well as the available *traveaux préparatoires*. In the context of this thesis an in-depth study of the legal instruments has been included, in particular the proposed Screening Regulation, the amended Asylum Procedures Regulation and the proposed Crisis and Force Majeure Regulation. Moreover, the

[49] J Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal Dogmatic Research' in R Van Gestel, H Micklitz, E Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, Cambridge University Press, New York, 2017, p. 210, 221–224.
[50] European Convention for the Protection of Human Rights and Fundamental Freedoms, Entered into Force 4 November 1950.
[51] J Smits (n 49), p. 212.

European Commission has developed an accompanying Staff Working Document that has been consulted to further clarify the content of the Pact.[52]

The inherent knowledge gap when examining a legal proposal has called for examining sources that may not be considered to fall within the scope of the traditional understanding of the legal doctrinal method. The knowledge gap has been accentuated by the European Commission's decision not to produce an *ex-ante* impact assessment despite it being required by the Interinstitutional Agreement on Better Law Making.[53] To remedy this gap, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) undertook to conduct a "Horizontal Substitute Impact Assessment" of the Pact. This report has been relied on to gain further understanding of the practical implications of the Pact in order to be able to fulfill the research purpose of this thesis. Although, this report may not be classified as a *traveaux préparatoires,* it is written by established academics in the field and may thereby to a certain extent be considered to fall within the scope of the legal doctrinal method.

A need to move beyond the traditional sources included in the legal doctrinal method has been identified as being necessary in order to be able to answer the main research question of this thesis. Therefore, this thesis also undertakes a critical legal analysis. The critical legal analysis has its roots in the Critical Legal Studies (CLS) movement, which underlines the inherent connection between law and politics. It is based on an understanding of law as not being objective and neutral but rather characterized by certain moral, epistemological and empirical assumptions.[54] It is important to underline that the proposals articulated in the Pact are based on certain assumptions of the current migration situation. Therefore, when undertaking an assessment of the Pact these motives will be examined to underline the fact that the Pact is deeply connected to the current political context of the EU. In order to examine this and to assess the effects of the Pact there has been a need to move beyond traditional legal sources. This includes consultations of Non-Governmental Organizations' (NGOs) commentaries and reports with regard to the Pact, often relating the Pact to current practices of Member States.

[52] See (n 3).
[53] Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making: Interinstitutional Agreement of 13 April 2016 on Better Law-Making, 12 May 2016, [OJ L 123], para 12, 13.
[54] M Tushnet, 'Critical Legal Studies: A Political History', *The Yale Law Journal*, Volume 100, Number 5, 1991, p. 1517.

Hence, the critical legal analysis provides for a more comprehensive analysis of the actual effects that the Pact will have in terms of use of pre-entry detention of asylum seekers.

1.4 Previous Research and Contributions on the Topic

Galina Cornelisse has made extensive contributions on the use of immigration detention in the EU, on which this thesis has relied on. This includes her book dedicated to the topic, '*Immigration Detention and Human Rights: Rethinking Territorial Sovereignty'* which has been relied upon in order to acquire a more comprehensive understanding of the detention regime.[55] Moreover, Cornelisse has contributed to further examination of the use of detention in the context of the Pact, including her article on '*Border Control and the Right to Liberty in the Pact: A False Promise of Certainty, Clarity and Decent Conditions*'. In addition, the work of Violeta Moreno-Lax and Cathryn Costello, on the use of detention in the context of the EU and the ECHR have been important in conducting this thesis. Furthermore, Cornelisse has underlined the restricted attention that border procedures have received in legal literature, especially in the context of detention.[56] Therefore, this thesis aims at contributing to this field which will gain further importance in the future, given the proposal for introducing mandatory border procedures in the EU.

Due to the thesis aim to assess the proposed screening and asylum border procedure proposed by the Pact on Migration and Asylum there has been a reliance on the present contributions with reference to the Pact. This includes the book "*Reforming the Common European Asylum System: Opportunities, Pitfalls and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*".[57] This volume is based upon a series of blog posts published by the Odysseus Network months after the publication of the Pact and includes contributions by experts and established academics in the field that are drawing attention to the legal and practical challenges of the Pact. In addition, the contributions in the volume "*The EU Pact on Migration and Asylum in Light of the United Nations Global Compacts on Refugees – International Experiences on Containment and Mobility and their Impacts on Trust and Rights*"

[56] G Cornelisse, 'Territory, Procedures and Rights: Border Procedures in European Asylum Law', *Refugee Survey Quarterly*, Volume 35, Number 1, 2016.
[57] D Thym, 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*, Nomos Verlagsgesellschaft mbH& Co.KG, Baden-Baden, 2022.

have provided further knowledge and perspectives on the Pact, that has been valuable in the context of writing this thesis.[58] Hence, this thesis aims at further contributing to the examination of the Pact and the current challenges facing the EU with regard to asylum policies.

1.5 Delimitations

This thesis will focus on the European framework regulating the use of pre-entry detention, including the ECHR and EU-law. It is however of importance to keep in mind that the right to liberty is protected in other international instruments *inter alia* the International Covenant on Civil and Political Rights,[59] the African Charter of Human and People's Rights[60] and the American Convention on Human Rights.[61] The Refugee Convention[62] is also importance and will briefly be discussed, yet due to the focus of the thesis, there will mainly be an examination of the European legal framework in the context of the use of pre-entry detention of asylum seekers.

This thesis focuses on the risk for an increase of pre-entry detention as regulated by the RCD. Therefore, the thesis will not address the Pact's potential contribution to an increase of the use of pre-deportation detention, which is regulated in the Return Directive.[63] Thus, the thesis does not address the return border procedure proposed in the Asylum Procedures Regulation that prescribes the possibility to detain applicants for an additional twelve weeks following the possibility to detain applicants for twelve weeks during the asylum border procedure.[64] It is thus important to keep in mind that beyond the examination of the possibility for detention in the context of the asylum border procedure, the proposal also allows for continued use of detention during the return border procedure.[65]

[58] S Carrera, A Geddes, (eds), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compacts on Refugees – International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute, San Domenica di Fiesole, 2021.
[59] International Covenant on Civil and Political Rights (ICCPR), Adopted 19 December 1966, Entry into force 23 March 1976, Article 9.
[60] African Charter of Human and People's Rights, Adopted 27 June 1981, Entry into force 21 October 1986, Article 6.
[61] American Convention on Human Rights, Adopted 22 November 1969, Entry into force 18 July 1978, Article 7.
[62] Convention Relating to the Status of Refugees, Adopted 28 July 1951, Entry into force 22 April 1954; Protocol Relating to the Status of Refugees, Adopted 31 January 1967, Entry into force 4 October 1967.
[63] 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, 24 December 2008, [OJ L 348].
[64] Proposed Asylum Procedures Regulation, Article 41, 41.a.
[65] Ibid, Article 41.a.5.

Due to this thesis focus on pre-entry detention of asylum seekers, the thesis will not focus on the proposed Screening Regulation's introduction of a screening procedure within the territory of Member States. This procedure is to be applied for third-country nationals found within the territory of a Member State, where there is an indication that they have crossed an external border in an unauthorized manner.[66]

This thesis will not examine the impact of the proposed new solidarity mechanism in the Asylum Migration Management Regulation. However, this thesis recognizes the impact that the solidarity mechanism can have in terms of the risk for an increased use of detention. This is due to the fact that the solidarity mechanism in the RAMM retains the first country of entry criterion, meaning that asylum seekers have to apply for asylum in the first Member State that they reach. This means that the states at the external borders of the EU will face increased pressure on their borders. Consequently, accommodation facilities, reception conditions and overcrowding will be affected. Hence, this may contribute to continued bottlenecks at the EU's external borders which has been proven to affect the use of detention. There is however a noted need for further research on this topic that was not possible to be conducted in the context of this thesis.

A final limitation of this thesis is that it will not undertake a particular focus on the established severe consequences that the use of detention has for children.[67] Both the examined proposed Screening Regulation and the proposed Asylum Procedures Regulation may contribute children being exposed to detention. However, due to the scope of this thesis child-centered approach will not be employed.

1.6 Terminology

This thesis will focus on detention upon arrival, also referred to as *pre-entry detention*. It is used in order to prevent unauthorized entry of third-country nationals and serves to clarify whether the person has fulfilled the entry conditions to the EU. This form of detention may also be used to clarify the person's identity and nationality.[68] Pre-entry detention, constitutes one of

[66] Proposed Screening Regulation, Article 5.
[67] Convention on the Rights of the Child, Adopted 20 November 1989, Entry into force 2 September 1990, Article 37.
[68] G Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Brill Nijhoff, Leiden, 2010, p. 247.

the three forms of immigration detention: detention upon arrival, detention within the system of asylum and detention in the context of removal.

Asylum seeker, refers to a person that has lodged an application for international protection or expressed an intention to do so.

1.7 Outline

Chapter 2 examines the legal regime governing the pre-entry detention of asylum seekers in Europe. It begins by addressing the understandings of the definition of detention, with reference to the diverging interpretations made by the ECtHR and the Court of Justice of the European Union (CJEU). Thereafter, the Chapter examines the two most relevant rights in the context of the use of pre-entry detention, the right to liberty and its possible restrictions as well as the right to freedom of movement as prescribed by the ECHR. Subsequently, an examination of the relevant EU-law provisions regarding pre-entry detention is undertaken, including the right to liberty and the right to asylum as prescribed by the Charter. Finally, the relevant EU secondary law provisions of the RCD are examined.

Chapter 3 is dedicated to examining the relevant aspects of the Pact in the context of the use of pre-entry detention. First, two of the underlying premises are examined to provide the reader with a more comprehensive understanding of the presented proposals. Thereafter, the components of the proposed screening and asylum border procedure and the Crisis and Force Majeure Regulation are examined.

Chapter 4 evaluates whether the proposed screening and asylum border procedure risk increasing the use of pre-entry detention in Member States. First, the reliance on the legal fiction of non-entry is examined in reference to Member States past practices during the hotspot approach as well as examining the current practices of Greece in building 'Closed Controlled Access Centers'. Thereafter, two main risks of the screening procedure that may contribute to an increased risk of the use of pre-entry detention will be presented. Firstly, the effects of regulating detention during the screening procedure through national law and secondly, the wide personal scope of the screening procedure. Subsequently, there will be an analysis of the inherent connection between the use of border procedures and the use of detention and to what

extent the introduction of mandatory asylum border procedure will affect the use of pre-entry detention.

Chapter 5 is devoted to examining to what extent the proposed screening and asylum border procedure comply with the right to liberty as established in the ECHR and the EU Charter. This analysis includes an examination of the wide prerogative of states to control the entry of third country nationals into their territory according to current interpretations of Article 5 ECHR. The chapter then examines to what extent the restrictions on the right to liberty that both the proposed screening and asylum border procedure represent can be considered to be compatible with the understanding that restrictions of the right to liberty are to be narrowly constructed. Hence, this chapter aims at establishing the components of the proposed screening and asylum border procedure that are likely to impinge on the right to liberty.

Chapter 6 will present the findings of this thesis regarding the proposed screening and asylum border procedures' contribution to a risk for an increased use of pre-entry detention contrary to the right to liberty. The chapter will also present recommendations that would contribute to mitigating such a risk.

2 The Legal Regime Governing the Pre-Entry Detention of Asylum Seekers

2.1 Introduction

The point of departure with regard to the legal regime regulating immigration detention is the foundational right to liberty for all, that is prescribed by international and regional human rights law.[69] Therefore, the right to liberty of asylum seekers must be seen as the rule and the detention of asylum-seekers as the restrictive exception.[70] This is related to the understanding that a state's deprivation of an individual's personal liberty constitutes one of the most violent intrusions by a state.[71] The EU's legal regime regulating immigration detention is based on the principle that a refugee is not to be penalized for the sole reason that he or she is seeking international protection.[72] This obligation derives from Article 31 of the Refugee Convention and articulates the obligation not to penalize a refugee for illegal entry or presence on a state's territory.[73] Member States' obligations to implement this is underlined in the RCD, which articulates that Member Stats shall not employ detention as a measure to punish the person for seeking international protection.[74]

This chapter will examine the legal regime that regulates the use of pre-entry detention. Firstly, recent CJEU and ECtHR case law will be examined in order to concretize the definition of detention. Secondly, the two most relevant rights in the context of detention of asylum seekers, the right to liberty and the right to freedom of movement will be examined. The right to asylum, articulated in the Charter will also be discussed in this context. Finally, the EU-law provisions of the RCD relating to detention of asylum seekers will be further examined. Hence, this chapter will present the current legal safeguards offered by the ECHR, the EU Charter and EU-legislation, in the context of pre-entry detention of asylum seekers. This will provide the reader

[69] ICCPR, Article 9; ECHR, Article 5; EU Charter, Article 6.
[70] UNHCR, '*Detention Guidelines: Guidelines on the Application Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention'*, Geneva, 2012, para 14; RCD, Article 8.
[71] G Cornelisse (n 68), p. 249.
[72] RCD, Article 8.
[73] Refugee Convention, Article 31; C Costello and M Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers', *Refugee Survey Quarterly*, Volume 35, Issue 1, 2016, p. 47.
[74] RCD, Recital 15.

with an understanding of the current legislation, which is essential in the context of the purpose of this thesis, to assess to what extent the proposed Screening Regulation and Asylum Procedures Regulation will adhere to these legal obligations.

2.2 The Definition of Detention

In Article 2.h. of the RCD, detention is defined as 'means of confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.'[75] The CJEU has understood detention as articulated in Article 2.h. of the RCD to consist of a coercive measure of last resort, which cannot be satisfied by limiting the asylum seeker's movement.[76] The United Nations High Commissioner for Refugees (UNHCR) has defined detention in slightly different terms, as 'the deprivation of liberty or confinement in a close place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities'.[77] Both the CJEU and the ECtHR have made efforts to further clarify which forms of restriction of liberty in a particular place amount to detention, which will be further examined in the next part of this chapter.

2.2.1 Ilias and Ahmed v. Hungary

On the 21st November 2019 the Grand Chamber of the ECtHR delivered the *Ilias and Ahmed v. Hungary* judgement, finding that the holding of asylum-seekers at the Röszke transit zone, in Hungary, did not amount to detention.[78] Six months later the CJEU delivered its judgement in the *FMS & FNS, SA & SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság* judgement, in which it found that the holding of asylum-seekers at the Röszke transit zone, indeed amounted to detention.[79] The CJEU refers to the *Ilias and Ahmed v. Hungary* case in its judgement, claiming that the facts of the two cases differ.[80] This argument is based on the fact that the applicants were placed in different zones of the Röszke transit zone. In the *Ilias and Ahmed v. Hungary* case the applicants were placed in the section for asylum seekers, whereas the applicants were

[75] RCD, Article 2.h.
[76] C-924/19, C-925/19, FMS & FNS, SA & SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, CJEU, [GC], 14 May 2020, para 221. Hereafter referred to as 'FMS and Others'.
[77] UNHCR (n 70), Para 5.
[78] Ilias and Ahmed v. Hungary, Application No. 47287/15, ECtHR, [GC], 21 November 2019.
[79] C-924/19, C-925/19, FMS and Others.
[80] Ibid, para. 71.

placed in the zone for third-country nationals whose application for asylum had been rejected in the *FMS and Others case*.[81] The impact of these differences will be further discussed under section 2.2.2.

The *Ilias and Ahmed v. Hungary* case regards two Bangladeshi nationals that transited through Turkey, Greece, Former Republic of Macedonia and Serbia.[82] Both applicants applied for international protection, but their applications were denied on admissibility grounds. Following their appeal, both applicants were kept in the Röszke transit zone for 23 days.[83] It is important to note that the Röszke zone was separated into two different zones, one for asylum seekers and one for third-country nationals of which their application for international protection had been denied. From the zone in which the asylum seekers were held, there was a possibility to leave toward Serbia, which was not a possibility for the third-country nationals in the zone for those that had received a negative decision on their asylum application.[84] The ECtHR examined whether the holding of the applicants in the transit zone amounted to the restriction of movement according to Article 2 of Protocol 4 ECHR or the deprivation of liberty according to Article 5 ECHR. In this respect the ECtHR underlined the importance of making this distinction by considering present day conditions and challenges while keeping a realistic and practical approach.[85] The Court considered the exceptional situation of mass-influx of asylum seekers and migrants at the Hungarian border.[86] Moreover, the Court found that the applicants had a *de facto* possibility of leaving the transit zone and return to Serbia. Thereby, the Court concludes that there was no deprivation of the liberty, as prescribed by Article 5 ECHR, in this case.[87]

This was contrary to the finding of the preceding Chamber judgement that found that the mere fact that there was a possibility for the applicants to leave the Röszke transit zone to enter Serbia, where the applicants were not sure to gain admission to the country, cannot be considered to rule out that there is an infringement of Article 5 ECHR. Moreover, the Chamber argued that the applicants could not leave the transit zone without facing grave consequences, including forfeiting their asylum claims and running a risk of refoulement. Therefore, the

[81] Ilias and Ahmed v. Hungary, para 15; C-924/19, C-925/19, FMS and Others, para 71–74.
[82] Ilias and Ahmed v. Hungary, para. 10–11.
[83] Ibid, para. 8.
[84] A Bombay and P Heynen, *'The ECtHR's Ilias and Ahmed and the CJEU's FMS-case: A Difficult Reconciliation? A Look at the Divergent Jurisprudence on the Concept of Detention in European Asylum Law'*, Sui Generis, 2021, p. 256. Available at: https://sui-generis.ch/article/view/sg.189**,** Accessed 3 February 2022.
[85] Ilias and Ahmed v. Hungary, para 211–213.
[86] Ibid, para 228.
[87] Ibid, para 237, 250.

Chamber found that the holding of the applicants in the Röszke transit zone constituted *de facto* detention, as any other conclusion would void the protection afforded by Article 5 ECHR, by requiring applicants to choose between the right to liberty and the right to non-refoulement as prescribed by Article 3 ECHR.[88] The *Ilias and Ahmed v. Hungary* Grand Chamber judgement did not come to this conclusion. It has therefore been argued that the judgement presents an erosion of the protection granted by Article 5 ECHR, by suggesting that the holding of asylum seekers in transit zones do not constitute a deprivation of liberty as long as there is a theoretical possibility for the applicants to leave the country at hand.[89]

2.2.2 The FMS and Others Case

The joint *FMS and Others* case examined two sets of proceedings, FMS and FNZ, a couple of Afghan nationality as well as SA and SA junior, a father and his infant child, of Irani nationality.[90] All applicants reached the Hungarian Röszke transit zone, by passing through Turkey, Bulgaria and Serbia before entering the transit zone in Hungary. The applicants were placed in the zone for third-country nationals whose application for asylum had been rejected.[91]

In assessing whether the applicants stay in the Röszke transit zone amounted to detention the CJEU addressed the definition in Article 2.h. of the RCD and found that detention must be understood to constitute a coercive measure that deprives the applicant from his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter.[92] Thereby, the Court clarified that detention consists of a deprivation of the freedom of movement and not a mere restriction of the freedom of movement. The deprivation of freedom of movement is characterized by the fact that the applicant is isolated from the rest of the population in a particular place.[93] In the case, the Hungarian government claimed that the fact that the applicants were free to leave the Röszke transit zone should lead the CJEU to find that the holding of applicants in the transit zone could not amount to detention. Yet, the CJEU particularly pointed to the fact that the applicants may face penalties when entering Serbia as they would be considered illegal, therefore the applicants

[88] Ilias and Ahmed v. Hungary, Application No.47287/15, ECtHR, 14 March 2017, para 55–56.
[89] A Bombay and P Heynen (n 84), p. 256.; V Stoyanova, 'The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and How the Ground beneath Our Feet Continues to Erode', *Strasbourg Observers*. Available at: https://perma.cc/J6V6-CMDY, 2019. Accessed 3 February 2022.
[90] C-924/19, C-925/19, FMS and Others, para. 48, 80.
[91] Ibid, para. 49, 81, 70.
[92] Ibid, para. 223.
[93] Ibid, para. 217.

could not be considered to have an effective possibility to leave the Röszke transit zone.[94] In this case the CJEU concluded that the conditions of detention of applicants for international protection in the Röszke transit zone, where applicants were held permanently, where the applicant's movement was limited and monitored and where he or she could not legally leave in any direction, reached the threshold of deprivation of liberty, as set out in the RCD.[95]

The different conclusions that the ECtHR and the CJEU reaches with regard to the classification of the applicants stay at the Röszke transit zone amounts to detention underlines the present unclarities with regard to which practices are defined as detention.[96] It may be questioned whether the factual differences between the cases, being related to the different zones within the Röszke transit zone that the applicants were placed in, merit the different legal assessments made by the Courts. In the *Ilias and Ahmed v. Hungary* case the applicants were placed in the section for asylum seekers, and the ECtHR argued that there was a possibility for the applicants leave the zone to enter Serbia.[97] In the *FMS and Others* case the CJEU underlined that the applicants were placed in the zone for third-country nationals whose application for asylum has been rejected. Hence, the Court argued that the only possible way for the appli4ants to leave the zone was through airplane to the country of origin, in which there was an armed conflict. In addition, the country of origin was not a party to the Refugee Convention. Therefore, the Court claimed that the applicants could not leave the zone.[98] In this context, it is important to underline that despite the applicants being placed in different zones, they were placed at the Röszke transit zone in Hungary, during a similar time period. The Röszke transit zone is surrounded by a four-meter-high fence with barbed wire at the top. Furthermore, the entirety of the zone is guarded by police and security guards. Applicants are held in metal containers, of approximately 13 m2.[99] Commentators have therefore argued that the factual circumstances of the two cases are indeed similar.[100] It is therefore clear that the definition of detention may evidently vary depending on which European Court is to assess this question, as highlighted by the examination of the *Ilias and Ahmed v. Hungary* case and the *FMS and Others* case.[101] This

[94] C-924/19, C-925/19, FMS and Others, para 228–229.
[95] Ibid, ruling para 4.
[96] G Cornelisse (n 8), p. 72.
[97] Ilias and Ahmed v. Hungary, para 15, 18, 236.
[98] C-924/19, C-925/19, FMS and Others, para 71–74.
[99] Ilias and Ahmed v. Hungary, para 15; C-924/19, C-925/19, FMS and Others, para 68.
[100] A Bombay and P Heynen (n 84), p. 256.
[101] G Cornelisse (n 8), p. 72.

present unclarity may negatively impact the human rights protection of asylum seekers subjected to pre-entry detention, which will be further analysed in Chapter 5 of this thesis.

