

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Ebot Ismaila Ayuk

**ANALYSING THE EU REFUGEE LEGAL FRAMEWORK: A
CASE STUDY OF HUMAN RIGHTS VIOLATIONS**

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Supervisor: Dr. Evhen Tsybulenko, senior lecturer, Ph.D.

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced, and the same paper has not been previously presented for grading.

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Ebot Ismaila Ayuk

12 May 2021

Student code: 183947HAJB

Student e-mail address: ismailayuk@gmail.com

Supervisor: Dr. Evhen Tsybulenko, senior lecturer, Ph.D.

The paper conforms to requirements in force.

.....

(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

.....

(name, signature, date)

TABLE OF CONTENTS

ABSTRACT	4
INTRODUCTION	5
1. OVERVIEW OF REFUGEE LAW	7
1.1. Rights and responsibilities of parties to the Refugee Convention.....	8
1.1.1. Noncompliance	9
1.2. European Union Refugee Framework	10
2. VIOLATIONS OF REFUGEE HUMAN RIGHTS IN THE EUROPEAN UNION	13
2.1. Detention of refugees in Europe	14
2.2. Deterrence policy.....	16
2.2.2. violation in relation to interception at seas	19
3. RECOMMENDATIONS AND POSSIBLE SOLUTIONS	21
CONCLUSION	26
LIST OF REFERENCES	28
APPENDICES	31
Appendix 1. Member states to the Refugee Convention 1951	31
Appendix 2. Refugee detention camp in Greece amidst the coronavirus.....	32
Appendix 3. one of the detention centres in Libya.....	33
Appendix 4: The division of the ocean into different zones according to the United Nation Convention on Law of the Sea.	34
Appendix 5. Map showing NGO ship banned from carrying out SAR operations in the Mediterranean Sea 15 December 2020.....	35
Appendix 5. Non-exclusive licence / to be added only in graduation thesis as the last appendix /	36

ABSTRACT

The shores of Europe over the years have become a safe haven for refugees fleeing political persecution, economic hardship, and natural disasters from different corners of the globe to seek a better and safe life in Europe. The vast majority of refugees entering Europe consist of those seeking asylum and economic migrant, which places an extreme burden on the first country of entry because it is challenging to distinguish who is in real need of protection. These first countries of reception have a task to ensure and protect the human rights of the refugees irrespective of particular challenges as guaranteed by the Common European Asylum System (CEAS).

The problem here is that some of the first countries of entry's reception facilities have unforgiving conditions, a lack of a harmonized law for evaluating and accessing refugee's applications, and ambiguous rules in the Dublin regulation relating to the asylum application. Therefore, this paper investigates if any the lack or absence of adequate laws can result in the violation of refugee's human rights. The research will apply quantitative and qualitative data in order to present the findings in an academic format. The findings, legal cases, legislation, academic writings, and scientific books will be examined and analysed to present the findings better. Therefore, the data gathered from scientific sources will aid to draw a conclusion and recommendations for the protection of refugee's human rights.

Keywords: Refugees, Asylum seekers, Human rights, European Union (EU), Refoulement

INTRODUCTION

Two essential documents, the United Nations Charter and the Universal Declaration of Human Right of December 10, 1948, assured that every human being would enjoy fundamental human rights and freedoms without any form of discrimination.¹ These rights are also enshrined and harmonized in the European Convention of human rights, a pivotal living document that guarantees human rights across the European Union. According to the Convention relating to the status of refugees of 1951, a refugee;

(2) As a result of events occurring before 1 January, 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.² It is common for refugees to go through rigorous checks at candidates countries in Europe, which may differ from one refugee to another on a case to case basis.³

Directive 2011/95/EU lay down the criteria for a refugee applicant to be granted refugee status; the applicant must face a real founded fear of oppression, the reason for persecution should be related to the refugee's race, religion, nationality, or membership in a particular social group.⁴ The latter is problematic because a natural person who resides in another country can still face persecution on grounds not related to the above mentioned clause. Member states are required to guarantee international protection when refugees arrived at their borders without the exception of territorial waters. This paper will present some EU countries like Italy that have witnessed a tremendous influx of refugees use sophisticated and equipped military ships to blockade refugees from entering their territorial waters. Directive 2013/32/EU lay down the framework to grant

¹ Convention relating to the Status of Refugees Adopted on 28 July 1951, by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

² Ibid.

³ Papademetriou, T. (2016). Refugee Law and Policy: European Union. *Library of Congress: Legal reports*. 78-106.

⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and the content of the protection granted.

international protection to refugees that member states must adhere to due to granting and withdrawing refugee status. The Common European Asylum System (CEAS), the Charter of Fundamental Rights and the Geneva Convention Relating of 1951 to the Status of Refugees and its 1967 Protocol binds the EU member states to protect refugee's human rights. In certain instances, the European Court of Human Rights has found some member states guilty of violating the rights of refugees.⁵

It is against this backdrop that this paper will investigate whether the absence or loopholes in refugee laws have resulted in the violation of refugees' human rights. Despite numerous international conventions on refugee laws, there is still loop holds for effective Transnational and domestic refugee laws. The absence of proper laws to protect refugees has left them exposed to human rights violations.

The paper aims to identify if there is any form of human rights violation of refugees. Also, this paper will propose further recommendations to legislation to have a more unified legal framework on refugee law. It is realised that the EU needs a harmonized legislation to tackle its refugee crisis. As such, the main research question will focus on the legal gaps, if any, which can lead to the violation of refugees' human rights and legal protection?

The research will apply qualitative data in order to present the findings in an academic format. The findings, legal cases, legislations, academic writings, and scientific books will be examined and analysed to present the findings better. For a better understanding of the work, the research will be divided into chapters. Chapter one will focus on analysing refugee law with more emphasis on EU and International refugee framework. This will help to understand the existing refugee laws in order to identify gaps or loop holes that can or has resulted to violation refugee human rights. The subsequent chapter will examine violation of refugee's human rights by analysing legal cases and border controls of certain European States or absence of adequate refugee infrastructures such as hospitals and camps. The final chapter of the research will look at possible solutions and recommendations to coup with Europe's refugee crisis.

⁵ Papademetriou, T. (2016). Refugee Law and Policy: European Union. *Library of Congress*: Legal reports. 78-106.

