A critical analysis of the European Commission´s proposal for a New Pact on Migration and Asylum

"A fresh start to undermine and destroy the nation-states of Europe"

Analysis completed on the behest of the AfD Delegation within the ID Group

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1. EXECUTIVE SUMMARY

The Critical Analysis of the Pact aims for two goals. First, to give an overview of the "Pact" and, second, to identify weaknesses in its reasoning and provide reflections on how to critically deal with such a legislative proposal in a more overall strategic dimension.

After author´s preface and a list of abbreviations and definitions (chapters 1 and 2), a brief overview of the structure of the Pact is presented (chapter 3). The starting point in the pact stems from five major "experiences" (5.1.1-5.1.5). The Pact develops further via "challenges" (5.2.1-5.2.5) before it reaches the "legislative proposals" (5.3.1-5.3.5).

Some of the experiences in the Evidence Document may be questioned, not for being downright false but for being misleading, as in 5.1.1 A, the dropping number of arrivals 2015-2019. The number of arrivals over different routes, 5.1.1 C, can be questioned as different official sources give different numbers. Experiences of returns may deserve to be mentioned as the Pact in general put the reason for low return rates with the Member States and their suboptimal legal instruments. Here we show other facts that may better explain the observations.

The Evidence Document and its experiences may be questioned, but what you find will not disqualify essential elements of the Pact.

The five legislative proposals are described in their essential legal provisions (5.4.1-5.4.5), as are the four guiding documents (5.5.1-5.5.4). The central piece is of course the "Asylum and Migration Management Regulation" (AMR) with its "solidarity mechanism". This time, compared to 2016, the Commission wants to win a wider acceptance as the broader concept of solidarity which now could mean taking responsibility for returnees from other Member States. We provide a view into the legal basis of solidarity (5.2.2.1) whilst keeping in mind that this concept is evoked in areas sensitive

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to state sovereignty, to put pressure for cooperation in areas that, at least partly, remain in the domain of the MS and where EU competences are not exclusive.

The "Crisis and Force Majeure Regulation" is a crisis adaptation (or derogation) of several rules related to the solidarity mechanism in the AMR, and adaptation of time limits in the "Revised Asylum Procedures Regulation". These three regulations are systematically related on an operational/functional level, whereas the "Revised Screening Regulation" and the "Revised Eurodac Regulation" are specifically addressed to pre-entry screening and the use of biometric data.

Of the guiding documents, two are related to humanitarian issues related to NGO participating in SAR ("Recommendation on SAR by Private Vessels" and "Guidance on Facilitators Directive"). The "Migration Preparedness and Crisis Blueprint" covers and suggests an intelligence function, a network, to create the necessary situational awareness in order to respond timely to a crisis situation. The "Recommendation on Resettlement and Complementary Pathways" is a general call to the Member States to continue with resettlements and try to find new legal pathways.

Except for reflections and questioning of a more technical nature, we also suggest some few but strategic ideas on how to respond on an overall level. The minor objections found so far will not carry the weight to overturn the Pact, they are more like needle stitches. Personally, we believe there should be created an Alternative Pact with a clear strategic end state for the sake of truly challenging the Migration Pact. We suggest some ideas that could be used for that.

2. PREFACE

Needless to proclaim as news, but necessary to remember: The European Project relies on a supranational framework. This is expressed in, for example, the continuous undermining of state competences in domains such as border control and migration policy.

Once operating *within* the framework of the European Project it is, by definition, a trick to raise doubts against the framework itself; in a sense it is taken for granted. However, it is our belief that even inside the framework, one or two issues may be found that carry the weight that allows them to be used to question, not only the issue at hand, but also the framework. Whether we succeed in identifying any such, we leave for the reader to consider.

The aim of this paper is to provide a critical analysis of the new "Pact on Migration and Asylum" launched by the Commission on September 23, 2020 (hereafter "the Pact").

To address this task, we set up a systematic approach to the documents and the concepts in the Pact. It follows closely the outline in the Evidence Document and will be developed under the headline 3, Structure of the Pact. We provide an overview of the content and bring up critical reflections.

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To find the right dimensions of the problem, we suggest that the issue of migration should be seen as a drama taking place in three dimensions:

1. Technical, issues, legal or practical, dealing with individual cases level.

2. Operational, dealing with plans and legislative acts concerning Member States. For example, with regards to solidarity mechanisms.

3. Strategic, dealing with the overall issues, such as should reception of asylum seekers and migrants be addressed in the European continent or outside, as is the case according to the model used by Australia[1].

The third, strategic, dimension is not an issue at all in the Pact, but the focus is on various aspects of the technical and operational dimension. Nevertheless, a patriotic response should include a vision of a (unspoken) strategic end state, like for example that the EU adheres to the Australian model or a model inspired by the EU-Turkey Statement, or that the EU ceases to be and migration turns a strictly national issue. From the desired end state one can new deduce operational goals in how to deal with the Pact.

Reflections, questions and remarks that we address to the Pact are found in *italics*.

3. ABBREVIATIONS AND DEFINITIONS

2.1 Official documents and their abbreviations	
Official name of document and hyperlink	**Status and Abbreviation**
COMMISSION STAFF WORKING DOCUMENT Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] {COM(2020) 610 final} a.k.a Evidence Document https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291023467&uri=SWD:2020:207:FIN	Non-legislative, preparatory ED
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final	Legislative SCR

[1] https://www.migraciokutato.hu/en/2016/11/29/the-australian-model/

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a.k.a new Screening Regulation https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291190831&uri=COM:2020:612:FIN	
Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2020/611 final a.k.a revised Asylum Procedures Regulation https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291268538&uri=COM:2020:611:FIN	Legislative APR
Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818 COM/2020/614 final a.k.a revised Eurodac Regulation https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295417610&uri=COM:2020:614:FIN	Legislative RER
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final a.k.a new Asylum and Migration Management Regulation https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291110635&uri=COM:2020:610:FIN	Legislative AMR
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of crisis and force majeure in the field of migration and asylum	Legislative CFR

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COM/2020/613 fina a.k.a new Crisis and Force Majeure Regulation https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295614020&uri=COM:2020:613:FIN	
Migration Preparedness and Crisis Blueprint: Commission Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint) a.k.a new Migration Preparedness and Crisis Blueprint https://ec.europa.eu/info/files/migration-preparedness-and-crisis-blueprint-commission-recommendation-eu-mechanism-preparedness-and-management-crises-related-migration-migration-preparedness-and-crisis-blueprint_en	Recommendation MPC
Commission Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways a.k.a new Recommendation on Resettlement and complementary pathways https://ec.europa.eu/info/files/commission-recommendation-legal-pathways-protection-eu-promoting-resettlement-humanitarian-admission-and-other-complementary-pathways_en	Recommendation RRP
Commission Recommendation 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 a.k.a new Recommendation on Search and Rescue operations by private vessels https://ec.europa.eu/info/files/commission-recommendation-cooperation-among-member-states-concerning-operations-carried-out-vessels-owned-or-operated-private-entities-purpose-search-and-rescue-activities_en	Recommendation RSR
Commission Guidance on the implementation of EU rules on	Guidance

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definition and prevention of the facilitation of unauthorised entry, transit and residence a.k.a new Guidance on the Facilitators Directive https://ec.europa.eu/info/files/commission-guidance-implementation-eu-rules-definition-and-prevention-facilitation-unauthorised-entry-transit-and-residence_en	GFD

Definitions		**Author´s remarks**
Asylum	A form of protection given by a State, on its territory, based on the principle of non-refoulement and internationally or nationally recognised refugee rights (e.g. access to employment, social welfare and health care). It is granted to a person who is unable or unwilling to seek protection in his/her country of citizenship and/or residence, in particular, for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion	
Asylum-seeker[2]	A non-EU national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken.[3]	Migrants who apply for asylum may, depending of the final decision of the asylum procedure, qualify as refugees or persons in need of subsidiary protection.
Migrant	A broader-term of an immigrant and emigrant, referring to a person who leaves one country or region to settle in another, often in search of a better life.[4]	Other migrants may obtain residence status due to work or family connections.
Refugee	In the *EU* context, either a **third-country national** who, owing to a **well-founded fear of persecution** for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the **country of nationality** and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a **stateless person**, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to	In the global context the source of the definition is found in the 1951 Geneva Refugee Convention. Typically, the need for protection remains as long as the regime remains in the country of origin.

[2] An overall statistics on migration in Europe 2017-19 can be find here: https://www.ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf
[3] https://ec.europa.eu/home-affairs/e-library/glossary/asylum-seeker_en
[4] European Migration Network

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	such fear, unwilling to return to it, and to whom Art. 12 (Exclusion) of Directive 2011/95/EU (Recast Qualification Directive) does not apply.[5]	
Subsidiary protection	Protection given to a **third-country national** or a **stateless person** who does not qualify as a **refugee** but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their **country of origin**, or in the case of a stateless person to their country of former habitual residence, would face a **real risk of suffering serious harm** as defined in Art. 15 of Directive 2011/95/EU (Recast Qualification Directive), and to whom Art. 17(1) and (2) of this Directive do not apply, and is unable or, owing to such risk, unwilling to avail themselves of the **protection** of that country.[6]	Typically, civilians who are risking their lives in an armed conflict, such a civil war. The need for protection remains as long as the war remains, but not beyond that.
Humanitarian protection	A form of non-EU harmonised **protection** nowadays normally replaced by **subsidiary protection**, except in some EU Member States.	
Relocation	The transfer of persons having a status defined by the Geneva Convention or subsidiary protection within the meaning of Directive 2011/95/EC from the EU State which examined their application /granted them international protection to another EU State where they will be examined for / granted similar protection.[7]	Relocation is an intra-EU "solidarity tool and a mechanism" intended to alleviate Greece and Italy from the large number of asylum seekers who arrived on their territories.

4. STRUCTURE OF THE PACT

The Pact, or the idea behind the Pact, starts with five "experiences" referred to in the ED. In the next step, these experiences, or evidences, raise five "challenges" that in turn motivates the legislative proposals. The guiding documents are, to some extent, related to the mentioned reasoning, as is the MPC closely related to the CFR. The RSR and GFD are closely related to each other and how the Commission wants the Member States to relate to NGO's and

[5] https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/refugee_en
[6] https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/subsidiary-protection_en
[7] https://ec.europa.eu/home-affairs/e-library/glossary/relocation_en

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humanitarian assistance in Mediterranean SAR. The RRP deals with legal pathways, which is another issue, independent from the ones mentioned, but still part of the Commissions pro-migration package.

The relations between the experiences, the challenges and the legislative proposals are implicative in the sense that they rely not only on observations ("facts") but also on political elements; both are open to scrutiny, as are the links between them:

Experiences, Evidences → Challenges → Legislative proposals

The reader will find an excursion into a deeper analysis of the legal basis of some concepts (like "solidarity") to find new openings for questioning some central themes in the Pact.

5. ANALYSIS OF THE PACT AND ITS WEAKNESSES

5.1 The five major experiences

The five major experiences (ED, p 4-5) consists of:

1. The number of irregular arrivals to the EU dropped 92% between 2015 and 2019;

2. Between 2016 and 2019, the share of migrants from countries of origin that statistically have a low chance of being granted international protection was higher than 2015;

3. Asylum applications have not followed the decreasing trend in irregular arrivals;

4. Migrants disembarked following SAR operations represent about 50% of total arrivals by sea 2019; and

5. Outcome of returns from Europe.

The five major experiences are organised in a seemingly logical (chronological) sequence, as appears when reading the headlines for the first three experiences.

