

HANDLING THE MIGRANT & REFUGEE CRISIS: IS THE EU DOING ENOUGH?

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ABSTRACT

The European Union (EU) has been embroiled in a bitter controversy since 2015 regarding its handling of migrants and refugees who have been coming in large numbers from countries such as Syria, Iraq, Eritrea, Nigeria, Afghanistan, and Somalia. Many of its decisions such as the 2016 EU-Turkey deal have been criticized sternly on the ground that such decisions not only undermine the fundamental principles of rule of law and access to justice but also violate the broad mandates under the international laws, both conventional and customary. Such decisions are also not in keeping with the regional Rules and frameworks such as the European Convention on Human Rights. Many migrants and refugees who have already landed in the EU territory or are in the no-man's land find themselves in a disconsolate situation, which has further worsened in the wake of the Covid19 pandemic. They are pigeon-holed in temporary detention camps while their asylum applications are pending for months! Seemingly, many of the EU countries contend that their public expenditure would increase precipitously if they start granting asylum to all the seekers. The objective of this paper is to argue that the economic defence of such countries is unsustainable and that the EU chose it as a matter of policy (a distant dad policy) not to take substantive steps to ameliorate the conditions of these migrants and refugees. To reach at apriori justifications, the paper theoretically dissects the guiding

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normative frameworks (including that of EU's) and emerging facts governing the subject. It also critically reviews some of its dealings that indicate that post-2015 migrant crisis, the EU's policy has been to not allow the laws to operate harmoniously. The paper concludes by saying that in view of the imminent threat created because of the Covid19 pandemic, the EU must pass a Directive harmonizing all existing laws on migrants and refugees. The paper uses analytical and descriptive methods to provide support for the conclusions.

INTRODUCTION

The European Union (EU) has been embroiled in a bitter controversy since 2015 regarding its handling of migrants and refugees who have been coming¹ in large numbers from countries such as Syria, Iraq, Eritrea, Nigeria, Afghanistan, and Somalia and from a few other countries of Northern and Central Africa and the Middle-east.² It was, in fact, a big turning point in Europe's migration history after WWII; by early 2016 approximately 135,711 persons³ had already entered Europe. As per Eurostat, the total number of asylum seekers had more than doubled (from 530,600 to a whopping 1216900) between 2014 and 2015. The figures remained on the higher side till 2016. By the end of 2019, about 842500 applications for asylum were pending.⁴ The figures are shocking! The uncontrolled migration

¹ Some of the possible reasons behind this mass exodus include armed conflicts, terrorism, ethnic tensions, regionalism, natural and man-made disasters, climate change, etc.

² Maxime H. A. Larivé, *A Crisis for the Ages: The European Union and the Migration Crisis* 15 MIAMI-FLORIDA EUROPEAN UNION CENTER OF EXCELLENCE 1, 6 (2015).

³ *Migrant crisis: Migration to Europe Explained in Seven Charts*, BBC (March 4, 2016) <https://www.bbc.com/news/world-europe-34131911> (last visited July 28, 2020).

⁴ *Asylum seekers in the European Union (Poster)*, Eurostat (June 19, 2020) <https://ec.europa.eu/eurostat/documents/4031688/11010669/KS-01-20-236-EN-C.pdf/75412b0e-d240-36b7-f597-d9ad8b9f6bd1> (last visited July 29, 2020). As per the data, a substantial number of people among asylum seekers were from Syria, Afghanistan and Venezuela.

still continues, although on a lesser scale. The EU was of course not prepared for this unpleasant surprise and the entire EU system seemed to crumble. Many refugee and human rights scholars who used to revere EU's liberal policies and programmes suddenly started criticizing EU for not living up to the human rights standards and for not adopting a pro-rights approach to address the multifarious issues facing the migrants and refugees.

Many migrants and refugees, including women and children, who have already landed in the EU territory or are in the no-man's land face tremendous hardships and find themselves in a disconsolate situation, which has further worsened in the wake of the Covid19 pandemic. They fear the risk of statelessness (because most of them do not have the necessary nationality/citizenship documents) on not being granted asylum by the contracting state. The home states, in violation of the customary principles of state responsibility, are almost always reluctant to address the issues facing migrants and refugees. But when the home states are not interested in discharging their extra-territorial obligations by sending state agents to the contracting states(s) or by adopting suitable laws or by empowering courts to hear extra-territorial matters or by strategically assisting the contracting state(s),⁵ is it not the responsibility of the EU states to look into the human rights issues of such people? After all, the rights guaranteed under various international and regional human rights instruments are applicable to all persons, irrespective of nationality or statelessness.⁶ That leads us to delve into a rudimentary question, is refugee protection under international laws (international refugee laws and international human rights laws) in an infirm

⁵ OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 142 (Cambridge University Press, 2010).

⁶ *See id.*

state?⁷ But for the purposes of this present essay, we shall not try to answer the above question.

Debatably, the EU miserably failed to handle the migrant and refugee crisis. Till now, it has not drawn up a uniform law to devise stateless determination procedure⁸ and there is hardly any homogeneity among the EU states with regard to such procedure.⁹ It has not been able to devise a composite asylum system and has also failed to ensure compliance of all states either in matters of non-refoulement or subsidiary protection. Despite a few attempts¹⁰ to unify the EU countries under a single-umbrella clause, nothing much could be achieved. While some EU states such as Austria, France, Germany and Sweden have extended protection to migrants and refugees,¹¹ some others such as Hungary, Czech Republic and Poland have not, in sharp contradistinction with the broad mandates of the European Convention on Human Rights (ECHR) and the Refugee Convention, 1951,¹² and in stark violation of the observations of the European Court of Human Rights (ECtHR) in its recent judgment in *M. K and Others's case*.¹³ In the said case,

⁷ Stephen Meili, *The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?* 41 FORDHAM INT. LAW J. 383, 384 (2018). According to the author, the primary reasons behind such failure include underfunded programmes on humanitarian assistance, unreliable refugee determination procedures, disregard for refugees' socioeconomic rights, etc.

