WORKING PAPER

Safeguarding the integrity of the asylum system and the moral rights of rejected asylum seekers: a conditional right to remain

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Abstract

Following the 2015 refugee crisis, concerns about the integrity and the sustainability of the asylum system have deepened. Policies that aim to deter ingenuine asylum seeking through economic and social rights restrictions, and the swift return of those whose protection claim has been rejected, have consequently increased. However, this goal is in tension with moral claims of asylum seekers during the asylum process, and also with a potential right of rejected asylum seekers to remain, if they have developed social ties in the receiving society during the lengthy asylum process. Taking the perspective of an ethical policy maker, this working paper develops guidelines towards a policy response to the dilemma between maintaining the integrity and sustainability of the asylum system and the moral rights of rejected asylum seekers.

The working paper argues that restricting the rights of asylum seekers and reducing the length of the asylum process raise ethical concerns and practical problems. Rejected asylum seekers should be treated differently depending on their normative attitude to the refugee system. Those who have made their claim in good faith should have a social membership-based right to remain in the host society. By contrast, those rejected asylum seekers who have made disingenuous claims in bad faith should be legitimately returned.

Keywords

1. Introduction[*]

This working paper engages with the question which rights are owed to rejected asylum seekers. Asylum is a policy domain rife with conflicting claims about the causes of asylum-seeking migration, the feasibility to accommodate asylum seekers and refugees, and above all the legitimacy of asylum claims. The 2015 refugee crisis has exacerbated conflicting perspectives on asylum and has reinforced restrictive trends across Europe. Political debates in the European Union (EU) have continued to shift towards greatly reducing the scope for asylum (Geddes et al 2020, 127 ff). Moreover, irregular migration has become an even greater political and public concern. Policies have shifted towards a more restrictive and punitive approach towards persons who reside, work or have entered irregularly in the EU.

Political entrepreneurs play a role in mobilizing discontent against (irregular) migration. At the same time research also indicates that actions of government elites to curb irregular migration do respond to a perception of popular discontent with (irregular) migration (Boswell and Slaven 2019). In the post-2015 era policies of toleration and initiatives to regularize irregular migrants are now – with few exceptions for workers in key sectors during the Covid-19 pandemic – deemed out of question across EU member states (Kraler 2018). These restrictive trends have culminated in the heightened ambition of EU states to return rejected asylum seekers, i.e. to return persons who have made a claim for international protection but whose claim has been rejected as an outcome of their asylum process, and who have thus become irregular migrants. Politically, an increase of returns is expected to decrease irregular migration, signal the state's ability to control migration, and is seen as a way to deter future (ingenuine) asylum-seeking migration. As governments are guided by the idea that (asylum seeking) migration is pulled by the perception of a receiving country as welcoming, the return of migrants in turn is viewed as an effective deterring message (Hadj Abdou 2020).

Given the political, exclusionary developments, there is an increased need to focus on the question which moral obligations we have towards rejected asylum seekers. This question cannot be treated though in isolation from the bigger one how to safeguard the international protection system. Governments will not be willing to uphold a system that undermines the integrity of the asylum system.

As the other contributions in the Dilemmas' Project, we thus engage with a real-world dilemma, and approach the problem of rejected asylum seekers from the normative perspective of an ethical policy maker. In other words, we bracket our purely moral stance which would endorse a cosmopolitan inclusive approach. There are at least three kinds of moral reasons of international justice why most rejected asylum seekers should be accommodated. The first reason is the vastly unjust distribution of the world's resources and opportunities, coupled with the obvious failure of affluent states to discharge their duties of global justice. In the context of global distributive injustice people who are fleeing from hardships of war, poverty or lack of opportunities for a better life are merely claiming their moral entitlements to a decent life by crossing international borders (Carens 2013). The second injustice concerns the border control regime of the international state system. Current admission regimes are morally arbitrary, driven by the national interest of affluent states that prioritize skilled and rich migrants, thereby skewing resources from the world's poor to the rich. If the system of border control were less prohibitive and there were more available legal

pathways to immigration, people on the move would not be forced into the asylum system trying to fit their case into an overly narrow legal framework. Thirdly, without a decent responsibility sharing system in place that would fairly allocate refugee protection across all states, the pressure on one state to reject is much higher than it otherwise would be. Cosmopolitan morality would thus lead us to include most rejected asylum-seekers.

This working paper, however, takes a different starting point. It thinks about urgently needed solutions here and now, within the institutional contours of the refugee protection regime, and it takes both moral demands and political feasibility constraints seriously. On the one hand disregarding the individual moral rights of asylum seekers undermines the moral integrity and legitimacy of a liberal state. On the other hand, not returning rejected asylum seekers compromises the rationale of the asylum system which is based on an adjudication process, examining the validity of asylum claims, and return those rejected. It is with the objective of safeguarding a fragile protection regime in mind that we search for a solution for the policy dilemma concerning rejected asylum seekers: protecting the moral rights of rejected asylum seekers while maintaining the integrity of the current refugee protection system.

