

Common European Asylum System: Contradictions and Crises

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Abstract: *This paper exposes the contradictions and lack of commonality in the Common European Asylum System (CEAS), as well as the wide discrepancy between the European Union's (EU) human rights rhetoric and exclusionary practices. It examines in detail the Dublin System, which determines the state responsible for processing an asylum claim. This examination demonstrates the differences between an appearance of unity and solidarity on asylum within the EU, but a reality of divergent policies and nationalist approaches to asylum. The failure of countries to fully apply EU law has major negative consequences for asylum seekers and refugees. Finally, the paper explores four possible future directions for the CEAS: disintegration and a return to national asylum systems, strict enforcement of existing EU law, the European Commission's Dublin IV proposal, or a supranational EU asylum system.*

Introduction

In 2015 and 2016, over 1.3 million asylum seekers risked their lives in the Mediterranean to reach Europe.¹ The current refugee crisis is Europe's largest mass population movement since the Second World War.² As part of the European Union's (EU) efforts to harmonize policies in many issue-areas across Europe, it has begun to develop a Common European Asylum System (CEAS) with an extensive body of EU asylum law. The Dublin Regulation, which assigns responsibility to one state for processing an asylum claim, is one of

¹ "Mediterranean: Dead and Missing at Sea," United Nations High Commissioner for Refugees, accessed January 19, 2017, <http://data.unhcr.org/mediterranean/download.php?id=2334>.

² "The EU and the Refugee Crisis," European Commission, July 2016, accessed November 16, 2016, doi:10.2775/1491.

the system's essential features. The Common European Asylum System is inherently contradictory, proclaiming unity, solidarity, freedom and human rights, while practising nationalism and exclusion. Reforms are required to make the CEAS fair and effective for asylum seekers and for all the states involved.

Refugees under International Law

International law guarantees the right to asylum and defines who qualifies as a refugee. Article 14(1) of the Universal Declaration of Human Rights declares that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."³ The United Nations' 1951 Convention Relating to the Status of Refugees defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."⁴ This definition excludes internally displaced people, who are still within the borders of their own country. It also restricts the recognized causes of displacement to targeted persecution, excluding those displaced for other reasons such as war, gang violence, or environmental change. The Convention was amended in 1967 by a Protocol, which removed the geographic and temporal restrictions that had previously limited the definition of a refugee to people in Europe who fled prior to 1951.⁵ Articles 12-30 of the Convention outline the rights of refugees, such as access to courts, employment, housing, public education, social security, labour protections, identity papers and freedom of movement within the territory.⁶ Articles 31-34 suggest that a refugee should not be penalized for illegal entry into the country, should not be forced to return if his or her life would be in danger (the principle of *non-refoulement*) and should have the opportunity to become naturalized in that country.⁷

³ United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A (1111), accessed November 14, 2016, <http://www.un.org/en/universal-declaration-human-rights/>.

⁴ "Convention and Protocol Relating to the Status of Refugees," United Nations High Commissioner for Refugees, 2010, accessed October 6, 2016, <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>, 3.

⁵ *Ibid.*, 2.

⁶ *Ibid.*, 20-29.

⁷ *Ibid.*, 29-30.

EU Law and the Dublin System

Over the past century, Europe has developed extensive legal and institutional mechanisms to respond to refugee movements. Various refugee crises in Europe have contributed to these developments: the Russian Revolution, the First World War, the collapse of the Ottoman Empire, the Cold War in Eastern Europe, and the conflicts in Bosnia and Kosovo in the 1990s.⁸ In response to the Second World War, the Council of Europe was founded in 1949, and today it is comprised of 47 states, 28 of which are also members of the separate European Union.⁹ In 1950, the Council of Europe adopted the European Convention on Human Rights and established the European Court of Human Rights.¹⁰ Individuals, groups, or non-governmental organizations may bring a case to the court if they allege violations of the European Convention.¹¹ This court has judged many cases relating to migration, creating an extensive body of case law on migration issues and providing a means for asylum seekers to claim violations of their rights.¹²

Within the European Union, the extensive EU asylum *acquis* applies in addition to the European Convention on Human Rights and the European Court of Human Rights case law. The Court of Justice of the European Union is responsible for applying the EU Charter of Fundamental Rights and to rule on violations of EU law by Member States (MS).¹³ This Charter contains a right to asylum and a right to *non-refoulement*.¹⁴ The Treaty of Amsterdam in 1999 was the first to place elements of refugee policy under EU jurisdiction, and stipulated that Member States would work over five years to harmonize policies on rights for refugees, reception conditions, procedures and criteria for eligibility, guided by the 1951 UN Refugee

⁸ Roland Bank, "Forced Migration in Europe," in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasbiyeh et al., (Oxford, United Kingdom: Oxford University Press, 2014), 691.

