

**TO WHAT EXTENT DO ELEMENTS OF THE DEROGATIONS WITHIN THE
REGULATION (EU) 2024/1359 LIMIT THE RIGHT TO ASYLUM, IN RELATION TO
THE PRINCIPLE OF NON-REFOULEMENT?**

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I, the undersigned, Sofia Mashchenko, candidate for the MA degree in Human Rights declare herewith that the present thesis titled “To what extent do elements of the derogations within the Regulation (EU) 2024/1359 limit the right to asylum, in relation to the principle of non-refoulement?” is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of the work of others, and no part of the thesis infringes on any person's or institution's copyright. I also declare that no part of the thesis has been submitted in this form to any other institution of higher education for an academic degree.

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ABSTRACT

Asylum and migration have been a widely debated topic, present at the European Union's recent policies. In particular, Regulation (EU) 2024/1359, addresses the situations of crisis and force majeure situations. This thesis aims to answer the main question: to what extent do elements of the derogations within the Regulation (EU) 2024/1359 limit the right to asylum, in relation to the principle of non-refoulement? By addressing academic and legal sources available, through the comparative legal and inductive approach, it was possible to contrast the distinct frameworks' perception regarding derogations. The analytical segment of the work helped prove the initial hypothesis, that indeed the Crisis and Force Majeure Regulation, allows the states to derogate from their obligations under international refugee law and foster legal lacunas in asylum application procedure for third-country nationals or stateless persons during a situation of crisis and force majeure, in relation to Article 33. This is particularly evident in the border procedures, where the relationship between the right to asylum and the principle of non-refoulement is most visible.

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INTRODUCTION

Asylum and migration are currently dominating the political debates within the European Union. Following the results of the last election of the European Parliament and the success of right-wing parties, the hard stance on the issues has accentuated, specifically as the President of the Commission proposed to view migration ‘[...] through a security lens[...]’.²

In recent years Europe has seen a significant increase in the number of refugees and migrants coming into the continent. The statistics illustrate this phenomenon, in 2015 there were 1,216,860 asylum applications, this number significantly decreased in 2020 with the Covid-19 crisis, representing 415,235 applications.³ Scholars argue the response to the influx has not been uniform and lacked coherency.⁴ Concretely, this is evidenced through the 2015 crisis, where the European asylum framework that was in place, lacked a harmonious approach among the Member States.⁵

Furthermore, it is essential for the context to consider the Common European Asylum System (CEAS). CEAS is a normative framework that aims to harmonise the procedures amongst all member states that will be applicable to those who seek international protection.⁶ The system

² Chris Horwood and Roberto Forin, ‘Hard Winds Coming: Impacts of the EU Elections for Mixed Migration’ (*Mixed Migration Centre*, 25 July 2024) <<https://mixedmigration.org/hard-winds-coming-eu-elections/>> accessed 4 May 2025.

³ Statista, ‘Number of Applications for Asylum in the European Union from 2013 to 2023’ (8 November 2024) <<https://www.statista.com/statistics/454836/number-of-asylum-applications-in-the-eu/>> accessed 26 January 2025.

⁴ Sergio Carrera and others, ‘The EU’s Response to the Refugee Crisis’ [2015] CEPS Essay 2 <<https://www.ceps.eu/ceps-publications/eus-response-refugee-crisis-taking-stock-and-setting-policy-priorities/>> accessed 12 January 2025.

⁵ Florian Trauner, ‘Asylum Policy: The EU’s “Crises” and the Looming Policy Regime Failure’ (2016) 38 *Journal of European Integration* 312, 319 <<http://www.tandfonline.com/doi/full/10.1080/07036337.2016.1140756>> accessed 12 January 2025.

⁶ European Union Agency for Asylum, ‘2.1 The Common European Asylum System and Current Issues in Asylum Report 2020’ (January 2022) <<https://euaa.europa.eu/asylum-report-2020/21-common-european-asylum-system-and-current-issues>> accessed 4 April 2025.

creates an emphasis on the notion of ‘shared responsibility’⁷ amongst the Member States to process asylum applications in a dignified manner. Historically, Tampere Declaration (1999) played a significant role as it created a set of guidelines to regulate situations with mass incomings of third-country nationals into the Member States.⁸ Following the first five years of this system, member states implemented changes regarding the five core legislations that were at the core of the framework: ‘Recast Asylum Procedures Directive, Recast Reception Conditions Directive, Recast Qualification Directive, Recast Dublin III Regulation and Recast Eurodac Regulation’.⁹ However, as it has been mentioned, since 2015 the Common European Asylum System, faced administrative challenges that required the reform. This included redefining priority areas to address the reception of asylum seekers to establishing ‘[...] migration and border security [...]’ as new challenges.¹⁰ Consequently, in September 2020 European Commission announced its plans for the new Pact on Migration and Asylum to build a more resilient asylum system.

The new Pact on Migration and Asylum, includes a myriad of legal instruments to address the existing gap, one of them being Regulation (EU) 2024/1359. Elements of the Pact encompass measures such as: Eurodac Regulation, Screening Regulation, Qualification Regulation and Reception Conditions Directive,¹¹ amongst other instruments. The Regulation will enter into force in 2026, thus it will not be possible to see the practical aspects of how it is materialised. Nonetheless, this analysis offers a preliminary view of how Member States might apply it.

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ European Commission, ‘Legislative Files in a Nutshell’ (*Migration and Home Affairs*, 4 June 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum/legislative-files-nutshell_en> accessed 27 January 2025.

Moreover, currently within the academia there is a very limited amount of research done which addresses each element of the pact individually, outlining their potential deficiencies.

1.1 Contextualisation of the research

The research question of the thesis is: to what extent do elements of the derogations within the Regulation (EU) 2024/1359 limit the right to asylum, in relation to the principle of non-refoulement? The preliminary hypothesis is that the Crisis and Force Majeure Regulation, allows the states to derogate from their obligations under international refugee law and foster legal lacunas in asylum application procedure for third-country nationals or stateless persons during a situation of crisis and force majeure. In particular, when it comes to the reception conditions. Through a comparative legal and inductive research approach, solid theoretical and normative frameworks will be established. These will help evaluate how the Crisis and Force Majeure regulation impacts the rights migrants and refugees during crisis situations.¹² The realisation of this legislation required consultation of different EU organs.

European frameworks, such as those provided by the Council of Europe and European Union Agency for Fundamental Rights will serve as contextual basis. The 1951 Refugee Convention will be the legal reference. These will aid to understand how derogations are applied within different scenarios and allow to contextualise the derogations of Article 33 and the right to asylum in the Crisis and Force Majeure Regulation. Referring to compatibility of derogations, the contextual

¹² If those are declared.

interpretation,¹³ with the principle of non-refoulement established in the 1951 refugee convention in relation to the right of asylum, will be taken into consideration.

As recognised in the Charter of Fundamental Rights of the European Union, in Article 18, asylum is a fundamental right.¹⁴ It is, in this sense, is very closely linked to Article 78¹⁵ of the Treaty on the Functioning of the European Union which explains EU's asylum policy.¹⁶ This relationship is demonstrated through the idea that the substance of both articles refers to asylum. However, Article 78 embodies more practical obligations required from the Member States whereas Article 18 refers to the idea that asylum should be granted. Article 78 of the TFEU entails that any third-country national should be given the correct status when requesting international protection and assures the principle of non-refoulement. Musco Eklund, argues that this could lead to the establishment of two obligations a positive and a negative one.¹⁷ Firstly, an obligation to grant the correct status to a third-country national and secondly, an obligation which forbids refoulment.¹⁸ Catherine Phuong mentions that to fulfil the obligations under Article 33 of the Refugee Convention, states '[...] may be required to grant temporary admission to those claiming to be refugees [...]'.¹⁹ If the states fail to do so, they will not be abiding by their obligations.²⁰ For the purposes of this thesis, Article 18 of Charter of Fundamental Rights of the European Union, will serve as a normative

¹³ Ekaterina Baskova, Haris Delimargas and Ana Gamgoneishvili, 'Contextual Interpretation' (*Wikis der Freien Universität*, 20 November 2012) <<https://wikis.fu-berlin.de/spaces/oncomment/pages/372999125/Contextual+Interpretation>> accessed 24 May 2025.

¹⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/392 art 18.

¹⁵ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 78.

¹⁶ Amanda Musco Eklund, 'An EU Right to (Seek) Asylum: An Analysis of Whether the Right to Asylum in the EU Charter Entails a Right to Seek Asylum' (2020) 1 *Europarättslig tidskrift* 135, 140 <<https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1536183&dswid=-4264>> accessed 5 February 2025.

¹⁷ *ibid.*

¹⁸ *ibid.* See also Labayle, pp. 427–433.

¹⁹ Catherine Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers' 2 <<http://www.esil-sedi.org/english/pdf/Phuong.PDF>> accessed 4 May 2025.

²⁰ *ibid.*

contextualisation to the right of asylum and the definition that will be taken into consideration is the one provided by the European Commission further on in the study.

The right to asylum and the principle of non-refoulement are related. In essence, the right to asylum entails safety for the individual as according to the rhetoric presented by the European Parliament, for those who leave the country of their origin or habitual residence due to fears of persecution²¹ as well as admission. Henceforth, there are two significant elements that represent the two provisions, safety for the individual seeking asylum and admission.

1.2 A new way forward in EU migration and asylum policy with Regulation (EU) 2024/1359?

Having established an overview of Regulation (EU) 2024/1359 as a subject of the thesis, broad context should be viewed. This legislation addresses situations of major influx of third-country nationals into the EU. In the preamble of the Regulation, it states that this legislation aims to ‘[...] to enhance the preparedness and resilience of the Union to manage situations of crisis and to facilitate operational coordination [...]’²²

The main element for the analysis in this thesis is to study of the right to asylum in the Regulation (EU) 2024/1359. This right in the Regulation will be analysed in relation to Article 33 of the 1951 Refugee Convention. The central elements of right to asylum that will be considered are ‘safety for

²¹European Parliament, ‘Guaranteeing the Right to Asylum’ (*European Parliament*) <<https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu/guaranteeing-the-right-to-asylum>> accessed 4 April 2025.

²² Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 9.

the individual’ and ‘admission’, the obligations that come with that notion from the welcoming EU state, since the third-country national reaches its borders and the obligations that it has to the third-country national.

This EU legislation lays down concrete steps that should be taken when the migration and asylum systems of EU states are overburdened.²³ The Regulation (EU) 2024/1359, is one of many elements comprising migration law. One must conceptualise how crisis and force majeure situations are dealt with beyond the Regulation. This is an essential step to gain a holistic view of these two phenomena are viewed.

1.2.1 Crisis and force majeure in migration law

A crisis is often viewed as ‘[...] an extraordinary event leading to increased but temporal instability and uncertainty in the pre-existing status quo or perceived ‘normality’.²⁴ Indeed, this definition creates a solid base for analysis, as argued by Sahin-Mencutek and others. This requires the presence of multiple actors and multi-level governance to approach the situation.²⁵ Hence why, ‘hybrid forms of coordination’²⁶ often materialize in these instances. Significantly, this could relate to the Regulation itself, as one of the prime objectives is to address a situation of crisis, there have to be multiple approaches and actors involved. As is stated in Regulation (EU) 2024/1359 in

²³ *ibid* recital 4.

²⁴ Zeynep Sahin-Mencutek and others, ‘A Crisis Mode in Migration Governance: Comparative and Analytical Insights’ (2022) 10 *Comparative Migration Studies* 1, 2
<<https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-022-00284-2>> accessed 10 January 2025.

²⁵ Zhilin Liu and others, ‘Multi-Level Governance, Policy Coordination and Subnational Responses to COVID-19: Comparing China and the US’ (2021) 23 *Journal of Comparative Policy Analysis: Research and Practice* 204, 205
<<https://www.tandfonline.com/doi/full/10.1080/13876988.2021.1873703>> accessed 11 June 2025.

²⁶ Sahin-Mencutek and others (n 24) 2.

paragraphs 30, 31 and 36, during a situation of migratory pressure, there are multiple actors involved: the Member States, the Council, the Commission and EU Solidarity Coordinator, amongst others.²⁷

Within the scope of public international law, the legal doctrine on force majeure is applied during ‘unforeseen events.’²⁸ These could include matters that are out of the state’s control, such could be the case with hurricanes or other elements related to climate,²⁹ for instance. There should be three main elements present for a state to successfully conjure a situation of force majeure: ‘irresistibility, unpredictability, and externality.’³⁰ Relating these provisions to the context of the Regulation (EU) 2024/1359, a situation of force majeure in the field of migration may arise because of events that exceed state’s capacity to confront them.³¹

Through the conceptual framework, it’s clear how the terms ‘crisis’ and ‘force majeure’ are connected. One element that stands out is that both phenomena occur in a situation of grave uncertainty. Often these happen in circumstances that fall outside of the competence scope of state. What can be deduced is that if one of these events occur, a state will have to adapt and make the necessary changes to confront the situation.

²⁷ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1, recitals 30, 31, 36.

²⁸ Mayanna Dellinger, ‘Rethinking Force Majeure in Public International Law’ (2017) 37 Pace Law Review 458 <https://heinonline.org/HOL/Page?handle=hein.journals/pace37&div=17&g_sent=1&casa_token=&collection=journals> accessed 23 May 2025.

²⁹ *ibid.*

³⁰ Simon Hentrei and Ximena Soley, ‘Force Majeure’, *Oxford Public International Law* (2011) 4 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1042?prd=OPIL>> accessed 23 May 2025.

³¹ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 4.

1.2.2 A general overview on the term ‘derogations’

Another term that needs a thorough introduction is derogation. It is imperative to view it as the conclusions obtained will aid to identify the potential incoherences from the standards and protections set in the provisions in Article 33 of the Refugee Convention within the Regulation in question. Derogations in migration law could be perceived as legislative measures, in Italian and German cases, national security is prioritised, limiting the scope of safeguards available to third-country nationals who are in search of international protections or the ones that are ‘[...] remaining under the return procedure.’³² In this scenario a derogation within the context of the Crisis and Force majeure Regulation establishes a scheme for ‘[...] delaying asylum application registration, adapting border procedures, and introducing flexibility within the Dublin system regarding deadlines and procedures take charge requests, take-back notifications, and transfers.’³³

Derogations tend to occur in a situation of emergency which could be caused by an influx of third-country nationals.³⁴ This is seen through Article 78(3) of the Treaty of the Functioning of the European Union :

‘In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the

³² Anna Magdalena Kosińska, ‘Legal Responses in the Area of Migration Security after 2015 Migration Crisis in Italy, Germany and Poland. Whose Security Does National Law Protect: Migrants or Citizens?’ (2021) 17 *Journal of Human Security* 66, 75 <<http://www.librelloph.com/journalofhumansecurity/article/view/johs-17.1.66>> accessed 6 February 2025.

³³ Meltem Ineli-Ciger, ‘Navigating the Labyrinth of Derogations: A Critical Look at the Crisis Regulation’ (*EU Immigration and Asylum Law and Policy*, 10 June 2024) <<https://eumigrationlawblog.eu/navigating-the-labyrinth-of-derogations-a-critical-look-at-the-crisis-regulation/>> accessed 12 January 2025.

³⁴ Salvatore F Nicolosi, ‘Addressing a Crisis through Law: EU Emergency Legislation and Its Limits in the Field of Asylum’ (2022) 17 *Utrecht Law Review* 19, 23 <<https://www.utrechtlawreview.org/articles/10.36633/ulr.776/>> accessed 12 January 2025.

Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.’³⁵

This Article, as indicated by Nicolosi,³⁶ entails that in case of an emergency which comes as result of an unexpected migratory influx, EU and Member States will adopt decisions benefitting them.

1.2.3 Introduction to situation of emergency and border and reception conditions

Regulation (EU) 2024/1359, is used to determine the declaration of migration emergency. A Member State when facing a situation of influx of third-country nationals, may request authorisation to deviate from the common procedures.³⁷ Subsequently, the European Commission, will study the situation and only then formally declare a situation of force majeure or crisis, with a Commission implementing decision. There’s also a possibility for the Commission to propose a Council implementing decision.³⁸

During a situation of an emergency, deviations border and reception conditions, is where the derogations to the right to asylum, could be the most visible. Border and reception conditions, are intrinsically connected to the right of asylum, and thereby to the principle of non -refoulement.³⁹

This is addressed in the derogations chapter on the Crisis and Force Majeure Regulation.⁴⁰

³⁵ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 78(3).

³⁶ Nicolosi (n 34) 23.

³⁷ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 24.

³⁸ *ibid.*

³⁹ Galina Cornelisse and Marcelle Reneman, ‘Border Procedures in the Commission’s New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?’ (2020) 26 *European Law Journal* 181, 194 <<https://onlinelibrary.wiley.com/doi/10.1111/eulj.12382>> accessed 24 May 2025.

⁴⁰ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 ch IV.

Border and reception conditions that a third-country national may be subjected to legal uncertainties. The legal dimension established by FRA and the European Convention on Human Rights is beneficial for the contextualisation of border procedures. Indeed, concerning the duty to control European borders, states have the obligation to put in place secure border supervision, while respecting their obligations under international law.⁴¹ For instance, this could be evidenced through Article 13 of the code which states ‘EU countries have to put in place an effective border surveillance system to prevent unauthorised entry’.⁴² EU countries are under strict obligations to secure the borders, an aspect that is reflected in the New Pact on Migration and Asylum. What is more, the European Court of Human Rights has expressed the view that state parties to the Convention are given ‘undeniable sovereign right to control aliens’ entry into [...] their territory’⁴³, but simultaneously states that the respect for provisions established in the European Convention on Human Rights must be of priority for the states.⁴⁴

Additionally, in relation to limits of derogations, that could be connected to border procedures, it is necessary to make a reference regarding ‘suspending asylum in case of large numbers of arrivals’.⁴⁵ This is particularly essential, as the document elaborated by FRA highlights legal provision Under Article 15 of the European Convention on Human Rights, where states can derogate from certain provisions of the Convention, but no derogation are possible from Right to

⁴¹ European Union Agency for Fundamental Rights, ‘Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders’ 2 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf>accessed 19 May 2025.

⁴² European Union Agency for Fundamental Rights, ‘Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders’ (n 41).

⁴³ Saadi v United Kingdom [GC], No 13229/03 (ECtHR, 29 January 2008). Chahal v the United Kingdom [GC], No 22414/93, (ECtHR, 15 November 1996).

⁴⁴ Mocanu v Romania [GC] No 10865/09, (ECtHR, 17 September 2014) paras 315-326.

⁴⁵ European Union Agency for Fundamental Rights, ‘Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders’ (n 41).

life, which is established in Article two of the Convention as well as the prohibition of torture, inhuman or degrading treatment or punishment, expressed in Article 3 of the Convention.⁴⁶ Moreover, the document explicitly states, ‘The protection from refoulement is an absolute right.’⁴⁷

From an academic perspective, elements of refoulement could be evidenced through Gilbert and Bentajou’s point of view.⁴⁸ The authors rightfully point out that international protection may be denied if there are sufficient grounds to demonstrate that the third-country national is a threat to ‘national security’ or ‘public order’. Moreover, the authors point out that there are significant discrepancies in the application of the right to asylum.⁴⁹ This presents incoherences, or in other words legal lacunas, between the 1951 Refugee Convention and the EU legislation on the matter. For instance, the legislation increases and prolonged waiting times for the asylum applications to be processed in a situation of crisis.⁵⁰ This places access to the right of asylum in relation to article 33, in a situation of uncertainty. The Crisis and the Force Majeure Regulation – in particular the section which explains the derogations – , does not specify the exact and precise conditions under which the third-country nationals will be held during the waiting, hence putting them at risk at the border.⁵¹ In addition, there is no certainty that the asylum will be accepted during a situation of crisis and force majeure.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ Geoff Gilbert and Anna Magdalena Bentajou, ‘Exclusion’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (1st edn, Oxford University Press 2021) 713 <<https://academic.oup.com/edited-volume/41310/chapter/352057284>> accessed 8 February 2025.

