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Border Procedures in the European Union: How the Pact Ignored the Compacts

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Abstract: This article analyses the (potential) role of the Global Compact for Migration and the Global Compact for Refugees in the development of EU law concerning asylum seekers who arrive at the external borders of the European Union (EU). Under the current rules, many asylum seekers are refused entry to the territory of the EU and detained while their asylum claim is examined in a border procedure. Some EU Member States even push back asylum seekers without a proper assessment of their needs for international protection. Despite widespread violations of the fundamental rights of asylum seekers at the external borders of the EU, the New Pact on Migration and Asylum presents the new integrated border procedure as an important instrument to ‘deal with mixed flows’ and make the Common European Asylum System (CEAS) work. However, the EU legislator has not substantiated the claim that border procedures will contribute to achieving the aims of the CEAS, such as the creation of a uniform, fair and efficient asylum procedure and prevention of abuse. Neither does the Pact provide a solution for pushbacks and systematic use of detention, nor does it guarantee the quality of the asylum procedure, including the identification of persons with special needs. The Pact therefore not only fails to comply with the EU’s own Better Regulation guidelines and protect the fundamental rights of asylum seekers, but it also ignores the standards of the Global Compacts. What role can the Global Compacts still play in the ongoing negotiations over the Pact?

Keywords: border procedures; Global Compacts; New Pact on Migration and Asylum



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1. Introduction

The situation of asylum seekers and other migrants arriving at the external borders of the European Union has been of great concern to European institutions, Member States and human rights organisations for many years. According to Frontex, in the first nine months of 2021, 133,900 migrants crossed the EU’s external borders in an illegal manner.¹ Many of these migrants, including children, have been subjected to (sometimes violent) pushbacks, detention measures and accelerated asylum procedures at the border, implying systematic violations of their fundamental rights.²

In September 2020, the European Commission (henceforth: the Commission) proposed a New Pact on Migration and Asylum (henceforth: the Pact), which aims to provide a ‘durable European framework’ offering ‘a proper response’ to the challenges faced by the Member States in the area of external border control and immigration.³ An important pillar

¹ Frontex, News Release, ‘Migratory situation at EU’s borders in September: Increase on the Central Mediterranean and Western Balkan routes’ (15 October 2021).

² See, for example, Fundamental Rights Agency, Migration: Key Fundamental Rights Concerns, Bulletin 2-2021 (24 September 2021), UN Special Rapporteur on the human rights of migrants, Report on means to address the human rights impact of pushbacks of migrants on land and at sea (12 May 2021), (EPRS 2020).

³ Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 1.

of the Pact is the introduction of an integrated border procedure: ‘a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure’.⁴

The proposals for the New Pact were issued only a few years after the adoption of the United Nations Global Compact for Safe, Orderly and Regular Migration⁵ (henceforth: GCM) and Global Compact on Refugees (henceforth: GCR)⁶. These Compacts are not legally binding. However, they express the political commitment of the participating UN Member States to comply with specific principles and objectives (Carrera and Cortinovic 2019, p. 1; Costello 2018) that are rooted in international human rights law.⁷ As we will argue in this article, the New Pact as a whole not only fails to engage explicitly with the Global Compacts,⁸ but the proposed integrated border procedure even violates some of the principles and objectives they promote.

After briefly setting out the proposed measures establishing the integrated border procedure (Section 2), this article identifies four areas in which the proposals for the integrated border procedure in the Pact ignore the Global Compacts. First, it shows that the proposals are not evidence-based, as is required by both Compacts.⁹ Negating its own Better Regulation Guidelines, the Commission failed to properly evaluate existing legislation on border procedures, monitor Member State practices and carry out an impact assessment of the proposed legislation (Section 3).

Second, the proposed legislation does not provide solutions for current problems at external borders experienced by migrants and even risks exacerbating those problems. This includes difficulties and delays in accessing the asylum procedure and practices of pushbacks (Section 4) and inadequate examination of international protection needs (Section 5)¹⁰. This is incompatible with the GCR, which provides that States should have mechanisms in place for the registration, documentation and status determination of migrants, enabling all those in need of international protection to find and enjoy it.¹¹ Finally, the proposals, if adopted and implemented, will result in the continuation of practices whereby Member States systematically detain migrants at external borders (Section 6), while the Compacts require that immigration detention be a measure of last resort and promote the development of alternatives for such detention.¹² In our conclusions (Section 7), we highlight the role that the Global Compacts could still play in the current negotiations over the proposed legislation.

2. The Integrated Border Procedure in the Pact

In short, the proposed integrated border procedure comprises the following measures. First, all migrants arriving at external borders, including those who apply for international protection and those who do not satisfy the conditions for entry in the EU, will be screened to establish their identity and to carry out health and security checks.¹³ During

⁴ COM(2020)609 final, p. 4.