It is tempting to add a causal link between 5.1.2 and 5.1.3; asylum applications have not followed the decreasing trend in irregular arrivals, *therefore*, the high pressure on national asylum systems remains. The fourth experience (5.1.4) is a special case of the first, addressing migrants disembarked from Search and Rescue operations (SAR) at sea. The section ends with experiences on returns (5.1.5).

Identifying a point that is questionable, where we can raise a doubt, we name them with a Q followed by the 5.1.x referring to the relevant experience, or Q.5.2.x referring to the relevant challenge, etc.

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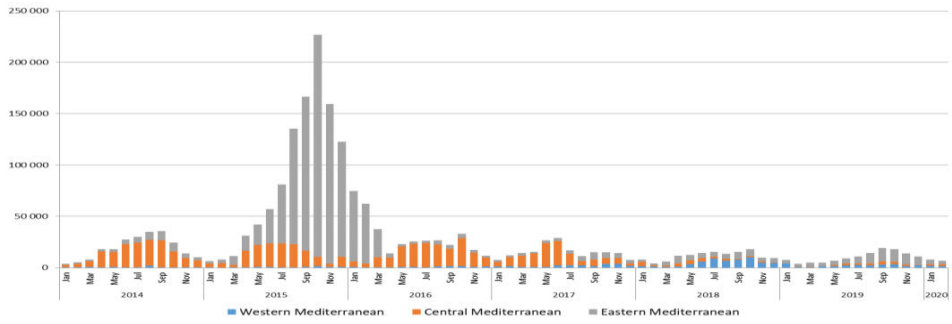
5.1.1 A) Experience No. 1 - The number of irregular arrivals to the EU dropped 92% between 2015 and 2019 [8]

Q.5.1.1 A: What impression follows from the statistics?

Even though true, this claim may be misleading. The drop is illustrated in ED, figure 2.1:



The 92% drop may sound reassuring; however, the ED does not mention anything about the pre 2014 levels. Is there anything that can be understood as "normal" levels of irregular (or illegal) border crossings?

The data on this must be collected elsewhere, in this case from Frontex website. Below is a table of such data, available for 2008-18.

Year	Eastern Med. route[9]	Central Med. Route[10]	Western Med. Route[11]	All three routes	Monthly average
2008	52 300	39 800	6 500	98 600	8 217
2009	40 000	11 000	6 650	57 650	4 804
2010	55 700	4 500	000	65 200	5 433
2011	57 000	64 300	8 450	129 750	10 812
2012	37 200	15 900	6 400	59 500	4 958
2013	24 800	40 000	6 800	71 600	5 967
2014	50 834	170 664	7 243	228 741	19 062
2015	885 386	153 946	7 004	1 046 336	87 195
2016	182 277	181 376	9 990	373 643	31 137
2017	42 319	118 962	23 063	184 344	15 362
2018	56 561	23 485	034	137 080	11 423

[8] ED p 28 -
[9] https://frontex.europa.eu/along-eu-borders/migratory-routes/eastern-mediterranean-route/
[10] https://frontex.europa.eu/along-eu-borders/migratory-routes/central-mediterranean-route/
[11] https://frontex.europa.eu/along-eu-borders/migratory-routes/western-mediterranean-route/

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This goes to show how the statistics is presented in the ED. When data is only presented from 2014 – 2019, there is a decrease in the number of illegal border crossings. As mentioned, it gives a reassuring impression that the situation is under control or, in some sense, normal and that there is no reason for concern.

However, if data from 2008 is included in the picture, even 2017-18 is on a higher level of illegal border crossings than before 2014. Further down this line, it is worth paying attention to the fact that 2011 was a special year during which the Libyan civil war broke out. The impact of this war is clearly reflected in the statistics for the Central Mediterranean Route. From another perspective, levels from 2000-2005 could be argued to represent a more "normal" level of illegal border crossings.

Or, give it a second thought, should illegal border crossings ever be considered "normal"?

As can be seen here, it is not the data as such that is of interest, but rather how they are presented, giving the overall impression of a drop, but only when we take the peak 2015-16 as a starting point for the observation. Not very surprisingly, as in other presentations of illegal border crossings, the starting point has been set to 2014, displaying the decreasing trend 2015-17.[12]

Hence, one might be led to believe that this part of the Pact is based on a manipulated selection of data that is clearly misleading.

5.1.1. B) Experience No. 2 - Between 2016 and 2019, the share of migrants from countries of origin that statistically have a low chance of being granted international protection was higher than 2015.[13]

While the number of irregular arrivals has decreased, the share of third-country nationals arriving from countries with low recognition rates (lower than 25%) has risen from 14% (2015) to

43%	2016
67%	2017
57%	2018
26%	2019

In particular, on the **Central Mediterranean** route, the share of arrivals from countries with an EU-average recognition rate below 25% rose from 36% in 2014 to 70% in 2019.

On the **Western Mediterranean route** their share rose sharply from 61% in 2014 to 99% in 2018 and 2019. (ED, p 30)

Q 5.1.1B: Is this not just a polite way of saying that in the Central and Western Mediterranean routes, many migrants are not in need of international protection?

Why then, is there no further effort to change the underlying reasons for this situation?

5.1.1. C) <u>The distribution of migrants over the different routes</u>

[12] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-250-F1-EN-MAIN-PART-1.PDF (P. 2)
[13] ED, p 29

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Q 5.1.1 C: Can we trust the numbers?

While reviewing the data on irregular arrivals, it may be pointed out that the numbers presented by different EU actors are not consistent. It is a small detail and is uncertain if it lends itself to any benefit in terms of planting doubts, but we point it out:

In the ED, p 32, it is stated that in 2016 there were 374,314 irregular arrivals in the three main routes. The source is referred to as Eurostat and EBCGA (footnote 50). However, from EBCGA (European Border and Coast Guard Authority, a.k.a Frontex), the numbers referred to for the three main routes above (2016) is 373 643 irregular arrivals, namely

Western Med. Route:	9 990
Central Med. Route:	181 376
Eastern Med. Route	182 277
SUM	373 643

Source: https://frontex.europa.eu/along-eu-borders/migratory-routes/western-mediterranean-

Under the headline 2.2 "Migrants saved in search and rescue operations", the irregular arrivals to the EU (2016) in the three main migratory routes (ED p 35, the table) is stated to be 365 293.

Q.5.1.1D: A 9000 + difference is way too much to be acceptable in an official document. Why is this data not consistent? If seemingly hard facts such as explicit numbers cannot be trusted - then what can?

Concluding, there is an unaccounted difference of up to 9 021 illegal border crossings for 2016 (374 314 – 365 293). There are three different figures for the number of irregular arrivals 2016 in the three main migratory routes.

Q.5.1.1.E: How about supporting those in need, but supporting them outside the EU?

This may sound like a heretic question but, in fact, this is what the EU is already doing, regardless of resettlements and payments to Turkey. This is about the strategic dimension of migration. The EU-Turkey statement has had a lasting effect on the Eastern Mediterranean Route. When compared to the period preceding the Statement, irregular arrivals are still 94% lower. The number of deaths in the Aegean have decreased as well.

The ED has a relatively small note on the EU-Turkey statement on page 30.

About 1 700 000 migrants are receiving support for daily needs in Turkey and so far around 27 000 Syrian migrants have been resettled from Turkey to EU Member States.[14]

[14] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdfhttps://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

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The somewhat striking paradox with this is that the model outlined here seems to be very functional with regard to protecting people from civil war in a country closer to the conflict zone, with the advantages that the persons in need for subsidiary protection...

- Does not need to hire expensive smugglers to make it to their end destination and therefore families can be kept together
- Can remain in the same or similar culture, with less cultural clashes
- Can receive basic support, including health care and education to a lesser cost than would have been the case in Europe

Questions not asked, neither answered, are

- *The cost, EUR 6 billion, has not been compared to the estimated total cost for letting 1 700 000 migrants proceed to (Western)Europe and apply for asylum there. Why?*

- *The underlying idea with the EU-Turkey statement, that EU – even before a migration crisis is at hand – negotiates with third countries about reception of migrants, has not been exhausted. Why? And why is this not the model for how to receive migrants, especially in times of crisis or force majeure?*

- *The information about the apparent good sides of keeping migrants safe and sound outside Europe has received relatively little discussion and debate in the mainstream media. Why?*

These questions are touching and highlight the one true strategic question that was never asked in media, never (enough) debated, never analysed nor made subject to referendum: of course people in distress should be given a helping and protecting hand - but where and how?

The 1951 Geneva Convention on the Status of Refugees was written to protect political dissidents from the Soviet/Eastern bloc that defected to Western Europe. There was no option but to help them in the country in which they applied for asylum.

Now the situation has radically changed and this calls for different and more flexible approaches. The little note on the EU-Turkey statement can function as a bridge to question the entire approach of receiving irregular migrants inside the EU.

5.1.2 Experience No. 3 - Asylum applications have not followed the decreasing trend in irregular arrivals

Given that migrants shall be received and tried for asylum in Europe, the issue of multiple asylum applications should be addressed. It is, and should be recognised, as a secondary issue in relation to the first; *where to help those in need.*

One fact that calls for an answer is that the decrease in irregular arrivals has not been followed by a decrease in the number of asylum applications (ED, p 32). The discrepancy can be explained by unauthorised movements followed by multiple asylum applications, applications

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lodged by persons who arrived legally (from visa-free countries) to the EU and in applications lodged by those who arrived irregularly, without being apprehended at the external borders.

Very obviously, this situation calls for a reliable identification system that is accessible by officials across all Member States.

It can, and probably will, be argued by opponents that this shows the need for a unified asylum system in order to prevent unauthorised moves and so called "asylum shopping".

Q.5.1.2: Does the unexpectedly high amount of asylum applications show that asylum processes should not take place within the EU at all? Those who really need protection, and not just seeking financial opportunities, would accept to have their asylum applications processed outside the EU. This would also, almost certainly, decrease the number of asylum applications, as economic migrants would have far less incentives than today.

5.1.3 Consistently high number of asylum applications implicates high pressure on the national asylum systems.

This assessment obviously follows from the experiences above in 5.1.2.

5.1.4 Experience No. 4 - Migrants disembarked following SAR operations represent about 50% of total arrivals by sea 2019 (ED, p 35-)

There are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third-country nationals have no points where to officially seek entry. The nature, profile, and scale of arrivals further to SAR operations have a direct impact on the EU's migration and asylum systems, as well as on integrated border management, due to the fact that Member States cannot apply the same tools to SAR disembarkations as for irregular crossings by land.

Q.5.1.4: If there were effective border checks for land arrivals, they would all apply in a country with external borders. We know this is not the case, as many apply in countries without external borders, such as Germany, Sweden or other northern European countries. So, in effect, where is the difference?

5.1.5 Experience No.5 - Outcomes of returns from Europe.

The number of third country nationals found to be irregularly present in the EU decreased by 70% between 2015 and 2019. However, *only 1/3 of irregular third country nationals actually returned in 2019*.

Every year, between 400,000 and 500,000 foreign nationals are ordered to leave the EU because they have entered illegally or are staying irregularly. However, on average only one third of them go back to their country of origin or to another third-country through which they travelled to the EU, ED p 36.

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The EUROSTAT data on third-country nationals found to be irregularly present in the EU has decreased. However, we should remember that only persons who are apprehended or otherwise come to the attention of national immigration authorities are recorded in this statistic. It is not intended to be a measure of the total number of persons who are present in the EU on an unauthorised basis.[15] In conclusion, we are left with an unknown amount of uncertainty here.

There are a number of reasons why failed asylum seekers do not want to return to their country of origin.