⁴⁹ Gilbert and Bentajou (n 48).

⁵⁰ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 11.

⁵¹ The Regulation does make a reference to another legislation, Directive (EU) 2024/1346. Which could be used to provide context for the rights of third-country nationals.

The following sections of the thesis will address normative and theoretical frameworks that establish the legislative decisions that led up to the approval of the Regulation. The relation between crisis, force majeure and asylum will be discussed as well as the roles that distinct actors play within the Regulation. Chapter four will focus on assessing European frameworks, their views on derogations and contrast them with the ones present in the Regulation. Lastly, the analysis section will assess to what extent the derogations in the legislation limit the right to asylum, in relation to the non-refoulement principle.

2. NORMATIVE AND THEORETICAL FRAMEWORKS

2.1 Legislative decisions that led up to the Regulation

To analyse the provisions of the Regulation 2024/1359, it is essential to provide an overview of the legislative decisions on EU level that led up to its consolidation. With this overview it will be possible to see the essential context of the Regulation and the opinions of distinct EU organs regarding its content. The opinions that will be taken into consideration are of the European Economic and Social Committee as well as European Committee of the regions. This negotiation process cannot be seen as an isolated process, it consolidates an essential part of the new Pact on Asylum and Migration, which not only embodies the Crisis and Force Majeure Regulation but other instruments that were mentioned previously.

Examining the legislative decisions that led up to the approval of the Regulation. On the 16th September 2020, the President of the European Commission announced the New Pact on Asylum and Migration.⁵² Consequently, on the 23rd September 2020, the Commission revealed as part of the New Pact on Asylum and Migration a proposal for a Regulation regarding ‘[...] situations of crisis and force majeure in the area of migration and asylum.’⁵³ This is significant because, since the beginning EU had envisioned the Regulation and it being part of the New Pact on Asylum and Migration. In the reasoning for adoption of the Regulation, the European Union argues that it

⁵² European Parliament, ‘Crisis and Force Majeure Regulation In “Promoting Our European Way of Life”’ (*Legislative Train Schedule*, 24 January 2025) <<https://www.europarl.europa.eu/legislative-train/carriage/crisis-and-force-majeure-regulation/report?sid=8801>> accessed 12 February 2025.

⁵³ *ibid.*

specifies concrete rules for crisis scenarios when third-country nationals arrive to the territory of a Member State, putting in a precarious situation their migratory systems.⁵⁴

Taking into consideration the consultative opinion of the European Economic and Social Committee, which was issued in February 2021,⁵⁵ it is possible to note some suggestions for the advancement of the Regulation in question. In addition, EESC made a valid point to outline that the Regulation fosters an environment of ‘procedural support’ rather than ‘emergency solidarity measures’.⁵⁶ As argued, ‘[...] solidarity is undermined by bureaucratic procedures required to implement it.’⁵⁷ EESC mentions that in a situation of crisis or force majeure scenarios, states should follow the provisions of international law, fundamental rights and general principles of Union.⁵⁸ The European Committee of the Regions also issued an opinion, it made a remark to article 36 of the Regulation, where the Committee added a provision regarding unaccompanied minors. There, the CoR advocated for the rights of minors who should be relocated to Member States if they have family there, this will allow for a better implementation of solidarity mechanism and above all, the respect for the rights of the child.⁵⁹ After a round of negotiations, the Regulation 2024/1359 was adopted by the Council of the 14th May 2024.⁶⁰

⁵⁴ *ibid.*

⁵⁵ European Economic and Social Committee, ‘Opinion of the European Economic and Social Committee on: Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive 2003/109/EC and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020) 610 Final – 2020/0279 (COD)) 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 – 2020/0277 (COD))’ <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020AE5705>>.

⁵⁶ *ibid.* 6.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ European Committee of the Regions, ‘Opinion of the European Committee of the Regions – A New Pact on Migration and Asylum’ 27 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AR4843>>.

⁶⁰ European Parliament (n 52).

Significant amount consultation has gone into the formal approval of the Regulation. Whilst conducting the analysis of the legislative decisions and concretely, the opinions of European Committee of the Regions and European Economic and Social Committee – did not expressly mention the right to asylum. This evidences that asylum is not a priority at this stage.

2.2 The relation between crisis, force majeure and asylum as key terms of the Regulation

To provide an analysis of the asylum provisions it is necessary to define and study the key terms that relate to the Regulation 2024/1359: crisis, force majeure and asylum.⁶¹ With the definitions provided in this Regulation and complemented by academic literature it will be possible assess if the asylum provisions in the Regulation compatible with the ones set out in the 1951 Refugee Convention, specifically Article 33.

Establishing one of the most crucial concepts of this thesis, asylum. As defined by the European Commission asylum is:

‘A form of protection given by a State on its territory, based on the principle of non-refoulement and internationally or nationally recognised refugee rights and which is granted to a person who is unable to seek protection in their country of citizenship and / or residence, in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.’⁶²

⁶¹ The term asylum is not expressly defined in the Regulation 2024/1359, however, since it is a key aspect of this study, there needs to be a section dedicated to its definition and meaning.

⁶² European Commission, ‘Asylum’ (*EMN Asylum and Migration Glossary*) <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/asylum_en>accessed 12 February 2025.

This definition was chosen as it comes directly from the European Union and expressly mentions the principle of non-refoulement, creating a clear link with asylum as concept. Significantly, this re-establishes a crucial fact, the right to asylum and the principle of non-refoulement are connected. From looking at this definition there is almost a reciprocal relationship between the definition and the principle, which once again reinforces the need to study and evaluate them together.

Analysing the definition of crisis in the Regulation 2024/1359, where the definition of crisis situation is displayed in two parts, it is categorised as:

- a) ‘an exceptional situation of mass arrivals of third-country nationals or stateless persons in a Member State by land, air or sea[...] that it renders the Member State’s well-prepared asylum, reception, including child protection services, or return system non-functional, including as a result of a situation at local or regional level, such that there could be serious consequences for the functioning of the Common European Asylum System; or
- b) a situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State,[...]’⁶³

Taking into consideration specific parts of the definition it is worthwhile noting that there’s a specific differentiation between the ‘[...] mass arrivals of third country nationals or stateless persons in a Member State[...]’ and ‘[...] a situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State with the aim of destabilising the

⁶³ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 1(4).

Union [...]’.^{64 65} Particularly, the most significant difference that can be observed, is that in the instrumentalization there is an active involvement of a nation outside of the EU, which utilises third-country nationals as a tool for their own agenda. Instrumentalisation has been on European Union’s agenda for quite some time now. Thus, is evidenced through Iris Goldner Lang’s reasoning, where she points out that instrumentalization is ethically incorrect and could play a very significant role in migration regulation within the EU migration and asylum framework.⁶⁶ Moreover, the author argues that such emphasis on instrumentalization comes as result of the occurrences involving third-country nationals at the borders with countries outside of the EU.⁶⁷

There are certain incoherences about how the EU approaches instrumentalisation, indeed disregarding the genesis of the definition of this term to support its policy interests. This could be viewed Goldner Lang’s point of view, the EU institutions strongly condemn the use of refugees and third-country nationals by non-member states for their own political purposes. Analysing the situation from a distinct perspective, the EU describes the arrival of third-country nationals as a threat to its security, which contradicts the ‘guaranteeing people’s rights’ approach that the EU traditionally aims for, concretely with its New Pact on Asylum and Migration.⁶⁸

⁶⁴ *ibid.*

⁶⁵ Even though the situations of crisis in migration law have been described in the “Introduction” section, that only offered a general point of view. Therefore, to assure a successful and critical analysis of the right to asylum in the Regulation 2024/1359, it is vital to analyse the definition of crisis in this context.

⁶⁶ Iris Goldner Lang, ‘Instrumentalisation of Migrants: It Is Necessary to Act, but How?’ (*EU Immigration and Asylum Law and Policy*, 15 October 2024) <<https://eumigrationlawblog.eu/instrumentalisation-of-migrants-it-is-necessary-to-act-but-how/#:~:text=According%20to%20the%20Regulation%2C%20a,Union%20or%20a%20Member%20State%2C>> accessed 16 February 2025.

⁶⁷ *ibid.*

⁶⁸ European Commission, ‘What Is the Pact on Migration and Asylum?’ (*Migration and Home Affairs*, 21 May 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 26 April 2025.

Firstly, having determined why it was crucial for the EU to include the term ‘instrumentalisation’ in its crisis situations definition, it is possible to reach certain conclusions. Even though “mass arrivals of third-country nationals or stateless persons” and ‘instrumentalisation’ of third-country national by a hostile state, do seem different there is one denominator in common: third-country nationals. Whose rights will inevitably be affected. This does not seem to be included in the crisis situation definition. Moreover, the definition lacks a critical perspective from the EU itself, where it fails to realise that their own migration structures and systems are not as well equipped. Further in a situation of crisis or instrumentalisation, the structures within a Member State may experience shortcomings or become overwhelmed to process the asylum applications that they are faced with as could be seen in paragraph four of the preamble in the Regulation.⁶⁹ In these circumstances of mass influx of asylum seekers the Member State might not be able to process all the asylum applications as seen in recital 12.⁷⁰ When facing a situation of instrumentalization, as seen in recital 14 of the preamble, third-country national or a stateless person may request protection at the external border or in a transit of a member state.⁷¹ This situation may result in an increase of asylum applications, and cause derogations to certain asylum procedures, such as the border procedure, as seen in recital 24 of the preamble.⁷²

Secondly, regarding force majeure situations, the definition provided in the Regulation is the following:

⁶⁹ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 4.

⁷⁰ *ibid* recital 12.

⁷¹ *ibid* recital 14.

⁷² *ibid* recital 24.

