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HUMAN RIGHTS IMPLICATIONS OF THE EUROPEAN UNION MIGRATION AND ASYLUM PACT IN SEARCH AND RESCUE OPERATIONS

Patricia VELLA DE FREMEAUX¹

Felicity G. ATTARD²

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ABSTRACT: This article focuses on the legal aspects of the search and rescue considerations in the European Union Migration and Asylum Pact. It provides a considered overview of the core instruments making up the European Union Migration and Asylum Pact and considers how these relate to each other and interact with one another. Particular attention is given to the evaluation of the human element in the light of the difficulties surrounding disembarkations following rescue at sea. Building on this legal analysis, the article also highlights the persistent tensions between State sovereignty and the obligation to uphold and respect the principles of international law. The evolving nature of irregular migration places further pressure on legislative frameworks. The authors also reflect on efforts that aim to operationalize solidarity, while noting that implementation must not come at the cost of weakening obligations under international refugee and human rights law. The authors conclude that, although the Pact represents a positive step in the progressive development of the law in this area, considering the significant efforts made to address migration through cooperation and development, a number of legal and practical challenges remain, which could endanger fundamental human rights protections, therefore continuous monitoring and evaluation is paramount.

KEYWORDS: EU Migration and Asylum Pact; Human Rights; Search and Rescue; Human element.

IMPLICACIONES PARA LOS DERECHOS HUMANOS DEL PACTO DE MIGRACIÓN Y ASILO DE LA UNIÓN EUROPEA EN LAS OPERACIONES DE BÚSQUEDA Y RESCATE

RESUMEN: Este artículo se centra en los aspectos jurídicos de las consideraciones sobre búsqueda y rescate en el Pacto de la Unión Europea sobre Migración y Asilo. Ofrece una visión general de los

¹ Professor and Head of Department of International Law, Faculty of Laws, University of Malta, patricia.vella-de-fremeaux@um.edu.mt.

² Senior Lecturer, Department of International Law, Faculty of Law, University of Malta, felicity.attard@um.edu.mt.

instrumentos fundamentales que conforman dicho Pacto y analiza cómo se relacionan e interactúan entre sí. Se presta especial atención a la evaluación del factor humano a la luz de las dificultades que rodean los desembarcos tras el rescate en el mar. A partir de este análisis jurídico, el artículo también destaca las persistentes tensiones entre la soberanía de los Estados y la obligación de defender y respetar los principios del derecho internacional. La naturaleza cambiante de la migración irregular ejerce una mayor presión sobre los marcos legislativos. Los autores también reflexionan sobre los esfuerzos destinados a hacer operativa la solidaridad, señalando que su implementación no debe ir en detrimento del debilitamiento de las obligaciones derivadas del derecho internacional de los refugiados y de los derechos humanos. Los autores concluyen que, si bien el Pacto representa un paso positivo en el desarrollo progresivo del derecho en este ámbito, considerando los importantes esfuerzos realizados para abordar la migración mediante la cooperación y el desarrollo, persisten diversos desafíos jurídicos y prácticos que podrían poner en peligro la protección fundamental de los derechos humanos, por lo que el seguimiento y la evaluación continuos son primordiales.

PALABRAS CLAVE: Pacto de Migración y Asilo; Derechos Humanos; Búsqueda y Rescate; Factor humano.

IMPLICATIONS DU PACTE EUROPÉEN SUR LA MIGRATION ET L'ASILE EN MATIÈRE DE DROITS DE L'HOMME DANS LES OPÉRATIONS DE RECHERCHE ET DE SAUVETAGE

RÉSUMÉ: Cet article se concentre sur les aspects juridiques des considérations relatives à la recherche et au sauvetage dans le Pacte de l'Union européenne sur la migration et l'asile. Il offre un aperçu approfondi des principaux instruments qui le composent et examine leurs relations et interactions. Une attention particulière est accordée à l'évaluation de l'élément humain à la lumière des difficultés liées aux débarquements après un sauvetage en mer. S'appuyant sur cette analyse juridique, l'article souligne également les tensions persistantes entre la souveraineté des États et l'obligation de respecter les principes du droit international. L'évolution de la migration irrégulière exerce une pression supplémentaire sur les cadres législatifs. Les auteurs s'interrogent également sur les efforts visant à opérationnaliser la solidarité, tout en soulignant que sa mise en œuvre ne doit pas se faire au détriment d'un affaiblissement des obligations découlant du droit international des réfugiés et des droits de l'homme. Les auteurs concluent que, bien que le Pacte représente une étape positive dans le développement progressif du droit dans ce domaine, compte tenu des efforts importants déployés pour lutter contre la migration par la coopération et le développement, un certain nombre de défis juridiques et pratiques subsistent, susceptibles de mettre en péril la protection des droits fondamentaux de l'homme. Un suivi et une évaluation continus sont donc primordiaux.

