Parliamentary Assembly
Assemblée parlementaire
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 15438
10 January 2022

European Union Pact on Migration and Asylum: a human rights perspective

Report[1]
Committee on Migration, Refugees and Displaced Persons
Rapporteur: Mr Oleksii GONCHARENKO, Ukraine, European Conservatives Group and Democratic Alliance

Summary

The report welcomes the European Union's commitment to implementing European human rights fully into all its policies on migration and asylum. It supports the holistic approach to the management of irregular migration proposed in the EU Pact and the introduction of a crisis reaction mechanism strengthening solidarity provisions, which is extremely important in the current situation.

The report examines five most pressing human rights issues that arise from the perspective of the Council of Europe's human rights framework: screening, immigration detention and expulsion, asylum procedures, solidarity and vulnerable groups. It considers that the proposed Pact raises significant issues for the human rights protection of migrants and refugees.

The report recommends that EU member States agree to a mandatory relocation system, as a measure of solidarity with EU border countries, prioritising the cases of family reunion and unaccompanied migrant children. It also invites the European Union to amend the Pact's proposed Screening Regulation to ensure that it includes an effective suspensive remedy against incorrect screening categorisation, and to address the needs of persons in vulnerable situations by mainstreaming of disability, age and gender sensitive considerations, as well as health-related vulnerabilities and those affecting, victims of human trafficking and women victims of gender-based violence.

1. Reference to committee: Doc. 15181, Reference 4549 of 20 November 2020.

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A. Draft resolution[2]

1. On 23 September 2020, the European Commission issued a Communication on a New Pact on Migration and Asylum, introducing a number of proposals aimed at improving asylum and migration management procedures in Europe; in particular, an integrated procedure at external borders (pre-entry screening leading to an asylum procedure and/or a swift return decision), a common EU return system to improve expulsion procedures and a new obligatory solidarity mechanism. While the Pact's proposals are primarily addressed to the European Union and its 27 member States, its conceptualisation of regional migration governance is relevant to the wider membership of the Council of Europe.

2. The recent political crisis in Afghanistan and a State-sponsored increase of migration pressure at the European Union's border with Belarus has shown that an efficient reaction mechanism to migration and asylum challenges in Europe that is fully consistent with human rights obligations is urgently needed.

3. The Parliamentary Assembly welcomes the European Union's commitment to integrating European human rights standards fully into all its policies on migration and asylum and supports its efforts to put forward a "more human and more effective migration and asylum system". It supports the holistic approach to the management of irregular migration proposed in the EU Pact and the introduction of a crisis reaction mechanism strengthening solidarity provisions, which is extremely important in the current situation.

4. The Assembly reiterates the obligation of EU member States to implement existing EU migration- and asylum-related legislation, which remains applicable regardless of reform proposals, and encourages the European Union institutions to reach an agreement on the main legislative proposals of the EU Pact, while ensuring its compliance with the Council of Europe standards as they pertain to the Pact.

5. It also believes that the new asylum and migration management system will contribute to minimising the impact of the Covid pandemic in Europe by reducing the length of procedures and providing States with emergency funding to address Covid-19 in reception facilities and public hospitals. The EU Migration Preparedness and Crisis Blueprint could be an effective tool for information exchange between member States on the responses to the pandemic in Europe.

6. The Assembly strongly supports the proposal to facilitate more labour migration across different skill levels and to protect migrant labourers from exploitation. It encourages the European Union to increase legal pathways, in particular, for the EU's neighbourhood countries.

7. At the same time, the Assembly notes that the proposals included in the Pact are very complex and do not contribute to the clear understanding of the proposed management of the EU external borders, bringing concerns that proposed accelerated asylum procedures will reduce their quality and fairness, and thus lead to higher rejection rates and inability of asylum seekers and refugees to access the safeguards, such as adequate legal assistance and a fair and fast asylum procedure.

8. The Assembly considers that before the adoption of the Pact proposals, a comprehensive human rights assessment of compatibility of each measure with the case-law of the European Court of Human Rights needs to be undertaken by the European Commission.

9. The Assembly believes that special procedures for the protection of persons in vulnerable situations must address the needs of these persons and integrate the heightened duties of support that arise from human rights obligations. This includes the mainstreaming of disability, age and gender sensitive considerations, as well as health-related vulnerabilities and those affecting, victims of human trafficking and women victims of gender-based violence. This must happen throughout all migration and asylum processes, primarily through respect for provisions on vulnerability that are set out in EU legislation and associated jurisprudence.

10. The Assembly considers it is important to propose concrete recommendations to the governments of the European Union member States on how to make sure that European migration policy contributes to the development of European solidarity, economic prosperity, respect for human rights and protection of the well-being of all. Therefore, it recommends to:

10.1. amend the Pact's proposed Screening Regulation to ensure that it includes an effective suspensive remedy against incorrect screening categorisation, so as to fully respect the obligations arising out of the right to an effective remedy (Article 13 of the European Convention on Human Rights

2. Draft resolution adopted by the committee on 24 November 2021.

(STE No. 5)). The Regulation should also guarantee access to information, the rights of people undergoing the screening, including access to a lawyer and the right to challenge the decision, and also the privacy and protection of the data collected;

10.2. ensure that every asylum seeker at the EU border or within its jurisdiction has access to, and receives a fair and effective determination of the merits of their claim to international protection, in recognition of *non-refoulement* obligations. The legal fiction of "non-entry" should be removed to ensure that access to a fair procedure is guaranteed to all;

10.3. clarify the provisions relating to restrictions and deprivation of liberty, in particular during the screening procedure, to protect migrants and asylum seekers from unlawful detention and ensure conformity with the obligations flowing from the right to liberty (Article 5 of the European Convention on Human Rights), in line with the relevant case-law of the European Court of Human Rights. Explicit references should be included in the Pact's proposals to the use of detention only as a measure of last resort with clear references to the obligation to work towards alternatives to immigration detention and apply them. Asylum seekers and refugees should not be detained solely on immigration grounds;

10.4. ensure that all children under the age of eighteen are exempted from the proposed border procedures under the Pact, irrespective of age, in line with the principle of the best interests of the child and the obligations towards children, as outlined in the Convention on the Rights of the Child; similarly, all children (under the age of 18) should be exempt from detention;

10.5. agree on a mandatory relocation system as a measure of solidarity prioritising the cases of family reunion and unaccompanied migrant children;

10.6. reconsider the proposal to allow States to opt for "return sponsorship" instead of relocating people to their own territories as it raises serious human rights and legal concerns;

10.7. clarify in the Pact's proposal what concrete support must be made available to persons identified as being in a vulnerable situation, including comprehensive support that meets basic health and welfare needs addressing specific vulnerabilities. Reference to existing obligations on provision of special procedural and special reception guarantees for vulnerable persons is required;

10.8. make sure that a cross-cutting assessment of the impact of the proposals on women and girls, as well as boys, in a vulnerable situation is undertaken by the European Union, identifying the different impact of the proposals. Proposals to address inequalities found should be made;

10.9. conduct a cross-cutting review of the proposals to determine the compliance of provisions with obligations towards persons with disabilities, in line with obligations under the UN Convention on the Rights of Persons with Disabilities; in particular, the duty on States to provide reasonable accommodation to persons with disabilities should be explicitly included as an obligation;

10.10. introduce in national legislation special legal provisions prohibiting the criminalisation of non-governmental organisations or individuals carrying out search and rescue operations at sea or providing humanitarian or other forms of assistance to migrants, asylum seekers and refugees;

10.11. increase the capacity of search and rescue operations in the Mediterranean Sea and establish predictable disembarkation arrangements in ports of safety for rescued persons;

10.12. ensure that relevant non-governmental organisations working in the field of migration can provide information and legal assistance and take part in monitoring fundamental rights at borders. This entails the possibility for such organisations to be granted access to border areas and places of deprivation of liberty in order to provide humanitarian assistance and legal advice and assistance;

10.13. ensure that both the European Border and Coast Guard Agency (Frontex) and the new EU Agency for Asylum carry out their respective duties in full compliance with fundamental rights.

