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EU BORDERS AND POTENTIAL CONFLICTS BETWEEN NEW TECHNOLOGIES AND HUMAN RIGHTS

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Passports are only good for annoying honest folks, and aiding in the flight of rogues
Around the World in 80 Days
Julio Verne

ABSTRACT: Immigrants and asylum seekers have been arriving at the borders of the European Union (EU) continuously for decades. Although there was a noticeable decline during the pandemic, their numbers have already picked up again. Their identification is crucial, also in case of failure in their attempt to cross the border. This is the case of migrants who die at sea and whose bodies cannot be identified. The agencies of the Area of Freedom, Security and Justice together with the member states have addressed the border identification of migrants and asylum seekers by progressively resorting to artificial intelligence (AI) technologies to develop a system that guarantees security at European borders. The European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (EU-LISA) has had its mandate extended to focus on the implementation of EU border and asylum management and migration areas. The purpose of this note is to point out some potential risks in the current management at the border of AI systems in relation to the human rights of migrants and asylum seekers.

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KEYWORDS: migration, asylum, EU borders, human rights, artificial intelligence.

LAS FRONTERAS DE LA UE Y LOS POSIBLES CONFLICTOS ENTRE LAS NUEVAS TECNOLOGÍAS Y LOS DERECHOS HUMANOS

RESUMEN: Los inmigrantes y los solicitantes de asilo han venido llegando a las fronteras de la Unión Europea (UE) de forma ininterrumpida desde hace décadas. Aunque hubo una disminución notable durante la pandemia, su número ya ha vuelto a recuperarse. Su identificación es crucial, también en caso de fracasar en su intento de cruzar la frontera. Este es el caso de los migrantes que mueren en el mar y cuyos cuerpos no pueden ser identificados. Las agencias del Espacio de Libertad, Seguridad y Justicia junto con los Estados miembros han abordado la identificación fronteriza de migrantes y solicitantes de asilo recurriendo progresivamente a las tecnologías de inteligencia artificial (IA) para desarrollar un sistema que garantice la seguridad en las fronteras europeas. La Agencia de la Unión Europea para la gestión operativa de sistemas informáticos a gran escala en el espacio de libertad, seguridad y justicia (EU-LISA) ha visto ampliado su mandato para centrarse en la implementación de la gestión de asilo y fronteras de la UE y áreas de migración. El propósito de esta nota es señalar algunos riesgos potenciales en la gestión actual de los sistemas de IA en relación con los derechos humanos de los migrantes y los solicitantes de asilo.

PALABRAS CLAVE: migración, asilo, fronteras UE, derechos humanos, inteligencia artificial.

LES FRONTIÈRES DE L'UE ET LES CONFLITS POTENTIELS ENTRE LES NOUVELLES TECHNOLOGIES ET LES DROITS DE L'HOMME

RESUMÉ: Les immigrés et les demandeurs d'asile arrivent aux frontières de l'Union européenne (UE) sans interruption depuis des décennies. Bien qu'il y ait eu une baisse notable pendant la pandémie, leur nombre a déjà repris. Leur identification est cruciale, même en cas d'échec dans leur tentative de franchir la frontière. C'est le cas des migrants qui meurent en mer et dont les corps ne peuvent être identifiés. Les agences de l'Espace de Liberté, de Sécurité et de Justice ainsi que les États membres ont abordé l'identification aux frontières des migrants et des demandeurs d'asile en recourant progressivement aux technologies de l'intelligence artificielle (IA) pour développer un système garantissant la sécurité aux frontières européennes. L'Agence de l'Union Européenne pour la Gestion Opérationnelle des Systèmes d'Information à grande échelle au sein de l'Espace de Liberté, de Sécurité et de Justice (EU-LISA) a vu son mandat étendu pour se concentrer sur la mise en œuvre des zones de gestion des frontières et de l'asile et de la migration de l'UE. L'objectif de cette note est de souligner certains risques potentiels dans la gestion actuelle des systèmes d'IA en ce qui concerne les droits humains des migrants et des demandeurs d'asile.

MOTS CLÉS: migration, asile, frontières de l'UE, droits de l'homme, intelligence artificiel.

I. DENTIFICATION SYSTEMS FOR THIRD-STATE NATIONALS AND THE USE OF *BIG DATA* AND ARTIFICIAL INTELLIGENCE AT THE EXTERNAL BORDERS OF THE EUROPEAN UNION

In this note, when talking about new technologies, we will refer, on the one hand, to those related to the use of massive data or *big data* and, on the other, to artificial intelligence systems. The European Union has resorted to the use of these technologies as a way of expanding its capacity to control

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and manage its border areas, as well as access to the territory of the Union of nationals of third states through its visa system[2].

Without being a completely new topic –the use of Big Data and AI based system– we can affirm that the intention of generalizing its use is relatively recent and that it is currently in full development. In 2016, the Commission presented the so-called *Smart borders package,* which consists of a set of measures that include an Entry/Exit System (SES) and amendments to the Schengen Code to improve the management of the external borders of Member States, fight against irregular migration and provide information on those nationals of third States who remain in the territory longer than they are allowed[3]. To achieve this type of *smart borders*, the European Commission supports the development of AI as it is considered a crucial instrument in the strategic development of Europe, as well as the ecological and digital agenda[4]. The added value presented by the Union in this field is to provide a joint approach that harmonizes and gives rise to a European framework on AI. To this end, the Commission has already developed a coordinated plan on AI in 2018, most recently revised in 2021[5], which helped lay the foundations for national strategies and policy developments. For the purposes of this note, we will use as the concept of artificial intelligence the one proposed by the European Commission, based on the one developed by a Group of Experts[6], and which

[2] EUROPEAN COMMISSION, "White Paper on Artificial Intelligence: A European approach to excellence and trust", COM (2020) 65 final, Brussels 2020. EUROPEAN UNION HIGH LEVEL EXPERT GROUP ON ARTIFICIAL INTELLIGENCE, "A Definition of AI: Main Capabilities and Scientific Disciplines", p. 6, 2019. This document establishes the concept of Artificial Intelligence that the European Union should make its own.

[3] European Commission, website, "Migration and Home Affairs", https://ec.europa.eu/home-affairs/pages/glossary/smart-borders-package_es.

[4] EUROPEAN COMMISSION, "Communication and roadmap on the European Green Deal", COM (2019) 640 final, Brussels, 11.12.2019.

[5] EUROPEAN COMMISSION, "Coordinated Plan on Artificial Intelligence", revised. COM (2021) 205 final, Brussels, 04.21.2021.

[6] EUROPEAN UNION HIGH LEVEL EXPERT GROUP ON ARTIFICIAL INTELLIGENCE, "A Definition of AI: Main Capabilities and Scientific Disciplines", 2019, p. 6. Concept of Artificial Intelligence: "Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or

encompasses under this name both the various *software* and *hardware systems* used as a scientific discipline *per se*. Thus, in the first case, it would be systems designed by humans, with a complex purpose and that act in both the physical and digital dimensions, perceiving their environment through data acquisition and generally interpreting them in a structured manner. In addition, they are systems capable of reasoning about knowledge and processing the information that results from these data to decide what would be the best actions to achieve the purpose that has been granted to them.

The internal space created by the Member States to guarantee freedom of movement is reinforced in principle by greater control at the external borders[7]. AI driven technologies are being used at the EU borders to carry out people identification, including migrants/asylum seekers, as they are deemed appropriate to guarantee internal security in the EU territory. This freedom-security binomial always hides the resignations that are considered *necessary* in the field of human rights[8]. According to DENCIK, a wide variety of digital technologies have been used (artificial intelligence, biometric data, social networks) to try to control and record the flows of migrants/asylum seekers arriving in European territory, with a vision far removed from what

processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behavior by analyzing how the environment is affected by their previous actions.