- They have already tasted the welfare fruits of another society, which they find attractive.
- They have, sometimes, adapted themselves with a social network, friends and relations.
- The investment into costs of smuggling (ignore here the notes on fatalities), which seemingly is officially a non-issue, is hardly ever debated.

(Image source[16])

[15] https://ec.europa.eu/eurostat/cache/metadata/en/migr_eil_esms.htm
[16] https://www.mindsglobalspotlight.com/@middleeast/2017/06/02/32178/migrants-turn-to-smugglers-despite-risks-cost

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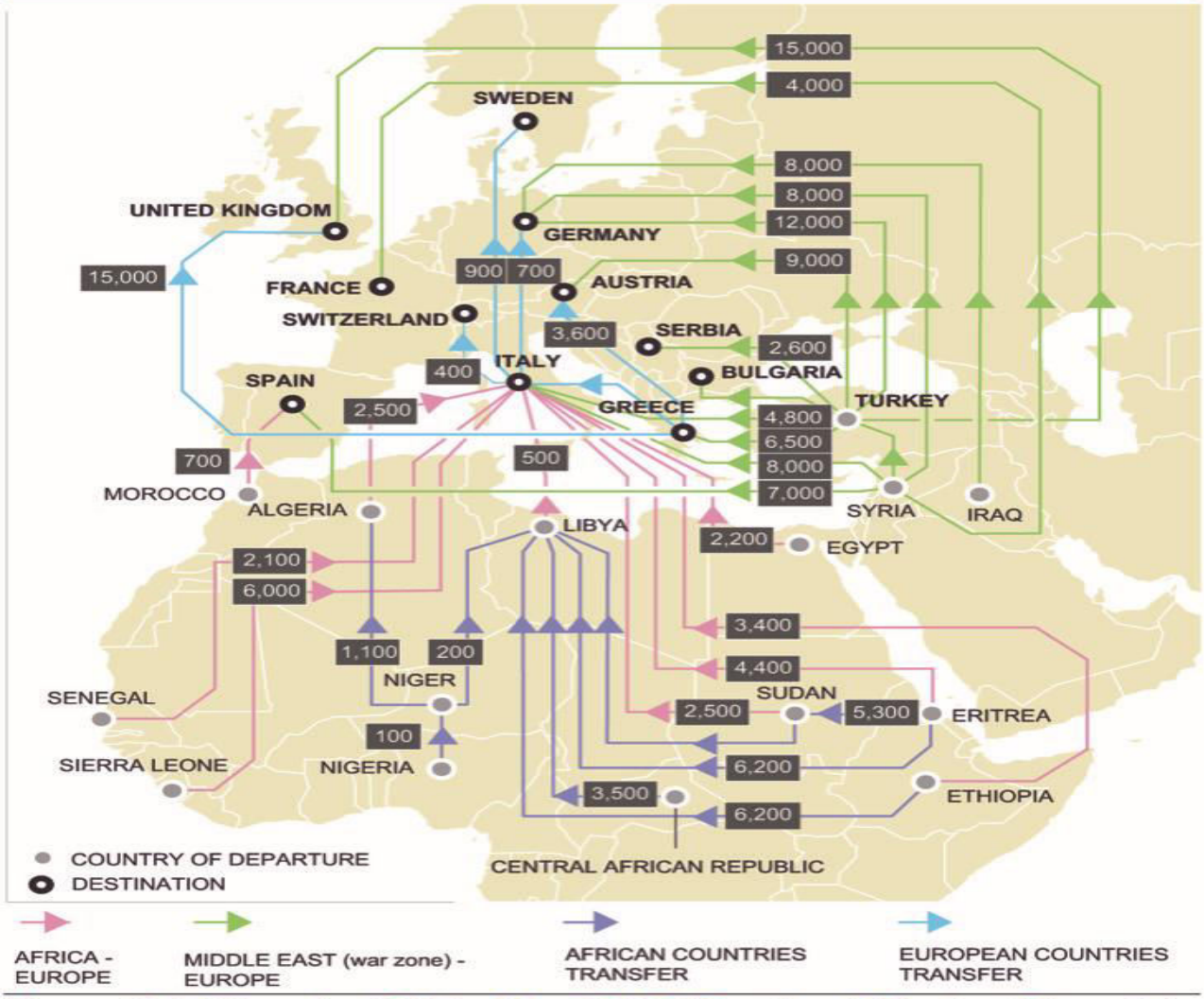
Migrant Smuggling: How much it costs

AFRICA, MIDDLE EAST ▶ EUROPE

Main Directions of Migrant Smuggling • Period: 2015 - 2017
XX,XXX Prices in EUR (the highest documented values)
(1 EUR = 1.12 USD) *Prices are rounded to the nearest hundreds*



Migrant fatalities: Jan 2014 - May 2017 (Dead and Missing Migrants)

Source: International organization for Migration (IOM), Migrant Files, MINDS

MINDS Global Spotlight – CTK

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The migrants and their family in the country of origin may have invested a lifetime of savings in order to have one family member, usually a young man, established in a country from which he can subsequently earn money and return it to pay back the "investment".

The money may possibly have been consumed by smugglers, as a fee for transportation, ID documents, help to bypass border crossing points, stops to change route/smugglers etc.

The typical young man simply cannot return without the money, or he will suffer consequences from his family whose savings were lost.

See and consider also the case of Mali, below p. 22.

As long as there is no sincere will to return after failed asylum application, there will always be migrants that obstruct their return, disappear and try elsewhere, or simply disappear for the reasons mentioned above.

The only effective way to deal with this, according to common sense, is to cut the smugglers business idea and let the asylum procedure take place outside of Europe.

Q.5.1.5. Why is such an option not even a topic for discussion? Why would the EU succeed where the MS have not - because there is no will from the migrants side to return?

5.2 The five major challenges (ED, p 5-9) and the legislative proposals.

5.2.1 National inefficiencies and the lack of an integrated, harmonised approach at the EU-level in policy as well as management

It is pointed out that despite increased cooperation, Member States asylum and return systems largely operate separately (ED, p 5 and 42).

From the ED: This creates inefficiencies and encourages movements of migrants across Europe. There is a lack of coordination and streamlining at all stages of the migration process, from arrival to the processing of asylum requests, provision of reception conditions and handling of returns.

The lack of integrated approach leads to (ED, p 42)

Claimed challenge	*Comments*
Hampered efforts to ensure a fair and swift process that guarantees access to procedures, equal treatment, clarity and legal certainty.	*1) These are rather serious allegations against some or all Member States. But they are very unclear, very unspecific and not supported by facts. Should such allegations be accepted as a reason for a more integrated approach?* *2) If these allegations were supported with facts, so that we could assume them to be true, the important issue should be to remedy the problems, not primarily to create a more integrated approach at the EU level. How would we know that such an approach would cure the stated deficiencies?*

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	3) Why could it not suffice to suggest that EU or any other international organisation keep a control task to review whether migrant´s rights are observed and – if not - blow the whistle? Is this not the task[17] of the UNHCR and why are they not good enough?
At the same time, it reduces the capacity to return people who do not qualify for international protection by increasing obstacles within the EU and to third countries´ cooperation on readmission	*We all agree that low return rate is a serious problem. But the fault does not lie with the MS, but with the unwillingness of the failed asylum seeker to not leave Europe.* *With an integrated approach, how would it increase the willingness to accept an extradition order if the asylum application is rejected? It will not (5.1.5).*
The MS lacks sufficient preparedness and contingency plans in order to ensure sufficient capacity in case they are confronted with increased or rapid changing migration pressure.	*The EU failed the Coronavirus test of readiness, preparedness and early action.*[18] *Why would we trust that the EU could handle an urgent crisis?*

Further, there are claimed to be a number of *loopholes* as regards return and asylum procedures that facilitate absconding and unauthorised movements, hamper returns and put a heavy burden on national administrative and judicial systems.

The loopholes include, notably (ED, p 5, p 44):

Claimed challenge	***Alternative way to address it***
Return and negative asylum decisions being issued separately	*Change national law and regulations.* *It follows logically that a person without residence rights or a visa must leave a country in which he/she was denied asylum. The real issue here is the will of the applicant to follow the negative decision and leave the country.*
Inefficient rules in case of subsequent asylum applications submitted during the last stages of return	*Change national law and regulations.* *The underlying reason is that the applicant does not want to leave the country in which asylum was requested.*
Only 10-15% of return decisions are followed up with a readmission request or a request for identification and re-documentation to third country concerned	*The EU could act here upon request from the MS or coordinate the efforts of the MS with regards to obtain ID and re-documentation from a third country.*

[17] https://www.unhcr.org/what-we-do.html
[18] https://www.politico.eu/article/coronavirus-europe-failed-the-test/
https://www.reuters.com/article/us-health-coronavirus-europe-france-idUSKBN21C3DT

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The focus in this section is on the problem of returns, but addressed so that the problem lies with the MS, not with the (rejected) asylum seeker. If there was a will, there would be a way (out of the EU and back home) and here we once more refer to the experience related to the non-debated subject of costs for smuggling above (5.1.5).

This is basically backed up and supported by this text (ED, p 43):

"Member States regularly report to the Commission that they face a significant burden in dealing with unfounded, inadmissible or fraudulent asylum applicants who, through the use of procedural and legal loopholes in the national asylum systems, are able to delay or prevent their return."

The Pact here briefly touches upon the problem, but without seeing or recognising it. It is masked behind the concept of "loopholes".

There will always be loopholes found by those who look for it. If the COM gets away with this kind of reasoning, the COM will also get away with a similar reasoning arguing, for example, that national tax legislations suffer from loopholes that people with creative tax planning ideas are able to use; therefore, the tax legislation should be regulated at EU level. This is a door that needs to remain closed and well locked.

Further, as can be seen in statistics on return rates across Member States, there are significant differences (as presented in ED, p 44, Figure 3.1.1, below). This actually proves that the high return rates that some countries present, notably Latvia (97%), Malta (97%), Estonia (88%), Poland (88%) and Lithuania (87%) is an issue that can be resolved within the existing national legal framework of each respective MS. The principle of subsidiarity should therefore prevail here and prevent any initiative from the EU.

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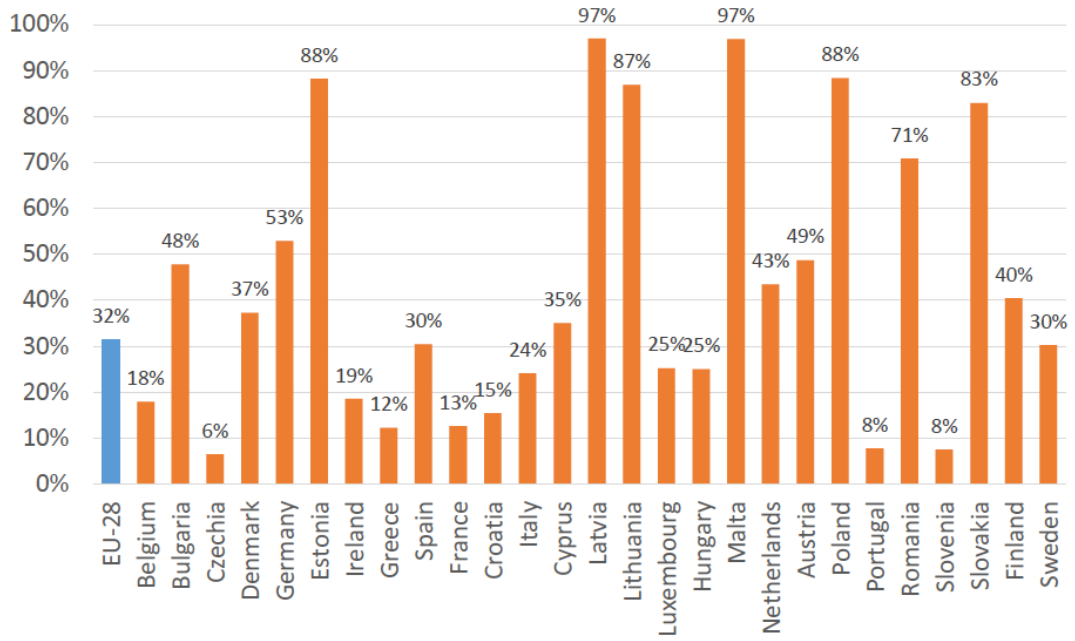
Figure 3.1.1: *Return rate per Member State (EU28)*



Source*: Eurostat*

The ED states that the return rate of countries where return decisions are issued in the same legal act as negative asylum decisions tend to have higher levels of return efficiency compared to countries that have separate issues. Sweden, for example, has decisions of negative asylum and return in the same legal act, yet the return rate is just 30%.