2.3 European Convention of Human Rights

This sub-chapter will focus on the two most relevant rights in the context of pre-entry detention of asylum seekers, the right to liberty and security articulated in Article 5 ECHR and the right to freedom of movement articulated in Article 2 of Protocol 4 ECHR. Both rights are closely related, and the ECtHR has underlined the difficulties in distinguishing between the two when assessing situations of containment of individuals. However, the correct classification is fundamental since it affects the individual's access to rights and safeguards.[102]

2.3.1 The Right to Liberty and Security in Article 5

Article 5 of the ECHR prescribes that all persons have the right to liberty and security of the person. The right to liberty establishes a right to physical liberty of the person and therefore no person shall be arbitrarily detained.[103] The ECtHR has deemed the right to liberty enshrined in Article 5 ECHR to constitute a fundamental human right since it protects the individual against arbitrary interferences by the state with his or her right to liberty.[104] However, this right may be restricted in certain situations. For the purpose of this thesis, this section will focus on the state's right to restrict the right to liberty in the context preventing an unauthorized entry into the country.[105] This restriction relates to the recognition of state's particular right, subject to international obligations, to control their borders and to take measures against foreigners that are circumventing the restrictions on immigration.[106] This has in the ECtHR's case law been referred to as the 'undeniable sovereign right to control aliens' entry and residence in the territory'.[107] The ECtHR has understood the state's permission to detain as a necessary adjunct of the right to control entry of aliens.[108]

The next part of this chapter will further examine the possible restriction that Article 5.1.f ECHR presents to the right to liberty. In order for a restriction of the right to liberty and security

[102] Khalifa and Others v. Italy, Application No. 16483/12, ECtHR, [GC], 15 December 2016, para 64.
[103] Ilias and Ahmed v. Hungary, para. 211.
[104] Saadi v. the United Kingdom, Application No. 13229/03, ECtHR, [GC], 29 January 2008, para 63.
[105] ECHR, Article 5.1.f.
[106] Ilias and Ahmed v. Hungary, para. 213.
[107] Amuur v. France, Application No. 19776/92, ECtHR, 25 June 1996, para 41; Saadi v. the United Kingdom.
[108] Saadi v. the United Kingdom, para 64.

to be lawful, the restriction has to fulfil two conditions. Firstly, the restriction must be based on one of the specific grounds articulated in Article 5.1.a to f ECHR. Secondly, the restriction must be prescribed by law that meets the quality of law, as well as being free from arbitrariness.[109] This means that the conditions for the deprivation of liberty have to be clearly defined and that the law itself is foreseeable in its application.[110] Furthermore, the Court underlines that the first limb of Article 5.1.f ECHR, to prevent the effectuating of an unauthorized entry, must be understood to include the principle that detention should not be arbitrary.[111]

The conditions for when detention under the first limb of Article 5.1.f ECHR can be applied, were developed in the *Saadi v. the United Kingdom* case, when the Court for the first time interpreted the meaning of the first limb of Article 5.1.f ECHR.[112] This case regarded the detention of an Iraqi national that fled the Kurdish Autonomous region of Iraq, after having treated and facilitated the escape of three fellow members of the Iraqi Worker's Communist Party. The applicant was first granted 'temporary admission' into the United Kingdom, with daily duty to report, before being detained to fast-track his asylum application.[113]

The *Saadi v. the United Kingdom* judgement provided clarification with regard to the interpretation of what constitutes the 'effecting an unauthorized entry' as articulated in the first limb of Article 5.1.f. of the ECHR. The Court underlined that until a state has 'authorized' the entry of an individual any entry in 'unauthorized', and that the detention of a person that wishes to enter the state without the appropriate authorization, can be detained under the first limb of Article 5.1.f ECHR. It is important to underline that the Court articulated that an asylum seeker that surrenders him or herself to the immigration authorities does not, according to the Court, seek to effectuate an authorized entry. The Court underscored that such an interpretation would be too narrow and restrict the undeniable right of states to exercise control over their territory, in a too far-reaching manner.[114] The dissenting judges are sceptical towards such an interpretation of the first limb of Article 5.1.f ECHR as it is difficult to reconcile with the principle that asylum seekers that have presented a claim for international protection are

[109] ECHR, Article 5.1; Z.A.and Others v. Russia, Applications No. 61411/15, 61420/15, 614271/15, 30281/16, ECtHR, [GC], 21 November 2019, para 161.
[110] Khlaifia and Others v. Italy, para 92.
[111] Saadi v. the United Kingdom, para 73–74.
[112] Ibid, para 74.
[113] Ibid, para 10, 13–14.
[114] Ibid, para 65.

considered to be lawfully present on the territory.[115] The Council of Europe's Parliamentary Assembly, also criticized the Court's finding, as its interpretation of an 'unauthorized entry', it suggests that an entry is unauthorized until it is authorized by the authorities, which could mean that unless the state authorizes entry, a person can be detained *ad infintum*.[116] The consequences of such an interpretation of 'unauthorized entry', will be further discussed in the context of the proposed Pact, due to its relevance in the context of the risk for an increased use of detention.[117]

In the *Saadi v. the United Kingdom* case the Court underlined that the application of Article 5.1.f ECHR does not require an assessment of the necessity of the use of detention.[118] In contrary, the dissenting judges underlined that there should be an assessment of the necessity of detention in the context of immigration, to ensure asylum seekers the same level of protection of their right to liberty, since necessity is required for the other restriction in Article 5 ECHR.[119] The implications that the ECtHR's finding in this respect will be further discussed under Chapter 5 of this thesis.

The Court developed the following criteria to assess whether detention under the first limb of Article 5.1.f ECHR is arbitrary: the detention must be carried out in good faith, it must be closely connected with the purpose to hinder an unauthorized entry and the conditions of detention should be appropriate. In this context the Court highlighted the fact that it must be noted that detention in accordance with Article 5.1.f. ECHR is not to be applied to individuals that have committed crimes but to aliens that, often fearing from their lives, are fleeing their own country.[120] In the case the Court found that the purpose of the detention was to make the asylum procedure more effective, as the applicant's procedure had been fast tracked. Therefore, the detention was closely connected with the purpose of preventing an unauthorized entry.[121] Moreover, the Court underlined that the difficult administrative problems, caused by a large

[115] Saadi v. the United Kingdom, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, p. 32.
[116] A Medonca, '*The Detention of Asylum Seekers and Irregular Migrants in Europe',* Council of Europe Parliamentary Assembly, Doc 1205/11, 11 January 2010. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12435&lang=en, Accessed 10 February 2022.
[117] See Chapter 5.
[118] Saadi v. the United Kingdom, para 74; W Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, 2015, p. 243.
[119] Saadi v. the United Kingdom, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, p. 35.
[120] Saadi v. the United Kingdom, para 73–74.
[121] Ibid, para 76–77.

number of asylum application, the seven-day detention of the applicant was found to be lawful under Article 5 ECHR.[122]

The *Saadi v. the United Kingdom* judgement has been criticized, not the least by the six dissenting judges.[123] The dissenting opinion particularly underlined the Court's focus on the justifying the detention by referring to bureaucratic and administrative goals, which are unrelated to preventing the applicant from effectuating an unauthorized entry. This creates legal uncertainty for asylum seekers with regard to the use of detention during the asylum procedure. Moreover, the dissenting judges question the acceptance of a seven-day period of detention and question where and how to draw the line for what time period is acceptable.[124] The *Saadi v. the United Kingdom* judgement led the dissenting judges to question whether the protection afforded by Article 5 ECHR with regard to the arbitrary detention of asylum seekers will provide lower levels of protection, compared to European Union standards.[125] This similar observation has been made with regard to more recent case law, in particular the *Ilias and Ahmed v. Hungary*, case, where the CJEU and the ECtHR have demonstrated diverging attitudes toward detention of asylum seekers.[126]

Finally, the procedurals safeguards articulated in the ECHR, that are relevant in the context of pre-entry detention of asylums seekers will be presented. Article 5.2 ECHR articulates the right to be informed of the reasons for the detention.[127] Thus, it constitutes an essential safeguard as all persons detained should know why they are being deprived of their liberty, which is essential in order to have the possibility to challenge the lawfulness of the deprivation of liberty.[128] Article 5.4 ECHR prescribes the *habeas corpus* provision with regard to detention, meaning that all persons that are detained have the right to have the lawfulness of their detention speedily assessed by a Court. If the Court finds that the detention in not lawful the person shall be issued

[122] Saadi v. the United Kingdom, para 80.
[123] Saadi v. the United Kingdom, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä; See also V Moreno-Lax, 'Beyond Saadi v. UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law', *Human Rights and International Legal Discourse*, Volume 5, Issue 2, 2011.
[124] Saadi v. the United Kingdom Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, p. 34–35.
[125] Ibid, p. 37.
[126] A Bombay and P Heynen (n 84), p. 256; See Section 2.2.1.
[127] ECHR, Article 5.2.
[128] Khalifa and Others v. Italy, para 115.

a release order and be released.[129] Article 5.5. ECHR prescribes the right to compensation in case of an unlawful detention.[130]

2.3.2 The Right to Freedom of Movement in Article 2 Protocol 4

As has been demonstrated in the ECtHR's case law the right to liberty and the right to freedom of movement are two closely interlinked rights that are both relevant in the context of the detention of asylum seekers.[131] Article 2 of Protocol 4 to the ECHR articulates the right to freedom of movement. It prescribes that everyone that is lawfully on the territory of a state, shall within that territory have the right to liberty of movement and freedom to choose his or her residence.[132] It has been questioned whether asylum seekers may be considered to have lawfully entered the territory of the state. The ECtHR has underlined that it is up to domestic law to articulate the necessary conditions that have to be fulfilled in order for the individual to be found to be lawfully present on the territory.[133] It has been argued that asylum seekers that have a pending asylum application are to be considered to be lawfully present on the territory.[134] In addition, the current EU-law, in particular the RCD, Article 7, prescribes the freedom of movement of asylum seekers.[135] This can be seen as further confirming the notion of asylum seekers should be seen as being lawfully on the territory and thereby enjoy the right to freedom of movement as articulated in Article 2, Protocol 4 ECHR.

The right to freedom of movement in Article 2 of Protocol 4 can be restricted by law. Firstly, the restriction must fulfil one of the following legitimate aims: national security public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health and morals or for the protection of the rights and freedoms of others. Secondly, the restriction must be necessary in a democratic society.[136] It is important to underline that the ECtHR thus prescribes that a restriction of the freedom of movement must be necessary in a democratic society. As mentioned in the previous section, the ECtHR's case law has underlined that such a test of necessity when restricting the right to liberty under Article 5.1.f. ECHR is not required,

[129] ECHR, Article 5.4; Khalifa and Others v. Italy, para 131–132.
[130] ECHR, Article 5.5.
[131] Khalifa and Others v. Italy, para 64.
[132] ECHR, Protocol 4, Article 2.1.
[133] Omwenyeke v. Germany, Application No. 44294/04, ECtHR, 20 November 2007.
[134] V Moreno-Lax, 'Beyond Saadi v. UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law', *Human Rights and International Legal Discourse*, Volume 5, Issue 2, 2011, p. 182.
[135] RCD, Article 7.
[136] ECHR, Protocol 4, Article 2.3.

despite the fact that these restrictions represent a more severe infringement of the individual's rights.[137]

It is important to note that four states have not ratified the 4th Protocol to the ECHR, thus Article 2 of Protocol 4 cannot be invoked against these states. These states are Greece, Turkey, Switzerland and the United Kingdom.[138]

2.3.3 Drawing the Line Between the Deprivation of Liberty and the Restriction of the Freedom of Movement

The difficulty of separating the right to liberty and the right to freedom of movement has been underlined by the ECtHR: 'Although the process of classification into one or other of these categories sometimes proves to be no easy task, in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends'.[139] It is important to note that Article 5 of the ECHR provides protection against the deprivation of liberty, and not the mere restriction of liberty which falls within the ambit of a restriction on the freedom of movement under Article 2 of Protocol 4 of the ECHR.[140] The ECtHR has clarified that the difference between the deprivation of liberty and the restriction of liberty is a question of 'degree and intensity and not one of nature or substance'.[141] When drawing the line between the deprivation of liberty and restriction of liberty in cases concerning asylum seekers, the ECtHR has underscored that this approach should be practical and realistic, having regard to the present-day conditions and challenges.[142] In order to draw the line between the restriction of liberty and the deprivation of liberty, in the context of confining asylum seekers in airport transit zones or reception centres for identification and registration of migrants the ECtHR established four factors that have to be taken into consideration in order to distinguish between the two rights. These four factors to take account to include: 1) the individual situation of the applicant, 2) the applicable legal regime of the respective country and its purpose, 3) the relevant duration of detention, in

[137] Saadi v. the United Kingdom, para 74; M Pichou, 'Reception or Detention Centers? The Detention of Migrants and the EU "Hotspot" Approach in the Light of the European Convention on Human Rights', *Critical Quarterly for Legislation and Law*, Volume 99, Number 2, 2016, p. 126.
[138] European Court of Human Rights, '*Guide on Article 2 of Protocol No.4 to the European Convention on Human Rights'*, Council of Europe, First Edition, 31 December 2021, para 5.
[139] Khalifa and Others v. Italy, para 64.
[140] ECHR, Article 2 Protocol No. 4.
[141] De Tommaso v. Italy, Application No. 43395/09, ECtHR, [GC], 23 February 2017, para 80.
[142] Ilias and Ahmed v. Hungary, para. 213.

reference to the purpose and procedural protection enjoyed by applicants, 4) the nature and degree of the actual restrictions imposed or experiences by the applicants.[143]

2.4 The Charter of Fundamental Rights of the European Union

The Charter of the Fundamental Rights of the European Union forms part of EU primary law, and therefore holds the same legal status as the Treaties.[144] It is important to note that the Charter is applicable for the Member States when they are implementing union law.[145] Given this thesis focus on the implementation of the current RCD as well as the Pact on Migration and Asylum, the Charter will be of central importance.

2.4.1 The Right to Liberty and Security in Article 6

Article 6 of the Charter has gained increased importance, due to the large number of asylum seekers reaching EU-territory since 2014-2016 which has led to an intensification of enforcement activities at national and EU-level. The hotspot approach can be seen as one such enforcement activity. Despite the fact that these actions are still being carried out by the Member States, detention has become much closer linked to the EU.[146] Moreover, the CJEU has given several judgements in which Article 6 of the Charter was directly relied upon. These cases have mostly been concerned with the detention of asylum applicants.[147] Thus, underlining the CJEU's concern with the use of detention in the context of asylum seekers, including pre-entry detention.[148]

Article 6 of the Charter prescribes that everyone has the right to liberty and security of person. Thus, the protection prescribed by Article 6 of the Charter extends to all natural persons, regardless of nationality or immigration status.[149] The CJEU has confirmed that Article 5 ECHR

[143] Ilias and Ahmed v. Hungary, para 217; G Goodwin-Gill, J Mc Adam, E Dunlop, *The Refugee in International Law*, 4th Edition, Oxford University Press, Oxford, 2021, p 474.
[144] TFEU, Article 6; J Wouters, M Ovadek, *The European Union and Human Rights: Analysis, Cases and Materials*, Oxford University Press, Oxford, 2021, p. 94.
[145] EU Charter, Article 51.
[146] D Wilsher, 'Article 6' in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford, 2021, p. 116.
[147] See for example C-528/15, Al Chodor, CJEU, 15 March 2017; C-60/16, Mohammad Khir Amayry v. Migrationsverket, CJEU, 13 September 2017.
[148] D Wilsher (n 146), p. 123.
[149] D Wilsher (n 146), p. 125.

is to be understood as a minimum threshold of protection, where the Charter may provide a more extensive protection of the right to liberty.[150]

The right to liberty as prescribed by Article 6 of the Charter is not absolute and may be limited. Such a limitation must be prescribed by law, be subject to the principle of proportionality as well as being necessary. The limitation must also genuinely meet the general interests recognized by the Union or the need to protect the rights and freedoms of others.[151] The requirement of legality underlines that any person subjected to detention should be able to easily know the sources of law that have been relied upon when restricting their right to liberty.[152] Limitations must also be proportional. The proportionality requirement prescribes an assessment that the restrictive measure adopted does not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued. Moreover, the necessity requirement suggests that due to the importance of the right to liberty, enshrined in Article 6 of the Charter, and the gravity of the interference which detention poses limitations of the right may only take place in situations where they are strictly necessary.[153] This right may also be restricted through the use of detention and the restriction of freedom of movement, as prescribed by secondary EU-law, RCD.[154] These restrictions of the right to liberty and security will be further analysed under section 2.5. of this chapter.