"As a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors and actuators), as well as the integration of all other techniques into cyber-physical systems."

Once the Draft Law on AI becomes an effective EU regulation, the AI concept should be adapted to the one included in this legal text.

[7] Del Valle Gálvez, A., "Inmigración, derechos humanos y modelo europeo de fronteras Propuestas conceptuales sobre "extraterritorialidad", "desterritorialidad" y "externalización" de controles y flujos migratorios", *Revista de Estudios Jurídicos y Criminológicos,* nº 2, 2020, pp. 145-210, p. 155.

[8] Numerous authors have already spoken out on human rights issues at the borders of the European Union. Among them, Cassarino J. P., Marin L., "The New Pact of Migration and Asylum: Turning EU Territory into a non-Territory"*, European journal of migration and law,* Vol. 24, No. 1, 2022, pp. 1-26.

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they call *data justice*[9] (application of justice and human rights criteria to the use of data) and more prompt to criminalizing and hindering their entry. We will analyze some situations in which the use of these technologies can lead to the violation of fundamental rights recognized by international Human Rights instruments, as well as by the Human Rights Charter of the European Union or by the European Convention on Human Rights.

1. MIGRATION/ASYLUM AND ARTIFICIAL INTELLIGENCE: RISKS TO HUMAN RIGHTS

Artificial intelligence neutrality depends upon several technical and ethical conditions. Sometimes, its use has ended up in discriminatory practices. For example, the use of algorithms to perform facial recognition in the United States capable of predicting crime resulted in errors that mainly harmed the African American community [10]. Problems have also been found with the use of predictive technologies in the United Kingdom in relation to social benefits, denying access precisely to people who met the vulnerability criteria, for which their use had to be withdrawn. There has also been talk of a possible *surveillance humanitarianism*[11] (control humanitarianism), which refers to the absence of conclusive studies by those responsible for providing humanitarian aid to migrants and refugees —states, international organizations, NGOs— about whether the benefits of using new technologies are greater than the risks they present for the respect of the human rights of these people[12]. Very recently, in Spain, a ruling by a contentious-administrative court[13] denied the

[9] Metcalfe P, Dencik L., "The politics of big borders: Data (in)justice and the governance of refugees". *First Monday* 24(4), 2019, https://firstmonday.org/ojs/index.php/fm/article/view/9934/7749 .

[10] Angwin, J., Larson, J., Mattu, S., Kirchner, L., "Machine Bias: There's Software Used Across the Country to Predict Future Criminals and It's Biased Against Blacks", *ProPublica*, 2016, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[11] Latonero, M., "Stop surveillance humanitarianism", *New York Times*, July 11, 2019. https://www.nytimes.com/2019/07/11/opinion/data-humanitarian-aid.html .

[12] Latonero, M. et al., "Digital Identity in the Migration & Refugee Context: Italy Case Study", 2019, https://datasociety.net/library/digital-identity-in-the-migration-refugee-context/. Valdivia, A., Corbera-Serrajòrdia, J., Swianiewicz A., "There is an elephant in the room: Towards a critique on the use of fairness in biometrics", *AI Ethics*, 2022.

[13] *Judgement- Sentencia* Nº 143/2021 del Juzgado Central de lo Contencioso Administrativo Nº 8, Madrid, 13 Enero 2022.

Civio Foundation petition to obtain the source code of the application that grants the electricity social bonus, due to clear flaws in its configuration[14]. The failed application of the algorithm that makes it up is the main reason why a much smaller number of people have had access to the benefits of this social bonus; in this case, the technological error punished the most vulnerable[15].

The use of biometric data at the external borders of the Union with the migrant/asylum-seeking population has also been the subject of controversy in relation to human rights[16]. The Treaty on the Functioning of the European Union (TFEU)[17] already included the legal basis of what would have to be the Common European Asylum System and which, to date, is not fully developed. For this reason, it is at least surprising to observe the decisive step of the Commission and the Council to advance in everything related to AI in the border territory while they get stuck in the creation of this integrated model of migration management, as evidenced by the unequal reception of the New European Pact on Migration and Asylum presented in September 2020. It should not be forgotten that states such as Hungary, Poland, the Czech

[14] Valdivia, A., De La Cueva, J., "The Paradox of Efficiency: Frictions Between Law and Algorithms", *Verfassungs Blog on Constitutional Matters*, April 2, 2022, https://verfassungsblog.de/roa-the-paradox-of-efficiency/.

[15] UNESCO COMEST, "Preliminary Study on the Ethics of Artificial Intelligence", SHS/COMEST/EXTWG-ETHICS-AI/2019/1, 2019, pp. 32, https://unesdoc.unesco.org/ark:/48223/pf0000367823. It gives an example of the Allegheny Family Screening Tool (AFST), a predictive model used to forecast child neglect and abuse. It states that it "exacerbates existing structural discrimination against the poor and has a disproportionately adverse impact on vulnerable communities".

[16] Valdivia, A., Corbera-Serrajòrdia J., Swianiewicz A., *op. cit.*.

[17] The Lisbon Treaty (TFEU) entered into force in December 2009. It finally included the Charter of Fundamental Rights, in addition to including the parallel transformation of the Area of Freedom, Security and Justice (arts. 2.2 and 67 TFEU). This included the creation of a Common European Asylum System (art. 78); the creation of an integrated border management system (art. 77 TFEU) and "…a common immigration policy aimed at guaranteeing, at all times, effective management of migratory flows, equitable treatment of third-country nationals who reside legally in the Member States, as well as the prevention of illegal immigration and trafficking in human beings and a reinforced fight against both" (art. 79.1).

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Republic and Slovakia immediately criticized the mechanism for distributing asylum seekers among the Member States[18].

However, on June 22, 2022, 18 European States together with Norway, Switzerland and Liechtenstein committed on a political declaration to develop a "voluntary, simple and predictable solidarity mechanism designed to provide the Member States most affected by migratory flows in the Mediterranean and mainly under pressure, including the Western Atlantic route, with needs-based assistance from other Member States complementary to European support, by offering relocations (the preferred method of solidarity) and financial contributions, without prejudice to the respect of Union law, and in particular Regulation 604/2013"[19]; this is a first step towards the implementation of the New European Pact on Migration and Asylum, despite of the political and voluntary nature of it and the absence of the reluctant Eastern European States[20].

Even though more studies capable of globally calibrating the impact of new technologies on human rights are still[21] needed, a clear agreement

[18] Abrisketa, J., "El Pacto Europeo sobre Migración y Asilo: Hacia un marco jurídico aún más complejo", in Abrisketa J. (Dir.), *Políticas de asilo de la UE: convergencias entre las dimensiones interna y externa*, Thomson Reuters-Aranzadi, Pamplona, 2021, pp. 307-335.

[19] COUNCIL OF THE EUROPEAN UNION, "First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism", 22 June 2022 https://home-affairs.ec.europa.eu/system/files/2023-05/Declaration%20on%20solidarity_en.pdf.

[20]Furthermore, on 7 September 2022, the European Parliament and five rotating Council Presidencies signed a "Joint Roadmap of the European Parliament and Rotating Presidencies of the Council on the organization, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New European Pact on migration and asylum" regarding the conduct of negotiations between the co-legislators committing to work together to adopt the reform of the EU migration and asylum rules before the 2024 EU elections. EUROPEAN PARLIAMENT, "Migration and asylum: MEPs committed to complete the necessary reforms", Press release, https://www.europarl.europa.eu/news/en/press-room/20220909IPR40155/migration-and-asylum-meps-committed-to-complete-the-necessary-reforms.