Engaging with this dilemma the working paper is structured as follows: In a first step, we outline the dilemma in the field of asylum in depth. Second, we focus on current government policies to disincentivize ingenuine asylum seekers and their effects to evaluate practical shortcomings that can support us in addressing the dilemma. Third, building on the normative political philosophy of refugeehood, we then discuss which rights we owe to asylum seekers during the asylum process to better understand the relevant moral grounds for their legitimate claims once their case has been rejected. As a last step in the argument we elaborate on the specific case of the rights of rejected asylum seekers. We argue that the normative attitude of asylum claimants towards the refugee system matters both morally and politically. If they have made their asylum claim in good faith, i.e. through a reasonable ethical interpretation of the existing normative framework, they should have a right to remain based on their degree of integration. Instead, if their asylum claim has been made in bad faith, intentionally taking advantage of the refugee system while knowing their claim is invalid, they should be subject to legitimate return. Finally, before concluding, we consider ethical and practical objections to placing an emphasis on the normative attitudes of migrants in the determination of rights of rejected asylum seekers.

2. Unravelling the dilemma

There is an increasing and rich debate on the ethics of asylum as well as irregular migration in political theory (for an overview see e.g. Gibney 2014). A prevalent way in which political theorists engage realpolitik in their ethical reasoning in the field is by taking the international state-system and its border control regime as a factual starting point, in contrast to reasoning from cosmopolitan presuppositions and reasons of global justice. They then proceed by critically assessing migration policies from the normative point of view of a just liberal democracy, where the moral constraints on policy are derived from the norms and principles widely accepted in liberal democracies (Carens 2013, Part I; Song 2019; Blake 2020; for a discussion see Brock 2020). The arguments typically aim to show what would count as ideal policy for a bounded liberal democratic community, and assess the ways in which contemporary immigration policies fail to live up to widely held moral commitments of such communities. This contribution moves a further step towards political reality by taking a dilemma as a starting point of reasoning. This choice has to do with recognizing the gravity and the urgency of the challenge of asylum in a world where the international protection regime is increasingly put under pressure.

The key political challenge in the field of asylum is the (in)ability of liberal democratic states to control migration: By subscribing to the Geneva Refugee Convention (GRC) of 1951, and its 1967 New York protocol, European states have recognized a duty to protect those suffering persecutions on grounds of race, religion, political opinion or social group. The right to protection includes the right to seek asylum in the first place The granting of refugee status entails a generous range of rights akin to citizenship status. Other types of 'subsidiary protection' have also emerged for those who do not qualify for refugee status (Geddes et al 2020, 32). The GRC as well as the European Convention on Human Rights (ECHR) prohibit to return refugees or asylum-seekers to a country in which they are liable to be subjected to torture or to inhuman or degrading treatment or punishment *(non-refoulement principle)*.

The possibility to control migration and refuse entrance of those who knock at Europe's doors is thus limited by the human right of protection. Put differently, whilst states have agreed to grant protection, given the incapacity to control this type of migration, asylum seeking migration is largely considered as an unwanted type of migration by governments.

During the Cold War, asylum has not been a matter of political concern as refugees from communist countries were, based on ideological considerations, largely met with sympathy; and arrivals of asylum seekers were mostly limited to a few hundred annually and often these were recognized as refugees without checking their claims individually. As numbers started to rise in the wake of the Fall of the Iron Curtain, European policy makers instead started to focus on potential abuse of the system. If the source of rising numbers of asylum-seeking migration was that migrants were using the asylum route to benefit from access to rights and opportunities in their preferred destination states, then this was a domain where states could show their capacity to control. Governments, as Geddes et al (2020, 121) underline, had effectively isolated the one area where they could shape migration flows, given that national policies were unlikely to tackle conflict and persecution in countries of origin.

From a government's perspective the key objective in the field of asylum has thus been to firstly prevent the arrival of asylum seekers, especially those without warranted claims. Secondly, if asylum seekers without a warranted claim have arrived, states should be able to return them once their claim has been rejected. This objective however is among other (moral and practical) reasons impeded by the lengthiness of asylum procedures. Given that asylum procedures tend to be lengthy, during the time that asylum seekers are in the destination country waiting for their procedures to be adjudicated, they develop social membership ties that can become, in and of themselves, a legitimate ground for a right to stay.

Notwithstanding that the duration of asylum procedures varies greatly across EU countries (as well as across groups of asylum seekers), in all EU states a significant time period can pass until a final decision concerning an asylum claim is taken. Whilst the duration of the asylum process can be certainly shortened to some extent, there are limits if the principle of the right to appeal, i.e. a right to an effective legal remedy, is upheld. This is a fundamental feature of the rule of law in a liberal democracy but prolongs asylum process considerably.