It has been established that the right in Article 6 of the Charter corresponds to Article 5 ECHR, and both articles shall have the same meaning and scope, as articulated in Article 52.3 of the Charter. Thereby, any limitation imposed on Article 6 of the Charter may not exceed those permitted by the ECHR.[155] However, the coherency of the Charter and the ECHR may be sacrificed to avoid adversely affecting the autonomy of Union law and that of the CJEU.[156] Wilsher underlines the existing tensions between protecting the right to liberty of individuals and the EU's policies to control external borders. He believes that the ECtHR's jurisprudence

[150] C-528/15, Al Chodor, para 37; D Wilsher (n 146), p. 125.
[151] EU Charter, Article 52.1.
[152] C-528/15, Al Chodor, para 38. This is of importance with regards to the implementation of EU directives, that are at times incorrectly transposed. The CJEU has required that a Directive be implemented in a particular legislative code, in order to ensure transparency.
[153] C-601/15 JN v. Staatssecretaris voor Veilighed en Justitie, CJEU, 15 February 2016, [GC], para 54, 56.
[154] RCD, Article 7 and 8.
[155] Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, 14 December 2007, [OJ C 303], Explanation on Article 6.
[156] C-601/15 JN v. Staatssecretaris voor Veilighed en Justitie, para 47.

is becoming less important as the CJEU engages with the extensive EU legislation in this field and starts to develop a more autonomous approach.[157]

2.4.2 The Right to Asylum in Article 18

The examination of the right to asylum is relevant in the context of this thesis due to the inherent connection between the right to asylum, border procedures and the use of pre-entry detention to implement such border procedures.[158] Moreover, the relevance of the right to asylum in the context of detention was further confirmed by the CJEU in the *FMS and Others* case. The CJEU explicitly relied on the right to asylum when finding that Hungary's argument that the applicants had the possibility to leave the Röszke transit zone to enter Serbia, should contribute to the CJEU finding that the applicants were not detained. However, the CJEU underlined that if the applicants were to leave the Röszke transit zone to enter Serbia they would forfeit the right under Article 18 of the Charter.[159] Thus, CJEU did not find the argument presented by the Hungarian government convincing.[160] This section will focus on clarifying the scope of the right to asylum whereas, Chapter 4.5.1, will further clarify the inherent link between the right to asylum, border procedures and pre-entry detention in the context of the Pact on Migration and Asylum. This section will not present an in-depth examination of the right to asylum due to this thesis focus on the right to liberty.

Article 18 of the Charter articulates that the right to asylum shall be guaranteed in the context of the obligations articulated in the Refugee Convention as well as being in accordance with the Treaty of the European Union (TEU)[161] and the TFEU.[162] The meaning and substantive scope of the right to asylum as prescribed in Article 18 in the Charter is subject to profound diversions.[163] This is due to the fact that the power to decide upon the individual's right to entry, stay or expulsion has been seen to be the absolute power of the state. The individual has been seen to be given the privilege to request for protection but it has not been seen as a matter of legal entitlement for the individual.[164] This approach was further promoted in the drafting of

[157] D Wilsher (n 146), p. 149.
[158] G Cornelisse (n 8), p. 72.
[159] C-924/19, C-925/19, FMS and Others, para. 230.
[160] G Cornelisse, M Reneman, 'Border Procedures in the Member States: Legal Assessment" in van Ballegooij, (eds) '*Asylum Procedures at the Borders: European Implementation Assessment*', European Parliamentary Research Service, PE 654.201, 2020, p. 79.
[161] Consolidated Version of the Treaty of the European Union, 2012/C 326 /01, 26 October 2012, [OJ C 326].
[162] EU Charter, Article 18.
[163] V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford University Press, Oxford, 2017, p. 371.
[164] Ibid, p. 338.

the Universal Declaration of Human Rights, that solely recognizes a right to leave any country but only enter your own, with a right to seek asylum but not a guarantee to be granted asylum. There is no text of universal scope that deals with the right of asylum. This is mainly due to the great divide between those states that claim to have a moral duty to offer asylum to people in need of protection and the states that do not want to curtail their sovereign prerogatives.[165] Despite the fact that the right to grant asylum enshrines a sovereign prerogative, the right to asylum in Article 18 of the Charter constitutes an individual right. This can be understood by the very nature of the Charter, as a human rights instrument. Moreover, the CJEU has through its case law clarified that the right should be understood as constituting an individual right.[166]

The right to asylum, enshrined in Article 18 of the Charter is considered have a wider scope than solely being a procedural right to seek asylum as well as going beyond issues of refoulement. The UNHCR claims that interpreting the right in such narrow fashion would fail to secure the *effet utile* of the right to asylum. Therefore, the UNHCR interpreted the right to asylum in Article 18 of the Charter to *inter alia* include the protection against refoulement, including non-rejection at the border, as well as access to territories for the purpose of admission to fair and effective process for determining status and international protection needs.[167]

Regarding restrictions of the right to asylum as articulated in Article 18 of the Charter, it is subject to the general limitation clauses of the Charter, i.e., Article 52 of the Charter. Moreno-Lax, believes that derogations cannot be applicable with regard to Article 18 of the Charter. This is due to her understanding of the right to asylum as being closely interlinked with the absolute right to non-refoulement. Moreno-Lax writes: 'Here – at the junction between the rights to (leave to seek) asylum and to *non-refoulement* – legality, legitimacy and necessity conditions cannot be given any weight.'[168]

[165] V Moreno-Lax (n 163), p. 339; Universal Declaration of Human Rights, 1948, Article 13.2, 14.
[166] M Den Heijer, 'Article 18' in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford, 2021, p. 562; See for example C-175/17 Belastingdienst v Toeslagen, CJEU, 26 September 2018, C-181/16 Gnandi, CJEU, 19 June 2018.
[167] UNHCR, '*UNHCR Statement on the Right to Asylum, UNHCR Supervisory Responsibility and the Duty of States to Cooperate with the UNHCR in the Exercise of its Supervisory Responsibility'*, 2012, p. 6–9. https://www.refworld.org/pdfid/5017fc202.pdf, Accessed 2 February 2022.
[168] V Moreno-Lax (n 163), p. 391.

2.5 The Reception Conditions Directive

Moving from the human rights law framework regulating pre-entry detention of asylum seekers we now turn to the EU-secondary law regulating detention. This section will focus on the rules set out in the RCD, as these rules are applicable when detaining an asylum seeker, as long as there is an ongoing asylum application or an appeal against a refusal of an asylum application. When there is no such application at hand the Return Directive will be regulating detention practices.[169]

2.5.1 Detention

The RCD sets out that the detention of an applicant is permissible only if it is proven to be necessary and is based on an in individual assessment of each case. Moreover, Member States may only detain an applicant if other less coercive alternatives cannot be applied effectively.[170] Member States must lay down alternatives to detention, such as regular reporting to the authorities or the deposit of a financial guarantee, in their national law.[171] The RCD articulates six exhaustive grounds in which an applicant may be detained. These detention grounds include: 1) To determine or verify the applicants identity, 2) To determine the elements of an asylum application which could not be obtained in the absence of detention, particularly where there is a risk of the applicant absconding, 3) In order to decide, in the context a procedure, the applicant's right to enter the territory, 4) When the applicant is detained due to return or removal and there are reasonable grounds that her or she is making an application for asylum in order to delay or frustrate the enforcement of the return decision, 5) For reasons of protection of national security or public order, 6) In order to fulfil the procedures of return to another Member State under the Article 28 of the Dublin Regulation. These detention grounds must all be laid down in national law.[172] Costello and Mouzourakis highlight the broad formulation of the current detention grounds and underline that detention must be necessary in order for it to be permitted. Hence the necessity requirement prescribes that the detention grounds must be narrowly interpreted in individual cases.[173] Additional detention grounds have been introduced in the 2016 proposal for a recast Reception Conditions Directive, that is considered to be part of the Pact on Migration and Asylum. These will be examined in the following chapter.[174]

[169] RCD, Article 2.b; D Wilsher (n 146), p. 138.
[170] RCD, Article 8.2.
[171] RCD, Article 8.4.
[172] RCD, Article 8.3.
[173] C Costello and M Mouzourakis (n 73), p. 62.
[174] 2016 Proposed Reception Conditions Directive, Article 8.3.c, 8.3.d.

Article 9 of the RCD articulates that an applicant shall be detained for as short a period as possible and shall only be kept in detention as long as the ground set out in Article 8.3 RCD are satisfied. Moreover, when an administrative procedure is relevant due to the particular detention ground such procedure shall be executed with due diligence. Furthermore, any delay that is not attributable to the applicant cannot justify continued detention.[175] The RCD does not specify a maximum duration of detention. The CJEU has noted that the absence of a maximum time limit for the detention of an applicant is not contrary to an applicant's right to liberty as prescribed in Article 6 of the Charter, as long as the procedural safeguards set out in Article 9 of the RCD are respected. Therefore, the CJEU claims that Article 9 of the RCD must be interpreted to not require Member States to set up a set time limit for a maximum period of detention. This is as long as the Member States provides in their national law that the detention only lasts as long as the grounds on which the detention decision is based on still continue to apply and secondly, that administrative procedures linked to that ground are carried out diligently.[176]

Applicants shall as a rule be held in specialized detention facilities. However, if a Member State cannot provide for such an accommodation, the applicant may be held in prison facilities, but should be kept separately from other prisoners. Moreover, the RCD clarifies that detained applicants shall as far as possible be held separately from other third-country nationals that have not lodged an application for asylum. In addition, detainees shall have access to open-air space, have the possibility to communicate with *inter alia* the UNHCR, family members and legal advisers. The applicants shall also be provided with the rules applicable in the facility in which they are held, that sets out their rights and obligations in a language that they are supposed to understand.[177]

The RCD also includes specific provisions on the detention of vulnerable persons and applicants with special reception needs. This includes minors that shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. Unaccompanied minors shall solely be detained in exceptional circumstances and Member States shall ensure that they are provided accommodation that is separated from adult-accommodation. However, Member States may derogate from the following when applicants

[175] RCD, Article 9.
[176] C-924/19, C-925/19, FMS and Others, para 263–266.
[177] RCD, Article 10.

are detained in border or transit zones, the possibility of minors' engaging in leisure activities, the provision of separate family accommodation and accommodation separates by the genders.[178]

The RCD also provides for procedural guarantees, including that the detention decision shall be ordered in writing by judicial or administrative authorities. This detention order shall state the reasons for detention in fact and law. If the detention order is taken by an administrative authority the decision shall be subjected to speedy judicial review. Subsequently, the order shall be judicially reviewed.[179] The detained applicant shall immediately be informed in writing in a language that he or she can reasonably understand, on the grounds for detention as well as the procedure for challenging the decision. The applicant shall also be given the possibility to request free legal assistance and representation. In addition, the detention shall be judicially reviewed, at reasonable time intervals, either *ex officio* or by request of the applicant.[180]

2.5.2 The Right to Freedom of Movement

Article 7 RCD regulates the restriction of the freedom of movement of asylum seekers. This includes the conditions under which this freedom may be restricted as well as the asylum seekers place of residence.[181] The asylum seekers' freedom of movement can be restricted, meaning that the applicant is able to move freely in a particular area that is assigned to them. This assigned area is not to affect the unalienable sphere of private life and shall allow for sufficient scope for guaranteeing access to all benefits under the Reception Directive.[182] The fact that the restriction on the applicant's freedom of movement should not affect the applicant's sphere of private life creates a restriction on Member States' discretions in the context of reception facilities. Yet, the limitation's scope is unclear and Member States have interpreted the 'applicant's sphere of private life' narrowly.[183] This is of relevance in the context of this thesis, due to the fact that when restrictions of the freedom of movement become too extensive, they may lead to a *de facto* deprivation of liberty rather than a restriction of the freedom of movement of an asylum seeker. In such cases the rules of detention will be applicable despite

[178] RCD, Article 11.
[179] Ibid, Article 2.2, 2.3.
[180] Ibid, Article 9.4, 9.5,
[181] Ibid, Article 7; E Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' *Refugee Survey Quarterly*, Volume 35, Issue 1, 2016, p. 11.
[182] RCD, Article 7.1.
[183] E Tsourdi (n 181), p. 12. See C Costello and M Mouzourakis (n 73), p. 61, for further discussion on the coherence between Article 7 RCD and Article 26 of the Refugee Convention.

the fact that the applicant is held in a facility that is not considered a *de jure* a detention facility. Examples of such facilities include border or transit zones or a facility running in the framework of hotspots.[184] This underlines the importance of keeping in mind that the domestic designation of a particular facility does not hinder the facility to constitute *de facto* detention.[185]

2.6 Chapter Conclusion

This chapter has examined the scope of the right to liberty and to what extent this right may be restricted as prescribed by the two European legal regimes, the ECHR and the EU Charter. Moreover, the chapter has also underscored the importance of distinguishing between the right to liberty and the freedom of movement as articulated in the Protocol 2, Article 4 of the ECHR and the RCD, in order to accurately classify a stay at the border. Recent case law, the *Ilias and Ahmed v. Hungary* case and the *FMS and Others* case have highlighted different approaches taken by the ECtHR and the CJEU with regard to defining which practices at the border amount to detention. It is important to keep in mind that the RCD constitutes detailed legal rules on the use of pre-entry detention and underlines that there must be an assessment of the necessity of the use of detention, contrary to the ECtHR's position in the *Saadi v. the United Kingdom* case. Hence, it may be suggested that the EU legal regime provides a more robust protection for asylum seekers in regard to pre-entry detention practices. However, the introduction of the proposed screening and asylum border procedure in the Pact on Migration and Asylum may impact this current order. The following chapter will examine the proposed screening and asylum border procedure and how they will allow for greater avenues to use pre-entry detention in regard to asylum seekers.

[184] E Tsourdi (n 181), p. 15.
[185] Khlaifia and Others v. Italy, para 71.

3 The Pact on Migration and Asylum

3.1 Introduction

This chapter will present two underlying premises and objectives of the Pact, in order to better understand the rationales of the proposed procedures introduced by the Pact. These objectives include, the changing composition of migratory flows and the hindering of applicants' absconding through non-entry. Thereafter, there will be an examination of the proposed legislative instruments, including the proposal for a Screening Regulation, the proposal for an amended Asylum Procedures Regulation and the proposal for a Crisis and Force Majeure in the Field of Migration and Asylum. This examination will focus on the aspects of the proposals that are relevant in the context of pre-entry detention.

3.2 The Objectives of the Pact on Migration and Asylum

3.2.1 Tackling the Changing Composition of Migratory Flows

One central aspect of the European Commission's understanding of the current migration situation is the changing composition of migratory flows, which permeates the New Pact on Migration and Asylum. The Commission notes that there has been a significant decrease in the number of irregular arrivals to the EU. In 2015 the number or irregular arrivals to the EU was 1.8 million. In 2019 this number amounted to 142 000 people, hence, signifying a 92 % decrease of irregular arrivals to the EU.[186] The Commission argues that there have been important decreases regarding third-country nationals taking the Central Mediterranean route and the Western African route. However, arrivals from the Eastern Mediterranean route and the Western Balkan route have seen an increase of third-country nationals arriving. [187] Thus, the Commission claims that there has been an increase in the number of third-country nationals arriving from countries of low recognition rates. In particular, the Commission highlights that processing the asylum claims and finalizing the return procedure of third-country nationals from countries of origin with low recognition rates lead to an important burden on the national

[186] European Commission (n 3), p. 28.
[187] Ibid, p. 28–29.

authorities processing the asylum applications. The Commission claims that these asylum applications are often lodged to facilitate absconding or hamper returns.[188]

This understanding of an increasing number of third-country nationals arriving from countries of low recognition rates relates to the Commission's understanding of there being an increasingly mixed flow of third-country nationals coming to the EU.[189] The Commission underlines that the people entering the EU in 2015-2016 had 'clear international protection needs', whereas this has been replaced by a significantly more mixed flow of people, including applicants with divergent protection needs.[190] The premise of an increasingly mixed flow of third-country nationals is used in order to justify the proposals in the Pact. This includes both the pre-entry screening procedure and the asylum border procedures, that are both seen as particularly important migration management tools to tackle the mixed flow that requires the prevention of the unauthorized entry of applicants from low recognition rate countries.[191]

In this context, it is important to note that the European Commission's reliance on the premise of mixed migratory flows needs to be employed with a certain degree of vigilance. Firstly, it must be underlined that migratory flows are of great complexity and are subject to significant variations and reflect multiple interrelating factors such as geopolitical, economic and social factors in the country of origin. Moreover, a mix of policy and legislative measures adopted in the transit country or country of destination play a very important role. Due to the complexity and wide variety of factors impacting migratory flows, commentators have questioned the Commission's reliance on a short-term trend as a ground for building the EU's long-term legislation in the field of migration and asylum.[192]

In addition, the European Commission's reliance on the premise of their being an increase of mixed migratory flows, largely relies on the fact that there has been a significant decrease in recognition rates. The Commission underlines that in 2019, EU-wide first instance recognition

[188] European Commission (n 3), p. 31.
[189] E Brouwer, G Campesi, S Carrera, R Cortinovis, E Karageorgiou, J Vedsted-Hansen, L Vosyliute, '*The European Commission's Legislative Proposals in the New Pact on Migration and Asylum'*, Study, Policy Department for Citizen's Rights and Constitutional Affairs: Directorate General for Internal Policies, European Parliament, PE 697. 130, 2021, p. 40.
[190] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 1.
[191] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 4; Proposed Screening Regulation, Explanatory Memorandum, p. 1.
[192] E Brouwer et al (n 189), p. 40.

rate fell to 30%. In 2016 the recognition rate was at 56%.[193] However, it is important to consider that the numbers regarding the first instance recognition rates may not provide an accurate picture of the actual number of third-country nationals receiving international protection in the EU. This is due to the fact that this number does not consider the number of applications that are successfully challenged on appeal.[194] Moreover, there are important disparities between the different Member States with regard to positive recognition rates, including for applicants of the same nationality. Furthermore, the differences in legal and administrative challenges facing applicants with regard to access to effective remedies in the appeals phase affects the number of positive decisions on appeal. These factors all underline some important limitations of the Commission relying on the premise of mixed migratory flows as one of the foundations of the Pact on Asylum and Migration.[195]

3.2.2 Hindering Secondary Movements of Applicants Through Non-Entry

A fundamental part of the EU's Pact on Migration and Asylum is the idea that filing for asylum in the EU does not constitute an automatic right to enter the EU.[196] This understanding underpins the proposed Screening Regulation as well as the facilitation of the use of border procedures through the proposed Asylum Procedures Regulation. The rationale, proposed by the European Commission is that the screening procedure and the facilitation of the use of border procedures in combination with the policy of non-entry to EU territory, will enable for a quick removal of inadmissible, abusive and applications from applicants originating from low-recognition rate countries. By ensuring the non-entry of these applicants to the EU this will constitute an important migration management tool and contribute to reducing the illegal entry, stay as well as unauthorized movements.[197] This is related to the European Commission's concern for the fact that despite increased cooperation on EU level and support from EU-agencies there is a lack of harmonization of Member States' reception systems. This leads to incentivizing unauthorized movements, where applicants seek to find the best reception conditions. Therefore, the reforms, in particular the pre-entry phase, consisting of the pre-screening and the border procedure, is aimed at significantly contributing to preventing onward

[193] European Commission (n 3), p. 29.
[194] E Brouwer et al (n 189), p. 41.
[195] Ibid, p. 40–41.
[196] European Commission (n 3), p. 72.
[197] Ibid, p. 73–74.

movements of applicants.[198] The objective of hindering secondary movements is of relevance in the context of this thesis, since the limitation of secondary movements through the non-entry of third-country nationals into Member States' territories requires some form of containment of applicants at the external borders of the EU. Therefore, this premise and the proposed solutions have important effects on the use of pre-entry detention.

In the context of proposing solutions to hinder secondary movements, it is important to note that the European Commission recognizes that it lacks data regarding secondary movements, making exact quantification of secondary movements complicated. There is currently no publicly available report on the scope of secondary movements to the northwest of the EU.[199] Therefore, commentators have underlined the importance to recognize the complexity of secondary movement. This includes an understanding of the quality of international protection in a specific country as being influenced by a broad set of factors, such as social, institutional and economic conditions, well beyond simply reception standards and existence of adequate asylum procedures.[200] Yet, the European Commission's approach does not take such complexities into account and instead retains a punitive approach to secondary movement.[201] This underscores an important limitation of the second examined premise underpinning the pre-entry phase.

3.3 The Proposed Screening Regulation

The proposed Screening Regulation will be the first step in the pre-entry phase. It will satisfy the need for quickly identifying the applicants that are in need of protection and those that are to be returned. By introducing the Screening Regulation the European Commission aims at presenting an essential tool to handle the mixed migratory flows, by creating uniforms rules regarding identification. The Commission argues that the Proposed Screening Regulation should 'lead to enhancing the synergies between external border controls, asylum and return procedures.'[202] The components of the screening procedure will be presented briefly. However,

[198] Proposed Asylum Procedure Regulation, Explanatory Memorandum, p. 4–6.
[199] European Commission (n 3), footnote 53.
[200] S Carrera, S Marco, R Cortinovis, N Chun Luk, '*When Mobility is not a Choice: Problematising Asylum Seekers' Secondary Movements and their Criminalization in the EU'*, CEPS Papers in Liberty and Security in the Europe, Number 2019-11, 2019, p. 6. Available at: https://www.ceps.eu/download/publication/?id=26027&pdf=LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf, Accessed 22 February 2022.
[201] E Brouwer et al (n 189), p. 43.
[202] Proposed Screening Regulation, Explanatory Memorandum, p. 1.

the focus of this section is the components of the screening procedure that are relevant in the context of pre-entry detention.