[21] Rodrigues, R., "Legal and human rights issues of AI: Gaps, challenges and vulnerabilities", *Journal of Responsible Technology,* Vol. 4, 2020, p. 12. In this article, the author reviews different authors who have dealt with the subject, highlighting various areas of human rights that may be affected by new technologies. In Spain, Gascón Marcén, A., "Derechos humanos e inteligencia artificial", in Pérez Miras et al (dir.) *Setenta años de Constitución Italiana y cuarenta años*

is derived from the literature consulted on the existence of risks and even some certainty, as there are already proven cases, that those systems including predictive algorithms violate some human rights, being most obvious to the case of migrants/asylum seekers the right to freedom of expression, the right to privacy, the right to one's own image, respect for dignity and the right to equality. RODRIGUES has deeply analyzed the human rights related to AI use as can be seen in the table below, incorporating migrants though only in one category, the one related to privacy and data protection. Still, the scope could be larger, as migrants and asylum seekers are clearly vulnerable people, a category that is repeated in several parts of the table below.

Surely AI driven technologies applied to migrants and asylum seekers could be used for predicting migratory influx and help European Union States to prepare better for it. However, it seems that often these new systems only serve to reinforce the existing policies that do not favor the entrance of migrants and asylum seekers[22]. A human-rights based approach to migration management seems to be not developed in depth by the European Union, while AI technologies advance fast and are used at the EU borders. The new political declaration that tries to deblock the development of the new European Pact on Asylum and Migration, stresses relocations as the preferred method of solidarity among EU member States, without mentioning migrants/asylum seekers human rights at all. AI based technologies seem to be the instrument to implement this approach.

Table 1. Legal and human rights issues of AI: Gaps, challenges and vulnerabilities

AI legal issue	Human rights principles that might be affected
Lack of algorithmic transparency	fair trial and due process; effective remedies; social rights and access to public services; rights to free elections
Cybersecurity vulnerabilities	the right to privacy; freedom of expression and the free flow of information

de Constitución Española, 2020 (Romboli, S. (coord.), *Retos en el siglo XXI*, vol. 5, pp. 335-350. Also in Valls Prieto, J., *Inteligencia artificial, Derechos humanos y bienes jurídicos,* Cuadernos Aranzadi del Tribunal Constitucional, No. 48.2/2021, Thomson Reuters-Aranzadi, Pamplona, 2021.

[22] Beduschi A., "International migration management in the age of artificial intelligence", *Migration Studies*, Volume 9, Issue 3, 2021, pp. 576-596, p. 581.

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AI legal issue	Human rights principles that might be affected
Unfairness, bias and discrimination	elimination of all forms of discrimination against women; equal rights of men and women; enjoyment of children's rights without discrimination; equality before the law, equal protection of the law without discrimination; enjoyment of prescribed rights without discrimination; non-discrimination, right to life of migrant workers; right to liberty and security of the person; prohibition of discrimination on the basis of disability; right to fair trial; right to freedom from discrimination
Lack of contestability	right to an effective remedy; access to justice
Legal personhood, subjecthood, moral agency	right to recognition everywhere as a person before the law; right to equality; elimination of all forms of discrimination
Intellectual property issues	right to own property alone or in association with others; right to freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which s/he is the author.
Adverse effects on workers	right to social security; prohibition of discrimination in relation to the enjoyment of rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; right to work, including the right of everyone to the opportunity to gain his living by work which s/he freely chooses or accepts); right of persons with disabilities to work, on an equal basis with others
Privacy and data protection issues	migrant's right to privacy; respect for privacy of person with disabilities; right to respect for private and family life; right to privacy and data protection; children's privacy; protection of the integrity of older persons and their privacy and intimacy
Liability issues related to damage caused	right to life; right to effective remedies
Lack of accountability for harms	right to life; right to effective remedies

Source: Rodrigues R., "Legal and human rights issues of AI: Gaps, challenges and vulnerabilities", *Journal of Responsible Technology*, No 4, 2020, p. 8.

The European Commission itself recognizes that the algorithms used by AI "pose specific and potentially high risks to security and fundamental rights that current legislation cannot address or in view of which it is difficult to apply current legislation"[23]. For this reason, the Commission has developed

[23] EUROPEAN COMMISSION, "Coordinated Plan on Artificial Intelligence", revised, COM (2021) 205 final, 21.04.2021, p.4.

the Ethical Guidelines for a viable Artificial Intelligence[24], a document that describes the characteristics of what a viable artificial intelligence should be. For this, three components must be met: 1) that it is lawful, complying with all existing and applicable rules; 2) that it is ethical; 3) that it is technically and socially robust to avoid damage. These ethical lines are framed in the fundamental rights enshrined in the EU Treaties, the Charter of Fundamental Rights of the European Union (the "EU Charter") and international human rights law. The inclusion of the ethical point of view serves to ensure an analysis prior to its development that considers fundamental rights or, in its own terms, "identify what we must do instead of what we can do (currently) with technology"[25].

Still, some authors consider that this is not enough to ethically protect fundamental rights. An "authentic European legal framework, which goes beyond the recommendations and indications of an ethical nature"[26] should be developed, based on the precautionary principle that informs European Union legislation. In this regard, this principle could be used to provide responses to the challenges derived from the use of new technologies, such as AI, following a path already walked by the European Union when developing environmental legislation[27]. The use of predictive technologies and Big Data could violate fundamental rights of migrants and asylum seekers in a way that was not imaginable prior to their discovery. In this regard, even though the technological industry considers regulatory practices as obstacles to innovation, they also can see that the use of AI systems at EU borders "may

[24] EUROPEAN COMMISSION, "Ethical Guidelines for Trustworthy AI", 2019, https://data.europa.eu/doi/10.2759/14078 .

[25] *Ibidem*. p. 12.

[26] Presno Linera, M., "Derechos fundamentales e inteligencia artificial en el Estado social, democrático y ¿digital? de Derecho, *El Cronista del Estado Social y Democrático de Derecho*, Nº. 100, 2022, pp. 48-57.

[27] Mazur, J., "Automated decision-making and the precautionary principle in EU law", *Baltic Journal of European Studies*, Vol. 9(4), 2019. This author considers that "the experiences collected in environmental law concerning the precautionary principle could be a source of lessons to be learned concerning the regulatory measures adopted in order to deal with scientific uncertainty, not only in the natural environment, but also in the digital one".

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have ethical implications and carry risks for the safeguarding of human rights, such as individual privacy"[28].

2. EUROPEAN AGENCIES AND NEW TECHNOLOGIES: FIGHT AGAINST IRREGULAR IMMIGRATION OR SOMETHING ELSE?

Irregular immigration is one of the causes that have driven the creation of new agencies within the framework of the European Union. The latest figures provided by FRONTEX put the number of people who have irregularly crossed the external borders of the Union[29] in 2020 at almost 200.000 people, a number substantially higher than the 146,000 people from the year before the pandemic. The prospects for the future, with the conflict in Ukraine[30] at the gates of the Union territory and its consequences beyond the European continent, especially in already highly vulnerable areas of Africa, do not encourage a reduction in human displacement. The European Union has gradually developed a structure of Agencies that support its institutions for the effective deployment of the corresponding policies in the Area of Freedom, Security and Justice (AFSJ)[31]. In this section, we will highlight the use of new technologies that incorporate artificial intelligence and other predictive systems within the AFSJ in matters of migration/asylum. The agencies that we will include are the European Asylum Office and the EU-LISA Data Agency and we will outline potential frictions of the practice of these Agencies, especially in the use of AI, with the human rights recognized in the EU.

[28] Silfversten E., et al, "Artificial Intelligence-based Capabilities for the European Border and Coast Guard. Final Report", 2021, https://frontex.europa.eu/assets/Publications/Research/Frontex_AI_Research_Study_2020_final_report.pdf.

[29] FRONTEX, "EU external borders in 2021: Arrivals above pre-pandemic levels", News release , November 1, 2022; https://frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-2021-arrivals-above-pre-pandemic-levels-CxVMNN.