The longer applicants stay in a country, however, the stronger their moral claim is to remain in the country in which the application was lodged and to obtain regular residence rights (Carens 2013, 147). At the same time, if a destination country lets all rejected asylum seekers stay on social membership grounds regardless of the outcome of their asylum procedures, the whole system of adjudicating the legitimacy of asylum claims is pointless from the perspective of receiving states. Put differently, if those who do not have a right to stay gain a right to do so through the adjudication procedure, the whole process is put ad absurdum. Letting asylum seekers without warranted claims -within the framework of the contemporary refugee system- stay, could potentially compromise the legitimacy and integrity of this asylum system as a whole. States would be condoning misuse of the asylum system by those who are not entitled

to its protection. It might also be seen as an "invitation" to circumvent the system, in the sense that people without a legitimate claim to asylum might feel encouraged to apply in the hopes of being allowed to stay although their claims are rejected. However, if governments try to process asylum claims rapidly in order to prevent the formation of any social membership ties, they might violate the rights of all asylum seekers, including those with warranted claims, to a fair procedure, which includes the right to be heard, the right to legal assistance, as well as the right to an effective remedy. In addition, the absence of a fair procedure is likely to violate the non-refoulement principle, as it would result in higher numbers of "false negatives", i.e. genuine asylum seekers being sent back to countries where they face serious threats. However, if states do process asylum claims in line with quality and fairness principles, as noted above, persons whose protection claim will be rejected, will have established social ties, i.e. their deportation would violate the right to stay based on social membership, which brings us back to the start of the key dilemma in the field of asylum (see table 1). In short, the moral rights of rejected asylum seekers are in tension with the integrity and the sustainability of the refugee system.

Table 1: The dilemma

Phases	Policy response 1	Versus	Policy response 2
During the asylum process	Increase capacity and deter ingenuine asylum seekers by restrictive, fast and final decisions, risking false negative decisions	OR	Preserve the quality of the procedure and legal remedies, risking that those who are rejected on solid grounds will have developed social membership ties
After the rejection of protection claim	Enforce returns for all rejected, violating their membership rights and those of others linked to them	OR	Accept that rejected asylum seekers can stay after a long procedure, putting the entire adjudication process into question

In order to discuss this dilemma, we proceed in two steps. The first step concerns the rights of asylum seekers during the asylum process and the potential policy responses by states, considering the potential that some of those who made a claim could have done it based on unwarranted grounds; i.e. claims that fall outside the scope of the current system of protection. The second step concerns the phase once the asylum process has been terminated and an asylum seeker has been rejected, discussing the existing policy options and ethical considerations.

3. Existing policies and moral obligations during the asylum procedure

The first question we need to tackle is which policies tend to be applied during the adjudication process, to evaluate whether they are (morally) just and to discuss solutions in line with our

overall objective to ease the tension between the integrity of the system and the individual moral rights of asylum seekers. We will focus on the two major policy trends: the first one is the policy to accelerate asylum processes, and the second one is to restrict rights to deter ingenuine asylum seeking in the first place. We will include empirical reflections as well as normative arguments from justice, fairness, legitimacy and humanitarian concerns, on both policy trends.

3.1 Restricting the rights of asylum seekers to deter ingenuine asylum seeking

In order to prevent or deter (ingenuine) asylum seekers more and more governments have been choosing to restrict rights of asylum seekers that are viewed as incentivizing ingenuine asylum seeking. This concerns especially two entitlements, namely the right to work during the asylum process and access to welfare.

In 2015, for instance, in the midst of the European refugee crisis Denmark severely cut down on welfare benefits for non-EU nationals, and in parallel ran an ad campaign in Lebanese newspapers, a country that has been hosting large numbers of Syrian refugees, about these welfare cuts to deter asylum seeking migration (Agersnap et al 2020). Denmark was not the only state to opt for such measures. Also, other governments have increasingly restricted welfare as a preventive measure to reduce immigration in the wake of the 2015 refugee crisis. Before we proceed to moral reflections, let us first consider if these measures are justified under practical considerations.

Some studies (e.g. Thielemann 2008, Schulzek 2012) have provided evidence that asylum seekers are to some extent pulled by the welfare state. As concerns the effect of policies that have reduced welfare benefits for asylum seekers, recent research (Agersnap et al 2020) shows significant effects of these welfare reductions on curbing inflows of asylum-seeking migrants.

Whilst the evidence overall is still scarce, there are empirical indicators that welfare plays a role in incentivizing asylum-seeking migration. However, we do lack knowledge whether it incentivizes specifically ingenuine asylum seeking migration, or whether it influences country choice of asylum seekers in general. Are asylum seekers more likely to opt for countries with more generous access to welfare independently of whether they have an ingenuine or genuine asylum claim? If the latter is the case, this implies that measures could deflect asylum migrants to other countries by cutting back on welfare without reducing the overall flow. In Europe such policies would result in a race to the bottom and further undermine solidarity among EU states with regard to refugee admission and protection.Concerning restricted access to the labor market, we can observe that overall employment bans on asylum applicants are a persistent and widespread feature of Western countries' asylum policies. In 2015, at the peak of the refugee crisis, only four European countries (Greece, Norway, Portugal and Sweden) allowed asylum seekers immediate access to the labour market (Fasani et al 2020). Despite this policy pattern there is, however, a lack of academic evidence that the right to work acts as a driver for asylum seeking migration. A meta-analysis of studies on the issue from 1997 to 2016 by the University of Warwick (2016) has concluded that no research has found a long-term correlation between labor market access and destination choice. Moreover, as Maarbach et al (2018) demonstrate, banning the employment of asylum seekers for a considerable time period after arrival not only adversely affects the well-being of refugees but also imposes significant costs on the host country's economy. Fasani et al (2020) come to similar conclusions about the detrimental economic effect of employment bans for asylum seekers. - A possible solution, that we cannot discuss at length here, which would both reinforce the right to work of asylum seekers and respond to economic shortages in host countries would be to set up temporary labour migration programs and prioritize asylum seekers in recruitment by issuing temporary

work visas to them (see Bauböck and Ruhs 2021). Although some of these programs include rights restrictions that may be incompatible with the requirements of international refugee protection, the idea is certainly worth further reflection.

