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The Confluence Between COVID-19 and Informal Externalisation Agreements and the Precarious State of the Right to Seek Asylum

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Abstract

The swift closure of international borders with the outbreak of the COVID-19 pandemic has placed the right to seek asylum in a precarious position. The paper questions the impact of COVID-19 on the right to seek asylum in the face of the informal externalisation agreements (IEA) concluded by the European Union (EU) Border States and other destination states to shift border management to neighbouring transit states. The paper argues that IEA marginalised the right to seek asylum well before the outbreak of COVID-19. The pandemic's impact on the right to seek asylum, per se, is temporal, which can be defused through enhanced procedural measures. However, in the long run, COVID-19 provides an alibi to the Border States to further externalise asylum and migration controls through IEA. Thereby, COVID-19, along with IEA, is highly likely to make the right to seek asylum obsolete.

Keywords: *Asylum; COVID-19; externalisation; informal agreements; transit states*

Introduction

The outbreak of the COVID 19 pandemic has prompted scholarly debate on the potential impact of the pandemic on irregular migrants and asylum seekers that are being held at overcrowded temporary accommodation centres, detention centres, and hotspots — situated all along the Turkey-Greece, Serbia-Hungary, and Libya-Italy travel routes to Europe (Crawley, 2021; Ghezelbash & Feith Tan, 2020; Kluge et al., 2020; Meer et al., 2021; Truelove et al., 2020). The pandemic has almost dismantled the international asylum regime by forcing the states receiving asylum seekers to restrict cross-border movement to control the virus spread (Bala & Lumayag, 2021; Ghezelbash & Feith Tan, 2020; Lumayag et al., 2020; Jauhiainen, 2020). Accordingly, asylum seekers who irregularly enter the destination states via land or sea routes became the natural victims of the pandemic. Thereby, the outbreak of the pandemic adversely affected the right to seek asylum (Ghezelbash & Feith Tan, 2020; Jauhiainen, 2020; Meer et al., 2021; Pelliconi, 2020, p. 19). Researchers are putting their heads together to assess the pandemic's short term and long-term impacts on the right to asylum (Ghezelbash & Feith Tan, 2020; Meer et al., 2021). However, the important fact to consider is the degree of relevance to which the pandemic affects the right to seek asylum in the face of enormous IEA concluded between the border\destination and transit states and the exclusionary frameworks established thereunder.

I argue that the right to seek asylum was effectively marginalised well before the outbreak of the pandemic. I analyse the impact of COVID-19 on the right to seek asylum against the IEA concluded by the EU and its Border States – Italy, Hungary, and Malta. The use of IEA emerged as a tool to hide the involvement of the EU institution in the adoption of the EU-

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Turkey Statement – an informal agreement between the EU and Turkey to curb the unprecedented arrival of asylum seekers at the Greek Islands. Similarly, Italy – the second largest recipient of asylum seekers in the EU, with the support of the EU – concluded a Memorandum of Understanding (MoU) with Libya to prevent the arrival of asylum seekers at the Italian shores. Under the MoU, Italy delegated the responsibility of preventing asylum seekers movement towards the Italian shores to the Libyan Coast Guard (LCG) and the Libyan Department of Combating Irregular Migration (LDCIM). In the same way, Hungary concluded an informal agreement with Serbia under which the Serbian Commissariat for Refugees (SCR) permits only 1 asylum seeker a day to enter the Hungarian Transit Zone to seek asylum in Hungary (Ashraf et al., 2019).

Hence, I argue that a majority of asylum seekers was denied the right to seek asylum due to IEA and that only a small number of asylum seekers beating all the odds of the exclusionary mechanisms established under IEA are expected to be the victim of the Pandemic exclusionary measures for a short while. I further argue that in the long run, the health emergency resulting from the pandemic will be used by the Border States as an alibi to legitimise IEA and deny the right to seek asylum. Therefore, the pandemic is highly likely to complement the informal externalisation of migration and asylum controls to transit states by pursuing other Border States to shift responsibility through IEA.

The paper is divided into three parts: part one analyses the impact of IEA on the right to seek asylum; part two analyses the right to seek asylum at the face of the COVID-19 pandemic and the legitimacy of the denial of the right to seek asylum at the face of public health emergency; whereas part three analyses the reasons which could pursue more Border States to involve in IEA at the face of COVID-19.

The Right to Seek Asylum

The Universal Declaration on Human Rights (UDHR) is the only international instrument that explicitly recognises the right to asylum when someone fears prosecution in the home state (Universal Declaration of Human Rights, 1948, Art 14(1)). The UDHR is not a legally binding instrument; in contrast, other international human rights and international humanitarian law instruments, including the International Convention Relating to Status of Refugees 1951 (hereinafter the Refugee Convention), lack explicit recognition of the right to asylum (Lomba, 2004, p. 8; Worster, 2014, p. 477). Nonetheless, some of the regional human rights instruments, such as the American Convention on Human Rights (1969), under Art 22(7), the African Charter on Human and Peoples Rights (1981) under Article 12(3), and the Charter of the Fundamental Rights of the European Union (2012) under Article 18, explicitly recognise the right to asylum.

