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PRE-ENTRY SCREENING AND BORDER PROCEDURES AS NEW DETENTION LANDSCAPE IN THE EU PACT ON MIGRATION AND ASYLUM. THE SPANISH BORDERS AS A LABORATORY FOR IMMOBILITY POLICIES

Gustavo de la Orden Bosch[1]

ABSTRACT: The paper analyses the Screening Proposal presented by the European Commission as part of the New Pact on Migration and Asylum. The aim is to clarify what would be new and old in the EU's legal framework and practices at the external borders, focusing mainly on immigration detention. In particular, the study addresses possible changes and continuities in detention policies. The research conducts a legal analysis aimed at determining the level of legal certainty and identifying legal loopholes and shortcomings. In order to contrast the results of the analysis, the study focuses on the Spanish legal system on border and migration control. Specifically, the study analyses the impact of an eventual adoption of the Screening Proposal on the Spanish border detention system. As a result, the research highlights that the current detention mechanisms in Spain already fulfil the functions pursued by the screening and border procedures proposed as new in the Pact. Furthermore, the approval of the Screening Proposal would entail constitutional and legal amendments that would reduce the scope of migrants' human rights and procedural guarantees at Spanish borders. The paper argues that, if the proposal is approved, screening and accelerated border procedures still should bet a set of human rights basic standards and international obligations. The paper argues that, if the proposal is approved, screening and pre-entry border procedures still should meet a set of human rights basic standards and international obligations, according the current legal framework and the

[1] Associate researcher, Institute of Human Rights Pedro Arrupe, University of Deusto. This article is part of the research project "The European Pact on Migration and Asylum and the Mediterranean States in the post-covid context" (EURASYLUM II), financed by the Ministry of Economy and Competitiveness and the European Regional Development Fund (DER 113999RB-100), of which the author is member.

case-law of regional courts.

KEYWORDS: Screening and border procedure, New Pact on Migration and Asylum, EU borders, Detention, Spain.

EL CONTROL PREVIO A LA ENTRADA Y LOS PROCEDIMIENTOS FRONTERIZOS COMO NUEVOS DISPOSITIVOS DE DETENCIÓN EN EL PACTO DE MIGRACIÓN Y ASILO DE LA UE. LAS FRONTERAS ESPAÑOLAS COMO LABORATORIO DE LAS POLÍTICAS DE INMOVILIDAD

RESUMEN: El artículo analiza la Propuesta de Screening presentada por la Comisión Europea como parte del Nuevo Pacto sobre Migración y Asilo. El objetivo es aclarar qué hay de nuevo y de antiguo en el marco jurídico y las prácticas de la UE en las fronteras exteriores. En particular, el estudio aborda los posibles cambios y continuidades en las políticas de detención. La investigación lleva a cabo un análisis jurídico dirigido a determinar el nivel de seguridad jurídica e identificar las lagunas y deficiencias legales. Para contrastar los resultados del análisis, el estudio se centra en el ordenamiento jurídico español en materia de control fronterizo y migratorio. En concreto, el trabajo analiza el impacto de una eventual adopción de la Propuesta de Screening sobre el sistema español de detención en frontera. Como resultado, la investigación pone de relieve que los actuales mecanismos de detención en España ya cumplen las funciones que persiguen los procedimientos fronterizos propuestos como nuevos en el Pacto. Además, la aprobación de la Propuesta de Screening conllevaría modificaciones constitucionales y legales que reducirían el alcance de los derechos humanos de los migrantes y las garantías procesales en las fronteras españolas. El trabajo sostiene que, si se aprueba la propuesta, el screening y todos los procedimientos fronterizos previos a la entrada deberían seguir cumpliendo una serie de normas básicas de derechos humanos y obligaciones internacionales, de acuerdo con el marco jurídico actual y la jurisprudencia de los tribunales regionales.

PALABRAS CLAVE: Control previo y procedimientos fronterizos, Nuevo Pacto sobre Migración y Asilo, Fronteras de la UE, Detención, España.

LE CONTROLE PREALABLE A L'ENTREE ET LES PROCEDURES AUX FRONTIERES COMME NOUVEAUX DISPOSITIFS DE DETENTION DANS LE PACTE EUROPEEN SUR LES MIGRATIONS ET L'ASILE. LES FRONTIERES ESPAGNOLES COMME LABORATOIRE DES POLITIQUES D'IMMOBILITE

RESUME: L'article analyse la proposition de filtrage présentée par la Commission européenne dans le cadre du nouveau pacte sur la migration et l'asile. L'objectif est de clarifier ce qui est nouveau et ce qui est ancien dans le cadre juridique et les pratiques de l'UE aux frontières extérieures. En particulier, l'étude aborde les changements possibles et les continuités dans les politiques de détention. L'étude procède à une analyse juridique visant à déterminer le niveau de sécurité juridique et à identifier les lacunes et les insuffisances juridiques. Pour contraster les résultats de l'analyse, l'étude se concentre sur le système juridique espagnol dans le domaine du contrôle des frontières et de la migration. Plus précisément, l'étude analyse l'impact d'une éventuelle adoption de la proposition de filtrage sur le système espagnol de détention aux frontières. Il en résulte que les mécanismes actuels de détention en Espagne remplissent déjà les fonctions poursuivies par les procédures frontalières proposées comme nouvelles dans le Pacte. En outre, l'approbation de la proposition de filtrage entraînerait des modifications constitutionnelles et juridiques qui réduiraient la portée des droits de des migrants et des garanties procédurales aux frontières espagnoles. L'étude affirme que, si la proposition est adoptée, le screening et toutes les procédures de pré-entrée aux frontières devraient continuer à respecter un ensemble de normes fondamentales en matière de droits de l'homme et d'obligations internationales, conformément au cadre juridique actuel et à la jurisprudence des tribunaux régionaux.

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MOTS CLES: Filtrage et procédure aux frontières, Nouveau pacte sur l'immigration et l'asile, Frontières de l'UE, Détention, Espagne

I. INTRODUCTION

The construction of Schengen Area has meant the deconstruction of traditional European States' borders. To make this process possible, since its inception, the Schengen Area has been built upon the enforcement of strict border security and surveillance measures, mainly at the external borders. These latter have attracted most of the political and media attention, as well as the scholars' lenses. In these external areas, security concerns relate to cross-border criminality, but also and especially to the management of migratory pressure towards the European territory. In addition, Member States have been particularly wary of internal borders because of possible fraud at their asylum systems by "orbiting refugees" who engage in so-called asylum shopping, which could be facilitated by the lack of controls between Member States. Thus, despite the seemingly clear-cut distinction between external and internal, what happens on the external borders has an impact on the internal borders, and vice versa.

In addition, regardless of the practical and logical interconnection between border controls and human mobility, the legal design of the Schengen Area has been developed in the outwards of migration and asylum policies in the EU. Moreover, the inception of Schengen Area took place firstly outside the realm of the then European Community, which subsequently absorbed it in order to improve freedom of movement within the common European market. Notwithstanding the formal detachment among the Schengen Area, migration policies and the Common European Asylum System (CEAS), in practice they are closely linked. As for migration, visas entail the right to move freely all across the 27 Schengen Member States, and its legal framework is quite easy to understand: visas are granted by Member States themselves in accordance with their national legislations, although within the EU framework composed of the Schengen Border Code and the few Directives in force on migration visas and residence permits. As for asylum, the legal scenario becomes more complex due to CEAS rules. Precisely, these latter are aimed to prevent the free movement of asylum seekers across internal borders of the Schengen

Area. Implicitly, CEAS (in particular the "Dublin Regulation"[2]) has its roots in the design of Schengen, seeking to prevent secondary (and free) movements of asylum seekers.