Latvia, Malta, Lithuania and Poland had, until 2015 (with the implementation of the recast Reception Conditions Directive) irregular entry or stay as grounds for detention.[19] *We should remember that Poland, Latvia and Lithuania share borders with Ukraine, Belarus and Russia - none of which were a failed state. Russia maintained a relatively high return/readmission rate between 2016-19, around 60-70%, whereas for Ukraine the return rate was around 80% (ED, p 37, figure 2.3 a). Nevertheless, there has been international concern expressed for Poland*[20] *and Latvia*[21] *for not having used detention of asylum seekers as a last resort.*

By contrast, Malta has received migrants from African countries and faced another situation. Malta has been severely criticized for pushbacks[22]*, for bypassing the Reception Conditions Directive by relying on health legislation to deprive asylum-seekers their freedom of movement*[23]*, etc.*

[19] FRA, European Union Agency for Fundamental Rights: Detention of third-country nationals in return procedures, p. 17, available at Internet: https://www.refworld.org/pdfid/4ecf77402.pdf
[20] http://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/grounds-detention
[21] https://reliefweb.int/sites/reliefweb.int/files/resources/Latvia-report.pdf
[22] https://www.amnesty.org/en/latest/news/2020/09/malta-illegal-tactics-mar-another-year-of-suffering-in-central-mediterranean/
[23] https://www.asylumineurope.org/reports/country/malta/grounds-detention

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The bottom line is, of course, that high return rates *cannot be explained by whether negative asylum decision and return is in the same legal act or not, but by other factors, such as the migrant´s country of origin and action taken, legal or not, to deal with the situation. Therefore, the conclusion in the ED is weak and it seems obvious that the underlying truths are not touched upon in the paper.*

On readmission: A comment on the choice of words in ED, p 46, where "third countries unwillingness or lack of capacity to cooperate on readmission of own nationals is an additional challenge". The correct word should not be "challenge" but problem, a serious problem or *breach of international customary law* (we would call it *a sham*.) It is well known that some countries, for example **Mali,** refuses to cooperate with the EU in signing and implementing readmission agreements[24], as it would most likely make the politicians lose support in their home country. In the Mali case, the underlying reason for this is found in the fact that migration is not necessarily a migration of the poor, but rather often "an adventure" of relatively wealthy and powerful families whose younger men try to improve their position in a patriarchal society. For these young men, returning with empty hands and often having lost a small fortune forces them to confess to a failure, which they often avoid by not returning to their families, or they keep trying to cross to Europe again and again.[25]

The EASO Asylum Report 2020, p 37, states that "The 23 readmission agreements and arrangements between the EU and partner countries have improved operational flows in returning migrants to countries of origin. However, results have been poor on the number of persons actually returned. Improving the implementation of return agreements in practice is needed, including using broad policy leverage, such as restrictive visa measures for third countries not cooperating in readmissions."[26]

The future hope lies with the mandate of Frontex, according to EASO. But having said that, the EU has – according to EASO - so far *not proven* to be efficient into demanding effect of the already existing readmission agreements.

Q 5.2.1B: Why should we trust the EU to become more efficient when it has already had several years to prove its efficiency without succeeding?

In a way, if the EU successfully negotiated readmission agreements on behalf of the Member States, that would not be bad at all. However, such an EU, supporting sovereign Member States seems not to be realistic anymore.

5.2.2 Fragmented and voluntary ad hoc solidarity between Member States (MS) has affected MS of first entry negatively.

Since late 2015 the focus on discussions and actions on solidarity were focussed on relocation, since the Dublin system has failed according to the Commission.

[24] https://www.modernghana.com/news/744146/mali-denies-agreement-on-failed-eu-asylum-seekers.html
[25] https://repositorio.iscte-iul.pt/bitstream/10071/6295/1/The_tough_way_back_failed.pdf
[26] https://www.easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf

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The issue of compulsory relocation of applicants has been and still is the key to disagreement, and therefore also the key in the Pact is finding an agreement among Member States. It does so by suggesting a new form of solidarity.

The ED reviews the problems with the implementation of the Dublin Regulation. From the operational perspective of how it was utilised, especially during the migration crisis 2015/16, it is hard to disagree. The Dublin system was not designed to handle the 2015 crisis. If this fact is acknowledged, which I find good reason to do, the inevitable step is that *either* the EU needs a *shift in strategic approach*, which was never an issue for debate, or a new *reformed operational approach*, which is the focus of the Pact. The follow up questions in operational level are of no strategic importance, but more of efficiency, reduction of unintended consequences and minimising frictions, as the strategic paradigm is unfortunately already set.

5.2.1.1 The legal framework and basis for internal (interstate) solidarity.

There is a duty of sincere cooperation set out in Article 4(3) of the TEU, requiring the EU and MS to "assist each other in carrying out tasks which flow from the Treaties". The *principle* of solidarity is set out in Article 80 of the TFEU. It covers not only asylum policies, but also immigration and border control policies.

However, Article 80 alone *does not* constitute a legal basis within the meaning of EU law. The Council has stated that within the same chapter, only Articles 77(2) and (3), 78(2) and (3) and 79 (2), (3) and (4) TFEU contain legal bases enabling the adoption of EU legal acts.[27] The Parliament has stated that Article 80 TFEU provides a joint legal basis in the areas of asylum, migration and borders along, 'jointly' with Articles 77 to 79 TFEU. The Advocate General of the CJEU has stated that Article 78(3) constitutes a legal basis for provisional measures to implement the principle of solidarity, when read in conjunction with Art 80 TFEU.[28]

Article 80 TFEU reads:

"The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

The words "Whenever necessary" is commonly understood as not only requiring an objective justification (political necessity) for those measures, but also a reminder to adhere to the principles of subsidiarity and proportionality.[29]

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[27] Council Statement on Article 80 TFEU 8256/14 https://data.consilium.europa.eu/doc/document/ST-8256-2014-ADD-1/en/pdf

[28] https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI(2020)649344_EN.pdf

[29] Rosenfeld, Herbert, (2017), The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU, p 9. Internet: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944116

Alternative für Deutschland

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Q.5.2.2.1: If an opponent refers to Solidarity in Article 80, a valid question may be: Solidarity according to Art 80 TFEU presumes necessity, subsidiarity and proportionality. How can it possibly be necessary to….

> *… (for example) propose a Migration Pact that presumes that all persons in need of international protection must receive that in one of the Member States, whereas, in fact, even today many receive it in Turkey?*

Further, references to interstate solidarity have a common denominator: they feature in areas sensitive to state sovereignty, i.e. in areas that at least partly remain in the domain of the MS and where EU competences are never exclusive.

In the area of Freedom, Security and Justice (AFSJ), competences are shared between the EU and the MS (see Articles 2(2) and 4(2)(j) TFEU. An important caveat to the exercise of EU competences is found in Article 72 TFEU regarding the maintenance of law and order and the safeguarding of internal security, which of course so far remains a MS competence.

The conclusion from above is that solidarity is invoked to ensure cooperation and good faith where EU primary law framework is missing. However, one should distinguish between a narrow reading of solidarity as a legal term and its common usage to give meaning to other concepts of EU law and politics.[30]

5.2.2 Inefficiencies in the Dublin system

The current Dublin Regulation has shown several deficiencies and weaknesses concerning the existing rules and its implementation. Even with a more efficient and stricter enforcement by all Member States of the existing rules, and with additional measures to prevent unauthorised movements, there is a high likelihood that the current system would remain unsustainable in the face of continuing migratory pressure and without a solidarity mechanism to support Member States facing migratory pressure to address their needs.

5.2.3 The lack of a dedicated mechanism to address crisis situations and situations of force majeure - CFR

This challenge can be seen as a sub-challenge to the previous (5.2.1-3) to deal with crises or situations of force majeure with a maintained migration management system. It focuses on the need for specific rules on crisis solidarity which would include a solidarity scheme for relocation with a wider scope or return sponsorship to ensure that Member States are obliged to provide a quick response to release the extreme pressure faced by affected Member States. It also calls for procedural derogations that Member States can apply in their asylum and migration systems. Derogations from the asylum and return rules should ensure that Member States have the means and sufficient time to carry out relevant procedures in those fields.

[30] Ibid.

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5.2.4 The lack of a fair and effective migration system hinders the access of migrants to the asylum procedure, equal treatment in all MS as regards procedural safeguards, rights and legal certainty (ED, p. 8 p. 64-65)

Here special attention is focused on migrants rescued in SAR operations. A "ship-by-ship" approach, with long and unpredictable times for disembarkations and relocations, has proven to be unsustainable, is putting vulnerable migrants at risk and is delaying access to international protection. This points to the need of clearer rules for the determination of responsibility and to provide for a solidarity mechanism that can reflect the specificities of disembarkations following search and rescue operations.

Long waiting periods, as well as asylum and return procedures not sufficiently streamlined, can have an impact on the protection of fundamental rights of those seeking international protection, as expressed in a UNHCR recommendation to the European Commission.

5.3 Addressing the challenges by creating legislative proposals (ED, p 9-15)

In 2016 the European Commission presented a set of seven legislative proposals to complete the reform of the CEAS with the aim to move towards a fully efficient, fair and humane asylum policy which can function effectively even in times of high migratory pressure. The co-legislators reached a broad political agreement on five out of these CEAS proposals introduced in 2016, namely as regards the setting-up of a fully-fledged European Union Asylum Agency; the reform of Eurodac; the review of the Reception Conditions Directive; the Qualification Regulation and the EU Resettlement framework.
No common position was reached on the reform of the Dublin system and the Asylum Procedure Regulation. An overview, ED, p 69

Challenges		Addressing the Challenges
Lack of integrated approach to implement the European asylum and migration policy • Uneven playing field across Member States, hampering efforts to ensure access to procedures, equal treatment and legal clarity		A more efficient, seamless and harmonised migration management system • A comprehensive approach for efficient asylum management: AMR • A seamless asylum-return procedure and an easier use of accelerated border procedures: APR • A coordinated, effective and rapid screening: SCR
National inefficiencies and lack of EU harmonisation in asylum and migration management • Challenges of return and asylum		A fairer, more comprehensive approach to solidarity and relocation • Compulsory solidarity system: AMR

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nexus • Return programmes • Slow processing of applications • Difficulty using the border procedure		
Absence of a broad and flexible mechanism for solidarity • Relocation is not the only effective response to deal with mixed flows		Simplified and more efficient rules for migration management • Wider and fairer responsibility criteria, improved procedural efficiency: AMR • More efficient data collection: RER
Inefficiencies of the Dublin System • Lack of sustainable sharing of responsibility • Inefficient data processing • Procedural inefficiencies		
Lack of targeted mechanisms to address extreme crisis situations • Difficulty to ensure access to asylum or other procedures at the borders during crisis		A targeted mechanism to address extreme crisis situations: CFR
Lack of a fair and effective system to access fundamental rights		Improved access to fundamental rights of migrants and asylum seekers

5.3.1 A more efficient, integrated and seamless migration management system – Proposal for a Regulation on Asylum and Migration Management (AMR, SCR, RER), ED p. 70

The proposed AMR is based on a system of monitoring the migratory situation, preparedness and planning, including contingency planning. AMR introduces a wider toolbox of solidarity measures.

