

Asylum and COVID-19: An International Disinterest in the Sanctity of a Fundamental Right

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I. INTRODUCTION

From the onset of the COVID-19 pandemic, the medical community and legal advocates alike have urged the world’s refugee and asylum-seeking populations to prioritize securing access to healthcare, sanitary tools, and social-distanced shelter.¹ However, for many, those life-preserving resources remain out of reach. The reality of what tools are readily accessible to asylum-seekers to combat the virus are bleak.²

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1. *COVID-19 in Newly Resettled Refugee Populations*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/refugee-populations.html>.

2. Org. for Econ. Coop. & Dev. [OECD], *What is the Impact of the COVID-19 Pandemic on Immigrants and Their Children?*, 3-4, (Oct. 19, 2020), <https://read.oecd-ilibrary.org/view/?ref=>

Nevertheless, the reality of the accessibility to asylum procedures may be even bleaker. The threat of COVID-19 is global.³ The COVID-19 pandemic, international in its reach, ceased much of the world's asylum procedures as states reacted swiftly with border closures and lockdowns.⁴ States reacted to the threat of the virus quickly to ensure the protection of their citizens,⁵ but an already vulnerable population of individuals were, in consequence, left with limited opportunity for survival.⁶ “[T]he deep-seated fear of the outsider . . . as an invisible threat, as a potential carrier of disease and danger” was encapsulated by the political elite and general public alike that “without any proof that asylum seekers . . . were potential carriers of the COVID-19 or were even infected by it, in the Spring of 2020, one state after another closed its borders to them.”⁷ This fear of the unknown and this fear of the outsider coincided to dissipate the already fleeting opportunity to seek asylum in the United States and the European Union.

Prior to the outbreak of COVID-19, the law and policies surrounding asylum had been shifting further away from the initial obligations to which states committed.⁸ As anti-immigrant sentiment and nativism grew in the last decade throughout Europe⁹ and the United States, policymakers have utilized the opportunity to refocus asylum availability and opportunity.¹⁰

137_137245-8saheqv0k3&title=What-is-the-impact-of-the-COVID-19-pandemic-on-immigrants-and-their-children%3F&_ga=2.188891112.219128371.1633290649-1835454095.1633290649.

3. See *Impact of COVID-19 on People's Livelihoods, Their Health and Our Food Systems: Joint statement by ILO, FAO, IFAD and WHO*, WORLD HEALTH ORG. (Oct. 13, 2020), <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people%27s-livelihoods-their-health-and-our-food-systems>.

4. Daniel Ghezelbash & Nikolas F. Tan, *The End of the Right to Seek Asylum? Covid and the Future of Refugee Protection*, EUR. UNIV. INST. (Sept. 2020), https://cadmus.eui.eu/bitstream/handle/1814/68175/RSCAS%202020_55.pdf?sequence=1&isAllowed=y.

5. See generally Joshua W. Busby, *Understanding the Anemic Global Response to COVID-19*, 45 J. HEALTH, POL., POL'Y. & L. 1013, 1013–1021 (Dec. 1, 2020).

6. See Qais Alemi, Carl Stempel, Hafifa Siddiq, & Eunice Kim, *Refugees and COVID-19: Achieving a Comprehensive Public Health Response*, WORLD HEALTH ORG. (Aug. 1, 2020), 98(8), 510–510A.

7. Seyla Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, 2 JUS COGENS 75, 77 (July 28, 2020), <https://link.springer.com/content/pdf/10.1007/s42439-020-00022-1.pdf>.

8. See Kenneth R. Vaughan, *Anti-Immigrant Sentiment and Opposition to Democracy in Europe*, J. IMMIGRANT & REFUGEE STUD. 1, 2-3 (Nov. 17, 2020), <https://www.tandfonline.com/doi/pdf/10.1080/15562948.2020.1843749?needAccess=true>.

9. *Id.*

10. See Ruth E. Wasem, *More Than a Wall: The Rise and Fall of US Asylum and Refugee Policy*, 8 J. MIGRATION & HUM. SEC. 246, 246 (Aug. 31, 2020), <https://journals.sagepub.com/doi/pdf/10.1177/2331502420948847> (“Nativism also prevailed in the first half of the twentieth century, shutting the door on refugees. In sum, the tensions between the aspiration to welcome asylees and

In the European Union, asylum applications dropped 30% in 2020 compared to 2019, although the year started with more applications.¹¹ In January and February of 2019, there were 104,055 asylum applications, compared to in January and February 2020, where there were 116,009 asylum applications filed.¹² The pre-COVID increase in asylum applications from early 2019 to early 2020 provides doubt in the suggestion that the drop in asylum applications in post-COVID 2020 can be attested to the natural ebbs and flows of the asylum system. In the United States, the number of asylum applications received dropped to the lowest it has been in the last five years in 2020.¹³ In the fiscal year 2020, the United States received 92,800 applications for asylum, compared to the fiscal year 2018, where 106,100 applications were received.¹⁴ Of the 92,800 applications for affirmative asylum received, United States Citizenship and Immigration Services completed only 56,000 applications.¹⁵ By the end of 2020, the remaining uncompleted petitions became additions to the growing backlog.

Moving forward, preserving the right to asylum may be in jeopardy.¹⁶ As applications for asylum decline, the backlog of asylum applicants remains unconscionable. In the United States, at the end of the fiscal year 2020, the immigration backlog included 640,329 pending asylum cases.¹⁷ In 2017, the backlog consisted of 376,214 cases, almost half of the current pending caseload.¹⁸ In the European Union, in December 2020, 410,356 asylum claims were pending.¹⁹ As the backlogs continue to grow and asylum grant rates continue to decline, the future availability of asylum may be at risk.

refugees and the nativist fears of foreigners of different religions, nationalities, and races have characterized the United States since its founding. What distinguishes Donald Trump's anti-immigrant stance today from the past is that no successful or aspiring president had ever made opposition to the admission of refugees and asylees a centerpiece of their platform.”)

11. *Latest Asylum Trends—2020 Overview*, EUR. ASYLUM SUPPORT OFF. [EASO] (Feb. 18, 2021), <https://www.easo.europa.eu/asylum-trends-2020-preliminary-overview> [hereinafter EASO Asylum Trends 2020].

12. *Id.*

13. *2020 USCIS Statistical Annual Report 9* U.S. CITIZENSHIP & IMMIGR. SERVS. [USCIS] (2020), <https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf>.

