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Ensuring human rights-compliant asylum procedures

Report[1]
Committee on Migration, Refugees and Displaced Persons
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Summary

Human rights-compliant asylum procedures are part of every member States' obligations according to international human rights law and to the European Convention on Human Rights (ETS no. 5). However, the management of the growing number of asylum seekers in Europe is today frequently characterised by the adoption of policy reforms gradually restricting the right to seek asylum and even the right to access the territory of asylum itself. The ostensible justification for this trend is seen in a wide-spreading narrative which seeks to balance State security against the obligations to respect human rights law, including non-derogable principles such as the principle of *non-refoulement*.

Based on a fact-based overview of the difficulties faced by those seeking to enter Europe for protection and safety, this report warns against the numerous human rights violations and erosions of the rule of law across the continent. While acknowledging the challenges faced by State authorities in ensuring a fair, individualised and effective examination of asylum claims, it includes recommendations addressed to the Council of Europe, its member States as well as to the European Union, aiming to support State authorities in recommitting to their human rights obligations and the rule of law.

1. Reference to the committee: Doc. 15601, Reference 4692 of 25 November 2022.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls and aligns with the position of the United Nations High Commissioner for Refugees (UNHCR) whereby the refugee definition is declaratory which means that a person is a refugee as soon as s/he fulfils the criteria contained in the definition and that principles foreseen by international refugee law should apply in all situations.

2. Article 3 of the European Convention on Human Rights (ETS No. 5, "the Convention") and Article 4 of its Protocol No. 4 (ETS No. 46) commit member States to making sure that they will not expose, positively or negatively, anyone falling under their jurisdiction to a risk of torture, or inhumane or degrading treatment. Only through a fair and effective individual examination of an asylum application can such obligation be met. In case of appeal, the remedy must be accompanied by the automatic suspensive effect of expulsion measures should the applicant complain of a risk under Articles 2 or 3 of the Convention. These safeguards are required for the appeal to be considered effective and in compliance with Article 13 of the Convention, as well as with the consistent case law of the European Court of Human Rights ("the Court").

3. The Assembly expresses its profound concern at the gradual erosion of the right to seek asylum as a reaction to the growing number of asylum applications in Europe, as well as to the instrumentalisation and exaggeration of the phenomenon of incoming migration, orchestrated for political purposes domestically or by certain external regimes as a means of exerting pressure on European countries for other purposes. It warns against this trend which, on the one hand, infringes on international human rights and European law and which thus eventually weakens the core principles of the rule of law and, on the other hand, leads to chaos and human suffering.

4. The Assembly reiterates the concerns already expressed in Resolution 2404 (2021) "Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus" in which it condemned "the growing tendency to restrict the right to seek asylum of persons crossing a border irregularly and any practice by member States of *refoulements* of migrants and asylum seekers to third countries, where international protection needs may not be guaranteed".

5. The Assembly recalls the reply by the Committee of Ministers to Recommendation 2161 (2019) "Pushback policies and practice in Council of Europe member States", in which the Committee of Ministers noted that "the right to seek asylum must be respected", in particular, "the right to an individual and fair examination" of asylum applications by the competent authorities" (Doc. 15088).

6. The Assembly highlights that asylum seekers may not be able to avail themselves of their right to seek asylum because of restriction or even blocking of access, disproportionally strict eligibility criteria or wide derogation rules, insufficient capacities and resources to process cases or dire reception conditions. It underlines that policies of deterrence have neither demonstrated their efficiency in enhancing domestic security nor strengthened the protection of civil liberties. Therefore, the Assembly calls on member States to avoid resorting to such policies.

7. The Assembly encourages member States to design accelerated procedures only if in full compliance with human rights standards, making use of already existing procedures such as the *prima facie* procedure. The Assembly reiterates the imperative that accelerated procedures do not result in lowering procedural safeguards, in accordance with the Court's case law. It recalls the commitments by the Committee of Ministers to ensure access to justice for asylum seekers, pursuant to Resolution No. 1 on access to justice for migrants and asylum seekers and to the Guidelines on human rights protection in the context of accelerated asylum procedures.

8. The Assembly reiterates that access to legal aid must be guaranteed. It encourages national parliaments to guarantee the professional independence of legal aid providers and ensure their high competence in line with the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law (CM(2021)36-add2final).

9. The Assembly recalls its Resolution 2461 (2022) and Recommendation 2238 (2022) "Safe third countries for asylum seekers", and welcomes the reply of the Committee of Ministers (Doc. 15874) informing the Assembly of its readiness to evaluate the need for and feasibility of updating Recommendation Rec(97)22

2. Draft resolution adopted unanimously by the committee on 29 May 2024.

to member States containing guidelines on the application of the safe third country concept. The Assembly is therefore looking forward to the results of this evaluation and updated guidelines on the safe third country concept.

10. The Assembly calls on national parliaments to review the alignment of national legislation with the case law of the European Court of Human Rights and with the above-mentioned documents adopted by the Committee of Ministers.

11. The Assembly calls on parliaments and governments of member States to significantly increase the availability of the resources necessary for the processing of asylum claims in a fast, fair and effective manner especially at the border, including through proper access to legal aid and effective remedy.

12. The Assembly notes the adoption of the European Union Pact on Migration and Asylum. It recalls its Resolution 2416 (2022) "European Union Pact on Migration and Asylum: a human rights perspective" and the remaining validity of the recommendations. In particular, the Assembly:

12.1. reiterates its deep concerns at the prospect of detention and *de facto* detention being systematised especially in the context of the newly established border procedures. It expresses its uncompromising opposition to the detention of children, whatever their age, and recalls that asylum seekers are not immigration detainees;

12.2. stresses the importance of frontloading human, infrastructural and technical resources to ensure that member States can deliver on their international human rights obligations to ensure effective access to the territory of asylum and to a fair and swift asylum procedure for all individuals across the European Union territory;

12.3. welcomes the initiative of establishing human rights border monitoring mechanisms and underlines that these mechanisms should be effective, independent, and work in co-ordination with the Council of Europe's monitoring bodies notably those referred to in paragraph 14.2, and with the UNHCR. These mechanisms should also take into consideration the Principles on the Protection and Promotion of the Ombudsman Institution ("the Venice Principles") adopted by the European Commission for Democracy through Law (Venise Commission) in 2019, and be in line with the recommendations of the European Union Agency for Fundamental Rights on "Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders" published in 2022;

12.4. welcomes the adoption of the Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, at European Union external and internal borders; and recommends that the Schengen evaluators are trained on the identification of people in need of international protection in line with Council of Europe standards and recommendations;

12.5. encourages the European Commission to ensure that the allocation of the European Union funding be conditioned on specific fundamental rights clauses. In particular, the Assembly underlines the importance of imposing such conditions in accessing European Union funding during preliminary, mid-term and reviewing evaluation. It recommends that such conditions involve criteria assessing the respect for effective access to procedural safeguards during asylum procedures as part of the "enabling conditions" pursuant to Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions.

13. The Assembly notes that the adoption of the European Union Pact will lead to a two-year period for evaluation of the situation in European Union member States with respect to the implementation of the new legislation in place. It also notes that the Pact entails components which involve external co-operation elements which will have an impact on non-European Union member States, many of which are members or partners of the Council of Europe.

