ASILE

Global Asylum Governance and the European Union's Role

Refugee and Human Rights Law Standards Applicable to Asylum Governance and the Right of Asylum

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CONTENTS

1. INTRODUCTION

This chapter interrogates key instruments, standards and trends in global asylum governance, exploring the compatibility of emerging asylum regimes with international and regional instruments and standards in this area. The chapter takes a global view, while drawing on national and regional practice from the six countries central to the ASILE project, Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey, where relevant.

The chapter deals with those international and regional human rights and refugee law standards directly related to asylum governance. We define 'asylum governance' as legal procedures and standards most closely connected to the grant and content of international protection, including access to asylum, asylum procedures, scope of international protection and content of international protection. As a result, we do not focus on standards relating to reception conditions, including detention standards.

The chapter proceeds in four substantive sections. First, we briefly set out the most relevant international and regional human rights and refugee law instruments, as well as the relationship between human rights and refugee law in this area and the (potential) impact of the Global Compact on Refugees (GCR) on global asylum governance. Second, we provide an account of key binding international and regional standards governing access to asylum, asylum procedures, the scope of protection and content of protection.

Our final two sections are dedicated to trends in emerging global asylum regimes observed throughout the ASILE project. Our third section is devoted to the tension between paradigms of deterrence and containment and admission to territory, including the emergence of pushbacks as a systematic global practice; the use of 'safe third country' mechanisms; crisis derogations and perceived 'instrumentalisation' of asylum; externalisation of asylum responsibilities; and the use of third country solutions to moderate containment approaches.

Finally, the chapter addresses a set of tendencies related to the temporariness of protection, encompassing differential treatment between groups of protection seekers and refugees; issues of exploitation due to limitations on the right to work; and the concept of 'vulnerability' as a protection issue.

2. LEGAL INSTRUMENTS ON ASYLUM GOVERNANCE

2.1 Universal and regional instruments

The heart of asylum governance at the international level remains the *1951 Convention on the Status of Refugees* and its *1967 Protocol* (Refugee Convention),[1] which includes the inclusion, exclusion and cessation criteria, the cardinal principle of *non-refoulement,* the principle of non-penalisation, and the set of civil, political and socio-economic rights accruing to refugees as their attachment to the asylum state grows.[2]

The Refugee Convention, to which 149 states are party, is complemented by international human rights law instruments which provide an array of general human rights owed to all persons, including protection seekers and refugees. At the regional level, instruments in Europe, the Americas and Africa lay down binding standards on the rights of protection seekers and refugees, in some cases going beyond international law standards. No such binding regional instruments are present in Asia and the Middle East.

At Council of Europe level, standards of refugee protection derive from the regional human rights regime provided for in the European Convention on Human Rights (ECHR). The EU asylum *acquis*, resting on the *Treaty on the Functioning of the European Union* (TFEU) and the *Charter of Fundamental Rights of the European Union* (EUCFR), provides an elaborated system of secondary legislation, with the Court of Justice of the European Union (CJEU) developing far-reaching jurisprudence in this area.

In the Americas, three regional human rights instruments are of relevance to asylum governance. The *1948 American Declaration on the Rights and Duties of Man* (ADHR) sets out the first regional 'set of comprehensive international standards in relation to human rights and duties.'[3] While the ADHR is formally non-

[1] James C. Hathaway, "The Architecture of the UN Refugee Convention and Protocol." in Cathryn Costello, Michelle Foster and Jane McAdam, *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) .
[2] James C. Hathaway, James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 173-232.
[3] David James Cantor and Stefania Barichello, 'Protection of Asylum Seekers under the Inter-American Human Rights System', *Regional Approaches to the Protection of Asylum Seekers* (Routledge 2016).

binding, some authors consider the Declaration binding on Member States of the Organization of American States (OAS) as the codification of regional practice.[4]

The *Organization of American States Charter* (OAS Charter) created the Inter-American Commission on Human Rights (IACHR). The IACHR is a source of non-binding guidance in the Inter-American human rights system. In turn, the *1969 American Convention on Human Rights* (ACHR) created the IACtHR, which produces binding jurisprudence upon referral from the Commission. At the sub-regional level, *1984 Cartagena Declaration* on Refugees is an influential soft law framework that has increased the scope of protection for refugees through uptake in national legislation, complemented by subsequent initiatives every ten years.[5]

The African regional protection system for refugees is based on the *1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention), ratified by 51 of the 55 African Union member states. The OAU Convention was the world's first regional refugee protection instrument. In addition, the African Charter on Human and Peoples' Rights[6] includes guarantees for refugees, while the Kampala Convention is concerned with the protection needs of internally displaced persons.[7]

2.2 Refugee law and human rights law instruments: distinctions and overlaps

The Refugee Convention provides more robust protection standards than general human rights treaties with regard to a number of issues. However, some rights are only sporadically, or not at all, protected by the Refugee Convention. As a result, the comprehensive and effective protection of Convention refugees depends on supplementary provisions in general human rights treaties. In addition, persons in need of international protection beyond the scope of the Refugee Convention are exclusively covered by the general protection standards laid down in universal and regional human rights treaties.