14. *Id.*

15. *Id.*

16. *See generally* Ghezelbash & Tan, *supra* note 4.

17. *Adjudication Statistics*, EXEC. OFF. FOR IMMIGR. REV. [EOIR] (July 8, 2021), <https://www.justice.gov/eoir/page/file/1106366/download> (noting that the total receipt to total grants rate ratio is 13.33:1).

18. *Id.*

19. EASO Asylum Trends 2020, *supra* note 11.

This Comment will discuss the pre-COVID framework for asylum law in the United States and the European Union before transitioning to how the United States and the European Union shifted their asylum policy once facing the still ongoing public health crisis that is the COVID-19 pandemic. Part II discusses international asylum law, specifically asylum law in the United States and the European Union before the onset of the COVID-19 pandemic. Part III discusses how asylum law has shifted during the COVID-19 pandemic, with the COVID-19 pandemic serving as a snapshot of how quickly states can adjust their priorities surrounding asylum law. Part IV poses questions about how the shift may be permanent, with COVID-19 as a reminder of how asylum law ideology has shifted to allow for such changes. As states attempt to return to pre-COVID normalcy, the world must wait to see whether the fundamental right to seek asylum from persecution exists in a post-COVID-19 society.

II. PRE-COVID FRAMEWORK OF ASYLUM LAW IN THE EUROPEAN UNION AND THE UNITED STATES

The Universal Declaration of Human Rights (UDHR) provides that, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution[,]”²⁰ therefore guaranteeing the right to seek and receive asylum from other states. However, the term persecution has no universally accepted definition in international law, allowing states to infer what human rights violations constitute “persecution.”²¹ The right to seek protection from persecution is codified in various international human rights laws, each with its own signatory states, substantiating the right to seek asylum across various states.²² In addition, the principle of non-refoulement lies at the foundation of the right to asylum, obligating states

20. G.A. Res. 217 (III) A, Art. 14 Universal Declaration of Human Rights, (Dec. 10, 1948).

21. U.N. High Comm’r for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, Jan. 1992, UNHCR 1979, Ch. 2, (B)(2)(b), <https://www.unhcr.org/4d93528a9.pdf> (“There is no universally accepted definition of “persecution,” and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.”).

22. See Organization of American States [OAS], American Convention on Human Rights “Pact of San Jose, Costa Rica” art. 22(7), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights art. 12(3), June 27, 1981, 1520 U.N.T.S. 217.

to refrain from removing an individual to a region where there would be the risk of irreparable harm upon reintroduction.²³

Following the UDHR, the 1951 Geneva Convention Relating to the Status of Refugees [hereinafter 1951 Convention] supports the right to asylum through its definition of refugee as “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”²⁴ With the 1967 Protocol Relating to the Status of Refugees [hereinafter 1967 Protocol], signatory states adopted the universal right to asylum, embracing its obligation to welcome refugees.²⁵

A. *Pre-COVID Asylum Law—The European Union*

While states of the European Union were signatories of the 1951 Convention, there was a significant amount of space for developing national asylum policy within the bounds of the obligations set forth by the 1951 Convention and 1967 Protocol.²⁶ Based on the 1951 Convention and 1967 Protocol, the guarantee of the right to asylum for individuals entering the European Union came with the ratification of the Charter of Fundamental Rights of the EU.²⁷ The 1951 Convention indicated access to asylum through the principle of non-refoulement.²⁸ The Charter of

23. Note, UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, U.N. note EC/SCP/2 (Aug. 23, 1977), <https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>. The principle of non-refoulement is also included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). See United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* <https://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf> [hereinafter CAT]; United Nations International Convention for the Protection of All Persons from Enforced Disappearance [ICPPED] art. 16, *entered into force* Dec. 23, 2010, 2716 U.N.T.S. 3, *available at* <https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>.

24. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

25. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

26. HELEN O’NIONS, *ASYLUM—A RIGHT DENIED: A CRITICAL ANALYSIS OF EUROPEAN ASYLUM POLICY*, 7-10 (2016).

27. Charter of Fundamental Rights of the European Union art. 18, Oct. 26, 2012, 2012 O.J. (C 326/02) 399.

28. 1951 Convention, *supra* note 24 (“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.”).

Fundamental Rights of the EU includes protections against collective expulsion and a ban on expelling an individual to a State where there is a serious risk of deadly harm or degrading treatment.²⁹ Under Article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms for the European Court of Human Rights (ECHR), the member states of the European Union are prohibited from performing collective expulsion of noncitizens.³⁰ Collective expulsion is the “expulsion of aliens, as a group.”³¹ ECHR case law on collective expulsion holds that collective expulsion is to be understood as “any measure compelling aliens as a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”³² States must make an individual adjudication of an asylum seeker that enters their borders.³³

The development of a common policy for asylum was secured with the Treaty on the Functioning of the European Union, a policy that was to ensure compliance with the principle of non-refoulement.³⁴ The harmonization of states’ legislation on asylum was crucial to the European Union’s goal of upholding the same standard of freedom and fundamental rights throughout its body.³⁵ The Treaty provided standards for the common asylum policy, including an emergency contingency if a member state was overwhelmed by an influx of asylum seekers.³⁶ With the desire to provide fairness for asylum-seekers and add efficiency in the process, the European Union adopted the Dublin II Regulation in 2003.³⁷ The

29. Charter of Fundamental Rights of the European Union, *supra* note 27.

30. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms *amended by* protocol no. 11 art. 4, Nov. 4, 1950, 46 E.T.S.

31. Rep. of the Int’l Law Comm’n, Rep. on the Work of its Sixty-Sixth Session, U.N. Doc. A/69/10 (2014).

32. Henning Becker v. Denmark, App. No. 7011/75, Eur. Ct. H.R., 215, 235 (Oct. 3, 1975); see Vedran Andric v. Sweden, Decision as to the admissibility of Application No. 45917/99, 23 ¶ 1 (Feb. 1999).

33. See Conka v. Belgium, 51564/99, Eur. Ct. H.R., (2002), *available at* <https://www.refworld.org/cases,ECHR,3e71fdfb4.html>.

34. Consolidated Version of the Treaty on the Functioning of the European Union art. 67(2), Oct. 26, 2012, 2012 O.J. (C 326/47) 78 [hereinafter TFEU].