However, the American Convention on Human Rights (1969) and the Charter on Human and Peoples Rights (1981) balance the 'right to asylum' against international law and domestic laws of the concerned state. Similarly, the Charter of the Fundamental Rights of the European Union (2012) aligns the right with the scope of the Refugee Convention. In Europe, the case law European Court of Human Rights (ECtHR) gives an uncontested right to Party States to control the entry of aliens at the borders (*Hirsi Jamaa and Others v Italy,* 2012). This means that access to international protection is balanced against conditions and qualifications established under international law. An asylum seeker must establish the existence of persecution in the

home state or the state of the previous residence. Accordingly, the right to asylum is only recognised as a right to seek asylum or the right to apply for asylum, and the grant of the right is dependent on the concerned state's verification of persecution claim (Guy S. Goodwin-Gill, 1996; Meili, 2017; Nicolosi, 2015; Worster, 2014).

Worster (2014) argues that the right to asylum is only accessible under certain situations of persecution; therefore, its scope is limited to the extent of accessing asylum procedures. Similarly, Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen argue "the right to seek asylum can only be understood as establishing a procedural right to access the asylum process" (p. 482). The right to seek asylum procedures is derived from the principle of non-refoulement enshrined under Article 33 of the Refugee Convention (Convention Relating to the Status of Refugees, 1951, Art 33). The Article prohibits party states from expelling 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. Prohibition of torture and expulsion of aliens enshrined under various international humanitarian law and international human rights instruments has also been interpreted in a way to recognise the principle of non-refoulement (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Art 3; Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Art 2(3); American Convention on Human Rights, 1969, Art 22(8); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Art 3).

The absoluteness of the principle of non-refoulement is further vindicated by Article 19(1) of the Protocol against the Smuggling of Migrants (2004), which specifically enshrines that nothing in this Protocol shall affect the responsibilities of States in relation to the Refugee Convention and the principle of non-refoulement as contained therein. Thereby, the universal recognition of the principle makes it a *Jus Cogen* — a principle of international law from which nation-states cannot derogate (Allain, 2001; Elif, 2012; Convention Relating to the Status of Refugees, 1951, Art 42(1)). This universal recognition of the principle and nation-states commitment not to derogate from the principle entities asylum seekers a right to seek asylum (Gil-Bazo, 2015, p. 11).

The Impact of IEA on the Right to Seek Asylum

In the EU, IEA concluded by the Border States marginalised the right to seek asylum well before the outbreak of the COVID-19 pandemic. Initially, the purpose of IEA was to remove procedural barriers in the conclusion of externalisation agreements with safe third countries (Lipson, 1991; Pauwelyn et al., 2012), and evade legal responsibility of the EU institutions for legal challenges in the EU supranational courts (Bendiek & Bossong, 2019; Cassarino, 2007; Slominski & Trauner, 2018). However, at the later phase, IEA turned into a more complex form of the expansion of state authority, shifting of borders controls, and mean of Border States collaboration with non-state actors to prevent migratory flows towards their external borders (Ashraf et al., 2019). Joint statements, guidelines, declarations, memorandum of understandings, and exchange letters are some of the main forms of officially recognised IEA (Lipson, 1991, p. 500). IEA also take place through secret mutual understanding between the governments and border authorities of the collaborating states, which are not known to the public generally (Ashraf et al., 2019). IEA are concluded at both multilateral and bilateral levels. At the multilateral level, the EU-Turkey Statement enforced as of 20 March 2016 was

the first step towards informal externalisation of asylum management (Jill Alpes et al., 2017; Tunaboylu & Alpes, 2017).

The Statement provides Greece with a mechanism to return irregular migrants, including asylum seekers, to Turkey on the ground of coming through Turkey. The mechanism is grounded on the principles of 'safe first country' and 'safe third country' provided under articles 35 and 38 of the Asylum Procedures Directive and consideration of Turkey as a safe country of asylum (Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, 2013, Art 35 & 38). The Statement was concluded after extensive involvement of the European Commission and the European Council to reduce irregular arrivals into Greece; therefore, the scope of informality in the EU-Turkey Statement is limited to elude the responsibility of the EU institutions for violation of the principle of non-refoulement and the right to seek asylum establishing therefrom (Smeets & Beach, 2020, p. 130). The same was proven to be true when the European Commission argued that the Statement was concluded by the Heads of the EU States (*NF, NG, NM v. European Council,* 2017; *Complaints No 506-509-674-784-927-1381/2016/MHZ v. European Commission,* 2017). By keeping their involvement informal, the EU institutions successfully eluded their responsibility for the violation of human rights.

