Undermining Protection in the EU: What Nine Trends Tell Us About The Proposed Pact on Migration and Asylum

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June 2021

PHOTO CAPTION: A woman from Afghanistan approaches Croatia’s border with Bosnia in an attempt to enter the European Union and claim asylum on January 6, 2021. Photo Credit: Damir Sagolj/Getty Images.
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Introduction

An effective approach to asylum looks holistically at the experience of displacement and the extent of individuals’ protection needs, from life-saving aid at the moment of crisis to community support for building a new life. The European Union has a range of laws, policies, financial resources, and technical capacity to realize such an approach. Nevertheless, undermined by political dissonance, it has maintained an ad hoc, crisis-driven response. This leaves a few Member States bearing most of the pressure and many displaced people without adequate protection.

In September 2020, the European Commission presented a new EU Pact on Migration and Asylum, promising to overhaul this non-system and establish a coherent, comprehensive approach. Regrettably, the proposed Pact does little to correct for flaws in existing policies and practices. It fails by focusing on keeping people out of Europe rather than on realizing the right to seek protection. It institutionalizes an approach by which states, through their actions and inactions, have avoided effective responsibility-sharing and undermined asylum.

Eight months later, EU bodies and Member States continue discussing the Pact, with no agreement in sight. Nevertheless, the Commission has already begun rolling out strategies and action plans envisioned within the proposal. The EU also approved the budget for its new term, which includes funding for asylum and migration activities at regional and national levels. Even as negotiations on the Pact continue, Member States can take positive steps to improve the lives of asylum seekers and refugees and reverse course on policies that do harm.

Ultimately, however, Europe needs to establish a truly comprehensive, coordinated regional approach that is rights-based and people-centered. The proposed Pact fails to apply the difficult lessons of the past, but the opportunity for real reform is not lost. The EU’s Council, Parliament, and Commission can find sustainable solutions that serve the interests of displaced people, host communities, and states. They must consider each element of the Pact within the broader context of a European approach to building inclusive societies. Expanding the lens—to incorporate everything from how the EU addresses root causes of displacement to the accessibility of legal migration pathways—reveals the gaps and inconsistencies, as well as the opportunities, in the effort to reform the EU asylum system.

The Promise of a Pact

Outlining her agenda for the European Commission’s coming five-year term, then-new President Ursula von der Leyen promised in 2019 to propose a New Pact on Migration and Asylum as a “fresh start” for Europe. The announcement signaled the importance of addressing this long-intractable issue. Although few agree on how to resolve the challenge, EU bodies, Member States, and civil society broadly agree that the existing ad hoc, crisis-driven approach has failed. A new Pact offered the opportunity to internalize past lessons and finally establish an effective and humane system for protection and responsibility-sharing.

After months of delay—largely attributed to the coronavirus pandemic—the Commission finally presented its Pact in late September 2020. In its words, the Pact “cover[s] all of the different
elements needed for a comprehensive European approach to migration.” As detailed in Appendix 1, it includes a package of nine new legislative and non-legislative instruments; a set of earlier reforms that had never been concluded; and an implementation roadmap, including plans for additional initiatives the Commission would present. As of May 2021, the Commission had rolled out several of these initiatives. It also presented some that lie outside the migration “architecture” but nevertheless impact the experience of displaced people arriving and living in Europe. All this has advanced even as its co-legislators—the European Council and Parliament—have made little progress towards agreement on the proposed legislation.

Meanwhile, in December 2020, the EU reached a historic agreement on a new Multiannual Financial Framework (MFF), the long-term budget for its next term, 2021-2027. It also established a COVID-19 recovery fund, known as Next Generation EU. Together, they amount to €1,824.3 billion. These budgets include the financing to realize the Pact and related initiatives at the EU and country levels. To access the funds, Member States are developing national recovery and resilience plans, which the Commission, Council, and Parliament must review and approve. Appendix 2 highlights several relevant accounts used to respond to displacement outside and within EU borders.

The Proposal: False Premises and Distorted Priorities

Even as Member States disagree over the policies needed to address the challenge Europe faces, they share some fundamental understanding that lies at the Pact’s core. The EU grapples with so-called “mixed migration flows.” In discussions about asylum, policymakers consistently center the idea that individuals arriving irregularly in Europe do not all meet the criteria to receive refugee or other protective status. Those who do, they say, should and will be afforded the rights due to them under the law. Those who do not, however, are “economic migrants” and should return to their countries of origin. Many policymakers call for focusing on preventing irregular migration in the first place by addressing “root causes” of displacement via humanitarian and development aid. They argue that legal migration channels offer adequate alternatives.

On this simplistic basis, the challenge would be to differentiate between those who do and do not qualify for protective status, and to send the latter back. However, in trying to create a system to do so, the Pact relies on faulty premises: that most arriving persons do not have valid claims to asylum, that officials can quickly determine this, and that authorities can easily and swiftly return rejected applicants to their countries of origin.

These assumptions belie the data on protection rates, return rates, and people’s complex lived experiences at home, in transit, and at borders. First, individuals’ needs and circumstances cannot be definitively determined by their country of origin and other limited facts gathered during a short review. Second, only about 30 percent of individuals whose asylum applications are rejected are actually returned, and only one-third of those returns are voluntary. The unwillingness of third countries (i.e., non-EU countries) to readmit their nationals and capacity
constraints in EU states leave most removal orders unfulfilled.¹ Authorities cannot detain individuals if there is “no reasonable prospect of removal” but are not required to grant them stay permits. As a result, rejected asylum seekers can end up in a state of protracted irregularity.

It is hard to see how the Pact offers a solution given this flawed foundation. To ensure that adequate protection and support reach those who need it, one needs a holistic view of the relevant policies and funds, from reception to integration. The Pact purports to have this, but in fact has what Catherine Woollard, director of the NGO network ECRE, describes as “a narrow, almost obsessive focus on restricting movement of people [...] (regardless of their protection needs).” It wrongly prioritizes preventing and returning people rather than protecting them. The NGO EuroMed Rights calls it “return mania.”

