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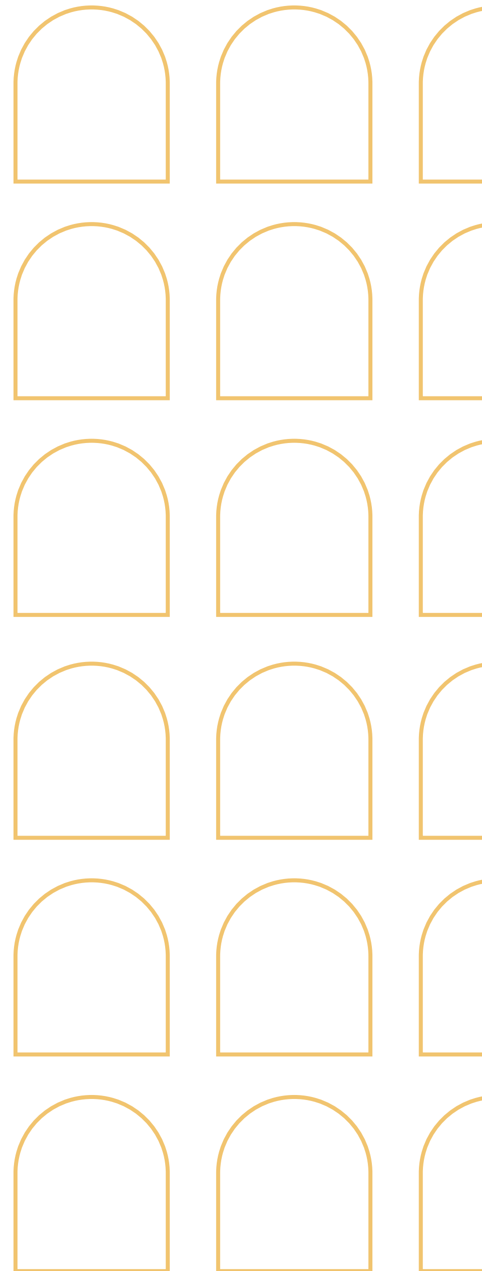
POLICY BRIEF

Implementing the United Nations Global Compact on Refugees?
Global Asylum Governance and the Role of the European Union



1. Introduction: 'Contained mobility'

The ASILE project studies the changing relationship between containment and mobility amongst the key asylum governance instruments and actors from both an international comparative and European Union (EU) perspective and from the European Union (EU). It aims to inform the EU's role in the implementation of the United Nations Global Compact on Refugees (UN GCR). This Policy Brief outlines and synthesizes the preliminary findings and policy recommendations emerging from the first 18 months of the ASILE project which started in December 2019.

There has been a substantial body of scholarly literature on the practices and legality of containment in migration instruments. Containment policies are characterised under various labels. These include non-entrée, non-admission, non-arrival, deterrence and deflection, as well as source-control and delegated contain-

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ment policies directed at the countries of origin of refugee flows (Aleinikoff, 1992; Shacknove, 1993; Noll and Vedsted-Hansen, 1999; Moreno-Lax and Giufree, 2017).

ASILE provides a critical analysis of a wide range of policy, legal, financial mobility and inclusion instruments that have been officially portrayed as 'promising practices' by the UN GCR in in countries like Brazil, Canada, Jordan and South Africa. These include resettlement, community or private sponsorship, humanitarian admission or dispensation programmes, and economic investment or trade deals focused on labour market integration in refugee-hosting countries.

The ASILE project unpacks these practices and interrogates the rationales upon which they are premised, and their inclusionary or exclusionary components: do they facilitate agency, mobility and the international protection of asylum seekers and refugees? What are the context and region-specific parameters characterizing the dynamics of their scope and local implementation? Does the design and its effects serve the purpose of containment or does it run contrary to international and regional refugee and human rights standards? ASILE country-specific research demonstrates that instruments or tools formally understood or framed as 'mobility or inclusion' such as "complementary pathways" present some *'containment-driven'* features, leading to instances of individual exclusion and restrictions of refugees' agency (ASILE Country Fiches).