35. See Magnus Henrekson, Özge Öner, & Tino Sanandaji, *The Refugee Crisis and the Reinvigoration of the Nation-State: Does the European Union Have a Common Asylum Policy?* 83-110 (Rsch. Inst. of Indus. Econ., Working Paper No. 1265, 2019).

36. TFEU, *supra* note 34, at art. 78(2)-(3).

37. See Council Regulation 343/2003 of 18 Feb. 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1 [hereinafter Dublin II Regulation].

Dublin II Regulation focused on harmonizing the various asylum policies across the member states by delineating which state was responsible for incoming asylum seekers.³⁸

In order to manage the everchanging flow of asylum seekers, the European Union established a Common European Asylum System (CEAS).³⁹ The European Asylum Support Office became fully operational in June 2011.⁴⁰ After a year of intensely increased migration, in 2016, the European Commission presented reforms for the system to provide a more sustainable asylum model.⁴¹ The pillars of the reforms included reinvesting focus into efficiency of process, a corrective fairness mechanism for allocation purposes, and enforcing the Eurodac system to handle irregular migration.⁴²

B. *Pre-COVID Asylum Law—The United States*

The United States became a party to the 1967 Protocol Relating to the Status of Refugees in November 1968.⁴³ Rather than rely on international asylum policy,⁴⁴ the United States instituted its own federal asylum law via the Immigration and Nationality Act (INA)⁴⁵ and the Refugee Act of 1980.⁴⁶ The Refugee Act of 1980 established the right to seek asylum for all, regardless of the admissibility or manner of entry,⁴⁷ and placed the discretionary power to grant asylum on the Attorney General.⁴⁸

38. UNHCR, *The Dublin Regulation: Asylum in Europe*, <https://www.unhcr.org/4a9d13d59.pdf> (last accessed Oct. 20, 2021) (“The ‘Dublin’ system operates on the assumption that, as the asylum laws and practices of the EU States are based on the same common standards, they allow asylum seekers to enjoy similar levels of protection in all EU Member States. In reality, however, asylum legislation and practice still vary widely from country to country, causing asylum-seekers to receive different treatment across Europe.”).

39. Ina Sokolska, *Common European Asylum System: Achievements During the Legislative Term 2014-2019*, POL’Y DEP’T FOR CITIZENS’ RTS. & CONST. AFF. 1, 1 (2019), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI\(2019\)608877](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2019)608877).

40. 1967 Protocol, *supra* note 25, at art. 1.

41. European Commission Press Release IP/16/1620, *Towards a Sustainable and Fair Common European Asylum System* (May 4, 2016), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1620 (on file with European Commission).

42. *Id.*

43. 1967 Protocol, *supra* note 25, at art. 1.

44. The United States is not a party to the 1951 Convention.

45. See 8 U.S.C. § 1158(a)(1); INA 208.

46. Refugee Act of 1979, Pub. L. No. 96-212, S. 643, 96th Cong. (1980).

47. 8 U.S.C. § 1158(a)(1); *see also* Refugee Act of 1979, Pub. L. No. 96-212, S. 643, 96th Cong. (1980).

48. 8 U.S.C. § 1158(b)(1)(A); INA 208(b)(1). (“The Secretary of Homeland Security [SHS] or the Attorney General [AG] may grant asylum to an alien who has applied for asylum in

In the United States, the legal standard dictating an individual's eligibility for asylum or refugee status relies on their ability to show a well-founded fear of persecution.⁴⁹ The term "well-founded fear," which is the evidentiary standard in asylum cases,⁵⁰ is comprised of two elements. To establish a well-founded fear of persecution, an individual must show that they had (1) a subjective fear of persecution and (2) that the individual had an objective, reasonable basis for that fear.⁵¹ The legal standard encompasses the principle of nonrefoulement, preventing an asylee from being returned to a state where they may face further harm.⁵² Therefore, asylum is available to almost anyone who can establish that they face a fear of persecution or harm.⁵³

C. How Were the Policies Surrounding Asylum Law Already Shifting?

Over the last decade, the European Union has attempted to reformat its asylum policy and procedure multiple times. With the influx of migration in 2015, German Chancellor Angela Merkel acknowledged that the issue of asylum would preoccupy Europe in the years to follow.⁵⁴ She recognized the scale of the task but believed that "[i]f Europe fail[ed] on

accordance with the requirements and procedures established by the SHS or AG under this section if the [SHS] or the [AG] determines that such alien is a refugee within the meaning of section INA 101(a)(42)(A).").

49. 8 U.S.C. § 1101(a)(42) ("The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."); *see also* INA 208(a)(1) ("In general, any alien who is physically present in the United States or who arrives in the US . . . irrespective of such aliens status, may apply for asylum in accordance with this section, or, where applicable, section 235(b). . .").

50. Grace Kim, *Abandoning the Subjective and Objective Components of a Well-Founded Fear of Persecution*, 16 *Nw. J.L. & Soc. POL'Y* 192, 192 (2021).

51. *Demirovski v. I.N.S.*, 39 F.3d 177 (7th Cir. 1994); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).

52. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."). *See also* CAT, *supra* note 23, at art. 3.

53. 8 U.S.C. § 1158(a)(1); 8 U.S.C. § 1158(b)(2)(A); INA 208(a)(1); INA 208(b)(2)(A) (listing exceptions of individuals unable to file for asylum).

54. *Germany, the EU Country Which Takes the Most Asylum Seekers, is Straining*, *ECONOMIST* (Aug. 21, 2015), <https://www.economist.com/europe/2015/08/21/germany-the-eu-country-which-takes-the-most-asylum-seekers-is-straining>.

the question of refugees, then it won't be the Europe we wished for."⁵⁵ From 2013 to 2020, the majority of noncitizen arrivals entered the European Union through the sea border,⁵⁶ overwhelming coastal states as the state of first arrival.⁵⁷ The influx of immigration spurred anti-immigrant policies and tools in various states, with a renewed focus on border control for both land⁵⁸ and sea.⁵⁹

The European Union responded by strengthening their external borders⁶⁰ and guarding maritime routes.⁶¹ The Schengen Borders Code allowed for internal border control to be utilized, in addition to external border control, for a temporary duration and within a limited scope.⁶² With the migrant crisis continually portrayed as detrimental in the media, the public's hesitation on accepting asylum seekers and refugees fed into the political narratives of various member states.⁶³ Through this fear, different

55. *Migrant Crisis: Merkel Warns of EU 'Failure,'* BBC (Aug. 31, 2015), <https://www.bbc.com/news/world-europe-34108224>.