[4] Ibid 5, 36. For a contrary view, see Jose H Fischel de Andrade, 'Regional Refugee Regimes: Latin America', in Cathryn Costello, Michelle Foster and Jane McAdam, *The Oxford Handbook of International Refugee Law* (OUP 2021) 324.
[5] San José Declaration on Refugees and Displaced Persons, 7 December 1994; Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America. Mexico City, 16 November 2004; and Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean. Brasilia, 3 December 2014
[6] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter).
[7] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) (Kampala Convention)

The relationship between the refugee and human rights law instruments is mutually complementary. Most notably, the principle of *non-refoulement* is embedded in and expanded upon by international human rights law instruments, proscribing the return of any person to a real risk of torture, inhuman degrading treatment or punishment. Beyond *non-refoulement,* human rights instruments at both universal and regional level contribute to asylum governance in areas including the right to family life, the right to leave, asylum procedures, reception conditions and the right to work.

Beyond the substantive complementary role played by human rights instruments, human rights treaty monitoring bodies play a crucial role in driving the normative development of asylum governance, as the Refugee Convention lacks a concomitant supervisory mechanism. As a result, regional human rights courts in Europe, Africa and the Americas have developed jurisprudence on key areas of protection, while the United Nations treaty bodies provide important asylum-related guidance through individual complaints mechanisms.

2.3 The potential impact of GCR

While a non-binding instrument, the GCR explicitly acknowledges its grounding in 'the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol'.[8] The GCR further acknowledges the key role of regional protection instruments to the international refugee regime.[9]

As a global responsibility sharing instrument, the GCR in theory has the potential to develop legal standards on asylum governance in a number of ways, including the elucidation of the scope of existing binding obligations at international or regional level, evidence of state practice in support of or against emerging customary norms or as a building block toward binding forms of responsibility sharing, such as an additional protocol or framework convention.[10]

[8] Global Compact on Refugees para 3.
[9] Global Compact on Refugees para 5.
[10] Volker Türk and Madeline Garlick, 'From burdens and responsibilities to opportunities: the comprehensive refugee response framework and a global compact on refugees' (2016) 28 *International Journal of Refugee Law* 4, 656-678; Patrick Wall, 'A new link in the chain: Could a framework convention for refugee responsibility sharing fulfil the promise of the 1967 protocol?' (2017) 29 *International Journal of Refugee Law* 2, 201-237.

3. STANDARDS – PROCEDURES, SCOPE AND CONTENT OF PROTECTION

3.1 Administrative arrangements for asylum procedures

3.1.1 Contextualising the right to seek asylum

Whereas the right to seek asylum is generally recognised in international law,[11] administrative arrangements for examining asylum requests play a crucial role in making this right a reality. On the one hand, migration control arrangements may effectively undermine the right if they prevent people from accessing the examination procedure, often due to the extraterritorial exercise of such controls. On the other hand, administrative arrangements will not serve the purpose of identifying persons in need of protection if they do not comply with certain minimum quality standards for those who manage to access the relevant examination procedure.

The right to an asylum procedure is therefore a critical precondition for effective access to protection for those in need of international protection, just as the conduct of examination procedures is contingent on applicants getting access to the procedure in the first place. Following a brief account of the legal standards on asylum procedures, we illustrate how the regulatory context and administrative modalities at domestic level impact the implementation of these standards, thereby being decisive for the realisation of the right to seek asylum.

While some cooperative measures aim – though not always successfully – to prevent protection seekers from coming within the jurisdictional responsibility of the state of prospective destination, the situations dealt with in this section presuppose the exercise of jurisdiction of the destination state, thus generally triggering that state's obligations under international refugee and human rights law. Indeed, the various measures resorted to by states to avoid examining asylum requests can be seen as a continuum of deterrence and containment practices that raise serious issues of compatibility with the relevant legal standards. The following will identify the legal standards relevant to situations where protection seekers attempt to enter the territory and examination procedure of such states.

3.1.2 Quality standards for asylum procedures

Although neither the Refugee Convention nor international or regional human rights treaties provide specific standards on the examination of applications for

[11] Nikolas Feith Tan and Jens Vedsted-Hansen, *Catalogue of International and Regional Legal Standards: Refugee and Human Rights Law Standards Applicable to Asylum Governance* (ASILE 2021) 14-23 with further references.

asylum, the prohibition of *refoulement* explicitly or implicitly enshrined in these instruments[12] imposes on states parties the obligation to conduct a meaningful examination of requests for international protection if they consider removing an asylum seeker. Thus, in order to respect their *non-refoulement* obligations states are required to identify or, as the case may be, set up authorities with the requisite competence and capacity to examine whether any non-citizen applying for asylum is in need of protection, unless they are prepared to accept the request for protection by granting residence and treating the non-citizen in accordance with refugee and human rights law standards.