Our research indicates that while complementary pathways instruments feature some relevant inclusionary or protection-driven components, they also display a set of exclusionary features which operationalise hierarchies of deservedness and temporariness, and lead to discrimination (Macklin and Blum, 2021; Tsourapas, 2021; and Medina Araújo, 2021). This trend is also apparent in the EU (See *Section 4* of this Policy Brief below), where the resettlement of refugees has been promoted as the key legal pathway but mainly as part of a broader migration management and containment agenda with third countries (Carrera and Cortinovis, 2020).

ASILE shows how these asylum governance instruments might be better understood through the lens of a '*contained mobility*' paradigm (Carrera and Cortinovis, 2020). 'Legal or complementary pathways' instruments envisage or allow for some limited or highly selective mobility and socio-economic inclusion of people looking for or benefiting from international protection. However, exclusionary features and constraining dynamics of containment are still at play in their rationale, operational design and/or practical implementation dynamics and actors.

2. Critical Assessment of 'Promising Practices' around the World

With regards to Refugee Status Determination (RSD), the ASILE project confirms the large margin of discretion and lack of transparency affecting current RSD procedures which have already been identified in the literature (Costello, Nalule and Ozkul, 2020). The Project is paying attention to the exclusionary and inclusionary components of individual RSD procedures under the 1951 Geneva Convention standard compared to group-based RSD adopted by countries like Turkey (Ineli-Ciger and Yigit, 2021) or Brazil (Medina Araújo, 2021). The research is also exploring the roles of UNHCR in states that are not signatory to the 1951 Geneva Convention such as Bangladesh (Uddin Khan and Mahbubur Rahman, 2021; and Hossain, 2021).

The private or community sponsorship model implemented by countries like Canada constitutes an example of a policy which is often considered as "promising". ASILE research warns that the Canadian private sponsorship model has the potential to "download and privatise what should be a public responsibility to resettle refugees thereby replacing a public commitment with a private charity" (Macklin and Blum, 2021). Community sponsorships can be successful when implemented alongside publicly funded resettlement schemes, and when they ensure non-discriminatory access and conditions (Tan, 2021b).

An additional example of a "complementary pathway" instrument is the Zimbabwean Dispensation Programme (ZDP) (Khan and Rayner, 2021). ASILE research has revealed that the programme was not meant to relabel refugees as ordinary migrants. Yet, "many Zimbabweans who came to seek asylum in South Africa felt compelled to transfer to the Zimbabwean Dispensation Programme" and fall under an economic migration status rather than refugee protection status. The ZDP provided a greater security of residence with a 4 years residence work permit when compared with the asylum seekers permit which is valid for 3 to 6 months. Thus, de facto ZDP has become a complementary pathway for refugees and other people looking for international protection.

LESSONS LEARNED

Community Sponsorships

Community sponsorship is a flexible mobility approach that may either be a standalone complementary pathway or a form of resettlement. The New EU Migration and Asylum Pact aims to develop a 'European model of community sponsorship.' Based on the Canadian experience and lessons learned from recent European pilots, the introduction and expansion of community sponsorship in the EU should be undertaken in line with the following principles:

- 'Additionality' to existing resettlement programmes;
- Non-discrimination between refugees in terms of selection and standards of treatment;
- Protection-focused, not primarily for purposes of labour or education migration;
- Clarity of legal status for sponsored refugees; and
- Transparency and accountability, through a robust legal or policy framework (Tan 2021a).

The "Jordan Compact" of 2016 has been framed as one of the main responses to the so-called 'Syrian crisis'. Although the Jordan Compact came along with a promise of resettlement, its main focus is still on refugees' labour market integration as 'deterrence' to onward mobility towards the EU. It is therefore different from complementary pathways focused on mobility. The economic investments "have unlocked the potential to further support forcibly displaced populations" (Tsourapas, 2021). Nevertheless, the main note of caution is that such strategies seem to work only in the short-term, as political attention and funding over time are fading from Jordan. Despite this, the needs of asylum and refugee will persist long-term.

The main challenge characterizing the Jordan Compact is impractical socio-economic inclusion in a fragile local labour market and insecurity of residence. This is because Syrians are expected to repatriate from camps once the situation allows them to. The situation for refugee livelihoods in Jordan has considerably worsened since the Covid-19 pandemic (Turner, 2021). The focus on creating employment for Syrians has led to the emergence of an uneven playing field among refugees and migrants of other nationalities. Furthermore, the Jordan Compact serves the objective of migration deterrence for Syrian refugees not to move into the EU (Fakhoury, 2021).