Moreover, the Pact proposes little that is actually new. The Commission presented it amid pledges that there would be no more tragedies like the fire that destroyed Moria, the notorious refugee camp in Lesvos, Greece. But its proposal is likely to reproduce the conditions that created Moria. Shifting rather than sharing responsibility will perpetuate overcrowding and deficient reception conditions. Weak provisions for maritime search-and-rescue operations and rights monitoring at borders will leave lives at risk. The use of summary procedures to consider asylum claims and thin commitment to refugee resettlement and integration will undermine access to protection. Meanwhile, outsourcing migration and asylum policy can distort relations with non-EU countries and the use of foreign aid.

Members of the European Parliament (MEPs) expect the Commission to present a regulatory impact assessment and simulations that forecast how the proposals would—or would have—played out in various circumstances. But advocates argue they can already predict the harmful effects of these recycled proposals. Some, like EuroMed Rights, have conducted their own simulations. Ultimately, rather than real, sustainable solutions to protect people arriving at Europe’s borders, the Pact institutionalizes a policy of exclusion that will exacerbate human suffering. The mix of people arriving in Europe and risks they might face is why the bloc should base its approach not on the assumption that most individuals can be turned away, but that any one of them might need safety.

**Europe’s Approach: Defining Features and Limitations of the Pact**

The evolving legal and regulatory framework and its wide scope—illustrated in the appendices by the range of relevant policies and financial accounts—reflect the EU’s attempt to develop a comprehensive response to the complex matters of asylum and migration. However, trends in the region reveal the adverse effects of the systems in which Europe’s approach manifests. The proposed Pact could institutionalize these, replicating bad policy and practice across Member States and exacerbating harms.

¹ In the context of the EU, a “third country” is defined as a country that is not a member of the EU or a country or territory whose citizens do not enjoy the EU right to free movement, as defined in Art. 2(5) of the Schengen Borders Code. [Source: European Commission]
(1) **Systematic violations of human rights at EU borders**

Alarming reports of authorities using harsh tactics to deny asylum seekers and migrants access to European territory have increased. In Greece, officers are alleged to regularly conduct pushbacks at land and sea, forcing individuals away before they can claim asylum or simply failing to rescue ships in distress. Reports also describe authorities forcing people who had reached Greece’s shores onto faulty life rafts and towing them out towards Turkish waters. In Ceuta and Melilla—Spanish enclaves on Morocco’s northern coast—rights groups report authorities using excessive force to push back people attempting to cross the border. Authorities have also conducted summary expulsions, or “hot returns,” directly deporting individuals who do manage to cross. Along the Balkan route, “chain pushbacks” see individuals repeatedly pushed back, sometimes all the way from Italy through Slovenia, Croatia, and back out of the EU to Bosnia and Herzegovina. In Hungary, border authorities continue to openly push asylum seekers back to Serbia, in breach of a legally binding ruling by the European Court of Justice.

The End Pushbacks Partnership, an NGO collective, describes illegal and often violent pushbacks taking place at 19 internal and external European borders in 2020. The Protecting Rights at Borders (PRAB) initiative, by another collective of civil society organizations, recorded 2,162 instances of pushbacks at different borders in six countries between January and April 2021 alone. In January 2021, the UN Refugee Agency (UNHCR) urged European states to end pushbacks, warning asylum was “under attack.” Despite such “abundant” evidence, the EU has taken little action to hold Member States accountable. Even after reports that Frontex, the European border and coast guard agency, has been involved in these practices, the Commission’s response has been lackluster.² Frontex remains on track to grow dramatically into a newly armed, 10,000-person “standing corps” with a central role in managing returns. Meanwhile, the death toll is rising in the Mediterranean and Atlantic, where at least 500 people died between January and May 2021. Reports of non-rescue by national coastguards make an EU-run SAR capacity necessary.

There must also be independent monitoring to ensure rights are protected at European borders. The Pact does well to propose that Member States develop an independent border monitoring mechanism. However, for it to truly protect rights and hold governments accountable, the mechanism must be significantly expanded and strengthened. It requires a broader mandate to allow for monitoring and investigating all rights violations—not just at formal crossing points or during the screening phase.

(2) **Restrictions on the right to access a fair and efficient asylum process**

The coronavirus pandemic showed how authorities can exploit emergencies to limit access to international protection. But concern about the closing space for asylum in Europe predate COVID-19. When Turkish President Tayyip Erdoğan declared in late February 2020 that he was opening Turkey’s borders and encouraged refugees to enter Europe, Greece responded by closing its border and suspending asylum applications for one month. The outbreak of COVID-19 soon after became a pretext for extending those closures. Other countries followed suit, effectively eliminating access to international protection in most EU countries, with severe consequences for displaced people. More recently, Slovenia amended its asylum law to

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² For a detailed discussion of the allegations against and investigations into Frontex, and how its oversight structure prevents accountability, see “The Frontex Push-Back Controversy: Lessons on Oversight (Part I),” (Elspeth Guild, EU Migration Law blog, April 2021) and “Fronting Up to Frontex,” (Catherine Woollard, ECRE Editorial, April 2021).
authorize measures that will restrict the rights of asylum seekers in situations deemed “complex migration crises.”

The right to asylum must be upheld even in emergencies. Certainly, the COVID-19 pandemic brought with it public health challenges. However, both the Commission and UNHCR issued practical guidance for Member States to be able to preserve access to protection. Nevertheless, that access largely remained under threat. Purportedly temporary derogations of states’ obligations risk becoming the norm if they are tolerated. For example, in March 2021, Hungary extended a policy blocking access to territory and asylum for people who may need international protection. The decree allows police to summarily remove anyone irregularly in the country. It follows another policy requiring people to express their intent to seek asylum at a Hungarian embassy in neighboring non-EU countries before being able to access Hungarian territory and asylum procedures—an unrealistic requirement for people fleeing for their lives.

