

DISCRIMINATION BASED UPON RACE, RELIGION AND ETHNICITY WHEN FILING FOR ASYLUM IN THE EUROPEAN UNION

Policy Paper



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Authors and researchers on this publication are CICL Fellows Alexander Ayer and J. Michal Forbes.

Editors: Catherine Moore (CICL) and Ariel Ricker (Advocates Abroad)

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Executive Summary

Individuals within the European Union, regardless of immigration status, should be afforded the protections of both EU law and the European Convention on Human Rights. There is a large body of law in Europe that exists to protect individuals from racial and religious discrimination. However, the law has been applied unevenly. This has, subsequently, caused gaps in many crucial areas, including asylum and migration. As a result, migrants who are now seeking asylum face discrimination, perceived or actual, when ideally they should be protected from such.

Most applicants applying for asylum within the European Union are non-Caucasian and non-Christian, which has, in several instances highlighted a shift towards nationalistic and restrictive immigration policies. This paper will examine the current state of the law in Europe to evaluate the degree of protection from racial and religious discrimination asylum seekers can expect. First, this paper will examine the legal framework within the European Union. Next, this paper will examine the implementation of refugee law in three EU countries, recent developments in the region, and recent EU case law. Then, this paper will examine Council of Europe law, including treaty law and case law, since EU countries are also state parties to the European Convention on Human Rights. Finally, this paper will make policy recommendations to ensure that the EU is not discriminating against asylum seekers and that every State participates in aiding refugees.

No one should be discriminated against on the basis of their race, religion, or ethnicity and such discrimination, whether perceived or actual, has no place in the asylum adjudication process.

Overview of Current Refugee Situation

In the last two decades, there have been a series of civil wars, massacres and *coup d'états* in Africa and the Middle East, which have caused millions to flee their home country. In 2015 alone, more than 1 million people poured into the European continent via sea, most fleeing war and poverty.¹ Refugees fleeing from violence face an abundance of difficulties before gaining asylum. Unfortunately, several EU countries have made this process more difficult. While the EU has implemented a plan to resettle additional refugees throughout the Union, some countries have begun to implement restraints to prevent the implementation of this policy, including discriminating against refugees and asylum seekers based upon country of origin, religion or ethnicity.

Currently, the EU allows for refugees to be returned to their country of origin under two circumstances.² If an individual does not apply or does not qualify for asylum, he or she is classified as an “irregular migrant” and is eligible to be returned to Turkey under an existing agreement with Greece, known as the EU-Turkey Statement.³ Or, if an individual submits an asylum claim, but is determined to have arrived from a country where he or she could have claimed protection (a “safe third country” or “first country of asylum”), the individual may not be eligible for asylum in the EU.

¹ Mediterranean Sea Arrivals - 2015 Data - by Location, Country of Arrival, Demographic and Country of Origin, UNHCR, <https://data2.unhcr.org/en/documents/details/46781>; See also, James McAuley, *Central European Countries resist new E.U. refugee quota proposal*, THE WASHINGTON POST (May 4, 2016), https://www.washingtonpost.com/world/europe/central-european-countries-resist-new-eu-refugee-quota-proposal/2016/05/04/5be5a32c-120e-11e6-a9b5-bf703a5a7191_story.html.

² Elizabeth Collet, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (Mar. 2016), <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>.

³ *Greece passes law allowing migrants return to Turkey*, BBC (Apr. 1, 2016), <http://www.bbc.com/news/world-europe-35948447>.

In 2015, the number of first-time asylum applicants in Europe more than doubled, from 563,000 in 2014 to almost 1.26 million.⁴ A significantly high number of those applicants come from Syria, Afghanistan and Iraq. In fact, the number of those coming from Syria rose to 363,000 in 2015, which was 29% of the total number of asylum applicants,⁵ while Afghani citizens accounted for 14% of the total and Iraqis for 10%. Meanwhile, Kosovans and Albanians accounted for 5% and Pakistanis for 4%.⁶ By the end of 2015, only 229,00 first-time applicants were granted refugee status in the EU. An additional 56,000 were granted subsidiary protection and 22,000 were given authorization to remain for humanitarian reasons.⁷

According to the British Refugee Council (BRC), a charity that provides direct services refugees in the UK, the number of applications for asylum in the EU has increased yet again from 2015 to 2016.⁸ The BRC notes that number of asylum applicants in the UK from Iran and Pakistan almost doubled in the last year.⁹ The countries with the least number of applicants, Nigeria (300) and Sudan (275), also both saw an increase in the number of applicants.¹⁰

Greece, Germany, and Hungary, three countries that will be explored further during this policy paper, have experienced an ebb and flow of asylum applications over the past few years. For example, Germany had over 94,000 asylum applicants in August 2016, which appears to be its peak for the past year according, whereas Greece had just over 7,600 asylum applicants in

⁴ Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RESEARCH CENTER (Aug. 2, 2016), <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> (Note: A visual representation of Eurostat numbers by the Pew Research Center, a world renowned, non-partisan think tank is quite striking)

⁵ *Asylum Statistics*, EUROSTAT STATISTICS EXPLAINED (last accessed Dec. 22, 2016), http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Asylum_applicants.

⁶ *Id.*

⁷ *Id.*

⁸ *Quarterly Asylum Statistics*, BRITISH REFUGEE COUNCIL (Aug. 2016), 1, http://www.refugeecouncil.org.uk/assets/0003/8736/Asylum_Statistics_August_2016.pdf.

⁹ *Id.* (In August of 2015, Iran and Pakistan both had 487 applications.)

¹⁰ *Id.*

November 2016.¹¹ In 2015, according to the UN High Commission for Refugees (UNHCR), approximately 234,000 individuals from the Muslim majority countries of Syria, Iraq, Iran, Afghanistan, and Pakistan applied for asylum in Germany.¹² This amount accounts for more than half of the individuals who applied for asylum in Germany during this time.¹³ Similarly, although on a much smaller scale, 7,132 individuals from these countries applied for asylum in Greece, out of a total 10,861 applications.¹⁴ Applications in Hungary for 2015 totaled just over 174,000, with 135,605 applications from individuals from the aforementioned Muslim majority countries.¹⁵ Similar ratios were seen in 2016 in both Hungary and Greece, but the ratio of individuals applying for asylum in Germany increased significantly, with more individuals coming from Syria, Iraq, Iran, Afghanistan, and Pakistan.¹⁶

Greece has been at the center of much of the refugee crisis since the outset. Many EU nations have closed their borders, leaving Greece to handle the influx on its own.¹⁷ Temporary refugee camps were set up and hopes were high that asylum applications could be handled

¹¹ *Asylum and first time asylum applicants - monthly data (rounded)*, EUROSTAT, <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/main-tables> (last accessed May 11, 2017)

¹² *Population Statistics*, UNCHR, http://popstats.unhcr.org/en/asylum_seekers_monthly (last accessed May 11, 2017) (refined search to these countries)

¹³ *Id.* (Total asylum applications for Germany during 2015 totaled 441,364)

¹⁴ *Id.* (refined search to Greece for the listed countries and to show total applicants for 2015); *See also, for conflicting data*, Statistical Data of the Greek Asylum Service (from 7.6.2013 to 31.3.2017), HELLENIC REPUBLIC MINISTRY OF MIGRATION POLICY, http://asylo.gov.gr/en/wp-content/uploads/2017/04/Greek_Asylum_Service_Statistical_Data_EN.pdf (last accessed May 11, 2017) (Interestingly, the Greek Asylum Service (GAS) reports that asylum applications were actually 13,195 for the 2015 year. There were 7,938 individuals from Afghanistan, Iran, Iraq, Pakistan, and Syria. It is unclear why there is a discrepancy in the data.)

