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The End of the Right to Seek Asylum?
COVID-19 and the Future of Refugee Protection

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Abstract

The COVID-19 pandemic has had a devastating impact on the institution of asylum, exacerbating longer term trends limiting the ability of asylum seekers to cross-borders to seek protection. As a result, the early months of 2020 saw an effective extinguishment of the right to seek asylum. This working paper examines how this played out in Australia, Canada, Europe and the United States. National and regional responses varied, with Australia and the United States effectively ending asylum seeking. In Europe, some states upheld the right to seek asylum by exempting asylum seekers from general border closures, while other countries used the crisis to suspend the right to seek asylum. Finally, this working paper explores strategies for restoring and protecting the right to seek asylum beyond the pandemic.

Keywords

Asylum; Refugees; COVID-19; Pandemic; Coronavirus;

I. Introduction*

The global pandemic has stopped asylum seekers in their tracks, as states across the world have sealed their borders, suspended asylum procedures and – in some cases – summarily deported asylum seekers. Some of these measures have been explicitly justified using public health emergency laws. Others have been implemented quietly and informally behind the scenes under the cover of the COVID-19 pandemic. As a result, it is presently near-impossible for most asylum seekers to travel to access protection. While these drastic measures have come as immediate responses to the spread of COVID-19 across borders, they are best understood as an exacerbation of underlying tendencies toward the extinguishment of the right to seek asylum in the Global North.

Access to asylum in the developed world has been under pressure since the end of the Cold War, with the emergence of a vast array of non-entrée measures to prevent asylum seekers accessing the territory or asylum procedures of destination states.¹ As a result, over the past thirty years, lack of legal access to asylum for refugees has emerged as ‘perhaps the single most prominent topic in refugee studies’.² Indeed, even before the outbreak of COVID-19, scholars documented the emergence of today’s ‘deterrence paradigm’³ and predicted the end of the right to seek asylum in the traditional asylum countries in the Global North.⁴

We argue that COVID-19 has precipitated existing trends towards the end of the right to seek asylum in Australia, the European Union (EU), the United States and Canada.⁵ As a result, for perhaps the first time since the construction of the modern international refugee regime, the early months of 2020 saw an effective extinguishment of the right to seek asylum. The extent to which the right to seek asylum will bounce back from this state of emergency footing remains to be seen, however COVID-19 and its unfolding consequences provide an apt opportunity to explore the implications of a potential end of a right to seek asylum and set out some thinking on how to prevent that eventuality.

This contribution proceeds in four sections. First, we briefly set out the content of the right to seek asylum under international law. Second, we frame the impact of COVID-19 on asylum seekers with reference to existing measures restricting access to asylum in the Global North. Third, we set out the state of the right to seek asylum between March and August 2020, as destination states largely closed their borders. Finally, we canvass ways to protect the right to seek asylum beyond the pandemic.

II. The Content of the Right to Seek Asylum

The term ‘asylum’ lacks accepted legal definition and the institution of asylum is not a straightforward area of international law.⁶ While Article 14 of the *Universal Declaration on Human Rights* sets out an individual right to ‘seek and enjoy’ protection from persecution, the 1951 *Convention Relating to the*

* This Working Paper is linked to the ASILE project (Global Asylum Governance and the European Union’s Role, <https://www.asileproject.eu/>), but is not a deliverable of the project.

¹ James C Hathaway, ‘The Emerging Politics of Non-Entrée’ (1992) 91 *Refugees* 40.

² Cathryn Costello, ‘Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?’ (2019) 30 *International Journal of Refugee Law* 643.

³ Thomas Gammeltoft-Hansen & Nikolas Feith Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) 5 *Journal on Migration and Human Security* 28.

⁴ Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018) 185–86.

⁵ Daniel Ghezelbash, ‘COVID-19 and the End of Asylum’ (*COVID-19 Watch – Kaldor Centre for International Refugee Law*, 8 June 2020) <<https://www.kaldorcentre.unsw.edu.au/publication/covid-19-and-end-asylum>> accessed 16 July 2020.