⁹ European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law Relating to Asylum, Borders and Immigration," (Luxembourg: European Court of Human Rights, 2016), accessed November 16, 2016, http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf, 15.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, 15-16.

¹³ Bank, "Forced Migration in Europe," 692.

¹⁴ European Union and Council of Europe, "Handbook on European Law," 21.

Convention.¹⁵ The EU has articulated minimum standards in a series of policies called directives (The Temporary Protection Directive, Reception Conditions Directive, Asylum Procedures Directive, and the Qualification Directive).¹⁶ These directives guarantee protection in several situations beyond the scope of the definition of a refugee in international law, establish minimum standards for the reception of asylum seekers and for refugee rights, and outline appropriate asylum application procedures.¹⁷

Prior to 2007, EU asylum law functioned on the principle of minimum standards. With the Treaty of Lisbon in 2007 and the Stockholm Programme, the EU began to stipulate common standards for all EU countries to follow.¹⁸ The Treaty of Lisbon authorizes the European Parliament and the Council to “adopt measures for a common European asylum system.”¹⁹ In 2010, the European Asylum Support Office was created to increase cooperation between MS, to provide financial and technical assistance to MS struggling for processing large numbers of asylum applications, and to implement the CEAS.²⁰

To organize the distribution of asylum seekers across the EU, the EU created the Dublin System. The initial Dublin Convention was signed by EU governments in 1990, and came into force in 1997.²¹ The Dublin-II Regulation replaced it in 2003, and the Dublin-III Regulation replaced Dublin-II in 2013. This Regulation determines which state is responsible for processing an asylum-seeker’s application, which is typically the country through which the person first entered the EU.²² If a person enters one EU country and then moves to another,

¹⁵ Ibid., 19-20.

¹⁶ Bank, “Forced Migration in Europe,” 693.

¹⁷ Ibid.

¹⁸ Christian Kaunert and Sarah Léonard, “The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?” *Refugee Survey Quarterly* 31, no. 4 (2012): 4, doi:10.1093/rsq/hds018.

¹⁹ Member States of the European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007) OJ C 306/01, Article 65.63.2, (Treaty of Lisbon).

²⁰ European Parliament and the Council of the European Union, *Regulation No 439/2010 establishing a European Asylum Support Office* (2010) OJ L132/11.

²¹ See Member States of the European Communities, Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, (1997) OJ C254/01; and “The Dublin Convention on Asylum Applications: What It Means and How It’s Supposed to Work,” Refugee Council, August 2002, accessed April 27, 2017, https://www.refugeecouncil.org.uk/assets/0001/5851/dublin_aug2002.pdf.

²² Kaunert and Léonard, “The European Union Asylum Policy,” 11.

the second country may transfer that person back to the country of first entry. Dublin-III provides more rights to asylum seekers, including the rights to appeal a transfer, to personal interviews, and to more extensive considerations of family ties, but the basic principles remain the same.²³

The Dublin System has both positive and negative consequences. On the one hand, it prevents a person from applying for asylum in multiple countries, and prevents a situation in which no state will accept an asylum-seeker's application as the state deemed responsible must process the claim.²⁴ On the other hand, it equally serves as a way for states to avoid the processing of asylum claims. Lisa Schuster conducted field work among Afghan men asylum seekers living in Paris whom the French state was attempting to deport to another EU state under the Dublin system.²⁵ She found that many of the Afghans had little chance of making a successful refugee claim anywhere in the EU because no Member State was willing to process the claims, and the result was that many would likely become undocumented EU residents.²⁶ Based on her findings, Schuster argues that "Dublin II allows MS that are not first entry states to ignore their moral and legal responsibilities towards a significant number of asylum seekers."²⁷ To give another example, Britain uses the Dublin Regulation to deport around 1,000 people each year to return them to the country where they first entered the EU.²⁸ While it can be argued that countries are simply following regulations by deporting asylum seekers to the country of first entry, international law suggests that refugees should not be penalized for illegal entry into a country, and in practice the system allows states to relinquish responsibility for many asylum seekers despite the fact that they may not be able to effectively access asylum.