¹⁵ *Id.* (refined search to Hungary for the listed countries and to show total applicants for 2015)

¹⁶ *Id.* (refined search to Germany, Hungary, and Greece for 2016. Numbers are as follows: Total applicants in Germany – 721,778. Total applicants from mentioned countries in Germany – 530,284; Total applicants in Greece – 12,796. Total applicants from mentioned countries in Greece – 12,796; Total applicants in Hungary – 27,891. Total applicants from mentioned countries in Hungary – 23,761); *See also, for conflicting data*, HELLENIC REPUBLIC MINISTRY OF MIGRATION POLICY, *supra* note 14 (GAS reports that asylum applications were actually 51,092 for the 2016 year. There were 41,667 individuals from Afghanistan, Iran, Iraq, Pakistan, and Syria. There is no way to determine why this discrepancy in data exists.)

¹⁷ Liz Alderman, *Aid and Attention Dwindling, Migrant Crisis Intensifies in Greece*, THE N.Y. TIMES (Aug. 13, 2016), http://www.nytimes.com/2016/08/14/world/europe/migrant-crisis-greece.html?_r=0.

quickly.¹⁸ Although European assistance has been slow to arrive, Greece is doing what it can to expand asylum services. According to the Greek Asylum Service, staffing has increased from 290 in 9 sites at the end of 2015 to 650 in 17 sites in January 2017.¹⁹ Yet, as the situation intensifies, nerves are becoming frayed. The Committee on Eliminating Racial Discrimination looked into the increasing instances of race and religious motivated violence in Greece.²⁰ Popularity for right-wing, nationalist groups in Greece has not decreased, which has led to a rise in crimes committed against refugees.²¹ Greece has been struggling to respond, but has taken steps to combat the issue. Greece reported to the Committee in 2016 that they have created two new police offices to address these hate crimes and appointed more special prosecutors to bring the people committing these crimes to justice.²²

Hungary has been particularly hostile to migrants and refugees. The Prime Minister of Hungary, Viktor Orban, has refused to accept any additional refugees into Hungary and even proposed a detention system that would keep migrants detained until an asylum decision had

¹⁸ *Id.*

¹⁹ *The Work of the Asylum Service in 2016*, HELLENIC REPUBLIC MINISTRY OF MIGRATION POLICY (Jan. 17, 2017) <http://asylo.gov.gr/en/wp-content/uploads/2017/01/Press-Release-17.1.2017.pdf> (last accessed May 11, 2017)

²⁰ *Committee on the Elimination of Racial Discrimination examines the report of Greece*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Aug. 4, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20341&LangID=E>.

²¹ See, e.g., Eva Cossé, *What the Greek Authorities Should Do to Prevent Hate Crimes Directed at Migrants*, NEWSWEEK (Dec. 11, 2016), <http://www.newsweek.com/greece-refugees-migrant-crisis-golden-dawn-hate-crimes-530155> (“In the latest major incident, in late November, suspected far-right extremists—allegedly with links to the neo-fascist Golden Dawn—and local residents attacked and intimidated refugees in the Souda camp on the island of Chios, causing injuries and panic. There have been other incidents, though on a smaller scale, on Chios and other Greek islands, as well as the mainland. At the end of August, a previously unknown group calling itself the Lone Wolves of Radical, Autonomous, Militant National Socialism claimed responsibility for firebombing and destroying a squat in Athens. Over 100 asylum seekers and migrants, mostly families with children, living in the squat were thankfully unharmed.”); Vasiliki Mitsiniotou, *Racist attacks against refugees in Greece show rise*, AA (Apr. 27, 2016), <http://aa.com.tr/en/politics/racist-attacks-against-refugees-in-greece-show-rise/562189>; Patrick Strickland, *Refugees in Greece's Chios fear violence from far-right*, AL JAZEERA (Jul. 5, 2016), <http://www.aljazeera.com/indepth/features/2016/06/refugees-greece-chios-fear-violence-160622125507719.html>;

²² CERD, *supra* note 20.

been made.²³ Prime Minister Orbán's refusal seemed to be aimed primarily at Muslim refugees, citing that these refugees posed a threat to Europe's "Christian values."²⁴ Orbán also referred to the refugees as a "poison."²⁵ Prime Minister Orbán has further sought to rally public support to further his restrictive policies in defiance of the EU resettlement plan by holding a public referendum,²⁶ during which the Hungarian government spent an estimated \$36 million on advertisements that referred to refugees as "potential terrorists" and "invaders."²⁷ The government also contended that the EU wanted to "settle a whole city's worth of illegal immigrants in Hungary."²⁸ This latter claim was a bold one, especially considering that at the time it was only being asked to accept 1294 people (when the population of the entire country is 10 million).²⁹ When the referendum vote finally occurred in early October 2016, the results were overwhelmingly in favor of Orbán's exclusion policy. However, the vote failed to reach the required minimal attendance required by law for valid referendums due to low voter turnout.³⁰ Despite this failure, Orbán appears determined to continue these exclusion policies, evidenced most recently by taking on the Council of the European Union at the European Court of Justice.³¹

²³ New York Times Editorial Board, *No Way to Treat Refugees*, THE N.Y. TIMES (Oct. 10, 2016), http://www.nytimes.com/2016/10/10/opinion/no-way-to-treat-refugees.html?_r=0; *Hungary hardens immigration line*, POLITICO (Feb. 7, 2017), <http://www.politico.eu/article/hungarys-new-hardline-immigration-scheme-viktor-orban-refugees-migration-crisis-europe/> ("Under Orbán's proposal, those entering Hungary illegally — even if they are fleeing war-torn countries in the Middle East and Africa — will be kept in government camps, banned from moving freely within Hungary, until their status has been resolved, which could take 'months.'");

²⁴ *Id.*

²⁵ Lydia Gall, *Hungary's War on Refugees*, HUMAN RIGHTS WATCH (Sept. 16, 2016), <https://www.hrw.org/news/2016/09/16/hungarys-war-refugees>.

²⁶ New York Times Editorial Board, *supra* note 21.

²⁷ Gall, *supra* note 23.

²⁸ *Id.*

²⁹ New York Times Editorial Board, *supra* note 21.

³⁰ *Id.*

³¹ Stephanie Bodoni, *Hungary Fights EU Refugee Relocation Plans at Top EU Court*, BLOOMBERG (May 10, 2017), <https://www.bloomberg.com/news/articles/2017-05-10/hungary-fights-eu-refugee-relocation-plans-at-top-eu-court> ("Orbán has been the staunchest opponent of an open-door policy in the EU, building a fence around his country's southern border, rounding up asylum seekers in container camps and openly rejecting a decision by the bloc to allocate a set number of refugees by national quotas. *His anti-immigrant views -- he told entrepreneurs in*

Hungary is not the only Eastern European country to enact such policies. Slovakia has claimed that the restriction of prohibiting asylum-seekers of the Muslim religion into its country is more for the sake of refugees, as a representative for the Interior Minister claimed that there are no mosques in the country.³² Poland has been less overt in its restrictions; however, they have also wanted to restrict the entry of any refugees citing security concerns, specifically connected to terrorism.³³ Both Hungary and Poland have recently seen the rise of authoritarian political movements with nationalistic tendencies.³⁴ However, much of the specific rhetoric surrounding their resistance to asylum seekers has been directed against the refugee's religious, ethnic, or cultural differences.