⁵ United Nations General Assembly, Global Compact for Safe, Orderly and Regular Migration, Resolution 73/195, Adopted by the General Assembly on 19 December 2018 (henceforth referred to as GCM).

⁶ Report of the United Nations High Commissioner for Refugees. Part II. Global Compact on Refugees, UN Doc. A/73/12 (Part II), New York: United Nations (henceforth referred to as GCR).

⁷ See GCM, paras. 1 and 2 and GCR, para. 5.

⁸ The Communication of the Commission about the New Pact (COM(2020) 609 final), the Proposal for a Screening Regulation (COM(2020) 612 final) and the Proposal for an amended Asylum Procedures Regulation (COM(2020) 611 final) do not refer to the Global Compacts.

⁹ GCM para. 17, GCR paras. 45–48.

¹⁰ See also ‘Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum’ (Carrera 2020, p. 5) and ‘Admissibility, Border Procedures and Safe Country Notions’ (Vedsted-Hansen 2020, p. 174), both in: (Carrera and Geddes 2021).

¹¹ GCR, paras. 58 and 61.

¹² GCM, para. 29 and GCR, para. 60.

¹³ 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, Art 1 under a and b.

the screening, migrants are not authorised to enter the territory of the Member State.¹⁴ The screening may take up to five days, which may be extended in exceptional circumstances by another five days.¹⁵ After the screening, migrants will be refused entry and/or referred to the suitable procedure, which, amongst others, can be an asylum procedure or a return procedure.¹⁶

Second, if asylum seekers are channelled into the asylum procedure, their applications will be examined either in a normal asylum procedure or in an asylum border procedure. Just as during the screening, those subject to the asylum border procedure are not allowed to enter the territory of the Member States.¹⁷ The Pact *obliges* Member States to use a border procedure in three cases: (1) if the asylum seeker poses a risk to national security or public order; (2) if the asylum seeker has misled the authorities by presenting false information or documents or by withholding relevant information or documents; or (3) if the asylum seeker is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 per cent.¹⁸ The asylum border procedure should be as short as possible but may take up to 12 weeks. After that period, asylum seekers have a right to enter the territory of the Member States.

Third, if an asylum border procedure is used and the application is rejected, a return border procedure will follow.¹⁹ Just as in the asylum border procedure, persons in a return border procedure are not authorised to enter the Member State's territory.²⁰ They should be kept at the external borders, or in their proximity, or in transit zones.²¹ The return border procedure has a maximum duration of 12 weeks.²²

Lastly, the Pact introduces a Crisis Instrument which allows Member States to derogate from the normal border procedures in 'exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State.'²³ In such situations, Member States may extend the use and duration of border procedures. Hence, in situations of crisis, they may apply the asylum border procedure to applicants coming from a country with an EU-wide recognition rate of 75% or lower.²⁴ This means that this border procedure could affect people who have a large likelihood of being refugees. Moreover, in situations of crisis, it is possible to extend the duration of the asylum border procedure and the return border procedure each with another eight weeks.²⁵ As a consequence, the proposed seamless asylum and return border procedure could last for a total period of 40 weeks plus ten days of screening.

¹⁴ Ibid., Art 4.

¹⁵ Ibid., Art 6(3).

¹⁶ Ibid., Art 13.

¹⁷ 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, Art 41(6). In this particular respect, the proposed border procedure is similar to the current border procedure in Art 43 Asylum Procedures Directive (2013/32/EU).

¹⁸ COM(2020) 611 final, Art 41(3) linking it to the 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, Art 40(1), which provides for cases in which *accelerated* procedures may be used to decide on the merits of an asylum applications.

¹⁹ COM(2020) 611 final, Art 41a (1) and (2).

²⁰ Ibid., Art 41a(2).

²¹ However, if capacity becomes stretched, Member States may resort to the use of other locations within their territory. See COM(2020) 611 final, Art 41a(2).

²² COM(2020) 611 final, Art 41a (2).

²³ 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, Art 1. The crisis shall be of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and would risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union.

²⁴ COM(2020) 619 final, Art 4(1) (a).

²⁵ Ibid., Artt 4 and 5.

3. European Legislation on Border Procedure: Led by Facts or Myths?

Reading the Pact, one gets the impression that the Commission considers the integrated border procedure as a panacea for some of the migratory problems that Member States and the EU face. It aims to quickly filter out ‘abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union’. The Commission claims that ‘the use of the border procedure would be beneficial to the system of asylum generally, as a better management of abusive and inadmissible asylum requests at the border, would benefit the efficient treatment of genuine cases inland’.²⁶ As we will set out in this section, these statements are not supported by adequate data.