Due to the absence of specific standards for asylum procedures in the Refugee Convention and the relevant human rights treaties, standards on the quality of such procedures have developed gradually through the interaction between soft law norms, primarily adopted in connection with the Refugee Convention, and norms adopted by the international and regional bodies created under human rights treaties to monitor states' compliance with their treaty obligations.

In the context of the Refugee Convention, the Executive Committee of the UN High Commissioner for Refugees – UNHCR's governing body – recommended in 1977 basic requirements for national procedures for determination of refugee status. Among these were modalities to secure respect for the principle of *non-refoulement* such as clearly identifying an authority – wherever possible a single central authority as opposed to border officers – with responsibility for the examination, assistance of competent interpreters and the opportunity to contact a UNHCR representative, as well as the right to appeal and to remain in the country during the examination and the appeals procedure.[13] Additional standards have been adopted both by the Executive Committee and by UNHCR itself, including quality ambitions for asylum procedures and recommendations focusing on particularly vulnerable categories of protection seekers such as women and children.[14]

Although legally non-binding, these recommendations not only had significant influence on the asylum procedures established in many states and those implemented by UNHCR, but also inspired standard setting at the regional level. Thus, both within the Inter-American, African and European human rights systems recommended standards on asylum procedures have been adopted for the

[12] Ibid. See also above section 2.1.
[13] UNHCR Executive Committee, Conclusion No 8 (XXVIII) 1977: Determination of Refugee Status, section (e).
[14] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva 1979, reissued in 1992, 2011 and 2019). For an overview of relevant Executive Committee Conclusions and UNHCR Guidelines on International Protection, see Tan and Vedsted-Hansen (2021) 28-30.

purpose of securing effective protection of the rights enshrined in the respective human rights treaties when dealing with asylum applications.[15]

3.1.3 Procedural standards and collective expulsion

In addition to the principle of *non-refoulement* as set out above, the prohibition of collective expulsion requires an individual assessment concerning every affected person, aiming to secure that any circumstances warranting protection against removal are identified and adequately examined. Without such an assessment the decision to expel risks exposing the individual to persecution or violation of the prohibition of torture and other ill-treatment. The prohibition is enshrined in various human rights instruments, most notably Article 4 ECHR Protocol 4 which states in absolute terms that '[c]ollective expulsion of aliens is prohibited' and thus does not allow states to introduce restrictions on the prohibition. Although the ICCPR does not include an explicit prohibition of collective expulsion, Article 13 ICCPR is considered to include an implicit prohibition as this provision entitles each alien to an individual decision in order to prevent arbitrary expulsions.[16] Given that Article 13 ICCPR applies only to aliens lawfully in the territory, it does not protect against collective expulsion of aliens in an irregular situation or of those seeking admission at the border, as opposed to Article 4 ECHR Protocol 4 which applies to non-admission of protection seekers at the border.

Expulsion is considered collective if measures compelling aliens, as a group, to leave a country are not taken on the basis of a 'reasonable and objective examination of the particular case of each individual alien of the group'.[17] Nonetheless, the concept of 'collective expulsion' has been narrowly interpreted so as to not include situations where the affected persons have not made use of existing procedures for gaining lawful entry into the territory. This interpretation is significantly qualified for protection seekers, as such conduct only excludes them from the prohibition of collective expulsion, if the state provided 'genuine and effective access to means of legal entry, in particular border procedures', and the persons affected by the return decision did not have 'cogent reasons' for not using these border procedures.[18]

[15] For an account of regional standards in Africa, the Americas and Europe, see Álvaro Botero and Jens Vedsted-Hansen, 'Asylum Procedure', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (OUP 2021) 597-606. See also Tan and Vedsted-Hansen (2021) 35-42.

[16] HRC, CCPR General Comment No. 15: The Position of Aliens Under the Covenant (1986) para. 10; see also Vincent Chetail, *International Migration Law* (OUP 2019) 139.

[17] *N.D. and N.T. v. Spain* (ECtHR, judgment 13 February 2020) para. 193.

[18] Ibid. paras. 201, 210-11; see Sergio Carrera, *The Strasbourg Court Judgment* N.D. and N.T. v. Spain. *A* Carte Blanche *to Push Backs at EU External Borders?* (*EUI Working Paper RSCAS 2020/21,* EUI 2020) 6, 11.

3.1.4 Implementation and conflation of procedural standards

Clear standards do not in themselves provide any guarantee that asylum procedures are properly conducted. Varying compliance with procedural standards may have diverse reasons, ranging from insufficient resources and capacity to outright violation of states' obligations under refugee and human rights law. In some countries asylum cases become conflated with other migration channels and systems to the effect that protection seekers may be *de facto* protected despite the lack of formal examination of their need for protection or, by contrast, may be denied requisite protection because they are treated as irregular immigrants without regard to their condition as potential refugees.

As an example, Brazil has offered two pathways to protection for people fleeing Venezuela, either the ordinary asylum procedure or the grant of residence under the MERCOSUR Residence Agreement. [19] In Turkey, both protection seekers and Syrian refugees are subject to restrictions of freedom of movement that can be enforced by severe sanctions. Thus, the applications of protection seekers who without good reason fail to comply with reporting or residence requirements are considered withdrawn and the examination is terminated. [20] These examples show that the quality of asylum procedures may be significantly influenced by their entanglement with other regulatory arrangements, including those concerning detention and other measures towards irregular migrants.