56. *Migration: New Pact on Migration and Asylum*, EUR. COMM'N 1, 19 (Sept. 23, 2020), https://ec.europa.eu/info/sites/default/files/new-pact-on-migration-and-asylum-package_1.pdf.

57. See generally Nora Markard, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, 27 EUR. J. INT'L L. 591 (2016).

58. Ghezelbash & Tan, *supra* note 4, at 3 ("States have erected border walls around the world at unprecedented pace. Prominent examples include on the US-Mexico border, Norway's arctic border with Russia, Hungary's border with Serbia, the Bulgaria-Turkey border and the Spanish enclaves in Morocco.")

59. *Id.* at 4 ("Following the European Court of Human Rights' (ECtHR) decision in *Hirsi* prohibiting Italy's interdiction and return of asylum seekers to Libya, EU and Italian actors have attempted to circumvent their *non-refoulement* obligations by avoiding direct contact with asylum seekers, instead coordinating search and rescue in concert with the Libyan coast guard, an approach currently the subject of a legal challenge before the ECtHR.")

60. Council Regulation 562/2006 of Mar. 15, 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 2006 O.J. (L105) 1, 3-4 (EC) (Article 2 defining internal and external borders, "1. 'internal borders' means: (a) [T]he common land borders, including river and lake borders, of the Member States; (b) [T]he airports of the Member States for internal flights; (c) [S]ea, river and lake ports of the Member States for regular ferry connections; 2. 'external borders' means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports provided that they are not internal borders.")

61. See Jussi S. Jauhiainen, *Biogeopolitics of COVID-19: Asylum-Related Migrants at the European Union Borderlands*, 111 J. ECON. & HUM. GEOGRAPHY 260, 263 (July 1, 2020).

62. Council Regulation 562/2006 of Mar. 15, 2006, establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), 2006 O.J. (L 105) 1, 2 (EC) ("Member States should also have the possibility of temporarily reintroducing border control at internal borders in the event of a serious threat to their public policy or internal security. The conditions and procedures for doing so should be laid down... that the principle of proportionality is respected.")

63. Mike Berry, Inaki Garcia-Blanco, & Kerry Moore, *Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries*, U. N. HIGH COMM'N FOR REFUGEES 1, 4 (Dec. 2015), <https://www.unhcr.org/56bb369c9.pdf> ("A key reason for the unwillingness of EU leaders to take a more decisive and coherent approach to the refugee crisis has

member states developed different mechanisms and policies regarding asylum, disillusioned from the purported optimization that a harmonized asylum policy would bring to Europe.⁶⁴ For example, during the COVID-19 lockdown, Greece summarily, and at times violently, returned asylum seekers arriving at their land and sea borders with Turkey, ignoring Article 4, Protocol 4 to the European Convention on Human Rights' prohibition of collective expulsion.⁶⁵ The European Union's initial goal of cohesive asylum policy became increasingly out of reach as states faced varying levels of responsibility for asylum seekers' adjudication and resettlement.

In the last decade, the United States has experienced an influx of asylum seekers arriving at its southern border.⁶⁶ This influx was driven by migration from Central America, including the northern triangle: Honduras, El Salvador, and Guatemala, and from Asia, South America, and Africa.⁶⁷ Beyond the goal of building a wall along the southern border, the Trump Administration orchestrated other attempts to disrupt the asylum and immigration system.⁶⁸ While the number of asylum applications steadily increased, the Trump Administration claimed there was an abundance of fraudulent applicants⁶⁹ and forced the narrative of asylum as a cause for undocumented and dangerous immigration.⁷⁰ In addition, the Trump Administration held undocumented asylum seekers in detention facilities pending the final determination of their cases,⁷¹ and

been the high levels of public anxiety about immigration and asylum across Europe . . . across the EU attitudes towards asylum and immigration have hardened in recent years.”).

64. See Vaughan, *supra* note 8.

65. *Greece: Investigate Pushbacks, Collective Expulsions*, HUM. RTS. WATCH (July 16, 2020), <https://www.hrw.org/news/2020/07/16/greece-investigate-pushbacks-collective-expulsions>.

66. *Annual Flow Report: Refugees and Asylees: 2017*, DEP'T OF HOMELAND SEC. OFF. OF IMMIGR. STAT. 1, 1-2 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

67. Ryan Baugh, *Refugees and Asylees: 2019*, DEP'T OF HOMELAND SEC. OFF. OF IMMIGR. STAT. 1, 6-8 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf.

68. See *Refugee Blockade: The Trump Administration's Obstruction of Asylum Claims at the Border*, HUM. RTS. FIRST (Dec. 11, 2018), <https://www.humanrightsfirst.org/resource/refugee-blockade-trump-administration-s-obstruction-asylum-claims-border-december-2018>; see also Daniel J. Beers, *The End of Resettlement? U.S. Refugee Policy in the Age of Trump*, 9 J. SOC. SCI. 1, 1 (2020).

69. *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, DEP'T OF JUSTICE (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> (“We have a generous asylum policy . . . Unfortunately, this system is currently subject to rampant abuse and fraud.”).

70. Paul W. Schmidt, *An Overview and Critique of US Immigration and Asylum Policies in the Trump Era*, 7 J. MIGRATION & HUM. SEC. 92, 95 (2019).

71. *Id.* at 96.

villainized the asylum-seeking population to the general public through their categorization as criminal immigrant detainees.⁷²

In 2018, the Trump Administration instituted the Migrant Protection Protocols (MPP).⁷³ The MPP, also referred to as the “Remain in Mexico” program, was an executive action allowing the United States government to return asylum seekers to Mexico to await adjudication on their asylum claims in the U.S, shifting the humanitarian needs of asylum-seekers onto Mexico.⁷⁴ DHS relied on the statutory authority in section 235(b)(2)(C) of INA for the MPP’s legality, which states “in the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.”⁷⁵ As of January 2021, the United States government had returned 71,021 immigrants to Mexico subject to the MPP.⁷⁶ As of January 2021, nearly 71,021 people had entered the MPP, with just 650 of them being granted relief out of 41,844 completed cases.⁷⁷ The MPP “significantly deteriorated the legal system designed to assess who should be granted asylum protections according to U.S. immigration law.”⁷⁸

In 2019, the United States negotiated and agreed to the Asylum Cooperative Agreements (ACAs) with El Salvador, Honduras, and Guatemala.⁷⁹ The ACAs allow for the United States to transfer asylum petitioners to a third country in the Central America region other than the

72. See Emily J. Johanson, *The Migrant Protection Protocols: A Death Knell for Asylum*, 11 U.C. IRVINE L. REV. 873, 885 (2021) (noting that “[a]sylum seekers are still regularly prosecuted for illegal entry and reentry despite domestic and international law forbidding the government from penalizing asylum seekers for their presence within U.S. territory without authorization,” as a direct violation of Article 31 of the 1951 Convention).