⁶ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 355.

Status of Refugees ('*Refugee Convention*') is silent on access to asylum.⁷ Instead, the Convention lays down the principle of *non-refoulement*, which prohibits the return of a refugee 'by any manner whatsoever' to a risk of persecution. The principle is also embedded in international and regional human rights law instruments, proscribing the return of any person to a real risk of torture, inhuman degrading treatment or punishment.⁸

There exists an individual right to seek asylum, in the sense of applying for protection, as a corollary to the principle of *non-refoulement*. The individual right to seek today amounts to a *procedural* right to claim international protection from state authorities and to receive a fair and effective procedure assessing the veracity of that claim.⁹ In order to comply with this obligation, states are obliged to conduct an individual, fair and efficient procedure to determine the protection needs of an asylum seeker.¹⁰ The right does not amount to a right of admission but does require that states conduct an assessment of the claims of the asylum seeker.

Hathaway suggests that Article 33(1) of the 1951 Convention 'amounts to a *de facto* duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk'.¹¹ Some scholars have argued that while it is 'theoretically possible to provide such procedures extraterritorially, this is difficult, if not impossible'.¹² It is this procedural right to apply for protection that this article is principally concerned with.

III. Tendencies toward the End of the Right to Seek Asylum

The individual right to seek asylum was under pressure in the Global North long before COVID-19. Below, we provide a brief overview of deterrence and non-entrée practices targeting different modes of travel that have limited access to asylum in Australia, Europe, Canada and the United States over the past three decades. As part of the phenomenon that Ayelet Shachar has labelled the 'shifting border',¹³ we see border enforcement measures blocking asylum seekers from travelling by plane, sea and land occurring in source countries, and then again across the entire travel continuum, including 'visa screening, airport check-in, points of embarkation, transit points, international airports and seaports'.¹⁴ Alongside these measures, states have also developed a suite of policies that have facilitated the removal of asylum seekers who manage to circumvent those controls and physically reach sovereign territory.

⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

⁸ See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 art 5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Opened for signature 10 December 1984, 1486 UNTS 85 (entered into force 26 June 1987) art 3; Convention on the Rights of the Child. Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 6 & 37.

⁹ On the scope of the right to seek asylum, see Hans Gammeltoft-Hansen and Thomas Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 *European Journal of Migration and Law* 439.

¹⁰ Jens Vedsted-Hansen, 'The Asylum Procedures and the Assessment of Asylum Requests' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014).

¹¹ James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 301.

¹² Asher Lazarus Hirsch and Nathan Bell, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime' (2017) 18 *Human Rights Review* 417, 428.

¹³ Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press 2020).

¹⁴ Statement of Mutual Understanding on Information Sharing among the Department of Citizenship and Immigration and the U.S. Immigration and Naturalization Service (INS) and the U.S. Department of State (DoS), Preamble, 27 February 2003.

Seeking Asylum By Plane

A combination of visa controls and carrier sanctions have proved incredibly effective in preventing asylum seekers from using air travel. It has become impossible for most citizens of refugee-producing countries to board a plane heading to the states of the Global North without a visa. States do not issue visas for the purpose of seeking protection and employ elaborate ‘risk factor’ algorithms to deny potential asylum seekers access to other temporary visa categories (such as tourist visas). The enforcement of these visa restrictions is then outsourced to private airline companies, who are tasked with ensuring that individuals without a valid visa are prevented from travelling. Airlines which fail to uphold this responsibility are punished through carrier sanctions, which can include significant fines, and the impounding of aircraft.¹⁵ States also deploy airline liaison officers in transit and departure states to assist and advise the airline companies with their visa enforcement responsibilities.¹⁶ The resulting document and immigration checks have made it near-impossible for refugees to travel and advance their claims to protection (aside from a small minority who succeed in circumventing the risk factor algorithms and obtain a tourist or other similar visa). These barriers to accessing air travel have pushed asylum seekers to take the far more dangerous modes of irregular travel over land and sea.