Within the last 24 months, Germany went from being considered a safe haven for migrants, to increasingly more restrictive.³⁵ In 2015, Germany received as many as 1.5 million refugees, primarily from Syria, Afghanistan and Iraq.³⁶ However, after a series of small attacks by refugees from Afghanistan last year, critics of the German Chancellor's open-door immigration policy began to emerge.³⁷ Germany's tougher approach to admitting migrants has

February that Hungary must "preserve its ethnic homogeneity" -- have been echoed around parts of eastern Europe.") (emphasis added)

³² *Id.*; See also, Laura Smith-Spark, Vasco Cotovio and Arwa Damon, *Slovakia Says it will Only Take Christian Migrants as Europe's Crisis Mushrooms*, CNN (Aug. 20, 2015, 1:15 PM), <http://www.cnn.com/2015/08/20/europe/europe-migrant-crisis/>.

³³ Matt Broomfield, *Poland Refuses to take a Single Refugee because of 'Security' Fears*, THE INDEPENDENT (May 9, 2016), <http://www.independent.co.uk/news/world/europe/poland-refuses-to-take-a-single-refugee-because-of-security-fears-a7020076.html>.

³⁴ *Id.*; See also, New York Times Editorial Board, *supra* note 21.

³⁵ Anthony Falona, *Germany used to be the promised land for migrants. Now, it's turning back more of them*, THE WASHINGTON POST (Sept. 29, 2016), https://www.washingtonpost.com/world/europe/germany-used-to-be-the-promised-land-for-migrants-now-its-turning-back-more-of-them/2016/09/27/6b5c7a7a-7a7c-11e6-8064-c1ddc8a724bb_story.html.

³⁶ Kate Connolly, *Refugee crisis: Germany creaks under stain of open door policy*, THE GUARDIAN (Oct. 8, 2015, 7:35 AM), <https://www.theguardian.com/world/2015/oct/08/refugee-crisis-germany-creaks-under-strain-of-open-door-policy>.

³⁷ Gareth Davies and Jennifer Newton, *German's slam Angela Merkel for open door immigration policy after Afghan refugee goes on train ax rampage*, THE DAILY MAIL (July 19, 2016, 4:21 PM), <http://www.dailymail.co.uk/news/article-3697634/Angela-Merkel-criticised-Afghan-refugee-went-axe-rampage-German-train.html>. (The case of Muhammad Riyad, a 17-year old- an Afghan migrant, who injured 15 people with

sent an international message that it is not so easy anymore for refugees to seek asylum in Germany. In fact, by September 2016 Germany had rejected more than a third of asylum applications for those already there.³⁸ Some spectators say that Germany is fearful of possibly admitting ISIS insurgents. This could and most likely will lead to discrimination of asylum seekers from smaller towns in Iraq or Syria where Islamic militarists have taken over.

While the countries discussed in this paper are not representative of the entirety of Europe nor do the situations discussed in this paper represent an exhaustive list of behavior, Advocates Abroad wishes to highlight many of the ongoing issues regarding discriminatory treatment of refugees, asylum seekers, and migrants. At the heart of this discrimination lies the fear of the “other,” of which race, religion, and ethnicity are at the heart.

weapons on a train in Würzburg last night before he was shot dead by police. Following that incident, Merkel’s critics began to publicly express concern that Islamic error groups could have smuggled in fighters with the mass crowds last year)

³⁸ Lynn Davidson, *‘We were unprepared’ Angela Merkel admits she may have blundered with Germany’s open-door immigration policy after she is hammered in the polls*, THE SUN (Sept. 19, 2016), <https://www.thesun.co.uk/news/1813495/angela-merkel-admits-she-may-have-blundered-with-germanys-open-door-immigration-policy-after-she-is-hammered-in-the-polls/>.

I. Legal Framework

Europe is distinct in that it is comprised of two separate legal systems – the European Union and the Council of Europe. This paper will discuss both systems in turn, as each system is different in its laws and protection.

A. European Union Law

The European Union (EU) is an international body dedicated to building a shared economy among European nations, and fostering a greater sense of community through the building of democratic values, upholding human rights, and ensuring justice.³⁹ Pursuant to the Treaty on the Functioning of the European Union, the EU has subsequently developed policies handling immigration, and processing refugees, as well as addressing issues of discrimination.⁴⁰

To help give direction to these ends, European legislative bodies were created, consisting of a European Parliament and the European Council (not to be confused with the Council of Europe). The power of these legislative bodies is derived from several treaties which form the bedrock of EU law.⁴¹ When the EU legislature acts, it frequently does so through the creation of Directives and Regulations. Directives are binding upon all EU Member States; however, they must be implemented through national law, resulting in a certain degree of flexibility in the methods a Member State can use to achieve the Directive's goals.⁴² Regulations are also binding

³⁹ *Consolidated Versions of the Treaty on the European Union and of the Treaty Establishing the European Community*, art. 1-2, 2002, O.J. (C 325) 1.

⁴⁰ *Handbook on European law relating to asylum, borders and immigration*, PUBLICATIONS OFFICE OF THE EUROPEAN UNION (2d ed, 2014), 64-65, available at http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf.

⁴¹ *Types of EU Law*, EUROPEAN COMMISSION (last visited Nov. 28, 2016), https://ec.europa.eu/info/law/law-making-process/types-eu-law_en.

⁴² *Id.*

upon all EU Member States; however, they have direct effect.⁴³ As soon as a regulation reaches its implementation date, it is fully binding upon all EU Member States without any further action.⁴⁴

1. Regulations & Directives

The E.U. legislative bodies have taken a broad approach to protecting individuals from racial discrimination. Specifically, there are two primary Directives: Directive 2000/43/EC on Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, and Directive 2000/78/EC on Establishing a General Framework for Equal Treatment in Employment and Occupation. There is a third Directive, which directly relates to the granting of asylum to third party nationals or stateless persons, Directive 2011/95/EU on the Qualifications of Third-Party Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status of Refugees or for Person's Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast). Finally, Regulation No 604/2013 directs the EU-wide asylum system.

Directive 2000/43/EC on Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin

Directive 2000/43/EC is concerned first and foremost with racial and ethnic discrimination and has a broad scope. Paragraph 12 states that protection from discrimination should cover more than just employment, and should be given a wider interpretation to cover other aspects of life such as "... education, social protection including social security and

⁴³ *Id.*

⁴⁴ *Id.*

healthcare, social advantages and access to the supply of goods and services.”⁴⁵ Further, the Directive states that any law that directly or indirectly discriminates on the basis of race or ethnic origin shall be void by 2003. Any laws going forward which have such an effect will be deemed discriminatory under the Directive and are, thus, actionable offences.⁴⁶

The Directive, however, does not specifically mention access to asylum. One could argue that an asylum program constitutes a service under Paragraph 12 and, thus, race should not be a bar to accessing the program. The list of areas covered was not intended to be exhaustive, as indicated by the phrase “such as” in Paragraph 12 at the beginning of the list.⁴⁷ Thus, while access to asylum programs is not specifically mentioned, one could argue that, given the broader purpose of the Directive to end racial and ethnic discrimination, discrimination in this field should not be tolerated either. This is supported by other provisions that speak generally to the purpose and effect that Directive 2000/43/EC should have.⁴⁸

The Directive extends even to third party nationals; however, there are important limitations.⁴⁹ Two significant limitations being the difference in treatment based on nationality is permitted, as well as maintaining existing entry and residence requirements of third party nationals.⁵⁰ This is repeated again in Article 2.⁵¹ These provisions are highly problematic, as States are not required to alter existing practices governing entry and residence of third-country nationals. This, therefore, leaves open the possibility of discrimination. Further, a country may

⁴⁵ Directive 2000/43/EC of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] L 180, pmb. (12). [*hereinafter*, Directive on Equal Treatment].