In this realm, since the attribution of competences to the European institutions in the field of borders, migration and asylum, there have been multiple back and forth. States are particularly suspicious about the attribution of competences in areas so sensitive to sovereignty. The last step so far has been the "New European Pact on Migration and Asylum", as a new attempt of the European Commission to make a common policy on these fields a reality. After several proposals to amend migration and asylum policies in the afterwards of the so-called "refugee crisis" of 2015-2016, the European Commission presented the "Pact" as a new set of proposals in September 2020. A number of new amendment proposals were launched to the European institutions: three new regulations (a screening regulation, an asylum and management regulation, and a crisis and force majeure regulation); two amended proposals revising the asylum procedure regulation and the Eurodac regulation); three recommendations (on migration preparedness and crisis blueprint, on resettlement and complementary pathways, and on search and rescue operations by private vessels); and one guidance document (on the enforcement of the Facilitators Package).

The paper analyses one proposal of the New European Pact on Migration and Asylum, namely the "Proposal for a Screening Regulation"[3]. This proposal purports to combat and prevent irregular migration, the nutshell of the Pact. The analysis aims to clarify the impact of the proposed border control mechanisms on migrants' rights, notably those related to the functioning of the Schengen area and access to the CEAS. Specifically, the study analyses the impact of an eventual adoption of the Screening Proposal on the European immigration detention system at the external borders. The overarching question

[2] 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 (recast) (OJ L 180, 29.6.2013, p. 31–59).

[3] European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. COM/2020/612 final.

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is to what extent the Pact proposals are "new" in the face of current policies and practices deployed at some external and internal borders of the European Union (EU). To this end, Spanish borders would be specially considered in order to determine the novelty and the impact of the proposals if adopted. The question is to what extent Spanish border, migration and asylum policies would have to change or not in order to adapt themselves to the European new rules if adopted.

II. THE NEW PACT ON MIGRATION AND ASYLUM: BLURRING THE BORDERS BETWEEN MIGRATION AND ASYLUM

In September 2020 the European Commission presented the so-called "New European Pact on Migration and Asylum", consisting of a package of reform proposals. After the unsuccessful initiative deployed in 2016 for the improvement of CEAS, the Pact constitutes a broader and more comprehensive approach, covering border, migration and asylum policies. However, the different measures focus mainly on borders and their link with the asylum system. The Pact makes scarce references to regular channels of access to migration. As explained by Thym[4], while half of the proposals offer new policies, the remainder focuses on cooperation with third countries, database and expanding Frontex competences, reinforcing border procedures and mitigating the "migration crisis" at the external borders.

The initial version of the New European Pact on Migration and Asylum in 2020 is slightly innovative, though it has the particularity to strengthens the link between asylum, migration and border policy. This connection is embodied in three main measures: 1) the introduction of the "pre-screening" or pre-screening procedure, to classify persons on the move and to carry out a prior admissibility check on entry and the processing of asylum applications; 2) the expansion of border procedures beyond the external borders, so that they can be carried out even within the territory, provided that the person has presumably crossed irregularly an external border; 3) the immediate expulsion of anyone who is not entitled to access or whose asylum application is rejected

[4] Thym, D., "Never ending story? Political dynamics, legislative uncertainties, and practical drawbacks of the 'New' Pact on Migration and Asylum", in Thym, D. and Odysseus Academic Network (eds.), *Reforming the Common European Asylum System. Opportunities, pitfalls, and downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Nomos, Baden-Baden, 2022, p. 12.

in the pre-screening or other border procedure.

The aim of this section is to explore the proposal to apply pre-entry controls to any migrant irregularly crossing the EU borders (subsection 1) and to critically assess what are the novel features of this amendment and what are the continuities of current immigration control policies (subsection 2).

1. Pre-entry screening procedures at the external (and internal?) borders

Among the legislative proposals presented, the Commission launched the "Proposal for a Screening Regulation"[5] with the aim of establishing a pre-entry check on any migrant who crosses the border irregularly. The proposal leaves room for ambiguity due to some lacunae in its provisions, which is "a first indication that the Commission deliberately leaves Member States legislative and practical leeway on crucial matters"[6].

The screening is aimed to: i) all third-country nationals "apprehended in connection with an unauthorised crossing of the external border of a Member State by land, sea or air" (Art. 3), ii) those who have applied for international protection during border checks without fulfilling entry conditions, and iii) those disembarked after a search and rescue operation, before they are referred to the appropriate procedure. Also, in its initial version, the Commission has proposed to extend the screening procedure within the territory of the Member States where the third-country national is apprehended and there is no indication that the person has been subject to controls at external borders[7]. According to ECRE[8], an improvement in the Pact negotiations in the first half of 2023 is the repeal of the extension of the screening procedure within the territory.

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[5] European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders, *loc. cit.*

[6] Thym, D. "Never ending story? Political dynamics, legislative uncertainties, and practical drawbacks of the 'New' Pact on Migration and Asylum", *op. cit.*, p. 23.

[7] Proposal for a Screening Regulation, *loc. cit.*, article 5: "Screening within the territory. Member States shall apply the screening to third-country nationals found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner."

[8] ECRE - European Council on Refugees and Exiles. Weekly Bulletin, "Editorial: EU Asylum Reform: Parliament Agrees its Positions; Council Enters Wild Terrain", 28 April 2023, https://ecre.org/editorial-eu-asylum-reform-parliament-agrees-its-positions-council-enters-wild-terrain/ accessed 20 October 2023.

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Overall, the objective is to classify the person as an asylum seeker or as an irregular migrant to be immediately expelled. According to Article 1, "[t]he purpose of the screening shall be the strengthening of the control of persons who are about to enter the Schengen area and their referral to the appropriate procedures". In the case of asylum seekers, if there is a low chance of recognition, they are referred to an accelerated procedure and, in case of refusal, immediately to a rapid return procedure[9]. The objective of the screening is the identification of non-country nationals and the verification that they do not pose a threat to internal security. Likewise, the screening shall entail health checks to identify vulnerable migrants in need of health care or posing a threat to public health. In total, the set of screening procedures, at their maximum legal duration, can last for six months. In all this time the person is considered as to has not yet entered the territory.

The pre-screening procedure is extended for 5 days, for identity, health and safety checks. If there is no lawful basis for entry, the person would be transferred to the return procedure. If the person has applied for asylum and is considered a "genuine asylum seeker" (according to "objective" criteria such as nationality and country of origin), who does not pose a security threat, or because is a minor, he or she would be transferred to the ordinary asylum system. The same applies when there is little chance of readmission, regardless of whether the aforementioned "objective" criteria are fulfilled.

However, if the chances of recognition are low (on the basis of nationality, or coming from a country with less than a 20% recognition rate), or because he or she represents a security threat, the person is transferred to a fast-track asylum procedure. This special procedure lasts 12 weeks and consists of a speedy assessment of the admissibility of the application. In case of refusal, the person is transferred to the return procedure, which may be extended for a further 12 weeks.