Crossing Land Borders

States have erected border walls around the world at unprecedented pace.¹⁷ 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. We also, again, see border enforcement shifting outwards, with refugee transit and source countries being co-opted as ‘buffer zones’.¹⁸ While not necessarily manifesting in physical border walls, the government authorities in these states are mobilised to apprehend migrants and disrupt their journeys, in return for aid, capacity building and other forms of inducement or coercion.¹⁹

Seeking Asylum By Boat

The United States and Australia have long standing policies of intercepting and returning asylum seekers at sea, which have been tacitly upheld in domestic courts.²⁰ Both countries transfer asylum seekers they can summarily return to extraterritorial processing sites. The United has operated the Migrant Operations Centre on Guantanamo Bay Cuba for this purpose since the 1990s, which provided the blueprint for Australia’s offshore processing of asylum seekers in Nauru and Papua New Guinea.²¹ In both countries, these policies have been effective in deflecting almost all asylum seekers who travel by sea.²²

¹⁵ Elspeth Guild, ‘The Border Abroad—Visas and Border Controls’ in Kees Groenendijk and others (eds), *In Search of Europe’s Borders* (Brill 2002).

¹⁶ Asher Lazarus Hirsch, ‘The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls’ (2017) 36 *Refugee Survey Quarterly* 48, 62.

¹⁷ Ron E Hassner and Jason Wittenberg, ‘Barriers to Entry: Who Builds Fortified Boundaries and Why?’ (2015) 40 *International Security* 157.

¹⁸ David FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 8.

¹⁹ Jennifer Hyndman and Alison Mountz, ‘Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe’ (2008) 43 *Government and Opposition* 249.

²⁰ *Sale v. Haitian Cntrs. Council, Inc.*, 509 U.S. 155 (1993); *CPCF v Minister for Immigration & Border Protection* (2015) 255 CLR 514.

²¹ Ghezelbash (4) 112–3.

²² Azadeh Dastyari and Daniel Ghezelbash, ‘Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures’ (2020) 32 *International Journal of Refugee Law* 1.

The European Convention on Human Rights (ECHR) and the EU asylum *acquis* provide the most robust protections of the right to seek to asylum in the Global North.²³ However, access to asylum has long been subject to a range of migration control measures.²⁴ Deterrence has been particularly marked since the migrant and refugee crisis of 2015, sparked in part by the flight of Syrian protection seekers. This is particularly evident in the central Mediterranean, where EU and Italian cooperation with the Libyan government includes funding, equipping and training the Libyan coastguard and a reprisal of Italy–Libya bilateral agreements to combat irregular migration.²⁵ Following the European Court of Human Rights’ (ECtHR) decision in *Hirsi* prohibiting Italy’s interdiction and return of asylum seekers to Libya,²⁶ 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.²⁷ In the eastern Mediterranean, Spain has strengthened bilateral cooperation with Morocco to prevent departures and assist ‘hot returns’ by land and sea.²⁸

Safe Third Country Arrangements

Even where asylum seekers manage to circumvent the non-entrée policies outlined above and reach the destination state, they may still be denied the right to seek asylum. An increasingly common policy used to this end is the safe third country concept. Developed in Europe and the 1980s, and subsequently spreading to almost all countries of the Global North, the policy allows for the return of an asylum seeker to a particular country on the basis that they can purportedly access effective protection there.