11. The Assembly also considers that the European Commission should continue to hold EU member States to account in their treatment of migrants, asylum seekers and refugees by fully exercising its powers under EU law to institute infringement procedures and other measures short of infringement such as monitoring, recommendations, provision and withdrawal of funding, whenever member States fail to fulfil their human rights obligations, including in relation to the prohibition of refoulement and violence against migrants, asylum seekers and refugees at the European Union's external borders.

12. The Assembly welcomes the proposal to establish independent monitoring mechanisms at the national level to investigate allegations of fundamental rights violations at borders. Taking into account the Council of Europe's competence in this field, the Assembly calls on Council of Europe member States to make sure that these national monitoring bodies are independent from national authorities, work on clearly defined mandates,

are accessible to migrants, asylum seekers and refugees and take into account and act upon relevant information provided by international organisations, non-governmental organisations, EU agencies and institutions. Furthermore, these monitoring mechanisms should have sufficient resources to exercise their functions and have a well-trained staff, prepare periodic and public reports with findings and conclusions, including steps to hold those responsible for violations of fundamental rights to account. It is highly important to enlarge the scope of the monitoring by these bodies to ensure that they can consider cross-border events and border control activities.

13. The Assembly encourages the European Commission to consider further supporting the development of co-operation programmes with the Council of Europe to ensure consistent knowledge-sharing among national monitoring bodies, in order to strengthen their contribution to the effective implementation of the European Convention on Human Rights and other relevant instruments.

B. Explanatory memorandum by Mr Oleksii Goncharenko, rapporteur[3]

1. Introduction

1. Recent years have witnessed intense debates around the European Union's policy on migration and asylum. The events of 2015, which saw an increase in the number of people seeking international protection within the European Union and the fragmented response by its member States in providing this protection, fuelled calls for a revised EU policy that would better address contemporary challenges. As the recent events in Afghanistan have illustrated, a significant number of refugees continue to need international protection in 2021, some of whom will potentially be hosted by European Union and Council of Europe member States. The urgency of a comprehensive approach to migration and asylum that is fully consistent with human rights obligations is manifested in the ongoing situation at the Lithuania-Belarus border.[4] These ongoing geopolitical tensions at the Eastern EU border also form part of the context which frames the development of the European Union's Pact on Migration and Asylum and the need for Council of Europe member States to engage with its development.

2. At the international level, in 2018, following a two-year process of inter-governmental negotiations to reach consensus on a contemporary approach to migration,[5] States – including most EU and Council of Europe member States – affirmed their commitment to upholding the human rights of migrants and refugees through the UN Global Compacts on Refugees (GCR) and for Safe, Orderly, and Regular Migration (GCM).[6] They pledged to protect, promote, and fulfil these obligations as they arise from pre-existing international and regional human rights treaties and reaffirmed their commitment to managing their borders in full compliance with their human rights obligations. The Compacts articulate the substantive scope and content of pre-existing human rights obligations and provide a migrant-specific dimension that acknowledges the specific challenges associated with migration. They are rooted in pre-existing human rights obligations – for refugees, as they arise through the UN Refugee Convention and for migrants, as they arise from the core UN human rights treaties and regional instruments. Their guiding principles include the principle of non-discrimination and the principle of non-regression.

3. The European External Action Service and the European Commission are fully engaged with the November 2020 regional review of the Compacts' implementation, providing a detailed report on EU implementation. This indicates the commitment of EU institutions to the achievement of the Compacts' goals. The Parliamentary Assembly has similarly embraced the Compacts and highlighted the role of international co-operation in their implementation, as instruments which seek the increased human rights protection of all migrants and refugees. It has called upon the national parliaments of all Council of Europe member States to take steps towards the Compacts' adoption and implementation in addition to proposing specific action through which the human rights of all people on the move are protected and promoted in line with international standards of human rights, democracy, and the rule of law.[7]

4. In September 2020, the European Commission published its proposal for a New Pact on Migration and Asylum ('the Pact'), in recognition of the fact that the European Union's current migration and asylum system 'no longer works' and that there is a need for 'common European solutions to a European challenge'.[8] The proposed Pact includes:

a. a communication on a New Pact on Migration and Asylum;[9]

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3. I would like to thank Prof. Elspeth Guild, Queen Mary University of London and Emeritus Professor, Radboud University (Netherlands) and Nicolette Busuttil, Doctoral Researcher (School of Law, Queen Mary University of London) and Visiting Lecturer in Refugee Law (Westminster Law School, University of Westminster) for their assistance in the preparation of this report.

4. Letter by Council of Europe Commissioner for Human Rights to Lithuanian PM: www.coe.int/en/web/commissioner/-/lithuania-safeguards-in-asylum-procedures-and-preventing-pushbacks-should-be-central-to-response-to-migration-challenges

5. UNGA, "The New York Declaration for Refugees and Migrants", UN A/RES/71/1, 19 September 2016.

6. Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018); Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018).

7. See the Assembly Resolution 2379 (2021) "Role of parliaments in implementing the United Nations global compacts for migrants and refugees", adopted on 28 May 2021.

8. European Commission, "A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity", Press Release 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

9. https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

b. a proposal for a regulation introducing screening of third country nationals at the external border ('Screening Regulation');

c. an amended proposal for a regulation establishing a common procedure for international protection;

d. a proposal for a regulation on asylum and migration management;

e. a recommendation on co-operation concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities;

f. an amended proposal for a Regulation on the establishment of Eurodac (comparison of biometric data);

g. a proposal for a regulation addressing situations of crisis and *force majeure* in the field of migration and asylum;

h. a Commission Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Blueprint);

i. a Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence;

j. a Commission Recommendation on legal pathways to protection in the European Union.

5. While the Pact's proposals are primarily addressed to the European Union and its 27 member States, its conceptualisation of regional migration governance is relevant to the wider membership of the Council of Europe. In addition to the shared borders with EU member States, the Council of Europe is rooted in respect for the human rights of all, including migrants and refugees in the European region. In the face of global challenges, including the impact of Covid-19, the Assembly has invited the European Union to promote solidarity among member States, preserve access to the asylum process and expand and improve regular migration pathways.[10] As the Council of Europe's Special Representative on Migration and Refugees' mandate highlights, the reality of refugees and migrants in the European region requires continued dialogue and assistance among States.[11] All 47 Council of Europe member States remain well-placed to co-operate and dialogue with the European Union on migration-related issues.[12] This co-operation can bear fruit in discussions on solidarity, including those relating to relocation, resettlement and migration governance mechanisms that are in full compliance with all relevant international and regional human rights standards. In this respect, the Council of Europe Commissioner for Human Rights communication to the European Commission outlined key areas of concern relating to the protection of the rights of migrants, including refugees and asylum seekers, and which include pushbacks and the denial of access to asylum in European Union and other Council of Europe member States.[13] It further outlined her willingness to work in partnership with the Commission to support efforts relating to solidarity and which include Council of Europe member States.