The purpose of the identification is to take personal data, to give the chance of applying for asylum, and to determine risks to security and public

[9] The amended proposal for a Regulation on Asylum Procedure exempts unaccompanied minors and families with children under the age of 12 from asylum border procedures, unless when they are considered to be a danger to the national security or public order of a Member State (Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final, Arts. 41.5 and 41.9).

health. Based on the results of the identification, the person is transferred to the asylum or return procedure.

Similarly, asylum seekers subject to border procedures will not be allowed to enter the territory of the Member States. According to the Commission's proposal, they might be accommodated in specific "locations" situated at or in proximity to the external borders[10]. The Commission does not explicitly mention detention, but it is clear that the emphasis on the need to prevent irregular entries will induce Member States to confine all asylum seekers subject to border procedures to the same places where pre-entry checks take place. In short, the Screening Proposal reinforce detention practices within border areas.

Finally, migrants who are subject to a return border procedure may be detained in order to prevent unauthorised entry and to carry out return for the duration of the procedure, which would last for a maximum of 12 weeks. This is in addition to the 12 weeks during which the migrant has been subject to the asylum border procedure, meaning that the new external border management mechanism gives Member States the power to restrict the migrants' freedoms for a total of six months.

2. New and old legalised practices of (dis)respecting migrants' rights

In its Proposal for a Screening Regulation, the Commission aims to establish a "smooth procedure at the border, applicable to all third-country nationals moving without authorisation"[11]. From the first look, it seems as a novel mechanism in migration policy. However, the Recast Asylum Procedures Directive already foresees that Member States may provide for procedures in order to decide at the border or transit zones the admissibility of an application, made at such locations; and/or on the merits of an application.

This existing pre-entry procedure gives rise to numerous instances of de facto detention at the external borders when Member States examine applications before granting right to enter the country[12]. Secondly, the

[10] European Commission, Proposal for a Screening Regulation, *loc. cit.*, article 6.1.

[11] Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (COM/2020/609 final), 23.9.2020, p. 4.

[12] Cornelisse, G.; Reneman, M., "Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?", *European Journal Law*, Vol.

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Screening Proposal comes closer to the hotspot model[13], but without limiting it to situations of mass influx by sea or cooperation with Mediterranean coastal states[14]. Thus, the prediction of Vradis et al.[15], who argue that from 2015 onwards the hotspot system implemented a new European border regime, seems to be fulfilled.

The innovations of the Pact in the legal design of these border procedures can be summarised in two main points. Firstly, the novelty of the proposal consists in unifying identification, asylum and return procedures. Thus, the Commission seeks to ensure the outcome of the removal and to eliminate the possibility of remaining irregular after the rejection of entry or of the asylum application. In fact, the Commission now refers to the "general asylum and return system" as a whole. Secondly, this set of border procedures (pre-entry control, asylum and return) are developed under the fiction of non-entry into the territory. The novelty is due to the explicit reference to this fiction, although the border procedures set out in the Pact are similar to those already in force under Article 43 of Asylum Procedure Directive 2013/33[16].

26, No. 3-4, 2020, p. 182.

[13] Jakulevičienė, L., "Pre-screening at the border in the Asylum and Migration Pact: A paradigm shift for asylum, return and detention Policies?", in Thym, D. and Odysseus Academic Network (eds.), *Reforming the Common European Asylum System. Opportunities, pitfalls, and downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Nomos, Baden-Baden, 2022, p. 83.

[14] Campesi, G., "The EU Pact on Migration and Asylum and the dangerous multiplication of 'anomalous zones' for migration management", in Carrera, S. And Geddes, A. *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, European University Institute, San Domenico di Fisiole, 2020, pp. 195-204.

[15] Vradis, A., Papada, E., Painter, J., Papoutsi, A., *New borders: hotspots and the European migration regime*, Pluto Press, London, 2019. See also: Del Valle Gálvez, J.A., "Los refugiados, las fronteras exteriores y la evolución del concepto de frontera internacional", *Revista de Derecho Comunitario Europeo*, Vol. 55, 2016, pp. 759-777. Additionally, on the inconsistencies of migration and asylum policies regarding liberal democracies: De Lucas, J., "Déficits y falacias de la democracia liberal ante la gestión de la diversidad: El caso de las políticas migratorias y de asilo", *Deusto Journal of Human Rights*, Vol. 1, 2016, pp. 15-37.

[16] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ L 180, 29.6.2013, p. 96–116). Cornelisse, G., "Border control and the right to liberty in the Pact: A false promise of 'certainty, clarity and decent Conditions'?", in Thym, D. and Odysseus Academic Network (eds.). *Reforming the Common European Asylum System. Opportunities,*

As for the first point, the Pact unifies identification, asylum and return procedures, all carried out at external borders. This, first of all, increases the responsibility of Member States with external borders and puts even more pressure on their reception capacities[17]. Depending on each case, asylum seekers intercepted at the external border might not be directly transferred to the CEAS. According to the Commission's latest proposals, asylum seekers would be subjected to a preliminary identification procedure and health and security checks, during which they could formally submit an asylum application. Then they would be transferred to one of three procedures: a regular asylum procedure for "genuine" asylum seekers, an accelerated border procedure for "suspected" irregular migrants, or a return procedure for those whose application has been rejected. In this regard, the Screening Proposal fits properly with the general aim of the Commission of promoting border and accelerated procedures[18].

As for the second point, the proposal does not clarify where exactly the control is carried out, which causes legal uncertainty[19]. Border procedures are carried out under the legal fiction of non-entry into the territory. Thus, in the case of asylum seekers, the non-entry fiction could obstacle the activation of the Refugee Convention, because they are not formally inside the country -Convention Relating to the Status of Refugees, art. 1.A.2-[20]. It is worth noting that border procedures are not protection procedures, but classification procedures for rejection. This might provoke a delay of protection, in contradiction with the Refugee Convention. Nonetheless, the fact that the Convention renders its application conditional upon the asylum seeker being

pitfalls, and downsides of the Commission Proposals for a New Pact on Migration and Asylum, Nomos, Baden-Baden, 2022, p. 64.

[17] 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. 307–355; Abrisketa, J. "El Pacto Europeo sobre Migración y Asilo y el control previo a la entrada: ¿quid prodest?", *La Ley Unión Europea*, Vol. 106, 2022, pp. 248-291.

[18] Jakulevičienė, L. "Pre-screening at the border in the Asylum and Migration Pact: A paradigm shift for asylum, return and detention Policies?", *op. cit.*, p. 96.

[19] Abrisketa, J. "El Pacto Europeo sobre Migración y Asilo: hacia un marco jurídico aún más complejo", *op. cit.*, p. 315.

[20] Hathaway, J.C., "Forced migration studies: Could we agree just to 'date'?", *Journal of Refugee Studies*, Vol. 20, No. 3, 2007, p. 353.

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at the border or within the territory does not mean that States are entitled to instrumentalize this requirement to circumvent their international obligations. Indeed, the non-entry fiction -or any other mechanism of extraterritorial control- does not hinder the exercise of (extraterritorial) jurisdiction[21].

Furthermore, fhe fiction of non-entry into the territory does not make it clear where the procedure takes place: at the border post, in transit zones, or in detention centres. Moreover, due to the Covenant's insistence on the external dimension, it cannot be ruled out that the procedure may take place on territory outside the EU. It is not only the place of the procedure that is uncertain, but also the legal situation in which the person finds him or herself. The Commission states that migrants may be "kept"[22] at the border, without clarifying the conditions of detention, whether it is a restriction or a deprivation of liberty. In the end, this is left to the discretionary of the State. As Campesi argues: "the proposals put forward by the Commission seem to encourage member countries to multiply the sites of border enforcement, transforming EU borders into a space in which 'anomalous zones' will proliferate. This is 'a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended'"[23].