⁸ Noémi Radnai, *Statelessness Determination in Europe: Towards the Implementation of Regionally Harmonised National SDPs* 1-17 (Institute of Stateless and Inclusion, Statelessness Working Paper Series No. 2017/08, 2017).

⁹ European Migration Network, *Stateless Persons in the European Union*, DG Migration & Home Affairs (2020), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_inform_statelessness_en.pdf (last visited July 31, 2020).

¹⁰ In September 2015, the EU had called an urgent meeting of ministers to address the emergency relocation of about 1,60,000 refugees across the EU nations.

¹¹ The United Kingdom (UK) also followed an inclusive policy by embracing asylum seekers until its June 2016 decision to depart from the EU system. Formally, the UK exited from the EU on January 31 2020 and is presently in an 11-month transition phase.

¹² ANKE HASSEL AND BETTINA WAGNER, THE EU'S 'MIGRATION CRISIS': CHALLENGE, THREAT OR OPPORTUNITY? 61 (Bart Vanhercke et al. eds., ETUI aisbl 2016).

¹³ [40503/17 42902/17 43643/17, 23/07/2020](https://www.echr.coe.int/ViewDoc.aspx?id=40503/17_42902/17_43643/17_23/07/2020). Judgment (Merits and Just Satisfaction), Court (First Section).

the Strasbourg Court unanimously held that the Polish authorities had violated Articles 3 and 13 of the ECHR and Article 4 of Protocol 4 of the Convention by denying the appellants access to asylum procedure. It also noted that Poland had failed to discharge its obligations envisaged under Article 34 of the Convention. Also, in another recent case,¹⁴ the European Court of Justice (ECJ) has pulled up Czech Republic, Hungary and Poland for failing to comply with the 2015 asylum programme and for breaking the law over refugee quotas that was agreed on in the said programme. Despite decisions on the contrary, these states continue to follow a policy of exclusionism; with more and more migrants and refugees crossing shores, the policy of these states has been to restrict and not to promote their causes. They are deliberately choosing a deterrent policy to prevent the influx of migrants and refugees.¹⁵ Implicit in such choice is the general apprehension that their public expenditure would increase precipitously if they start granting asylum to all the seekers.

With the situation going out of control, the EU was forced to not only redefine its priorities but also revamp its policy paradigm in accordance with the changing social needs. In 2015 itself, the EU members met a number of times to chalk out an amicable solution to the unfolding crisis. It was at this precarious juncture that it had adopted a contentious policy, which the author euphemistically terms as the ‘distant dad’¹⁶ policy, to address the concerns of migrants and refugees. The EU supposedly played the role of a distant father who stayed away from his disobedient children to avoid a face off. In doing

¹⁴ Jennifer Rankin, *EU Court Rules Three Member States Broke Law over Refugee Quotas* THE GUARDIAN (April 2 2020, 12.38 PM),

<https://www.theguardian.com/law/2020/apr/02/eu-court-rules-three-countries-czech-republic-hungary-poland-broke-law-over-refugee-quotas> (last visited July 31, 2020)

¹⁵ Thomas Gammeltoft-Hansen and Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy* 5 JMHS 28, 30 (2017).

¹⁶ Robert Rannigan, *Are You A Distant Dad?* THE GOOD MEN PROJECT (October 14, 2018), <https://goodmenproject.com/featured-content/are-you-a-distant-dad-lbkr/> (last visited July 30, 2020).

so, the EU had opted for a refined formulation of the deterrence paradigm,¹⁷ skeletally the same that was followed by its errant children. It allowed the EU the dual advantage of upholding a formal commitment to international refugee law and simultaneously being spared from the burdens.¹⁸ That the EU was tacitly following a refined formulation of the deterrence paradigm under the cloak of a distant dad was reflected in some of its decisions such as the 2016 EU-Turkey deal, which has been criticized sternly on the ground that it not only undermines the fundamental principles of rule of law¹⁹ and access to justice but also violates the broad mandates under the international laws, both conventional and customary.

Following the 2015 exodus, Turkey became a focal point of Europe's migration politics.²⁰ Discussions between the EU Commission and Turkey for a prospective deal to control the astounding number of migrants started sometime in June 2015. In November, 2015, during a special summit, the first plan was hatched to ensure migration control and it was agreed that Turkey would screen all migrants and refugees who used Turkey as their intermediate connection route. The EU agreed to pay Turkey six billion euros in two equal tranches in return of concessions such as visa liberalization for Turkish nationals for the Schengen area, etc.²¹ The agreement also allowed Turkey to negotiate on EU accession. The primary purpose of the agreement, which was adopted in March 2016 as the EU-Turkey statement,²² was, however, to stop

¹⁷ Gammeltoft-Hansen and Tan, *supra* note 15, at 31.

¹⁸ *Id.* at 33.

¹⁹ Bodo Weber, *The EU-Turkey Refugee Deal and the Not Quite Closed Balkan Route* FRIEDRICH EBERT STIFTUNG 1, 20 (2017).

²⁰ Gerda Heck and Sabine Hess, *Tracing the Effects of the EU-Turkey Deal* 3 MOVEMENTS 35, 44 (2017).

²¹ Umut Uras, *Turkey, EU and the Imperilled Refugee Deal* Aljazeera (March 3, 2020), <https://www.aljazeera.com/news/2020/03/turkey-eu-imperilled-refugee-deal-200302085719576.html> (last visited July 31, 2020).

