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The Screening Regulation (EU) 2024/1356: Fundamental Rights Challenges and Vulnerability Assessment

Dissertation to obtain a

Master's Degree in Law,

in the specialty of International and European Law.

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September 2025

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ACKNOWLEDGEMENTS

I would like to start by thanking Professor Veronica Corcodel for all her help, corrections, suggestions and teachings throughout the development of my Master's dissertation. Thank you so much for your patience, dedication and discussions, which were essential to achieving the final result of this dissertation.

I would also like to thank my family for all their support, encouragement and patience throughout these two years of study, research and discoveries in the world of law. Thank you for your words of support and for the opportunities you have given me, which have marked my entire academic career, culminating here and at NOVA School of Law.

A special thank you to my friends, from those I've known for a long time to those I got to know during my Master's degree. To the friends who have been with me since the Bachelor's, FLUL thrived at NOVA LAW, it is possible! To the friends I made at NOVA School of Law, may the future be bright for all of us and may we leave our mark on the world! A special mention to Camila, thank you for your words of encouragement and support throughout the Master's-if you are ever tired of being known for who you know, you know, you will always know me. To my long-time friends, words are still not enough to thank you for all the support and faith you have always placed in me, thank you for never letting me give up and for always knowing what to say, especially at times when everything seemed to be going the other way. I'd be nothing without you!

Finally, I could not fail to mention Seville and the team at the Portuguese Consulate. Thank you for making my Erasmus experience in this final year of my Masters so special. I have learned so much from you and, unfortunately, I will never be able to repay all the care, affection and trust you placed in me. I hope that this brief mention makes you feel as happy and appreciated, just as I felt during the three months that you welcomed me.

AGRADECIMENTOS

Gostaria de começar por agradecer à Professora Veronica Corcodel por toda a ajuda, correções, sugestões e ensinamentos ao longo do desenvolvimento da minha dissertação de Mestrado. Um grande obrigada pela paciência, dedicação e discussões que foram essenciais para alcançar o resultado final desta dissertação.

Agradeço à minha família por todo o apoio, encorajamentos e paciência ao longo destes dois anos de estudo, investigação e descobertas no mundo do Direito. Obrigada pelas palavras de apoio e pelas oportunidades que me proporcionaram e que marcaram todo o meu percurso académico, que culmina aqui e na NOVA School of Law.

Um agradecimento especial aos meus amigos, desde os de longa data até aos que tive a oportunidade de conhecer durante a frequência do Mestrado. Aos amigos que me acompanharam desde a licenciatura, Letras vingou em Direito, é possível! Aos amigos que fiz na NOVA School of Law, que o futuro seja muito risonho para todos e que deixemos a nossa marca no mundo! Uma menção especial para a Camila, obrigada pelas palavras de incentivo e por todo o apoio no decorrer do Mestrado- if you are ever tired of being known for who you know, you know, you will always know me. Para as minhas amigas de longa data, palavras continuam a não ser suficientes para agradecer todo o apoio e fé que sempre depositaram em mim, obrigada por nunca me deixarem desistir e por saberem sempre o que dizer, especialmente nos momentos em que tudo parece estar ao contrário. Não seria nada sem vocês!

Por fim, não poderia deixar de mencionar Sevilha e a equipa do Consulado-Geral de Portugal. Obrigada por terem tornado a minha experiência de Erasmus, neste último ano de Mestrado, tão especial. Convosco aprendi tanto e, infelizmente, nunca conseguirei retribuir todo o cuidado, carinho e confiança depositados em mim. Espero que esta breve menção vos faça sentir felizes e reconhecidos, tal como me senti ao longo dos três meses em que me acolheram.

QUOTING

The citations, references and bibliography in this dissertation are formatted according to the 6th edition of the APA (American Psychological Association) citation style. The dissertation is written in British English.

LIST OF ABREVIATIONS

CEAS- Common European Asylum System

CFREU- Charter of Fundamental Rights of the European Union

CJEU- Court of Justice of the European Union

ECHR- European Convention on Human Rights

ECtHR- European Court of Human Rights

EU- European Union

EURODAC- European Asylum Dactyloscopy Database

SAR- Search and Rescue

SR- Screening Regulation

TCN- Third-Country National

TEU- Treaty on European Union

TFEU- Treaty on the Functioning of the European Union

UDHR- Universal Declaration of Human Rights

UN- United Nations

UNHCR- United Nations High Commissioner for Refugees

"Scary news is: you're on your own now.

Cool news is: you're on your own now."

Taylor Alison Swift

O corpo da dissertação ocupa um total de 156 119 caracteres.

The body of the dissertation occupies a total of 156 119 characters.

ABSTRACT

The prioritization of border control over the respect for fundamental rights has been a recurring theme concerning the European Union and its institutions. The 2015 refugee crisis raised concerns regarding national security and that translated into stricter policies which lead to the fortification of borders, increasing surveillance mechanisms and anti-migration feelings, all at stake of the respect for fundamental rights. As a consequence, marginalization of vulnerable groups, detentions and deportations started to paint the European Union's migration track record.

The purpose of this thesis is to explore the fundamental rights challenges within the framework of the New Screening Procedure, a constitutive element of the New Pact on Migration and Asylum. By examining the screening rules, through a vulnerability lens, this work will assess how the protection of vulnerable populations is achieved, taking into account possible inconsistences that we might find, in the new regulation, between humanitarian values and security concerns. Issues such as short time frames for analysis and processing of applications, risks of overcrowding, detention grounds, racial profiling, amongst others will be discussed as well as their critical ethical and practical outcomes.

RESUMO

A priorização do controlo fronteiriço em detrimento do respeito pelos direitos fundamentais tem sido um tema recorrente na União Europeia e nas suas instituições. A crise migratória de 2015 suscitou preocupações em matéria de segurança nacional, o que se traduziu em políticas mais rigorosas que conduziram à fortificação das fronteiras, ao aumento dos mecanismos de vigilância e a sentimentos anti-migração, tudo isto em detrimento do respeito pelos direitos fundamentais. Como consequência, a marginalização de grupos vulneráveis, as detenções e as deportações começaram a marcar o historial migratório da União Europeia.

O objetivo principal desta tese é explorar os desafios aos direitos fundamentais no âmbito do novo procedimento de triagem, um elemento constitutivo do Novo Pacto em matéria de Migração e Asilo. Ao examinar as regras de triagem, através de uma lente de vulnerabilidade, este trabalho avaliará a forma como a proteção das populações vulneráveis é conseguida, tendo em conta as possíveis inconsistências que podemos encontrar no novo regulamento, entre valores humanitários e preocupações de segurança. Questões como os prazos curtos para análise e processamento dos pedidos, os riscos de sobrelotação, os motivos de detenção, a caraterização racial, entre outras, serão discutidas, bem como os seus críticos resultados éticos e práticos.

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CHAPTER 1

1. Introduction

Fourteen years ago the European Court of Human Rights (hereafter, ECtHR) established that asylum seekers are a part of a *particular, underprivileged* and, more importantly, *vulnerable population group* (M.S.S v. Belgium and Greece, 2011) and the Court of Justice of the European Union declared that asylum seekers are to be considered as an *indivisible class of protected persons* (CIMADE and GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, 2012). The M.S.S judgement was crucial to reinforce the need to have a human rights centred approach, in managing asylum and migration, bearing in mind the applicant's migratory vulnerabilities through a context-specific analysis of their experiences and of all relevant information available (Baumgärtel, 2020). Before that, and given the fact that the 1951 Refugee Convention did not (and still does not) mention the term vulnerability, jurisdictions would mostly base their approach on the immutable characteristics shared by certain groups, in order to identify if they were at risk of harm (Fromm, et al., 2021). This judgment also established a baseline for the welfare obligations that the state owes to destitute persons who depend on it (Heri, 2021).

Vulnerability arises from the interaction between risk and protective factors and results in a need of having different types of responses for those in vulnerable situations or scenarios (IOM Publications Platform, 2019). Bearing this is mind, we can already establish that this term cannot be defined nor interpreted as a static, normative, measurable one. On the contrary, it is a multi-layered and dynamic concept that may lead to exclusion, disempowering feelings and stigmatization, namely once it is embedded into migration policy and legal and political conjunctions, becoming a bureaucratic label used to classify migrants. However, there has been a general approach by the European Union (EU), exacerbated since the 2015/2016 migration "crisis", of letting the fear of securitization win over the respect for inclusion, integration and the rule of law, instead of working together on a way to uniformly approach said crisis, in order to contribute to the evolution of refugee law, namely by increasing its level of inclusiveness.

More than a decade has gone by, since the 2011/12 judgments, and we still do not have clear, internationally recognized procedures for accurately identifying vulnerabilities, as well as the appropriate mechanisms to respond effectively to them. If the New Pact could

have been seen as a new synonym to tackle to this challenge, its rules do not bring much of a difference to what has been already put into practice. Articles 7º and 8º of the Schengen Borders Code provide somewhat a form of screening that would result in an acceptance or refusal of entry, as the new Screening Procedure will do. What is new is the fact that the screening will conduct people to the correct procedures (asylum or return). Therefore, pre-screening procedures are not a new construction, nor are registration, identification and procedures relating to fingerprinting. This procedure entails, on the one hand, the blurring of the distinction between those seeking international protection and other types of migrants, at least at the screening stage, and on the other, the obligation to establish an independent mechanism to monitor compliance with fundamental rights. The incentive to a broader cooperation between EU agencies and relevant authorities is another "new" aspect (Jakuleviciene, 2020).

What this thesis aims to explore are the risks and limitations associated with the European approach to the Screening Procedure and its challenges concerning fundamental rights and asylum law guarantees. The main object of analysis will be the New Screening Procedure and its main components. It will also touch on the interplay between anti-discrimination law, EU migration and asylum law, and human rights law. By analysing this intersection, what we aim to do is bring forward the issues revolving around the fundamental rights of those seeking asylum.

The inspiration for this topic came from the recently adopted Pact on Migration and Asylum that has been subject to many criticisms concerning its lack of emphasis on the protection of vulnerable groups. Therefore, there will be a primary focus, throughout this thesis, on the issue of migrants/refugees seeking to reach the European continent and their vulnerability in hopes that, in the future, all migration and asylum related policies are improved and adopt a more human approach. Policy makers tend to be obstructed by the general goals and aspirations when discussing the issue of migration. Hence, in order to potentially improve this, in a near future, this thesis will focus on the difficulties faced by migrants and asylum seekers that are aggravated by the barriers imposed by law.

Following the introductory section, the primary section of this thesis will be an analysis of the New Screening Procedure enshrined in the New Pact. In this section, this thesis will analyse said instrument, namely by studying the Screening Regulation and its core objectives and components. An interplay between that regulation and the respect for

fundamental rights will be carried out, taking a look at some of the most recurring critiques of said instrument.

The thesis will also provide an examination of the vulnerabilities migrants/asylum seekers are exposed to, the potential violations of rights that they might face and how the construction of EU policy and laws might be aggravating that, especially with the new rules posed by the New Pact and its Screening Procedure. The juxtaposition between the new screening regime and its vulnerability assessment, including the respect for fundamental rights, requires an in-depth analysis from a fundamental rights perspective. Therefore, this thesis seeks to contribute to that discussion in hopes that the understanding of the migratory process gains a new facet, a more human one.

In this thesis I will refrain from using the expression "*vulnerable migrants*". Attributing negative connotations to a certain group of individuals constitutes a ground of discrimination, especially when we are talking about human beings who are not able to fully enjoy their fundamental rights. All migrants are in a vulnerable position, therefore, all are vulnerable and that characteristic needs to be applicable to all of them, without exceptions, because they are always in a disadvantaged position.

1.1 Terms and definitions

The present thesis aims to explore how the Screening Regulation, adopted under the New Pact on Migration and Asylum, deals with migrants' and asylum seekers' fundamental rights and vulnerabilities. Taking that into account, it is of crucial importance the following key concepts are crucial for the analysis:

- **1.1.1 Asylum-seekers**

Often intertwined with other concepts like "refugees" and "migrants", the term is used to describe those individuals who are seeking international protection. They are often referred to as someone who has already applied for refugee status and is still waiting for a decision to be made. The United Nations High Commissioner for Refugees (hereafter, UNHCR) notes that "*not all asylum-seekers will be found to be refugees, but all refugees were once asylum-seekers*" (United Nations High Commissioner for Refugees, 2024).

