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Asylum Crisis Italian Style: The Dublin Regulation Collides With European Human Rights Law

Maryellen Fullerton*

Using the Italian asylum system as a case study, this article lays bare the current impasse in European asylum policy and underscores the injustice and inefficiencies caused by the European Union (EU) Dublin Regulation. Deficiencies in the asylum systems in EU states on the southern and eastern borders encourage asylum seekers to flee from the EU states they enter first. In recognition of the dire conditions in some asylum systems, the European Court of Human Rights has forbidden states to rely on the Dublin Regulation to send asylum seekers back to the first state for a decision on the asylum application. Instead, states that apprehend asylum seekers must provide the applicants an opportunity to contest their return by presenting evidence that the first EU state they entered has a deficient asylum system. This creates opportunities for satellite litigation. It also creates perverse incentives for member states to respond to the Dublin Regulation proceedings by offering individualized relief to the litigants rather than remedying system-wide deficits. This cumbersome procedure is inefficient and imposes great human costs on individual asylum seekers ensnared in the European system.

A bolder and simpler approach is necessary. In light of the massive refugee crisis in the Mediterranean, the vastly uneven situations of asylum seekers in different EU states, and the evolving European human rights norms, the current Dublin Regulation should be suspended. More precisely, EU member states should examine asylum applications with a presumption that the state with custody of the asylum seekers will decide the asylum claim. Transfers pursuant to the Dublin Regulation should be limited to exceptional cases involving family unity or other compelling humanitarian reasons.

This reworking of the Dublin Regulation would instantly diminish the workload on the EU asylum system. In recent years, close to twenty percent of asylum applications filed in Europe have led to transfer requests under the Dublin Regulation, but very few actual transfers take place. Thus, most of the Dublin process is wasted effort. Of the Dublin transfers that occur, many take place between states that send and receive asylum seekers from one another. These states should decide the substance

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of the applications rather than engage in an elaborate process of swapping asylum seekers.

Suspending most Dublin transfers would allow asylum officials to redeploy their resources to focus on the merits of the claims. It would benefit individual asylum seekers who would experience shorter periods of uncertainty about their status. Moreover, suspending the Dublin Regulation could lead to the increased sharing of responsibility among EU states for receiving asylum seekers.

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INTRODUCTION

Within sight of the island of Lampedusa,¹ fire destroyed an overloaded fishing boat. As people rushed to escape the flames, the boat full of Eritrean refugees capsized. All of those sleeping below deck were killed. Some of those on deck, though they could not swim, landed in the water and managed to stay afloat for several hours. At daylight, fishing boats and the

1. See Irene Tischenko, *Lampedusa*, LIFE IN ITALY (July 29, 2015), <http://www.lifeinitaly.com/tourism/sicily/lampedusa> [https://perma.cc/X3DG-D8W9].

Italian Coast Guard arrived at the scene. More than 350 people died in the accident in October 2013, but 155 survived to claim asylum in Italy.² As gruesome images flashed around the world, headlines told the story of the migrants' deaths at Europe's door. Matteo Renzi, the Prime Minister of Italy, called for a European summit,³ and EU diplomats proposed military operations to destroy ships used by migrant smuggling rings.⁴ This tragedy—and the lack of a coordinated European response to it—was an omen of the humanitarian crisis that has unfolded in Europe in recent years.

Lampedusa, a small Italian island seventy miles off the Tunisian coast, is a vacation destination. An isolated speck of natural beauty, where imposing headlands meet the Mediterranean Sea, it features fresh seafood and sand beaches. Lampedusa is also the nearest Italian landfall to North Africa and is the entry point to Europe each year for thousands of asylum seekers packed on rickety boats. Fifteen thousand landed on Lampedusa in 2013, ten thousand from Eritrea alone,⁵ a country infamous for its political prisoners and its years-long military conscription.⁶ In 2014, the numbers skyrocketed: 170,000 asylum seekers crossed the Mediterranean to Italy.⁷ More than one million Syrians, Eritreans, and others fleeing repressive regimes made the perilous crossing in 2015, and 153,000 of them landed in Italy.⁸

As more asylum seekers made their way across the Mediterranean, more tragedies occurred. A ship overcrowded with migrants and asylum seekers sank off the coast of Libya in April 2015, with 900 people locked in the

2. See Zed Nelson, *Lampedusa Boat Tragedy: A Survivor's Story*, THE GUARDIAN (Mar. 21, 2014), <http://www.theguardian.com/world/2014/mar/22/lampedusa-boat-tragedy-migrants-africa> [https://perma.cc/VHL2-JZBM].

3. *Italian Prime Minister Requests European Summit on Migrant Crisis*, RTE NEWS (Apr. 20, 2015), <http://www.rte.ie/news/2015/0419/695113-malta-migrant-boat/> [https://perma.cc/RA8X-649J].

4. EU officials also promised that no refugees intercepted at sea would be sent back against their will. See Somini Sengupta, *E.U. Is Prepared to Combat Migrant Smugglers, Official Says*, N.Y. TIMES (May 11, 2015), <http://www.nytimes.com/2015/05/12/world/europe/eu-prepared-to-combat-migrant-smugglers-diplomat-says.html> [https://perma.cc/4AWH-7FGJ].

5. Of the 14,753 boat people who landed on Lampedusa in 2013, 9,834 were from Eritrea. *Id.* More than 170,000 arrived in Italy by sea in 2014; the largest contingents were Eritreans and Syrians. U.N. High Comm'r of Refugees, *So Close Yet So Far From Safety* (Oct. 2014), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFviewer.html?docid=54ad53b69&query=italy%20syria%20eritrea> [https://perma.cc/88X6-GJNA].

6. See Nelson, *supra* note 2; U.S. DEP'T OF STATE, ERITREA 2013 HUMAN RIGHTS REPORT (2013), <http://www.state.gov/documents/organization/220321.pdf> [https://perma.cc/3E4D-VVT9]; see also *Annual Report: Eritrea 2013*, AMNESTY INT'L (May 23, 2013), <http://www.amnestyusa.org/research/reports/annual-report-eritrea-2013?page=show> [https://perma.cc/8LP8-8BDW].

7. Elisabetta Povoledo, *Migrants in Rome Try to Recover After Ponte Mammolo Camp is Destroyed*, N.Y. TIMES (May 15, 2015), http://www.nytimes.com/2015/05/16/world/europe/migrants-in-rome-try-to-recover-after-ponte-mammolo-camp-is-destroyed.html?_r=0 [https://perma.cc/E8DW-75FF].

8. The UN High Commissioner of Refugees reported that 1,015,078 migrants crossed the Mediterranean to Europe by boat in 2015, with 153,000 reaching Italy. U.N. High Comm'r for Refugees, *Refugees/Migrants Emergency Response – Mediterranean* (Mar. 1, 2016), <http://data.unhcr.org/mediterranean/country.php?id=105> [https://perma.cc/ZRF7-EFGJ] [hereinafter UNHCR, *Mediterranean Emergency Response*].

hold and feared dead.⁹ That same week, a boat carrying 200 migrants crashed into the rocks off the Greek island of Rhodes, while authorities in Italy received distress calls that another ship with over 300 migrants was sinking in the Mediterranean.¹⁰ In all, more than 3,700 people lost their lives in the Mediterranean Sea in 2015 as they tried to reach safety in Europe.¹¹ Finally, in September 2015, the EU responded to the mass arrivals of desperate individuals. The EU Council agreed to redistribute 120,000 asylum seekers from Italy and Greece to other member states, an agreement opposed by four of the twenty-eight EU states.¹² Notwithstanding the formal agreement to assist asylum seekers in overwhelmed member states, the lack of a sense of collective responsibility was evident. By the end of 2015, only 144 asylum seekers had been officially relocated from Italy.¹³ The fate of hundreds of thousands of other asylum seekers who have recently made their way to Europe remains unresolved.

The large-scale humanitarian crisis has shone a spotlight on the increasingly dysfunctional institution of asylum in Europe. Ten years after the launch of the much-heralded Common European Asylum System (CEAS),¹⁴ the lack of common standards has seriously undermined the EU-wide approach. Glaring differences between the asylum systems in EU states on the southern and eastern borders and those in the west encourage asylum seekers to flee the EU states they enter first. In recognition of the inhuman and degrading conditions in some asylum facilities, the European Court of Human Rights (ECtHR) has forbidden European states from automatically relying on the Dublin Regulation,¹⁵ which is the EU mechanism for transferring asylum seekers between member states. The ECtHR requires national tribunals to afford asylum seekers an opportunity to present evidence of deficient asylum systems in the EU states into which they entered. Re-

9. Jim Yardley, *Rising Toll on Migrants Leaves Europe in Crisis; 900 May Be Dead at Sea*, N.Y. TIMES (Apr. 20, 2015), <http://www.nytimes.com/2015/04/21/world/europe/european-union-immigration-migrant-ship-capsizes.html> [https://perma.cc/H38L-E6J5].

10. AFP, *Migrant Boat Disaster: EU Proposes a 10 Point Crisis Plan Following Hundreds of Deaths in the Mediterranean*, NEWS.COM.AU (Apr. 21, 2015), <http://www.news.com.au/world/europe/migrant-boat-disaster-eu-proposes-10-point-crisis-plan-following-hundreds-of-deaths-in-the-mediterranean/story-fnh81p7g-1227312713630> [https://perma.cc/N6AD-6WNP].

11. U.N. High Comm'r of Refugees, *Italy Sea Arrivals, UNHCR Update #4* (Dec. 2015), <https://data.unhcr.org/mediterranean/download.php?id=528> [https://perma.cc/S6H9-M5ZG].

12. Council Decision 1523/2015, 2015 O.J. (L 239) 146 (relocating 24,000 asylum seekers from Italy); Council Decision 1601/2015, 2015 O.J. (L 248) 80 (relocating 15,500 asylum seekers from Italy); see James Kanter, *The Migrant Crisis in Europe: Readers' Questions Answered*, N.Y. TIMES (Sept. 27, 2015), <http://www.nytimes.com/2015/09/28/world/europe/refugee-crisis-europe-syria.html> [https://perma.cc/E9GF-ZSYW].

13. MARIA DE DONATO, ASYLUM INFO. DATABASE, COUNTRY REPORT: ITALY (2015), <http://www.asylumineurope.org/reports/country/italy> [https://perma.cc/M63P-LT22] [hereinafter COUNTRY REPORT].

14. *Common European Asylum System*, EUR. COMM'N (June 23, 2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm [https://perma.cc/S63K-5F5T].

15. Council Regulation 343/2003, 2003 O.J. (L 50) 1 (EC) (establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national) [hereinafter Dublin II].

cent EU legislation has acknowledged the need to improve the Dublin Regulation and has added greater procedural safeguards to it.¹⁶ Unfortunately, the amended Dublin Regulation, together with the evolving European human rights jurisprudence, has created a more cumbersome approach likely to impose greater costs on the individual asylum seekers ensnared in the European system. Rather than focusing on a thorough and efficient examination of the merits of the asylum claims, these new developments encourage EU states to devote more attention and effort to ancillary issues.¹⁷ Furthermore, a recent ECtHR judgment has created perverse incentives for member states to provide individualized relief to litigants whose cases reach the ECtHR rather than focusing on improving system-wide deficiencies in their asylum systems.¹⁸

A bolder and simpler approach is warranted. At this juncture, in light of the massive refugee crisis in the Mediterranean, the vastly uneven situations of asylum seekers in different EU states, and the evolving European human rights norms, the current Dublin Regulation should be suspended. More precisely, EU member states should examine asylum applications with a presumption that the state with custody of the asylum seekers will decide the asylum claim. Transfers pursuant to the Dublin Regulation should be limited to exceptional cases involving family unity or other compelling humanitarian reasons.

This reworking of the Dublin Regulation would diminish the workload of the EU asylum system. In recent years, close to twenty percent of asylum applications filed in Europe have led to transfer requests under the Dublin Regulation.¹⁹ However, very few actual transfers take place: only one-fifth of the requests result in transfers.²⁰ Eighty percent of the Dublin process fails to address the underlying issue. Furthermore, many of the Dublin transfers that take place are between states that send and receive asylum seekers to and from one another.²¹ It would be more efficient for the states

16. Council Regulation 604/2013, 2013 O.J. (L 180) 31 (EU) [hereinafter Dublin III] (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).

17. For example, pursuant to *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255, EU states must thoroughly evaluate the system-wide inadequacies in asylum procedures and conditions before transferring asylum seekers to another country that may be responsible for evaluating the substance of the asylum claims. See *infra* text accompanying notes 274–299.

18. See *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R. (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [<https://perma.cc/76ZV-FUBK>] (prohibiting transfer pursuant to the Dublin Regulation without assurance of reception conditions in receiving country suitable for family with minor children).

19. SUSAN FRATZKE, MIGRATION POLICY INST. EUR., NOT ADDING UP: THE FADING PROMISE OF EUROPE'S DUBLIN SYSTEM 6 (2015), <http://www.migrationpolicy.org/sites/default/files/publications/MPle-Asylum-DublinReg.pdf> [<https://perma.cc/2KDC-NUKQ>].

20. *Id.* at 11.

21. *Id.* at 13.

to decide the substance of the applications submitted to them, rather than engaging in an elaborate process to swap asylum seekers.

In addition to eliminating the wasted effort, suspending most Dublin transfers would allow asylum officials to redeploy their resources to focus on the substance of the asylum claims. This would permit them to decide more quickly which applicants qualify for asylum or other forms of protection and which do not. Curtailing satellite transfer litigation—along with the attendant individualized hearings and appellate review—would save states time and money. It would also benefit individual asylum seekers by expediting the decisions on their requests for protection and thus more quickly eliminate uncertainty about their status.

Furthermore, resources redeployed from Dublin hearings, receiving transferees, and reintegrating them into the receiving states' asylum systems could be used more productively. They could be invested in improving systemic weaknesses in a state's asylum process, thus assuring better treatment to current and future arrivals. Sustained efforts to shore up and recalibrate the weaker asylum systems in the states along the EU periphery is one way to create a more equal and more just EU asylum system.

Suspending the Dublin Regulation could also have a profound impact on EU member states' commitment to sharing responsibility for the reception of asylum seekers in the EU. Most asylum seekers subject to Dublin transfers have traveled from the coastal and frontier states of the EU into the interior.²² Requiring EU states to decide the asylum applications submitted by asylum seekers physically present in their national territory would result in a larger number of asylum claims being determined by EU states that are distant from the periphery. This would, in effect, spread responsibility more broadly within the EU. Indeed, this scenario is exactly what occurred when hundreds of thousands of asylum seekers sought refuge in Europe in the summer of 2015. Germany temporarily suspended the Dublin Regulation, chose not to spend time and resources requesting states on the EU periphery to assume responsibility, and evaluated the asylum claims for the applicants who had arrived in Germany. As will be explained in the following pages, European human rights law required this result. Germany's suspension of the Dublin Regulation was a harbinger of the future.

This Article lays bare the current impasse in the CEAS. Focusing on Italy—an EU member state on the southern frontier of immigration—as a case study, this Article illuminates the injustice and inefficiencies caused by the Dublin Regulation. Part I begins with an overview of the CEAS. It discusses, in particular, the Dublin Regulation and the Reception Conditions Directive, the two components most directly implicated by the flight of the Lampedusa survivors and other asylum seekers from Italy northward into the heart of Europe. Part II examines the Italian asylum system and the

22. See, e.g., *id.* at 9–10 (explaining that many asylum seekers arrive in Germany and Sweden from the border states of Greece and Italy).

impact of EU asylum law on Italy. Here, the Article pays special attention to transfers requested pursuant to the Dublin Regulation and to the accommodations provided to applicants for protection.

Part III turns to the limits that European human rights law places on transfers of asylum seekers to different EU member states. These limits include the *non-refoulement* prohibition and its application by the ECtHR to curtail transfers of asylum seekers to European states where the individuals would face a serious risk of inhuman or degrading treatment. The Article argues that the judgment of the ECtHR in *M.S.S. v. Belgium and Greece*²³ fractured the CEAS by ruling that EU member states cannot rely on the Dublin Regulation to return asylum seekers to sister EU states with seriously flawed asylum systems.

Part IV shows that the *M.S.S.* decision not only effectively halted public transfers of asylum seekers to Greece, but also had far wider consequences. It mandated a fact-intensive examination into each individual case of an asylum seeker ordered to depart from one EU member state to another. In light of *M.S.S.*, a growing number of national courts have concluded that European human rights law prevents the return of asylum seekers to Italy, the major Mediterranean gateway into the EU.²⁴ Challenges to the Dublin Regulation again reached the ECtHR. In late 2014 in *Tarakhel v. Switzerland*,²⁵ the ECtHR concluded that unsatisfactory Italian reception conditions precluded Switzerland from relying on the Dublin Regulation to return asylum seekers to Italy.²⁶

Part V examines the recent legislative amendments to the Dublin Regulation and the Reception Conditions Directive. It notes that new procedural safeguards will likely increase delays in the process, complicating and exacerbating the problems involved in transferring asylum seekers between countries. It also analyzes the statistical information and reveals that the Dublin system has required an inordinate amount of effort for a paltry result.

The Article concludes that the *common* European asylum system is an illusion. Worse, the current CEAS framework guarantees a proliferation of

23. *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255.

24. *E.g.*, Verwaltungsgericht [VG] [Administrative Trial Court] Jan. 24 2013, 2013 OPENJUR 5398 (Ger.), <https://openjur.de/u/601080.html> [<https://perma.cc/9UUE-RMET>] (refusing to return Eritrean asylum seekers with small children to Italy where they had been homeless after applying for asylum); Verwaltungsgericht [VG] [Administrative Trial Court] Feb. 21 2013, 2A 126/11 (Ger.), <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE140000906&st=null&showdoccase=1> [<https://perma.cc/9VG9-3PMM>] (refusing to return Iranian asylum seekers to Italy where they had been housed on shipping containers with poor sanitary conditions and limited rations of food and water).

25. *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R. (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [<https://perma.cc/76ZV-FUBK>].

26. In *Tarakhel*, the court ruled that Swiss authorities must obtain from Italian asylum officials "detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit" in order to assess whether the returning the asylum seekers would subject them to a risk of inhuman or degrading treatment. *Id.* ¶ 121.

legal proceedings, increasing both the human suffering of asylum seekers and the burdens on asylum systems throughout the EU. It is time to replace the duplicative individualized hearings required by the current legal regime with a more rational scheme. In the end, it is crucial to the institution of asylum in Europe that national systems provide substantially equivalent reception conditions and yield substantially similar results on asylum applications. Until then, there should be a presumption that the EU member states decide the asylum claims of asylum seekers in their custody.

I. COMMON EUROPEAN ASYLUM SYSTEM

When the EU was created, immigration and asylum were matters left to the competence of the member states.²⁷ Accordingly, the national government of each of the six original member states defined the terms under which non-EU citizens could enter and depart from that state.²⁸ In contrast, the movement of EU citizens between member states was within the competence of the supranational organization, originally known as the European Economic Community.²⁹

By 1999, the EU had more than doubled in size and encompassed fifteen member states. In the post-Cold War era, the EU anticipated adding ten formerly communist states in the near future. The addition of these states would, again, more than double the size and population of the EU.³⁰ Refu-

27. In 1957, the Treaty of Rome founded the European Economic Community, also known as the "Common Market," comprised of Germany, France, Italy, Belgium, the Netherlands, and Luxembourg. Treaty of Rome Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome]. Over the next five decades, the original six members grew to twenty-eight, the number of member states today. In 1993, after many amending treaties in the interim, the Maastricht Treaty on European Union changed the name and other important aspects of governance. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Treaty of Maastricht]. The Treaty of Lisbon renamed the Treaty of Rome as the Treaty on the Functioning of the European Union. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. Prior to the European Economic Community, the European Coal and Steel Community (ECSC) had been founded in 1951. Treaty of Paris Establishing the Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Paris].

28. The Court of Justice of the European Union emphasized the immigration competence of member states, as opposed to the supranational European Economic Community. See Case 281/85, Fed. Republic of Ger. & Others v. Comm'n of the Eur. Cmty., 1987 E.C.R. 3203.

29. The European Economic Community was premised on four fundamental rights that citizens of member states had with regard to other member states: the freedom of movement of goods, services, capital, and people. Treaty on the Functioning of the European Union art. 45, Oct. 26, 2012, 2012 O.J. (C 115) 47. Originally, free movement of people referred to workers, but the concept expanded to include non-working individuals, such as retirees, and ultimately all citizens of other EU member states. See Directive 2004/38/EC, of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, 2004 O.J. (L 229) 35.

30. The original six countries, France, Germany, Italy, Belgium, Luxemburg, and the Netherlands, had been joined in the intervening years by Denmark, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland, and Sweden. Ten additional countries joined in 2004: Cyprus and Malta, plus the former Warsaw Pact nations of Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia. Bulgaria and Romania joined in 2007. Croatia joined in 2013. See *EU Member Coun-*

gee status and asylum had been major issues in the previous decade, with the dissolution of the Soviet Union and the wars in former Yugoslavia sending many individuals to seek safety in various EU member states.³¹ The inconsistent responses of member states to those refugee emergencies were fresh memories, and it was easy to foresee the inefficiencies, duplications, and complexities of having twenty-five different asylum laws in contiguous territory under harmonized visa policies. At this juncture, the EU issued the Tampere Declaration, committing itself to developing a common European asylum system throughout all member states.³² The fifteen years since Tampere have featured complex political negotiations to construct an asylum regime applicable throughout the EU.

In the first phase, between 2000 and 2005, EU member states enacted a set of laws that imposed more detailed and explicit requirements on the asylum process. These included rules regarding: which member state should decide particular claims,³³ care of asylum seekers during the process,³⁴ criteria for who is entitled to legal protection,³⁵ and procedural rules for asylum decisions.³⁶ These key elements of the CEAS became law via the EURODAC Regulation,³⁷ the Temporary Protection Directive,³⁸ the Dublin Regulation,³⁹ the Reception Conditions Directive,⁴⁰ the Qualification

tries, EUR. UNION (Nov. 4, 2015), <http://europa.eu/about-eu/countries/member-countries/> [<https://perma.cc/WS4L-X53U>].

31. The war in former Yugoslavia displaced more than 500,000 Bosnians into other European countries. U.N. High Comm'r of Refugees, *Asylum in Europe: Summer of Sadness*, Refugee Magazine, Issue 101 (Sept. 1, 1995), <http://www.unhcr.org/3b543ddd4.html> [<https://perma.cc/X2X3-E5VQJ>].

32. Presidency Conclusions, The Tampere European Council, ¶ 13 (Oct. 15–16, 1999), http://www.europarl.europa.eu/summits/tam_en.htm [<https://perma.cc/358G-D6UH>] [hereinafter Tampere Declaration].

33. Dublin II, *supra* note 15.

34. Council Directive 2003/9, 2003 O.J. (L 31) 18 (EC) [hereinafter Reception Conditions Directive] (laying down minimum standards for the reception of asylum seekers in the member states).

35. Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC) [hereinafter Qualification Directive] (addressing minimum standards for the qualification and status of third-country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted).

36. Council Directive 2005/85, 2005 O.J. (L 326) 13 (EC) [hereinafter Procedures Directive] (addressing minimum standards on procedures in member states for granting and withdrawing refugee status in the member states).

37. Council Regulation 2725/2000, 2000 O.J. (L 316) 1 [hereinafter Eurodac Regulation] (concerning the establishment of "Eurodac," *European Dactyloscopy*, for the comparison of fingerprints for the effective application of the Dublin Convention).

38. Council Directive 2001/55, 2001 O.J. (L 212) 12 (EC) [hereinafter Temporary Protection Directive] (regarding minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof). The Temporary Protection Directive, which has thus far never been employed, was a response to the mass movement of Bosnian refugees throughout the EU in the 1990s. *Temporary Protection*, EUR. COMM'N (June 23, 2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm [<https://perma.cc/QW7U-ZNQA>].

39. Dublin II, *supra* note 15.

40. Reception Conditions Directive, *supra* note 34.

Directive,⁴¹ and the Asylum Procedures Directive.⁴² Most pertinent to this Article's discussion are the two 2003 laws, the Dublin Regulation and the Reception Conditions Directive. Each was amended in 2013 and is worthy of a treatise to itself; they are discussed briefly below in their original versions to provide background for the asylum crisis in Italy. In a later section, some of the important 2013 modifications are highlighted.

All of the CEAS laws adopt a minimum standards approach. Member states must provide at least the guarantees set forth in EU legislation but are free to be more generous.⁴³ Today, there are twenty-eight different asylum systems in the EU.⁴⁴ Each member state dutifully transposes the EU legislation into its national law, but local structures and historical contexts mold the actual asylum processes in each individual EU state. Moreover, member states do not always enforce the laws they have passed. Asylum seekers' experiences vary so much significantly from state to state that it strains credulity to say that the twenty-eight member states have one common system.

A. Dublin Regulation

The Dublin Regulation has its origins in a separate non-EU treaty, the Dublin Convention, signed in 1990 by twelve states.⁴⁵ All twelve were members of the EU, but they entered into the treaty separate from and parallel to their EU legal obligations. Several non-EU states, such as Norway, Iceland, and Switzerland, ratified the treaty.⁴⁶ The Dublin Convention had multiple goals. It aimed to prevent individuals from seeking asylum in more than one EU state. It intended to reduce the number of asylum seekers shuttled between member states when the states debated which one was responsible for determining the asylum claim. It attempted to articulate

41. Qualification Directive, *supra* note 35, at 12.

42. Procedures Directive, *supra* note 36, at 13.

43. Even with this variable solution, there were wrenching political compromises as to the floor below which member states could not go. For a window into debates and compromises in the drafting of the asylum legislation, see generally Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT'L J. REFUGEE L. 461 (2005).