People who do apply for the right to a thorough review of their individual cases. For this to exist not only de jure but de facto, displaced people need information, legal aid, interpretation, and time to navigate the process. Too often—especially for people in overcrowded camps and held immigration detention—these are not available.

For their part, authorities must carry out asylum procedures fairly and efficiently; without discrimination on the basis of applicants’ race, religion, or any other characteristic; and consistently across the EU. In practice, notable disparities in protection rates for people of certain nationalities suggest authorities do not all base asylum determinations on the same objective assessments of risk. The European Commission itself has acknowledged that, “the EU’s asylum system remains undermined due to significant differences in recognition rates across EU countries. For example, in 2019 the recognition rate of Afghan citizens at first instance ranged from 2% in Hungary to 93% in Italy.”

An efficient and well-resourced asylum system is also critical to avoid subjecting people to prolonged periods of uncertainty. Even before the pandemic interrupted asylum services, backlogs left applicants facing long wait times. As arrivals fell in 2020, authorities adapted to coronavirus restrictions, the European Asylum Support Office (EASO) boosted assistance to Member States, and backlogs shrunk. However, without sustained effort to strengthen asylum systems and improve capacity, they are likely to become overwhelmed again once pandemic-related travel restrictions ease and asylum seekers again flee to Europe.

Unfortunately, officials have created new problems by attempting to speed up asylum processing with surface-level fixes. Shortening time limits without ensuring adequate personnel and infrastructure capacity can lower the quality of reviews. Similarly, accelerated “border procedures” can lead to cursory reviews of asylum claims and insufficient time for appeal, resulting in unfounded rejections and refoulement.3 Border procedures provide fewer due process guarantees and generally involve formal or de facto detention. Although individuals who

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3 “Border procedures” refer to instances in which authorities decide on applications for international protection directly at the border of an EU+ country or in a transit zone, before the applicant enters the territory. The use, scope, and exact features of border procedures vary across EU+ countries. They may be used when taking decisions on (1) the admissibility of an application or (2) the merits of an application being examined in an “accelerated procedure.” Accelerated procedures are used when an application is likely to be unfounded or under specific grounds, such as the applicant being from a safe country of origin or presenting national security concerns.
qualify as “vulnerable” are exempt from border procedures, vulnerability is not always visible. Without adequate time to collect information and conduct interviews, authorities might not realize someone has special procedural or protection needs.

The Pact is likely to exacerbate these issues. The Screening Regulation creates a new “pre-entry” screening procedure that, despite its name, applies to anyone who has arrived irregularly, including anyone who is later apprehended within EU territory. The process involves identification; fingerprinting; registration; and health, security, and vulnerability checks to assess someone’s likelihood of successfully claiming asylum. Accordingly, authorities refer the applicant to either the border asylum procedure—if a negative decision is likely and the individual is not part of a vulnerable group—or to the normal asylum procedure.

Despite the risks, the amended Asylum Procedures Regulation (APR) introduces new grounds for accelerated border procedures. They would apply to applicants coming from those third countries (i.e., non-EU countries) for which the average EU-wide, first-instance protection rate is less than 20 percent. This sets an arbitrary threshold and relies on an inadequate picture of protection needs. It does not account for higher instance decisions made on appeal or review. In 2020, for example, 40.7 percent of first-instance decisions were positive, but another 29.7 percent of final decisions were also positive. Moreover, as discussed, recognition rates vary widely across the EU.

Finally, the amended APR would require Member States to issue asylum and return decisions at the same time and “streamline” the appeal procedure to prevent delays in returns and “reduce the risk that the rejected asylum applicant absconds.” It shortens the amount of time for an appeal to take place and eliminates an appellant’s automatic right to stay pending a decision. Experts warn that this model’s use in Greece has not led to more efficient asylum and return procedures, but to violations of fundamental rights, including to an effective remedy and non-refoulement.

Ultimately, the screening procedure creates a legal fiction of non-entry and preempts the asylum process. It risks increasing detention, exacerbating overcrowding at borders, and imposing time constraints that could reduce individuals’ access to information, assistance, and adequate assessments. All this could affect their access to protection.

(3) Failure to share responsibility
Under the EU’s “hotspot approach,” EU agencies provide capacity support to frontline states to assist in identifying, registering, and fingerprinting individuals at the EU’s external borders. The additional support has been necessary because of the Dublin Regulation, which ruled that asylum seekers must apply in the country where they first arrive. Naturally, this creates disproportionate pressure on frontline states that have proved unable to match the demands they face.

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4 Positive decisions include those granting refugee status, subsidiary protection status, or authorization to stay for humanitarian reasons.
The EU allows for **relocations** from one Member State to another of individuals who have applied for or been granted international protection.\(^5\) However, this “intra-EU solidarity tool” is used ad hoc, most often in emergency situations. For example, in March 2020, eleven EU countries **agreed to relocate** 1,600 unaccompanied minors from Greece. After Moria was destroyed, sixteen countries ultimately agreed to receive **5,200 vulnerable asylum seekers**, including the 1,600 children. Pandemic-related travel restrictions caused delays, but authorities gradually **began relocating** people in April 2020. One year later, **about 3,000 asylum seekers and refugees** had been relocated, with many more still in need. In May 2021, after **more than 2,000 people** arrived on the Italian island of Lampedusa in just 24 hours, EU Commissioner for Home Affairs Ylva Johansson urged Member States to “show solidarity” and support Italy with relocation. More than one week later, **Ireland was the first and only** country to have answered her call, offering to take in ten people. Austria **outright rejected** the plea.

Although the drawbacks of this reactive, voluntary, stopgap system are obvious, replacing it has been one of the EU’s biggest challenges. The bloc needs a harmonized, proactive process by which responsibility for processing asylum claims and providing protection are equitably shared. The Pact promises to address the issue by creating a “mandatory but flexible” **solidarity mechanism**. It requires Member States to contribute to a regional asylum process but gives options as to how they do so.