[30] UNHCR, "Operational Data Portal, Ukraine Refugee Situation", https://data.unhcr.org/en/situations/ukraine. Last update of 9 May 2023 states following: 8,207,977 refugees from Ukraine recorded across Europe; 5,093,606 refugees from Ukraine registered for Temporary Protection or similar national protection schemes in Europe.

[31] The legal basis of the AFSJ is successively found in the European Treaties. 1) Article 3.2 of the Treaty of the European Union (TEU), states as one of the objectives of the EU the creation of an area of freedom, security and justice (AFSJ) is mentioned before the objective of completing an internal market. 2) Title V of the Treaty on the Functioning of the European Union (TFEU) -articles 67 to 89- is dedicated to the AFSJ. Among the specific sections of this title is the one dedicated to policies on border controls, asylum, and immigration.

A. The prediction of migratory movements by the European Union Agency for Asylum, an adequate use of data?

Predicting migratory movements seems rationally feasible, but reality has defied European logic on two very recent occasions: the movement of refugees from Syria in 2015 and in 2022 that of refugees from the conflict in Ukraine. However, the former European Asylum Office (EASO) –the European Union Agency for Asylum (EUAA) as of January 2022[32]– did not seem to have the structure or sufficient means to deal with the implementation of the Common European Asylum System, as established by the new regulation, which affirms "the need for a high, uniform and effective level of application of Union Law on asylum in the Member States". This requires building on the work of EASO and transforming it into a full-fledged agency, such that it is a "center of asylum expertise"[33]. Among its functions, described exhaustively in Article 2 of the Regulation, is that of "compiling and analyzing all the information, of a qualitative and quantitative nature, related to the situation in terms of asylum and the application of the SECA".

In principle, this competence is inherited from its predecessor, and, in its exercise, it had already aroused criticism from the European Data Protection Supervisor[34]. In a report[35] related to a complaint filed against the former EASO, it had stated that the methods for predicting possible migratory pressures towards the EU –which make use of AI-based predictive technology called "machine learning"– could pose a significant risk to migrants´ fundamental rights monitored through their presence on social networks.

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[32] Regulation (Eu) 2021/2303 of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, 15 December 2021. The Agency effectively replaced the previous European Asylum Office on 19 January 2022. http://www.consilium.europa.eu/es/press/news/20220119-new-eu-asylum-agency/.

[33] *Ibidem*, para. 6.

[34] The European Data Protection Supervisor and its specific functions are regulated in Regulation (EU) 2018/1725 of the European Parliament and the Council on the protection of natural persons in relation to the use of data by the European institutions, N. 45/2001, of 23 October 2018; and in Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39-98.

[35] EUROPEAN DATA PROTECTION SUPERVISOR, "Formal consultation on EASO's social media monitoring reports", case 2018-1083, D (2019)1961, https://edps.europa.eu/data-protection/our-work/publications/consultations/social-media-monitoring-reports_en.

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According to the European Data Protection Supervisor, this type of monitoring activity of social networks went far beyond reasonable individual expectations. Furthermore, the likely risk is that these "profiling activities" take place outside of their original context. In addition, in its report, it clearly established the need for the former EASO to carry out its activities incorporating the principles of "minimization of the data collected" and to have a "specific purpose", as established by the General Data Protection Regulation of the European Union: analyzing data only for the sake of it does not respect these principles.

The new Regulation on the European Asylum Agency[36] does not mention social networks as a possible source of information for carrying out its predictive activities, as the Supervisor had made clear in this report. However, it does not expressly prohibit its use either, but in its Article 4 establishes that to achieve the purposes established in Article 2, "the Agency and the competent national authorities in matters of asylum and immigration and other pertinent services will exchange all the information needed in a timely and accurate manner".

In short, it is a very ambiguous and open clause that includes both the terms "pertinent services" without defining what they are, and "necessary information" without establishing what type. It will be necessary to observe the future development of this competence by the new Agency, hoping that it will be able to correct old habits and incorporate the spirit of guarantee that the Data Supervisor urged it to adopt. The fact that there are similar projects in other parts of the world, such as in Canada or the United States, does not justify their existence and their lack of control and respect for the fundamental rights of privacy and institutional transparency[37].

The latest events at the border between Morocco and Spain near Melilla[38] on June of 2022[39] (23 migrants dead confirmed by the Moroccan authorities)

[36] See note 32 above.

[37] Bircan, T., Korkmaz, E., "Big data for whose sake? Governing migration through artificial intelligence". *Humanities and Social Sciences Communications,* Vol. 8, 2021.

38 Melilla and Ceuta are two cities under Spanish sovereignty situated in African territory. They are consequently the only European Union border in African soil.

[39] Peregil F., "La tragedia bajo la valla de Melilla que nadie pudo tapar en Marruecos", *El País*, June 25, 2022. https://elpais.com/espana/2022-06-25/la-tragedia-bajo-la-valla-de-melilla-que-nadie-pudo-tapar-en-marruecos.html. "Melilla: death toll from mass incursion on Spanish

may confirm that the use of these powerful databases to predict migratory movements is not being neither very accurate nor successful. The monitoring of such a contentious border should be covered by the European Asylum Agency, that should provide to the relevant member States –Spain precisely in this matter– with this predictive information. The European Asylum Agency supports Spain[40] to manage their asylum and/or reception procedures, but it does not seem capable of preventing these mass incursions. The high number of migrants dead –the highest death toll ever at that border– as already provoked the reactions of international organizations. Among them UNHCR[41] and the IOM that have "urged all authorities to prioritize the safety of migrants and refugees, refrain from the excessive use of force and uphold their human rights". Spanish President, Pedro Sánchez, condemned the "violent assault", which he blamed on "mafias who traffic in human beings"[42]. The use of predictive AI based technologies should be there to prevent these human movements, as the regulation states. If not, what for?

B. EU-LISA and database interconnectivity: new "super-powers"?

EU-LISA is an EU Agency created to carry out "the operational management of large-scale computer systems in the area of freedom, security and justice"[43]. This Agency has been reinforced since its creation in 2011, having modified its Regulations in 2018. The Agency mainly manages the

enclave rises to 23", *The Guardian*, June 25, 2022, https://www.theguardian.com/world/2022/jun/25/eighteen-killed-as-throng-of-migrants-storms-spains-melilla-border-from-morocco.

[40] EUROPEAN ASYLUM AGENCY, "EASO support to Spain becomes fully operational", Press note, https://euaa.europa.eu/news-events/easo-support-spain-becomes-fully-operational.

[41] UNHCR, "UNHCR and IOM deplore loss of life at Nador-Melilla crossing", June 25, 2022, https://www.unhcr.org/news/press/2022/6/62b738274/unhcr-iom-deplore-loss-life-nador-melilla-crossing.html.

[42] See above, article in The Guardian, note 39.

[43] EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL, REGULATION (EU) 2018/1726 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of November 14, 2018 on the European Union Agency for the Operational Management of Large-Scale Information Systems in the Area of Freedom, Security and Justice (EU-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011.

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second-generation Schengen Information System (SIS II) databases [44], as well as the Visa Information System (VIS)[45] and the European database of asylum seekers (EURODAC)[46]. These three databases constitute the so-called *digital*

[44] EUROPEAN COMMISSION, "Schengen Information System, Migration and Home Affairs", https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-information-system_es . Regulation (EC) No. 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second-Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration, *OJ* L 381*,* 28.12.2006; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending, and Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No. 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, PE/36/2018/REV/1, *OJ* L 312, 7.12.2018. SIS II: The Schengen Information System (SIS)31 was established in 1995 and updated in 2013 and again in 2018. The SIS allows competent authorities to access it to view alerts for the purpose of refusing entry or stay in the Schengen area, or to consult alerts on missing persons and on persons or objects related to criminal offences. In 2018 it was updated again to introduce new categories of alerts -children at risk of parental abduction, entry prohibitions, people who have a return order- and to introduce new biometric data (palm prints, facial images and DNA profiles of missing people).