1. OVERVIEW OF REFUGEE LAW

The Refugee Convention or the Geneva Convention also known as the Convention relating to the status of refugees of 28 July, 1951 which is a United Nation (UN) multilateral treaty and the blue print for international refugee law. There are about 146 member states who are signatories to this Convention.⁶ The UN refugee convention sets out the definition of a refugee by laying down certain criteria that an individual needs to meet before they can be called a refugee. It also sets out certain rights which are awarded to those who have been granted asylum. Furthermore, the Convention spells out the responsibilities of nations that award asylum. Nevertheless, within the content of Article one of the Convention, certain refugees such as those who committed non-political crimes, crime against peace, war crime, and crime against humanity before entry into the recipient state or crimes or crimes which are contrary to the principles of the United Nations if found guilty by competent authorities cannot qualify as a refugee or be granted the status of refugee.⁷ For instance, in the case law *T v Immigration Officer AC 742*, in an opinion by the United Kingdom (UK) House of Lords denied uphold the decision of the UK immigration office not to grant asylum to the appellant who was an Algerian seeking asylum in the UK. The reason for refusal was that the appellant was involved in plans to bomb a civilian airport in Algeria prior to entry into the UK.⁸

One of the core foundations and pillars that serve as a source to the refugee convention is Article 14 of the Universal Declaration of Human Rights 1948. This article assures that individuals can seek for asylum in another country if they are under persecution given that the persecution did not arise as a result of committing political crimes.⁹ There should not be a link between the crime and alleged political motives. As such, the benefits enshrined in the provision of the refugee convention shall not be enjoyed by a refugee who is found guilty to be a danger to the community and security of the country they are seeking protection from.¹⁰ It is evident that the rights guaranteed in this Convention serve as the backbone to refugee law since its inception. As a treaty that functions at

⁶ Convention relating to the status of refugees July 28, 1951.

⁷ Database of the International Committee of the Red Cross, Cambridge University Press, 2005

⁸ Case AC 742, *T v Immigration Officer*, opinion of the House of Lords, May 22, 1996.

⁹ Ait Kaci, Y. (2015), Universal Declaration of Human Rights December, United Nations Publisher, 1-72.

¹⁰ Grahl-Madsen, A. (2001), *The Land Beyond: Collected Essays on Refugee Law and Policy*, Martinus Nijhoff Publishers, 8.

a multilateral level, then it needs to serve as living instrument that is, it should be able to be use to solve complex issues from recent times. It can be seen that population displacement, warfare, economic migration, ethnic conflicts, terrorism all present an intricate situation for the refugee convention which has made some school of thoughts to call for a new international refugee treaty.

1.1. Rights and responsibilities of parties to the Refugee Convention

There are about 146 parties to the Convention and as a common principle of international law, a treaty becomes legally binding to those who are signatories to it and are required to carry out the duties enshrined within the treaty in good faith. The members to this treaty are therefore charged with the duty to ensure and protect the rights of refugees within their territorial borders. In ensuring the practice of this provision, following article 3, contracting must takes necessary steps not to discriminate against refugees irrespective of their country of origin, race, and religion. According to article 7 of the Convention, refugees shall be given the same as other aliens of that contracting state. Furthermore, member state or parties to Convention are obliged by article 9 to provide travel documents to refugees except for reasons related to national security and public order and any travel document had been issued by another contracting state to the Convention, it must be recognised. One of the most conflicting articles with regards to the provision of this Convention is article 33 which focuses on nonrefoulement. Within the context of this article members are compelled not to forcefully return a refugee to a territory where the refugee may or will face profound danger due to their political opinion, membership to a social association, race, religion, nationality. This was practice in the land mark case of *Soering V The UK*. The applicant was a German national who resided in the United States of America (U.S.A). the applicant committed murder after an argument and fled to UK. While on trial in the UK for cheque fraud, the U.S.A requested the applicant be extradited to the States. Following a unanimous decision of the European Court of Human Right, it was affirmed that the applicant may face possible torture and may face inhumane treatment if return to the States. This will be in violation of article 3 of the European Convention of Human Rights.¹¹ Members to Convention are also required to facilitate the naturalisation process of refugees in accordance with article 34.¹² Another important

¹¹ Case 14038/88, European Court of Human Rights, *Soering v. The United Kingdom*, 7 July 1989.

¹² Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

responsibility for member states in relation to the Convention is enshrined in article 31 which guarantees that refugees should not be returned even if they entered the country illegally.¹³

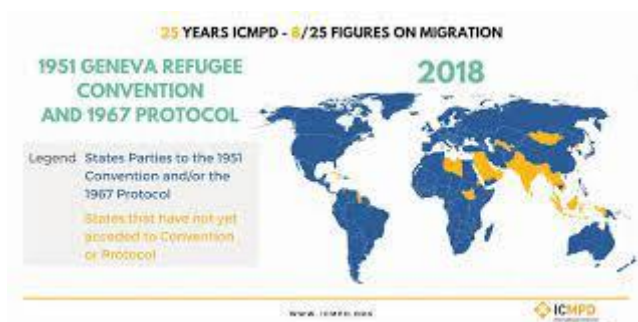


Fig 1: Member states to the Refugee Convention.

Source: International Centre for Migration Policy Development.

The map above shows the different nation states around that world that are parties to the 1951 Refugee Convention and its 1967 Protocols. This is evident that the member states of the European Union are parties to this Convention.

1.1.1. Noncompliance

As a principle of international law, the 146 contracting states to the refugee convention of 1951 must perform their obligations of the treaty in accordance with recognised law. Even though it is a legally binding document, the United Nation High Commissioner for Refugees (UNHCR)¹⁴ has only supervisory powers. It cannot force signatories to the Convention to abide by the provisions of the treaty but rather encourage member states to guarantee they will uphold their responsibilities relating to the Convention. Since there is no formal process of filing or submitting complaints about violation of the Convention, the UNHCR for refugees' advices applicant to submit their complaints to the UN Human Rights Committee which will be handled by the committee in charge of civil and political rights or the committee for economic, social, and cultural rights.¹⁵ Usually, member states can file complaints against another party to the International Court of Justice (ICJ) In most cases, member states who violates the provisions of the treaty are usually publicly shamed by the media and the UN. It can be said that since there is no actual enforcement mechanism or body to hold and sanction members to for violating the Convention, the it creates room for

¹³ Moloney. R. (2012, November 29), Crikey. Retrieved from <https://www.crikey.com.au/2012/11/29/crikey-clarifier-does-australias-refugee-policy-breach-un-rules/> 15 March 2021.