44. See Tampere Declaration, *supra* note 32, for a list of the EU member states.

45. Signed in 1990 by Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Denmark, Greece, Ireland, the United Kingdom, Portugal, and Spain, the Dublin Convention went into force in September 1997 for the original twelve states, in 2008 for Switzerland, the most recent ratifying state, and at dates in between for the other states. See generally Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Aug. 19, 1997, 1997 O.J. (C 254) 1 [hereinafter Dublin I].

46. See generally Agreement Between the European Community and the Republic of Iceland and the Kingdom of Norway Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or Iceland or Norway, 2001 O.J. (L 93)

40. See also Agreement Between the European Community and the Swiss Confederation Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland, 2008 O.J. (L 53) 5, ¶ 4.

criteria that enabled EU states to determine quickly which state was the most appropriate to render an asylum decision on the merits.

In 2003, the EU incorporated the Dublin system as a core element of the CEAS.⁴⁷ The EU legislation, called the Dublin II Regulation in recognition of its origins,⁴⁸ set forth its goals:

A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the [European Union].

The European Council, at its special meeting in Tampere . . . [agreed to ensure] that nobody is sent back to persecution, i.e. [to maintain] the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

[T]his system should include . . . a clear and workable method for determining the Member States responsible for the examination of an asylum application.

Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.⁴⁹

The heart of the Dublin II Regulation describes criteria for determining which state is responsible for deciding the claim.⁵⁰ For example, if the asylum seeker has a valid visa, the issuing member state is responsible for determining the asylum claim.⁵¹ If the asylum seeker has a family member who has received a residence permit based on refugee status, the issuing member state is responsible for deciding the asylum application.⁵² If the

47. Dublin III, *supra* note 16; see Dublin II, *supra* note 15; Council Regulation 604/2013, 2013 O.J. (L 180) 31 (amending Dublin II, 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).

48. See Dublin I, *supra* note 45 (indicating that Dublin I was the Dublin Convention); *supra* note 15 and accompanying text (Dublin II); *supra* note 47 and accompanying text (describing Dublin II as the second iteration, this time as part of EU law); *supra* note 16 and accompanying text (Dublin III refers to the 2013 revisions).

49. *Id.* pmbll., cls. 1–4.

50. *Id.* arts. 5–14; Dublin III, *supra* note 16, arts. 7–15.

51. Dublin II, *supra* note 15, art. 9(2); Dublin III, *supra* note 16, art. 12(2).

52. Dublin II, *supra* note 15, art. 7; Dublin III, *supra* note 16, art. 9.

asylum seeker is an unaccompanied minor, special rules apply.⁵³ In the absence of any of the listed criteria, the default provision is that the first EU state the asylum seeker entered is responsible for examining the asylum claim.⁵⁴ The Dublin Regulation contains several escape hatches. Member states can opt not to transfer asylum seekers if there are humanitarian reasons to proceed with the claim.⁵⁵ They can also choose, under what is known as the sovereignty clause, to exercise responsibility for the asylum claim even if the state is not responsible under the Dublin criteria.⁵⁶

Few member states rely on either the humanitarian or the sovereignty clauses; most rely on the default provision. For example, in 2013, fewer than three percent of German requests that other member states take charge of asylum seekers pursuant to the Dublin Regulation were predicated on family grounds, and less than one percent involved humanitarian grounds; roughly ninety-seven percent concerned asylum seekers who had entered without documents.⁵⁷ Similar statistics characterize other states that file many Dublin transfer requests.⁵⁸ This places substantial burdens on the member states that form the external border of the EU, and, in particular, on Italy and Greece.⁵⁹ Their asylum systems are foundering under their economic crises, inadequate asylum infrastructure, and the surging number of claimants.⁶⁰ Many asylum seekers prefer to seek asylum elsewhere in the

53. Dublin II, *supra* note 15, art. 6; Dublin III, *supra* note 16, art. 8.

54. Dublin II, *supra* note 15, art. 13; Dublin III, *supra* note 16, art. 13(1). There must be evidence or proof, as detailed in the Directive, that the asylum seeker entered that portion of the EU first. Dublin III, *supra* note 16, art. 22(3). The responsibility of the first country entered ceases after twelve months. *Id.* art. 13(1). At that time, the country where the asylum seeker has been most recently living for five or more months becomes responsible. *Id.* art. 13(2).

55. Dublin II, *supra* note 15, art. 15 (containing a humanitarian clause referring to family reasons or cultural considerations, and the asylum seeker must consent); Dublin III, *supra* note 16, art. 17(1) (allowing member states to decide asylum claim even if not responsible under Dublin III).

56. Dublin II, *supra* note 15, art. 3(2); Dublin III, *supra* note 16, art. 17(1).

57. See FRATZKE, *supra* note 19, at 8.

58. *Id.*

59. Of the 8,149 requests Italy received in 2013 to take charge of asylum seekers located in other states, seventy-one were based on family reasons, eight on humanitarian grounds, and 8,070 on first entry into the EU. The statistics were similar in Poland (48, 5, and 543, respectively) and in Hungary (46, 2, and 350, respectively). See *id.* at 9, tbl.2.

60. For a sample of reports concerning the abysmal conditions asylum seekers faced in Greece, see generally Moises Saman, *Greece: Unsafe and Unwelcoming Shores*, HUMAN RIGHTS WATCH (Oct. 2009), <https://www.hrw.org/news/2009/10/12/greece-unsafe-and-unwelcoming-shores> [<https://perma.cc/L2JH-FZJS>]; U.N. High Comm'r for Refugees, *Observations on Greece as a Country of Asylum* (Dec. 2014), <http://www.refworld.org/docid/54cb3af34.html> [<https://perma.cc/M8D2-89CV>]; AMNESTY INT'L, THE DUBLIN II TRAP: TRANSFERS OF DUBLIN ASYLUM SEEKERS TO GREECE (2010), <http://www.amnesty.eu/en/news/statements-reports/eu/asylum-and-migration/the-dublin-ii-trap—transfers-of-asylum-seekers-to-greece-0446/#.VtuJu5MrdU> [<https://perma.cc/2PM7-Q4ST>]; NAT'L COMM'N FOR HUMAN RIGHTS, DETENTION CONDITIONS IN POLICE STATIONS AND DETENTION AREAS OF ALIENS (2010), http://www.nchr.gr/images/English_Site/SINTIKESKRATISIS/Police_detention_2010.pdf [<https://perma.cc/BED6-246F>]; AMNESTY INT'L, IRREGULAR MIGRANTS AND ASYLUM-SEEKERS ROUTINELY DETAINED IN SUBSTANDARD CONDITIONS (2010), <https://www.amnesty.org/en/documents/EUR25/002/2010/en/> [<https://perma.cc/7SZ4-K3CS>]; see also Comm'r for Human Rights, *Report by Nils Muiznieks, Following his Visit to Italy from 3 to 6 July 2012*, CommDH (2012) 26 (Sept. 18, 2012), https://www.ecoi.net/file_upload/1226_1348554916_com-instranetdh.pdf [<https://perma.cc/PQ53-P6A6>]; U.N. High

EU, and, consequently, many try to evade the Dublin system. They may move surreptitiously in order to avoid contact with authorities and authorities' efforts to take the asylum seekers' fingerprints.⁶¹

The Dublin II Regulation depends on EURODAC, the EU-wide fingerprint database of asylum seekers and irregular migrants.⁶² This system, launched in 2000, records the fingerprints, country of origin, and other personal data of asylum seekers.⁶³ By the end of 2012, EURODAC contained the fingerprints of more than 2.3 million individuals.⁶⁴ Officials who receive an asylum application immediately take the applicant's fingerprints and enter them into the EURODAC database to see whether the applicant had previously been in another EU state.⁶⁵ If so, the Dublin Regulation may indicate that the other EU state is responsible for deciding the asylum claim, and the asylum seeker may be sent back to the other EU state.⁶⁶ Many asylum seekers are aware of the Dublin scheme and want to avoid being sent to states with substandard asylum systems.⁶⁷ Accordingly, if they enter the EU through one of the poorer border states, they avoid the authorities and try to travel elsewhere before they present their asylum claim. If they encounter the police in the first EU state they enter, asylum seekers may refuse to have their fingerprints taken. They may attempt to mutilate the tips of their fingers,⁶⁸ for example, or protest through hunger strikes. If their strategies are not successful and they are fingerprinted, they may nonetheless leave the state where they initially entered the EU. They travel onward, hoping they can either live clandestinely in another member state or persuade another member state to process their asylum application on the merits.

As mentioned earlier, the EURODAC and Dublin II Regulations comprise two of the six pillars of the CEAS that were enacted between 2000 and 2005. Shortly after 2005, refugee advocates and government officials began discussing legislative improvements to the asylum laws, thus launching the second phase of the CEAS. The European Commission circulated a proposed

Comm'r for Refugees, *Recommendations on Important Aspects of Refugee Protection in Italy* (July 2012), <http://www.unhcr.org/500950b29.pdf> [<https://perma.cc/3HFF-3AF7>]; SWISS REFUGEE COUNCIL, RECEPTION CONDITIONS IN ITALY: REPORT ON THE CURRENT SITUATION OF ASYLUM SEEKERS AND BENEFICIARIES OF PROTECTION, IN PARTICULAR DUBLIN RETURNEES (2013), <http://www.refworld.org/docid/5315872c4.html> [<https://perma.cc/FRL4-ZPRY>] [hereinafter SWISS REFUGEE COUNCIL].

61. See FRATZKE, *supra* note 19, at 15.

62. Eurodac Regulation, *supra* note 37 (referring to European Dactyloscopy).

63. The original Eurodac Regulation of 2000 became effective in January 2003. *Supra* note 37; see also Council Regulation 603/2013, 2013 O.J. (L 180) 1, ¶ 4 (EU) (recasting the Regulation enacted in 2013, with an effective date in July 2015).

64. Chris Jones, *Eleven Years of Eurodac*, STATEWATCH (Jan. 2014), <http://www.statewatch.org/analyses/no-235-eurodac.pdf> [<https://perma.cc/8MNE-UVTF>].

65. Eurodac Regulation, *supra* note 37, art. 4.

66. *Id.* arts. 1, 11.

67. See, e.g., FRATZKE, *supra* note 19, at 15.

68. See, e.g., Nelson, *supra* note 2; see also Author's Interviews with Asylum Seekers, Initial Reception and First Aid Center (CPSA) in Lampedusa, Italy (Feb. 2013).

amendment to the Dublin II Regulation that included greater procedural protections for asylum seekers,⁶⁹ including the right to a personal interview,⁷⁰ to receive information about the Dublin process,⁷¹ and to a pre-transfer challenge to a transfer decision.⁷² This 2008 Proposed Recast Dublin Regulation (proposed Dublin III Regulation) also included a mechanism that could trigger temporary suspension of transfers to member states whose asylum systems were under great pressure.⁷³ The temporary suspension mechanism, strongly opposed by some member states, was a major sticking point.⁷⁴ The European Parliament reviewed the Commission's proposal and adopted an alternative text in 2009.⁷⁵ Despite robust discussion and commentary among member states, the UN High Commissioner for Refugees (UNHCR), international nongovernmental organizations, academics, and others,⁷⁶ neither the 2008 nor the 2009 text was adopted.

In the meantime, challenges to applications of the 2003 Dublin II Regulation mounted. Asylum seekers threatened with transfer pursuant to the Dublin II Regulation pursued appeals in national and supranational courts. As discussed below, both the ECtHR and the Court of Justice of the European Union (CJEU) ruled in favor of asylum applicants' challenges to the Dublin Regulation in 2011.⁷⁷ This brought renewed urgency to the 2012 negotiations of the Recast Dublin Regulation (Dublin III). The European

69. *Proposal for a Regulation of the European Parliament and of 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*, at 8, COM (2008) 820 final (Mar. 12, 2008) [hereinafter COM, *Int'l Protection*].

70. *Id.* art. 5(1).

71. *Id.* art. 4(1).

72. *Id.* art. 26(1).

73. *Id.* art. 31(1) ("When a Member State is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation to that Member State could add to that burden, that Member State may request that such transfers be suspended.")

74. See, e.g., *Council of the European Union Note 15561/10 from Presidency on Common European Asylum System – State of Play*, at 3 (Oct. 29, 2010) (ministers expressed serious concerns regarding proposed suspension mechanisms for Dublin transfers).

75. *Proposal for a Regulation of the European Parliament and of 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 (Recast)*, COM (2008) 0820 (Apr. 29, 2009).

76. See, e.g., Eur. Council on Refugees and Exiles, *Comments on the European Commission Proposal to Recast the Dublin Regulation* (Apr. 2009), <http://www.ecre.org/topics/areas-of-work/protection-in-europe/133.html> [<https://perma.cc/YX3D-Z27C>]; U.N. High Comm'r for Refugees, UNHCR Comments on the European Commission's Proposal for a Recast of the Regulation of the European Parliament and of 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 ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a Recast of the Regulation of the European Parliament and of the Council Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of [the Dublin II Regulation] (COM(2008) 825, December 2008) (Mar. 18, 2009), <http://www.refworld.org/pdfid/49c0ca922.pdf> [<https://perma.cc/8G7G-9Q62>].

77. See *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255; *Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-13905.

Parliament and the European Council agreed on a new text and enacted the Dublin III Regulation in June 2013,⁷⁸ with implementation to take place in 2014.⁷⁹ Because Dublin III includes provisions that attempted to cure deficiencies highlighted by the ECtHR and the CJEU, its modifications will be addressed after discussing the pertinent judicial rulings.

B. *Reception Conditions Directive*

The Reception Conditions Directive, first enacted in 2003 and revised in 2013,⁸⁰ requires all EU member states to provide asylum seekers with “material reception conditions [that] provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.”⁸¹ The Directive defines material reception conditions to include housing, food, clothing, and a daily expenses allowance.⁸² States may provide housing, food, and clothing directly by delivering these goods to asylum seekers who live in state-supported centers, or states may give asylum seekers financial allowances or vouchers to acquire food and shelter themselves.⁸³ The Directive requires states, in furnishing housing and other services, to take into account special treatment needed by

vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.⁸⁴

The Directive also requires member states to promptly inform asylum seekers about benefits they are entitled to, obligations with which they must comply, and organizations or individuals who might provide them assistance and information about health care.⁸⁵ The applicants must receive emergency care and treatment for illnesses.⁸⁶ Minor children must receive

78. The European Parliament adopted the Council text on June 12, 2013, the final act was signed on June 26, 2013, published in the official journal on June 29, 2013, and entered into force on Jan. 1, 2014. The 2003 Dublin II Regulation was repealed when the Dublin III Regulation went into effect in 2013.

79. Dublin III, *supra* note 16, art. 49.

80. Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, 2013 O.J. (L 180) 96 (EU), <http://www.refworld.org/docid/51d29db54.html> [<https://perma.cc/DZ6W-SZYD>] [hereinafter Recast Reception Conditions Directive].

81. *Id.* art. 17(2).

82. *Id.* art. 2(g).

83. *Id.* art. 17(5).

84. *Id.* art. 21.

85. *Id.* art. 5(1).

86. *Id.* art. 19(1).

education under the same conditions as children of citizens of the member state.⁸⁷ Vocational training may be provided, and employment authorization must be granted if more than one year has passed since the filing of the asylum application.⁸⁸ When the EU Reception Conditions Directive entered into force in February 2003, it allowed member states two years to incorporate the EU standards into their national laws. Some states did not meet the legislative deadline.⁸⁹ A similar two-year transition period is allowed for the 2013 revision.⁹⁰ As discussed below,⁹¹ even when national legislation has been amended in a timely fashion to include the EU norms, not all of EU member states have translated the new measures into an adequate reception system for asylum seekers.

Compared to the United States, where asylum seekers receive no government support during the pendency of their claims,⁹² EU law mandating government-supplied accommodations for all asylum seekers while they wait for their asylum hearing appears strikingly charitable. In fact, the EU approach is both generous and utilitarian. The generosity of guaranteeing a “dignified standard of living”⁹³ to asylum applicants is part of the effort to assure that asylum seekers receive “comparable living conditions”⁹⁴ in all EU member states, in order to “limit the secondary movements of applicants influenced by the variety of conditions for their reception.”⁹⁵

The realities on the ground, however, belie the aspirations codified in the Reception Conditions Directive. Some states have been neither generous in providing shelter to asylum seekers nor effective in forestalling secondary movements of asylum seekers and other applicants for protection.⁹⁶ Furthermore, the dismal reception conditions in some EU states—and the utter

87. *Id.* art. 14.

88. *Id.* art. 16 (discussing vocational training); *id.* art. 15 (discussing employment). The delay in deciding the application must not be due to the applicant, and member states can decide the conditions for granting access to the labor market, with priority permissible for EU citizens and third-country nationals who are lawfully present. *Id.* art. 15(2). Once granted, employment permission cannot be withdrawn during the appeals process until the applicant receives notice of the negative appellate decision. *Id.* art. 15(3).

89. Reception Conditions Directive, *supra* note 34, art. 26 (stating that member states must bring national laws into compliance with this Directive by February 6, 2005). Italian implementing legislation was not enacted until May 30, 2005. Decreto Legislativo 30 maggio 2005, n.140, G.U. July 21, 2005, n.168 (It.) (enacting minimum standards for the reception of asylum seekers).

90. Recast Reception Conditions Directive, *supra* note 80, art. 31.

91. See discussion *infra* Section II.B.2.

92. HUMAN RIGHTS WATCH & SETON HALL LAW, “AT LEAST LET THEM WORK”: THE DENIAL OF WORK AUTHORIZATION AND ASSISTANCE FOR ASYLUM SEEKERS IN THE UNITED STATES 15 (Nov. 12, 2013), <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united> [<https://perma.cc/UB9K-UGQ7>].

93. Recast Reception Conditions Directive, *supra* note 80, pmbl., cl. 11.

94. *Id.*

95. *Id.* pmbl., cl. 12.

96. FRATZKE, *supra* note 19, at 9–10, 13–14 (describing, for example, secondary movement from Greece and Italy to Germany and Sweden as common).

absence of accommodations in other EU states—have played a key role in the collision of European human rights law with European asylum law.⁹⁷

II. THE ITALIAN ASYLUM SYSTEM

The 155 refugees who survived the capsized and burning boat on the coast of Lampedusa in October 2013 were brought ashore.⁹⁸ Their encounter with the CEAS began in Italy, where they were fingerprinted and taken to reception centers for processing.⁹⁹ Within six months, however, 153 of the 155 survivors had left Italy to try to start new lives in other European countries.¹⁰⁰ They did not wait for their asylum decisions in Italy, and they do not want to return there.¹⁰¹ Their departures illuminate the crisis in the Italian asylum structures and the dysfunction in the CEAS.

A. *Historical Context*

Historical context is crucial to assessing the contemporary asylum policy in Italy because it helps explain Italy's parallel frameworks for asylum. Mussolini's use of exile to punish opponents and persecution of political dissidents was recent history for those drafting Italy's Constitution in 1947. Mindful of the vulnerability of individuals who challenge state authority, they were determined that post-Fascist Italy would provide refuge to those oppressed by autocratic forces in other lands. Article 10 declares, "A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian Constitution shall be entitled to the right of asylum under the conditions established by law."¹⁰²

97. *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255, ¶¶ 169–72 (stating that asylum seekers in Greece were homeless, with fewer than 1,000 beds for tens of thousands asylum seekers, and because asylum seekers slept outside in parks, they were subject to the weather and predators); see discussion *infra* Section II.B.2.b (describing the situation in Greece and Italy, where many asylum seekers were housed in large facilities containing several thousand individuals, with three toilets for one hundred individuals, no heat, in atmospheres of violence and crime).

98. Nelson, *supra* note 2.

99. *Id.*

100. Juliane von Mittelstaedt & Maximilian Popp, "Aren't We Human Beings?": *One Year After the Lampedusa Refugee Tragedy*, DER SPIEGEL ONLINE (Oct. 9, 2014), <http://www.spiegel.de/international/europe/lampedusa-survivors-one-year-after-the-refugee-tragedy-a-994887.html> [https://perma.cc/DRP2-BSW2] (describing how, on the one-year anniversary of the Lampedusa tragedy, only one of its former passengers was still in Italy, living in an abandoned building in Rome after being returned to Italy by Swedish asylum authorities); see also Nelson, *supra* note 2.

101. This flight from Italy occurred in 2013, when Italy received 15,000 asylum seekers on Lampedusa. The situation has been exacerbated by the large numbers of asylum seekers who arrived in Italy in 2014 (170,000) and 2015 (150,000). *Migrant Arrivals by Sea Top 170,000 in Italy in 2014 Top 170,000 in 2014*, INT'L ORG. FOR MIGRATION (Jan. 16, 2015), <https://www.iom.int/news/migrant-arrivals-sea-italy-top-170000-2014> [https://perma.cc/SHM6-SA43]; UNHCR, *Mediterranean Emergency Response*, *supra* note 8 (reporting that 1,015,078 migrants crossed the Mediterranean to Europe by boat in 2015, with 153,000 reaching Italy).

102. Art. 10, cl. 3 Costituzione [Cost.] (It.).

The right to asylum is expressly embedded in the constitution and is expansive in scope. The Italian Constitution does not limit asylum to those who are persecuted, but extends asylum to all those who have been prevented from participating in democratic self-government. It encompasses those who run afoul of governments that have more constricted views of freedom and democracy than those set forth in the Italian Constitution. Notwithstanding the explicit constitutional guarantee of asylum, the Italian parliament has never enacted the implementing legislation called for in the constitution. To this day, there are no procedures setting forth the terms by which individuals deprived of democratic freedoms can claim their constitutional right to asylum.¹⁰³

Despite the absence of an effective constitutional right to asylum, there is a functioning Italian asylum system. In the post-war years, Italy sent a delegation to the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,¹⁰⁴ and it was one of the first nations to ratify the resulting 1951 Refugee Convention.¹⁰⁵ The asylum procedures have developed as a result of Italy's ratification of the 1951 Refugee Convention, which protects a substantially smaller category of refugees than the Italian Constitution. According to the 1951 Convention, those with a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group qualify as refugees.¹⁰⁶

When Italy ratified the 1951 Refugee Convention, it limited the refugee definition to those who suffered a well-founded fear of persecution in Europe.¹⁰⁷ By adopting this geographic reservation, Italy ensured that individ-

103. Individuals have filed claims in Italian courts relying on the constitutional guarantee of asylum, and the courts have recognized these claims. Those who are successful in the judicial system on constitutional asylum claims are not admitted to the asylum system, however. See H el ene Lambert, Francesco Messineo & Paul Tiedemann, *Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?*, 27 REFUGEE SURV. Q. 16, 24–25 (2016). The Italian asylum system developed in response to refugee protection obligations set forth by the international refugee convention, see Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention], and the Common European Asylum System, see *infra* text accompanying notes 114–243.

104. U.N. High Comm'r for Refugees, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Tenth Meeting* (Nov. 21, 1951), <http://www.unhcr.org/3ae68cdc4.html> [https://perma.cc/KCV8-LS4T].

105. See 1951 Refugee Convention, *Participants*, UNTS DATABASE (Mar. 6, 2016), https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en [https://perma.cc/JGD6-HEBH] [hereinafter 1951 Refugee Convention, *Participants*]. Italy signed the 1951 Refugee Convention on July 23, 1952 and ratified it on November 15, 1954. *Id.*

106. 1951 Refugee Convention, *supra* note 103, art. 1(A)(2).

107. See 1951 Refugee Convention, *supra* note 103. As a compromise, the drafters of the 1951 Refugee Convention had allowed contracting states two options: They could limit the scope of the Convention to refugees caused by events occurring in Europe, see *id.* art. 1(B)(1)(a), or events occurring in Europe or elsewhere, see *id.* art. 1(XB)(1)(b). In 1951, Italy selected the Europe-only option. See Christopher Hein, *Italy: Gateway to Europe, but not the Gatekeeper?*, in *KOSOVO'S REFUGEES IN THE EUROPEAN UNION* 142 (Joanne van Selme ed., 2000). The 1951 Refugee Convention does not define persecution. See *infra* section II.B. The current Italian asylum looks to the criteria set forth in the EU

uals persecuted in most regions of the world—such as Africa, Asia, and Latin America—had no legal claim to asylum in Italy. Indeed, even refugees from Europe had difficulty vindicating their rights in Italy. For the next four decades, Italian law lacked procedures to determine who should be recognized as refugees and granted asylum.

Nonetheless, for decades Italy was a major way station for refugees on their way to resettlement in the United States, Canada, Australia, and Israel.¹⁰⁸ Though the legal underpinnings for refugees to gain resident status in Italy were practically nonexistent during the Cold War, Italian policy was generous to refugees in transit. Finally, in 1990, Italy adopted legislation setting forth a procedure for those claiming asylum.¹⁰⁹ The 1990 legislation also deleted the geographical reservation,¹¹⁰ thus expanding the refugee definition in Italy to encompass those fleeing persecution anywhere in the world.

Despite Italy's slow pace in enacting national asylum legislation, Italy was one of the most active in forging a unified post-war Europe. Italy was one of the six founding members of the European Economic Community in 1960, the predecessor to the EU.¹¹¹ Italy was an early participant in the Schengen system to remove internal border controls in Europe.¹¹² It was also one of the initial states to ratify the Dublin Convention.¹¹³ When the EU concluded in the late 1990s that migration and asylum could no longer be left to the individual member states, the Italian government registered

Qualification Directive, *supra* note 35, to decide whether an asylum seeker fears persecution and is entitled to refugee status, whether they fear specified serious harm, such as violence from armed conflict, and are entitled to subsidiary protection, or whether there are overriding humanitarian circumstances that entitle them to remain in Italy.