²² *EU-Turkey statement, 18 March 2016*, Council of the European Union (March 18, 2016, 05:30 PM), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (last visited July 26, 2020).

the flow of migrants, especially irregular migrants, into Europe. Vide the deal, anyone who would enter the Greek islands via the Aegean Sea after March 20, 2016 would be deported to Turkey which would take a final call whether to allow such asylum seekers in its own soil. In tune with the overt (and tacit) arrangements of the deal, the EU adopted a hotspot approach and the arriving migrants were pigeon-holed, locked down on the (Greek) islands under horrendous living conditions.²³ The approach although apparently unlawful yielded results (for those who sought deterrence) and the number of migrants significantly decreased between 2016 and 2020. A twist in the tale came in early March 2020, when Turkey unilaterally decided to allow migrants to move to Europe, frustrating the very purpose of the agreement. The entire ordeal is a narrative of the restrictive policy of the EU towards migrants and refugees and an attestation of the EU's growing disinterest towards them.

In light of the above observations, the objective of this paper is to argue that the economic defence is unsustainable and that the EU chose it as a matter of policy (a distant dad policy) not to take substantive steps to ameliorate the conditions of those affected because of the impasse. The paper tries to address two questions: whether the economic defence is sustainable and whether EU chose to address the migrant and refugee issues as a matter of policy. Since the issues of migrants and refugees are addressed both under international human rights laws and international refugee laws, the paper dichotomises the operative normative framework available at the global and the EU levels to reach at generalizations. The paper also makes references to a few case laws governing the subject.

²³ Heck and Hess, *supra* note 20, at 46.

**THE GLOBAL & EU FRAMEWORKS ON THE PROTECTION OF MIGRANTS
AND REFUGEES**

THE GLOBAL FRAMEWORK

The aspect of human rights of migrants and refugees finds mention in almost all leading global human rights instruments. The UN Charter, for example, through Article 55(c) read with Article 1(3) bestows an obligation on nation states to promote universal respect for all persons for the purposes of creating stability and well-being. The most comprehensive guidelines on the causes of migrants and refugees are mandated under the provisions of the Universal Declaration of Human Rights (UDHR). While Article 3 establishes the right to life and liberty, Article 5 stipulates that no person shall be subjected to torture or other forms of inhuman treatment. Further, Article 9 creates a human right obligation on states to not subject a person to unlawful arrest, detention or exile. The most substantive reference to the rights of the migrants and refugees can be found in Articles 13, 14 and 15 of the UDHR; while Article 13 bestows rights on all to travel to any country and to return to one's own country,²⁴ Article 14 establishes the right to asylum for those facing persecution and Article 15 mandates a non-derogable right to nationality, a provision that directly and substantively negates the issue of statelessness. Apart from the UDHR, the Torture Convention, 1984 through Article 3 augments the principle of non-refoulement. Under Article 3, a state party is under an *erga omnes* obligation to not repatriate a person to any state (which may include his/her home state) where he/she may be subjected to torture.²⁵

²⁴ A similar provision finds mention in art. 12 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

²⁵ Art. 7 of the ICCPR also stipulates a non-derogable right against torture.

Under Article 22, to receive petitions of complaint from individuals, states parties may recognize the jurisdiction of the UN Committee against Torture.²⁶

The global instrument supporting the causes of refugees is the Refugee Convention, 1951 including its additional protocol of 1967. Interestingly, the Convention was largely meant to serve the purposes of the Europeans who were displaced before January 1, 1951 because of World War II and its after effects.²⁷ Such meaning resonates through the restrictive definition of the expression ‘refugees’ appearing in Article 1A(2) of the Convention. Although the definitional irregularity (rather the geographical limitation) was to a large extent rectified by expanding the term in the additional protocol, yet the clause ‘well-founded fear of being persecuted’ appearing in the definition makes it restricted and open to purposive interpretation.²⁸ The preamble to the Convention echoes the impending need to extend protection to refugees through international cooperation and dialogue, and maintains that international solidarity and state responsibility are concepts that are mutually reinforcing.²⁹ The Convention recognizes non-negotiable refugee rights³⁰ such as the right to non-discrimination, right to property, right to association, right to profession and employment and the like. Vide Article 16, a refugee shall enjoy unfettered access to courts located in the contracting state.³¹ Article 31 of the Refugee Convention creates an obligation on the states to treat refugees sympathetically and the states are not allowed to levy

²⁶ Elspeth Guild and Violeta Moreno-Lax, *Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR* 1-29 (CEPS Paper in Liberty and Security in Europe No. 59, 2013).

²⁷ RHONA K. M. SMITH, *TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS* 607 (2nd Edition, Routledge, 2010).

²⁸ Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View* 13 *FORDHAM INT. LAW J.* 35, 36 (1989).

²⁹ Susan F. Martin et al., *International Responsibility-Sharing for Refugees* 1-44 (KNOMAD Working Paper No. 32, 2018).

³⁰ James C. Hathaway and Anne K. Cusick, *Refugee Rights Are Not Negotiable* 14 *GEO. IMMIGR. L. J.* 481, 539 (2000).

³¹ Art. 16(2) embodies the right of a refugee to legal assistance and exempts him/her from bond payments and costs.

penalties or detain refugees because of their irregular entry or presence. Article 31³² also states that the movement of such refugees shall not be restricted by the states. Although Article 32 creates an exception for expulsion of a refugee on the grounds of national security and/or public order, such expulsion must not violate procedural due process. Article 33 of the Convention embodies the principle of non-refoulement.