⁴⁶ *Id.* at art. 16, 3 (4), & 7 (1)-(2).

⁴⁷ *Id.* at pmb. (12).

⁴⁸ *Id.* at art. 2 (1)-(2), & 14 (a)-(b).

⁴⁹ *Id.* at pmb. (13).

⁵⁰ *Id.* at pmb. (13).

⁵¹ *Id.* at art. 2 (2). (“This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”)

claim that the discriminatory treatment is based on nationality, when it is truly motivated by racial or religious intolerance, as concepts of race and religion can blend into nationality.

However, other EU Directives may help to fill in this legal gap.

Per the Directive, each Member State has a duty to “ensure that judicial and/or administrative procedures... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them.”⁵² The term “all persons” implies the inclusion of individuals from third-party nations, as opposed to only citizens of E.U. Member States. This reaffirms the earlier recognition of third party rights, mentioned in Paragraph 13.⁵³

Organizations are similarly empowered to raise legal actions against discriminatory policies on behalf of others under Article 7 §2.⁵⁴ Victims may rely on either direct or indirect evidence, such as the use of statistics.⁵⁵ Protection against direct and indirect discrimination has been enshrined in the law of all E.U. Member States, despite some difficulties persisting in select states, particularly in Northern Europe.⁵⁶ However, the effectiveness of these provisions may vary by Member State. Article 15 specifically states that the manner of proving racial discrimination “is a matter for national judicial or other competent bodies, in accordance with the rules of national law or practice.”⁵⁷ While the effectiveness of any of the remedy provisions are dependent upon individual Member States, the sanction cannot be purely symbolic and must

⁵² *Id.* at art. 7 (1).

⁵³ *Id.* at pmb. (13).

⁵⁴ *Id.* at art. 7 (2).

⁵⁵ *Id.* at pmb. (15).

⁵⁶ *Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation ('Employment Equality Directive')*, EUROPEAN COMMISSION (Jan.17, 2014), at 8. [*hereinafter*, The General Report].

⁵⁷ Directive on Equal Treatment, *supra* note 43, pmb. (15).

offer some degree of actual relief.⁵⁸ Further, the intervention of organizations may be limited on the national level. Paragraph 19 leaves open the possibility of “associations and legal entities... to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defense before courts.”⁵⁹ A legal entity, arguably such as an international organization representing the interests of refugees, may be entitled to start a legal proceeding to fight a discriminatory practice on behalf of a disenfranchised group. However, this right may be limited depending on the Member State and its domestic procedures.

Directive 2011/95/EU on Standards for the Qualifications of Third-Party Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status of Refugees or for Person’s Eligible for Subsidiary Protection, and for the Content of the Protection Granted

This Directive was created to implement standards for third country nationals and stateless persons to seek asylum in the EU, to give further effect to the goals of the 1951 Refugee Convention, and to help further establish a common European asylum system.⁶⁰ The Directive applies to refugees, as understood by Article 1 of the Refugee Convention, or those seeking international protection on similar grounds.⁶¹ A Member State may take a number of factors into consideration when they are determining the suitability of an applicant for refugee status.⁶² However, applicants should not be denied refugee status on racial or religious grounds. Article

⁵⁸ The General Report, *supra* note 54, at 7.

⁵⁹ Directive on Equal Treatment, *supra* note 43, pmb. (19).

⁶⁰ 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 (Recast), [2011] L 337/9 [*hereinafter*, Directive on the Status of Refugees Recast].

⁶¹ *Id.* at pmb. (14) - (15).

⁶² *Id.* at art. 9-12.

20 of the Directive states that it should be interpreted without prejudice to the rights of the Refugee Convention, which protects against racial and religious discrimination.⁶³

Paragraph 16 of the Preamble states specifically that the Directive should be interpreted to respect the obligations created by the European Union's Charter of Fundamental Rights. Specifically, the Directive should be interpreted to fully promote Article 21 of the Charter, which explicitly prohibits discrimination on the basis of race, ethnicity, or religion.⁶⁴ Additionally, Member States are also bound by their obligations under international law that prohibit discrimination.⁶⁵ For this reason, this Directive offers perhaps the most help for asylum seekers who are likely to face racial or religious discrimination. There are a few limitations worth noting. The United Kingdom, Ireland, and Denmark were explicitly exempted from the binding effects of the Directive, meaning that their own policies may be remarkably different in terms of racial or religious policies when granting refugee status.⁶⁶

Regulation No 604/2013 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

More commonly referred to as "Dublin III", Regulation No. 604/2013 has become crucial in the ongoing refugee and migrant crisis. The protections articulated in Directive 2011/95/EU are incorporated into this regulatory system.⁶⁷ The EU or one of its Member States should not discriminate against an asylum seeker. Paragraph 39 of the Preamble states that the Regulation

⁶³ *Id.* at art. 20 (1) & Geneva Convention Relating to the Status of Refugees, art. 3, July 28, 1951, 189 U.N.T.S.137.

⁶⁴ *See*, Directive on the Status of Refugees Recast, *supra* note 58 pmb1 (16); Charter of Fundamental Rights of the European Union, art. 21, Dec. 18, 2000, O.J. (C 364) 1, 14.

⁶⁵ Directive on the Status of Refugees Recast, *supra* note 58, pmb1 (17).

⁶⁶ *Id.* at pmb1 (50) - (51).

⁶⁷ *Regulation No. 604/2013, of the European Parliament and the Council 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*, pmb1. (10) & art. 2(d), 2013 O.J. (L 180) 31, 32 & 36. [*hereinafter*, *Regulation on Examining Asylum Applications*].

should be carried out in respect for the existing protected rights, especially those of the Charter of Fundamental Rights of the European Union.⁶⁸

The Regulation should be carried out with full observance of the rights in Article 47 of the Charter, which guarantees the right to file a cause of action in the event of a violation of one's rights.⁶⁹ Furthermore, if the discriminated party cannot afford representation, under the same provision of the Charter of Fundamental Rights of the European Union, that party may be entitled to legal aid in order to pursue their claim and ensure justice.⁷⁰

If a cause of action is brought under this Regulation, persons subjected to this Regulation may also find support for any causes of action within the case law of the European Court of Human Rights, as the Regulation states that Member States continue to be bound by all of their obligations under international law, including the rulings of that court.⁷¹

2. Case Law

There is a lack of case law in this area, presumably because of the novelty of this issue and the fact that a potential victim must exhaust all local remedies before reaching the European Court of Justice.

B. Council of Europe Law

The Council of Europe (CoE) is its own creature, separate from the EU, but all EU Member States are also members of the CoE.⁷² It includes 47 Member States, and is focused on

⁶⁸ *Id.* at pmb1. (39).