²³ "EU Asylum Policy: EU Country Responsible for Examining Applications," European Union, last modified January 3, 2015, <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32013R0604>.

²⁴ Kaurert and Léonard, "The European Union Asylum Policy," 11.

²⁵ Liza Schuster, "Dublin II and Eurodac: examining the (un)intended(?) consequences," *Gender, Place & Culture* 18, no. 3 (2011): 412, doi:10.1080/0966369X.2011.566387.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Matthew Holehouse, "EU to Fine Countries 'Hundreds of Millions of Pounds' for Refusing to Take Refugees," *The Telegraph*, 14:10, sec. 2016, accessed November 17, 2016, <http://www.telegraph.co.uk/news/2016/05/03/eu-to-fine-countries-that-refuse-refugee-quota/>.

Discrepancies in Laws

The Dublin System relies on the false assumption that EU law is universally and equally implemented so asylum seekers will receive the same treatment in each country. Despite an extensive common legal framework for asylum across the EU, actual policies, practices and rates of granting refugee status vary significantly across countries.²⁹ Despite the goal of a common system for asylum, Europe continues to respond to the refugee crisis largely within the framework of the nation-state. While changes in asylum policy over time have moved toward further integration, these policies are largely negotiated under and implemented through intergovernmental agreements. Once established, they are subject to national interpretation. For example, trying to maintain national control over asylum policies, the United Kingdom, Ireland, and Denmark have opted out of some EU asylum policies while still participating in the Dublin System.³⁰ Several of the EU Directives contain a combination of binding and optional clauses, so countries can choose not to follow some parts.³¹ For example, the Qualification Directive contains optional rules regarding the assessment of internal protection (the availability of protection in another region of the asylum seeker's country of origin).³² In addition, Iceland, Liechtenstein, Norway and Switzerland are members of the Dublin System, but not the European Union,³³ and thus they are not bound to respect EU asylum law.³⁴ Consequently, the EU's common standards are not guaranteed in every country.

Countries also interpret EU law differently. In a study of asylum law in the European Union, the UNHCR offered recommendations for addressing the variations in practice across the EU including: the creation and sharing of reliable country of origin information, the creation of unified interpretations of key terms such as "real risk" of serious harm, and a broadened definition of what qualifies as an "armed conflict" in order to provide protection to

²⁹ Bank, "Forced Migration in Europe," 693.

³⁰ *Ibid.*, 694.

³¹ *Ibid.*

³² European Commission, "Proposal for a Regulation on Standards for the Qualification of Third-Country Nationals as Beneficiaries of International Protection" COM/2016/0466 (2016).

³³ "EUROPA - Countries," European Union, accessed November 16, 2016, https://europa.eu/european-union/about-eu/countries_en.

³⁴ Bank, "Forced Migration in Europe," 693.

people who do not experience persecution as stipulated in the 1951 UN Refugee Convention but nevertheless qualify for international protection.³⁵ For example, determining a “real risk of serious harm” typically depends on assessing the level of “indiscriminate violence”, yet Member States require different levels of “indiscriminate violence” and use different methodologies to make their assessments.³⁶ The consequence of these variations is that the likelihood an asylum seeker will receive refugee status varies widely depending on which state processes the application.³⁷ For example, 2010 asylum recognition rates for Iraqis within the EU ranged from 10.9% in the UK to 78.5% in Belgium, while both use the same Qualification Directive to determine eligibility for refugee status.³⁸ As such, there is a veneer of unity and harmonization as national governments choose which portions of EU law to apply, and asylum seekers experience different treatment across the EU even though common standards are supposed to apply.