The Dublin Regulation in the EU assigns responsibility for assessing asylum seekers’ protection request to the state of entry.²⁹ As a result, coastal states at the EU’s southern sea border, notably Greece, Italy and Spain, and states at the EU’s eastern land borders, such as Hungary, have attracted significant groups of asylum seekers and become the key migration control sites. The EU–Turkey Statement of March 2016, allows for asylum seekers arriving in the Greek Aegean islands to be returned to Turkey. While it has led to a significant fall in irregular migration between Turkey and Greece,³⁰ there have been serious concerns raised as to the welfare and safety of returnees to Turkey.³¹

²³ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter) art 18; Council Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13 (Procedures Directive).

²⁴ For an overview, see FitzGerald (n 18) 160–218.

²⁵ Memorandum of Understanding between Italy and the Libyan Government of National Accord on Cooperation in the Field of Development, Fight against Illegal Immigration, Trafficking in Human Beings and Smuggling and on Enhancement of Border Security of 2 February 2017.

²⁶ Mariagiulia Giuffré and Violeta Moreno-Lax, ‘The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows’ in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

²⁷ *SS and others v Italy* App no 21660/18 (ECHR, filed 26 June 2019).

²⁸ Maria Martin & Lucia Abellan, ‘Spain and Morocco Reach Deal to Curb Irregular Migration Flows’ *El País* (4 February 2020). <https://english.elpais.com/elpais/2019/02/21/inenglish/1550736538_089908.html> accessed 16 July 2020.

²⁹ Council Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180 (Dublin Regulation).

³⁰ European Council, ‘EU–Turkey Statement’ (Press Release 144/16, 18 March 2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement> accessed 16 July 2020.

³¹ Maybritt Jill Alpes et al, ‘Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns From Greece Over Access to Asylum’ (*RSCAS Policy Briefs* 2017/29) <<https://cadmus.eui.eu/handle/1814/48904>> accessed 16 July 2020.

In North America, the Canada–US Safe Third Country Agreement continues to be relied upon by Canada to return asylum seekers to the United States, notwithstanding a recent court decision declaring the agreement unconstitutional.³² The 2019 Migrant Protection Protocols allows the United States to return undocumented asylum seekers to Mexico, where they must await the conclusion of their asylum proceedings.³³

In some cases, asylum seekers are sent to destinations with which they have no pre-existing relationship. Australia’s offshore processing policy is one such example, under which asylum seekers who have transited through Indonesia or Malaysia are transferred to Nauru (and formerly to Papua New Guinea). Australia’s approach appears to have inspired a series of similar arrangements between the United States and Guatemala,³⁴ Honduras³⁵ and El Salvador³⁶ to accept the transfer of asylum seekers who arrive at the US–Mexico border. There is no requirement that the asylum seeker had previously transited through the country to which they were being transferred.

In sum, the right to seek asylum stood on shaky ground prior to COVID-19. A combination of visa regimes, carrier sanctions, maritime interdiction, extraterritorial asylum and safe third country rules rendered access to asylum difficult and dangerous. Then came the pandemic.

IV. The Right to Seek under COVID-19

The COVID-19 pandemic brought the deterrence measures outlined above to their logical conclusion, as border closures and states of emergency in destination states largely suspended the right to seek asylum. It is now near-impossible to seek asylum in Australia. While the sea route to Australia was shut down some time ago, prior to the pandemic, some asylum seekers had been able to fly to Australia on valid visas and subsequently apply for protection. COVID-19 travel restrictions now prevent people from entering Australia unless they are an Australian citizen or permanent resident. On 18 March 2020, the Governor-General declared a human biosecurity emergency,³⁷ which activated the expansive powers under the Biosecurity Act 2015.³⁸ Shortly thereafter, Prime Minister Scott Morrison announced that Australia would close its borders to all non-citizens and non-residents from 20 March 2020.³⁹ On 3 September 2020, the government announced that the travel ban would be extended through to 17

³² Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 5 December 2002. The Canadian Federal Court found that the agreement violated Canada’s Charter of Rights: *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)* 2020 FC 770. The decision was suspended for six months, allowing the arrangements to remain in effect until mid-2021, to give the Parliament time to respond. The Canadian government is appealing the decision in the Federal Court of Appeal.