3.3.1 The Components of the Screening

The purpose of the screening procedure is to strengthen the control of persons who are about to enter the EU, as well as referring them to the appropriate procedure.[203] The pre-entry screening comprises of six mandatory elements: 1) Preliminary health and vulnerability check,[204] 2) Identification,[205] 3) Registration of biometric data,[206] 4) Security checks,[207] 5) Filling out a Debriefing form,[208] 6) Referral to the appropriate procedure.[209] Following the completion of the screening procedure there are three identified main outcomes. These include, firstly, the channelling of the applicant to the appropriate asylum procedure, either to the normal asylum procedure or to the asylum border procedure.[210] The second possible outcome is the channelling of the applicant to a return procedure.[211] Thirdly, the applicant may be refused entry.[212]

3.3.2 Personal Scope

The screening procedure will apply to all third-country nationals that are apprehended at an unauthorized external border crossing or following search and rescue operations. This shall apply regardless, if the applicant has applied for international protection.[213] Moreover, the screening procedure shall also apply to the third-country nationals that have applied for international protection at an external border crossing or transit zone that do not fulfil entry conditions.[214] In addition, the screening procedure shall also be applicable to third-country nationals that are apprehended within the territory of a Member State and there is no indication that they have crossed the border into the Member State in an authorized manner.[215] The category of people that are exempted from the screening procedure are those third country

[203] Proposed Screening Regulation, Article 1.
[204] Ibid, Article 9.
[205] Ibid, Article 10.
[206] Ibid, Article 6.6.c, 14.6.
[207] Ibid, Article 11, 12.
[208] Ibid, Article 13.
[209] Ibid, Article 6.6.
[210] Ibid, Article 14.2.
[211] Ibid, Article 14.1.
[212] Ibid, Article 14.1.
[213] Ibid, Article 3.1.
[214] Ibid, Article 3.2; Regulation (EU) 2016/399 of the European Parliament and the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders, 23 March 2016 [OJ L 77], Article 6. Hereafter referred to as 'Schengen Border Code (SBC)'.
[215] Proposed Screening Regulation, Article 5.

nationals that have been granted entry to a Member State based on e.g. humanitarian reasons as prescribed by the Schengen Border Code, Article 6.5.c.[216]

It is important to note that the proposed Screening Regulation does not explicitly differentiate between unauthorized migrants and third-country nationals seeking protection.[217] Hence, disregarding the current fine line between an asylum seeker that is subject to specific protection needs according to the Refugee Convention, as well as being recognized in the Schengen Border Code, Article 6.5.c. Jakuleviciene underlines the unclear personal scope of the Screening Regulation proposal since it recognizes the Schengen Border Code, Article 6.5.c. exception to the screening procedure, while still including applicants for international protection under Article 3.2 of the Screening Proposal. This unclarity risk contributing to a disregard for the particular protection needs of asylum seekers.[218] This will be further discussed under 5.3.3. of this thesis.

3.3.3 Location and the Use of Detention

The proposed Screening Regulation states that during the screening procedure at the external borders, third-country nationals shall not be authorized to enter the territory of a Member State.[219] In these cases the screening shall take place either at locations situated at the border or in proximity to the external borders.[220] It is up to the Member States to find appropriate locations for the screening procedure. They should consider geography, existing infrastructure as well as the fact that both third-country nationals that are apprehended at the border and individuals that present themselves to a border crossing point, can easily be submitted to the screening procedure. In addition, the European Commission states that the tasks related to the screening may be performed in hotspot areas.[221]

The proposal clarifies that it is up to the Member States to apply measures according to national law to prevent the persons subjected to the screening procedure to enter the territory of the Member State. The Member States shall undertake the necessary measures to ensure the non-

[216] Proposed Screening Regulation, Article 3.3.
[217] Ibid, Article 3.1.a-b.
[218] L Jakuleviciene, 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' in D Thym, 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*, Nomos Verlagsgesellschaft mbH& Co.KG, Baden-Baden, 2022.
[219] Proposed Screening Regulation, Article 4.
[220] Ibid, Article 6.1.
[221] Ibid, Recital 20.

entry of third country nationals and the third county nationals are according to the proposal to be 'held' by the national authorities.[222] In order to ensure non-entry and the fact that the Commission employs the term 'held by the authorities' implies the need for the restriction of the third country nationals' movements. The Commission provides no suggestion regarding how the regime of non-entry is to be upheld.[223] It is however, noted that detention may be used for this purpose, in individual cases and when it is required. However, the particular situations that require detention, and the modalities thereof shall be regulated by national law.[224] This allows for major discretions for Member States in regard to whether they will be using detention, which has been criticized as it opens up for a situation of wide-spread use of detention during the proposed screening procedure.[225] These proposed screening procedure's possible contribution to the use of pre-entry detention will be further examined under Chapter 4 of this thesis.

Regarding third-country nationals found within the territory of a Member State that are suspected to have crossed the external border in an unauthorized manned, screening shall take place at an appropriate location within the territory of a Member State. Hence, this procedure does not have to take place at a location in proximity to external borders.[226]

3.3.4 Time Frame

The screening procedure taking place at the external borders or in proximity to the borders, shall be carried out without delay and be completed within five days of either apprehension at the external border, disembarkation into a Member State's territory or presentation at a border crossing point. In times of exceptional nature, 'where a disproportionate number of third country nationals need to be subject to screening at the same time, making it impossible to conclude the screening in that time limit', the screening procedure may be prolonged with an additional five days. This means that in 'exceptional times' the screening procedure could maximum take place for ten days in total.[227]

[222] European Commission (n 3), p. 71.
[223] Proposed Screening Regulations, Recital 12, Explanatory Memorandum, p. 9.
[224] Ibid.
[225] L Jakuleviciene (n 218), p. 92.
[226] Proposed Screening Regulation, Article 5, Article 6.2.
[227] Ibid, Article 6.3.

3.3.5 Monitoring of Fundamental Rights

The proposed Screening Regulation articulates that each Member State shall establish an independent monitoring mechanism to ensure the Screening procedure's compliance with fundamental human rights. This includes to monitor compliance with EU law, international law and in particular the EU Charter. Moreover, the monitoring mechanism shall, when relevant, ensure that national laws, regarding detention grounds and duration of detention respect fundamental rights. In addition, the Member States are required to implement safeguards to guarantee the independence of the monitoring mechanism.[228]

3.4 The Proposed Asylum Procedure Regulation

The proposed Asylum Procedure Regulation articulates the second part of the pre-entry phase, namely the asylum border procedure and return border procedure.[229] There are many novelties introduced in the proposed Asylum Procedure Regulation, yet, this following section will focus on the asylum border procedure, due to this thesis' focus on pre-entry detention of asylum-seekers.

3.4.1 A Mandatory Asylum Border Procedure

Following the screening procedure an asylum border procedure may be used for the third-country nationals that have made an application for international protection at the external border or a transit zone. The asylum border procedure may also be used for those that have been apprehended due to an attempted unauthorized crossing of the external border as well as following a disembarkation into a Member State's territory following a search and rescue mission.[230] In these cases decisions are to be taken regarding the admissibility of an application or the merit of an application, in cases where an accelerated examination procedure can be used.[231]

The important novelty with the proposed Asylum Procedure Regulation is that it prescribes that in certain cases it should become mandatory to employ border procedures, contrary to the

[228] Proposed Screening Regulation, Article 7, Recital 23.
[229] Proposed Asylum Procedure Regulation, Recital 40.
[230] Ibid, Article 41.1. a–d.
[231] Ibid, Article 41.2.

current Asylum Procedures Directive[232] that does not impose the mandatory use of border procedures.[233] There are three acceleration grounds that may lead to the mandatory application of the asylum border procedure. These include, in cases where; 1) The applicant has misled the authorities by for example presenting false documents or withheld important information that would have negatively affected the applicant's decision; 2) The applicant can for serious reasons be considered a danger to national security or public order of the Member State; 3) When the applicant has the nationality or habitual resident of a third country where the proportion of positive decisions with regard to applications for international protection is 20% or lower. The 20% recognition rate will be calculated based on the latest available yearly Union-wide average Eurostat data. There are two exceptions to the fact that the border procedure should be applied to the applicants of a country of nationality with a 20 % recognitions rate. Firstly, if there has been a significant change in the third country since the publication of the relevant Eurostat data. Secondly, if the applicant belongs to a category of persons for whom the 20% recognition rate cannot be considered representative for that person's particular protection needs.[234] The additions of the ground for the mandatory application of border procedures based on the use of the 20% or lower recognition rate has been added through the Pact, contrary to the other two grounds for use of border procedure that were already present in the 2016 proposal for an Asylum Procedures Regulation.[235] The addition of the third ground for mandatory use of border procedures is expected to lead to an important augmentation of the use of asylum border procedures.[236]

It is important to note that asylum border procedures may not be used in cases regarding unaccompanied minors or children below the age of twelve and their families.[237] However, the asylum border procedures may be used if the applicants are for serious reasons considered to constitute a danger to the national security or public order of the Member State. Similarly, if

[232] APD, Article 31.8.
[233] Proposed Asylum Procedure Regulation, Article 41.3.
[234] 2016 Proposed Asylum Procedures Regulation, Article 40.1.c, f; Proposed Asylum Procedures Regulation, Article 40.1.i, Article 41.3.
[235] See 2016 Proposed Asylum Procedures Regulation, Article 40.1; Proposed Asylum Procedures Regulation, Article 40.1.i, Article 41.3.
[236] E Brouwer et al (n 189), p. 68. The proposed third ground for the mandatory use of border procedures has been greatly criticized, due to the scope of this thesis these critiques will not be further examined in this context but see for example J Vedsted-Hansen, '*Admissibility, Border Procedures and Safe Country Notions'*, ASILE, Global Asylum Governance and the European Union's Role, 2020. Available at: https://www.asileproject.eu/admissibility-border-procedures-and-safe-country-notions/, Accessed 24 February 2022.
[237] Proposed Asylum Procedures Regulation, Article 41.5.

the unaccompanied minor or child under twelve years old and family have been forcibly expelled to serious reasons of public security or public order under national law, the asylum border procedure may be employed.[238]

3.4.2 Location and the Use of Detention

During the asylum border procedure applicants shall not be authorized to enter the territory of the Member State.[239] Applicants shall be kept 'in proximity to the external border or transit zones'.[240] Member States shall ensure that the applicants are held in accommodations close to the external border or in transit zones that respect the requirements laid out in the RCD and ensure that the necessary arrangements are made to fulfil the conditions laid out in the RCD.[241] Member States shall be allowed to process the applications for international protection at a different location than the location in which they were made. Thereby, transferring of applicants to the facility where the border procedure will be carried out is considered acceptable. However, the Commission underlines that even though it is up to the Member States to decide on where the appropriate facilities are to be located, the Member States should seek to limit such transferring of applicants. Therefore, Member States should strive to set up appropriate facilities where the majority of applications for international protection are lodged.[242] Member State have to notify the Commission of the location in which the border procedures will be taking place.[243]

Regarding the use of detention, the proposal states that the asylum border procedure can be applied without the use of detention. However, Member States shall be able to apply detention following the provisions set out in the RCD. It is underlined that in cases of detention the guarantees of the RCD must be respected, including the guarantees of an individual assessment, judicial control and conditions of detention.[244] The Horizontal Substitute Impact Assessment of the New Pact on Migration and Asylum, requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), highlights that the 'holding' of applicants at the external border or in transit zones will likely amount to detention.[245] In addition, the

[238] 2016 Proposed Asylum Procedures Regulation, Article 40.5.b; Proposed Asylum Procedures Regulation, Article 41.5.
[239] Proposed Asylum Procedures Regulation, Article 41.6.
[240] Ibid, Article 41.13
[241] Ibid, Recital 40c. See section 2.3.2.
[242] Ibid, Recital 40 c.
[243] Ibid, Article 41.13.
[244] Ibid, Recital 40f. See section 2.3.2.1.
[245] G Cornelisse, G Campesi,'*The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment'*, European Parliamentary Research Service, PE 694.210, 2021, p. 63.

European Commission, in 2013 underlined that border procedures should not be employed as they 'imply detention'.[246] The Commission does not present any justification for its change in position in the proposed Asylum Procedures Regulation as it is simply stated that it is possible to apply border procedures without recourse to detention.[247] By not structurally addressing the difficulty of conducting border procedures without recourse to large scale detention, the proposal contributes to unclarities in regard to the implementation of the asylum border procedure. The inherent connection between the use of border procedures and the use of detention highlights the need for further examination of whether the introduction of mandatory border procedures will satisfy the right to liberty. This will be further examined in Chapter 4 and 5 of this thesis.

It is important to mention that the 2016 proposal for an amended Reception Conditions Directive introduced an additional detention ground. This additional detention ground articulates that in cases where an applicant has not respected his or her restriction of the freedom of movement, prescribed by Article 7.2. of the RCD, and there is a continued risk that the applicant will abscond, detention may be used.[248] The introduction of this new ground underlines the Commission's emphasis on measures to restrict the freedom of movement, where non-compliance of such restrictions can lead to the use of detention.[249]

3.4.3 Time Frame

The asylum border procedure shall be as short as possible but not exceed a total of twelve weeks. From the time of registration of the application for international protection, a fair examination of the claim, as well as a potential appeal shall be completed within the twelve-week limit.[250] If the Member State fails to take a final decision within the twelve-week period the applicant shall be authorized to enter the territory of the Member State.[251] However, if the person has not requested the right to remain during appeal or the Court has not decided to grant the applicant the right to remain pending the appeals procedure, the applicant shall not be authorized to enter the territory and shall be referred to the return procedure. In addition, the

[246] European Commission, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty of the Functioning of the European Union Concerning the Position of the Council on the Adoption of the Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, COM(2013) 411 final, 10 June 2013, p. 4.
[247] Proposed Asylum Procedures Regulation, Recital 40f.
[248] 2016 RCD, Article 8.3.c.
[249] G Cornelisse (n 8), p. 67–68.
[250] Proposed Asylum Procedures Regulation, Article 41.11.
[251] Ibid, Article 41.11, Recital 40e.

applicant may not be authorized to enter the territory if the person has filed a subsequent application and the right to remain during this application has been revoked.[252]

3.5 The Propsed Crisis and Force Majeure Regulation

The proposed Crisis and Force Majeure Regulation aims at creating a structured approach to handle a crisis rather than the *ad hoc* responses that were used in 2015.[253] The Commission also presented the Migration Preparedness and Crisis Blueprint, that will support the implementation of the Crisis and Force Majeure Regulation, by anticipating migration flows, increasing resilience and improve technical coordination.[254]

The proposed Crisis and Force Majeure Regulation, defines a situation of crisis, as an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly to a Member State or following disembarkation into a Member State after a search and rescue operation. These exceptional situations should be of such scale compared to the Member State's population and GDP that it renders the Member State's asylum, reception and return system non-functional and can have serious consequences to the functioning of the CEAS. The Regulation will also be triggered if there is an 'imminent risk' of such a situation.[255] Situations of force majeure are also covered by the proposed Crisis and Force Majeure Regulation and refer to situations in which 'Member States are faced with abnormal and unforeseeable circumstances outside their control, the consequences of which could not have been avoided in spite of exercise of all due care'.[256] There has been significant criticism of the vagueness of the definition of crisis and force majeure as it opens up for a potential political and non-neutral interpretations. Moreover, the fact that 'an imminent risk' of such a situation is considered to trigger the application of the proposed Crisis and Force Majeure Regulation allows for a wide application of the proposed derogations in the proposal.[257]

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[252] Proposed Asylum Procedures Regulation, Article 41.12.
[253] Proposed Crisis and Force Majeure Regulation, Explanatory Memorandum, p. 1.
[254] European Commission, Commission Recommendation (EU) 2020/1366 of 23 September on an EU Mechanism for Preparedness and Management of Crises Related to Migration, 1 October 2020, [OJ L 317], recital 14. Hereafter referred to as 'Migration Preparedness and Crisis Blueprint'; Proposed Crisis and Force Majeure Regulation, Explanatory Memorandum, p. 9.
[255] Proposed Crisis and Force Majeure Regulation, Article 1.2.a–b.
[256] Ibid, Recital 7.
[257] ECRE, '*ECRE Comments on the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum COM(2020) 613'*, 2021, p. 3, 9–10. Available at: https://www.ecre.org/wp-content/uploads/2021/03/ECRE-Comments-COM2020-613-V2-2.pdf, Accessed 25 February 2022.

The proposed regulation will not be examined comprehensively, as a significant part of the proposed Crisis and Force Majeure Regulation centres around the rapid triggering of the solidarity mechanism, which is not within the scope of this thesis. In addition, the proposal for granting an immediate protection status, thus replacing the current Temporary Protection Directive, will not be examined due to it being beyond the scope of the thesis.[258] Rather, the examination of the Regulation will focus on the relevant derogations it proposes to the proposed Asylum Procedures Regulation in the context of pre-entry detention, in the context of asylum border procedures examined under section 3.4.

3.5.1 Asylum Crisis Management Procedure

The first derogation from the proposed Asylum Procedures Regulation articulated in the proposed Crisis and Force Majeure Regulation includes expanding the number of people that can be subjected to the asylum border procedure. The asylum border procedure can in regular times be applied to examine the merits of applications for nationals of a third country with a recognition rate of 20 % and lower.[259] In times of crisis, the asylum border procedure may be applied for third-country nationals of a third country with a recognition rate of 75% or lower, in addition to cases as referred in Article 40.1 of the proposed Asylum Procedures Regulation.[260] Due to 75% recognition rate being a high number, it is likely that many, if not most asylum seekers would be channelled to the asylum border procedure in times of crisis.[261]

The second important proposed derogation in times of crisis is the prolongation of the maximum duration of the asylum border procedure. In times of crisis, it will be possible to extend the duration from the twelve weeks, prescribed by the proposed Asylum Procedures Regulation Article 41.13, to an additional eight weeks.[262] This means that there is a possibility for the applicant to be held at the border during the Asylum Crisis Management Procedure for a maximum period of 20 weeks, amounting to approximately five months. During this five-month period Member States shall have the possibility not to authorize the applicants entry into their territory.[263] Thus, the proposed Crisis and Force Majeure Regulation suggests an expansion of

[258] Proposed Crisis and Force Majeure Regulation, Explanatory Memorandum, p. 10.
[259] Proposed Asylum Procedures Regulation, Article 41.2.b.
[260] Proposed Crisis and Force Majeure Regulation, Article 4.1.a.
[261] E Brouwer et al (n 189), p. 141.
[262] Proposed Crisis and Force Majeure Regulation, Article 4.1.b.
[263] Ibid, Recital 16.

the number of people subjected to the asylum border procedure as well as the duration of such a procedure. This may have significant consequences on the use of detention of asylum-seekers, which will be further explored in the following section.

3.5.2 The Effect on the Use of Detention

The proposed Crisis and Force Majeure Regulation, allows for further exacerbation of the unclarities and gaps regarding the use of detention that was examined in the context of the regular asylum border procedure. This is due to the fact that the Crisis and Force Majeure Regulation allows for a wider scope of application of the border procedure, it allows for a wider personal scope of application and extents the time limits.[264] Moreover, the Migration Preparedness and Crisis Blueprint establishes that during crisis hotspots and reception centres are to be established at points of high pressure.[265] This may have important effects on the right to liberty of asylum seekers as it expands the possible use of detention.

