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## The Common European Asylum System: A Critical Commentary

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*The European Union was faced with a horrendous migrant crisis in 2015, wherein numerous (in millions) refugees sought asylum from MENA regions owing to civil and external wars in those regions. In recent years, the methodology of adjudicating migrants has been complicated across the European continent, promoting 'open attacks on case laws'. The number of refugees in Europe is bound to increase by multi-folds. The visa provision requirements in the EU are stringent, leading to asylum seekers entering the continent illegally. However, European states like Greece and Italy have come under the scrutiny of UNHRC for improper implementation of policies and poor asylum conditions. Long periods of detention before the procedure and during the same added to inequality, discrimination, and restricted access remain to be the defining aspects of the refugee experience in Europe. There should be an established benchmark to ascertain the quality of the asylums to eliminate poor-quality asylums. This paper discusses the problems, judicial framework, and plausible solutions related to the European common asylum system.*

**Keywords:** *asylum, mena, unbr.*

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### INTRODUCTION

#### ***International Background:***

International protection, as defined by UNHCR, refers to the security provided to an individual in a foreign country if they cannot go back to their country for a range of reasons, including

international conflict, racism, et cetera. The Universal Declaration of Human Rights<sup>1</sup> of 1948 states that citizens of every nation-state must be provided with a few fundamental rights. This agenda is furthered by the Convention on the Status of Refugees of 1951<sup>2</sup> and the 1967 Protocol. The formerly defined non-refoulement while the latter emitted broadening the dimensions of the Convention. Furthermore, the Geneva Conventions of 1951<sup>3</sup> state that asylum is both; a fundamental right and an international obligation.

### *European Perspective:*

European Law, although being an entity of its own, is influenced by these international laws. European Union (EU, *hereinafter*) incorporates the fundamentals laid down by these statutes into its direction. The European Convention on Human Rights of 1950<sup>4</sup> was enforced in 1953. Widely regarded as the most comprehensive framework, due to a standard asylum system throughout, EU laws have their drawbacks. One significant drawback is the quota system. Countries in the EU share the responsibility of housing refugees and asylum seekers. Europe was faced with a horrendous migrant crisis in 2015 wherein numerous (in millions) refugees sought asylum from MENA regions owing to civil and external wars in those regions. This led to a growing conversation regarding the rights of migrants which found a place in the international discourse.

## **EUROPEAN COURTS ON MIGRANT RIGHTS**

In recent years, the methodology of adjudicating migrants has been complicated across the European continent. Consecutive crises like an economic downfall, migration influx, questions about the rule of law, and the global pandemic led to the executive being rendered with decision-making power. Such administration of power led to minimal surveillance of the judiciary and the legislature, promoting '*open attacks on case laws*'<sup>5</sup> Considering the current global situation, the quantum of refugees is bound to increase by multi-folds. However, European strategies such as

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<sup>1</sup> Universal Declaration of Human Rights 1948

<sup>2</sup> Convention relating to the Status of Refugees 1951

<sup>3</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950

<sup>5</sup> *M.A & Ors v Lithuania* App No. 59793/17 (ECtHR, 11 December 2018)

push and pullbacks, detention, and denial of socio-political rights have resulted in a rejection of fundamental rights guaranteed to refugees under international law.

## COMMON EUROPEAN ASYLUM SYSTEM

### *A Brief Timeline*

The European Council first started drafting a standard system for all asylum seekers across the European continent. This system drew inspiration from the Geneva Conventions. In 2015, Europe was struck by the worst migrant crisis known to it. This influx led to the realization that there were several deficiencies in the policies. To counter the same, in 2017, the EP and the EC agreed to five proposals that reformed the refugee policy of the continent. A European Union Asylum agency was set up along with Eurodac. Reception Conditions Directive<sup>6</sup> was reviewed with the Qualification Regulation<sup>7</sup> and the EU Resettlement framework<sup>8</sup>. EC also adopted a New Pact on Migration and Asylum<sup>9</sup> that provided solutions to handling situations like the influx.