‘force majeure refers to abnormal and unforeseeable circumstances outside a Member State’s control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations under Regulations (EU) 2024/1351 and (EU) 2024/1348.’⁷³

With the established definition of force majeure situations in some ways there are certain similarities between a situation of crisis and force majeure. For instance, both definitions refer to environments of uncertainty, in the case of a crisis the Regulation alludes to ‘[...] exceptional situation [...]’⁷⁴ and in the case for force majeure the Regulation refers to ‘[...] abnormal and unforeseeable circumstances [...]’.⁷⁵ Viewing in further detail this aspect, the two definitions also allude to the idea that these situations will foster an aspect of hindering the working of a system with the EU structure or Member State’s own. In the case of crisis situation this could be evidenced through the mention of ‘[...] serious consequences for the functioning of the Common European Asylum System[...]’⁷⁶ and referring to instrumentalisation, this could be seen by the definition’s explicit referral to ‘[...] with the aim of destabilising the Union or a Member State[...]’.⁷⁷

However, when defining a force majeure situation, the Regulation refers to other legislative documents where certain obligations for Member States are established and during these abnormal circumstances a Member State does not have to comply with obligations set out in Regulations 2024/1351 and (EU) 2024/1348. The new system for migration and asylum within the EU has crafted a system where in times of crisis, or situations deemed as so Member States a free from

⁷³ *ibid* 1(5).

⁷⁴ *ibid* 1(5)(a).

⁷⁵ *ibid* 1(5)(b).

⁷⁶ *ibid* 1(5)(a).

⁷⁷ *ibid* 1(5)(b).

compliance with their obligations, creating space for potential legal lacunas, such could be the case with ‘[...] cessation of the border procedure for specific categories of applicants.’⁷⁸ Thereby, the right to asylum for persons seeking international protection will be put in jeopardy, reinforcing the initial hypothesis.

2.3 Contextualisation of the right to asylum, the possible derogations and its application in the New Pact on Asylum and Migration

It is necessary to differentiate asylum from refugee status. When, referring to refugee status, it is usually attributed to a certain group of individuals who benefit from concrete protections.⁷⁹ As a general principle of international law, Maria Teresa Gil-Bazo, further establishes that the right to asylum is ‘the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it [...]’⁸⁰ Through the analysis of the very clear differences between refugee status and asylum, it is necessary to exemplify what does the right to asylum entail. Key elements of this right will be clarified, hence its relationship with Article 33 of the Refugee Convention will be further perceived better.

Further considering the elements that the right to asylum entails, is the principle of prohibition from refoulement, which is represented in Article 33 of the 1951 Refugee Convention. Nanda Oudejans

⁷⁸ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 24.

⁷⁹ MT Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27 International Journal of Refugee Law 3, 4 <<https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/eeu062>> accessed 17 February 2025.

⁸⁰ ‘Institute of International Law: Resolutions Adopted at Its Bath Session, September 1950’ (1951) 45 American Journal of International Law 15, art 1 <https://www.cambridge.org/core/product/identifier/S0002930000228145/type/journal_article> accessed 8 March 2025.

in her article ‘What is asylum? More than protection less than citizenship’ mentions how the right to asylum is intrinsically linked to Article 33.⁸¹ In international law there is no explicit provision to grant asylum, the states are still obliged to apply principle.⁸² In the 1951 Refugee Convention, Article 33, concretely section 1 is expressed as the following:

‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’⁸³

This means that countries should not be sending the asylum seeker back to a place where they are faced with persecution⁸⁴. This principle also obliges the states to grant the person a fair pathway to the asylum procedures and embodies a ‘negative duty’ upon the receiving state not to turn them down at the border⁸⁵.

Relating the right to asylum and Article 18, specifically section 1 of the EU Charter of Fundamental Rights it is possible to see very clear congruences, thus helping contextualise better Article 33 of the Refugee Convention. There is a connection between the two provisions, Article 18 establishes the ‘embodiment’ within the EU fundamental rights framework already taking into consideration the non-refoulement principle established by the Article 33. It is also worth mentioning that non-

⁸¹ Nanda Oudejans, ‘What Is Asylum? More than Protection, Less than Citizenship’ (2020) 27 *Constellations* 524, 527 <<https://onlinelibrary.wiley.com/doi/10.1111/1467-8675.12521>> accessed 8 March 2025.

⁸² Phuong (n 19) 2.

⁸³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33(1).

⁸⁴ Oudejans (n 81) 527.

⁸⁵ Oudejans (n 81).

refoulement plays a very significant role in international law,⁸⁶ hence it may be binding to the countries that are not even part to the Convention. Nonetheless, in both cases all EU members are bound by the provisions within the two articles.

However, it is essential to consider the overall essence of the Article 18 to visualise the potential derogations presented in the Regulation. Article 18 states: ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’⁸⁷. The right to asylum is expressly mentioned in Article 18. Further elaborating, regarding the scope of the article, Madalina Moraru argues that there are no exact normative provisions in the Article.⁸⁸ Moreover, this view is supported by Tobias Lock, this Article provides a practical aspect to the provisions established in the 1951 Refugee Convention.⁸⁹ Nonetheless, he also established the fact that it is also up to the individual member states to decide if they wish to increase the scope of protections guaranteed by the article. Lastly, the author clarifies a symbiotic relationship between the right to asylum and Article 33⁹⁰. This notion reinforces the idea mentioned previously, the fact that right to asylum embodies guarantees and safety from the welcoming states.

⁸⁶ Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, ‘The Principle of Non-Refoulement—Part 1’ in Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 246 <<https://academic.oup.com/book/56033/chapter/475037073>> accessed 9 June 2025.

⁸⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/392 art 18.

⁸⁸ Madalina Moraru, ‘The EU Fundamental Right to Asylum In Search of Its Legal Meaning and Effects (Pre Print Version)’ in Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (CUP 2019) 139–158

<https://www.researchgate.net/publication/354167581_The_EU_Fundamental_Right_to_Asylum_In_Search_of_its_Legal_Meaning_and_Effects_pre_print_version>accessed 10 March 2025.

⁸⁹ Tobias Lock, ‘Article 18 CFR’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2153–2155 <<https://doi.org/10.1093/oso/9780198759393.003.538>>accessed 10 March 2025.

⁹⁰ Lock (n 89).

In relation to European Court of Human Rights and its provisions on derogations, it is essential to take them into consideration as they will provide a significant additional information for the study, to understand better the derogations within the Crisis and Force Majeure Regulation. It is beneficial to view Article 15 –derogation in time of emergency– of the European Convention on Human Rights.⁹¹ This provision allows the States party to the Convention to derogate from ensuring certain rights and freedoms to their population.⁹² Nonetheless, there are some limitations to this provision: the derogations can be applied in times of war or ‘threatening the life of a nation’, the derogations from the Convention rights have to be tailored to the concrete emergency, the derogations have to be coherent with State’s obligation under international law.⁹³

Through the development of the relationship between right to asylum and Article 33 of the Refugee Convention it is possible to deduce the following conclusions for these normative and theoretical frameworks. Article 18 of the Charter of Fundamental Rights of the EU is the normative embodiment of the right to asylum, however it was essential to analyse it for the necessary context to better conceptualise Article 33.

Scholars argue that Article 18 lacks concrete legislative provisions, inevitably leaving some scope for interpretation to the Member States. Right to asylum should be analysed in conjunction with Article 33 of the 1951 Refugee Convention in order to have a more precise view of the right. In addition, relevant mechanisms, such as those within ECHR, should also be taken in consideration as they establish a relevant framework on derogations which could be comparable to those

⁹¹ Press Unit (European Court of Human Rights), ‘Factsheet-Derogation in Time of Emergency’ 1 <https://www.echr.coe.int/documents/d/echr/FS_Derogation_ENG> accessed 30 April 2025.

⁹² *ibid.*

⁹³ *ibid.*

derogations in the Crisis and Force Majeure Regulation. Article 18 of the EU Charter of Fundamental Rights as well as the derogation structures provided by ECHR.

The pact's aim is to control migration and foster a common asylum system, that represent the EU values.⁹⁴ With a multi-level governance approach, the approval of the European Council and the Parliament, on the 11 June 2024 the new Pact had entered into force. This new legislative measure aims to '[...] secure external borders [...]' with mechanisms such as '[...] crisis protocols and action against instrumentalization [...]'.⁹⁵ Solidarity, responsibility and the inclusion of migration in international cooperation appear to be at the core of the Pact.⁹⁶ These are 'the four pillars' that constitute this new Pact. The Regulation (EU) 2024/1359 on Crisis and Force Majeure situations, is playing a major role in the new migration and asylum regulations within the European Union.⁹⁷ It creates a framework for crisis management, that inevitably benefits Member States and to a certain extent curtails the rights of third country-nationals who are in search of asylum and protection.⁹⁸ Nonetheless, the official EU sources clarify, that asylum seekers will benefit from legal counselling and more effective asylum procedures.⁹⁹

Already scholars have been arguing that the New Pact on Migration and Asylum has certain deficiencies. According to Philippe De Bruycker, the 'solidarity' element within the Pact is presenting a great degree of flexibility, particularly in the field of how they deal with third-country

⁹⁴ European Commission 'What Is the Pact on Migration and Asylum' (*Migration and Home Affairs*, 21 May 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en>.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ European Commission, 'Legislative Files in a Nutshell' (*Migration and Home Affairs*, 4 June 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum/legislative-files-nutshell_en> accessed 16 March 2025.

⁹⁸ This point will be further discussed and elaborated in the following chapters.

⁹⁹ European Commission, 'Legislative Files in a Nutshell' (n 97).

nationals.¹⁰⁰ On one hand States offer relocation and on the other hand sponsorship to return to their country of origin.¹⁰¹ The ‘sponsorship’ element lacks the ‘safety’ component for the asylum seeker as is described in Article 33 of the Refugee Convention. Another argument, which demonstrates the limitation of rights within the New Pact is the idea presented by Carmen González Enríquez, one of the few things that reached a certain consensus was the idea of securing borders and allowing less option to request asylum.¹⁰² Her argument, reinforces the thesis alluded by De Bruycker and it is possible to conclude that even though the official EU sources depict the Pact as an instrument to consolidate the rights of those seeking asylum, the scholars however, find certain deficiencies.