108. E.g., Fred A. Lazin, *Refugee Resettlement and "Freedom of Choice": The Case of Soviet Jewry*, CTR. FOR IMMIGRATION STUDIES (July 2005), <http://cis.org/RefugeeResettlement-SovietJewry> [<https://perma.cc/9C2L-G6AJ>] (describing how many Soviet Jews were processed in Rome for resettlement in Israel or the United States); see also Hein, *supra* note 107, at 141–42.

109. Legge 28 febbraio 1990, n.39, D.L. Dec. 30, 1989, n.416 (It.).

110. The Martelli law incorporated into legislation the provisions of Decree Law No. 416 of December 30, 1989, Containing Urgent Provisions Regarding Political Asylum, Entry, and Sojourn of Non-EC Nationals, as well as Regularization of Non-EC Nationals and Stateless Persons Already Present in the National Territory. See Legge 28 febbraio 1990, n.39, D.L. Dec. 30, 1989, n.416 (It.). Article 1(1) of Decree Law No. 416 withdrew the Europe-only geographical reservation. See Hein, *supra* note 107, at 142. By 1990, only Congo, Hungary, Madagascar, Malta, Monaco, and Turkey maintained the Europe-only limitation. Hungary withdrew the geographical reservation in 1998 and Malta withdrew the geographical reservation in 2002. See 1951 Refugee Convention, *Participants*, *supra* note 105, at n.12.

111. Treaty of Rome, *supra* note 27.

112. Five member states created the Schengen Agreement, 1985, which Italy signed and ratified in 1990. The Schengen Acquis – Agreement on the Accession of the Italian Republic to the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, June 19, 1990, 1990 O.J. (L 239) 63. There are now twenty-six members. *Schengen Area Countries List*, SCHENGEN VISA INFORMATION (2015), www.schengenvisa.info.com/schengen-visa-countries-list/ [<https://perma.cc/MP97-48DT>].

113. Dublin I, *supra* note 45.

no dissent to the Tampere Declaration's call for the development of a European asylum law.

B. Current Asylum System

Italy's adoption of the CEAS Regulations and Directives, enacted between 2000 and 2005, transformed its rudimentary structures into a more elaborate and robust framework. The terms of each EU asylum law typically allowed member states two years in which to incorporate the EU provisions into national legislation. As each component of the EU asylum legislation entered into force, it brought clearer standards and procedures to the asylum regime in Italy. By 2008, Italian lawmakers had completed the transposition process,¹¹⁴ and the overall impact on the asylum system in Italy was salutary.

Currently, there are two administrative stages, followed by three levels of review within the civil court system. The first step of the asylum procedure occurs when individuals make a request for asylum either to the Italian border guards or, if they are inside Italian territorial boundaries, to the *Questura*, a nationwide police force organized by province.¹¹⁵ The initial encounter generally results in fingerprinting and identification, but it does not include a discussion of the substance of the asylum claim.¹¹⁶ Then appointments are scheduled for asylum seekers at the *Questura*, where a more formal inquiry and registration will take place.¹¹⁷ Due to the shortage of personnel, asylum seekers may report to the *Questura* office multiple times over several months until they are able to successfully record the details of their claim.¹¹⁸ Ultimately, the details are discussed in the *verbalizzazione* interview, when the *Questura* staff member asks a formalized set of questions and the asylum seeker provides oral answers.¹¹⁹ The asylum seeker also writes a short statement of the asylum claim in the applicant's native language to supplement the *Questura*'s summary of the applicant's responses.¹²⁰

114. Under EU law, regulations become effective immediately in member states, whereas directives must be adopted as law in member states by the national legislatures. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW chs. 3–4 (2007); ALINA KACZOROWSKA, EUROPEAN UNION LAW ch. 10 (2009). Accordingly, the EURODAC and Dublin Regulations became directly effective in Italy when adopted in 2000 and 2003, respectively. The Temporary Protection, Reception Conditions, Qualification, and Procedures Directives were transposed into Italian law via a series of legislative decrees. Decreto Legislativo 30 maggio 2005, n.140, G.U. July 21, 2005, n.168 (It.) (regarding reception of asylum seekers); Decreto Legislativo 19 novembre 2007, n.251, G.U. Jan. 4, 2008, n.3 (It.) (regarding qualification for protection); Decreto Legislativo 28 gennaio 2008, n.25, G.U. Feb. 16, 2008, n.40 (It.) (regarding asylum procedures).

115. COUNTRY REPORT, *supra* note 13, at 20.

116. This initial registration, known as the *fotosegnalamento*, is administrative in nature. *Id.*

117. *Id.* at 21.

118. This is particularly true in large cities. *See id.*

119. The C/3 form (*Modello C/3 per il riconoscimento dello status di rifugiato ai sensi della Convenzione di Ginevra*) sets forth details of the applicant's claim for international protection as well as details of travel to Italy. *Id.* It is commonly called the *verbale*. *Id.*

120. *Id.*

The *Questura* forwards the *verbalizzazione* to the Territorial Commission for the Recognition of International Protection, a unit of the Ministry of the Interior, which has the authority to grant or deny the application.¹²¹ In theory, the Territorial Commission will interview the asylum seekers within thirty days,¹²² but, in reality, asylum seekers wait several months.¹²³ The Territorial Commissions—the administrative decision-makers in the Italian asylum process—receive evidence, interview the applicants, and issue written decisions on the merits of each case.¹²⁴ They can grant three alternative forms of protection: refugee status,¹²⁵ subsidiary protection status,¹²⁶ or a humanitarian residence permit.¹²⁷

Until late 2014, there were ten Territorial Commissions and sub-commissions, each responsible for the claims filed by asylum seekers living within a prescribed geographical area.¹²⁸ The massive increase in asylum seekers led the government to authorize the establishment of ten additional Territorial Commissions, with a possibility of supplementary sub-commissions, if needed.¹²⁹ Each Commission has four members: an official from the municipality where the Commission meets, an official from the national police, a staff member from the UNHCR office, and a *Questura* officer, who serves as the President of the Commission.¹³⁰ The Territorial Commission interviews each asylum applicant in person, with translators paid for by the Ministry of Interior.¹³¹ Applicants may bring a lawyer, but most do not.¹³² Typically, a single member of the Commission does the interview,¹³³ and then drafts a recommended decision, which all members of the Commission

121. See *id.* at 27–29.

122. *Id.* at 28.

123. In major cities, such as Rome, this portion of the process can take up ten months. *Id.* at 28.

124. *Id.*

125. *Id.* at 29. Refugee status is defined in the Qualification Directive, *supra* note 35. In Italy this entails a five-year renewable residence permit. Decreto Legislativo 21 febbraio 2014, n.18, G.U. Mar. 7, 2014, n.55 (It.) (regarding implementation of 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).

126. Subsidiary protection status is defined in the Qualification Directive, *supra* note 35. Italian law, which used to provide a three-year renewable residence permit, has now changed the term to five years, the same as accorded refugees. D.L. n. 18/2014 (It.).

127. See Decreto Legislativo 25 luglio 1998, n.286, L. Mar. 6, 1998, n.40, art. 6(10) (It.) (governing immigration and norms on the condition of foreign citizens); COUNTRY REPORT, *supra* note 13, at 29.

128. COUNTRY REPORT, *supra* note 13, at 27.

129. Decreto Legge 22 agosto 2014, n.119, G.U. Oct. 21, 2014, n.245, art. 5 (It.) (concerning international protection).

130. COUNTRY REPORT, *supra* note 13, at 27–28.

131. *Id.* at 32.

132. *Id.* at 34–35.

133. *Id.* at 28. Multiple interviews, each by a single member of the Territorial Commission, may take place simultaneously in the same room. Author's Interview with Territorial Commission, Gorizia (May 7, 2013); Author's Interview with Territorial Commission, Milan (May 30, 2013).

discuss and vote on.¹³⁴ The asylum claimant receives a written decision explaining the rationale and the result.¹³⁵

Asylum seekers have the right to seek judicial review of negative decisions. There is a thirty-day deadline to file appeals to the Civil Court.¹³⁶ The appeal suspends government expulsion orders.¹³⁷ Applicants can appeal negative judicial decisions to the Court of Appeals¹³⁸ and ultimately to the Supreme Court.¹³⁹ The administrative process before the Territorial Commissions generally takes far longer to resolve than the thirty-day goal.¹⁴⁰ The subsequent judicial review, which occurs within the general civil court system, can be lengthy.¹⁴¹

Pursuant to the EU Qualification Directive, Italy has embraced both subsidiary protection status and refugee status. Until 2014, applicants granted subsidiary protection received renewable three-year residence permits; now, they receive the same renewable five-year permits as those granted refugee status.¹⁴² In addition, Italian legislation (not EU law) recognizes humanitarian reasons, such as serious medical conditions or displacement due to natural disasters, as grounds for a one-year residence permit.¹⁴³ Frequently, Italy grants more applications for subsidiary or humanitarian protection than for refugee status. In 2014, for example, 3,600 received refugee status, 7,600 received subsidiary protection, and 9,300 obtained humanitarian residence permits.¹⁴⁴ In 2013, a similar pattern occurred: 3,000 received refugee status, 5,500 received subsidiary protection status, and 7,500 received humanitarian residence permits.¹⁴⁵ Statistics, of course, do not assure that

134. The decision is by majority vote; in the case of a tie, the President casts the deciding vote. COUNTRY REPORT, *supra* note 13, at 28.

135. *Id.* at 33.

136. Decreto Legislativo 28 gennaio 2008, n.25, G.U. Feb. 16, 2008, n.40, art. 35 (It.); Decreto Legislativo 1 settembre 2011, n.150, D.L. June 18, 2009, n.69 (It.) (modifying D.L. n. 25/2008 and addressing Supplementary Provisions to the Code of Civil Procedure). Asylum applicants whose claims were rejected as “manifestly unfounded” have fifteen days to appeal, as do certain others. COUNTRY REPORT, *supra* note 13, at 33.

137. Asylum applications rejected as “manifestly unfounded” do not have suspensive effect, but the appellant can seek a stay from the judge. This is true for certain other categories of rejected claimants, such as those who had received an expulsion order before filing their asylum application, and those who had abandoned the collective shelters for asylum seekers without justification. COUNTRY REPORT, *supra* note 13, at 33.

138. D.Lgs. n. 25/2008, art. 35(11) (It.); COUNTRY REPORT, *supra* note 13, at 34.

139. D.Lgs. n. 25/2008, art. 35(13) (It.); COUNTRY REPORT, *supra* note 13, at 34.

140. COUNTRY REPORT, *supra* note 13, at 28.

141. *Id.* at 34.

142. Decreto Legislativo 21 febbraio 2014, n.18, G.U. Mar. 7, 2014 n.55 (It.).

143. *What is . . . Humanitarian Protection?*, ITALIAN CIVIL PROT. DEP'T, PRESIDENCY OF THE COUNCIL OF MINISTERS, http://www.protezionecivile.gov.it/jcms/en/che_cose.wp?contentId=APP26737 (last visited Mar. 8, 2016) [<https://perma.cc/WVC6-SFG3>].

144. *Asylum Applicants and First Instance Decisions on Asylum Applications: 2014*, EUROSTAT, tbl.9 (2015), <http://ec.europa.eu/eurostat/en/web/products-data-in-focus/-/KS-QA-15-003> [<https://perma.cc/EPF6-2XZRJ>].

145. *Asylum Applicants and First Instance Decisions on Asylum Applications: 2013*, EUROSTAT, tbl.9 (2014), <http://ec.europa.eu/eurostat/en/web/products-data-in-focus/-/KS-QA-14-003> [<https://perma.cc/D35V-P4YC>] [hereinafter EUROSTAT, *Asylum Applications 2013*]. In 2012, 2,000 received refugee

the law is applied appropriately. Whether some of the individuals granted humanitarian residence or subsidiary protection status should instead have qualified as refugees remains an unanswered question.

Nonetheless, the proportion of positive decisions by the Territorial Commissions is large. Italian authorities typically issue positive decisions in more than fifty percent of the asylum claims.¹⁴⁶ Counting the various forms of protection together, asylum applicants were successful in roughly eighty percent of the decisions issued by Italian authorities in 2012 and sixty percent in 2013.¹⁴⁷ This is a much higher percentage than those who received protection in decisions reached in 2013 in France (seventeen percent), Germany (twenty-six percent), or Belgium (twenty-nine percent).¹⁴⁸

Several other aspects of the Italian asylum system bear mention. Detention is rarely employed.¹⁴⁹ Only those who do not request asylum until after they have received an expulsion order are detained.¹⁵⁰ Furthermore, the Italian government has a liberal *non-refoulement* policy. It does not send individuals with expulsion orders back to Afghanistan, Iraq, Pakistan, Somalia, or Sudan.¹⁵¹

1. *Dublin Regulation Transfers*

The EU Dublin Regulation has introduced a significant level of complexity to the Italian asylum process, requiring Italian officials to consider whether to transfer asylum seekers to other EU member states rather than evaluating their claims for protection in Italy. When the *Questura* staff takes fingerprints of asylum seekers, they forward the fingerprints to EURODAC, the EU-wide asylum claimant database.¹⁵² If the EURODAC system already contains the fingerprints, the state in which the asylum seeker was fingerprinted may be responsible for assessing asylum eligibility. This diverts the case to the Dublin Unit, an office within the Ministry of the Interior.¹⁵³ This group examines the case in light of the criteria set forth

status, 5,000 received subsidiary protection status, and 2,000 received humanitarian residence permits. *Asylum Applicants and First Instance Decisions on Asylum Applications: 2012*, EUROSTAT, tbl.9 (2013), <http://ec.europa.eu/eurostat/en/web/products-data-in-focus/-/KS-QA-13-005> [<https://perma.cc/ED5J-RZJE>] [hereinafter EUROSTAT, *Asylum Applications 2012*].

146. Of the 23,565 decisions issued on asylum applications in 2013, 14,390 were positive. EUROSTAT, *Asylum Applications 2013*, *supra* note 145. Of the 27,280 decisions issued in 2012, 22,025 were positive. EUROSTAT, *Asylum Applications 2012*, *supra* note 145.

147. This constituted an eighty percent success rate for the 27,290 decisions issued by Italian authorities in 2012, EUROSTAT, *Asylum Applications 2012*, *supra* note 145, and a sixty-one percent success rate for the 23,565 decisions issued in 2013, EUROSTAT, *Asylum Applications 2013*, *supra* note 145.

148. EUROSTAT, *Asylum Applications 2013*, *supra* note 145, fig.9.

149. Interview with Christopher Hein, Director, Italian Council on Refugees (CIR) (Nov. 28, 2012) [hereinafter Interview with Christopher Hein].

150. *Id.*

151. *Id.*

152. COUNTRY REPORT, *supra* note 13, at 37.

153. *Id.*

in the Dublin Regulation to see if the asylum application should be decided elsewhere.¹⁵⁴ As noted earlier, the vast majority of cases considered by the Dublin Unit concern the “default” provision: in the absence of family ties or prior residence, the first EU state entered is responsible for the asylum claim.¹⁵⁵

It is too soon to assess the impact of the 2013 modification to the Dublin Regulation (Dublin III). The Dublin II Regulation did not require a personal interview of the asylum seeker or a hearing.¹⁵⁶ The Dublin Unit would only consider the fingerprint records, the travel route, and other details that the asylum seeker may have provided to the *Questura* staff during earlier encounters.¹⁵⁷ Based on this information, the Dublin Unit decided whether Italy or another EU member state was responsible for evaluating the asylum claim. If it was found to be the latter, the Dublin Unit issued an order transferring the asylum seeker to the other EU state.¹⁵⁸ If such an order was issued, the Italian authorities closed the asylum procedure and no longer considered the merits of the case.¹⁵⁹

In 2014, Italy requested other EU states, primarily Greece and Malta, to shoulder responsibility for 5,412 asylum applicants.¹⁶⁰ Of these, Italy only transferred ten individuals, less than one percent of the asylum seekers it sought to send elsewhere.¹⁶¹ This minuscule result was due to the reluctance of other EU states to accept responsibility under the Dublin Regulation as well as various delays and other procedural errors by the Dublin Unit, which resulted in judicial decisions quashing many of the transfer orders. For example, the Regional Administrative Tribunal of Lazio cancelled a transfer decision to Slovenia because the transfer had not taken

154. *Id.* at 38.

155. Dublin II, *supra* note 15, art. 10(1); Dublin III, *supra* note 16, art. 13.

156. The Dublin III Regulation requires a personal interview before an asylum seeker may be transferred to another EU state. Dublin III, *supra* note 16; Commission Regulation 604/2013, 2013 O.J. (L 180) 31, art. 5 (EU); see ANNA GALOSI & CRISTINA LAURA CECCHINI, EUR. COUNCIL ON REFUGEES AND EXILES, DUBLIN II REGULATION: NATIONAL REPORT: EUROPEAN NETWORK FOR TECHNICAL COOPERATION ON THE APPLICATION OF THE DUBLIN II REGULATION – ITALY 16 (2012), <http://www.refworld.org/docid/514054492.html> [<https://perma.cc/Y79U-SZAQ>] [hereinafter ECRE, DUBLIN II NATIONAL REPORT] (stating that Italian authorities schedule no interview specifically focused on a Dublin transfer, instead relying on the information gathered during the *verbalizzazione* encounter during the standard asylum application procedure); see also COUNTRY REPORT, *supra* note 13, at 40–41.

157. COUNTRY REPORT, *supra* note 13, at 40–41.

158. *Id.* at 39.

159. *Id.* at 39–41 (stating that at this point, the asylum seeker could appeal the transfer order in the Italian administrative courts).

160. *Id.* at 37. During the first six months of 2015, Italy made 4,871 outgoing Dublin transfer requests. For statistics on Dublin requests in earlier years, see ECRE, DUBLIN II NATIONAL REPORT, *supra* note 156, at 21. In 2011, Italy requested other EU states to accept 1,275 asylum applicants. *Id.* The country wished to send 210 asylum seekers to Greece, 154 to Malta, 115 to Norway, and 101 to the United Kingdom. *Id.*

161. See COUNTRY REPORT, *supra* note 13, at 37; ECRE, DUBLIN II NATIONAL REPORT, *supra* note 156, at 22 (describing that in 2011, other EU states agreed to assume responsibility for 196 of the 1,275 requests placed by Italy, but Italy transferred only fourteen individuals).

place within the six-month period mandated by the Dublin Regulation.¹⁶² Another reason for the paltry number of Dublin transfers is the enduring asylum system crisis in Greece, which many asylum seekers enter before arriving in Italy.¹⁶³ The Dublin Unit has not officially suspended transfers to Greece, despite the *M.S.S. and N.S. v. Secretary of State for the Home Department* judgments.¹⁶⁴ It has, however, approved few such transfers, and many of those approved have been overturned by the Italian administrative courts.¹⁶⁵

The Dublin Unit is also responsible for replying to requests from other countries that want to send asylum seekers back to Italy. In 2014, Italy received 28,904 requests to take responsibility for determining the merits of asylum claims filed in other European states.¹⁶⁶ This is more than five times as many requests as Italy presented to other states.¹⁶⁷

Italy's exceedingly long coast line, combined with the southerly setting of Sicily and Lampedusa's proximity to North Africa, has made it a favored entry point into the EU. The overwhelming majority of Dublin transfer requests received by Italy are based on the asylum seekers' entry into the EU through Italy.¹⁶⁸ In simple terms, other EU states are not arguing that the asylum seekers have family links or prior ties to Italy that would make Italy the appropriate venue for assessing the asylum claims. Rather, other EU states almost always rely on the Dublin "default" criterion: Italy is responsible for the asylum applications merely because the asylum seekers arrived there prior to entering other EU countries.

Many, perhaps a majority, of the asylum seekers who arrive in Italy do not want to stay there. They hope to travel further north, to countries with more generous asylum systems, to countries with more developed immigrant communities, to countries with stronger economies, to countries where the local language, such as French, Spanish, or English, is more

162. See ECRE, DUBLIN II NATIONAL REPORT, *supra* note 156, at 22–23.

163. Italian judges were suspending transfers even pre-*M.S.S.* based on the lack of implementation of EU law in Greece. ECRE, DUBLIN II NATIONAL REPORT, *supra* note 156, at 25.

164. *Id.* at 24.

165. The Dublin Unit requested that Greece take responsibility for 210 cases in 2011, and it appears that 2 of the 210 cases resulted in transfers. *Id.* at 24–25; see TAR, 15 febbraio 2012, n.1551, Giur. it. 2012 (It.).

166. COUNTRY REPORT, *supra* note 13, at 37. The majority of the Dublin requests came from Switzerland, Germany, and Sweden. *Id.* The 28,904 requests received by Italy in 2012 resulted in 1,918 transfers. *Id.* Italy received 14,019 Dublin transfer requests from other countries in the first half of 2015. *Id.* at 64. Recently, Italy has opened several temporary centers to house those returned under the Dublin Regulation. They can shelter 450 individuals on a temporary basis, and the majority of places are reserved for vulnerable persons. *Id.*

167. *Id.* at 37 (reporting that Italy requested the transfer of 5,412 asylum seekers to other countries pursuant to the Dublin Regulation, in contrast to the 28,904 Dublin transfer requests it received from other countries).

168. See UNHCR, *Mediterranean Emergency Response*, *supra* note 8 (stating that Italy, along with Greece, Spain, and Malta, form the southern border of the EU; France, Croatia, and Slovenia which also are along the southern EU frontier, are more distant from Africa and the Middle East).

widely used elsewhere in the world.¹⁶⁹ They fear harsh conditions in the Italian asylum centers, and they are alarmed at the high unemployment rate of Italian citizens. They also worry that there is not a chance that they will have a decent life in Italy.¹⁷⁰

The numbers of asylum seekers entering through Italy continue to rise. A decade ago, roughly 15,000 new asylum seekers reached Italy in an average year, but more than 30,000 arrived in 2008 and nearly 40,000 when the Arab Spring began in 2011. The number of arrivals by boat increased from 43,000 in 2013,¹⁷¹ to 170,000 in 2014,¹⁷² and 150,000 in 2015.¹⁷³ As these asylum seekers, like the Lampedusa survivors, leave Italy and file applications elsewhere, they often face the Dublin Regulation. Many of them contend that European human rights law protects them from being returned to Italy.¹⁷⁴ They point to systemic deficiencies in the reception conditions provided by Italy as the major flaw.

2. Reception Conditions

The Italian system, though decent in many regards, violates the EU Reception Conditions Directive in profound ways that can result in demeaning and life-threatening conditions for asylum seekers. The disregard for the reception conditions law occurs throughout the Italian procedure. The situation is so severe that in many instances other EU states should not rely on the EU Dublin Regulation to return asylum seekers to Italy.

The failings in the Italian asylum policy highlight fractures that are likely occurring elsewhere within the CEAS as well. Italy transposed the terms of the EU Reception Conditions Directive into Italian law in 2005 by adopting standards that correspond to the EU measures.¹⁷⁵ Italy, however, has not translated the law into reality, nor has its recent legislation incorporating the 2013 revision of the EU Reception Conditions Directive changed that reality.¹⁷⁶ In the ten years since the Italian reception conditions law

169. See, e.g., HUMAN RIGHTS WATCH, TURNED AWAY: SUMMARY RETURNS OF UNACCOMPANIED MIGRANT CHILDREN AND ADULT ASYLUM SEEKERS FROM ITALY TO GREECE 10 (2013), https://www.hrw.org/sites/default/files/reports/italy0113ForUpload_0.pdf [<https://perma.cc/GV95-UF43>] [hereinafter HUMAN RIGHTS WATCH REPORT]; COUNTRY REPORT, *supra* note 13, at 38; Nelson, *supra* note 2.

170. See *infra* text accompanying Part IV (describing claims made by asylum seekers).

171. *Migrant Arrivals by Sea Top 170,000 in Italy in 2014*, INT'L ORG. FOR MIGRATION (Jan. 16, 2015), <https://www.iom.int/news/migrant-arrivals-sea-italy-top-170000-2014> [<https://perma.cc/SHM6-SA43>].

172. *Id.*

173. UNHCR, *Mediterranean Emergency Response*, *supra* note 8 (reporting that 1,015,078 migrants crossed the Mediterranean to Europe by boat in 2015, with 153,000 reaching Italy).

174. See *infra* Part IV.

175. Decreto Legislativo 30 maggio 2005, n.140, G.U. July 21, 2005, n.168 (It.).

176. In August 2015, the Italian government adopted legislation to implement the 2013 revisions of the Reception Conditions Directive and the Procedures Directive. Decreto Legislativo 18 agosto 2015, n.142, G.U. Sept. 15, 2015 n.214 (It.) (addressing implementation of Directive 2013/33/EU on minimum standards for the reception of asylum applicants and Directive 2013/32/EU on common procedures for the recognition and revocation of the status of international protection); COUNTRY RE-

went into effect, Italy has failed to provide an adequate and dignified standard of living to many asylum seekers. Indeed, a significant number of asylum seekers have received no shelter at all. Many have been homeless, reduced to begging for a place to sleep and foraging for food.¹⁷⁷

There are several components to the problem. First, Italy has erected bureaucratic barriers that prevent asylum seekers from filing their claims for weeks or months. Second, Italian authorities have created overlapping systems of shelters for asylum seekers, which creates confusion, and the shelters accommodate far fewer than the number of asylum seekers who arrive in Italy every year. Third, and most shocking, those granted protection in Italy often find themselves living on the street, abandoned by the government authorities that have recognized their vulnerability and their need. All three of these situations involve fundamental misreadings and misapplications of EU law. The first stems from a restrictive and illogical interpretation of the text of the Directive. The second results from the Italian government's failure to develop adequate shelters despite the clear command of both the Reception Conditions Directive and Legislative Decree 140/2005. The third arises from a fundamentally flawed vision of the underlying purpose and requirements of the CEAS.

a. At the Beginning: Delayed Access to Shelters

Italy has adopted an exceedingly restrictive interpretation of the Reception Conditions Directive in order to avoid its responsibilities under the CEAS. The Directive requires member states to make reception conditions available to asylum applicants "when they make their application for asylum."¹⁷⁸ The Italian practice treats the *verbalizzazione* interview with the *Questura* as the point at which the individual "makes an application for asylum" within the meaning of the Reception Conditions Directive.¹⁷⁹ The scheduling of the *verbalizzazione* is completely controlled by the *Questura*; the asylum seeker has no power to accelerate the date, which sometimes occurs weeks or even months after entry into Italy. Between the time they arrive in Italy and the date of their formal *verbalizzazione* interviews, asylum seekers need food and shelter. Italy, however, refuses to view them as asylum seekers and therefore denies them the protections mandated by the CEAS.¹⁸⁰

PORT, *supra* note 13, at 12 (stating that a regulation implementing the legislation is expected to be adopted within six months of the legislation's entry into force).