[45] EUROPEAN COMMISSION, "VIS Regulation", https://eur-lex.europa.eu/ES/legal-content/summary/vis-regulation.html. Council Decision of 8 June 2004 establishing the Visa Information System (VIS), (*OJ* L 213*,* 15.6.2004, and Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No. 810/2009 establishing a Community Code on Visas (Visa Code) PE/29/2019/REV/1 *OJ* L 188*,* 12.7.2019. The Visa Information System, VIS, defines the procedures and conditions for the exchange of visa data in relation to short-stay visa applications between the Member States of the European Union (EU) that have signed the Agreement and the Schengen Convention.

[46] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *OJ* L 180*,* 29.6.2013, p. 31-59. See also the recently Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests

frontier of the EU[47] and there are already authors that point out the fragility and lack of precision of these systems that require constant maintenance so that they can be reliable and credible, especially in the case of alerts –notably SIS II– and that would allow criminals and potential victims of crimes such as human trafficking or children at risk of parental abduction to be detected.

As if that were not enough, two new regulations of the year 2019 [48] add new capabilities to the EU-LISA Agency, specifically, that of interoperability between the three databases, which it already managed, although independently, in addition to incorporating three other databases that are not yet completed. The new databases are the Entry and Exit System (EES)[49], the European Travel Information and Authorization System (ETIAS)[50] and the European Criminal Records Information System (ECRIS)[51], with information on third-

for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM/2020/614 final, currently under negotiations. The legislative procedure is still on-going. Latest meeting on 20 February 2023, see Document ST_6623_2023_INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_6623_2023_INIT. Illamola Dausà, M., "EU-LISA, el nuevo modelo de gestión operativa de las distintas bases de datos de la UE", *Revista CIDOB d'Afers Internationals,* N. 111, 2015, p. 105-126.

[47] Bellanova, R. & Glouftsios G., "Controlling the Schengen Information System (SIS II): The Infrastructural Politics of Fragility and Maintenance", *Geopolitics*, 27(1), 2022, pp. 160-184 .

[48] Regulation (EU) 2019/817 establishing a framework for the interoperability of information systems in the European Union in the field of borders and visas, PE/30/2019/REV/1, *OJ* L 135, 22.5.2019, p. 27-84. Regulation (EU) 2019/818 establishing a framework for the interoperability of information systems in the European Union in the field of judicial cooperation, asylum and migration, and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, PE/31/2019/REV/1, *OJ* L 135, 22.5.2019, p. 85-135.

[49] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes and amending the Convention implementing the Schengen Agreement and Regulations (EC) No. 767/2008 and (EU) No. 1077/2011, *OJ* L 327, 9.12.2017.

[50] Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No. 1077/2011, (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, PE/21/2018/REV/1 (*OJ* L 236*,* 19.9.2018).

[51] Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralized system for the identification of Member States holding

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country nationals. The objective is to improve inspections "at the external borders of the European Union (EU), allow better detection of security threats and identity theft and help prevent and combat illegal immigration"[52]. As Tassinari[53] has stated "the interoperability Regulations n. 817 and 818 confirm the innovation of an EU border management strategy that relies increasingly on large-scale IT systems in order to: improve the efficiency of inspections at external borders; contribute to prevent and combat irregular immigration and achieve a high level of security within the Schengen area".

However, the interoperability of databases should respect and protect recognized human rights and, although this aspect should be guaranteed in all EU legislation, some challenges lie ahead. Six databases have been put together and everything seems aseptic and according to law: we have reliable data and supercomputing systems allowing us *to play* with them and increase the chances of obtaining, in principle, predictions that make our interior space safer and prosperous. It is worth asking whether this type of movement has been conveniently oriented and justified based on weighty scientific reasons or whether the European Union is simply showing itself to be extraordinarily receptive to using part of its budget to invest in the new technologies that companies offer, without taking enough time to assess the risks of their use in cases as sensitive as the identification of people, be they migrants or asylum seekers.

As Blasi Casagrán[54] shows, the interconnection of databases for police purposes does not necessarily help respecting the right to request asylum of vulnerable people. As an example, she referred to the situation of a thirteen-

conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, PE/88/2018/REV/1 , *OJ* L 135*,* 22.5.2019.

[52] EUROPEAN COMMISSION, "Interoperability of European Union information systems in the field of justice, freedom and security", https://eur-lex.europa.eu/legal-content/ES/TXT/? uri=LEGISSUM:4400468.

[53] Tassinari, F., "The Externalization of Europe's Data Protection Law in Morocco: an Imperative Means for the Management of Migration Flows", *Peace & Security-Paix et Sécurité Internationales (*EuroMediterranean Journal of International Law and International Relations), N. 9, 2021.

[54] Blasi Casagrán, C., "Fundamental Rights Implications of Interconnecting Migration and Policing Databases in the EU", *Human Rights Law Review*, Volume 21, Issue 2, 2021, pp. 433-457.

year-old Syrian boy who has managed to reach the Greek border as an unaccompanied minor. At the border, the authorities checked his passport, collected his fingerprints, and entered his personal data into the corresponding system. With the push of a button, they can verify a variety of data, despite having no criminal record. For example, border agents could find out if you have applied for asylum before, if you are actively wanted by the police and how many times you have entered the EU before (with and without a visa). Due to this interconnectivity, the system informed the border guard that the minor´s application for asylum in the EU had been denied, which left him with two possibilities, being sent back to Turkey or staying in Greece as an irregular migrant. None of them were protecting this unaccompanied minor´s human rights.

Not only within EU borders databases are interconnected to facilitate migration control at the border. In a very recent detailed study by Nalbandian[55], she clearly points out the human rights challenges in the use of AI at the border referring to its use by 1) UNHCR in its attempt to facilitate the best access to assistance to migrants and asylum seekers; 2) New Zealand´s use of algorithms to avoid "unnecessary burden in the country's external border controls" and 3) the United States in its tech-oriented migration policy that usually ends up with the deportation of undocumented migrants. The author also asserts that "even despite well-intentioned efforts, the decision to use AI as a tool to increase efficiency and support the implementation of migration or asylum management policies and programs often involves jeopardizing or altogether sacrificing individuals' human rights, including to privacy and security, and raises concerns about vulnerability and transparency".

At European level, certainly, the fight against irregular immigration seems to be well ensured with this interoperability of databases, but, although access to them is limited to cases in which "there is a well-founded suspicion that the suspect, perpetrator or victim of a terrorist offense or other serious offense is a person whose data is stored in the EES, VIS, ETIAS or Eurodac"[56], there

[55] Nalbandian, L., "An eye for an 'I:' a critical assessment of artificial intelligence tools in migration and asylum management". *Comparative Migration Studies,* Vol. 10, 2022.

[56] Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on the establishment of a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, pars. 31 and 32.

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are some difficulties for its actual application. Before, border policemen had to check national databases first, whereas now it is possible to require access to this huge, combined database when an identification was desired. Monitoring the correct use of data, on the other hand so easily accessible, turns out to be a very complex and almost impossible task. Basically, this increased connectivity of EU databases will allow more authorities to have access to the system; on the other hand, migrants/asylum seekers might be less and less capable of understanding and exercising their data subject rights[57].

On the other hand, there are several fundamental rights that could be harmed by this interoperability[58]: privacy and data protection due to the problem of the "real and foreseeable need" of these data, always in relation to the European Data Protection Regulation, discrimination against third country nationals (for example, the Regulation does not mention that the competent agent has to follow procedures that guarantee that he does not request identification based on race or color), the collection of data on children (despite the fact that it is possible from the age of 12 and not before, there are many risks associated with the way in which the data is stored and how it can negatively affect minors), and, finally, the violation of the principle of proportionality.