2.4 Purpose and objectives of the Regulation

Regulation (EU) 2024/1359 is part of the New Pact on Asylum and Migration. As is stated in recital three of the Regulation, and complements the Council Directive 2001/55/EC.¹⁰³ This Directive, outlines the criteria regarding the temporary protection of third-country nationals, that Member States should follow in the event of mass influx of displaced persons.¹⁰⁴ These two work in unison to address mass influx of individuals into the EU. The main objective of the Regulation is to improve

¹⁰⁰ Philippe De Bruycker, ‘The New Pact on Migration and Asylum: What It Is Not and What It Could Have Been’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos Verlagsgesellschaft mbH & Co KG 2022) 35 <<https://www.nomos-elibrary.de/index.php?doi=10.5771/9783748931164-33>> accessed 15 March 2025.

¹⁰¹ *ibid* 36.

¹⁰² Carmen González Enríquez, ‘The EU Pact on Migration and Asylum: Context, Challenges and Limitations’ (*Real Instituto Elcano*, 28 May 2024) <<https://www.realinstitutoelcano.org/en/analyses/the-eu-pact-on-migration-and-asylum-context-challenges-and-limitations/>> accessed 15 May 2025.

¹⁰³ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 3.

¹⁰⁴ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L212/12.

EU's to emergency migratory events, such as crisis and force majeure by creating an enhanced legal framework that fosters solidarity and shared responsibility among Member States.¹⁰⁵

The objectives of the Regulation mention the idea that if other instruments such as Regulation (EU) 2024/1351 as well as Regulation (EU) 2024/1348 of the European Parliament are insufficient to mitigate a situation of instrumentalisation of migrants, a force majeure event or a mass influx of third-country nationals, the Regulation (EU) 2024/1359 has the necessary provisions to improve the preparedness.¹⁰⁶ The text emphasises on the idea of solidarity and sharing of responsibility amongst Member States in application of relevant asylum provisions to manage situations of crisis and force majeure.¹⁰⁷

According to scholar, Evangelia Tsourdi in 'Solidarity in EU asylum policy: From an emergency-driven approach to the fair sharing of responsibility', solidarity is a bidding notion that is entrenched in the EU treaties.¹⁰⁸ The author places in evidence that Article 80 of TFEU, where it is stated that 'The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility,[...]'.¹⁰⁹ She also implies that the notion of '[...] sharing responsibility [...] goes beyond the mere 'solidarity', it requires the Member States

¹⁰⁵ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 3.

¹⁰⁶ *ibid* recital 5.

¹⁰⁷ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 6.

¹⁰⁸ Evangelia (Lilian) Tsourdi, 'Solidarity in EU Asylum Policy: From an Emergency-Driven Approach to the Fair Sharing of Responsibility', *Challenge Europe: Yes, we should! EU priorities for 2019-2024*, vol 24 (2019) 87 <https://www.epc.eu/content/PDF/2019/Article_10.pdf>accessed 19 April 2025.

¹⁰⁹ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 80.

to to mutually support one another.¹¹⁰ This will help avoid unequal burdens.¹¹¹ Applying this principle to the context of asylum and migration Tsourdi, emphasises that to achieve the full sharing of responsibility and solidarity in the event of a mass influx of third-country nationals, there has to be a ‘perspective’ element, laying down criteria. In other words, EU asylum policy should operationalise solidarity and sharing of responsibility, rather than limit these notions in a migratory context only to crisis or force majeure situations.¹¹²

Article 1 of the Regulation, gives an overview of the measures that will be implemented during exceptional situations.¹¹³ In its recital 13, that if those exceptional situations do materialise, the Member State already should have in place measures of coordination between national asylum and migration systems, to ensure effective response to the influx of citizens coming from third countries.¹¹⁴ These temporary measures within the context of the Regulation could be referenced to as derogations, which could curtail the rights of third-country nationals.¹¹⁵ In concrete, the right to asylum.

The main objectives of the Regulation, lay down the necessary provisions to improve the preparedness of Member States during situations of crisis.¹¹⁶ However, through an overview the

¹¹⁰ Tsourdi (n 108).

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 1.

¹¹⁴ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 13.

¹¹⁵ *ibid* recital 21.

¹¹⁶ *ibid* recital 5.

right to asylum of third-country nationals or stateless persons may be curtailed, during the border procedures, to which these individuals are subjected.

3. ANALYSIS OF THE REGULATION; EU ORGANS AND MEMBER STATES

To provide an analysis, regarding the derogations to the right of asylum, in relation to Article 33 of 1951 Refugee Convention is beneficial to outline general aspects of Regulation (EU) 2024/1359. This section will generally address the purpose of the Regulation, what roles do EU and other relevant organs play in the Regulation and what are the Member State obligations. With this in mind, establishing clear roles of EU Member States and Organs, from an analytical perspective, will give a deeper understanding of the preliminary hypothesis.

3.1 Member State roles in the Regulation

Member States play an active role and are subjected to certain obligations under this Regulation. By giving an overview of the concrete Member States' responsibilities, it will be possible to gain an insight into what could be implications once the Regulation comes into force, especially what are their capabilities within the derogations.

Member States are at the prime subjects of the legislation as they are the ones taking on a crisis situation. This is seen through the explicit mention of the possibility for the Member States to apply Article 78(3) of the Treaty on the Functioning of the European Union,¹¹⁷ which in its paragraph three concerns the application of provisional measures in a crisis situation.¹¹⁸ Additionally, this Regulation ensures a symbiotic relationship between the Union and individual States.¹¹⁹ This could

¹¹⁷ *ibid* recital 11.

¹¹⁸ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 78(3).

¹¹⁹ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 6.

be evidenced in paragraph six, where it states that both entities should have the legal tools to mitigate a situation of migratory influx, as well as create a necessary balance between the efforts of all member states.¹²⁰

Even though, the Regulation states that Member States' asylum and migratory systems, as well as their financial resources should be able to manage unforeseeable circumstances that threaten national security appropriate actions should be taken by the State.¹²¹ When faced with these scenarios, a State could apply for a permission –to relevant EU organs– to implement derogations as well as, solidarity measures. Referring to the latter, an affected state has the possibility to request those from other Member States.¹²² From an analytical perspective this aspect, fosters cooperation between the Member States. The need for solidarity is reinforced through the idea that Member States who, due to their geographic position encounter themselves in a situation where they might face an elevated number of asylum seekers.¹²³ It is within their interest to encourage solidarity measures with other states that perhaps do not face the same migratory challenges.¹²⁴ States may also engage in burden-sharing practices, that promote security and stability, hence creating a possibility for a safer environment for those seeking asylum.¹²⁵

The latter aspect of a request is further developed in Article 2 of the Regulation denominated “Reasoned request by a Member State”.¹²⁶ There, once again, it is emphasised that if a Member

¹²⁰ *ibid.*

¹²¹ *ibid* recital 4.

¹²² *ibid* recital 31.

¹²³ Iris Goldner Lang, ‘Is There Solidarity on Asylum and Migration in the EU?’ (2013) 9 Croatian Yearbook of European Law & Policy 1, 9 <<https://hrcak.srce.hr/114177>>accessed 25 May 2025.

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 2(1).

State, encounters itself in a situation that is a crisis or a force majeure, it is allowed to submit a request to the Commission to benefit from solidarity measures.¹²⁷ According to the legislative text will allow for a better management of the mass influx of third-country nationals.¹²⁸

The Regulation makes a reference to Regulation (EU) 2024/1351, which indicates that it is not the responsibility to go beyond the national capabilities.¹²⁹ However, the Regulation's text goes on to further establish that in a situation of crisis it is a possibility, that during the implementation of the Solidarity Response Plan, Member States that are involved could potentially examine more international protection applications that fall outside of their scope of capabilities.¹³⁰ When these events occur, Member States might have to examine certain applications above their 'fair share'.¹³¹ A situation of migratory pressure could be viewed in the context of the 2015 crisis. The establishment of the European Agenda on Migration, to a certain extent resembles the solidarity mechanisms with the Regulation. Particularly, EU funds were mobilised to help Member States address the influx of migrants.¹³² Nonetheless, these measures lacked efficiency due to political difference among Member States. Looking into the future, this Crisis and Force Majeure Regulation could be a way forward to harmonise a coherent response from the Member States. However, this coherent response has the potential to promote derogations to the right to asylum, especially if the Member State reaches a situation that is beyond its capabilities.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 38.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Eugene Quinn, 'The Refugee and Migrant Crisis: Europe's Challenge' (2016) 105 *Studies: An Irish Quarterly Review* 275, 278 <<https://www.jstor.org/stable/24871398>> accessed 25 May 2025.

3.2 The role of EU organs in the Regulation

Having established the roles of Member States, the analysis of the role of EU organs is crucial. With this process it will be possible to see to what extent are the EU organs are responsible in authorising derogations to the right of asylum and seeing if they are compatible with the provisions of Article 33 of the Refugee Convention.

What concerns the role of EU organs, provisions in Article three of the Regulation should be highlighted when referring to the role of Commission.¹³³ It is its job to assess the situation, when it receives a request to benefit from solidarity response measure. It must consult with other organs such as: ‘relevant Union agencies’, UNHCR and the IOM.¹³⁴ Through this initial consultation, the situation will be studied and truly assess if the Member State is facing a crisis or a force majeure situation.¹³⁵ If the necessary requirements are met that demonstrate that the Member State is facing unprecedented migration circumstances, then within two weeks the Commission will decide if the Member State is in a crisis situation.¹³⁶ That decision will be forwarded to the Council and the European Parliament.¹³⁷

Further elaborating on the role of the Commission, as it could be regarded one of the decisive organs within this Regulation, the provisions around how the Commission decides on declaring a crisis or a force majeure situation are in Article three of the Regulation.¹³⁸ When determining a

¹³³ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 3(1).

¹³⁴ *ibid.*

¹³⁵ *ibid* 3(1).

¹³⁶ *ibid* 3(8).