The idea of evidence-based policy making entails that policy decisions are ‘better informed by available evidence and should include rational analysis’ (Baldwin-Edwards et al. 2019). It is assumed that rational policy making should produce better outcomes.²⁷ Both Global Compacts endorse the idea of evidence-based policy making. Louise Arbour, Special Representative of the Secretary-General for International Migration, stated that with the GCM, ‘Governments committed to a global migration framework based on facts not myths’ (Statement by Louise Arbour 2018). In this context, it is worth highlighting that the very process of preparation of both compacts was characterised by an extensive process of consultation of States and stakeholders and information gathering (Kraly and Hovy 2020; United Nations 2018, p. III).²⁸

The GCM states in its first objective that States ‘commit to strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable and comparable data’. These data should foster ‘evidence-based policymaking’ and allow ‘for effective monitoring and evaluation of the implementation of commitments over time’.²⁹ The GCR posits that ‘reliable, comparable, and timely data is critical for evidence-based measures to [. . .] assess and address the impact of large refugee populations on host countries in emergency and protracted situations; and identify and plan appropriate solutions’.³⁰

In this light, it is striking that the proposals concerning the integrated border procedure in the Pact are far from evidence based. This shortcoming comes most prominently to the fore with regard to the *mandatory character* of the border procedure and the rationale underlying policies of *non-entry*. For both of these characteristics, the Commission fails to provide any justification in the Pact (EPRS 2021). Moreover, the Commission failed to evaluate the existing border procedure,³¹ which lies at the basis of the new integrated border procedure, and to monitor its application in the EU Member States. See also (Di Salvo and Barslund 2020). As a result, information regarding, amongst others, the effectiveness and efficiency of the current border procedure was lacking when the Commission proposed the new instruments. Moreover, there was no clear picture as to the extent of the fundamental rights violations taking place at borders and in transit zones.³² The Commission also omitted carrying out a proper impact assessment of the proposed legislation, which would have identified the problems to be solved, the reasons for and aims of the integrated border procedure and its potential impact on migrants’ fundamental rights (See Cornelisse and Reneman 2021). The lack of evaluation, monitoring and impact assessment is incompatible with the Commission’s own Better Regulation Guidelines (European Commission 2017).

²⁶ COM(2020) 611 final.

²⁷ Ibid.

²⁸ (Kraly and Hovy 2020). (United Nations 2018) United Nations. 2018. Global Compact on Refugees. New York. Available online: <https://www.unhcr.org/5c658aed4> (accessed on 11 April 2022).

²⁹ GCM, para. 17.

³⁰ GCR, para. 45.

³¹ 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, Art 43.

³² See EU: *Independent Monitoring Mechanism on EU borders must ensure fundamental rights and accountability* (Amnesty International 2020)

These guidelines aim to ensure rational policy making and are supposed to form a coherent system of checks and balances underpinning the legitimacy of EU action. (See [Cornelisse and Reneman 2021](#), p. 183).

It was the European Parliament which in 2020 took up the task of drafting an implementation report, focusing specifically on border procedures.³³ This report noted that the assessment of the transposition and application of border procedures was hindered by a lack of comprehensive data, for example with regard to (the grounds, length and location of) detention and the use of alternatives to detention ([EPRS 2020](#)). In 2021, the European Parliament requested a Horizontal Substitute Impact Assessment of the New Pact. This impact assessment concluded that under the Pact, lack of data concerning the implementation and application of the CEAS is likely to persist, seeing that the Pact does not propose adequate mechanisms to force Member States to comply with their reporting obligations ([EPRS 2021](#), p. 171).

We have argued elsewhere that the Commission's failure to back up its legislative proposal with evidence is a symptom of the 'broken balance' between politicisation and rationality in the policy field of asylum, resulting in a more political role of the Commission. See ([Cornelisse and Reneman 2021](#)). Two factors have facilitated the increased politicisation of the Commission. First, the Commission has been engaged in a continuous struggle over competence with the Member States in this policy field. Member States have tried to avoid the adoption of EU law which would require substantial changes to restrictive national asylum systems. Consequently, EU asylum legislation is often complex and leaves wide discretion to Member States, resulting in widely diverging State practices. This renders monitoring and evaluation of EU law highly problematic and at the same time very important. Second, the shift towards a politicised Commission was caused by an increasing sense of crisis and emergency in the field of EU asylum policy, in particular after the situation of a high influx of migrants in 2015. The Commission wished to counter the image of uncontrolled migration and a failing European asylum system ([Costello 2018](#)) by proposing new legislation and ad hoc measures ([European Parliament 2016](#), p. 6). In this process, the Commission did not take time to evaluate and monitor existing EU legislation and policy.³⁴

In the next sections, we will demonstrate that the proposals for the integrated border procedure fail to address major shortcomings in the current EU border procedure. We focus on problems relating to access to the asylum procedure and pushbacks, the examination of asylum applications and detention.