To conclude, the EU intends to deepen upon these risks through its research funding program HORIZON[59]. At least, it shows the need to keep

57 QUINTEL, T., "Why should we care about the Privacy of Asylum Seekers?", *EUI Migration Policy Centre Blog*, https://migrationpolicycentre.eu/data-privacy-of-asylum-seekers/.

58 BLASI CASAGRAN, C., *op.cit.* pp. 443-456. In these pages, the author fully develops this problem.

59 European Commission Decision, amending Commission Implementing Decision C(2021)1940 on the adoption of the work programme for 2021-2022 within the framework of the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation and on its financing as regards the 2022 budget. Part 6, Horizon Europe - Work Programme 2021-2022 Civil Security for Society, C (2022) 2975 final, 10 May 2022, 218 pp.

Part 6 of the Program, Civil Security and Society, describes research lines to be funded with references specifically to "Effective management of EU external borders", "Increased Cybersecurity" and a general cross-cutting one "Strengthened Security Research and Innovation (SSRI)". Synergies should be also sought with the Integrated Border Management Fund (IBMF), consisting of the Border Management and Visa Instrument (BMVI) and the Cus-

asking questions and follow up on technological developments that seemingly occur at a very fast pace and potentially harm long-standing human rights recognized within the European continent.

II. THE NEW REGULATIONS ON MIGRATION AND ASYLUM AND ARTIFICIAL INTELLIGENCE: HUMAN RIGHTS KICKED INTO THE LONG GRASS?

The EU tries to insert human rights in its management of migration and asylum, but the use of new technologies brings notable challenges, some of which we have already pointed out. In this section we will analyze whether these risks also exist in regulatory instruments that are still in the process of regulatory development by the European institutions. These are the *pre-screening* regulations that introduce the New Pact on Migration and Asylum and the proposed regulation on artificial intelligence.

1. THE *PRE-SCREENING* REGULATION

The Commission chaired by Ursula von der Leyen has tried to unblock the situation of the common asylum system within the Union, with serious difficulties in exercising the principle of solidarity between Member States and a notable delay in the integration of national asylum policies. For this, as we indicated at the beginning of this note, the so-called New Pact on Migration and Asylum of the EU, of September 2020, was developed, which tries to go beyond the existing regime to address the identification of migrants/asylum seekers from a more integral angle.

In this new proposal for a regulation[60], which would modify the previous ones, replacing them, a new border procedure is introduced, called "pre-screening" (or pre-examination), based on the apparent change in the nature of the type of people arriving in the EU, since they are no longer just third-country nationals with right to international protection, but rather "mixed

toms Control Equipment Instrument – for border capabilities; the Internal Security Fund (ISF) – for law enforcement capabilities and the Digital Europe Programme.

[60] Regulation of the European Parliament and of the Council introducing a control of third-country nationals at external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM (2020) 612 final 2020/0278 (COD), Brussels, 23.9.2020.

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migratory flows"[61]. This implies that not all people can opt for EU protection and, therefore, it is necessary to identify as soon as possible who will do so and who will have to benefit from a return process. In this way, it seems that the difference between asylum seekers and migrants is practically eliminated, since the former are equal to the latter in having to undergo this pre-examination indistinctly[62].

In principle, the proposal intends to be complementary to the Schengen Borders Code under which border procedures were already carried out. According to more critical voices, this proposal for a regulation does nothing more than "redecorate"[63] a vision of the EU 's external borders made as secure as possible and with many difficulties in being able to cross it by third-country nationals without proper documentation, including those who may be potential refugees. And it uses this term, "redecorate", because this proposal for a regulation seems to insist on the philosophy of "hot spots"[64], which for the Commission were successful in repelling massive movements towards the EU, while for the legal doctrine they were authentic fields of detention completely removed from the fulfillment of the human rights to which the EU itself had committed itself.

Legally, the proposal is somewhat ambiguous and unclear when it comes to effectively differentiating that asylum seekers must be excluded from entry procedures, since they are protected by European and international[65] border legislation. On the one hand, it is recognized[66] (par. 14 of the proposal) but,

[61] *Ibidem*, p. 1.

[62] Jakulevičienė, L., "Re-decoration of existing practices? Proposed screening procedures at the EU external borders", Thym D. (coord.), *EU Immigration and Asylum Law and Policy Blog,* October 27, 2020, https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/.

[63] *Ibidem*.

[64] Churruca, C., "La gestión humana y eficiente de la migración. Los hotspots – espacios de detención en las fronteras exteriores de la Unión Europea", in Abrisketa J. (Dir.), *Políticas de asilo de la UE: convergencias entre las dimensiones interna y externa*, Thomson Reuters-Aranzadi, Pamplona, 2021, pp 39-64.

[65] The United Nations Convention on Refugees (1951) in addition to the recognition of asylum seekers as a particularly vulnerable category by the Strasbourg jurisprudence. (MSS v Belgium and Greece *; Tarakhel v Switzerland [GC],* AS v Switzerland).

[66] Regulation of the European Parliament and of the Council introducing a control of third-country nationals at external borders and amending Regulations (EC) No. 767/2008, (EU)

on the other hand, it is clearly stated that they must submit to the procedure (Art. 3.2)[67]. This formulation seems to equate both types of migrants and cast a shadow of doubt on any third-party national in a vulnerable situation approaching an EU border. Consequently, they will find themselves scrutinized[68] by border agents, with short interviews and without the presence of personnel capable of assisting them –lawyers or social workers– and their immediate future will depend on this. In this sense, the proposal makes a brief reference to the member states "assigning adequate personnel and sufficient resources to carry out the control efficiently", mainly highlighting this last aspect and not the vulnerability of those they must "prosecute".

2. THE NEW EU REGULATION ON ARTIFICIAL INTELLIGENCE

The European Union intends to regulate Artificial Intelligence to harmonize the rules on this matter[69] in the EU territory. Certainly, this future legislation will affect both Europeans and citizens of third countries residing in the territory of the Union as well as migrants/asylum seekers. Our attention is focused on the latter, limiting ourselves to briefly describing the current situation of this legislative act, highlighting how the fundamental rights of migrants/asylum seekers could be affected.

2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM (2020) 612 final 2020/0278 (COD), Brussels, 23.9.2020: "(14) In view of the purpose of the exception referred to in Article 6(5) of Regulation (EU) 2016/399, persons whose entry has been authorized by a Member State under that provision in an individual decision they must be submitted to the control despite not fulfilling all the entry conditions".

[67] I*bidem*, art. 3.2: "Likewise, the control will apply to all third-country nationals who request international protection at border crossings or in transit areas and who do not meet the entry conditions established in article 6 of Regulation (EU) 2016/399".

[68] *Ibidem*, art. 6.6: "The control will include the following mandatory elements:
a) the preliminary health check and vulnerability assessment referred to in Article 9;
b) the identification contemplated in article 10;
c) the registration of biometric data in the appropriate databases referred to in article 14, paragraph 6, insofar as this has not already been done;
d) the security control referred to in article 11;
e) the completion of an interview form contemplated in article 13;
f) referral to the appropriate procedure referred to in article 14".

[69] Proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on artificial intelligence (artificial intelligence law) and amending certain union legislative acts, COM (2021) 206 final 2021/0106 (COD), Brussels, 21.4.2021.

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The Artificial Intelligence proposal (hereinafter referred to a Draft Act) intends to address the level of risk that the use of AI could entail, dividing them into four categories: unacceptable risk, high risk, limited risk, and minimal risk. The approach to AI within the EU has been developed through a variety of documents[70] that intend to provide trust to the Europeans when they are using these new technologies and unify rules for the internal market, allowing "to build an ecosystem of excellence in AI and strengthening the EU's ability to compete globally"[71].