73. *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, DEP’T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

74. *Id.*

75. 8 U.S.C. § 1225(b)(2)(C); INA 235(b)(2)(C); see *Memorandum for Implementation of the Migrant Protection Protocols*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT [ICE], (Feb. 12, 2019), <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf>.

76. *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/mpp/> (last visited Mar. 23, 2021).

77. *Id.*

78. Johanson, *supra* note 72.

79. Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994, 64,005 (Nov. 19, 2019) (to be codified at 8 C.F.R. Part 208).

petitioner's country of nationality.⁸⁰ This policy has come under criticism for its possible violation of the principle of nonrefoulement,⁸¹ as the qualifying factor for the petitioners' transfer is based upon the assumption of a safe third country which may or may not be available in the northern triangle region.

In 2019, the Trump Administration instituted a new travel ban focused on asylum seekers, known as the "Third Country Transit Ban" or "Asylum Ban 2.0."⁸² The ban makes all individuals who entered or arrived in the United States across the southern border ineligible for asylum if they had transited or passed through at least one country outside of their country of origin and have not applied for asylum or protection in that country.⁸³ By instituting this policy, the administration was effectively trying to disable a significant proportion of the migrant population that had to travel through South and Central America to reach the U.S. southern border. This population includes asylum seekers from Asia, Africa, and South America who could not enter through other ports of entry but chose not to seek asylum elsewhere for various reasons. This shift affected the asylum eligibility of individuals long before COVID-19 affected the free movement for asylum seekers worldwide.

III. HOW DID ASYLUM POLICIES SHIFT AS THE THREAT OF COVID-19 GLOBALIZED?

As the COVID-19 virus entered into its global stages, the UNHCR reminded all states of the obligations they have to maintain international protections for individuals fleeing harm.⁸⁴ The United Nations High Commissioner for Refugees (UNHCR) reiterated that, "while States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement."⁸⁵ In as early as April

80. *Refugees and Asylees: 2019*, *supra* note 67.

81. See Yael Schacher & Rachel Schmidtke, *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement*, HUM. RTS. WATCH, (May 19, 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

82. 8 C.F.R. § 208.

83. *Id.*

84. *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, U.N. HIGH COMM'R FOR REFUGEES [UNHCR], (Mar. 16, 2020), <https://data2.unhcr.org/en/documents/details/75349>.

85. *Id.*

2020, the UNHCR and the IOM acknowledged the degradation of the right to asylum.⁸⁶ The advocacy message from the UNHCR was clear: “States may take steps to protect public health and to limit COVID-19 transmission at borders, [but] such measures must be non-discriminatory, necessary, proportionate, subject to regular review, and reasonable in line with international law; health concerns do not justify the systematic use of immigration detention.”⁸⁷ Under international human rights law, any restrictions on the freedom of movement must be proportionate, lawful, and necessary when facing a public health emergency.⁸⁸

While the World Health Organization (WHO) stated that travel restrictions were not the most effective way in countering a pandemic,⁸⁹ at the start of the pandemic, 168 states closed their borders,⁹⁰ with 90 states instituting a hiatus on asylum.⁹¹ The WHO has previously discouraged the use of travel bans for infectious disease outbreaks, such as the 2014 Ebola disease virus and the 2003 Severe Acute Respiratory Illness (SARS), citing their potential to (1) decrease the number of healthcare workers willing to volunteer their services, (2) spur fear in those not complying with the ban to seek medical treatment, (3) create an unfounded sense of security within the general public that would prevent individuals from taking health and safety precautions; and (4) disrupt essential trade, thereby limiting the availability of essential goods to the general public.⁹² While the WHO recommended that refugees and migrants be integrated

86. *COVID-19: Access Challenges and the Implications of Border Restrictions*, U.N. HIGH COMM’R FOR REFUGEES & INT’L OFF. FOR MIGRATION [IOM], (Apr. 27, 2020), <https://data2.unhcr.org/en/documents/details/76447> (“Border restrictions which have been imposed or increased as part of measures to respond to Covid-19 are impacting heavily on asylum-seekers and refugees, preventing many across the world from seeking asylum and safety, in violation of the international legal principle of non-refoulement.”).

87. *Id.*

88. *CCPR General Comment No. 27: Article 12 Freedom of Movement*, U.N. HUM. RTS. COMM., CCPR/C/21/Rev.1/Add.9, (Nov. 2, 1999), <https://www.refworld.org/docid/45139c394.html>.

89. *Commission Communication for COVID-19: Temporary Restriction on Nonessential Travel to the EU*, at 1, COM (2020) 115 final (Mar. 16, 2020).

90. Mary A. Shiraef, et al., *The COVID Border Accountability Project (COBAP): Mapping Travel and Immigration Policy Responses to COVID-19*, COBAP (2020), <https://covidborderaccountability.org/index.html>.

91. *Statement by Ms. Gillian Triggs, Assistant High Comm’r for Protection, to the 71th session of the Executive Committee of the High Comm’r’s Programme*, U.N. HIGH COMM’R FOR REFUGEES (Oct. 7, 2020), <https://www.unhcr.org/en-us/admin/dipstatements/5f7e26744/state-ment-ms-gillian-triggs-assistant-high-commissioner-protection-71th.html>.

92. Nicole A. Errett, et al., *An Integrative Review of the Limited Evidence on International Travel Bans as an Emerging Infectious Disease Disaster Control Measure*, 18 J. EMERGENCY MGMT., 7, 8 (2020).

into national health care initiatives to reduce the spread and ensure the protection of the right to health,⁹³ different states approached the integration of asylum-seekers and migrants with different levels of precaution and urgency. With the continuation of the COVID-19 pandemic, asylum policy shifted further away from its idealistic goals.