### *Appraisal*

#### **Ideals**

Since EU law relies heavily upon ideals prescribed by international law, it is framed in a way as to give human rights the highest degree of importance. The drafting of common legislation was made with the idea of reinforcing ideals of equality and humanity. Furthermore, it makes states responsible for providing for those in dire need. Moreover, the responsibility case upon member states cannot be denied, therefore, resulting in increased commitment toward the protection of human rights. The reliance on and incorporation of international ideals ensures that the laws are as transparent, adequate, and reasonable as international standards require.

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<sup>6</sup> Reception Conditions Directive 2013

<sup>7</sup> Qualification Regulation, Directive 2011

<sup>8</sup> EU Resettlement framework 2016

<sup>9</sup> New Pact on Migration and Asylum 2020

## TREATMENT OF UKRAINIAN REFUGEES

Member states of the EU expressed solidarity toward Ukrainian refugees and extended as much humanitarian aid as possible. The 'open borders policy of the EU reinstated their stance. This policy extended a completely different narrative than the one shown in the 'fortress Europe' approach that was implemented during the 2015-16 refugee influx. A temporary protection directive was issued in March 2022, which is an emergency scheme of the EU. This was done to tackle the mass influx of refugees in the most reasonable way possible. The aim was to provide immediate and collective protection to all displaced persons as a consequence of the Ukraine - Russia war. All EU countries that border Ukraine allowed people who reside in Ukraine and want to flee the war to cross borders on humanitarian grounds. Furthermore, temporary protection of up to one year has also been guaranteed. They have also been given rights such as the right to temporary protection, the right to apply for international protection in the EU, and repatriation assistance.<sup>10</sup>

## CRITIQUE

### *Inclination towards legislation over Human Rights*

A routine like the transfers of refugees, leading to *refoulement*, is commonplace in the European Union for security. However, such a concept leads to compromising human rights. The Dublin system was drafted with the promise of protection from *refoulement*. However, human rights violations are still prevalent. In the case of *T.I. v the U.K.*<sup>11</sup>, the U.K. asked Germany to review the applicant's asylum application which would lead to his transfer to Germany. Upon denial by Germany, the applicant would be forced to return to his home country in the face of danger. It was alleged that this would lead to a violation of Articles 2, 3, 8, and 13 of EHCR. However, it

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<sup>10</sup> Jessica Schultz et al., 'Collective Protection as a Short-term Solution: European Responses to the Protection Needs of Refugees from the War in Ukraine' (*EU Immigration and Asylum Law and Policy*, 8 March 2022) <<https://eumigrationlawblog.eu/collective-protection-as-a-short-term-solution-european-responses-to-the-protection-needs-of-refugees-from-the-war-in-ukraine/#more-8300>> accessed 25 November 2022

<sup>11</sup> *T.I. v United Kingdom* App No. 43844/98 (ECtHR, 7 March 2000)

was adjudicated that there was no such breach. The decision laid the grounds that indirect *refoulement* is still persistent.

In the case of *K.R.S. v the U.K.*<sup>12</sup>, an asylum-seeker sought asylum in the U.K. after stopping in Greece. There was a lot of evidence to support that Greece has a sub-standard system, including reports from UNHCR. The E.C.J. also ruled that Greece did not implement the Reception Directive just a year before this case. Yet, the ECtHR held that there was no violation. However, in the case of *M.S.S. v Belgium and Greece*<sup>13</sup>, the facts were similar to the previous case, but the judgment was the opposite. This contrast is an improvement, yet, the initial two cases showed that ECtHR shielded legislation over human rights.