¹⁴ Moore, J., Musalo, K., & Boswell, R. A. (2011). *Refugee law and policy: a comparative and international approach*. Carolina Academic Press, 202.

¹⁵ Office of the United Nations High Commissioner for Human Rights: Individual Complaint Procedures under the United Nations Human Rights Treaties, Geneva, 2013, May 5.

violation of the treaty without any serious punishment. The absence of a monitoring body to identify member states who have breached the Convention. As such member states have inhumane mandatory detention facilities as in article 9 of the Convention, poor medical infrastructures, restrictions of refugees to work which is not in line with article 17 of the Convention.¹⁶ Even with the presence of UN bodies like the Human Rights committee, the High Commissioner for refugees, since they are not actual courts to enforce the provisions of the Convention, the most common form of punishment which member receives for violating the Convention usually amounts to international criticisms which is not significant enough.

1.2. European Union Refugee Framework

Following the September 11, 2001 bombing of the World Trade centre in U.S.A, and other terror attacks that occurred within Europe¹⁷, the European Union decided to reform its refugee laws with the 1951 Refugee Convention being one of the main sources for EU refugee law. Due to the mass influx of refugees following events like the Arab spring¹⁸ domestic and ethnic wars, persecution necessitated a change of law. This has led to several refugee reform laws which will play a pivotal role in this research in order to determine the lapses in these laws that can lead to human right violations of refugees. This is evident that it has not been an easy route to formalise a legal blueprint to tackle the challenges associated with refugees.¹⁹ The refugee menace was so severe to the extent that some EU member states like Greece and Italy started reinstating temporary borders in order to cope with the uncontrollable influx of refugees arriving at the shores of Europe and at the borders of candidate countries. This practice constitutes a violation of the Treaty on the Functioning of the European Union (TFEU) as it prevented freedom of movement which is one of the four fundamental pillars of freedom within member states.²⁰ This huge inflow of refugees exposed certain areas of the Common European Asylum System (CEAS) which is at the core of Europe's refugee law that was reformed between 2011 to 2014.²¹ One of the principal aims of this new reform is to have a harmonised EU refugee law in order to have the same or similar outcomes

¹⁶ Ibid

¹⁷ Bruin, R. Wouters, K. (2003), Law Terrorism and the Non-derogability of Non-refoulement, *International Journal of Refugee* 15 (1): 5–29

¹⁸ Killian S. O'Brien (2011),; Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem, *Goettingen Journal of International Law* 3(2), Heinonline, 715-732.

¹⁹ Money, J. (2001). Immigration and European Integration: Towards Fortress Europe, *The American Political Science Review*, 95(1), 254.

²⁰ Craig, P. De Burca, C. (2015). *EU Law Text, Cases, and Materials*, (6th ed), Oxford University Press, 744.

²¹ Papademetriou, T. (2016). Refugee Law and Policy: European Union. *Library of Congress*. Legal report, 78-106.

on refugee cases across the Union as most of the member states relied on domestic laws to regulate issues related to asylum.²² The number of refugees arriving at recipient member states were alarming. Also, the issue mandatory or arbitrary detention facilities with inhospitable refugee camps to deter future refugees from entering their territory, overcrowding of refugees, heterogeneous asylum law, and vague clause in the Dublin Regulation which determine which member state is in charge of examining refugees' applications.²³

As earlier mentioned, the CEAS born in 1999 which stands at the core of EU refugee law providing protection to refugees who are most often vulnerable. It is relevant to note that the CEAS is made up of regulations and directives. According to the guidelines of the above mentioned document, with respect to Directive 2011/95/EU which lays down the standards and a uniform due process for granting international protection to refugees.²⁴ When the refugees arrive at the border of any EU member state, they are registered and the biometric data entered into the European Dactyloscopy or EURODAC database. Following the Dublin Regulation 604/2013, which is responsible for deciding which European Union member state will handle applications for refugees. During this process, it is compulsory for member states to provide legal assistance in a language that is understood by the refugee. This is followed by an interview of the refugee and a medical examination of the applicant. After this procedure, applicants have the right to continue living in the country where they applied and should be given the permission to move freely as they so choose. Furthermore, according to Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, in order to ensure adequate standard of living, member states are responsible to provide good housing, food, and health care to the refugees. Also, refugees who are minors are to be given the right to access education under similar conditions as nationals of that state and should have access to the job market. An area of controversy is the issue of detention of refugees which is forbidden by the law except on the grounds that there is a need to verify the applicant's identity, to examine the reason(s) stated by the applicant for as a refugee, to determine if the applicant had the right to enter the borders of a member state, if the applicant will be refouled, and for reasons related to national security.²⁵

²² Ackers, D. (2005). The negotiations on the asylum procedures directive. *European Journal of Migration and Law*, 7(1), 1-34.

²³ 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.

²⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

²⁵ Papademetriou, T. (2016). Refugee Law and Policy: European Union. *Library of Congress*. Legal report, 78-106.

The CEAS requires member state to grant subsidiary protection to refugees on the grounds that even if they did not qualify or meet the requirements to be granted refugee status or international protection if they are return or refouled to their country of origin, they may face harm or suffering. This can also be in the case where the applicant if he or she is return home may face charges that can led to him or her being sentenced to death or be tortured. This will be violation of article 2 and 3 respectively in the European Convention of Human Rights.²⁶

²⁶ European Convention of Human Rights, 4 November 1950.