MOT CLES: Pacte Européen sur la Migration et l'asile; Droits de l'homme; Recherche et Sauvetage; l'élément humain.

I. INTRODUCTION

The problem of maritime migration has been at the forefront of the European Union (EU)'s legislative and policy-making landscape for decades. The Common European Asylum System (CEAS)³ was established in 1999

³ European Commission, Migration and Home Affairs, "Common European Asylum System", https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en, accessed 30 July 2024.

with the objective of improving cooperation on asylum matters and has been developed periodically in stages since then. Following an unprecedented number of arrivals in 2015, the European Commission attempted to reform the CEAS through a package of proposals aimed at addressing the deficiencies apparent in the existing framework⁴. These ultimately failed due to disagreement on the principles of solidarity and shared responsibility. In the meantime, the migration crisis has shown no signs of being alleviated. As of 12 May 2025, sea arrivals in Italy, Greece, Spain, Cyprus, and Malta amounted to 44,595, with 414 estimated dead or missing⁵.

The EU Pact on Migration and Asylum⁶ (EU Pact) was consequently proposed by the European Commission in September 2020⁷ and agreed to by both the Council and Parliament in December 2023⁸, with the aim of overhauling the asylum and migration policies of the EU by advocating for an approach based on solidarity, shared responsibility, and respect for human rights. The EU Pact represents a significant effort to create a more cohesive, effective, and humane approach to migration, reflecting the EU's attempt to learn from past crises and better prepare for future challenges. The Council of the EU adopted the Pact on 14 May 2024⁹, and Member States have two years to implement the laws with the help of an implementation plan being prepared by the EU Commission¹⁰.

⁴ BEIRENS, H., "Cracked Foundation, Uncertain Future: Structural Weaknesses in the Common European Asylum System", *Brussels Migration Policy Institute Europe*, 2018.

⁵ United Nations High Commissioner for Refugees, "Operational Data Portal, Mediterranean Situation", <https://data.unhcr.org/en/situations/mediterranean>, accessed 16 May 2025.

⁶ European Commission, Migration and Home Affairs, "Pact on Migration and Asylum", https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en, accessed 30 July 2024.

⁷ European Commission, "A New Pact on Migration And Asylum," Communication COM (2020) 609 final.

⁸ European Commission, "Commission welcomes the major progress achieved by Parliament and Council on the New Pact on Migration and Asylum", 20 December 2023, https://ec.europa.eu/commission/presscorner/detail/en/statement_23_6708, accessed 30 July 2024.

⁹ European Council, Council of the European Union, "The Council adopts the EU's pact on migration and asylum", 14 May 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/>, accessed 30 July 2024.

¹⁰ European Commission, Migration and Home Affairs, "European Commission and NGOs

The 2020 Communication introduces the new Pact as “a fresh start” in order to create “a system that manages and normalises migration for the long term and which is fully grounded in European values and international law”¹¹. While the aim of the EU Pact was to reach consensus among EU Member States, the proposal was set against a backdrop of varying political views on migration, ranging from stringent border controls to more humane approaches to the phenomenon, making negotiations complex and delicate. It is arguable that this consensus could equate to a lowest common denominator approach. This paper sets out to address the question of whether the EU Migration and Asylum Pact affects the human element intrinsic in maritime migration, specifically within the context of search and rescue (SAR). This piece attempts to answer this question by examining a selection of the main features of the current Pact. Of particular interest is a common European approach to search and rescue, with attention being given to the smuggling of migrants and their disembarkation. In this respect, the EU has launched a number of initiatives such as the Global Alliance to Counter Migrant Smuggling¹². The EU Commission thus maintains that “developing a more coordinated EU approach to the evolving SAR practice, grounded in solidarity, is crucial”¹³.

The newly approved Pact adopts a comprehensive approach to addressing migratory and asylum challenges, centred around a number of key elements. Foremost amongst these is a fairer sharing of responsibility in an attempt to avoid EU border States being overwhelmed by migratory pressures. Linked to this are streamlined asylum procedures (including pre-entry screening and faster border procedures) with the aim of expediting the processing of asylum applications and the simultaneous introduction of efficient return policies intends to expedite return procedures. A particularly welcome aspect is the enhancement of legal pathways into Europe, thus potentially diminishing the need to rely on migrant smugglers. Furthermore, the integration of migrants

discuss the implementation of the Migration Pact”, 27 May 2024, https://home-affairs.ec.europa.eu/news/european-commission-and-ngos-discuss-implementation-migration-pact-2024-05-27_en, accessed 30 July 2024.