4. Access to the Procedure and Pushbacks at External Borders

The GCR 'is grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement' with the Refugee Convention at its core.³⁵ Both the GCM and the GCR recognise the importance of border control, respectively recommending pre-screening of migrants and the registration and identification of refugees.³⁶ The GCR recognises that 'registration and identification of refugees is key for people concerned, as well as for States to know who has arrived'.³⁷ It specifies that it 'facilitates access to basic assistance and protection, including for those with specific needs'.³⁸

³³ European Parliament, Report on the implementation of Article 43 of 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 (2020/2047 (INI)), LIBE Committee, Erik Marquardt as rapporteur.

³⁴ Note that the Commission has proposed to enhance monitoring in the New Pact on Migration and Asylum. 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.

³⁵ GCR, para. 5.

³⁶ GCM, para. 27, GCR, para. 58.

³⁷ GCR, para. 58.

³⁸ See notes 27 above.

The principle of non-refoulement is protected by EU law,³⁹ which goes a step further than international refugee law by also protecting the right to asylum.⁴⁰ However, the Proposal for a Screening Regulation does not explicitly accord persons who wish to apply for asylum a right to remain, nor does it provide for material reception conditions during the period of screening, leaving compliance with fundamental rights during this period to the Member States.⁴¹ The Proposal thus seems to primarily serve security interests, leaving it to individual Member States to ensure ‘access to basic assistance and protection, including for those with specific needs’⁴² during this phase. This conclusion is supported by the fact that the provisions in the Proposal for a Screening Regulation on the outcome and the debriefing of the screening do not in any way refer to findings on special needs that may have emerged during the screening.⁴³ The choice to tailor EU legislation in such a way that it responds to (legitimate) security concerns while leaving it up to the Member States to ensure conformity with the human rights of migrants sits uneasily with the GCR, which holds that ‘security considerations and international protection are complementary’.⁴⁴ This is especially true in view of widespread problems that have been reported with regard to adequate material reception conditions at external borders in Europe, for example illustrated by (but by no means limited to) past experiences with the Greek refugee camps.⁴⁵

When it comes to timely access to the asylum procedure, some of the adaptations, which are foreseen by the Crisis Instrument, are equally in tension with the GCR’s insistence on conformity with international protection and applicable international law standards, also in ‘emergency and protracted situations’. The Crisis Instrument allows Member States to delay the registration of applications for international protection up to four weeks (instead of the usual three working days).⁴⁶ This derogation aims to ensure the ‘enforcement of procedures in situations of crisis, when specific adjustments are needed to allow the competent authorities under strain to exercise their tasks diligently and cope with significant workload’.⁴⁷ Such delays in registration would result in an extended duration of a stay at the external border, thus exacerbating some of the problems discussed above. Indeed, the Court of Justice of the EU has held that ‘effective, easy and rapid access to the procedure guarantees the protection of the fundamental rights of applicants’.⁴⁸

In the context of registration of protection claims, the GCR also calls attention to the need to ‘avoid protection gaps’ and the importance of ‘[enabling] all those in need of international protection to find and enjoy it’.⁴⁹ The GCR’s insistence on minimising protection gaps is relevant in the face of the numerous pushbacks which have been reported across a majority of EU Member States (EPRS 2021, pp. 28–29). However, when it comes to addressing these flagrant violations of international refugee law, the Pact provides remarkably little answers. Thus, the proposal for a Screening Regulation proposes that Member States set up a monitoring mechanism, which should cover ‘the respect of fundamental rights in relation to the screening, as well as the respect of the applicable national rules in the case of detention and compliance with the principle of non-refoulement’.⁵⁰

³⁹ Art 19 Charter of Fundamental Rights of the European Union (the Charter). See also Art 21 of Directive 2011/95/EU (Qualification Directive).

⁴⁰ Art 78 TFEU and 18 of the Charter.

⁴¹ COM(2020) 612 final.

⁴² See notes 37 above.

⁴³ COM(2020) 612 final, Art 13 and 14.

⁴⁴ GCR, para. 56.

⁴⁵ (EPRS 2020, pp 93–94, 206). See also ‘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’ (Fundamental Rights Agency 2019).

⁴⁶ COM(2020) 619 final, Article 6, by derogation from the four working days in Article 27 of the proposal for an amended Asylum Procedures Regulation (COM(2016) 467 final).

⁴⁷ COM(2020) 619 final, p. 3.

⁴⁸ CJEU Case C-808/18 *Commission v Hungary* [2020] paras. 102–6.

⁴⁹ GCR, para. 51.

⁵⁰ COM(2020) 612 final, p. 3.

It is unlikely that this monitoring mechanism would actually provide an adequate answer to pushbacks, seeing that it would not extend beyond the screening procedure, thus leaving out the effective monitoring of pushbacks that occur outside the context of any legal procedure. In addition, the mechanism which the Commission proposes is a *national* mechanism, while it has been argued that only an independent mechanism for ensuring compliance with non-refoulement would be effective (Dumbrava 2020; Stefan and Cortinovis 2020).