- **1.1.2 Refugees**

The 1951 Refugee Convention recognizes the status of refugees as a person who "*owing to a well-founded fear of being persecuted 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 himself or herself of the protection of that country*". Adding to this definition it is important to mention that the circumstances that compel a refugee to flee might be subject to different interpretations, accordingly to which legal instrument we are basing our interpretation on.

- **1.1.3 Migration Crisis**

A migration crisis can be caused either by a mass influx of third-country nationals or stateless persons arriving in the EU (situations of disembarking following a SAR operation are also included) that are of such scale that end up making the EU's asylum, reception or return system non-functional or by a situation where a third-country or non-state actor encourages or even facilitates the movement of third-country nationals and stateless persons to the external EU borders so that they destabilise the EU as a whole or a particular Member-State[1]. This action can compromise the maintenance of law and order and national security (European Commission: Migration and Home Affairs, 2024). Comparing with what was presented in the 2015 European Agenda on Migration, a migration crisis was not defined as a concept. Instead, there was a descriptive term which referred to the "*plight of thousands of migrants*", "*human tragedy in the whole of the Mediterranean*" and the need for a long-term action plan (based on four pillars) to better manage migration (European Commission, 2015).

- **1.1.4 Third-Country National**

A TCN refers to situations where we have more than one state concerned and a person is not a national of either state. In the context of the EU, this kind of situations refers to any person who is not a citizen of the EU[2].

- **1.1.5 Screening Procedure**

Screening, according to the 2024 Screening Regulation, refers to the process that aims to identify or conduct a verification of identity whilst performing health and vulnerability checks, as well as security checks, fingerprints and registration in the EURODAC database, as stated in article 8º of the Regulation (EU) 2024/1356. This process applies to all third-country nationals that are trying to enter Europe so that they are directed to

[1] Per stated in the European Commission: Migration and Home Affairs' glossary.
[2] As stated in article 20º (1) of the Treaty on the Functioning of the European Union.

the correct procedure, considering their application/case. Once the screening procedure is completed they have two options: either they follow the asylum procedure or are returned to their country of origin (Council of the European Union, 2024).

1.2 Research Question

Are the concerns related to fundamental rights adequately addressed within the Screening Regulation, particularly in the context of the vulnerability assessment?

1.2.1 Research Problem

The purpose of this thesis is to critically analyse the impact of the Screening Border Procedures, enshrined in the New Pact on Migration and Asylum, that seek to manage the migratory process within EU borders and also guarantee the protection of refugees and asylum seekers. The main argument of this work will be that the functioning of the Screening Procedure does not adequately address the concerns related to fundamental rights, particularly in the context of a vulnerability assessment. Therefore, it is an urgent matter to revise practices enshrined in the New Pact in order to better understand if they actually comply with Human Rights Law and how they can be adjusted if needed.

1.3 Outline of Chapters

Chapter 1 provides a brief but necessary introduction to the topic, starting the discussion on the understanding of vulnerability and how that characteristic is particularly interesting concerning the context of migration and asylum. Then, it outlines the way the research was conducted, namely by providing fundamental concepts that will help to better understand the main issue that is being analysed. Lastly, it presents the methodology used within the thesis in order to demonstrate the research process.

Chapter 2 will touch upon the main subject of analysis, the Screening Procedure, by analysing some of its critiques, in light of fundamental rights. This chapter will be divided in two different sections: the first one will analyse the new screening procedure and its constitutive elements and some of the critiques that have surfaced with it, namely the resurgence of the concept of legal fiction of non-entry and the recreation of ‘hotspot’ areas, previously introduced in the context of the 2015/2016 ‘crisis’ in frontline Member States. The second one will explore the possibility of detention (de facto or arbitrary and extensive) given the fact that the measures cannot guarantee, in practice, that governments

would be able to prevent entry through means other than detention, alongside with an analysis of children's and pregnant women´s rights in this context.

Chapter 3 will touch on the principle of non-refoulement in light with the right to seek asylum and its actual status. The last section, Chapter 4, will delve into the right to an effective remedy and legal aid as well as taking a look into its gaps and challenges associated with it. Finally, Chapter 5 will bring forward the conclusions achieved throughout this thesis.

1.4 Literature Review

This literature review provides an evaluation and synthesis of previous work on the main field of analysis so that the reader has a broader understanding of it. It will also highlight the trends and gaps regarding the subject of analysis.

1.4.1 Vulnerability in the European context

There is no general definition of vulnerability in the Common European Asylum System (hereafter, CEAS) instruments, therefore, they do not take a uniform approach concerning the treatment of vulnerable persons. From here we can assess a simple, but important problem: those with less visible vulnerabilities might not benefit from the vulnerability provisions covered by the CEAS (Hamel, 2024). This also means that Europe continues to fail when it comes to their border control and management since they cannot agree on a suggestion or proposal on how to approach this kind of situations. Migrants and asylum seekers have no say on the control that they will be subject to and their voices are not going to be heard either. Consequently, European policy leaders have the responsibility to make them heard, to tend to their necessities and special needs. The inconsistency showed in EU law instrument translates into ambiguity in domestic law. Almost ten years have come by since the 2015 refugee crisis and the response is still the same: there is no consensus on the procedural and reception guarantees required for vulnerable groups (European Council on Refugees and Exiles: AIDA, 2017). Accordingly, migrant vulnerability is exacerbated by the fragmented characteristic of European asylum policies and the barriers to achieve social and economic integration. Undocumented migrants become even more vulnerable if we take into account these circumstances: their lack of legal status signifies less opportunities to fully participate in the host society or even

achieve a good life status. Here, vulnerability appears as a constrain to accomplish emancipation (Moreno-Lax & Vavoula, 2024).

What we now might question is the legal meaning of vulnerability or of being identified as being vulnerable. If law, the system of rules practiced by a community, can undermine the ability of certain groups or individuals to build life in said community, what remains of protection and justice? What is the option for migrants? If the law becomes a double-edged sword what can we do to improve legal order and its connection with migration? (Moreno-Lax & Vavoula, 2024)

This is why is fundamental to stir up the debate and reinforce the necessity to address the interplay between vulnerability, law and migration. Would this be the right moment to invoke article 14º of the European Convention on Human Rights (hereafter, ECHR) that has been playing a marginal role in the migratory context? (Baumgärtel & Ganty, 2024). The current reformulation of Europe's migration policy presents an opportunity for the EU to consider migratory cases as discriminatory instances in order to identify how structural biases affect vulnerable groups and introduce safeguards that can prevent discrimination and add humanitarian dimensions to migration management.

1.4.2 How does EU Law protect those aiming to enter its borders?

EU Law developed a framework aimed at protecting certain individuals seeking to enter the continent, namely asylum-seekers and refugees. The main objective concerns the protection of fundamental rights whilst paying attention to border security and management. Starting with the right to seek asylum, the main principle of EU law, on the protection of migrants or refugees, said right is enshrined in the 1951 Refugee Convention and in article 18º of the Charter of Fundamental Rights of the European Union (hereafter, CFREU).

Article 18º of the Charter states that the right to asylum "*shall be guaranteed with due respect for the rules of the Geneva Convention (...) and the Protocol (...) and in accordance with the Treaty of the European Union and the Treaty on the Functioning of the European Union*".

The Charter also states two other important rights that need to be interpreted alongside article 18º. The first one is article 4º that prohibits torture and inhuman or degrading treatment or punishment and the second one is article 19º which states the principle of

non-refoulement. Taking a look at asylum law, the CEAS comes up as the main European instrument that is responsible for the regulation of migration.

Ten instruments compose the recently reformed EU migration and asylum law system and the need to analyse how they protect migrants and asylum seekers is evident. For starters, the Qualification Directive sets the grounds for grating international protection, including refugee status or subsidiary protection so that those fleeing have a set of rights available to them, which includes protection from refoulement (article 21º) and the right to family unit (article 23º). The Reception Conditions Directive lays down the standards for the reception of applicants for international protection. Amongst its provisions, the main ones concern the living conditions that the applicants are entitled to, meaning that they have the right to access healthcare, school/education, etc. This document also comprises a chapter dedicated to applicants with special needs.

Regarding the Union Resettlement Framework, this regulation is responsible for establishing common rules for resettlement and humanitarian admissions. In turn, the Asylum and Migration Management Regulation (that repels the III Dublin Regulation), determines which Member State is responsible for examining an application for international protection and establishes a solidarity mechanism (mandatory but flexible). The aim of the regulation is to prevent a phenomenon called *asylum shopping* and secondary movements. Finally, the Asylum Procedures Regulation establishes a common procedure for granting or withdrawing international protection. It lays down the tasks that each competent national authority has to carry out in order to ensure fair and efficient asylum decision-making processes. Once again, there is a mention to special procedural guarantees (article 21º and forward), applicable to those who might need them.

To conclude, I found it necessary to mention the Treaty on the Functioning of the European Union (hereafter, TFEU) and the Treaty on European Union (hereafter, TEU). Even though those legal texts do not, directly, grant specific provisions aimed at the protection of people seeking to enter Europe, they do mention how the EU manages its borders and the migration process as a whole (they are the foundation of secondary legislation). On the one hand, article 78º TFUE states that the EU's common asylum system must be in accordance with international refugee law, ensuring compliance with the principle of non-refoulement. On the other hand, article 3º TEU defends the protection

of human rights wide worldly. Article 6º is responsible for the incorporation of the Charter of Fundamental Rights of the EU into EU law.

1.4.3 Securitization and Migration

Irregular migration is usually seen as posing a big threat to states and the most common response is deterrence. The EU is no exception to the norm and attempts to contain people in their countries of origin (Grundler, 2024). Migration control has always been a preoccupation[3], but what we have been observing is a merging of asylum policies with migration control techniques which, most of the time, might not be lawful. In this case, since the screening procedures will be used to manage and categorize migrants at the EU's borders, migration control and these procedures become deeply intertwined. More specifically, the vulnerability assessments, which intend to identify and safeguard those with special protection needs, can become subordinated to a logic of control and transform into a filtering mechanism instead of a safeguard. The old narrative of "invasion" of Europe combined with the aspiration of the far-right has culminated in an interpretation of migration as a risk to Europe's integration project (Moreno-Lax, 2024).

Consequently, the securitization of migration has led to a change in EU migration and asylum law: this system, nowadays, is more of a control task than a protection one meaning that it is being misused. Much of this process is at the fault of the Dublin system and its rules, such as the one-country analysis practice, which determines which EU country is responsible for examining an asylum application. The main problem associated with the one-country analyses practice is that it puts disproportionate pressure on some countries, namely border countries, and then leads to unequal responsibility-sharing across the EU, overloads the systems and weakens protections. Consequently, this approach contributes to the misuse of the CEAS, However, the New Pact instruments do not do much more for the evolution of the CEAS. For instance, the new screening procedure builds on the previous hotspot approach. The fiction of non-entry continues and there is an option (in the Crisis and Force Majeure Regulation) of derogation of certain practices in times of crisis which may eliminate the distinction between different

[3] The creation of FRONTEX, the implementation of visa restrictions or the use of detention and or return procedures are some examples of migration control being a central concern for the EU.

categories of migrants (Moreno-Lax, 2024). The main criticism concerns the possibility of detention without any exemptions and scarce procedural guarantees.

The possibility of detention of minors reveals a serious limitation in the EU's assessment of this reform process. With this securitized framework, where detention becomes normalized as legitimate tool to control irregular migration flows, the obligation to respect fundamental rights and protect vulnerable groups no longer takes precedence. Accordingly, article 37º (b) of the Convention on the Rights of the Child states that "*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*". All EU Member States, individually, are signatories of this convention which means they are bound by the obligations of the convention. As a result, the EU, as a whole, needs to make sure that the detention of minors only happens as a matter of last resort.