¹¹ 2020 Communication, *op. cit.*, p. 1.

¹² European Commission, “Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework”, 28 November 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6081, accessed 30 July 2024.

¹³ 2020 Communication, *op. cit.*, p. 13.

and refugees, as well as the strengthening of partnerships with third countries in the management of migration, is praiseworthy.

II. OVERVIEW

The Pact consists of a number of legislative instruments¹⁴ aimed at regulating migratory and asylum issues in an integrated way. Together with these, the Commission issued recommendations in other crucial areas, such as search and rescue operations by private vessels¹⁵ and guidance regarding non-criminalisation of humanitarian assistance¹⁶. Further action plans and strategies were presented by the Commission, amongst which was a Communication in 2021 on a renewed EU action plan against migrant smuggling (2021-2025)¹⁷. This represents a recognition of the link between the various branches of law dealing with irregular migration, which had also been outlined in Section 5 of the 2020 Communication dealing with the fight against migrant smuggling¹⁸.

III. THE CORE EU PACT INSTRUMENTS

1. Screening Regulation

The Screening Regulation¹⁹ establishes uniform rules for the pre-entry screening of health, identity, and security for all irregular migrants and asylum

¹⁴ European Council, Council of the European Union, “The Council adopts the EU’s pact on migration and asylum”, *op. cit.*

¹⁵ Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities [2020] OJ L317/23.

¹⁶ Communication from the Commission, “Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence”, [2020] OJ C323/1.

¹⁷ Commission, “A renewed EU action plan against migrant smuggling (2021-2025)”, COM (2021) 591 final.

¹⁸ 2020 Communication, *op. cit.*, p. 5.

¹⁹ Council Regulation (EU) 2024/1356 of the European Parliament and the Council of 14 May 2024 introducing the 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 [2024].

seekers arriving at the EU border²⁰. Screening, according to Article 5, is carried out at the external borders and includes those “disembarked in the territory of a Member State following a search and rescue operation”²¹. Screening is to be carried out “without delay and shall in any case be completed within seven days from the arrival at the external border or disembarkation”²². The Screening Regulation also provides for screening within the territory in the case of individuals found illegally in the State²³. In such cases, the screening is to be carried out “without delay and in any case shall be completed within three days from apprehension”²⁴.

The purpose of these screening procedures is to ensure that individuals are efficiently assessed prior to entering the EU, thus creating a more organised management of migration flows. This screening creates a “legal fiction”²⁵ of non-entry, in that individuals are not considered to have legally entered the EU until they pass this screening, even if they are physically present at the border.

2. Eurodac Regulation

The recast version of the Eurodac Regulation²⁶ aims to enhance the existing system to broaden its use for migration management, including the return of irregular migrants, aside from its previous use as an asylum database. In doing so, its purpose is, *inter alia*, to “support the asylum system”²⁷ and “assist with

²⁰ *Ibid.*, Articles 12-16.

²¹ *Ibid.*, Article 5(1)(b).

²² *Ibid.*, Article 8(3).

²³ *Ibid.*, Article 7(1).

²⁴ *Ibid.*, Article 8(4).

²⁵ ORAV, A. and BARLAOURA, N., “Legal fiction of non-entry in EU asylum policy”, European Parliamentary Research Service, April 2024, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2024/760347/EPRS_BRI\(2024\)760347_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2024/760347/EPRS_BRI(2024)760347_EN.pdf), accessed 30 July 2024.

²⁶ Council Regulation (EU) 2024/1358 of the European Parliament and the Council of 14 May 2024 on the establishment of ‘Eurodac’ for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council [2024].

²⁷ *Ibid.*, Article 1(1)(a).

the control of irregular immigration to the Union”²⁸. The existing database is now a comprehensive asylum and migration database, expanding the various types of data collected, including facial images and identity documents, in addition to merely fingerprints, in order to achieve improved tracking of applications and applicants²⁹.

