Complementary Protection and the Recognition Rate as Tools of Governance: Ordering Europe, fragmenting Rights

Olga Demetriou

Author details:
Olga Demetriou
Associate Professor
Durham Global Security Institute
School of Government and International Affairs

Correspondence Address:
Elvet Hill Road
Durham, DH1 3TU
United Kingdom

E-address:
olga.demetriou@durham.ac.uk

Recognition rates measure how far states afford rights to refugees. Recent developments of the Common European Asylum System (CEAS) have supplemented this measure with factors such as population and wealth. Concurrently, laws have developed nationally and Europe-wide regulating "complementary protection" for those not qualifying as "refugees" under the 1951 Convention. These two parallel developments in migration governmentality, I argue, are part of a process that increasingly complicates the field of knowledge around refugeehood, raising the level of expertise needed to access protection. This article focuses on the use of complementary protection in Europe since 1999 and explores (i) the legal process of proliferation of protection categories and (ii) the political process of calculating rates. The paper employs a methodological mix of ethnographic observation and critical readings of law and statistics to map various ways of counting recognition rates. This highlights the importance of statistics in feeding a narrative of liberal, Western, European society that protects refugees. Yet it is evident that both protection and its denial are constitutive of a CEAS governmentality that is best described as "ordered fragmentation." One of its basic assumptions is the denial of refugee agency, rendering states the subjects of the protection regime.

Key words: humanitarian protection, subsidiary protection, Eurostat asylum statistics, refugee regime, governmentality of migration

The Spectrum of Refugee Protection

Nazar introduced himself in mid-2017 during an orientation session for volunteers at a

refugee social centre in Athens. Afghan, in his early twenties, he was recently granted refugee status, he told me, but had trouble finding work. He decided to volunteer to help and keep busy. The search for jobs was difficult: Greece was still suffering from an economic downturn and was monitored by international institutions. The work at the centre took his mind off things, and made him feel useful; he was also "giving something back," because he recognised the plight of the people he was helping. The centre was one of the many international non-governmental initiatives that sprang up after 2015, when Greece experienced a "refugee crisis" (*prosfiyikí krísi*). Among other skills, his knowledge of Afghan dialects and English would be useful for the services the centre offered, Nazar surmised.

Much as he looked forward to his volunteer duties, Nazar worried about his future. It had been a struggle to get his refugee papers. He described the arduous journey from Afghanistan, his tribulations with the Greek asylum system, and the daily discrimination that frustrated his attempts to integrate in society. So now, successful as he had been in securing refugee recognition, he was having trouble finding work, having trouble moving around Athens, even having trouble sitting in cafes like the one we were at without getting awkward looks. He was also worried about his girlfriend, who had made her own way to Europe and expecting to join him as a future wife, which was proving more difficult than he initially thought. It was uncertain that authorities either in Greece, or the country where she was, would recognise them as "family" since they had not been married prior to their journeys.

There was a sense of accomplishment as Nazar took out his papers to show me his recently acquired status. They indicated that he was receiving protection under "humanitarian status" (*anthropistikó kathestós*). Family reunification is not granted under such a status; even if they found a way to marry officially while apart, it was unlikely that humanitarian status would help. As Nazar was beginning to understand the vagaries of refugee protection, he would grasp the implications of complementary protection and the lesser rights it affords relative to refugee status "proper." Nazar was at the "doorstep of Europe" (Cabot, 2014), and with a foothold through the door, was now having to navigate the predicament of a specific kind of refugeehood. The legal maze he had been delivered from was becoming only his first hurdle. Protection, for Nazar, implied entry into a regime that in a Foucauldian sense (2007) governs and disciplines while protecting, and which thus placed new restrictions on his agency to decide and shape his future at the very moment when it granted him security and welfare.

The legal intricacies of protection that underpin this regime and deny agency are confusing not only for Nazar, but many practitioners too. The massive literature on the refugee regime centres around the parameters of the 1951 Geneva Convention on the Status of Refugees. Under its terms, refugees flee state persecution and cannot return to their country. Hence, the hosting country affords them rights of residence, work, and family life in the name of the international community (Hathaway, 2005). Such protection is thought to make all the difference in the asylum system: recognised refugees on this side, rejected applicants on the other. Yet refugee law has long discussed the position of those excluded from this definition of "refugee" who are nevertheless in need of protection (Hathaway, 1991; Goodwin-Gill, 1996; McAdam, 2007; Gil-Bazo, 2007).

The office of the United Nations Commissioner for Refugees (UNHCR) acknowledges such other forms of protection, better known as "complementary." In Europe today two such forms are used: humanitarian and subsidiary protection. Together with "Geneva" protection,

they constitute the main positive outcomes in the asylum determination process. But even though these are well known to legal experts, little has been made of them analytically, in contrast to Geneva protection. In the many years I have been speaking to refugee rights practitioners in various locations, complementary protection was an afterthought, if discussed at all. And its various guises across Europe often seemed shifting and uncertain.

Nazar's lack of awareness of the implications of humanitarian status for his immediate future, and indeed, my own uncertainty at the time as to what exactly it entailed, reflects the ways complementary protection is constituted as a specialised field of knowledge in the refugee regime. It underscores the level of legal expertise needed to assess whether forms of protection are appropriate. The ordering power of that assessment is significant because –as "positive" decisions– protection statuses, once secured, are often not appealed.

Complementary protection is an apparatus of government (Foucault, 1990; 2007) which uses specialized knowledge to elicit the acquiescence of subjects into the restrictions it imposes on them; to discipline them, as Foucault would say, through forms of government that they willingly accept (which is what he means by "governmentality"). While it was conceived as a way of protecting more people than strict applications of the Geneva Convention might, in practice it has undermined refugee rights rather than enhance them. The transition from law to implementation entails a conceptual shift from the refugee as a subject of rights to the refugee a subject of discipline.