The fact that the asylum systems in some European countries fail to meet the standards of EU and international law makes it legally problematic to return asylum seekers to those countries if they are deemed responsible under the Dublin System for processing the claims. In two important court cases related to the Dublin System in 2011 and 2014, the European Court of Human Rights ruled that Greece’s asylum system violated Article 13 (right to an effective remedy) and Article 3 (prohibition of degrading treatment) of the European Convention on Human Rights because of terrible conditions for asylum seekers in Greece.³⁹ The Court also ruled that Belgium and Italy were at fault for returning the asylum seekers to Greece, because in doing so Belgium and Italy subjected the asylum seekers to degrading treatment and to the risk of being sent back to their country of origin without due process.⁴⁰ If European countries cannot legally return asylum seekers to the country deemed responsible for processing their

³⁵ “Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence,” United Nations High Commissioner for Refugees, July 27, 2011, <http://www.refworld.org/docid/4e2ee0022.html>, 101-106.

³⁶ *Ibid.*, 30.

³⁷ *Ibid.*

³⁸ *Ibid.*, 7.

³⁹ A summary of the cases of *M.S.S. v. Belgium and Greece* (January 21 2011) and *Sharifi and Others v. Italy and Greece* (October 21 2014) can be found in “Factsheet - ‘Dublin’ Cases,” European Court of Human Rights, June 2016, accessed November 16, 2016, http://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf.

⁴⁰ *Ibid.*

applications, due to an inadequate asylum system in that country, then the whole system becomes problematic.

Problems with asylum standards are especially pronounced in small border countries, as structural issues are compounded with the requirement under the Dublin System for processing applications at the country of first entry. Between January 1 and November 30 2015, Greece received nearly 743,000 sea arrivals, mostly on its small islands.⁴¹ As of December 20, 2016, Greece was hosting nearly 49,000 asylum seekers and refugees, including more than 15,000 people on its islands, which only have the capacity to accommodate about half that number.⁴² Even with United Nations High Commissioner for Refugees (UNHCR) support, the Greek asylum system cannot process so many new arrivals in such a short period.

The CEAS is supposed to respect principles of European solidarity and burden sharing, but in practice nationalism limits solidarity within the EU. The EU aims to “frame a common policy on asylum...based on solidarity between Member States.”⁴³ Due to location, a few border countries, such as Greece and Italy, receive most of the EU’s asylum seekers, without a sufficient assistance from other EU countries to provide for a large number of refugees. The EU proposed a relocation plan, transferring 160,000 asylum seekers from Greece and Italy by September 2017 to ease the pressure on these countries, but this plan continues to be highly contested and its implementation slow.⁴⁴ In September 2015, the European Commission passed a mandatory quota measure distributing these 160,000 relocated asylum seekers among MS, despite opposition to the plan from Poland, Slovakia, Romania, and Hungary.⁴⁵ In October 2016, Hungarian Prime Minister Viktor Orbán declared the results of a referendum in which 98% of Hungarians opposed the EU’s mandatory refugee quotas, although since just over 40% of eligible voters participated the result may not be representative of the views of all

⁴¹ “Greece: Total Number of Sea Arrivals (Jan - 30 Nov 2015),” United Nations High Commissioner for Refugees, December 1, 2015, accessed January 19, 2017, <http://www.refworld.org/docid/566680c14.html>.

⁴² “Greece: Europe Refugee Emergency - Daily Map Indicating Capacity and Occupancy (Governmental Figures) As of 20 December 2016 08:00 A.m. EET,” United Nations High Commissioner for Refugees, December 20, 2016, accessed January 19, 2017, <http://www.refworld.org/docid/58624c504.html>.

⁴³ *Treaty of Lisbon*, Article 64.2.

⁴⁴ European Commission, “The EU and the Refugee Crisis.”

⁴⁵ Holehouse, “EU to Fine Countries for Refusing to Take Refugees.”

Hungarians.⁴⁶ As of April 10 2017, 16,340 people had been relocated.⁴⁷ However, to meet the target of relocating all remaining eligible candidates by September 2017, which include 14,000 individuals in Greece and 3,500 in Italy, the European Commission urges MS to increase the rate of relocation.⁴⁸ If the current rate of relocation continues, only Malta and Finland will likely meet their obligations by the September deadline, while Hungary and Poland still refuse to participate in relocation, Austria has yet to begin relocations, and Bulgaria, Croatia and Slovakia are only relocating a limited number of refugees.⁴⁹