14. With a view to ensuring coherence in the concrete materialisation of effective human rights safeguards forming guidance for the approach of member States of the Council of Europe, including European Union member States, the Assembly:

14.1. encourages the European Commission and European Union member States to make explicit reference to the Council of Europe's relevant standards and documents, including country reports and relevant case law of the European Court of Human Rights, both in their gap analyses and in the follow-up and assessment documents produced in the framework of the European Union Pact;

14.2. stresses that particular attention should be paid to the preventive mechanisms and monitoring tools falling under the remit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Group of Experts on Action against Trafficking in Human Beings, the Group of Experts on Action against Violence against Women and Domestic Violence and the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108);

14.3. calls on the above-mentioned monitoring bodies to pay specific attention to vulnerable persons with a migration background, including persons in need of international protection, as part of their monitoring activities;

14.4. invites the Special Representative of the Secretary General on Migration and Refugees (SRSG) to facilitate intergovernmental discussions, for instance through the Network of Focal Points on Migration, to design operational guidelines allowing for the concrete implementation of the European Union Pact according to Council of Europe standards, including with regard to aspects involving non-European Union member States such as external co-operation on asylum and the use of the safe country concept during asylum procedures.

15. The Assembly is convinced that the accession of the European Union to the European Convention on Human Rights will strengthen the regional approach to human rights. In this prospect, the Assembly takes note of the already fruitful co-operation between the European Union and the Council of Europe in the field of asylum and:

15.1. welcomes the reference made to the “Venice Principles” to guide the mandatory national monitoring mechanism to be established as part of the Screening Regulation;

15.2. invites member States of the Council of Europe represented in the management board of the European Union Agency for Asylum (EUAA) to promote operational guidelines with a view to ensuring coherence in the approach to and application of asylum procedures at European Union and Council of Europe levels;

15.3. invites the SRSG to contribute to enhancing such coherence as representative of the Council of Europe at the EUAA Consultative Forum.

B. Explanatory memorandum by Ms Stephanie Krisper, rapporteur

1. Introduction

1. In mid-2023, according to the United Nations High Commissioner for Refugees (UNHCR), the number of people in need of international protection in the world reached the record number of 47.5 million persons (110 million if counting internally displaced persons). Although most of those in need of international protection are not present in Europe (hosting about 12 million refugees and asylum seekers by the end of 2022 – representing approximately 1.7% of the more than 700 million citizens in Council of Europe member States), European countries have also witnessed a significant increase in the number of international protection seekers, recording in mid-2023 the largest number of new individual asylum applications since 2016.[3] In the wake of several international crises leading to phases of increased arrival of people claiming international protection in Europe,[4] and also linked to political trends across Europe, public and policy debates on asylum and migration have featured high on the political agenda in Europe since the 1990s.

2. A further element has been a trend towards what can be characterised as a form of blackmail from certain States towards Europe as regards migration movements. Concerns have also been expressed with respect to the “instrumentalisation of migration” at the border by some State authorities, which the Parliamentary Assembly condemned in Resolution 2404 (2021) “Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus.”

3. In the face of these developments, narratives by the shapers of public opinion claiming that the current asylum systems are failing in efficiency have gained strength. Hence, the justified need to review and refine outdated asylum legislation has in the last few years turned into a frequent questioning of the very pertinence of such frameworks, coupled with overt justification of an almost structural trend towards policy changes. This situation is characterised by member States increasingly speeding up asylum procedures and seeking externalisation of these procedures in co-operation with countries of transit, countries of first asylum or even countries in which the applicants have never set foot.

4. The number of cases brought before the European Court of Human Rights (hereafter “the Court”) over the past few years prove that several of these developments have put procedural rights at risk or are a breach of State parties’ obligations.[5] In this respect, a concerning trend is being witnessed whereby courts’ rulings, at national or European level, are increasingly portrayed by some State representatives as obstructing their States’ sovereignty to manage asylum and namely to decide on restricting human rights safeguards as regards access to, or during, asylum procedures.

5. In addition to being in violation of human rights, these deterrence policies have proven, in the past years, to lead to only more chaos, human suffering and lack of control. The constant narrative, over the past twenty years, that the asylum system is abused, and is inefficient, has turned the very issue of asylum – the protection of people fleeing persecution – into an obsession and a problem to be solved, as if the number of asylum seekers would simply decrease by restricting access to the territory and to the fundamental right to seek asylum.

6. The permanent state of emergency, dealing with a policy issue in a crisis mode for decades, is not only contradictory in terms (if this is permanent, then it cannot be deemed an emergency), but it is also misleading policy making. Conditioning domestic and border security upon more restrictive asylum policies places the obligation to protect asylum seekers below national security. This misrepresentation brings terrible consequences to human lives, and it is fuelling the misbelief across the general public that migrants, including those who have a need for international protection, are a problem, furthering xenophobia and racism.

7. National security and protection of human rights should be combined, neither hierarchised on a set of priorities nor conditioned upon one another. This is counter-intuitive and dangerous. It is used as a justification for constant policy reforms, placing strain on the entire administrative system and public officials who have to keep adjusting to new procedures, often entailing additional significant difficulties for applicants during the processing of their case during transition periods or when the rules suddenly change.[6]

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3. UNHCR (2023), “Mid-Year Trends 2023” and UNHCR (2022) “Global Trends Report 2022 especially Europe”.
4. UNHCR (2020), “The State of The World's Refugees 2000: Fifty Years of Humanitarian Action”, Chapter 7.
5. Council of Europe (2021), “Thematic Factsheet – Migration & Asylum”, Department for the Execution of Judgments of the European Court of Human Rights.
6. For example Denmark decided that all refugees would only be granted temporary status, “Danish research reveals strain on refugees since country's 'paradigm shift”, *The Local*, 13 March 2024.

8. These reforms are often nationally based, thus causing asylum seekers and asylum officers to bear the brunt of the lack of co-ordination between member States which fail to apply the standards provided for in the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol (hereunder "the Refugee Convention") in a harmonised fashion. Moreover, the lack of harmonised procedures across Europe, in States where resources devoted to asylum are uneven, is itself justification for additional reforms at a regional level, furthering the same counter-productive trend, and leading to avoidance strategies and even mistrust between States.[7]

9. Asylum policy reforms have often been argued from the angle of security issues. However, the link between asylum and security policy is artificially inflated, for example, by an overproportionate level of reporting on crimes committed by asylum seekers or refugees and by addressing this topic in a populist manner in the political discourse. Moreover, by deploying emergency mechanisms to counter the arrival of asylum seekers rather than enacting well-resourced and structural asylum policies, State authorities are favouring the emergence of diversion strategies and situations of despair on the side of asylum seekers. Further consequences are containment and management strategies where detention of adult and children asylum seekers becomes the norm, and where asylum seekers are viewed with suspicion.

10. Acknowledging this dramatic status quo, the present report aims to discuss the current practice and demonstrate, through a fact-based analysis, that human rights-compliant asylum procedures are an obligation that does not play against the interests of State authorities regarding order and security matters, but quite the contrary: a human rights-compliant approach to asylum procedures is a pragmatic approach that upholds the rule of law and therefore guarantees security and civil liberties for all.

11. In this context, the motion for resolution entitled "Ensuring human rights-compliant asylum procedures" (Doc. 15601) calls on the Assembly to "provide guidance to national parliaments on how to implement existing binding international standards so as to allow member States to determine the conditions of entry to their territory while protecting the human rights of those fleeing war, persecution, violence and the consequences of climate change". The report should also take due account of the following motions: "Transfer and resettlement of asylum seekers" (Doc. 15571) and "Externalising asylum increases the risk of undermining the system of international protection" (Doc. 15912).