6. The Pact introduces an integrated procedure at external borders (pre-entry screening leading to an asylum procedure and/or a swift return decision). Special attention is paid to the treatment of vulnerable groups including migrant children. It also establishes a common EU return system to improve expulsion procedures and introduces a new obligatory solidarity mechanism. Although the Commission called for swift agreement by the EU 27 States to all the measures, as of September 2021, provisional agreement has been reached on only two measures: a revision of the Blue Card Directive on the admission of highly skilled workers (marginally widening legal pathways for regular migration) and the transformation of the European Asylum Support Office into a European Union Agency for Asylum with a reinforced mandate including capacity building in non-EU countries (many of which will be Council of Europe States). The core components of the Pact including the screening regulation, changes to common procedures, the management regulation (which contains the new "solidarity" mechanism for member State responsibility for asylum seekers) are far

10. Assembly Resolution 2340 (2020) "Humanitarian consequences of the Covid-19 pandemic for migrants and refugees".
11. https://rm.coe.int/mandate-of-the-secretary-general-s-special-representative-on-migration/16809ee0e1.
12. See, for example, the call for unity and solidarity in the fulfilment of human rights obligations in response to the pandemic by the Committee of Ministers at the 120th Athens Ministerial Session in November 2020, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a03445 and the decision adopted in May 2019 on the need to continue addressing the challenges arising from global migration (2019 Helsinki Ministerial Session).
13. Letter to Mr Schinas and Ms Johansson (March 2020), https://rm.coe.int/letter-to-mr-margaritis-schinas-vice-president-for-promoting-our-europ/16809cdcb4. See https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

from achieving consensus.[14] Member States are not convinced that the new solidarity mechanism is workable or desirable; States which consider themselves on the front line of arrivals are dissatisfied with the very complex proposals.[15]

7. The publication of the Pact generated significant commentary. Some international organisations welcomed the Pact as a "renewed opportunity to uphold human rights in migration governance".[16] The United Nations High Commissioner for Refugees (UNHCR) welcomed specific elements, including those relating to prompt identification of persons in need of protection, solidarity across the European Union, stronger support for vulnerable groups and children and the commitment to global responsibility sharing. In its recommendations to inform negotiations, UNHCR reaffirmed the role of existing legal obligations, including the right to asylum, as key norms that remain applicable regardless of certain elements within the proposals.[17] While cautiously endorsing certain elements of the Pact, most notably the proposal for an independent monitoring mechanism contained within the proposed screening regulation, a joint statement by leading international and national NGOs highlighted significant human rights concerns. Civil society welcomed the Pact's references to migration as positive for Europe and as a necessary reframing, given a landscape dominated, as the Assembly had previously noted, by particularly negative rhetoric surrounding migration.[18] Yet, civil society has concluded that this positive view of migration is not borne out by the proposals. Instead, these organisations note that "the Pact risks exacerbating the focus on externalisation, deterrence, containment and return".[19] The European Council on Refugees and Exiles' (ECRE) article-by-article analysis of the instruments illustrates the limitations of the Pact and their likely deleterious impact on levels of human rights protection.[20]

2. Relevant international standards

8. The international human rights law framework outlines the civil, political, social, economic, and cultural rights which accrue to every human being regardless of migration status.[21] Refugees are protected through a specific treaty – the UN Refugee Convention – which protects them from return to States where they are at risk of persecution because of who they are or what they believe in, and establishes their entitlements in a number of fields, including residence, education, and access to the labour market. Additional UN human rights treaties address the entitlements of specific groups, such as children, women and girls and persons with disabilities.[22] These reflect how States may have heightened obligations towards those in a position of vulnerability, including obligations of support, to ensure that their rights are practical and effective, rather than theoretical and illusory. These commitments have been fully reaffirmed in December 2018 by the adoption of the Global Compacts, which add three important obligations as regards the achievement of migrant and refugee rights: full adherence to human rights standards, full application of the principle of non-discrimination, and compliance with the rule of non-regression. Given this latter commitment, the Pact must be examined

14. See exchange of letters 1 June 2021 from the migration ministers of Germany, France, Belgium, Luxembourg, the Netherlands and Switzerland to the European Commission VP Schinas criticising the Greek Government for failure to comply with existing CEAS rules and the response of the Greek minister on 4 June 2021 to the same Commission V-P rejecting the criticism (on file with the author). See divergence among Member States on the Proposed Screening Regulation in the compilation of written comments on the proposal and the Portuguese Presidency's compromise proposal for discussion under the Slovenian Presidency (25 June 2021):
https://drive.google.com/file/d/14sYsv__HarYvwES3qz6tDrnOYgTKvBk-/view,
https://drive.google.com/file/d/1h_jzL8hoDvpcuuyTkL0H3HqGKDmOcyt4/view.

15. www.politico.eu/article/on-migration-pact-eu-may-finally-try-break-it-to-make-it-strategy/ 8 June 2021.

16. See, the joint statement by the Special Representative of the Secretary General on Migration and Refugees of the Council of Europe and the Regional Representative for Europe of the UN Human Rights Office (OHCHR), https://europe.ohchr.org/EN/Stories/Pages/JOINTSTATEMENT.aspx.

17. See, UNHCR's Recommendations for the Portuguese and Slovenian Presidencies of the Council of the European Union, January 2021, www.refworld.org/docid/5ff4799d4.html; UNHCR, Practical considerations for fair and fast border procedures and solidarity in the European Union, 15 October 2020, www.refworld.org/docid/5f8838974.html.

18. Assembly Resolution 2175 (2017) "Migration as an opportunity for European development".

19. www.amnesty.eu/wp-content/uploads/2020/10/NGO-Statement-Pact-Oct-2020-FINAL.pdf. On children, see also joint statement on Pact's impact on children's rights (December 2020): https://reliefweb.int/report/world/joint-statement-impact-pact-migration-and-asylum-children-migration.

20. www.ecre.org/ecre-publications/comments-papers/.

21. The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights.

22. UN Convention on the Rights of the Child, UN Convention on the Elimination of Discrimination against Women, UN Convention on the Rights of Persons with Disabilities.

also from the perspective of whether it will result in a diminution of migrants' and refugees' rights from the current position. If so, then its proposals are not compliant with the non-regression duty set forth in the Compacts.

9. In the European context, the European Court of Human Rights has repeatedly affirmed the European Convention on Human Rights (ETS No. 5) as an instrument which protects the human rights of migrants and refugees. In considering member States' treatment of this population, the Court reiterates the importance for States to exercise their migration and asylum policies in line with their human rights obligations and has condemned States' use of crises – whether financial or administrative – to justify non-compliance.[23] The judicial interpretation of the prohibition of *refoulement* cements its status as an absolute obligation on States not to expel individuals when this exposes them to a real risk of torture or inhuman or degrading treatment or punishment.[24] The Court has further highlighted the role of States in manufacturing and exacerbating migrants' and refugees' vulnerability by acknowledging how restrictive laws, policies and practices can prevent them from effective enjoyment of rights.[25]

10. EU law similarly provides that immigration control can only be exercised in compliance with fundamental rights obligations. The EU Charter of Fundamental Rights (EU Charter) enumerates the rights which bind EU member States when they act within the scope of EU law, including their treatment of migrants and refugees, and incorporates Convention rights. In the field of asylum, the Common European Asylum System (CEAS) is meant to be in full compliance with the Refugee Convention, the obligation of *non-refoulement*, and "other relevant treaties" within which the European Convention on Human Rights plays a critical role. The CEAS is framed by respect for fundamental rights, which include international human rights law obligations, particularly those arising from the Convention.[26] The CEAS establishes common standards in relation to eligibility for international protection and the content of such protection, the reception conditions for applicants for international protection, the allocation of responsibility among the EU member States for examining their applications and the procedures to be followed in their determination.[27]

11. Within this framework, the European Commission plays a specific role in promoting member States' compliance with the CEAS and human rights obligations. As the "guardian" of EU law, the Commission has the power to take legal action against member States in specific circumstances; it must do so if it considers that a member State has failed to fulfil an obligation under the EU Treaties.[28]In the face of widely-acknowledged implementation gaps between extant CEAS obligations and the situation in member States,[29]the Commission can institute infringement proceedings against the relevant member State.[30] This power has been exercised repeatedly in the field of migration and asylum.[31]It has led to the Court of Justice of the European Union (CJEU) ruling that certain national laws, policies, and practices are incompatible with member States' obligations towards refugees.[32] As such, even prior to the negotiation and adoption of the