As per Article 33(1), “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

The Sweep of Article 33 is wide and transgresses the interests of the state in controlling migration, despite the exceptions created under Article 33(2).³³ This view was reflected by the Inter-American Commission on Human Rights in *Haitian Interdiction case*,³⁴ wherein the Commission observed that by interdicting Haitis, the United States had not only violated their fundamental rights to life, liberty and property but also frustrated the very principle of non-refoulement by not duly considering their claims for asylum. The Commission also noted that the act of the United States to repatriate Haitis to their home country without objectively determining their refugee status violated Article 27 of the American Declaration of Human Rights that

³² GUY S. GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION AND PROTECTION 47 (Department of International Protection for the UNHCR, 2001). The author was requested by the Department of International Protection, UNHCR to revisit art. 31 of the Convention (in terms of its scope, conditions of entitlement and the accurate nature of the immunity contemplated under the provision) in view of the various types of detention systems prevailing against the interests of the refugees and asylum seekers. After deconstructing the expressions occurring in art. 31 and after assessing their import, he opined that in light of art. 14 of the UDHR, its application must be prescribed by law and must be in sync with the interests of public safety.

³³ Taylor H. Garrett, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 25 MICH. J. INT'L L. 751, 754 (2004).

³⁴ Case 10.675, Inter-Am. C.H.R., Report No. 28/93, OEA/Ser.L/V.85, doc. 9 rev. (1993). The final decision (on merits) was pronounced by the Commission on March 13, 1997.

bestows a right on the state parties to derogate (with exceptions)³⁵ from their human rights obligations.

Vide the exclusion clause mandated under Article 33(2) read with Article 1F³⁶ of the Convention, contracting states may deport an individual to his/her home state if there are reasonable grounds that such individuals would pose a threat to national security. Apart from the Refugee Convention, a few provisions of the Fourth Geneva Convention, 1949 and a few more regional declarations spell out the issues of refugee protection, albeit in a restricted sense.

The two guiding Conventions on Statelessness are the Convention relating to the Status of Stateless Persons, 1954 and the Convention on the Reduction of Stateless, 1961. Both the conventions operate in a collectively exhaustive principle; while the 1954 Convention provides the substance, the 1961 Convention provides the procedure. As per Article 1(1) of the Convention relating to the Status of Stateless Persons, a ‘stateless person means a person who is not considered as a national by any State under the operation of its law.’ Article 1(2) classifies those against whom the provisions of the convention shall not apply. Article 3 of the Convention stipulates that a stateless person shall not be subject to discrimination on the basis of religion, race or country of origin. Article 12 of the Convention envisages that either the country of domicile or the country of residence shall determine the

³⁵ These exceptions are spelt out under art. 27(2) of the Convention. In a way, art. 27(2) lays down those rights that cannot be suspended even in times of war, public danger or any other form of emergency. For more details see: Andrés E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. UNIV. INT. LAW REV. 269, 281 (2001).

³⁶ Under art. 1F the provisions of the Refugee Convention shall not apply to an individual who has:

- a) committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, or
- b) committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee, or
- c) been guilty of acts contrary to the purposes and principles of the UN.

personal status of stateless persons. The Convention also spells out the various rights that stateless persons may enjoy; such rights include right to access to courts, right to property, right to form associations, right to employment, etc. Article 31 of the Convention embodies the non-expulsion clause and contracting states are obligated not to expel stateless persons from their territory. The 1961 treatise is an operative draft that spells out the norms relating to the conferral and non-withdrawal of citizenship so as to prevent cases of statelessness. The law created in Article 1 of the Convention resonates with the broad principles on nationality mandated under Article 15 of the UDHR. Article 8(1) of the 1961 Convention creates a positive obligation on contracting states to not deprive a person of his/her nationality if such deprivation renders him/her stateless. However, the *non obstante* clause appearing in Article 8(3) may empower contracting states to deprive a person of his/her nationality on certain grounds.

There is no overarching international law protecting the migrants³⁷ *per se*, however, the broad principles such as that of non-refoulement or subsidiary protection laid down under the Refugee Convention and its additional protocol are applicable *ejusdem generis* to migrants. Further, all human rights instruments are applicable to them. Furthermore, if such migrants become stateless by any reason, then the two conventions on statelessness would automatically apply.

THE EU FRAMEWORK

The moot laws guiding the human rights jurisprudence of the migrants and refugees in the context of the EU system can be found in provisions under

³⁷ The provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (which came into force in 2003) protect the causes of migrant workers (who are already employed) and their families not of 'migrants,' who are seeking employment. Thus, the provisions of this convention are not relevant to the present essay.

two separate instruments. One is the Treaty on Functioning of the European Union (TFEU). Article 78 of TFEU creates a positive obligation on EU to develop a harmonized and uniform policy on asylum and refugee protection in conjunction with the principles of non-refoulement mandated under the 1951 Refugee Convention (and its 1967 protocol) and other related instruments. It also asks the European Parliament to adopt measures to promote an asylum system common for all EU nations. Article 78 read with Article 79³⁸ of TFEU consolidates the obligation further. The other instrument is the European Convention of Human Rights (ECHR). Article 3 of the ECHR contemplates that no one shall be subject to torture and/or inhuman, degrading treatment. The unqualified sweep of Article 3 seems to protect migrants and refugees against their return to home states or to any other country where they may face inhuman, degrading treatment, including persecution. In a pre-2015 judgment in *Hirsi's case*,³⁹ the ECtHR had struck down the legality of Italy's cooperation scheme with Libya, contending that pushbacks of refugees on the high seas violated Article 3 of the ECHR. Apart from TFEU and ECHR, the Charter of Fundamental Rights of the European Union (CFREU) protects the rights of the asylum seekers through Article 18. Also, Article 19 of the CFREU not only prohibits collective expulsions but also forbids states to remove, expel or extradite any person to any state where he/she may be subjected to death penalty, torture or any other inhuman treatment.