3. Asylum Procedure Regulation (including the Return Border Procedure Regulation)

The Asylum Procedure Regulation (APR)³⁰ establishes common procedures for granting and withdrawing international protection³¹. To this end, it introduces mandatory border procedures for “all applications for international protection made in the territory of the Member States, including at the external border, on the territorial sea or in the transit zones of the Member States”³². In other words, when applying for asylum, such application is to be examined under the established border procedure. The aim is to ensure a quick assessment in determining the admissibility and merits of asylum claims:

The purpose of the border procedure for asylum and return should be to quickly assess *in principle* at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, *in a manner that fully respects the principle of non-refoulement*, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection³³.

Following screening, it will be determined whether an asylum seeker will fall under the normal asylum procedure or into an accelerated procedure. Article 42 provides for this accelerated examination procedure in certain cases, such as when statements are “clearly inconsistent *or* contradictory”³⁴, when the

²⁸ *Ibid.*, Article 1(1)(c).

²⁹ *Ibid.*, Article 2.

³⁰ Eurodac Regulation, *op. cit.*

³¹ *Ibid.*, Article 1.

³² *Ibid.*, Article 2(1).

³³ *Ibid.*, Preamble, para 58.

³⁴ *Ibid.*, Article 42(1)(b).

third country may be considered a safe country of origin³⁵, or when there are “reasonable grounds to consider the applicant a danger to the national security or public order of the Member States...”³⁶.

To this end, the border procedure is envisaged to be “as short as possible while at the same time enabling a complete and fair examination of the claims”³⁷. As a general rule, the border procedure duration should not exceed twelve weeks, although provision is made for extension in certain cases³⁸. Should no decision be reached in a maximum of sixteen weeks, applicants for international protection are referred to the regular asylum procedure and thus permitted to access the territory of the Member State³⁹.

In the case that the application is rejected under the border procedure, the applicant is to be transferred under the procedures established in the Return Border Procedure Regulation⁴⁰, which is aimed at expediting the return of those who do not qualify for asylum.

4. Asylum and Migration Management Regulation

Inspired by the obligations of solidarity and fair sharing of responsibility embodied in Article 80 of the Treaty on the Functioning of the European Union⁴¹ (TFEU), Article 1 of the Asylum and Migration Management Regulation (AMMR)⁴² lays out the three pillars emanating from “the objective of reinforcing mutual trust”. To this end, the Regulation establishes a common framework for managing asylum and migration within the EU which also provides for the functioning of the CEAS⁴³, sets out a mechanism for

³⁵ *Ibid.*, Article 42(1)(e).

³⁶ *Ibid.*, Article 42(1)(f).

³⁷ *Ibid.*, Article 51(2).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Council Regulation (EU) 2024/1349 of the European Parliament and the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148 [2024].

⁴¹ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/49.

⁴² Council Regulation (EU) 2024/1351 of the European Parliament and the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024].

⁴³ *Ibid.*, Article 1(a).

solidarity⁴⁴ that is mandatory but flexible, and lastly, replaces the Dublin III Regulation⁴⁵, laying down expanded criteria for determining the Member State responsible for examining applications for international protection⁴⁶. The ultimate aim is to ensure a comprehensive approach in the actions of Member States, one that is balanced in the management of migration and reflects the principles of fairness and shared responsibility.

Article 56 of the AMMR explains that the Annual Solidarity Pool is the “main solidarity response tool”, through which Member States pledge their contribution to the Pool⁴⁷. This system does not go down the route of binding asylum quotas, which have been proven ineffective in previous years. The solidarity mechanism thus established is flexible, in that Member States may choose from different mechanisms to this end, ranging from relocation⁴⁸, financial contributions⁴⁹, responsibility offsets⁵⁰, and alternative measures such as providing operational support, capacity building, staff support, and technical equipment. It is stated in Article 57(4) that Member States are given full discretion when choosing between these different types of solidary mechanisms.

In the case of States facing either “migratory pressure” or “significant migratory pressure”⁵¹, there is the possibility envisaged that such Member States may request a deduction in their contributions⁵². Once again, situations of SAR have been considered by the Regulation, whose Article 11(3) states that Member States which have “faced large number of arrivals due to recurring disembarkations following search and rescue operations” during the past twelve months can be considered by the Commission to be under

⁴⁴ *Ibid.*, Article 1(b).

⁴⁵ Council Regulation (EU) 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31, 37.

⁴⁶ AMMR, *op. cit.*, Article 1(c).

⁴⁷ *Ibid.*, Article 56(3).

⁴⁸ *Ibid.*, Article 56(2)(a).

⁴⁹ *Ibid.*, Articles 56(2)(b), 64.

⁵⁰ *Ibid.*, Article 63.

⁵¹ *Ibid.*, Articles 1(24), 1(25).