In Cyprus, activists and practitioners have been speaking over the last decade of an entrenched practice to grant complementary protection instead of refugee status to deter people from bringing family over. One such case was Faneel's. After years of waiting for a decision, he was eventually granted humanitarian protection. But a few years after that, he decided to return to his country, where as a political activist he had received threats. He had grown weary, he explained to me, of seeing his family through virtual meetings over a computer. His young child was growing up and he was increasingly realising how little they knew each other. And there was no hope for resolution. In the landscape of asylum provision, complementary protection renders Nazar and Faneel subjects not of protection but of "prevention through deterrence" (De Leon, 2015; Stewart et al., 2016).

This prompts me to look at complementary protection as a tool of ordering refugeehood in Europe. I do this alongside, but also against the grain, of the intuitive tendency in migration studies to concentrate on the oppressive dynamics in the denial of protection to those kept outside the system: people drowned at sea, denied entry at borders, pushed back, having asylum applications rejected, arrested, detained, deported. Such studies argue that law and state practices work on a continuum to deny people the right to move and offer the concept of autonomous migration as a corrective to grasping emancipatory potentials in migrant practices (De Genova, 2013; 2017; Hamilakis, 2016; Tazzioli, 2014; Mezzadra, 2010).

I am arguing that an analysis of disciplinary (rather than oppressive) forms of power that work through protection rather than its denial hold lessons about how refugeehood is ordered. Those lessons regard the efficacy and persistence of regimes of controlling human movement, but also enlighten us on the ways through which these regimes produce imbricated gradations of citizenship and protection (Demetriou 2014, 2018) through socio-political adaptations of legal categories.

Nazar and Faneel are not subjects of resistance but deterrence, yet they are also subjects of discipline, in the sense that they uphold the system and comply with its demands; they even celebrate it when it grants them papers. It is because the system offers protection that it can also legitimise deterrence and deny agency. Thus, looking at these internal workings is indispensible to an account of how the externalisation of violence becomes possible. Nazar's case shows that this disciplinary and at the same time ordering power, which works through acquiescence and categorisation respectively, emerges from a demographic landscape of refugee recognition that is mired by ever-proliferating gradations of status. Just as citizenship orders subjects along a spectrum of rights positioning them as minorities, naturalised citizens, and birthright nationals (Isin, 2002), refugeehood also operates on a spectrum: asylum-seeking, humanitarian protection, subsidiary protection, temporary protection, Geneva Convention, internal displacement.

These legal statuses –and as I am going to demonstrate in this paper, their sociopolitical manipulation– mark out refugeehood as a field of power ordered by two forms of knowledge: law and demography (in the loose sense of counting a population). These knowledge regimes are disciplinary not only the political sense of guiding the creation of policy and governance, but also in the scientific sense of marking out specialised fields of study. In fact their efficacy emanates from this double aspect - they are Foucauldian "regimes of truth" (1977). A critical analysis of them as such disciplinary regimes then must also address them from these different disciplinary perspectives; and this is what I offer in the paper as a methodological suggestion. The article thus develops in three steps that correspond to different analytical knowledge regimes (anthropology, law, statistics) that read together, I argue, allow us a clearer view of the political field of power I seek to interrogate.

Just as legal instruments mark out the contours of complementary protection, asylum statistics regularly monitor and report the levels at which it is granted. Eurostat counts the numbers of people receiving "Geneva," subsidiary and humanitarian protection at quarterly intervals across Europe. UNHCR counts Geneva and "other" forms of protection annually. These numbers are quoted alongside the total numbers of applications examined, to yield a ratio of recognitions to applications known as "the recognition rate." The recognition rate as a tool of knowledge is thus central to the governmentality of refugeehood because it is taken as indicative of a country's adherence to liberal principles of safeguarding refugee rights. Countries use the different protection statuses to "perform well" on statistical charts, while simultaneously ordering refugees in different sub-categories of protection. As these sub-categories afford their subjects differential rights, recognition and protection become idiosyncratic forms of denying rights and technologies of regulation and deterrence.

Yet in the last 20 years, just as complementary protection instruments have become more specific, a shift has also occurred in the workings of the recognition rate. A former human rights practitioner recently quipped about these rates: "do people still count them?" What she meant was that since the early 2000s recognition rates had lost their potency as monitoring tools. With that, she was also lamenting the general degradation in human rights practices. This monitoring function was weakened through the introduction of other factors in calculating protection. The Common European Asylum System (CEAS), in its many guises over the last two decades, has correlated recognition rates to country-specific factors such as population size, levels of wealth as indicated by gross domestic product (GDP), and

unemployment.[1] These three are determining factors in the assignment of relocation quotas implemented in the 2015-2018 period, a system which allocates people assumed to need protection to different states but leaves the status determination process to each state. Relocation was already piloted in Malta in 2010 (EC, 2011) under the European Pact on Migration and Asylum, which made reference to pressures on Member States due to their "demographic situation" (2008: 12). In understanding how the spectrum of protection works therefore, we need to focus on the evolution of classification on the planes of law (complementary protection) and demography (statistics around recognition rates).

It is therefore necessary to look at how complementary protection is reported in order to understand the story that Europe tells itself about its constitution as a liberal space where refugee rights are respected. The critique of the violence that protection numbers hide becomes more poignant against the good stories that Eurostat statistics present. Law and demography as institutional regimes of expert knowledge, need to first develop complexly as disciplinary *dispositifs* (mechanisms arising from the knowledge regimes I have described that categorise subjects and determine their welfare), before they can be reduced to *dispositifs* of oppression and violence (mechanisms predicated on exclusion). This development is what the rest of the paper charts.