To achieve a broader sense of responsibility, the EU should also come up with alternatives for detention in managing migration. While it is not the only measure available and functions as an administrative measure, rather than a criminal sanction, its recurring use can transform into a normalization of detention as a primary resource rather than last resource and change perceptions about migrants. It is also worth mentioning the fact that the lack of a concrete definition of detention and the possibility of extension of detention periods, in which individuals will be deprived of their right to liberty, can lead to damaging practices (Mohandes, 2024). If on the one hand there is an established period, it is also true that by setting a precedent we can observe an extension of that same period and we run the risk of overly broad and harmful interpretations.

The protection factor has shifted its goal and has been transformed into a control purpose of unwanted migrants in European soil. Treating all irregular migrants as unwelcomed and as a threat is what led us to the hotspot approach, which is being replicated. It is urgent that we find a middle-ground solution that satisfies EU leaders and respects the fundamental rights of migrants and asylum seekers. If we do not want a repetition of the 2015 crisis, we must act in order to change how we view migrants and asylum seekers. If we are unable to provide safe pathways to access Europe, we must come up with other solutions. Even though the EU has tried to manage migration

that is a utopian task, it will never be achievable. The root causes of the migratory process are not properly addressed and the EU has pre-existing universal obligations that cannot be disregarded in favour of "controlling" unwanted migration (Moreno-Lax, 2023).

What we cannot allow is the standardization of deterrence, coercion and violence so that the EU carries off its border controls. Law cannot be used to control nor as a means to achieve certain objectives through unlawful practices. The EU cannot continue to use deterrence and coercion as structural features of the migration control system, nor continue to disregard its shore of responsibility by doing a contactless border control- this should not be seen as somehow relieving the EU and its Member States from their fundamental rights obligations.

1.5 Methodology

1.5.1 Approach

The research question aims to explore whether the practices established by the new screening procedure will adequately address fundamental rights concerns, namely in the context of a vulnerability assessment. This will be done by examining some of its major critiques alongside the respect for fundamental rights. This subject is worthy of examination since some of the provisions might facilitate disrespect for fundamental rights. The screening of third-country nationals, aligned with the possibility of detention, spikes the discussion on the reform of the CEAS and if it is actually improving and benefiting the lives of migrants and asylum seekers. Therefore, an analysis of EU legislation (primary and secondary) is crucial so that we can acknowledge a topic that is open to so many interpretations, understandings and opinions. Side by side with this research, it is imperative to develop a doctrinal approach to better comprehend the intersection between the major laws and policies which regulate migration and the experiences of those going through the migratory process.

1.5.2 Doctrinal Approach

Since the topic of research involves numerous actors and a range of legislation (directives, regulations, conventions, etc.), a doctrinal approach, accompanied by socio-legal insights, reveals as a much needed in the sense that it opens the possibility of exploring the functioning of the law within societies, how one shapes the other and how both

environments might be influenced. A part of this study will implement a fundamental rights based approach which aims to focus on the value of human live, the difficulties faced by migrants and asylum seekers, in comparison with the focus on securitization, in hopes to demonstrate that the EU is not putting its best foot forward when we talk about raising the bar of the CEAS in a way that is humane and dignified, despite the EU claiming otherwise (Gazi, 2021).

By choosing to analyse the intersection between law and migration in a manner that is consistent with the respect for fundamental rights, thereby the adoption of a fundamental rights based approach, we will be taking a look into international human rights standards that seek to promote and protect them. This thesis will highlight how discriminatory practices and the distribution of power results in leaving behind certain categories of groups (United Nations Sustainable Development Group, 2024). If the institutions and organisms tasked with the social upliftment are not contributing to the possibility of empowerment, then it is mandatory that we call them out for their accountability and duty (European Commission, 2021).

1.5.3 Potential Challenges

This research methodology could face some limitations. For example, by mainly analysing EU Law and some international conventions, this study does not want to convey the idea that those are the only areas that have impacted the argument. There are other areas of law and policy that also demonstrate how the EU's response to migration, through the New Pact and more specifically the new screening procedure, is impacting migrants and asylum seekers and contributing to the exacerbation of their vulnerabilities, even though it has not been yet implemented.

Another limitation is in regards the time frame in which this study is conducted. Since the New Pact was adopted during the initial year of this research (2024) and Member States have a period of two years of implementation, the Court of Justice of the European Union's (hereafter, CJEU) judgements might be scarce and we might need to follow case-law referring to previous judgements in order to understand the new regime and all the challenges that come from it.

The thesis represents a very small portion of analysis of a much bigger issue and is aware of the limitations that arise from it. That said, the research question is not going to be

answered in a holistic manner, the conclusions achieved will congregate mere suggestions to the problem studied and not a final nor concrete answer.

CHAPTER 2

The New Screening Procedure

Composed by twenty-five articles, the Screening Regulation or Regulation (EU) 2024/1356 lays down the provisions for the screening of third-country nationals at external borders and within the territory of the Member States in order to strengthen the control of border crossings, identify those subject to the screening and those who might pose as threat to internal security, per article 1º of said regulation.

From the 12th of June 2026, the Screening Regulation (hereafter, SR), where the New Screening Procedure is stipulated, will start to apply. Applicable to the Schengen area, including its associates (excluding Ireland and Denmark), this regulation introduces a mandatory form of screening, the so-called screening procedure. Said screening procedure will entail: a preliminary health check; vulnerability checks; identity verification; registration of biometric data and a security check. After this, a screening form is filled, by the screening authorities, and a referral to the appropriate procedures (either asylum or return procedures) occurs [per article 8º (5)]. The time duration of this process should not exceed three [article 8º (4)] to seven [article 8º (3)] days, depending on where the screening is conducted. After the screening is done or the time limit is met, people will be referred to the procedures above mentioned (PICUM, 2024).

The screening can be done at the EU's external borders (article 5º) or within the territory (article 7º). When talking about the screening done at the external borders, the process is applicable to three different categories of non-EU nationals (including children) who do not fulfil the entry conditions under the Schengen Borders Code: those who are apprehended after having crossed the external border in an unauthorised manner; those who have applied for international protection during border checks or have been disembarked after a search and rescue operation. The screening of third-country nationals, within the borders, occurs when there is no indication that an illegally staying third-country national was subject to controls at the external borders (article 1º).

The novelty with this screening procedure is that it establishes a uniform and swift process, aiming at expedite decisions, for identifying and registering incoming irregular migrants at EU's external borders. All of them will be registered as soon as they arrive and will have to go through mandatory identity, security, health and vulnerability checks to determine if they do need protection and or not. During this procedure an analysis of their asylum applications will be conducted in order to determine if they are authorised to enter EU's territory, bearing in mind the need to ensure the presence of an independent monitoring mechanism that monitors the respect for fundamental rights during the screening. All in all, what the EU aims to do is to put in place competent asylum procedures, with shorter timelines and stricter rules, whilst guaranteeing the rights of individuals, especially vulnerable groups. According to the Department for Migration and Home Affairs, "*This screening will reinforce security within the Schengen area as it will ensure that irregular migrants who are being screened do not pose any threat to internal security. They will also help protect public health and to provide migrants with treatment in case of urgent or essential need*" (European Commission, 2024).

However, criticism and concerns have arisen. From fundamental rights protection concerns to border pushbacks, many critics have surfaced. The most challenging one pertains to detention. Throughout this process, migrants must stay at the screening locations, in designated facilities, and cannot leave until the monitoring is completed. Accordingly, to recital 11 and articles 6º, 7º and 9º (1) of the Screening Regulation, "(…) *Third-country nationals subject to the screening should remain available to the screening authorities during the screening.* (…)". This provision constitutes a direct link to likely detentions and creates serious concerns regarding the possibility that Member States could resort to *de facto* detention and the (dis)respect for fundamental rights.

Amnesty International (in a joint statement with other organisations) has also expressed its concerns relating to the Screening Procedure and everything that it entails. First and foremost, it argued that the Screening Procedure will lead to widespread racial profiling in the EU and that will mean a discriminatory impact on racialized communities, minorities, etc. This equals to a discriminatory policy adjudicated and increase detention (Amnesty International, 2023). The next section will delve into this matter and will explore the connection between the legal fiction of non-entry and the reuse of hotspot

areas; detention, vulnerability and issues on children's rights and other groups of people, such as pregnant women.

2.1 Legal Fiction of Non-Entry

Firstly, used in Germany, circa 2018, to include land crossings, the concept of legal fiction of non-entry is now central to the Screening Regulation (article 6º) and concerns situations in which states claim that even if a third-country national arrives that arrival is only recognized once is legal. Therefore, the legality of the procedure takes precedence over the physical presence in the territory. This concept then creates a legal space where states exercise control and restrict third-country nationals' rights, namely their mobility. What can happen from this phenomenon is that despite the obligation to ensure that fundamental rights are complied with, states can claim that they do not have any legal obligations to provide rights to those who just arrived in the country. As such, states use this legal fiction of non-entry as an instrument to perform migration control. It can also serve as a means to relieve Member States from their fundamental rights obligations, even though, legally speaking, it is not an acceptable practice.

Additionally, the fiction of non-entry can contradict article 31º of the 1951 Refugee Convention and article 6º (5) of the Schengen Borders Code (European Council on Refugees and Exiles, 2022). The conflict between this legal construct and article 31º of the 1951 Refugee Convention (Refugees Unlawfully in the Country of Refugee) can arise because the legal fiction of non-entry undermines the rights enshrined in said article, namely the fact that contracting states shall not penalize against irregular entry or presence. However, if a state argues that an asylum seeker has not entered their territory, then that protection is denied and asylum seekers are not bound by article 31º protections. The issue with article 6º (5) of the Schengen Borders Code (Entry Conditions for Third-Country Nationals) which sets out derogations from entry conditions including the fact that Member States must allow entry "*on humanitarian grounds, grounds of national interest or because of international obligations*", lies in the fact that if a state applies the legal fiction of non-entry it can, again, argue that an asylum seeker has not entered its territory and that means that article 6º (5) is not applicable. This practice then also undermines the requirements to give access to state territory even when international obligations or other grounds do require it.

Article 6º of the SR clearly states that "*During the screening, the persons referred to in Article 5(1) and (2) shall not be authorised to enter the territory of a Member State*". This means that the SR itself also creates a legal space to restrict asylum seekers rights. During the screening, asylum seekers are restricted in terms of their freedom of movement while undergoing screening. Adding this to the detention provisions enshrined in the SR it means that this regulation, alongside with the legal fiction of non-entry, facilitates detention. All in all, this could severely affect the mental health of those being detained, as well as put at stake the respect for their fundamental rights, including the right to liberty. Therefore, the level of assurance of using humane procedures, during the screening, is low as no one can really ensure what Member States are putting into practice. The presence of a monitoring mechanism might help but the lack of guarantees, associated with its creation and assurance of independence, does not help the case. It is also important to note that the fact that they are not authorised to enter the territory constitutes a synonym of not accessing formal asylum procedures, because if they are not in the country then the state has no duty of providing them those rights, per a simple read of what constitutes the fiction (European Council on Refugees and Exiles, 2022).

The case law of the ECtHR is not consistent on this matter. The Court has sided with the State's argument on its sovereign right to apply the fiction of non-entry so that it could prevent unauthorised entries. Examples of this appear in the case Saadi v. United Kingdom (2008) where an Iraqi Kurd had been physical present in UK's territory for days but the State had a contrary point of view. However, not all cases were like this one. In Hirsi Jamaa and Others v. Italy (2012), the Court found that the Italian authorities had unlawfully intercepted a total of twenty-three Somali and Eritrean nationals that were travelling by boat, which later were returned back to Libya which represented an issue of collective expulsion and refoulement to a territory in which they could be subject to ill-treatment. When analysing this situation, the Court concluded that all individuals concerned were under Italian jurisdiction and, given that, Italy could not evade from its responsibilities under the ECHR. The court decided in this way in order to held Italy accountable and prevent claims of non-entry by Italy. Here, the physical presence of the applicants, into the territory, did not matter for the final decision (European Council on Refugees and Exiles, 2022). The ECtHR prioritized the individuals' situation and the respect and protection of fundamental rights, whereas in the Saadi case it respected the state's use of the legal fiction of non-entry.