Within the EU framework on asylum, the Schengen acquis, which comprises the 1985 Schengen Agreement, the Convention and the accessions, and the Dublin Rules that include the Dublin Convention, 1990 plus the Dublin Regulations (the most recent being the 2013 Regulation) are the twin pillars

³⁸ Art. 79 of TFEU obligates the EU to devise a comprehensive policy to manage migration flows and to ensure fair treatment of people from other countries.

³⁹ *Hirsi Jamaa and Others v. Italy*, No. 27765/09, ECHR 2012.

determining the rights and obligations of the migrants and refugees. Article 2(1) of the Agreement empowers the citizens of the treaty states to (unconditionally) cross internal borders. Articles 28 through 38 of the Schengen Agreement lay down the procedure of admitting asylum applications in harmony with the provisions of the Refugee convention. Especially, Article 30 deals with the detailed method of processing applications of asylum seekers. The definition of asylum seekers is found in Article 1. Regrettably, Article 1 defines an asylum seeker as an ‘alien’ who has lodged an asylum application and in respect of which a final decision is yet to be taken. Even a harmonious construction of the expression ‘alien’ would indicate that the intention of the drafters was to develop a schema for not allowing the ‘they’ to assimilate with the ‘we.’ This further compels us to infer that the ‘vanishing border theory’ as contemplated under the Schengen Agreement in particular and the Schengen *acquis* in general was exclusively applicable for the Europeans. Apart from the asylum application issue, the Schengen *acquis* redefined visa policy and practice, border protection rules, law enforcement, etc.⁴⁰ The Dublin system on the other hand attempts to harmonize asylum policies across EU. Article 6 of the Dublin Convention stipulates that if it is proved that an asylum seeker has irregularly crossed borders and has entered into the sovereign territory of an EU nation, that nation will process the seeker’s application, setting the criteria for determining which state shall be responsible to process an asylum application. Because of Article 6, border states such as Italy and Greece had to handle a high number of applications for asylum compared to other EU members. In a nutshell, while the 1985 Schengen Agreement abolishes almost all forms of inner border controls and promotes a common external frontier regime, the Dublin system mandates that an asylum seeker’s application be assessed in the first country of entry so that administrative

⁴⁰ Heck and Hess, *supra* note 20, at 40.

work is minimised and asylum-shopping⁴¹ is prevented. The ideals of the Schengen Agreement and the Dublin Convention eventually transpired into Common European Asylum System (CEAS) in 1999. Since its establishment, CEAS has worked as the primary nodal agency adopting quite a few legislative measures to harmonize the common minimum standards relating to asylum.⁴² The above laws are augmented through EC Directives and Regulations.

A. THE ECONOMIC DEFENCE

Those EU countries that follow the deterrence paradigm and are characteristically disinterested in the causes of the migrants and refugees posit many justifications behind their choice. Arguably, one such justification is economic, i.e., their public expenditure would exponentially increase if asylum is allowed. A related concern is that inflows of migrants and refugees would escalate unemployment, strain infrastructure and impact public budgets beyond control, leading to another debt crisis.⁴³ The results of a survey on this matter revealed that many of the EU nations perceived that opening the gate for the refugees would jeopardise employment opportunities.⁴⁴ In fact, between 2015 and 2016, a number of newspapers also aired such concerns, albeit in a general sense. Interestingly, the International Monetary Fund (IMF) estimations prove to the contrary. According to the IMF, additional public expenditure on asylum seekers regarding their reception, housing, education, food, health expenses, etc., would

⁴¹ Hassel and Wagner, *supra* note 12, at 66.

⁴² Common European Asylum System, European Commission, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (last visited July 27, 2020).

⁴³ Sebastian Dullien, *Paying the Price: The Cost of Europe's Refugee Crisis* EUROPEAN COUNCIL OF FOREIGN RELATIONS 1, 2 (2016). The author recommends the creation of a European Refugee Union that would centralise policies on refugees and asylum seekers and also determine their financing.

⁴⁴ Shubham Poddar, *European Migrant Crisis: Financial Burden or Economic Opportunity?*, 43 SOCIAL IMPACT RESEARCH EXPERIENCE (SIRE) 1, 2 (2016).

approximately be equal to 0.1-0.2 percent of the GDP of the EU countries. While such a low estimate *prima facie* refutes the economic justification clause, it does not take into consideration expenditure that is incurred on training and integration programmes.⁴⁵ Surprisingly, GDP in the EU has been steadily increasing ever since 2015, although there was a marginal fall (from 15.932 trillion US \$ to 15.593 trillion US \$) between 2018 and 2019. Between 2010 and 2019, EU's GDP was at 14.54, 15.742, 14.636, 15.294, 15.633, 13.547, 13.883, 14.736, 15.932 and 15.593 trillion US \$, respectively.⁴⁶ The above is not a sorry figure at all; developing states whose GDP figures are no way comparable with the EU figures accommodate about 84% of the world's refugees!⁴⁷

The germane work by Sebastian Dullien interpolating fiscal data of various EU countries indicate that although the initial costs of integrating migrants/refugees in the national system may be high, the long-term fiscal benefits will be higher.⁴⁸ Dullien's study indicates that in countries such as Netherlands, Belgium, France, etc., cost per refugee (calculated in percent of per capita GDP, 2015) is high whereas in countries such as Spain, Austria, etc., cost per refugee is low, indicating further than a nuanced approach is necessary to understand refugee issues in the light of law and economics. That being said, nations and the EU would be financially in a better position if they increase the cost per refugee thereby boosting aggregate demand.⁴⁹ It would create a win-win situation and provide economic opportunities for all in the long run. In a sense, social benefits would far outweighed short-term costs if

⁴⁵ *Id.* at 7.