³³ Department of Homeland Security, ‘Migrant Protection Protocols’ (Press Release, 24 January 2019) <<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>> accessed 17 July 2020.

³⁴ Agreement Between the Government of the United States of America and the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, 26 July 2019.

³⁵ Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 25 September 2019.

³⁶ Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, 20 September 2019.

³⁷ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020, F2020L00266.

³⁸ Biosecurity Act 2015 (Cth), s 475.

³⁹ Prime Minister of Australia (Press Release, 29 March 2020). <<https://www.pm.gov.au/media/border-restrictions>> accessed 16 July 2020.

December 2020.⁴⁰ Exemptions can only be issued by the Border Force Commissioner, where there are compassionate or compelling reasons to travel to Australia. The need to seek protection is not one of the grounds for seeking an exemption.

The United States has gone down a similar path, announcing travel restrictions on 20 March 2020 that allow border agents to deny entry to almost all asylum seekers. The order issued by the Centers for Disease Control and Prevention (CDC) authorises the immediate deportation of undocumented aliens arriving overland from Mexico and Canada.⁴¹ The order is effective until 20 March 2021 (unless repealed earlier). The cited legal basis for the order is the Public Health Service Act which authorises the suspension of entry of persons to the United States where there is a serious danger of the introduction of a communicable disease.⁴²

Significantly, the order operates completely outside the regular immigration removal process, allowing asylum seekers to be sent back without a hearing or any opportunity to raise protection concerns. The only narrow exception is limited screening for claims under the Convention Against Torture where an asylum seeker makes an ‘affirmative, spontaneous and reasonably believable claim’ of a fear of torture.⁴³ Given the rapid timeframe and lack of information, it is no surprise that virtually no asylum seekers are being assessed as meeting this threshold. By 31 July 2020, more than 105,000 individuals had been returned to Mexico under the rapid-expulsion procedures.⁴⁴ Comprehensive statistics are not available for asylum claims made by that cohort. However, it has been reported that just two asylum seekers of approximately 20,000 who entered via the southern border were allowed to remain between 20 March and 13 May 2020.⁴⁵

It is not only asylum seekers apprehended at the border that are being returned. It appears that US Customs and Border Protection (CBP) has taken a broad view of the powers given to it by the public health order and is targeting asylum seekers already in the country, including unaccompanied children, for summary removal.⁴⁶ Even Canada, a state that has in the past resisted the same levels of restriction, has been turning back asylum seekers who try to enter the country irregularly over land since 14 March 2020. It has continued to rely on its safe third country agreement with the United States, notwithstanding the potential risk of chain *refoulement*, and the Federal Court finding that the agreement violates the Canadian Charter of Human Rights.⁴⁷

⁴⁰ Minister for Health, Hon Greg Hunt, ‘Human Biosecurity Emergency Period Extended by Three Months’ (Press Release, 3 September 2020) <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/human-biosecurity-emergency-period-extended-by-three-months>> accessed 4 September 2020.

⁴¹ Centre for Disease Control and Prevention, Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending the Introduction of Certain Persons from Countries Where Communicable Disease Exists, 26 March 2020, 85 F.R. 17060 (CDC Order).

⁴² Public Health Service (PHS) Act, 42 U.S.C. §§ 265, 268.

⁴³ U.S. Border Patrol, ‘COVID-19 CAPIO’ Guidance (on file with author).

⁴⁴ U.S. Customs and Border Protection, ‘CPB Enforcement Statistics’ (3 September 2020) <<https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>> accessed 4 September 2020.

⁴⁵ Nick Miroff, Under Trump Border Rules, ‘U.S. Has Granted Refuge to Just Two People Since Late March, Records Show’ *Washington Post* (13 May 2020) <https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html> accessed 17 July 2020.