The fiction of non-entry might be in contradiction with the EU legal framework on asylum, both in force and proposed in the Pact. On one hand, as recalled by Birgit Sippel, LIBE Committee Rapporteur on the Screening Proposal[24], according with the existing Asylum Procedure Directive[25]

[21] Nagore Casas, M., "The instruments of pre-border control in the EU: A new source of vulnerability for asylum seekers?", *Paix at Sécurité Internationales*, Vol. 7, 2019, pp. 161-198.

[22] European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations, Explanatory Memorandum, 5.

[23] Campesi, G. "The EU Pact on Migration and Asylum and the dangerous multiplication of 'anomalous zones' for migration management", *op. cit.*, p. 197.

[24] Sippel, B., *Draft Report on the proposal for a regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020) 612), 15 November 2021*, LIBE - Committee on Civil Liberties, Justice and Home Affairs, 2023, https://www.europarl.europa.eu/doceo/document/A-9-2023-0149_EN.html accessed 20 October 2023.

[25] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, p. 60–95).

and the proposal for a new Asylum Procedure Regulation[26], applicants for international protection have the right to remain in the Member State's territory pending the examination of the application. In addition, the fiction collides with the provisions of the Schengen Borders Code[27], which provides that "for humanitarian reasons, or reasons of national interest or international obligations, a Member State may authorise the entry into its territory of third-country nationals who do not fulfil the conditions set out in paragraph 1" (Art. 6.5).

Not only the place of the procedure is uncertain, but also the legal situation in which the person is detained. As stated above, the Commission notes that persons may be "kept" at the border, without clarifying its conditions. In any case, this legal requirement would fit with the definition of detention of CJEU case-law: "a coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter."[28]. Ultimately, this is left to national law and allows for restrictions or deprivation of liberty.

The identification process lasts for five days, extendable for a further five days in cases of mass influxes. In addition, the handling of all border procedures can take up to 6 months, while the person is "held" or detained at the border. Likewise, according to the Proposal for a Migration and Asylum Crisis Regulation[29] (Art. 4 and 5), in the case that a mass influx of irregular arrivals would overwhelm a Member State's asylum, reception or return systems, the duration of the asylum border procedure and the return border

[26] European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM/2020/610 final).

[27] Abrisketa, J. "El Pacto Europeo sobre Migración y Asilo: hacia un marco jurídico aún más complejo", *op. cit.*, p. 317.

[28] CJEU, *FMS*, Case C-924/19, par. 223 (ECLI:EU:C:2020:367); *Commission v Hungary*, Case C-808/18, par. 159 (ECLI:EU:C:2020:1029). In the latter, the CJEU concluded that Hungary's widespread detention of asylum seekers in transit zones constituted a breach of the Procedures Directive 2013/32/EU and the Reception Conditions Directive 2013/33/EU.

[29] European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum (COM/2020/613 final).

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procedure may be extended with another 8 weeks.

In short, the Pact extends and normalises detention practices, not only in terms of time limits or space, but also in terms of the grounds for deprivation of liberty. Briefly, the Screening Proposal brings to concerns that border procedures will entail excessive use of detention[30]. In this regard, as Cornelisse explains[31], in addition to the Screening Proposal, the Proposal for a Regulation on Asylum and Migration Management[32] establishes that detention of applicants for international protection is admissible if there is a risk of absconding, removing the current requirement of a "significant" risk of absconding set out in Article 28 of the Dublin Regulation 604/2013[33].

Additionally, according to the original version of the Pact, the pre-screening process and the fiction of non-entry extends even beyond the external border[34]. This represents another chief novelty, that the new mechanism for the management of external borders would also apply to all third-country nationals apprehended within the territory of Member States, when there are evidences that they eluded border checks at the external border on entry. This means that they would be subjected to pre-border screening and the subsequent border procedures as if they had never physically entered EU territory. No time limit is set, so the border procedure could apply, for example, to a person who has been living in the EU for years. However, as stated above, according to ECRE[35], an improvement in the Pact negotiations in the first half of 2023

[30] Campesi, G., Cornelisse, G., *The European Commission's New Pact on Migration and Asylum. Horizontal Substitute Impact Assessment*, European Parliamentary Research Service (EPRS), 2021, p. 63.

[31] Cornelisse, G. "Border control and the right to liberty in the Pact: A false promise of 'certainty, clarity and decent Conditions'?", *op. cit.*, p. 67.

[32] European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, *op. cit.*

[33] 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 (recast). *OJ L 180, 29.6.2013, p. 31–59.*

[34] European Commission, Proposal for a Screening Regulation, *op. cit.*, art. 5.

[35] ECRE - European Council on Refugees and Exiles. Weekly Bulletin, "Editorial: EU Asylum Reform: Parliament Agrees its Positions; Council Enters Wild Terrain", 28 April 2023, https://ecre.org/editorial-eu-asylum-reform-parliament-agrees-its-positions-council-enters-wild-terrain/ accessed 20 October 2023.

has been the repeal of the extension of the screening procedure within the territory. Notwithstanding, the original scope of Screening Proposal confirms that, for the purposes of the Pact, border security and migration control take precedence over protection.

III. CURRENT AND EVENTUAL BORDER REALITY IN SPAIN PRE- AND POST-EVENTUAL APPROVAL OF THE SCREENING PROPOSAL: IS THERE ANYTHING NEW UNDER THE SUN?

This section analyses the mechanisms provided by the Spanish legal system to guarantee regular entry and stay in the territory by foreigners. In particular, the study will focus on detention mechanisms at external border areas. In light of the current legal framework and practices at Spanish border detention centres, the objective of this section is to determine whether the proposals of the New Pact on border procedures are innovative. Secondly, the section poses the question about what legal changes or amendments would be necessary to adapt the Spanish system to the proposals posed by the European Commission. This last question will be answered in the final conclusions.

Spain is a high-profile case study because of the diversity of Spanish geographical borders, which are both maritime and land, and extend along the south of the European continent and also the African continent, in Ceuta, Melilla and the Canary Islands. Likewise, since 2019, the so-called Atlantic route to the Canary Islands has witnessed an increase in crossings and shipwrecks, making it one of the most transited and dangerous migration routes to Europe[36].

The Spanish legal system on borders and migration has an administrative nature, i.e. it is governed by administrative law. Therefore, infringements are of the same nature and do not constitute crimes. Irregular entry or stay in the territory without the proper documentation or authorisation is not a criminal offence, but an administrative offence. Only certain conducts are qualified in the Spanish Criminal Code as "crimes against migrants", where migrants are not necessarily the perpetrators. Such offences consist of facilitating irregular migration (Criminal Code, Art. 318 bis) or hiring foreigners without a work permit (Criminal Code, Art. 311 bis).

[36] IOM – International Organization for Migration. *Missing Migrants Project*, 2023, https://missingmigrants.iom.int/ accessed 20 October 2023.