⁴⁶ *GDP (current US\$) - European Union* The World Bank (2020), <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU> (last visited July 31, 2020).

⁴⁷ Charlotte Edmond, *84% of Refugees live in Developing Countries* World Economic Forum (June 20 2017), <https://www.weforum.org/agenda/2017/06/eighty-four-percent-of-refugees-live-in-developing-countries/> (last visited July 30, 2020).

⁴⁸ Dullien, *supra* note 43, at 2.

⁴⁹ *Id.* at 8.

the migrants and refugees are extended social and economic protection. The logic holds true from another sense; Europe is home to a lot of aging people and migrants (70% of asylum seekers are of working age, i.e., between 18 and 64 years)⁵⁰ will but mitigate such a demographic challenge by being a part of the labour force.⁵¹

While it is true that there are only a few studies that indicate that GDP growth increases with refugee integration, it is equally true that there hardly any studies showing that those states which have not adhered to the principles of non-refoulement or subsidiary protection saying that it would increase their public expenditure had an increase in their GDP by following such a rule!

B. THE DISTANT DAD POLICY

One of the notable aspects in this ongoing migrant and refugee crisis issue is that the EU member states are hardly able to converge on a single comprehensive migrant and refugee management policy. They conspicuously lack mutual solidarity in their actions and are trying to push forward their own national interests and strategies.⁵² Countries such as the Poland, Czech Republic, Hungary,⁵³ Romania and Slovakia, etc., had raised their voices against a revamped plan for the relocation of refugees which further attests the growing disharmony within the EU regime.⁵⁴ The EU seemingly failed to bring to book these nation states that were not only turning a deaf ear to the numerous problems facing the migrants and refugees but also putting them (although indirectly) under excessive physical and psychological agony.

⁵⁰ *An Economic Take on the Refugee Crisis*, Institutional Paper 033 European Commission 7, 14 (2016).

⁵¹ Dullien, *supra* note 43, at 2.

⁵² Livia Benková, *Europe's Response to the Migration Crisis* 3 FOKUS 1, 1 (2017).

⁵³ In fact, the-then Prime Minister of Hungary had vehemently criticized such plan and had accused Germany of promoting moral imperialism. For more details see: Larivé, *supra* note 2, at 10.

⁵⁴ See Larivé at 1.

Contrary to the provisions safeguarding migrants and refugees, countries such as Hungary, Poland and the Czech Republic did not accept the refugee burden; while only 12 out of 2000 refugees were accepted by the Czech Republic, Poland and Hungary did not receive any of them. Although the Court of European Justice had recently held that Hungary, Poland, and the Czech Republic violated the EU norms by not allowing refugees,⁵⁵ the EU has only played the role of a distant father by not taking sufficient cognizance of the matter and by not harmonizing all the scattered laws and policies. It is not the international laws that have failed to address concerns of the migrants and refugees it is rather the laid-back policy of the EU that has led to the fiasco. That being said, there is no gainsaying that the protectionist regime mandated under various international instruments needs to be vetted in view of the changing social contexts;⁵⁶ international refugee law is after all not yielding the results it ideally should have!

Let us speculate on the likely reasons why EU chose to be a distant dad evincing little interest to respond to the rapidly deteriorating situation in the wake of its recent migrant crisis, more so in view of the Covid19 pandemic. One of the possible explanations behind such a policy is that EU is grappling with its intra-migration issues; EU's increasing vulnerability to intra-migration has been triggered largely because of a seemingly huge disparity between the West European countries and the new member states in terms of income and wealth opportunities.⁵⁷ Hence, people from these newly admitted states (and, of course, with lesser GDP) are moving to the rich European countries, leading to a north- further-north migration. The second possible explanation is EU's penchant for a homogeneous culture across the EU nation

⁵⁵ EU Court Rules against Three States over Refugees, BBC News (April 2, 2020), <https://www.bbc.com/news/world-europe-52133906> (last visited July 27, 2020).

⁵⁶ Azfer Ali Khan, *Can International Law Manage Refugee Crises?* OXF. UNIV. UNDERGRAD. LAW J. 54, 65 (2016).

⁵⁷ Hassel and Wagner, *supra* note 12, at 62.

states because of its common roots and singular European identity.⁵⁸ This approach may additionally explain why the EU states sought to prevent further encroachment by asylum seekers from ‘other’ countries of the Middle-east⁵⁹ and Northern Africa. But such kind of nativism and (in a sense) xenophobia⁶⁰ towards a particular ethnic group may provide only a partial explanation behind the apathy of the nation states to extend protection to these people. Also, such logic is fallacious; studies indicate that a few countries in Europe are moving away from homogeneity and are increasingly standing up to diversity and multiculturalism.⁶¹ The third potential explanation is the migrant-crime link driven by the apriori assumption that the number of migrants/refugees is directly proportional to the rate of crimes; the higher the number of migrants in a state, the higher the number of crimes and vice-versa. There are also assumptions that migrants/refugees pose a threat to national security and that they bring disorder.⁶² Although a couple of studies⁶³ conducted in a few Scandinavian countries such as Sweden and Norway indicate that there may be a migrant-crime link but drawing cogent conclusions out of those is highly premature. Another likely explanation is that quite a few of the states’ constitutions of the EU do not overwhelmingly support the causes of the refugees, including their formal protection and social inclusion. Arguably, the citizenship provisions in such constitutions are not in conformity with the broad principles guiding the protection of the

⁵⁸ Natasha S. Frederic and Juan M. Falomir-Pichastor, *Heterogeneity of Ingroup Identity and Anti-Immigrant Prejudice: The Moderating Role of RWA and Outgroup Homogeneity* 31 INTERNATIONAL REVIEW OF SOCIAL PSYCHOLOGY 1, 1 (2018).