⁵² *Ibid.*, Articles 61, 62.

migratory pressure, “provided those arrivals are of such a scale that they create disproportionate obligations even on the well-prepared asylum, reception and migration system of the Member State concerned”.

The solidarity mechanism aims to create a balanced and equitable system with the flexibility provided therein intended to accommodate the diverse capabilities and needs of different Member States. However, it requires robust monitoring and enforcement to ensure that commitments are met and support is adequately distributed. Ultimately, its effectiveness will depend on the consistent and committed participation of all Member States.

5. Crisis and Force Majeure Regulation

The Crisis and Force Majeure Regulation⁵³ provides the legislative frameworks for managing migration during “exceptional situations of crisis, including instrumentalisation, and *force majeure*”⁵⁴. These terms are defined as follows:

1. Situation of crisis:

a) An exceptional situation of mass arrivals of third-country nationals or stateless persons in a Member State by land, air or sea, including of persons that have been disembarked following search and rescue operations, of such a scale and nature, taking into account, *inter alia*, the population, GDP and geographical specificities of the Member State, including the size of the territory, that it renders the Member State’s well-prepared asylum, reception, including child protection services, or return system non-functional, including as a result of a situation at local or regional level, such that there could be serious consequences for the functioning of the Common European Asylum System⁵⁵; or

b) A situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security⁵⁶.

⁵³ Council Regulation (EU) 2024/1359 of the European Parliament and the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024].

⁵⁴ *Ibid.*, Article 1(1).

⁵⁵ *Ibid.*, Article 1(4)(a).

⁵⁶ *Ibid.*, Article 1(4)(b).

2. *Force majeure*.

Abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations...⁵⁷

In such cases, according to Chapters III and IV, the affected Member State is to submit a “reasoned request” to the Commission in order to trigger the solidarity mechanism and possible derogations owing to the Member State, whilst still ensuring that fundamental rights are respected⁵⁸. This framework ensures a rapid and effective response to such events, with the solidarity mechanism effectively redistributing asylum seekers amongst Member States so as to alleviate the burden on the most affected Member States. The above mechanism is particularly important in the current scenario of mass arrivals by sea, as, in cases outlined in the Regulation, temporary measures of solidarity (Article 1 and Chapter III), derogations (Chapter IV), and expedited procedures (Chapter V) are applied, ensuring that arrivals are swiftly processed and, if needed, relocated.

IV. ADDITIONAL INSTRUMENTS

Additional instruments which were proposed in 2016 and agreed to in 2022 complete the EU Pact.

1. Qualification Regulation

The Qualification Regulation⁵⁹ replaces the previous Directive and incorporates the provisions of the 1951 Convention Relating to the Status of Refugees⁶⁰ and its 1967 Protocol⁶¹ into EU law. The subject matter of the

⁵⁷ *Ibid.*, Article 1(5).

⁵⁸ *Ibid.*, Article 2(1).

⁵⁹ Council Regulation (EU) 2024/1347 of the European Parliament and the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council [2024],

⁶⁰ Convention Relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 137.

⁶¹ Protocol Relating to the Status of Refugees, adopted 31 January 1967, entered into force 4

Regulation consists of standards for:

- a) the qualification of third-country nationals or stateless persons as beneficiaries of international protection;
- b) a uniform status for refugees or persons eligible for subsidiary protection; and
- c) the content of the international protection granted⁶².

The aim is to standardise the criteria for the granting of international protection, whether refugee status or subsidiary protection status, within the EU⁶³.

2. Reception Conditions Directive

The Reception Conditions Directive⁶⁴ establishes minimum standards “for the reception of applicants for international protection in Member States”⁶⁵, thus aiming to ensure a humane reception system that provides adequate standards of living for asylum seekers arriving in the EU.

3. The Union Resettlement and Humanitarian Admission Framework

The Union Resettlement and Humanitarian Admission Framework Regulation⁶⁶ is focused on another aspect of the enhancement of solidarity and responsibility-sharing amongst EU Member States. It aims to provide a standard procedure for the resettlement of refugees from third countries to EU Member States so that consistency and predictability will be features in such resettlement. It also aims to provide safe and legal pathways for those in need of international protection, enhancing the EU’s ability to respond to

October 1967, 606 UNTS 267.

⁶² Qualification Regulation, *op. cit.*, Article 1(a)-(c).

⁶³ *Ibid.*, Article 3.

⁶⁴ Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

⁶⁵ *Ibid.*, Article 1.