⁶⁹ *Id.*; *See also*, Charter of Fundamental Rights of the European Union, *supra* note 62 at art. 47 (1)-(2).

⁷⁰ Charter of Fundamental Rights of the European Union, *supra* note 62, art. 47 (3).

⁷¹ *Regulation on Examining Asylum Applications*, *supra* note 65, pmb1. (32).

⁷² *Our Member States*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/about-us/our-member-states> (last visited Dec. 1, 2016).

the issues of Human Rights, due process, and the rule of law.⁷³ Unlike the EU, the CoE does not have the ability to make binding law upon its Member States. However, it can create treaties to which Member States can join, and subsequently bind themselves to, such as the European Convention of Human Rights and Fundamental Freedoms (ECHR)⁷⁴ and its court, the European Court of Human Rights.⁷⁵ Individuals have the right, under the Convention, to plead their cases directly to the Court should their rights under the Convention be violated.⁷⁶

1. Treaty Law

European Convention for the Protection of Human Rights and Fundamental Freedoms

The ECHR offers an extensive degree of protection against racial and religious discrimination. Article 14 prohibits discrimination on the basis of “race, colour, language, religion... national or social origin... or other status.”⁷⁷ Further, the Convention provides that any party, not just nationals of Member States, shall have a cause of action before a national authority to seek an effective remedy for a violation of the rights protected in this Convention.⁷⁸ So, in theory, if a refugee or migrant is denied asylum based on their race or religion as part of a legally designated resettlement plan, then that refugee should have a cause of action in a national court. Article 1 states that the Contracting Parties will secure the rights of the Convention “to everyone within their jurisdiction.”⁷⁹ Further, subsequent decisions by the European Court of Human Rights have expanded the applicability of the ECHR to bind states for their actions, even

⁷³ Values, COUNCIL OF EUROPE, <http://www.coe.int/en/web/about-us/values> (last visited Dec. 1, 2016).

⁷⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No.005. [*hereinafter*, ECHR]

⁷⁵ *European Court of Human Rights (ECtHR)*, COUNCIL OF EUROPE, http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (last visited Nov. 19, 2016).

⁷⁶ *Id.*

⁷⁷ ECHR, *supra* note 72 at art. 14 (“The enjoyment of the rights and freedoms set forth in the ... Convention shall be Assured, without distinction of any kind, based in particular on sex, race, color, language, religion, political or other opinion, origin, national or social status, belonging to a national minority, property, birth or any other situation.”)

⁷⁸ *Id.* at art. 13.

⁷⁹ *Id.* at art. 1.

when these actions are taken outside their own territory.⁸⁰ Refugees who are already in the borders of a Member State when they are subjected to discrimination, therefore, should have a cause of action provided by the Convention.

However, a problem emerges relating to jurisdiction. A claim of an Article 14 violation must be put paired with a claim for a violation of another Convention right.⁸¹ Therefore, an asylum seeker must put forward an additional claim. The most relevant pairing might be freedom of religion (Article 9) or the right to private and family life (Article 8).⁸²

Protocol No. 12 to the Convention for Protection of Human Rights and Fundamental Freedoms

Additionally, Protocol No. 12 to the ECHR is designed to protect individuals from a wide variety of discrimination. Specifically, under Article 1, the Protocol states that the enjoyment of any right established by law cannot be denied for a variety of protected classifications including race, color, or religion.⁸³ Public authorities, such as government agencies tasked with implementing asylum programs, cannot discriminate on the basis of any of these protected classifications.⁸⁴ However, the Protocol may only be of limited use. While nearly forty countries have signed the Protocol, only eighteen have ratified it.⁸⁵ It is enough to bring the Protocol into effect, but its range is limited in scope.

⁸⁰ *Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*, THE EUROPEAN COURT OF HUMAN RIGHTS (Feb. 2016), 1-2, http://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf (referencing *Loizidou v. Turkey*).

⁸¹ See, e.g., *Sommerfeld v. Germany* [GC], App. No. 31871/96, Eur. Ct. H.R. (2003).

⁸² ECHR, *supra* note 72 at art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”); art. 9 (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”)

⁸³ Protocol 12 to the European Convention of Human Rights, art. 1 §1, Nov. 4, 2000, EST No.177.

⁸⁴ *Id.* at art. 1 §2.

⁸⁵ *Chart of Signatures and Ratifications of Treaty 177*, COUNCIL OF EUROPE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=YsrSyggE (last visited Nov. 22, 2016) (The ratifying countries are Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Malta, Montenegro, Netherlands, Romania, San Marino, Serbia, Slovenia, The Former Yugoslav Republic of Macedonia, and Ukraine.).

2. Case Law

Since 2011, many human rights organizations have been closely eyeing the decisions of the ECtHR to see if they will address possible asylum application discrimination. As previously discussed, the word “discrimination” is a term of art in law. Perhaps for that reason, the court has not blatantly called something “discrimination,” even if it *seems* as though the migrant was discriminated against in his or her asylum application.

Consider the recent case of *B.A.C. v. Greece*, where the ECtHR found that Greece’s failure to decide on a 12-year old asylum application, violated the European Convention on Human Rights.⁸⁶ The importance of this case is that the applicant, amongst other grounds, claims that he had been discriminated against based upon his nationality under Article 8 of the European Convention of Human Rights combined with Article 14.⁸⁷

The applicant was a Turkish national who was arrested for his pro-Kurdish and pro-Communist activism.⁸⁸ He subsequently fled to Greece and applied for asylum in January 2002. After his initial application was rejected, he filed an appeal with the Consultative Asylum Committee, which issued a favorable opinion in 2003. However, the Minister for Public Order never decided on whether the applicant would be granted asylum. Instead, the applicant had to renew his asylum seeker’s card and held a “tolerated status” under the law. Unfortunately, this did not allow him to attend school, get married, open a bank account, or even get a driver’s license.⁸⁹ As a result, the applicant claimed the Greek officials interfered with his right to a

⁸⁶ *B.A.C. v. Greece* [GC] App. No. 11981/15, Eur. Ct. H.R. (2013) (Failure by the authorities to deal with an application by an asylum-seeker in an uncertain situation and at risk of deportation breached the Convention.).

⁸⁷ ECHR, *supra* note 72 at art. 8 & 14.

⁸⁸ *B.A.C v. Greece (no.11981/15) [Articles 3,8 and 13]*, EUROPEAN DATABASE OF ASYLUM LAW (Oct. 13, 2016), <http://www.asylumlawdatabase.eu/en/content/bac-v-greece-no-1198115-articles-3-8-and-13-13-october-2016>.

⁸⁹ Ellen Desmet, *On a positive Note: B.A.C. v. Greece*, STRASBOURG OBSERVERS (Nov. 21, 2016), <https://strasbourgobservers.com/2016/11/21/on-a-positive-note-b-a-c-v-greece/>

private life, as enumerated in Article 8 of the ECHR, based upon his race and his country of origin.

The Court stressed the importance of the obligation that states process asylum applications in a timely way to keep the applicant's "precarious and uncertain situation to a minimum."⁹⁰ More surprisingly, the Court failed to make any reference the applicant's claim that his application was not decided upon due to discrimination as a Turkish national. In fact, the court decision did not discuss discrimination at all in its decision. Considering that the applicant asserted Article 14 in conjunction with Article 8, it is odd that the court addressed the issue raised under Article 8 without mentioning Article 14. However, many critics found the decision lacking and pointed out that the Court is "reluctant to tackle allegations of discrimination on grounds of nationality in migrant case law".⁹¹ After this decision, many advocates are wondering if the ECHR will ever discuss and hold that an asylum applicant has faced discrimination based on ethnic group, religion or country of origin in the wake of the migrant crisis stemming from the Middle East.