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23. See, for example, M.S.S. v Belgium & Greece, App no 30696/09 (European Court of Human Rights 2011).
24. In international refugee law and international human rights law, non-refoulement outlines the prohibition on returning a person to a State where they have a well-founded fear of persecution on the grounds set out in the Refugee Convention or where there is a real risk that he or she will be subject to torture contrary to the UN Convention against Torture, enforced disappearance under the UN Convention against Enforced Disappearances, or cruel, inhuman or degrading treatment, as under the European Convention on Human Rights.
25. See MSS v. Belgium and Greece, op. cit.
26. See Article 6 of the Treaty on the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT.
27. The CEAS is a set of legislative instruments which includes the Qualification Directive, the Dublin III Regulation, the Reception Conditions Directive, the Asylum Procedures Directive, and the Eurodac Regulation. See https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.
28. See Articles 258 and 260 of the Treaty on the Functioning of the European Union; European Commission, 'Infringements: FAQs', https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_12; https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en
29. See, for example, ECRE, 'Asylum Information Database: AIDA' https://asylumineurope.org/reports/; Human Rights Watch 'European Union: Events of 2019', www.hrw.org/world-report/2020/country-chapters/european-union#.
30. ECRE, Making the CEAS Work, Starting Today, (2019), www.ecre.org/wp-content/uploads/2019/10/PN_22.pdf, 4.
31. European Commission, 'Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones': https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260; ECRE, 'Hungary: Facing Fifth Infringement Procedure Related to Asylum Since 2015' https://ecre.org/hungary-facing-fifth-infringement-procedure-related-to-asylum-since-2015/; https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure/2020-annual-report-monitoring-application-eu-law/migration-home-affairs_en
32. C-808/18, Commission v. Hungary, ECLI:EU:C:2020:1029

Pact's proposals, the Commission continues to play an important role in holding member States to account and ensure that refugees' and migrants' human rights are fulfilled through the implementation of existing fundamental rights obligations.

3. Main human rights concerns raised by the pact

12. This report examines five thematic areas in the light of the comprehensive human rights framework and considers that the proposed Pact raises significant issues for the human rights protection of migrants and refugees: screening, immigration detention and expulsion, asylum procedures, solidarity and vulnerable groups.

3.1. Screening

13. The proposal for a regulation introduces a screening stage for third country nationals arriving irregularly at the European Union's external border (and within the territory of the European Union where the person is unable to establish regular entry). It presents screening as 'a mere information-gathering stage which prolongs or complements the checks at the external border crossing point and which does not entail any decision affecting the rights of the person concerned'.[33] Accordingly, instead of an appeal right against incorrect screening, the proposal introduces an innovation to the CEAS – a duty on member States to establish an independent national monitoring mechanism to ensure compliance with fundamental rights. The monitoring mechanism has been cautiously welcomed by a number of actors, including international organisations[34] and others, with reservations about the scope of the mechanism.[35] The European Court of Human Rights has frequently had regard to the reports of independent monitoring mechanisms when considering the situation in a country where an allegation of a human rights abuse has taken place.[36] But it has also consistently held that the right to an effective remedy contained in Article 13 of the Convention must be respected and is a right belonging to the individual. Unless the monitoring mechanism has the attributes and powers of a tribunal or court, it will not be able to provide a remedy under Article 13 of the Convention.

14. Errors in screening can result in serious harm to the individual. For instance, a child who is incorrectly screened as being an adult may be placed in detention with adults and will not benefit from the additional safeguards and assistance applicable to children. If the child is unable to articulate clearly a claim to international protection, he or she may be streamed into an accelerated return procedure risking refoulement. Another example is that of an Afghan woman incorrectly screened as Pakistani, as she was born in an Afghan refugee camp in Pakistan (which does not confer Pakistani citizenship). She will be at risk of a truncated safe country of origin procedure because of the incorrect screening decision. Problems like these were widely encountered in 2015-2016 when the Commission directed Greece and Italy to set up Hot Spots where screening took place before access to a protection procedure. Academics have documented the extensive problems of inadequate and incorrect screening which occurred and the harm which the lack of an appeal caused individuals.[37]

3.2. Detention and expulsion

15. The likely increased use of immigration detention contemplated in the Pact is questionable in view of the right to liberty, which is protected across international and European human rights law and permits the deprivation of liberty for migrants only in narrowly circumscribed circumstances.[38] The deleterious effects of immigration detention are widely acknowledged. Detention significantly affects migrants' and refugees' enjoyment of other rights and has a documented impact on mental health.[39] It prejudices individuals' ability to access legal assistance, engage with immigration and asylum procedures, and exacerbates existing vulnerabilities.[40]

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33. 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), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A612%3AFIN, pages 12-13.

34. OHCHR, https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2596&LangID=E.

35. Study for the European Parliament's LIBE Committee The European Commission's Legislative Proposals in the New Pact on Migration and Asylum July 2021PE 697.130.

36. De Beco, Gauthier, ed. *Human rights monitoring mechanisms of the Council of Europe*. Routledge, 2012.

37. D'Angelo, Alessio. "Italy: the 'illegality factory'? Theory and practice of refugees' reception in Sicily", *Journal of Ethnic and Migration Studies* 45.12 (2019): 2213-2226.

38. For an overview of the Court's case law on Article 5, see www.echr.coe.int/documents/guide_art_5_eng.pdf; in the EU context, see C-924/19 PPU FMS ECLI:EU:C:2020:367.

16. Notwithstanding, immigration detention features at multiple points throughout the Pact whether implicitly or explicitly. This likely expansion of its use appears inconsistent with human rights obligations and diverges significantly from the trajectory under international human rights law to move towards the use of detention as a last resort. The lack of clarity around detention in the proposals risks normalising migrant detention and inverting its use from an exception into a norm.[41] Yet, as affirmed through the Global Compacts, the international community committed to reducing the use of immigration detention; detention should only be used as a last resort, with alternatives to detention pursued with diligence.

17. The concerns around the use of detention are evident in the pre-entry procedures contemplated in the Pact. While the proposed screening regulation does not explicitly sanction detention, its use is implicit throughout the procedure and, from a logistical perspective, it is likely that some form of detention – whether in law or in fact – will be used. The Horizontal Substitute Impact Assessment on the Proposals, commissioned by the European Parliament, concludes that "pre-entry procedures may involve the excessive use of detention".[42] For example, the proposal refers to the obligation on those in the screening process to "remain in the designated facilities throughout" (Article 9(1)(b)). For individuals channelled into an asylum border procedure, the amended proposal for an Asylum Procedures Regulation (APR) provides that these individuals must also remain at or in proximity to the external border or transit zones pending determination of their asylum application or their return (Article 41(13) APR).[43] Although these facilities are not defined, commentators highlight the "strong risk" of "de facto detention with detainees deprived of the safeguards that apply in formal detention regimes".[44] The risk of informal detention regimes that restrict the right to liberty and have cascading detrimental effects on the enjoyment of other rights looms large.

18. The use of detention is closely linked to expulsion. The European Commission's 2020 Communication highlights the importance of "an effective and common EU system for returns".[45] The Explanatory Memorandum to the Asylum Procedures Regulation proposal emphasises how a "seamless link between asylum and return procedures is therefore necessary to increase the overall efficiency and coherence of the asylum and migration system".[46] However, the design of an integrated asylum and return procedure that appears to subordinate States' obligations to provide protection and puts an emphasis on return, raises considerable fundamental rights challenges, including those related to the right to asylum (Article 18 of the EU Charter) and *non-refoulement* obligations (Article 3 of the Convention, Articles 4 and 19 of the EU Charter).