3.2 Scope and content of protection

The scope and content of protection for refugees and other persons in need of protection is defined by a rather complex regime of interacting and mutually complementary standards in the Refugee Convention and various international and regional human rights treaties.

3.2.1 Scope of protection

The 1951 Convention's Article 1A(2) provides the internationally accepted definition of refugeehood as a person outside their country with a well-founded fear of persecution on a Convention ground. Article 1D carves out from Convention protection refugees who are receiving the protection or assistance of other United Nations agencies, most notably refugees under the protection or assistance of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). [21] Article 1F of the Refugee Convention operates to

[19] Roberto Cortinovis and Lorenzo Rorro, *Country Note Brazil* (2021) 4 and 7; UN Working Group on Arbitrary Detention, Report on Mission to Brazil, 30 June 2014 (UN doc. A/HRC/27/48/Add.3) paras. 52 and 57.
[20] Roberto Cortinovis, *Country Note Turkey* (2021) 8-9; Special Representative of the Secretary General of the Council of Europe on migration and refugees, Report on fact-finding mission to Turkey, 10 August 2016 (SG/Inf(2016)29) sections IV.5 and X.2.
[21] Susan Akram, *UNRWA and Palestinian refugees* (OUP Oxford 2014).

exclude refugees where there are serious reasons to consider a person has committed war crimes, crimes against humanity, a serious non-political crime or 'acts contrary to the purposes and principles of the United Nations'.[22] Finally, Article 1C exhaustively sets out the circumstances in which an asylum state may end a refugee's status.

Drawing on international human rights law conceptions of *non-refoulement,* complementary or subsidiary protection statuses have proliferated to 45 states in recent decades.[23] As *non-refoulement* obligations under international human rights law protect any person against return to torture or other serious ill-treatment, this form of protection provides for the protection of people in refugee-like situations who do not meet the nexus requirement of the Refugee Convention.[24] The EU Qualification Directive, notably, grants 'subsidiary protection' to any person facing a real risk of the death penalty; torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict.[25]

At the regional level, both the OAU Convention and the Cartagena Declaration system provide broader conceptions of refugeehood than the 1951 Convention. The definition of refugeehood contained in the OAU Convention, notably, provides protection from conflict and indiscriminate violence, an approach more suited to protecting people fleeing from generalised violence and war. Importantly, too, the African regional system does not include use of the internal protection alternative concept, acknowledging that people may flee localised risks in one part of their country of origin. The non-binding Cartagena Declaration expands the scope of protection by identifying five 'situational events' that give rise to refugeehood. These situations are based on objective and often generalised conditions in the country of origin, such as generalised violence, internal conflicts or massive violations of human rights.[26]

[22] Refugee Convention Article 1F(c).
[23] Jane McAdam, 'Complementary Protection' in C. Costello, M. Foster and J. McAdam, *The Oxford Handbook of International Refugee Law* (OUP 2021) 661-678
[24] See further Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).
[25] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, article 15.
[26] Nikolas Feith Tan and Julia Kienast, The Right of Asylum in Comparative Regional Perspectives Access, Procedures and Protection (ASILE Working Paper, 2022).

3.2.2 Content of protection

The protection standards or entitlements applying to refugees under the Refugee Convention increase gradually according to the factual and legal nature of the refugee's attachment to the country of asylum. Five attachment criteria are decisive for the acquisition of rights under the Convention system: (1) Refugees who are subject to a state's jurisdiction, yet with no additional connection to that state; (2) Refugees who are physically present in the territory of a state; (3) Refugees who are lawfully present in the territory; (4) Refugees who are lawfully resident in the country; and finally (5) Refugees who have durable residence or even formal domicile in the country.[27]

Under the 1951 Convention, some of the protection standards are reflecting the specific predicament of refugees, such as the prohibition of *refoulement* (Article 33), the exemption from penalties for unlawful entry or presence (Article 31) and the issuance of travel documents (Article 28). Other Convention standards are based on reference to the rights accorded to either the citizens of the asylum country[28] or most-favoured foreign nationals[29] or the standards applicable to aliens in general in that country.[30]

4. CONTAINMENT VS. ADMISSION TO TERRITORY AND PROTECTION AGAINST REMOVAL

4.1 (Extraterritorial) border control: Pushbacks and pullbacks

Pushbacks, pullbacks and other forms of summary forced returns are frequently used in long-standing "deterrence"[31] and "containment"[32] approaches. These measures often require the cooperation with third countries to take back or prevent the departure of protection seekers. *The common rationale behind this*

[27] For a detailed account of the meaning of these criteria, see James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 173-219; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 595-9.

[28] See, in particular, Articles 16 (access to courts), 20 (rationing), 22 (public education) and 23 (public relief and assistance).