II. State Implementation of EU Law

Despite the initial difficulties with twenty-five EU Member States whose laws were found to infringe on the rights articulated in Directive 2000/43/EC and 2000/78/EC, currently all EU Member States should have their laws in compliance with these two Directives.⁹² Discrimination, as articulated under these Directives, should create a cause of action under the relevant national

⁹⁰ *Id.*

⁹¹ Marie-Bénédicte Dembour, *When Humans become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015).

⁹² The General Report, *supra* note 54 at 2-3.

law, which may be pursued in the national courts.⁹³ If a national government's laws are not in compliance with the requirements of a Directive, one could bring the matter before a court, an Ombudsman, or the Commission.⁹⁴ If a complaint is submitted to the Commission, which monitors the implementation of these Directives, the Commission has the power to bring a Member State before the European Court of Justice for failing to properly implement a Directive, but it cannot offer individual relief.⁹⁵

A. Greece

Greece has given effect to its obligations under the aforementioned EU Directives to prevent racial and religious discrimination in their national law. Examples can be found in both the constitution and legislation. While the Greek Constitution grants special recognition of the Eastern Orthodox Church, Article 13 of the Greek Constitution guarantees enjoyment of all civil rights and liberties irrespective of religion.⁹⁶ Continuing this theme, Article 5 guarantees, regardless of race or religious beliefs, that “all persons living within Greek territory shall enjoy full protection of their life, honor, and liberty.”⁹⁷ This provision is significant, as the phrase “all persons living in Greece” suggests these protections are not just reserved to Greek citizens, but anyone residing in Greek territory, thus, potentially, including refugees.⁹⁸

As part of its obligations to give national effect to EU Directives, Law 3304/2005

⁹³ *Id.* at 4.

⁹⁴ *Applying EU Law*, EUROPEAN COMMISSION, (last visited Nov. 28, 2016), https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/applying-eu-law_en

⁹⁵ *Id.*; *See also*, The General Report, *supra* note 54 at 4.

⁹⁶ 2001 Constitution of Greece, art. 13, para. 1, *available at* <http://www.wipo.int/edocs/lexdocs/laws/en/gr/gr220en.pdf> [*hereinafter*, Constitution of Greece].

⁹⁷ *Id.* at art. 5, paragraph 2.

⁹⁸ Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC, Country Report-Greece 2013, MIGRATION POLICY GROUP (Jan. 1, 2014), at 22. [*hereinafter*, Report on Greece].

explicitly prohibits discrimination on the basis of religion, race, or ethnic origin.⁹⁹ Act 474/1990 in Article 1, paragraph 1 provides a clearer definition of what it means to discriminate, clarifying that racial discrimination has the effect of creating exclusions, restrictions, or preferences which affect an individual's ability to access various aspects of life and society.¹⁰⁰ However, as of 2014, Law 3304/2005 still lacked any real definition for what constituted religious discrimination, and other sources of Greek law have not made the matter much clearer.¹⁰¹

Greece further adopted Directive 2011/95/EU into their national law via a Presidential Decree.¹⁰² The Decree specifically states that it should be interpreted in accordance with a number of international obligations, including the 1951 Refugee Convention, and the subsequent 1967 Protocol.¹⁰³ As stated previously, these agreements were to be applicable to those seeking asylum regardless of race or religion. Thus, Greece has acknowledged its duty to implement the Directive to assess those seeking asylum without discriminating on the basis of the applicant's race or religion.¹⁰⁴ In the same Presidential Decree, Greece has recognized its obligations under international law to comply with the principle of non-refoulement, meaning that if an asylum-seeker is facing substantial risk of harm if they are returned to their home country than that asylum-seeker cannot be returned.¹⁰⁵

⁹⁹ *Id.* at 19.

¹⁰⁰ *Id.* (“[A]ny distinction, exclusion, restriction or preference... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”)

¹⁰¹ *Id.* at 19, 21-22.

¹⁰² Diatagma (2013: Presidential Decree No. 141), on the transposition into the Greek legislation of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (L 337) on minimum 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 (recast), Official Gazette 2013, Volume A 226/21-10-2013, ch. A, art. 1 (Greece), available at <http://www.refworld.org/docid/54eb4e774.html> [*hereinafter*, Presidential Decree].

¹⁰³ *Id.* at ch. A, art. 3.

¹⁰⁴ 1951 Convention Relating to the Status of Refugees, *supra* note 62 at art. 3.

¹⁰⁵ Presidential Decree, *supra* note 100 at Ch. G, art. 21 (1).

B. Germany

To bring into effect the EU Directives on discrimination, Germany passed into law the General Act on Equal Treatment. It provides the broad protection against racial discrimination required by Directive 2000/43/EC; additionally, it provides the same broad protection against religious discrimination.¹⁰⁶ To further the fight against discrimination, the Act recognizes the authority of the Federal Anti-Discrimination Agency to help resolve instances of discrimination.¹⁰⁷ Those who have suffered discrimination can bring a claim before the Federal Anti-Discrimination Agency, which can provide the affected party with information to help bring legal action, and in some cases the Agency can help bring about a resolution outside of court.¹⁰⁸ In terms of relief, §21 states that a victim, in addition to other actions to gain compensation, has the right to file for an injunction to stop a discriminatory practice.¹⁰⁹ However, haste is required. Without a showing of good cause, one could lose the right to an injunction or compensation if an action is not filed within two months from the time of the discriminatory action.¹¹⁰

The Act empowers representative organizations in a number of beneficial ways. §23 grants to anti-discrimination organizations the ability to act as legal advisors for victims of discrimination.¹¹¹ However, these organizations must operate on a “non-profit and non-temporary basis.”¹¹² Further, the organization must be dedicated to protecting from discrimination persons affected by the categories of discrimination covered in the Act (race,

¹⁰⁶ Act Implementing European Directives Putting into Effect the Principle of Equal Treatment, Aug. 14, 2006, Federal Law Gazette 1, at §1-2, as amended (Ger.), *available at* http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile [*hereinafter*, Act Implementing Equal Treatment].

¹⁰⁷ *Id.* at §27(1) & (3).

¹⁰⁸ *Id.* at §27(2).

¹⁰⁹ *Id.* at §21(1).

¹¹⁰ *Id.* at §21(5).

¹¹¹ *Id.* at §23(2) & (3).

¹¹² *Id.* at §23(1).

religion, gender, ethnic origin, disability, age or sexual orientation), and be composed of a minimum of 75 people or be an association of seven or more organizations.¹¹³

The Federal Office for Migration and Refugees (abbreviated as “BAMF” in German) handles all issues of implementing the requirements of asylum, including those articulated under Regulation No. 604/2013 (Dublin III) and Directive 2011/95/EU.¹¹⁴ The law that brings Directive 2011/95/EU into effect under German law is the Asylum Act.¹¹⁵ The Asylum Act guarantees access to asylum for refugees and those seeking subsidiary protection. The same Act incorporates much of the 1951 Convention on the Status of Refugees, particularly in how it defines who is eligible for refugee status under German law.¹¹⁶ To gain subsidiary protection in Germany, an individual must prove that if they are returned to their native country that they may face execution, torture or similar treatment, or they must prove the presence of an ongoing war creates a substantial chance of suffering indiscriminate violence.¹¹⁷ This last factor may prove to be particularly useful for individuals fleeing from Iraq, Syria, and other areas where there is an active armed conflict.