It is important to mention that despite being adopted in 1950 the ECHR only entered into force in 1953. Since then, it became the cornerstone of the European legal order, binding all EU member states on the promise of respecting and upholding fundamental rights. This also meant that the EU would, from that moment on, be subject to control by a legal body, the ECtHR, on the basis of the provisions enshrined in the ECHR. The Charter of Fundamental Rights of the EU mirrors many ECHR provisions and that allowed the creation of a harmonized fundamental rights framework (European Court of Human Rights, 2024).

In N.D and N.T v. Spain (2020), in a case concerning the return of two men to Morocco after attempting to cross the border of the Melilla enclave, the Grand Chamber of the Court ruled that "*the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system*" and that "*The Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction*" (EDAL-European Database of Asylum Law, 2020).

On its turn, the CJEU has also pronounced on issues relating to the legal fiction of non-entry. In 2020, it delivered a judgment in joined cases FMS and Others, confirming that holding asylum seekers in transit zones at the external border constitutes detention. The CJEU emphasised that such measure must be necessary and proportionate, be subject to a formal decision, include a possibility for judicial review and lastly not go beyond the border procedure as defined by the Asylum Procedures Directive. It also rejected the extension of the inadmissibility criteria contained in the directive, stating that the ground of national legislation providing for a "safe transit country" is contrary to EU law (European Parliament, 2024).

2.1.1 Hotspot Areas

Hotspot areas are the main areas where the screening of third-country nationals will occur. Since they are the first points of entry and the screening procedure is conducted there it is necessary to analyse them and try to understand if fundamental rights are respected while maintaining security at European borders. This concept was conceptualized in the European Agenda on Migration of 2015, but no definition of it was provided. What the Council did was explain its applicability as a "*platform for the agencies to intervene,*

rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders" (Casolari, 2015). The agencies mentioned comprise the European Union Agency for Asylum (EUAA), the European Border and Coast Guard Agency (FRONTEX), the European Union Agency for Law Enforcement Cooperation (EUROPOL) and the European Union Agency for Criminal Justice Cooperation (EUROJUST) (European Commission, 2024).

Therefore, a hotspot is characterised by "*specific and disproportionate migratory pressure*" and where the Member State concerned might ask for assistance in order to better deal with the migratory flows and the consequent migratory pressure. However, the hotspot only consists of one during the time of crisis and when the hotspot approach proves to be necessary of implementation. The question that now arises is: how does one know when or how the hotspot approach is triggered. Statewatch states that "*the triggering of the hotspot approach is based both on the assessment of the Member State concerned and the risk analysis provided by relevant EU agencies, in particular FRONTEX and EUAA*" (Statewatch, 2015).

In practical terms, what this means is that, once the approach is triggered, the Commission and the EU Agencies will examine the request in order to define the necessary support package. An EU Regional Task Force (EURTF) will then be responsible for the coordination of the work on the ground, meaning that its responsible for the administrative and operational part of the process, for example: assisting with the registration and screening of irregular migrants at the ports of disembarkation, pre-return assistance in pre-removal centres, etc. (Statewatch, 2015).

It also important to note that even though the hotspot approach does not provide for any reception facilities, it only "*builds on their existence*", they are crucial for a successful implementation of said approach. One might also ask what is the benefit of choosing this kind of approach instead of another and the answer relies on the fact that it provides "*comprehensive and targeted support*" to the affected frontline Member State and helps the relocation scheme, the combat of smuggling and enhances the return policy (Statewatch, 2015). All in all, most of the benefits here are for one part of the equation only- the state- whilst the other part concerned- migrants and asylum seekers- does not get any explicit gains. Hence, it is not uncanny that this approach has been criticized,

especially in terms of disrespecting the fundamental rights of migrants and asylum seekers that are perpetrated inside of the hotspot areas (Campesi, 2020).

We can now interrogate us on what do migrants and asylum seekers benefit from this approach. Based on a simple read the answer is: not much. Understanding hotspot areas as areas where arriving migrants are detained it is already possible to imagine what might come regarding those specific locations. Italy and Greece have been the "European labs" for testing the hotspot approach and are good examples to show the past/current situation. By being two countries which have been receiving high numbers of migrants, both countries face several challenges. For example, during the period of the Covid-19 pandemic it would have been natural that both countries adapted their hotspot areas into something that would safeguard the safety of all concerned. However, in Italy, the hotspots were evaluated as being unsafe and were replaced by quarantine ships and in Greece the hotspots continued to be fully operative, but the number of those entitled to accommodation and pocket money, for example, was reduced which meant that subsistence was affected. Greece then made another drastic decision, in 2021, when the access to water and food for those who did not filled an asylum application was denied. The amount of restriction led to the deterioration of the living conditions and hampered the access to fundamental rights (Borderline Sicilia, 2022).

To understand how prevailing, the practices of detaining migrants in those hotspots are, I elected an ECtHR's case concerning Italy and the illegal detention of foreign minors in the Taranto hotspot. On the 29th of November 2023, the ECtHR condemned Italy for illegally detaining several unaccompanied minors, recurring to inhuman and degrading treatment and not appointing guardians nor providing information on the possibility of challenging their conditions in a court (AT and Others v. Italy, 2023). Following ECtHR's decision, the competent authorities were asked to immediately take care of the placement of the minors concerned and to ensure monitoring of the reception conditions in order for them to comply with humanity and dignity (Melting Pot Europa, 2023).

It is important to mention that according to Italy's national law, namely Legislative Decree 142/2015, it is illegal to detain unaccompanied foreign minors in repatriation detention centres, hotspots and government first reception centres, but what systematically happens is precisely the contrary, a widespread detention of minors. Only

those above the age of sixteen can be extraordinary allocated in reception centres for adults following Legislative Decree 133/2023 (Melting Pot Europa, 2023).

However, and as demonstrated through jurisprudence, unfortunately, there are other rulings concerning this same subject and country, such as: JA and Others v. Italy (2023) and MA vs Italy (2023). The JA and Others case was the first case where the ECtHR assessed the compatibility between the Convention and the hotspot approach. The migrants concerned spent ten days at the Lampedusa hotspot and the Court found that their living conditions violated article 3º (Prohibition of torture) and article 5º (Right to liberty and security) because its presence amounted to unlawful detention. The Court also found that they were victims of a collective expulsion since they were forcibly removed from Italy to Tunisia. In this judgement, the Court criticized the lack of safeguards of the migrants but did not expressly state if Italy was to be held responsible for the actions taken. All in all, the Court did not make a final and globally applicable stance on the compatibility, it only analysed the specific circumstances of the applicant in light of the ECHR. Nonetheless, this ruling shows how Italy has been recurring to detention, even when it is illegal.

Greece, on its turn, has also had its share of case-law on hotspots. On A.D. v. Greece (2023), the ECtHR ruled that the living conditions of the hotspots on the Greek Aegean Islands, namely the Samos hotspot, were inhuman. The case concerned a pregnant asylum-seeker who stayed almost three months there, until she gave birth. When she arrived she was forced to live in a tent, had no access to sanitary facilities and could not access prenatal health care before being admitted to the hospital. The Court's assessment stated that the living conditions were inhuman and that the applicant needed special care, which meant that the Court adopted a vulnerability approach.

All in all, what both cases demonstrated the shortcomings of EU Member States in managing and accommodating vulnerable migrants. Recital 38 of the SR states that "*Particular attention should be paid to individuals with vulnerabilities, such as pregnant women, elderly persons, single-parent families, persons with immediately identifiable physical or mental disability, persons visibly having suffered physiological or physical trauma and unaccompanied minors.*", but by opting to use a policy based on the detention of humans for purposes of migration management, the EU, is choosing a path that involves serious fundamental rights violations, as the ones stated in the analysed cases.

As reported by the Voelkerrechstblog, "*By doing so, the EU and its member states are betraying the core European values enshrined in the ECHR*." (Voelkerrechtsblog, 2023).

What the new SR is, once again, doing is to continue the normalization of an approach that was originally designed as an exception to respond to "*disproportionate migratory pressure",* an approach that amounts to violations of fundamental rights and only prejudices migrants and asylum seekers (Campesi, 2020). It will allow for an expansion of detention and undermine the rights of refugees whilst outsourcing responsibility. Those pre-entering "arrangements", under the "remain available" clause, continue to blur the line between deprivation of liberty and detention and will most likely resemble what has been previously conducted in hotspots meaning that it can lead to overcrowding at the borders and signify a downgrade of fundamental rights protection (PICUM, 2024).

2.2 Detention Concerns

Understood as a deprivation of liberty, detention, in the context of EU asylum law, is "*the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement*." (Directive (EU) 2024/1346). Detention should only be used as a measure of last resort, after exhausting other less intrusive measures or proving that they are insufficient, alongside the principles of proportionality and necessity (Regulation (EU) 2024/1356).

This practice can occur in different scenarios such as: for enforcing returns (in order to carry out the removal of the person concerned), during the asylum procedure (i.e. to confirm identity, to prevent absconding, etc.) and during the screening procedure. During the asylum procedure the detention, if needed, is ruled by different legislation, mainly to protect those who are detained and monitor the conditions in which they are detained in (i.e.: living conditions, sanitary conditions, access to adequate healthcare, etc.). That being said, a fundamental right that must be respected when we are talking about detention is the right to liberty and security (European Parliament, 2023). Article 5º (1) of the ECHR states that "*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.*". Right after, it enumerates six circumstances in which detention is lawfully allowed. Article 6º of the CFREU also comprises this right by stating that: "*Everyone has the right to liberty and security of person.*".

The International Covenant on Civil and Political Rights (ICCPR), on its turn, declares [article 9º (1)] that: "*1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"* and "*1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*", according to article 10º (1) ICCPR. Article 9º (1) of the Universal Declaration of Human Rights (hereafter, UDHR) affirms that "*No one shall be subjected to arbitrary arrest, detention or exile*."

The above mentioned international instruments set a conjecture of recognised rights that aim to prevent the use of arbitrary detention by asserting the right to liberty and security. However, none of them clearly distinguish between deprivation of liberty and restriction of the freedom of movement. When determining this, the European Court of Human Rights takes a look at: "*i) the applicants' individual situation and their choices; ii) the applicable legal regime of the respective country and its purpose; iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events; and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants*." (Council of Europe, 2024).

The grounds allowing for detention can be found in other European instruments such as the Return Border Procedure Regulation, the Reception Conditions Directive and the Asylum Procedures Regulation. Moreover, the act of detaining someone "*must be carried out in good faith pursuant to a legal basis*", in line with the principles of proportionality and necessity and by guaranteeing procedural safeguards to the detainees (European Council on Refugees and Exiles, 2021).

Regarding the Screening Regulation, the grounds of detention are to be the rules of the Return Directive (Directive 2008/115/EC), as long as the person concerned did not ask for asylum (if the person did ask, the applicable rules are the ones from the Reception Conditions Directive). One might be detained "*for the duration of the screening, to prevent any risk of absconding, potential threats to internal security resulting from such absconding or potential threats to public health resulting from such absconding*." (article 6º SR). However, the fact that now we have clearly stated provisions that might lead to systematic detention, namely article 6º and recital 11, clearer rules are needed, even

though it is also stated that detention should only be used as a last resort. The use of the expression "*Member States shall lay down in their national law provisions to ensure that persons (…) remain available to the authorities responsible for carrying out the screening"* (article 6º) definitely means that those subject to the screening will be limited in terms of their liberty and freedom of movement.