Law: Multiple categories, fragmented protection

> *Protection has, in effect, been co-opted and instrumentalised as never before to serve national interests and a political discourse which reinforces the securitisation of migration and asylum (predominantly in post-industrial countries) at the expense of the rights and protection of migrants* (Zetter, 2015a: 65)

Three types of complementary protection exist in Europe today: subsidiary, humanitarian, and temporary. Subsidiary protection was introduced with the Qualifications Directive 2004/83/EC in October 2006.[2] Its application had a profound impact on asylum statistics beginning from 2008, as it also coincided with the streamlining of how protection is counted. Eurostat data collected prior to 2008 relied largely on states' goodwill to report numbers ("gentlemen's agreements" in the language of Eurostat metadata).[3] Streamlining after 2008 allowed an easier comparison of practices. A 2015 report reviewing the Directive's application uses recognition rates as a key comparative indicator of states' conformity to uniform procedures (EU, 2019: 13). The report found that "the practical application of the Directive still varies significantly… lead[ing] to different outcomes of asylum applications across Member States in terms of recognition rates, even when applicants with similar profiles came from the same country of origin." (EU, 2019: 29). Factors that contribute to these discrepancies are economic considerations and the use of humanitarian status as alternative, the report notes (EU, 2019: 30). This explanation illustrates how the multiplication of categories of protection (e.g. humanitarian) is tied to the multiplication of

[1] For example, the Commission's First Annual Report on Immigration and Asylum to the European Parliament noted that "total figures for asylum applications hide significant differences between Member States when the numbers are expressed as a proportion of population" (2010: 12).

[2] Modified by Directive 2011/95/EC (see ECRE, 2013, on changes). Denmark has opted out.

[3] Decisions on applications and resettlement (migr_asydec) - Reference Metadata in Euro SDMX Metadata Structure (ESMS), §15.2, available at https://ec.europa.eu/eurostat/cache/metadata/en/migr_asydec_esms.htm, accessed 7 June 2019.

the factors considered when granting it (e.g. economy). It also exemplifies remarkably how this relationship operates in the production of the "recognition rate" as a tool of knowledge and *dispositif* of governance. These two parallel processes (proliferation of categories and factors of protection, and the operation of the recognition rate) are, I argue, crucial in understanding the European refugee regime.

The Qualifications Directive classifies "subsidiary protection" within the sphere of international protection as applicable to a "person who does not qualify as a refugee [but who]… if returned to his or her country of origin … would face a real risk of suffering serious harm" (Art 2f). "Serious harm" is in turn defined as "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment …; or (c) serious and individual threat … [through] indiscriminate violence in situations of international or internal armed conflict" (Art 15). Legal scholars have argued that these "types of threats … indicate a strong presumption for Convention status" (Mc Adam, 2007: 65) and therefore subsidiary protection should apply only under special conditions rather than as an alternative to refugee status. The definition of "serious harm" is especially problematic (Tiedemann, 2012) not least because torture is often a major consideration in the granting of humanitarian status.

And while these implications should be non-consequential for the quality of protection (McAdam, 2007), the different statuses of protection, from refugee to subsidiary to humanitarian, do in practice come with diminished rights. Thus, while a language of equal rights between refugee and subsidiary protection is emphasised throughout the Directive, the small print differentiates them: social assistance is partly left to national law (§45); exclusion criteria are harsher than those for refugees (Art 17.3); residence permits shorter (one year instead of three, Art 24.1, 24.2); social welfare may be limited (Art. 29.2). Even the standards for 1951 Convention become stricter in the Directive, as for example, refugee protection becomes explicitly applicable only to third country nationals, *refoulement* becomes possible, and the naturalisation of refugees is not considered (Gil-Bazo, 2007: 239, 253, 259). Subsidiary protection, in short, offers Member States an opportunity to interpret "international protection" in more restrictive ways. It puts asylum seekers in a category that allows states more discretion and thus allows them to circumvent international legal standards. Between the UN sphere of protection (Refugee Convention) and the EU sphere (Qualifications Directive and its subsidiary protection), a restriction of rights has taken place that goes against the principle of needs-based protection and which has raised the bar of expert knowledge needed to navigate the EU asylum system.

Humanitarian protection extends this process further. Defined by the Directive as applicable to persons "allowed to remain in the territories of the Member States for reasons *not due to a need for international protection* but on a discretionary basis on compassionate or humanitarian grounds" (§15, emphasis added) it is effectively relegated to national law. But in being so, it is also constructed as the lowest of a three-tier system of decision making which passes from the UN Convention (refugee protection) to the EU Directive (subsidiary) to national law and policy (humanitarian). Except that humanitarian protection is not outside international human rights law. The purpose of humanitarian protection is instead to address the needs of those who fall under the parameters of international human rights instruments other than the Refugee Convention, namely the Convention again Torture (CAT) and major treaties like the International Covenant on Civil and Political Rights (McAdam, 2007; Gil-Bazo, 2007,

Gorlick, 1999, Pobjoy, 2010). It ensures, at a very minimum, that people are not returned to places where their rights under these instruments are not guaranteed. In other words, there is nothing less "international" about humanitarian protection than there is under refugee, except the fact that European states have decided not to regulate it. The framing of humanitarian protection as outside the scope of "international" statuses like refugee and subsidiary, creates the impression that humanitarian protection is extended by states "on purely compassionate or humanitarian grounds… rather than on the basis of their international obligations" (Gilbert, 2004 in Gil-Bazo, 2007).