⁴⁶ Caitlin Dickerson, ‘10 Years Old, Tearful and Confused After a Sudden Deportation’ *New York Times* (21 May 2020) <<https://www.nytimes.com/2020/05/20/us/coronavirus-migrant-children-unaccompanied-minors.html?referringSource=articleShare>> accessed 17 July 2020.

⁴⁷ Claire Ellis, COVID-19: Canada Locks its Gates to Asylum Seekers *Open Democracy* (10 April 2020) <<https://www.opendemocracy.net/en/pandemic-border/covid-19-canada-locks-its-gates-asylum-seekers/>> accessed 17 July 2020; Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship) 2020 FC 770.

In the EU, COVID-19 precipitated external and internal border closures, initial suspension of asylum procedures and further restrictions in the Mediterranean. As a result, asylum applications dropped to just 8,730 in April and 10,200 in May 2020, down from 34,737 in March and 61,421 in February. In June 2020, asylum applications increased to 31,500 but remain well below pre-pandemic levels.⁴⁸ Promisingly, the EU Commission recommended that border closures include exemptions for asylum seekers and most states in fact continued to admit asylum seekers, including Austria, Denmark and Sweden.⁴⁹ However, the right to seek asylum was suspended or curtailed in other European countries. In Hungary, for example, a state of emergency declared in relation to COVID-19 has suspended the right to seek asylum.⁵⁰

For asylum seekers reaching European territory, suspension of asylum procedures has delayed access to asylum under COVID-19. Greece suspended its asylum procedure for one month for asylum seekers crossing via the Turkish land border, giving rise to concerns of collective expulsion and *refoulement*.⁵¹ Most other European states closed asylum offices, thus effectively suspending the asylum procedure, while some basic registration processes continued.⁵² Some countries halted in-person interviews, but kept channels for applications for protection in writing open.⁵³

Further restrictions were introduced to block asylum seekers attempting to cross the Mediterranean. Italy, Malta and Cyprus closed their ports for most boats, citing public health concerns, preventing the disembarkation of asylum seekers rescued at sea.⁵⁴ Malta went further, using private vessels to detain asylum seekers at sea or return them to Libya.⁵⁵ In the eastern Mediterranean, Greece appears to have copied Australia's policy of using lifeboats in push-back operations to Turkey.⁵⁶ The United Kingdom is also now considering emulating Australia's boat push-back policy in the English Channel.⁵⁷

The right to seek asylum in the first months of the pandemic suffered badly in the Global North. In Australia, the closure of routes to protection by air alongside existing rejection of asylum seekers by boat effectively extinguished the right to seek asylum. Similarly, the Trump Administration's use of a sweeping public health order has effectively ended territorial asylum (at least for those crossing land borders) in the United States. The picture is more mixed in Europe. While some European states upheld the right to seek asylum by exempting asylum seekers from general border closures, other countries used

⁴⁸ Of the 8,730 April applications, 7,507 were first time applications. European Asylum Support Office (EASO), 'Latest Asylum Trends' <<https://easo.europa.eu/latest-asylum-trends>> accessed 7 September 2022.

⁴⁹ UNHCR, 'Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic' (9 April 2020) <<https://data2.unhcr.org/en/documents/download/75453>>; EU Agency for Fundamental Rights, 'Migration: Key Fundamental Rights Concerns' (Quarterly Bulletin 2, 2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-migration-bulletin-2_en.pdf> accessed 16 July 2020.

⁵⁰ European Council on Refugees and Exiles, 'COVID-19 Measures Related to Asylum and Migration Across Europe' (28 May 2020) <<https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-28-May.pdf>> accessed 16 July 2020.

⁵¹ Amnesty International, 'Refugees at Heightened Risk of Refoulement under Turkey's State of Emergency' (22 September 2017) <<https://www.amnesty.org/en/documents/eur44/7157/2017/en/>> accessed 16 July 2020.

⁵² European Council on Refugees and Exiles (n 51).