The resistance of MS to relocate refugees from Greece and Italy shows that EU MS fail to fulfill the Treaty of Lisbon's goal of asylum policy based on solidarity. Reflecting on the reluctance of many European countries to aid Greece during its debt crisis after the 2008 global financial collapse, Peter Hall, an accomplished scholar in the field of European politics and policy, concludes that "it is now clear that, for the most part, feelings of social solidarity stop at national borders."⁵⁰ This insight applies equally to the migration crisis. Similarly, Eleni Karageorgiou from the Faculty of Law at Lund University in Sweden in her study of Europe's response to the Syrian refugee crisis found a "deficit of solidarity" between EU countries.⁵¹ She argues for "the need for the EU to revisit solidarity as a concept with normative significance and not as a mere political rhetoric."⁵² The migration crisis has exposed limits to solidarity in a seemingly unified and harmonized Europe.

⁴⁶ "Hungary PM Claims EU Migrant Quota Referendum Victory," *BBC News*, October 3, 2016, sec. Europe, accessed November 17, 2016, <http://www.bbc.com/news/world-europe-37528325>.

⁴⁷ "Relocation and Resettlement: Steady Progress Made but More Efforts Needed to Meet Targets," *European Commission*, April 12, 2017, accessed May 1, 2017, http://europa.eu/rapid/press-release_IP-17-908_en.htm.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Peter A. Hall, "The Economics and Politics of the Euro Crisis," *German Politics* 21, no. 4 (2012): 367, doi:10.1080/09644008.2012.739614.

⁵¹ Eleni Karageorgiou, "Solidarity and Sharing in the Common European Asylum System: The Case of Syrian Refugees," *European Politics and Society* 17, no. 2 (2016): 210, doi:10.1080/23745118.2016.1121007.

⁵² *Ibid.*

Human Rights Rhetoric, Exclusionary Practices

Despite Europe's prominent discourse of human rights, its migration practices are guided more by exclusion, security and border controls. Rights discourses underlie European institutions. For example, the 2007 European Union's Treaty of Lisbon states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁵³

This article parallels the 1951 Convention which stipulates that "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."⁵⁴ Apparently, the Union is established on normative foundations, including human rights, freedom and non-discrimination.

However, the idealist discourse of the EU often does not translate into practice. Indeed, the European Commission uses the phrase "stopping irregular uncontrolled migration" alongside discourses of human rights.⁵⁵ This discourse implies that refugee movements are problematic even dangerous for Europe, and these movements must be contained and ended. Dimitris Dalakoglou, Chair in Social Anthropology at Vrije University Amsterdam, suggests that "what we observe coming to the surface in the context of the current refugee crisis is the manifestation of Europe's most ugly and discriminatory spatiality—the preservation at all costs of its border security."⁵⁶ Mass migration movements do pose important security concerns. However, while the EU discursively emphasizes norms such as human rights, security concerns frequently contradict these norms and prevent many legitimate refugees from accessing asylum.

⁵³ *Treaty of Lisbon*, Article 1.3.

⁵⁴ UNHCR, "Convention and Protocol Relating to the Status of Refugees," 17.

⁵⁵ European Commission, "The EU and the Refugee Crisis."

⁵⁶ Dimitris Dalakoglou, "Europe's Last Frontier: The Spatialities of the Refugee Crisis," *City* 20, no. 2 (2016): 180, doi:10.1080/13604813.2016.1170467.

The restrictions of the Dublin System and other EU asylum laws contrast with the freedom of movement which is available to EU citizens. In 1985, most Member States of the EU signed the Schengen Agreement, abolishing internal border controls within the Schengen area.⁵⁷ The Treaty of Lisbon ensures freedom of movement for EU citizens.⁵⁸ While an unconditional right to free movement for refugees may be ethically appealing, it is not practical. However, the Treaty of Lisbon promises “a policy...ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders.”⁵⁹ The refugee crisis makes it clear that asylum seekers are still subject to internal border controls, such as the Dublin Regulation which effectively keeps asylum seekers in one state to have their application processed. Free movement and an absence of border controls within the EU are both tied to citizenship, not territory, as asylum seekers within the borders of the EU do not enjoy the same privileges.