2. VIOLATIONS OF REFUGEE HUMAN RIGHTS IN THE EUROPEAN UNION

Enshrined in the Universal Declaration of Human Rights of 10 December, 1948 are certain core rights such as the right to life in Article 3 of the Declaration, no one is to be treated as a slave Article 4, Article 5 which focuses on prohibition of torture. The Declaration also content other nonhard core rights which cannot be neglected such as right to education, remedy, prohibition of arbitrary detention or exile, freedom of movement. Since the document is not a treaty it is technically not legally binding to its signatories but never the less, member states to ensure and protect the rights²⁷ These rights are further upheld in the European Convention on Human Rights (ECHR) where within the jurisdiction of each member state, they are required to do everything possibly best to protect fundamental human rights. Since the ECHR is a treaty, then it is legally binding to its signatories. As such, it has its own international enforcement mechanism to ensure that parties to it adhere to their responsibilities. The European Court of Human Rights in Strasbourg, France seats as the machinery to to enforce the ECHR. It is relevant to note that both states and individuals can lodge a complaint at the European Court of Human Rights. Also, the judgement of each case is legally binding and those who are parties to a particular ruling must abide to the final decisions of the judges and take necessary step to comply with the court's decision.²⁸

Several factors such as domestic wars like in Syria, political persecution, physical and mental violence forced certain people to move out of their country of origin to seek refuge in most European territories which to the refugees is a safe heaven. With this outburst off refugees that witnessed a surge after World War Two (WW2) at the borders of member states²⁹, it is without doubt that certain human rights were violated. Never the less, it is essential to note that member states are required to ensure good living conditions for the refugee by providing adequate housing, food, medical care, employment, just to list the few. The European Court of Human Rights makes

²⁷ Universal Declaration of Human Rights, 10 December, 1948.

²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14.

²⁹ Moreno-Lax, V. (2017). Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. Oxford University Press. 1-28.

it clear to EU member states that they have the right to use legal means necessary to curb the influx of refugees coming into their borders, but must respect international laws because as in the case law *Medvedyev v France* 3394/03 were in the courts decision, “the end does not justify the use of whatever means to prevent the mass inflow of refugees into their borders”³⁰

2.1. Detention of refugees in Europe

The European Convention on Human Rights which has been in existence for more than 70 years does not directly have refugee laws. It indirectly covers certain rights which can also be enjoyed by refugees such as right to life, prohibition of torture, right to fair trial, right to liberty and security. and effective remedy. With regards to the CEAS and together with the UN Refugee convention, the detention of refugees is prohibited. According to the Directive 2003/9/EC on the conditions for the reception of asylum seekers to detain means when a member state to restrict the right to freedom of movement of an asylum seeker to a particular place depending on the place of entry of the refugee. Article 5 of the European Convention on Human Rights ensures the right to liberty and security. As a right to personal freedom, everyone has the right not to be deprived from enjoying their personal liberty in the form of arrest or detention. The detention of any refugee must be done in accordance with democratically recognised laws, the reason for the arrest must be clear. Also, if there is no proof or grounds that the detainee will not attend trials then they should be release pending appearance before a legal authority and if not guilty should be compensated. In the case law *Assanidze v. Georgia*, the European Court of Human Rights found Georgia guilty for unlawful arrest of the applicant which breach his right as spelled out in Article 5 of the European Convention on Human Rights. The court ordered the release of the applicant and remedy be paid to him.³¹

³⁰ Case 3394/03, ECHR, Grand Chamber, *Medvedyev v France*, 29 Mar 2010 para 81.

³¹ Case 71503/01, European Court of Human Rights, 4 August 2004.



Fig 2: Refugees in detention camp in Greece amidst the coronavirus.
Source: Euro Mediterranean Human Rights Monitor (2020)

The figure above shows the nature of a detention camp in Greece together with women and minors characterise by overcrowding, poor living condition. The sanitary conditions in most detention centres for refugees in Europe is poor which can elevate the rate of the spread of diseases.³² In connection with the principles EU refugee laws predominantly CEAS, gives member states sweeping powers when it comes to detention with regards to Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection. For instance, states are allowed to detain refugees will verifying their identity, to investigate if an applicant has the right to be in a particular member state. With sort of powers given to candidate states, they can detain refugees arbitrary which is a denial of their liberty. This method is used as a form of deterrence to discourage other asylum seekers.³³ Never the less, states are required if necessary, to only detain refugees for a short period of time and for those who do not pose a any danger to escape before they are granted refugee

³² Majcher. I, Flynn. M. (2014), *Immigration detention in Greece*, Geneva, 3-18.

³³ Hailbronner, K (2007), *Detention of Asylum Seekers*, *European journal of migration and law* 9, 159-172.

status. In conjunction with Article 18 of the Directive 2013/33/EU, member states should not necessarily detain a person for the sole reason that they are applying for asylum.³⁴ Asylum seekers should be granted the right to move freely without prolonged detention. Following the case law *E.K v Greece*, the applicant's detention period was extended up to six months for fear that he may abscond but the court found that the six months period was too long to conclude all administrative procedures while in detention as asylum claims for detainees in particular have to be concluded rapidly.³⁵ As such, there was a violation of his right guaranteed by Article 5 of the European Convention on Human Rights.

Asylum seekers who are in detention camps and especially need to appear for a hearing must be given adequate housing, food, medical care, and legal help. The reception conditions at the detention sites should not devalue the standard of living for the applicants or detainees. If these fundamental necessities are not met then it can result in human rights abuses. With regards to the Case of *Mubilanzila Mayeka & Kaniki Mitunga v. Belgium*, the court in its decision found that the applicant who was five years old travelling alone to meet her mother who has been given refugee status was detained in a Brussels airport for two months without any legal representative which was considered as a violation of Article 3 of the European Convention on Human Rights which amounts to inhumane and degrading treatment. The authorities ignored the fact that as a minor travelling alone it is easy for the child to be in suffering and it was their duty to provide adequate care to the child.³⁶

2.2. Deterrence policy

Following the aftermath of the Arab Spring coupled with wars in Africa, persecution ranging from religious to political beliefs, and violence were some of the major reasons that force some people to leave their country of origin to resettle elsewhere. As migration became a crisis in the European Union, the granting of asylum became a political issue and some countries even mounted physical barriers to deter asylum seekers.³⁷ The attitude and reception nature towards the earliest refugees were not as strict and political as today. The shores of Southeast Europe (countries like Greece,

³⁴ *Ibid*

³⁵ Case 73700/13, ECHR, Grand Chamber, *E.K v Greece*, 14 January 2021.

³⁶ Papademetriou, T. (2016). *Refugee Law and Policy: European Union*. Library of Congress. Legal report, 78-106.