A new **screening phase** will allow for a swift determination of whether to channel individuals into the asylum or the return procedure. This should be decided within five days and includes establishing identity and to identify any security or health concerns or vulnerabilities (ED, p 71). To prevent undetected movements, a swift registration in Eurodac is proposed.

It is quite commonly known that many asylum seekers often "lose" their passport or ID on their way; in some cases they really do not have any. In such cases it may be very difficult, uncertain and time consuming to establish identity, notably when documents must be sent from the country of origin. From this perspective, five days, seems unrealistic.

Q.5.3.1.A: *If an asylum seeker from, for example, Afghanistan needs to ask relatives to mail ID, documents to him/her, how will the proposed SCR deal with this? Five days will not do.*

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On the other side, the suggested procedures at the external border includes an assessment of security threats (see 5.4.4 below) and indications for unfounded claims. Abusive, inadmissible requests or applicants from low recognition rate countries should swiftly be ordered to return. However, an individual assessment of an asylum application is nevertheless always to be ensured within the border procedure (ED, p 72).

The idea is that more efficient border procedures will lessen the burden on the asylum and migration authorities inland, which in turn will be able to more efficiently assess genuine claims.

Q.5.3.1.B: The critical question here is if this procedure has been tried in real life, under what conditions has the outcome ever been evaluated and extrapolated across the external border, with focus on the three migration routes?

The legal dimension of the procedure allows for one level of appeal in the border procedure.

Furthermore, under the new proposal, Member States are to receive EU financial operational support to ensure that the asylum and return phases of the border procedure are closely connected to each other, e.g. by keeping applicants whose applications have been rejected in border facilities until the enforcement of the return decision.

However, irregular migrants in a return procedure would not be subject to detention as a rule (ED, p 73), with the defined exception for risk of absconding, however.

Q.5.3.1.C: The intention here seems vague and unclear. What is the idea to keep rejected asylum seekers in border facilities, without being subject to detention? How to know then if they will remain in these facilities?

By ensuring that rejected asylum seekers do not enter the EU's territory and that returnees remain available in the border area or transit zone, the return border procedure will contribute to reducing irregular entry, stay and unauthorised movements.

We would say, ok, so far so good, if it works in real life. The ideas behind this part of the proposal show some sense of reason, given we keep the analysis on operational level. The possible downside is that EU gradually takes over more and more competences and functions from the Member States.

5.3.2 A fairer and more comprehensive approach to solidarity (AMR)

A new approach to **solidarity** is presented (ED p 74-75), where the solidarity no longer is limited to relocation, but includes **carrying out returns** from another Member State and in certain cases also capacity building, operational support or support in the external dimension. An example of the latter is to put in place (to finance) enhanced reception capacity, including infrastructure, to enhance the reception conditions for asylum seekers. The proposal also includes contingency planning at both national and EU level. A special focus is given to unaccompanied minors for the purposes of relocation.

Member States would have to submit a "Solidarity Response Plan" indicating which contributions they will make. The amount and nature of such contributions will be calculated according to a "distribution key" based on population and GDP of each Member State. Where contributions

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indicated by the Member States are sufficient, the Commission shall adopt an implementing act establishing a "solidarity pool". Under conditions when the indications by the Member States fall short of needs identified in the Migration Management Report, the Commission will adopt an implementing act setting out the shares of each Member State according to the above distribution key.

Costs for a Member State will be offset by means of payments from the EU budget of EUR 10 000 for each relocation (EUR 12 000 for unaccompanied minors).

The solidarity mechanism will be triggered by "a holistic qualitative assessment and evaluated according to a number of criteria, which extend beyond the asylum field to the migratory situation of Member States, as well as to that of the EU as a whole" (ED, p 75).

Q.5.3.2.A: Can you give an example of when the mechanism will be triggered and how the Member States can foresee that?

Comment: Even though the approach may seem rational, it may in the long-term perspective be irrational to weaken the Member States. The trigger mechanism is described in a vague, unclear and unpredictable way that makes it strange to consider that the EU should possess this power over its Member States. Here, we presume, the solidarity between Member States that oppose a strong, federal, EU must prevail.

This part of the proposal seems like an obvious invitation to the more patriotic countries (i.e. the Visegrad countries) to accept, as they then could show solidarity with focus on, for example, returns. However, that would still imply that they give away to the EU when to show solidarity, to whom and under what conditions?

Q.5.3.2.B: Is there ever any such thing as a compulsory solidarity? Shouldn't solidarity be an expression of free will, be it from an individual or a nation? Even without this part of the proposal, there is always a door open for showing solidarity for any nation that wishes to.

5.3.3 Simplified and more efficient rules for robust migration management (AMR, RER)

The new system foresees a wider definition of "family member" to include siblings and families formed in transit (ED, p 78).

Q.5.3.3.A: Is there any thought on how this wider definition will not be misused? How to control this, unless DNA testing is included in the screening phase?

The new solidarity measures foreseen in the AMR includes, amongst others, a specific process leading to relocation of persons following disembarkation from SAR operations. As there are no official border checks for SAR arrivals, points of entry are more difficult to define and also third-country nationals have no points where to officially seek entry (ED, p 79).

Q.5.3.3.B: Many asylum seekers travelling over land avoid official border crossing points as they travel from south eastern countries to northern European countries. What is stopping any such asylum seeker, or any person having disembarked after SAR, to report as asylum seeker at the nearest police station?

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In order to have a clearer picture of secondary movements, the RER proposal also provides the possibility to count "applicants" as opposed to "applications". There is some new information to be introduced in Eurodac like marking opportunities when an application has been rejected, information on monitoring return processes, marking of security threats and information on visa issuing or extension (ED, p 80).

This part of the Pact indeed seems to improve the possibility to detect unauthorised movements. In line with this such information needs to be introduced in Eurodac and harmonised with the 2019 Interoperability Regulation (a European Search Portal, a shared Biometric Matching Service, a Common Identity Repository and a Multiple Identity Detector).

Q.5.3.3.C: It is hard to find remedies like this to count applicants instead of only applications. Is it not like cleaning up after some amateur legislator doing something for the very first time?

The new legislative framework introduces a technical system of take back notifications to remedy some procedural inefficiencies in the Dublin system, but this is hardly interesting in the big picture.

5.3.4 A targeted mechanism to address extreme crisis situation and situations of force majeure – Proposal for a Regulation establishing procedures and mechanisms addressing situations of crisis (CFR), (ED p 82-83)

The proposed system is supposed to deal with situations of migration crises and other force majeure situations, keeping the COVID-19 pandemic in mind. A wider scope of relocation is foreseen with the inclusion of applicants for international protection that are in the border procedure and also irregular migrants. It also foresees a faster procedure to grant immediate protection to groups of third-country nationals who are at a high degree of risk of being subject to indiscriminate violence because of an armed conflict. Also, it is foreseen that there will be a shorter period of time for triggering the transfer of migrants subject to return sponsorships. To deal with situations of force majeure the CFR extends time frames for the obligation to relocate or undertake return sponsorships of persons.

5.3.5 A fairer and more effective system to reinforce migrants and asylum seekers´ rights

In brief, the Commission (ED, p. 84-) proposes to strengthen and clarify a number of rights through the different proposals:

- Right to (extended) family reunification, including siblings and families formed in transit countries. *This will increase the influx; how will the EU protect against fake family arrangements? DNA analysis seems here to be the only option.*

- Best interest of the child, a better defining of the principle. *This is already covered by Art 3, UN The Convention on the Rights of the Child, of 20 November 1989*

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- Prioritisation of relocation of unaccompanied minors by financial incentive. *Why are children separated from their families in the first place? So that the families can safely join later?*

- Possibility for a quicker long-term resident status, motivated that it will "be an important contribution towards facilitating the full and quick integration of beneficiaries of international protection in the Member State of residence." *Where is the empirical evidence for this claim? So far we can find full and quick integration by, for example, migrants from South East Asia, former Yugoslavia and other European countries. Did they receive a resident status faster?*

- Right to an effective remedy.

- Right to material reception conditions, but limited to where the applicant is required to be present.

- Suspensive effect of appeals. Here the Commission proposes that, as regards the border procedure, appeal upon the eventual rejection would not have a suspensive effect, meaning that applicants cannot wait for the decision of the court, they must leave.

- Procedural safeguards in the border procedure will still include provision of legal assistance, the right to effective remedy and respect the principle of non-refoulement.

- Detention will be used only in cases when there is a risk of absconding, of hampering return or a threat to public order or national security – and only as a last resort in individual cases. It shall not exceed the maximum time of the border procedure (12 weeks for asylum and 12 weeks for return).

- The RER proposal introduces a screening that will be carried out with respect to fundamental rights as the right to dignity, protection of personal data, prohibition of torture and inhuman or degrading treatment or punishment, the right to (apply for) asylum, protection from collective expulsion and refoulement, non-discrimination and will full account to the rights of the child and special needs of vulnerable persons.

Almost 14 000 unaccompanied minors were registered in the EU in 2019. Two in three of these are citizens of Afghanistan, Syria, Pakistan, Somalia, Guinea or Iraq.[31] We have so far not been able to find data on family reunification.

Q.5.3.5: It is striking to see how the challenge 5.2.5 is not backed up by substantial experiences. Are we talking existing rights that have been violated? How can prioritising the relocation of minor be a right? From where is that right derived? The principle of the best interest of the child; where are the facts that make us understand why this is needed, when there already is a Convention on the Rights of the Child? At the same time, children are entitled to the right to a family life, compare Art 8. European Convention on Human Rights. When children are separated from their family to make it alone to Europe, when the family joins later for reunion… Is this not because the EU has a

[31] https://ec.europa.eu/eurostat/documents/2995521/10774034/3-28042020-AP-EN.pdf/03c694ba-9a9b-1a50-c9f4-29db665221a8

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system that promotes such separations? This is of course a very sensitive matter. We cannot help but suspect that this also blocks people from seeing what is happening. Would the processing of asylum applications closer to the area of origin stop this tragedy of having children separated, abused and exploited, just to have them arrive ahead of their family?

Do we even know if, or how many, children that have/have not their family to arrive in the destination country? Why is there no such statistics? Why is there no voice that asks these questions?

We cannot escape the impression that this challenge is made up out of political correctness and without a solid empirical base that makes it acceptable. Maybe that is the case when someone who questions something labelled "rights" by definition appears very negative.

5.4 The five legislative proposals

5.4.1 AMR, the asylum and migration management regulation

The proposal **aims to** establish a common framework to asylum and migration management based on principles of integrated policy-making, solidarity and sharing of responsibility. Further, to enhance the system's capacity to determine efficiently and effectively the single Member State responsible for examining an application for international protection – and to discourage abuses and prevent unauthorised movements (AMR, p 4-5).

The **legal basis** is Article 78, second paragraph, point (e) and Article 79, second paragraph, point (c) of the Treaty on the Functioning of the European Union (TFEU).