In addition to moral concerns which we discuss below, the question which rights package is granted to asylum seeking migrants during the asylum process as we have outlined thus has practical policy implications. Moreover, there is an inherent paradox in the debate on welfare and work incentives for asylum seekers, if we consider that many governments keep asylum seekers dependent on welfare provisions because they deny them the right to work (Mayblin 2014).

3.2 Accelerating the asylum procedure

Another frequently explored policy option to deal with potentially unwarranted claims is to filter them out at the start of the asylum process. In line with the EU Asylum Procedure Directive (2013/32/EU), many EU member states have introduced accelerated, priority or fast track asylum procedures to respond to a (potential) overload of the asylum system by people with an unwarranted protection claim (and as well as to accelerate the procedure for persons from certain countries with a high probability to have a valid claim); or the fast screening at borders as has been proposed in the EU Commission`s Proposal for a New Pact on Asylum and Migration (COM/2020/609). Another policy solution is the "hotspot approach" that has been introduced during the height of the 2015 refugee crisis in Greece and Italy. In the hotspot approach, asylum seekers are detained in remote centers, and those that following a screening process are not deemed to qualify for international protection are then channeled into pre-removal centers. Whilst this approach has the potential to reduce the overload of the system and to filter out persons with unwarranted claims, a wide body of research (e.g. Tazzioli 2020) has underlined that a policy of containment is incompatible with protection. The experience with hotspots in Italy and Greece has also been that they have failed in their objective to effectively accelerate asylum processes.

Accelerated procedures in principle ought to target cases that are manifestly unfounded (or manifestly well-founded) in order to expedite the asylum process and to reduce an overload of the system. According to the UNHCR (w.y.) manifestly unfounded cases would include asylum applications that have clearly no relation to the criteria of refugee status, and subsidiary protection, or which are "clearly fraudulent or abusive". The latter category of abusive or fraudulent claims involve claims "made by individuals who clearly do not need international protection, as well as claims involving deception or intent to mislead, which generally denote bad faith on the part of the applicant" (UNHCR, w.y., 4-5). The key criteria according to UNHCR are whether an applicant has a claim according to international law, or acted in good or bad faith, i.e. someone who knows that (s)he has no claim according to the existing law.

EU member states apply a more expansive approach regarding who can be categorized as having a manifestly unfounded claim, based on high past rejection rates -or manifestly well-founded claims based on high past acceptance rates. Through measures such as triaging applicants are put into different 'tracks'. Persons who come from countries with previously low (or very high) protection rates would be typically put into accelerated or simplified procedures in contrast to other cases that would be adjudicated under the regular process. Whilst this approach can render the adjudication process certainly faster, given their short-termism and the focus on categories of asylum seekers rather than a focus on their individual rights, these procedures have been criticized to undermine procedural guarantees, i.e. to violate the rights of asylum seekers who are categorized based on previous low protection rates. In 2015, the UK High Court Judge called out fast track procedures for establishing structural unfairness (Jakulevičienė 2020).

In sum, as of yet preponderant evidence suggests that accelerated procedures undermine important rights that are owed to asylum seekers. The litmus test whether accelerated asylum processes are a justified means to address concerns about unwarranted claims is the potential to uphold effective remedies. During the appeals process significant numbers get asylum, or other forms of protection that were initially denied to them. In 2020, around 69,200 people in the EU received positive final decisions based on appeals or reviews, of whom 21,600 were granted refugee status, 22,400 were granted subsidiary protection, and a further 25,300 were granted humanitarian status (Eurostat 2020).

From a practical perspective hence, both current policy solutions, restricting rights during the asylum process as well as expediting asylum procedures, seem to be (at least in their current form) tools with a limited utility for an effective and just response to potentially unwarranted claims for asylum. We now proceed to ethical considerations.

3.3 Ethical obligations during the asylum process

How can we ethically ground our obligation to asylum seekers? Given our aim to couple ethical considerations with institutional and political reality, we draw on a political conception of refugeehood and take refugee protection to be the legitimacy condition of the modern state system (Owen 2020; Song 2019). The basic idea is that the international state system that allocates persons' rights protection to particular states regularly fails some people. It is then the state system as a whole that must assume joint responsibility for a foreseeable system failure. Refugees are owed what Owen calls *legitimacy repair mechanisms* to restore their status and standing as citizens in the international community: "Refugees are people for whom the international community must stand as *in loco civitatis*, that is, as a substitute for their own state (ibid., 12); whose basic rights protection is best served by flight from, or non-return to the state (ibid., 48)".

This idea introduces a powerful normative shift in our approach to refugee protection with far reaching implications. As Song (2019, 113) noted, if refugee protection is a fundamental moral constraint on state sovereignty, it is also the precondition of the state's right to control immigration. This view renders contemporary state action that enforces immigration controls against refugees morally objectionable in two ways. It violates the rights of refugees and it thereby undermines the states' own source of legitimacy. Addressing the refugee issue, according to this view, first and foremost requires a fundamental shift in the normative structure of refugee protection: states must assume their responsibility for refugees as an action necessary to restoring their own legitimate standing.