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Chiefly, Spanish Law does not provide for an offence that formally and directly criminalises irregular migration. On the contrary, entry and stay conditions, as well as those relating to non-compliance, are regulated by administrative law. However, the latter enables the implementation of mechanisms that have traditionally been implemented for criminal control. Because of their effects in restricting freedom of movement and the right to life, these administrative mechanisms could be associated with criminal control devices. The most prominent measure in this regard is the administrative detention in Detention Centres for Foreigners (CIEs, by its Spanish acronym: *Centro de Internamiento de Extranjeros*). As Brandariz & Fernández-Bessa explain, "the severity and effects of measures such as detention or expulsion, among the most serious that can be imposed in a current legal system, show that their nature is materially criminal"[37]. Such measures, as will be analysed below, consist primarily of the restriction or deprivation of the right to freedom of movement aimed at the exclusion from the territory.

1. Detention of migrants and asylum seekers at Spanish external borders

As explained above, in Spain irregular entry is not a crime, but an administrative offence. However, irregular entry triggers different mechanisms of immobility or detention, which vary according to the place of entry and the procedure carried out in each one. According to the regulation on "detention", "reception" or "care" centres, all these are part of a complex structure that is used for the identification, reception and expulsion of migrants apprehended during irregular border crossing or irregular stay in the territory. There are different types of centres depending on the function they are intended to fulfil: CIEs (*Centro de Internamiento de Extranjeros*: Detention Centre for Foreigners), CETIs (*Centro de Estancia Temporal de Inmigrantes*: Centre for Temporary Stay of Immigrants), and CATEs (*Centro de Atención Temporal de Extranjeros*: Centre for Temporary Assistance of Foreigners). CIEs and CETIs have their own regulations[38], while CATEs lacks of specific regulation and, by analogy, internal

[37] Brandariz, J.A.; Fernández-Bessa, C. "La crimigración en el contexto español: El creciente protagonismo de lo punitivo en el control migratorio", in López-Sala, A. and Godenau, D. (eds.), *Estados de contención, estados de detención: El control de la inmigración irregular en España*, Anthropos, Barcelona, 2017, p. 121.

[38] CIEs regulation is contained in: Real Decreto 162/2014, de 14 de marzo, por el que se aprueba el reglamento de funcionamiento y régimen interior de los centros de internamiento

police regulations and protocols on custody of detained persons are applied. In turn, the functionality of each centre is determined to a large extent by their geographical location, i.e. on the mainland, on the coast, in archipelagos or in the enclaves of Ceuta and Melilla.

The mechanism of deprivation of liberty by excellence is the CIE. These centres are closed facilities located in different Spanish cities. They depend on the Ministry of the Interior and their main objective is to carry out the expulsion of irregular migrants. Detention for more than 72 hours needs judicial authorization, in accordance with Art. 17 of the Spanish Constitution. The maximum duration of detention is 60 days[39].

Secondly, irregular migrants entering through Ceuta and Melilla are housed in the Temporary Immigrant Stay Centres (CETI). These centres depend on the Ministry of Inclusion, Social Security and Migration. They are open establishments for identification and reception, so there is no maximum duration of stay. However, as will be analysed, in both enclaves, migrant people could find their freedom of movement limited due to the geography of both cities and the policy of departure controls.

Thirdly, since 2018, new detention centres have been implemented, called Centres for Temporary Assistance to Foreigners -CATEs by its Spanish acronym-. These are aimed at dealing with the increase in arrivals by sea on the coasts of Andalusia and the Canary Islands. They are closed facilities for first identification and reception, that depend on the Ministry of Interior. A notable shortcoming is the lack of legal regulation. By analogy, as will be considered below, regulations on police stations are applied and people should not be detained for more than 72 hours without judicial authorization.

After outlining above the main features of CIEs, this section will focus on CETIs and CATEs, as centres specifically deployed along Spanish external borders to carry out first reception and referral procedures.

2. Detention in CETIs

Centres for Temporary Stay of Immigrants (CETI) are a special type of

de extranjeros («BOE» núm. 64, de 15/03/2014). CETIs are regulated by: Arts. 264-266, Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009 («BOE» núm. 103, de 30/04/2011).

[39] Real Decreto 162/2014, *op. cit.*, Art. 21.2.

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establishment within the public network of "migration centres", regulated by Art. 264 to 266 of the Regulation of Organic Law 4/2000 (RLOEx: *Reglamento de la Ley Orgánica de Extranjería*)[40]. The other type of establishment that compose the aforementioned network are the Refugee Reception Centres (CAR: *Centro de Acogida de Refugiados*). According to RLOEx, these migration centres pursue social integrity, carrying out tasks of information, care, reception, social intervention, training, detection of trafficking and referral. They are managed by the General Direction for Inclusion and Humanitarian Attention, within the Ministry of Inclusion, Social Security and Migration.

Amnesty International defines CETIs as centres for assistance, "with social, psychological, health, and legal assistance, and training and leisure activities, including Spanish classes"[41]. This type of centre has only been implemented in the autonomous cities of Ceuta and Melilla. The CETI of Melilla was created in 1999, with an initial reception capacity of 480 places, and in 2022 it had 782 places[42]. The CETI of Ceuta was set up in 2000 and has a capacity of 512 places after an extension in 2004. However, the number of places in both CETIs has been many times exceeded in practice, leading to situations of overcrowding[43].

According to the regulation of the public network of migration centres, reception in CETIs are both for persons seeking international protection and migrants who have irregularly entered Ceuta and Melilla, "provided that they do not possess documentation allowing them to be transferred to the mainland or a transfer authorisation from the competent authorities"[44]. People

[40] Real Decreto 557/2011, *loc. cit.*

[41] Amnistía Internacional, "¿Qué son los CETI y por qué es urgente el traslado durante la pandemia?", *Amnistía Internacional. Blog*, 14 April 2020, https://www.es.amnesty.org/en-que-estamos/blog/historia/articulo/que-son-los-ceti-y-por-que-es-urgente-el-traslado-durante-la-pandemia/ accessed 20 October 2023. Author's translation: "Los Centros de Estancia Temporal de Inmigrantes (CETI) son centros de carácter asistencial […]. Cuentan con asistencia social, psicológica, sanitaria, jurídica y actividades de formación y tiempo libre, entre las que se incluye la enseñanza del español."

[42] Data collected by the author during a visit to the CETI of Melilla in July 2022.

[43] Amnistía Internacional, "El asilo en España: un sistema de acogida poco acogedor", Report EUR4120016, Amnistía Internacional, 2016, https://doc.es.amnesty.org/ms-opac/search?fq=mssearch_fld13&fv=EUR4120016 accessed 20 October 2023.

[44] Procedimiento de gestión de plazas de los programas de acogida e integración dirigidos a solicitantes y beneficiarios de protección internacional, del estatuto de apátrida e inmigrantes

housed in the CETIs include men, women and accompanied minors, mostly from sub-Saharan African countries, and the average age is below 40 years old[45]. The facilities currently have modules for families[46].

The nature of CETIs is that of open administrative establishments, so their distinguishing feature is the regime of freedom of entry and exit during the day. Consequently, there is no maximum length of stay as CETIs are not considered technically detention centres. People remain housed until their transfer to mainland is authorised or a return order is executed. Transfer to the mainland can take months and authorisation is determined by the number of places available. According to Amnesty International, in 2016 the average length of stay in the CETI of Ceuta was of five months for irregular migrants who were not protection seekers, while the latter could stay even longer until the resolution of the admission phase of the asylum procedure[47]. In 2022, the length of stay in the CETI of Melilla ranged from one to five months[48].