5. Quality of the Asylum Procedure including Identification of Persons with Special Needs

In order to implement the provisions of the Refugee Convention and guarantee the principle of non-refoulement, States should identify refugees in a status determination procedure (asylum procedure). International law leaves it to States to ‘establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure’.⁵¹ Nevertheless, UNHCR (UN High Commissioner for Refugees (UNHCR) (2020)) and international human rights treaty bodies have developed standards for national asylum procedures (Cantor 2015, pp. 79–106). As will be further explained below, on the EU level, the Procedures Directive has established a detailed set of standards for asylum procedures.⁵²

The GCR does not provide States with much guidance regarding asylum procedures. It just mentions that States have status determination mechanisms in place to avoid protection gaps and enable all those in need of international protection to find and enjoy it.⁵³ It makes clear that asylum procedures should be fair, efficient, adaptable and integer.⁵⁴

Border procedures have two distinctive characteristics which directly affect the asylum seeker’s ability to effectively participate in this procedure and the quality of decision-making: time limits are short, and the applicant remains in detention throughout the procedure. Short time limits may prevent asylum seekers from properly preparing and substantiating their asylum application and making use of their procedural rights. The fact that asylum seekers are detained limits their access to legal assistance and information and their ability to gather evidence in support of their case. There is an important tension between the factors time and detention in border procedures. Longer time limits may enhance the applicant’s ability to substantiate their case and make use of procedural rights, but they also prolong the applicant’s detention, which may have negative effects on their well-being.

It may therefore be argued that border procedures should only be applied to less complex cases or cases in which the asylum seeker is not cooperating with the authorities or poses a risk to public order or national security (EPRS 2020, p. 128). The current Procedures Directive allows Member States ‘in well-defined circumstances’ to examine the admissibility and/or substance of asylum applications in a border procedure, prior to a decision on an applicant’s entry to its territory.⁵⁵ Nevertheless, it provides 10 different grounds for application of the border procedure.⁵⁶ In practice, Member States do not limit the application of the border procedure to less complex cases. Some Member States automatically channel all asylum applications made at the border into the border procedure, irrespective of their merits or complexity (EPRS 2020, p. 71).

The Proposal for an amended Asylum Procedures Regulation extends rather than limits the application of border procedures. As was mentioned before, it even makes the

⁵¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 189. See also (Cantor 2015).

⁵² Directive 2013/32/EU.

⁵³ GCR, para. 61.

⁵⁴ GCR, paras. 61–62.

⁵⁵ Directive 2013/32/EU, Preamble Recital 38, affirmed by CJEU in Joined Cases C-924/19 PPU and C-925/19 PPU FMS [2020] para. 236.

⁵⁶ Directive 2013/32/EU, Art 31(8).

application of the border procedure mandatory in specific types of cases, such as cases of asylum applicants from countries of origin with a low recognition rate (less than 20%).⁵⁷ Vedsted-Hansen notes that ‘the totality of the procedural proposals seems to have the rather clear cognitive implication that many asylum seekers neither deserve nor need to undergo substantive examination in normal asylum procedures with the full scope of guarantees’ (Carrera and Geddes 2021, p. 177)⁵⁸.

Time limits for decision making in European border procedures (in the administrative and appeal phase) are often extremely short, sometimes no longer than a few days (EPRS 2020, p. 99). Due to these short time limits and the fact that they are detained, asylum seekers experience substantial problems accessing information and (free) legal assistance and contacting the outside world in order to collect evidence in support of their case (EPRS 2020, pp. 105 and 112). Sometimes, personal interviews are short or very long and/or take place remotely or in spaces where confidentiality is not guaranteed. It is likely that all these factors negatively affect the quality of the decisions taken in the border procedure.

The Commission has not substantiated how the Proposal for an amended Asylum Procedures Regulation contributes to the aim of establishing fair and efficient asylum procedures (Carrera and Geddes 2021, p. 172)⁵⁹. The proposal introduces a right to free legal assistance during both the administrative and appeal phase of the border procedure.⁶⁰ However, the Commission does not mention in its proposal how the existing practical hurdles for making use of this and other procedural rights will be overcome. Moreover, the proposal retains the wide discretion afforded to the Member States with regard to the applicable timeframe in border procedures, as no minimum time limits are set for different steps in the procedure.⁶¹

Moreover, the proposal does not comply with the GCR’s requirement to pay particular attention to persons with special needs.⁶² According to the GCR, states should have mechanisms ‘for identification, screening and referral of those with specific needs to appropriate and accessible processes and procedures’.⁶³ This entails that children are referred to best-interest determination procedures, that victims of human trafficking and other forms of exploitation receive victim care and stateless persons enter statelessness determination procedures. Moreover, this implies that asylum procedures should be adapted to the special needs of applicants.