Depending on the way their home state has failed displaced persons, and what precisely needs to be repaired or restored in their global status, Owen (2020) distinguishes three types of refugees. First, asylum refugees who are persecuted by their own state are conceived as persons whose membership in a political community has been repudiated. In addition to the immediate need of safe space, their global political standing needs urgent repair through membership in a new state. Second, *sanctuary refugees* are those who are fleeing warzones and civil strife. They are not directly targeted by their state, but left unprotected from persecution and harm and their citizenship should therefore be seen as ineffective or inoperative. What is owed to them is a safe space, a sanctuary that temporarily substitutes the protection of their rights of citizenship, including basic security, liberty and welfare. Third, refuge refugees are fleeing from specific harmful events or threats such as natural disasters. They require immediate emergency assistance outside of their state and return to home as soon as public order is restored and resources are available for their survival there.

The case of sanctuary refugees, whose ineffective citizenship triggers the international legitimacy repair mechanism of surrogate membership helps us to reason about international

obligations towards asylum seekers. Sanctuary refugees require international protection temporarily, until their country undergoes a positive regime change and returns to safety, which renders their ground for protection void. During this time period , however, restoring their status requires a rather robust set of social and economic rights.

Asylum seekers who are waiting for their claims to be adjudicated can fall into either of the three normative refugee categories. Neither the validity of their claim nor the ground for their claim has been established. Given the uncertainty of where exactly each particular person falls, and the default moral attitude of a liberal state to treat persons as innocent and in good faith until proven otherwise, we argue that asylum seekers should be conceived as "temporary refugees", morally on a par with sanctuary refugees. Based on the presumption of innocence, they should be seen as genuine refugees in good faith for the period of time they are waiting for their claims to be adjudicated and until proven otherwise. They are owed temporary surrogate membership in the asylum state and, should their claims turn out to be invalid, may also legitimately face non-voluntary repatriation.

Treating all asylum seekers morally on a par with temporary refugees in need of sanctuary has the following implications for their moral entitlements. Persons stuck in the asylum system for years are owed a safe space where they can effectively pursue a plan of life and experience themselves as social agents, even if this imagined future has a short-term horizon. This includes basic security, mobility, as well as certain social and economic rights, such as genuine opportunities for access to education as well as to the labour market. Local political rights are also thought to be necessary for the exercise of social agency (Owen 2020, 78; Aleinikoff & Zamore 2019, 71). Given the temporal horizon these social and economic rights may be subject to temporal restrictions. For example, their right to work can be realized through a temporary work visa, which may be discontinued, renewed or requalified as permanent depending on the outcome of the asylum process.

Despite the fact that this moral entitlement to social and economic protection is also enshrined in regional and domestic law, increasingly restrictive state policies routinely violate asylum seekers' right to work and access to welfare (Aleinikoff & Zamore 2019, 5).

Besides the practical inefficacy of this state strategy outlined above, the moral problem with rights restrictions is that they deny the moral entitlements of genuine refugees. We think this is a serious violation of the state's duty of international protection, underpinning legitimate statehood, and cannot be justified by the presence of potential free riders. We also think there is an alternative, more just and fair solution that has the signaling potential to maintain the integrity of the refugee protection system, which we discuss in the following section.

4. After the asylum procedure: rights of rejected asylum seekers

The next prong of our dilemma kicks in during the stage when the decision on the asylum application has been already taken. As we have outlined, rejecting the claim of an asylum seeker does not imply that s/he has no moral right to stay. A right to stay can occur based on the social membership ties acquired during the process. Moreover, returning rejected asylum seekers is not only immoral under certain circumstances, it is also often politically and practically infeasible, for example because states of origin and transit refuse their readmission (see Geddes et al 2020, 111 ff). In 2019 EU Member States, for instance, returned 142,300 people to non-EU countries, whilst having issued a significantly higher number of return orders (491,200) (Eurostat 2020). We have argued above that during the asylum process all applicants are owed a robust package of protections, including economic and social rights that support their temporary integration into the host state. This leads to a new normative scenario whereby asylum seekers acquire extra moral grounds for making legitimate demands on the

host society. Asylum seekers rejected after a fair procedure, in principle, no longer have a valid ground for international protection, and hence could be legitimately returned to their allegedly safe home. However, the temporary rights of protection they enjoyed in the asylum-seeking phase for a relatively long period of time generates new moral grounds for a potential right to remain in the state of asylum.

There are at least three moral grounds on which failed asylum seekers' right to remain can be supported. These are normative claims that build on the rights and resulting normative circumstances we have argued for in the asylum process. The first is, as already discussed above, that the temporary status of asylum seeking can last for quite long. The longer the period of waiting the stronger the claim for inclusion. Second, economic rights granted during the asylum process along with other social contributions they have made generate a contribution-based reciprocity ground to remain. Third, the no harm principle constitutes a strong moral constraint on legitimate repatriation that takes also into account the harm to family members who have a right to stay, and other members of the society. Asylum seekers who have developed significant personal ties with citizens or long-term residents of a host state should not be deported (Owen 2020, Brock 2020, Carens 2013). While neither of these reasons are uncontroversial, we argue that in the case of good faith asylum seekers they are jointly sufficient to ground their claim to remain in the host country and obtain regular residency rights. Let us call these three joint considerations for short the asylum seeker's social membership in the host country.