³⁷ Gammeltoft-Hansen, T. (2014). International refugee law and refugee policy: the case of deterrence policies. *Journal of Refugee Studies*, 27(4), 574-595.

Romania, and part of Turkey)³⁸ recorded an overwhelming number of refugees via the seas and over land spiking of refugee crisis. This high flow of refugees or migrants raise serious security concerns which motivated EU member states to look for lasting situations.³⁹ EU member states took on measures to curb down the volume of asylum seekers arriving at their borders. It is without doubt that member states have the rights to take measures to check irregular migration at their borders⁴⁰ nonetheless, it is the different ways in which they deter refugees even possible bona fide refugees from seeking asylum or protection. There are no democratic or international laws that will permit or allow states to violate human rights for the purpose of protecting their borders and to deter asylum seekers. The deterrence policies adopted by some European nations can led to the violation of refugee's human rights.

Some countries resorted to externalisation policy by forming partnership with countries of origin for the refugees. It is believed that one of the best strategies to deter irregular migration and asylum seekers is from their country of origin. The externalisation policy aimed at shifting task to prevent and stop the mass influx of refugees at third party country or country of origin was adopted at the Tampere Agreement in 1999 which was a meeting to manage to the flow of refugees. As part of this agreement, Italy and Libya entered into an agreement to train Libyan coastal guards and to support the creation of detention camps in Libya.

³⁸ Liebscher, K. Christl, J. Mooslechner, P. Ritzberger-Grünwald, D: *European Economic Integration and South-East Europe: Challenges and Prospects*, 2005, Edward Elgar Publishing Limited. 1-368.

³⁹ Huysmans, J. (2000). The European Union and the securitization of migration. *JCMS: Journal of Common Market Studies*, 38(5), 751-777.

⁴⁰ Triandafyllidou, A. Dimitriadi, A. (2014), Deterrence and Protection in the EU's Migration Policy, *The International Spectator*, 49:4, 146-162.



Fig 3: one of the detention centres Libya

Source: the humanitarian practice network (2018)

The figure above shows one of the refugee centres in Libya. It is relevant to note that as part of Italy's effort to reduce and discourage migrants and asylum seekers from migrating to Italy. The problem with this relationship is that being backed by a superior nation like Italy, there have been gross violations of human by Libya's coastal guard and in the detention centres. Majority of the detention sites tied with human right reports are exemplify with poor sanitary conditions, mental and physical torture, sexual abuse and malnutrition.⁴¹ Migrants are left in a deteriorating situation in Libya where they are at the mercy of militias which became popular post 2011 civil war. These militias based on dozens of report from different international organisations, Non Governmental Organisation (N.G.O), several human rights watch groups have confrimed that refugees are tortured, sexxually abused and even sold as slaves.⁴² It is reported that the detainees have to either bribe or be trapped in the detention centres under dehumanising conditions at the quirks of groups

⁴¹ Beşer, M. E., & Elfeitori, F. (2018). Libya Detention Centres: A State of Impunity, Ankara, 1-20.

⁴² United Nation Support Mission in Libya, Detained and Dehumanized: Report on Human Rights Abuses Against Migrants in Libya, 13 December 2016.

who have no recognition for the rule of law. This has led to the reduction even for bona fide asylum seekers in the European Union.⁴³

2.2.2. violation in relation to interception at seas

Most refugees fleeing Africa go through Northwest Africa particularly via Libya because of its geographical proximity to Europe and since there is no effective and efficient government body post Ghadffi's removal from power. The migrants who transit through Libya often rely on smugglers most of whom are unskilled transports them using inefficient sea worthy vessels which bare makes it to the shores of Europe.⁴⁴ Some migrants risk their lives at sea just to make it at the borders of European member states while others are intercepted at sea under horrible conditions and are at times abandoned at the mercy of the seas. Close to 10.000 people have lost their lives attempting to cross the mediterranean sea over the last decade. The fact is that it cannot be denied that some of the vessels intercepted have bona fide refugees.⁴⁵ The death rate at sea which has been partly blamed on the European measures to intercept, refouled, and to eventually deter migrants from coming to Europe. In as much as they have the right to protect their borders, the interception measure have to be balanced in relation to the protection of refugees human rights as gaurantee in the UN Refugee Convention on Human Rights.⁴⁶

⁴³ Vandvik, B. (2008). Extraterritorial Border Controls and Responsibility: A View from ECRE. Amsterdam Law Forum: 27–36.

⁴⁴ United Nation Support Mission in Libya, Detained and Dehumanized: Report on Human Rights Abuses Against Migrants in Libya, 13 December 2016

⁴⁵ Fischer-Lescano, A., Löhr, T., Tohidipur, T., (2009), Border Controls at Sea: Requirements under International Human Rights and Refugee Law, *International Journal of Refugee Law*, (21), 2, 256–296.

⁴⁶ D. Lutterbeck, (2006), Policing Migration in the Mediterranean, 11, *Mediterranean Politics*, 59-82.

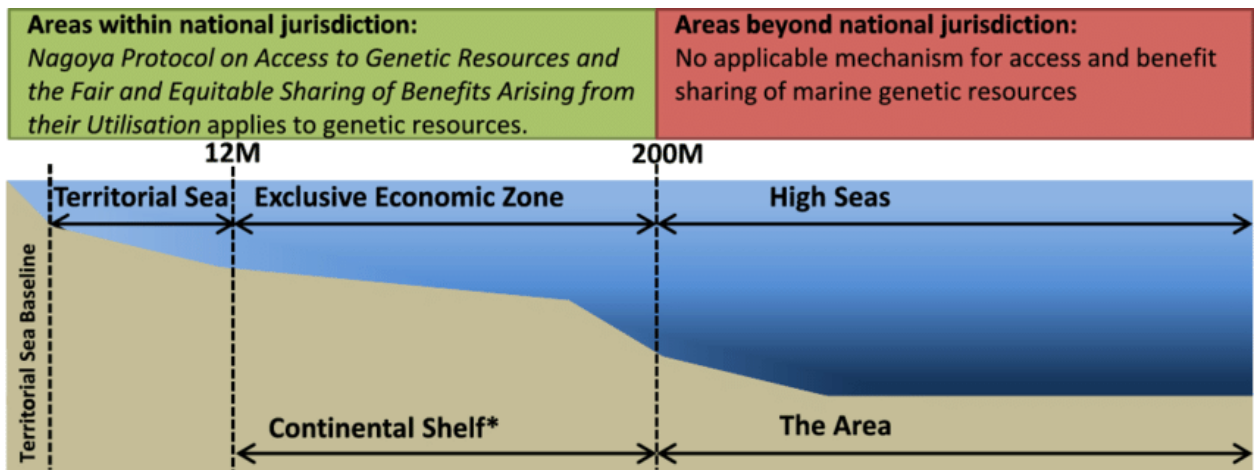


Fig 4: The division of the ocean into different zones according to the United Nation Convention on Law of the Sea.