Concerning **subsidiarity**: Title V of the TFEU on the Area of Freedom, Security and Justice confers certain powers on these matters to the European Union. These powers must be exercised in accordance with Article 5 of the Treaty on the European Union, i.e. if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Union.

One of the objectives of AMR is to limit unauthorised movements of third-country nationals between Member States, which is a cross-border issue by nature. Another objective is the new solidarity mechanism applied in general and in particular to asylum seekers from SAR. It is claimed that actions taken by individual Member States cannot satisfactorily reply to the need for a common EU approach.

This could theoretically be referred to subsidiarity control mechanism by national parliaments, with the purpose of delaying the process.[32]

Budgetary implications necessary to support the implementation amount to EUR 1 113 500 000 foreseen for the period 2021-2027 (AMR, p 16, p 99)

[32] https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism_en#procedures-triggered-so-far

The "Solidarity mechanism" (AMR, p 18-)

Solidarity contributions that Member States will be under the obligation to provide consist of either relocation or return sponsorship. There is also the possibility to contribute to measures aimed at strengthening the capacity of Member States in the field of asylum, reception, return and in the external dimension.

Specifically related to SAR: When a MS has informed the Commission that it considers being under **migratory pressure**, the Commission will make an assessment of the situation. This will take into account the particular situation prevailing in the Member State on the basis of a number of criteria and the information available, including the information gathered under the Migration Preparedness and Crisis Blueprint (below 5.5.1).

The assessment of migratory pressure is regulated in Article 50 (3) and (4) and consists of 11 quantitative and 10 qualitative criteria. Where the Commission´s assessment indicates that a MS is under migratory pressure, it will identify the overall needs of the MS and indicate the appropriate measures needed to address the situation and all other MS shall contribute through measures of relocation or return sponsorship or a combination of such measures, according to the Distribution Key in Article 52 – 56 (the formula for the distribution key can be found in Annex III to AMR).

Within two weeks from the submission of the Solidarity Response Plans, the Commission will adopt an implementing act setting out the solidarity measures to be taken by Member States for the benefit of the Member State under migratory pressure.

The provisions on the Solidarity Mechanisms are found in Articles 45-56. Articles 47, 48 and 49 applies to SAR.

It is worth noting here that a MS is, under the AMR, supposed to inform the Commission that it considers itself to be under migratory pressure. Then the Commission shall assess the migratory situation in that state. Here the Commission creates a legal concept "migratory pressure" and subdues the MS to act similar to how a region or a municipality acts towards the state when it requests support in emergency situations, like larger forest fires or major accidents.

The predictability in Art 50 (3) and specially (4) seems very low, so the discretionary dimension is obvious, large and with implications that conflicts state sovereignty.

Furthermore, Art 64 concerns penalties where MS are ordered to lay down rules on penalties in national law applicable to infringements of AMR.

It is outside the scope of this study to argue that this is sensitive enough to demand and successfully get a unanimity vote in the Council. But if so, this would be one way of stopping it and the effort to argue for this in national campaigns could be worth it.

Other provisions in the AMR focus on streamlining the procedure for determining the responsibility for examining an application for international protection. Furthermore, they aim for

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quick access to the examination procedure, for "protection for those in need of it" and that "unauthorised movements are discouraged" (AMR, p 23).

The AMR notably maintains the extended definition of family members proposed in 2016, by including siblings of an applicant and by including family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State. Evidence rules are made more "flexible" in order to facilitate efficient family reunification. Formal proof (such as original documentary evidence and DNA testing) should *not* be necessary in cases where the circumstantial evidence is coherent, verifiable and sufficiently detailed. (AMR p 24).

Q.5.4.1: How can this not be abused? This is an open invitation to abuse; it is naïve and shows that the Commission clearly does not have any experience from real life. What harm would DNA-testing do when it comes to verify claimed biological family relations in circumstances such as, for example, a child born after leaving the home country and therefore without any ID or registration?

For unaccompanied minors, the proposal clarifies that the Member State where the minor first lodged application will be responsible, unless it is demonstrated that this is not in the best interests of the minor.

Q.5.4.1: What are the chances that this will direct waves of minors to certain countries in the north western part of the EU?

5.4.2 RER, the "Eurodac" regulation

The RER supports the AMR and ensures consistency with the Screening Regulation. The main **objective** of the proposal is to control irregular migration and unauthorised movements inside the EU by identifying an illegally staying third-country national or stateless person. It amends Regulations (EU) 2018/1240 and (EU) 2019/818. The objective will be reached by comparison of biometric data for the effective application of AMR and the future *Resettlement Regulation*. These new functionalities would allow for the counting of applicants in addition to applications for international protection.

The legal basis is Article 78(2) (a) (c) (d) (e) and (g). The subsidiarity condition is filled as the RER objective is to remedy a transnational problem.

Summary of provisions

Counting applicants in addition to applications

"Currently, there is no possibility of knowing how many applicants there are in the EU because the numbers refer to applications and therefore several applications may belong to the same person. Considering this, it is necessary to transform the Eurodac system from a database counting applications to a database counting applicants. This can be done by linking all data sets in Eurodac belonging to one person, regardless of their category, in one sequence, which would allow the counting of persons."(RER, p 11).

Q.5.4.2. A. First, a system that counts applications only – as is the case today - does not bear the fingerprint of a

legislator mastermind. It is clear evidence that the EU is disconnected from the reality of migration officers, lawyers and above all, migrants themselves. Second: How do we not see this as a trust/confidence issue? This is also an issue of serious waste with taxpayers' money. If we counted people instead of peoples numerous applications, a lot of tax money would have been saved years ago.

Cross-system statistics

This will allow EU-LISA to draw up cross-system statistics using data from Eurodac, Entry/Exit System (EES), ETIAS and the Visa Information System (VIS).

A new category for persons disembarked following SAR

While the responsibility rules for this new category are the same as the rules for persons who enter irregularly, the distinction is relevant in relation to the fact that Member States of disembarkation face specific challenges as they cannot apply to SAR disembarkations the same tools as for irregular crossings by land or air. For instance, there are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third country nationals have no points where to officially seek entry.

Q5.4.2.B. This argument presumes that arrivals by land, for example via the Western Balkan route, or the borders with Belarus, Moldavia and Ukraine, report at the first official border crossing point which seems highly unlikely. From this perspective, this motivation is questionable.

Ensuring full consistency with AMR and SCR

For consistency with AMR a set of provisions reflecting all the relevant aspects regarding the establishment of responsibility of a Member State and relocation of beneficiaries are added. They were already included in the 2016 proposal. A limited number of changes were done to ensure consistency with the SCR.

Indicating rejected applications and whether voluntary return assistance has been granted

Simply the legal basis for a new field in Eurodac where MS will indicate when an application has been rejected and the applicant has no right to remain in accordance with the APR.

Q.5.4.2.C: Reflection similar to Q.5.4.2.A. Common sense would suggest this should have been included from day 1. How come it was not?

Indicating whether following screening it appears that the person could pose a security threat

The creation of a new field that allows excluded persons posing a serious enough security threat from relocation. *The question posed above seems highly relevant.*

Indicating whether a visa has been issued

The legal basis for a new field.

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Interoperability

These amendments will ensure the proper legal basis for the functioning of Eurodac within the new interoperability framework including the ETIAS Regulation and the VIS Regulation.

Further, it may be useful to know that biometric data, that is fingerprints of all fingers and a facial image, shall be collected by every Member State for each applicant of international protection of at least six years of age during the screening. The biometric data shall, alongside personal information, be transferred to the Central System, Art 10 (1) within 72 hours from having been taken.

5.4.3 APR, the Asylum Procedure Regulation

The objective of the proposal is to establish a common asylum procedure to replace the various divergent procedures in different MS. The common procedure is said to be efficient, simpler, clearer and shorter with adequate procedural safeguards and rights, such as the right to be heard in a personal interview, interpretation, free legal assistance and representation. Furthermore, some common rules are also included related to safe countries of origin and safe third countries.

This proposal is amending the 2016 proposal and will, together with the SCR, make a "seamless link" between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return.

In short, by the external border a new pre-entry phase is established, consisting of a screening and border procedure for referral to asylum procedure or return. During the screening phase, migrants will be registered and screened (see below 5.4.4) to establish identity, health and security risks. There will be a decision whether or not the applicant should proceed to the asylum procedure, refusal of entry or return. Should the decision be asylum procedure, this could take place in an asylum border procedure (when the applicant poses a security threat or is unlikely in need of international protection or the claims are clearly abusive) or else in a normal asylum procedure. There is, within the asylum border procedure, a new acceleration ground added when applicants come from third countries with less than 20% recognition rates. When an asylum border procedure is used and determines that the individual is not in need of protection, a return border procedure will follow.

There is an obligation (Art 41(3)) of MS to apply the asylum border procedure in cases of disembarkation after SAR if 1/ the applicant poses a security risk, 2/ the applicant mislead the authorities by presenting false information or withheld relevant information or 3/ the applicant is from a third country with a recognition rate less than 20%. The exception from this rule is unaccompanied minors and minors below the age of 12 and their family members; these are only subject to the border procedure if they are considered a security threat or threat to public order of the MS. The asylum border procedure has a time limit of 12 weeks, starting from the first registration.

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However, there is one serious note here: Where the asylum procedure is still ongoing at the end of the deadline for concluding the border procedure, the applicant shall be authorised to enter the Member States territory for completion of the asylum procedure (APR, p 16).

Q.5.4.3: This will clearly give incitement for some applicants to prolong the procedure, for example by claiming that they or their relatives search for their ID documents, but circumstances are such that they need longer time than expected. There will be these kind of situations. Why is there no alternative course of action in the proposal to deal with them, except for letting the applicants into the territory?

According to the proposal the asylum and return border procedures may be applied in another MS than in which the application was made (Art 41 (8)).

Detention may (as an exception) be used in individual cases during the border procedure/border return procedure if justified on the grounds clearly defined in the Reception Conditions Directive and the Return Directive.

The return border procedure (Art. 41 a) applies to applicants that have been rejected in the asylum border procedure and has a time limit of 12 weeks, starting from when the applicant no longer has a right to remain.

For the suggested normal asylum procedure, it is proposed that some measures to prevent migrants from delaying the procedure for the sole purpose of preventing their removal from the EU and misusing the asylum system (APR, p 17).

A subsequent application has as a general rule automatic suspensive effect. However, under the following conditions, an applicant who lodges a subsequent application should not be authorised to remain pending the decision declaring the application inadmissible (cumulative conditions, all must be met). That the removal is imminent and it is clear that the application is made merely in order to delay or frustrate the removal, that there is no risk of refoulement and that the subsequent application was presented within one year of the decision on the initial application (Art 43).

Further, there are several minor technical provisions, like timeframes for lodging of first level appeal, that we consider be in place only for streamlining the procedure. Their legal content does not seem remarkable.

The legal bases are Art. 78 (2)(d) and 79 (2)(c) TFEU. The common procedure and same procedural rules cannot be established by the MS individually; hence the subsidiarity condition is fulfilled.

Given that the precondition about asylum seeking inside the EU is accepted, then there is not much to say about the content of the APR. The legal safeguards, like being heard in person, the right to representation and the right to appeal seem reasonable. There is a lot of space for lodging amendments like, for example, increasing opportunities for detention and to remove the cumulative criteria for suspension and replace it with alternative criteria instead.

Even though the proposal overall seems rational and well balanced, from a political perspective, this is a clear step in the direction of federative control. One of the well-known and accepted criteria for a sovereign state is that it shall have

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effective control over a defined territory, including its borders. It is an issue open for discussion whether the surrender of asylum procedure to the EU implies such a loss of control. But never the less, it is giving away a little piece of sovereignty in a way that opens the door for other steps in the same direction.