In the UK's recent iteration, humanitarian protection is considered after the refugee recognition process has failed (HO, 2017), and takes account of risks under CAT, returning to situations of general violence, and severe medical reasons. In Greece, the reform of the citizenship code of 2015 (Law 4332/2015) similarly grants humanitarian protection to rejected asylum applicants but also to other categories and situations: victims of trafficking, domestic violence, work exploitation, labour accidents, grave illness, minors in care, and parents of Greek citizens. The process is two-pronged, both tied to and separate from the asylum system. In Cyprus, practitioners explained, humanitarian protection is similarly two-pronged but rests solely on the discretionary powers of the Minister of Interior "to grant to those they alone deem worthy." This exemplifies well how the Directive's exclusion of humanitarian protection from its scope leaves "standards of treatment for persons protected by *non-refoulement* … to the whim of individual States" (Mc Adam, 2007: 85) – or Ministers.

Comparative surveys by ECRE in 10 European countries (2004; 2009) showed that while some countries considered expedience as grounds for humanitarian protection (impossibility of return to the country of origin), most countries used family unity, the protection of children, and health reasons as their primary grounds (2009: 6). Health reasons are most frequently invoked as "typical" by practitioners. Fassin's example of Marie (2011: 141-143) is exemplary: a Haitian failed asylum seeker in France who, in her dire predicament, was granted humanitarian protection because she had contracted HIV. For Fassin, this indicates that "in a little more than two decades, as asylum gradually lost its credence, illness gained prominence … [exposing] a form of governmentality whereby the claim to bare life [i.e. life reduced to physical sustenance] was the ultimate way to access a political existence" (2011a: 143, 145). This shift, I would add, correlates with the shift from internationally-induced obligation to nationally-regulated compassion. Humanitarian protection, in other words, speaks both of the role of bodily vulnerability in the politics of compassion (Ticktin, 2011) and the politics of claiming the nation's sovereign right to decide who to care for. Sovereignty is at the heart of the splintering of "the concept of international protection as further differentiated statuses and unprotected categories develop" (McAdam, 2007: 84). It defines the terms of compassion and expedience on which rights are granted – and refugees, having been denied agency, are rendered victims and/or numerical management cases.

Notably, since Fassin's and Ticktin's observations on humanitarian governmentalities, it is subsidiary protection that has been gaining ground across Europe (fig 2, next section). This, I would argue, indicates that a question of European sovereignty is folded into these processes of splintering protection and downgrading political persecution. There is, in other words, an added European anxiety to the double process that Zetter aptly describes above as the fragmentation and politicization of protection (also Zetter, 2015b: 24). That anxiety is gleaned in the operation of temporary protection, which although stipulated in Directive

2001/55/EC, has never been granted in Europe. Emerging from the context of Yugoslav war displacements (§3, §6), it aims to coordinate action when there is a "mass influx" of displaced persons by providing year-long residence permits with a view to repatriation. But the Directive requires a qualified majority to enunciate a situation of "mass influx" (§14), otherwise defined simply as "arrival in the Community of a large number of displaced persons" (Article 2d). Its non-application therefore bespeaks of a lack of collective European sovereignty, not people's lack of protection needs.

Yet the Directive also hints at continuities in governmental thinking, which supplant the lack of collective sovereignty by managerial logic. The Directive speaks of "burden-sharing" (§4) and "solidarity" (§7, §9) – concepts that have been well rehearsed in the post-2015 period. Until recently, they have driven the development of the Dublin Directive, another key tool of migration governmentality in Europe (Schuster, 2011a; 2011b), which assigns asylum examination to the country of entry. In a reverse logic to Dublin, the process through which temporary protection is supposed to work apportions asylum-seekers to different Member States to have their applications examined. This is aligned remarkably to the process of "relocation" as Greek practitioners related it to me in 2017 (Council Decision 2015/1601). In the Directive, as for relocation, Member States declare capacities for reception and are matched with needs (Art 25), transfer requests are coordinated with the Commission and UNHCR, and asylum applications are evaluated by the destination country (Art 26). Through shifting the focus on management instead of norms (Scheel and Ratfisch, 2014; Zetter, 2015b), the relocation programme integrates temporary protection provisions into the asylum process. The Directive is therefore interesting as a *dispositif* which dares not speak its name: its use has not formally been declared but its provisions are being implemented in practice. "Temporary protection" becomes a de facto status *despite the law* and indeed, in this de facto sense is a vital part of the asylum regime in Denmark, Germany, Australia, Israel and Turkey (Rygiel et al, 2016).

These three European complementary protection mechanisms show how obligation, compassion, and sovereignty are filtered through concepts of standardisation, management, and capacity. Through the increase of categories of protection, rights are hierarchised (refugee-subsidiary-humanitarian) and diluted. At the same time, a specific logic of governing through particular categories and processes persists in new forms of management (temporary protection morphs into relocation). And as emphasis is increasingly being placed on management rather than qualification, effective protection becomes de-prioritised. This is also seen beyond Europe in the displacement of emphasis in global discussions from the need to protect to the need to decide who protects; a discussion that has given rise to the Global Compacts on Refugees and Migration respectively in 2018 (Hathaway, 2018; Doyle, 2018; Chimni, 2018). There is thus a mirroring of proliferating categories of protection onto proliferating factors taken into account in responsibility sharing, which together order Western, post-industrial states as liberal spaces of protection, while legitimising disciplinary techniques. And the tool that most effectively enables this is the statistics around "recognition rates."