For example, if the Commission determines that a Member State’s national reception system is “under pressure” or at risk of becoming so, others will have to help. However, rather than having to relocate people, countries could provide operational support or capacity building to the Member State under pressure or organize **return sponsorships**. The latter is a new idea by which a Member State would, on behalf of another Member State, facilitate the return of rejected asylum seekers to their countries of origin. Individuals would stay in place while the sponsoring Member State provides financial support and negotiates the return with the third country. If return does not occur within eight months, individuals would be transferred to the sponsoring Member State to finish the process. For example, if a Malian national applies for asylum in Italy and is denied protection, she would wait there while Poland—among the countries **refusing to accept** refugees—handled negotiations with the Malian government for her return.

The idea raises **significant concerns**. Member States allowed to choose which nationalities they sponsor will likely select individuals from third countries with which they have stronger bilateral relationships. This could create perverse incentives for those countries to agree to special arrangements that might put asylum seekers at risk. The proposal also makes anti-migrant governments responsible for deportation, raising questions about potential mistreatment.

Moreover, although allowing states greater discretion might seem a practical solution to the political impasse, it **may not solve** the problem on the ground. If many governments opt to give financial or operational support rather than to host asylum seekers, over-crowding will continue.

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\(^5\) Relocation differs from resettlement. **Relocation** involves the transfer of an individual from one EU Member State that granted them international protection to another Member State where they will receive similar protection, or the transfer of an individual who has applied for international protection from the Member State responsible for examining their application to another Member State that will assume that responsibility. **Resettlement** is defined as “the transfer, on a request from [UNHCR] and based on their need for international protection, of a third-country national or stateless person, from a third country to an EU Member State, where they are permitted to reside” with refugee or equivalent protective status. Source: European Commission Migration and Home Affairs.
in frontline states. Ministers of the Interior and Migration of Cyprus, Italy, Malta, Spain, and Greece—known as the “MED5”—**emphasized this point** in a March 2021 press conference.

The Commission appears to have anticipated such shortfalls. It tries to create an incentive by offering financial contributions to Member States that choose relocation. It also includes separate, **tailored response mechanisms** for certain situations. First, to ease pressure on coastal states responsible for disembarking people rescued at sea, the Commission would estimate annual needs and set up a “solidarity pool” to which Member States voluntarily pledge relocation or other support. Second, if the Commission determines there is a situation of **crisis** or **force majeure**, a **special instrument** would take effect. It could involve a faster and broader solidarity mechanism to process relocation and return sponsorships; “precise derogations” from the usual rules governing asylum and return; granting of a new, immediate, short-term protection status for certain groups; and operational support to a Member State in need.

In all cases, the Pact includes corrective mechanisms to compel contributions when voluntary measures do not suffice to help a Member State under pressure. However, relocation is never mandatory. This complex patchwork of special mechanisms applying in narrowly but ambiguously defined circumstances seems an unlikely solution to Europe’s existing approach.

**4) Inhumane and inadequate reception conditions**

The ramifications of EU states’ inadequate asylum capacity and failure to share responsibility are most visible in the shocking images of refugee camps in the former “Calais Jungle” of France, the Port of Arguineguín in Spain’s **Gran Canaria**, the docks of Italy’s **Lampedusa**, and elsewhere. In Greece, the geographical limitation established in the EU-Turkey Deal enforced a **dangerous containment policy** that holds asylum seekers in severely overcrowded camps on the Aegean Islands rather than allowing them to move to the mainland. A de facto policy of containment also exists in Spain, where asylum seekers and migrants have been blocked from traveling to the Spanish mainland from the Canary Islands, Ceuta, and Melilla, despite Supreme Court decisions **affirming their freedom of movement**.

In September 2020, the EU and Greece established a special **European taskforce** to implement a joint pilot project to build new reception facilities in Lesvos. The taskforce’s announcement made explicit reference to the Pact, which had just been proposed, suggesting it would test the Commission’s promise to, “ensure that migration is managed in an effective way, including adequate living conditions, more certainty through faster procedures and more balanced responsibility-sharing and solidarity.” The fact that, as already stated, the proposal actually offers few new solutions—and draws in particular on the existing Greek model—offers little cause for optimism.

One new feature in Greece will be **Multipurpose Reception and Identification Centres (MPRICs)**, built with EU funds, to replace the existing camps that consist mostly of tents and containers. Although these permanent facilities promise to offer better conditions, plans to allow only “controlled entry and exit” raise concerns about limiting individuals’ freedom of movement and possible access restrictions for NGOs, lawyers, and journalists. More generally, there is a risk that this pilot will **entrench mechanisms proposed in the Pact** that has not yet been approved.

The need to share responsibility in order to reduce pressure on frontline states and make better conditions possible is clear. Circumstances are particularly dire for those with acute protection
needs. Authorities and humanitarian actors must develop and implement differentiated responses for members of marginalized and vulnerable populations. They should, for example, install locks in bathrooms and adequate lighting to help reduce threats to women, girls, and LGBTQ+ individuals in reception centers; ensure accessibility for people with disabilities; and provide guardianship, legal assistance, and psychosocial care for unaccompanied minors. Difficulty accessing education and mental health services pose major problems for children in displacement. Adequate procedures must be in place to quickly identify individuals with vulnerabilities or special needs upon arrival and trigger appropriate referral pathways to connect them to the care they need. Importantly, representatives of the populations being supported must be involved in the design and execution of these responses.

The outbreak of COVID-19 exposed many of the existing deficiencies in reception systems across the EU. Foremost, it surfaced worries about limited access to healthcare for displaced communities. Although many European countries, such as Portugal, effectively expanded medical testing and treatment to refugee and migrant populations, all must now commit to vaccinating everyone, regardless of their migration status. They should also extend special accommodation schemes to ensure continued access to safe shelter. In Greece, evictions following the premature termination of one such program put thousands of refugees at risk of homelessness. Finally, the threat to livelihoods also underscored the importance and effectiveness of cash assistance for people in humanitarian need.