⁵⁹ Sarah Kenyon Lischer, *The Global Refugee Crisis: Regional Destabilization & Humanitarian Protection*, 146 DÆDALUS, THE JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES 85, 87 (2017).

⁶⁰ Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach* 101 CAL. L. REV. 1013, 1015 (2013).

⁶¹ Karen Schönwälder & Triadafilos Triadafilopoulos, *The New Differentialism: Responses to Immigrant Diversity in Germany* 25 GERMAN POLITICS 366, 367 (2016).

⁶² Burch Elias, *The Perils and Possibilities of Refugee Federalism* 66 AM. U. L. REV. 353, 385 (2017).

⁶³ Göran Adamson, *Migrants and Crime in Sweden in the Twenty-First Century* 57 SOCIETY 9, 12 (2020).

interests of the refugees through the conferment of the right to asylum; there is an inherent conflict in laws regarding the protection of citizens versus the protection of non-citizens; constitutions are largely skewed in favour of the citizens. Only about half of the EU members states' constitutions extend the right to asylum, while some (like the Czech Republic, Germany, etc.) do it in a limited way, others (France,⁶⁴ Italy, etc.) do it in a broader way.⁶⁵ Since quite a few constitutions do not recognize the constitutional right to asylum in a formal way, the EU is not interested to implement the global mandates on the protection of the migrants and refugees. But this logic also seems untenable not only because the right to asylum⁶⁶ is gradually taking the shape of a *jus cogens* right having the potential to create non-derogable *erga omnes* obligations in international law but also because constitutional asylum and conventional asylum are not in contradiction with each other and formal constitutional asylum generates no distinctiveness.⁶⁷ The fifth probable explanation is the instrumental role of the media in redefining EU's narrative concerning the rights of the migrants and refugees. For example, in Czech Republic, between 2014 and 2016, the mainstream media played a decisive role in changing the perception narrative; about 900 newspaper articles that were published in and around the same time had put the refugees in bad light and had depicted them as a security threat and an administrative burden.⁶⁸

⁶⁴ Arguably, France was the first country to recognize the right of asylum in its 1793 Constitution. The right has lived through the French Constitution, 1946 (the preamble) to the Fifth Republic System, 1958 (art. 53-1).

⁶⁵ Meili, *supra* note 7, at 399.

⁶⁶ Roman Boed, *The State of the Right of Asylum in International Law* 5 DUKE J. COMP. & INT'L L. 1, 1 (1994). As per the author, the right to asylum in the perspective of a migrant/refugee includes (1) the right of a person to seek asylum and (2) the right of a person to be granted asylum. Such right can only play a purposeful role if the issues of admission and burden-sharing are effectively addressed.

⁶⁷ He'le'ne Lambert, Francesco Messineo, and Paul Tiedemann, *Comparative Perspectives of Constitutional Asylum in France, Italy and Germany: Requiescat in Pace?* 27 REFUG SURV Q. 16, 20 (2008).

⁶⁸ Marie Jelínková, *A Refugee Crisis Without Refugees: Policy and media discourse on refugees in the Czech Republic and its implications* 13 CENT. EUR. J. PUBLIC POLICY 33, 39

The adverse role of the media not only had a significant deterrent effect on Czech's policy decisions regarding admitting asylum seekers but also had an auxiliary effect on EU's policy agenda. On such Czech's policy the United Nations High Commissioner for Refugees (UNHCR) had observed that the violation of the basic rights of the migrants and refugees was systematic, not sporadic, designed to dissuade them from entering into the country.⁶⁹ But the moot question is that did it create reasonable grounds for the EU to adopt such a step-fatherly approach! While the above speculations are highly discomfoting, they create a generic guideline, especially from the point of view of regulation and public policy.

C. THE COVID19 PANDEMIC SITUATION AND BEYOND

The situation created by the Covid19 pandemic has rendered the matters even worse and many of the asylum seekers and refugees are facing illegal detention.⁷⁰ In the absence of a sturdy normative framework guiding global public health, these migrants are facing utter crisis since they don't have any sufficient access to healthcare facilities. A recent news report published by Al-jazeera has shown how Greece is turning a deaf ear to the rising worries of the migrants and how it is strategically reducing migrants' access to healthcare or legal aid, especially in the wake of the Covid19 pandemic.⁷¹ The Report *inter alia* indicates the EU's tacit support behind the Greek

(2019). There are also other studies that tend to underscore the role of the media in creating public against migrants and refugees; see generally, Zakaria Sajir and Miriyam Aouragh, *Solidarity, Social Media, and the "Refugee Crisis": Engagement Beyond Affect* 13 INT. J. COMMUN. 550, 554 (2019).

⁶⁹ See Jelínková, at 35.

⁷⁰ Lisa Schlein, *Refugees Unlawfully Detained Amidst COVID-19 Pandemic Must Be Released* VOA News (July 26, 2020, 10.01 AM), <https://www.voanews.com/africa/unhcr-refugees-unlawfully-detained-amidst-covid-19-pandemic-must-be-released> (last visited July 30, 2020). Many countries have not prescribed any limit on the maximum period of detention. See generally, Goodwin-Gill, *supra* note 32, at 1.