The approach also inspired the EU Border States` facing exceptional arrival of asylum seekers to externalise asylum control to transit states without attracting legal responsibility for the violation of the principle of non-refoulement and the right to seek asylum. Accordingly, in a short period, Italy and Hungary reached IEA with neighbouring Libya and Serbia, respectively, to curb the arrival of asylum seekers. Italy's informal asylum externalisation to Libya started under the pretext of the Memorandum of Understanding (MoU) signed between both countries on 02 February 2017 (Baldwin-Edwards et al., 2019). Soon after the conclusion of the MoU, the EU endorsed the MoU at its 2017 annual summit in Malta (Baldwin-Edwards et al., 2019, p. 5). Under the MoU, Italy pledged to provide patrol vessels, patrol vessels, navigational systems, and other technological equipment to the LCG to increase its capacity of effectively curbing irregular movements in the Mediterranean (Guttry et al., 2018, p. 53). Italy also pledged to provide field training to the personnel of the LCG to ensure that the LCG and the Italian Navy coordinate smoothly.

To this end, under the mandate of Operation Sophia – initiated by the EU (Dastyari & Hirsch, 2019, p. 450), the Italian Navy designed a three-month training programme for the LCG (Statewatch, 2017). The programme amid to advance the LCG's interception, interrogation, surveillance, and coordination skills (Statewatch, 2017). Furthermore, the Italian Navy has also assisted the LCG in setting up the Libyan Maritime Rescue Coordination Centre (MRCC) and Search and Rescue Zone (Baldwin-Edwards & Lutterbeck, 2018). After that, the Italian authorities started operational coordination with the LCG to intercept irregular migrants in the central Mediterranean (Pijnenburg, 2018, p. 403). To this end, Italy stationed a naval support mission in Libyan territorial waters, whose sole objective was to monitor asylum-seekers setting off from the Libyan shores and direct the LCG to pull-back them back (Human Rights Watch, 2018). Additionally, the Italian MRCC also coordinates with the LCG to pull back asylum seekers spotted outside the Libya SAR zone and, on some occasions, inside the Italian SAR zone (Pijnenburg, 2018, pp. 403–404).

Under the mandate of the MoU, Italy has also established border control on Libya's southern border, which is the main entry point of asylum seekers originating from sub-Saharan and travelling towards the EU to seek asylum (Guttry et al., 2018, p. 53). To this end, Italy pursued various non-state actors involved in human trafficking and the slave trade of asylum to quit their smuggling operations and turn their militias into border guards in return for hefty financial remuneration (Baldwin-Edwards & Lutterbeck, 2018, p. 10). In addition to human rights violations, this approach was poised to contravene Article 10 & 80 of the Italian Constitution. Article 10 of the Italian Constitution explicitly enshrines that anyone prosecuted in his/her home state has a right to seek asylum in Italy (Constitution of Italy, 1947). Furthermore, under Article 80 of the Italian Constitution, the Italian government must seek parliamentary approval of an international treaty if it entails financial costs on the national budget (Constitution of Italy, 1947, Art 80). Therefore, to avoid seeking parliamentary approval due to fear that the parliament will not approve the MoU due to potential contravention of the Italian Constitution, the Government decided to bear the costs from the EU budget (Mancin, 2018, p. 262). However, since Italy has already been penalised by the ECtHR in the case of *Hirsi Jamma and Other* (2012) for contravening the principle of non-refoulement by sending asylum seekers back to Libya under the Treaty of Friendship 2008. Italy desired to keep the agreement informal to avoid human rights challenges in the Court of Justice of the European Union (CJEU) and the ECtHR.

The informal collaboration enables Italy to exercise a de-facto control on Libya's state institutions, particularly the LCG and the LDCIM. Furthermore, the informal collaboration also enables Italy to exercise a de-facto control on the asylum seekers` movement in Libya as well as in the Mediterranean. The reports of the UNHCR, International Organisation of Migration, and various other international organisations showed that, after the enforcement of the MoU, the numbers of asylum seekers reaching Italy decreased up to 90% in the same year (Baldwin-Edwards & Lutterbeck, 2018, p. 10). Thereby only small numbers of asylum seekers, lucky enough to beat all the odds of the informal exclusionary infrastructure established by Italy, were able to exercise the right to seek asylum.

Similarly, Hungary has also reached a mutual understanding with Serbia – an IEA – to restrict asylum seekers access to Hungarian transit zones established at the Hungary-Serbian border (Ashraf et al., 2019). The existence of this informal agreement was first reported by the European Council on Refugees and Exiles in its 2018 report highlighting asylum procedures in Hungary (ECRE, 2018b). Later, the EU funded research project – RESPOND – studying multilevel governance of migration in 11 EU countries also reported the existence of the informal agreement between Hungary and Serbia (Ashraf et al., 2019). Under the agreement, both states agreed on a mechanism to manage irregular migration transiting through Serbia (ECRE, 2018b, p. 18). The agreement followed the erection of barbed wire by Hungary on the borders of neighbouring Serbia and Croatia to prevent asylum seekers from reaching Hungary. On the Serbian border, Hungary established two transit zones – entry points for asylum seekers wishing to seek protection in Hungary (Ashraf et al., 2019, p. 308; ECRE, 2018b, p. 18). The transit zones are established on the Hungarian land, fully secured from the Hungarian side, open from the Serbian side, and consist of a series of containers used to accommodate asylum seekers (Ashraf et al., 2019, p. 308; ECRE, 2018b, p. 18).