A. *The Initial Asylum Restrictions*

As the world began to shut down in response to the growing outbreak, the European Commission provided guidance to EU member states, stating that “any restrictions in the field of asylum, return, and resettlement must be proportional, implemented in a non-discriminatory way and take into account the principle of non-refoulement and obligations under international law.”⁹⁴ If states were to place restrictions on access to asylum and the procedures to achieve asylum, the restrictions must be proportional to the health or public safety risk responsible for spurring the change. The purpose of guidance was to provide methods to member states on “how to ensure [the] continuity of procedures as much as possible while fully ensuring the protection of people’s health and fundamental rights in line with the EU Charter of Fundamental Rights.”⁹⁵ National sanitary authorities may take measures necessary “based on risk assessment and scientific advice,” but third-country nationals must be able to apply for asylum, and the authorities must register their application.⁹⁶ The Asylum Procedures Directive⁹⁷ and the Reception Conditions Directive⁹⁸ provided further guidance on procedural shifts member states

93. *Interim Guidance for Refugee and Migrant Health in Relation to COVID-19 in the WHO European Region*, WORLD HEALTH ORG. [WHO], 4, (Mar. 25, 2020), https://www.euro.who.int/_data/assets/pdf_file/0008/434978/Interim-guidance-refugee-and-migrant-health-COVID-19.pdf.

94. *Communication from the Commission COVID-19: Guidance on the Implementation of Relevant EU Provisions in the Area of Asylum and Return Procedures and on Resettlement*, 2020 O.J. (C 126) 1, 12-13.

95. *Id.* (stating that “[a]ny measure taken in the area of asylum, resettlement and return should take full account of the health protection measures introduced by all Member States in their territories to prevent and contain the spread of COVID-19.”).

96. *Id.*

97. Council Directive 2013/32/EU, art. 6, 14, 31, Common Procedures for Granting and Withdrawing International Protection (recast), 2013 O.J. (L180) 60 (EC) (The Asylum Procedures Directive allowed for procedural changes such as the extension of time for registering applications (Article 6(5)), the omission of the personal interview, discretionary based of the circumstances of the case (Article 14(2)(b)), and the extension of the six-month examination period to nine months, altered to include delays due to COVID-19 (Article 31(3)(b)).).

98. *Id.* (Article 13 of the Reception Conditions Directive allowed for Member States to “require medical screening of applicants on public health grounds.”).

can utilize while still adhering to EU asylum policy. UNHCR acknowledged that “travel arrangements for resettling refugees are currently subject to severe disruption.”⁹⁹

On March 21, 2020, the United States Department of Health and Human Services and the Centers for Disease Control introduced new restrictions blocking entry to people traveling from Canada or Mexico who would “be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders,” regardless of their country of origin.¹⁰⁰ This restriction relied on 42 U.S.C. 265.¹⁰¹ As of February 2021, 317,590 people were turned away from the U.S. southern border based on Title 42 Expulsions, and 151 people were turned away from the U.S. northern border.¹⁰²

B. *The Utilization of Travel Bans*

The European Union combatted the rapid spread of COVID-19 by instituting travel restrictions throughout its member states, adopting the recommendation from a communication to the European Parliament, the European Council, and the Council.¹⁰³ These travel restrictions included restricting non-essential travel from third-party countries past the EU external border.¹⁰⁴ This travel restriction “must exempt nationals of all EU member states” and “should also not apply” to other certain other travelers, such as “persons in need of international protection or for other humanitarian reasons.”¹⁰⁵ The distinction between groups exempted from travel restrictions by mandate versus those where the exemption was

99. Lucas Rasche, *Four Implications of the Covid-19 Pandemic for the EU’s Asylum and Migration Policy*, HERTIE SCH. JACQUES DELORS CTR., 1, 2, (July 24, 2020), https://hertieschool-f4e6.kxcdn.com/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20200724_Covid-19_Migration-Rasche.pdf.

100. *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, U.S. DEP’T OF HEALTH & HUM. SERVS., CTR. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/coronavirus/downloads/10.13.2020-CDC-Order-Prohibiting-Introduction-of-Persons-FINAL-ALL-CLEAR-encrypted.pdf> (the order banning entry did not include U.S. citizens, U.S. legal permanent residents, or citizens of countries in the U.S. visa waiver program).

101. *Id.*; 42 U.S.C. § 265.

102. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS & BORDER PATROL, (Oct. 25, 2021), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

103. *Temporary Restriction on Nonessential Travel to the EU*, *supra* note 89, at 1.

104. *Id.*

105. *Id.*

simply a recommendation allowed national governments to have a broader range and institute further restrictions.¹⁰⁶

Many states took advantage of the European Union's suggested restrictions on non-EU citizen travel. On March 20, 2020, Cypriot officials prevented a boat carrying 175 Syrian asylum seekers from entering their maritime territory.¹⁰⁷ Seemingly justified as per EC recommendation, the prevention was a necessary measure to enforce the entry ban. In September 2020, Cypriot officials again summarily returned 200 individuals before they had the opportunity to file asylum claims onshore.¹⁰⁸ On April 7, 2020, Italy declared its ports unsafe for disembarkment due to the public health crisis of COVID-19.¹⁰⁹ This declaration placed a hiatus on one of the more popular destinations of sea route migration.

In September 2020, the European Commission proposed to reform the system through a comprehensive approach to migration and asylum policy based on three main pillars: efficient asylum procedures providing certainty for migrants and refugees, effective solidarity with fair shares of responsibility, and strengthened international partnerships with third-party nations.¹¹⁰

Under the Trump Administration, the United States halted its U.S. asylum program as an included group in its COVID-19 travel ban,¹¹¹ the

106. *Id.*

107. *Turkish Cypriot Authorities: Release Detained Syrian Asylum Seeker*, HUM. RTS. WATCH (Apr. 16, 2020), <https://www.hrw.org/news/2020/04/16/turkish-cypriot-authorities-release-detained-syrian-asylum-seekers>.

108. *Cyprus: Asylum Seekers Summarily Returned, Pushbacks Against Surge of Arrivals by Boat From Lebanon*, HUM. RTS. WATCH (Sept. 29, 2020), <https://www.hrw.org/news/2020/09/29/cyprus-asylum-seekers-summarily-returned> (“A tally of boat pushbacks and arrivals compiled by a local Cypriot nongovernmental organization, KISA, based on Cypriot police statistics, indicates that in the first eight and a half months of 2020, Cypriot authorities encountered 779 people on boats seeking to enter Cyprus irregularly, with 431 people on six boats coming during the first six months, and 348 people on 11 boats coming from late August through the first two weeks of September. KISA reported that 375 people were taken directly to a camp after landing or being interdicted by Greek Cypriot authorities, that 221 landed in the self-declared Turkish Republic of Northern Cyprus and then crossed into Greek Cyprus, and that 185 were summarily pushed back at sea.”).