5.4.4 SCR, The revised screening regulation.

This proposal puts in place a screening in the pre-entry phase by the external border with the overall purposes to;

- Ensure the identity of the person by checking relevant documents and to conduct an identity check against information in European databases (Art 10);
- Conduct a preliminary health and vulnerability check with a view to identify needs for immediate care or isolation on public health grounds (Art 9);
- Register biometric (fingerprints and facial image) data (Art 10) and;
- Conduct a security check through a query of relevant national and EU databases, in particular SIS (Art 11, 12).

The screening could be followed by relocation under the mechanism for solidarity (AMR) if the applicant is not subject to the border procedure pursuant to APR.

Legal basis is Article 77 (2) (b) TFEU. The budgetary implications are EUR 417,6 million (2021-27).

Provisions

The SCR applies to: All third-country nationals who have crossed the external border in an unauthorised manner, those who have applied for international protection without fulfilling entry conditions and those who disembarked following SAR and those within the territory of the MS with no indication that they have been subject to controls at external borders. (Art 1, 3 and 5)

The compliance with fundamental rights is monitored by an independent mechanism (Art 7).

Q 5.4.4. A remark concerning security screening: This looks good in text, but the reality is that no security screening can target unknown persons who, without previous record, migrate with the intent or possible intent to conduct activities that will be regarded as threatening security. Neither is it possible to assess who will be radicalised by fundamentalist groups, imams, Koran schools and similar. This is the side of security screening that is not up for discussion.

Further; why is there no proposal to collect and register DNA data? It would be of help for verifying family claims, but, potentially, also in criminal investigations. A neglect like this seems closely related to one mentioned above, to register only applications and not applicants.

5.4.5 CFR, the Crisis and Force majeure regulation

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The overall objective of the proposal is to provide for the necessary adaptation by way of derogation from certain rules on asylum and return procedures (APR and Return Directive) in order to assure that MS are able to address situations of crisis and force majeure in the field of asylum and migration management.

The proposal introduces specific rules on the application of the solidarity mechanism set out in the AMR with a view to deal with crisis situations generated in any Member State by a mass influx of persons and achieve a fair sharing of responsibilities between Member States.

By definition, this proposal deals with cases where a Member State cannot alone cope with the situation (subsidiarity condition fulfilled).

The legal basis is Article 78 (2) (c), (d) and (e) and Art 79 (2) (c) TFEU.

The provisions

Where a Member State considers that it is facing a crisis situation (mass influx of third-country nationals arriving irregularly being of such a scale that it renders the asylum, reception or return system non-functional) or a situation of force majeure, that Member State shall submit a request to the Commission for the purpose of applying the rules laid down in CFR.

The solidarity mechanism in AMR is activated, but with shorter time frames concerning, for example, report on migratory pressure, solidarity response plans and Commission implementing acts on solidarity (AMR Articles 51-53), as stated in CFR, Art 2.

Where the Commission considers such a request justified, it shall within ten days from the request, by means of an implementing decision, authorise the Member State concerned to apply the derogatory rules laid down in Articles 4, 5 or 6 for up to six months, extendable to one year.

Article 4: Asylum crisis management procedure: The asylum border procedure can be applied to applicants coming from a country with an EU-wide recognition rate of 75% or lower. In addition, the border procedure may be applied for an additional period of eight weeks, thus extending the ordinary twelve weeks.

Article 5: The return crisis management procedure Lays down a possibility for MS to derogate from certain provisions of the border procedure for carrying out returns according to APR and the Return Directive. The provisions apply to applicants whose application were rejected in the asylum crisis management procedure and they include a rule that extends the maximum duration for carrying out returns by an additional eight weeks.

Article 6 concerns extension of time limits for registration of applications.

In situations of force majeure time limits (for e.g. registration, requests, notifications and transfers) are extended in Articles 7 and 8. Similarly, the time frame for undertaking solidarity measures is extended according to Article 9.

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5.5 The Commission's Recommendation and Guidance documents

5.5.1 MPC, Migration Preparedness and Crisis Blueprint

This document is closest linked to the CFR as its objective is to preparedness for an effective and timely response in a crisis situation. This recommendation involves the Member States, the Council, the Commission, EEAS, EASO, Frontex, EUROPOL, eu-LISA and the FRA together forming a Crisis Management Network ("the Network").

The concept has two stages:

1/ A monitoring and preparedness stage, an always activated stage, where the actors provide timely and adequate information in order to keep and share a common and updated migration situational awareness and provide for early warning/forecasting as well as increase resilience to efficiently deal with any type of migration crisis.

2/ A migration crisis management stage. When the general EU crisis mechanisms are activated, the Commission takes lead of the Network, which will support the work of the general EU crisis mechanisms. This part of the MPC contains checklists with measures to be taken by each actor (like for example to coordinate messages for public communication), by the Commission in relation to countries of origin, by Member States at the EU external borders, by other Member States under pressure etc.

Note: These checklists look like Standard Operating Procedures or, at least, like drafts to such.

5.6 RSR, private vessels engaged in SAR

This recommendation underlines the importance of several NGOs that operate private vessels in the Mediterranean and contribute to rescue persons at sea who are then brought to EU territory for safe embarkation. The recommendation states that there is a need to avoid criminalisation of those who provide humanitarian assistance to people in distress at sea.

The vessels used this way should be registered and properly equipped to meet the relevant safety and health requirements associated with this activity; this is stated as a matter of public policy. The Commission calls for more cooperation between MS and also between MS and the Commission and wishes further to establish an interdisciplinary Contact Group in which MS can cooperate and coordinate activities in order to implement this recommendation.

Furthermore it is suggested that flag and coastal Member States should exchange information on a regular and timely basis on the vessels involved in SAR and the entities (NGOs) that operate them.

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Q5.6: There has been evidence presented by Italian prosecutors that NGOs have been "colluding" (communicating, probably through agreed channels) with people traffickers/smugglers in Libya.[33] *Why is this not acknowledged as a serious problem?*

5.7 GFD, Guidance on Facilitators Directive

A Commission guidance on the implementation of EU rules on definition and prevention of facilitation of unauthorised entry transit and residence.

The GFD takes its starting point in Directive 2002/90/EC - the Facilitation Directive – that obliges Member States to appropriately penalise anyone who, in breach of laws, intentionally assists a non-EU country national to enter or transit through an EU country. The Directive does, however, also provide the possibility to exempt humanitarian assistance from being criminalised.

In 2017, the Commission carried out the first comprehensive evaluation of the Facilitators Package, finding a concern related to possible criminalisation of humanitarian assistance, the evaluation pointed in particular to a perceived lack of legal certainty. In 2018, the Commission consulted with civil society and EU agencies to build up knowledge and identify issues linked to interpreting the Facilitation Directive. The European Parliament adopted in July 2018 a resolution on guidelines for the Member States to prevent humanitarian assistance from being criminalised, calling upon the Commission to adopt guidelines for MS specifying which forms of facilitation should not be criminalised, in order to ensure clarity and uniformity.

Since 2015 research shows that "acts carried out for humanitarian purposes" have been increasingly criminalised and stakeholders have been pointing out an increasingly difficult environment for NGOs and individuals when assisting migrants.

The general objective of the Facilitators Package is to fight irregular migration and organised crime networks that endanger migrants' lives. The GFD shows that (only) eight Member States include in national law an exemption for punishment for facilitating unauthorised entry in order to provide some form of humanitarian assistance.

The actual guidance in the GFD boils down to three main points:

1/ Humanitarian assistance that is mandated by (international)[34] law cannot and must not be criminalised.
2/ In particular, the criminalisation of NGOs or any other non-state actors that carry out SAR and that complies with the relevant legal framework amounts to a breach of international law.

[33] https://www.bbc.com/news/world-europe-39686239
https://www.euractiv.com/section/future-eu/news/france-adds-its-voice-to-stop-ngo-ships-from-acting-as-taxis/

[34] For example: The obligation for shipmasters to assist any individual, vessel or aircraft in distress at sea is recognized as a principle of customary international law.

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3/ Where applicable, assessment of whether an act falls within the concept of 'humanitarian assistance' should be assessed on a case-by-case basis, taking into account all the relevant circumstances.

The Commission invites MS that have not already provided for legal exclusion of humanitarian assistance, to be exempted from otherwise criminal act, to do so.

5.8 RRP, Resettlement and Complementary Pathways

A recommendation from the Commission to the Member States that the MS are encouraged to;

- provide legal pathways for those in need of international protection;
- implement their pledges under existing resettlement schemes;
- ensure continued resettlement from Turkey, Lebanon and Jordan;
- contribute to continued stabilisation in the Central Mediterranean by resettling those in need of protection from Libya, Niger, Chad, Egypt, Ethiopia and Sudan;
- ensure continuity of renewed growth of resettlement operations after the disruptions caused by the coronavirus pandemic;
- ensure that all stages in the resettlement process are carried out to a high quality standard, including integration and social inclusion measures (e.g. universities, labour market) and monitoring these;
- promote humanitarian admission of vulnerable people and by to scale up other forms of legal pathways and facilitate the access to the right to family reunification;
- develop and support programmes that facilitate access to other existing legal avenues for those in need of international protection.

Member States are also invited to participate and cooperate in the EASO Resettlement and Humanitarian Admission Network. Upon request, Member States should communicate to the Commission the number of people resettled in their territory in line with their pledges.

Furthermore, the EU needs to move from ad hoc resettlement schemes to schemes that operate on the basis of a stable framework ensuring that the schemes are sustainable and predictable.

6. REFLECTION

For a patriot it is easy to identify the aspects contained within the Pact that appears to be attractive. One aspect is that the Commission acknowledges that there is a significant flow of immigrants from countries with a low recognition rates, and that this needs to be addressed. Two other aspects are the issue of unauthorised movements, that is to say illegal border crossings, and multiple asylum applications in the same or in different countries. Lastly we have the aspect of that so far 1 700 000 Syrians are still in Turkey and not in Europe. All other parts of this proposal are intended to

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promote and permanent the present status, which is the submerging of Europe through mass-immigration, only with taking away some frictions that currently disturbs this system.

To highlight some of the more acute problems of the proposed EU Pact on migration one can consider the following seven issues.