177. SWISS REFUGEE COUNCIL, *supra* note 60, at 6, 38–40.

178. Recast Reception Conditions Directive, *supra* note 80, art. 13(1).

179. COUNTRY REPORT, *supra* note 13, at 21, 62; *see also* SWISS REFUGEE COUNCIL, *supra* note 60, at 11–12.

180. Interview with Christopher Hein, *supra* note 149 (indicating that asylum seekers who are transferred from another EU member state to Italy pursuant to the Dublin Regulation generally arrive at the Rome airport accompanied by police officers from the transferring state); *see also* COUNTRY REPORT, *supra* note 13, at 59, 29–30 (stating that officials at the airport give the returned asylum seeker a paper indicating the *Questura* to which they should report and that in recent years Italy has opened a few

The Italian practice is an illogical and illegitimate interpretation of the Reception Conditions Directive. Moreover, if member states can escape their obligations under the Reception Conditions Directive by artificially delaying the moment when persons “make” or “lodge” their asylum application, this would provide perverse incentives. Article 3 states that the Directive applies to those who “make an application for asylum at the border or in the territory.”¹⁸¹ Although the phrase “make an application” is not defined, the Directive expressly contemplates that this act can take place at the border. It is common that asylum seekers attempt to enter a country via remote frontier areas, and remote border control posts often lack well-developed administrative facilities and staff. It follows that the Reception Conditions Directive contemplates that an individual can “make an application for asylum” via a straightforward communication to a border guard in a small outpost. It is unnecessary to interpret the text to refer only to elaborate, formal procedures in which the substance of asylum claims are fully amplified.

A similar result should apply to asylum seekers who first encounter Italian authorities at a *Questura* office within Italy. The Article 3 text “make an application for asylum” should encompass their request for permission to stay and apply for asylum. Indeed, the Italian practice demonstrates that Italian authorities in reality view the individuals as asylum seekers from their first appearance at the *Questura* even though the authorities insist that pre-asylum seekers do not mature into asylum seekers until they have their *verbalizzazione* interviews. Though Italian authorities do not call individuals asylum seekers until after the *verbalizzazione*, the only reason the authorities schedule them for the *verbalizzazione* is that the authorities believe they want to claim asylum.

Reflection on basic migration principles bolsters this conclusion. Italy, like most states, generally requires non-citizens to obtain permission in order to enter and remain within its territory.¹⁸² EU law authorizes all EU member states’ citizens to move freely within the EU.¹⁸³ Non-citizens with entry visas also have permission to enter, as do individuals from states that have special entry agreements with Italy. However, non-citizens who lack visas or other special permission to enter and remain in Italy are barred—

temporary shelters for Dublin returnees, but frequently they are not eligible for accommodations in the reception facilities).

181. Recast Reception Conditions Directive, *supra* note 80, art. 3(1).

182. NUALA MOLE & CATHERINE MEREDITH, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (2010) (“A key attribute of national sovereignty is the right of states to admit or exclude aliens from their territory . . . [o]nly if exclusion from the territory or from protection would involve a breach of some other provision of international law are states bound to admit aliens . . . [and the] concept of asylum is the most important example of the latter principle.”).

183. Treaty of Rome, *supra* note 27, art. 1 (establishing that free movement of EU citizens within the EU is a cardinal principle of the EU); *see also* Council Directive 2004/38, 2004 O.J. (L 158) 77 (EU) (establishing the current legislation governing free movement and the right of citizens of the Union and their family members to move and reside freely within the territory of the member states).

unless they qualify for asylum or other international protection. Those who come to Italy to seek asylum generally do not possess Italian visas or residence permits. Accordingly, many of them promptly report to the *Questura* to request permission to remain in Italy during their asylum process.¹⁸⁴ The *Questura* officials typically issue them temporary residence permission and then schedule them to come back for the *verbalizzazione* interview.¹⁸⁵ The non-citizens granted temporary residence by the *Questura* must be asylum seekers, because otherwise there would be no basis for the *verbalizzazione* interview. Accordingly, these non-citizens should also be considered asylum seekers and entitled to the same protections as those who explicitly tell a border guard they want asylum.

Indeed, the structure of the Reception Conditions Directive supports this conclusion. The Directive orders EU states to provide individuals with documents stating they are asylum seekers and have permission to stay while their asylum application is pending.¹⁸⁶ States must do this within three days after an application is “lodged.”¹⁸⁷ This requirement ensures that asylum seekers can quickly obtain evidence that they are legally present. It makes no sense for the Directive to mandate that member states act quickly—within three days—to provide residence permission, but to allow state officials to wait for weeks or months before they acknowledge that an individual who has reported and asked for asylum officially “make[s] an application for asylum.”

Other provisions of the Reception Conditions Directive also support the conclusion that asylum seekers “make” an asylum application as soon as they first tell the authorities they want asylum or need international protection. The Directive requires member states to inform asylum seekers within fifteen days of lodging their asylum claim of the benefits and obligations related to their reception as asylum seekers.¹⁸⁸ States must furnish information on organizations that may provide assistance to asylum seekers concerning food, shelter, health, and other related services.¹⁸⁹ In fact, the Italian practice is to distribute leaflets with this type of information long before the *verbalizzazione* interview.¹⁹⁰ It would defy common sense to think that these EU obligations—which help asylum seekers provide for their basic human needs and prepare for their asylum hearings—do not come into play until fifteen days *after* several weeks of waiting for the *verbalizza-*

184. COUNTRY REPORT, *supra* note 13, at 21 (stating that those who apply for asylum at the border are given a letter, *verbale di invito*, that invites them to continue the asylum procedure by reporting to the *Questura* office).

185. See, e.g., COUNTRY REPORT, *supra* note 13, at 13; *Hussein v. Netherlands & Italy*, App. No. 27725/10, Eur. Ct. H.R., ¶¶ 33–34 (2013), [http://hudoc.echr.coe.int/eng?i=001-118927#{"itemid":\["001-118927"\]}](http://hudoc.echr.coe.int/eng?i=001-118927#{) [<https://perma.cc/2428-47DQ>].

186. Recast Reception Conditions Directive, *supra* note 80, art. 6(1).

187. *Id.*

188. *Id.* art. 5(1).

189. *Id.*

190. COUNTRY REPORT, *supra* note 13, at 46–47.

zione interview. It would be counterproductive for EU law to allow member states to delay providing this information for several months while newcomers wait in limbo.

Furthermore, the Directive authorizes member states to restrict asylum seekers to an assigned area.¹⁹¹ Under the Italian interpretation of “make an application for asylum,” the individuals who requested asylum at the border are not asylum seekers during the weeks or months before the *verbalizzazione* interview. Therefore, the Directive would not allow Italy to limit individuals’ movements to an assigned area during their initial weeks or months in the country. Illogically, the Italian understanding of the Directive would authorize officials to regulate the geographical locations of individuals only after they provide information at the *verbalizzazione* interview, but would allow the newly arrived individuals free movement within Italy before that time.

In addition to the text and structure of the Reception Conditions Directive, the policy behind the EU asylum law renders the Italian practice un-supportable. The Directive is premised on the need for an “area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection within the Union.”¹⁹² Those forced to seek protection within Italy report to the *Questura*, return on the dates scheduled, and frequently are rescheduled for appointments on subsequent dates. They have no control over the date and time of the *verbalizzazione* interview. Yet the Italian authorities insist that these individuals must somehow survive on their own in Italy, a country where they are unlikely to speak the language or have social networks. It is inhumane to exclude them from the protections of the Reception Conditions Directive for the first few weeks when they may be most vulnerable and isolated.

If member states can refrain from acknowledging that individuals have lodged asylum claims until late in the process, member states can artificially shorten the period during which they must furnish food, shelter, and other necessities of life. To escape the mandate that they provide a “standard of living adequate for the health of applicants and capable of ensuring their subsistence,”¹⁹³ member states would simply need to declare that asylum seekers only “make an application for asylum” when they provide evidence at the hearing on the merits of their asylum claim. Under this reading of the Directive, states are only responsible for providing the material reception conditions specified by EU law only for the few hours or few days between the merits hearing and the decision entered in the case. This type of manipulation of procedural definitions by government authorities surely is not what EU asylum law contemplates.

191. Recast Reception Conditions Directive, *supra* note 80, art. 7(1).

192. Recast Reception Conditions Directive, *supra* note 80, pmbli., cl. 2.

193. *Id.* art. 13(1).

It is difficult to imagine a practice more destabilizing to the common European asylum policy than Italy's delay for several weeks or months in providing access to reception centers or other assistance to newly arrived individuals. The prospect of homelessness at a time when they are disoriented, vulnerable, and isolated incentivizes asylum seekers to travel elsewhere in Europe to file their asylum applications. This is true even if homelessness only occurs to a portion of the asylum seeker population in Italy; so long as asylum seekers think there is a significant possibility that they may be homeless, they will want to leave.

b. In the Middle: Limited Number of Shelters and Limited Services

The Italian government provides accommodations to thousands of asylum seekers each year, yet the specter of homelessness confronts many asylum seekers and refugees in Italy. There are two major problems. There are far fewer shelters than there are asylum seekers who need shelter; the shelter system is disorganized, difficult to access, and uneven in quality. Annual statistics highlight the lack of capacity problem. Italy reported that it received approximately 15,000 asylum seekers per year in the first years of the twenty-first century. This was followed by roughly 10,000 asylum seekers per year for several years, and then the numbers increased dramatically. There were 31,000 asylum seekers in 2008, 18,000 in 2009, 12,000 in 2010, 37,000 in 2011, 17,000 in 2012, 42,000 in 2013, 170,000 in 2014, and 150,000 in 2015.¹⁹⁴ In the face of these persistently large numbers of arrivals, the Ministry of the Interior planned to double the accommodations so that by 2016 the long-term reception centers may be able to shelter 30,000 asylum seekers.¹⁹⁵ In addition, in 2014 and 2015, the Minister of Interior requested local authorities to identify facilities that could be used for emergency shelters for the large numbers of asylum seekers arriving by sea.¹⁹⁶

Aside from the dearth of accommodations, the reception system is marked by confusion and dysfunction. Over the past two decades, Italy has developed multiple overlapping systems to provide accommodations to asylum seekers. National authorities have created Initial Reception and First

194. See *Statistiche*, CONSIGLIO ITALIANO PER I RIFUGIATI, <http://www.cir-onlus.org/en/media2/statistics> (last visited Mar. 8, 2016) [<https://perma.cc/CU2W-KBYY>] (reporting that starting in 2013 the number of asylum claims has been far lower than the number of migrants reported to have arrived in Italy); *supra* notes 169–174 (detailing arrivals in Italy since 2012, and indicating that observers say many asylum seekers have chosen not to file asylum applications in Italy); see also, e.g., Niels Frenzen, *Very Few Migrants Reaching Italy Apply for Asylum*, MIGRANTS AT SEA (Jan. 12, 2015), <http://migrantsat-sea.org/category/post-category/data-stats/> [<https://perma.cc/LQ6Y-46TK>]; COUNTRY REPORT, *supra* note 13, at 38.

195. COUNTRY REPORT, *supra* note 13, at 68.

196. *Id.* See also William Spindler, *Italy Reception Centres Under Strain as Thousands Rescued at Sea*, UNHCR NEWS STORIES (May 6, 2015), <http://www.unhcr.org/554a075a6.html> [<https://perma.cc/5GKD-659G>].

Aid Centers (CPSA),¹⁹⁷ Accommodation Centers for Asylum Seekers (CARA),¹⁹⁸ Accommodation Centers (CDA),¹⁹⁹ Centers for the Protection of Refugees and Asylum Seekers (SPRAR),²⁰⁰ and, most recently, Emergency Reception Centers (CAS).²⁰¹ In theory, asylum seekers spend their first few hours or days in the Initial Reception Centers for immediate medical care, health screening, and registration. Those without documents then move to the CARA or CDA facilities for up to thirty-five days while their identities are checked and their applications are formalized.²⁰² Afterwards, they transfer to the SPRAR centers, where they spend six months.²⁰³ In theory, asylum seekers will be quickly registered and will have their asylum claims reviewed during the first month; those who receive protection will spend half a year with services that will help them become self-sufficient. Premised on this optimistic timeline, the four CPSA Centers and the ten CARA and CDA Centers were built as temporary processing centers through which substantial numbers would pass in a short time.²⁰⁴ Because they were envisioned as temporary way stations, they are not equipped with education, healthcare, and other services that help individuals respond to their precarious situations. Further, they tend to be large institutions, some

197. EUR. MIGRATION NETWORK, FOCUSED STUDY 2013: THE ORGANIZATION OF RECEPTION FACILITIES FOR ASYLUM SEEKERS IN DIFFERENT MEMBER STATES 2–3 (2013), http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/14a.italy_national_report_reception_facilities_en_version_en.pdf [<https://perma.cc/ZW8Z-JKF9>] [hereinafter EMN, FOCUSED STUDY] (indicating that Initial Reception and First Aid Centers, *Centri di Primo Soccorso ed Assistenza*, (CPSA), established in 2006, are located near the major landing sites for boat arrivals); see also COUNTRY REPORT, *supra* note 13, at 60.

198. *Id.* at 2–3 (describing Accommodation Centers for Asylum Seekers, *Centri per Accoglienza di Richiedenti Asilo* (CARA), established by Legislative Decree 25/2008, are larger centers where it is contemplated asylum seekers will remain for approximately thirty days while waiting for access to the formal administrative asylum procedure); see also COUNTRY REPORT, *supra* note 13, at 60.

199. EMN, FOCUSED STUDY, *supra* note 197, at 2–3 (stating that Accommodation Centers, *Centri di Accoglienza* (CDA), were established in 1995 for irregular migrants, not specifically for asylum seekers, but asylum seekers sometimes receive accommodations); see also COUNTRY REPORT, *supra* note 13, at 60.

200. EMN, FOCUSED STUDY, *supra* note 197, at 1 (describing the System of Protection for Asylum Seekers and Refugees, *Sistema di Protezione per Richiedenti Asilo e Refugiati* (SPRAR), established in 2002 by Law 189/2002, which provides publicly funded shelters sponsored by local authorities and nonprofits organizations, and consists of smaller shelters designed for longer stays, and Presidential Decree No. 303/2004 provides for a variety of assistance and integration services); COUNTRY REPORT, *supra* note 13, at 60–61.

201. COUNTRY REPORT, *supra* note 13, at 60, 69 (stating that the October 2013 tragic deaths at Lampedusa led the Italian government to establish *Mare Nostrum*, a naval operation in which Italian ships patrolled the Mediterranean Sea to identify and assist endangered boats). Anticipating that these operations would bring greater numbers of asylum seekers to Italy, the Ministry of Interior ordered local governments to identify facilities that could be used as Emergency Reception Centers, *Centri di Accoglienza di Soccorso* (CAS). *Id.* By June 2015 these temporary shelters hosted 50,000 individuals. *Id.*

202. *Id.* at 74.

203. MARIA DE DONATO, ASYLUM INFO. DATABASE, COUNTRY REPORT: ITALY 52–53 (2015), <http://www.asylumineurope.org/reports/country/italy> [<https://perma.cc/8W8G-MYN7>] [hereinafter January 2015 COUNTRY REPORT]; EMN, FOCUSED STUDY, *supra* note 197, at 6 (discussing timing at the different centers).

204. January 2015 COUNTRY REPORT, *supra* note 203, at 52–53, 59–60.

of which house over 1,000 individuals and are isolated from the local community.²⁰⁵ In contrast, the 430 SPRAR Centers are much smaller, are jointly run with municipalities and local groups, and provide multiple support services for the residents.²⁰⁶

The reality collides with the theory. The accommodations are too few and are fundamentally misallocated. There are approximately 750 places available in the initial reception centers, approximately 10,000 in the CARA and CDA centers, and—until recently—approximately 3,000 in the SPRAR system.²⁰⁷ How would asylum seekers move from the short-term CARA centers to the longer-term SPRAR centers, if there are more than twice the number of beds in the thirty-day CARA settings as there are in the SPRAR centers where the stay is expected to be six times as long? This fundamental mismatch in types of facilities led to a dysfunctional system. After a few days in the Initial Reception and First Aid Centers, many asylum seekers were assigned to CARA Centers, even though the individuals in question had identity documents and did not need to be screened and processed. They were not placed in SPRAR accommodations, because there were no openings available.²⁰⁸ The length of the stay compounded the inappropriateness of the setting. Many asylum seekers remained in the CARA Centers far longer than the thirty-five day maximum²⁰⁹ due to lack of capacity in the SPRAR facilities. Stays of six months or longer in the CARA Centers were routine,²¹⁰ consigning asylum seekers to “temporary” centers that lack needed social services such as psychological counseling, language classes, vocational training, and so on. The recent plans to fund many more SPRAR homes in order to accommodate up to 20,000 asylum seekers and refugees should make a decided improvement in the Italian reception system.²¹¹

The lack of support services is intensified because the CARA Centers tend to be located in isolated and rural settings, far from public transportation or normal community life.²¹² Several are huge facilities. For example, 3,000 asylum seekers can be housed in the CARA Center in Mineo in Sicily and more than 1,000 in the CARA Center Crotona in Calabria in southern Italy.²¹³ This is essentially a large warehouse of foreigners, far from home,

205. EMN, FOCUSED STUDY, *supra* note 197, at 1; COUNTRY REPORT, *supra* note 13, at 66.

206. EMN, FOCUSED STUDY, *supra* note 197, at 1; COUNTRY REPORT, *supra* note 13, at 66–68.

207. EMN, FOCUSED STUDY, *supra* note 197, at 6 (stating that SPRAR recently increased by 2,400 to bring capacity to 5,400). In September 2013 plans were announced to increase the number of SPRAR placements to 16,000 by 2016. This number has been increased to 20,000. *Id.* COUNTRY REPORT, *supra* note 13, at 68.

208. January 2015 COUNTRY REPORT, *supra* note 203, at 52.

209. Decreto Legislativo 28 gennaio 2008, n.25, G.U. Feb. 16, 2008, n.40, art. 20 (It.) (establishing that twenty days maximum if there are no documents, thirty-five days if there are false documents).

210. January 2015 COUNTRY REPORT, *supra* note 203, at 53; D.Lgs. n. 25/2008, art. 6 (It.) (permitting extended stays if no support for asylum seekers and no accommodations in SPRAR).

211. COUNTRY REPORT, *supra* note 13, at 68.

212. *Id.* at 71.

213. *Id.* at 66.

unschooled in Italian, and vulnerable to violence and crime. There have been reports of poor sanitary conditions, with only three toilets for one hundred individuals and no laundry facilities other than the showers; furthermore, there have been reports of no heat and payment requested to receive a pillow or a blanket.²¹⁴

Some asylum seekers are never assigned to a shelter and others leave shelters due to the dehumanizing conditions.²¹⁵ Italian law provides that asylum seekers who are not placed in CARA or SPRAR centers should receive a financial allowance for living expenses.²¹⁶ Again, the reality diverges from theory; officials never provide financial allowances.²¹⁷ Asylum seekers are either assigned to over-capacity CARA or SPRAR centers or, sometimes, turn to squatting in abandoned buildings, such as the notorious Salaam Palace, home to 800 asylum seekers and refugees on the outskirts of Rome.²¹⁸ In addition, some private organizations furnish housing and services to asylum seekers and other vulnerable individuals, though there do not appear to be many of these.²¹⁹

Italy has struggled to respond to the large numbers of asylum seekers who have arrived during the past decade.²²⁰ Ad hoc responses have resulted in overlapping and uncoordinated systems to shelter asylum seekers. An Italian parliamentary committee reported in November 2013 that Italian accommodations for asylum seekers had progressively deteriorated throughout each of the prior three years.²²¹ Two years later, in November 2015, Doctors Without Borders issued a report to an Italian parliamentary com-

214. January 2015 COUNTRY REPORT, *supra* note 203, at 63; see also Verwaltungsgericht [VG] [Administrative Trial Court] Feb. 21 2013, 2A 126/11 (Ger.), <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.phtml?doc.id=MWRE14000906&st=null&showdoccase=1> [https://perma.cc/9VG9-3PMM].

215. E.g., Verwaltungsgericht [VG] [Administrative Trial Court] Feb. 21 2013, 2A 126/11 (Ger.), <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.phtml?doc.id=MWRE14000906&st=null&showdoccase=1> [https://perma.cc/9VG9-3PMM]; Tarakhel v. Switzerland, App. No. 29217/12, Eur. Ct. H.R. (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":"001-148070"}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [https://perma.cc/76ZV-FUBK].

216. Decreto Legislativo 28 gennaio 2008, n.25, G.U. Feb. 16, 2008, n.40, art. 6(7) (It.) (indicating that the first payment of the allowance totals Eur 557.80 for the first 20 days; the second payment amounts to Eur 418.35).

217. COUNTRY REPORT, *supra* note 13, at 65.

218. *Id.*; see also Elisabetta Povoledo, *Palace of Squatters is a Symbol of Refugee Crisis*, N.Y. TIMES (June 14, 2014), http://www.nytimes.com/2014/06/15/world/europe/palace-of-squatters-is-a-symbol-of-refugee-crisis.html?_r=0 [https://perma.cc/2P58-N9F4]; Povoledo, *Migrants in Rome*, *supra* note 7.

219. Interview with Christopher Hein, *supra* note 149; Interviews with Individuals in St. Paul Outside the Walls, Rome, Italy (Jan. 2013).

220. *Khlaifia v. Italy*, App. No. 16483/12 (2015), <http://hudoc.echr.coe.int/eng?i=001-157277> [https://perma.cc/E3TG-MTQS]. On September 1, 2015, the ECtHR ruled that the reception conditions in the Initial First Aid and Reception Center on Lampedusa constituted inhuman or degrading treatment. *Id.* The court recognized that the Italian island Lampedusa had received 55,000 migrants in a short time immediately after the 2011 Arab Spring political developments, and that the authorities had worked to accommodate the large number of fleeing individuals. *Id.* Nonetheless, the court ruled that the serious overcrowding, lack of sanitary facilities, and poor detention conditions violated European human rights law. *Id.*

221. COUNTRY REPORT, *supra* note 13, at 70.

mission criticizing reception centers in Sicily for “sanitation that is often out of order, [lack of facilities] to give treatment against scabies and . . . no guarantee of privacy.”²²² At the end of 2015, Doctors Without Borders severed its ties with the reception center and explained its decision:

[T]he overcrowding, the lack of legal information, the lack of protection and the all-round precarious and undignified conditions in which people are received in Sicily continue. Under current circumstances, which we fear will continue, our capacity to offer an effective response to the medical and psychological needs of vulnerable people—including pregnant women, minors, and victims of torture—in . . . reception centers across Ragusa Province is extremely limited.²²³

Italy has announced plans to rationalize the reception system in 2016, repositioning the existing CARA and CDA facilities as regional hubs that will more efficiently process asylum applications.²²⁴ The impact of these plans is an open question. Thus far, the lack of long-term planning and the lack of a coordinated and rational plan for accommodating asylum seekers have exacerbated the pressures that large surges of refugees and other migrants have imposed on the Italian asylum system.

c. At the End: After the Formal Grant of Protection

Italy’s treatment of refugees and others granted protection might be even more scandalous than the delay in providing accommodations at the start of the asylum process or the deficits in reception conditions during the asylum proceedings. For those who receive positive decisions on the applications for protection, the Italian policy is to give them residence permits and leave them to fend for themselves. Abandoned by the system after they succeeded in their claims, some refugees have ended up homeless in Italy.²²⁵

To put this in context, asylum seekers include some individuals who are eligible for protection and others who are not. The Reception Conditions Directive mandates that all receive accommodations, and that all should be treated as potentially meritorious claimants at the start, because it is impossible to know at the beginning—before applicants have a fair determination procedure—which ones will ultimately be able to prove that they are entitled to receive long-term residence in Italy.²²⁶ Once the Italian asylum pro-

222. *Migration: Unacceptable Conditions for Migrants and Asylum Seekers in Pozzallo Reception Center, Italy*, MEDECINS SANS FRONTIERS (Nov. 20, 2015), <http://www.msf.org/article/migration-unacceptable-conditions-migrants-and-asylum-seekers-pozzallo-reception-center> [https://perma.cc/WYF2-LRXJ].

223. *Italy: MSF Ends Activities in Pozzallo Reception Center*, DOCTORS WITHOUT BORDERS (Dec. 30, 2015), <http://www.doctorswithoutborders.org/article/italy-msf-ends-activities-pozzallo-reception-center> [https://perma.cc/NWZ8-X578].