⁵³ UNHCR (n 49).

⁵⁴ European Agency For Fundamental Rights, 'COVID-19 Puts Asylum Seekers at a Higher Risk' (27 May 2020) <<https://fra.europa.eu/en/news/2020/covid-19-puts-asylum-seekers-higher-risk-conditions-camps-deteriorate-and-asylum>> accessed 16 July 2020.

⁵⁵ Human Rights Watch, 'Malta: Disembark Rescues People' (22 May 2020) <<https://www.hrw.org/news/2020/05/22/malta-disembark-rescued-people>> accessed 16 July 2020.

⁵⁶ Niamh Keady-Tabbal & Itamar Mann, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' *Just Security* (22 May 2020) <<https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/>> accessed 16 July 2020.

⁵⁷ 'Home Office Seeks Military Help over Migrant Crossings' *BBC News* (8 August 2020) <<https://www.bbc.com/news/uk-53704809>> accessed 4 September 2020.

the crisis to suspend the right to seek asylum. At the external border, some states pushed back and refused port to asylum seekers at sea.

What lessons do these first critical months of the pandemic hold for the future of the right to seek asylum? First, there is a real danger that *temporary measures harden into permanence*. For example, Schengen border controls introduced at the height of Europe's 2015 migrant and refugee crisis in some cases remain in place today. Second, there are already signs that destination states are *exploiting states of emergency during the pandemic* to limit access to asylum. The United States' CDC order is the most egregious example of a state using the pandemic as cover for policy priorities unfeasible before COVID-19. To what extent will the right to seek asylum survive the pandemic?

V. Protecting Asylum

The COVID-19 pandemic, at least temporarily, all but extinguished the right to seek asylum in states of the Global North. What strategies can be adopted to revive it in a post-pandemic world? Most immediately, there may be scope to challenge the legality of restrictions introduced on public health emergency grounds in domestic courts. Some measures, such as the CDC order in the United States may never have been valid in the first place.⁵⁸ Other travel bans, while potentially valid when issued, may cease to be so as the public health emergency is contained.

Challenging the underlying long-standing trend towards limiting access to asylum will be more difficult. *Strategic litigation* in domestic and supra-national forums will have an important role to play. Given the key role extraterritorial controls have played in limiting access to asylum, the focus needs to be on ways to hold governments accountable for their actions beyond their borders. This will include reinforcing arguments under international human rights and refugee law that a state's jurisdiction flows wherever it exercises 'effective control'.⁵⁹ But it is important to think innovatively and look beyond human rights and refugee law.⁶⁰ For example, there have been some successes in using tort law,⁶¹ as well as financial auditing mechanisms to hold governments accountable for extra-territorial actions against asylum seekers.⁶²

But strategic litigation alone will likely not be enough. At the heart of the demise of the right to seek asylum is a crisis of solidarity. States have adopted a competitive mindset, implementing increasingly punitive measures aimed at shifting asylum flows to other jurisdictions. States feel pressured to copy or outdo restrictive policies in other jurisdictions or face the prospect of increased asylum flows.⁶³ A similar mindset will make states reluctant to be first movers when it comes to easing COVID-19 asylum restrictions. *Coordination* between states on how and when to lift restrictions could alleviate these concerns. Such coordination should be managed and facilitated by bodies such as the EU and UNHCR.

⁵⁸ Lucas Guttentag, 'Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors' *Just Security* (13 April 2020) <<https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>> accessed 16 July 2020.

⁵⁹ Shachar (n 13) 62–66.

⁶⁰ Nikolas Feith Tan & Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 *German Law Journal* 335.

⁶¹ Gabrielle Holly, 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation' (2020) 21 *German Law Journal* 549.

⁶² Rouven Diekjobst & Timeela Manandhar, 'Follow the Money and See Where it Goes – Unmasking the EU's Libya Programme', *Voelkerrechtsblog* (25 May 2020) <<https://voelkerrechtsblog.org/follow-the-money-and-see-where-it-goes-unmasking-the-eus-libya-programme/>> accessed 16 July 2020.