12. It should be clarified that, irrespective of the very broad spectrum that the title of this report may cover, the report will focus on access to asylum procedures and their quality. This means compliance with the right to seek asylum, the principle of *non-refoulement* as a core principle deriving from the non-derogable prohibition of torture and, subsequently, procedural rights as anchored in Article 13 of the European Convention on Human Rights (ETS No. 5). The report will neither delve into compliance with civil, political, economic, cultural, and social rights nor enter into the specific aspects of the European Union Temporary Protection Directive as triggered for individuals fleeing the war of aggression launched by the Russian Federation against Ukraine since February 2022.

2. Legal obligations and international standards

13. Human rights-compliant asylum procedures are part of every member State's obligation deriving from international human rights law, in particular the Refugee Convention as well as the European Convention on Human Rights.

14. Under Article 33 of the Refugee Convention, refugees cannot be sent to a place where they may be persecuted. However, this convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is left to each member State to establish the procedure. This being said, member States must make sure that every person seeking asylum experiences a human rights-compliant procedure. That means first and foremost guaranteeing effective access to the asylum procedure.

15. The European Convention on Human Rights further obliges States to ensure the safety of the individuals under their jurisdiction through a number of negative and positive obligations deriving from its Articles 2 and 3 as well as from Article 4 of its Protocol No. 4 (ETS No. 46). Procedural aspects should be in line with Article 13 of the Convention on the right to an effective remedy. The right to legal aid is enshrined in Article 6(3)(c) of the Convention including free legal aid "where the interests of justice so require."

7. The walls being built inside Europe during the so-called "refugee crisis" in 2015 are one example that illustrates avoidance strategies and mistrust between States.

16. The Court has made it clear that "the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant" (*A.M v. The Netherlands*). It is also worth noting that the Court considers that in situations of deprivation of liberty, where people are refused entry to the territory, in "transit zones" or in any location where a "fiction of non-entry" is established in law, "the remedy by which the alleged Article 3 risk in the event of removal is being reviewed has to be particularly speedy in order to comply with the requirements of Article 13 taken in conjunction with Article 3 of the Convention" (case No. 39126/18, *E.H. v. France*).

17. Further, the obligation to respect human rights (Article 1 of the Convention) is involved if a jurisdictional link is established, which can be the case in extra-territorial situations. This was confirmed in the case of *HirsiJ amaa v. Italy* where asylum seekers were intercepted in the high seas by an Italian ship and sent back to Libya. The Court affirmed that States must make sure, through an individual examination, that people returned will not be exposed to a risk of being subjected to torture or to inhuman or degrading treatment or punishment, irrespective of the people explicitly expressing a fear of persecution.[8]

18. Access to the territory of asylum is also safeguarded in the Convention as clarified by the Court in cases referring to pushbacks and prevention of unauthorised entry in Greece, Hungary, Italy, Lithuania and Poland. Pursuant to obligations deriving from Article 3 and/ or Article 13 taken in conjunction with Article 3, member States cannot remove asylum seekers to a third country without examining their asylum claim on its merit (see for instance case No. 47287/15, *Ilias Ahmed v. Hungary*).

19. Importantly, the Court has already acknowledged the challenges which may derive from a high number of arrival of migrants and asylum seekers, while recalling the absolutely non-derogable character of Article 3 of the Convention: "The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of those States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision" (case No. 30696/09*, M.S.S. v. Belgium and Greece*).

3. Asylum in Europe: an overview based on facts

20. Asylum and migration and the associated policies have been in the last few years a very heated topic of debate which has been subject to political manipulation. As this report takes a solution-oriented approach, it is based on evidence that is available through several official sources of information, providing converging data on the reality of the matter, quantitatively and qualitatively. By consolidating these sources of data, the report delivers a solid basis of facts for consequential analysis.

21. To complement the data available through official statistics, a request for information was sent to the parliaments of members States and to the Assembly's partners for democracy and observer States through the European Centre for Parliamentary Research and Documentation (ECPRD). Responses were received from 35 countries – 34 members States and Canada – and from the European Parliamentary Research Service and I would like to convey my gratitude to those who have contributed. The main features are summarised below.

3.1. Most asylum seekers in Europe come from war-torn countries

22. Over the past years, the number of people seeking international protection has grown significantly, also in relation to the overall growth of the world population.[9] As a consequence, the number of decisions made by the asylum administrations has also been on the rise.[10] In this context, it should be noted that the number of decisions and applications should not be equated with the number of persons who submit an asylum application, as the same person can submit several applications due to secondary movements and several decisions can therefore affect one person.

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8. Based on the interpretation of obligations deriving from Article 4 of Protocol No. 4 to the Convention and of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4 to the Convention, the Court found violations of Article 4 of Protocol No. 4 to the Convention and of Article 13 of the Convention taken in conjunction with Article 3 and Article 4 of Protocol No. 4 to the Convention. Reference to the relevant case law can be found in the guides on the case law of the European Convention on Human Rights on immigration and on prohibition of torture.
9. UNHCR (2023), op. cit.
10. Some member States, such as Türkiye which is one of the major countries of first asylum in Europe, have not shared information on this item; the figures should therefore be considered as underestimated.

23. In 2022, there were at least 5 099 936 decisions made on asylum in first and in second instance across 34 member States, which is four times higher than in 2017 when at least 1 243 292 decisions were made in the first and second instance. In 2022, the vast majority of decisions were made in favour of temporary protection (84.2%), and less than 9% of the cases were rejected or declared inadmissible. In 2017, 44% of the claims were granted a form of international protection.

24. National statistics indicate that the majority of people seeking asylum on European soil are recognised as being in need of international protection. The top five countries of origin were: Afghanistan, Syria, Iraq, Russia, and Türkiye in 2022; Afghanistan, Syria, Türkiye, Iraq, and Morocco in 2023, although it is clear that Ukraine is by far the most frequently represented country of origin, with more than 4 million temporary protection status granted in 2022 and more than one million in 2023.[11] This information confirms that most persons seeking for protection in Europe originate from war-torn countries: Ukraine, Syria, and Afghanistan.

25. According to Eurostat, the protection rate in the first instance reached 53% in 2023 among EU members, with one third of the cases rejected in the first instance being overturned by higher instances. The highest number of positive decisions were received, according to the ECPRD results, by millions of individuals fleeing the Russian war of aggression against Ukraine.

3.2. Asylum lottery

26. On European soil, an international protection seeker faces an "asylum lottery", as illustrated by the recognition rate discrepancies across Europe. Taking the example of international protection seekers from Afghanistan in Europe in 2022, recognition rates varied between 8% in Austria and 100% in Norway, despite the UNHCR maintaining that conditions in Afghanistan are not met to allow for a safe and durable return and despite the guidelines shared by the European Union Agency for Asylum.[12]

27. According to information shared by member States through the ECPRD platform, some clear discrepancies can be found when desegregating the number of asylum requests and the number of asylum decisions in the first instance by nationality. This is confirmed by statistics available on the official websites of the national asylum authorities and UNHCR which I am using in the below examples.