Freedom of entry and exit is a substantial difference between CETIs and CIEs. In the latter, the person is at judicial disposal and the detention cannot exceed a maximum period of 60 days[49]. During this period, migrants cannot leave the centre voluntarily. They can leave it only when expulsion is enforced or the release is ordered because the return is not feasible within the maximum period of detention. In the latter case, the release is carried out but the order of expulsion and the irregular status are maintained.

Notwithstanding, in CETIs, the scope of voluntary entry and exit is reduced in practice due to the immobility regime for irregular migrants and asylum seekers in Ceuta and Melilla. On the one hand, due to the system of

vulnerables. Resolución de 16 de mayo de 2014, de la Dirección General de Migraciones, por la que se convocan subvenciones en las áreas de asilo y refugio, inmigrantes vulnerables y para la atención sociosanitaria en los Centros de Estancia Temporal de Inmigrantes de Ceuta y Melilla. «BOE» núm. 137, de 6 de junio de 2014, páginas 43192 a 43216. (author's translation).

[45] Amnistía Internacional, "¿Qué son los CETI y por qué es urgente el traslado durante la pandemia?", *loc. cit.*; Amnistía Internacional, "El asilo en España: un sistema de acogida poco acogedor", *loc. cit.*

[46] *Ibidem.*

[47] Amnistía Internacional, "El asilo en España: un sistema de acogida poco acogedor", *loc. cit.*, p. 15.

[48] Data collected by the author during a visit to the CETI of Melilla in July 2022.

[49] Real Decreto 162/2014, *loc. cit.*, Art. 21.2.

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"double control" set by the Declaration incorporated into Spain's accession to the Schengen Area[50], irregular migrants cannot travel to the peninsula or another territory of the Schengen Area by air or sea, unless the journey is made through irregular channels. On the other hand, asylum seekers in Ceuta and Melilla are currently subject to a general policy of not being allowed to move to the mainland, except when their asylum application is formally admitted (implicitly one month after the application submission) or when they are authorised (generally in conditions of overcrowding in the CETIs, or by referral to reception services of subsidised NGOs on the mainland)[51]. Thus, while irregular migrants and asylum seekers do not remain "trapped" in CETIs, their freedom of movement is restricted in practice to the perimeters of the respective Spanish enclaves. This may serve to explain why CETIs have only been set up in places where access and exit to the mainland is easily controlled by the authorities.

However, this is not the only reason, as the Canary Islands have similar geographical characteristics. The additional reason lies in the types of border in each area, land and maritime, and in the elements of segregation that are likely to be implemented in one or the other. Although Ceuta and Melilla have both land and maritime borders, irregular arrivals occur mainly by land. These arrivals are mostly prevented by fences. In contrast, arrivals to the Canary Islands take place exclusively by sea. In addition to the control carried out by the Moroccan authorities, the containment of arrivals to the islands is performed by a special surveillance maritime system called SIVE (by its Spanish acronym: *Sistema Integrado de Vigilancia Exterior*: Integrated External

[50] Instrumento de ratificación del Acuerdo de Adhesión del Reino de España al Convenio de aplicación del Acuerdo de Schengen de 14 de junio de 1985 entre los Gobiernos de los Estados de la Unión Económica Benelux, de la República Federal de Alemania y de la República Francesa, relativo a la supresión gradual de los controles en las fronteras comunes, firmado en Schengen el 19 de junio de 1990, al cual se adhirió la República Italiana por el Acuerdo firmado en París el 27 de noviembre de 1990, hecho el 25 de junio de 1991 («BOE» núm. 81, de 5 de abril de 1994, páginas 10390 a 10422), Acta final, III.1.

[51] The current policy on asylum seekers movement obeys to the case-law of the Spanish Supreme Court of 2021, which stated that immobility during the asylum procedure in Ceuta and Melilla -as the previous political criteria imposed- was illegal (Supreme Court, Administrative Chamber, Fifth Section-, Judgment num. 1128/2020 and Judgment num. 1130/2020, both of 29 July 2020; and Fourth Section, Judgment num. 173/2021, of 10 February 2021.

Surveillance System)[52], which is deployed all along Spanish coasts but does not have the capacity on its own to stop navigation (as fences do in land).

These circumstances would explain why CATEs have been installed in the Canary Islands as detention centres. Although CATEs fulfil a similar function to CETIs, as places of first reception and identification, they differ because of the type of borders where they are installed. CETIs are located on land borders, enclosed by fences, with numbers of arrivals that can be absorbed by the public network of migration centres. In contrast, CATEs have been set up since 2018 along the Andalusian and Canary Islands coasts, in circumstances different from those of Ceuta and Melilla, motivated by emergency situations due to the increase in migratory pressure in these border areas. Unlike CETIs, CATEs are deployed at maritime borders, which do not have other containment elements beyond the surveillance of maritime spaces and which, in recent years, have experienced situations of migratory pressure that have not been "absorbed" by the available resources and infrastructures.

3. Detention in CATEs

In 2017 and 2018, given the increase in arrivals on the Andalusian coasts, migrants were housed in sports centres, fish markets, warehouses and other large disused facilities, in order to proceed with identification, fingerprinting, filiation and the opening of return files. At their beginning, these makeshift spaces were called "First Assistance and Detention Centres" ("*Centros de Primera Asistencia y Detención*"). Under those circumstances of high migratory pressure, the CIEs did not represent a solution given the operational and bureaucratic difficulties involved in detention and expulsion. The poor housing conditions and overcrowding in the improvised reception areas were denounced by NGOs and the Spanish Ombudsman. As a consequence, the government opted for the de facto creation of the CATEs as a new strategy for the containment of migrants[53].

[52] On SIVE, see for instance: García Andrade, P., "Extraterritorial strategies to tackle irregular immigration by sea: A Spanish perspective", in Ryan, B. and Mitsilegas, V., *Extraterritorial immigration control. Legal challenges*, Brill, Leiden, 2010, p. 318; Léonard, S., Kaunert, C., *Refugees, security and the European Union*, Routledge, London, 2019., p. 120.

[53] Barbero, I. "Los Centros de Atención Temporal de Extranjeros como nuevo modelo de control migratorio: situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías". *Derechos y libertades. Revista de Filosofía del Derecho y derechos humanos*, Vol. 45, 2020, p. 270.

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In the case of the Canary Islands, from August to the end of November 2020, migrants disembarked in Canarias were held in police custody for several days on the floor of the Arguineguín dock in the island of Gran Canarias. During that period, the number of persons held in such conditions reached 2,600, a number that exceeds the total population of the town of Arguineguín (2,259, as of January 2021, according to data from the National Institute of Statistics -INE: *Instituto de Estadística Nacional*)[54]. Some migrants were held in such conditions for more than 20 days. The Ombudsman requested the immediate closure of the dock as a reception place[55]. The migrants were evicted and moved to a police camp in Barranco Seco, another town on the island of Gran Canaria. Initially, the camp consisted of a row of military tents which were later replaced by prefabricated modules, partly funded by the European Commission which earmarked 13.5 million euros for the reception structures. The camp was then renamed CATE. On the islands of Lanzarote and Fuerteventura, migrants were held in tents deployed in warehouses located in the ports, managed by the police. Another part of the European Commission's budget was allocated to the facilities on both islands. On Fuerteventura, the tents were replaced by prefabricated modules inside the vessels.