C. Hungary

Hungary has incorporated the applicable EU laws into its Constitution.¹¹⁸ Pursuant to its obligations to combat discrimination, the Equal Treatment Authority in Hungary has the power

¹¹³ *Id.* at §1 & §23(1).

¹¹⁴The German National Contact Point for the European Migration Network (EMN), Annual Policy Report 2013, Federal Office for Migration and Refugees, at 14 (2014) (Ger.), http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/2013/11a.germany_national_policy_report_migration_asylum_2013_en_version_final.pdf

¹¹⁵ Asylum Act, Sept. 2, 2008, Federal Law Gazette 1., at ch. 1 §1 (1)2, as amended (Ger), *available at* http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf [*hereinafter*, Asylum Act].

¹¹⁶ *Id.* at ch. 1 §3 (1)-(2).

¹¹⁷ *Id.* at ch. 1 §4 (1).

¹¹⁸ The Fundamental Law of Hungary [Constitution], Apr. 25, 2011, art. E (3). *available at* <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>

to impose sanctions on both people and entities it finds to be engaged in discrimination around several protected classes (including race or religion) across many aspects of life.¹¹⁹ Further, Article XV of the Fundamental Law of Hungary (the Hungarian Constitution) provides that fundamental rights shall not be denied to any person on the basis of race or religion.¹²⁰ The fact that these rights apply to all persons, and not all citizens, is helpful for asylum seekers who might face discrimination; however, it is unclear if access to an asylum program is considered to be a fundamental right.

Hungary possesses another anti-discrimination law: Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (referred to as the ETA).¹²¹ This law explicitly prohibits discrimination based on religion or race in many aspects of life, including employment, the public sector, and businesses open to the public.¹²² Despite these efforts, gaps in the law seem to persist at least up until 2011, specifically in relation to religious discrimination in employment and wages.¹²³ Further, Hungary struggled with properly implementing the concept of a shifting burden of proof in relation to proving discrimination under Directive 2000/43/EC; however, the situation has since improved and its laws now allow for a more plaintiff-friendly approach.¹²⁴ The ETA only requires that a plaintiff substantiate their claim that they suffered discrimination, establishing that they have a protected characteristic and that they suffered some kind of disadvantage.¹²⁵

Hungary implemented Directive 2011/95/EU through Act XCIII of 2013 and appears to

¹¹⁹ Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC, Country Report 2011-Hungary, MIGRATION POLICY GROUP (Jan.1, 2012), at 6, *available at* <http://www.refworld.org/docid/525534c70.html> [*hereinafter* Report on Hungary].

¹²⁰ *Id.* at 25

¹²¹ *Id.* at 5

¹²² *Id.*

¹²³ *Id.* at 90- 91

¹²⁴ The General Report, *supra* note 55, at 9.

¹²⁵ Report on Hungary, *supra* note 128, at 124-125.

have substantially amended that Act through Act CXXVII of 2015.¹²⁶ Yet, the degree to which Hungary has been found non-compliant, generally, with EU asylum law is remarkable. Over the last ten years Hungary has been warned that it was failing to properly implement multiple EU Directives related to asylum eight times.¹²⁷ In 2014, Hungary was investigated, specifically, for failing to properly implement Directive 2011/95/EU.¹²⁸ In fact, Hungary was issued infringement warnings related to asylum three times in 2015 alone.¹²⁹ Despite these warnings, in 2015, Hungary implemented even stricter policies related to asylum seekers.¹³⁰

Hungary's legal aid program is an example of this failure. In theory, Hungarian law does allow for legal aid to be used by refugees and other asylum-seekers.¹³¹ However, the system is subject to several important limitations. Not only are there funding and personnel issues, but also legal aid does not cover the cost of translation during the asylum-seeking process, making it largely impractical for many asylum-seekers.¹³²

III. Policy Recommendations

The following policy recommendations represent just some ways in which EU Member States could ameliorate the situation. They are by no means exhaustive nor guaranteed to completely eliminate discrimination. However, these recommendations represent innovative and,

¹²⁶ *Annex – Transposition of the CEAS in National Legislation, Hungary*, ASYLUM INFORMATION DATABASE, <http://www.asylumineurope.org/reports/country/hungary/annex-transposition-ceas-national-legislation> (last visited Nov. 28, 2016).

¹²⁷ *Browse infringements of EU Home Affairs law; Hungary*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_country_hungary_en.htm (last visited Nov. 28, 2016).

¹²⁸ *Browse infringements of EU Home Affairs law*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_asylum_en.htm (last visited Nov. 28, 2016).

¹²⁹ *Browse infringements of EU Home Affairs law; Hungary*, *supra* note 125.

¹³⁰ Country Report: Hungary, AIDA ASYLUM INFORMATION DATABASE (Nov. 2015), 11, available at http://www.ecre.org/wp-content/uploads/2016/06/aida_hu_update.iv_0.pdf.

¹³¹ *Id.* at 19-20.

¹³² *Id.* at 20.

sometimes, novel solutions that could be implemented. Further, the proposals below are meant to spur dialogue amongst decision makers, which Advocates Abroad welcomes and encourages.

A. Ease Financial Burden of Affected Member States

A reoccurring complaint from a number of EU states is that their economy simply cannot afford to provide all of the financial welfare and support that asylum seekers need. This allows states to discretely discriminate against asylum applicants under the blanket claim that they cannot afford to provide social welfare to the mass number of people wanting to enter their country, regardless of country of origin.

Recently, the EU created a large-scale aid program that provided debit cards to Syrian refugees in Turkey.¹³³ The program right now is considered to be the largest cash-based aid program and the biggest humanitarian relief contract that the EU has ever signed.¹³⁴ Expanding this program takes away the argument from states with smaller GDPs that they simply cannot afford to host migrants. In addition, if the EU were to increase the amount of funding that is given on these cards, migrants would be able assimilate into different states almost seamlessly. Currently, the debit cards contain up to 100 Turkish liras a month, or about \$30 for each registered family member. If that amount was doubled or tripled, that would alleviate some of the financial burden of these smaller states. As this idea gains more momentum and support from human rights organizations and the media, this idea might become widespread and accepted. The more programs that challenge the common excuses used by EU Member States, the better.

¹³³ Peter Kenyon, *Europe's Aid Plan for Syrian Refugees: A Million Debit Cards*, NPR (Oct. 27, 2016), <http://www.npr.org/sections/parallels/2016/10/27/499327680/europes-aid-plan-for-syrian-refugees-a-million-debit-cards>.

¹³⁴ Gabriel Steinhauser and Laurence Norman, *EU to Provide Debit Cards, Cash to Refugees in Turkey as Part of Migration Deal*, THE WALL STREET JOURNAL (Sept. 8, 2016), <http://www.wsj.com/articles/european-union-to-provide-debit-cards-and-cash-to-refugees-in-turkey-as-part-of-migration-deal-1473335668>.