Which	What, where	Why
1	The EU-Turkey statement and the unwillingness to talk about strategic issues. The ED, page 30.	On 18 March 2016 the European Union and Turkey reached an agreement aimed at solving the issue of the immense number of immigrants crossing the Mediterranean Sea from Turkey to Greece. This agreement intended to close the people-smuggling routes and reduce the number of immigrants entering the EU. It focused principally on the following issues: returning to Turkey any immigrant entering Greece from Turkey irregularly, that is to say illegally; and resettling, for every migrant readmitted by Turkey, another Syrian from Turkey. In order to compensate Turkey, the EU committed to accelerating the visa liberalisation roadmap and allocating six billion euros to Turkey to deal with the illegal immigration and refugee crisis. This is undoubtedly controversial, since it concerns international refugee law, EU law and human rights law. Specifically, the statement refers to the prohibition of collective expulsions and the respect of the non-refoulement principle. The legal basis for returning irregular migrants to Turkey is Art. 33 of the Asylum Procedures Directive. This allows an application to be considered inadmissible, and therefore removes the need to examine whether the applicant qualifies for international protection if "a country which is not a Member State is considered as a first country of asylum for the applicant", or "a country which is not a Member State is considered as a safe third country for the applicant".[35] This approach could have been discussed as a general model, but it never was. In fact, it is hidden from being on the agenda as a topic for any such discussion. Why? It contradicts the major strategic EU approach to immigration, that it shall be taken care of inside the EU. The problem with the EU-Turkey Statement is not that it exists, it is that it is not given the appropriate attention and never talked about

[35] http://www.europeanpapers.eu/en/europeanforum/eu-turkey-agreement-controversial-attempt-patching-up-major-problem

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		as an alternative strategic model.
2	The "Solidarity mechanism" ED, p 50 – AMR Part IV Art 45-	1/ Initially: Is there any such thing as forced solidarity? Of course not, but it is a nice concept in the EU agenda, used in a way that all opponents will appear against solidarity and thus just egoistic. The Commission could simply have acknowledged that the Dublin Regulation failed because they themselves and the member states constantly fail to apply the legal framework due to fear of the use of coercive measures despite these being within the legal remit of a democratic nation and also created immense pull factors encouraging illegal immigration to Europe. One such aspects that they largely have failed to enforce is how many safe countries can an asylum seeker pass and then later apply for international protection in a country of his or her choice? Legally, there is no limitations here, but the Dublin Regulation did make it clear that the first country where someone officially registered their fingerprints was the country that should be in charge of the application. The "Solidarity Mechanism" is just a response from the EU because their policy of offering protection to any and all that makes their way to Europe has met with resistance from a number of European nations that do not agree with this policy of mass-immigration to Europe. So in order to name and shame and if they cannot provide these nations with their replacement population they can make them pay for their insolence to defy the open border policy. 2/ Further: Unpredictability and aggregation of power with the Commission. Note Art 50 and the assessment of "migratory pressure" in terms of quantitative and qualitative measures. My impression is that the assessment will be quite unpredictable when based on the factors listed in Art 50 (3) a)-k) and 50 (4) a)-j). No matter the degree of predictability, it is the Commission who will be the case owner in declaring or not declaring a Member State to be under "migratory pressure". This is an aggregation of power on a federal level, a big step in the direction towards federalism.
3	The extended family-concept	The AMR maintains the extended definition of family members proposed in 2016 in two ways: (1) by including the

	ED, p 78- AMR, p 24-, 34, Recital (47)	sibling or siblings of an applicant and (2) by including family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State. The extension to cover families formed during transit reflects recent immigration tactics by asylum fraudsters as well as economic migrants, that has noted that the forming of false of true family connections in camps raises their possibility to stay in the EU.. The rules on evidence necessary for establishing responsibility are made more flexible, in particular in order to facilitate efficient family reunification. The rules clarify that formal proof, such as original documentary evidence and DNA testing, should *not* be necessary in cases where the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility. This will lead to more immigrants to be accepted in the EU and it also opens the door for even more abuse of the system then in addition it has "naturally" also been suggested by the EU that DNA testing will in many cases not be deemed necessary.
4	The misconceptions on returns and readmission agreements ED, p 21, p 38 AMR Art 45(1)(b)	On Returns: "Member States' asylum and return systems remain largely not harmonised, thus creating inefficiencies and encouraging the movement of migrants across Europe to seek the best reception conditions and prospects for their stay." (ED, p 21) " There is a variety of factors that can help explain the divergence in return rates to the same third country. This includes bilateral relations, availability of embassies or consulates, national (political) context in Member States and differences in return systems and procedures." (ED p 38) Returns becomes an important concept, as it is now part of the "Solidarity Mechanism" as return sponsorship is one of the options to show solidarity. "Off the record", but what everyone realizes, is that here the Commission flirts with countries like Hungary, Czech Republic and Poland. Therefore, it is important that the problem of return is presented as being rooted in the Member States as a problem that the EU effectively can address. Hence, it may not be

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		understood as a problem rooted in the migrants themselves. With which we find reason to disagree with and refer to the case of Mali (p. 22) as an example, that we find to be representative for also other countries, although less known. What is not much talked about is that accepting returns is politically difficult for many African countries. In December 2016, Mali was offered USD 160 million to cooperate on migrate returns, but it withdrew from the deal due to a public outcry.[36] The above clearly boils down to the end statement, that many irregular immigrants do not want to return – and they even are supported in this by their countries of origin; about this there is not a word in the Pact. Yet another example of how the European Commission seldom wants to describe essential problems, or describes them in an non-factual manner, in regard to the uncontrolled mass-immigration from the developing world to European nations.
5	NGO:s and so called search and rescue operations RSR GFD	Clearly it is a concern for the EU that persons affiliated with European based so called NGO:s have faced legal actions from Member States that included seizing of private vessels, arresting NGO members acting as crew members and instigating criminal procedures against them. From the EU perspective there is an urge to the MS, make a distinction between 1/ real smugglers and 2/ those enforcing human rights imperatives of saving lives at sea. How do deal with situations when NGO:s communicate with "real smugglers" to meet and transfer of immigrants from one vessel to another? Where is the point where this naturally amounts to assistance to smuggling? Is not saving life at sea an act to support those who happen to find themselves in an unpredictable accident, an unforeseeable distress and emergency? Can saving lives a sea ever be a planned action? Naturally the answer is, no. The second non-issue, perhaps the so-called elephant in the room, is of course that there is total silence about the most natural question: Once a life is saved at sea, who or what says where the saved person shall be set a shore? Search and Rescue Operations at sea is not a taxi or asylum shopping

[36] https://www.africaportal.org/features/focus-on-migrant-returns-threatens-aueu-negotiations/

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		activity. The reason for the silence is of course the understood presumption that they should be put ashore in Europe, *not* brought back to the coast from which they embarked. It is easy to come up with all sorts of objections against the idea that they should be brought back: There are human rights concern in Libya, etc. But then again, why cannot the reasonably able EU address these concerns? Why is there no talk about this? Because there is no political will to do so. Because there is an agenda not to do so as the agenda is that of the globalist, who favors open borders, the death of the nation state and believes erroneously in the merits of a multicultural society The main accusation here is that there never was a sufficient attempt to device an alternative as to where to disembark those saved at sea. Some may say, we have considered and tried to arrange alternatives; to then we would say: The try was no good enough. If there is a political will, there is a way.
6	Family unification ED, p 65	The Pact (p. 65): "There is a need to reinforce the right to family reunification and strengthen the rights of unaccompanied minors. Family reunification and family unity procedures are often protracted or start too late, pointing to the need to speed up family reunification procedures and prioritise unaccompanied minors." Why do families split up in the first place and why do unaccompanied minors arrive before parents and family? This is another non-issue that it seems forbidden by the EU to discuss or shed any light on. The reality is that application based on minors and family connection sometimes carry a relief of evidence concerning identity, as is the case in Sweden.[37] It is worth to know that according to Art. 11 (2) Dir 2003/86/EC of 22 September 2003 on the right to family unification[38], a decision rejecting an application may not be based solely on the fact that documentary evidence is lacking. The legislative incentive or pull factor for splitting up

[37] https://lagen.nu/dom/mig/2018:4 https://lagen.nu/dom/mig/2018:17 https://lagen.nu/dom/mig/2016:13
[38] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=SV

		families is never investigated, talked about or considered as an infringement of the right to family unity.
7	Legal pathways RRP, Recital 1	Last but most importantly is the so called legal pathways. The EU claims as follows: " The number of refugees and others in need of international protection is rising globally. As a result, there is a need to strengthen the Union's capacity to fulfil its moral duty to provide effective assistance. All Member States should participate in the Union's collective efforts to show solidarity to those in need of international protection by offering legal pathways to the Union and enhancing the protection space outside the Union." Moral duty? To provide effective assistance? Where? In complex issues, is there any moral duty that does not affect another moral duty? Why is there no talk about moral duty to our fellow European citizens? Should we not show solidarity with them? This is a non-issue and this is my critic point. When there may or may not be a moral duty, there is no legal obligation, because the same legal basis as referred in the EU-Turkey Statement (above) can be applied to those safe in a third country. Lastly, we must note that there is already today legal and safe "pathways", ways in which you can apply for residence in European nations. You will most probably not be granted this, it will probably be difficult to apply but there is already rules in place for a good reason. Just because the pressure builds up, more people want to come into Europe and sit at our table, enjoy the labor of our forbearers and partake of our welfare states does not mean we have to accommodate this wish.

About the analyst and author:

PROFILE

Experienced lawyer and military officer with a demonstrated history of working in Swedish courts and the Swedish Armed Forces, including missions to post conflict zones (Bosnia and Hercegovina, Mali).

Skilled in law, legal research, representing clients, negotiation, court proceedings, investigations as well as military staff procedures including drafting duties and advising on operational issues.

Experienced legal and political adviser from the European Parliament.

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Master´s degree in social and behavioural science (1994) and a Master´s degree in law (1999).
Swedish Defence College (TSK 2013/14)

Born 1966. Swedish citizen.

WORK EXPERIENCE

Consulting National Expert
Legal researcher 2020-

- Transposition checks for VVA, Brussels. In short, desktop research on how Sweden implements EU Directives, with regard to the Single Market.

European Parliament Brussels, BE
APA/ Analyst & Adviser 2017 – 2019

- Accredited Parliamentary Assistant for Swedish MEP. Contracted until 30/06/2019.
- Analytic and advisory duties in fields of justice, migration, security and home affairs. Legal and political advice. Media contacts. Drafting debate articles. Drafting votes in committee and plenary.

Advokatfirman M. AB Malmö, SWE
Attorney at law (Advokat, Member of Swedish Bar Association) 2007-2017

- Owner of Advokatfirman M. AB.

- Client representation in investigations, court proceeding and, concerning commercial cases, negotiations outside court. Criminal cases, migration cases, family law, claims cases, commercial cases and compulsory care cases. Supervised two assistant lawyers.

Swedish Armed Forces SWE/BiH/Mali
LtCol (res.) and Staff Legal Adviser 1990 –

- Reconnaissance / Intel officer. Later staff officer BDE and regional staff. Part time.
- Advisory duties regarding International Humanitarian Law, Human Rightx, Operational law, regulations, rules of engagement (ROE) and applicable national law. Disciplinary and claims cases.
- Staff legal adviser Multinational Integrated Logistic Unit, EUFOR ALTHEA, Bosnia and Hercegovina, Tuzla, 2006. Staff legal adviser SWE ISR TF, MINUSMA, Mali, Timboucto, 2016

Advokatfirman K Kalmar, SWE
Assistant lawyer, attorney at law 2002-2006

- Legal research. Client representation in investigations, court proceeding and, concerning commercial cases, criminal cases, family law, claims cases, and compulsory care cases.

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Oskarshamn och Malmö tingsrätter (District courts) Malmö, Oskarshamn, SWE
Lawyer clerk 2000-2002

- Legal research. Preparing cases, drafting decisions, sentences, etc.
- After one year, acting judge in minor (no prison sentence) criminal cases.

EDUCATION

Swedish Defence College Stockholm, SWE
Tactical Staff Course, Part time 2013-14
Use of force in tactical, operational and strategic levels from a staff officer's perspective.

University of Pretoria, RSA
Human Rights and International Humanitarian Law in Conflicts, 2013

Swedish Defence College Stockholm, SWE
Staff Legal Adviser course 2012
International humanitarian law and national law in peace, crisis and armed conflict.

Nato School, Oberammergau
Staff Legal Adviser Course 2012

Lund University Lund, SWE

Degree of Master of Laws, LL.M 1995-99

Traditional master's degree in Faulty of Law, according to regulations in the Higher Education Act. Major in criminal law and Claims/Insurance law.

Degree of Master of Social Science, M.Sc. 1987-1994
Major in advanced experimental psychology and behavioral sciences.

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Reserve officer Class 1-2 1989-90

Leadership, tactics, technique for officer in armored cavalry units.

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