28. In 2022, the recognition rate of Russian nationals varied widely across member States: 8.1% in Finland to 33.8% in Austria. The same applied to asylum seekers from Sudan whose recognition rate varied from 1% in Malta to 75% in Poland. As the situation deteriorated severely in Sudan in 2023, so did the recognition rate across member States where information was available: 14.4% in Austria, and 28% in Finland, and this is despite UNHCR advising against the return of Sudanese as of May 2023.[13]

29. Deficiencies in decision making are also proven by the success rate of appeals. For instance, in Austria, about 50% of first instance rejected cases were overturned in second instances. This highly critical situation correlates with the length of asylum procedures. Discrepancies suggest that each member State seems to position itself differently according to some countries of origin of asylum seekers. The list of countries considered as safe countries of origin is another illustration of there being consequences for the procedural safeguards for applicants.

3.3. Heterogeneous policies on legal aid across Europe

30. Besides the "asylum lottery", asylum seekers in Europe are also faced with a heterogenic situation on legal aid – which leaves them in an even more arbitrary situation. Some countries have free legal aid provided by the State authorities throughout the whole procedure or in the second instance only, and remuneration levels are very different.[14] In other countries, legal aid is provided by non-governmental actors, sometimes as the only resource available to support asylum seekers legally -[15] with corresponding limits in resources and quality.[16]

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11. Eurostat, "Decisions granting temporary protection by citizenship, age and sex – annual aggregated data", last accessed on 24 April 2024.
12. UNHCR (2022), "Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I)" and EUAA (2023), "Afghanistan – Country Focus, Country of Origin Information Report".
13. UNHCR, "Position on returns to Sudan (May 2023)" – Sudan.
14. Lawyers defending asylum cases may be less paid compared to other law domains receiving more of the budget, and sometimes unevenly across local Bars in the same country; this is for example the case in Andalucía and on the Canary Islands, where asylum cases are less remunerated for legal aid providers than in other parts of the country. In Austria,

31. As to the independence of legal aid, problems have arisen, for example, in Finland because legal aid providers for asylum cases are selected and contracted through a public procurement by the Migration Department.[17] This leads to a situation whereby the same institution that decides on the legal claims is also "the one selecting and paying the lawyers expected to challenge its own decisions".[18]

32. There is no access to an effective remedy at all stages of the appeals procedure across member States and several national legislations are in contradiction with the European Court of Human Rights' positioning according to which "[t]he mere possibility of requesting suspensive effect or a remedy which has such effect "in practice" only is not sufficient".[19] Manifestly unfounded cases or cases of asylum seekers considered as coming from a safe country of origin are usually excluded from or restricted in a suspensive appeal.[20]

3.4. Lack of data coherence

33. I would like to express my appreciation for all the contributions received to the ECPRD request: compiling such information is a particularly time-consuming exercise and I am grateful for the time dedicated by the secretariats in the various parliaments and for their trust in sharing this information. The responses provide rich information on a series of challenges, not least on the need for more systematic and structured data collection in some areas as mentioned above, but also in respect of the basic care services provided to asylum seekers (it is telling that no response was provided). The absence of clear information on this last subject matter is problematic and brings also further into question the basis for the growing sentiment, often relayed by political leaders, that asylum seekers are a burden to public resources and are abusing the reception system.

34. The lack of transparency in obtaining certain data on asylum, with the exception of course of the necessary restrictions on personal data, makes it more difficult for public scrutiny to evaluate policies in this area and hinders a fact-based public debate on the topic of asylum and migration. Where data was received, the lack of coherence between member States when consolidating data was another challenge: a regional overview of the situation is difficult because, as the responses collected through the ECPRD platform proved, methodologies of data collection are different.[21] Very much to the detriment of comparability, temporary protection holders – such as Ukrainians (in the case of Poland or Luxembourg) or Syrians (in the case of Türkiye) – are not necessarily counted in the number of international protection seekers. It is worth mentioning here that as the number of individuals gaining protection on the basis of the European Union Temporary Protection Directive due to the war of aggression launched by the Russian Federation against Ukraine in February 2022 is very high, it can be concluded that the much-praised management by European countries of access to international protection for Ukrainians demonstrates that it is possible to cope with sudden high numbers of arrivals of people in need of protection – despite all the claims and narratives in preceding years that the systems were overburdened and unable to withstand further pressure.

3.5. Common challenges: secondary movement and return

35. Among international protection seekers, secondary movements can be surmised via the number of asylum cases withdrawn. In 2022, based on the information shared by 35 member States through the ECPRD platform, 130 564 cases have been withdrawn. Whenever withdrawals are segregated between explicit and implicit (usually considered in cases where persons have not attended an asylum interview or have failed to

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attorneys appointed for legal aid will get no direct remuneration if the case is lost in the last instance: it is the government that will pay a flat rate of compensation to the local Bar, which partly funds the retirement pensions of the lawyers. Information shared by Council of Bars and Law Societies of Europe (CCBE) by email on 14 March 2024.

15. ECRE/ ELENA (2017), "Legal note on access to legal aid in Europe3 and Council of Bars and Law Societies of Europe, (2022), "CCBE recommendations on a framework on legal aid in the field of migration and international protection".

16. CCBE (2018), "Recommendations on legal aid".

17. Legal aid in other civil law or criminal law domains is managed by an independent institution falling under the authority of the Ministry of Justice.

18. Amnesty International (2022), "Lithuania: forced out or locked up. Refugees and migrants abused and abandoned".

19. Council of Europe/European Court of Human Rights (2016), "CourTalks on asylum".

20. In the Netherlands, the rejected asylum seeker may request a provisional measure which, if granted, may have a suspensive effect. In such cases, in the UK or in Lithuania, remedies are not automatically suspensive, whereas in Sweden, the appeal has an automatic suspensive effect unless the Migration Court decides otherwise.

21. When asked about the number of registered applications for international protection, heterogenic data was transmitted: some member States explicitly distinguish between the number of registered cases and the number of registered persons. Some statistics count in the number of applications for resettlement or the number of relocations from EU countries in the framework of the EU relocation mechanism but not all.

inform about a change of address), the latter largely supersedes the former for the year considered (30 out of 32 responding member States): it makes up almost 90% of the cases.[22] In any case, these numbers evidently lead to a statistical bias, in that a person who applies for asylum in different countries is recounted several times.

36. In this context, it can be assumed that denial of access to asylum procedures, as well as slow asylum procedures *per se*, motivate protection seekers to move on, searching for security and perspectives elsewhere. In fact, at the EU level, public spending on border management and the budgetary resources of the Frontex agency have increased significantly over recent years, while relatively few resources have been allocated to enhancing the quality and effectiveness of asylum procedures. However, for the objective of increasing order and security, it would be equally important to allocate resources to border controls and registration of third country nationals on the one hand, and fair and effective asylum procedures and humane reception conditions on the other.

37. Another element emerging from the answers to the questionnaire sent is the lack of information regarding the number of return decisions issued after the rejection of an asylum claim, as well as the number of returns having actually been carried out. This is surprising considering that policy debates and narratives often whirl around the obstacles faced, or conversely the success, in returning rejected international protection seekers.