Source: Vierros, M., Suttle, C. A., Harden-Davies, H., Burton, G., (2015), Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources, *Research Gate*, 1-8.

From the figure above some the different zones of the ocean according to the United Nations Convention on Laws of the Sea,⁴⁷ some European states are of the opinion that the interception of migrant vessels is usually around the section of the ocean where laws do not apply known as the high seas.⁴⁸ Nevertheless, this does not mean that vulnerable migrants will be left whims of the ocean to survive on their own with vessels that cannot match with the might of the ocean. States like Germany, Spain, Greece and especially Italy have repeatedly stressed on the issue that their arm force have the right to intercept migrant vessels believed to be destined for their borders. It should be understood that some of the intercepted vessels with potential bona fide refugees when forced back home and may be expose to torture violates the policy of nonrefoulement and Article 3 of the ECHR. It is without doubt that it is that right of states to decide who enters their country but willfully returning someone to a country where they can face danger of being tortured is a violation of prohibition of torture. In the case law *Hirsi Jamaa and others v. Italy*, the Grand Chamber of the European Court of Human Rights was against the Italian decision of intercepting a vessel with refugees on the Mediterranean sea. The applicants were brought on board an Italian military ship and returned to tripoli without telling them exactly their destination and were forcefully handed to Libyan authorities which exposed them to torture, sexual exploitation, and forced labour which is against the ECHR.⁴⁹ It is evident that the lack of willingness and a clarified or harmonised law

⁴⁷ Vierros, M., Suttle, C. A., Harden-Davies, H., Burton, G., (2015), Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources, *Research Gate*, 1-8.

⁴⁸ *Ibid*

⁴⁹ Case 2765/09, Grand Chamber of the ECHR, *Hirsi Jamaa and others v. Italy*, 23 February 2012.

on how to rescue refugee at sea has been a contributing factor of human right violations. As this confusion and dispute takes hold, some states refuse to rescue refugees due to the costs and even reject to welcome rescued refugees in their ports.⁵⁰

3. RECOMMENDATIONS AND POSSIBLE SOLUTIONS

Migration will always be part and parcel in the history of every society. One cannot deny the fact that the previous EU legal framework on refugee is not without loopholes which is responsible for the violation of refugee human rights. As such, there is a need to reverse and propose a new framework that can safe as a living instrument. That is it should be able to solve current issues related to migration and refugee law. One of the incident that raised a lot of red flag was the Lampudsa event where hundreds of migrants drowned and died at the Island of Lampadusa in 2013. This proofed that the legal frame refugee had lapses. This refugee crisis was more severe between 2015 and 2016 as the call for a new or to reform the CEAS. In most cases, the areas that raised concern was the lack of solidarity, lack of trust, and unwillingness of some EU member states to accept refugees in within their borders.⁵¹ Events like the dawn of the of the Arab spring and ther migration factors like climate change, running for fear of persecution, the shores of Europe signicantly recoreded an influx of asylum seekers. This has had an impact on its political, and socio economic life style. Refugees or those seeking asylum can contribute the growth of an economic if there are better laws are passed to support refugees. The EU was build on the foundation of freedom of movement which is practical in the schengen zone. As such, the law makers of the EU have a responsibilty that ensures freedom of movement comes with certain rights and security. This can be done by building a strong and long standing migration legal framework which does not only deal with current migration challenges but also having long term solutions. Migration is a complex and debatable topic as parties concerned mostly view it from their nations stand point of view and how it impact their nation. As an international practice, states cannot just give a blind eye or dear ears to refugee or asylum seekers who are in need of international

⁵⁰ Martin, M. (2014), *Prioritising Border Control over Human Lives: Violations of the Rights of Migrants and Refugees at Sea*, Euro-Mediterranean Human Rights Network, 1-25.

⁵¹ Bendel, P., & Ripoll Servent, A. (2017). Asylum and refugee protection: *EU politics in crisis*, 1-11.

protection.⁵² As the EU cannot fully prevent refugees from seeking asylum in their borders, and the current refugee or migration law have not been able to tackle and resolve refugee crisis, there is need to adopt new laws that are reliable and durable enough to handle refugee related issues. This gave birth to the EU new pact on migration and asylum with a more comprehensive style towards migration.⁵³ The new pact ensures speedy response to migration challenges especially on having a faster asylum procedure, balance and adequate responsibility sharing, and more solidarity towards migrants. This is relevant in the future because it does not only contribute in providing a reliable solution to the refugee crisis but also helps to provide clear migration laws and bring trust amongst EU member states as they try to manage the refugee crisis.⁵⁴

The dialogue on migration and asylum law cannot be completed without involving or having meaningful partnership with third party countries especially the source or countries of origin. This approach will help to address some of the main causes of migration and find lasting solutions with these countries rather than waiting to intercept the migrants at sea or on land. In the long run, this will help to reduce the number of inflow of refugees to the shores of Europe and foster development in these third party countries and in the end it will be a win win solution for the departure and host countries. Never the less, for the refugees who make it at the borders of EU member states, the procedure as laid out in CEAS was to register the refugees, take biometric information, examine the reason for applying for asylum, and interview just to list the few which usually is a lengthy process as bona fide refugees are mixed with economic migrants.⁵⁵ The new solution is to have an integrated approach when refugees arrived at the borders of any EU member states. This new integrated approach proposes three main procedural approach when refugees arrived at the borders. The first step should be the prescreening⁵⁶ via identification, health and security checks, and finger print registration with the European Union Asylum Fingerprint database (EURODAC). The purpose of this is to determine transparently in an early stage which migrant will be eligible for refugee status and who will be return. This new approach makes it faster to deal with migrants when they arrive at the different European borders after which a large portion of those who will be granted legal entry to seek for asylum will be consisted of bona fide

⁵² European commission, A fresh start on migration: building confidence and striking a new balance responsibility and solidarity https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 Accessed 10 April 2021.