(5) Closing space for civil society
Some European governments are restricting the ability of independent civil society organizations to help. In Greece, a new NGO law announced in November 2019 created a mandatory “NGO transparency registry.” Its requirements—including ISO certification, two-year financial audits, and activity reporting—are overly burdensome for many NGOs to meet. Several amendments and decrees followed that, taken together, violate EU law on freedom of association and the protection of civil society space.

The effects have been considerable. In a survey of 70 organizations conducted in November 2020, the NGO Choose Love found that, as a result of the registration legislation, 20 respondents had already lost access or faced greater difficulty accessing reception facilities. Another 40 expected to have problems providing essential services. In March 2021, Civic Space Watch reported that, although approximately 200 NGOs had applied to join the registry, only 27 had been successful. It argues that authorities do not apply the rules consistently but rather use their discretionary power to decide which organizations to approve. A study commissioned by the European Parliament also highlighted how the government had waged “smear campaigns” against NGOs to strengthen its “vague justifications” for the new rules.

Meanwhile, Hungary faced infringement procedures in February 2021 for its failure to comply with a ruling of the Court of Justice of the European Union (CJEU), which found its NGO “Transparency Act” violated EU law. Although the government announced two months later that it would repeal the law, it proposed an equally concerning replacement.

Around the Mediterranean, Italy, Malta and others used the pandemic as pretext to obstruct NGO search-and-rescue (SAR) operations, even as they neglected their own responsibilities to provide aid. The proposed Pact includes a Recommendation on Member States’ cooperation with private SAR vessels and explicitly points to the “need to avoid criminalisation of those who
provide humanitarian assistance to people in distress at sea.” While welcome, it should go further to ensure the non-criminalization of humanitarian aid in all settings. Civil society partners are critical to the implementation of any Pact.

(6) Unmatched promises for legal pathways
Absent legal pathways to seek protection, individuals resort to dangerous routes and risk exploitation. Fighting human trafficking and smuggling is a stated priority for Member States, MEPs, and the Commission, which presented its Strategy on Combating Trafficking in Human Beings in April 2021 and has an Action Plan Against Migrant Smuggling forthcoming. This is an important goal. However, it should not serve as a pretense for closing the asylum space and for the securitization of migration. This can lead to harms against and criminalization of asylum seekers themselves, as in the case of a Somali man sentenced in May 2021 to 146 years in prison. He was found steering the boat in which he and other asylum seekers arrived in Lesbos and charged with human smuggling, though passengers testified that he was trying to help after the boat capsized. Moreover, criminalizing trafficking and protecting survivors is not enough—to make these dangerous practices obsolete, individuals need more and easier access to regular means of going to Europe.

Unfortunately, in its Recommendation on legal pathways to protection, the proposed Pact simply extends the EU’s 2020 resettlement pledging exercise to a two-year scheme, granting just 29,500 places through 2021. As of late February 2021, the bloc had implemented only 38 percent of the scheme, resettling 11,200 refugees. This comes at a time when global resettlement has hit a record low, despite an estimated 1.44 million refugees urgently needing resettlement globally.

The pandemic caused travel restrictions and service interruptions that partially account for the dismal resettlement outcome. However, many countries have adopted new procedures to allow them to resume the process. All states should do so and continue incorporating flexible processing modalities—such as remote dossier selection, interviewing, and orientation—into their overall resettlement mechanisms. These good practices will allow authorities to continue working around any lasting restrictions.

In addition to—and not instead of—resettlement, states should expand complementary pathways, including humanitarian admissions and labor- and education-related programs. The Pact does well to facilitate family reunification, including by expanding the definition of “family member.” The Commission’s Recommendation is also important in emphasizing the value of work- and study-related migration. A preliminary agreement between European Parliament and Council negotiators in mid-May 2021 to revise the Blue Card Directive is a positive sign that progress is possible. Five years after they were first proposed, the new rules will expand access to and rights afforded by this labor migration scheme, which creates an EU-wide permit for high-skilled workers.

However, the EU must also promote inclusive schemes that do not discriminate against low-skilled workers, who are equally essential to Europe’s economies and communities. In a report adopted in May 2021, the European Parliament noted the relative absence of legal migration from the EU’s migration policy since 2015—including from the Pact—and the inclination towards attracting highly skilled workers in what does exist. MEPs call for facilitating legal migration,
which they recognize helps prevent trafficking, support economies in countries of origin, and meet EU labor needs.

The Commission’s Recommendation does well to promote Member States’ use of community sponsorship schemes. These programs, which give private sponsors, groups of individuals, and NGOs formal role in welcoming beneficiaries of international protection, can support resettlement and facilitate integration. Member States should learn from and build on existing good models, including NesT in Germany and the “Humanitarian Corridor” program in Italy, France, and Belgium.

(7) Uneven commitments to refugee integration
Without socioeconomic integration, refugees and asylum seekers are deprived of their fundamental right to dignified lives while host countries forego the benefits of their economic and social contributions. The Pact proposes a welcome change that would make recognized refugees in the EU eligible for long-term resident status after three years instead of five. Overall, however, it gives relatively little attention to the issue of integration. That is instead addressed in the Action Plan on Integration and Inclusion.

Xenophobia also grows more easily when integration is not supported. In a March 2021 report, the Commission found that one in four people from an ethnic or immigrant background in the EU feels discriminated against. In February 2021, it launched infringement procedures against five countries—Belgium, Bulgaria, Finland, Poland, and Sweden—whose national laws “do not fully or accurately transpose EU rules on combatting racism and xenophobia by means of criminal law.” Meanwhile, prospects for integration vary significantly across Member States. Some, like Greece and Cyprus, have undermined refugee integration, while others, like Portugal and Germany, have developed good practices.

In this context, the Anti-Racism Action Plan is also critical. The Commission presented it in September 2020 following waves of protest against police brutality and racial injustice, and the recognition of the COVID-19 pandemic’s disproportionate impact on racialized minorities. Both Plans signal that integration and inclusion are priorities for Europe. Combatting xenophobia and improving integration require both top-down and bottom-up approaches to establish and reinforce a positive narrative and inclusive discourse around asylum and migration. In fact, even as toxic messaging permeates some political rhetoric, strong demonstrations of welcome and acts of solidarity have come from citizens and local officials in municipalities throughout Europe.