4. Current human rights violations and concerns

4.1. Restricted access to the territory of asylum

38. Even though Article 31 of the Refugee Convention provides for the non-criminalisation of unauthorised entry by people in need of international protection, border management has increasingly resulted in preventing people from accessing a territory of asylum, with the UNHCR noting that, “[a]s a result, [it] observed numerous violations of the principle of *non-refoulement*, including through arbitrary expulsions and violent pushbacks at sea or redirections at frontiers”.[23]

39. Blocking access to the territory of asylum has taken various forms. Pushbacks have been a common practice for over 15 years, as documented in the Assembly’s latest report on the matter, and as evidenced by several civil society and equality bodies.[24] In early 2023, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) noted an increase in informal practices of *refoulement* at land and sea borders in several European countries.[25]

40. In some member States, denying access to the territory of asylum is systematic and institutionalised. In Hungary for instance, the authorities have decided that an asylum claim could only be examined in a Hungarian embassy. The policy excludes any other possibility to lodge an asylum claim on Hungarian soil. Moreover, an asylum request filed by a person originating from a country deemed as safe is automatically declared inadmissible. These rules were considered, when challenged before the Court, as “effectively deny[ing] asylum seekers the right to access a fair and efficient asylum procedure.”[26] Such so-called deterrence policies are on the rise, and growingly challenged before national courts and before the Court. By way of example, in 2022, the amendments passed by the Polish Government to the existing legislation aiming to allow for the immediate rejection of an asylum application if a person was crossing the border unauthorised were considered in violation of the Polish Constitution.[27]

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22. It is worth noting that most information was shared by countries part of the Dublin Regulation and Eurodac.
23. UNHCR (2022), op.cit.
24. See for example the webpage by the European Network of National Human Rights Institutions (ENNHRI), providing resources on Human rights and accountability at borders – Practices of National Human Rights Institutions in Europe, Testimonies of Pushback Violence at European Borders documented by the Border Violence Monitoring Network, and HRW (2009) “Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asyl,um Seekers”.
25. CPT (2023), “32nd General Report of the European Committee for the Prevention of Tortureand Inhuman or Degrading Treatment or Punishment”.
26. UNHCR (2022), “Amicus Curiae, Recommendations concerning the execution of the judgments of the European Court of Human Rights in the cases of Ilias and Ahmed v. Hungary (Application No. 47287/15; Grand Chamber judgment of 21 November 2019) and Shahzad v. Hungary (Application No. 12625/17; Judgment of 8 July 2021)”.
27. Reference cited in the Asylum Report 2023 by the EUAA.

41. On the other hand, it may be noted that legal and safe pathways to protection remain very limited. For example, procedures for family reunification can take a very long time in some States and cannot be appealed against or challenged. As regards resettlement, quotas remain critically low. The data provided via the ECPRD platform outlined that only 12 out of the 35 countries have provided international protection through resettlement over the past years. In 2022 in Europe, resettlement decisions accounted for only 0.5% of the total decisions in asylum procedures – despite the paradigm that providing legal pathways for international protection seekers is the most efficient way to reduce suffering and deaths along migration routes as well as irregular migration and organised crime related to the smuggling of people.

4.2. Obstacles to accessing the procedures on the territory of asylum

42. Despite some good, albeit rare, practices at the border or even in centres and camps including the use of cultural mediators to provide support and interpretation services, many international protection seekers have been hampered from effective access to an asylum procedure – including when finally physically reaching a territory of asylum on European soil – whether through informal or formal channels. One of the biggest problems in asylum reception camps and detention centres visited throughout Europe remains, according to the CPT, the lack of information for individuals about their situation and about the procedures and timelines that lie ahead. As explained by the CPT, decisions on their asylum claims are not usually provided in a language or form applicants can understand.[28] In this context, little visibility has been given to some of the good practices or recommendations provided to help improve access to asylum in a fair manner.

43. While States have introduced policies with more stringent conditions to access an asylum procedure and complexified their asylum systems with different categories of international protection schemes – and *de facto* unequal procedural rights, it remains to be assessed whether these policies are helpful for administrations in fulfilling the procedural obligations which they are legally bound by. By contrast, simplifying procedures through fast-track procedures for asylum seekers whose claims are considered manifestly well-founded due to their country of origin, has proved an efficient way to provide protection, as long as sufficient resources are in place to shorten the examination delays in compliance with the procedural safeguards required, for example in France concerning refugees from Syria in 2015 and 2016.[29]

44. The discrepancies in the legislation across members States as well as in the recognition rate seem to demonstrate the importance of, if not the need for, more harmonised standards on effective access to legal aid and to legal representation at all stages of the asylum procedure, and ensuring that access to an effective remedy is guaranteed in appeal procedures.

45. “Transit zones” have furthermore been used to block access to asylum procedures. The situation in international ports, airports, and train stations in a number of European member States has increasingly been regulated so as to treat “transit zones” under special procedures where procedural safeguards, including in the field of asylum, are lower than in the rest of the territory.[30]

46. Bilateral and regional co-operation frameworks also provide formal instruments which are used to restrict access to asylum procedures. Prohibiting entry may also result from a requirement that asylum requests are lodged extra-territorially (as foreseen in the controversial agreement signed between Italy and Albania in 2023), or handled by third-country administrations (as foreseen in the recently-adopted UK legislation and accompanying arrangements put in place between the UK Government and that of Rwanda).

47. In situations where asylum seekers and migrants are instrumentalised by a State to exert pressure on another State, some member States have enacted measures which raise human rights concerns, even though such measures may originate from legitimate objectives related to public order and border management.[31] Declaring a state of emergency may have a detrimental effect on access to asylum as noted earlier and as highlighted by the European Court of Human Rights in many cases. For example, Belarus instrumentalised asylum seekers and migrants to exert pressure on the European Union, leading to the introduction by Lithuania in 2021 of legislation aiming to prevent access to international protection procedures for people residing illegally on the territory, citing the context of mass arrival of foreign nationals, including

28. Exchanges of views with the Head of Division of the CPT, meeting of the Committee on Migration, Refugees and Displaced Persons, Paris, 8 December 2023.
29. “Pascal Brice. ‘Il n’y a pas de crise de l’asile en France’”, *Le Télégramme*, 9 July 2016 [in French only].
30. Anafé (2022), “Screen, detain, deport – Analysis of the provisions applicable to borders in the New European Pact on Migration and Asylum”.
31. Letter addressed by the Commissioner for Human Rights of the Council of Europe to the Minister of Interior of Finland, 4 December 2023.

people in need of international protection, over the Belarus-Lithuania border. This decision was considered in breach of EU law including Article 18 of the Charter of Fundamental Rights of the European Union by the Court of Justice of the European Union, in 2022.[32]

4.3. Weakness of human rights monitoring mechanisms

48. Mechanisms to monitor and ensure compliance with human rights standards of the actions of law enforcement authorities in border areas remain weak. Judicial oversight or fundamental rights monitoring at the border has been made increasingly difficult over the years. The mandate of the ombudspersons does not for example always allow for operational and even unannounced border monitoring; in many member States the mandate of the ombudsperson is limited to a supervisory role.

49. The Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, stressed in a report on pushbacks that "the very first aim of border monitoring is to gather and verify information on human rights violations at the borders."[33] The Assembly underscored, in Resolution 2462 (2022) "Pushbacks on land and sea: illegal measures of migration management" the importance of "well-functioning independent border monitoring mechanisms at national and European levels." These should be fully independent and should not be "restrict[ed] [in] their access to border or migrant retention facilities" or "limit[ed] [in] their actions through other means".

50. The Council of Europe itself has developed specific standards in recent years especially from the perspective of the prevention of torture, inhumane and degrading treatment, and through the lens of child protection. In particular, the CPT is mandated to monitor the treatment of persons deprived of their liberty in the context of border control activities at land and sea borders of Council of Europe member States. In the chapter entitled "The prevention of ill-treatment of foreign nationals deprived of their liberty in the context of forced removals at borders"[34], it noted the "disregard for basic legal safeguards and access to asylum" during summary and forced removals across Europe.