224. COUNTRY REPORT, *supra* note 13, at 67.

225. SWISS REFUGEE COUNCIL, *supra* note 60, at 39–41.

226. Recast Reception Conditions Directive, *supra* note 80, pmbl. (establishing need area of freedom and security for those who *legitimately* seek asylum in EU).

cess has taken place and the authorities have evaluated all the applicants, the authorities know which applicants' claims are meritorious and have the legal right to stay in Italy. The existence of individuals who deserve protection lies behind the idea that member states must provide decent reception conditions for asylum seekers.

However, the Italian practice discriminates against the very people the system aims to protect. Once the Italian asylum process determines that an individual deserves protection, that individual loses the right to the accommodations afforded to others still in the process—those who may or may not have meritorious applications for protection.

A cramped reading of the Reception Conditions Directive underlies this practice. The Directive refers to those who have “made an application for asylum in respect of which a final decision has not yet been taken.”²²⁷ Relying on the reference to “final decision,” the Italian government’s view is that those who have received a decision in their case no longer fall within the scope of the Directive. To adopt such a limiting view of the Directive is illogical²²⁸ and contrary to the development of a common European asylum policy. Those who have won their asylum cases are, by definition, vulnerable and law-abiding individuals. They have followed the prescribed asylum process and have proved they cannot be safe in their home country. They are the very people the EU asylum policy intends to shelter. A literal reading of the text can be said to support the Italian government’s interpretation that the Reception Conditions Directive extends only to applicants with pending claims and not to applicants whose claims have been decided. Indeed, it is sensible to conclude that applicants whose claims have been rejected are no longer entitled to the safeguards provided by the Reception Conditions Directive. It makes no sense, however, to withdraw these safeguards from those whose claims have been decided positively. The premise of the Reception Conditions Directive is that vulnerable newcomers to EU member states need assistance to help them survive while they access their rights under EU and international law. Their vulnerability and survival needs do not vanish on the day they receive a decision vindicating their legal rights. Once they have established their right to protection in the EU, they deserve at least as much support as provided earlier.

Furthermore, it does not make sense to increase the vulnerability and heighten the challenges to integration for the very people the Italian officials have just authorized to reside in Italy. When Italy grants residence permission and simultaneously rescinds the entitlement to social support, this sends a message that Italy does not want these individuals to stay. It

227. *Id.* art. 2(b); Reception Conditions Directive, *supra* note 34, art. 2(c).

228. *See* Reception Conditions Directive, *supra* note 34, pmb1. It is illogical to develop an area of freedom, security, and justice for those within the EU in *legitimate* need of protection, but then to withdraw social assistance as soon as individuals are evaluated and found deserving of protection.

casts doubt on the EU's stated commitment to "absolute respect of the right to seek asylum."²²⁹

Moreover, it is self-defeating. If refugees and others granted protection obtain basic necessities and participate in the social structures of Italian life, they will become self-supporting and contribute to Italian society. Refugees need avenues through which they can do so. Granting refugees residence permits in need of regular renewal and telling them they are on their own is not likely to yield positive gains for Italy or for the individuals in need of international protection. A more justifiable approach would be to offer some basic support to provide refugees a transition into Italian life. Housing subsidies, language classes, cultural awareness, vocational training—these support services that are provided in some Italian centers open to asylum seekers will, in the end, enable refugees to support themselves and become part of the fabric of Italian life.

In addition to its contention that the Reception Conditions Directive does not apply to asylum seekers who have been successful, Italy justifies its abandonment of support for successful applicants on the terms of the 1951 Refugee Convention. The Convention requires contracting states to provide refugees the same treatment accorded to nationals with regard to public relief and assistance,²³⁰ social security,²³¹ labor protection,²³² and public education.²³³ With regard to employment,²³⁴ self-employment,²³⁵ practicing a profession,²³⁶ and access to housing,²³⁷ contracting states must treat refugees in as generous ways as they treat noncitizens. Italy argues that refugees have the same rights as Italian citizens.²³⁸ They can apply for jobs, rent apartments, and go grocery shopping. This abstract "equal treatment" collides with the reality that refugees and holders of subsidiary protection and humanitarian permits are fundamentally disadvantaged in comparison with Italian citizens. Currently, the applicants for protection tend to be new arrivals, not members of communities that have long-established footholds in Italy.²³⁹ The new arrivals generally do not speak Italian fluently and have

229. Tampere Declaration, *supra* note 32, ¶ 13.

230. 1951 Refugee Convention, *supra* note 103, art. 23.

231. *Id.* art. 24.

232. *Id.*

233. *Id.* art. 22.

234. *Id.* art. 17.

235. *Id.* art. 18.

236. *Id.* art. 19.

237. *Id.* art. 21.

238. This is reminiscent of the damning commentary by Anatole France: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, beg in the street, and steal bread." ANATOLE FRANCE, *THE RED LILY* 119 (Calmann-Lévy trans., 14th ed. 2007) (1894).

239. For example, the largest group of asylum applicants reviewed in 2015 was from Nigeria (12,500), followed by groups of applicants from a wide variety of African and Asian countries: Gambia (6,500), Pakistan (6,000), Senegal (5,000), Bangladesh (4,500), Mali (4,000), and Afghanistan (3,000). COUNTRY REPORT, *supra* note 13, at 6. None of these countries had been a previous Italian colony or had obvious ties to Italy.

not been educated in Italy. They lack the familial and neighborhood networks that Italian citizens generally possess. Raised in different cultures with different expectations,²⁴⁰ refugees lack the training and cultural fluency of those who are native-born. Justifying the treatment of refugees on the grounds that refugees have the same rights as Italian citizens—that is, neither citizens nor refugees receive help from the Italian government—is dishonest.

Most fundamentally, Italy's view that successful applicants lose the protections mandated by the Reception Conditions Directive undermines the CEAS. The Tampere Declaration proclaimed the EU aim to create "an area of freedom, security and justice in the European Union" that is open to "those whose circumstances lead them justifiably to seek access to our territory."²⁴¹ When Italian authorities decide that the applicants who "justifiably" sought access to Italy no longer fall within the scope of the CEAS, the authorities' actions make the right to protection nothing more than an ephemeral legal construct. If the asylum system does not address the basic survival needs of those granted asylum, it is fundamentally misconceived.

A substantially related problem is that Italy's interpretation also incentivizes successful applicants to leave Italy and seek protection elsewhere in the EU. This will intensify secondary movements of refugees and others who qualify for protection within the EU, a result that undercuts a major goal of creating a *common* European asylum system. When one member state installs a dramatically less desirable support framework for those granted asylum than do the other member states, this will reduce the numbers of individuals who want to remain in the first member state—like Italy. This, in turn, will encourage asylum seekers to avoid or leave Italy for European destinations where refugees have access to social support that allows them to succeed. Secondary movements will impose substantial costs on other EU member states. Not only will their reception systems be called on to respond to greater numbers of applicants for protection, but their asylum procedures and judicial systems will also experience greater workloads. When those granted protection by Italy travel to other member states in order to survive, the EURODAC system will report that they previously resided in Italy.²⁴² Asylum authorities and national courts in the other member states must now expend significant energy to assess whether the individuals should be returned to Italy or whether the conditions prevailing in Italy violate European human rights law.

If the Italian interpretation is correct in that the Reception Conditions Directive applies only to asylum seekers and provides no assurances to those granted protection, then the EU must amend the CEAS. A common system cannot exist if the end results are so disparate: homelessness for those

240. COUNTRY REPORT, *supra* note 13, at 6.

241. Tampere Declaration, *supra* note 32, ¶¶ 2, 3.

242. See *supra* text accompanying notes 62–69 (EURODAC discussion).

granted refugee status in one EU state and state-provided accommodations in another. This will fuel destabilizing secondary movements. The plight of refugees and other successful applicants for protection will be an important part of the European human rights calculus in assessing the threat of inhuman and degrading treatment if returned to Italy. As the German Administrative Court of Giessen concluded, the specter of homelessness for those who have been granted protection in Italy is a powerful factor in refusing to order returns under the Dublin Regulation.²⁴³

III. EUROPEAN HUMAN RIGHTS LAW AND THE TRANSFER OF ASYLUM SEEKERS

A. *The Non-refoulement Norm*

Almost fifty European states, including all twenty-eight EU member states, have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²⁴⁴ One of the key features of this broad human rights treaty is its prohibition of torture and inhuman treatment: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”²⁴⁵

The ECtHR has interpreted this provision to require state parties to refrain from torture and inhuman or degrading conduct within their territories and to refrain from returning individuals to countries where they face a real risk of torture, inhuman, or degrading treatment.²⁴⁶ The protection against return to another country, known as *non-refoulement* protection, has given the ECHR extraterritorial effect: rejected Chilean asylum seekers in Sweden, for example, fell within ECtHR jurisdiction when they challenged Sweden’s decision to return them to their homeland.²⁴⁷ Somali asylum seekers also came within the protection afforded by the ECHR when they protested the Dutch government’s order deporting them to “relatively safe” areas of Somalia despite the generally unstable situation.²⁴⁸

243. Verwaltungsgericht [VG] [Administrative Trial Court] Jan. 24 2013, 2013 OPENJUR 5398 (Ger.), <https://openjur.de/u/601080.html> [<https://perma.cc/9UUE-RMET>]; see *infra* text accompanying notes 331–348.

244. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 [hereinafter ECHR]. The ECHR was signed on November 4, 1950, came into force on September 3, 1953, and has been expanded and modified by seventeen Protocols. There are currently forty-seven state parties to the convention. *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL OF EUR. (Mar. 7, 2016), http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=h3q1InPT [<https://perma.cc/S32W-GCWV>].

245. ECHR, *supra* note 244, at 3.

246. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

247. *Cruz Varas & Ors v. Sweden*, 1991 Eur. Ct. H.R. 26.

248. *Salah Sheekh v. Netherlands*, App. No. 1948/04, Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-78986&filename=001-78986.pdf> [<https://perma.cc/Y2Y5-UPZ3>].

In addition to the broad reach of European human rights law, the ECHR *non-refoulement* principle is more expansive than the *non-refoulement* obligation that arises in the traditional refugee context. International law forbids the return of refugees to states “where [their] lives or freedom would be threatened on account of [their] race, religion, nationality, political opinion or membership in a particular social group.”²⁴⁹ European human rights law also forbids the return of anyone—not just refugees—to a state where there are serious risks of inhuman or degrading treatment.²⁵⁰ Consequently, asylum seekers in Europe have sometimes been able to obtain relief under the ECHR that they might not have been eligible for under refugee law principles.²⁵¹ This has led to a rich and varied jurisprudence to which rejected asylum seekers in Europe frequently turn.²⁵² It is important to note, however, that European human rights law and European asylum law form parallel systems with different remedies. In applying Article 3 of the ECHR, the ECtHR can forbid deportation, which will yield permission to stay in Europe as long as the inhuman and degrading conditions remain in the homeland.²⁵³ Only the asylum system, however, can determine whether an individual satisfies the refugee criteria and is entitled to a renewable residence permit as well as the other legal protections guaranteed by EU law to those in need of international protection.²⁵⁴

After the CEAS came into effect, asylum seekers in Europe began to rely on European human rights law to challenge elements of the asylum system. In particular, asylum seekers frequently challenged the operation of the Dublin Regulation, asserting that, in practice, it resulted in individuals being exposed to risks that they would experience inhuman or degrading treatment or even death. In essence, they argued that the Dublin Regulation’s premise that all EU member states are safe countries for asylum seekers was faulty.²⁵⁵ Some of these challenges to the Dublin Regulation contended that the asylum procedures in some of the EU member states were so inadequate that they would not yield accurate decisions on the merits of the claims, and therefore would send asylum seekers to countries where they faced persecution, torture, inhuman treatment, or worse.²⁵⁶ Other challenges focused on the inadequacy of the reception conditions in the EU state to which the asylum seeker would be transferred, arguing that the asylum seekers would face inhuman or degrading treatment within the

249. 1951 Refugee Convention, *supra* note 103, art. 33(1).

250. ECHR, *supra* note 244, art. 3; *Soering*, 11 Eur. Ct. H.R. 439; MOLE & MEREDITH, *supra* note 182, at 20–21.

251. MOLE & MEREDITH, *supra* note 182, at 23–38.

252. See generally MOLE & MEREDITH, *supra* note 182.

253. *Id.* at 19–23.

254. See *supra* notes 33–43 and accompanying text.

255. E.g., *K.R.S. v. United Kingdom*, App. No. 32733/08, Eur. Ct. H.R., at 17 (2008), [http://hudoc.echr.coe.int/eng#{"docname":\["k.r.s."\],"itemid":\["001-90500"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/4VSC-YSMQ>] (“The presumption must be that Greece will abide by its (CEAS) obligations.”).

256. E.g., *id.* at 12–14.

EU.²⁵⁷ Both of these assertions were present in *M.S.S.*, a challenge filed by an Afghan asylum seeker who protested the Belgian authorities' reliance on the CEAS in sending him back to Greece.²⁵⁸ In its landmark judgment in 2011, the ECtHR ruled that Greece was not a safe country and that Belgium could not apply the Dublin Regulation to send an asylum seeker to Greece.²⁵⁹ Within one year, the CJEU came to a similar conclusion in *N.S.*²⁶⁰ These two opinions seriously impaired the Dublin Regulation, one of the structures that undergird the CEAS. Together, they foreshadowed *Tarakhel*, the 2014 judgment that has thrown the functioning of the CEAS into doubt.

B. *Judicial Enforcement of European Human Rights Law*

1. *The European Court of Human Rights*

During the last few decades of the twentieth century, the ECtHR's jurisprudence has gradually expanded protection afforded to asylum seekers in Europe. An actual grant of asylum, however, was beyond its purview.²⁶¹ The court's interpretations of human rights law developed on a parallel track to EU law. However, as the EU increasingly gained competence over migration and asylum matters, it became more likely that EU law and European human rights law would intersect. As the EU developed the CEAS, albeit in a piecemeal fashion, litigants mounted human rights challenges to the CEAS framework.²⁶²

A pivotal case came before the ECtHR shortly after the final pillar of the CEAS, the Asylum Procedures Directive, became law.²⁶³ Mr. K.R.S., a citizen of Iran, arrived in the United Kingdom in 2006 and filed an asylum claim.²⁶⁴ The United Kingdom authorities determined that he had entered the EU via Greece and that he should be returned to Greece pursuant to the 2003 Dublin Regulation for a ruling on the merits of his case. He filed judicial challenges to this ruling in the United Kingdom courts, but ultimately was unsuccessful.²⁶⁵ He was ordered to be deported to Greece in July 2008.

257. *E.g.*, *Hussein v. Netherlands & Italy*, App. No. 27725/10, Eur. Ct. H.R., ¶ 59 (2013), [http://hudoc.echr.coe.int/eng?i=001-118927#{"itemid":\["001-118927"\]}](http://hudoc.echr.coe.int/eng?i=001-118927#{) [<https://perma.cc/2428-47DQ>].

258. *M.S.S. v. Belgium & Greece*, 2011-J Eur. Ct. H.R. 255.

259. *See* discussion *infra* text accompanying notes 279–299.

260. *Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-13905; *see* discussion *infra* text accompanying notes 305–327.

261. MOLE & MEREDITH, *supra* note 182, at 19.

262. *See generally* MOLE & MEREDITH, *supra* note 182.

263. The Procedures Directive, *supra* note 36, was the final pillar to become law. It was enacted in 2005, and article 43 provides that member states must implement the Directive's terms into national legislation by December 1, 2007 (with an extension until December 1, 2008 to implement art. 15 regarding the right to legal assistance and representation).

264. *K.R.S. v. United Kingdom*, App. No. 32733/08, Eur. Ct. H.R. (2008), [http://hudoc.echr.coe.int/eng#{"docname":\["k.r.s."\], "itemid":\["001-90500"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/4VSC-YSMQ>].

265. *Id.* at 2–3.

One week before his expulsion, he sought an emergency stay from the ECtHR.²⁶⁶ He contended that Greece had not complied with the Asylum Procedures Directive and that the asylum procedures in Greece were so deficient that he faced a serious risk of being sent back to Iran where he feared persecution or worse. The court granted the request, known as a Rule 39 measure²⁶⁷ and informed the United Kingdom authorities that Mr. K.R.S. should not be expelled to Greece pending the court's review of his case.²⁶⁸ The court specifically referred to a UNHCR report casting doubt on the adequacy of the asylum procedures in Greece:

The parties' attention is drawn to paragraph 26 of the [UNHCR] report that states that "In view of EU Member States' obligation to ensure access to fair and effective asylum procedures, including in cases subject to the Dublin Regulation, UNHCR advises Governments to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice. UNHCR recommends that Governments make use of Article 3(2) of the Dublin Regulation, allowing States to examine an asylum application lodged even if such examination is not its responsibility under the criteria as laid down in this Regulation."

[T]he Rule 39 measure will remain in force pending confirmation from your authorities that the applicant, if removed to Greece and if he so wishes, will have ample opportunity in Greece to apply to the Court for a Rule 39 measure in the event of his onward expulsion from Greece to Iran.²⁶⁹

This was hardly a unique situation. The ECtHR reported that it had issued eighty provisional stays under Rule 39 suspending removals from the United Kingdom to Greece during the four months in 2008 when Mr. K.R.S. filed his stay request.²⁷⁰ The large number of emergency stays issued by the court signaled that the court had serious concerns about the safety of asylum seekers transferred to Greece. Nonetheless, despite the concerns expressed by UNHCR, international human rights bodies, and nongovernmental organizations, the court ultimately concluded that "the presumption must be that Greece will abide by its obligations under" the

266. *Id.* at 3.

267. Under Rule 39 of its Rules of Court, the ECtHR may indicate any "interim measure" that it considers should be adopted "in the interests of the parties or of the proper conduct of the proceedings." R. OF Cr. R. 39(1), EUR. Ct. H.R. As a majority of Rule 39 applications relate to the suspension of an expulsion or extradition order, the Court grants such requests "only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm." ECHR Press Unit, *Interim Measures*, EUR. Ct. H. R. (2013), http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf [<https://perma.cc/B5AJ-U8WM>].

268. K.R.S. v. United Kingdom, App. No. 32733/08, Eur. Ct. H.R., at 3 (2008), [http://hudoc.echr.coe.int/eng#{"docname":\["k.r.s."\], "itemid":\["001-90500"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/4VSC-YSMQ>].

269. *Id.*

270. *Id.* at 3–4.

CEAS.²⁷¹ New asylum legislation in Greece gave comfort to the ECtHR. The court ruled that the United Kingdom could rely on the CEAS, and on the Dublin Regulation in particular, to send Mr. K.R.S. to Greece. Only in Greece could he then submit an asylum request.²⁷² Accordingly, as of late 2008, the court reaffirmed the view of the United Kingdom and other EU member states that the Dublin Regulation permitted them to send asylum seekers found in the interior of the EU to member states forming the EU's external borders.²⁷³

A mere two years after the unanimous decision in *K.R.S. v. the United Kingdom*, the ECtHR changed direction. In *M.S.S. v. Belgium and Greece*,²⁷⁴ the court concluded that Belgium had violated European human rights law when it relied on the Dublin Regulation to send an asylum seeker to Greece.²⁷⁵ The fact that Greece had adopted the CEAS provisions into national legislation did not warrant a presumption that Greece would abide by EU law.²⁷⁶ Indeed, the court ruled that the reception conditions and asylum procedures were so abysmal in Greece that sending an asylum seeker to Greece subjected him to inhuman and degrading treatment.²⁷⁷ Moreover, the court ruled that in addition to Greece's violation of European human rights law, Belgium's transfer pursuant to the Dublin Regulation had also violated the asylum seeker's human rights.²⁷⁸

Mr. M.S.S., an Afghan asylum seeker, entered Greece in 2008, was detained for one week, and left Greece without applying for asylum.²⁷⁹ He traveled to Belgium, where he filed an asylum claim based on his work as an interpreter for international forces in Kabul.²⁸⁰ When he provided documents supporting his work as an interpreter, the Belgian authorities refused to review them because Greece was responsible for determining his asylum application, according to the Dublin Regulation.²⁸¹ His attorney attempted to appeal this decision in Belgium and to seek an emergency stay from the ECtHR under Rule 39, but Belgian authorities promptly transferred Mr.

271. *Id.* at 17–18. In addition, the Court established another presumption with regard to the possibility of a subsequent remedy for the asylum seeker: “The Court recalls in this connection that Greece, as a Contracting State, has undertaken to abide by its [European Human Rights] Convention obligations and to secure to everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 3. In concrete terms, Greece is required to make the right of any returnee to lodge an application with this Court under Article 34 of the Convention (and request interim measures under Rule 39 of the Rules of Court) both practical and effective. In the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant.” *Id.*

272. *Id.* at 17–18.

273. *Id.*

274. 2011-I Eur. Ct. H.R. 255.

275. *Id.* ¶¶ 360, 368.

276. *Id.* ¶¶ 345–60.

277. *Id.* ¶¶ 347–60.

278. *Id.* ¶ 360.

279. *Id.* ¶¶ 9–10.

280. *Id.* ¶¶ 11, 267.

281. *Id.* ¶ 17.

M.S.S. to Greece.²⁸² While his attorney in Belgium pursued the legal proceedings, Mr. M.S.S. was detained in Greece in a small room with twenty other individuals, provided only a dirty mattress to sleep on and very little food to eat, allowed to use the toilets only at the discretion of the guards, and denied all access to the outdoors.²⁸³ After three days, he was released from detention and applied for asylum.²⁸⁴ He had nowhere to live, so he went to a park where other homeless asylum seekers had gathered.²⁸⁵ Unprotected from the elements and from criminal acts, he managed to survive six weeks of homelessness, at which point he tried to leave Greece.²⁸⁶ He was arrested again and placed in detention for a week, convicted of using false papers in his attempt to leave Greece, and sentenced to time served.²⁸⁷

In reviewing these facts, the ECtHR expressly acknowledged the particular burdens the EU asylum law places on Greece:

The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other member States in application of the Dublin Regulation. The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision.²⁸⁸

Turning to the homelessness that Mr. M.S.S. had suffered while an asylum seeker in Greece, the court emphasized:

[T]he situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack

282. *Id.* ¶¶ 386–92.

283. *Id.* ¶ 206.

284. *Id.* ¶ 35.

285. *Id.* ¶ 37.

286. *Id.* ¶¶ 37, 43.

287. *Id.* ¶¶ 43–45 (explaining that he was arrested for possessing a false Bulgarian identity card, convicted of attempting to leave the country with false papers, and sentenced to two months imprisonment, suspended for three years).

288. *Id.* ¶ 223.

of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.²⁸⁹

Further, the court noted that the Greek authorities must have known that asylum seekers were reduced to homelessness:

[T]he Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. [I]t is a well-known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a reception centre and that . . . all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings.²⁹⁰

Therefore, the court concluded:

[I]n view of the obligations incumbent on the Greek authorities under the European Reception Directive, the Court considers that the Greek authorities have not had due regard for the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.²⁹¹

The court also examined the conditions of detention in which Mr. M.S.S. was held. It noted that prior ECtHR judgments had concluded that detaining asylum seekers for two to three months in an "overcrowded place in appalling conditions of hygiene and cleanliness" had violated the prohibition against inhuman and degrading treatment.²⁹² Mr. M.S.S. had been de-

289. *Id.* ¶ 254.

290. *Id.* ¶ 258.

291. *Id.* ¶ 263.

292. *Id.* ¶ 222 (referring to *S.D. v. Greece*, App. No. 53541/07, Eur. Ct. H.R. (2009), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-93034"\]}](http://hudoc.echr.coe.int/eng#{); [<https://perma.cc/S9WL-QDR5>]; *Tabesh v. Greece*,

tained for significantly less than two months, though he had been detained on two or three occasions.²⁹³ In these circumstances, the court held that the conditions of detention constituted inhuman and degrading treatment: “[A] period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3.”²⁹⁴

Accordingly, the court ruled that Mr. M.S.S. had experienced massive and substantial violations of his human rights while an asylum seeker in Greece.²⁹⁵ In particular, the court emphasized the prolonged homelessness Mr. M.S.S. experienced, his lack of access to sanitary facilities, the lengthy periods of uncertainty he suffered concerning his ability to access the asylum process, and his lack of prospects for improvement.²⁹⁶

Furthermore, the court emphasized that Belgium as well as Greece had also violated European human rights law.²⁹⁷ The Belgian authorities’ reliance on the Dublin Regulation did not preclude their responsibility under the ECHR:

[T]he [degrading] conditions of detention and living conditions in Greece . . . were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources. . . . [T]he Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.²⁹⁸

Significantly, though the court ruled that both Greece and Belgium had violated Article 3, the court assessed greater damages against Belgium than against Greece.²⁹⁹

The *M.S.S.* judgment effectively fractured the CEAS. The court ruled that European human rights law trumps EU law. Moreover, the court ruled that the Dublin Regulation, one of the main pillars of the EU asylum system, was unlawful, at least in regard to transfers of asylum seekers to Greece. More broadly, the consequence of the *M.S.S.* judgment was that European states could no longer rely on the presumption that all EU member states are safe countries with minimally acceptable asylum systems. Nor could EU member states rely on a ministerial application of the Dublin

App. No. 8256/07, Eur. Ct. H.R. (2010), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-95892"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/8MC7-PK2H>]; *A.A. v. Greece*, App. No. 12186/08, Eur. Ct. H.R. (2010), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-100014"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/8SSB-DJTJ>].

293. *Id.* ¶¶ 10, 33–35.

294. *Id.* ¶ 222.

295. *Id.* ¶¶ 263–64.

296. *Id.* ¶ 263.

297. *Id.* ¶¶ 362–68.

298. *Id.* ¶¶ 366–67.

299. The Court awarded 24,900 Euro in non-pecuniary damage against Belgium, *id.* ¶ 411, and 1,000 Euro against Greece, *id.* ¶ 406.