To effectively promote integration, states should invest in robust and innovative integration programs through multi-stakeholder partnerships, especially at the local level. This includes working with civil society and the private sector to better mobilize and deploy resources to provide learning, training, and employment opportunities for refugees and asylum seekers. Importantly, it should also support host communities and include projects to increase interactions among these populations, helping to foster a sense of inclusion.

The lesson oft-repeated throughout the pandemic—that communities are only as strong as the most vulnerable among them—provides moral and practical imperatives for developing this programming. Moreover, dedicated funding in the relevant accounts within the MFF (including the AMIF, ESF+, ERDC, and Cohesion funds) provide the means to do so. Given the key role and political will of municipalities to welcome refugees, recent changes made to reinforce the
“partnership principle” in the use of these integration funds is important. This ensures the active involvement of regional and local authorities and civil society in planning and implementation.

(8) **Externalization of asylum and migration policy**

The desire to curb irregular migration has significantly shaped EU and Member State foreign policy, often distorting supposed “partnerships” with countries of origin and transit to serve European political interests. International cooperation is certainly critical for migration and the international protection regime to be safe, orderly, and humane. Foreign aid can help states address poverty, instability, climate change, and other factors driving displacement, and develop their asylum capacities. However, making aid conditional on third-country efforts to prevent migration undermines the mutual benefit and shared responsibility on which partnerships should be built.

“Migration cooperation” and “border management” can be euphemisms for the use of harsh security measures to block would-be migrants and asylum seekers. And using development aid to tackle drivers of displacement does not offset the EU’s need and responsibility to establish adequate asylum capacity itself—individuals urgently seeking safety will continue trying to reach Europe. Simply outsourcing asylum procedures undermines Europe’s moral and legal commitments.

Moreover, if the goals are—as policymakers claim—to protect lives, curtail irregular migration, and uphold “orderly” movement, this externalization fails dramatically. Five years after parties signed the 2016 EU–Turkey Statement, observers hold that the deal was “unethical, illegal and unnecessary” and provides a “blueprint for evading protection responsibilities.” The so-called Libyan coastguard continues to benefit from significant EU money and training amid long-standing and well-documented allegations of its abuse and detention of asylum seekers and migrants. And UNHCR warns that Denmark’s proposal to process asylum claims in extraterritorial centers may “erode” the international and European systems for refugee protection as it is “contrary to [their] foundational principles and spirit.” Nevertheless, in May 2021, Denmark and Rwanda reached an agreement that would realize this system.

The case of Spain shows clearly how these arrangements create precarious situations that put rights and lives at risk. Agreements with North and West African countries like Morocco and Tunisia to block Mediterranean routes to Europe have instead pushed people to the Atlantic route—the most dangerous in the world. This created a humanitarian emergency in the Canary Islands that Spain was still grappling with months later, when it again came under pressure. In mid-May 2021, a record 6,000 people entered Ceuta in one day after Morocco loosened border controls over a diplomatic dispute. The Spanish government sent troops to the border and had summarily returned nearly half of the individuals before the next day.

Externalization has thus proven irresponsible and ineffective. Nevertheless, the Pact only intensifies the trend by codifying it, namely in the Regulation on Asylum and Migration Management (RAMM). Moreover, the EU’s new Neighborhood, Development and International Cooperation Instrument (NDICI) instrument furthers externalization by attaching conditions for development assistance on third countries’ success in preventing migration, blocking access to international protection, or readmitting citizens. In this context, the Commission presented to the Council an assessment on partner countries’ cooperation on readmission. It was endorsed...
to explore how the EU can “enhance cooperation” by, for example, using visa measures and aid as incentives or penalties with third countries.

European political interests and relationships with third countries can also influence whether Member States deem a country safe to return individuals whose asylum applications are rejected or withdrawn. Both the EU and individual Member States conclude readmission agreements with third countries, creating a complex web of often informal agreements that, MEPs warn, lack proper oversight and can have human rights implications. They might authorize returns to a country even if just parts are considered safe, or fail to consider the particular risks to asylum seekers with individual vulnerabilities—thereby risking returning people to places where they would be in danger. For example, the EU’s renewed Joint Declaration on Migration Cooperation and Greece’s bilateral agreement deem Afghanistan safe for returns despite warnings in EASO’s own security analysis. Morocco and Tunisia lack asylum laws and fail to protect migrants, asylum seekers, and refugees, but have return agreements with Spain, France, and Italy. Meanwhile, Denmark in April 2021 withdrew temporary protection and associated residency rights for some Syrians on the basis that Damascus is safe, despite assessments from NGOs, UNHCR, and the European Parliament to the contrary.

(9) Leadership in global humanitarian action
Collectively, the EU and its Member States are the largest humanitarian donor in the world, contributing 36 percent of global humanitarian assistance. In 2021, the EU demonstrated its continued commitment to agile, principled humanitarian action with its new strategy. Of the €10.3 billion allocated for the MFF period, it adopted an initial annual budget of €1.4 billion in 2021—a more than 60 percent increase over 2020. Through these efforts, Europe plays a critical role in responding to situations of forced displacement and promoting refugee rights and access to protection globally. In 2020 alone, the EU led coordinated efforts to raise money for countries hosting displaced Venezuelans, Syrians, Rohingya, and people from the Central Sahel, as well as for the global coronavirus response. Its actions send strong, positive signals to other countries about the importance of global solidarity.

To make aid more responsive and effective, the EU should also boost support to local groups. The COVID-19 pandemic underscored how disruptions to operations and access during emergencies make local capacity essential. Although the EU is signatory to the Grand Bargain and states its support for localization, it only provides aid to certified NGO partners based in the EU or UN agencies and international organizations. But partnership and capacity support for local groups are essential to building trust with communities and facilitating information sharing that improves humanitarian response. Equally important is creating opportunities for displaced people to advocate for themselves and influence the design and implementation of decisions that affect them. The Commission took a positive step in 2020 by creating a new Expert Group on the Views of Migrants that includes migrants, asylum applicants, and refugees and advises on Commission strategy and initiatives. For the EU, supporting refugee-led efforts and elevating local communities must be a priority.