In addition, it appears that “the overwhelming majority” of European policies are designed to keep potential refugees out rather than willingly grant asylum.⁶⁰ Schuster suggests that “the concern of EU MS is actually to reduce the number of those able to apply for asylum to an absolute minimum, rather than ensuring access to this status to anyone who might need it.”⁶¹ This goal is achieved through laws such as visa requirements, reductions in benefits for asylum-seekers, and investments in border technologies to catch migrants attempting to cross borders.⁶² The Stockholm Programme, initiated in 2010, provided for increased border control through EU’s border agency Frontex.⁶³ However, the Programme failed to identify “how it can be assured that persons in need of international protection would not be impeded in their access to safety in EU-Europe by the establishment of increased border controls.”⁶⁴ Between 2014 and 2016, Europe spent at least €17 billion to reduce numbers of migrants, including €15.3 billion

⁵⁷ European Union and Council of Europe, “Handbook on European Law,” 18.

⁵⁸ *Treaty of Lisbon*, Article 1.4.

⁵⁹ *Treaty of Lisbon*, Article 65.62.1.

⁶⁰ Kaurert and Léonard, “The European Union Asylum Policy,” 2.

⁶¹ Schuster, “Dublin II and Eurodac,” 401.

⁶² *Ibid.*

⁶³ Bank, “Forced Migration in Europe,” 695.

⁶⁴ *Ibid.*

spent outside Europe on mechanisms to decrease migration.⁶⁵ European countries have often not respected their legal obligations to refugees at extraterritorial border controls, especially in the high seas.⁶⁶ As of May 2, 2017, temporary border controls in the Schengen Zone have been reinstated in France, Germany, Austria, Denmark, Sweden and Norway as a response to security concerns.⁶⁷

A prime example of the drive to exclude and limit migrants is the EU's deal with Turkey, which returns Syrians who have crossed into Greece from Turkey.⁶⁸ Turkey is not a part of the European Union nor of the Dublin System, so it functions as an external location for the EU to send asylum seekers where the EU is no longer responsible. Under the EU-Turkey agreement, the EU returns refugees who have arrived irregularly by sea, then accepts an equal number of resettled refugees directly from Turkey.⁶⁹ While EU leaders credit the agreement for significantly reducing the number of refugees arriving by sea from Turkey, and for offering a legal pathway to enter Europe, it is clear that the goal is to control migration movements rather than to address humanitarian concerns.⁷⁰ The UNHCR has criticized the deal, expressing concerns that the rights of asylum seekers will not be respected in Turkey, and that the Greek government, especially on the Greek islands, is not sufficiently prepared to host people and assess their asylum claims.⁷¹ Especially since Turkey is not bound to respect EU asylum laws, the UNHCR has good reason to be concerned about respect for refugee rights.

Roland Bank, the Head of Protection for the UNHCR in Austria and Germany, concludes: "Overall, in light of Europe's record regarding forced migration, it is not possible to

⁶⁵ John Cosgrave et al., "Europe's Refugees and Migrants: Hidden Flows, Tightened Borders and Spiralling Costs," Overseas Development Institute, September 2016, accessed November 17, 2016, <http://www.refworld.org/docid/57dbed324.html>, 13.

⁶⁶ Bank, "Forced Migration in Europe," 692.

⁶⁷ European Commission, "Temporary Reintroduction of Border Control," Text, *Migration and Home Affairs - European Commission*, accessed May 2, 2017, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en.

⁶⁸ European Commission, "The EU and the Refugee Crisis."

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ See "UNHCR on EU-Turkey Deal: Asylum Safeguards Must Prevail in Implementation," UNHCR, March 18, 2016, accessed November 17, 2016, <http://www.unhcr.org/news/press/2016/3/56ec533e9/unhcr-eu-turkey-deal-asylum-safeguards-must-prevail-implementation.html>; and "UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect," UNHCR, March 22, 2016, accessed November 17, 2016, <http://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>.

identify Europe as a stronghold of human rights or a region taking a liberal approach to guaranteeing [*sic*] the protection to forced migrants.”⁷² Powerful constructions of refugees as security threats, dangerous others, and illegal migrants dominate over portrayals of refugees as vulnerable individuals recognized as needing protection under international law. Prominent discourses of xenophobia, islamophobia, racism and nationalism create strong ‘us versus them’ dichotomies, and limit rights to citizens of the state. The turn to the European Union to address asylum policy can also be interpreted as an attempt to limit the rights of migrants. Virginie Guiraudon, Director of Research at the French National Centre for Scientific Research, argues that integration of migration policy in Europe “constitutes a case of strategic ‘venue shopping’ by migration control agencies adapting to institutional and material policy constraints.”⁷³ She suggests that governments can bypass constraints at the national level which are favourable to the rights of foreigners, including judicial review, different view points, and the influence of migrant aid groups, by taking migration policy-making to an international level.⁷⁴ In the treatment of refugees and asylum seekers, Europe fails to embody its own supposedly universal values of justice, equality, freedom and human rights.