In line with the GCR, the Procedures Directive obliges Member States to identify applicants with special needs and exclude them from the border procedure if no adequate support can be provided to them there. Nevertheless, many Member States do not have effective mechanisms in place for this purpose (EPRS 2020, p. 114). Moreover, several Member States apply border procedures to cases of (unaccompanied) minors (EPRS 2020, p. 116). The Proposal for an amended Asylum Procedures Regulation does not guarantee the identification of and support to asylum applicants with special needs. The border procedure can still be applied to minors of 12 years and older.⁶⁴ The Commission also has not explained how the problem of the lack of identification procedures for asylum seekers with special needs in existing border procedures will be solved.

⁵⁷ COM(2020) 611 final, Art 41(3).

⁵⁸ ‘Admissibility, Border Procedures and Safe Country Notions’ (Vedsted-Hansen 2020), in: (Carrera and Geddes 2021).

⁵⁹ COM(2020) 611 final, p. 5.; ‘Admissibility, Border Procedures and Safe Country Notions’ (Vedsted-Hansen 2020), in: (Carrera and Geddes 2021).

⁶⁰ COM(2016) 467 final, p. 47.

⁶¹ COM(2016) 467 final, p. 21 and p. 28.

⁶² This includes (unaccompanied and separated) children; women at risk; survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices; persons with medical needs or disabilities; those who are illiterate; adolescents and youth; and older persons.

⁶³ GCR, paras. 59–60.

⁶⁴ COM(2020) 611 final, pp. 11, 14–15, 17, 27.

6. Systematic and De Facto Detention

Both Compacts require that immigration detention be a measure of last resort and promote the development of alternatives for such detention.⁶⁵ This resonates with the protection of the right to liberty in international law, with the UN Human Rights Committee being of the opinion that ‘irregular entry on its own cannot justify detention’ (Tsourdi 2020, p. 172). In this section, we will argue that the normalisation of pre-entry procedures, which the Pact entails, makes compliance with the right to liberty as stipulated by the Compacts increasingly difficult, if not impossible.

In the first place, the Pact is not clear as to what extent the integrated border procedure entails the use of detention. The Proposal for a Screening Regulation leaves it up to individual Member States whether or not they use detention during the screening. The Proposal for an amended Asylum Procedures Regulation determines that the use of detention is regulated by EU law, but it leaves unanswered the question whether these procedures actually require detention. Instead, it seems to suggest that border procedures can be used without the use of detention.⁶⁶ This is striking, not in the least because the Commission has always been of the opinion that border procedures ‘imply detention’.⁶⁷ As applicants for asylum have a right to remain on the territory of the Member States, at least until they have received a decision on their application for international protection, securing non-entry will in most cases *require* the use of detention (International Commission of Jurists 2021).

By not making clear when and under what circumstances the fiction of non-entry requires detention, the integrated border procedure will not put an end to the existing situation in the EU, in which the qualification of a stay at the border differs considerably per Member State. Thus, a stay at the border in comparable circumstances may amount to detention in one Member State, while it does not in another Member State (EPRS 2020, pp. 81–84). This inevitably results in instances of de facto detention—the use of detention without a legal basis. Indeed, research has shown that in many Member States, a legal basis for practices that in actual fact amount to detention is lacking (EPRS 2020, pp. 81–84, 121, 132, 204–5). De facto detention is not reconcilable with the right to liberty and it ipso facto hinders the legal assessment whether it has been used as a last resort.

Research has also shown that currently, EU Member States as a rule do not assess whether less coercive measures than detention can be imposed.⁶⁸ General rules regarding alternatives to detention in the particular context of a border procedure are not provided for in the national laws of the Member States.⁶⁹ We have seen that the current proposals make the use of a border procedure mandatory in some cases, while they do not provide for mechanisms which assist in the identification of persons with special needs so as to exclude them from border procedures. The result is that the proposed integrated border procedure will likely exacerbate practices of systematic detention at the external borders of Europe (EPRS 2021, p. 96).

The requirement that detention be a measure of last resort also entails that detention cannot last longer than necessary. In this respect, the extension of the border procedure in times of crisis is especially worrisome, because persons can be held at external borders for a maximum of forty weeks plus ten days of screening. Seeing that in such situations, the asylum border procedure may be applied to persons coming from countries with an EU-wide recognition rate of 75% or lower, detention will affect a great many people who are fleeing persecution or war. The way in which the extension of the border procedure in the Crisis Instrument relates to the protection of the right to liberty is not explained by the Commission, but *prima facie*, it seems difficult to reconcile with the requirement that

⁶⁵ See notes 12 above.

⁶⁶ COM(2020) 611 final, Art 41(6) and (13).

⁶⁷ COM(2016) 467 final, p. 15 and COM(2013) 411 final, p. 4.

⁶⁸ *Ibid.*, pp. 89–90.

⁶⁹ See notes 27 above.

detention is to be a measure of last resort for which alternatives need to be considered (EPRS 2021, p. 97).