This being, from my perspective, means that the Screening Regulations lacks in offering suggestions of alternatives to detention, such as reporting obligations, the requirement to reside at a certain location or financial guarantees (European Parliament, 2023), and leaves that task to Member States and national legislation. For example, when talking about reporting duties, a practice used by Bulgaria, Malta, Hungary, Latvia, amongst others countries, we are able to find that this alternative gives the person concerned freedom of movement throughout the country in which he or she is allocated in, having to occasionally report to the police. However, we also notice a shortcoming: find accommodation or housing or even someone that will guarantee it for them, since foreigners, most of the times, are not established in the country and do not have any financial guarantees. On the subject of financial guarantees, from my perspective, we only have disadvantages concerning this alternative. A migrant, usually, does not have that much financial capacity, let alone enough permits to work and obtain money. From that, it almost seems impossible for him or her to acquire the financial guarantees asked for and therefore fulfil the conditions of said alternative (Office of the United Nations High Commissioner for Human Rights, 2017).

That being said, is easy to conclude that the risk of absconding is used as a means to penalise asylum seekers and almost discourage them from asking for international protection, since they are, from a starting point of view, viewed as somewhat criminals, because they do not fulfil the requirements and are not allowed to enter the European territory.

Leaving to national law the task of ensuring that those not authorised to enter the territory "*remain available*" poses as another challenge: there is no common rule. This happens mainly because the rules regulating immigration detention in the context of border control, are either those from the Return Directive or the Reception Conditions Directive. The Screening Regulation does not establish a legal ground for their deprivation of liberty, the applicable rules must then be European ones (Council of Europe, 2024). Even

though the periods of detention are expressly stated: seven days for the screening conducted at external borders and three days for the screening conducted within the territory, in times of crisis these periods can be derogated and the duration expanded, despite recital 10 expressing that the screening should be "*carried out without delay*". If on the one hand, it is a positive note that the duration of the detention period is explicit, on the other hand, a question about the feasibility of it arises. Since the screening involves a multitude of checks, one might ask if seven or three days are enough to gather and analyse all the information needed in order to make a fair decision. A vulnerability check, for example, takes longer than a security check. Bearing in mind the quantity of arrivals and the number of resources available, we must analyse if the time frames sufficient to conduct the whole process in a manner that is consistent with the respect for fundamental rights, that leads to fair and truthful decisions and takes into account all the circumstances of those concerned.

Other concerning topic up for debate is on the types of groups of individuals that will be detained. By going through the SR, we can assess that children will possibly be subject to detention, LGBTQ + people too, as well as pregnant women, individuals with medical issues, elderly, stateless persons, etc. What stands out in this context is that more people will be detained and this will obviously aggravate their already disadvantaged position, by "*denying them a fair and full assessment of their protection needs*" (Amnesty International, 2024). In this case, vulnerability can act as "*vehicle for empathy and an antidote to judicial apathy and formalism and as a mechanism for context-engagement and a victim-oriented perspective*", per stated by Corina Heri (2021).

In regards to this matter, and to better understand Heri's statement, I find necessary a brief conceptualization of vulnerability and its usage. To start, this thesis follows Martha Fineman's theory, which views vulnerability as an inherent aspect of human condition, [that is a natural condition that characterizes certain persons or groups of people making it inherent and inevitable (Gilodi, et al,2022)], alongside a situational perspective of the issue, acknowledging that human vulnerability is also particular and dependent if certain characteristics, contexts and different relationships (Mustaniemi-Laakso, et al.,2017). Fineman's understanding of vulnerability, as an aspect of the human condition, places this discussion at the centre of states' responsibility, abstracting it from negative connotations (Fineman, 2008). Moreover, this thesis also shares the views presented in

the work of De Lomba and Vermeylen that view ethical vulnerability as being an enabling factor to the rethinking of the EU's asylum and migration policies through the lens of lived human experiences (De Lomba & Vermeylen, 2023). Furthermore, it opens up the dialogue to reimagine said policies and empower migrants to assert their right to social welfare as co-inhabitant alongside their hosts, thereby placing an obligation on the latter to share potentially limited resources or resources that are made limited by restrictive policies. All in all, independently of how one might interpret this concept, the term vulnerability is crucial in order to determine or help determine if a particular (affected) individual receives the necessary support, protection and assistance to live a safe live (Krivenko, 2022), as stated by Heri (2021).

To sum up, to ensure the availability of persons during the screening, the regulation allows for detention under EU law (for screening purposes), including children, as there is no explicit prohibition of detaining them. Therefore, it is applicable to children who may be subject to detention on the basis of their own parents' "migratory status". Nonetheless, the major concern is that, once these new rules become applicable, convenience may overrule European Union's standards (Tsourdi, 2024). The International Federation of Red Cross and Red Crescent Societies (IFRC) fears that the rights of migrants and asylum seekers and their dignity will be put at stake and advocates for a humane implementation of the Pact stating that the EU and its Member States need to remind themselves that their future decisions affect real people (International Federation of Red Cross and Red Crescent Societies, 2024).

2.2.1 Children's Rights

According to international and EU Law, as mentioned before, every individual has the right to liberty and security, however, the SR does not contain any provisions excluding children (those below the age of eighteen years old) from having their liberty deprived for the purpose of immigration control, nor do the Asylum Procedures Regulation or the Return Border Procedure Regulation. What we can find in the Asylum Procedures Regulation is a list of exemptions from the asylum border procedure taking into account certain situations, such as: the necessary support cannot be provided to applicants with special reception needs, including minors; there are relevant medical reasons for not applying the procedure and the necessary conditions and guarantees for detention cannot be met.

Taking this in consideration, children should never be detained, as a general rule, because of their vulnerability, regardless of their parents' immigration status or if they are accompanied or not. As the EU's Fundamental Rights Agency (2025) puts it: "*The status of being a child and their extreme vulnerability prevail over their migratory situation*". If the child´s best interests are to be the primary consideration during the screening, per the SR, it is questionable as to why the EU is allowing for immigration detention of children and thus not meeting the international standards of the United Nations (hereafter, UN) Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrants Workers and Members of their Families that deem child immigration detention to be in violation of the UN Convention on the Rights of the Child (PICUM, 2024).

By analysing ECtHR's jurisprudence, alongside the interpretation of the ECHR, we can find different cases and circumstances, but the majority of them demonstrate that children are being detained, even though immigration detention of children has been found as unlawful under the ECHR (Strasbourg Observers, 2022). For example, if we take a look at the Nikoghosyan and Others v. Poland (2022), we come across a case where a family composed by adults and three children (all asylum-seekers) were placed in a detention facility without an assessment of their particular situation and needs and without using detention as a measure of last resort. The family sought asylum but was subjected to automatic detention under conditions akin to incarceration, which were particularly unsuitable for children. The Court criticized the measures taken by the Polish authorities, stating that they were violating article 5º (1) (f) of the ECHR and asserted that the family was entitled to compensation for the damages caused. It also stated that the child's best interests could not be confined to keeping the family together and that the authorities had to take all necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life (Nikoghosyan and Others v. Poland, 2022).

Another recent case regarding detention of children is the M.D. and A.D. v. France (2021) where a mother and her four-month old daughter were held in administrative detention (for forty-five days) pending their transfer to Italy, where they firstly applied for asylum. The applicants, relying on article 3º of the ECHR, complained that the administrative detention, they have been subject to, corresponded to inhumane and degrading treatment-

a statement that was backed up by the Court, which stated that the conditions of the detention constituted a violation of numerous rights such as human dignity, inhuman and degrading treatment and that, once again, less restrictive measures could have been adopted for this specific case. The applicants also stated that, based on article 5º (4) of the ECHR, the child did not have access to an effective remedy to challenge the lawfulness of the administrative detention and its consequent extension (twenty-eight days). They also submitted that their detention breached the right enshrined in article 8º ECHR, but the Court did not analyse this complaint given the fact that they had already found a violation of article 3º (prohibition of torture) of the Convention (M.D. and A.D. v France, 2021).

At national level, the Administrative Court of Athens issued a judgment (on the 14th of November 2024) regarding the detention of a refugee family. This family, with a minor, objected their detention period (for over two weeks), due to the delay of their registration by the Reception and Identification Services. The Court ruled that this constituted unlawful detention and ordered for the family to be placed at an open facility pending their registration. It also highlighted the living conditions experienced by those in RIC Malakasa (Refugee Support Aegean, 2024).

Vulnerability should then play a huge part in all of this. The ECtHR frequently refers to this concept in its case-law, mainly in order to contextualize the situation concerned, but has never provided a definition for it. Contrary to Martha Fineman's theory, the Court does not expressly consider every applicant to be vulnerable (Fineman understands vulnerability as a universal human experience), instead, it uses vulnerability as a means to approach inequality, the respect for human dignity, non-discrimination, etc. However, the usage of this term cannot lead to situations where value judgements may deem a group as not being vulnerable enough to be worthy of protection or originate one-dimensional perceptions of groups. Hence the Court can start a revolution by engaging more and more with this notion, but, at the same time, recognizing the trickiness that comes with it. The recognition of vulnerability cannot be used as an "award" nor create conditions that may put in place a feeling of competition (Strasbourg Observers, 2022).

Also disserting on this issue, Baumgärtel and Ganty, discuss how the principle of migratory vulnerability plays a part in the ECtHR's approach which normally opts on a group-based notion of vulnerability. In their joint article, both authors argue that the

approach creates shortcomings and, therefore, it is necessary to have what they call the principle of migratory vulnerability which follows Fineman's line of thought and adds what they call the "*transitory and situational adjective*" as a social-induced characteristic shared by all migrants who are deemed as vulnerable. Furthermore, the determination of the principle would be based off factual information provided by international organisms, NGOs and other reliable sources attending to the specific situation of each vulnerable migrant. Quoting them: "*As a principle characterised by 'flexibility and versatility', its utility would not be limited to the immediate change of Article 14 ECHR praxis*" (Baumgärtel & Ganty, 2024).

Relating to Court judgements, they argue that this principle could be recognised as a ground to initiate a claim under article 14º ECHR. To start, as it seeks to avoid any determinative affiliations, migrant vulnerability can be used as basis bearing in mind that it encompasses distinct kinds of migratory realities, avoids determinative affiliations and relates to situational vulnerability which means that it can evolve over time, is not context dependent and can be mutable. However, they also make the claim that alone, migratory vulnerability, does not constitute a case of discrimination if migration control is to be interpreted as an autonomous and separate cause of processes of stratification. In situations like those, migratory vulnerability, would then need to be intersected with other grounds and therefore constitute a case of discrimination (Baumgärtel & Ganty, 2024).

To reiterate, this concept would then offer an autonomous remedy that would allow migrants to challenge unjustifiable differentiation and exclusion processes that they might have been subject to and also allow the Court to "*reintroduce a sense of real universality*" and to help recognize the social-political disadvantages that migrants face (Baumgärtel & Ganty, 2024).

In the case of children's rights, vulnerability can play a part when talking about subjecting them to detention. If they are considered vulnerable, therefore with special needs, requiring particular protection and attention, the EU and its Member States must take this into consideration and reverse some of the measures that might be implemented. We are talking about human beings that are not legal adults and most of the time do not have enough agency (due to their youth) or even comprehend what they might have to endure. That being said, that means that the state has more responsibility, positive obligations, in order to ensure that they enjoy their rights (Heri, 2021). Vulnerability then plays a part in

trying to increase state's responsibility for the protection of those in need and the respect for fundamental rights.

According to a guide on the case-law of the ECtHR, the fact that children are accompanied by their parents during the period of immigration detention is not enough to exempt the competent authorities from their duty to protect children and consequently take appropriate measures in accordance with their positive obligations under article 3º ECHR. That being said, the conduct of the accompanying parent cannot be decisive for the question of whether or not the threshold of severity to engage article 3º of the Convention has been reached in respect of the child (Council of Europe, 2024).

To finalize, taking a look at some of the provisions of the SR we can find some problematic ones. The first one that I would like to highlight relates to the appointment or not of a legal guardian to unaccompanied children. The usage of the expression "*as soon as possible*" [article 13º (3)] does not seem satisfactory enough when it comes to the timeframe for appointing a representative for the child(ren). Once again, the SR is lacking in terms of being assertive and precise in regards of a matter that is of extreme importance. In S.F. and Other v. Bulgaria (2017), the ECtHR held that children, either separated or unaccompanied, in a migratory context, are to be considered extremely vulnerable and entitled to special protection. Moreover, when it comes to specific regards of unaccompanied children, it is well stated in case law (Rahimi v. Greece, 2011) and in the European Border and Coast Guard Regulation [article 80º (3)] that they need to have their rights protected (FRA- EU Agency for Fundamental Rights, 2023).