Demography: The production and dilution of the "recognition rate"

Eurostat numbers, like all censuses (Ruppert, 2011), enact, more than they represent, a population – here, the subjects of protection. Alongside UNHCR, it is the main body consulted on European asylum statistics. Key users include Commission Directorates and the European Asylum Support Office (EASO). Its numbers, as "outcomes of the struggles over methods, truth claims, budgets and influence" (Scheel et al, 2016: 9), result in part from "gentlemen's agreements" (pre-2008 data) and are plagued by missing data and categorization problems such as aligning first instance and appeal level decisions before and after 2009.[4] In exploring the enactment of subjects of protection that this embattled universe generates, I draw on two separate literatures: quantitative analyses of asylum statistics and critical analyses of their production. I thus analyse the data as a tool of migration governance and a performance of European governmentality (also Pelizza, 2019). A story of protection in liberal states emerges from the data that stands against the story of border violence and death that other forms of counting tell.[5] My analysis explores this story and how it is told. The "recognition rate" in its various guises, I argue, enacts not only those protected as the "subjects of protection," but also those doing the protecting: Member States, their agents, "Europe," and what I call its "ethical regions."

National-level differences in categorisation that mire the Eurostat project (Gromme and Ruppert, 2019: 12), are exacerbated in the sphere of migration, by practices conducive to the "production of ignorance" (Scheel and Ustek-Spilda, 2019). The rounding of numbers to the nearest 5 for example (metadata, §18.5), frustrates the extraction of meaningful information where numbers are low, thus rendering invisible practices like discouraging applications. The "recognition rate," after all, does not strictly reflect the rate a country grants protection but rather its effectiveness in examining applications. In 2000s Greece, applicants would queue for months to lodge their applications – "the pink slip" they received as confirmation allowed them to stay in the country while awaiting a decision (Amnesty International, 2004; Cabot, 2012). For those years then, numbers of applications (upon which the recognition rate is calculated), do not represent the people who seek protection but rather enact the category "asylum-seekers" as people who hold a pink slip.

The "recognition rate" is produced today as a tool for governing protection in a statistical field of knowledge that is at once power-laden and diffuse, and where expertise is highly differentiated and elusive. Thus far, factors like population and GDP were taken as external to the asylum system, which affected rather than co-produced the rate (e.g. Holzer et al, 2000). Today, their incorporation into the rate is part of the strategy for managing migration. Testing EU recognition rates against population size, GDP, unemployment, and far right support, Neumayer found that between 1980 and 1999 asylum seekers were "push[ed] into lower protection statuses in times of economic crises or when destination countries perceive themselves as being overburdened" (2005: 44). Unemployment and numbers of asylum-

[4] This entails that "comparisons of prior-2008 and after-2008 Asylum data should be exercised with caution" (metadata §15.2). I merged them here because subsidiary protection was introduced in 2008, with the following limitations: (i) the sample consists of the 29 countries of the pre-2008 set (27 Member States by 2013, Iceland and Norway); (ii) there is a striking lack of entries pre-2008, mainly for countries that post-2008 do not provide significant protection; (iii) recognition rates belong to two separate registers, one post-2009, which records first instance decisions and final decisions differently, and one pre-2009, where "decisions" are provided as a total.

[5] See, for example, https://openmigration.org/en/ (accessed 11 June 2019).

seekers was found to affect specifically Convention recognitions (2005: 64). So the process of tying the recognition rate to external factors reflects established but informal practices. This is exemplified in the relocation mechanism of 2015, itself a development of older projects as explained above, where status determination (the actual granting of protection) happens after people have been moved around according to these composite rates. In fact, prior to 2015 legal scholars had argued that the absence of an agreement on the transfer of protection between states puts into question the EU goal of "uniform asylum status" (Peers, 2012: 556). They further warned that the interaction of the various directives on asylum and residence could result in serious breaches of rights "if the EU adopted [relocation] rules" (ibid). Now that relocation is entrenched in the system, the fact that these factors are folded into policy renders invisible the separation between protection as an ethical (and legal) response to need and its management as a practical question of expedience.

Other long-standing informal practices within the asylum system included the use of refusal as deterrence: an increase in applications across the EU-15 decreased 1982-2001 recognition rates (Vink and Meijerink, 2003: 305-11). Alternatively, complementary protection has been used to keep rates up: 1999-2010 recognition rates in countries judged "generous" concerned complementary protection (Toshkov and de Haan, 2013: 679). These practices are today formalised under the relocation rubric, which counts not only GDP and population as weighting factors (40% each) in apportioning applicants to Member States, but also unemployment and pre-existing presence of asylum-seekers (10% each). This formalisation was enabled through the inscription of legal and statistical complexity into the recognition rate.

In this frame, the 1999-2017 data tell an overall positive story about recognition rates across Europe: rates have been going up, refugee protection roughly equals complementary, differences in rates between countries are decreasing. All of the positive decisions recorded in the data (29 countries, 19 years, all statuses) amount to just under 2.5 million. This results from 4.4 million applications decided at first instance (post-2009) and 412,464 concluded at final stage (since 1999); 2.7 million were examined only between 2015 and 2017.[6] This suggests a recognition rate roughly above 50%. But this sits uncomfortably beside an abysmal count of protected people over two decades. In 2018, Turkey alone hosted 3.5 million, Uganda and Pakistan 1.4 million each (UNHCR, 2019). The numbers also compare unfavorably to the relevant policing statistics that Eurostat releases since 2009: 4 million people were refused entry, 7.5 million found to be illegally present, 5.5 million ordered to leave, and 2 million returned to third countries (210,000 forcibly). Hence, the potential recognition rate that might have pertained if the first two categories had a chance to apply for asylum could be closer to 15% than 50% - but this is only possible to suggest if different sets of data is put together and assumptions made about their comparability.