Conclusion

Europe must finally establish a coordinated, regional approach to international protection that is fair, sustainable, and humane. Above all, it must ensure the safety, rights, and dignity of all
displaced people. Doing so is not incompatible with advancing European interests at home and abroad—in fact, it is precisely in line with the goals and values of the EU. The Pact’s many references to parallel and foreseen instruments demonstrate the EU’s recognition that asylum must be understood and addressed within a broad context. This comprehensive approach is welcome. However, it should also yield an inclusive approach that prepares Member States to fulfill their moral and legal obligations to provide access to protection to anyone who might need it, and to share the responsibility for doing so.

**Recommendations**

As they continue negotiations on the EU Pact and pursue reform of the European asylum system, EU institutions and Member States should:

**Guarantee access to territory for asylum seekers and safeguard fundamental rights at Europe’s internal and external borders.** The interventions of national border guards and Frontex must comply with human rights obligations under EU and international law. Member States must swiftly investigate allegations of pushbacks, mass expulsions, and other abuses at EU borders and hold perpetrators to account. The European Commission should ensure that neither its funding nor operational support makes the EU complicit in rights violations. It should, inter alia, withdraw support for the Libyan coastguard and suspend Frontex operations where Member States do not adequately protect human rights.

**Establish an independent border monitoring mechanism.** The monitoring mechanism as proposed in the Pact should have a sufficiently broad mandate to investigate all allegations of abuse and rights violations along EU borders. The mechanism should involve and complement institutions that already play a role in monitoring, including NGOs, the EU Fundamental Rights Agency (FRA), national ombudspersons, and UNHCR. The EU should provide safeguards and adequate resources to ensure the mechanism’s legal, operational, and financial autonomy, and establish avenues for accountability. It should delineate consequences for Member States that interfere with the mechanism’s work or fail to address its findings, including withholding funding or technical support or launching infringement procedures.

**Uphold the effective right to asylum, ensuring that procedures are fair, efficient, and consistently applied across Member States.** Avoiding protracted asylum processes that leave applicants in long periods of uncertainty is in the interest of all. However, speed cannot come at the expense of due diligence and justice. The Pact’s disproportionate focus on facilitating returns risks undermining the right to asylum and violating rights, including to non-refoulement. Returns can only happen upon completion of a thorough, fair, and efficient asylum examination, with special safeguards in place to identify and protect vulnerable cases. The EU should eliminate or significantly reform the proposal for a new pre-screening procedure and the expanded use of accelerated border procedures and detention.

**Establish an effective, rights-based, regional solidarity mechanism that equitably distributes responsibility for protection among Member States.** It is not clear how the solidarity mechanism proposed in the Asylum and Migration Management Regulation (RAMM)
will succeed in reducing pressure on frontline states. The EU must establish a permanent, resilient, and sustainable solidarity mechanism requiring all states to share the responsibility for protection equitably and effectively. Cooperation must therefore be mandatory, continuous, and predictable, in a way that serves vulnerable individuals’ needs over states’ political interests. The EU should also establish a regional capacity for search and rescue (SAR) operations.

**Provide adequate and dignified reception conditions and differentiated responses for groups with special needs.** Asylum seekers have the right to basic needs, including adequate food, healthcare, housing, and education. The EU must abandon the hotspot approach that leaves people trapped in overcrowded, subpar reception facilities. The Commission should promote and Member States should facilitate the use of cash-based assistance, which grants recipients greater resilience and agency to meet their needs while also supporting local economies. Adopting adaptive, flexible response modalities ensures the most effective aid reaches those who need it, even in times of crisis.

**Decriminalize and facilitate civil society efforts to support asylum seekers, refugees, and migrants.** Stigmatizing, impeding, and criminalizing non-governmental organizations (NGOs) puts lives at risk and undermines state interests. Member States should remove undue legal, administrative, and bureaucratic obstacles to NGO operations; provide legal protections for humanitarian efforts, such as SAR operations; and actively cooperate and partner with NGOs to maximize the effectiveness of their response.

**Expand safe and regular pathways to international protection.** Member States should fully resume refugee resettlement programs. They should aim to exceed the low bar set for the EU-sponsored resettlement scheme in 2021 by launching additional state-funded national resettlement programs. The bloc should also expand complementary pathways, including humanitarian admissions, family reunification, and labor- and education-related opportunities.

**Invest in robust integration mechanisms to support refugee inclusion through multi-stakeholder partnerships, especially at the local level.** Integration brings together EU objectives to uphold international protection, promote social cohesion and inclusion, combat racism, and improve economic growth and equality. Member States should take advantage of available EU funding to invest in integration and inclusion programs as they embark on an ambitious recovery from the COVID-19 pandemic and beyond. National governments should work closely with municipal governments, heeding the calls of those eager to welcome asylum seekers and refugees.

**End the externalization of asylum and protection obligations to countries of origin and transit.** When Member States outsource asylum policy, they avoid their responsibilities, exploit third countries, and put lives at risk. Development assistance should be conditional on recipients’ compliance with international law and human rights, and not on requirements that inevitably lead to abuses against asylum seekers. Ongoing monitoring of recipients’ aid spending should ensure that EU support does not implicate the bloc in human rights violations. Decisions to return individuals who have been denied protection must rely on genuine assessments of the comprehensive security and human rights landscape in the country of origin. Authorities should consult displaced people in making these assessments and ensure that any voluntary returns are truly made without coercion.
Demonstrate leadership in responding to displacement crises beyond EU borders. The EU and Member States should set an example for other countries by promoting protection and rights-based, principled humanitarian action in responding to displacement crises beyond EU borders. Exercising its political and financial leverage by continuing to engage in multilateral initiatives is crucial. The European Commission should also actualize the EU commitment to localization by reducing reliance on intermediary actors and directly supporting local—and especially refugee-led—groups. In addition, the EU should create spaces in existing and new fora for displaced people to communicate their needs, interests, and recommendations directly to policymakers.
Appendix 1: The Migration & Asylum Package

The New Pact on Migration and Asylum “sets out the Commission’s new approach to migration, addresses border management and ensures more coherence to integrate the internal and external dimensions of migration policies.” It explains how various legislative and non-legislative instruments fit together into this comprehensive approach.