¹³⁷ *ibid.*

¹³⁸ *ibid* 3(5).

situation that can be categorised as a crisis or force majeure event the Commission must consider certain relevant factors.¹³⁹ These factors include assessing if the Member States' asylum, migration or child protection systems have are no longer able to function properly.¹⁴⁰ Another factor that will be taken into consideration by the Commission is if the State that is facing a situation of instrumentalisation and is experiencing circumstances that don't allow the State to follow its obligations set out in other Regulations such as 2024/1348 and 2024/1351.¹⁴¹

EU institutions have been at the epicentre of migratory policies. By ensuring this coordination between the distinct levels of governance between the different actors within the EU will be ensured. This coordination idea was already proposed by the Commission 20 years ago but without major success.¹⁴²

To conclude it is visible that the implementation of the provisions within the Crisis and force Majeure Regulation, involves the cooperation and coordination from various EU organs, as well as international organisations. Therefore, it is apparent what are the concrete aims of the Regulation, what role do the EU institutions play as well as Member States. It will be clear how the right to asylum is curtailed by states during the initial admission procedure and therefore how Article 33 is curtailed. It provides the necessary context, to see to what the scope of action of these entities is when it comes to a situation of crisis or force majeure.

¹³⁹ *ibid* 3(6).

¹⁴⁰ *ibid* 3(6)(a).

¹⁴¹ *ibid* 3(6)(c).

¹⁴² Philippe De Bruycker, 'Genealogy of and Futurology on the Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy' (*EU Immigration and Asylum Law and Policy*, 6 May 2024)

<<https://eumigrationlawblog.eu/genealogy-of-and-futurology-on-the-pact-on-migration-and-asylum/>> accessed 25 May 2025.

4. DEROGATIONS WITHIN THE REGULATION IN RELATION TO THE RIGHT TO ASYLUM

4.1 Contextualisation of the term derogation in international refugee law

As indicated in previous sections, there's a wide range of literature available. The term derogation as according to International Committee of the Red Cross is '[...] suspension or suppression of a law under particular circumstances.'¹⁴³ The type of derogations that can be applicable in human rights law are those applicable in situation of an emergency, which could be the case of an armed conflict.¹⁴⁴ This definition varies to some extent to the definition provided in the Crisis and Force Majeure Regulation.

In relation to principle of non-refoulement, derogations are not as clearly visible. In a context of mass influx of refugees and Durieux and McAdam point out, States to a great extent admit the incomers however, the scope of rights granted to them that is covered by the 1951 Convention is limited.¹⁴⁵ This is applicable to Article 33, they are not being returned to a place where they may face persecution, however are left in a legal limbo.¹⁴⁶ The latter point could be viewed as a dimension of a derogation to the non-refoulement principle. Moreover, the overall right to asylum is being jeopardised by not granting the incomer full protection.

¹⁴³ International Committee of the Red Cross, 'Derogations | How Does Law Protect in War? - Online Casebook' <https://casebook.icrc.org/a_to_z/glossary/derogations> accessed 5 May 2025.

¹⁴⁴ *ibid.*

¹⁴⁵ Jean-François Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 International Journal of Refugee Law 4, 13 <<https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/16.1.4>> accessed 5 May 2025.

¹⁴⁶ Durieux and McAdam (n 145).

Another element of derogations for Article 33 that could be argued is that the Refugee Convention does not state anything regarding the rejection of asylum seekers at state borders as a violation of Article 33.¹⁴⁷ A legal lacuna is created. What is also debated by the states is that in a situation of mass influx of those who are seeking asylum, border closure is possible.¹⁴⁸ They must demonstrate that the influx puts in jeopardy ‘essential interest’¹⁴⁹ of the States, creates a situation of ‘grave and imminent peril’,¹⁵⁰ leaving ‘no alternative’¹⁵¹ and requires a thorough ‘balancing of interests’¹⁵² which needs an element of necessity.¹⁵³ Even in a scenario where the State claims these elements and has relied on the necessity element it will inevitably fail to meet its obligations.¹⁵⁴ Boed argues that it is due to the fact that the norm is of *jus cogens* nature –such as the case with Article 33–, ‘[...]the act in question violates a treaty provision that excludes necessity as an excuse of breach[...]’¹⁵⁵ and that the state has themselves contributed to foster a situation of necessity. If none of the conditions are proven, then, according to draft Article 33, the State deviates from its non-refoulment obligations and shut its borders in a situation of mass influx.¹⁵⁶ This scenario involving large numbers of asylum seekers, to a certain extent supports the theory outlined by Durieux and McAdam.

Adding another element to the potential scope of derogations of Article 33, from a more theoretical point of view. D'Angelo highlights that there are incoherences when interpreting Article 33, due to

¹⁴⁷ Roman Boed, ‘State of Necessity as a Justification for Internationally Wrongful Conduct’ (2000) 3 Yale Human Rights & Development Law Journal 1, 20 <<https://openyls.law.yale.edu/handle/20.500.13051/5809>>accessed 6 May 2025.

¹⁴⁸ *ibid.* 23.

¹⁴⁹ *ibid.* 25.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.* 32.

¹⁵⁶ *ibid.* 25.

a lack of uniform application.¹⁵⁷ It is also suggested that through a ‘restrictive’ view of Article 33 non-refoulement applies to those who are already within the country’s territory. This implies that rejection at the border is not violating the provisions of Article 33,¹⁵⁸ which supports the other perspective of restrictive view mentioned by Boed. However, critics opposing this view argue that Article 33 of the 1951 Convention does not have restrictive language regarding the non-ejection of refugees or their refoulement.¹⁵⁹

To conclude, this section outlined the potential derogations involving Article 33, from an academic perspective. These findings serve as a starting point to answer the main question and apply them within the analysis section. There are certain elements that need to be considered in order to view the later analysis of the derogations within the Regulation (EU) 2024/1359. These are: the limitation of rights when admitting asylum seekers, rejection of asylum seekers at the state borders and the application of restrictive view of Article 33 –which is heavily criticised–. Significantly, this is providing the essential context and the framework to confirm the initial hypothesis and answer the main question.

4.2 International Frameworks and their view on derogations

Having laid down the theoretical background on derogations to Article 33 and subsequently the right to asylum are addressed in the literature, it’s beneficial to understand how distinct international organisms address these. In particular, the ECHR and the FRA.

¹⁵⁷ Ellen F D'Angelo, ‘Non-Refoulement: The Search for a Consistent Interpretation of Article 33’ (2009) 42 Vanderbilt Journal of Transnational Law 285

<<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1378&context=vjtl>> accessed 6 May 2025.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid* 287.

In relation to ECHR, its framework on derogations was outlined in the normative framework, the provision on derogations is established within Article 15 of the European Convention on Human Rights.¹⁶⁰ For instance, applying the provision into practice, during the COVID-19 pandemic countries such as: Moldova, Estonia, North Macedonia, Latvia, Romania, Armenia, Serbia and San Marino have used their right to apply Article 15.¹⁶¹ Moreover, apart for the Covid pandemic only Greece, Ireland, Turkey and the United Kingdom applied Article 15, and had to justify it accordingly.¹⁶² What can be deduced from that is the fact that only in circumstances of dire necessity.

There are substantive requirements in order to implement those derogations, just in a case of an emergency or a war where the life of the nation is threatened.¹⁶³ Another element is the idea that the derogations requested by the State must be necessary for the situation.¹⁶⁴ Lastly, the ‘derogations cannot be incompatible with other obligations in international law’.¹⁶⁵ There are procedural requirements, which must be applied in light of Article 15(3).¹⁶⁶ The State wishing to apply derogations must notify the Secretary General of the Council of Europe, specifying the concrete measures that will be taken and when they will end.¹⁶⁷ It’s essential to mention that there are non-derogable rights that cannot be limited in the application of derogations such as: Article 2 –right to life–, Article 3 –prohibition of torture and inhuman or degrading punishment or treatment–, Article 4(1) –prohibition of slavery and servitude–, Article 7 –no punishment without law–, Article

¹⁶⁰ Press Unit (European Court of Human Rights) (n 91) 1.

¹⁶¹ *ibid* 2.

¹⁶² *ibid*.

¹⁶³ *ibid* 3.

¹⁶⁴ *ibid* 6.

¹⁶⁵ *ibid* 11.

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid*.

4 of Protocol No.7 to the Convention –right not be tried or punished twice–, Protocol No.6 to the Convention in the abolition of the death penalty and Protocol No. 13 on the abolition of the death penalty in all circumstances.¹⁶⁸

From an academic perspective, it could be argued that this legal framework lacks clarity and allows for legal lacunas and incoherences in application. Article 15 proves to be a very intricate provision, with a great number of nuances.¹⁶⁹ The element ‘in time of war’, presents ambiguous language.¹⁷⁰ Strasbourg organs have not provided a precise definition of what exactly ‘state of war’ entails, but gave a in-depth reasoning what is a ‘public emergency threatening the life of the nation’, and how the States parties to the Convention should notify the Council of Europe.¹⁷¹ A crisis situation has to be inevitable, for it to be considered a ‘threat to the life of a nation’,¹⁷² hence bestowing great certainty upon Strasbourg’s reasoning.¹⁷³ This creates a certain strange dichotomy, one requisite for derogations is fully developed, nonetheless, another lacks specifications.

In addition to the potential incoherences, the ECHR’s organs face a predicament in their justification which questions the base of Article 15.¹⁷⁴ There’s a possibility to derogate from Article –Right to liberty and security– and Article 6 –Right to a fair trial–, which as well as non-derogable rights are also crucial ones.¹⁷⁵ Regarding the time frame for the State to notify, there are no concrete

¹⁶⁸ *ibid* 14–17.

¹⁶⁹ Aly Mokhtar, ‘Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights’ (2004) 8 *The International Journal of Human Rights* 78, 78
<<http://www.tandfonline.com/doi/abs/10.1080/1364298042000212547>> accessed 10 May 2025.

¹⁷⁰ *ibid* 79.

¹⁷¹ *ibid*.

¹⁷² *ibid*.

¹⁷³ *ibid*.

¹⁷⁴ Mohamed M El Zeidy, ‘The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations’ (2003) 4 *San Diego International Law Journal* 316, 316
<<https://digital.sandiego.edu/ilj/vol4/iss1/10/>> accessed 10 May 2025.