So what of the 2.5 million decisions? They were in vast majority taken by 11 of the 29 countries (table 1), nearly half in Germany, the rest in western Member States who have been driving the EU migration agenda, and in Norway, Greece, and Italy. This reflects Germany's hegemonic position in European refugee policy, especially since 2015; or as Greek practitioners jestingly put it to me in 2017, "the headmaster's office is in Berlin."

[6] Annual rejection rate counts, even though difficult to measure precisely due to differences between first instance and final decisions, hover between 57% in 2006 and 85% (final stage) in 2015.

[insert Table 1 and caption here]

Refugee numbers have been rising since 2013, reaching 0.5 million in 2016. Since 2015, Europe has been protecting more people than before (fig 1a), both in absolute numbers and in terms of recognition rate at first instance (fig 1b), and with decreasing variance.[7] The "crisis" of 2015, the numbers suggest, was positively managed. Yet the drop that followed indicates an almost immediate effect of securitisation through practices like the CEAS revision, deployment in the Aegean and the Mediterranean of the European Border and Coast Guard Agency (FRONTEX) as well as NATO vessels, set up of Hotspots with EASO presence, the EU-Turkey deal, proliferation of bilateral agreements with transit countries.

[enter Figure 1 here]

This tension between securitisation and protection seems particularly acute in 2015 by comparison to the previous spike in applications, post-2001 (fig 1c). In 2015 the rise is notable in both applications and positive decisions, rendering, I argue, the 2015 "crisis" mainly one of access. Practitioners, former policy-makers, and internationals based in Greece suggested to me that in the summer of 2015, for a short period of time, Greece had instituted an undeclared "open borders" policy. And while the internationals described this with alarm, my Greek interlocutors took pride in the fact that for the first time a concerted approach to shift the labeling of crossers from "illegal migrants" to "refugees" was pursued top-down. The spectrality of humanitarian efforts in the Aegean at the time, drawing global attention to the plight of refugees in dingy boats (Giannakopoulos, 2016; Papataxiarchis, 2016; Kalir and Rozakou, 2016) was crucial in spreading that discursive shift beyond Greece. The rising numbers of protection thus suggest that the governmental pursuit of open borders had a major European impact. Spectrality worked to cast refugees not as "criminals" (de Genova, 2013; Aas, 2011) but as subjects of humanitarianism and, as Kirtsoglou argues (2018; 2019), humanity too. For a short period of time, autonomous migration and state policy became co-constitutive. A similar "temporary sync between Italy's disobedience to the Dublin III regulation and Syrians' strategy of movement" (Tazzioli, 2016: 10) had followed the Lampedusa shipwrecks of 2013, which killed over 360 people, eliciting the search and rescue operation Mare Nostrum – alongside a Europe-wide rise in recognition rates (1b).

But the humanitarian imperative that pervades these responses also elicits the use of complementary protection as corollary of need. Since the subsidiary protection regime came into force, it has paralleled Geneva recognitions (fig 1a), suggesting its use as an alternative status to refugee, and potentially an outsourcing mechanism for refugee protection. Humanitarian protection seems to have had this outsourcing function until 2008, when complementary protection shifted from national frames to EU. In fact, at country level (offsetting German totals by considering population proportions), subsidiary protection has been the preferred instrument (fig. 2).[8] In other words, countries with smaller populations seem more reluctant to grant full protection rights under the Convention;[9] and whereas they

[7] Variance dropped from 0.17 to 0.10 for refugee, 0.12 to 0.05 for humanitarian, and 0.05 to 0.03 for subsidiary.
[8] This ratio also allows the total number of positive decisions at both first instance and appeal stages to remain in focus. Typically, recognition rates would be calculated as a fraction of the total number of decisions in each year. But as this total number is not the sum of the decisions taken at the two stages (which the positive decisions are because there are no overlaps), these rates cannot be merged.
[9] Kirtsoglou and Tsimouris (2018) argue that a culturalist discourse underpins this reluctance.

used to practice this under national legislation (humanitarian protection), post-2008 they have been disciplined into the use of EU instruments.

[insert Figure 2 here]

And although as a disciplinary mechanism protection varies widely between countries, three groups emerge consistently (fig 3). Western European states grant more protection than others, and generally under refugee than other statuses (3a). Mediterranean states are positive and negative outliers, while new European states score low applications and recognitions: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia, and Slovakia, alongside Portugal and Spain lie below 20 refugee recognitions per million (omitted for clarity in 3a), and most of this group also falls under 10 complementary recognitions per million (3b). Across the three groups, there is strategic use of complementary protection (Malta, Sweden, Cyprus, and the Netherlands), considerable denial of protection (Ireland, Iceland, Italy, Spain), but only singularly high levels of full refugee protection (Austria). There is also variable use of EU and national instruments of complementary protection: the UK makes no use of subsidiary, Malta and Sweden use it extensively (3b).

In the disciplinary dynamics attempting to bridge these differences, a diachronic discourse of convergence (Schuster, 2000) and managerial effectiveness in applying the law is employed. The Evaluation Report of the Qualifications Directive of 2015 (EU, 2019) does just that. And failing this discursive nudge, the weighting of the recognition rate as applied in the 2015-2018 relocation programme appears particularly effective. Normally understood as the ratio of refugee recognitions over all decisions (table 2), the recognition rate ranges from Slovakia's 1.95% to Norway's 39.40% (averages at 16.95%). Its manifestation accords to the three broad groupings identified above. In the higher band (>20%) western Europe predominates alongside Romania and Bulgaria but Finland, Sweden, France, and the Netherlands are excluded. Subsidiary protection covers a greater span (UK's 0.53%, Malta's 60.19%, average at 17.12%). Above 20% is granted in Sweden, Finland and the Netherlands and in the Mediterranean/border states of Malta, Cyprus, Bulgaria, and Spain, as well as the Czech Republic. Humanitarian protection is granted at higher rates on appeal, in contradistinction to the other forms, and at significantly lower levels (0.06% in France, 22.81% in Italy),[10] confirming its almost exclusive use (rare, at that) as a fallback after refugee applications have failed. Rates below 10% in Convention status, reported in central Europe and the Mediterranean, could indicate a deterrence strategy – also noticeable in appeal decisions across the board.