Our first point is that liberal states should extend the right to remain to those rejected asylum seekers whose claims fall short of a strict legal interpretation of refugeehood but may be seen as a good faith interpretation of the existing legal norms and broader institutional practice of refugeehood. In other words, beyond the narrow definition of the GRC, taking into account the broader institutional context and practice of refugeehood allows for an ethical-political interpretation of who is owed protection through public reason (see for example Owen 2020, 10-11). This idea resonates with the current practice of subsidiary protection in the EU and takes it a step further. Subsidiary protection which derives from the non-refoulment principle, is granted to a third country national or stateless person who does not qualify as a refugee, but for whom there is sufficient ground to believe that if returned to her country of origin or her country of former habitual residence, she would face a real risk of suffering serious harm, and that she is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country (Directive 2011/95/EU). Put simply, states do recognize that asylum claimants who do not qualify for refugee status under the GRC in some instances cannot be sent back because the returnee would suffer serious threats to his life or freedom (non-refoulment principle).

Persons granted subsidiary protection, however, do tend to have fewer rights than recognized refugees, especially when it comes to rights to welfare and family reunification. Challenging this practice, we side with Carens (2016, 211) who argues that from a normative perspective persons who are granted subsidiary status should be considered genuine refugees, since if a state acknowledges that it is wrong to return someone it is de facto recognizing that this person is a refugee from a moral point of view, i.e. he or she faces a serious threat to basic human rights and/or a considerable degree of risk in that regard. From a legalistic perspective the Council of Europe (2017) argues that differences in treatment between 1951 Convention refugees and subsidiary protection beneficiaries are problematic in light of Article 14 of the European Convention of Human Rights (non-discrimination), and do generally not sit easily with EU principles of equality and non-discrimination.

Some EU member have introduced also a so-called *humanitarian right to remain* as a form of protection and residence right. Humanitarian reasons are specific to national legislation and this legal status does not exist in all EU Member States. In the countries where it does exist,

integration can serve as a major ground why such a right to remain is granted. In the Austrian case for instance, if an asylum seeker is neither granted refugee status nor subsidiary protection, the degree of integration is taken into consideration in order to determine whether a so-called humanitarian right to remain can be granted.

When coming to a decision in that regard, the authorities are asked to consider the length of stay in the country, family ties, and residence permits of family members, employment, ties with locals and associations, knowledge of the local language, participation in social activities, criminal record, chances of well-being in the country of origin including an assessment of family ties, work opportunities, and the knowledge of the national language there. The interests of an individual and rights such as the right to maintain a private life and family live as enshrined in the European Human Rights Convention (Article 8) are here contrasted with the interest of the state to enforce migration legislation. Humanitarian residence rights are a relevant form of protection from deportation. In 2020 in Austria for instance, 8,069 people were granted the right to asylum, 2,524 were granted subsidiary protection, and 2,621 received a legal status of a humanitarian residence right (BMI 2021, 28).

The normative reasons that jointly constitute a social membership-based right to remain can justify the practice of humanitarian protection. However, this practice re-emphasizes the dilemma from the perspective of states. Persons who initially do not have a justified claim to stay obtain one through the asylum procedure as a consequence of the long time period, as well as the degree of integration obtained during that period. In order to prevent such a possibility from arising, states do not only make use of the accelerated procedures we discussed above, they have also used differential inclusion as a mechanism to prevent integration of asylum seekers who are less likely to obtain a refugee status. For instance, Germany does not grant services such as language courses to asylum seekers from countries with recognition rates below fifty percent (Will 2018). Both the pre-categorization of cases based on a country-level proxy and the stratification of rights during the asylum-seeking phase are problematic from a moral point of view. We argue that there is a morally more-sound way to deter disingenuous and invalid asylum claimants from abusing and overburdening the asylum system without violating the rights of genuine refugees, as we will outline in the following section.

5. Good faith and bad faith asylum seeking

Asylum seekers are fleeing from complex multi-faceted realities and depending on the nature of their claim are morally entitled to different treatment. The fundamental distinction currently dominating the legal-political realm is whether their claim to international refugee protection is valid or unfounded based on specific criteria.

We consider a further moral distinction: those claimants who lack entitlement to refugee protection and are eventually rejected can be further distinguished based on their *normative attitude* to the refugee system. Asylum seekers may make an ingenuous claim in *good faith* or a disingenuous claim in *bad faith*. Good faith asylum seekers are those who genuinely believe that their case grounds an entitlement to refugee protection. Good faith claimants' motives match with a plausible interpretation of the norms of refugee protection. They have not launched an ingenuous claim but have been rejected due to a narrow legal interpretation of the existing criteria (of the GRC), or due to an inconsistent application of norms, or asylum determination processes that are skewed against asylum seekers. Bad faith asylum seekers, instead, are persons, who try to take advantage of the asylum system and make a disingenuous asylum claim to cross borders or to remain in receiving states for better opportunities.