The Pact presented in September 2020 included a package of nine instruments:

1. [Screening Regulation](#) > a new Regulation that establishes a new pre-entry screening procedure for third-country nationals who arrive at an external EU border irregularly or disembark after a search-and-rescue operation, as well as for “irregular migrants apprehended within [EU] territory and who eluded border controls on entering the Schengen area.”
2. [Asylum Procedures Regulation (APR)](#) > amendments to the Commission’s 2016 proposal establishing a common procedure for international protection that includes new border procedures and appeal processes;
3. [Eurodac Regulation](#) > targeted amendments to the Commission’s 2016 proposal that would expand the scope of the Regulation establishing Eurodac, a fingerprint database for identifying asylum seekers and individuals who cross borders irregularly;
4. [Asylum and Migration Management Regulation (RAMM)](#) > a new Regulation that establishes a common framework for managing asylum and migration, including a responsibility-sharing (“solidarity”) mechanism. This new governance system would replace the [Dublin Regulation](#);
5. [Crisis and Force Majeure Regulation](#) > a new proposal for a crisis instrument to address the presence or risk of “exceptional situations of mass influx of third-country nationals or stateless persons” that risk overwhelming a Member State’s asylum system. It sets out specific derogations and adaptations for the solidarity mechanism established by the RAMM;
6. [Migration Preparedness and Crisis Blueprint](#) > a Recommendation for an EU framework to anticipate and address crisis situations;
7. [Recommendation on Resettlement and Complementary Pathways](#) > aims to promote legal pathways to protection, including a stable resettlement scheme, humanitarian admission, and other complementary pathways through education and work and facilitated family reunification
8. [Recommendation on Search and Rescue (SAR) operations by private vessels](#) > promotes cooperation among Member States and with the Commission in relation to SAR operations carried out by privately owned or operated vessels, including NGO operations;

*While Recommendations are not binding, Regulations and Directives are binding legislative acts that establish rules or goals to be applied and achieved across the EU.*

The Commission also issued a Communication explaining how the Pact builds on previous efforts. Namely, it includes reforms the Commission proposed in 2016 and 2018 and on which
the Council and Parliament reached political agreement but did not conclude negotiations. The Communication offers a plan to conclude the negotiations on these instruments, which include:

1. **EU Asylum Agency Regulation** > creates a fully-fledged EU Asylum Agency, reinforcing the operational capacity of the existing European Asylum Support Office (EASO) and providing it with the necessary staff, tools, and funding to support Member states throughout the asylum procedure;

2. **Reception Conditions Directive** > ensures that common standards for reception conditions (including access to housing, food, clothing, health care, education, and employment) are provided for asylum seekers;

3. **Qualification Directive** > clarifies the grounds for granting international protection and provides access to rights and integration measures for beneficiaries of international protection;

4. **Union Resettlement Framework** > establishes a permanent framework with a unified procedure for resettlement across the EU;

5. **Return Directive** > recast proposal addresses the risk of absconding, assistance for voluntary returns, monitoring national procedures, and streamlining administrative and judicial procedures.

In addition, the Commission’s package provided a Roadmap for implementation that includes a series of initiatives to be subsequently presented “to complete the overall architecture” of the EU approach. Some of these initiatives have since been presented and include:


2. **Strategy on voluntary returns and reintegration**, released in April 2021;

3. Operational strategy on returns, forthcoming;

4. **Strategy on Combatting Trafficking in Human Beings, 2021-2025**, published in April 2021;

5. **Action Plan against Migrant Smuggling**, forthcoming;

6. **Skills and Talent package**, as part of developing legal pathways. Of relevance is the **Pact for Skills**, launched in November 2020 under the **European Skills Agenda** for sustainable competitiveness, social fairness, and resilience;


Finally, several strategic plans and initiatives lie outside the framework of the Pact but will directly impact the experiences of displaced people arriving and living in Europe. They include:


2. **EU Strategy on the Rights of the Child and the European Child Guarantee**, issued in March 2021, and includes actions to ensure access to basic services, including education, for children with migrant backgrounds;

3. **Strategic Outlook for Global Humanitarian Action**, published in March 2021;

4. Region-specific foreign policies, including the new **EU/Africa-Caribbean-Pacific Partnership Agreement**, **Agenda for the Mediterranean** and **Comprehensive Strategy with Africa**. These may encompass efforts around migration cooperation and re-admission agreements.
Appendix 2: Select funding sources


- the renewed Asylum, Migration and Integration Fund (AMIF) aims to strengthen a common asylum policy and promote integration and solidarity through, for example, support for emergency assistance, humanitarian admission, relocation, and resettlement (€8.7 billion). Of the funds, 36.5 percent is directly managed by the EU for initiatives including resettlement.
- the Neighborhood, Development and International Cooperation Instrument (NDICI) newly merges 11 development assistance instruments to cover the Commission’s spending on external affairs, including development and migration (€70.8 billion);
- the Humanitarian Aid budget supports emergency response and disaster preparedness around the world, including those related to displacement and climate change (€10.3 billion);
- the European Social Fund Plus (ESF+) aims to “improve employment opportunities, strengthen social inclusion, fight poverty, promote education, skills and lifelong learning, and develop active, comprehensive and sustainable inclusion policies,” including for migrants and refugees (€88.0 billion);
- the European Regional Development Fund (ERDC) (€200.4 billion) and Cohesion Fund (€42.6 billion) support local reception and integration programs for migrants.