The way in which South American countries have dealt with the Venezuelan crisis has presented some interesting insights for the EU (Brumat and Freier, 2021). Brazil has granted residence permits based on both the expanded definition of refugee of the Cartagena Declaration and on the application of the Residency Agreement of MERCOSUR (RAM) in order to deal with one of the largest influxes of forcibly displaced people in the history of the region. This has allowed the Brazilian state to reduce the backlog of residence and refugee requests while the RAM has provided an alternative to formal refugee protection (ASILE Country Fiches; ASILE Book on the EU Pact and the UN GCR; and Brumat 2021).

LESSONS LEARNED

South American Responses

In the face of large-scale displacement of Venezuelan citizens, South American borders remained largely open, as governments recognized that it is not possible to prevent border crossings. Brazil provides residence permits to Venezuelans based on migration (following the RAM) and refugee status. This provides them with the right to work and security of residence. Despite this, a large part of the Venezuelan displaced population works in the informal market.

The RAM provides a two-year residence permit which can be turned into a permanent one after providing a proof of employment or other subsistence. However, ASILE research on Brazil shows that having regular status in Brazil is not necessarily a guarantee of employment (Medina Araujo 2021). Unlike the case of the Zimbabwean Dispensation Programme, which is purely labour-related, Venezuelans are not compelled to apply for migratory status instead of refugee status. The choice between obtaining regular status as a refugee or migrant is not closely related to the reasons why the person left Venezuela. Rather, the choice depends on the economic status of the person because applying for refugee status is significantly cheaper than applying for migrant status. The choice can also depend on mobility opportunities because refugees cannot return to Venezuela and many people would prefer to go back temporarily for various reasons, such as to visit their relatives.

ASILE research highlights the central importance of ensuring adequate security of residence and a decent right to work – as a "composite right" comprising "both the freedom, accessibility and quality of work". This is because they are essential to ensuring international protection and socio-economic inclusion (Costello and O'Cinnéide, 2011). The inclusionary components of group-based recognition instruments and procedures, which are currently under-appreciated, calls for further research. However, group-based RSD runs the risk of curtailing legally binding socio-economic rights, freedom of movement and family life, and family reunification rights when compared to individual-based refugee statuses.

3. Migrants or Refugees? Rethinking People in Asylum Governance

ASILE research reveals a problematic reframing or relabelling of people in asylum governance instruments across all countries covered in the ASILE Country Fiches. Individuals looking for international protection, and particularly those who arrive spontaneously, are given different labels and statuses by national authorities which depart from the Geneva Convention's refugee status. These include other labels such as 'forced migrant', 'forcedly displaced person' or 'temporary protection beneficiaries' (ASILE Country Fiches) for which no commonly or internationally recognised definition exists.

Relabelling individuals' statuses runs a profound risk of blurring refugee protection with migration management in fundamental ways. This has negative implications on individuals, and their agency, as it reframes people with legitimate claims for international protection as "migrants". It also affects how state actors consider their discretion or sovereignty with regards to controlling the entry of foreigners in order to exclude people seeking international protection guaranteed by human rights instruments and the rule of law, where normally no derogation is permitted. ASILE research highlights that the emphasis put on the "right of states to control migration" prioritises states interests over human rights and essential rule of law guarantees (Spijkerboer, 2021).

The answer to the labelling question is central when identifying the applicable set of international and regional legal standards, the related package of human rights granted to individuals in international law, the obligations of (and potential responsibility by) state authorities and the roles of international organisations (such as UNHCR or IOM) in the implementation of asylum policies.

ASILE examines the extent to which the use of labels is related to relevant actors: who frames knowledge and priorities in these policy domains? What are the roles and competences of these actors on asylum and migration management (and capital, e.g. funding)? Who implements relevant policies and projects on migration and refugees? Are attempts to reframe statuses a conscious or instrumentalist effort by relevant states actors to limit their responsibilities in light of international refugee law (1951 Geneva Convention) and human rights law and restrict individuals' rights.

The ASILE Country Fiches show the key protection-enhancing role played by (1) national courts that adjudicate justice for people looking for international protection through a constitutionality test and by upholding international refugee-protection standards (e.g. Canada, Bangladesh or South Africa)[2]; (2) international and regional human rights monitoring bodies in keeping states accountable (ASILE Country Notes on "*International protection issues and recommendations from international and regional human rights mechanisms and bodies*" available in the ASILE Portal); and (3) civil society actors (CSAs) and human rights defenders, especially those engaged in the promotion and monitoring of human rights and refugee protection standards compliance by states actors.