Following the establishment of transit zones, asylum seekers wishing to seek asylum in Hungary had to apply from the transit zones and wait there until a decision is reached on their

applications. Since 2016, Hungary applies a daily quota for asylum seekers admitted into transit zones to access asylum procedures which were later dropped from the original 20-30 admissions per day per transit zone in 2016 to five in 2017 and only one in 2018 (Ashraf et al., 2019, pp. 308–309; ECRE, 2018b, p. 18). Anyone who leaves for Serbia, for any reason, risks termination of asylum procedures and thus a rejection of asylum application (*Ilias and Ahmad v. Hungary*, 2012, para. 247). In mid-2016, after intense criticism from the international organisation, Hungary informally engaged Serbia to prevent asylum seekers from gathering at the transit zones; after that, the SCR started preventing asylum seekers from travelling towards the Hungarian transit zones (ECRE, 2018b, p. 19).

Later on, both countries informally started a mechanism of maintaining a waiting list of asylum seekers wishing to seek protection in Hungary, which is prepared by the SCR, communicated between the authorities of both states through the community leaders chosen from the asylum seekers at the Serbian temporary reception centres, and reviewed by the Hungarian authorities to select asylum seekers for admission into the transit zones and apply for asylum (Ashraf et al., 2019, pp. 309–310; ECRE, 2018b, p. 19). Since the start of the waiting list system, the normal duration of waiting in Serbia to seek asylum in Hungary has exceeded a year. Furthermore, the Hungarian law also permits the Hungarian authorities to push back anyone apprehended within eight kilometres of the border; the rule was later extended to the entire Hungary (ECRE, 2018b, p. 20). Under the rule, Hungary has pushed back over 24000 asylum seekers in the following three years, while another 13500 asylum seekers were blocked from entering the Hungarian border (ECRE, 2018b, p. 21).

A review of the number of asylum seekers arrivals in all three Border State before and after implementation of IEA shows that IEA have severely damaged the right to seek asylum in the EU. By the end of 2016, The EU-Turkey Statement alone reduced the number of asylum seekers, up to 90% of one and half million arrivals in the preceding year, arriving in the EU through the eastern Mediterranean route (Jauhiainen, 2020, p. 262). Similarly, UNHCR statistics show that the number of asylum seekers arriving in Italy by the end of 2019 had dropped up to nearly 93% of the arrivals at the time when MoU was signed (UNHCR, 2020a). Thereby, here I can conclude that IEA concluded by the EU Border States and exclusionary arrangements established thereunder marginalised the right to seek asylum well before the outbreak of the COVID-19 pandemic. The pandemic only impacted a small number of asylum seekers who somehow managed to reach the EU borders. The next section analyses the pandemic's impact on the right to seek asylum and the legitimacy of the denial of the right in the face of the threat to public health.

The Right to Seek Asylum at the Face of COVID-19

The threat to public health as a result of the outbreak of COVID-19 forced the governments to prohibit social, economic, and educational activities in societies to save human lives. Thereby, the pandemic adversely impacted the right to seek asylum by providing a plausible alibi for governments to deny access to asylum procedures (Ghezelbash & Feith Tan, 2020). According to United Nations High Commissioner for Refugees (UNHCR), out of 167 states opting to close their borders due to the outbreak of the pandemic, 57 made no exception for asylum seekers and started to return them to transit states (UNHCR, 2020b). The situation resulted in a disregard of the principle of non-refoulement — recognised as a non-derogable

right under Article 42(1) of the Refugee Convention. The outbreak of the pandemic caused forced returns, denial of entry, and push-backs at both land and maritime borders (Babicka, 2020; Elmolla, 2020).

After the outbreak of the pandemic, all three EU Border States benefiting from some form of IEA closed their borders with the neighbouring transit states to restrict the remaining few arrivals. In Hungary, the right to seek asylum became inaccessible to asylum seekers normally admitted under the daily quota system. At the same time, asylum procedures in Greece were already terminated well before the outbreak of the pandemic due to the release of asylum seekers by Turkey as part of political confrontation with the EU (Jauhiainen, 2020, p. 261). Similarly, Italy issued a decree to close its ports for the disembarkation of asylum seekers rescued in its territorial waters for the duration of the pandemic (Human Rights Watch, 2020). However, after international criticism and circulation of COVID-19 recommendations by the UNHCR and European Commission (European Commission, 2020; UNHCR, 2020b), Italy started to quarantine asylum seekers in large ferries off its coast (ANSA, 2020; Di Meo & Bentivegna, 2021, p. 1859).