19. For example, the border return procedure envisaged under the APR Proposal applies to persons detained during the asylum border procedure who no longer have a right to remain and are not allowed to remain. These persons may continue to be detained for the purpose of preventing entry into the member State's territory, while preparing the return or carrying out the removal process (Article 41a (5)). Yet this provision does not provide clear, specific grounds for detention. Neither is there any reference to the use of detention as a last resort that follows a prior assessment of necessity and proportionality, which would reflect international and European law obligations. Similar issues arise in the use of detention in 'return sponsorship', which is one of the modalities of solidarity among member States proposed in the Pact. The proposal for a regulation on asylum and migration management foresees that those applicants may be detained for up to

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39. See, for example, von Werthern M, Robjant K, Chui Z, Schon R, Ottisova L, Mason C, Katona C., The impact of immigration detention on mental health: a systematic review. BMC Psychiatry. 2018 Dec 6;18(1):382, at: https://pubmed.ncbi.nlm.nih.gov/30522460/. Mary Bosworth, 'The impact of immigration detention on mental health: A literature review", Appendix 5 in S. Shaw, Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw, January 2016.

40. S Grant, "Immigration Detention: Some Issues on Inequality", (2011) 7 The Equal Rights Review, 69, at: www.corteidh.or.cr/tablas/r27135.pdf; JRS Europe, 'Becoming Vulnerable in Detention' (2011), at: https://jrseurope.org/wp-content/uploads/sites/19/2020/07/JRS-Europe_Becoming-Vulnerable-In-Detention_June-2010_PUBLIC.pdf.

41. The use of detention as a migration management tool where immigration detention is the norm rather than exception is already a significant issue in practice: ICRC, Policy Paper on Immigration Detention, April 2016; ICRC Second Comment on the Global Compact for Safe, Orderly and Regular Migration, July 2017, at: www.icrc.org/en/download/file/59882/icrc_second_comment_on_the_gcm.pdf.

42. www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU(2021)694210_EN.pdf, page 55.

43. Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2020/611 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:611:FIN.

44. See, ECRE's Policy Note #30, 'Screening Out Rights? Delays, Detention, Data Concerns and the EU's Proposal for a Pre-Entry Screening Process', page 3.

45. COM (2020) 609 final.

46. APR Proposal, page 3.

eight months. If return is not affected during this time-frame, then the individual is transferred to the responsible member State; however, there is still no clarity as to whether and for how long detention will continue following transfer.

3.3. Asylum procedures

20. Access to an asylum procedure is one of the most contested issues in the Pact.[47] It includes recommendations for more co-operation with third States to ensure that people do not arrive irregularly in the European Union (for instance, on small and unsafe boats). This is linked to the Pact's proposal to regulate private sector (NGO) search and rescue activities, which have come into existence following the failure of effective State activities in this area. The emphasis on preventing arrival seems to take priority over the right to *non-refoulement*. This includes the foreseen increased use of truncated asylum procedures, which raises serious concerns in relation to their compatibility with States' *non-refoulement* obligations. Accelerated procedures restrict applicants' ability to substantiate their claim to protection and adversely affect survivors of torture and persons with additional support needs who require careful consideration of their claims. The expanded use of derogations for the asylum procedure which dispense with key procedural safeguards in times of crisis are particularly problematic.

21. Among the most challenging issues for Council of Europe countries is the Pact's objective for the increased externalisation of asylum procedures. This means working with neighbouring countries to prevent asylum seekers from arriving in the European Union and remaining blocked in a neighbouring country, frequently a Council of Europe one. The problems attendant on this have been considered in an Assembly report in 2007.[48] At that time, the Assembly noted the negative human rights consequences of this externalisation, as revealed in the experiences of the USA in Guantanamo Bay, Cuba, and Australia in Papua New Guinea (and Nauru). In 2018, the Assembly noted that the reduction in the number of migrants entering Europe as a result of EU externalisation policies that involved third countries in migration management had been achieved at the expense of the rights of asylum seekers.[49] On 3 June 2021, the Danish Parliament voted to transfer their asylum seekers and to outsource its asylum applications for processing outside Denmark but to a destination yet to be determined.[50] Yet at the same time, Australia which has been an important architect and supporter of this off-shoring of asylum seekers (and the most criticised for this on human rights grounds)[51] is now reported to be about to abandon its scheme.[52]

22. The European Commission proposed changes to asylum procedures in 2016 which have not yet been agreed by its member States. The Pact includes amendments to that existing proposal to reinforce links between asylum procedures and the European return procedure (which includes border returns and returns under the Return Directive). All the proposals go in the direction of speeding up asylum procedures, tying them with return and limiting appeal rights. These have implications for *non-refoulement* and the correct application of Articles 3 and 13 of the Convention (the prohibition on return to torture, inhuman or degrading treatment or punishment and the right to an effective remedy). The justification for these changes which are all unfavourable for asylum seekers is that on average 370 000 asylum applications are rejected each year and these persons need to be transferred into return procedures (COM(2020)611, page 2). However, the European Union's statistical agency, Eurostat, notes that "in 2020, 521 000 first instance decisions on asylum applications were made in the European Union member States and a further 232 800 final decisions following an appeal or review. Decisions made at the first instance resulted in 211 800 persons being granted protection status, while a further 69 200 received protection status in appeal or review."[53] This means that, among those applicants recognised as needing international protection in the European Union, approximately a third had been rejected in first instance decision-making. Had they not had access to a procedure with a suspensive right of appeal they would have been returned to torture, inhuman or degrading treatment or

47. See, for example, UNHCR's comments on the implications of border procedures, www.refworld.org/pdfid/5f8838974.pdf.
48. Assembly Resolution 1569 (2007), "Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers".
49. Assembly Resolution 2228 (2018), Human rights impact of the "external dimension" of European Union asylum and migration policy: out of sight, out of rights?
50. www.euronews.com/2021/06/03/denmark-passes-a-law-to-send-its-asylum-seekers-outside-of-europe.
51. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E.Méndez A/HRC/28/68, 5 March 2015; UNHCR Note on the "Externalization" of International Protection, 28 May 2021, at: www.refworld.org/docid/60b115604.html.
52. www.politico.eu/article/doubts-australia-offshore-handling-refugees/ 21 June 2021.
53. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics#Number_of_asylum_applicants:_decrease_in_2020.

punishment contrary to EU *non-refoulement* obligations. In 2020, fair asylum procedures which carried suspensive appeal rights were a matter of life and death for almost 70 000 people in the European Union (almost a third of the total granted international protection).

23. Yet, it is these suspensive appeal rights which are being compromised in the Pact. Between the failure to provide an appeal right at all in the screening procedure and the truncated and accelerated asylum border procedures, access to a fair procedure has been placed in jeopardy, notwithstanding the Pact's statement that "all necessary safeguards are however in place to ensure that nobody falls in between the cracks and that the right to asylum is always guaranteed" (p 7) and that "the right to effective remedy is adequately ensured, as it is only in duly justified cases set out in this Regulation, where applications are likely to be unfounded, that an applicant should not have an automatic right to remain for the purpose of appeal" (p 12). As noted above, where appeal rights exist but carry no suspensive effect, the individual may be returned to the country from which they have claimed a well-founded fear of persecution or torture.

24. Further, a new ground for the application of accelerated procedures is proposed, which is based on the success rate of previous applicants from the same country (a 20% threshold). This proposed criterion has been heavily criticised by UNHCR as both arbitrary and unjust. It is arbitrary as recognition rates for asylum seekers from the same country vary dramatically across EU member States (for instance a 1% recognition rate for Syrian refugees in one State and a 95% rate in another), and it is unjust as it pins the chance of a fair and full asylum procedure on a statistical number relating to previous applications and not on the individual circumstances of the person seeking protection.