109. *EU/Italy: Port Closures Cut Migrant and Refugee Lifeline*, HUM. RTS. WATCH (Apr. 9, 2020), <https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline>.

110. *New Pact on Migration and Asylum*, EUR. COMM'N, 1, (Sept. 2020), https://ec.europa.eu/info/sites/default/files/new-pact-on-migration-and-asylum-package_1.pdf.

111. *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, *supra* note 100.

only other country to specifically ban asylum seekers was Hungary.¹¹² The travel ban utilized the fear for public health and safety as justification for its broad applicability to various noncitizen groups.¹¹³ The administration previously attempted the use of public health statute to limit migration but found some success with COVID-19.¹¹⁴ Utilizing 42 U.S.C. § 265,¹¹⁵ the administration worked to justify the entry ban, yet the ban does not supersede the United States' obligation to uphold the right to asylum.¹¹⁶

The dangers associated with the MPP are further exacerbated by the impact of the COVID-19 pandemic in the United States.¹¹⁷ Through the MPP, the overpopulated camps at Mexican border cities posed a severe risk for the spread of COVID-19 due to mass congregation and lack of sanitary resources.¹¹⁸ While the MPP theoretically has assurances against violating the principle of nonrefoulement, in practice, the risk of credible

112. *Migration: Key Fundamental Rights Concerns*, EUR. UNION AGENCY FOR FUNDAMENTAL RIGHTS [FRA] 1, 4 (June 30, 2020), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-migration-bulletin-3_en.pdf (“After closing down the transit zones at the southern border with Serbia, Hungary enacted a new law governing asylum procedures as part of a legislative package on ‘the transitional rules and epidemiological preparedness related to the cessation of the state of danger.’ The law also provides for the immediate removal from the territory of any person who crosses the Hungarian border unlawfully and indicates an intent to seek asylum.”); see also Mary A. Shiraef, *Closed Borders, Travel Bans and Halted Immigration: 5 ways COVID-19 Changed How—and Where—People Move Around the World*, CONVERSATION (Mar. 18, 2021), <https://theconversation.com/closed-borders-travel-bans-and-halted-immigration-5-ways-covid-19-changed-how-and-where-people-move-around-the-world-157040>.

113. Notification of CDC Order Suspending the Introduction of Persons from a Country Where Communicable Disease Exists, 85 Fed. Reg. 16,567 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71).

114. Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>; 42 U.S.C. § 265.

115. 42 U.S.C. § 265 (“Suspension of entries and imports from designated places to prevent spread of communicable diseases—Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.”).

116. *Responding to the COVID-19 Crisis While Protecting Asylum Seekers*, HUM. RTS. FIRST (2020), https://www.humanrightsfirst.org/sites/default/files/COVID-19%20Asylum%20Statement-2_0.pdf.

117. Johanson, *supra* note 72; see *US: COVID-19 Policies Risk Asylum Seekers' Lives*, HUM. RTS. WATCH (Apr. 2, 2020), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>.

118. *US: COVID-19 Policies*, *supra* note 117.

fear of persecution that many applicants express is not being analyzed before their return to Mexico.¹¹⁹

C. *The Threat of COVID-19*

The threat of COVID-19 continues to loom over the world as states enter new waves of the virus at different times.¹²⁰ The threat of the virus to the health and safety of the individual citizens in states was and is real. In the United States, as of March 2021, over 30.5 million people have reported cases of COVID-19, and 552,593 people have died because of the virus.¹²¹ In the European Union, as of March 2021, there have been 43,220,869 reported cases of COVID-19, and 946,622 people have died because of the virus.¹²²

The impact and devastation of COVID-19 is unquestionable.¹²³ Understandably, states reacted to the virus intending to secure the safety and well-being of their citizens, whether that be through lockdowns or mask mandates.¹²⁴ Nevertheless, looking at states' reaction to asylum seekers and analyzing the success states had in mitigating further damage to these vulnerable populations is quantifiable and can be achieved by comparing states that pursued stricter border control measures or immigration bans versus states that did not.

IV. HOW MIGHT ASYLUM LAW PERMANENTLY SHIFT POST COVID-19?

The COVID-19 pandemic is not nearly over. As different states are experiencing various levels of success with mitigating the loss the

119. Johanson, *supra* note 72.

120. See Lisa L. Maragakis, *Coronavirus Second Wave? Why Cases Increase*, HOPKINS MED. (Nov. 17, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus>.

121. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Mar. 31, 2021).

122. *COVID-19 Situation Update Worldwide, as of Week 12*, EUR. CTR. FOR DISEASE CONTROL (2021), <https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases>.

123. See Joint statement by ILO, FAO, IFAD and WHO, *supra* note 3 (“The COVID-19 pandemic has led to a dramatic loss of human life worldwide and presents an unprecedented challenge to public health, food systems and the world of work. The economic and social disruption caused by the pandemic is devastating: tens of millions of people are at risk of falling into extreme poverty, while the number of undernourished people, currently estimated at nearly 690 million, could increase by up to 132 million by the end of the year.”).

124. Claire Felter & Nathalie Bussemaker, *Which Countries Are Requiring Face Masks?*, COUNCIL ON FOREIGN RELS. (Aug. 4, 2020), <https://www.cfr.org/in-brief/which-countries-are-requiring-face-masks>; *Coronavirus: The World in Lockdown in Maps and Charts*, BBC (Apr. 7, 2020), <https://www.bbc.com/news/world-52103747>.

pandemic has caused,¹²⁵ those seeking asylum are facing various levels of success in their claims. The grant rate of asylum in the United States for 2020 was 26.3%.¹²⁶ In the European Union, 41% of first instance asylum adjudicated applications resulted in positive outcomes in 2020.¹²⁷

The European Union introduced the Pact on Migration in September 2020.¹²⁸ The pact's goal was striking a new balance between "responsibility and solidarity."¹²⁹ That included a renewed focus on deepening third-party relationships, strengthening external borders, and optimizing the distribution of responsibility for EU states.¹³⁰ While emphasizing the principle of "non-refoulement" as enshrined in international refugee law, the pact at the same time introduces measures that are clearly meant to complicate the possibility that individuals fleeing persecution and conflicts can seek or obtain protection in the European Union. The pact also reiterated the need to harmonize asylum policy within the European Union but targeted that shared focus on producing sustainable return procedures to countries of origin for EU member states to utilize.¹³¹ Goals of the new third-country relationships include incentivizing cooperation with returns and promoting voluntary returns.¹³² Through deepening third-country relationships, the European Union is effectively shifting responsibility to countries of origin,¹³³ many of which may be developing countries unable to reintegrate high migration flows effectively. There is also the shifting of responsibility between EU member states at the expense of the stability of the asylum-seeker,¹³⁴ where anti-immigrant States can effectively opt-out of their international obligation to support the right to asylum.