The second concerning aspect is the fact that one representative might have up to thirty children to assist and that seems disproportionate given the context and the special care this vulnerable group needs. Thirty different children who might have been through different circumstances and have different life experiences appears to be too much for one single individual. The last aspect that I find worth of mentioning relates to the wording of recital 25, more specifically the phrase "*Child protection authorities should, <u>wherever necessary</u>, be closely involved in the screening to ensure that the best interests of the child are duly taken into account throughout the screening*", that can be up for criticism. The use of the expression "*whenever necessary*" to talk about the presence of the child protection authorities should have been expressed differently, in my view. When talking about vulnerable individuals, as children are, more so if they are unaccompanied,

their protection guarantees should not be aligned with "at ease" terms, it is always necessary or should be to have the most competent authorities ready and at every child's disposal, not only whenever necessary. From my understanding, the SR could have elevated its compromise with the protection of the rights of the children by anticipating itself and mandating that child protection authorities must always be closely involved.

2.2.2 Pregnant Women's Rights

The sexual and reproductive rights of women, which include the right to health, to life, to freedom from torture and ill-treatment and the right to privacy, as many others, are intrinsic elements of the fundamental rights framework. As such, many international instruments address them. For example, article 33º (2) of the CFREU states that "(…) *everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child*.". That being said, pregnancy and consequently maternity are two circumstances deserving of special protection and appreciation. On its turn, article 12º (1) of the International Covenant on Economic, Social and Cultural Rights mentions how one has "*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*".

Therefore, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment is one of the central key rights when talking about women's sexual and reproductive lives and the obligations that states have to be proactive and adopt laws that protect and prevent torture and other forms of ill-treatment. When talking about women´s rights, in the context of detention, many topics surface, especially those concerning pregnant women and their specific needs whilst they are detained, including access to medical care which encompasses reproductive health, prenatal and postnatal services and the needs of their unborn child.

Throughout its jurisprudence, it is notable that the ECtHR recognizes vulnerability due to pregnancy, which is a satisfying start point. One of its first judgement on this matter, in 2004, the Court was asked to analyse if an adult applicant was to be considered as vulnerable because of her pregnancy when she was a victim of ill-treatment by the police (Bati and Others v. Turkey, 2004). The Court did not, however, explicitly state if the applicant was to be considered as a vulnerable individual or not, but what this judgement

did was bring into the scene the vulnerability of pregnant women and those giving birth (Heri, 2021).

In a 2011 judgment, the ECtHR ruled that Poland had an obligation to prevent inhuman and degrading treatment in terms of reproductive health care, more specifically the right that women have (or must have) to reliable and full information. The situation concerned the failure, on Poland's end, to enable a woman access to prenatal testing and information so that she could decide on if she wanted to have a legal abortion or not, violating article 8º of the Convention, as well as article 3º. The Court considered that the woman was in a situation of "great vulnerability" (R.R v. Poland, 2011) and as stated by Heri (2021) this case "*indicates that, to a certain extent, the vulnerability of women as concerns their reproductive health is a function of state interference in their independent decision-making regarding these matters*".

A more recent case, adjudicated in 2022, involved an Iraqi asylum seeking family (four children and two adults) that was detained in a Hungarian transit zone, at the border with Serbia. From all family members, two of them, namely the father and mother expressed to the authorities their vulnerability status. The father was a victim of torture and the mother was pregnant, but had already experienced complications, having a high-risk pregnancy (H.M. and Others v. Hungary, 2022).

The Court found that the mother was in a vulnerable situation and that the detention of the applicants was, in fact, not lawful. In reality, it was a *de facto* measure since the Hungarian government did not have any legal basis to justify the detention of the family. The Court also found that the mother had also been subject to inhuman and degrading treatment during her confinement (adding her high-risk pregnancy and other complications that relate to it). She was then "limited" during the period of detention and experienced situations that aggravated her condition like, for example, anxiety. Combining all of this with her vulnerable situation, the Court found that the threshold of severity, required by article 3º ECHR, had been exceeded (H.M. and Others v. Hungary, 2022).

In the light of pregnancy, the term vulnerability shows up as contextual. A pregnant person is indeed fragile in terms of their physicality and is also dependant, whether we like it or not. They may depend on medical healthcare providers for information about

their health and of their foetus, as well as access to certain services. This being said, vulnerability here works as "instrument" that enables the Court to recognize the necessity of upholding the protection of this person without any state interference or interests. Here, being able to have access to appropriate care during pregnancy must be the main concern overall. All in all, vulnerability must be seen as a tool to allow the Court to understand the suffering of all affected, specially the mother and the foetus (Heri, 2021).

In Europe, the general rule is that detention should only be used as a measure of last resort, after proving that other less coercive alternative measures cannot be applied effectively, per recital 11 of the SR. Adding to this, the Reception Conditions Directive states that pregnant women are to be considered applicants with special reception needs. Article 13º (1) states that "*The health, including the mental health, of applicants in detention who have special reception needs shall be of primary concern to national authorities. Where the detention of applicants with special reception needs would put their physical and mental health at serious risk, those applicants shall not be detained*.". Article 15º, on its turn, declares that "*Member States may require medical screening for applicants on public health grounds*.". While the Directive does not explicitly prohibit the detention of pregnant women it includes provisions which oblige the respective authorities to consider their special needs and guarantee them access to medical care.

A brief mention to the Return Border Procedure Regulation proves to be necessary. That regulation is another European instrument that has dispositions that regulate the matter concerned. It states that detention may be imposed only as a measure of last resort if it proves necessary [article 5º (1)]. The Asylum Procedures Regulation also mentions that "*Where applicants have been identified as being in need of special procedural guarantees, they shall be provided with the necessary support allowing them to benefit from the rights and comply with the obligations under this Regulation*" [article 21º(1)].

Concerning the Screening Regulation and the practice of detaining pregnant women, for immigration purposes, this instrument does not specify anything on that matter. For starts the regulation, does not acknowledge detention has such. What I mean by that is that the practice of detention is enshrined in the SR, but the EU does not want to view nor recognize it as favouring such procedure. Throughout its twenty-eight-page length, the word "detention" comes up eight times. This alone is sufficient to argue that, even though implicitly, detention is part of the Screening Procedure, even if it is not labelled as such.

In practice, the screening that migrants have to go through concludes, most of time, in them being kept in closed facilities where their freedom of movement is restricted, alongside with the possibility of *de facto* detention (once again, not classified as such). Regardless of the way the EU chose to approach this sensitive issue, a way that I find to be nonsensical, a basic read of the provisions shows that the incentive to recur to detention is there, even if shadowed to not attract much attention to it. All in all, it is easy to detect it.

On the subject of detaining pregnant women, the SR fails once again but not making it clear that, due to their vulnerability, this group of individuals should not even be considered as a potential target of detention. According to the UNHCR guidelines on detention, pregnant women and nursing mothers should not be detained and alternatives to detention should be placed when confronted with such cases (United Nations High Commissioner for Refugees, 2012). However, as it reads on the SR, none of that is even acknowledge nor briefly mentioned, as it should be. This leads me to interpret that the European Union did not think through when elaborating this document, nor did listen to any of the concerns expressed by civil society organisations. With this policy, pregnant women are put at risk, more than they already are, bearing in mind all the risks that come with one being pregnant and giving birth, just for immigration purposes and management of migratory fluxes.

The possibility of holding a pregnant woman for how many days in a space where her needs are not met and where she may not have access to crucial medical care should have been sufficient enough for European leaders to debate on how the SR should have been more considerate of every individuals' situation. Safeguarding pregnant women rights', one of the most vulnerable groups that compose our society, must be one the main concerns and objectives when developing a document with such grand impact. Not once the word, on the entirety of this document, or a provision advocating for the safeguard of this group comes up. The expression "pregnant women" shows up only to state that "*Particular attention should be paid to individuals with vulnerabilities, such as pregnant women, elderly persons, single-parent families, persons with an immediately identifiable physical or mental disability, persons visibly having suffered psychological or physical trauma and unaccompanied minors*." (Recital 38 SR).

CHAPTER 3

The EU Screening Regulation and the Protection of Asylum Seekers

3.1. The Principle of Non-Refoulement

As the cornerstone of international human rights law and EU Law, the principle of non-refoulement ensures that an applicant is not returned to a country where he or she can be subject of persecution, torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm, per article 33º of the 1951 Refugee Convention. The applicability of this principle is irrespective of the migration status of each migrant, therefore, it is applicable to all migrants (Office of the United Nations High Commissioner for Human Rights, 2018). This principle is a crucial and indispensable safeguard for all the duration of the asylum procedure and must be respected by all Member States in order to assure that the applicants have a right to remain in the territory (where they sought asylum) either to exercise the remedy of a right to appeal or during the pending of the outcome of such appeal (EUAA- European Union Agency for Asylum, 2024).

All in all, this principle is linked to the determination of refugee status and reflects the compromise of the international community in protecting the rights of "*all persons on the enjoyment of human rights, including rights to life, to cruel, inhuman or degrading treatment or punishment, and to liberty and security of the person*" (United Nations High Commissioner for Refugees, 1997).

Characterized by its absolute nature, the principle of non-refoulement, observes no exceptions (Office of the United Nations High Commissioner for Human Rights, 2018), however, article 33º (2) of the 1951 Refugee Convention contemplates the only stances in which one might be returned, all relating to situations in which the person concerned might pose as a threat to public/community security or their criminal record actually shows that they were convicted as being so. This examination and consequent determination must be done bearing in mind the principle of proportionality and the grave nature of the crime or of the nature of the person concerned. It is important to bear in mind the fact that the expulsion of a refugee must be always done as a last recourse, taking into account what means sending a refugee back to a country where he or she might face danger and several violations of their fundamental rights, however, and since all EU Member States are parties to the ECHR, those who present a security threat but also face

a serious risk of inhuman and degrading treatment in their country of origin, cannot be returned to said country, per article 3º ECHR and its non-derogable nature.

The prohibition of refoulement can be found in several international instruments such as: The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 3º) or the International Convention for the Protection of All Persons from Enforced Disappearance (article 16º). Regionally, the CFREU contains relevant provisions relating to this right, as well as, the ECHR. The latter, states, on article 3º, that *"No one shall be subject to torture or to inhuman or degrading treatment or punishment"*. Multiple interpretations[4] done by the ECtHR indicate that this provision prohibits the return of any human being to a place where they could or would be subject of torture, inhuman or degrading treatment or punishment.

On the other hand, the Charter of Fundamental Rights of the EU, more specifically, its article 4º contains the provision which prohibits torture, inhuman or degrading treatment or punishment. Articles 18º and 19º of the same document are also important to analyse regarding this discussion. Both include no derogations nor limitations as reinforced by various ECtHR judgements (for example: Chanal v. UK 1996*;* Saadi v. Italy 2008*)* (Peers, 2014). Article 18º, which contains the right to asylum, reads that the right mentioned must be guaranteed "*with due respect for the rules of the Geneva Convention (…) and the Protocol (…) in accordance with the Treaty establishing the European Community.*" Article 19º, on its turn, has two different parts to be analysed. Irrespective of its constitution, it is important to mention that this article applies to everyone.

The first part relates to collective expulsions and how the referred practice is not allowed. The second part, encodes that no one should be sent to a state where they might be subject to torture, inhuman or degrading treatment or punishment or subjected to the death penalty and can be related to article 4º ECHR. This protection is enshrined within the CEAS, for example by Regulation (EU) 2024/1347 and by article 3º ECHR, as previously mentioned and makes no differentiation between EU nationals or third-country nationals. The second paragraph is important in the sense that it states an obligation of EU Member States not sending anyone to a country where they might face the risks mentioned in the article (Peers, 2014).

[4] See, for example, Chanal v. The United Kingdom (1996), Saadi v. Italy (2008) or A.R.E v. Greece (2025).