Regarding migration and AI, the proposal mentions it in paragraph 39[72]:

> It is therefore appropriate to classify as high-risk AI systems intended to be used by the competent public authorities charged with tasks in the fields of migration, asylum and border control management as polygraphs and similar tools or to detect the emotional state of a natural person; for assessing certain risks posed by natural persons entering the territory of a Member State or applying for visa or asylum; for verifying the authenticity of the relevant documents of natural persons; for assisting competent public authorities for the examination of applications for asylum, visa and residence permits and associated complaints with regard to the objective to establish the eligibility of the natural persons applying for a status.

High-risk AI systems are consequently not forbidden in the field of migration, asylum and border control, but listed in Annex III of the proposal[73], being one of the circumstances under such category the use of AI based

[70] EUROPEAN COMMISSION, "White Paper on Artificial Intelligence", *op. cit.*

[71] EUROPEAN COMMISSION, "Shaping Europe´s Digital Future", https://digital-strategy.ec.europa.eu/en.

[72] Proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on artificial intelligence (artificial intelligence law) and amending certain union legislative acts, COM (2021) 206 final 2021/0106 (COD), Brussels, 21.4.2021.

[73] *Ibid.* Annex III, par. 7, p. 5.

"7. Migration, asylum and border control management:

(a) AI systems intended to be used by competent public authorities as polygraphs and similar tools or to detect the emotional state of a natural person.

(b) AI systems intended to be used by competent public authorities to assess a risk, including a security risk, a risk of irregular immigration, or a health risk, posed by a natural person who intends to enter or has entered into the territory of a Member State;

(c) AI systems intended to be used by competent public authorities for the verification of the authenticity of travel documents and supporting documentation of natural persons and detect non-authentic documents by checking their security features;

systems by public authorities in the fields of migration, asylum, and border control management. The question remains in this rapidly evolving field if it is a "closed list" or an "evolving" one. Following art. 7 of the Draft Act, the "Commission is empowered to adopt delegated acts in accordance with Article 73 to update the list in Annex III by adding high-risk AI systems where both of the following conditions are fulfilled: (a) the AI systems are intended to be used in any of the areas listed in points 1 to 8 of Annex III; (b) the AI systems pose a risk of harm to the health and safety, or a risk of adverse impact on fundamental rights, that is, in respect of its severity and probability of occurrence, equivalent to or greater than the risk of harm or of adverse impact posed by the high-risk AI systems already referred to in Annex III." Consequently, the Commission has the capacity to alter the list content if needed as it should be if human rights are to be guaranteed.

The Draft Act requires for such high-risks AI systems various requirements and limitations that translate into a procedure of control and monitoring with two stages: 1) imposing mandatory requirements on AI systems before entering the market, through the designation by Member States of a notifying authority/bodies[74] to develop a third-party conformity assessment, that leads –if positive– to the EU declaration of conformity[75]; and 2) implementing an "ex post" monitoring mechanism by market surveillance authorities and adjusted to the domain of intervention.

Once this has been obtained, the CE marking of conformity "shall be affixed visibly, legibly and indelibly for high-risk AI systems" (art. 49 Draft Act). As Raposo[76] clearly summarizes, for obtaining the CE marking, ethical conditions should be met, mainly derived from the Ethics Guidelines by the

(d) AI systems intended to assist competent public authorities for the examination of applications for asylum, visa and residence permits and associated complaints with regard to the eligibility of the natural persons applying for a status."

[74] Chapter IV of the Draft Act, NOTIFYING AUTHORITIES AND NOTIFIED BODIES, Arts. 30-39, develop the content of these two concepts.

[75] Proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on artificial intelligence (artificial intelligence law) and amending certain union legislative acts, COM (2021) 206 final 2021/0106 (COD), Art. 48, Brussels, 21.4.2021.

[76] Raposo, V.L., "Ex machina: preliminary critical assessment of the European Draft Act on artificial intelligence", *International Journal of Law and Information Technology*, Volume 30, Issue 1, 2022, pp. 88-109.

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AI High-Level Expert Group. They refer to: 1) data and data governance, 2) transparency, 3) human supervision, 4) accuracy, robustness, and cybersecurity and 5) traceability and auditability. In the framework of this Note, we will briefly focus on the issue of human oversight, as the Draft Act introduces it as a mandatory requirement for the design and development of these technologies[77]included as High Risk, such as the case of migration/asylum. This concept is mentioned in several articles of the proposal, without providing

[77] The concept as such, "human oversight" is mentioned in the Explanatory Memorandum of the AI Proposal, p. 4: "Furthermore, the proposal complements existing Union law on non-discrimination with specific requirements that aim to minimize the risk of algorithmic discrimination, in particular in relation to the design and the quality of data sets used for the development of AI systems complemented with obligations for testing, risk management, documentation and human oversight throughout the AI systems' lifecycle". See also Proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on artificial intelligence (artificial intelligence law) and amending certain union legislative acts, COM (2021) 206 final 2021/0106 (COD), Brussels, 21.4.2021.

"Art.14: *Human oversight*

1. High-risk AI systems shall be designed and developed in such a way, including with appropriate human-machine interface tools, that they can be effectively overseen by natural persons during the period in which the AI system is in use.
2. Human oversight shall aim at preventing or minimizing the risks to health, safety or fundamental rights that may emerge when a high-risk AI system is used in accordance with its intended purpose or under conditions of reasonably foreseeable misuse, when such risks persist notwithstanding the application of other requirements set out in this Chapter.
3. Human oversight shall be ensured through either one or all of the following measures:
   (a) identified and built, when technically feasible, into the high-risk AI system by the provider before it is placed on the market or put into service.
   (b) identified by the provider before placing the high-risk AI system on the market or putting it into service and that are appropriate to be implemented by the user.
4. The measures referred to in paragraph 3 shall enable the individuals to whom human oversight is assigned to do the following, as appropriate to the circumstances:
   (a) fully understand the capacities and limitations of the high-risk AI system and be able to duly monitor its operation, so that signs of anomalies, dysfunctions and unexpected performance can be detected and addressed as soon as possible.
   (b) remain aware of the possible tendency of automatically relying or over-relying on the output produced by a high-risk AI system ('automation bias'), for high-risk AI systems used to provide information or recommendations for decisions to be taken by natural persons.
   (c) be able to correctly interpret the high-risk AI system's output, taking into account in particular the characteristics of the system and the interpretation tools and methods available.

a legal definition, but referring mainly to its purpose and time of application. Lately, Obregon and Lazcoz[78] have concluded that "human oversight is underdeveloped in the European regulatory environment". Instead, they suggest using the more developed concept of "meaningful human control" that has been conceptualized in the framework of International Humanitarian Law by the Group of Governmental Experts on Lethal Autonomous Weapons Systems[79]. In doing so, they have suggested some elements that could be universally applicable in human oversight, irrespective of the field. As such, there are four elements that define the concept of "meaningful human control": 1) regarding the machine or software, it should always be technically possible for the human operator to modify parameters in the display; also, the operator must be able to paralyze or completely stop the process at any time at the sole discretion of the operator, without being prevented by the system; 2) regarding the human operator, it is required that they have a series of knowledge of a legal, ethical, technical and specific nature depending on the area in which the system operates; 3) the human operator must have "sufficient and reliable" information to be able to carry out a correct legal and ethical assessment, know the proper or erroneous operation of the device at that time, as well as the development of the mission and finally, 4) the operator must have enough time to be able to reflect and make the decision

(d) be able to decide, in any particular situation, not to use the high-risk AI system or otherwise disregard, override or reverse the output of the high-risk AI system.

(e) be able to intervene on the operation of the high-risk AI system or interrupt the system through a "stop" button or a similar procedure.

5. For high-risk AI systems referred to in point 1(a) of Annex III, the measures referred to in paragraph 3 shall be such as to ensure that, in addition, no action or decision is taken by the user on the basis of the identification resulting from the system unless this has been verified and confirmed by at least two natural persons".