[29] Articles 15 (right of association) and 17 (wage-earning employment).

[30] Articles 18 (self-employment), 19 (practice of liberal professions), 21 (housing) and 26 (freedom of movement).

[31] Gammeltoft-Hansen, Thomas, and Nikolas Feith Tan. "The end of the deterrence paradigm? Future directions for global refugee policy." *Journal on Migration and Human Security* 5.1 (2017): 28-56.

[32] Shacknove, Andrew. "From asylum to containment." *Int'l J. Refugee L.* 5 (1993): 516.

approach is to avoid responsibility for protection seekers.[33] *Where no immediate return is enforced, protection seekers are often held in detention during the asylum procedure or waiting for return. Hence, this approach has resulted in significant compatibility risks, with the potential to violate obligations related to the right to leave*[34]*, non-refoulement and the right to life.*[35]

The EU has entered manifold agreements with countries of transit, including Turkey[36]*, Libya, Morocco and Serbia, to prevent persons from leaving their territory and to readmit those who manage to leave. At the same time, the EU and its Member States are assisting these countries in controlling their borders with financial, technical and material assistance.*[37] *Most notably, European support to the Libyan Coast Guard has resulted in the pullback and arbitrary detention of tens of thousands of protection seekers*.

More direct forms of border control may be undertaken unilaterally. Hungary built border walls and transit centres for the detention of protection seekers at the border.[38] Syrians receiving temporary protection in Turkey who are found not to have obtained permission to leave the province in which they have registered have been subjected to prolonged detention and eventual deportation to Syria.[39] *Elsewhere, the US pushes back protection seekers to Mexico, currently justified under a public health protection exemption called 'Title 42'.*[40] *Australia is known for its maritime pushback of boats to Indonesia, Malaysia and Vietnam*.[41] All of this indicates that pushbacks and pullbacks have become in some cases a systematic global practice.[42]

That such deterrence and containment approaches are not the necessary consequence of high numbers of asylum applicants has been shown by a new approach the EU took when implementing the 2001 Temporary Protection Directive for the reception of displaced persons from Ukraine. Equally, Brazil has shown that a different path is possible with its prima facie recognition based on the expanded definition of the Cartagena Declaration and guarantees against removal for Venezuelans.[43]

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[33] Compare D 5.4 xx.

[34] See Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 European Journal of International Law 591

[35] D 5.1 and D 5.4 xx.

[36] European Council, 'EU–Turkey Statement' (Press Release 144/16, 18 March 2016).

[37] D 5.4 xx.

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[39] Roberto Cortinovis, *Country Note Turkey* (2021) 8-9.

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[42] DRC Annual Report 2021, 22.

[43] Cortinovis and Rorro, Brazil 6; Natália Medina Araújo and Patrícia Ramos Barros, Country Report – Brazil (ASILE, May 2022), 9 ff.

4.2 'Safe third country' and other summary removal practices

A less drastic form of summary removal, many states have for several decades returned protection seekers to 'safe third countries' without conducting any substantive examination of their need for protection. While such practices are not *per se* incompatible with international refugee and human rights law, they may jeopardise applicants' access to asylum and even to any meaningful examination of their case.[44] This is so primarily because the underlying presumption of access to examination and, if relevant, protection in accordance with international legal standards in the 'safe third country' may be unfounded or insufficiently corroborated, or because it is in *de facto* impossible to rebut that presumption. Even if the third country can be considered generally 'safe' for the purpose of refugee protection, there may well be individual circumstances that bring 'safety' into question. In addition, the prospect of protection may be illusory for individuals lacking any previous connection to the third country to which they are being transferred. Therefore, 'safe third country' removals will often in practice be hard to reconcile with the right to an asylum procedure that is firmly protected under human rights law.[45]

Various forms of collective expulsion have in all likelihood been practised more frequently in recent years, and some states seem to resort relatively more often to this kind of summary removal than to 'safe third country' practices. As prominent examples of the latter, both Canada and South Africa apply the 'safe third country' concept limiting access to their territory, in some cases reinforced by accelerated border procedures.[46] Instances of collective expulsion, often with characteristics resembling of pushbacks, are reported to be taking place at Turkish borders[47] as well as at the external borders of certain 'frontline' EU member states.[48]

4.3 Crisis derogations and perceived 'instrumentalisation' of protection seekers

A new theme in deterrence and containment approaches arose in 2021. In response to the mass arrivals from the Belarusian border with Latvia, Lithuania and Poland, the European Commission proposed a decision on provisional

[44] See 3.1 above.
[45] See Tan and Vedsted-Hansen, *Catalogue of International and Regional Legal Standards* 36-40 with references to relevant caselaw.
[46] Roberto Cortinovis, *Country Note Canada* (2021) 5-7; Chun Luk, *Country Note South Africa* (2021) 7-8.
[47] Roberto Cortinovis, *Country Note Turkey* (2021) 10.
[48] Reference to Croatia and ???

emergency measures under Article 78 (3) TFEU.[49] This proposal was based on the perception that the respective EU Member States, and thus the EU itself, was facing a "hybrid attack" from the Lukashenko regime, which actively assisted irregular migrants in travelling to the border and "instrumentalizing" them to create pressure and disturbance in the EU.[50]

Subsequently, the Commission further proposed an "instrumentalisation regulation" based on this incident.[51] Recital (1) explains:

> A situation of instrumentalisation of migrants may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.