So far, we have explored the principle of non-refoulement, its interconnectivity with EU law and other international instruments and how the expulsion of groups of aliens based on simple facts, such as their nationality is expressly, prohibited. Complementary to that fact, the principle of non-refoulement also obligates states to bear in mind medical conditions, health situations, mental health, aggravated forms of gender-based violence, confinement and poor living conditions before making a final decision on the return of an individual(s) (PICUM, 2025).

Now, it would be interesting to our analysis, as it adds a more profound layer of research, to explore how this principle affects one specific group of vulnerable people, in this case children. As reported by Office of the United Nations High Commissioner for Human Rights (2018), crucial attention should be paid to children, in the context of non-refoulement, meaning that a child should not be returned if that action does not comply with their best interests and results in a violation of their fundamental rights.

Asylum-seeking children, coming to Europe, are more susceptible of being trafficked or being victims of other forms of exploitation, abuse or even violence, more so if they are unaccompanied or separated. Because of this, the levels of protection concerning this specific group of vulnerable individuals must be held high and treated as a crucial priority by all lawmakers and practisers. States, on its turn, must endorse a child-based approach which includes the prohibition of non-refoulement and the best interests of the child.

Article 3º of the Convention on the Rights of the Child (CRC) states that the best interests of the child must be of primary contemplation. That being said this principle must be taken into account in all actions or decisions regarding children, especially if we are talking about a return procedure decision in which a child is involved or is the main object of said decision. In this light, the assessment done, that will likely result in a return decision, when it concerns a child, must be done in accordance with a child approach and that means child-friendly information, legal and guardianship support and the right of the child to be heard, per article 12º (2) CRC. Article 22º of the Convention on the Rights of the Child goes even further by specifically addressing refugee children in order to oblige states to give them adequate protection and humanitarian assistance so that they are able to exercise their rights such as family reunification (Peers, 2014).

To conclude, under EU law and the New Pact, those who arrive or reside irregularly and whose asylum applications are rejected are to be returned or deported. The Screening Regulation states that the only path is exactly the one mentioned above. That being said, individuals who did not apply for international protection or did not fulfil entry conditions are to be returned or refused of entry [per article 18º (4)] and, consequently, targets of a return border procedure (that might allude to detention). Having said that, protection concerns arise when an individual might be subject of a return procedure that can only be challenged through judicial manners and the concern grows even more if we add the possibility of child(ren) being involved. According to PICUM (2025) "*The EU focus on returns is not a realistic response to the complexities of migration, and will only lead to an increase in irregularity*".

All in all, we can conclude that despite all the measures taken to reinforce the protection of migrants, the principle of non-refoulement and its absolute nature might be compromised because of the measures enshrined in the New Migration and Asylum Pact. With the deadlines of the screening being somewhat short to analyse all that is needed, the lack of protection against arbitrary detentions and the fact that those who do not qualify for asylum or did not apply for international protection are most likely to be returned or deported, a particular challenge to article 19º arises and non-refoulement might gain other facet during migratory crisis with the new legislation and the EU's position regarding this matter. One might question if the right to an individual consideration of the person´s circumstances before expulsion will be truly respected and if the EU Member States will comply with their fundamental rights obligations or even if this might mean that we, unfortunately, will observe a rising of state breaches of the prohibition of collective expulsion.

3.2 The Right to Seek Asylum

Understood as a right based on the EU treaties or on the constitutional traditions that are common to the Member States of the EU, and interconnected with the principle of non-refoulement, the right to asylum, an individual right, observes various interpretations, especially when it comes to its scope and limitations and can be found in different regional, national or international instruments (Peers, 2014). For example, article 14º (1) of the UDHR states the right that everyone has to seek and to enjoy asylum, setting it as a right that must be universally protected. Be that as it may, the right, as it is on the UDHR,

differs from the right to asylum in the CFREU, as it only states the option of seeking and enjoying asylum.

The primary international source for granting asylum is the 1951 Refugee Convention which defines who is/can be a refugee (article 1º), as well as all the rights associated with the individual(s) who have been granted asylum by a State (encompassed throughout chapters II, III, IV for example). It builds on the UDHR, in particular its article 14º and it is protected by the United Nations High Commissioner for Refugees. This convention has the principle of non-refoulement as its core principle and, because of that, it outlines the basic standards concerning the treatment of refugees and all their rights, such as assistance and legal protection a refugee is entitled to. It also delves into the specification of those who do not qualify as a refugee and what obligations do refugees have towards the nation that welcomes them (article 2º).

That being, we can already establish that the convention set up a legal and moral precedent point related to refugee rights protection globally. It legally binds it signees to recognize and protect those who had to flee their countries of origin due to conflicts, persecution or other harms. However, given the most recent circumstances, doubts regarding this convention have started to pop up and questions about its adequacy nowadays. Benhabib (2020) builds on this and affirms that "(…) *At a time when some of the dysfunctionalities resulting from the universalization of the post W-W II refugee regime have become quite visible, more radical thinking is required for a new conceptualization of sovereign jurisdiction and renewed respect for human lives and rights* (…)". Because of this, Benhabib argues that we need to strengthen the 1951 Convention and have a more rigorous system relating to the global burden sharing that restricts "(…) *state manipulation, non-compliance and pressure, and particularly to the arbitrary good of big donors* (…)".

I share that vision and agree that currently, with the system that we have, states definitely undermine international law by its unlawful practices such as trying to create zones in which a refugee is physically in their territory but they are not legally recognised as such. Refugees acquire that categorization because they are obligated to flee from a territory in which their fundamental rights are not being respected and the governing authority does not have the capacity to protect them against it. Fleeing to the European continent, most of the time, represents a chance as to having those rights respected, but with the current

state of events, it seems that not even here, where democracy, rule of law and fundamental rights are the core principles of governance, refugees can settle and finally rest because they are sure that they will be safe and treated respectfully. We must bear in mind that the only difference between us and a refugee is purely geographical "luck" and that can change anytime.

Moving on to a European lens, the CFREU also touches on this subject. Its article 18º is the EU's basis on asylum and states that "The *right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community*." Here, jurisprudence only tells us how to apply for asylum but not obtain it. This aligns with what the ECtHR has affirmed throughout its judgements: the right to (political) asylum is not actually contained in the Convention nor on its Protocols. Neither in United Nations treaties. Nonetheless, this article figures "(…) *as protection from refoulement; access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; assessment of an asylum claim in fair and efficient asylum processes and an effective remedy in the receiving state; the grant of refugee or subsidiary protection when the criteria are met; etc*. (…)" (Peers, 2014).

The CJEU has also linked this article with article 47º CFREU, the one responsible for guaranteeing an effective remedy. However, given the fact that the right to asylum may be applicable to different contexts, the issue of remedies turns out to, most of the time, be context-dependent. This topic is of huge importance, more so in the case of collective expulsions, but it is also determinant when talking about, for example, detention of asylum seekers. The situation is even worse when we are faced with cases of asylum seekers at sea, at foreign airports or when cooperating with third countries and how it affects their fundamental rights standards, given the fact that secondary EU law is restricted to asylum applications lodged in the Union's territory (Peers, 2014).

As Peers (2014) puts it *"(...) The right to asylum is commonly understood as encompassing a range of distinct rights that govern the relationship between a person who seeks or is in need of international protection and the petitioned state* (…)". This demonstrates how the right to asylum is a multifaceted right, not limited to the principle of non-refoulement as previously mentioned, but incorporates other guarantees such as:

safeguards against arbitrary detention or ill-treatment, having access to a fair and efficient asylum process, etc. Furthermore, he notes that "(…) *Article 18 might be understood as the refugees 'vehicle for being able to invoke other Charter rights* (…)". These other rights might encompass the right to liberty, to private life, dignity, healthcare, etc. Both sentences allow us to understand how the right to asylum can be a means to finally enjoy the respect for fundamental rights and also a protection against persecution which prevents one from fully enjoying its rights.

The matter of the right to asylum becomes even more critical when we are confronted with the recent news that include Poland, a Member State of the EU, suspending migrants´ right to apply for asylum via its border with Belarus, as related by BBC on the 27th of March 2025 (BBC, 2025). This action follows up an initiative stated in February of this year, that contemplated a bill that would allow for a temporary suspension the right to asylum at the same border for a period up to sixty days with the possibility of extensions upon parliamentary authorization (Human Rights Watch, 2025) and that was signed into law by the Polish President. Under pretences related to sovereignty, national security and weaponisation of migration by Russia, and ignoring UNHCR's opinion, the Commission greenlighted the document (Euronews, 2025).

One thing is certain, when implementing EU law, EU Member States are obliged to comply with EU rules on asylum. As Romano (2024) says "(…) *EU Member States are mandated to ensure that access to international protection, such as the subsidiary protection and the refugee status, remains effective* (…)" in line with the principle of non-refoulement. The question that now poses is trying to understand why, in the period of two months, Brussels decided to change its stance on Tusk's proposal and approve it. We are talking about a border zone in which freezing temperatures can be reached, there is a high risk of disappearances given the status of the territory in which the border is located in, the access to aid is limited, etc. The fact that the document has made exceptions for specific groups of people does not make up for its violating content and aim. The same border guards who are responsible for the atrocious violations of fundamental rights are the ones entitled to analyse and determine who is considered "vulnerable" and who is not. This simply creates a never ending problem and exacerbates the already existent disadvantages that migrants face (Euronews, 2025).

Two weeks after the bill entered into force, two bodies belonging to migrants, who tried to cross the border, where found in a river (Euronews, 2025). This just shows that restricting and limiting the access to rights contributes to worsen an already difficult and conflicting situation, a humanitarian crisis. The EU, by encouraging Poland's political game, only puts at stake its stance on fundamental rights and migration.

Alongside Poland's move, the new German government announced, at the beginning of May, that it would be ordering a temporary rejection of most asylum seekers at its borders in order to try and limit irregular migration. This measure is going to apply to both irregular migrants and asylum seekers, excepting "vulnerable" groups which include pregnant women and children, per declarations made by the German Interior Minister. The objective of this measure, which reversed a 2015 directive, is to "*guarantee humanity and order in migration*" (France 24, 2025). All of these recent measures reflect the direction that the EU might be taking to carry out migration management. However, this stance is making one aspect quite clear: securitization and political interests are going to be held higher to the detriment of human lives. Moreno-Lax (2024) puts it very simply "(…) *The assimilation of 'claimed' refugees (or 'asylum seekers' yet to demonstrate the genuineness of their status) to the wider group of irregular (and unwanted) migrants is what has allowed for the conversion of asylum policy into yet another means to counter clandestine entry* (…)."

That being said, one might question if the Screening Regulation is indeed compatible with the right to asylum. As previously observed, in chapter II, one of the issues raised by the Screening Regulation is the fiction of non-entry. According to said regulation, those who will be subject to the screening will be not authorised to enter the territory of the Member-State responsible for the screening, they will be always placed at or close to the border in order to conduct the process and never actually be in EU's territory. This happens because according to the Screening Regulation, the first step to access international protection is a screening procedure. However, this creates a situation in which people are *de facto* in European territory, but not legally recognised as such which then creates or might create a gap in accountability on the respect for fundamental rights.

I argue that it is indeed a strategy to create some type of barrier in order to better securitize Europe whilst forgetting about the underlying realities and cementing inadequate principles to respond to a crisis that continues to infiltrate the CEAS and its legal

framework. Once again, the principal fixation is on containing irregular arrivals (repelling everyone) and strengthening borders by normalizing practices that deny fundamental protection and decrease the level of rule of law.

CHAPTER 4

Effective Remedies and Legal Aid under the Screening Regulation

4.1 The Right to an Effective Remedy

Effective access to legal aid is a key safeguard for migrants in terms of return proceedings so that they are able to exercise the right to an effective remedy, especially if they are detained. It helps guaranteeing that the individuals concerned have their rights respected and that the measures relating to their return are correctly applied (FRA- EU Agency for Fundamental Rights, 2021).