The principle of good faith is a fundamental principle of international law, which has gained a special contemporary significance in international treaty law. It requires parties to act with honesty, loyalty and reasonableness towards each other in the implementation of international treaties, such as the GRC. While the principle of good faith as a legal obligation to the host state, does not explicitly apply to individual asylum seekers, it is still implicitly enshrined in asylum practice. The UNHCR places an emphasis on the truthfulness of asylum seekers and on cooperatively assisting the host state officials in establishing the truth (Uçaryılmaz 2020, 54-56).

Given the uncertainty of each asylum case, morality requires that we err on the side of caution and apply the charitable assumption to all claimants. It would be wrong to deny genuine refugees their international moral entitlement during the asylum process, only because some applicants free-ride on a fragile system and advance their claim in bad faith. It would also be wrong to apply similarly harsh treatment to those applicants who have advanced their claims in good faith, yet who fell through the cracks of a complex legal apparatus, due to problems of reasonable interpretation.

To make a case for good faith claimants we need to draw a distinction between legal interpretation and a reasonable ethical interpretation of refugee law and institutional practice. Good faith claimants apply plausible moral interpretation of the international refugee regime within the limits of reasonableness. That is, their case may go beyond the strict legal definition of who is a refugee according to GRC, but may result as plausible, when we approach the refugeehood through a broader practice-based and institutionally embedded normative reconstruction. A good faith example would be a refugee who has left her country of usual residence feeling persecuted as she has suffered severe discrimination qua her social group membership in the LGBTQ community. Since discrimination does not equal persecution, during the process the claim of this asylum seeker might be rejected, but on our account, she would count as a good faith asylum seeker. Bad faith asylum claimants, instead, are those who do not have urgent moral grounds for international protection; still, they knowingly and willingly try to take advantage of the refugee system to advance their interests. The person hence applies for asylum in the knowledge that she does not qualify as refugee and/or after realizing that she does not qualify aims to construct reasons that she cannot be sent back, e.g. trough religious conversion in the reception state solely for the sake of remaining in the country, i.e. without having any inner conviction about the faith she or he converted to.

Subsidiary protection is morally underpinned by the idea that there is a wider scope for international protection than the GRC. The humanitarian right to stay, instead can be morally underpinned by the joint reasons of social membership, contribution and no-harm to the personal ties established. We think that a possible way to address the dilemma and to avoid the abuse of the humanitarian practice is by combining the two moral rationales. Liberal states must take seriously the social membership grounds of the right to remain and grant it to all rejected asylum seekers who have entered the asylum system on good faith. However, in order to safeguard the integrity of the refugee system states have to send a clear signal that intentional abuse of the system will not be tolerated. Even though all asylum seekers have gained extra moral grounds to remain, we argue that not every rejected asylum seeker should enjoy the right to remain. Bad faith failed asylum seekers ought to be treated differently, in light of the dilemma we are faced with. Recall that what is at stake is the tension between protecting the moral rights of refugees and asylum seekers, while safeguarding the integrity of the refugee protection system. A fair policy has to provide a proportional response to the moral wrong committed, and should also have a desired signaling effect towards source and receiving countries.

Making an asylum claim in bad faith involves the moral wrong of deception and the wrong of exploiting scarce resources and institutional capacity whose purpose is to support the most

vulnerable. Their education and health care needs put unjustified pressure on a fragile welfare system and they accumulate earnings they are not entitled to through the right to work Moreover, a further structural harm arises due to the lack of trust and support on the part of the citizenry, which can affect the willingness to protect genuine refugees in the future. From an ethical perspective, when placed on a balance with their integration claims, these multiple wrongs and harms cancel out the social membership ground that would otherwise yield a right to remain. Bad faith rejected asylum seekers, and only them, should then be subject to legitimate return. Sanctioning bad faith failed asylum seekers, and only them, has a double signaling effect. Effectively sanctioning free riders should restore the host citizens' trust in the refugee system, as well as deter future migrants who act in bad faith, and encourage protection seeking efforts in good faith.

While this idea of singling out disingenuous rejected asylum seekers for return and respecting the right to remain of good faith rejected asylum seekers may sound promising in theory, we need to acknowledge it has moral costs and runs into several difficulties in practice. In the remaining part of this section, we consider some pressing objections.

First, adjudicating the truthfulness of some types of claims (especially in the case of religious conversions or sexual orientation) might not only be difficult but actually impossible. One could argue that even if this would be in principle normatively desirable, it would be in practice undesirable for courts to spend even more time and money to try to adjudicate something that can ultimately not be proven. While this problem is a real one, it should not lead us to cast aside the idea but to caution public officials to draft and apply policies with circumspection. Especially in obvious and clear-cut cases it is not more difficult to detect such intentions than in the current adjudication of the person's degree of integration, disingenuous marriages and other standard non-immigration cases of criminal law. However, in some cases, such as the sexual orientation example, we might have to bite the bullet and accommodate bad faith asylum seekers for liberal moral reasons. Detecting the untruthfulness of such claims would violate the right to define one's own sexual orientation by subjective rather than objective criteria.

Second, migrants might be applying in what they presume is good faith, because they lack precise knowledge about the laws of the host country for example. We think that insufficient knowledge cases are to be expected given the complexity of the international legal regime, and the complex realities people are fleeing from. These, on our view, constitute grey zones that should be reckoned with as not sufficiently informed but good faith attempts. We are interested in clear-cut obvious cases of disingenuous asylum seeking that worry the wider publics in the receiving countries. In principle these clear-cut bad faith cases could be filtered out at the initial stage of asylum processes. But as we have discussed above such screening must be in full compliance with rights of asylum seekers, and must not compromise the individual right of asylum, and procedural guarantees. If these mechanisms create more moral wrongs than problems they address, then they are unfit solutions for the dilemma.