For asylum seekers, the consequences of the problems with the CEAS are severe. To give a few examples, as of April 22, over 1,000 asylum seekers have drowned in 2017 alone trying to cross the Mediterranean Sea.⁷⁵ Human Rights Watch documented long wait times to process asylum claims in Greece, ranging from several months up to a year before claims were considered.⁷⁶ Many asylum seekers have been forced to live in squalid conditions in makeshift camps, such as the 8,000 asylum seekers who were living in the Idomeni camp close to the Greece-Macedonia border when Greek authorities relocated the inhabitants to state-run

⁷² Bank, “Forced Migration in Europe,” 699.

⁷³ Virginie Guiraudon, “European Integration and Migration Policy: Vertical Policy-making as Venue Shopping,” *JCMS: Journal of Common Market Studies* 38, no. 2 (2000): 268, doi:10.1111/1468-5965.00219.

⁷⁴ *Ibid.*

⁷⁵ Lizzie Dearden, “Refugee Death Toll Passes 1,000 in Record 2017 as Charities Attacked for Conducting Mediterranean Rescues,” *The Independent*, April 22, 2017, accessed May 1, 2017, <http://www.independent.co.uk/news/world/europe/refugee-crisis-migrants-asylum-seekers-mediterranean-see-libya-italy-ngos-smugglers-accusations-a7696976.html>.

⁷⁶ Human Rights Watch, “Greece: A Year of Suffering for Asylum Seekers,” *Human Rights Watch*, March 15, 2017, accessed May 1, 2017, <https://www.hrw.org/news/2017/03/15/greece-year-suffering-asylum-seekers>.

facilities in May 2016.⁷⁷ The failure of the CEAS to efficiently process asylum claims and to fully implement the EU asylum law result in extensive suffering for asylum seekers.

Reforming the Common European Asylum System

One way to improve the conditions for refugees would be to strictly enforce existing EU law. The problem is not that refugees and asylum seekers lack legal protections within the EU, but rather that countries fail to implement these protections in a uniform manner. The EU has institutional and legal mechanisms to improve the situation for refugees, with an extensive body of EU law, the European Asylum Support Office, and the Court of Justice of the EU. These institutions must hold states accountable to EU and international law on refugee rights. All countries who wish to participate in the Dublin System should have to implement the full set of EU standards, as it is important to only include countries whose asylum systems meet EU standards and who can guarantee the rights of refugees returned to their country for processing.

However, it is becoming increasingly clear for the need to reform the Dublin System. In May 2016, the European Commission's proposed a Dublin IV Regulation to replace the current Dublin III.⁷⁸ To fairly distribute asylum seekers, Dublin IV proposes a shared automated system to record all asylum applications throughout the EU.⁷⁹ To avoid any MS being responsible for a disproportionate number of asylum applications, it proposes a fairness mechanism, in which a threshold number of applications for each MS would be calculated using population size and GDP.⁸⁰ Any asylum applications above the threshold would trigger the fairness mechanism, and the asylum seekers beyond the threshold number would be relocated across the EU. If a MS chooses to reject their allocation of asylum seekers, they would be

⁷⁷ "Greece Starts Moving Migrants from Squalid Border Camp," *Reuters*, May 26, 2016, accessed May 1, 2017, <http://www.reuters.com/article/us-europe-migrants-greece-idUSKCN0YF0NE>.

⁷⁸ "The Reform of the Dublin System," European Commission, May 4, 2016, accessed April 18, 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the_reform_of_the_dublin_system_en.pdf.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

required instead to contribute €250,000 per applicant to whichever state accepts the asylum seekers.⁸¹

Going further than Dublin IV, it is possible to imagine, though nearly impossible to implement, a supranational European Asylum System. In a supranational asylum system, the EU rather than individual countries would grant asylum. The EU would be responsible to provide for the rights of asylum seekers until their claims are processed. Such a solution would ensure equal treatment and adequate recognition of refugee rights throughout the EU. Asylum seekers could move freely within the EU like EU citizens. While perhaps a supranational asylum system would be ideal for guaranteeing refugee rights, in practice it is unrealistic, as it would require unprecedented integration and cooperation on issues of migration, with states giving up all sovereign control over granting refugees asylum.