In accordance with EU law, individuals are entitled to access a practical and effective legal remedy enabling them to challenge any act or decision that infringes upon their fundamental rights. Article 47º of the CFREU states that "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.* (…)". This article encompasses different safeguards such as: the rights of the defence, the right to access a tribunal, the right to be advised, defended and represented and the principle of equality of arms.

This article is based on different ECHR articles. For example, the first part is based on article 13º ECHR, right to an effective remedy. The Convention states that "*Everyone (...) shall have an effective remedy before a national authority (...)*". The Charter goes further and requires that the review must be carried out by a tribunal. The second part of article 47º is based on another ECHR article, in this case article 6º. The Convention states the

right to a fair trial only "*In the determination of his civil rights and obligations or of any criminal charge*" meaning that it can be applicable to asylum and immigration cases. Nonetheless, it applies to all legal proceedings and to everyone (FRA- EU Agency for Fundamental Rights, 2021).

The connection between this principle, article 6º and 13º ECHR and article 47º of the Charter is expressly stated in the Alassini case, where it is affirmed that "*it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union*" (Casarosa, 2019).

Intertwined with the right to an effective remedy we have legal aid which "transforms" the right to an effective remedy into a safeguard. The right to legal aid is to be interpreted as stated on article 8º UNDHR[5] and article 2º (3) ICCPR[6] meaning that everyone has the right to obtain legal assistance and representation payed by the state (JRS- Jesuit Refugee Service Europe, 2024). Access to legal aid means that the right to an effective remedy is actually put into practice, makes it meaningful, capable of changing the outcome of an (unlawful) decision. When talking about cases involving pre-removal detention, return or entry bans, most of EU Member States have some form of free legal aid for those who will be returned (FRA- EU Agency for Fundamental Rights, 2021).

This free legal aid, most of the time, also includes free legal representation, consultations prior to the hearing and assistance to help prepare an appeal. However, and because the conditions differ from country to country, to be able to have public free legal aid, one might need to qualify for them. First of all, the person concerned needs to prove that they

[5] "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*".

[6] *"Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.*"

lack financial resources to afford it, the so-called means test. Secondly, they need to apply for it and have that application approved or being marked as unlikely to fail, the merit test (FRA- EU Agency for Fundamental Rights, 2021).

In the case of children, being detained, more so, unaccompanied children, they should be guaranteed free access to legal and other assistance they might need, including legal representation or a guardian. Article 37º (d) of the United Nations Convention on the Rights of the Child reads that "*Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*" (FRA- EU Agency for Fundamental Rights, 2021).

When analysing the Screening Procedure, more specifically its 13th article, which concerns guarantees for minors, we came across several guarantees such as the appointment of representatives, respecting the best interests of the child, but the right to legal assistance is not expressly guaranteed, which then results in a critical gap. The only mention is article 8º (6) that presents the possibility of organizations and members providing advice and counselling to third-country nationals. That being, the SR could have legally enforced this aspect since it is such a crucial right for migrants, more so for unaccompanied children during the screening process.

4.2 Gaps and Challenges

Despite having the right to have free legal aid and assistance, it does not mean that everyone is entitled to it. A study conducted by the FRA, in 2021, showed precisely the contrary. In Portugal, for example, out of sixty-seven detainees only thirteen were entitled free aid. The main reasons are the lack of funding, the lack of lawyers available, the short time frames for authorising that support, the administrative fees, etc. This translates into a lack of consistency and continuity that is aggravated when the access to the detention facilities becomes even more restricted and hampers lawyer's work. The lack of information regarding having the possibility of free legal aid is another factor crucial to this process. Often, the language in which the information is transmitted is not one that the detainee is able to understand or its content is not written in a way that is

understandable. Interpreters are also scarce which hinders all stages of the process (FRA-EU Agency for Fundamental Rights, 2021).

One landmark concerning this right was the Jonhston Case in which the Court of Justice of the EU developed the definition of effective judicial protection and recognized it as a general principle of EU law. That case concerned the equal treatment between women and men and the main question was about the refusal of full-time employment as an armed member of a police force and of training in the handling of firearms for female police officers, which lead to sexual discrimination. The Court found that "*all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women*" and that "*for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides*" (C-222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary).

Regarding asylum cases and the lack of access to an effective remedy (and consequently the right to legal aid, as the latter is dependent on the circumstances of the case), some recent CJEU and ECtHR cases have arisen. The first I would like to analyse is the case of Y.N. v. Republic of Slovenia (2023). This case concerns a Moroccan national, Y.N., and the rejection, as manifestly unfounded, of his application for international protection, by the Ministry of Interior of the Republic of Slovenia. In accordance with article 70º of the Slovenian International Protection Act, the period for lodging an appeal against such decision is reduced from fifteen to three days, from the notification of the decision, since we are talking about an accelerated procedure. That being, Y.N. argued that he got notified on the 23rd of December 2022, the day before a weekend which contained a public holiday, and that that reduced his appeal period to one working day, the 24th of December. He also argued that he got no interpreter assistance and to communicate with his representative had to use a translation tool, since he only speaks Arabic, meaning that he could not effectively prepare his appeal (Y.N. v. Republic of Slovenia, 2023).

The referring court, on its turn, argued that the day to lodge the appeal started on the 24th of December and ended on the 27th of December, since the actual end date (the 26th) constituted a public holiday in Slovenia. The court also noted that the three-day period, resulting from the accelerated procedure, is disproportionately less favourable than the

period prescribed in the ordinary procedure, fifteen days. That being said, it submitted the following question to the CJEU: "*Must Article 46(4) of [Directive 2013/32], read in conjunction with Article 47 of the Charter, be interpreted as precluding a national procedural rule, such as the second sentence of Article 70(1) of the ZMZ-1, which provides, for the lodging of an appeal against a decision by which the competent authority rejects an application as manifestly unfounded under an accelerated procedure, a time limit of three days from the notification of such a decision, including public holidays, which may expire at the end of the first working day thereafter?*" (Y.N. v. Republic of Slovenia, 2023).

The CJEU concluded that "*a period for lodging an appeal (…) does not guarantee the right to an effective remedy before a tribunal for which provision is made in Article 47 of the Charter*". All things considered, the Court stated that "*Article 46(4) of Directive 2013/32, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation that lays down a period of three days (…) for lodging an appeal against a decision rejecting as manifestly unfounded an application for international protection, delivered by accelerated procedure, where that period is such as to constitute a restriction on the effective exercise of the rights guaranteed in Article 12(1)(b) and (2), and Articles 22 and 23 of that directive*." (Y.N. v. Republic of Slovenia, 2023).

The second and final case that I would like to analyse is the M.A. and Z.R. v. Cyprus (2024), the pushback case, which concerned two Syrian nationals who had to flee Syria because of the war and had been living in Lebanon. However, following a series of expulsions of Syrian nationals, by the Lebanese authorities, the applicants decided to seek for asylum in Cyprus. To reach their final destination, they boarded a boat, but upon arrival in the territorial waters belonging to Cyprus their boat was intercepted by the coastguard and none of those aboard was able to disembark. Here, the recall of events starts to differ between the applicant's statements and what the government says on if whether or not the applicants expressly stated that they wanted to apply for asylum (M.A. and Z.R. v. Cyprus, 2024).

Nonetheless they were returned to Lebanon with the justification that they had entered territorial waters without permission and without having requested for international protection. The applicants complained that the Cypriot authorities refused to allow them any asylum procedure, returning them without having analysed any asylum claim or

individual circumstances, which, on their understanding, violated article 3º ECHR. They also complained that they had no access to an effective domestic remedy, another violation of the ECHR, in this case article 13º (M.A. and Z.R. v. Cyprus, 2024).

The ECtHR analysed all the evidence presented and concluded that, from the Government's submission, that the Cypriot authorities did not conduct the necessary assessments to an effective asylum process and did not assess the risk of refoulement or their living conditions in Lebanon before removing the applicants. Therefore, since the procedural obligations were not met, Cyprus did violate article 3º ECHR. Relating to the alleged violation of article 13º ECHR, the ECtHR found their complaint admissible and applicable to the case. It also found that the applicants did express their wish to apply for asylum and that the remedies suggested by the government were not effective because they could not have suspensive effect, given the fact that the applicants were summary returned to Lebanon (M.A. and Z.R. v. Cyprus, 2024).

Both cases show that, since the Johnston case, disrespect for having access to effective remedies and legal aid still subsist and states still continue to violate fundamental rights on a daily basis and so little is seen and analysed in court´s judgements.

CHAPTER 5

5. Conclusion

Almost since its creation, the EU, has been dealing with multiple challenges and issues varying on its nature. Said challenges often exacerbate the flaws present in European systems. The 2015 was a "good" example of how the failures in the asylum and migration systems and policies ended up affecting and marginalizing those who are more vulnerable. The New Pact on Migration and Asylum turned out to be another aspect to take into account, especially because it challenges and amplifies migrant's vulnerabilities through its instruments.

This thesis has examined the universe of fundamental rights challenges that migrants and asylum seekers face in the context of the EU and its border management policies and strategies, focusing particularly on the New Screening Procedure of third-country

nationals. Throughout this work, the analysis pretended to demonstrate that while the EU aims to achieve a harmonization of its migration mechanisms, the implementation of the New Screening Procedure, an instrument of the New Pact on Migration and Asylum, demonstrates that there are tensions and conflictual issues between the protection of fundamental rights and securitization objectives. Following the latest update on how the New Pact on Migration and Asylum is being implemented, it is visible that some work has been done but, at the same time, further work is still needed. On the matter of external borders, the European Commission, on the 12th of June 2025, reported that "*Challenges remain as regards the identification of locations for the screening and the border procedures, as well as on procurement and adequate resources*" and that even though there has been some progress on a technical level, progress must arise at national level in order to ensure that everything is ready until mid-next year (The European Sting, 2025).

Through a critical lens of evaluation of the legal and procedural aspects of the Screening Regulation, this work highlighted the existing conflict between new policy measures and goals that enlarge vulnerabilities rather than contribute to its mitigation. From the observations done, which belong to a very small range of analysis, key facts include the potential for prolonged and inhuman detention-like conditions, the limited access to fair and individualized assessments, remedies and access to legal and effective legal safeguards. From those findings, this study showed how they particularly affect migrants, asylum seekers, unaccompanied minors, pregnant women, all individuals or groups of individuals who have specific protection needs and how this set of somewhat new body of policy approaches raises serious questions on the matter of respecting international and European fundamental rights standards. As Rondine (2024) puts it "*In this light, it does not solve the loopholes already existing in EU migration law. Instead, it deepens the discretion left to the Member States, shrinking the human rights protection of third-country nationals at the EU external borders*".

The New Screening Procedure reflects this issue and paradigm shift that without accountability mechanisms and competent monitoring might contribute to systemic exclusion, normalization of marginalization and careless regard to those seeking protection in the European continent. While, for some, this new set of laws might represent a new try on streamline migration management, it also represents new challenges and adversities for the protection of vulnerable migrants whilst managing

border control. By addressing issues such as these, this thesis wanted to reiterate and remember the importance and the part played by fundamental rights in the construction of EU policies so that they are shaped and orientated towards a rights-based approach which recognizes migrants and their rights, but also can establish a good and fair balance with the structural and societal barriers which perpetuate and exacerbate migrant's vulnerabilities.

In conclusion, this thesis tried to highlight some of the main concerns associated with the New Screening Procedure and the respect for fundamental rights protection in terms of managing irregular migration into the EU and in the EU. This work tried to express that rather than prioritizing stricter border control, which results in the disregard and disrespect for fundamental rights and migrant's dignity, European policies should work on developing effective tools to analyse the reality of irregular and or illegal border crossings within the EU. Taking into account NGO's and society members opinions and incorporate them into daily policies could be an interesting starting point that would help changing Europe's perspective and response on this matter. Crisis are normally viewed as moments that usually only bring the worst of one's way of responding to it, but they can also be looked at as being a new stage of the process and mean that a new vision is needed. While I do not share the same views as European leaders do on the theme of migration, fundamental rights and its management, I am still hopeful that the EU is a community that is always working for the general interest and can extend it to new comers, such as migrants and asylum seekers.

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