Thus, as of 2018, the CATE system was implemented and standardised, despite lacking a legal regulation. According to the Spanish Ombudsman, CATEs are "spaces set up by the government for the reception and initial care of persons who arrive irregularly on Spanish coasts" [56]. The status of CATEs as spaces for police detention does not allow them to be associated with CIEs, where detention takes place by a judicial order and can exceed 72 hours. Nor are they comparable to the "migration centres" regulated in Art. 264 of the RLOEx, as these compose the public network for social integration and are under the orbit of the Ministry of Inclusion, Social Security and Immigration[57].

[54] Instituto Nacional de Estadística, Population of the census on 1 January 2021 in Arguineguín, available at: https://www.ine.es/uc/C4YWkHqL.

[55] Spain. Defensor del Pueblo [Ombudsman]. *Mecanismo para la Prevención de la Tortura. Informe anual 2020*, Defensor del Pueblo, 2021, https://www.defensordelpueblo.es/wp-content/uploads/2021/06/Informe_2020_MNP.pdf, accessed 20 October 2023, p. 69.

[56] Spain. Defensor del Pueblo [Ombudsman]. *Mecanismo para la Prevención de la Tortura. Informe anual 2018*, Defensor del Pueblo, 2019, https://www.defensordelpueblo.es/wp-content/uploads/2020/10/Informe_2018_MNP_accesible.pdf accessed 20 October 2023.

[57] Barbero, I. "Los Centros de Atención Temporal de Extranjeros como nuevo modelo de

The first CATE was the one in San Roque, established in August 2018 in the port of Algeciras, in the province of Cádiz. Since then, CATEs have multiplied in coastal territories of the peninsula and in the Canary Islands: Algeciras, Malaga, Motril, Almería, Cartagena, Arrecife (Lanzarote) and Barranco Seco (Las Palmas). Some centres have mobile structures, with dismountable and mobile structures, as in the case of Barranco Seco.

The formal objective of CATEs is to provide a first reception space after disembarkation, carry out identification tasks and, depending on the case, initiate the return procedure with eventual detention in a CIE or initiate the asylum procedure and refer to the assistance and reception services of organisations with an agreement. In practice, the CATEs consist of infrastructures established as extensions of the National Police stations, consisting of the deployment of tent camps and modules. Their installation and management are under the responsibility of the Ministry of Interior. Inside them, the police carry out identification tasks and other entities provide medical care (Red Cross), information on international protection (United Nations High Commissioner for Refugees -UNHCR-) and legal assistance (Bar Associations).

Due to their location and their management by the National Police, the Spanish Ombudsman[58] considers that the CATEs are ruled by police station regulations (Instruction 4/2018, of the Secretary of State for Security), which approves the "Protocol for action in the custody areas of detainees of the State Security Forces and Corps". In addition, following Barbero[59], the rights set out in the Statute of the Detainee (Criminal Procedure Act, Art. 520) and in Art. 22 of the Organic Law on Aliens must be guaranteed during expulsion procedures: to be informed of their rights and the reasons for detention, not to testify against their will, to receive legal assistance in police and judicial proceedings, to inform a family member or other person of the detention situation and the place of custody, and not to be returned when international

control migratorio: situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías", *op. cit.*, p. 292.

[58] Spain. Defensor del Pueblo [Ombudsman]. *Mecanismo para la Prevención de la Tortura. Informe anual 2018*. *loc. cit.*, p. 64.

[59] Barbero, I. "Los Centros de Atención Temporal de Extranjeros como nuevo modelo de control migratorio: situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías", *op. cit.*, p. 295.

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protection is requested or in the case of pregnant women, minors and the sick.

According to the Spanish Constitution, detention in police stations is subject to a maximum time limit of 72 hours[60]. Once this period has expired, persons may be referred to a CIE for expulsion, or released with a return order, or, in the case of asylum seekers, they may be released with an appointment to submit a protection application or be referred to NGOs. In the latter case, the transfer is made to the so-called Emergency Reception and Referral Centres (CAED: *Centros de Acogida de Emergencia y Derivación*), managed by organizations financed and concessioned by the Ministry of Migration, Labour and Social Security.

The absence of legal regulation brings CATEs closer to the current hotspot regime, considering their common deregulated mechanisms built upon security concerns[61]. Likewise, in practice CATEs operate as classifying centres, some of them with the intervention of Frontex[62]. Furthermore, after analysing the Screening Proposal, it is worth noting that CATE system already fulfils the objectives pursued by screening and border procedures. However, as it is remarked in the conclusions of this paper, the adoption of the Screening Proposal would entail several and profound shifts in the Spanish detention system.

IV. CONCLUSIONS

There is not much new in the EU border and detention landscapes. All proposals of the EU Pact revolve around containment, immobility and expulsion of irregular migration. In other words, on the typical elements of securitization and criminalization processes, accompanied by an ambiguous legal framework and reduced procedural guarantees. Specifically, every proposal contains some form of detention and return dispositive. Immobility and expulsion are present at all stages. In particular, the Pact blurs the

[60] Spanish Constitution, Art. 17

[61] Campesi, G., "Between containment, confinement and dispersal: The evolution of the Italian reception system before and after the 'refugee crisis'", *Journal of Modern Italian Studies*, Vol. 23, No. 4, 2018, pp. 494–506.

[62] Barbero, I. "Los Centros de Atención Temporal de Extranjeros como nuevo modelo de control migratorio: situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías", *op. cit.*, p. 276.

distinction between irregular migrants and asylum seekers, which in practice is difficult to clearly differentiate. The novelty here is that the law itself blurs them. Consequently, asylum seekers are increasingly considered as subjects of detention, by their association with irregular migrants.

All these legislative proposals include new forms of detention and expulsion in the EU arena. In other words, containment, immobility and rejection, three typical elements of criminalisation, are legalised and normalised, in an ambiguous legal framework, with few procedural guarantees against arbitrariness and non-discrimination. Detention is foreseen for all procedure stages at the external borders: the pre-entry control, the transfer of asylum seekers between States, and the return of those whose applications have been rejected.

Particularly, pre-entry checks procedures are not essentially innovative, but replicate the hotspot approach. However, the Pact expands and normalizes hotspots as detention spaces. This is because, as for the Pact original version, the procedure would be applied not only at the external border but also if the migrant would be intercepted in the territory of the State. Yet, last Council negotiations has derogated this *sine die* extension of border procedures. On the other hand, the Pact normalizes hotspots because the procedure is no longer limited to mass influx crisis situations, nor to certain affected States as were the cases of Italy or Greece in 2015-2016.

Another innovation is that the procedure is carried out in a fiction of non-entry to the territory. The processing does not imply an authorization of entry. Likewise, it is not clear where the tasks take place: for example, whether they should be carried out in border checkpoints, transit zones or other special establishments. Even more, due to the Pact's insistence on the external dimension, there are doubts as to whether the procedure can take place on the territory of a third country. The main black hole would be that the pre-screening procedure could delay international protection, because of its dependency to the territory of the State according to International Refugee Law.

Nor is it clear what the legal status of the migrant is along the procedure, whether or not is actually detained. The proposal merely states that the person is "kept" at the border. Thus, the restriction or deprivation of liberty is left to the discretion of the State. Nonetheless, according to CJEU case-law analysed

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above, holding migrants under the conditions proposed will in any case entail their detention.

The Spanish scenario demonstrates that the Pact's proposals are not particularly novel. Migrants crossing Spanish borders irregularly are already detained for identification and referral. However, if the Pact's proposals were approved, the novelty would be that detention might include the fiction of non-entry into Spanish territory. Likewise, procedural guarantees would be significantly reduced.