3.6 Chapter Conclusion

This chapter has established that the proposed Pact on Migration and Asylum has the objective of addressing the changing composition of the migration flow to the EU. The Commission argues that there has been a significant increase in the number of third-country nationals reaching the EU that arrive from countries with low recognition rates. To achieve these objectives, the screening procedure and the asylum border procedure are proposed as tools to address this by ensuring the quick removal of inadmissible and allegedly abusive applications as well as applications from nationals of countries with low recognition rates. To ensure the fulfilment of these objectives, both the screening procedure and the asylum border procedure are based on non-entry. The applicants are to be 'held' by the authorities at the border or in proximity of the border. This raises questions regarding how Member States are to put the screening and asylum border procedure into practice without risking using detention *en masse*. Furthermore, the proposed Crisis and Force Majeure Regulation may further aggravate this risk since it allows for an expanded use of detention. The next chapter will further examine the components of the proposed screening and asylum border procedure that may contribute to an increased use of detention.

[264] Proposed Crisis and Force Majeure Regulation, Article 4.1.a –b.
[265] Migration Preparedness and Crisis Blueprint, recital 14; Proposed Crisis and Force Majeure Regulation, Explanatory Memorandum, p. 36.

4 Evaluating the Proposed Screening and Asylum Border Procedure's Risk of Increasing the Use of Pre-Entry Detention

4.1 Introduction

After having examined the relevant content of the proposed Pact on Migration and Asylum, in the context of pre-entry detention, we now turn to the question regarding to what extent the proposed screening and asylum border procedure may affect the use of pre-entry detention. Therefore, this chapter will focus on the aspects of the screening procedure and the asylum border procedure that are the most relevant in terms of evaluating to what extent these proposals may cause an increase in the use of detention. The first identified issue regards how Member States are to enforce the non-entry at the borders without recourse to detention. Since this is a relevant problem for both the screening and the asylum border procedure, it will be analysed in the context of both procedures. Secondly, there will be a presentation of current methods of holding third-country nationals at the external borders, including an examination of the hotspot approach and 'Closed Controlled Access Centres'. The third issue relates to the effects of the fact that national law will regulate the proposed screening procedure. Thereafter, the main problems in term of the asylum border procedure will be examined, by first establishing the inherent link between border procedures and the use of detention and secondly, examine the effects of making the use of border procedures mandatory for certain categories of third-country nationals.

4.2 Implementing the Legal Fiction of Non-Entry

During the screening procedure and the asylum border procedure, at the external border, third-country nationals are to be 'held' by the competent authorities to ensure the non-entry of the applicants into the Member States territory.[266] The proposed screening procedure and the asylum border procedure are to take place at locations on the Member States' borders or

[266] Proposed Screening Regulation, Article 4.1; Proposed Asylum Procedures Regulation, Article 41.6.

locations in proximity to the border, thus within the Member States' territory.[267] It is up to the national authorities to prevent the entry of the persons subjected to the proposed screening and asylum border procedure into the territory of the Member State.[268] It is important to keep in mind that non-entry is, as understood by the European Commission, as essential in order to address the main challenges in the field of migration. These challenges include to address the mixed migratory flow of migrants and individuals seeking international protection and hinder the secondary movements of asylum seekers within the EU.[269] The Commission established in the proposal that in individual cases this may include the detention of applicants, which will be regulated by the Member State's national law, in the screening procedure and by the RCD during the asylum border procedure.[270] This statement thereby clarifies that the European Commission does not embrace a policy of automatic detention during the proposed screening and asylum border procedure at the external border.[271] However, the European Commission does not provide guidance on how the third-country applicants subjected to these procedures are to be accommodated at the external borders to ensure the implementation of non-entry. This section will thus examine this in terms of whether this affects the risk for an increased use of pre-entry detention.

The premise of non-entry during the screening and asylum border procedures may also be referred to as the 'legal fiction of non-entry', since the applicant is legally not considered to have entered the state, while at the same time being present on the state's territory. This shall only have effects on the individual's right to entry and stay. Thereby, the individual is to be considered as being within the jurisdiction of the state in which or he or she is present.[272] This has been further confirmed by the ECtHR in the *Amuur v. France* case, where the Court underlined that holding asylum seekers in an 'international zone' in an airport does not create an extraterritorial status for such a zone.[273] In the more recent *N.D. and N.T. v. Spain* case the ECtHR, reaffirmed the fact that states cannot artificially create zones in their territory to alter

[267] Proposed Screening Regulation, Article 6.1; Proposed Asylum Procedures Regulations, Article 41.13; See section 3.2.1.3 and 3.2.2.2.
[268] Ibid, Article 4.1; Ibid, Article 41.6.
[269] Ibid, Recital 4, 8; Ibid, Explanatory Memorandum, p. 4.
[270] Ibid, Recital 12; Ibid, Recital 40.f.
[271] Proposed Screening Regulation, Recital 12; D Thym, 'Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the "New" Pact on Migration and Asylum', in D Thym, 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*, Nomos Verlagsgesellschaft mbH& Co.KG, Baden-Baden, 2022, p. 28.
[272] European Parliament (n 7), para. 8.
[273] Amuur v. France, para. 52.

or limit their territorial jurisdiction. In the case the Court highlighted that the fact that Spain could not unilaterally, by erecting fences at some distance from the border, reduce the scope of their territorial jurisdiction. This would, according to the ECtHR render the European Convention of Human Rights meaningless.[274] Hence, screening and asylum border procedure's reliance on the legal fiction of non-entry should not lead to jurisdictional unclarities.[275]

It is important to note that the reliance on non-entry during the screening and asylum border procedures at the external borders of the EU require some form of control over the applicants' movement, in order to implement the non-entry premise. Hence, the non-entry premise requires some form of restriction of the freedom of movement or the deprivation of liberty. As was established in Chapter 2, such restrictions are lawful in particular situations, granted that the legal standards set in place in case of such restriction of the right to liberty are respected. The examined case law in Chapter 2 underlined the difficulties in drawing the line between the restriction of the freedom of movement and when practices amount to detention. Since the European Commission does not engage with what forms of restrictive measures are to be employed during the screening and asylum border procedure, this contributes to blurring the lines between a restriction of the freedom of movement and detention. In not engaging with the question of how to implement the premise of non-entry there is a risk of restricting the freedom of movement as well as the right to liberty.[276] This has been pointed out by Member States, including Greece, Italy, Malta and Spain, that underlined the risk that the proposed screening and asylum borders procedure lead to large closed centers at the external borders. They underline that this cannot be accepted due to the importance of respecting the human rights of asylum seekers.[277] In addition, the Rapporteur to the European Parliament on the Pact's Screening Regulation has particularly underlined that the reliance on the legal fiction of non-entry will be very difficult to implement in practice without using detention and therefore suggests that the Pact should be amended to include a right to enter the territory.[278] It is also

[274] N.D. and N.T. v. Spain, Application No. 8675/16 and 8697/15, ECtHR, [GC], 13 February 2020, para 106–111.
[275] L Jakuleviciene (n 218), p. 92.
[276] G Cornelisse (n 8), p. 72.
[277] Governments of Greece, Italy, Malta and Spain, 'New Pact on Migration and Asylum: Comments by Greece, Italy, Malta and Spain', Statement, 2020, p. 2–3. Available at : https://www.lamoncloa.gob.es/presidente/actividades/Documents/2020/251120-Non%20paper%20Pacto%20Migratorio.pdf, Accessed 1 March 2022.
[278] B Sippel,' ***I Draft Report on the 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) 2017/226, (EU) 2018/1240 and (EU) 2019/817', Committee on Civil Liberties, Justice and Home Affairs, European Parliament, 2020/0278 (COD), 16 November 2021, p. 82–83.

important to highlight that the European Commission should underline that the procedures at the border are to ensure that the fundamental rights of all applicants are guaranteed.[279]

4.3 Holding Third-Country Nationals at the Border

4.3.1 The Hotspot Approach

This section will examine the hotspot approach adopted in 2015 in order to highlight previous methods to tackle the accommodation of third-country nationals at the external borders to implement border procedures. The importance of this example is that the proposed 'pre-entry phase' of the Pact on Migration and Asylum has been argued to largely replicate the *modus operandi* of hotspots.[280] This section does not present a comprehensive presentation of the hotspot approach and all problems caused by it in the context of the right to liberty. However, this section aims at exemplifying some identified problems with the hotspot approach and highlight the need to address such aspects in the proposed screening and asylum border procedure.

The 2015 Agenda on Migration set up the hotspot approach, which aimed at dealing with the immediate challenges faced by Member States on the frontline, after the increase of third-country nationals reaching the EU's external borders in 2015.[281] The hotspot approach introduced facilities for identifying, registering and fingerprinting applicants, through the support of the European Asylum Support Office (EASO), EURPOL and Frontex, on the ground in the Member States.[282] This procedure has been described as a screening procedure in order to identify the persons that wish to apply for asylum, those that are to be immediately returned and those for which the situation is unclear.[283] The hotspot approach was set up in Greece and Italy in order to assist these Member States that were confronted with a large amount of third-country nationals trying to enter the EU.[284]

[279] European Commission (n 1), p. 4.
[280] G Cornelisse (n 8), p. 75.
[281] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final, 13 May 2015, p. 2, 6.
[282] Ibid, p. 6.
[283] N Daren, S Sy, A Rigon, '*On the Frontline: The Hotspot Approach to Managing Migration'*, Study, Citizens' Rights and Constitutional Rights and Constitutional Affairs, European Parliament, 2016, p. 27.
[284] European Union Agency for Fundamental Rights, '*Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on Fundamental Rights in the "Hotspots" set up in Greece and Italy'*, FRA Opinion–3/2019, European Union Agency of Fundamental Rights, 4 March 2019, p. 15.

The approach was impacted by the EU and Turkey's adoption of the 'EU-Turkey Statement' in 2016, which introduced a mechanism where all irregular migrants were to be returned to Turkey.[285] This meant that the individuals that did not apply for protection or if their applications for international protection were rejected, were to be returned to Turkey.[286] As a consequence of the implementation of the EU-Turkey Statement hotspot facilities were increasingly transformed from Registration and Identification Centers (RICs) into closed centers and applicants were increasingly detained in order to facilitate returns to Turkey.[287]

An increase of the use of *de facto* detention was identified due to the implementation of the hotspot approach.[288] *De facto* detention is a practice where the applicants are denied the formal legal safeguards that apply in formal detention regimes, including the *habeas corpus* safeguards.[289] An increase of the use of *de facto* detention was noted in regard to the Greek practices in the hotspots. Article 14 of the Greek national law 4375/2016 prescribed that an applicant may be restricted within the premises of a RIC, for an initial period of three days, that may be extended to a total of 25 days.[290] This decision was to be taken by the Manager of the RIC and was applied to asylum seekers, even after having lodged an application for international protection. This measure was imposed automatically without possibility to challenge this restriction of movement. The measure has been understood to constitute *de facto* detention of individuals.[291] Following national and international criticism of such practices, as well as the difficulties in operating such closed facilities, alternatives to detention started to be used including geographical restrictions, to not leave the island and reside in the hotspot facility. These restrictions could last for up to a year and imposed indiscriminately on all individuals

[285] European Commission (n 281), p. 6.
[286] K Luyten, A Orav (n 10), p. 2.
[287] European Commission, Communication from the Commission: Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166 final, 16 March 2016; K Luyten, A Orav (n 10), p. 2.
[288] European Union Agency for Fundamental Rights (n 284), p. 56; Danish Refugee Council, *'Fundamental Rights and the EU Hotspot Approach'*, 2017, p. 18–19. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Fundamental%20rights_web%20%281%29.pdf, Accessed 11 April 2022.
[289] ECHR, Article 5.4; L Jakuleviciene (n 218), p. 92.
[290] Law No. 435 of 2016 On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the Establishment of the General Secretariat for Reception, the Transposition into Greek Legislation of the Provisions of Directive 2013/32/EC, 3 April 2016, Article 14.
[291] Asylum Information Database (AIDA), '*Country Report: Greece, 2017 Update'*, 2017, p. 152. Available at: https://asylumineurope.org/wp-content/uploads/2018/03/report-download_aida_gr_2017update.pdf, Accessed 11 April 2022.

reaching Greece.[292] This led to overcrowded facilities with lacking reception conditions, including insufficient water and food supply, as well as poor sanitation.[293]

As established above the main problems related to the Greek practices includes the increased use of *de facto* detention and the difficulty of drawing the line between the restriction of freedom of movement and deprivation of liberty. The proposed screening and asylum border procedure have been argued to advance an intensification of the hotspot approach. There are concerns that the accommodation at the border that is required during the proposed procedures and its reliance on non-entry, will possibly replicate the described situation in Greece. This may contribute to normalizing the hotspot approach which was a provisional measure to accommodate for asylum seekers in particular times of migratory pressures.[294]

4.3.2 Closed Control Access Centers

Current practices in Greece can be seen as confirming the normalization process of hotspot facilities by making such containment facilities at the external borders permanent. This can be seen in the building of five so-called 'Multi-Purpose Reception and Identification Centers' (MPRICs) in Greece.[295] These MPRICs will consist of reception facilities, with one area with a clear exit-entry system and a separated area with a clearly closed detention area. The European Commission highlights that detention may be used after an individualized decision.[296] In contrary, the Greek Migration minister refers to the MPRICs as 'Closed Control Access Centers', where new arrivals will be required to spend 25 days indoors as their documents are being examined. It is important to note that one of the centers located on the Greek island of Samos is provided with facilities such as restaurants, basketball courts and a football pitch, while at the same time being surrounded by military-grade fencing, watched over by police and

[292] UNHCR, *'Explanatory Memorandum Pertaining to UNHCR's Submission to the Committee of Ministers of the Council of Europe on Developments in the Management of Asylum and Reception in Greece'*, 2017, p. 10. https://www.refworld.org/docid/595675554.html, Accessed 11 April 2022.
[293] Asylum Information Database (AIDA) (n 291), p. 25.
[294] E Karageorgiou, 'The Impact of the New EU Pact on Europe's External Borders: The Case of Greece', in S Carrera, A Geddes, (eds), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compacts on Refugees – International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute, San Domenica di Fiesole, 2021, p. 52.
[295] European Commission, Annex to the Commission Decision Approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesvos, C(2020) 8657 final, 2 December 2020, p. 1.
[296] Ibid, p. 2, 6.

located in a remote valley.[297] In a letter to the Greek Minister of Migration and Asylum the Council of Europe Commissioner for Human Rights expressed the concern for the new MPRICs' operation as closed centers, as this could lead to large scale and long term deprivation of liberty and therefore urges the Greek Minister of Migration to reconsider the closed nature of the centers.[298]

It is important to note that Greece is one of many Member States that will be implementing the screening procedure, and a diversity of approaches may therefore be used. However, the Greek example help clarify current issues that may be reproduced through the implementation of the proposed screening and asylum border procedures. Firstly, this includes the inherent difficulty in drawing the line between measures that constitute the restriction of the freedom of movement and those that constitute detention. Keeping in mind that restrictions of the freedom of movement that become too wide may lead to the use of *de facto* detention. Secondly, the unclarity with regard to whether reception centers employed during the procedures will be open or closed, as highlighted by the Greek example above, further complicates the difficulties in assessing whether the holding of individuals in such facilities will be seen as constituting detention. Due to these unclarities with regards to how Member States are to implement the policy of non-entry during the proposed screening and asylum border procedures may lead to an increased risk for the use of detention.

4.4 Does the Screening Procedure Increase the Risk for Detention?

4.4.1 The Regulation of Detention by National Law

This section will examine to what extent the fact that the proposed Screening Regulation prescribing that the detention during the proposed screening procedure shall be regulated by national law, impacts the risk for an increased use of detention.[299] The proposal explicitly states that the RCD shall not have any legal effect during the implementation of the proposed

[297] H Smith, *'Why Greece's Expensive New Migrant Camps are Outraging NGOs'*, The Guardian, 19 September 2021. Available at: https://www.theguardian.com/world/2021/sep/19/why-greeces-expensive-new-migrant-camps-are-outraging-ngos, Last visited 7 April 2022.
[298] Commissioner for Human Rights D Miljatovic, '*Letter to Mr Michalis Chrysochoidis, Mr Notis Mitarachi, Mr. Ioannis Plakiotakis'*, CommHR/DM/sf 019-2021, 2021. Available at: https://rm.coe.int/letter-to-mr-michalis-chrysochoidis-minister-for-citizens-protection-o/1680a256ad, Accessed 7 April 2021.
[299] Proposed Screening Procedure, Recital 12.

screening procedure.[300] Hence, the safeguards of the RCD, including that detention may only be used when it is necessary, on the basis of an individual assessment and if no other less coercive alternative measures can be applied effectively, will be suspended during the proposed Screening procedure.[301] This provides states with wide discretions to decide where and under what conditions third-country nationals are to be accommodated during the screening procedure, without clarifying the applicable guarantees surrounding the holding of third-country nationals at the border. A study requested by LIBE underlined that the European Commission's decision to allow for national law to regulate detention stems from an unwillingness to acknowledge that the screening procedure will necessarily require the use of detention.[302] In repealing the application of the RCD during the proposed screening procedure the European Commission thus, opens up for unclarities in regard to which measures may be used to implement the screening procedure and whether these measures will amount to detention. This unclarity leaves space for states to increasingly resort to the use of detention.[303]

The Greek example in the section above as well as the Hungarian example that will be presented next, both underline the risk for an increased use of detention when leaving the regulation of detention to national law. This is due to the fact that legal unclarities have been exploited by Member States to undertake measures that increase the use of detention. [304] It must indeed be underlined that the proposed screening procedure is to take place at the first point of entry at the EU's external borders.[305] Consequently, the states located at the external borders will mainly be responsible for implementing the proposed screening procedure. This raises reasons for concern, as Member States at the external border including, Greece and Hungary, have already shown signs of disrespecting EU-law and human rights law when detaining asylum seekers.[306]

Hungary has in particular been found to pursue national policies that favour the systematic detention of asylum seekers in the transit zones of Röszke and Tompa.[307] This was in particular seen as a consequence of an amendment to the Hungarian Law on the Right to Asylum on 28th March 2017. The amendment prescribed that all asylum seekers were to be held in the transit

[300] Proposed Screening Regulation, Explanatory Memorandum, p. 5.
[301] RCD, Article 8.
[302] E Brouwer et al (n 189), p. 60.
[303] Ibid.
[304] Ibid, p. 59.
[305] Proposed Screening Proposal, Article 1.
[306] A Bombay and P Heynen (n 84), p. 260.
[307] C-808/18, European Commission v. Hungary, CJEU, [GC], 17 December 2020, para 315.

zones, with the sole exception of unaccompanied children under the age of 14. Moreover, the only exit possibility of the transit zone was to enter Serbia.[308] This law has been subject to review both in the *FMS and Others Case*, examined above, and also in the *European Commission v. Hungary* where it was found that this law led to the systematic detention of asylum seekers contrary to EU-law.[309] Hungary argued that the transit zones constituted reception centres in its territory at the external borders where the asylum procedures were conducted.[310] The CJEU however, reiterated the findings from the *FMS and Others* case, where the holding of asylum seekers at the transit zones that are surrounded by a high fence and barbed wire indefinitely, where applicants are held in 13 m2 containers, where there movement is monitored by law enforcement constitutes detention.[311] It was also underlined by the Court that the holding of the applicants also violated the RCD and the APD, for multiple reasons, including the obligation to provide individualized decisions in writing, with the factual and legal grounds for detention.[312] The transit zones were closed in 2020 and since Hungary has implemented new national legislation to restrict the possibility to seek asylum at the borders through the implementation of the so-called 'Embassy procedure', where asylum applications have to be filed outside Hungary at embassies. This led to criticism, including from the European Commission that launched its fifth infringement procedure related to asylum policies against Hungary and referred Hungary to the CJEU for unlawfully restricting the access to asylum procedures.[313] The national practice of Hungary, one of the countries at the external borders of the EU, underlines the potential risks in leaving the implementation of the screening procedures to national law, in the context of detention. As there has already been recorded use of *de facto* detention in Hungary, and thus, the failure to uphold the right to liberty for asylum seekers,