Paradoxically, the way for Europe to better manage migration flows is not to attempt to keep all migrants out, but to allow more people to come through legal channels. A report from the Overseas Development Institute suggests that the best way for Europe to control migration is to increase legal ways to reach Europe.⁸² Avenues of resettlement or various legal asylum channels are safer for refugees, as they do not need to resort to dangerous human smuggling and life-threatening travel, especially across the Mediterranean Sea. While many rights are guaranteed for refugees who reach the European Union, “access to Europe and thereby to protection has become a matter of financial investment – through the payment of ‘fees’ to smugglers and document forgers – and of risking one’s life in a perilous journey.”⁸³ Resettlement is also safer for receiving countries, as they can conduct security screenings and control who is entering their territory, while still fulfilling obligations toward refugees. A strong resettlement program, focused on reunifying families and caring for the most vulnerable refugees, would be of advantage both to refugees and receiving countries. Some refugees could also be resettled through educational programs, like the World University Service of Canada

⁸¹ Ibid.

⁸² John Cosgrave et al., “Europe’s Refugees and Migrants,” 13.

⁸³ Bank, “Forced Migration in Europe,” 692.

Student Refugee Program, in which refugee students are sponsored to come to a Canadian university and become Permanent Residents upon arrival.⁸⁴

Such legal resettlement programs should not, however, be at the expense of other asylum seekers arriving on the shores of Europe, as in the EU-Turkey deal. While EU MS have agreed to a voluntary resettlement programme for 22,500 refugees living outside the EU, participation is optional, and the number is insignificant compared to the need for resettlement.⁸⁵ As of November 2016, approximately half of these refugees had resettled in the EU.⁸⁶ In order for Europe to fulfill its humanitarian obligations and to curb unregulated migration, Europe must provide more legal avenues for refugees to resettle on the continent.

Conclusion

In practice, the Common European Asylum System is not so common. Ultimately, most European countries prefer to avoid taking responsibility for asylum seekers and refugees. The contradictions within the CEAS reflect a desire to maintain national control over asylum policies despite the increasing scope of EU asylum law. The Dublin System rests on precarious moral and legal foundations, since varying standards across countries make it problematic if not illegal to return asylum seekers to the state responsible for processing their claims. The refugee crisis has revealed that Europe is less unified than it might appear, both in terms of policy harmonization and in terms of solidarity with border countries struggling as the countries of first entry in the EU. Asylum seekers are increasingly portrayed as illegal migrants posing an economic and security threat. While EU citizens are free to move without restrictions and choose where to live within the EU, such freedom of movement is not guaranteed to asylum seekers. Many EU policies aim to keep refugees out of Europe rather than grant asylum. European ideas of human rights are subordinated to concerns of security and nationalism.

⁸⁴ World University Service of Canada, "Student Refugee Program," *WUSC Student Refugee Program*, 2017, accessed May 1, 2017, <http://srp.wusc.ca/>.

⁸⁵ European Commission, "The EU and the Refugee Crisis."

⁸⁶ "Relocation and Resettlement: Member States Need to Sustain Efforts to Deliver on Commitments," European Commission, November 9, 2016, accessed November 17, 2016, http://europa.eu/rapid/press-release_IP-16-3614_en.htm.

The future of the CEAS is uncertain. Future reforms could follow several directions: full enforcement of EU asylum law in all EU and Dublin System countries, the EU's Dublin IV proposal, or the creation of a supranational asylum system. Each direction would require greater policy harmonization, integration and cooperation. The alternative is disintegration, or a move away from the goal of a shared asylum system in favour of national control over asylum. It is still unclear whether Europe will utilize the current migration crisis as a catalyst for further integration, or whether it will lead to a breakdown in the current asylum system. Whether Europe decides to transcend nationalism, sovereignty and xenophobia to apply its supposedly universal values of freedom, justice, equality, and human rights remains to be seen.

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