A third objection is, that this differentiation might open up the possibility for abuse by state authorities and further strengthen a culture of suspicion towards asylum seekers. This could be the case in countries where, for political goals, state authorities aim to reject as many asylum applications as possible and discourage all asylum-seekers from placing a claim, whether legitimate or not, or refuse to grant protection from refoulement. The state, however, has an obligation to pursue refugee protection in good faith as well. The principle of good faith is a fundamental principle of international law that applies to all states. Through the 1969 Vienna Convention on the Law of Treaties, known as the treaty of treaties, bona fides is also binding on the state's implementation of the GRC. In practice, states have the obligation to safeguard the well-being of refugees, refrain from discriminatory treatment among them, to act

honestly and truthfully in investigating and adjudicating cases, and last but not least, to show reasonableness in evaluating each case by its own merit (Uçaryılmaz 2020).

Absence of good faith on the side of asylum seekers certainly would not entitle states to circumvent rights such as the non-refoulment principle. We think that abuse by state authorities is a serious concern that should caution us against introducing the distinction at the level of policy. If a policy proposal introduces more problems than it can solve, this should be a reason to reject it. However, we want to emphasize that our normative proposal is situated at a mid-level between ethics and policy. It is intended as an ethical guideline for policy debates.

6. Conclusion

This contribution addressed the policy dilemma of how to reconcile the moral rights of rejected asylum seekers with the objective to maintain the integrity of the asylum system. We have argued that policy approaches that aim to deter unwarranted asylum seekers and to reduce the case overload of the asylum system in EU member states raise both practical and ethical problems. The practical concern is that both the restriction of rights (most notably curtailing the right to work and access to welfare), as well as the expedition of asylum procedures have a limited potential to disincentive unwarranted asylum-seeking migration. In ethical terms the way these policies are currently set up undermine the rights of all asylum seekers.

Restricting the rights of asylum seekers during the asylum process would imply the moral cost of depriving legitimate asylum seekers from what is legally and morally owed to them. Assessments at initial stages of the asylum process can be a potential solution to the challenge of unwarranted claims, but they would need to focus on the individual right to asylum and avoid morally arbitrary differentiation and exclusion. We have also outlined that a morally more just way of dealing with the political challenge is to rest differential treatment on the different normative attitudes of asylum seekers to the refugee system. Asylum seekers who make a genuine claim in good faith should have a social membership based right to remain in the host country, respecting the moral claims of asylum seekers accumulated during the asylum process. Disingenuous claims made in bad faith should, instead, be legitimately deterred. Return of bad faith rejected asylum seekers is a morally appropriate response to advantage taking, which thereby restores the integrity of the asylum system, and can also signal effective state capacity of border control towards the citizenry.

We must stress that the idea of an asylum seeker making claims in bad faith is not meant to place moral blame in an overarching ethical framework. Persons fleeing hardships make the choice to migrate under severely unjust background conditions, which from an ideal moral point of view entitles them to be included in safe countries with opportunities for a decent life. Moreover, the global migration system is so broken, and legal migration is so severely constrained, that persons adopting such disingenuous strategies to migrate as their only choice within a broken system should not be judged too harshly. Most asylum-seeking migrants from the Global South have morally justified claims on affluent countries for admission. So, what looks like a bad faith asylum claim from a restricted institutional perspective, may be the attempt to claim legitimate moral entitlements from a global justice perspective.

However, in light of the dilemma explored in this working paper, both the integrity and the sustainability of the asylum system requires that some of the asylum-seekers whose claims are unfounded are sent back. By drawing a principled distinction between good faith and bad faith claimants among the rejected asylum seekers, our main point is to argue that not all rejected asylum seekers should be sent back and treated alike. Some, the good faith rejected asylum seekers, have a stronger moral claim to stay. Bad faith proponents may also have

moral entitlements on different grounds. However, our aim here is to nuance and improve the state's treatment of asylum seekers from a moral point of view, while at the same time achieve the desired signaling function of return and maintain the integrity of the adjudication system.

We have also noted that it is very difficult to establish in reality whether someone is making a genuine or an ingenuine claim when submitting their asylum papers. Asylum seekers experience severe hardships and traumas, and have to make hard choices under stress within a complex normative-legal system, whose intricate eligibility criteria are often unknown to them or leave ample space for interpretation. There will be many grey areas, that are extremely difficult to adjudicate. Nevertheless, some principled considerations may guide our thinking about the problem.

When applying such a distinction, we also need to weigh in the complicity of states in generating bad faith asylum seekers. The absence of legal migration avenues is a decisive factor for the overload of the current asylum system and the existence of bad faith asylum seeking. Hence a focus on bad-faith asylum seeking should not leave the structural conditions that give rise to these phenomena unaddressed. Applying the principle of good faith to asylum seekers is predicated on governments acting in good faith when adjudicating cases, acting upon their treaty based international duties as well as discharging broader global justice duties.

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