4. Principles contested

The UN GCR is anchored by a set of guiding principles. Paragraph 5 of the GCR emphasises that "The Global Compact emanates from fundamental principles of humanity and international solidarity, and seeks to operationalise the principles of "burden- and responsibility-sharing" to better protect, assist refugees and support host countries and communities." The actual meaning and scope of these principles are, however, far from uncontested.

While solidarity is one of these often-quoted concepts, this notion sometimes pursues or conveys 'inter-state responsibility sharing', a 'responsibility shifting' agenda and a state-centric understanding and framing of responsibility in relation to international protection (Byrne, Noll and Vedsted-Hansen, 2020). For instance, in the new EU Pact the Commission called for 'mandatory flexible solidarity' which allows the Member States to choose between participating in the relocation of asylum seekers, 'return sponsorships' or capacity building and operational support (Vosyliūtė 2021).

Solidarity is wrongly framed as something voluntary and follow a 'pick-and-choose menu' or perceive it as a charity-based option as opposed to an obligatory principle aimed at ensuring state accountability in cases of human rights and refugee protection violations. ASILE's research is highlighting the need for the EU and UN members to play a more active role in upholding refugee protection and human rights obligations that are mandatory. International or regional legally binding commitments are not a matter of choice and flexible responsibility cannot be applied.

The new EU Pact understanding of the solidarity principle is also detached from individuals and the role of civil society. This was synthesised by a representative of the Global Refugee Network at the ASILE First Annual Conference who stated "*nothing about us without us*". Therefore, it is crucial that refugee voices and civil society find a place and active role in conceptualising and assessing asylum instruments.

The principles or notions of 'vulnerability' and 'self-reliance' of refugees raise similar open questions. ASILE research addresses how migration and asylum management policies actually co-create the vulnerability of particular people looking for international protection. The project emphasises the importance of distinguishing between structural and individual vulnerabilities (Costello and O'Cinnéide, 2011)

ASILE investigates whether structural vulnerability is generated by laws and policies, and rendering individuals and families vulnerable to certain harms and insecurities (Costello and Freedland, 2016). This approach does not assume that women and girls, minors or LGBTIQ+ individuals are per se more 'vulnerable' than other people are in general. Instead, the Project addresses the question of 'vulnerable to what' as this allows for a more nuanced and intersectional analysis of vulnerability.

The Project assesses the role of the law in limiting and/or enabling decent work for refugees. ASILE Country Fiches show how the notion of "self-reliance", including calls for refugees to swiftly "integrate into the labour market" are often examples

2 The ASILE Country Fiche on Canada states that "In July 2020, the Federal Court ruled that the Canada-US Safe Third Country Agreement (STCA) violates the Canadian Charter of Rights and Freedoms, basing its judgment primarily on the punitive use of detention by US authorities against asylum seekers returned to the United States by Canada", page 7. According to the ASILE Country Fiche on Bangladesh "The High Court Division of the Supreme Court of Bangladesh in the case of *Refugee and Migratory Movement Research Unit (RMMRU) vs. Government of Bangladesh* (2017) has held that Article 33 of the 1951 Convention relating to the Status of Refugees has become a part of customary international law and accordingly binding upon Bangladesh.", page 9. Similarly, The ASILE Country Fiche on South Africa identifies as *Ruta v Minister of Home Affairs* (2018) as a seminal case in refugee law "as the Constitutional Court reaffirmed the importance of non-refoulement, limited the definition of an illegal foreigner and affirmed previous cases of High Courts and the Supreme Court of Appeal concerning containment practices.", pages 10-11.

of deterrence-driven migration policies, as is the case in Jordan (Tsourapas, 2021). In other cases, it may only allow access to decent work for *some* beneficiaries of international protection or residency status under structurally discriminatory conditions. ASILE research demonstrates that the right to decent work in international human rights law, in particular its 'minimum core', applies to asylum seekers and refugees and that many contemporary restrictions on asylum seekers and refugees' access to work are in breach of International Covenant of Economic, Social and Cultural (ICESCR) and regional human rights standards (Costello and O'cinnéide, 2011).