[308] Law No XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area, Article 80/J. The law provides the following:
1. The asylum application must be lodged in person with the competent authority, and exclusively in the transit zone, unless the asylum applicant:
(a) is the subject of a coercive measure, a measure or a penalty restricting his or her personal liberty;
(b) is the subject of a detention measure ordered by the competent asylum authority;
(c) is staying legally in Hungarian territory and does not seek accommodation in a reception centre. (…).
6. If the asylum applicant is an unaccompanied minor under 14 years of age, the competent asylum authority shall conduct the asylum procedure in accordance with the general rules, after the minor has entered Hungarian territory. That authority shall find him or her temporary accommodation without delay and, simultaneously, request the competent guardianship authority to appoint a guardian to protect and represent the minor. (…).
[309] C-808/18, European Commission v. Hungary, para 315.
[310] Ibid, para 148.
[311] Ibid, para 160.
[312] Ibid, para 167–211.
[313] Asylum Information Database (AIDA), '*Country Report: Hungary 2021 Update'*, 2021, p. 23–24. Available at: https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-HU_2021update.pdf, Accessed 15 April 2022; European Commission, *'Commission Refers Hungary to the Court of Justice of the European Union for Unlawfully Restricting Access to Asylum Procedure'*, Press Release, 15 July 2021. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3424, Accessed 15 April 2022.

leaving such an amount of discretion to Member States without clearly clarifying the guarantees applicable may lead to the screening procedure contributing to an increased use of pre-entry detention for asylum seekers.[314]

4.4.2 Wide Personal Scope

The proposed screening procedure shall apply to all third-country nationals that are apprehended in connection with an unauthorized entry of an external border of a Member State by land, sea or air as well as having been disembarked in the territory of a Member State following a search and rescue operation.[315] It is important to note that the personal scope of the proposed Screening Regulation largely resembles the current policies for individuals that are trying to enter or intercepted when attempting a border crossing. The current legislative instruments, including the Schengen Border Code and the Eurodac Regulation, prescribe the obligation of Member States to check the identity and travel documents of third-country nationals wishing to effectuate a crossing of the EU's external border.[316] Despite the observed similarities between the current legislation and the proposed screening procedure, the European Commission has argued that the screening procedure is necessary in order to establish a comprehensive approach to migration and ensure that the identified challenge of mixed flows is addressed.[317]

As has been established above, the proposed screening procedure is similar to the current manner in which third-country national are being screened with regards to their identity, security, possibilities for health checks as well as collecting biometric information. The hotspot approach clarified that the screening, including identification, registration and fingerprinting of third-country nationals effectuating external border crossings, led to the hotspots becoming points of congestion, leading to overcrowding in RICs. Hence, affecting the possible use of

[314] L Jakuleviciene (n 218), p. 92.
[315] Proposed Screening Regulation, Article 3.1.a–b.
[316] Schengen Border Code, Article 8; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 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 and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (recast), 29 June 2013 [OJ L 180], Article 14. Hereafter referred to as 'Eurodac Regulation'.
[317] Proposed Screening Procedure, Recital 4.

restrictions of the freedom of movement and the used of detention.[318] It is therefore of significance that the Screening Regulation does not address the problem of the possible creation of such bottleneck zones and its contribution to an increased risk of imposing of restrictive measures amounting to detention to tackle points of congestion such as hotspots.[319]

4.5 Does the Asylum Border Procedure Increase the Risk for Detention?

4.5.1 Border Procedures' Inherent Relation to Detention

The asylum border procedure is the second part of the proposed pre-entry phase, following the proposed screening procedure. During the entirety of the pre-entry phase persons are not to be authorized to enter the territory of the Member State.[320] Thus the asylum border procedure, is similarly to the proposed screening procedure based on the notion of non-entry of applicants during the pre-entry phase, despite the applicants' physical presence on the territory. The fact that the applicants will be physically present on the Member States' territory is clearly established as the proposed Asylum Procedures Regulation articulates that these procedures are to take place at locations on the Member States' borders or locations in proximity to the border, thus within the Member States' territory.[321] This is of significance for the purpose of this thesis, as proposing the use of non-entry in the context of the asylum border procedure requires some form of containment of asylum seekers at the borders of Member States, which may impact the risk of increasingly using pre-entry detention.[322] The following part will seek to establish the inherent connection between the use of detention and the use of border procedures. This inherent connection is caused by the particular interplay between on the one hand the right to asylum, which implies the access to an asylum procedure, and on the other hand the fact that the applicant is not to be authorized to enter the territory of the Member State. The following section will highlight how this relates to the need for containment of applicants at the border.[323]

[318] E Brouwer et al (n 189), p. 52–53.
[319] See Proposed Screening Procedure, Article 3; L Jakuleviciene (n 218), p. 86.
[320] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 6, Article 41.6.
[321] Ibid, Article 41.13; See section 3.2.1.3 and 3.2.2.2.
[322] G Cornelisse, G Campesi (n 245), p. 94.
[323] G Cornelisse (n 8), p. 72.

The scope of the right to asylum, as articulated in Article 18 of the Charter, is contested and the CJEU has avoided to further elaborate on the scope of the right to asylum.[324] However, the UNHCR has clarified that the right to asylum must be understood to comprise of *inter alia* the protection from refoulement and access to territories for the purpose of admission to fair and effective processes for determining status and protection needs.[325] Hence, the bare minimum understanding includes a the right to an assessment of an asylum claim, in order to establish the risk for refoulement.[326] Therefore, asylum seekers have a right to remain on the territory until the risk for refoulement if returned has been assessed.[327]

The right to asylum, however, must be examined in conjunction with the right to entry. The Schengen border code harmonizes the rules on entry into a Member State's territory, where the particular conditions set out in Article 6 SBC, must be established in order to be allowed entry into EU territory. This includes *inter alia* to be in the possession of a valid travel document; a valid visa; have a justification for the stay and means of sustenance during the stay. [328] The CJEU has however confirmed that border controls must respect the protection of asylum seekers, in particular the principle of non-refoulement.[329] However, there is still unclarity regarding under which circumstances asylum seekers may be refused entry to the territory when they do not fulfil the entry requirements of the SBC.[330] The current APD, prescribes that in the specific cases in which the conditions for applying a border procedure or an accelerated procedure are met, non-entry may be used. The use of border procedures is however, limited to admissibility cases, as prescribed by Article 33 APD.[331] Moreover, Article 31.8 of the APD articulates the ten acceleration grounds, including grounds such as that the applicant is from a safe country of origin or that the applicant has misled the authorities by presenting false information. According to the current APD, asylum border procedures may be used by Member States in cases in which one of the ten acceleration grounds are applicable. In these cases, the asylum seeker is not to be granted entry to the territory, unless a decision has not been taken

[324] See Section 2.3.1.2; G Goodwin-Gill, J Mc Adam, E Dunlop (n 143), p. 414.
[325] UNHCR (n 167).
[326] ECRE, Dutch Council for Refugees, '*The Application of the EU Charter of Fundamental Rights to Asylum Procedural Laws'*, 2014, p. 36. Available at: https://ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf, Accessed 11 March 2022.
[327] G Cornelisse, M Reneman (n 160), p. 75.
[328] Schengen Border Code, Article 6.
[329] C-606/10, ANAFE, CJEU, 14 June 2012, para 40.
[330] G Cornelisse (n 56), p. 78.
[331] APD, Article 43, Article 33.

within four weeks.[332] Hence, an important feature of the asylum border procedure in the current APD is that it does not allow for entry into the state's territory during the examination of the asylum claim.[333]

The proposed asylum border procedure builds on a similar logic as presented above, in that non-entry is prescribed during the proposed asylum border procedure.[334] Thus the proposed asylum border procedure is based on the notion of non-entry of applicants during the pre-entry phase, despite the applicants' physical presence on the territory. The fact that the applicants will be physically present in the Member States is clearly established as the proposed Asylum Procedures Regulation articulates that these procedures are to take place at locations on the Member States' borders or locations in proximity to the border, thus within the Member States' territory.[335] This is of significance as this legal constellation requires some form of containment of asylum seekers at the borders of Member States.[336] The link between the right to asylum, non-entry and the use of detention underlines the important dilemma when employing border procedures. This inevitable dilemma is that the requirement of assessing an asylum application requires time in order to satisfy procedural rights, such as effective remedy. However, this may require a longer period of containment and possible use of detention of the applicant.[337]

The link between the use of border procedures and the use of detention has been clearly established. For instance, the European Commission, established this inherent connection between the use of border procedures and the risk for detention when presenting the proposed Asylum Procedures Regulation in 2016, in which it stated that border procedures 'normally imply the use of detention throughout the procedure'.[338] Therefore, in 2016 the European Commission underlined that the application of border procedures should not be mandatory for the Member States.[339] Moreover, the impact of the reliance on the legal fiction of non-entry on detention practices was accentuated in a Report by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, on the implementation of border procedures. Several

[332] APD, Article 43.2.
[333] Ibid Article 43, Article 9.
[334] Proposed Asylum Procedures Regulation, Article 41.6.
[335] Ibid, Article 41.13; See section 3.2.1.3 and 3.2.2.2.
[336] G Cornelisse, M Reneman (n 160), p. 94.
[337] E Marquardt, '*Draft Report on the Implementation of Article 43 of Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection'*, Committee on Civil Liberties, Justice and Home Affairs, European Parliament, 2020, p. 6.
[338] 2016 Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 15.
[339] Ibid.

Member States were identified as relying on the fiction of non-entry to conduct *de facto* detention during border procedures. This means that the asylum seekers are detained without this being legally recognized, hence not being able to access the rights that are associated with being detained.[340] In the Pact's proposed pre-entry phase, the Commission has stated that the Screening and Asylum border procedures can be effectuated without recourse to detention.[341] However, the Commission does not engage with the remaining interplay between the right to asylum, non-entry and its effects on the use of detention. In turn, this also leads to a disregard for the inherent connection between expanding the use of border procedures, by making them mandatory, and the way in which this consequently contributes to an increased risk for the use of pre-entry detention.[342]

4.5.2 Expanding the Use of Border Procedures

As has been established in the previous section, the legal constellation of border procedures present an important risk for the use of detention. This section will examine the potential effects, in term of a risk for the increased use for pre-entry detention, of expanding the use of border procedures, by examining the proposed new acceleration ground.

The proposed Asylum Procedures Regulation, introduces three acceleration grounds that trigger the mandatory use of border procedures.[343] This is a novelty introduced by the proposal, as the currently in force APD Recast, and the 2016 proposed Asylum Procedures Regulation do not provide for the mandatory use of border procedures.[344] As mentioned in Chapter 3 the proposed acceleration grounds for which an asylum border procedure will be mandatory include: 1) The applicant has misled the authorities; 2) The applicant can for serious reasons be considered a danger to national security or public order of the Member State; 3) When the applicant has the nationality or habitual resident of a third-country where the proportion of positive decisions with regard to applications for international protection is 20% or lower.[345] The latter acceleration ground has been introduced by the Pact. The introduction of additional grounds is identified as a key migration management tool by the European Commission, in order to address the increased pressure arising from the mixed flows. Thereby, the European Commission,

[340] E Marquardt (n 337), p. 4.
[341] Proposed Asylum Procedures Regulation, Recital 40.f.
[342] G Cornelisse (n 8), p. 72.
[343] Proposed Asylum Procedures Regulation, Article 41.3.
[344] APD, Article 43; 2016 Proposed Asylum Procedures Regulation, Article 41.
[345] 2016 Proposed Asylum Procedures Regulation, Article 40.c, f, Proposed Asylum Procedures Regulation, Article 40.i.

through the proposals in the Pact, aims at making border procedures more flexible and efficient.[346]

In the proposed Asylum Procedures Regulation, it is established that the asylum border procedure can be applied without recourse to detention. However, Member States should be able to apply detention pursuant the detention grounds and provisions in the RCD. It is also established that the RCD's safeguards with regard to detention have to be applied, including that the use of detention must follow and individual assessment, judicial control and provide adequate conditions of detention.[347] In 2020 EASO examined the practices of Member States with regards to border procedures and particularly underlined that as a consequence of the fact that applicants are not authorized to enter the territory of the Member State, applicants are likely to be held in reception centers, where in practice the applicants are detained.[348] An Impact Study on the use of Border Procedures, requested by the European Parliament, particularly pointed to the fact that Member States, including Germany and Greece, hold applicants in closed centers during the course of the border procedure, where applicants are not allowed to enter or exit, unless they agree to leave the country. Yet, these measures are not labelled as detention, whereas other Member States, including France, Portugal and Spain, did call the holding of applicants in closed centers during the border procedures as detention. This highlights the different practices of Member States in the context of the use of detention during the course of border procedures.[349] Therefore, in introducing the use of mandatory border procedures and thereby increasing the use of border procedures, could seriously affect the risk for both *de jure* and *de facto* detention.[350]

4.6 Chapter Conclusion

This chapter has examined the way in which the fact that applicants are not authorized to enter the territories of the Member States during the screening and asylum border procedure contributes to a risk of an increased use of pre-entry detention. The European Commission states that there shall be no automatic use of detention during the proposed procedures.

[346] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 12–13.
[347] Ibid, Recital 40.f.
[348] EASO, *'Border Procedures for Asylum Applications in EU+ Countries'*, 2020, p. 11. Available at: https://euaa.europa.eu/sites/default/files/publications/Border-procedures-asylum-applications-2020.pdf, Accessed 16 April 2022.
[349] G Cornelisse, M Reneman (n 160), p. 16.
[350] E Brouwer et al (n 189), p. 76.

However, the significant unclarities with regard to what measures are to be employed by Member States to ensure the non-entry of applicants during the procedures, may contrary to the claim of the Commission, lead to the large-scale use of detention. This is due to the need for restrictive measures, that may amount to detention, in order to implement the procedures, and the premise of non-entry therein.

The hotspot approach and the building of the Closed Control Access Centers underline the risk for large scale use of detention when accommodating asylum seekers at the border. This is further accentuated in the proposed screening procedure as the use of detention during the screening procedure is to be regulated by national law. Hence, leaving extensive discretion to Member States to implement detention at the border. The Hungarian example underlined that national practices may exploit the legal unclarities with regard to the legal regime regulating the use of pre-entry detention. Regarding the proposed asylum border procedure, this chapter has emphasized the inherent and recognized connection between the use of border procedures and the use of detention. Hence, the introduction of mandatory asylum border procedures in certain cases contributes to the finding that the proposal may lead to the risk of an increased use of pre-entry detention. Therefore, this Chapter establishes that the proposed screening and asylum border procedure in their current form may contribute to the risk for an increased use of pre-entry detention for asylum seekers, if adopted in their current form. With this understanding, the next chapter will examine to what extent such a risk of an increased use of pre-entry detention can be found to be in compliance with the right to liberty.

5 The Compliance of the Proposed Screening and Asylum Border Procedure with the Right to Liberty

5.1 Introduction

The previous chapter has established that there is a risk that the proposed screening procedure and asylum border procedure may contribute to an increased use of pre-entry detention. This chapter will examine to what extent such an increased use of pre-entry detention can be considered to be in compliance with the right to liberty as prescribed by the ECHR and the EU Charter.[351] It is important to underline that an examination of the human rights compliance of the proposals is of great relevance as the EU has undertaken a self-proclaimed role as a human rights guarantor in the European region.[352] The European Union is founded on the commitment to respect human rights.[353] Moreover, the European Commission, underlines its commitment to ensure that every person subjected to the pre-entry phase will be guaranteed the fundamental rights.[354] In light of this commitment, this chapter will examine the most important identified issues of the proposals in terms of complying with the right to liberty. Firstly, the chapter will examine the existing wide state prerogative to control its territory and how this affects the proposal's human rights compliance. Secondly, there will be an examination of whether the restrictions on the right to liberty imposed by the proposed screening and asylum border procedure can be considered to be in line with the right to liberty. Thirdly, the chapter will examine the fact that the proposed pre-entry phase may contribute to the use of *de facto* detention and its coherence with the right to liberty. Finally, the chapter will examine the efficiency of the measures introduced by the European Commission to ensure compliance with the right to liberty.

5.2 The Wide State Prerogative to Detain

This section will begin by demonstrating the weight that is given to the state interest to control their territory and underline how this affects the right to liberty of asylum seekers. This is

[351] See Chapter 2.
[352] E Karageorgiou (n 294), p. 47.
[353] TEU, Article 2.
[354] European Commission (n 1), p. 4.

necessary in order to undertake the assessment of the level of compliance with the right to liberty of the proposed screening and asylum border procedures, according to the existing European human rights legal framework. There will be a particular focus on the compliance of detention with regard to it having to be based on a particular legal ground. Yet, this is only one of the requirements in order for detention to be legal. Thus, the other sections of the Chapter will focus on other aspects necessary for the assessment of detention, including the need for an individual assessment and respecting procedural rights. In addition, this section will focus on the ECHR, due to it being a purely human rights regime, keeping in mind that both the Charter and the ECHR will be applicable during the screening procedure and during the asylum border procedure the RCD will additionally be applicable.

5.2.1 The Right of States to Control their Territory

The ECHR is based on the understanding that states' have the undeniable sovereign right to control their territory. This is acknowledged in the first limb of Article 5.1.f. ECHR that explicitly allows for states to use detention in order to prevent a third-country national effectuating an unauthorized entry into the state's territory.[355] The ECtHR considers the use of detention to constitute a necessary adjunct to the state's 'undeniable right to control' over its territory.[356] In the *Saadi v. the United Kingdom* case the ECtHR acknowledged that in line with state's right to control their territory, the third-country national is effectuating an unauthorized entry until the state has authorized entry.[357] The state does not need to assess whether restricting the right to liberty through the use of pre-entry detention is necessary as affirmed by the ECtHR in the *Saadi v. the United Kingdom* case.[358] In the case the ECtHR noted that detention under Article 5.1.b. ECHR, the arrest or detention of a person that does not comply with the lawful order of a court, Article 5.1.d. ECHR the detention of a minor and Article 5.1.e. ECHR, the detention for medical or social reasons, all require an assessment of whether detention is necessary.[359] The six dissenting judges in the Separate Opinion to the *Saadi v. the United Kingdom* judgement stressed that there is no reason for why one of the guarantees to safeguard the right to liberty, that such a measure has to be necessary, should not apply to asylum seekers.[360] It has been highlighted that the ECtHR applies a lower level of scrutiny with regard

[355] ECHR, Article 5.1.f.
[356] Saadi v. the United Kingdom, para 64.
[357] Ibid, para 65.
[358] Ibid, para 72–74.
[359] Saadi v. the United Kingdom, para 70.
[360] Saadi v. the United Kingdom Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, p. 35.

to detention in an immigration context in comparison to a criminal law context.[361] The ECtHR's interpretation of the first limb of Article 5.1.f. ECHR thereby provides states with wide margin of appreciation when assessing when to use detention in an immigration context.[362]

It is important to recall that the RCD also allows for Member States to detain asylum seekers to prevent an unauthorized entry and prescribes the assessment of the necessity of such a measure.[363] Furthermore, the CJEU has underlined that due to the fundamental right of liberty that is enshrined in Article 6 of the Charter, any restrictions to this right must only apply when such measures are strictly necessary.[364] Thus, the EU-law regime can be argued to curtail the right of states to detain asylum seekers to a greater degree than the ECHR.[365]

5.2.2 The Wide State Prerogative to Detain in the Screening and Asylum Border Procedures

The screening and asylum border procedure are presented by the European Commission as tools to better control the entry of third-country nationals, especially as the European Commission aims at addressing the so-called mixed flow of third-country nationals.[366] To satisfy these policy interests, the European Commission deems it to be necessary to enable Member States to better control the entry of third-country nationals into their territories. This is achieved by not be authorizing third-country nationals to enter the territory of the Member State during the screening and asylum border procedure. In accordance with Article 5.1.f. ECHR, allowing for the use of detention until formal entry has been granted by the Member State, there is thus a legal ground for detaining all third-country nationals subjected to the proposed screening and asylum border procedure, including asylum seekers.[367] In relying on this fiction of non-entry, a presumption of irregularity for the totality of individuals subjected to these proceedings is created.[368] Due to the low protection afforded to asylum seekers in the context of pre-entry detention by the current European human rights legal regime, it may be argued that the proposed screening and asylum border procedure could to a certain extent be considered to be in line with

[361] C Costello, 'Immigration Detention: The Grounds Beneath our Feet', *Current Legal Problems*, Volume 68, Issue 1, 2015, p. 151, 158.
[362] G Cornelisse (n 68), p. 310.
[363] RCD, Article 8.3.c.
[364] C-601/15, JN v. Staatssecretaris voor Veilighed en Justitie, para 56.
[365] C Costello and M Mouzourakis (n 73), p. 70–72.
[366] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 4; Proposed Screening Regulation, Explanatory Memorandum, p. 1.
[367] Proposed Screening Regulation, Article 4; Proposed Asylum Procedures Regulation, Article 41.6.
[368] E Karageorgiou (n 294), p. 52.