⁶⁶ Council Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147 [2024].

global refugee situations effectively and in a coordinated way⁶⁷. Once again, the Regulation is based on the full application of the 1951 Refugee Convention and 1967 Protocol⁶⁸.

V. SEARCH AND RESCUE CONSIDERATIONS

While the duties of SAR remain firmly within the Member State's competence, bound by international law, the Pact aims to promote a more coordinated approach to SAR issues, based on principles of solidarity and fair sharing of responsibility. At the outset, it is to be noted that the definition of SAR in the various instruments making up the Pact reflects that found in the 1979 International Convention on Maritime Search and Rescue⁶⁹ (e.g. Screening Regulation, Article 2(15); AMMR, Article 2(23)).

Maritime SAR aspects within the context of the EU Pact are addressed in several instruments, reflecting the importance of this issue in managing migration via sea routes. The particular situations caused by regular disembarkations following SAR operations are specifically catered for in the EU Pact. A crucial instrument relating to SAR is the Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum as outlined above⁷⁰. There are, however, other instruments forming an integral part of the Pact which recognise the particular nature of such arrivals by sea following a SAR operation.

The AMMR aims to ensure that the processes related to the disembarkation of rescuees are clearly defined, thus integrating SAR considerations into broader migration management. It aims to balance the responsibilities among EU Member States and streamline the procedures for handling such cases. The AMMR recognises that an irregular entry following a disembarkation is different from other irregular entries⁷¹. A similar recognition is noted in Chapter VI of the Eurodac Regulation, which specifically deals with individuals disembarked

⁶⁷ *Ibid.*, Preamble, para 3; Articles 1, 3.

⁶⁸ 1951 Refugee Convention, *op. cit.*, 1967 Protocol, *op. cit.*, Preamble, para. 2.

⁶⁹ International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985, 1405 UNTS 97.

⁷⁰ Crisis and Force Majeure Regulation, *op. cit.*

⁷¹ AMMR, *op. cit.*, Article 33(1), (2).

following a SAR operation. The AMMR makes it clear that Member States facing “recurring disembarkations”⁷² following SAR operations could benefit from derogations and solidarity measures due to migratory pressure.

It should be recalled that Article 11(3) of the AMMR states that:

...where during the past 12 months a Member State has faced large number of arrivals due to recurring disembarkations following search and rescue operations, the Commission shall consider that Member State to be under migratory pressure provided those arrivals are of such a scale that they create disproportionate obligations on even the well-prepared asylum, reception and migration system of the Member State concerned.

In such cases, these Member States under migratory pressure are entitled to a share of the Annual Solidarity Pool as established by the Commission⁷³.

Linked to the EU Pact, the Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities⁷⁴ acknowledges the role of vessels owned or operated by private entities, which has become a regular feature in SAR scenarios of the past years together with the crime of migrant smuggling by sea, thereby exacerbating the already dire situation of loss of life at sea⁷⁵. Following on from an acknowledgment that:

Search and rescue operations in emergency situations require coordination and rapid disembarkation in a place of safety, and respect for the fundamental rights of rescued people, in conformity with the EU Charter of Fundamental Rights obligations, including the principle of non-refoulement, and with customary and conventional international human rights and maritime law, including the International Maritime Organisation (IMO) Maritime Safety Committee (MSC) Guidelines on the treatment of persons rescued at sea⁷⁶.

The Recommendation urges cooperation amongst Member States in relation to SAR operations carried out by NGO vessels in order to reduce fatalities at sea, protect the safety of maritime navigation, and aim for effective

⁷² AMMR, *op. cit.*, Preamble, para 25; Article 9(3)(xiii).

⁷³ *Ibid.*, Articles 12(5) and 57(2).

⁷⁴ Commission Recommendation (EU) 2020/1365, *op. cit.*

⁷⁵ *Ibid.*, Preamble, paras 8 and 9.

⁷⁶ *Ibid.*, Preamble, para 7.

migration management⁷⁷. It is interesting to note that the flag and coastal State are expressly mentioned. While the coastal State clearly refers to the SAR State, the reference to the flag State is not commonly found in the legal regulation of places of safety for disembarkation. It is submitted, however, that it may signal a potential development in introducing flag State responsibility in such SAR/disembarkation scenarios. Close cooperation between the Member States and the Commission is encouraged, especially through its European Contact Group on Search and Rescue, which was relaunched in 2023, with Member States being exhorted to furnish the Commission with any relevant information regarding the implementation of this instrument annually⁷⁸.