In some national instruments, international protection safeguards that are traded for immediate access to the labour market does not always ensure a decent right to work and non-discriminatory standards (Medina Araújo, 2021; Ineli-Ciger and Yigit, 2021). Representatives of the ASILE Civil Society Group have underlined that the critical obstacles to a decent right to work are structural discriminations and injustice; language barriers; and lengthy and complex recognition of qualifications. Some individuals under specific national instruments can get trapped between poverty and destitution, exploitative labour conditions and /or the non-refoulement principle.

5. The EU's Role in Implementing the UN GCR

The EU's arrangements with third countries and the New EU Pact on Migration and Asylum present a similar containment-driven logic. ASILE research argues that this challenges both the UN Global Compact on Refugees (GCR) and the objectives and founding principles of the UN Global Compact on Migration (GCM) (Carrera and Geddes, 2021).

The key foundational legal principles reflected in the UN GCR, such as the rule of law, democratic accountability, human rights and the primacy of refugee protection, are not sufficiently reflected in the New EU Migration and Asylum Pact. Instead, the Pact prioritises *localisation and speed and externalisation.* This raises central questions in relation to the legal responsibility and accountability of state authorities and other implementing actors (including EU Agencies like Frontex and EASO) in cases of human rights violations and/or non-compliance with EU law (Carrera, 2021).

When cooperating with third countries often characterized as 'transit' states, the EU integrates non-migration related policies such as trade, development, humanitarian aid and investment with a *migration management and policing rationale*. This conflicts with fundamental human rights and the rule of law. EU third country arrangements with African countries do not consider the different interests, normative outlook, regional integration or human rights systems on cross-border human mobility (ASILE Book on the EU Pact and the UN GCR).

EU external migration policies show a strategic use of non-binding political and financial instruments – often termed 'arrangements' (Tan and Vedsted-Hansen, 2011). The essential characteristic of these arrangements is that of 'informality' as they do not qualify as international agreements or EU law. The informal nature of such agreements mean that it is unclear whether the content of the agreements is legally binding, and if so, under which body of law. Informality is evident in the EU's reliance on third countries in readmission arrangements, the so-called 'fight against migrant smuggling', and human trafficking and border management. In EU external relations on migration such informality poses fundamental challenges to the rule of law, and particularly legal certainty, democratic accountability and judicial control.

The New EU Pact still promotes one of the most well-known EU 'arrangements', the 2016 EU-Turkey statement, as a 'solution' that stemmed the number of irregular entries by people looking for international protection. ASILE Research shows that this disregards the relevance of other factors that played a key role in preventing spontaneous arrivals, such as the so-called Western Balkans Route Statement (Spijkerboer, 2016; Tan and Vedsted-Hansen, 2011 and Ineli-Ciger and Ulusoy, 2021).

It is now evident that EU arrangements are characterized by legal uncertainty, are vulnerable to politicization and create a problematic dependency for the EU on third country government's 'good will' to cooperate in the containment of refugees and migrants. The extent to which arrangements like the EU-Turkey statement co-creates 'crisis' has been largely ignored and should also be another important lesson learned in the EU's role when implementing the UN GCR (Cortinovis, 2021).

ASILE research has identified many issues in need of greater scholarly attention, in particular in relation to the 'informal' economy, gendered and

racialized divisions of labour, and the role of law in both limiting work rights and enabling decent work (Costello and O'cinnéide, 2011). The UN GCR runs the risk of blurring refugee protection from legal commitments. However, for these processes to be meaningful and effective, establishing participatory forms of independent monitoring is vital, as are clear commitments rooted in legally binding human rights and refugee protection standards.

The EU is a crucial actor in this regard; not only because its Member States host many asylum seekers and refugees but also because its asylum policies are widely emulated internationally and so can be expected to have global impacts. Moreover, the EU plays a key role in international processes that seek to leverage better protection for refugees in the main host states outside the EU. ASILE research highlights that if these processes are to improve refugees' lives, a human rights-based approach to the right to work is vital.

6. Policy Recommendations to the EU

1. Mobility and inclusion instruments should comply with the following key features: first, they must not be discriminatory either in nature or effects; second, they need to follow a principle of additionality so that they are not a substitute or alternative to the right to seek asylum and spontaneous arrivals; third, they must be protection-driven; and fourth, they cannot substitute states' public responsibilities towards asylum and refugees and their resettlement.