25. The numbers of people drowning in the Mediterranean while seeking to arrive in the European Union is also a matter of concern to the Pact, not least as many of these people, if given a chance, would seek international protection. The challenge of search, rescue, and disembarkation in the Eastern Mediterranean, in particular, has been a matter of substantial international concern. The Assembly has repeatedly decried the loss of life at sea by those migrants and refugees attempting to reach European shores. It has called upon European Union and Council of Europe member States to act in line with legal obligations and designated the rescue of those at risk as a precondition to implementing respect for human life and assistance to people in mortal danger.[54] While the Pact includes a new Recommendation (2020/1365) on co-operation among member States concerning operations carried out by vessels owned and operated by private entities for the purpose of search and rescue activities, there is no concrete action to prevent further deaths. Instead, the Recommendation links the valiant efforts of humanitarian actors to carry out search and rescue at sea where State authorities have abandoned their obligations in this regard to the fight against smuggling of migrants and criminal trafficking gangs. While the fight against smuggling and trafficking in human beings is an important Council of Europe objective, tarnishing the reputation of European humanitarian actors who risk their lives to carry out search and rescue at sea as complicit with such gangs is unworthy of a European institution. It is incumbent on EU States from a human rights perspective, consistent with case law of the European Court of Human Rights,[55] to establish State-run search and rescue operations, such as the Italian Mare Nostrum operation, which ran for a year starting in 2013.[56] Any suggestion that search and rescue could be carried out by the Libyan Coast Guard and that disembarking those rescued in Libya would be consistent with European or international human rights standards has been effectively countered by the UNHCR on the basis of the situation of migrants and refugees in Libya.[57]

26. The emphasis on preventing arrivals, prioritising return, and transferring asylum seekers across EU member States overlooks the other ways in which the Pact could have addressed the reality of a European space that contemplates complementary migration pathways. Economic migration into the European Union is a fact of life which sits uneasily with the EU legal *acquis* in its area of freedom, security and justice. In 2019, the EU member States issued almost 3 million first residence permits to migrants according to Eurostat.[58] Well over 1 million of these permits were for labour migration purposes, the majority issued by Polish authorities to Ukrainian nationals (over 750 000). Very few of these labour-related residence permits were issued on the basis of EU law; almost all had national law as the legal basis.[59] Thus, it is evident that there is an EU policy and legal gap between the realities of labour migration into the European Union and EU

54. Assembly Resolution 2305 (2019) "Saving lives in the Mediterranean: the need for an urgent response: Parliamentary Assembly", and Resolution 2229 (2018) "International obligations of Council of Europe member States to protect life at sea".
55. *Hirsi Jamaa and others v. Italy*, App No 27765/09 (European Court of Human Rights, 2012).
56. www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx.
57. www.unhcr.org/libya.html.
58. https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=456573.
59. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0193&qid=1620651019259&from=EN.

legislation on the subject. The latter is not fit for the purpose. Instead of continuing to adopt legislation which does not create pathways to regular migration in practice, the European Union should take a look at the Polish response to labour migration pressure from Ukraine and the practical and effective way this has been dealt with.

3.4. Solidarity

27. The proposed new Regulation on Asylum and Migration Management includes new mechanisms to improve solidarity among member States in the asylum and migration field. This seeks to replace the existing Dublin III Regulation that allocates responsibility for examining applications for protection among EU member States.[60] The solidarity mechanism only relates to asylum seekers and persons treated as irregularly present in the European Union and consists of two forms. The first is solidarity through relocation of persons from receiving States (the front-line States) to other States when there is pressure or a risk of pressure such that national asylum and return capacities of the formers are unable to cope. The second is return sponsorship where member States sponsor the expulsion of a person who is present in another member State (which is overburdened) with the assistance of Frontex, the EU Border Agency, or in default the relocation of the person to the sponsoring State for procedures to be completed. The most striking aspect of this proposal is its complexity. Efforts by the European Union so far to achieve relocation of asylum seekers from front line States to other States with fewer asylum seekers have been mainly unsuccessful.[61] The issue of relocation has been examined in more detail in the report of the Assembly on "Voluntary relocation of migrants in need of humanitarian protection and voluntary resettlement of refugees"[62]. This lack of success of State-initiated relocation projects for asylum seekers can undoubtedly be understood by the complexity of the measures put into place. In fact, it is asylum seekers who have "self-relocated" from front-line States where reception conditions are frequently inadequate to other States. In theory, under the Dublin III Regulation, this is not permitted, and asylum seekers should be sent back to the first member State of arrival. Yet, in practice, only about 3% of asylum seekers are ever subject to a Dublin return.[63]

28. The Pact contemplates return sponsorship as a form of solidarity, whereby a member State commits to returning irregular migrants with no right to stay in the European Union on behalf of another member State and to do so directly from the territory of the first member State. Again, the detail of this proposal is very complex with a long stop date; if the expulsion does not take place within eight months the individual would be physically transferred to the sponsoring State. The human rights issues which arise under this proposal are mainly of two kinds, the guarantee of *non-refoulement* and a right to a suspensive right of appeal for anyone claiming a protection need. Practically, the issue of expulsion from the European Union is anomalous. According to Frontex, in 2019 member States took a total of 289 190 return decisions.[64] In the same year they undertook 71 163 forced returns (there were also 67 656 voluntary returns). The gap between the two figures – making a return decision and its implementation – is consistent over the past five years at least. One of the questions which arises from legal academic research on returns is the quality of return decisions – to what extent are return decisions taken as a way for officials to close complicated files or fulfil quotas set by their superiors? Better institutional investment in the quality of return decisions could result in a narrowing of the gap much more effectively than creating a complex system where those officials taking return decisions are increasingly insulated from the consequences of poor decision making, which can result in refoulement.

29. These proposals illustrate the extent to which the issue of solidarity is seen as reserved for solidarity among EU member States, with limited consideration, if any, of solidarity towards those in need of international protection or other Council of Europe States. For instance, solidarity through the relocation mechanism fails to integrate any considerations for the applicant's personal preferences in the process, despite research that shows how integration prospects are significantly improved when an individual has a connection to the State of transfer (for example a shared language, cultural background, or family ties that go beyond those accepted as relevant for transfer purposes). It highlights the proposals' underlying conceptualisation of the migrant as a commodity who is to be negotiated upon and transferred at the behest of States without any consideration of personal preferences or involvement in the decisions affecting them. This denial of agency is one instance that creates and exacerbates vulnerability. It is likely to entrench pre-existing disadvantage and runs counter to the participative dimension of the Global Compacts which stress refugees' involvement in decisions affecting them. Although this by no means prescribes that the individual has the final

60. COM (2020) 610.
61. Guild et al, 'Enhancing the Common European Asylum System and Alternatives to Dublin, Study for the European Parliament, LIBE Committee, 2015' (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2640526
62. Doc. 15401, rapporteur: Lord Alexander Dundee (United Kingdom, EC/DA).
63. As per EASO statistics.
64. https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Annual_Risk_Analysis_2020.pdf

say on where they are relocated, it is not acceptable to have systems which do not accord any weight to their preferences. In the case of children, the UN Convention on the Rights of the Child establishes a key obligation whereby the child's views are integrated in all decisions affecting them and where States must adapt systems to ensure that this can be provided.

3.5. Vulnerable persons

30. The risk of fundamental rights violations arising from the Pact's proposals is likely to disproportionately affect persons in vulnerable situations. States have heightened obligations of support towards persons with specific needs, for example towards persons with disabilities to whom they owe duties of reasonable accommodation. Yet, the emphasis on the identification of "vulnerable persons" in the proposals is not explicitly tied to clear obligations of comprehensive support. For example, while it is welcome that timely and adequate support in view of physical and mental health should ensue from a finding of vulnerabilities indicators (Article 9(2) Screening Regulation), the content of the support to be provided is not defined. Neither does the Pact engage with the extent to which it is the procedure or legal framework that places migrants and refugees in a vulnerable situation. A failure to provide support to specific groups and the lack of an explicit obligation to provide reasonable accommodation risks implementation which runs counter to international and European obligations.