Moreover, as the proposal would be adopted as an EU Regulation, Spanish legislation would have to be adapted through amendments to the Constitution and the Organic Law on Migration. Indeed, the Screening Proposal establishes a new form of detention during border procedures that exceeds the maximum length of "police custody" up to 72 hours according to Spanish constitutional provisions. On the other hand, regarding the material conditions of detention, the total number of detention and reception centres in Spain add up to a total of 5,000 places[63]. In 2021, only in the Canary Islands more than 22,000 people arrived irregularly. The question is whether a new kind of centres would be created or CATEs would be expanded. This could replicate the hotspot model as it has been set up in Greece and Italy.

As for the total length of detention, the Pact would extend the time up to 6 months. This would need a legal reform on the Spanish regulation of CIEs, which provides a maximum length of detention of 60 days. Likewise, although there is no maximum length of stay in CETIs located in Ceuta and Melilla (because they are qualified as "open establishments"), in practice the current average length of stay in a CETI is between one and five months. Therefore, the Pact would encompass at least one month more of stay in these reception centres.

In sum, the greatest paradox is that the implementation of the Pact in Spain would require constitutional and legal amendments in order to reduce the scope of human rights. Consequently, "new" would mean involution. Additionally, Spain usually does not expel its irregular migrants because of limited resources to execute expulsion orders[64]. So, the question would be how

[63] CEAR – Comisión España de Ayuda al Refugiado. CEAR Advocacy Department, *New Pact on Migration and Asylum: Risks and opportunities*, CEAR, Madrid, 2020. Available at: https://www.cear.es/sections-post/pacto-europeo-de-migracion-y-asilo/ accessed 20 October 2023.

[64] Brandariz, J.A., "The removal of EU nationals: An unaccounted dimension of the

could it comply with the EU Pact's accelerated return procedure?

Against this background, the EU Pact does not derogate the pre-existing legal framework, enriched by the case-law of the CJEU and the ECtHR[65]. Its implementation could be essential to preserve a standard protection of people at the borders. As for the specific realm of the Spanish borders, despite several legal incoherencies and contradictions regarding practices at the Spanish borders, the judgment of the Strasbourg Court in the case *N.D. and N.T. v Spain*[66] is of special relevance to curtail the discretionary power to intercept migrants crossing borders irregularly and expel them immediately. As posed by Carrera, counterintuitively, this ECtHR ruling is not a *carte blanche* for States to execute automatic expulsions or push backs of irregular immigrants and asylum seekers at EU external borders[67]. Likewise, the specific case-law of the Spanish Constitutional Court on expulsions, obliges the State to fulfil all the spectrum of legal guarantees before executing this extraordinary measure[68].

Basically, international protection has to be guaranteed in compliance with the Convention relating the Status of Refugees, and detention and return mechanisms should be enforced in accordance with the Directive 2008/115[69] on return and the Directive 2013/33 on reception conditions of asylum

European deportation apparatus", *Central and Eastern European Migration Review*, Vol. 10, 2021, pp. 13-33.

[65] For an analysis of European regionals courts' case-law on refugees, asylum seekers and stateless persons, see: UNHCR - United Nations High Commissioner for Refugees, *The case law of European regional courts: the Court of Justice of the European Union and the European Court of Human Rights. Refugees, asylum-seekers, and stateless persons*, 2015, 1st edition, https://www.refworld.org/pdfid/558803c44.pdf accessed 20 October 2023. For a comprehensive analysis of the ECtHR case law on detention of asylum seekers, see Ruiz Ramos, J., *Asylum detention under the European Convention of Human Rights*, Cuadernos Deusto de Derechos Humanos, Bilbao, 2022.

[66] ECtHR, Grand Chamber, *N.D. and N.T. v Spain*, Judgment of 13 February 2020 (applications n. 8675/15 and 8697/15) (ECLI:CE:ECHR:2020:0213JUD000867515).

[67] Carrera, S., "The Strasbourg Court judgment N.D. and N.T v Spain. A carte blanche to push backs at EU external borders?", *EUI Working Paper RSCAS 2020/21*, Robert Schuman Centre for Advanced Studies, Migration Policy Centre, 2020.

[68] Spanish Constitutional Court, Judgment n. 172/2020, of 19 November 2020. («BOE» num. 332, of 22 December 2020, p. 118585-118655).

[69] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98–107).

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seekers[70]. Following the criterion of the International Law Commission on the expulsion of aliens[71], beyond formal distinctions made by domestic or international legislation, measures of non-admission of aliens at borders amount to expulsion.

The fiction of non-entry cannot lead to a disguised and indirect expulsion (or so called "constructive expulsion"[72]), and must in any case respect the fundamental principle of non-refoulement (Convention relating the Status of Refugees, Art. 33.1; EU Charter on Fundamental Rights, art. 19.2), the prohibition of torture and inhumane and/or other degrading treatments (ECHR, Art. 3), and the prohibition of collective expulsions (ECHR Protocol 4, Art. 4; EU Charter on Fundamental Rights, art. 19.1). According to the jurisprudence of the ECtHR, extraterritoriality does not preclude States from being responsible for everyone's rights within their jurisdiction. As stated in *ND and NT vs. Spain*, States cannot rely on extraterritoriality to escape from the obligations of the ECHR.

Although the sovereign power of States on border controls remains indisputable, it should be complemented with "genuine and effective access to means of legal entry, in particular border procedures"[73]. The latter is one of the main contributions of the ECtHR case law to reduce rightlessness at borders. Legal means of entry are not limited to border procedures and pre-entry chekings to classify people between "genuine" asylum seekers and

[70] Directive 2013/33/EU, *op. cit.*

[71] International Law Commission (ILC), 2014 Annual Report of the ILC on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, 17, Draft articles on expulsion of aliens, para. 45. This criterion is followed by the ECtHR in its judgment *ND & NT vs. Spain*, para. 180: "the 'non-admission' of a refugee is to be equated in substance with his or her 'return' (*refoulement*), it follows that the sole fact that a State refuses to admit to its territory an alien who is within its jurisdiction does not realise that State from its obligations toward the person concerned arising out of the prohibition of *refoulement* of refugees."

[72] The ILC draft articles on expulsion of aliens, *op. cit.*, defines "disguised expulsion" as following: "Art. 10. Prohibition of disguised expulsions: For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law."

[73] ECtHR, Grand Chamber, *N.D. and N.T. v Spain*, *loc. cit.*, para. 35.

"rightless" migrants[74]. Thus, the legitimacy and effectiveness of any European Pact proposal should be dependent on the existence of legal means of entry, irrespective of whether it is forced or not. The persistent lacuna of amendment proposals in the EU is the scarcity of special provisions in this regard. States remain wary of attributing competencies in regular migration, which ensures that they retain control power within their national borders. As long as this remains unchanged, EU legislation will continue to revolve mainly around the prevention, detention and expulsion of those migrants who are constantly irregularised.

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74 CARRERA, S. "The Strasbourg Court judgment N.D. and N.T v Spain. A carte blanche to push backs at EU external borders?", *op. cit.*, p. 22: "Furthermore, while the Grand Chamber ruling could be seen as adopting a statist approach in its positioning and argumentation, its demand to states to ensuring and making accessible to individuals effective and genuine to means of legal entry – both for asylum and other purposes such as employment - gets us right into national competences' territory."

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