Regulation criteria in transferring asylum seekers to other member states. In the future, member states would have to assess the individual situation of every asylum seeker who protested that the Dublin Regulation would result in deportation to a state with inadequate asylum policies and practices. A transfer authorized pursuant to the Dublin Regulation, such as a transfer to the first EU member state the asylum seeker had entered, could not proceed if the transferred asylum seeker would not be safe. In such situations, the EU state with custody of the asylum seeker would have to relinquish its plan to transfer the asylum seeker and would have to determine the merits of the asylum claim.

2. *The Court of Justice of the European Union*

A few months after the *M.S.S.* judgment, the CJEU considered a similar case, *N.S. v. Secretary of State for the Home Department*, and reached a similar result regarding the Dublin Regulation and the CEAS. Significantly, the CJEU grounded its conclusion in a different source of law. The European Parliament, European Commission, and Council of Ministers proclaimed the Charter of Fundamental Rights in 2000,³⁰⁰ but its legal status remained uncertain for a decade. The Charter did not become EU law until the Lisbon Treaty adopted it in 2009.³⁰¹ Many provisions are relevant to the European asylum policy, but two are particularly salient. Article 4 of the Charter, identical to Article 3 of the ECHR, states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”³⁰² Article 18 states, “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”³⁰³

It was against this backdrop that *N.S.* developed. Rather than arguing that European human rights law trumped aspects of the EU asylum system, Mr. N.S. asserted that EU law itself prohibited the member states’ automatic reliance on the EU CEAS. Specifically, he claimed that the EU Charter of Fundamental Rights prohibits a conclusive presumption that member states are in compliance with the CEAS and that a member state can rely on the Dublin Regulation to transfer asylum seekers to another member state.³⁰⁴

300. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391 [hereinafter *Charter*]; see also *EU Charter of Fundamental Rights: How the Charter Became Part of the EU Treaties*, EUR. COMM’N, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (last visited Mar. 8, 2016) [<https://perma.cc/VT7A-GWDB>] [hereinafter *How the Charter Became Part of the EU Treaties*] (explaining the Charter’s evolving legal status).

301. *How the Charter Became Part of the EU Treaties*, *supra* note 300.

302. *Charter*, *supra* note 300, art. 4.

303. *Id.* art. 18.

304. *Joined Cases C-411/10 & C-493/10, N.S. v. Sec’y of State for the Home Dep’t*, 2011 E.C.R. I-13905, ¶ 48.

Mr. N.S., an Afghan asylum seeker, entered the EU via Greece, where he was arrested and detained.³⁰⁵ He did not claim asylum, was expelled to Turkey—where he was imprisoned—and eventually traveled to the United Kingdom, where he immediately filed for asylum.³⁰⁶ United Kingdom authorities relied on the Dublin Regulation to order him deported to Greece,³⁰⁷ while the asylum seeker protested that the inadequate reception conditions and substandard asylum procedures in Greece would violate his fundamental rights under EU law.³⁰⁸ He challenged this decision in the United Kingdom courts, which, ultimately, referred the case to the CJEU.³⁰⁹

Simultaneously, the High Court of Ireland referred a case to the CJEU in which asylum seekers from Afghanistan, Iran, and Algeria had traveled to Greece, where they had been arrested for illegal entry and fingerprinted.³¹⁰ They then made their way to Ireland, where they applied for asylum and contended that the deficiencies in the Greek asylum system precluded their return to Greece under the Dublin II Regulation.³¹¹

The national courts asked the CJEU for a preliminary ruling concerning the interaction of the EU Charter and the CEAS.³¹² Two questions capture the heart of the matter. The first: “[D]oes the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe . . . the minimum standards [set forth by the Reception Conditions Directive, Qualification Directive, and Asylum Procedures Directive]?”³¹³ The second: “Is the transferring Member State under [the Dublin Regulation] obliged to assess the compliance of the receiving Member State with Article 18 of the Charter [the right to asylum] and the [Common European Asylum System] Directives?”³¹⁴

305. *Id.* ¶ 34. The CJEU also joined a case in which asylum seekers from Afghanistan, Iran, and Algeria filed similar challenges to Ireland’s decision to rely on the Dublin Regulation to return them to Greece. All of the individuals had entered the EU through Greece; none had filed asylum applications in Greece. *Id.* ¶ 51. They argued that the asylum procedures and reception conditions in Greece invalidated the decision to deport them to Greece.

306. *Id.* ¶ 35.

307. *Id.* ¶ 37.

308. *Id.* ¶ 38.

309. *Id.* ¶¶ 41–50.

310. The President of the CJEU joined Case C-493/10, *M.E. v. Refugee Applications Commissioner*, and Case C-411/10, *N.S. v. Secretary of State for the Home Department*, as companion cases on May 16, 2011. *Id.* ¶ 54.

311. None of the individuals had filed asylum applications in Greece. *See id.* ¶¶ 51–52.

312. *Id.* ¶ 50.

313. *Id.* ¶ 50(3). The first question posed by the United Kingdom court concerned the CJEU’s competence to decide the matter, which the CJEU answered in the affirmative. The six additional questions raised concerns about the extent to which an EU member state could satisfy its human rights obligations by transferring asylum seekers to another EU member state and relying on the transferee state to comply with European asylum and human rights law. *Id.* ¶ 50(1)–(7).

314. *Id.* ¶ 53(1). The High Court in Ireland stayed the proceedings to ask the CJEU whether Ireland could rely on the Dublin Regulation. The two referred questions focused on whether Ireland was obliged to analyze Greece’s compliance with European asylum law and, if Greece was not compliant, whether Ireland would be responsible for deciding the merits of the asylum claim. *Id.* ¶¶ 51–53.

The CJEU noted that the structure of the CEAS, and particularly the Dublin Regulation, is premised on “mutual confidence” that all member states are treating asylum seekers in compliance with the legislative provisions.³¹⁵ According to the court: “It is not however inconceivable that the system may, in practice, experience major operational problems in a given member state meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.”³¹⁶

Once the court acknowledged the divergence between theory and practice in European asylum law, it struggled to delineate when the discrepancy would become too great. It emphasized that minor violations of the CEAS legislation were not sufficient to undercut a member state’s ability to rely on the Dublin Regulation to transfer an asylum seeker to another member state for examination of the merits of the asylum claim.³¹⁷ However, the court stated:

[I]f there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.³¹⁸

Accordingly, the court ruled that EU states cannot presume conclusively that member states will comply with the fundamental guarantees imposed by EU law,³¹⁹ because ratification of refugee and human rights conventions does not necessarily entail compliance with the treaty provisions.³²⁰ Consequently, awareness of systemic deficiencies in the reception conditions and asylum procedures will make it impossible to rely on the Dublin Regulation to transfer asylum seekers.³²¹ In response to concerns that member states lacked tools to determine accurately the asylum conditions in sister states, the CJEU observed that reports by UNHCR, international nongov-

315. *Id.* ¶ 79.

316. *Id.* ¶ 81.

317. *Id.* ¶¶ 82–85.

318. *Id.* ¶ 86. The precise formulation incorporates a double negative: “Article 4 of the [EU Charter of Fundamental Rights] must be interpreted as meaning that the Member States . . . may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of [the Dublin Regulation] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. . . .” *Id.* ¶ 106; *see also id.* ¶ 2 (CJEU’s ruling on Question 2).

319. *Id.* ¶ 99.

320. *Id.* ¶¶ 102–03.

321. *Id.* ¶ 106.

ernmental organizations, and international and regional institutions would provide trustworthy data.³²²

If a member state becomes aware of systemic deficits in a sister state that precludes transfer to that state, the member state should examine whether, pursuant to the Dublin Regulation criteria, any other EU state has responsibility over the asylum application in question.³²³ The CJEU warned, however, that this second phase of the Dublin process should not take too long: “The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time.”³²⁴

If the terms of the Dublin Regulation do not provide an expeditious transfer of the asylum seeker to another EU member state, the sovereignty clause comes into play.³²⁵ The member state where the asylum seeker is present must determine the merits of the asylum claim.³²⁶ Based on this analysis, the CJEU expressly ruled that EU law itself precludes a conclusive presumption that the CEAS is actually in effect in all EU member states.³²⁷

IV. ASYLUM, HUMAN RIGHTS, AND *NON-REFOULEMENT* TO ITALY

The *M.S.S.* judgment by the ECtHR and the *N.S.* judgment by the CJEU created major challenges for the CEAS. They ruled that the asylum procedures and reception conditions for asylum seekers in Greece were so deficient that other EU member states could not return them there. Both courts undertook detailed analyses of the conditions facing the individual protesting transfer back to Greece. Both courts were attentive to the existence of “substantial grounds for believing there are systemic flaws.”³²⁸ Moreover, both courts evaluated the conditions in Greece to determine whether they constituted inhuman or degrading treatment.

These judicial rulings have serious implications, particularly for Italy. This is because many asylum seekers first enter the EU through Italy.³²⁹ When other member states locate asylum seekers or recognized refugees within their borders, the government authorities are likely to ask if the asylum seekers’ journey took them through Italy. If so, EU states have an

322. *Id.* ¶¶ 90–91.

323. *Id.* ¶ 96.

324. *Id.* ¶ 98.

325. See *supra* notes 55–56 and accompanying text (discussing sovereignty clause).

326. Joined Cases C-411/10 & C-493/10, *N.S. v. Sec’y of State for the Home Dep’t*, 2011 E.C.R. I-13905, ¶¶ 107–08.

327. *Id.* ¶ 99.

328. *Id.* ¶ 86.

329. HUMAN RIGHTS WATCH REPORT, *supra* note 169, at 10–11.

incentive to employ the Dublin Regulation to return the asylum seekers to Italy.

Since 2011, asylum seekers have tried to rely on European human rights law and the EU Charter of Fundamental Rights to halt their transfer to Italy. In response, government authorities have argued that the *M.S.S.* and *N.S.* judgments are limited to circumstances like those in Greece, where there was a total breakdown in the asylum procedures, reception conditions, and grants of refugee status. In their view, human rights norms countermand Dublin Regulation transfers to Italy only if asylum seekers can demonstrate the Italian asylum system is totally and thoroughly dysfunctional.³³⁰

A. *Jurisprudential Developments*

A growing number of courts, both at the national and supranational level, have wrestled with the standards set by the ECtHR and the CJEU and the applicability of the standards to the situation in Italy. Their analyses have been intensely fact-driven, and the dialogue between courts has yielded inconsistent results. What has been consistent, however, is the great unease tribunals have voiced when the Dublin Regulation intersects with credible claims of substandard asylum systems.

1. *National Courts*

A series of German judicial opinions published in 2013 evaluated challenges to Germany's reliance on the Dublin Regulation to return asylum seekers to Italy. Administrative courts in Giessen, Braunschweig, Düsseldorf, and Frankfurt am Main concluded that there were serious and systematic shortcomings that would present a substantial risk of inhuman or degrading treatment if the asylum seekers were sent to Italy. It is hard to know how representative these cases are, but they reveal concerns that judges in another EU state have about reception conditions in Italy.

In January 2013, the Administrative Court in Giessen considered the appeal of an Eritrean family against the government's decision to rely on the Dublin Regulation to send them back to Italy.³³¹ The applicants were a married couple who had fled military conscription in Eritrea and escaped to Sudan.³³² They married in Sudan, had one child there, and traveled through several countries before they entered Italy.³³³ They filed asylum claims and

330. See, e.g., *Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-13905; *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R., ¶¶ 71, 79 (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [<https://perma.cc/76ZV-FUBK>].

331. *Verwaltungsgericht [VG]* [Administrative Trial Court] Jan. 24 2013, 2013 OPENJUR 5398 (Ger.), <https://openjur.de/u/601080.html> [<https://perma.cc/9UUE-RMET>].

332. *Id.* ¶ 2.

333. The husband said he went to Turkey, Greece, and then Italy. The wife, who had deserted the Eritrean army, said she went from Sudan to Libya to Italy. They filed for asylum in spring 2011. See *id.*

received protection as well as one-year residence permits.³³⁴ They lived in an Italian refugee center for six months, after which they were homeless.³³⁵ A nun took them in and provided temporary shelter for two months, while they ate at soup kitchens.³³⁶ They learned of a house where they could live, six adults per room.³³⁷ Life with a small child was very difficult under these circumstances, so they traveled to Germany, where their second child was born, and sought protection there.³³⁸ German authorities ruled that they should be sent back to Italy, pursuant to the Dublin Regulation, and Italian officials agreed to take them back.³³⁹ The applicants appealed.³⁴⁰

The Giessen court ruled that returning the applicants to Italy would place them at serious risk of inhuman or humiliating treatment.³⁴¹ In light of the *M.S.S.* judgment by the ECtHR, the Giessen court examined reports about the lack of guaranteed accommodations, the lengthy waiting lists for residences in refugee homes, and the difficulties in accessing medical care.³⁴² The court noted that, in theory, health care is guaranteed to those with residence permits, but in practice, bureaucratic restrictions and the difficulties of establishing a permanent residence make it hard to obtain health care.³⁴³ Using a similar perspective, the court remarked that those who receive residence permits have the same general rights as Italian citizens, but that in reality the refugees receive no financial assistance from the government and have to depend on seeking accommodations in government facilities.³⁴⁴ The court weighed, along with these structural deficiencies, the particular circumstances of the asylum seekers. They could not speak Italian.³⁴⁵ They were a family of four with two small children.³⁴⁶ They had previously experienced homelessness and hunger in Italy.³⁴⁷ The court concluded that sending these particularly vulnerable individuals to Italy would violate their human rights.³⁴⁸

334. The opinion refers to their recognition as refugees, *id.* ¶ 2, but under Italian law in effect at the time refugees received five-year residence permits, those with subsidiary protection received three-year residence permits, and those protected on humanitarian grounds received one-year residence permits. See *supra* notes 142–145 and accompanying text (discussing Italian legislation).

335. Verwaltungsgericht [VG] [Administrative Trial Court] Jan. 24 2013, 2013 OPENJUR 5398, ¶ 7 (Ger.), <https://openjur.de/u/601080.html> [<https://perma.cc/9UUE-RMET>].

336. *Id.* ¶ 2.

337. *Id.* ¶ 7.

338. They filed for protection in Germany in December 2011. *Id.* ¶ 1.

339. *Id.* ¶¶ 4–5, 20.

340. *Id.* ¶ 9.

341. *Id.* ¶ 22.

342. *Id.* ¶¶ 25–28.

343. *Id.* ¶ 28.

344. *Id.* ¶ 25.

345. *Id.* ¶ 27.

346. *Id.* ¶ 27.

347. *Id.* ¶ 2.

348. *Id.* ¶ 22.

The next month the Administrative Court in Braunschweig took a similar approach.³⁴⁹ An asylum seeker had left Iran and traveled through Turkey and Italy before reaching Germany, where he applied for asylum based on the persecution he had experienced as a member of the Baha'i faith in Iran.³⁵⁰ Relying on the Dublin Regulation, German authorities ordered him to be returned to Italy, where his fingerprints had been registered.³⁵¹ He reported that he had encountered terrible conditions in Italy.³⁵² He had been kept in a reception center in Crotona, Italy, with several hundred other refugees who were housed in containers and received only one liter of water and one meal each day.³⁵³ There were three toilets and three showers for one hundred people, and the hygienic conditions were deplorable.³⁵⁴ People could only wash their clothes in the showers.³⁵⁵ No heat was provided, and blankets and pillows were only available to those who paid for them.³⁵⁶ There were insufficient interpreters to explain the procedures.³⁵⁷ When he received an identity card and permission to leave the center after ten days, he traveled north to Germany, where the police stopped him.³⁵⁸

The Braunschweig court looked to the standard set by the CJEU in 2011 and inquired into whether there was a serious risk that returning the asylum seeker to Italy would constitute inhuman and degrading treatment.³⁵⁹ To this end, the court reviewed information and reports concerning reception conditions in Italy submitted by the German Foreign Office, the UNHCR, from nongovernmental organizations, and from experts.³⁶⁰ The court stressed that the reception conditions in Italy feature systematic homelessness, due to the lack of capacity, the long waiting lists, and the gap in reception between arrival and the formal registration of the asylum claim.³⁶¹ Noting that homelessness also occurred among those who had received protection in Italy and that homelessness made it especially chal-

349. Verwaltungsgericht [VG] [Administrative Trial Court] Feb. 21 2013, 2A 126/11 (Ger.), <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE140000906&st=null&showdoccase=1> [<https://perma.cc/9VG9-3PMM>].

350. *Id.* at 3–4.

351. *Id.* at 4.

352. *Id.* at 4–5.

353. *Id.*

354. *Id.* at 5

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 9. Rather than referring to judgement in *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255, the Braunschweig Administrative Court relied on *N.S. v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-13905.

360. Verwaltungsgericht [VG] [Administrative Trial Court] Feb. 21 2013, 2A 126/11, at 5–6 (Ger.), <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE140000906&st=null&showdoccase=1> [<https://perma.cc/9VG9-3PMM>].

361. *Id.* at 10–12.

lenging to access the health system,³⁶² the Braunschweig court granted the asylum seeker's petition not to return to Italy.³⁶³

In April 2013, the Administrative Court in Frankfurt am Main considered a complaint filed by a Somali asylum seeker challenging his transfer from Germany to Italy, where he had previously filed an asylum claim.³⁶⁴ The claimant had broken his leg, and the tribunal concluded that he would not have access to adequate medical care in Italy.³⁶⁵ Accordingly, the court ruled that Germany should not rely on the Dublin Regulation to send him back to Italy. Instead, the court ruled that the claimant should be permitted to pursue his asylum claim in Germany.³⁶⁶

In June 2013, the Administrative Court of Düsseldorf came to a similar decision.³⁶⁷ A Kurdish asylum seeker from Iran entered Germany in November 2010 after spending one night in Italy where he was fingerprinted.³⁶⁸ He filed a handwritten asylum claim in Germany, and he challenged the decision by the German authorities to return him to Italy pursuant to the Dublin Regulation.³⁶⁹ After supplying details of his claim, presenting documents concerning his political activity, and contesting the appropriateness of having his application examined in Germany, he sought judicial review.³⁷⁰ The Düsseldorf court evaluated the complaint to determine whether there were systematic deficiencies in the asylum system in Italy that would threaten the particular claimant with inhuman or degrading treatment.³⁷¹ The court emphasized several factors: the asylum seeker had not filed an asylum application in Italy; those who did file a claim faced a several weeks or months gap before the formal registration occurred, during which time they might be homeless; eighty percent of those returned to Italy pursuant to the Dublin Regulation during 2011³⁷² and 2012 were not provided accommodations in government centers; there were long waiting lists for accommodations and asylum seekers could not be sure they would receive assistance from private charitable organizations; and the applicant was particularly vulnerable to homelessness in that young men without

362. *Id.* at 13–14.

363. *Id.* at 14.

364. Verwaltungsgericht [VG] [Administrative Trial Court] Apr. 18, 2013, 9 K 28/11.F.A. (Ger.), <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=9%20K%2028/11> [<https://perma.cc/46JV-8E75>].

365. *Id.* at 2–3.

366. *Id.* at 4–5.

367. Verwaltungsgericht [VG] [Administrative Trial Court] Jun. 24, 2013, 22 K 2471/11.A (Ger.), <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=22%20K%202471/11> [<https://perma.cc/B3S3-2XC2>].

368. *Id.* at 2–3.

369. *Id.*

370. *Id.* at 3.

371. *Id.* at 7–9.

372. Of the 2,046 asylum seekers transferred under the Dublin Regulation to the Rome airport, only 416 received accommodations. *Id.* at 7. In the first eight months of 2012, only twenty percent of the 1,148 Dublin transferees received accommodations. *Id.*

families were the lowest priority in terms of accommodations.³⁷³ In light of this evidence, the court concluded that returning this individual to Italy exposed him to a serious risk of inhuman and degrading treatment.³⁷⁴ Accordingly, the Düsseldorf court did not sustain the order to transfer him to Italy, and the court proceeded to examine the merits of his asylum claim.³⁷⁵

One month later, in July 2013, the Administrative Court in Frankfurt am Main reviewed another appeal against a Dublin transfer to Italy.³⁷⁶ The Afghan asylum seeker had traveled through Iran, Turkey, Greece, Italy, and France before arriving in Germany.³⁷⁷ He presented evidence that he suffered from post-traumatic stress disorder and needed psychiatric treatment.³⁷⁸ There was a dispute as to whether he had applied for asylum in Italy. He said that he had arrived on a small boat that evaded the Italian coastal officers, had gone to a hospital in Italy where his fingerprints had been taken, had spoken to policemen in broken English with no interpreter present, and had said he did not intend to remain in Italy.³⁷⁹ Italian authorities reported that in addition to providing fingerprints he had filed an asylum application.³⁸⁰ The German court pointed out that the EURODAC database contains fingerprints of all noncitizens who illegally cross EU borders, a group substantially larger than all asylum seekers,³⁸¹ and reasoned that this evidence on its own was not evidence of an asylum claim.³⁸² It also noted that the Italian authorities did not submit any documents other than the fingerprint records that demonstrated the applicant had submitted an asylum request in Italy.³⁸³ Thus, there was no evidence that Italy had provided accommodations to the applicant or granted him protection.

Turning to the applicability of the Dublin Regulation, the Frankfurt am Main court evaluated whether there was evidence that the Italian asylum system suffered from structural deficiencies and systemic failures.³⁸⁴ The Frankfurt Administrative Court carefully examined reports by the Italian government, by the Council of Europe's Commissioner for Human Rights, and by nongovernmental organizations concerning reception conditions in Italy.³⁸⁵ The court concluded that the Italian authorities issued contradic-

373. *Id.* at 7–9.

374. *Id.* at 9.

375. *Id.* at 9–13.

376. Verwaltungsgericht [VG] [Administrative Trial Court] July 9, 2013, 9 K 28/11.F.A. (Ger.), <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=9%20K%2028/11> [<https://perma.cc/46JV-8E75>].

377. *Id.* ¶ 4.

378. *Id.* ¶ 7.

379. *Id.*

380. *Id.* ¶ 13.

381. *Id.* ¶ 22.

382. *Id.*

383. *Id.* ¶ 22.

384. *Id.* ¶¶ 26, 44.

385. *Id.* ¶ 33.

tory reports concerning the capacity of the various shelters,³⁸⁶ but that year after year the Italian reception accommodations fell far below the number of asylum seekers that Italy received.³⁸⁷ The insufficient capacity led to long waiting lists,³⁸⁸ which, in turn, led to asylum seekers and refugees living as squatters in desolate urban slums.³⁸⁹ It also led to scenes of asylum seekers turned out of reception centers after six months, who then slept on the center's doorstep.³⁹⁰ Those fortunate enough to receive accommodations sometimes lived in squalid settings, where there was no hot water, water was rationed, people slept in mattresses on the floor, prostitution was common, and criminal activity was rampant.³⁹¹

In contrast to several 2013 rulings by the ECtHR, discussed below, the Frankfurt court was reluctant to rely on government plans to upgrade the Italian asylum system, stating that the promise of improvements did not mean that the systematic deficiencies in the capacity and quality of the accommodations would be assuaged.³⁹² As to the undisputed fact that Italy—in contrast to Greece—has an established set of structures and reception centers, the Frankfurt court pointed out that the existence of structures does not guarantee that inhuman and degrading treatment has been eliminated.³⁹³ The court emphasized that the applicant did not need to show that every single asylum seeker was at risk, and that it was sufficient to provide evidence demonstrating that roughly fifty percent did not receive the accommodations mandated by EU law.³⁹⁴ The court also referred to decisions by other German courts that reported that asylum seekers returned from Germany to Italy were left on their own in the transit zone at Fiumicino airport in Rome and not provided access to the Italian asylum system.³⁹⁵ For these and related reasons, the court concluded that returning the asylum seeker in this case would expose him to a concrete risk of inhuman or degrading treatment in Italy.

2. *Supranational Courts*

As national courts reconsidered the Dublin Regulation in light of *M.S.S.* and *N.S.*, similar challenges reached the supranational courts.³⁹⁶ In particu-

386. *Id.* ¶ 28.

387. *Id.* ¶¶ 28–29, 32.

388. *Id.* ¶¶ 33, 36.

389. *Id.* ¶ 37.

390. *Id.* ¶ 39.

391. *Id.* ¶¶ 41–42.

392. *Id.* ¶ 60.

393. *Id.* ¶ 61.

394. *Id.* ¶ 62.

395. *Id.* ¶¶ 68–71.