The UNHCR reluctantly acknowledged the legitimacy of the border closures and denial of the right to seek asylum; however, it called upon the nation-states to implement a mechanism of protection-sensitive border management by enabling the asylum seekers to access asylum procedures following health check and quarantine, where needed (UNHCR, 2020b). Whereas, the European Commission directed the EU Member States to adopt quarantine measures – a practice not warranted from the EU Law; therefore, it recommended the Member States, particularly the Border States to implement such measures in accordance with national laws, provided that such measures are necessary, proportionate and non-discriminatory (European Commission, 2020, p. 3). The UNHCR provisional acceptance of the legitimacy of nation-states policy of restricting asylum seekers arrival is grounded on the general principles of international human rights law, which allows nation-states to derogate from or restrict human rights obligations in the case of a threat to public health (Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1963, Art 15; Charter of Fundamental Rights of the European Union, 2012, Art 52(1)).

Therefore, it can be induced that the EU Border States may be provisionally entitled to exercise a certain degree of discretion with regard to asylum seekers accessing international protection during the pandemic. However, as the right to seek asylum is drawn from the principle of non-refoulement, universally recognised under international human rights law and the EU human rights law, the Border States cannot derogate the right to seek asylum. Nevertheless, it must also be noted that the drafters of the international humanitarian law and international human rights law – specifically the European Convention on Human Rights (ECHR) and the Charter of the Fundamental Rights of the European Union did not foresee such a global threat to public health. Thereby, derogation and restriction clauses enshrined in different international laws lack consideration of such a global emergency. Had the drafter foreseen such a global emergency, their approach to the principle of non-refoulement and the right to seek asylum could have been different. Thus, it may be justifiable for the Border States to restrict the exercise of the right to seek asylum during the pandemic.

It must be noted that any restriction emplaced by a state on the exercise of human rights guaranteed under international law must be necessary, proportionate, and in accordance with the law (Protocol 3 to the European Convention for the Protection of Human Rights and

Fundamental Freedoms, 1963, Art 2(3); Charter of Fundamental Rights of the European Union, 2012, Art 52(1)). This means that there may be a need to balance the right to seek asylum against the state interest of protecting public health. Therefore, while the Border States cannot derogate the principle of non-refoulement, it seems reasonable for the Border States to temporarily restrict the right to seek asylum to a certain degree. This means that the UNHCR's recommendation to nation-states to subject asylum seekers, where needed, to health checks and quarantines is well balanced. This further means that the impact of COVID-19 on the right to seek asylum is temporary, and in the long run, defusable through the application of certain procedures.

Expansion of Informal Externalisation at the Face of COVID-19

The above discussion shows the impact of the pandemic on the right to seek asylum is *albeit* marginal; its confluence with IEA makes the right to seek asylum almost inaccessible. EU Border States have already shown dismay of the EU's policy. Because COVID-19 forced the EU Member States to reinforce internal borders within the EU, it looks highly unlikely that the Border States such as Greece, Hungary and Italy will give regard to the European Commission or the UNHCR recommendations. Thereby, the Border States are expected to increase emphasis on the externalisation of asylum and migration controls. To this end, IEA with transit states appear to be an ideal platform because of their ability to evade obligations arising from international law.

Hungary, for example, has successfully used IEA with Serbia to completely exonerate its responsibility with regard to the principle of non-refoulement and the right to seek asylum. In the case of *Ilias and Ahmed,* which involved, *inter alia,* violation of Article 3 of the ECHR, i.e., the principle of non-refoulement due to events that happened in the Hungarian transit zones before the start of Hungary's informal collaboration with Serbia, the Grand Chamber of the ECtHR only held Hungary responsible for the violation of inhuman and degrading treatment of asylum seekers at the border transit zones (Article 3 of the ECHR) (*Ilias and Ahmad v. Hungary*, paras 164–165). This was because Hungary addressed the issue of border expulsions and violation of the principle of non-refoulement by informally collaborating with Serbia and restricting asylum seekers from reaching the Hungarian transit zones to seek asylum. Additionally, the approach also addressed the issue of overcrowding in the transit zones; thereby, Hungary also managed to exonerate its responsibility arising from Directive 2013/33/EU of the European Parliament and Council Laying down Standards for the Reception of Applicants for International Protection (2013).

Similarly, informal collaboration with Libya helps Italy to avoid legal challenges in the ECtHR for violation of the principle of non-refoulement and the right to access asylum procedures. In the past, in the case of *Hirsi Jamma and Others* (2012, paras 137-138), Italy has been held responsible for returning asylum seekers to Libya without accessing the asylum needs of intercepted asylum seekers on a case by case basis. However, it must be noted that in the *Hirsi* case, the interception and expulsion of asylum seekers were carried out by the Italian Authorities (Pijnenburg, 2018, p. 405). Under the present collaboration with Libya, Italy avoids any direct involvement in the interception and expulsion of asylum seekers. As discussed above, Italy has rather delegated these responsibilities to the LCG after strengthening the operational capabilities of the LCG. Since then, the LCG has intercepted

asylum seekers in the Mediterranean in large numbers. In one case, on 6 November 2017, more than 20 asylum seekers when the LCG was called in to pull back asylum seekers of a distressed boat of Italian territorial waters (Pijnenburg, 2018, p. 405). A rescue ship belonging to the Sea-Watch humanitarian mission was present in the area; nonetheless, the LCG behaved aggressively to ensure a pull-back of asylum seekers (ECRE, 2018a).