### *Uneven sharing of responsibility*

Although widely assumed to be equal or proportionate, the burden of sharing responsibility varies by increasing degrees. The reason behind the lack of a proportion is that the state where the asylum-seeker first arrives is required to take charge of all legal formalities thereafter. Considering the instability in the MENA regions, asylum-seekers usually enter from the southern border in countries like Greece, Turkey, Cyprus, et cetera. The rule that the first nation where the asylum-seeker enters is responsible for all formalities completely discredits such discrepancies. It presumes that the influx of refugees in all European states is equal and proportionate. This also leads to discrimination since asylum conditions in several States can differ from others. Secondly, many asylum seekers would find it more comfortable and inclusive if they could settle where they relate linguistically or ethnically. Still, the rule forbids the same or at least delays the process. The CAES does not consider these details, proving that the focus is not on refugees; instead, it is on due procedure.<sup>14</sup>

<sup>12</sup> *K.R.S. v United Kingdom* App No. 32733/08 (ECtHR, 2 December 2008)

<sup>13</sup> *M.S.S. v Belgium and Greece* App No. 30696/09 (ECtHR, 21 January 2011)

<sup>14</sup> James C. Hathaway, 'Refugees and Asylum' in B. Opekin, R. Perruchoud and Redpath-Cross (eds), *Foundations of International Migration Law* (CUP 2012) 195

***Right to seek asylum***

The visa provision requirements in the EU are stringent, leading to asylum seekers entering the continent illegally. In the case of *Hirsi Jamaa and others v Italy*<sup>15</sup>, people intercepted at sea were termed 'illegal immigrants.' The visa requirements for specific countries are more rigid than others, forcing people desperately in need of asylum to travel illegally while simultaneously subjecting themselves to significant risks in the process. Various EU states have reduced legal entry pathways and informally built a stance across wanted and unwanted immigrants, an inherently discriminatory practice. Expressed extensively in several international doctrines and reinforced by A.18 of EUC that the right to seek asylum serves to be an undeniable right. However, due to situational hardships, it has not yet been wholly recognized and fulfilled in its truest sense.

**Analysis**

**Philosophically**, refugee rights are human rights, and the burden of protecting them should rest on all countries equally. The essence of humanity lies in helping those in need, which is why so many laws and treaties were formulated to uphold human dignity and rights. However, laws in the EU pay more attention to due process rather than putting humanity on the highest pedestal. The focus lies on the procedure process and not on the rights and needs of the asylum-seeker

**Comparatively**, the EU laws are similar to those stated in various international provisions upheld by UNHRC and ICJ. The laws in the EU guarantee several basic fundamental rights to all those seeking protection in the continent. It also draws upon the Geneva Convention, which is one of the best-structured doctrines on the rights of individuals. However, European states like Greece and Italy have come under the scrutiny of UNHRC for improper implementation of policies and poor asylum conditions.

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<sup>15</sup> *Hirsi Jamaa and others v Italy* App No. 27765/09 (ECtHR, 23 February 2012)

While **critically** analysing the CAES, it is pertinent to note that not all ideals mentioned in the laws have been fully realized. Firstly, human rights are not the priority, and indirect refoulement persists. Secondly, the responsibility of providing for asylum-seekers is not proportionate, and some states are more burdened than others. Thirdly, due to the difference in treatment of migrants depending on where they are from, even the right to seek asylum is not acknowledged.

## CONCLUSION

The political scenario keeps oscillating between the protection of refugees and protection from refugees. This fluctuation has placed CAES under great scrutiny. Lengthy periods of detention before the procedure and during the same added to inequality, discrimination, and restricted access remain to be the defining aspects of the refugee experience in Europe. To truly realize the goals of the CAES, it is pertinent to ensure cooperation, harmonization, and centralization. Secondly, the responsibility must be shared equally and proportionally among EU states. There should be an established benchmark to ascertain the quality of the asylums to eliminate poor-quality asylums. Moreover, suppose the quality of asylums is maintained adequately throughout the continent; in that case, asylum-seekers will not be desperate to move to other states since they already have habitable living conditions. Policies must be formulated by emphasizing humanity rather than other aspects since that is the inherent spirit of humanitarian law.