7. What Is the Potential Role of the Global Compacts in Improving the Situation?

This article has demonstrated that the integrated border procedure as proposed by the Commission in the Pact is *disproportionally* shaped to accommodate security concerns of the Member States. As is noted by UNHCR, ‘approaches to access to territory and asylum have increasingly been defined by deterrence policies [. . .] a surge in unilateralism by States, a gradual shrinking of the protection space for persons in need of international protection and an erosion of the institution of asylum’ (UNHCR 2021, p. 1). This is most pertinently illustrated by two characteristics of the integrated border procedure: the fact that its application becomes *mandatory* in a number of cases and the fact that it is built on the *fiction of non-entry*. However, the Commission’s implied claim that these characteristics contribute to achieving the aims of the integrated border procedure is not supported by evidence. The Commission failed to evaluate the existing EU legislation concerning border procedures and it omitted to carry out an impact assessment of the Pact.

It has been pointed out that the unbalanced insistence of the Pact on external border control, while leaving questions of solidarity largely to the discretion of the Member States, will entice continuing violations of international refugee law by States at the external borders of the EU (Radjenovic 2020). According to civil society, the fiction of non-entry in the EU proposals would allegedly obscure the relationship between the individual and the state, possibly even undermining the protection of non-refoulement.⁷⁰ This is confirmed by the large-scale human rights violations occurring at external borders, including pushbacks, summary asylum procedures and systematic detention.

The question is whether the Compacts can play a role in restoring the balance between on the one hand legitimate security concerns and on the other hand ‘the civilian and humanitarian character of international protection and applicable international law’.⁷¹ It is clear that the identified gaps in the fundamental rights protection of migrants can also be denounced with reference to the Charter of Fundamental Rights of the European Union and binding human rights treaties, such as the European Convention on Human Rights. However, apart from the intense regulatory complexity which is the result of the interface of EU law and international (soft) law, the very interplay between EU law and the Compacts may help to bring legal significance to a perspective, which has so far been lacking in EU immigration law and is lacking in the Pact. It is the perspective of *global solidarity*, the meaning and implications of which cannot be brought entirely under the scope of European protection of fundamental rights. Both Compacts call for a ‘a spirit of international solidarity and burden- and responsibility-sharing’.⁷² The GCR mentions that it ‘represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity *with refugees and affected host countries*’.⁷³

If, in the spirit of the Compacts, the Council, the Commission and the Member States would take the interest of global solidarity and responsibility sharing seriously, the binding force of resulting EU law would bring the implementation of the Global Compacts a significant step further (Guild et al. 2019, 2022)⁷⁴. The recent proposals of the European Parliament rapporteurs and UNHCR can assist them to do exactly that. Both the rappor-

⁷⁰ See, for example, ECRE, Comments on the Commission Proposal for a Screening Regulation COM(2020) 612 (2020).

⁷¹ See notes 44 above.

⁷² GCR, para. 53. See also GCR, paras. 4, 9 and 21 and GCM, paras. 14, 39 and 42.

⁷³ GCR, para. 4, emphasis added.

⁷⁴ Guild et al. (2019) argue that due to the friction between the application of human rights to everyone and the political sensitivities of certain states, the implementation of the Global Compacts depends upon partnerships with non-state actors. See also ‘The UN Global Compacts and the Common European Asylum System: Coherence or Friction?’ (Guild et al. 2022).

teur on the Proposal for a Screening Regulation⁷⁵ and UNHCR (UNHCR 2021, p. 1) have renounced the fiction of non-entry. Moreover, both the European Parliament rapporteur on the amended Proposal for an Asylum Regulation⁷⁶ and UNHCR⁷⁷ recommend limiting the application of the border procedure to less complex cases. This aligns with the Commission's earlier stance that border procedures should only be used in exceptional circumstances.⁷⁸ The Global Compacts may thus serve as advocacy tools in the continuing political negotiations and the legislative process to support the argument that the practices of containment which the Pact proposes through the integrated border procedure not only risk violating international and EU law, but ultimately do not establish a sustainable approach to the global governance of migration (Evan Easton-Calabria 2021, pp. 125–33).