[78] Obregón Fernández, A., Lazcoz Moratinos, G., "La supervisión humana de los sistemas de inteligencia artificial de alto riesgo. Aportaciones desde el Derecho Internacional Humanitario y el Derecho de la Unión Europea", *Revista Electrónica de Estudios Internacionales,* Vol. 42, 2021, pp. 1-29.

[79] GROUP OF GOVERNMENTAL EXPERTS ON LETHAL AUTONOMOUS WEAPONS SYSTEMS, 5th Meeting, Second Session of the 2023 CCW Group of Governmental Experts on emerging technologies in the area of Lethal Autonomous Weapons Systems (GGE on LAWS), https://media.un.org/en/asset/k10/k10nbzgdo8.

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to intervene or not[80]. Obregon and Lazcoz conclude that there are elements in the Commission Draft Proposal regarding human oversight that relate to these elements and that further work on the concept should be done.

Another issue to be considered human-rights vulnerable in the Draft Act is that it seems to introduce an interchangeability between the concept of migrant and asylum seeker, as there is no clear difference within the text, as we have already observed regarding the pre-screening regulation. As the Paragraph 39 concludes with the reference to the need of these AI systems in the area of migration, asylum and border control management "to comply with the relevant procedural requirements set by the Directive 2013/32/EU of the European Parliament and of the Council, the Regulation (EC) No 810/2009 of the European Parliament and of the Council and other relevant legislation", it is coherent to assert that both categories will not be considered equally, as these two Regulations don´t. However, monitoring the implementation of it by AI driven systems seems a real challenge.

Since its inception, the Draft Act has been questioned by European civil society organizations that are fighting for a human rights-based approach for AI driven systems within the EU. Thus, various organizations presented a statement in 2021 on the matter that included nine recommendations to consider[81]. The last report of the parliamentary committees within the legislative process, from April 2022[82] –a year later– does not seem to have included all its recommendations. Organized civil society has specified that there have been some improvements[83], although with nuances:

[80] *Ibidem*. For further information regarding the development of these two aspects, read the article above, specifically pp. 15-20.

[81] "An EU Artificial Intelligence Act for Fundamental Rights . A Civil Society Statement", November 30, 2021. This proposal was signed by 123 civil society organizations and indicated nine areas of intervention in this proposed regulation in order to guarantee respect for human rights.

[82] EUROPEAN PARLIAMENT, COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION, COMMITTEE ON CIVIL LIBERTIES, JUSTICE, AND HOME AFFAIRS, I Draft Report on the proposal for a regulation of the European Parliament and of the Council on harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM2021/0206 –C9-0146/2021– 2021/0106(COD)), 04-20-2022.

[83] ACCESS NOW, "EU Parliament's draft of AI Act: predictive policing is banned, but work remains to protect people's rights", May 4, 2022, https://www.accessnow.org/ai-act-

– a ban on individual risk assessment for predictive policing is added, but additional bans on location and group predictive policing, emotion recognition, and other problematic practices that undermine human rights are not included.
– the protection of fundamental rights has been improved, admitting the possibility of filing a complaint or legal remedies if AI systems have violated rights, but, on the other hand, the prohibition of remote biometric identification has not been sufficiently specified in public spaces.

An NGO platform has specified in a very recent report[84] that migrants/asylum seekers have not received the attention they should in this draft regulation. In a sentence collected by the researcher MOLNAR[85] to an emigrant in an irregular situation in Belgium, he expressed that "we are black and the border guards hate us. Their computers too". MOLNAR wants to highlight that migrants/asylum seekers are the subjects on whom these new technologies are tested, regardless of whether this will influence their human rights or not, establishing a correlation between "innovation" and "human laboratory". We have already seen AI being used to perform predictive analysis on people arriving at EU borders, using databases and other procedures that, even from a security angle, can be highly discriminatory. According to this author and several civil organizations, the proposal should be modified in the aspects already indicated, adding the inclusion of AI systems in migration control as one of the "high risk" uses (predictive systems, biometric identification, AI for surveillance and border supervision).

The regulation is still undergoing its legislative process and, despite pressure from civil society, it seems that certain conflictive aspects will not be modified. A deeper and more detailed study of the new regulation will have to be carried out once its content is final. Now, what we are faced with from the point of view of human rights are some inconsistencies and doubts.

predictive-policing/, accessed in May 2023.

[84] EDRI, "Regulating Migration Tech: How the EU's AI Act can better protect people on the move", May 9, 2022, https://edri.org/our-work/regulating-migration-tech-how-the-eus-ai-act -can-better-protect-people-on-the-move/.

[85] Molnar, P., "Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up", 2020, https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf, p. 57.

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III. CONCLUSIONS

The European Union has resorted to the use of massive data (*big data*) and artificial intelligence (AI) systems as a way of expanding its capacity to control and manage its border areas, as well as access to the territory of the Union of nationals of third states through its visa system.

To achieve the so-called *smart borders*, the European Commission supports the development of AI as it is considered a crucial instrument in the strategic development of Europe, as well as the ecological and digital agenda. The added value presented by the Union in this field is to provide a joint approach that harmonizes and gives rise to a European framework on AI. To this end, the Commission has already developed a coordinated plan on AI in 2018, revised in 202 [86], which helped lay the foundations for national strategies and policy developments.

Some risks have been identified in border management using AI, which could violate fundamental rights, as research has shown. The EU has constructed a vision of the border in both its "digital" and "physical" versions that makes use of new technologies with an approach that blames the migrant/asylum seeker for their situation, turning them into a "threat to security" and applies all kinds of "intelligent" procedures to it, propagating the vision of a *fortress Europe* that manages to mitigate migratory flows.

The use of AI by some of the EU Agencies responsible for supporting States in the management of migratory flows does not always seem to respect these fundamental principles and rights that the EU itself defends and prioritizes in its founding treaties. Both the interoperability of the different EU databases in the Area of Freedom, Security and Justice carried out by EU-LISA, as well as the predictive studies of migration create notable risks.

The latest regulatory trends with *pre-screening procedures* at the border and in the field of AI in the EU –including the proposal for a regulation currently under way– do not seem to bode well for the human rights of migrants/asylum seekers affected using these new predictive technologies. The Artificial Intelligence proposal intends to address the level of risk that the use of AI could entail, dividing them into four categories: unacceptable risk, high risk, limited risk, and minimal risk. High-risk AI systems are not forbidden in the

[86] EUROPEAN COMMISSION, "Coordinated Plan on Artificial Intelligence", COM(2021) 205 final, 04.21.2021, revised.

field of migration, asylum and border control, but listed in Annex III of the proposal. They are susceptible to being amended if needed, a positive aspect given the fast-paced development in this field.

The Draft Act includes for high-risks AI systems various requirements and limitations that translate into a procedure of control and monitoring in two stages, *ex-ante*, demanding technical and ethical requests for the producers through national agencies and *ex-post*, through monitoring.

For this reason, the European Commission has developed the Ethical Guidelines for viable AI that refer to, among other factors, "human supervision". The Draft Act introduces it as a mandatory requirement for the design and development of AI related technologies included as High Risk, such as the case of migration/asylum. Its lack of legal definition in the Act favors the use of another related concept, "meaningful human control", conceptualized in the framework of International Humanitarian Law by the Group of Governmental Experts on Lethal Autonomous Weapons Systems.

The European Union should amend aspects of the AI Draft Act that do not guarantee migrants/asylum seekers some of their fundamental rights and could enshrine discriminatory practices. AI related technologies at the border should not be linked to lack of human rights but to fair and equitable decisions on migration control. In doing so, the EU could provide a stable and human rights-based AI legal framework that guarantees industry research and development across the EU and inspire other States. Time is pressing.

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