51. According to the CPT, the key standards for border monitoring mechanisms to ensure effective monitoring of respect for human rights obligations are the following: "a mandate and powers to conduct regular and unannounced inspections" and to "publicly produce reports with clear recommendations", adequate human and financial resources including "staff with adequate expertise", "independence from the relevant authorities responsible for policing the borders", the ability to "communicate directly with the competent prosecutorial authorities if malpractice is observed." Effective complaint mechanisms should be accessible to foreign nationals for appeal and to obtain redress in case of abuse of their human rights at the border.

52. Border monitoring should also ensure that effective safeguards are in place to prevent human rights abuse. In particular, these should include ensuring that vulnerability checks and health screenings are systematically conducted by competent authorities, and that access to an individualised procedure is guaranteed, ensuring due respect for procedural safeguards before any decision for removal is made. Individuals apprehended or intercepted at the border should be "placed in a position to effectively make use of the legal remedies available against their forced removal, based on an individual assessment of the *prima facie* risk of ill-treatment in the case of removal."[35]

4.4. Failure to implement judgments of the European Court of Human Rights

53. Interesting information can also be found in the extensive record available in the monitoring of the execution of the European Court of Human Rights' judgments. I am deeply grateful to the Council of Europe's Department for the Execution of Judgments of the European Court of Human Rights for their input. The Court has indeed seen an increase in the number of complaints against some member States because of alleged

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32. Court of Justice of the European Union, Judgment (First Chamber), Reference for a preliminary ruling in the Case C-72/22 PPU, 30 June 2022.

33. The Commissioner is also referring to the specific publications contributed by partner official organisations – such as the EU Fundamental Agency – and networks of national human rights institutions competent on the matter such as the European Network on Human Rights Institutions. See for instance FRA, "Migration: Fundamental Rights Issues at Land Borders" (2020) and "Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders" (2022); ENNHRI, "Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum" (2021).

34. 32nd General report of the CPT (1 January - 31 December 2022).

35. "The prevention of ill-treatment of foreign nationals deprived of their liberty in the context of forced removals at borders", extract from the 32nd General report of the CPT published on 30 March 2023.

violations of the rights of asylum seekers. This information demonstrates that member States are deficient in two respects: they have weak human rights monitoring mechanisms, and they are also slow in implementing judgments when condemned for violating the rights of an asylum seeker.

54. As of April 2024, 133 rulings of the Court involving a breach of the *non-refoulement* principle were still not implemented. Among them, 66 cases concerned the failure to adequately assess the risks of removal to a certain country; 22 cases were related to the failure to adequately assess the risks before removal; 2 cases related to removal to a "safe" third country; 18 cases to removal on national security grounds; 7 cases to removal in breach of domestic law or despite Rule 39 indications by the Court and a further 18 cases involved collective expulsions. On the same date, there were 14 cases in which States were condemned for breaching the right to a suspensive effect of the appeal and had so far failed to fully implement the Court's judgment. The situation of migrant children emerges as a particularly worrying area where the Court's judgments have failed to be implemented.

55. If member States are usually slow in complying with judgments of the Court, they are not necessarily opposed to co-operation on the issue. Some good practices demonstrate the importance of ensuring follow-up on the judgment through inter-governmental dialogue. Nevertheless, the long list of judgments not implemented, in addition to the increasing number of cases brought before the Court in the field of migration and asylum, indicates that some national legislations are still not fully compliant with the obligations enshrined in the Convention. The Court's case law is also an indicator that this regional remedy mechanism is particularly important in this field and is effectively seized by asylum seekers, confirming the usefulness of regional courts in ensuring access to an effective remedy and effective judicial oversight.

5. Deterrence by asylum externalisation policies

5.1. "Safe third country" concept

56. A common externalisation strategy is to consider countries as safe countries of origin or safe third countries, so as to declare a claim inadmissible or to examine claims under an accelerated procedure. In principle, and pursuant to the Refugee Convention, cases can be declared inadmissible when the person seeking protection may pose a threat to public order or may have committed crimes (article 1F). By using lists of safe countries (of origin or of transit), public authorities are expanding the possibility of denying access to the procedure *prima facie* on a presumption of safety substantiated by consultative bodies providing country of origin information based on the available expertise at the national and regional levels.

57. Some examples are illustrative of this trend. For instance, the Danish Government aims to withdraw protection from refugees from Syria originating from areas in Syria which Copenhagen now deems safe, even though the regime in place which refugees escaped in the first place remains in place. What has been called a "paradigm shift"[36] has had adverse consequences on families who were denied the right to protection that they were initially granted AND faced with the impossibility – in addition to their well-founded fear – of returning due to the absence of diplomatic relations between Denmark and the Assad-ruled Syria. In Iceland, legislative reforms to the Foreigners Act in 2023 have expanded the scope of the safe third country concept to any country deemed natural and reasonable for the applicant to return to, without any guarantee that protection is effectively accessible. Asylum applicants coming from such countries are barred from a substantive review of their application. This poses a real risk to applicants' lives and security in contravention of the *non-refoulment* principle.[37]

58. Some examples of lists of safe countries that have been successfully challenged highlight that practices on such lists raise human rights concerns. For instance, in the Netherlands, in 2022, the Dutch Council of State[38] underlined that even when a country is considered as a safe country of origin for unaccompanied children, the authority should examine if adequate reception facilities are available in the country where the person should be returned. In Greece, the Council of State referred preliminary questions to the Court of Justice of the European Union on the legality of the Greek national list designating Türkiye as a safe third country for asylum seekers from Afghanistan, Syria, Somalia, Pakistan and Bangladesh. The compliance with such decision by Greece within its European and international obligations is being examined by the Court of Justice of the European Union.[39]

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36. Clingendael – Netherlands Institute for International Relations (2024), "Shifting the paradigm, from opt-out to all out?", by Myrthe Wijnkoop, Anouk Pronk and Robin Neumann.
37. Exchange of views with Ms Claudia Ashanie Wilson, lawyer, meeting of the Committee on Migration, Refugees and Displaced Persons in Reykjavik, 21 September 2023.
38. Case law consolidated by the EUAA and available on its dedicated webpage.

59. From a purely procedural perspective, and without entering into the question of shifting responsibility to the authorities of the “safe third countries” concerned, the ability to assess whether a country is safe for individuals in need of protection and the shifting of the burden of proof from the authority to the applicant are particularly sensitive issues, as I have developed further in my report “Safe third countries for asylum seekers” (Doc. 15592).

5.2. Bilateral agreements

60. Bilateral agreements have been instrumental for years in keeping asylum seekers away from the territory of member States as an asylum destination. The various agreements between Italy and Libya over the years and the most recent agreement between Malta and Libya, or even the co-operation agreements between Spain and Morocco, are examples of these practices. More recently, the controversial deal signed between the Italian and the Albanian Prime Minister in November 2023 has raised opposition from Albanian human rights institutions and opposition parties.[40]

61. It is concerning to see parliamentary and judicial oversight increasingly sidelined or discarded. A much-cited example can be found in the long-standing process towards the recent adoption of a law by the British Parliament allowing the UK “to send people to Rwanda who would otherwise claim asylum in the UK and/or have made irregular journeys to the UK. Rwanda will either grant them asylum or permanent residence.”[41] A previous agreement was deemed unlawful and non-enforceable by the Supreme Court on the basis that inadmissibility did not result from an in-merit or at least a country assessment ensuring that the persons sent to Rwanda would face no risk of ill-treatment including a risk of *non-refoulement*.[42] The British Government decided to maintain its position, backed by the House of Commons, to proceed with the agreement, arguing that the *non-refoulement* principle from Rwanda is guaranteed in Article 10 of the agreement. The Safety of Rwanda Bill passed in April 2024.[43] It remains to be seen if and how it can be implemented.