Article 5.1.f of the ECHR, provided that Member States also fulfil the other components of a lawful detention such as an individualized assessment and adhering to procedural rights. Such a finding would be a reflection of the ECtHR's development of a 'nearly absolute right of states to control their territorial borders' which leads to a failure in addressing the coercive measures employed to assert this right.[369] The following section, will however point to certain gaps in the ECtHR's development of this 'Saadi logic', that allows for a wide protection of the state interest to control the territory, and the low-protection regime against the large scale use of pre-entry detention in regard to asylum seekers.

5.3 Extensive Restrictions of the Right to Liberty in the Pact

This section will focus on assessing whether the proposed screening and asylum border procedures, may lead to such an extensive use of pre-entry detention that these procedures may lead to restrictions of the right to liberty that are too extensive. Hence, being contrary to the right to liberty in Article 5 ECHR and Article 6 EU Charter.

5.3.1 Narrowly Constructed Restrictions

In this context it is important to reaffirm that the right to liberty is a fundamental human right that has been considered to be essential to protect the right to liberty since 1215 in the Magna Carta and it is universally protected.[370] The right has been recognized to be of the highest importance in a democratic society.[371] Therefore, both the ECtHR and the CJEU have articulated that restrictions of this fundamental right have to be narrowly interpreted.[372] It has been questioned to what degree this understanding that restrictions to the right to liberty have to be narrowly constructed can be seen to be in coherence with the findings of the *Saadi v. the United Kingdom* judgement. This is due to the fact that the *Saadi v. the United Kingdom* judgement has been seen as providing states with very wide power to detain third-country nationals that are trying to enter the territory, as the individuals remain detainable as long as the state does not allow for their legal entry.[373] Such an interpretation leads to unclarities with

[369] G Cornelisse (n 68), p. 310.
[370] Magna Carta, 1215; C Costello (n 361), p. 177; ICCPR, Article 9; African Charter of Human and People's Rights, Article 6; American Convention on Human Rights, Article 7; ECHR, Article 5, EU Charter, Article 6.
[371] Medvedyev and Others v. France, Application No. 3394/03, ECtHR, [GC], 29 March 2010, para 76.
[372] Ibid, para 78; C-601/15, JN v. Staatssecretaris voor Veilighed en Justitie, para 56.
[373] Abdullahi Elmi and Aweys Abubakar v. Malta, Application No. 25794/13 and 28151/13, ECtHR, 22 February 2017, Concurring Opinion of Judge Pinto de Albuquerque, para 21.

regard to the European human rights protection of asylum seekers in regard to the use of pre-entry detention. Judge Pinto de Albuquerque therefore argued in his Concurring Opinion to the *Abdullahi Elmi and Aweys Abubakar v. Malta* case, that this 'Saadi logic' transforms the right of states to control their territory to a largely unfettered right to detain entry seeking third-country nationals.[374] Therefore, Judge Pinto de Albuquerque has called for a review of the Grand Chamber's interpretation of Article 5.1.f. ECHR 'for the sake of bringing coherence to the Court's messy case law and aligning it with international human-rights and refugee law. The Court cannot remain deaf to the worldwide call that *Saadi* must go.'[375]

5.3.2 The Particular Situation of Asylum Seekers

In contemplating restrictions to the right to liberty there is also a need to recognize the effects that the particular situation of asylum seekers should have in regard to the restriction of their right to liberty. This particular situation is based on the fact that asylum seekers are in search for international protection and should thus after presenting such a claim be considered to be lawfully present on the territory of a Member State.[376] Thus, the detention ground under Article 5.1.f. ECHR would not be applicable in such a case. Yet, the ECtHR argued that this would constitute a too narrow restriction of the state's undeniable sovereign right to control its territory.[377] The ECtHR has, however, been criticized for systematically disregarding the particular situation of asylum seekers, which is problematic as asylum seekers are legally considered to have no choice but flee from their country of origin. [378] Moreover, this view is difficult to reconcile with the ECtHR's finding of asylums seekers to constitute a particular vulnerable category that needs special protection.[379]

The particular situation of asylum seekers also relates to the right to non-penalization of asylum seekers. This right has been articulated in the Article 31 of the Refugee Convention as well as in EU-law, that asylum seekers shall not be penalized for the sole reason that they are applying for international protection. States shall thus, not use detention for the sole reason that a person

[374] Abdullahi Elmi and Aweys Abubakar v. Malta, Application No. 25794/13 and 28151/13, ECtHR, 22 February 2017, Concurring Opinion of Judge Pinto de Albuquerque.
[375] Ibid, para 33.
[376] Saadi v. the United Kingdom Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, p. 32.
[377] Saadi v. the United Kingdom, para 66.
[378] A S Pinto Oliviera, 'Aliens Protection against Arbitrary Detention' in D Moya, G Milios, *Aliens before the European Court of Human Rights: Ensuring Minimum Rights of Human Rights Protection*, Koninklijke Brill NV, Leiden, 2021, p. 100–101, 110.
[379] M.S.S v. Belgium and Greece, Application No 30696/09, ECtHR, [GC], 21 January 2011, para 233.

is seeking for asylum.[380] The six dissenting judges in the *Saadi v. the United Kingdom*, questioned this particular notion of affording a lower level of protection to asylum seekers in regard to the use of pre-entry detention, against the background of the ECtHR's findings in the case.[381]

The disregard for the particular situation of asylum seekers is apparent in regard to the Screening Regulation, as it does not differentiate between migrants and asylum seekers. They are instead grouped into one category of unauthorized entrants.[382] The importance of the differentiation has been based on the legal rationale that asylum seekers are to be given special treatment with regard to entry and stay in the host state. [383] Therefore, when assessing the restrictions of the right to liberty in the context of the screening and asylum border procedures, it is important to keep in mind the particular situation of asylum seekers as a group, which has indeed been recognized by the ECtHR.[384]

5.3.3 Restrictions Imposed by the Screening Procedure

As was established in the previous section the screening procedure's reliance on non-entry prescribes the possible large-scale use of detention.[385] The Rapporteur to the European Parliament on the Pact's Screening Regulation has particularly underlined that the reliance on the legal fiction of non-entry will be very difficult to implement in practice without using detention, or other forms of *de facto* detention practices or the deprivation of liberty.[386] This underlines that the implementation of the screening procedure will lead to wide restrictions on the right to liberty, which may not be seen to comply with the notion that restrictions should be narrowly constructed, as described in section 5.3.1.

The proposed Screening Regulation imposes time limits in order to address this issue. It will be a five-day procedure that may be prolonged for an additional five days during a crisis.[387] It may be questioned to what extent this would affect the finding of detention. In the *Saadi v. the United Kingdom* case it was established that a seven-day detention period was found to be lawful due

[380] Refugee Convention, Article 31; RCD, Recital 15; Proposed Reception Conditions Directive, Recital 20.
[381] Saadi v. the United Kingdom Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, p. 37.
[382] Proposed Screening Proposal, Article 3, 5, 4.1.
[383] L Jakuleviciene (n 218), p. 83–84.
[384] M.S.S v. Belgium and Greece, para 233.
[385] E Brouwer et al (n 189), p. 54.
[386] B Sippel (n 278), p. 82–83.
[387] Proposed Screening Regulation, Article 6.3.

to the high pressure on the British asylum-system and that it was seen as a reasonable time to be detained to speedily assess the asylum claim.[388] In the context of the proposed screening procedure it may be questioned whether a five-day or ten-day procedure can be seen as lawful since the proposed screening procedure cannot be equated with an asylum application procedure, as no legal decision is to be reached following the proposed screening procedure.[389] Moreover, commentators are questioning the practical feasibility for a five-day screening procedure.[390] In the report commissioned by the European Parliament it was underlined that there is a risk that time limits will not be respected by Member States, as occurred in the hotspots, in which time limits were imposed but not respected. This led to thousands of asylum seekers being stuck in the hotspots.[391] This further underlines that the Screening Regulation may contribute to important restrictions of the right to liberty which may not be seen as compatible with the fact that restrictions of the right to liberty are to be narrowly constructed.[392] Furthermore, this finding is aggravated by the fact that the screening procedure is to be applied in regard to asylum seekers that have been found to constitute a vulnerable group that need special protection.[393]

5.3.4 Restriction Imposed by the Asylum Border Procedure

A restriction on the right to liberty in Article 6 of the Charter, must be proportional and necessary to meet the general interests recognized by the Union or the need to protect the rights and freedoms of others, as prescribed by Article 52 of the Charter.[394] The European Commission deems, the use of non-entry of applicants during the asylum border procedure as being necessary in order to discourage applicants with abusive claims to enter the union without a valid reason.[395] It may be questioned if a mandatory border procedure of asylum claims from applicants of a nationality with a 20% recognition rate can be seen as necessary to meet the objective of discouraging applicants with abusive claims to enter the union. Keeping in mind that it is likely that detention will be applied for the twelve-week assessment of the asylum claim, since it has been established that border procedures in most cases involve detention.[396]

[388] Saadi v. the United Kingdom, para 79–80.
[389] Proposed Screening Regulation, Article 13, 14.
[390] L Jakuleviciene (n 218), p. 93.
[391] E Brouwer et al (n 189), p. 54.
[392] Medvedyev and Others v. France, para 76.
[393] M.S.S v. Belgium and Greece, para 233.
[394] EU Charter, Article 52.1.
[395] European Commission (n 3), p. 85.
[396] Proposed Asylum Procedures Regulation, Article 41.11; G Cornelisse, M Reneman (n 160), p. 121, See Key Finding 11.

Also, the proposed Crisis and Force Majeure regulation prescribes that the border procedure may be prolonged an additional eight weeks.[397] Moreover, according to the proposed Crisis and Force Majeure regulation, in a situation of crisis, the mandatory border procedure may be used for applicants from a third-country with a recognition rate of 75% or lower.[398] This is a high number that may lead to the channeling of most asylum seekers to the asylum border procedure in times of crisis, thus indicating the potential large-scale use of detention to ensure the non-entry of these asylum-seekers. Important to note is that asylum-seekers from countries of a recognition rate of 75% or lower cannot be considered to be included under the category of 'applicants with abusive claims' since a 75% recognition rate must be seen as indicating a significant need for international protection.[399]

This thesis argues that the imposition of the asylum border procedure will impose wide restrictions of the right to liberty. Firstly, the inherent link between border procedures and the use of detention discussed in Chapter four underlines that their implementation will require significant restrictions of the right to liberty.[400] Secondly, the European Commission argues that it is necessary to impose mandatory border procedures to discourage applicants with abusive claims. In this regard, it seems problematic to put on the same footing applications from third countries with a lower recognition rate than 20% with abusive claims. In particular, since the reliance on recognition rates excludes the applications that have been successful after an appeal.[401] Thirdly, relying on the 75% recognition rate in times of crisis would lead to almost all asylum seekers being subjected to the border procedures. Finally, the length of the asylum border procedure, twelve weeks in normal times and 20 weeks in times of crisis, constitute wide restrictions on the right to liberty. For these reasons, the proposed asylum border procedure is likely to lead to such wide restrictions of the right to liberty, that it may not be seen as complying with the notion that restrictions have to be narrowly constructed.

5.4 An Unadressed Risk of Increased *De Facto* Detention

This section will examine the proposed screening and asylum border procedure's failure to address the classifications of a stay at the border and how this may contribute to an increased

[397] Proposed Crisis and Force Majeure Regulation, Article 4.1.b.
[398] Ibid, Article 4.1.a.
[399] E Brouwer et al (n 189), p. 141.
[400] See Chapter 4.5.1.
[401] See Chapter 3; E Brouwer et al (n 189), p. 40–41.

use of *de facto* detention. The main purpose is to establish the important human rights breaches that the use of *de facto* detention constitutes and thereby underline the deficiencies of the proposed Screening Regulation and the proposed Asylum Procedures regulation in not adequately addressing this issue.

As has been mentioned the ECtHR has underlined the importance of defining a particular practice of containment as a restriction of freedom of movement or as a restriction of the right to liberty, despite the fact that there may be significant difficulties in doing so.[402] From the perspective of human rights law compliance, the classification of a stay at the border is of great importance. This is due to the fact that the classification of a stay at the border as a restriction of the freedom of movement, or as detention, gives access to differing procedural rights.[403] This is not surprising in itself, that lesser procedural safeguards are available to individuals in cases of restrictions of the freedom of movement as this practice is less infringing on the individual, than a restriction on the deprivation of liberty.[404]

De facto detention is characterized by the lack of a formal decision, based on legal grounds, following an individualized assessment, considering alternative measures that would have been less coercive than detention. This was underlined by the ECtHR in the *R.R. and Others v. Hungary* case, in which the ECtHR partly relied on the conditions set up in Article 8 of the RCD to assess the lawfulness of the detention in the Hungarian transit zone. Thus, a detention contrary to the provisions of Article 8 of the RCD can be seen as constituting an act of *de facto* detention.[405] The use of *de facto* detention constitutes a serious human rights violation as it constitutes a detention without legal basis contrary to Article 5 ECHR and Article 6 of the Charter. In addition, *de facto* detention practices undermine all legal and procedures safeguards against an arbitrary detention, including the right to an individualized assessment, the assessment of alternative measures, as well as the *habeas corpus* rights to challenge a detention decision.[406]

As has been mentioned in Chapter 4, there has been an increase in the use of *de facto* detention, in particular in border procedures, including the hotspot approach in Greece, as well as in transit

[402] Khalifa and Others v. Italy, para 64.
[403] ECHR, Article 5, Protocol 4 Article 2; Proposed Reception Conditions Directive, Article 7.8, 9.3.
[404] G Cornelisse (n 8), p. 74.
[405] R.R. and Others v. Hungary, Application No. 36037/17, ECtHR, 2 March 2021, para. 90.
[406] ECHR, Article 5; EU Charter, Article 6; RCD, Article 8, 9.

zones such as the Röszke transit zone in Hungary.[407] Moreover, a report requested by the European Parliament on the use of border procedures, highlights that detention is the norm during the border procedures.[408] The report underlines that the fact that the current regulation of border procedures in the APD and RCD do not provide any guidance on the reception of asylum seekers during border procedures has unsurprisingly led to states' having different terminology for qualifying the stay of asylum seekers during the border procedure. For instance, in Germany the applicants subjected to the border procedures are issued 'a notification of stay at the airport', which is qualified as a restriction of movement. However, the border facilities in Germany constitute closed centres in which its residents cannot enter or exit of free will. The official position of the German authorities is however that such stay does not constitute a deprivation of liberty.[409] This highlights a current trend in which a blurring of the lines between reception and detention is taking place.[410] This blurring has been particularly present with respect to the hotspot approach, where practices that are legally labelled as restrictions on the freedom of movement, in practice amount to detention.[411] This was confirmed in the ECtHR case *J.R. and Others v. Greece*. In the case the ECtHR underlined that the holding of applicants at the Vial hotspot in Greece, constituted a deprivation of liberty, while the Greek government argued that the applicants had been subjected to a restriction of their freedom of movement. When the hotspot was converted into a semi-open centre where applicants were free to go or stay during the day, the ECtHR held that the applicants were only subject to a restriction of their freedom of movement.[412] Hence, the judgement underlines the importance of classifying measures of containment correctly in order to respect the right to liberty.

Following recorded use of detention by Member States at the EU's external borders, including Greece, Italy, Hungary and Bulgaria, commentators have asked for clarifications on an EU-level with reference to the fact that a stay at a border or transit zone lacking a voluntary entry-exit system into the territory of the Member State constitutes deprivation of liberty.[413] The

[407] G Matevžič (n 9); G Cornelisse, M Reneman (n 160), p. 121, Key Finding 13; Danish Refugee Council (n 289), p. 18–19.
[408] P Baeyens, J Ott, 'The Implementation of Article 43 of Directive 2013/32/EU in Practice: Comparative Analysis', in van Ballegooij, (eds) '*Asylum Procedures at the Borders: European Implementation Assessment*', European Parliamentary Research Service, PE 654.201, 2020, p. 201–202.
[409] G Cornelisse, M Reneman (n 160), p. 202, 204.
[410] Ibid, p. 121, Key Finding 13.
[411] Ibid, p. 84.
[412] J.R. and Others v. Greece, Application No. 22696/16, ECtHR, 25 January 2018, para 86–87.
[413] G Matevžič (n 9), p. 54–56; ECRE, *'Relying on a Fiction: New Amendments to the Asylum Procedures Regulation: A Summary of ECRE's Comments on the New Amendments to the APR in COM(2020) 611 and Recommendations for the Co-Legislators'*, 2020, p. 2. Available at: https://ecre.org/wp-

identified need for a legal classification of the holding of applicants at the borders was also recommended in the European Parliament report on the application of border procedures.
The recommendations states that measures preventing asylum seekers from leaving a transit or border zone to access other parts of the territories should be legally classified as detention. Such a practice would be more in line with the current EU-legislation, including the RCD, as well as Article 5 ECHR and Article 6 of the Charter.[414]

The well-documented use of *de facto* detention by Member States' as well as the serious human rights violation that *de facto* detention constitutes raises serious concerns in the context of the proposed screening and asylum border procedure. This is related to the fact that neither the proposed Screening Regulation nor the proposed Asylum Procedures Regulation address the legal classification of the stay of applicants at the border during the proposed procedures. In not addressing this problem there is a serious risk for further use of *de facto* detention at the borders. Cornelisse and Reneman argue that the European Commission's failure to engage with the legal qualification of the stay shows serious ignorance of the current challenges at the border in regard to the respect of the fundamental right of third-country nationals at the external borders of the EU. By leaving this classification to the Member States there is a risk for further exacerbation of the current problem of *de facto* detention at the external borders.[415]

5.5 Weak Safeguards to Ensure Compliance with the Right to Liberty

This section will examine to what extent the safeguards presented by the European Commission in the proposed Screening Regulation and amended Asylum Procedures Regulation contribute to ensure the compliance with the right to liberty.

5.5.1 The Proposed Human Rights Monitoring Mechanism

As was established in Chapter 4, national law is to govern the use of detention during the proposed screening procedure.[416] The Screening Regulation does not make explicit mention of

content/uploads/2020/12/Policy-Note-29.pdf, Accessed 22 April 2022; ECRE, '*ECRE Comments on the Commission Proposal for a Screening Regulation Com (2020) 612'*, 2020, p. 13. Available at: https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf, Accessed 22 April 2022.

[414] G Cornelisse, M Reneman (n 160), p. 212.

[415] G Cornelisse, M Reneman (n 11), p. 194.