Following the incident, a case was filed against Italy in the ECtHR (ECRE, 2018a). However, for the ECtHR to hold Italy responsible, it has to establish whether Italy exercised a de-facto control on the LCG and commission of the pull-back act. Although Italy directed the LCG to the distressed boat, donated patrol vessel to LCG, trained the personnel of the LCG, it would be really hard for the Court to hold Italy responsible for just training the personnel of the LCG and providing them patrol vessels. Italy claims that it supplies patrol vessels and staff training to LCG to save precious lives in the Mediterranean (Loschi et al., 2018). Therefore, it looks problematic to hold Italy responsible for aiding or assisting the LCG.

For the reasons just mentioned, the prospects of the adoption of IEA by more Border States to curb the arrival of asylum seekers at the face of COVID-19 look highly promising. This is why on 28 May 2020, immediately after the outbreak of the COVID-19, Malta signed a MoU with Libya to curb the arrival of asylum seekers on the Island (Memorandum of Understanding, 2020). It is worth mentioning that Malta, for a while, has been secretly collaborating with the LCG to curb irregular movements towards the Island. However, seeing the aftermath of the Pandemic Maltese Government realised that this is high time to conclude a MoU with Libya to curb the arrival of asylum seekers on the Island. Under the MoU, Malta established two Coordination centres – one in Libya and the other in Malta to monitor the movement of asylum seekers in the Mediterranean (InfoMigrants, 2020). Following the establishment of the Centres, real-time information is sent to the LCG, whose responsibility is to intercept and pull back the asylum seekers. This shows that the COVID-19 has already started expanding the regime of IEA; thereby, I can conclude that the pandemic has a real prospect of widening the regime of informal asylum externalisation.

Conclusion

The outbreak of the COVID -19 pandemic was a huge shock for the people on the move to seek asylum in the EU and elsewhere. The UNHCR and the European Commission circulated emergency guidelines for the Border States to ensure asylum seekers access to international protection with intervention. The guidelines stressed that asylum seekers health checks and quarantine before granting them access to international protection sufficiently ensure the refugee receiving states` need to protect public health as well as asylum seekers` right to seek asylum. Thereafter, it was generally expected that the COVID-19 impact on the right to seek asylum would be temporal and limited. However, a careful examination of the Border States` asylum management practices shows increasing use of IEA to get away from the responsibility arising from international law. As a result, out of all the people on move to seek international protection, only a small number of asylum seekers were exercising the right to seek asylum in their destination states. In this sense, Covid-19 appears to have only impacted the asylum seekers lucky enough to beat all the odds of destination states` exclusionary practices.

However, considering the increasing use of IEA with the transit states after the outbreak of the COVID-19, marginalisation of the right to seek asylum appear to be long lasting. COVID-19 appears to be a decisive factor in pursuing the destination states to externalise asylum

management to neighbouring transit states through IEA. The cumulative effect of COVID-19 and IEA is highly likely to make the right to seek asylum obsolete. It is recommended that the CJEU, the ECtHR, and other international human rights courts must expand their jurisprudence on extraterritorial wrongful acts by relying on the Border State's knowledge and intent' to hold it responsible for aiding or assisting the pullback the asylum seekers or exercising effective control on the pullback operations of the transit state or its agent.

References

Allain, J. (2001). The jus cogens Nature of non-refoulement. *International Journal of Refugee Law*, *13*(4), 533–558.

ANSA. (2020, June 26). Italy: Migrant coronavirus cases pose no risk to public, officials say. *InfoMigrants*. https://www.infomigrants.net/en/post/25637/italy-migrant-coronavirus-cases-pose-no-risk-to-public-officials-say

Ashraf, T., Korkut, U., & Gyollai, D. (2019). The Expansion of State Authority over the Neighbouring States through Informal Migration Controls: The Case of Hungary's Control over Serbia. *Spanish Yearbook of International Law*, *23*(20), 306–316.

Babicka, K. (2020, June 29). The COVID-19 Measures Impact on the Rights of Migrants and Refugees in the EU. *Opinio Juris*. https://opiniojuris.org/2020/06/29/the-covid-19-measures-impact-on-the-rights-of-migrants-and-refugees-in-the-eu-access-to-the-right-to-seek-asylum-and-reception-and-living-conditions/

Bala, P., & Lumayag, L. (2021). The Practice of 'Othering' during COVID-19 Pandemic in Malaysia: From the cities to the highlands. *Migration Letters*, *18*(6), 621–636. https://doi.org/10.33182/ml.v18i6.1587

Baldwin-Edwards, M., Blitz, B. K., & Crawley, H. (2019). The politics of evidence-based policy in Europe's 'migration crisis'. *Journal of Ethnic and Migration Studies*, *45*(12), 2139–2155. https://doi.org/10.1080/1369183X.2018.1468307