The Commission is also providing Guidance on the effective implementation of EU rules on the definition and prevention of the facilitation of unauthorised entry, transit, and residence⁷⁹. The Guidance states that Article 1 of the Facilitation Directive must be interpreted in such a way that humanitarian assistance, which is a legal obligation, “cannot and must not be criminalised”⁸⁰. Furthermore, the criminalisation of any NGOs or non-State actors carrying out maritime SAR operations amounts to a breach of an international obligation and is not permitted under EU law⁸¹.

VI. EVALUATING THE HUMAN ELEMENT

At the centre of any activity regulating migration is the human element, which provides for the safeguarding of human rights and principles of protection, including non-refoulement. These should be the guiding principles in the management of migration and asylum within the Union. This appears to be what President von der Leyen had envisaged in her State of the Union Address⁸² in 2020, launching the New Pact on Migration and Asylum⁸³:

⁷⁷ *Ibid.*, para 1.

⁷⁸ *Ibid.*, paras 2 and 3.

⁷⁹ OJ C323/1, *op. cit.*

⁸⁰ *Ibid.*, Article 4(i).

⁸¹ *Ibid.*, Article 4(ii).

⁸² European Commission, “State of the Union Address by President von der Leyen at the European Parliament Plenary”, 16 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655, accessed 30 July 2024.

⁸³ 2020 Communication, *op. cit.*

We will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must be able to rely on the solidarity of our whole European Union... Everybody has to step up here and take responsibility.

Four years later, the EU Pact purports to have put into motion a procedure that provides for both efficient and effective migration management, as well as full respect for asylum and individual rights.

With regard to the advocated “human and humane approach”, a number of instruments acknowledge such need, especially insofar as rescue at sea is concerned. Further to ensuring a dignified treatment of all asylum seekers, the Reception Conditions Directive seeks to improve the reception conditions, aiming for a uniform approach. Moreover, the Screening Regulation acknowledges the particularity of arrivals of individuals via disembarkation in the territory of a Member State⁸⁴ and provides for their screening at the external borders. Paragraph 2 of the Preamble to the Regulation provides that:

The rules governing border control of persons crossing the external borders of the Member States of the Union must be accompanied by additional measures which should address situations where third-country nationals are, *inter alia*, disembarked following search and rescue operations, ... It is essential to ensure that, in those situations, third-country nationals are screened, in order to facilitate a proper identification and to allow for them to be referred efficiently to the appropriate procedures...

The Screening Regulation recognises the particular needs of vulnerable persons and attempts to treat all individuals with dignity, thus aligning with the EU’s commitment to a humane approach⁸⁵. The inclusion of health and security assessments at the border helps identify and address any immediate risks, ensuring that the entry process is safe and orderly for both arrivals and State security interests.

The integrated border procedure aims to streamline and accelerate the asylum decision process in order to reduce duration and the consequent uncertainty for asylum seekers. However, while this is beneficial for their physical and mental well-being, there is a risk that rights might be violated during the fast-tracked asylum procedures, with potential substandard

⁸⁴ Screening Regulation, *op. cit.* Articles 1(a),8(3).

⁸⁵ *Ibid.*, Preamble, para 7 and 12.

procedures becoming the norm. Concerns include short time frames for interviews, limited access to legal advice, if any, and superficial assessments of vulnerability. Furthermore, individuals who have travelled through “safe countries” prior to arrival in Europe risk having their claim refused without adequate assessment, with the possibility of being returned to countries where they face persecution. Beyond this, the possibility of different implementation across the Member States is a near-certain reality.

Furthermore, when a Member State considers itself to be in a situation of crisis or force majeure, that Member State should be able to request authorisation to apply the derogations and solidarity measures provided for in the Crisis and Force Majeure Regulation (Chapter IV). Similarly, such temporary measures could be applied in the case of instrumentalisation⁸⁶. This permission for derogation from ordinary rules may have the effect of leading to a fragmented application of the responsibility-sharing mechanism set up under the Pact and there is concern that such measures may also reduce human rights protection.

The main concern is that the border procedures envisage the detention of asylum seekers, including vulnerable groups such as children and families, which raises significant human rights concerns. Detention, defined as “the confinement of a person by a Member State within a particular place, where such person is deprived of freedom of movement” (*inter alia* Screening Regulation, Article 2(12)) features in a number of instruments making up the EU Pact (AMMR, Articles 44 and 45; Screening Regulation, Article 8(7); Reception Conditions Directive, Article 8; Return Border Procedure Regulation, Article 5). Notwithstanding that detention must be used as means of last resort⁸⁷ and that safeguards are put into place to ensure compliance with international and EU law, it remains a concern as to how commonplace detention will become in the new border procedure.