2. In addition to effective judicial protection and scrutiny, democratic accountability plays a crucial role in upholding states' implementation and follow up of their legal and political commitments and pledges under the UN GCR and Global Refugee Forum. The active contribution of national parliaments across relevant world regions could be further fostered in this respect. The European Parliament could more actively support and operationally implement 'parliamentary diplomacy' with other relevant transnational parliaments (e.g. the African Inter-Parliamentary Union, IPU).

This would facilitate region-to-region parliamentary exchanges and democratic accountability for the UN GCR implementation processes and EU-third country migration and asylum instruments and arrangements. This could take the shape of a permanent *inter-regional parliamentary mechanism on refugee protection and forced displacement*. This mechanism would be a venue for formal exchanges, including joint fact-finding missions, and strategy-setting on key issues and challenges; promising practices and lessons learned; and as a way to follow up of UN GRF political commitments and pledges by governments.

3. The principle of 'solidarity' needs to be reconsidered and critically examined so that it does not blur States' legally binding human rights and refugee protection commitments, and moves beyond a shifting statist focus on responsibility sharing. A *human rights and rule of law-centred approach* should inform the scrutiny of national, regional and EU policies in light of the UN GCR.

4. ASILE research is highlighting the central importance in ensuring the security of residence, including expanding the length of work/residence permits; and the right to decent work. This includes the need to consider the specificities of national and local context in relevant policies and their effects before labelling them as 'promising practices' for UN GCR purposes and assuming their transferability to other regions and countries. EU policies should also be informed, reviewed and monitored based on the actual experiences, desires, self-organization, and self-mobilization of refugees and international protection beneficiaries.

5. The implementation of the EU Pact on Migration and Asylum should focus on initiatives and projects that prioritize legal certainty, access to justice, effective remedies by people looking for international protection, and the independent monitoring of Member States and EU agencies' compliance with legally-binding international and EU human rights and rule of law. The EU should improve the design and effective implementation of human rights and refugee protection Impact Assessments (IAs) and independent monitoring tools and provide evidence on the actual impacts and practical effects of EU migration and asylum governance legal, policy and financial instruments. This should include evidence on their compliance with the rule of law and the EU Charter of Fundamental Rights.

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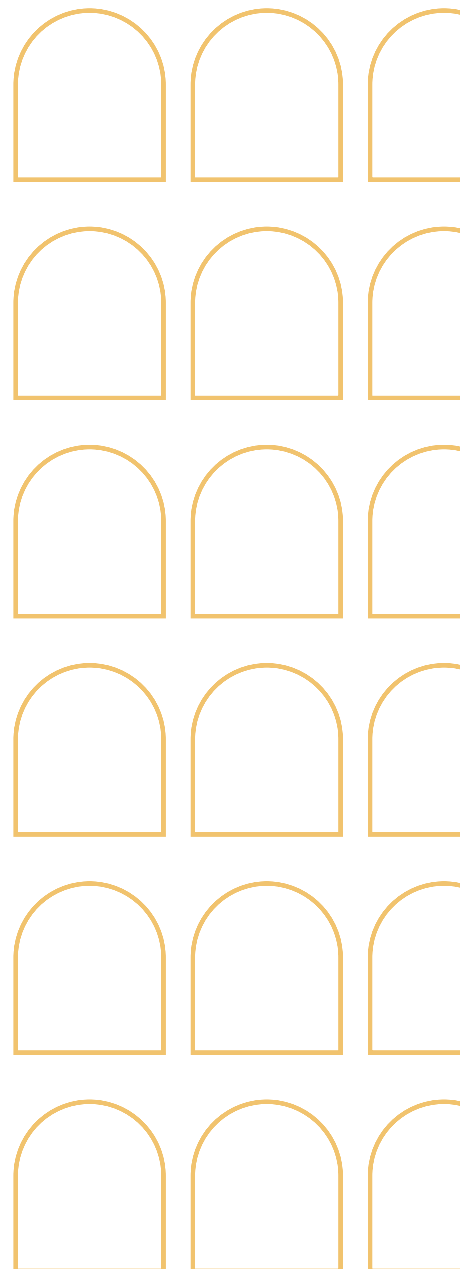

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