Baldwin-Edwards, M., & Lutterbeck, D. (2018). Coping with the Libyan migration crisis. *Journal of Ethnic and Migration Studies*, *45(12)*, 2241–2257. https://doi.org/10.1080/1369183X.2018.1468391

Bendiek, A., & Bossong, R. (2019). Shifting boundaries of the EU's foreign and security policy: A challenge to the rule of law. *Stiftung Wissenschaft Und Politik*, *Research paper No 12*, 1–28. https://doi.org/doi.org/10.18449/2019RP12

Cassarino, J.-P. (2007). Informalising Readmission Agreements in the EU Neighbourhood. *The International Spectator*, *42(2)*(2), 179–196. https://doi.org/10.1080/03932720701406365

Constitution of Italy, 22 December 1947, available at: Https://www.refworld.org/docid/3ae6b59cc.html [accessed 25 June 2019].

Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46.

Protocol 3 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention, 6 May 1963, ETS 45.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

Council of the European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013).

Crawley, H. (2021). The Politics of Refugee Protection in a (Post)COVID-19 World. *Social Sciences*, *10*(3), 81. https://doi.org/10.3390/socsci10030081

Crisp, J. (2020, July 2). The end of asylum? *United Against Inhumanity*. http://www.against-inhumanity.org/2020/07/02/the-end-of-asylum/

Dastyari, A., & Hirsch, A. (2019). The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy. *Human Rights Law Review*, *19(3)*(3), 435–465. https://doi.org/10.1093/hrlr/ngz024

Di Meo, S., & Bentivegna, E. (2021). Migrants' Quarantine and COVID-19 Pandemic in Italy: A Medico-anthropological View. *SN Comprehensive Clinical Medicine*, *3*(9), 1858–1862. https://doi.org/10.1007/s42399-021-00993-2

ECRE. (2018a, May 18). *Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard*. https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/

ECRE. (2018b). *Country Report: Hungary*. European Council on Refugees and Exiles. https://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2018update.pdf

Elif, U. (2012). A Comment on the Status of the Non-Refoulement Principle in International Law. *Uluslararasi Hukuk ve Politika*, *8*(30), 25–58.

Elmolla, J. (2020, June 4). Seeking protection in Australia: Challenges for asylum seekers during the COVID-19 crisis. *Refugee Law Initiative Blog*. http://rli.blogs.sas.ac.uk/2020/06/04/seeking-protection-in-australia-challenges-for-asylum-seekers-during-the-covid-19-crisis/

European Commission, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, C(2020) 2516 final 25 (2020). https://ec.europa.eu/info/sites/info/files/guidance-implementation-eu-provisions-asylum-retur-procedures-resettlement.pdf

Gammeltoft-Hansen, H., & Gammeltoft-Hansen, T. (2008). The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU. *European Journal of Migration and Law*, *10(4)*, 439–459. https://doi.org/10.1163/157181608X380219

Ghezelbash, D., & Feith Tan, N. (2020). The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection. *International Journal of Refugee Law*, *32*(4), 668–679. https://doi.org/10.1093/ijrl/eeab002

Gil-Bazo, M.-T. (2015). Asylum as a General Principle of International Law. *International Journal of Refugee Law*, *27*(1), 3–28.

Guttry, A. de, Capone, F., & Sommario, E. (2018). Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements between Italy and Libya. *International Migration*, *56(3)*, 44–60.

Guy S. Goodwin-Gill. (1996). *The Refugee in International Law* (2nd ed.). Oxford University Press.

Hirsi Jamaa and Others v Italy, Application no 27765/09, (ECtHR, 23 February 2012).

Human Rights Watch. (2018, July 25). EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk. *Human Rights Watch*. https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk

Human Rights Watch. (2020, April 9). *EU/Italy: Port Closures Cut Migrant and Refugee Lifeline*. Human Rights Watch. https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-life line

Ilias and Ahmad v. Hungary, (Application No. 47287/15, 21 November 2019).

InfoMigrants. (2020, June 5). *Malta sets up center in Libya to fight irregular migration—InfoMigrants*. https://www.infomigrants.net/en/post/25188/malta-sets-up-center-in-libya-to-fight-irregular-migration

Jauhiainen, J. S. (2020). Biogeopolitics of COVID-19: Asylum-Related Migrants at the European Union Borderlands. *Tijdschrift Voor Economische En Sociale Geografie*, *111*(3), 260–274. https://doi.org/10.1111/tesg.12448

Jill Alpes, Tunaboylu, S., & Ulusoy, O. (2017). Post-deportation risks under the EU-Turkey Statement: What happens after readmission to Turkey? *Migration Policy Centre European University Institute*. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwjDip_k_fvoAhVaQEEAHVGhC4IQFjACegQIBBAB&url=http%3A%2F%2Fwww.statewatch.org%2Fnews%2F2017%2Fnov%2Feui-deprtoations-turkey-readmission.pdf&usg=AOvVaw1izKe6tuHde-wV4TkcYHDK

Kluge, H. H. P., Jakab, Z., Bartovic, J., D'Anna, V., & Severoni, S. (2020). Refugee and migrant health in the COVID-19 response. *The Lancet*, *395*(10232), 1237–1239. https://doi.org/10.1016/S0140-6736(20)30791-1

Lipson, C. (1991). Why are some international agreements informal? *International Organization*, *45(4)*, 495–538. https://doi.org/10.1017/S0020818300033191

Lomba, S. D. (2004). The Right to Seek Refugee Status in the European Union. Intersentia.