⁶³ Ghezelbash (n 4); Daniel Ghezelbash, 'Forces of Diffusion: What Drives the Transfer of Immigration Policy Across Jurisdictions?' (2014) 1 *International Journal of Migration and Borders Studies* 139.

Broader commitments to *solidarity and responsibility sharing* are required to counter the long-standing demise of the institution of asylum. In this regard, the non-binding commitments in the Global Compact for Refugees (GCR), including financial aid to refugee host countries and expanded resettlement and complementary pathways programs are welcome.⁶⁴ But these will not be enough. The implementation of the GCR should be further geared towards protecting the right to seek asylum including through the recently-formed Asylum Capacity Support Group and by highlighting good practices in this area.⁶⁵

Resettlement, in particular, has an important role to play in the international refugee protection regime, and is one way in which states can demonstrate solidarity. However, its highly discretionary nature mean that it can never be a replacement for the right to seek asylum. States have an unfettered discretion as to how many, and which asylum seekers to accept under their programs.⁶⁶ This was illustrated by state responses to the COVID-19 pandemic. Resettlement programs were suspended around the world, and even refugees who have already been accepted have been prevented from travelling.⁶⁷ In the first half of 2020, just 10,304 refugees left for resettlement countries.⁶⁸ Even before the pandemic, the number of resettlement places available internationally was in decline, and have never come close to meeting demand.⁶⁹

To save the right to seek asylum, states of the Global North must lead by example by respecting that right themselves. There are some examples of good practice here, with Germany, Sweden and, to some extent, Canada leading the way. Moreover, abandoning the right to seek asylum in the developed world runs the real risk of emulation in the Global South, where 85 per cent of the world's refugees reside.⁷⁰ Indeed, destination states should look to the examples set by states such as Colombia, Lebanon and Uganda, which keep their borders open to far more asylum seekers than any state in the Global North. The implementation of international law into state practice requires leadership—it needs states to set an example to convince other states to adhere to protection norms. The question is will any state rise up to this challenge in the post-pandemic world?

⁶⁴ UNHCR, Report of United Nations High Commissioner of Refugees, Part II: Global Compact on Refugees, UN Doc. A/73/12 (Part II) (2 August 2018)

⁶⁵ UNHCR, 'Good Practices' (Global Compact on Refugee Digital Platform) <<https://globalcompactrefugees.org/channel/good-practices>> accessed 16 July 2020.

⁶⁶ Tom de Boer & Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees Cherry-Picking and the Lack of Due Process in the EU' (2020) 32 *International Journal of Refugee Law* 54.

⁶⁷ Adele Garnier et al, 'The COVID-19 Resettlement Freeze: Towards a Permanent Suspension?' (*COVID-19 Watch – Kaldor Centre for International Refugee Law*, 14 April 2020) <<https://www.kaldorcentre.unsw.edu.au/publication/covid-19-resettlement-freeze-towards-permanent-suspension>> accessed 16 July 2020.

⁶⁸ UNHCR, Resettlement Data Finder <https://rsq.unhcr.org/en/#d9Bz> accessed 7 September 2020.

⁶⁹ In 2019, for example, UNHCR identified 1.4 million refugees in need of resettlement and 107,800 refugees were resettled, including through private or community sponsorship. UNHCR, 'Global Trends: Forced Displacement in 2019' (June 2020) <<https://www.unhcr.org/5ee200e37.pdf>> accessed 16 July 2020.

⁷⁰ Gammeltoft-Hansen & Tan (n 3) 43; Jeff Crisp, 'The End of Asylum?' (*United Against Inhumanity*, 2 July 2020) <<http://www.against-inhumanity.org/2020/07/02/the-end-of-asylum/>> accessed 16 July 2020.

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