B. Fortified Religious Protection

The EU needs to provide broader coverage for those facing religious discrimination. EU Directive 2000/43/EC provides protection from racial or ethnic discrimination across a wide area, but lacks a provision for religious protection. Directive 2000/78/EC does provide some protection from religious discrimination, but it is limited to the areas of employment and occupational training.¹³⁵ This has had a real detrimental impact on European law as a whole. For example, while Greek law contains a fairly straightforward legal definition of racial discrimination, it appears to be lacking any counterpart for religious discrimination.¹³⁶ The issue could be addressed by creating a broad EU Directive for religious protection, just as was done for race and ethnicity. A proposed Directive came before the EU in 2008, which would have done just that,¹³⁷ but it was not put into effect.¹³⁸ If the EU could pass such a Directive, it would aid in curtailing institutionalized religious prejudice beyond the realm of employment.

C. Close Loopholes in Directive 2000/43/EC

Directive 2000/43/EC has a substantial deficiency. The Directive does not apply to nationality nor provides for third-party nationals seeking entry or residence.¹³⁹ This is a substantial problem, as restrictions based on nationality could be used as a thinly veiled effort to discriminate based on race, ethnicity, or religion. Discrimination aimed at third-party nationals in particular has been an issue in the past, and the previously mentioned rhetoric and reports of

¹³⁵ Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation [2000] L 303, pmb. (10) & art. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:en:PDF> [hereinafter, Directive on Framework for Equal Treatment]

¹³⁶ Report on Greece, *supra* note 96 at 19.

¹³⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation, COM(2008) 426, EUROPEAN UNION, (Feb 7, 2008).

¹³⁸ The General Report, *supra* note 54 at 9-10.

¹³⁹ Directive on Equal Treatment, *supra* note 43 at art. 2 (2).

violence currently happening in various parts of Europe do not indicate that the situation has drastically improved.¹⁴⁰ Further, countries may use existing entry rules to legally discriminate against those seeking access to asylum. Hungary attempted to do as much recently, as they used entry and residence rules to categorically deny any asylum seeker who passed through a designated safe country.¹⁴¹ While other Directives and Regulations seem to fill the exception for entry and residence of third part nationals, there have been ongoing problems with actually carrying out these protections for the benefit of those who need them.¹⁴² Therefore, it may be time for the legislative bodies of the EU to be purposeful and explicitly state that the accessibility to entry, residence, or asylum shall not be denied on racial or religious grounds and that nationality cannot be used to discriminate on racial or religious backgrounds.

D. Impose Sanctions for Member States Who Do Not Accept Migrants and Asylum Seekers

Another method to prevent racial discrimination might be to impose financial sanctions on countries that do not take a certain amount of asylum applicants. This method would establish minimum requirements for States to accept migrants from a certain country and make it extremely hard for them to be discriminatory. The European Commission has already proposed reforms to the EU asylum rules that would seek to impose financial penalties for those that refuse to accept migrants. Countries who refuse to accept migrants shall pay sanctions, and this money can be used to aid States that do decide to take migrants. This could provide incentives for the smaller EU countries with smaller populations, such as Malta, to accept as many migrants as

¹⁴⁰ The General Report, *supra* note 54 at 10.

¹⁴¹ *Country Report: Hungary*, *supra* note 128 at 11.

¹⁴² The General Report, *supra* note 54 at 10.

possible without causing the asylum-granting country's GDP to suffer.¹⁴³ This idea was initially proposed 2015, however, to date, there have been no further advancements on this idea.¹⁴⁴

Since each EU Member State has a different way of handling migrants, new Regulations like this would help even out the distribution of asylum seekers in Europe based upon a state's GDP. For example, The Netherlands has the strictest asylum laws in the EU, with two out of three asylum applications rejected. In fact, the Netherlands became the first EU country to start deporting people back to Somalia in 2013, despite the ongoing civil war. Netherland's GDP is one of the highest in the EU and has been increasing within the last three decades.¹⁴⁵ If the EU were to require the Netherlands to admit at least 100 migrants from Syria or be fined €250,000 per individual not admitted, they will likely be eager to comply with the quota system.

E. Allow One EU Member State To Decide for Another

To further prevent discrimination, it might be beneficial if one Member State gets to decide if the applicant for another Member State qualifies for relief. Currently, asylum seekers in the EU get their fingerprints stored in the EURODAC database upon their arrival.¹⁴⁶ The Dublin Regulation states that EU asylum claims must be processed in the first EU country where

¹⁴³ *List of European Countries by Population*, STATISTICS TIMES, (Mar. 27, 2015), <http://statisticstimes.com/population/european-countries-by-population.php>.

¹⁴⁴ Jacopo Barigazzi, *Sanctions weighed for nations that refuse refugees*, POLITICO (Sept. 5, 2015, 5:06 PM), <http://www.politico.eu/article/sanctions-considered-for-refugees-migrants-quota-crisis-opt-out/>.

¹⁴⁵ *Netherland's GDP 1960-2016*, TRADING ECONOMICS, <http://www.tradingeconomics.com/netherlands/gdp> (last visited Dec. 30, 2016).

¹⁴⁶ *Identification of applicants (EURODAC)*, EUROPEAN COMMISSION MIGRATION AND HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/identification-of-applicants/index_en.htm (last visited Dec. 30, 2016) (“When someone applies for asylum, no matter where they are in the EU, their fingerprints are transmitted to the EURODAC central system”).

the applicant arrives.¹⁴⁷ Those same officials that process migrants when they first arrive in the EU also determine which Member State will examine the application.

Consider, if France were to examine the applications for Malta, and Germany were to examine the applications for Poland and so on. This new system could potentially be completely unbiased because the country making the determination would not be coming into their country. For that reason, the Deciding State will not have any subconscious biases, that perhaps their country already has too many refugees from Syria or Somalia, and will simply look at the facts and decide. As a result, the potential of discrimination against asylum-seekers could be decreased, as the country of eventual settlement will not have the opportunity to let prejudices play a role in the decision of an individual's suitability for asylum.

IV. Conclusion

As previously mentioned, it is extremely hard to prove discrimination in the granting of asylum in the European Union. Although the applicable laws, including Regulations and Directives, expressly prohibit discrimination on a wide variety of basis, including race and religion as well as ethnicity, the term "discrimination" is difficult to pinpoint. As the lack of case law indicates, it is extremely hard to show the necessary intent to prove that a state was in fact acting in a discriminatory manner when reviewing asylum applications. Further, there are problems with existing laws, especially as they relate to providing greater coverage for religion. There have been an increasing number of issues with applying the current law on the ground level across many parts of Europe.

¹⁴⁷ Felicity Capon, *Germany Drops EU Rule in Order to Welcome Syrian Asylum Seekers*, NEWSWEEK (Aug. 25, 2015, 6:11 PM), <http://europe.newsweek.com/germany-drops-eu-rule-order-welcome-syrian-asylum-seekers-332020?rx=us> (Except for in Germany, Germany annulled the Dublin requirement for Syrian refugees allowing Syrians regardless of where they entered, to be eligible to apply for asylum in Germany.)

Yet, there is a way forward. There is a substantial amount of law in the form of Directives, Regulations, and treaties that should extend some protection to those facing discrimination during asylum proceedings. Further, several policy changes have already been proposed that could help to address the current deficiencies in the law. By implementing creative policies, the EU can decrease the amount of discrimination in processing and approving applications for asylum, bringing itself closer to fulfilling the requirements it has already set. In the interim, international and Europe-based human rights organizations should attempt to find creative arguments when addressing possible state discrimination in asylum applications.