It seems reasonable that the EU needs to safeguard its asylum system against abuse by political opponents. However, both proposals have received well-founded criticism.[52] Not only does the latter proposal establish a one-off case permanently, both proposals contain significant deviations from the current safeguards of the EU asylum *aquis*[53] as well as from the current reform proposals in the 2020 New Pact on Asylum and Migration.[54]

In view of recent decades of asylum policy in the EU, such instruments introduced for exceptional cases risk become permanently applicably and used frequently. This would cause a serious decrease in protection for protection seekers, in particular in terms of access to territory and procedural safeguards from *non-refoulement*.

The "instrumentalization" approach explained here is, however, not a standalone practice. It feeds into a trend of crisis asylum governance framing the arrival of protection seekers, in particular when arriving in large groups, as a threat to public security, public order or even as an emergency that justifies derogation from ordinary rules. For instance, since 2015 several European countries have tried to

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51 European Commission, Proposal for a Regulation of the European Parliament and the Council addressing situations of instrumentalization in the field of migration and asylum COM(2021) 890 final.

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53 Compare D 3.2. xx

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suspend asylum procedures in the face of specific events.[55] Title 42 public health orders in the US, initially a crisis-response to the COVID-19 pandemic, led to the summary expulsion of 1.6 million protection seekers in 2020 and 2021.[56] Such large-scale exemptions, however, need to be viewed very critically, because ordre public derogations generally need to be interpreted narrowly and carefully justified on a case-by-case basis. Hence, the instrumentalization proposal presents a slippery slope for the EU asylum *acquis*.

4.4 Externalisation arrangements

Externalisation is an umbrella concept that has recently been defined as 'the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory.'[57] Asylum externalisation arrangements thus involves a State externalising its own asylum system obligations towards refugees and protection seekers after they have arrived in its territory or jurisdiction to other States or entities outside its territory.[58]

Proposals to externalise asylum procedures or refugee protection are not new – as early as 1986 a draft United Nations General Assembly resolution was tabled for the establishment of regional processing centres. Nevertheless, both the United Kingdom and Denmark have recently proposed schemes to externalise both asylum procedures and refugee protection to Rwanda, though neither proposal has been implemented as yet.[59] These plans follow more established examples of externalisation practices, including the United States' transfer protection seekers intercepted on the high seas to Guantanamo Bay in Cuba[60] and two iterations of Australia's 'Pacific Solution' in Nauru and Papua New Guinea.[61]

While externalisation is not, in and of itself, a breach of international law, such arrangements have historically resulted in serious breaches of international human rights and refugee law and are generally anathema to genuine

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[56] United Nations Special Rapporteur on the rights of migrants, Human rights violations at international borders: trends, prevention and accountability A/HRC/50/31, 26 April 2022 para 41.
[57] Refugee Law Initiative Declaration on Externalisation and Asylum, *International Journal of Refugee Law*, 2022 para 1.
[58] David Cantor et al, "Externalisation, access to territorial asylum, and international law." *International Journal of Refugee Law* 34.1 (2022): 120-156.
[59] Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, 13 April 2022; L 226 Forslag til lov om andring af udlandingeloven og hjemrejseloven (Indforelse af mulighed for overforsel af asylansogere til asylsagsbehandling og eventuel efterfolgende beskyttelse i tredjelande), Lovforslag som vedtaget, 3 June 2021.
[60] Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP 2015)
[61] Madeline Gleeson and Natasha Yacoub, 'Cruel, Costly and Ineffective: the Failure of Offshore Processing in Australia', Kaldor Centre Policy Brief No. 11 (2021).

responsibility sharing. As a result, recent proposals and practice in this direction highlight the extent to which deterrence and containment approaches have become the dominant paradigm in certain asylum states and the risks externalisation arrangements pose to the objectives of the GCR for a more equitable protection system based on principles of responsibility sharing.[62]

4.5 Third country solutions: moderating containment?

The GCR seeks to grow resettlement and complementary pathways through the expansion of existing resettlement quotas and the development of new resettlement countries. [63] Resettlement is one of the three internationally recognised durable solutions allowing for responsibility-sharing brokered by UNHCR.[64] The GCR also aims to develop an additional array of 'complementary pathways' to admission, comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees.[65]

Notwithstanding the focus on third country solutions within the GCR framework, including the proliferation of Canada's community/private sponsorship model in a number of new jurisdictions,[66] there are presently no binding international or regional obligations to provide resettlement or complementary pathways. [67] Instead, such approaches are currently discretionary policies undertaken through administrative or legal instruments at national level. Neither Africa nor the Americas currently have a dedicated regional resettlement and complementary pathways mechanism.[68] At EU level, the 2016 Proposal for a Regulation on a Union Resettlement Framework would seem to remain a distant prospect.