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References

- Amnesty International. 2020. EU: Independent Monitoring Mechanism on EU Borders Must Ensure Fundamental Rights and Accountability. Available online: <https://www.amnesty.org/en/latest/news/2020/11/eu-independent-monitoring-mechanism-on-eu-borders-must-ensure-fundamental-rights-and-accountability/> (accessed on 11 April 2022).
- Baldwin-Edwards, Martin, Brad K. Blitz, and Heaven Crawley. 2019. The Politics of Evidence-Based Policy in Europe's "Migration" Crisis. *Journal of Ethnic and Migration Studies* 45: 2139. [CrossRef]
- Cantor, David Jame. 2015. Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence. *Refugee Survey Quarterly* 34: 79–106. [CrossRef]
- Carrera, Sergio. 2020. Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum. *CEPS Policy Insights* 22: 1–18.
- Carrera, Sergio, and Andrew Geddes. 2021. *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees*. Fiesole: European University Institute.
- Carrera, Sergio, and Roberto Cortinovis. 2019. *The EU's Role in Implementing the UN Global Compact on Refugees (CEPS 2019)*. Brussels: CEPS.
- Cornelisse, Galina, and Marcelle Reneman. 2021. Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality? *European Law Journal* 26: 181–98. [CrossRef]
- Costello, Cathryn. 2018. 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' *International Journal of Refugee Law* 30: 643. [CrossRef]
- Di Salvo, Mattia, and Mikkel Barslund. 2020. *Migration Policy Scoreboard: A Monitoring Mechanism for EU Asylum and Migration Policy*. Fiesole: Migration Policy Centre.
- Dumbrava, Costica. 2020. *Screening of Third-Country Nationals at the EU's External Borders*. Brussels: EPRS, European Parliament.
- EPRS. 2020. *Asylum Procedures at the Border, European Implementation Assessment*. Brussels: EPRS.
- EPRS. 2021. *The European Commission's New Pact on Migration and Asylum, Horizontal Substitute Impact Assessment*. Brussels: EPRS.
- European Commission. 2017. Commission Staff Working Document, Better Regulation Guidelines. SWD (2017) 350. July 7. Available online: [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2017\)350&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2017)350&lang=en) (accessed on 11 April 2022).
- European Parliament. 2016. *The Implementation of the Common European Asylum System*. Strasbourg: European Parliament.
- Evan Easton-Calabria. 2021. The Global Compact on Refugees and the EU's New Pact on Migration and Asylum: The Ripples of Responsibility-Sharing. In *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees, International Experiences on Containment and Mobility and their Impacts on Trust and Rights*. Edited by Sergio Carrera and Andrew Geddes. Fiesole: European University Institute.
- Fundamental Rights Agency. 2019. *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*. Vienna: Fundamental Rights Agency.

⁷⁵ 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) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020)0612—C9-0307/2020—2020/0278(COD)), p. 85.

⁷⁶ Draft Report on the implementation of Article 43 of 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 (2020/2047(INI)), pp. 6 and 10.

⁷⁷ UNHCR, EU Pact on Migration and Asylum, cit., pp. 3–4.

⁷⁸ See notes 67 above.

- Guild, Elspeth, Kathryn Allinson, and Nicolette Busuttill. 2022. The UN Global Compacts and the Common European Asylum System: Coherence or Friction? *Laws* 11: 35. [CrossRef]
- Guild, Elspeth, Tugba Basaran, and Kathryn Allinson. 2019. From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM). *International Migration* 57: 43–59. [CrossRef]
- International Commission of Jurists. 2021. *Detention in the EU Pact Proposals*. Briefing Paper. Geneva: International Commission of Jurists.
- Vedsted-Hansen, Jens. 2020. Admissibility, Border Procedures and Safe Country Notions. November 18. Available online: <https://www.asileproject.eu/admissibility-border-procedures-and-safe-country-notions/> (accessed on 11 April 2022).
- Kraly, Ellen Percy, and Bela Hovy. 2020. Data and research to inform global policy: The global compact for safe, orderly and regular migration. *Comparative Migration Studies* 8: 11. [CrossRef]
- Radjenovic, Anja. 2020. *Reforming Asylum and Migration Management*. Briefing, EU Legislation in Progress. Brussels: EPRS, European Parliamentary Research Service.
- Statement by Louise Arbour, Special Representative of the Secretary-General for International Migration. 2018. Marrakesh, December 11. Available online: <https://www.un.org/en/conf/migration/assets/pdf/Press-Briefing-11.12.2018-SRSG-Arbour.pdf> (accessed on 11 April 2022).
- Stefan, Marco, and Roberto Cortinovis. 2020. Setting the right priorities: Is the new Pact on Migration and Asylum addressing the issue of pushbacks at EU external borders? Forum on the new EU Pact on Migration and Asylum in light of the UN GCR, Asile Project. Available online: www.asileproject.eu (accessed on 11 April 2022).
- Tsourdi, Lilian. 2020. Alternatives to Immigration Detention in International and EU law'. In *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*. Edited by Madalina Moraru, Galina Cornelisse and Philippe De Bruycker. Bloomsbury: Bloomsbury Publishing.
- UN High Commissioner for Refugees (UNHCR). 2020. *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*. Geneva: UN High Commissioner for Refugees.
- UNHCR. 2021. *EU Pact on Migration and Asylum—Practical Considerations for Fair and Fast Border Procedures and Solidarity in the European Union*. Geneva: UNHCR.
- United Nations. 2018. *Global Compact on Refugees*. New York. Available online: <https://www.unhcr.org/5c658aed4> (accessed on 11 April 2022).