31. The Screening Regulation proposal refers to "vulnerability checks" within the screening process; these are meant to ensure the early identification of "persons with special needs" for the purposes of taking into account 'any special reception and procedural needs' in the relevant procedure' (Recital 9). Yet, as ECRE commentary has highlighted, the proposal provides that these checks are only carried out 'where relevant' in respect of those subject to screening at the external borders and who are undergoing medical screening to identify whether they 'are in a vulnerable situation, victims of torture or have special reception or procedural needs' (Article 9).[65] This formulation excludes those who are subject to the screening procedure but who were already in the EU member State, as well as the possibility of systemic vulnerability screening.

32. The same proposal links those persons identified through vulnerability checks to those considered vulnerable persons for the purpose of the Reception Conditions Directive (RCD). This list includes "disabled people, […] persons with serious illnesses, [and] persons with mental disorders" (Article 21 RCD). Yet, it is problematic that in referring to the standard of living to be guaranteed to these individuals, the instrument's preamble qualifies the reference to persons with disabilities to those 'persons with an immediately identifiable physical or mental disability, [and] persons visibly having suffered psychological trauma' (Recital 27). While it is understandable that the time-period foreseen for screening purposes is too short to identify complex forms of trauma or invisible disabilities, the categorisation among persons with disabilities stands out as inconsistent with obligations towards *all* persons with disabilities which do not admit of such distinctions, as are provided for in the Convention on the Rights of Persons with Disabilities (CRPD). It is concerning to see that where the proposals do refer to persons with disabilities, they adopt an approach that runs counter to the CRPD's inclusive approach towards all persons with disabilities, which is ratified by the European Union and all its member States.

33. Elements of the Pact, such as the likely expanded use of detention, risk placing individuals outside of the specified categories in situations that generate additional vulnerability. An example of ways in which the Pact can contribute to or create vulnerability is seen in the Asylum and Migration Management Regulation Proposal; Article 10 would limit the right to material conditions in the EU member State where the applicant is required to be present from the moment they are notified of a decision to transfer them to the responsible member State. As the Commission's explanatory memorandum thereto makes clear, this seeks to prevent "unauthorised movements".[66] This provision is meant to be applied without prejudice to the need for member States "to ensure a standard of living in accordance with EU law", that complies with European and international law obligations. Yet, the content of this fundamental rights-compliant standard of living is not elaborated on; the proposal does not set out the form or level of living standards which must be offered. This is compounded by the absence of a legal remedy through which individuals can challenge the living standards that might be offered in practice; in so doing, the proposal reverses earlier CJEU jurisprudence.[67] The attempt to overturn court judgements by legislative amendment is bad legislative practice that undermines the rule of law. Moreover, given considerable jurisprudence and documentation that member States routinely fail to provide reception conditions in line with existing fundamental rights obligations,[68] the absence of detail on

65. ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612 (November 2020) https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf, pages 8, 11, 29.
66. AMMR Proposal page 16.
67. C-179/11, Cimade & Gisti ECLI:EU:C:2012:594.

appropriate reception conditions appears likely to create and exacerbate violations. These include rights to dignity (Article 1 of the European Charter) and to freedom from inhuman and degrading treatment (Article 4 of the EU Charter, Article 3 of the Convention). Proposals such as this one run the risk of placing individuals in situations of precarity where they are unable to meet basic needs and lead a life in dignity, thus, creating vulnerability.

34. Additional hurdles to securing recognition of protection needs can also contribute to vulnerability. The creation of the screening process means an additional procedure that delays the individual's access to asylum procedures and risks delaying access to the entitlements that follow registration. Pursuant to the Reception Conditions Directive, EU member States must ensure that material reception conditions are available to applicants as soon as they apply for international protection (Article 17 RCD). Yet, the proposed Regulation is silent as to whether access to material reception conditions follow the individual's expression of a desire to be recognised as a beneficiary of international protection, which increases the likelihood of delays in access to basic rights.

35. The absence of any clarity as to whether asylum seekers in vulnerable situations are to be exempted from border procedures is problematic.[69] The emphasis on time-limits is likely to come at the expense of fundamental rights guarantees. Although time-limits in processing asylum applications are important to ensure the swift recognition of refugeehood and concomitant access to rights, truncated timelines are implicated in the misidentification of protection needs. While this is problematic for all applicants, it disproportionately affects those in vulnerable situations who require additional support to exercise their right to asylum, for example it is well-documented that survivors of torture and trauma can require longer timeframes to effectively participate in the asylum process. Similarly, refugees with claims based on sexual orientation can require longer timeframes to disclose their reasons for seeking protection. In the absence of concrete procedural guarantees that integrate the specificities of applicants who are already in a 'vulnerable' situation due to their status as asylum-seekers, shorter timelines which do not explicitly exempt those in need of additional support can exclude those they are meant to protect.

3.6. Children

36. At face value, the Pact appears to dedicate significant attention to vulnerable groups, with children being the primary beneficiaries. This attention aligns with the Assembly's consistent emphasis on the need to take concrete action to protect migrant children.[70] In the Global Compacts, States committed to addressing and reducing vulnerabilities in migration and to place the best interests of the child as a primary consideration whenever these are concerned. The GCM highlights this by promoting establishing "specialized procedures for their identification, referral, care and family reunification, and provid[ing] access to health care services, including mental health, education, legal assistance and the right to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian".[71] In the case of immigration detention, it means a commitment to "favouring community-based care arrangements …[and] work to end the practice of child detention in the context of international migration".[72]

37. Yet there appears to be a contradiction in terms between the Pact's recognition that EU member States are under an obligation to ensure that the best interests of the child are a primary consideration in all matters affecting them, and its proposed framework. It is laudable that the Pact acknowledges that the best interests principle must be a primary consideration in all procedures; this reflects established jurisprudence that children's vulnerability is heightened when they seek asylum.[73] Yet, this attention to the child's best interests is not always reflected in the proposed substantive provisions, as multiple civil society organisations focused on children's rights have highlighted.[74] Although unaccompanied children and those under the age of twelve who are accompanied by family members are generally exempted from border procedures (Article 41(3) and

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68. M.S.S. v Belgium and Greece, op. cit.; The CJEU has held that the transfer of individuals to Member States where they faced limited or no access to reception conditions constitutes a violation of the right of individuals to be free from torture, inhuman or degrading treatment. C-411-10 and C-493-10, Joined cases of N.S. v United Kingdom and M.E. v Ireland ECLI:EU:C:2011:865; C-163/17, Abubacarr Jawo v. Bundesrepublik Deutschland ECLI:EU:C:2019:218.
69. Article 19 of the 2016 Proposal for an Asylum Procedures Regulation and Article 49(9) of the 2020 APR Proposal.
70. See, for example Assembly Resolution 2324 (2020) and Recommendation 2172(2020) "Missing refugee and migrant children in Europe", and Resolution 2354 (2020) "Effective guardianship for unaccompanied and separated migrant children"; Committee of Ministers of Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration.
71. GCM, para 23.
72. GCM, para 29.
73. For example Mayeka and Mitunga v. Belgium, App No 13178/03, (European Court of Human Rights, 2006), para 55; Popov v. France, App Nos 39472/07 & 39474/07 (European Court of Human Rights, 2012), para 91.

41(5) APR), those over twelve years old are not.[75] Lowering protection standards for children over the age of twelve is inconsistent with the protection envisaged under Council of Europe standards, the UN Convention on the Rights of the Child and EU fundamental rights law. The Convention on the Rights of the Child does not categorise children's entitlement to rights according to their age. It defines a child as every person until the age of eighteen.[76] Yet, the proposals would permit a child above the age of twelve to be subjected to the border procedure, with all the risks that this entails.