[insert table 2 and caption here]

So the two levels of decision-making and the forms of protection intersect to enact states that protect people (mainly in western Europe), states that protect borders (mainly in the European south), and states that protect access (mainly new Europe). Within these geo-ethical regions, there are also states that strategically negotiate their positions. This strategic negotiation comes forcefully to the fore when the "recognition rate" is filtered through factors of population and wealth, the two most important criteria in the EU's "responsibility sharing" governmentality (table 3) as enacted in the relocation scheme.

[10] Estonia and Slovakia are at even further extremes but with too low application numbers for reliability.

[insert table 3 and caption here]

Relative wealth (purchasing power above European average) and higher levels of refugee protection (over 200 per million inhabitants) coincide in Austria, Germany, Norway, Sweden, Belgium and Denmark. Of these western European states, only Austria and Germany grant subsidiary protection at similar rates as additional protection, while the Netherlands and Sweden grant it in substitution, Sweden granting also humanitarian. The border states of Bulgaria, Malta, and Greece grant refugee protection at about 200 per million as a weighted rate of their wealth. Deterrent levels of up to 100 refugees per million are noted across the groups: in central Europe, Spain, Italy, Ireland, Finland, and the Netherlands. Humanitarian protection, sparingly granted, appears at higher levels in countries where population size accounts for much of the weighting (Malta, Norway, Luxembourg); it substitutes other forms of protection in Italy, and approximates refugee protection in Sweden and subsidiary in Norway and Denmark. But most spectacularly, under the lens of weighted rates, Cyprus' average refugee recognition rate of 5.36% (the fourth worst, table 2) can become readable as a far more tolerant attitude when weighted against population, wealth, and form of protection, rendering the country the third best at protecting a fictive 1106 individuals (weighted up from an average 701 individuals per year due to low population and GDP). Malta's 8.63% refugee recognition rate similarly translates into 3224 protected persons per million inhabitants. On the other hand, Romania's 21.19% can be read as just 48 persons per million.

Thus, different protection mechanisms have different governmental purposes that often override protection needs. Their use is often strategic in restricting rather than expanding refugee protection. Scrutiny of this use is diminished for countries that can cite population and GDP factors as mitigating their low recognition rates. Cyprus, which has been receiving much larger numbers of applications in 2018 and 2019 than in previous years granted 191 refugee and 1011 subsidiary recognitions in 2462 decisions (corresponding to recognitions rates of 7.76% for refugee and 48.8% for both statuses). And it has successfully lobbied in 2019, on the basis of demographic pressures, to permanently host an EASO representation, responsible among other things, for fast track processing of applications; this is just one of the proposals the country tabled in 2019, others including the establishment of a transit centre and easier removal processes.[11] While a European pattern of fragmentation across protection statuses and approaches to granting them is evident, this fragmentation is paradoxically ordered: a Europe of "ethical regions" emerges between southern border states that can legitimately be restrictive, western states that may feign protection through the guise of complementary, eastern states that are yet to be disciplined into protection.

This pattern also emerges in enforcement, between policing states of the south and liberal states of the north, which protect while enforcing the law. Eurostat's figures show that Spain has by far the most refusals of entry, while Greece arrests the highest numbers of irregular migrants. But the UK both protects (at a recognition rate of 24.31%) and deports (at the highest level across Europe, a total of 450,000 since 2009). And it is exactly because of this

[11] See http://www.moi.gov.cy/moi/asylum/asylumservice.nsf/asylumservice18_gr/asylumservice18_gr?OpenDocument and http://www.moi.gov.cy/moi/moi.nsf/All/B5FF4571EA6C3729C225847A002D0071?OpenDocument, last accessed 7/10/2019.

policing at the borders that protection in the heartland can be celebrated, and vice versa.

A highly calibrated regime of "ordered fragmentation" therefore, maintains the balance between policing and protection in the governmentality of refugeehood. As protection practices are fragmented, Europe's ethical regions are ordered into liberal hosts in the west, deterring receptors in the south, and uncooperative regions in the centre/east (in fact it could be argued that much of the disciplining efforts target the last category). This is enabled by the increasing complexity of legal and numerical categories that confound the field of knowledge as manifested in the recognition rate. Yet this regime, the final section shows, produces results that fail people even in the best case scenarios; it produces a humanitarianism that in rectifying management outdoes itself and leaves people entrapped within and outside refugeehood.

Rethinking knowledge and agency in protection

Rania has worked in refugee law in Greece for years. When I asked her about cases of complementary protection she had come across, she immediately thought of people who unjustly fell out of refugee status: had clearly suffered persecution, were under threat, cases where state actors were involved. Then she discussed other cases, less clear-cut – in rare instances, and with good advocacy, they also received full refugee protection. These were the "success stories" of her work. Except one, she remembered with a smile: "this one would have been almost funny except it wasn't!" The case concerned a young man, from a shunned minority group in his country, who had suffered violence and permanent physical impairment at the hands of individuals from outside his community who exploited him and abused him. The examination of the asylum claim took a long time, and the legal work had been complex and straining. At the end of it though, the man was recognised as a refugee under the Convention. "I will never forget, I gave him the news and his face dropped", Rania remarked. ""This is not I wanted', he said to me. 'I wanted humanitarian status: how can I go visit my parents now? All this time I've been waiting to go!'" One of the basic premises of refugee protection being that the individual cannot return to their country because they face grave danger there, the young man found himself in a situation where the protection he had sought came at an expense he felt unable to bear. He might have been right in expecting that under stricter interpretations, the harm inflicted on him by non-state actors in an area not plagued by generalized violence (keywords determining complementary protection) would steer a decision towards the minimum: protection under CAT, which would ensure his stay but little rights beyond that, rather than either the Refugee Convention or the Qualifications Directive. "I almost fell from my chair!" Rania continued. "I had to stop myself from laughing – I could see his anguish. 'Take what you have now, the good one, (*pare tóra to kaló*) and don't complain!' I said to him." The man asked if anything could be done to correct the decision: the answer was no. This was a good answer, the best in the law's perspective, and it was final. Tampering with it could have been detrimental. Yet it made its recipient miserable.