⁵³ Hadj-Abdou, L. (2021). From the Migration Crisis to the New Pact on Migration and Asylum: The Status Quo Problem, *Social Science Research Network*. 1-15.

⁵⁴ EUR-Lex, Access to the EU Law <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN> 11 May 2021.

⁵⁵ Papademetriou, T. (2016). Refugee Law and Policy: European Union. *Library of Congress*. Legal report, 78-106.

⁵⁶ Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM (2020) 612 of 23 September 2020.

refugees which makes it easy to grant them refugee status. The next procedure in conjunction to the first will be an amendment of the 2016 proposal for a new Asylum Procedures Regulation.⁵⁷ At this level, those who passed the prescreening stage, their applications would be handled at a fast pace in order to filter out migrants who are not in serious need of protection or they do not face any serious threat of persecution for them to qualify as refugees and return them while being mindful of the nonrefoulement principle. As such those who do not qualify to pass this stage will be return swiftly. This will give the refugee authorities of respective EU member states the to opportunity to deal with applications more effectively and efficiently to deliver a timely and clear decisions.⁵⁸

Another area that had lapses is the aspect of demonstrating solidarity and the act of sharing responsibility. It is essential that a harmonised framework relating to responsibility sharing and solidarity in the light of migration and asylum is necessary by adopting a new regulation on migration and asylum which legal binding.⁵⁹ The former Dublin regulation on how responsibility was shared did not really revolve the refugee crisis which created room for a new reform.⁶⁰ Clearly setting out the legal procedure for solidarity and fair responsibility sharing is vital as to how migrants and asylum seekers will be treated. By doing so, the load will not rest solely on the shoulders of one particularly member state who may have more influx of refugees than the others probably due to their geographical location which attract more migrants. As the load is shifted from individual member states to the entire EU, better treatment will be provided to the refugees in terms of health, camping, food at the reception facilities.

One of the topical issues in relation to refugees is the principle of nonfoulement. It is internationally recognised not to return refugees to countries where they may face significant dangers that is why prescreening is necessary to determine bona fide refugees from non vulnerable migrants. That is those who will not face severe harm or persecution if returned. The return principle usually depends on the national laws of one member state to another rather than a harmonised refoulement policy. A more concrete and robust common refoulement policy were the different resources of the EU as whole will be available to return unqualified migrants hospitably without violating their human rights is essential. In order for this approach to be sustainable, there is a need to have an open voluntary return scheme were those who willingly return will be given some degree of support to help them reintergrate into the society. Therefore, if the EU financially support and promote those who want to voluntarily return then it may help to put an end to the debate over refoulement policy.

One of the main aim of the New Pact is to serve as a living document which can predict an solve future refugee crisis. If this part is missing then the failure of the new pact will be eminent. Failling to be predict

⁵⁷ Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM (2020) 611 of 23 September 2020.

⁵⁸ EUR-Lex, Access to the EU Law

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN> 11 May 2021.

⁵⁹ Proposal for a Regulation on asylum and migration management, COM (2020) 610 of 23 September 2020.

⁶⁰ Carrera, S. (2021). 1. Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum. *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, 1.

future force majeure in relation to refugee crisis may be catastrophic for member states and EU at large. Just as nations have militaries to be prepared to defend their sovereignty against adversaries, so to the EU need a foresight to anticipate what future refugee crisis may look like because it is this background that facilitates effective response and resilience. This was proposed in the new Migration Preparedness and Crisis Blueprint.⁶¹ The main focus of this will be to anticipate and be prepared in order to tackle refugee crisis as it will help the EU and its member states to respond to unforeseen refugee crisis with ease and certainty.

Furthermore, the EU need a harmonised strategy search and help distress migrants especially at sea. Migrants especially from Africa go through the mediterranean sea to Italy and Malta as their main routes. As the number of migrants who arrived at the territorial waters of Europe about 1.4 million witnessed an increase, most EU member states resorted to the use of deterrance policy to prevent refugees from reaching their borders. For instances, in 2018, the EU Fundamental Rights Agency (FRA) published a list of private actors preventing them from carrying out search and rescue operations at sea. It is relevant to note that the EU cannot own its own without partnering with private organisations to carry out search and rescue operations.



Fig 5: Map showing NGO ship banned from carrying out SAR operations in the Mediterranean Sea 15 December 2020.

Source: EU Agency for Fundamental Human Rights

<https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal>

The figure above shows the list of NGO's coloured in red which were banned from carrying out search and rescue operations. Looking at the International Organisation for Migration (IOM), the

⁶¹ Commission Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), C (2020) 6469 of 23 September 2020.

death toll of migrants did not significantly drop as certain private bodies faced criminal proceedings from carrying out search and rescue operations over the mediterranean sea.⁶² One of the main destination of migrants is the shore of Lampadusa. Ever since the Lampadusa incident of 2013 where a migrant ship drowned leading to the death of more than 300 migrants, the Italiana government invested in search and rescue missions but lack of solidarity, responsibility sharing, and lack of financial support was a key role why most search and rescue missions were abandoned. In this regard, the solution is to have binding cooperation and commission not only with other EU member states but also with private organisations or stakeholders who have the resources to carry out search and rescue operations.⁶³ As it has already been established that contributions from private actors can help reduce the death rate of migrants at sea, the EU has proposed an efferctive migration commission to assit search and rescue operations.⁶⁴

A key area that needs more emphasis is that of signing better bilateral partnership with third parties especially those of the departure and the transit nations. The key issue here is to sign partnership that benefit the EU, the third party country, and the refugees. With this balance, the challenges face in relation to migration will be minimise. To achieve this approach, the EU can promote developmental activities in some of those departure countries, grant visas to qualified migrants, issue schoolarships to talented aliens. If relaible and resilient bilateral agreement are signed then it can help to reduce the inflow of refugees in Europe.⁶⁵ In this regards, more attention should be paid on the partnership agreed with third party nations so that EU policies⁶⁶ may not make the refugee challenges return to the state of affairs before the New Pact proposals.