[416] Proposed Screening Regulation, Recital 12.

the adherence of the screening procedure to Article 6 of the Charter. It is however, important to underline that in spite of the proposed Screening Regulation's provision that detention is to be regulated by national law, implementing the proposed screening procedure, that may require detention, must be understood as constituting an implementation of EU-law, thus falling within the scope of the Charter.[417]

The proposed Screening Regulation however makes clear that the legal effects of secondary EU-law, in particular the RCD that prescribes important safeguards in the context of detention, shall only apply after the proposed screening procedure has ended.[418] This leads to unclarity since the current RCD and the proposed Reception Conditions Regulation from 2016 both underline that they are to be applied in the context of a person that has made an application for international protection.[419] The proposed Screening procedure is to be applied for those that have made an application for international protection at the border checks but not fulfilled the entry conditions.[420] This contributes to creating a legal gap in EU-law that contributes to unclarity with regard to the application of safeguards when detention is used during the proposed screening procedure. It seems arbitrary that the safeguards of the RCD are not to apply during the proposed screening procedure and gives the implication for Member States that there is a lower level of protection during detention in the context of the screening procedure.[421]

However, the European Commission prescribes that each Member State shall establish an independent monitoring mechanism, that will *inter alia* ensure the compliance of national rules on detention, in particular with regard to grounds and the duration of the detention.[422] The proposed Screening Regulation highlights that Member States are to put in place the adequate safeguards in order to ensure that the mechanism is independent.[423] It is also stated that the Fundamental Rights Agency is to provide guidance to the Member States, in particular with reference to the independent functioning of the monitoring mechanism. In addition, Member States may invite national, international as well as NGOs to participate in the monitoring.[424] Introducing the monitoring mechanism can be seen as positive in terms of ensuring human

[417] Proposed Screening Regulation, Explanatory Memorandum, p. 11; EU Charter, Article 51.1 G Cornelisse, M Reneman (n 160), p. 96.
[418] Proposed Screening Regulation, Explanatory Memorandum, p. 5.
[419] RCD, Article 3.1; Proposed Reception Conditions Directive 2016, Article 3.1.
[420] Proposed Screening Procedure, Article 1.
[421] E Brouwer et al (n 189), p. 60.
[422] Proposed Screening Regulation, Article 7.2.
[423] Ibid, Article 7.2.
[424] Ibid, Article 7.2.

rights compliance. However, the study requested by LIBE and commissioned by the Department for Citizen's Rights and Constitutional Affairs, firstly, underlined the risk for difficulties in ensuring the independence of the monitoring mechanism and recommended that the participation of relevant national and international bodies as well as NGOs to be mandatory. Secondly, it was highlighted that there should be clear consequences and follow-up in case of non-compliance with the fundamental rights.[425] This questions whether the monitoring mechanism in its current form will provide an actual remedy to the fact that national rules will regulate detention during the screening procedure and not the RCD. In light of the presented examples in Chapter 4, it was underlined that states such as Greece and Hungary implemented rules that were found to be contrary to the right to liberty, thus underlining the need for a comprehensive monitoring mechanism. If adopted in its current form it is unlikely that the monitoring mechanism will be able to fulfil this purpose. Hence, there is a remaining risk that national rules on detention contrary to the right to liberty will be implemented during the screening procedure.

5.5.2 Implementation of Procedural Safeguards in the Asylum Border Procedure

The European Commission proposes that the right to liberty is to be assured through the application of the legal and procedural safeguards articulated in the RCD. These safeguards include that detention is justified based on specific grounds clarified in the RCD, in combination with a proof of the necessity and proportionality on the basis of an individual assessment. In addition, each case of detention should be subject to judicial review, be a measure of last resort, thus detention is only to be used if there are no other less coercive alternatives available.[426] From a human rights perspective, the EU-law, in particular the RCD, seen in the light of the CJEU's findings in the *FMS and Others* ruling may be seen as articulating greater avenues of protection, compared to that of the ECHR as a consequence of the European Court of Human Right's understanding of detention.[427]

EU Member States' practices have however given proof of difficulties in implementing the conditions of the RCD when conducting border procedures. In particular, in a report on the application of Article 43 in the current APD, which regulates the use of border procedures,

[425] E Brouwer et al (n 189), p. 62.
[426] Proposed Asylum Procedures Regulation, Explanatory Memorandum, p. 11; RCD, Article 8.
[427] A Bombay and P Heynen (n 84), p. 260.

found that there is no evidence supporting that Member States in fact assess whether other less coercive alternatives could be imposed with regard to the use of detention in border procedures.[428] In particular, several Member States have explicitly stated that necessity or alternatives to detention are not assessed when it is decided that a border procedure is applied. In both Belgium and the Netherlands, it was found that detention is systematically used when applying a border procedure. In these cases, there are no assessments with regards to the necessity of the detention. The Dutch government has argued that a refusal of entry at the border is only effective when coupled with a deprivation of liberty.[429] It is therefore regretful that the European Commission does not engage with the current difficulties of implementing the existing procedural safeguards, such as conducting an individualized assessment when proposing a more expansive use of border procedures. In not addressing these current problems and proposing guidance to ensure the implementation of these safeguards, there arises serious doubts in regard to whether the proposed asylum border procedure will respect the right to liberty.[430]

5.5.3 Silence on Alternatives to Detention

The development of alternatives to detention has been upheld as an important step in ensuring the right to liberty of asylum seekers, both by the European Council and the European Commission.[431] There have been important developments within this field, in particular within the Council of Europe that has in 2017 published a thorough analysis on alternatives to detention as well as adopting '*Practical Guidance on Alternatives to Immigration Detention; Fostering Effective Results'*.[432] In this regard it is important to underline that EU-law prescribes the use of alternatives to detention, since Member States may only use detention if other less coercive alternatives cannot be applied.[433] The lack of engagement with the development of alternatives to detention is therefore particularly disturbing in reference to the proposed screening and asylum border procedures' compliance with the right to liberty. It must be highlighted, that this is especially concerning in reference to the proposed screening procedure.

G Cornelisse, M Reneman (n 160), p. 122, see in particular key finding 15.
[429] Ibid, p. 89–90.
[430] See G Cornelisse (n 8).
[431] Council of Europe, the European Commission, the European Migration Network, '*Effective Alternatives to the Detention of Migrants: International Conference Organized by the Council of Europe, the European Commission and the European Migration Network, Report Summarizing the Key Messages from the Conference "Effective Alternatives to Detention of Migrants"'*, Strasbourg, 4 April 2019. Available at: https://rm.coe.int/coe-eu-emn-conference-4-april-2019-conference-report/168097e8ef, Accessed 21 April 2022.
[432] A S Pinto Oliviera (n 378), p. 98.
[433] RCD, Article 8.2.

Due to the fact that the RCD will not have any legal effect during the screening procedure. Hence the obligations prescribed in the RCD to use alternatives to detention will not have any legal effect during the screening procedure.[434]

5.6 Chapter Conclusion

This chapter has aimed at shedding a light on the conflicting interest between the state's right to control its territory and the right to liberty that is present in the ECHR. The ECtHR's interpretation of Article 5.1.f. ECHR in the *Saadi v. United Kingdom* judgement has led to providing states with extensive powers to use pre-entry detention to prevent the entry of asylum seekers as states have the right to use pre-entry detention until the state has decided to legally authorize entry. This interpretation comes into conflict with the fundamental right to liberty that both the ECtHR and the CJEU have argued should be narrowly interpreted. The proposed screening and asylum border procedures can be seen to align with the 'Saadi logic', in that they both rely on the premise of non-entry that allows for wide discretions for states to use containment measures to prevent the entry of third-country nationals. In this sense, the European Commission, has through these proposals prioritized the state prerogative to control its territory, over asylum seekers' right to liberty. This is particular clear with regard to the proposed screening procedure, where the situation of asylum seekers is not taken into consideration and the safeguards, such as the assessment of necessity and alternative measures, as prescribed by the RCD will not be given any legal effect during this procedure.

Moreover, the fact that the proposals do not clarify the classification of the stays at the border risk further exacerbating existing classification issues and contribute to the use of *de facto* detention. This thesis has found that the proposals are silent with regard to the issue of contributing to the use of *de facto* detention which presents an important challenge to the right to liberty. In addition, the failure to address the current challenges to implement procedural safeguards and alternatives to detention further raises questions regarding the proposal' compliance with the right to liberty. Furthermore, the identified shortcomings in respect to the human rights monitoring mechanism do not remedy the identified issues with respect to the right to liberty.

[434] E Brouwer et al (n 189), p. 169.

In the light of the above-mentioned findings, this Chapter concludes that the identified shortcomings and unclarities in the proposed Screening Regulation and amended Asylum Procedures Regulation, lead to the finding that if adopted in their current form the screening and asylum border procedure can largely be seen to not be in compliance with the right to liberty. Furthermore, the deficiencies within the legal framework itself, in particular the ECHR, underlines the low protection available to asylum seekers in Europe, to which the proposed screening and asylum border procedure may contribute to further lowering the protection of the right to liberty.

6 Final Conclusion and Recommendations

6.1 Final Conclusion

The purpose of this thesis has been to evaluate whether the proposed screening and asylum border procedure risk increasing the pre-entry detention of asylum seekers and to what extent this can be considered to be in compliance with the right to liberty. In order to fulfill this purpose, a comprehensive analysis of the European legal provisions in regard to the use of pre-entry detention in the EU was conducted, by examining Article 5 ECHR, Article 6 of the Charter and the RCD. The thesis also presented the most relevant proposals of the Pact on Migration and Asylum in the context of pre-entry detention: the Screening Regulation, the Asylum Procedures Regulation and the Crisis and Force Majeure Regulation. Thereafter, an analysis of whether the proposed screening and asylum border procedure risk increasing the use of detention and to what extent this could be considered to be in accordance with the right to liberty, was undertaken in order to answer the overarching research question.

Chapter 2 has answered sub-question 1, concerning which human rights law and EU-law safeguards enshrined in the ECHR and the Charter as well as the RCD, regulate the pre-entry detention of asylum seekers. Firstly, the chapter found that the discrepancy of the ECtHR's and the CJEU's assessment of which practices amount to detention in the ECtHR's *Ilias and Ahmed v. Hungary* judgment and the CJEU's *FMS and Others* judgement, underlines the unclarities that permeates the current classifications of a stay at the border. This affects asylum seekers' right to liberty and will therefore be further discussed in reference to Chapter 5. Secondly, the Chapter found that the ECHR articulates two rights that are relevant in the context of pre-entry detention, the right to liberty (Article 5 ECHR) and the freedom of movement (Article 2, Protocol 4 ECHR), where a practice has to amount to a deprivation of liberty and not merely the restriction of the freedom of movement in order to fall within the scope of Article 5 ECHR. The right to liberty may be restricted as prescribed by Article 5.1.f. ECHR that allow states to prevent individuals from effectuating an unauthorized entry. In the *Saadi v. the United Kingdom* case the ECtHR provided states with wide possibilities to use pre-entry detention as it argued that an entry is 'unauthorized' until the state has formally authorized entry. In addition, the case has established that in the context of pre-entry detention states do not need to assess whether

detention is necessary. The wide powers that the *Saadi v. the United Kingdom* case provides to states to use pre-entry detention has been criticized and contributes to a low-protection regime of asylum seekers' right to liberty. Thirdly, this Chapter has found that Article 6 of the EU Charter, prescribing the right to liberty, may provide a higher degree of protection for asylum seekers against the use of pre-entry detention. This is due to the CJEU's development of a more autonomous approach in defining the scope of Article 6 of the EU Charter, when interpreting the right in the light of EU-legislation. Moreover, it is found that Article 18 of the Charter, the right to asylum, is of significance in terms of the use of border procedures and the use of detention, which is further examined in Chapter 4. Thereafter, the Chapter finds that the RCD provides asylum seekers with important safeguards since it prescribes that detention may only be used when necessary, following an individualized assessment. Moreover, the RCD specifies detention grounds as well as procedural rights regarding the pre-entry detention of asylum seekers. In addition, the RCD also regulates the right to freedom of movement.

Chapter 3 has answered sub-question 2, regarding the underlying premises of the Pact that are relevant in the context of pre-entry detention, the procedures introduced by the Pact and how these will function. This chapter finds that the objectives of introducing these procedures are to better control the entry of third-country nationals and thereby tackle the European Commission's identified main challenges: mixed migratory flows and prevention of secondary movements. This is to be addressed through the introduction of the screening procedure, a five-day procedure, that is to ensure that all third-country nationals are to be channeled to the appropriate procedure. The screening procedure will rely on the legal fiction of non-entry, meaning that despite the third-country nationals being on the member states' physical territory, they are not considered to have legally entered the territory of the Member States. This implies the use of containment practices at the border, that are likely to amount to *en masse* detention. The proposed Screening Regulation underlines that detention may be used following an individualized assessment but is to be regulated by national law, the RCD shall be given no legal effect during the screening procedure. It is important to mention that during a time of crisis the screening procedure may be prolonged to a total of ten days. The second introduced procedure is the introduction of a mandatory asylum border procedure, for certain categories of asylum seekers. This procedure similarly to the screening procedure, relies on the legal fiction of non-entry. Thereby, the asylum border procedure is likely to impact applicants' right to liberty. The third examined proposal, the Crisis and Force Majeure Regulation, further expands the use of mandatory border procedures. Hence, during a defined crisis or force majeure

situation, the asylum border procedure will be applied to third-country nationals from a third-country with a recognition rate of 75% and may be applied for an additional eight weeks. This means that almost all asylum seekers will be subjected to an Asylum border procedure in times of crisis.

Chapter 4 of this thesis answered sub-question 3, regarding how the proposed screening and asylum border procedure contribute to a risk for an increased use of pre-entry detention of asylum seekers. The proposed screening and asylum border procedures' reliance on the premise of non-entry, which articulates that applicants shall not be seen as having legally entered the territory of the Member State, leads to there being a legitimate legal ground to detain third-country nationals throughout the entirety of the procedures. It must be kept in mind that the fact that there is a legal ground for the detention does not mean that the use of detention is legal since the ECHR requires that the use of detention is non-arbitrary, and EU-law prescribes that it should be necessary and proportional. However, this thesis argues that in relying on the premise of non-entry there is indeed a risk for an increased use of detention, during the entirety of the pre-entry phase. This finding is in particular based on the identified problems experienced at the external borders that have led to an increased use of pre-entry detention. In particular, containment practices during the hotspot approach have underlined the difficulties of states to hold asylum seekers at the borders without resorting to detention. This has been underlined by the increased blurring between restrictions on the freedom of movement and deprivation of liberty, where restrictions of the freedom of movement have led to *de facto* detention due to their extensive restrictive scope. Furthermore, national practices, such as those undertaken by Hungary have relied on the detention of applicants at the Röszke transit zone. Additionally, by introducing a new ground for the use of border procedure and making the use of border procedures mandatory in certain cases, presents a significant risk for an increased use of pre-entry detention. This is further underlined by the fact that the European Commission underlined the inherent connection between the use of detention and border procedures in 2016. Due to these existing problems at the external borders of the EU that are not addressed by the Commission in the proposals and the introduction of the non-entry premise, this thesis establishes that the proposed screening and asylum border procedure contribute to an increased risk of the use of pre-entry detention of asylum seekers in the EU.

Chapter 5 of this thesis has answered sub-question 4, to what extent the proposed screening and asylum border procedure, in regard to the pre-entry detention of asylum seekers, can be

considered to be in compliance with the right to liberty. This thesis find that the proposed screening and asylum border procedure poses significant challenges to the right to liberty. This is due to the fact that the right to liberty constitutes a fundamental democratic right and therefore, both the ECtHR and the CJEU have underlined that any restrictions to the right have to be narrowly constructed. In this context, this thesis recognizes that states have a sovereign right to control their territory but in accordance with Cornelisse and Judge Pinto de Albuquerque, this cannot be interpreted as allowing for a largely unfettered right to detain entry seeking asylum seekers. Therefore, the screening and asylum border procedure's reliance on the non-entry premise, that creates a legitimate legal ground to detain third-country nationals, cannot be found to constitute a narrowly interpreted restriction of the right to liberty. In addition, the fact that the proposals do not engage with the issue of classifications of stays at the border lead to a risk for an increased use of *de facto* detention. *De facto* detention constitutes a violation of the right to liberty since it neither complies with the legal nor procedural rules in regard to detention. Moreover, the shortcomings of the proposed human rights monitoring mechanism and the failure of states to adhere to legal and procedural safeguards, further highlights the lack of engagement with the right to liberty, in the proposed screening and asylum border procedures. For the above stated reasons this thesis finds that both the screening and the asylum border procedure have a low level of compliance with the right to liberty, if adopted in their current form.

Each chapter of the thesis have constituted a building block in order to provide an answer to the overarching research question, to what extent the Pact's proposed screening and asylum border procedure could lead to an increased use of pre-entry detention, contrary to the right to liberty, as prescribed by the ECHR, the Charter and EU-law. Due to the above stated findings this thesis reaches the conclusion that there is a significant risk that the proposed screening and asylum procedure will lead to an increased use of pre-entry detention of asylum seekers in the EU, contrary to the right to liberty. Below are recommendations that could contribute to better protecting asylum seekers' right to liberty.

It is important to note that the Pact on Migration and Asylum may face significant political barriers in terms of its adoption due to the Member States varying degree of support to the proposals. Yet, the examination of the proposals and their effect on the right to liberty provides important insights into the current state of the rights of asylums seekers in the context of pre-entry detention in the EU. This thesis has through its findings underlined that the right to liberty

of asylum seekers cannot be seen as one of the priorities of the European Commission, despite the promise of Commissioner Johansson that 'there shall be no more Morias'. Rather, this thesis paints a gloomy picture, where the large-scale detention of asylum seekers is likely to be a part of the future practices of the European Union.

6.2 Recommendations

Despite this thesis' rather bleak conclusion this section aims at providing recommendations for amendments of the proposals to ensure a better protection of asylum seekers' right to liberty.

Recommendation 1

The European Commission should clearly define measures that prevent asylum seekers from leaving a transit zone or a border zone to access other parts of the territory as legally classified detention. This would be in line with the findings of the CJEU in the FMS and Others case as well as the Charter and RCD. By clarifying which measures amount to detention the proposals could better engage with the issues of classifying stays at the border or in transit zones as well as limiting the use of *de facto* detention.

Recommendation 2

The European Commission should remove the legal fiction of non-entry from the proposed Screening Regulation and Asylum Procedures Regulation. This is due to the fact that following the findings of this thesis it is clear that it involves containment of individuals at the external borders that risk leading to the large-scale use of detention. Thus, applicants should be legally authorized to enter the territories of the Member States during the screening and asylum border procedure, to ensure the protection of the right to liberty of asylum seekers.

Recommendation 3

The European Commission should amend the proposed Screening Regulation to repeal the provision that detention during the screening procedure is to be regulated by national law and it should be clear that the safeguards of the RCD shall apply during the entirety of the screening procedure. There is no reason for why EU-law shall not apply to the use of detention during the implementation of a procedure prescribed by EU-law. This is of importance to ensure that the shortcomings of national rules on the use of detention in border or transit zones at the EU's external borders, including in Greece and in Hungary are addressed. Moreover, this would

remove the impression that there is a lower level of protection against pre-entry detention for asylum seekers during the screening procedure.

Recommendation 4

The European Commission should amend the proposed Asylum Procedures Regulation by removing the introduction of mandatory asylum border procedures. This is due to the established inherent connection between the use of border procedure and the use of detention, that the European Commission has indeed recognized in 2016 as a reason for not introducing mandatory border procedures. A recent study commissioned by the European Parliament underlined that Member States are using detention, in some cases *de facto* detention to implement border procedures. Therefore, it is of fundamental importance to reduce the use of border procedure rather than expand the use of them to ensure better compliance with the right to liberty.

Recommendation 5

The European Commission should amend the proposed Crisis and Force Majeure Regulation to not include derogation possibilities that can expand the use of the asylum border procedure. Making the asylum border procedure mandatory for nationals of countries with a recognition rate of 75% includes almost all asylum seekers coming to the EU. Furthermore, expanding the use of the asylum border procedure an additional twelve weeks will allow for a widespread use of detention. In not amending the Crisis and Force Majeure Regulation the European Commission would allow for almost all asylum seekers being subjected to an asylum border procedure in times of crisis, that could last up to approximately six months (24 weeks). Therefore, to avoid such large-scale use of pre-entry detention of asylums seekers in time of crisis the proposed Crisis and Force Majeure Regulation should be amended to limit such wide use of pre-entry detention of asylum seekers.

Recommendation 6

This final recommendation calls for a better engagement with the right to liberty on the part of the European Commission. In particular, this thesis has found that there is a lack of engagement with the current challenges with regards to the use of pre-entry detention, including the use of *de facto* detention at the external borders of the EU. These challenges call for an increased engagement with this issue, where the Human Rights Monitoring Mechanism is one, yet insufficient mode of engagement. Therefore, this thesis calls for an acknowledgement of the

current challenges in regard to the use of pre-entry detention of asylum seekers and proposals that address these particular challenges. This is essential to ensure that asylum seekers in the future EU will be guaranteed the right to liberty.

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