¹⁷⁵ El Zeidy (n 174).

specifications in Article 15(3), and it lacks sanction provisions.¹⁷⁶ Critically, leaving the Court with little room to manoeuvre in such scenarios, which also relates to Mokhatr's point. Even though, there is great work that has gone into formulation of derogation provisions there are loopholes that States may abuse of, leading to violation even of non-derogable rights.¹⁷⁷

Proceeding with FRA, it establishes extensive guidelines to address, how the non-refoulement principle is protected against derogations and thus so is the right to asylum.¹⁷⁸ FRA mentions that both Article 18 and 19 of the Charter, provide guarantees from refoulment, hence complementing the provisions within Article 33.¹⁷⁹ Moreover, the authorities are not allowed to deny the incomers their right to seek asylum.¹⁸⁰

Recently, the Fundamental Rights agency has developed a Position Paper which establishes its position on 'return hubs' in third countries for migrants who have been ordered to leave the EU.¹⁸¹ This is particularly threatening to numerous fundamental rights. The migrants will be held in third-country hubs until member states or Frontex can make a decision on their return to the country of origin.¹⁸² EU law allows Frontex to proceed with relocation of migrants from one third-country to another. Nonetheless, FRA states that this could result in direct violation of Article 18 and 19 of the Charter, which would endanger the principle of non-refoulement.¹⁸³ In order for these

¹⁷⁶ *ibid* 317.

¹⁷⁷ *ibid*.

¹⁷⁸ European Union Agency for Fundamental Rights and Council of the European Union, 'Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders' 6
<<https://fra.europa.eu/en/publication/2020/fundamental-rights-refugees-asylum-applicants-and-migrants-european-borders>>.

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid*.

¹⁸¹ European Union Agency for Fundamental Rights, 'Planned Return Hubs in Third Countries: EU Fundamental Rights Law Issues | European Union Agency for Fundamental Rights' (2025)
<<https://fra.europa.eu/en/publication/2025/return-hubs>> accessed 19 May 2025.

¹⁸² *ibid* 4.

¹⁸³ *ibid*.

‘derogations’ to respect fundamental rights that were established in those articles there must be essential safeguards in place as well as guaranteed expertise from independent human rights monitoring mechanisms.¹⁸⁴

Through the analysis in this section it was possible to see how the two European entities address derogations with specific emphasis to non-refoulement and right to asylum. Although, in comparison to ECHR’s extensive framework on derogations, FRA provides a rather general one. Nonetheless, it is essential to take into consideration both frameworks to have a better understanding the possible implications of derogations and how these could be applied in the Force Majeure and Crisis Regulation.

4.3 Asylum framework in the Regulation

To see how derogations within the Crisis and Force Majeure Regulation deviate from the provisions set out in Article 33 and how these affect the right to asylum, the relevant provisions with the Regulation must be analysed. The ECHR and FRA provisions will serve as contextual background to have a holistic perspective.

The Crisis and Force Majeure Regulation already in its preamble states that apart from respecting the principle of solidarity and sharing responsibility, the provisions within the Regulation ensure the adoption of the adequate guidelines on asylum. This includes the employment of expedited procedure, which allows the Member States to be able to adapt to situations of crisis and force

¹⁸⁴ *ibid.*

majeure.¹⁸⁵ The legislation explicitly mentions, that the right to asylum has to be being respected, and makes a reference to the Geneva Convention relating to the Status of Refugees of 28 July 1951 and the right to protection in the event of removal, expulsion or extradition.¹⁸⁶

In order allow for an efficient management of a crisis and force majeure situation, and ensure the application of relevant asylum procedures, asylum border procedure would be used.¹⁸⁷ This measure entails an a comprehensive analysis of the asylum application at EU's external borders, to determine if the application is admissible.¹⁸⁸ The EU argues that it is a fundamental part in determining individuals who represent a risk or are coming from countries where asylum recognition rates are low.¹⁸⁹ The procedure creates a framework for 'an adequate capacity' within each Member State, creating an equilibrium between the resources available nationally and the number of applications.¹⁹⁰ The conditions for establishing adequate capacity are: 'the number of irregular border crossings, search and rescue arrivals and refusals of entry over a three-year period'.¹⁹¹

After an adequate request by the Member State, the Commission assess the situation and determines if the State is experiencing a crisis or a force majeure scenario.¹⁹² During this process, it is the Council and the Commission's role to monitor the situation constantly.¹⁹³ The Commission,

¹⁸⁵ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 6.

¹⁸⁶ *ibid* recital 8.

¹⁸⁷ *ibid* recitals 26-27.

¹⁸⁸ *ibid* recital 26.

¹⁸⁹ European Council and Council of the European Union, 'A Common Asylum Procedure' (*Consilium*, 19 February 2025) <<https://www.consilium.europa.eu/en/policies/asylum-procedure/>> accessed 19 May 2025.

¹⁹⁰ *ibid*.

¹⁹¹ *ibid*.

¹⁹² Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 3(1).

¹⁹³ *ibid* 6(1).

should put specific emphasis to assess if the fundamental rights and humanitarian standards are respected and consult with the Asylum Agency to monitor the situation within a particular member state if there are concerns regarding its asylum procedures.¹⁹⁴

In a situation of crisis, where a great level of preparation is needed Member States should have ready “contingency plans” to respond to set scenario.¹⁹⁵ This also includes overcoming difficulties that affect the functioning of the Common European Asylum System and to ensure the protection of rights of those who are applying for international protection as well as foster future resilience.¹⁹⁶ Comparing this framework, which at first glance seems quite migrant and refugee-centered, to provisions within the ECHR and FRA it is possible to highlight some significant aspects. Analysing the general asylum framework within the ECHR in relation to the one indicated in the Regulation. Both frameworks, recognise the role that the Refugee Convention plays as a reference to help secure the rights of those seeking asylum. What is quite striking is the idea that the principle of non-refoulement is only mentioned once in the whole Regulation¹⁹⁷, whereas the ECHR, with articles 2 and 3 embodies that provision, making it absolute.¹⁹⁸ This presents already an incoherence, within the asylum framework of the Regulation. To fully respect the rights of those who are seeking international protection, this principle has to be embedded in the genesis of the asylum provisions within legislation. As it ensures that migrants are not returned to a place where

¹⁹⁴ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 recital 34.

¹⁹⁵ *ibid* recital 59.

¹⁹⁶ *ibid* 10.

¹⁹⁷ This aspect will be analysed in a greater detail in the next section.

¹⁹⁸ European Court of Human Rights, ‘Asylum’ 2

<https://www.echr.coe.int/documents/d/echr/COURTalks_Asyl_Talk_ENG> accessed 19 May 2025.

they can face grave dangers for their life.¹⁹⁹ Moreover, those same articles of ECHR, also rule out the possibility of ‘indirect refoulement’²⁰⁰, which means that there has to be a proper assessment of the individual cases for international protection.²⁰¹ This in comparison does not correlate with the asylum border procedure.

Contrasting FRA’s framework on asylum with these provisions, what results rather expectable is the idea that FRA plays a significant role in the Crisis and Force Majeure Regulation. FRA’s main task is to determine gaps in the application of fundamental rights and what are the potential risks within this legislation.²⁰² Regarding the whole pact,²⁰³ FRA demonstrates quite critical approach, outlining the necessity to monitor asylum provisions in order to ensure that those seeking international protection receive fair procedures.²⁰⁴ From an analytical perspective, not only FRA’s expertise on migration matters but also the agency proves to be quite critical of the provisions within the Pact. In a document elaborated by the Agency and the FRA, ‘Handbook on European law relating to asylum, borders and immigration’, it is highlighted that access to asylum should be guaranteed with the appropriate procedures.²⁰⁵ Principle of non-refoulement, is once again reiterated as an integral part of the process.²⁰⁶

¹⁹⁹ ‘The 1951 Refugee Convention’ (*UNHCR*) <<https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention>> accessed 13 May 2025.

²⁰⁰ European Court of Human Rights (n 198) 2.

²⁰¹ *ibid.*

²⁰² European Union Agency for Fundamental Rights, ‘Pact on Migration and Asylum: FRA’s Support in Its Implementation | European Union Agency for Fundamental Rights’ (6 March 2025) <<https://fra.europa.eu/en/themes/asylum-migration-and-borders/migration-asylum-pact>> accessed 19 May 2025.

²⁰³ In which the Regulation (EU) 2024/1359 plays a very significant part.

²⁰⁴ European Union Agency for Fundamental Rights, ‘Pact on Migration and Asylum’ (n 202).

²⁰⁵ European Union Agency for Fundamental Rights, European Court of Human Rights, and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* (Edition 2020, Publications Office of the European Union 2020) 44 accessed 19 May 2025.

²⁰⁶ *ibid.*

What is already visible from assessing elements of the asylum framework within the Regulation, before even referring to the derogations, is that already certain inconsistencies are visible in comparison to other international frameworks. The lack of consistent inclusion of non-refoulement principle in the Regulation, reinforces the idea that migration and asylum are now being viewed as a security issue, rather than a human right one. The Commission has been a driving force in making it clear that the Pact's goal is to introduce an essence of security into the topic of migration.²⁰⁷ Simultaneously, combine this element with a humanitarian purpose.²⁰⁸ This presents a paradox, as the Commission is making a claim of promoting the rights of migrants,²⁰⁹ however the Regulation in question fails to address the principle of non-refoulement as a consistent element that underpins this legislation.

By emphasising on the security element of the Pact, and in consequence of in the Regulation, through measures such as securing external borders whilst guaranteeing the rights of asylum seekers, the EU creates inconsistencies. The notion of a humanitarian purpose, in relation to derogations when it comes border procedures lacks concrete development. This legal lacuna could, in the future, place the principle of non-refoulement at risk, in countries that express strong opposition towards hosting migrants. Such could be the case with states like Poland.²¹⁰

²⁰⁷ Giuseppe Gambazza, 'The EU New Pact on Migration and Asylum: Policies and Discourses for a "Fresh Start"' (2024) 28 *Space and Polity* 289, 289 <<https://doi.org/10.1080/13562576.2024.2412578>> accessed 26 May 2025.

²⁰⁸ *ibid* 290.

²⁰⁹ *ibid*.

²¹⁰ Kasia Narkowicz, "'Refugees Not Welcome Here': State, Church and Civil Society Responses to the Refugee Crisis in Poland' (2018) 31 *International Journal of Politics, Culture, and Society* 357, 357 <<http://link.springer.com/10.1007/s10767-018-9287-9>> accessed 26 May 2025.