⁶² Lloyd-Damnjanovic, I. (2020), Criminalization of Search-and-Rescue Operations in the Mediterranean Has Been Accompanied by Rising Migrant Death Rate, *Migration Policy Institute*, 1-6.

⁶³ EUR-Lex, Access to the EU Law

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN> 11
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⁶⁴ Commission Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, C (2020) 6468 of 23 September 2020.

⁶⁵ EUR-Lex, Access to the EU Law

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN> 11
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⁶⁶ Bendel, P., & Ripoll Servent, A. (2017). Asylum and refugee protection: *EU politics in crisis*, 1-11.

CONCLUSION

Violations of refugee's human rights has and will continue to be a complex and debatable topic. The same conditions that were used to resolved refugee crisis in the past may not necessarily apply in current circumstances. It is however realised that one cannot entirely put an end to migration and no one nation can deal with refugee crisis on her own. Open collaboration and commitment are essential to tackle the challenges that are associated with violation of refugee's human rights. According to the UN Convention on Refugee, for a person to be granted refugee status, they must be sufficient grounds or reasons to believe that they had face severe harm or persecution from the country they departed from. This gives EU member states a huge task who do not only have to ensure that the refugees who arrived at their borders are protected but also to determine or be able to swiftly separate from the diverse refugees those who actually qualify for refugee status and those who if return will not face any real or severe harm in their country.

Even though the ECHR does not directly mention violation of refugee human rights, but certain action its parties to the Convention like returning a refugee to a country where there is profound evidence that they will face serious danger or torture can result to breach of Article 3 of the ECHR. Due to the geographical location of some EU member states, it is without that those states closest to the European shores like Italy, Spain, Greece, and Portugal will always witness an influx of refugees. As such, these states need more support from the EU and its member states than those states that are farther inland. States should not abandon each other just because they are not dealing directly with refugee crisis as another state. The goal should be the willingness of states to help in solidarity and to accept responsibility as accorded to them.

It is realised that one of the major lapses in lieu with refugee law was the absence of a reliable harmonised framework. In most cases, EU member states depended on their national laws to address refugee related issues which contributed to violations of refugee's human rights as discussed in the paper. It's evident that some of the policies adopted by some EU member states like intercepting migrant boats, criminalising search and rescue operations of private actors forced refugees to dangerous sea routes at the mercy of smugglers which often result to the death of hundreds of refugees. The EU New Pact proposals on migration and asylum made mention of mechanism to be able to predict and resolve future refugee crisis is a big goal which if the New

Pact is fully implemented will achieve positive results. For this to work, all the stakeholders involve have to be committed to their role and demonstrate the willingness to cooperate in solidarity and sharing responsibility. The actors involve need to be able to embrace the new proposals for the benefit of the EU, departure countries and the refugees. The mere fact that migration remains to be a topical issue, it will always open room for future researchers to continue searching for root causes of migration and how to provide long standing solutions.

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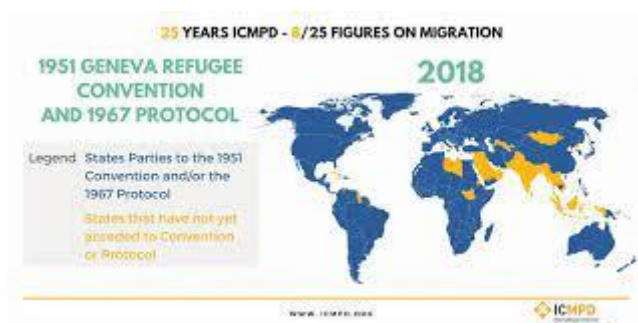
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APPENDICES

Appendix 1. Member states to the Refugee Convention 1951



Source: International Centre for Migration Policy Development.

Appendix 2. Refugee detention camp in Greece amidst the coronavirus



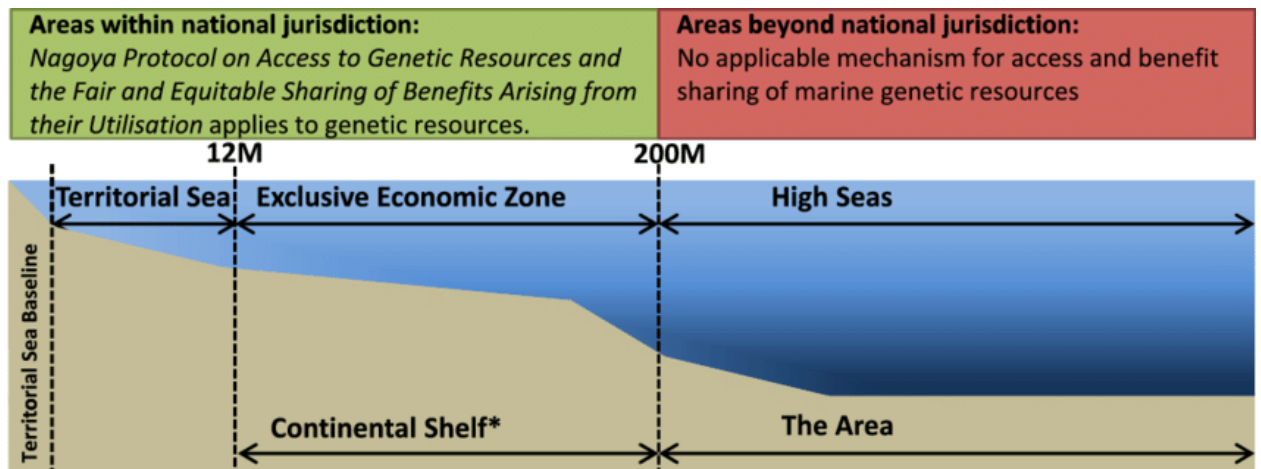
Source: Euro Mediterranean Human Rights Monitor (2020)

Appendix 3. one of the detention centres in Libya



Source: the humanitarian practice network (2018)

Appendix 4: The division of the ocean into different zones according to the United Nation Convention on Law of the Sea.



Source: Vierros, M., Suttle, C. A., Harden-Davies, H., Burton, G., (2015), Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources, *Research Gate*, 1-8.

Appendix 5. Map showing NGO ship banned from carrying out SAR operations in the Mediterranean Sea 15 December 2020.



Source: EU Agency for Fundamental Human Rights

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