38. This lowering of existing protection standards towards children is also seen through the proposal that generally the responsibility for an application for international protection lodged by an unaccompanied child without family members in another member State, lies with the first member State where they applied (Article 15 of the Asylum and Migration Management Regulation). The general provision provides for unaccompanied children to be transferred to the first member State in which they applied. This proposal reverses the current situation where responsibility for examining the claim lies with that member State where the child is present and last applied for protection. The Commission's explanatory statement notes that this rule allows this cohort to have "swift access to the procedure" and allows for a quick determination of the responsible member State, yet it is unclear how an additional transfer of the child in question would hasten rather than protract procedures.[77] Moreover, despite the presentation that transfer would generally not appear to conflict with the child's best interests, it bears highlighting that the extant provision in the Dublin III Regulation was codified following a CJEU judgment which reaffirmed that the best interests of a child must be a primary consideration in all decisions adopted by a member State and that this requires the member State where the child is present and last applied for asylum to examine that claim.[78] The current proposal risks minors being placed in a situation where they have to go through yet another procedure that delays their access to protection, creating an additional layer of complexity that leads to unnecessary delays and exacerbates vulnerabilities.

3.7. Gender mainstreaming

39. The proposals do not appear to mainstream gender considerations. This contrasts with commitments in the Global Compacts which call for the mainstreaming of the gender perspective throughout all migration policies and for gender-responsive procedures and services that address gender-related barriers.[79] The differential impact of the migration process on women is widely documented. Women on the move are often in situations of great vulnerability, as they are at higher risk of gender-based violence, including trafficking and exploitation. They are likelier to face poverty, limited access to basic services, and other situations of discrimination with the concomitant risk to their physical and mental well-being. Discrimination on the basis of gender identity and sexual orientation is also prevalent.[80] The Pact falls within those EU policies that must comply with the obligation to promote equality between the sexes (Articles 2 and 3(3) of the Treaty on the Functioning of the European Union) and the prohibition of discrimination on the basis of sex and sexual orientation set out in the EU Charter (Article 21 of the EU Charter). Its proposals must integrate gender-mainstreaming considerations to address existing inequalities and prevent the creation of additional ones. Since gender mainstreaming means incorporating a "gender equality perspective in all policies at all levels and at all stages, by the actors normally involved in policy-making",[81] these inequalities must be addressed from the outset. The Action Plan for Integration and Inclusion 2021-2027, which the European Commission released in November 2020, was welcomed for the extent to which it engages with the specific needs of migrant women,[82] not least by acknowledging the challenges arising from weaker social networks and greater childcare and family responsibilities.[83] Yet, in contrast, the Pact's proposals omit to engage in any depth with

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74. Joint statement on Pact's impact on children's rights (December 2020): https://reliefweb.int/report/world/joint-statement-impact-pact-migration-and-asylum-children-migration; International Commission of Jurists, www.icj.org/wp-content/uploads/2021/06/Detention-in-the-EU-Pact-proposals-briefing-2021-ENG.pdf, page 11.
75. "ECRE Comments on the Amended Proposal for an Asylum Procedures Regulation, COM(2020)611: Border Asylum Procedures and Border Return Procedures", https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM-2020-611-2-December-2020.pdf, page 13.
76. Article 1 of the Convention on the Rights of the Child. The CJEU confirms that obligations to take a child's best interest into account subsist towards all children under the age of 18, C-441/19, TQ.
77. Asylum and Migration Management Regulation Proposal, page 26.
78. C-648/11 MA, BT, DA, CJEU, 6th June 2013.
79. See, GCR, paras 74-75; GCM paras 15, 23. New York Declaration, paras 31, 60.
80. On gender and migration see, European Institute for Gender Equality, 'Sectoral Brief: Gender and Migration', https://eige.europa.eu/sites/default/files/documents/gender_and_migration_sectoral_brief.pdf.
81. www.coe.int/en/web/genderequality/what-is-gender-mainstreaming.
82. European Network of Migrant Women, "EU Migration & Asylum Pact Through the Eyes of a Woman", www.migrantwomennetwork.org/wp-content/uploads/MIGRATION-PACT-THROUGH-THE-EYES-OF-A-WOMAN.pdf
83. European Commission, COM(2020) 758, Action plan on Integration and Inclusion 2021-2027, https://ec.europa.eu/home-affairs/sites/default/files/pdf/action_plan_on_integration_and_inclusion_2021-2027.pdf.

the multiple and intersectional discrimination on the basis of sex and gender faced by migrants, refugees, and asylum seekers. Indeed, the references to women among the vulnerable persons foreseen in the proposals consist solely of references to pregnant women and single parents with children. This overlooks the vulnerable situations that women and all those subject to gender-based discrimination are placed in because of the proposals themselves. The failure in the Pact to assess, engage with, and address explicitly the impact of measures such as mandatory screening procedures, the increased use of detention and the enforced relocation on those who are already in vulnerable situations and excluded from equal and effective access to protection stands out as ripe for increased vulnerability to human rights violations.

4. Conclusions and recommendations

40. The European Union's commitment to implementing European human rights fully into all its policies on migration and asylum is to be welcomed. The proposed EU Pact on Migration and Asylum needs to reflect fully this objective, which the majority of EU States reaffirmed in 2018 on voting in favour of the UN Global Compacts for Refugees and Migration. Before commencing negotiation of the measures which form the Pact, a comprehensive human rights fitness test including a careful assessment of compatibility of each measure with the case law of the European Court of Human Rights needs to be undertaken. The Pact should provide an opportunity to promote co-operation and solidarity, where Council of Europe States can play a key role. The role of the European Union and its member States as champions of human rights protection in the region, in particular in respect of refugees and migrants, must not be undermined by proposals such as these.

a. The Pact's proposed Screening Regulation should be amended to include an effective suspensive remedy against incorrect screening categorisation, which fully respects the obligations arising out of the right to an effective remedy (Article 13 of the Convention).

b. The European Union must ensure that every asylum seeker at the EU border or within its jurisdiction receives a fair and effective determination of their claim to international protection, in recognition of *non-refoulement* obligations, and as identified by this Assembly. The legal fiction of non-entry must be dispensed with to ensure that access to a fair procedure is guaranteed to all.

c. Provisions relating to restrictions and deprivation of liberty must be precise, sufficiently clear and unambiguous to protect migrants and refugees from unlawful detention and to ensure conformity with the obligations flowing from the right to liberty (Article 5 of the Convention). The Pact's proposals should include explicit references to the use of detention as a last resort with clear references to the obligation to work towards alternatives to detention.

d. EU labour migration regulation urgently needs to be revisited to better reflect the realities of this kind of migration and to accommodate legitimate movement. The case of the Polish regulation of Ukrainian migrant workers can be used as a case study regarding the use of complementary pathways for migration into the European Union.

e. All children under the age of eighteen should be exempted from border procedures, irrespective of age, in line with the principle of the best interests of the child and the obligations towards children, as outlined in the Convention on the Rights of the Child and Assembly resolutions.

f. Special procedures for the protection of persons in vulnerable situations must address the needs of those persons and integrate the heightened duties of support that arise from human rights obligations. This includes the mainstreaming of disability-, age- and gender- sensitive considerations throughout all migration and asylum processes.

g. The Pact's proposals should clarify the support that must be made available to persons identified as being in a vulnerable situation. This should include comprehensive support that meets basic health and welfare needs and address specific vulnerabilities.

h. The European Union should undertake a cross-cutting assessment of the impact of the proposals on women and girls in a vulnerable situation. This must identify the differential impact of the proposals in light of pre-existing disadvantages and be accompanied by proposals to address these inequalities.

i. A cross-cutting review of the proposals must be conducted to determine the compliance of provisions with obligations towards persons with disabilities, in line with obligations under the UN Convention on the Rights of Persons with Disabilities. In particular, the duty on States to provide reasonable accommodation to persons with disabilities should be explicitly included as an obligation.

j. The European Commission should continue to hold EU member States to account in their treatment of migrants and refugees by fully exercising its powers under EU law to institute infringement procedures whenever member States fail to fulfil their human rights obligations.