396. Early in 2013, in February, the ECtHR received a challenge to Germany's decision to send asylum seekers to Italy pursuant to the Dublin Regulation. In *Isse and Mousa v. Germany*, the European Court sent German authorities a formal request to stay the transfer of asylum seekers. Letter from K. Reid, Deputy Section Registrar to Dominik Bender & Stephan Hocks (Feb. 13, 2013); Letter from K. Reid, Deputy Section Registrar, to Dominik Bender & Dr. Stephan Hocks (Feb. 13, 2013), <http://www>

lar, the ECtHR reviewed multiple claims challenging Dublin transfers to Italy. *Mohammed Hussein v. the Netherlands*,³⁹⁷ *Abubeker v. Austria and Italy*,³⁹⁸ and *Halimi v. Austria and Italy*³⁹⁹ all emphasized the inadequacy of the reception conditions and asylum procedures in Italy, but the court was hesitant to conclude that the Italian system fell below minimum human rights standards and ruled against the asylum seekers in all three of these cases.⁴⁰⁰ A year later, however, the court reached the opposite result. Three years after the *M.S.S.* and *N.S.* judgments, the Grand Chamber of the ECtHR ruled in *Tarakbel* that European human rights law forbade the planned transfer of asylum seekers to Italy under the Dublin Regulation.⁴⁰¹

The first step in the ECtHR's assessment of Dublin transfers to Italy took place in April 2013 in *Mohammed Hussein*, in a Somali asylum seeker's attempt to prevent the Netherlands from returning her to Italy. Samsam Mohammed Hussein told conflicting stories about harsh treatment after an Italian ship intercepted her boat in the Mediterranean and took the passengers to Lampedusa, where they were fingerprinted.⁴⁰² At one point, she said that she had been raped and that Italian authorities had left her homeless⁴⁰³; at another, she said she had received a short-term residence permit.⁴⁰⁴ After Italy supplied information that she had applied for protection in Italy, had received shelter at a refugee center in Tuscany, had been granted a residence permit for three years, and had received medical care during her pregnancy,⁴⁰⁵ Ms. Mohammed Hussein conceded the accuracy of these details.⁴⁰⁶

.asyl.net/fileadmin/user_upload/redaktion/Dokumente/20456.pdf [https://perma.cc/FB9K-HW8N]. The Court specifically inquired, "Which guarantees can the German Government obtain from the Italian Government to assure that the applicants will receive a sufficient level of protection, in particular in terms of reception conditions and accommodation in Italy especially in view of the applicant's particular family situation?" *Id.* This case is not discussed in the text because the record does not indicate the response filed by Germany or the subsequent proceedings, but the Court's official query conveyed serious trepidation about the asylum system in Italy.

397. App. No. 27725/10, Eur. Ct. H.R. (2013), [http://hudoc.echr.coe.int/eng?i=001-118927#{"itemid":\["001-118927"\]}](http://hudoc.echr.coe.int/eng?i=001-118927#{) [https://perma.cc/2428-47DQ].

398. App. No. 73874/11, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-122459> [https://perma.cc/76FS-ULRJ].

399. App. No. 53852/11, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-122454> [https://perma.cc/G65U-GM4M].

400. *See infra* notes 401–441 and accompanying text.

401. App. No. 29217/12, Eur. Ct. H.R. (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [https://perma.cc/76ZV-FUBK].

402. App. No. 27725/10, Eur. Ct. H.R., ¶¶ 8–11 (2013), [http://hudoc.echr.coe.int/eng?i=001-118927#{"itemid":\["001-118927"\]}](http://hudoc.echr.coe.int/eng?i=001-118927#{) [https://perma.cc/2428-47DQ].

403. Ms. Mohammed Hussein said Italian authorities transferred her to Florence, but left her at the railroad station and did not provide food or shelter. *Id.* ¶ 10. She asserted that she survived by relying on food distributed by the church, that she had no access to health care, even though she had been raped and was pregnant, and that she had never been able to apply for asylum in Italy. *Id.*

404. In a subsequent interview she said that Italian authorities had given her a three-month residence permit, but that she had intended to travel to the Netherlands and had not wanted to apply for asylum in Italy. *Id.* ¶ 11.

405. *Id.* ¶ 23. Italian authorities reported that the father of her child was another Somali living at the refugee center, and that she had never mentioned a rape. *Id.*

Unsurprisingly, the court did not look favorably on Ms. Mohammed Hussein's claim. Ms. Mohammed Hussein had been housed in a refugee center, allowed to file a prompt asylum application, and within five months of her arrival in Italy granted subsidiary protection and a residence permit.⁴⁰⁷ In these circumstances, said the court, Ms. Mohammed Hussein's treatment in Italy did not constitute a violation of Article 3.⁴⁰⁸

Several months later, the ECtHR rejected as inadmissible two other applications contending that the return of asylum seekers to Italy would violate their human rights. The first case, *Abubeker*, concerned a man born in Eritrea but considered stateless when he entered Italy in 2007. Mohammed Abubeker applied for asylum, received shelter in a refugee reception center in southern Italy,⁴⁰⁹ was rejected as a refugee, but was then granted a humanitarian residence permit for one year.⁴¹⁰ He left the center and traveled to Germany, which relied on the Dublin Regulation to send him back to Italy in April 2008.⁴¹¹ He then lived in a SPRAR refugee center in Italy for one year, after which Italian authorities granted him subsidiary protection and provided a three-year residence permit.⁴¹²

Mr. Abubeker next traveled to Austria where he applied for asylum in early 2011.⁴¹³ He challenged Austria's decision to return him to Italy pursuant to the Dublin Regulation, contending that his severe psychological and medical problems would be exacerbated due to Italy's failure to provide accommodations and health care for beneficiaries of protection.⁴¹⁴ The Austrian authorities rejected Mr. Abubeker's challenge, and the ECtHR was not sympathetic to his contentions. The court noted that Mr. Abubeker had been housed on two separate occasions in Italian refugee shelters and had been granted residence permits that could lead to employment authorization and access to social assistance and health care.⁴¹⁵ In response to Mr. Abubeker's assertion that his mental illness undercut the Italian authorities' view that he had voluntarily left refugee accommodations to become homeless, the court concluded that Mr. Abubeker had not furnished evidence of his mental state at the pertinent time.⁴¹⁶

The *Halimi* case, decided the same day as *Abubeker*, posed significantly different facts. Nasib Halimi, an Afghan who said he had fled Taliban per-

406. Ms. Mohammed Hussein agreed that she had received accommodations, medical care, and a three-year residence permit in Italy, but disputed other details about her case. *Id.* ¶ 24.

407. *Id.* ¶¶ 4–7, 24.

408. *Id.* ¶ 75.

409. *Abubeker v. Austria and Italy*, App. No. 73874/11, Eur. Ct. H.R., ¶ 4 (2013), <http://hudoc.echr.coe.int/eng/?i=001-122459> [https://perma.cc/76FS-UJLR].

410. *Id.* ¶ 5.

411. *Id.* ¶¶ 5–6.

412. *Id.* ¶ 8.

413. *Id.* ¶ 9.

414. *Id.*

415. *Id.* ¶¶ 59–60.

416. *Id.* ¶ 61.

secution in Afghanistan in 2008, had been smuggled into the EU, where he was discovered by Italian police in 2010, interrogated, and released.⁴¹⁷ He did not apply for asylum, but after five days in Italy, left for Austria, where he immediately sought asylum.⁴¹⁸ Six months later, Austrian officials sent him back to Italy pursuant to the Dublin Regulation.⁴¹⁹ After twelve days in Italy, Mr. Halimi returned to Austria and filed a second asylum application there.⁴²⁰ He alleged that the Italian police had mistreated him, that he had been turned away from a refugee center, had been homeless, and had subsisted on food donations from churches, but that he had not applied for asylum in Italy.⁴²¹ In support of his second asylum request, he submitted evidence concerning his medical condition, his post-traumatic stress disorder diagnosis, and the ongoing psychological therapy he was receiving in Austria.⁴²²

The court noted that Mr. Halimi had never applied for asylum in Italy and, consequently, had not been eligible to access the Italian asylum system in his prior times there.⁴²³ Instead, he had been treated as an unlawful immigrant and had apparently received valid expulsion orders.⁴²⁴ Accordingly, the court concluded that there was no evidence that Italy had done anything in violation of the ECHR.⁴²⁵ As to the future, Italian authorities guaranteed that if Mr. Halimi were returned by Austria, Mr. Halimi would be able to file an asylum claim and would have access to shelter and to medical care.⁴²⁶ The court acknowledged reports of “de facto obstacles to the lodging of asylum applications in Italy”⁴²⁷ and of “shortcomings [in] living conditions for asylum seekers in Italy,”⁴²⁸ but did not think that these failures amounted to “such a systemic failure as was the case in *M.S.S. v. Belgium and Greece*.”⁴²⁹ Accordingly, the court denied Mr. Halimi’s application.⁴³⁰

In all three cases in which the court ruled against asylum seekers in 2013, *Mohammed Hussein, Abubeker*, and *Halimi*, the court focused on the particular details of the individual applicant’s prior experience in Italy, none of which presented sympathetic claims for protection against return to Italy. In two of the cases, Italy had provided the applicants with accommo-

417. *Halimi v. Austria and Italy*, App. No. 53852/11, Eur. Ct. H.R., ¶ 4 (2013), <http://hudoc.echr.coe.int/eng?i=001-122454> [<https://perma.cc/G65U-GM4M>].

418. *Id.* ¶ 4.

419. *Id.* ¶¶ 7–10.

420. *Id.* ¶ 11.

421. *Id.*

422. *Id.* ¶¶ 16–19.

423. *Id.* ¶¶ 62, 64.

424. *Id.* ¶ 63.

425. *Id.* ¶ 65.

426. *Id.* ¶ 69.

427. *Id.* ¶ 68.

428. *Id.*

429. *Id.*

430. *Id.* ¶¶ 74–76.

dations and with residence permits, and in the third case the applicant had not applied for asylum in Italy. In each of the cases, the court placed great weight on assurances by Italian authorities that they would provide special individualized attention to the applicants if they were returned to Italy.⁴³¹ For example, the court emphasized that the Italian government would receive advance notice in order to prepare for Ms. Mohammed Hussein's arrival, and the Italian Ministry of the Interior agreed to pay her travel expenses from Rome to Sicily.⁴³² Ms. Mohammed Hussein and her two small children would also receive special priority for accommodations in the reception system as they qualified under Italian legislation as vulnerable persons.⁴³³

While these arrangements were beneficial for Mr. Mohammed Hussein and her family, this is not the typical scenario that faces individuals returned to Italy pursuant to the Dublin Regulation. To the contrary, Dublin transferees often confront substantial obstacles when they arrive back in Italy. If they had earlier applied for and received some form of protection in Italy, their residence permits are likely to have expired.⁴³⁴ In that event, they must file an application to renew their permission to stay in Italy, and this requires them to travel to the appropriate provincial police headquarters. There they must present their original paper permits, which many no longer have.⁴³⁵ Seeking a replacement permit can then become an even more cumbersome process. Furthermore, if individuals returned pursuant to the Dublin Regulation had lived in refugee shelters during their prior residence in Italy, they generally are not provided accommodations.⁴³⁶

Although the ECtHR's jurisprudence places on the applicant the burden of showing systemic failings in a country's asylum system, the court accorded little weight in *Mohammed Hussein, Abubeker*, and *Halimi* to reports submitted by the UNHCR, the Council of Europe's Commissioner for Human Rights, and nongovernmental organizations detailing longstanding inadequacies in the reception conditions in Italy.⁴³⁷ The reports unanimously concluded that the reception facilities lacked the capacity to accommodate thousands of the asylum seekers that arrive annually,⁴³⁸ a fact the

431. *Abubeker v. Austria and Italy*, App. No. 73874/11, Eur. Ct. H.R., ¶¶ 70–71 (2013), <http://hudoc.echr.coe.int/eng?i=001-122459> [<https://perma.cc/76FS-ULRJ>]; *Halimi v. Austria and Italy*, App. No. 53852/11, Eur. Ct. H.R., ¶¶ 69–72 (2013), <http://hudoc.echr.coe.int/eng?i=001-122454> [<https://perma.cc/G65U-GM4M>]; *Hussein v. Netherlands & Italy*, App. No. 27725/10, Eur. Ct. H.R., ¶¶ 76–78 (2013), [http://hudoc.echr.coe.int/eng?i=001-118927#{"itemid":\["001-118927"\]}](http://hudoc.echr.coe.int/eng?i=001-118927#{) [<https://perma.cc/2428-47DQ>].

432. *Hussein*, App. No. 27725/10, ¶ 77.

433. *Halimi*, App. No. 53852/11, ¶ 77.

434. *Hussein*, App. No. 27725/10, ¶¶ 48, 76–77.

435. *Halimi*, App. No. 53852/11, ¶ 48.

436. *Id.* ¶ 49.

437. *Abubeker v. Austria and Italy*, App. No. 73874/11, Eur. Ct. H.R., ¶ 41 (2013), <http://hudoc.echr.coe.int/eng?i=001-122459> [<https://perma.cc/76FS-ULRJ>]; *Halimi*, App. No. 53852/11, ¶¶ 32–34; *Hussein*, App. No. 27725/10, ¶¶ 43–44, 47–50.

438. *Hussein*, App. No. 27725/10, ¶¶ 43–44, 46.

Italian authorities acknowledged openly. The reports also described inadequate reception services for vulnerable individuals, concerns about unreasonable limitations on the length of residence in some centers, minimum subsistence standards in some of the facilities, and other troubling issues.⁴³⁹ Nonetheless, the court concluded that the Italian reception conditions had “some shortcomings,” but did not show the type of “systemic failure to provide support or facilities catering for asylum seekers . . . as was the case in *M.S.S. v. Belgium and Greece*.”⁴⁴⁰ Italy had created a detailed asylum structure, whereas Greece had not. The Italian reception conditions, as inadequate as they were, were better than the appalling reception situation that M.S.S. faced in Greece.⁴⁴¹

Taken together, the ECtHR decisions in 2013 were discouraging to asylum advocates. The court set a low bar in assessing whether poor reception conditions constituted a “real risk of ill treatment.”⁴⁴² The court disregarded reports on systemic problems in the Italian asylum system, despite the M.S.S. legal requirement that the asylum seekers demonstrate system-wide failures. In addition, the court was receptive to individualized guarantees provided by government authorities to the rare asylum seeker who had the resources to propel her case all the way to the court’s attention. As a policy matter, this last factor seemed especially pernicious: it incentivized government authorities to respond favorably to a few asylum seekers who challenged transfer pursuant to the Dublin Regulation rather than to improve the basic reception conditions for all asylum seekers.

One year later, however, the ECtHR issued two judgments against Italy in rapid succession. The first, *Sharifi and Others v. Italy and Greece*,⁴⁴³ focused on the practices of Italian border authorities in ports on the Adriatic Sea. When ferryboats arrived from Greece, Italian officials frequently placed undocumented individuals into the custody of the ferry captains and immediately returned them to Greece.⁴⁴⁴ The individuals received no hearing of any kind in Italy.⁴⁴⁵ The court ruled that Italy had violated the ECHR by returning asylum seekers to Greece, thereby exposing them to risk of *refoulement* to Afghanistan.⁴⁴⁶ The court reiterated its holding in *M.S.S.*,⁴⁴⁷ and insisted that the Italian authorities must perform an individualized

439. *Id.* ¶¶ 43–44, 46.

440. *Id.* ¶ 78.

441. The Court also referred to recent government plans to make improvements to the reception system. *Id.* ¶ 78.

442. In *Halimi*, the Court described its task, stating, “In order to determine whether there is a real risk of ill-treatment in the present case, the Court must examine the foreseeable consequences of sending the applicant to Italy, bearing in mind the general situation there and his personal circumstances.” *Halimi*, App. No. 53852/11, ¶ 57.

443. *Sharifi v. Italy & Greece*, App. No. 16643/09, Eur. Cr. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-147287> [<https://perma.cc/RMD2-2QAU>] (final judgment issued January 21, 2015).

444. *Id.* ¶¶ 101–04, 215.

445. *Id.*

446. *Id.* ¶ 235.

447. *Id.* ¶ 232.

evaluation of each applicant before relying on the Dublin system to return asylum seekers to another EU state.⁴⁴⁸ *Sharifi's* conclusion was important, but hardly surprising. Italy had completely precluded asylum seekers from access to the asylum system.⁴⁴⁹ Nonetheless, the court's re-emphasis on *M.S.S.* was prescient.

Three weeks after *Sharifi*, the ECtHR's Grand Chamber, composed of seventeen judges, announced a significant expansion of the court's Dublin Regulation jurisprudence. In *Tarakhel v. Switzerland*, the court examined claims by asylum seekers who had entered the Italian asylum system and then departed for other European countries. Its evaluation of the situation differed in both approach and result from that of the court's 2013 cases. The Grand Chamber placed great weight on evidence concerning the overall asylum structures in Italy as it evaluated the asylum seekers' protests that returning them to Italy would violate their human rights. The court scrutinized reports submitted by UNHCR, the Council of Europe's Commissioner for Human Rights, nongovernmental organizations, and observations submitted by other European governments.⁴⁵⁰ The court sought a comprehensive understanding of the Italian asylum system and of the potential impact of its ruling.

The Tarakhel family, two parents and six minor children,⁴⁵¹ were originally from Afghanistan but had lived in Iran for fifteen years.⁴⁵² They arrived on the coast of Italy in 2011, were fingerprinted, and placed in a reception center for ten days.⁴⁵³ The family was then transferred to a CARA center for asylum seekers, where they said they endured appalling sanitary conditions, a lack of privacy, and a climate of violence.⁴⁵⁴ Two days later, the family left and went to Austria, where they immediately applied for asylum.⁴⁵⁵ Austria rejected their application and decided to return them to Italy pursuant to the Dublin Regulation.⁴⁵⁶ Three months later, the Tarakhel family applied for asylum in Switzerland.⁴⁵⁷

448. *Id.* ¶¶ 233–34.

449. *Id.* ¶¶ 242–43.

450. *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R., ¶¶ 106–15 (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [<https://perma.cc/7GZV-FUBK>].

451. *Id.* ¶ 1. The youngest child was born in 2012 after the family arrived in Europe. *Id.* ¶ 10.

452. *Id.* ¶ 9. The father first left Afghanistan for Pakistan, where he married his wife, and then the family went to Iran. *Id.*

453. *Id.* ¶ 10.

454. *Id.* ¶ 11.

455. They departed the CARA center in Bari, Italy without permission on July 28, 2011, and they were registered in Austria via the EURODAC system on July 30 and applied for asylum. *Id.* ¶ 12.

456. *Id.* ¶ 12.

457. *Id.* ¶ 13.

Switzerland, though not a member state of the EU,⁴⁵⁸ has a separate agreement with the EU to apply the Dublin Regulation.⁴⁵⁹ Relying on the Dublin Regulation, Switzerland rejected the Tarakhel family's asylum claim and ordered them returned to Italy.⁴⁶⁰ Multiple rounds of appeals ensued, first to the Federal Administrative Court, and then to the Federal Migration Office, which forwarded the case again to the Federal Administrative Court.⁴⁶¹ At each stage, the court and the migration officials rejected the Tarakhel family's contention that it would be inhuman and degrading treatment to return them to Italy.⁴⁶² In particular, the Swiss court commented that the Tarakhel family had left Italy so quickly that the Italian authorities had not had a chance to shoulder their responsibilities to the asylum seekers.⁴⁶³ The Tarakhel family then asked the ECtHR to bar their return to Italy.⁴⁶⁴

The Tarakhel family stressed four major points concerning reception conditions in Italy: the delay of several weeks or months before individuals are allowed to submit their formal asylum applications, with the consequent risk of homelessness during that time; the woeful mismatch between the annual number of asylum seekers and the accommodations for them; the dismal living conditions in some of the accommodations that are available; and the grave consequences for children consigned to centers where they were separated from their families and exposed to a threatening atmosphere with virtually no privacy.⁴⁶⁵

The Swiss government, supported by the Italian, Dutch, Norwegian, Swedish, and United Kingdom governments, did not respond to the complaint about the insufficient assistance provided during the time that

458. Switzerland has been a party to the ECHR since 1974 and is bound by its prohibition against returning individuals to torture or inhuman or degrading treatment. *See Switzerland*, EUR. CT. H.R. (Jan. 2016), http://www.echr.coe.int/Documents/CP_Switzerland_ENG.pdf [<https://perma.cc/NP4Y-X7FA>].

459. Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's Association with the Implementation, Application and Development of the Schengen *Acquis*, 2008 O.J. (L 53) 52.

460. *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R., ¶¶ 15–16 (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [<https://perma.cc/76ZV-FUBK>]. The Swiss Federal Migration office interviewed the Tarakhel parents on November 15, 2011, requested the Italian authorities to accept the Tarakhels on November 22, and formally rejected the Tarakhel asylum application on January 24, 2012, ordering them removed to Italy. *Id.* ¶¶ 14–16.

461. The Tarakhel family appealed to the Federal Administrative Court on February 2, 2012, which rejected their appeal on February 9, 2012. They requested the Federal Migration office to reopen their proceedings on March 13, 2012, a request rejected by the Federal Administrative Court on March 21, 2012. *Id.* ¶¶ 17–19.

462. *Id.* ¶ 17.

463. *Id.* ¶ 18.

464. *Id.* ¶ 20. The Chamber to which the case was originally assigned issued a preliminary stay. *Id.* ¶ 21. The Chamber later relinquished jurisdiction to the Grand Chamber, which proceeded to consider the merits of the claim. *Id.* ¶ 5.

465. *Id.* ¶¶ 57–67.

elapses between arrival in Italy and formal application for asylum.⁴⁶⁶ With regard to the lack of capacity, the governments argued that Italy had plans to dramatically increase the accommodations for asylum seekers,⁴⁶⁷ that the UNHCR had not called for a halt in Dublin transfers to Italy,⁴⁶⁸ and that prior rulings by the ECtHR had not concluded that the substantial shortage of shelters for asylum seekers constituted a human rights violation.⁴⁶⁹ They argued that the conditions in the Italian reception centers must not be deplorable enough because no EU states had suspended Dublin transfers to Italy,⁴⁷⁰ that the European Asylum Support Office was working to improve reception conditions in Italy,⁴⁷¹ and that the violent outbursts in the reception center had ended before the Tarakhel family arrived.⁴⁷² Italy contended that asylum seeker families were not always split up in Italian facilities,⁴⁷³ and that special accommodations could be made for families with children.⁴⁷⁴

The Grand Chamber of the ECtHR did not address the applicants' assertions concerning initial delays in accommodations for asylum seekers newly arrived in Italy, as the Tarakhel family had not experienced this personally.⁴⁷⁵ Rather, the core of the court's analysis concentrated on the inadequate number of accommodations and the conditions of those accommodations.⁴⁷⁶ In particular, the court emphasized the human rights norms that require states to place special prominence on the extreme vulnerability of children.⁴⁷⁷ In assessing the accommodations, the court relied heavily on the 2013 UNHCR report on the Italian asylum structures,⁴⁷⁸ the 2012 report by the Council of Europe's Commissioner for Human Rights,⁴⁷⁹ analyses submitted by the International Organization of Migration, and various other groups' analyses.⁴⁸⁰ The court acknowledged that the parties debated the accuracy of the statistics, but noted that everyone agreed that there were many more asylum seekers and refugees than accommodations,⁴⁸¹ and that waiting lists were so long that most of those on the

466. *Id.* ¶¶ 69, 76–77. The Italian government did comment that the average asylum procedure took ninety-two days in 2013 compared to seventy-two days in 2012, and that efforts were being made to expedite the process. *Id.* ¶ 76. This was not germane, in that the Tarakhels had complained about the risk of homelessness at the outset, not about the length of the procedure itself.

467. *Id.* ¶¶ 70, 78.

468. *Id.* ¶¶ 71, 79.

469. *Id.* ¶ 70.

470. *Id.* ¶ 71.

471. *Id.* ¶ 80.

472. *Id.* ¶ 86.

473. *Id.*

474. *Id.* ¶ 86.

475. *Id.* ¶ 107.

476. *Id.* ¶¶ 108–15.

477. *Id.* ¶ 99.

478. *Id.* ¶¶ 47, 111–12.

479. *Id.* ¶¶ 49, 111–12.

480. *Id.* ¶ 50.

481. *Id.* ¶¶ 108–10.

list had no realistic chance of obtaining the desired accommodations.⁴⁸² The court noted that the reports and recommendations also indicated that those who found accommodations were likely to face unduly overcrowded, unhealthy, and sometimes violent conditions.⁴⁸³ Accordingly, the evidence indicated that asylum seekers returned to Italy face serious risks of inhuman or degrading treatment.⁴⁸⁴

Turning to the applicants themselves, the court emphasized the unique vulnerabilities of child asylum seekers and the special protection obligations governments have for children.⁴⁸⁵ The court reiterated the major deficiencies in the current reception system in Italy and emphasized the grave risks posed to child asylum seekers.⁴⁸⁶ Although the Italian authorities represented that they view families with children as a particularly vulnerable group and normally work to keep the family together in age-appropriate conditions,⁴⁸⁷ the court noted conflicting evidence concerning routine separation of family units in some Italian cities.⁴⁸⁸ Due to the real risk that the Tarkhel family, with their six minor children, would face inhuman or degrading treatment in Italy's seriously overwhelmed reception system, the court prohibited Switzerland from returning them without first obtaining individual guarantees that Italian authorities would provide accommodations appropriate to the age of the children and would keep the family together.⁴⁸⁹

The *Tarakhel* judgment differs from the earlier ECtHR rulings concerning Dublin transfers to Italy both in its prohibition of *refoulement* and in its attentiveness to evidence of systemic failings in the Italian reception conditions. The court was careful to note that "the current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment,"⁴⁹⁰ but it gave credence to reports of system-wide failures in Italy. As in the *Mohammed Hussein*, *Abubeker*, and *Halimi* decisions, the *Tarakhel* judgment underscored the risks that specific family members were likely to face if returned to Italy. The common thread in all of the cases is the court's attention on the risks the specific individuals will face if returned to Italy.⁴⁹¹

482. *Id.* ¶ 108.

483. *Id.* ¶¶ 111–15.

484. *Id.* ¶ 115.

485. *Id.* ¶¶ 118–19.

486. *Id.* ¶¶ 120–21.

487. *Id.* ¶ 120.

488. *Id.* ¶ 66. There was evidence that this occurred systematically in Milan. *Id.* ¶ 64.

489. *Id.* ¶ 122.

490. *Id.* ¶ 114.