125. Joe Hasell, *Which Countries Have Protected Both Health and the Economy in the Pandemic?*, OUR WORLD IN DATA (Sept. 1, 2020), <https://ourworldindata.org/covid-health-economy>.

126. *Asylum Denial Rates Continue to Climb*, TRAC IMMIGRATION (Oct. 28, 2020), <https://trac.syr.edu/immigration/reports/630/>.

127. *Asylum Statistics: Statistics Explained*, EUROSTAT (Apr. 8, 2021), https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

128. Commission Communication on a New Pact on Migration and Asylum, COM (2020) 609 final (Sept. 23, 2020) [hereinafter *New Pact on Migration and Asylum*].

129. European Commission Press Release IP/20/1706, *A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity* (Sept. 23, 2020).

130. *New Pact on Migration and Asylum*, *supra* note 128.

131. *Id.* at 12.

132. *Id.* at 10-13.

133. European Commission Press Release IP/20/1706, *supra* note 129.

134. Eleni Karageorgiou, *The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity*, 7 NORDIC J. EUR. L. 3, 6 (2020) ("In addition, flexibility in interstate relations and a 'new balance between responsibility and solidarity seems to come at a cost: more coercion and commodification of asylum-seekers to be traded and transferred between the EU.'").

The United States has been intentional in its lack of support for incoming asylum claims. The ceiling of refugee admission has continually declined over the last five years,¹³⁵ with the allotted spots dwindling to a number that represents a fraction of the current backlog. In 2019, the refugee ceiling was set at 30,000 admissions,¹³⁶ while in 2020, that ceiling was set at 18,000 admissions.¹³⁷ In comparison, the 2017 refugee ceiling was set at 110,000 admissions.¹³⁸ The denial rate for asylum claims has continued to climb in the last five years, jumping from 21.37% in 2016 to 54.52% in 2020.¹³⁹

With the advent of the Biden Administration, steps have been taken to remedy the current crisis at the southern border.¹⁴⁰ On January 20, 2021, the Biden administration announced it would “cease adding individuals into the [MPP] program,”¹⁴¹ providing a glimmer of hope for preserving the U.S. asylum system in the years to come.

V. CONCLUSION

The COVID-19 pandemic has disrupted the timeframe of the asylum process and has further restricted the free movement of individuals,¹⁴² making a vulnerable community more vulnerable. Now the question is how will states approach asylum policy and procedure when COVID-19 is no longer a threat?

In the United States, anti-asylum sentiment was indicated throughout the tenure of the Trump Administration, but there is a new administration that may be more favorable to asylum seekers and refugees alike.¹⁴³ The

135. *Refugees and Asylees: 2019*, *supra* note 67, at 2.

136. *Id.*

137. *FY2020 Refugee Ceiling and Allocations*, CONG. RSCH. SERV. 1, 1 (Nov. 7, 2019), <https://fas.org/sgp/crs/homesecc/IN11196.pdf>.

138. *Refugees and Asylees: 2019*, *supra* note 67, at 2.

139. *Asylum Decision Rates*, EXEC. OFF. FOR IMMIGR. REV. (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1248491/download>.

140. *Public Health and the Draw Down of the Migrant Protection Protocols Program*, DEP'T. OF STATE, OFF. OF THE SPOKESPERSON (Feb. 2, 2021), <https://www.state.gov/public-health-and-the-draw-down-of-the-migrant-protection-protocols-program/>.

141. *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, U.S. DEP'T OF HOMELAND SEC. (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

142. Jaya Ramji-Nogalesa & Iris G. Langb, *Freedom of Movement, Migration, and Borders*, 19 J. HUM. RTS. 593, 593 (2020).

143. See *The MPP Program and Border Security Joint Statement by Assistant to the President and National Security Advisor Jake Sullivan and Assistant to the President and Homeland Security Advisor Dr. Elizabeth Sherwood-Randall*, U.S. DEP'T OF HOMELAND SEC. (Feb. 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/the-mpp-program-and-border-security-joint-statement-by-assistant-to-the-president-and->

United States was not the only state to shy away from the international obligations associated with the fundamental right to asylum.¹⁴⁴ As illustrated above, EU member states also leaned into their self-interest at the expense of preserving the right to asylum.¹⁴⁵ The border-control free region that the European Union worked to be through years of integration abruptly paused, and travel restrictions made free movement more difficult.¹⁴⁶ Based on the outpour of new border control methods utilized in 2020, moving forward to a post-pandemic society, a core question for states will be how they choose to control their borders.

This Comment invites further discussion on the future of international asylum policy in a post-COVID-19 society, including discussing the disintegration of asylum protections in both the United States and the European Union through the lack of adherence to the principle of non-refoulement. Across the globe, access to asylum has drastically reduced due to the public health emergency of the COVID-19 pandemic. The lack of access to the fundamental right to seek protection from persecution was claimed as necessary to preserve state populations' well-being and safety, but how will states reintegrate their original obligations to international human rights law?

national-security-advisor-jake-sullivan-and-assistant-to-the-president-and-homeland-security-advisor-and-deputy-na/.

144. Nanjala Nyabola, *The End of Asylum: A Pillar of the Liberal Order Is Collapsing—But Does Anyone Care?*, FOREIGN AFFS. 1, 2 (Oct. 10, 2019), <https://www.foreignaffairs.com/articles/2019-10-10/end-asylum> (“The United States is far from the only country to slam its gates on those fleeing crumbling social, political, and economic systems. Around the world, rich and poor countries alike are pulling up their drawbridges, slashing the number of refugees they are willing to accept, and denying asylum to those who might have been admitted in the past.”).

145. *See id.*

146. Ramji-Nogalesa & Langb, *supra* note 142, at 596.