62. At the EU level, some co-operation agreements are also conducted without parliamentary oversight – for instance, the reinforcement of the capacities of the Libyan Cost Guards that was later harshly criticised for generating practices of pullbacks towards a country where the treatment of migrants and asylum seekers has notoriously been known over the years as being in breach of international human rights law.

6. The European Union Pact on Migration and Asylum: a chance to gear towards the rule of law and to regain control

6.1. Upgrading the standards?

63. In April 2024, the European Parliament endorsed the New Pact on Migration and Asylum. The general reviewing of the existing legislation, comprising nine regulations and one directive, aims to further harmonise asylum procedures throughout EU member States towards “fast and efficient asylum and return procedures with stronger individual safeguards”.[44]

64. The measures foreseen by the Pact comprise: the obligation to provide access to legal support to asylum seekers throughout the procedure; the obligation to set up national border monitoring mechanisms entailed in the screening mechanism; screening procedures upon arrival of asylum seekers to identify well-founded claims at the earliest stage of the process to help refer individuals to the appropriate procedures. The UNHCR will be granted access to asylum seekers during the border procedure.

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39. “Hearing before the Court of Justice of the European Union on Thursday 14 March on the preliminary questions of the Greek Council of State regarding Turkey as a ‘safe third country’”, press release, Greek Council for Refugees, 13 March 2024.
40. “Albania's Constitutional Court rules that migration deal with Italy can go ahead if approved”, *Euronews*, 21 January 2024, and “Protocol between the Government of the Italian Republic and the Council of Ministers of the Albanian Republic” (informal translation provided by the Odysseus Network).
41. “UK-Rwanda treaty: provision of an asylum partnership”, policy paper, UK Home Office, 5 December 2023.
42. Judgment in the case of R (AAA) v. SSHD, Royal Court of Justice of the United Kingdom, 29 June 2023.
43. UK Home Office policy paper, op. cit. See Article 10: “No Relocated Individual (even if they do not make an application for asylum or humanitarian protection or whatever the outcome of their applications) shall be removed from Rwanda except to the United Kingdom in accordance with Article 11(1).”
44. “Progress made to manage migration and asylum in the EU”, European Commission (last accessed on 24 April 2024).

65. The Pact has to be seen in the context of the above-described trends and climate which have only increased human suffering and disorder on this question in Europe, leading to a “race to the bottom” – instead of a co-ordinated policy response – and a clear lack of solidarity among member States.

66. The aim of the Pact is to prevent uncontrolled onward movements from countries of first entry, screen more efficiently protection seekers and people with no right to remain on the territory to facilitate redirection to either an asylum or a return procedure and commit to border security imperatives and international protection obligations in times of crisis or “instrumentalisation” of migration movements.

67. The reforms foreseen by the Pact are presented as an opportunity to reverse the trend. It will test EU member States on their willingness to genuinely abide by human rights-compliant procedures. They will have to demonstrate whether they are willing to apply the Pact in good faith with the aim of proving its effectiveness as a response to the challenges addressed above. Such a good faith application is particularly needed in the light of significant human rights concerns expressed by refugee law experts on certain provisions, and also as regards the need to allocate sufficient resources to ensure the functioning of the foreseen human rights safeguards.[45]

6.2. Legalising a race to the bottom? Human rights concerns

68. Severe shortcomings and human rights violations at the EU borders have been documented at length over the years. By adopting regulations rather than directives, the Pact is in theory offering stronger assurances that procedural obligations and regional solidarity will be effectively complied with by member States. However, in practice, several concerns remain – regarding the same human rights violations that have occurred over the past years, as set out above.

69. It remains to be seen if access to the territory of asylum will continue to be restricted, as border monitoring remains within the competence of national authorities which, in turn, should demonstrate enough political will to ensure the effectiveness of proper monitoring. Moreover, resettlement quotas will only be granted on a voluntary basis, with therefore no guarantee that legal and safe pathways to protection will increase.

70. Once international protection seekers will have reached European soil, deterrence practices regarding reception conditions and procedural practices as regards the screening of individuals at the European Union’s external borders could still occur. Asylum seekers originating from a country with a low recognition rate will see their case processed outside the standard procedure because of their nationality or, because of their itinerary (first country of asylum). This will place a heavier burden of proof on asylum seekers claiming protection and risks lowering safeguards throughout the procedure.

71. In this context, the *de facto* systematic detention of asylum seekers, including children and families, when a border procedure is triggered, is an additional source of concern.[46]

72. With regard to border procedures, the UNHCR has underlined that there is a serious risk of increased resort to derogation rules, especially when States resort to extraordinary procedures designed to address crisis situations, as well as of a wider use of detention at the border should safeguards not be effectively in place and sustained.[47] Furthermore, concerns are raised as to a possible lack of “adequate capacity” in reception centres, especially in situations with higher numbers of arrivals. This could lead to situations of humanitarian crises at the European Union’s external borders.

73. As regards access to legal assistance, the Asylum Procedure Regulation does not provide for free legal assistance and representation at all stages of the procedure but limits the obligation of free legal assistance and representation to the appeal procedure. Thus, suspensive appeal in the second instance will be denied to asylum seekers whose cases are considered in the border procedure as well as to persons whose cases are considered inadmissible or treated in an accelerated procedure, except in cases where leave to remain is requested and considered favourably by the authority in charge.

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45. UNHCR, 2024, “Recommendations for the Belgian and Hungarian Presidencies of the Council of the European Union (EU)”, January 2024.
46. “Historically bad: new EU Pact on Migration and Asylum normalises rights violations and endangers children”, Save The Children, 20 December 2023. See also “Children and the EU Migration and Asylum Pact”, UNICEF, December 2023.
47. UNHCR’s 2024 Recommendations, op. cit.

74. The Pact has also introduced a refined definition of the "safe third country" concept to be used at the EU and national levels when implementing the border procedures and with a view to identifying cases considered as inadmissible. However, the existing diversity across European States on this aspect is already indicative of the heterogenous and possibly disharmonious way in which such a concept may be interpreted by member States.

75. Finally, the Pact foresees more bilateral co-operation with third countries, which might potentially lead to the conclusion of bilateral agreements with countries which do not respect human rights – especially in cases where democratic oversight is not sufficiently guaranteed. While co-operation aiming to reinforce protection capacities along migration routes – what the UNHCR calls the "route-based approach" – is welcome and needed and should be further encouraged by member States,[48] such co-operation cannot absolve member States from their international protection obligations within their own territory.

76. Given these numerous questions on the content and implementation of the Pact, linked to human rights concerns, ensuring that enough resources are made available and guaranteeing common criteria and effective human rights monitoring should lie at the core of its entry into practice.