⁷¹ *New Report Criticises Greece over Inhumane' Asylum System*, Al Jazeera News (July 2, 2020), <https://www.aljazeera.com/topics/subjects/refugees.html> (last visited July 26, 2020).

initiative. A similar report shows the growing brutality of the Croatian border police against irregular migrants.⁷²

The UNHCR noted that in the situation of Covid19 pandemic “refugees fleeing war and persecution should not be punished or criminalized simply for exercising their fundamental human right to seek asylum.”⁷³ It further noted that refugees and displaced people are at an increased risk of being trafficked and exploited since their access to essential services and other social protection networks are very limited.⁷⁴ Furthermore, very recently it derided Poland for denying access for asylum seekers.⁷⁵ Although the UNHCR is doing its bit to address the appalling conditions facing the migrants and the refugees in the wake of Covid19 pandemic, the pious obligation is bestowed on the ‘dad’ (EU) to restructure and harmonize the laws and policies in accordance with the situational needs and requirements.

In the author’s opinion, the EU must pass a Directive in harmony with its other Directives to save the millions of lives that are at high risk not only because of the Covid19 pandemic but also because of the sluggish response of the ‘dad’ and some of his children to adopt a pioneering initiative in this regard. Let the novel hope of migrants and refugees for a new beginning not fade in the oblivion of darkness!

⁷² *Croatian Police Brutality against Migrants Reported to Austria*, Al Jazeera News (June 30, 2020), <https://www.aljazeera.com/news/2020/06/croatian-police-brutality-migrants-reported-austria-200630092905674.html> (last visited July 31, 2020).

⁷³ *UNHCR Stresses Urgent Need for States to End Unlawful Detention of Refugees and Asylum-seekers, Amidst COVID-19 Pandemic*, UNHCR India (July 24, 2020), <https://www.unhcr.org/en-in/news/press/2020/7/5f1569344/unhcr-stresses-urgent-need-states-end-unlawful-detention-refugees-asylum.html> (last visited July 29, 2020).

⁷⁴ *UNHCR Warns of Increased COVID-19-related Trafficking Risks for Refugees, Displaced and Stateless*, UNHCR India (July 30, 2020), <https://www.unhcr.org/en-in/news/press/2020/7/5f22e2844/unhcr-warns-increased-covid-19-related-trafficking-risks-refugees-displaced.html> (last visited July 28, 2020).

⁷⁵ *UNHCR Calls on Poland to Ensure Access for People Seeking Asylum*, (July 24, 2020) <https://www.unhcr.org/en-in/news/press/2020/7/5f1a89674/unhcr-calls-poland-ensure-access-people-seeking-asylum.html> (last visited July 28, 2020).

CONCLUSION

In light of the dissected facts and theoretical frameworks, it may be said that the economic defence is unsustainable and those nation states that are refusing to entertain the causes of the migrants and asylum seekers should have worked out a justifiable solution in accordance with the mandates spelt out in the respective conventions and in view of the recent observations by the ECtHR and the ECJ. The EU nation states must forge synergistic partnerships with various private and inter-governmental organizations not only to create frameworks to address migrant and refugee issues but also to promote the causes of subsidiary protection and non-refoulement. The issue may be addressed holistically through international responsibility-sharing⁷⁶ and adopting a common yet differentiated approach.⁷⁷ The need of this hour is to rectify the existing pitfalls and to create a holistic framework so that nation-states may create their own laws to support the migrants and asylum seekers. The very recent Ukrainian initiative⁷⁸ to bring in a new law named ‘Amendments to Certain Legislative Acts of Ukraine Concerning Recognition as a Stateless Person’ to protect the causes of stateless persons is a welcome step in this regard.

While there are several laws operating at various levels of the EU system, there is hardly any harmonization of the laws. There are also overlapping and conflict points. For example, the provisions of the Dublin Regulation 2013 (the Dublin III Regulation) seemingly frustrates the broad human rights

⁷⁶ Martin et al., *supra* note 29, at 13.

⁷⁷ Such an approach would ensure that all states necessarily contribute in a proportionate and meaningful manner, although not all states are required to evince the same kind of commitment. For details see: Gammeltoft-Hansen and Tan, *supra* note 15, at 47.

⁷⁸ *UNHCR Welcomes New Ukrainian Statelessness*

Law Set to End Legal Limbo for Thousands, UNHCR India (July 17, 2020), <https://www.unhcr.org/en-in/news/briefing/2020/7/5f1155844/unhcr-welcomes-new-ukrainian-statelessness-law-set-end-legal-limbo-thousands.html> (last visited July 31, 2020).

provisions of non-refoulement under the ECHR regime.⁷⁹ The ECtHR in a few of its decisions had also taken cognizance of the matter to that effect and had asked states to not rely on the Regulation to send back asylum seekers to the first state to procure a decision on their respective asylum applications.⁸⁰ The observation of the Court was largely based on the pitiable conditions of the asylum systems prevailing in some of the EU nations. The conditions have further deteriorated palpably in the wake of the Covid19 pandemic. Many migrants and refugees are seeking asylum in the fear of being stateless. But unfortunately, a few EU countries such as Greece have been detaining these asylum seekers so that their asylum applications are not processed in accordance with the established procedures. This also contravenes Article 31 of the Refugee Convention that creates an obligation on the contracting states to not penalise refugees on account of their irregular entry. Thanks to the very recent initiative of UNHCR to call on states to immediately release those asylum seekers and refugees who are facing illegal detention. Debatably, there is an impending need to streamline the CEAS, which is thus far in a doleful condition.⁸¹

⁷⁹ Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides With European Human Rights Law*, 29 HARV. HUM. RIGHTS J. 57, 95 (2016).

⁸⁰ *Id.* at 97.

⁸¹ *Id.* at 62.