Loschi, C., Raineri, L., & Strazzari, F. (2018). *The implementation of EU Crisis Response in Libya: Bridging theory and practice* (p. 31). EUNPACK Working paper.

Lumayag, L., Rosario, T. D., & Sutton, F. S. (2020). Reflections on Collective Insecurity and Virtual Resistance in the times of COVID-19 in Malaysia. *Migration Letters*, *17*(5), 719–731. https://doi.org/10.33182/ml.v17i5.1013

Mancin, M. (2018). Italy's New Migration Control Policy: Stemming the Flow of Migrants from Libya Without Regard for Their Human Rights. *The Italian Yearbook of International Law Online*, *27(1)*, 259–281. https://doi.org/doi:10.1163/22116133-02701015

Meer, N., Hill, E., Peace, T., & Villegas, L. (2021). Rethinking refuge in the time of COVID-19. *Ethnic and Racial Studies*, *44*(5), 864–876. https://doi.org/10.1080/01419870.2020.1855359

Meili, S. (2017). The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law. *Fordham International Law Journal*, *41*, 383–424.

Memorandum of Understanding between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration, signed 28 May 2020, entered into force 01 July 2020, (2020). https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf

NF, NG, NM v. European Council, T-192/16, T-193/16, T-257/16, (CJEU/General Court, 28 February 2017).

Nicolosi, S. F. (2015). Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law. *International Human Rights Law Review*, *4*, 303–332.

Joint complaints No 506-509-674-784-927-1381/2016/MHZ v. European Commission, (European Ombudsman, 18 January 2017). Retrieved 7 June 2018, from http://www.ombudsman.europa.eu/en/cases/decision.faces/en/75160/html.bookmark

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45.

Organization of American States (OAS), American Convention on Human Rights (1969), B-32.

Pauwelyn, J., Wessel, R., & Wouters, J. (2012). *Informal International Lawmaking*. OUP Oxford.

Pelliconi, A. M. (2020, April 23). Covid-19: Italy is not a "place of safety" anymore. Is the decision to close Italian ports compliant with human rights obligations? *EJIL: Talk!* https://www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/

Pijnenburg, A. (2018). From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg? *European Journal of Migration and Law*, *20(4)*, 396–426. https://doi.org/10.1163/15718166-12340036

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, (2004).

Slominski, P., & Trauner, F. (2018). How do Member States Return Unwanted Migrants? The Strategic (non-)use of 'Europe' during the Migration Crisis. *Journal of Common Market Studies*, *56(1)*(1), 101–118.

Smeets, S., & Beach, D. (2020). When success is an orphan: Informal institutional governance and the EU–Turkey deal. *West European Politics*, *43(1)*(1), 129–158. https://doi.org/10.1080/01402382.2019.1608495

Statewatch. (2017, December 8). Statewatch News Online: EU: Frontex training materials for Libyan Coast Guard come up short on human rights. http://www.statewatch.org/news/2017/dec/eu-frontex-libya-cg.htm

The Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU.

Truelove, S., Abrahim, O., Altare, C., Lauer, S. A., Grantz, K. H., Azman, A. S., & Spiegel, P. (2020). The potential impact of COVID-19 in refugee camps in Bangladesh and beyond: A modeling study. *PLOS Medicine*, *17*(6). https://doi.org/10.1371/journal.pmed.1003144

Tunaboylu, S., & Alpes, J. (2017). The EU-Turkey deal: What happens to people who return to Turkey? *Forced Migration Review*, *54*, 84–87.

UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (10 December 1984), 1465, UNTS 85.

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p 137.

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

UNHCR. (2020a, January). *Mediterranean Situation—Operational Portal.* https://data2.unhcr.org/en/situations/mediterranean/location/5205

UNHCR. (2020b, March 31). *The COVID -19 Crisis: Key Protection Messages.* Refworld. https://www.refworld.org/docid/5e84b9f64.html

Worster, W. T. (2014). The Contemporary International Law Status of the Right to Receive Asylum. *International Journal of Refugee Law*, *26*(4), 477–499. https://doi.org/10.1093/ijrl/eeu046

Bala, P., & Lumayag, L. (2021). The Practice of 'Othering' during COVID-19 Pandemic in Malaysia: From the cities to the highlands. *Migration Letters*, *18*(6), 621–636. https://doi.org/10.33182/ml.v18i6.1587

Lumayag, L., Rosario, T. D., & Sutton, F. S. (2020). Reflections on Collective Insecurity and Virtual Resistance in the times of COVID-19 in Malaysia. *Migration Letters*, *17*(5), 719–731. https://doi.org/10.33182/ml.v17i5.1013