In this case, the otherwise restricted rights that complementary protection comes with were preferable to "full" refugee protection. And while indeed, in the hierarchy of rights, Convention status might be "the good one," this is a stark reminder that complementary protection has a moral purpose: to extend protection to people who despite needing it,

would not qualify as refugees; and to do so at a similar level and not below it. Instead, in the morality of "humanitarian reason" (Fassin, 2011a), international human rights obligations are obscured. Hence, the tribulations of the man in (humanitarian) need, registered as physical impairment on his body, "upgraded" him to refugee status despite (strict) legal prescriptions and his wishes. The asylum system's humanitarian reason elevates bodily injury and other "vulnerabilities" to the chief determinant of legitimacy. But in doing so it renders people victims and denies them the agency to claim protection on their own terms.

What complementary protection does then, in splitting off refugeehood from such special forms of victimisation is to foreclose the possibility that those who flee have agency; and should be able to choose the form of protection best for them. The man in question, in contradistinction to Nazar, is legally aware, as people who flee violence and land in legal mazes asking them to prove that they did so, often are; but by no means always. So protection should apply as much to legal subjects who are agents of their own futures as to those who embody different forms of knowledge. Differentiated rights based on needs and people's capacity to be knowledgeable subjects (rather than the view of them as knowable subjects) would be a better use of complementary statuses.

My argument is that rather than steering the numerical "outflow" (in the authorities' view) of refugee recognition into lesser rights, all protection systems should be geared towards granting rights relevant to people's needs. They should work for people and not states. The Qualifications Directive correctly delegates humanitarian protection into a separate process, Rania's case confirms, allowing people to stay but leaving room for discretion with respect to additional rights. Be that as it may, this could be a desireable status in some cases; but choosing it should be initiated by those concerned and not the state; it should be a question not of sovereignty gradations but of subjects articulating their needs. These are already the principles guiding refugee law. But the practice of negotiating consensus at the European level (subsidiary protection) and implementing standards in national legislation (humanitarian) dilutes them. Sovereignty is at the heart of the fragmentation processes that prioritises states over people as the subjects of protection.[12]

Conclusion

The management of migration has been overhauled in Europe since the introduction of FRONTEX and stringent external border policing measures in the early 2000s, tying into a global normalisation of crisis ongoing since 2001 (Neocleous, 2004; Roitman, 2010; Walters, 2015; Hansen, 2018) and drawing on even earlier legacies of control (Bloch and Schuster, 2005). A shift from protection to management has been pervasive on this global scale but its effects are recently becoming visible: the Global Compacts of 2018 and the rise of IOM as a major actor (Pecoud, 2017) are two such instances.

This regime of management in Europe, I have argued here, has entailed two parallel processes of multiplication of categories: a legal one regarding protection statuses and a political one regarding weighting factors in counts of the recognition rate for the purpose of apportioning asylum-seekers. This means a fragmentation of protection which presumes a hierarchy of statuses based on the practice of reducing rights. In the process, people and

[12] This has also been shown for other recent policies, such as the hotspots approach (Pallister-Wilkins, 2018).

states are ordered into categories of needs, capacities and roles, while the curtailment of their rights is obscured.

Thus protection, rather than being fragmented across states, as "burden-sharing" discourses insist, is rather apportioned. A good story is told by climbing recognition rates, large numbers of protection at first instance level, and preference for refugee protection instead of complementary in many states. However, this good story evolves amongst the main players in Europe's asylum policy. A darker story is obscured in the levels of rejection and the consideration of the much larger numbers than the 2.5 million of protected people presented here. This is the well-document story of Fortress Europe, border policing, and hotspots (Huysmans, 2006; Vaughan-Williams, 2008; Bigo, 2008; Fassin, 2011a; Squire, 2016; D'Angelo, 2018; Pallister-Wilkins, 2018).

My point here is that it is only on the back of this darker story that western European states in the main, can appear to be liberal. A good cop / bad cop division of labour seems to play out between the periphery and centre of Europe today between those that protect refugees and those that stop them from entering. This leaves border states, like Greece and Italy, facing a conundrum as to the story they want to be part of: that of harsh policing or compassionate protection?

Asked about what changed in Greece on the plane of refugee rights from the early 2000s when we first met, Rania is emphatic that a lot certainly has: gone are the days when Greece had humiliating recognition rates of 0.1%. The summer of 2015, other advocates agreed, was the epitome of an immense shift to a more humane treatment of refugees. But the price Greece has paid for opening its borders in 2015 has come at the cost of heavy monitoring by European bodies, the setup of hotspots on five of its islands, and NATO patrols of its Aegean border. This is the spiraling down of convergence that recognition rates (of those who manage to reach the heart of Europe) will not show. Coercion, of people and states, is possible through discipline, and only after that discipline has developed complex accounting and categorising mechanisms to order its subjects.

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