Another feature mentioned in von der Leyen’s quote is the duty of “saving lives at sea”. The commitment to SAR operations voiced in the 2020 quotation outlined above is a constant feature in the various instruments making up the EU Pact, as was discussed in the previous section. These instruments emphasise the paramount importance of protecting life at sea.

⁸⁶ Crisis and Force Majeure Regulation, *op. cit.*, Article 1.

⁸⁷ Screening Regulation, *op. cit.*, Preamble, para 11.

Finally, the solidarity mechanism envisaged in 2020 seems to have progressed beyond the empty promises of solidarity present in previous attempts at cooperation and fair sharing of responsibility. The solidarity mechanism introduced by the AMMR aims to allow a fair distribution of responsibilities amongst Member States, especially in the case of those facing disproportionate pressure due to large numbers of arrivals. It is augured that the aim of offsetting this imbalance will reduce State pushbacks and State failure to rescue at sea.

Supplementary initiatives also aim to address migration holistically. On the 15 November 2023, the EU Commission published its Skills and Mobility Package, including within it a proposal for a regulation establishing an EU Talent Pool⁸⁸. The EU Talent Pool is designed to facilitate international recruitment and match the skills of migrants with labor market needs across the EU. This platform helps attract talent from outside the EU and supports their integration into local communities. The Pact provides added support for resettlement and humanitarian admission programmes⁸⁹, encouraging Member States to pledge more places for resettlement. It also provides for complementary pathways to protection, featuring community sponsorship programmes and humanitarian corridors. These legal pathways provide additional options for individuals in need of protection to reach safety in the EU, thus reducing the need to resort to criminal organisations⁹⁰. Linked to this are the legal migration channels called to be developed in cooperation with third countries as a pivotal element for effectively managing migration. The aim of addressing the root causes of migration, ameliorating the situation in source countries, and improving migration management generally is a promising proposal that could do much to reduce the need to migrate irregularly, thus addressing the cause as opposed

⁸⁸ European Commission, Migration and Home Affairs, “Commission proposes an EU Talent Pool to help address labour shortages across Europe”, 15 November 2023, https://home-affairs.ec.europa.eu/news/commission-proposes-eu-talent-pool-help-address-labour-shortages-across-europe-2023-11-15_en, accessed 30 July 2024.

⁸⁹ European Council, Council of the European Union, “A new EU resettlement framework”, <https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-migration-asylum-reform-pact/resettlement-framework/>, accessed 30 July 2024.

⁹⁰ European Commission, Migration and Home Affairs, “Legal migration and integration”, 6 June 2024, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration_en, accessed 30 July 2024.

to fighting the symptoms⁹¹.

VII. CONCLUDING COMMENTS

President von der Leyen's vision emphasizes a human and humane approach, saving lives at sea, solidarity, and responsibility sharing. The EU Pact incorporates elements that reflect these principles. The integrated border procedure in the EU Pact aims to create a more efficient and streamlined process for managing asylum applications at the borders. However, certain aspects of the Pact raise concerns about the protection of migrant rights in implementing these procedures and thus may not fully align with the humane approach advocated by von der Leyen in 2020. Ultimately, the Pact represents a progressive development in this area of law, in that it takes significant steps towards addressing migration through cooperation and development. Nevertheless, a number of challenges associated with these strategies will require continuous monitoring and evaluation to ensure they respect the principles of human rights and effective migration management.

More specifically, while the Pact aspires to harmonise migration management with European values and international obligations, the above analysis reveals that its treatment of maritime migration and SAR operations reflects the persistent imbalance between control and protection. The emphasis on fighting migrant smuggling and securing external borders often overshadows the need to safeguard lives at sea and uphold the rights of rescuees. Although, as indicated, the Pact introduces some cooperative mechanisms, these do not yet amount to a binding or uniform legal framework for SAR and disembarkation. As a result, the human element in maritime migration still remains vulnerable to discretionary practices shaped by national interests, rather than governed by a common, rights-based legal approach. The Pact, therefore, falls short of fully embedding the legal duty to protect within its migration control architecture.

⁹¹ European Commission, Migration and Home Affairs, "EU Pact on Migration and Asylum: reinforced rules to tackle migration challenges", 30 April 2024, https://home-affairs.ec.europa.eu/news/eu-pact-migration-and-asylum-reinforced-rules-tackle-migration-challenges-2024-04-30_en, accessed 30 July 2024.

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