6.3. The necessity of serious budgeting when implementing the Pact

77. I had the privilege of conducting a fact-finding mission to the EU institutions in Brussels in February 2024 and to meet with senior officials involved in the negotiation of the Pact at the European Commission (DG Home), at the EU Council (JHA Unit) and at the European Parliament (three of the rapporteurs on the above mentioned filed). Throughout the preparation of the report, I was able to meet with refugee law experts and practitioners from the Council of Bars and Law Societies of Europe (CCBE) and from the European Council on Refugees and Exiles (ECRE). I also had the opportunity to discuss the practical and procedural aspects of the Pact where co-operation with the Council of Europe may prove beneficial to ensuring the international human rights standards which the EU law should guarantee. I am particularly grateful for the time that colleagues from the UNHCR Representation in Brussels, the EU Agency for Asylum, the EU Agency for Fundamental Rights and the EU Court of Auditors were able to dedicate to me.

78. The formal adoption of the Pact will mark the start of a two-year implementation phase in which the European Commission and member States individually will devise implementation plans based on needs assessments aiming to identify gaps and resources needed for the Pact to be enacted. This assessment phase, in co-ordination with the EU Asylum Agency but also international partners able to provide a comprehensive assessment of the situation and the need to ensure human rights compliance throughout the entire asylum cycle, will be crucial.

79. All my interlocutors previously mentioned agreed that a human rights-compliant implementation of the Pact requires that enough resources be made available to meet the legal standards. In February 2024, the European Parliament has already agreed upon an extra € 2 billion on migration and border management lines of the Multiannual Framework including € 0.88 billion for the Asylum, Migration and Integration Fund (AMIF), and € 0.2 billion for the EU Agency for Asylum. These budgetary resources will hopefully be allocated towards measures that contribute to ensuring a human rights-compliant implementation of the Pact.

80. Furthermore, infrastructure, capacities and sufficient staff are critical for a successful implementation of the Pact. To allow for ordinary procedures to prevail, capacities should be structurally planned and budgeted for as a full-fledged component of public policy regarding the implementation of asylum law. Here, the scope of the concept of "adequate capacity" should not be limited to the provision of reception facilities, but rather understood as an adequate framework in terms of human, financial and infrastructure capacities, encompassing all aspects from the training of asylum officers to the budgeting of interpretation and legal aid. Failing to address the needs may lead EU member States to use derogations or to further engage in the logic of preventing access to the territory of asylum to avoid responsibilities which they consider they cannot meet.[49]

81. In addition to effective pre-assessment mechanisms, adequate resources should be provided to ensure effective fundamental rights monitoring throughout the entire procedure and at the border. In this respect, pre-assessment, and ongoing fundamental rights monitoring of the use of the Internal Security Fund and the AMIF are necessary.

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48. Ibid.
49. Ms Catherine Woollard, Director of European Council on Refugees and Exiles (ECRE), speaking at the hybrid event hosted by the European Policy Centre, Brussels, on 21 March 2024 and during the exchange of views with the Committee on Migration, Refugees and Displaced Persons in Reykjavik on 21 September 2023.

82. The Pact also lays the ground for a mandatory yet flexible solidarity mechanism between member States, which may take various forms: the relocation of asylum seekers and refugees, financial compensation to countries of first entry, or co-operation programme with non-EU countries of transit. Concerns arise that "frontline" EU States will be left facing the largest reception and processing responsibilities, where, again, more solidarity would be key for ensuring that every member States' resources can be best allocated to human rights-compliant asylum procedures and reception conditions. Moreover, ensuring a fair distribution of asylum seekers among member States would reduce deterrence strategies and prevent situations of humanitarian crises at the European Union's external borders in cases of higher numbers of asylum applications.

7. Conclusion

83. The reality faced by individuals approaching Europe in the search for protection and security is harsh. Various obstacles already hamper their access to an asylum procedure in Europe, let alone their admission to Europe as a genuine territory of asylum. The series of procedural and political barriers which are employed, sometimes in full disregard of the principle of *non-refoulement* and of rulings of the European Court of Human Rights, is extremely concerning, not just for the safety and the civil rights of those who are directly affected, but also because it reinforces a belief that acting in breach of international human rights law in the field of asylum and migration is necessary and acceptable.

84. My concerns have been deepened by the information collected as part of the preparation of this report, indicating that while the vast majority of international protection seekers in Europe come from war-torn countries, recognition rates on cases involving claimants from the same country of origin sometimes vary very widely across member States. The heterogeneity in the existence and quality of legal aid also concurs with creating situations akin to an "asylum lottery" for the individual concerned.

85. This report does not intend to underplay the real challenges faced by member States in fulfilling their legal obligations and respecting the rule of law as regards the treatment of those seeking protection in Europe. It does however wish to underline the importance of respecting these principles. Any slippage towards disregard for the rules in force, arbitrariness, or inadequate procedural safeguards are not merely a weakening of the international human rights and rule of law order in general, they most certainly have real effects on individual lives: it is literally a matter of life and death for many. It is with this imperative in mind that procedural obligations on asylum procedures have been approved by member States.

86. Council of Europe member States should be proud of their record in drawing up and ratifying legal instruments in the field of human rights and particularly in the field of asylum. The binding legal framework has been enriched by many recommendations and other texts on asylum procedures, adopted by the Committee of Ministers of the Council of Europe. While acknowledging the significant need for resources to meet these obligations, member States and the relevant institutions of the European Union should bear in mind that the focus of the budget in this area in recent years has been insufficient and that spending on enhancing procedures and their implementation is likely to yield better return on investment. The end result should be a more efficient and cost-effective system in which fair, individualised and effective access to asylum procedures, including in appeal, is guaranteed.

87. The body of work developed by the Council of Europe over the years deserves to be more widely used. It includes practical monitoring tools and preventive mechanisms attached to specific conventions such as the CPT, the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) as well as expertise, programmes such as the HELP tutorials and courses for legal practitioners (Human Rights Education for Legal Professionals).

88. These tools have already proved useful in the field of asylum, for example as regards practical guidance in the field of border monitoring and the protection of children (joint note by the Council of Europe and the European Union Agency for Fundamental Rights on Children in migration: fundamental rights at European borders), the detention of asylum seekers ("Guide for practitioners on the administrative detention of migrants and asylum seekers"), safeguards aimed at reducing the risk of ill-treatment and *refoulement*, or the approach of asylum seekers who are victims of trafficking and victims of gender based and domestic violence.[50]

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50. See in particular GRETA (2024), "Practical impact of GRETA's monitoring work in improving the implementation of the Convention on Action against Trafficking in Human Beings", and GREVIO (2022) "Mid-term Horizontal Review of GREVIO baseline evaluation reports".

89. The Council of Europe's membership, encompassing 46 member States including all EU member States, as well as neighbourhood partnerships, is both geographically and politically a grouping for which a well-functioning, effective and human rights-compliant asylum approach makes immense sense. Its solid human rights and rule of law acquis, emanating from the case law of the European Court of Human Rights and other instruments, along with its span of reach towards civil society, the local authority level and international partners – in particular the European Union, are a unique strength and offer excellent opportunities to create a new momentum and a healthier dynamic in the field of asylum procedures.

90. In line with the Reykjavik Declaration and in the perspective of the implementation of the newly adopted EU Pact on Migration and Asylum, I am convinced that the Council of Europe should be a privileged partner for the European Union to accompany EU and non-EU member States in the process of the implementation of the Pact. I am hopeful that this report and the unfolding recommendations will provide a useful input to work in this area aiming to move towards an asylum policy which fully respects human rights and the rule of law, which is resilient in the face of populist discourse and knee-jerk reactions, and which proves its capacity to contribute to order and security for all.