As a result, while the GCR's suite of third country solutions provide admission to a limited number of refugees globally, their overall impact on global asylum governance remain relatively small-scale and represent discretionary policy approaches, not legal obligations. Moreover, third country solutions are often embedded in broader containment approaches, notably in the case of the EU-

[62] Sergio Carrera and others, 'Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons Learned and Feasibility for the EU. (CEPS Research Reports, September 2018).
[63] UNHCR, *The Three-Year (2019-2021) Strategy on Resettlement and Complementary Pathways*, 2019)
[64] UNHCR Statute art 9; UNHCR, *Resettlement Handbook* (2011) 3.
[65] GCR paras 7 and 95.
[66] Nikolas Feith Tan, "Community Sponsorship in Europe: Taking Stock, Policy Transfer and What the Future Might Hold." *Frontiers in Human Dynamics* 3 (2021): 564084.
[67] Tom de Boer and Marjoleine Zieck. "The legal abyss of discretion in the resettlement of refugees: Cherry-picking and the lack of due process in the EU." *International Journal of Refugee Law* 32.1 (2020): 54-85.
[68] Cartagena states implemented a Solidarity Resettlement Programme between 2005 and 2014

Turkey Statement's 'one-for-one' resettlement arrangement and the Emergency Transit Mechanism in Niger as a corollary to EU policy in Libya.[69]

5. TEMPORARINESS OF PROTECTION

5.1 Differential treatment/discrimination of certain categories of persons in need of protection

Temporality has various meanings and impacts in asylum governance, both when applying the requirement of a well-founded fear of persecution in the refugee definition and in the context of the duration of protection. The latter may depend on the cessation grounds in Article 1C of the Refugee Convention, just as the duration of residence permits under national law may influence the period of time in which a refugee can expect to be securely settled and enjoying protection in the country of asylum.

Many states have in mass influx situations resorted to measures of temporary protection, often combined with the suspension of examination of individual asylum requests. The most recent example of such temporary protection is the coordinated response by the EU member states to the arrival of persons displaced by Russia's armed attack on Ukraine in February 2022 by way of activating the 2001 Temporary Protection Directive for the first time.[70]

This measure, combined with the exemption of Ukrainian citizens from the visa requirement to enter EU member states, created privileged access to protection for displaced people from Ukraine as compared with previous groups of protection seekers arriving in the EU, including the significant numbers who arrived in the European 'asylum crisis' of 2015-16. At the same time, however, the standards of protection under the Temporary Protection Directive are not fully on par with the legal entitlements for refugees according to Articles 3-34 of the Refugee Convention. To the extent displaced Ukrainians may fall within the Convention refugee definition, this raises questions of differential treatment that may ultimately be considered discriminatory in breach of international law. While on the one hand the Temporary Protection Directive provides for better standards than those offered protection seekers, this relative advantage may on the other

[69] Carrera and Cortinovis, *The EU's Role in Implementing the UN Global Compact on Refugees: Contained mobility vs International Protection*.

[70] Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection; Directive 2001/55/EC 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.

hand vanish over time insofar as the protected persons might be eligible for international protection if they were to be allowed access to examination and status under the ordinary arrangements for refugee protection.

In addition, a number of states have in recent years either introduced subsidiary asylum categories for the express purpose of temporary protection, mostly for persons fleeing generalised risks, or limited the temporal duration of refugee protection in general across the various asylum categories. Whereas temporary protection arrangements were previously often introduced in order to maintain or increase states' asylum capacity by allowing for new groups of persons in need of protection over time, the more recent tendency towards temporariness may rather be seen as a measure of indirect deterrence. Here again, discrimination issues may arise in that various categories of refugees may be subjected to differential treatment in respect of entitlements that are protected by human rights treaties, hence triggering the accessory prohibition of discrimination in Article 2 ICCPR, Article 2 ICESCR and Article 14 ECHR.

5.2 Exploitation due to limitations on the right to work

Limiting protection seekers' right to work[71] is widespread global practice.[72] Particularly in cases of mass influx, considerations of national labour markets additionally play a large role. Bangladesh, for instance, refuses to grant Rohingya refugees the right to work, because of the perception that job security would lead them to leave the camps and integrate into society instead of returning to Myanmar, thus undermining the temporariness of their reception.[73]

The reluctance to include protection seekers in the labour market is also widespread. Such limitations create long waiting periods, diminish refugees' sense of self-worth and can make them vulnerable to exploitation, particularly in the 'informal sector'.[74] Previous ASILE research has found that:

> Restrictions on the right to work may also contribute to violations of absolute rights, such as the prohibitions on inhuman and degrading treatment, or forced labour. This is particularly the case in relation to asylum seekers and refugees, who are often in a legally vulnerable position.[75]

[71] Compare UDHR art 23(1); ICESCR arts 6 and 7; ICRSR arts 15, 17, 19, 23, 24 and 28. xx
[72] See Cathryn Costello and Colm O'Cinnéide, The Right to Work of Protection seekers and Refugees (*ASILE,* May 2021).
[73] M Sanjeeb Hossain, Country Report Bangladesh (ASILE, May 2022) 22.
[74] See Costello and O'Cinnéide, Right to Work 8 for a discussion of the informal sector and 20 f for a discussion of vulnerability.
[75] Costello and O'Cinnéide, Right to Work 6; see further *MSS v Belgium and Greece* (GC) App no 30696/09 (ECtHR, 21 January 2011); *Chowdury and Others v Greece* App No 21884/15 (ECtHR, 30 March 2017).