4.4 Compatibility of the Derogations with Article 33 of the 1951 Refugee Convention and the implications to the right to asylum

After an analysis of the relevant international and European frameworks regarding the right to asylum, its relation to the principle of non-refoulement and the possible derogations that can affect those legal provisions, it's necessary to proceed with the study of derogations within the Force Majeure and Crisis Regulation. Through this process the legal lacunas of the Regulation were already present, even in chapters and articles that did not refer to derogations. The Crisis and Force Majeure Regulation addresses the derogations in Chapter IV, within articles 10, 11, 12 and 13. This section will analyse how the right to asylum in relation to Article 33 is being omitted and disregarded. The two elements of right to asylum in relation to principle of non-refoulement that should be considered when conducting this analysis are admission and safety.

4.4.1 Dimension of admission

The aspect of admission is addressed, within Article 10 'Registration of applications for international protection in situations of crisis, or force majeure'.²¹¹ This is seen through the section 1, where the asylum applications could be processed within four weeks by a means of derogating from Article 27 of Regulation (EU) 2024/1348.²¹² On a first glance, this provision respecting towards the right to asylum and subsequently the principle of non-refoulement. However, a delay, even of four weeks regarding admission can leave the asylum seekers in a situation of legal uncertainty, as it is not indicated here what will happen to them during that time frame. Similarly,

²¹¹ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 10.

²¹² ibid 10(1).

this could lead to a wide range of problems, such as health issues leaving the asylum seekers in a legal limbo, where they face uncertainty.²¹³

In addition, section 3 states ‘When applying paragraph 1, Member States may prioritise the registration of applications which are likely to be well-founded’.²¹⁴ The criteria for the establishment of a ‘well-founded’ application are based upon the initial assessment.²¹⁵ Corresponding with UNHCR’s description, ‘manifestly well-founded’ means that the applicant has met the standards of the refugee definition provided in the 1951 Convention or in relation to a broader eligibility established by the UNHCR.²¹⁶ However, as it has been stated through the Regulation, during a crisis or a force majeure situation Member States’ asylum systems may become overwhelmed, reaching their full capacity. What can be preliminary deduced from this derogation is that it is not guaranteed that the application, even at the initial stage will be processed accordingly, which could undermine the element of admission. Therefore, this could place the right to asylum of an applicant in prejudice and the provisions of Article 33 of the Refugee Convention have the potential to not be applied in an adequate manner.

Article 11 covers ‘Measures applicable to the asylum border procedure in a situation of crisis or force majeure’.²¹⁷ Section 1 outlines that detention and asylum applications of third-country

²¹³ Jenny Phillimore and Sin Yi Cheung, ‘The Violence of Uncertainty: Empirical Evidence on How Asylum Waiting Time Undermines Refugee Health’ (2021) 282 *Social Science & Medicine* 114154, 1 <<https://linkinghub.elsevier.com/retrieve/pii/S027795362100486X>> accessed 26 May 2025.

²¹⁴ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 10(3).

²¹⁵ *ibid.*

²¹⁶ UNHCR, ‘Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to RSD under UNHCR’s Mandate (The Glossary)’ (*Refworld*, 2020) 21 <<https://www.refworld.org/policy/legalguidance/unhcr/2020/en/119486>> accessed 16 May 2025.

²¹⁷ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 11.

nationals can take up to 18 weeks.²¹⁸ This provision creates an even bigger burden on the asylum seekers than the one mentioned in the previous section. The legal lacuna regarding the waiting time is clearly exacerbated. Inevitably, section 3 of that article mentions the fact that the threshold for international protection of certain third-country nationals will be reduced to 5%.²¹⁹ This number in the Regulation (EU) 2024/1348, is 20%.²²⁰ This provision, significantly reduces the eligibility criteria and disregards Article 33 of the Refugee Convention. Section 4, in a situation of crisis, states that Member State may expand the scope of applying border procedures for third-country nationals for whom the percentage of granting asylum is 50 or lower.²²¹ This accentuates the uncertainty, as the time for potential detention of asylum seekers can be up to four months.²²² In a paradox reality, section 10 of the Article mentions the idea that the principles of the right to asylum and non-refoulment should be respected.²²³

4.4.2 Dimension of safety for the individual

Article 12 addresses ‘extension of time limits set out for take charge requests, take back notifications and transfers in a situation of crisis referred to in Article 1(4), point (a), or force

²¹⁸ European Council on Refugees and Exiles, ‘ECRE Comments on the Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (EU) 2021/1147’ (2024) 41–42 <https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Crisis-and-Force-Majeure-Regulation.pdf> accessed 12 June 2025.

²¹⁹ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 11(3).

²²⁰ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU 2024 art 42(1)(j).

²²¹ Nikolas Feith Tan and Meltem Ineli-Ciger, ‘Beyond Derogations in the EU Crisis Regulation: Making Expedited Procedures for Manifestly Well-Founded Asylum Claims Work in Practice’ (2024) 26 European Journal of Migration and Law 421, 437 <https://brill.com/view/journals/emil/26/4/article-p421_2.xml> accessed 8 January 2025.

²²² *ibid.*

²²³ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 11(10).

majeure’.²²⁴ What results quite problematic from the provisions in this Article is the idea that the timeframe to process a petition for an asylum seeker increases from two months to four months.²²⁵ The time for responses for taking charge could be increased to two months. Moreover, Member States when carrying out Dublin transfers will have up to a year, instead of the established six months, to do that.²²⁶ The incoherences dimension of safety for the individual seeking asylum, is seen in increase of the processing times. Within this Article, there is no concrete mention regarding conditions under which the third-country national will be held, nor there is an explicit guarantee that a correct status. This, relates to the dimension of safety

Finally, Article 13 establishes the provisions regarding ‘derogations from the obligation to take back an applicant in a situation of extraordinary mass arrivals’,²²⁷ perhaps results as one of the most questionable sections within the Regulation. Firstly, the title itself already distances itself from the non-refoulement principle, and hence the right to asylum is endangered. Secondly, section 1 of the Article places the asylum seeker in a situation of grave legal uncertainty. Thirdly, the applicant becomes too dependent on the capacity of one Member State’s ability to manage the crisis situation. Fourthly, when a state faces a situation of crisis that was triggered by mass arrivals, there is a possibility to suspend the Dublin transfers to that state.²²⁸ Mass arrivals, seem to be the loophole and the method to pave the way forward to apply derogations, accentuating the point made previously by Boed.²²⁹ Once again, the element of safety for the asylum seeker is being put

²²⁴ *ibid* 12.

²²⁵ Chiara Scissa and Francesco Luigi Gatta, ‘Access to Asylum in Times of Crises, Force Majeure and Instrumentalization in the EU: Restrictive Trends in Asylum Law and in the Case-Law’ (2024) 3 *Rivista giuridica di classe A* 259 <<https://www.fsjeurostudies.eu/files/FSJ.3.2024.11.SCISSA.GATTA.pdf>> accessed 19 May 2025.

²²⁶ *ibid*.

²²⁷ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 13.

²²⁸ Scissa and Gatta (n 225).

²²⁹ Boed (n 147) 14.

at prejudice in this provision, as the third-country national is dependent on the state's already overwhelming system.

There are incoherences between the provisions within the Crisis and Force Majeure Regulation. For instance, it states explicitly in Article 11,²³⁰ that the right to asylum and the principle of non-refoulement are being respected. It is quite the opposite. The derogations create a environment of grave uncertainty, by extending decision times and thus exposing the asylum seekers to additional hurdles in their journey. Moreno-Lax analysing the new Pact on Asylum and Migration has studied its overall derogations and provisions.²³¹ She states that '[...] the special treatment applicable to – irregularly arriving– refugees under the 1951 Convention is not given particular attention.'²³² This resonates with the derogations present in the Crisis and Force Majeure Regulation. What appears to be the case is that the overall view in relation to asylum seekers is perceived from a security perspective, rather than a humanitarian one, as could be seen with basing asylum requirements on the country of origin.

²³⁰ Regulation (EU) 2024/1359 of the European Parliament and Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359/1 art 11(10).

²³¹ Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (2024) 9 SSRN Electronic Journal 196 <<https://www.ssrn.com/abstract=4719772>> accessed 17 May 2025.

²³² *ibid.*

CONCLUSION

Throughout this thesis, there was an attempt to analyse critically Regulation (EU) 2024/1359 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L1359/1, with a migrant centred perspective. The overall implications of the New Pact on Asylum and Migration were mentioned to have a view of the current EU affairs on asylum. By establishing solid theoretical and normative frameworks that addressed the legislative decisions that led to the adoption of the Crisis and Force Majeure Regulation it was possible to see what is the role of the various EU organisms in the legislation.

The analysis section where concrete aspects of the Regulation were taken into consideration, provided an answer to the main research question: to what extent do elements of the derogations within the Regulation (EU) 2024/1359 limit the right to asylum, in relation to the principle of non-refoulment? As established, the derogations present significant legal lacunas that deviate from the full spectrum of protection that is covered by the right to asylum and thus directly affect the provisions of Article 33 of the 1951 Refugee Convention. Particularly, this is seen in the border procedures, the initial stages of the asylum request, where the relationship with the principle of non-refoulment is the most visible. This is where the relationship between the right to asylum and the principle of non-refoulement is most visible. The aspects that deviate from the central elements of admission and safety for the asylum seeker which are accentuated in the increase of waiting times to process asylum applications and detention, prioritisation between the origin of the applications and being over-dependent on the state's migration systems, even when they have reached their full capacity. As analysed these derogations foster a scenarios that deviate from the dimensions of 'admission' and 'safety for the individual', elements that connect that right to asylum and Article 33. Through these findings it was possible to answer the main question. Although the

Regulation does have positive aspects, which should not be ignored, overall the derogations contradict many of the elements within the Regulations itself.

The Regulation (EU) 2024/1359, will only enter into force from 2026. From a practical perspective it is hard to speculate how this legislation will be implemented in reality. The prediction of the nature of future migratory crises is quasi-impossible at this stage. However, this thesis offered an academic view of the potential effects that the derogations may have. It could be argued that these new types of restrictions contribute to a creation to a new wave of derogations that deserve future research initiatives.

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