Child labour, prevalent in some refugee situations, raises further human rights concerns.[76] These tendencies undermine a key GCR objective, the enhancement of refugees' self-reliance.

On some occasions, the need to grant access to the labour market in a mass influx situation has been recognised. This is important, since a temporary situation might easily expand for a long period. In the implementation of the EUTPD, access to work made it favourable for Ukrainians to seek protection under the umbrella of the TPD instead of the asylum procedure, including due to the immediate right to work.

Generally, such special regimes for refugees arriving in a mass influx, may be problematic in terms of differential treatment. The Jordanian Government and its donors concluded the *Jordan Compact* in 2016 to give specifically Syrian refugees, the largest group of refugees in Jordan, access to the labour market by issuing more than 200,000 work permits.[77] Jordan is frequently referenced as a good practice example of GCR implementation, easing pressure on the host country and enhancing refugee self-reliance.[78] Yet, many professional sectors and refugees of other nationalities remain excluded and only few permits were issued to women.[79]

The EU-Turkey Statement includes provisions for the opening of Turkey's labour market to Syrians with temporary protection status. However, access remains restricted in practice, with one percent of Syrians in Turkey having actually obtained such a work permit, of whom only ten percent are women. Again, these measures favour Syrian nationals and neglect other nationalities. All of this pushes people to seek work in the informal sector.[80]

Brazil provides an example of good practice giving protection seekers, refugees, regularized migrants and Haitians with humanitarian visas access to the labour market. In practice, however, employers are hesitant to rely on workers with a temporary residence status. Hence, many refugees resort to precarious jobs under their qualification and many find themselves in the "informal sector".[81]

5.3 Vulnerability as a protection issue

The assessment of "vulnerability" has become an important tool to discover individual or group-based protection needs in variou parts of the world. States and

[76] Costello and O'Cinnéide, Right to Work 9; Manfred Liebel, 'Economic and Labor Rights of Children' in Jonathan Todres and Shani M King (eds), *The Oxford Handbook of Children's Rights Law* (OUP 2020).
[77] Lewis Turner, Country Report Jordan (*ASILE,* May 2022).
[78] Costello and O'Cinnéide, Right to Work 7.
[79] Turner, Jordan 18 f.
[80] Costello and O'Cinnéide, Right to Work 34.
[81] Also language barriers and the recognition of degrees form obstacles. See Araújo and Barros, Brazil 15 ff.

humanitarian organisations increasingly target resources to the "most vulnerable".[82] The WFP has developed a tool called 'Refugee Influx Emergency Vulnerability Assessment' (REVA) for this purpose.[83] Also Jordan has developed a large-scale study called the 'Vulnerability Assessment Framework' (VAF) specifically for Syrians not living in camps.[84] It monitors vulnerability in the overall population, while enabling targeting for services and referral pathways by categorizing the interviewees into four levels of vulnerability.[85]

However, the concept of "vulnerability" has no single meaning and requires adequate definition and translation to communicate it to refugees.[86] In addition, a socio-economic focus of vulnerability assessments might produce a conflation of vulnerability and poverty.[87] In the Brazilian context the label is even considered stigmatizing and as having negative implications for protection seekers, because of the prejudices and victimization.[88] ASILE research on Bangladesh further points out how the category of "vulnerable" may be exploited by the humanitarian sector for financial gains and, thus, aggravate the difficult circumstances of the concerned individuals.[89]

[82] Lewis Turner, 'The Politics of Labeling Refugee Men as "Vulnerable"' (2021) 28 *Social politics* 1, 5.
[83]
[84] Yet, it will be expanded also to Syrians in camps and non-Syrians. Turner, Country Report Jordan 12.
[85] Turner, Country Report Jordan 12.
[86] Turner, Country Report Jordan 14 f.
[87] Turner, Country Report Jordan 13.
[88] Araújo and Barros, Brazil 26.
[89]

6. EMERGING ASYLUM GOVERNANCE REGIMES: NATIONAL LAW AND POLICY IN INTERACTION WITH INTERNATIONAL AND REGIONAL BODIES

Conclusions:

- link to GCR objectives to which we have identified tendencies
    - containment and other measures preventing access to asylum, procedures and territory
    - moderated through third country solutions
    - temporariness as a protection response with limited self-reliance options
- Success or failure of GCR will on large depend on whether deterrence and containment will continue, if third country solutions will work or hollow out GCR solutions; leaving vulnerability issues and exploitations issues unresolved.

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