491. The court in *Tarakhel*, *id.* ¶ 18, however, showed less concern about the applicants' actual prior experiences in Italy than did the courts in *Hussein v. Netherlands & Italy*, App. No. 27725/10, Eur. Ct. H.R., ¶¶ 76–78 (2013), [http://hudoc.echr.coe.int/eng?i=001-118927#{\"itemid\":{\"001-118927\"}}](http://hudoc.echr.coe.int/eng?i=001-118927#{\) [<https://perma.cc/2428-47DQ>]; *Abubeker v. Austria and Italy*, App. No. 73874/11, Eur. Ct. H.R., ¶¶ 70–71 (2013), <http://hudoc.echr.coe.int/eng?i=001-122459> [<https://perma.cc/76FS-ULRJ>]; and *Halimi*

Furthermore, although the *Tarakbel* judgment reached the opposite result, it followed the earlier cases in embracing the Italian government's willingness to construct guarantees regarding specific applicants. In effect, this approach rewards exceptional treatment promised to a few fortunate litigants. Asylum seekers with knowledge, resources, and good luck can pursue multiple appeals within the national asylum system against a government decision to transfer them to Italy pursuant to the Dublin Regulation, and, if unsuccessful, can then challenge the transfer in the ECtHR. The Italian authorities are likely to learn of the litigation seeking to cancel a transfer to Italy, and they have an incentive to avoid a judicial ruling that castigates the Italian asylum system. Consequently, Italian officials will promise special housing and other support to the litigants if they are returned to Italy. While gratifying for the individuals involved, personal solutions in a handful of cases should not be the benchmark for evaluating whether Dublin returns conflict with the prohibition against inhuman or degrading treatment. Nor should Italy be able to divert the court's attention from the systemic problems by proffering atypical government support to a few individual asylum seekers.

In sum, the ECtHR jurisprudence in 2013 and 2014 indicate a court initially reluctant to condemn Italy's woeful asylum shelter system. The court was also reluctant to interrupt the functioning of one of the key EU asylum laws. However, as the evidence of Italy's asylum crisis grew more incontrovertible and as Italy's failure to take major steps to improve its asylum system became more apparent, the court was compelled to apply the analysis it developed in *M.S.S.* to Italy. The *Tarakbel* judgment acknowledged that the Italian asylum system was less dismal than Greece's, but the court nonetheless extended its *non-refoulement* prohibition to Italy. The court's conclusion has serious ramifications for other European countries with systemic failings in their asylum policies, and accordingly, places many Dublin Regulation transfers in jeopardy.

V. THE FRACTURED EUROPEAN ASYLUM SYSTEM

As the tenth anniversary of the CEAS arrived, the *M.S.S.* judgment by the ECtHR and the *N.S.* judgment by the CJEU exposed fractures in the CEAS foundational principles. These judgments made it clear that some EU member states do not provide adequate reception conditions to asylum seekers, and they required that each individual asylum seeker receive the opportunity to rebut the presumption that CEAS states respect fundamental human rights. Consequently, states must carefully assess each asylum seeker's case to determine if they would face a real risk of experiencing

v. Austria and Italy, App. No. 53852/11, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-122454> [<https://perma.cc/G65U-GM4M>].

inhuman or degrading treatment in the receiving country. Asylum seekers must be able to appeal, or seek reconsideration, of such important decisions. Accordingly, each transfer pursuant to the Dublin Regulation must include the possibility of multiple assessments of the facts specific to each asylum seeker. This defeats the Dublin Regulation's purpose of assuring rapid determination of the state responsible for examining an asylum application.

The 2014 *Tarakhel* judgment casts further doubt on the compatibility of the EU asylum system with human rights standards. Member states can no longer relegate the *M.S.S.* and *N.S.* judgments to circumstances where there is a total collapse of the asylum system, as in Greece in 2011. Indeed, the ECtHR expressly acknowledged that the reception system in Italy was not comparable to that in Greece, but nonetheless ruled out the Dublin transfers ordered by the Swiss authorities due to "the possibility that a significant number of asylum seekers removed to [Italy] may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions."⁴⁹² *Tarakhel* made it clear that serious overcrowding, lack of privacy, and unhealthy conditions in asylum facilities can constitute inhuman or degrading treatment. This conclusion will be applicable to multiple EU member states that have serious deficiencies in their asylum facilities and processes. Member states on the periphery of the EU are frequently the destination of transfers under the Dublin Regulation, and these states are among the most vulnerable to human rights challenges.⁴⁹³

Furthermore, the paramount significance of the *Tarakhel* judgment is its requirement of thorough individualized assessments of the suitability of the reception conditions and the asylum structures in the receiving country before a Dublin transfer can take place. While *Tarakhel* severely criticized the Italian reception system, the *Tarakhel* judgment did not halt all future Dublin transfers to Italy. Indeed, during the year after *Tarakhel*, the ECtHR refused to stop the transfer of two young male asylum seekers to Italy from other EU states.⁴⁹⁴ Before the asylum seekers could be transferred, however, they had to receive careful evaluations of their unique circumstances and of the circumstances they would likely face upon return to Italy.⁴⁹⁵ The Dub-

492. *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R., ¶ 120 (2014), [http://hudoc.echr.coe.int/eng?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/eng?i=001-148070#{) [<https://perma.cc/76ZV-FUBK>].

493. Even before *Tarakhel*, multiple national courts in EU states prohibited Dublin transfers to Greece, Hungary, Bulgaria, and Malta. COUNTRY REPORT, *supra* note 13, at 42.

494. *A.M.E. v. Netherlands*, App. No. 51428/10, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-152295> [<https://perma.cc/D7S9-QL5L>] (finding young able Somali asylum seeker could be removed to Italy); *A.S. v. Switzerland*, App. No. 39350/13, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-155717> [<https://perma.cc/ZPY2-LXA4>] (finding healthy young man could be transferred to Italy).

495. *Tarakhel*, App. No. 29217/12, ¶¶ 115–22 (requiring individual assessment).

lin evaluation had to include the right to appeal within the national court system and the right to petition the ECtHR.⁴⁹⁶

This ensures that the Dublin process will become even more time consuming. Evidence needs to be developed regarding the individual asylum seeker's medical and psychological conditions, family situation, and other vulnerabilities. Reports must be gathered regarding the capacity and sanitary conditions of the asylum shelters and the access the transferred individual will have to the asylum procedures. Careful evaluations and fact-specific determinations take time and effort. They are in conflict with the Dublin Regulation's premise that accurate assessments of which state is responsible for determining the asylum claim can be accomplished quickly.

A. *Dublin III: Amendments to Assuage Human Rights Concerns*

These jurisprudential developments brought great urgency to ongoing EU efforts to improve the CEAS, including the cornerstone Dublin II Regulation. Long before the European courts issued the judgments discussed above, however, modifications to the CEAS were under discussion. Indeed, as soon as the first phase of the CEAS concluded in 2005,⁴⁹⁷ the second phase, a period devoted to assessment and improvement, began. Originally slated to take place between 2005 and 2010, the second phase concluded in 2013, by which time five of the six CEAS laws had been revised.⁴⁹⁸ Its goal was to bring into being a more fair and humane CEAS: "Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar."⁴⁹⁹

The amendment process of the Dublin II Regulation began in earnest in 2008. The UNHCR and several nongovernmental organizations recommended assigning responsibility for the asylum claim to the EU state where the application was filed, but the broad consensus of EU member states supported maintaining the general Dublin framework.⁵⁰⁰ Calling the Dub-

496. See *id.* ¶¶ 126–31 (finding that process must include close scrutiny by national authority and ability to lodge an appeal with a body that undertakes a thorough examination and can grant an effective remedy).

497. The enactment of the Procedures Directive, *supra* note 36, the sixth and final element of the CEAS, occurred in December 2005. Member states had two years, until December 2007, to transpose the Directive into their national legislation. *Id.* art. 43.

498. The Temporary Protection Directive of 2001, *supra* note 38, has never been utilized and has not been modified. The Recast Qualification Directive was adopted in 2011, with the effective date of December 2013. Council Directive 2011/95, 2011 O.J. (L 337) 9. The Recast Reception Conditions Directive, *supra* note 80, the Recast Asylum Procedures, Council Directive 2013/32, 2013 O.J. (L 180) 60, and the Recast EUODAC Regulation, Council Regulation 603/2013, 2013 O.J. (L 180) 1, all became effective in July 2015. The Recast Dublin Regulation, Dublin III, *supra* note 16, enacted in 2013, entered into force in January 2014. Council Regulation 604/2013, 2013 O.J. (L 180) 31.

499. *Common European Asylum System*, EURO. COMM'N (June 3, 2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm [https://perma.cc/58AD-42HW].

500. COM, *Int'l Protection*, *supra* note 69, at 5.

lin II Regulation the “first cornerstone of the [Common European Asylum System],”⁵⁰¹ the European Commission proposed a series of amendments that tinkered around the edges. Its explicit goal was to improve the efficiency of the Dublin transfer system,⁵⁰² and it urged higher standards of protection for asylum seekers subject to the Dublin procedure.⁵⁰³ To increase efficiency, the Commission proposed deadlines for making and responding to Dublin requests, sharing more information between EU states prior to carrying out transfers, emphasizing the discretion states have to deviate from the Dublin criteria for humanitarian or compassionate reasons, and requiring a compulsory interview of the asylum seeker to obtain information relevant to state responsibility.⁵⁰⁴ To augment the protection of asylum seekers, the Commission recommended providing more information about the Dublin system to asylum seekers, guaranteeing a right to appeal against Dublin transfer decisions, and furnishing a right to legal assistance and translation services.⁵⁰⁵

The Commission’s proposal included a mechanism for a temporary suspension of transfers under the Dublin Regulation. Member states “faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure” could request that states temporarily halt Dublin returns to the overwhelmed state.⁵⁰⁶ This proposal preceded the *M.S.S.* and *N.S.* judgments, but concerns about Dublin transfers to member states with weak asylum systems were already well known.⁵⁰⁷ Indeed, in 2008 alone, the ECtHR issued eighty provisional stays of transfers to Greece.⁵⁰⁸

After five years of discussion and negotiation, during which national and supranational courts were grappling with numerous challenges to Dublin transfers to Greece, Italy, and other member states, Dublin II was amended.⁵⁰⁹ The 2013 Recast Dublin Regulation, or Dublin III, acknowledged the dire circumstances that threatened the European-wide system. In particular, the new legislation referred to the risk to human rights caused by deficiencies in the asylum systems of EU member states.⁵¹⁰

Nonetheless, the temporary suspension mechanism did not survive political negotiations. Instead, Dublin III’s response to the impending crises was

501. *Id.* at 3.

502. *Id.* at 5.

503. *Id.*

504. *Id.* at 7.

505. *Id.* at 8.

506. *Id.* art. 31.

507. E.g., U.N. High Comm’r for Refugees, *Position on the Return of Asylum Seekers to Greece under the Dublin Regulation* (Apr. 2008), <http://www.unhcr.org/482199802.html> [<https://perma.cc/36G8-NPJU>] (advising against all returns to Greece).

508. *K.R.S. v. United Kingdom*, App. No. 32733/08, Eur. Ct. H.R., at 3–4 (2008), [http://hudoc.echr.coe.int/eng#{"docname":\["k.r.s."\],"itemid":\["001-90500"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/4VSC-YSMQ>].

509. Dublin III Regulation, *supra* note 16.

510. *Id.* pmb., cl. 21.

a cumbersome early warning crisis management system.⁵¹¹ The European Commission would invite member states facing crises in transferring asylum seekers to “draw up a preventive action plan”⁵¹² and submit reports on the risks “of particular pressure being placed on a Member State’s asylum system and/or problems in the functioning of the asylum system of a Member State.”⁵¹³ In light of the disastrous situations identified by national courts and the ECtHR over the past few years, this voluntary crisis planning approach is destined to be ineffectual.

Aside from the crisis management warning system, the core of Dublin III is similar to the original Dublin system. There is a clause allowing member states to decide on humanitarian grounds, including family and cultural considerations, to take responsibility to determine the merits of the claim.⁵¹⁴ A sovereignty clause permits a member state to examine the merits of an asylum claim even if the state is not responsible under the Dublin criteria.⁵¹⁵

In addition to preserving the core criteria, Dublin III contains several new procedural safeguards to improve the accuracy and fairness of transfer decisions. For example, EU states must now provide a personal interview to every asylum seeker evaluated under the Dublin criteria,⁵¹⁶ must furnish free legal assistance if requested,⁵¹⁷ must guarantee the right to appeal a Dublin transfer order,⁵¹⁸ must allow a request to stay the execution of the transfer order pending the decision on the appeal,⁵¹⁹ and must provide special protections for asylum seekers who are minors.⁵²⁰ Dublin III also includes an express acknowledgement that European human rights law sometimes forbids transfer pursuant to the Dublin criteria, but, in those instances when transfer is not allowed, Dublin III encourages member states to find another member state that might have responsibility.⁵²¹ Only if the duty to determine the asylum claim cannot be thrust onto another member state must the state with custody of the asylum seeker review the asylum application.⁵²²

Perhaps it can be considered an advance that Dublin III expressly admits that European human rights law trumps the CEAS. This is hardly a surprising addition, however, in light of European jurisprudence. On the other hand, the absence from Dublin III of effective tools to respond to the deep-

511. *See id.* art. 33.

512. *Id.* art. 33(1), ¶ 1.

513. *Id.*

514. *Id.* art. 17(2).

515. *Id.* art. 17(1). Formerly Dublin II art. 3(2). *See* Dublin II, *supra* note 15, art. 3(2).

516. *Id.* art. 5(1).

517. *Id.* art. 27(6).

518. *Id.* art. 27(1).

519. *Id.* art. 27(3)(a).

520. *Id.* art. 6.

521. *Id.* art. 3(2), ¶ 2.

522. *Id.* art. 3(2), ¶ 3.

ening asylum crisis in Europe is profoundly worrisome. Dublin III's call for drafting action plans and filing reports is not a proportionate response to the human rights challenges that national and supranational courts have identified. It is unclear how the Dublin III approach will cajole, encourage, persuade, or support those member states with severe deficiencies in their asylum systems to make substantial improvements. Furthermore, Dublin III ignores the political realities. It is built on the incorrect premise that member states will accurately decide when they should halt transfers to sister states and instead take on the responsibility themselves of determining the asylum claim. The political pressure runs in the opposite direction. Member state governments want to shrink the numbers of asylum claims they examine. Unless they are expressly required to act, few, if any, member states will voluntarily expand their asylum systems.⁵²³ Instead, they will likely avert their eyes from the plight of asylum seekers returned to sister states that are ill equipped to provide a satisfactory asylum process.

B. *Suspending the Dublin III Regulation*

Those member states whose asylum systems fall far below the standards set forth in the CEAS are generally poor, are frequently swamped with asylum seekers making their entry into the EU, and lack the political will to treat asylum seekers as the law requires. Italy is a prime example, as is Greece. Furthermore, there have been repeated calls to halt Dublin transfers to Bulgaria.⁵²⁴ National courts have refused to apply the Dublin criteria to send asylum seekers to Hungary,⁵²⁵ Poland,⁵²⁶ and Malta.⁵²⁷

523. See Ian Traynor, *EU Ministers Push Through Divisive Deal To Share 120,000 Refugees*, THE GUARDIAN (Sept. 22, 2015), <http://www.theguardian.com/world/2015/sep/22/eu-governments-divisive-quotas-deal-share-120000-refugees> [https://perma.cc/ZX6V-6PX3] (describing the refusal of several EU states to accept even small numbers of Syrian refugees in the fall of 2015 when neighboring EU states had received hundreds of thousands of refugees provides a recent example; ultimately, the EU voted modest quotas of refugees for each EU state).

524. U.N. High Comm'r for Refugees, *Observations on the Current Situation of Asylum in Bulgaria* (Jan. 2, 2014), <http://www.unhcr.org/534cfae69.html> [https://perma.cc/3RZV-Y459]; ECRE Joins UNHCR in Calling on EU Member States to Stop Sending Asylum Seekers to Bulgaria under the Dublin Regulation, Euro. Council on Refugees and Exiles (Jan. 10, 2014), <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/555-ecre-joins-unhcr-in-calling-on-eu-member-states-to-stop-sending-asylum-seekers-to-bulgaria-under-the-dublin-regulation.html> [https://perma.cc/V9YE-ETPK].

525. See, e.g., COUNTRY REPORT, *supra* note 13, at 42; *Dublin: France, Suspension of Transfers*, ASYLUM INFO. DATABASE, <http://www.asylumineurope.org/reports/country/france/asylum-procedure/procedures/dublin> (last visited Mar. 9, 2016) [https://perma.cc/YU43-3MCA] (discussing a French administrative court suspending transfer to Hungary).

526. *Netherlands: Court of Appeal Suspends Dublin Transfer to Poland*, EURO. DATABASE OF ASYLUM LAW, <http://www.asylumlawdatabase.eu/en/content/netherlands-court-appeal-suspends-dublin-transfer-poland-awb-1311314-art-47-charter> (last visited Mar. 9, 2016) [https://perma.cc/BK6J-XACV] (discussing a Court of Appeal Decision suspending transfer to Poland).

527. See, e.g., COUNTRY REPORT, *supra* note 13, at 42; *German Administrative Court Suspends Transfer to Malta*, ECRE WEEKLY LEGAL UPDATE (Jan. 30, 2015), <http://www.ecre.org/component/content/article/64-elena-publications/957#German> [https://perma.cc/P4M4-SG4A] (discussing an administrative court in Minden suspending transfer to Malta due to serious defects in reception conditions and procedures).

Together, these developments—both the 2013 legislative modification of the Dublin system and the human rights rulings prohibiting the return of individual asylum seekers to states where they may face inhuman or degrading treatment—presage greater pressure on the transfer of asylum seekers between EU states. The ECtHR requires greater scrutiny of the operational realities in the asylum systems in Italy and other EU states along the southern and eastern borders, where large numbers of asylum seekers first enter the EU.⁵²⁸ States with custody of asylum seekers must gather thorough and accurate reports of reception conditions in EU border states.⁵²⁹ Simultaneously, they must establish thorough and reliable procedures to evaluate Dublin transfers and assess challenges to transfer orders, and they must engage in individualized negotiations with the authorities in other European states.⁵³⁰ This multi-layered human rights approach may yield greater protection to individual asylum seekers. It will accomplish this, however, at the expense of the CEAS. It will divert resources from examining the merits of the asylum applications to the preliminary proceedings. Rather than devote enormous energy to the decision as to which CEAS state is responsible for determining the asylum claim, states should deploy their efforts to assessing accurately and quickly whether the individual applicants are in need of asylum or other international protection.

At first glance, the current Dublin system appears massive. Roughly seventeen percent of the asylum applications filed in Europe from 2008 to 2013 triggered a request that another state exercise responsibility for assessing the claim.⁵³¹ This amounted to 300,000 requests out of 1.7 million asylum applications.⁵³² This large number of requests, however, actually resulted in very few transfers. For example, in 2012 Germany issued 11,574 requests under the Dublin Regulation to transfer asylum seekers to other states.⁵³³ Of these, 3,062 transfers took place.⁵³⁴ In Switzerland, there were similar results, including 11,029 requests to transfer asylum seekers⁵³⁵ and 4,637 actual transfers.⁵³⁶ Other top Dublin “sending States,” such as Sweden, Austria, and Belgium, registered similar stark discrepancies between the numbers of asylum seekers involved in Dublin procedures and the num-

528. See *supra* notes 274–299 and accompanying text (discussion of *M.S.S. v. Belgium & Greece*); *supra* notes 450–489 and accompanying text (discussion of *Tarakhel v. Switzerland & Italy*).

529. See *supra* notes 274–299 and accompanying text (discussion of *M.S.S. v. Belgium & Greece*); *supra* notes 450–489 and accompanying text (discussion of *Tarakhel v. Switzerland & Italy*).

530. See *supra* notes 455–497 and accompanying text (discussion of *Tarakhel v. Switzerland & Italy*).

531. FRATZKE, *supra* note 19, at 6 (including data reflecting transfer requests in both EU states and non-EU states, such as Switzerland, that have become part of the Dublin system).

532. *Id.*

533. *Id.*

534. *Id.* at 26, tbl.A-1.

535. *Id.* at 26, tbl.A-3. Of the 11,574 German requests, 7,916 were accepted, but only 3,062 took place. *Id.*

536. *Id.* at 26, tbl.A-1.

bers actually transferred.⁵³⁷ Overall, only one-fifth of the transfer orders submitted by states led to transfers.⁵³⁸ Thus, states invested a phenomenal amount of energy in the transfer process, yet roughly eighty percent of the time, energy, and financial costs of the Dublin system amounted to naught.

Furthermore, many of the member states that are most active in trying to send asylum seekers to other states are also actively receiving and processing requests to accept asylum seekers from other states. For example, in 2012, among the top five states sending Dublin requests included Germany, Sweden, and Belgium.⁵³⁹ Together these three states sent 23,498 transfer requests, which comprised almost fifty percent of the European total.⁵⁴⁰ During the same year, Germany, Sweden, and Belgium also were among the top five states receiving Dublin requests.⁵⁴¹ Together, these three states received almost 10,000 Dublin transfer requests.⁵⁴² It would be more productive if states devoted their resources to deciding the asylum applications on the merits, instead of processing thousands of requests to change venue each year. This is particularly true if, as the Dublin data shows, only a small percentage of the processed requests result in transfers.

Equally compelling, the evidence reveals that member states frequently exchange similar numbers of Dublin requests with each other. The 2013 statistics show that Germany sent 1,380 asylum requests to Sweden, as it received close to 1,000 requests from Sweden.⁵⁴³ Similarly, Belgium sent 355 requests to France, and in the same year received 562 requests from France.⁵⁴⁴ Sweden sent 627 transfer requests to Norway, while receiving 403 requests from Norway.⁵⁴⁵ The transaction costs of the Dublin system are enormous.

It does not make sense to use a system with triplicate layers of individualized fact-finding. This is an inefficient use of state resources, imposes great delays on the asylum process, and keeps asylum seekers in prolonged suspense concerning their legal situations. That many states both send and

537. *Id.* at 27, tbl.A-3 (stating that of the 11,029 Swiss requests, 9,328 were accepted, but only 4,637 occurred).

538. *Id.* 26, tbl.A-1 & 27, tbl.A-3.

539. *Id.* at 11. In 2013, 76,358 transfer requests resulted in 56,466 positive responses, which led to 15,938 transfers. *Id.* This is a 20.8 percent success rate.

540. *Id.* at 26, tbl.A-1. Germany, Sweden, Belgium, Switzerland, and France together sent 39,916 Dublin transfer requests of the European total of 53,439. *Id.* These five states sent seventy-five percent of the total. *Id.*

541. *Id.* Germany sent 11,574 Dublin transfer requests, Sweden sent 7,805, and Belgium sent 4,119. *Id.*

542. *Id.* at 26, tbl.A-2. Germany, Sweden, Belgium, Italy, and Poland together received 30,230 Dublin transfer requests of the European total of 53,439. *Id.* These five states received fifty-five percent of the total. *Id.*

543. *Id.* Germany, Sweden, and Belgium received roughly seventeen percent of the total. *Id.* Italy, with 15,618 (thirty percent), received the highest number of transfer requests, and Poland, with 5,533 (ten percent), received the second highest number. *Id.* Together these five states received 30,185 or fifty-five percent of the total.

544. *Id.* at 13.

545. *Id.*

receive large numbers of Dublin transfer requests only compounds the problem.

Germany's temporary suspension of the Dublin Regulation in August 2015 tacitly recognized the deep flaws of the Dublin system.⁵⁴⁶ Faced with hundreds of thousands of Syrian asylum seekers who had walked through Greece and other countries to seek refuge in Germany, German officials announced that they would not activate the Dublin Regulation to transfer Syrian asylum seekers to other EU states. Germany decided to evaluate the Syrian applicants' asylum claims, despite overwhelming evidence that the asylum seekers lacked travel documents and had entered other EU countries before they arrived in Germany.⁵⁴⁷ The German Ministry of Interior pronounced the Dublin system inefficient and burdensome.⁵⁴⁸ In actuality, Germany had no other realistic option. Had Germany relied on the Dublin Regulation criteria for determining which EU state might be responsible for evaluating the merits of the asylum claims, Germany would have had to initiate several hundred thousand individual hearings inquiring into the applicants' identities, travel routes, mental and physical conditions, and other particular vulnerabilities. It would have been unworkable, time-consuming, and demoralizing.

Furthermore, transferring large numbers of asylum seekers to Greece and other countries on the perimeter of the EU would have run afoul of European human rights law. The *M.S.S.*, *N.S.*, and *Tarakbel* judgments all forbid EU states from relying on the Dublin Regulation to send asylum seekers to countries with systemic defects in their asylum processes. Indeed, the impact of this jurisprudence came into the spotlight several months later. In October 2015, Germany announced it would reinstate the standard Dublin transfer procedures, but would not apply them to asylum seekers who had entered EU territory via Greece.⁵⁴⁹ Both *M.S.S.* and *N.S.* had expressly concluded that the conditions for asylum seekers in Greece were so abysmal that Dublin transfers to Greece constituted inhuman and degrading treatment. Even if the Greek asylum system had improved significantly in the four years since the *M.S.S.* and *N.S.* judgments, graphic news reports made it clear that Greek institutions had not been able to cope with the magnitude of people arriving in the summer and fall of 2015.⁵⁵⁰ As a result, European human rights law prohibited Germany from transferring asylum seekers to Greece. Since most of the asylum seekers had traveled through

546. *Id.*

547. Adam Taylor, *Germany's Small Yet Important Change to the Way It Deals with Syrian Refugees*, WASH. POST (Aug. 26, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/08/26/germanys-small-yet-important-change-to-the-way-it-deals-with-syrian-refugees/> [https://perma.cc/U67U-JDSL].

548. *Id.*

549. *Id.*

550. *Germany Reinstates Dublin Rules for Syrian Refugees*, DEUTSCHE WELLE (Nov. 10, 2015), <http://www.dw.com/en/germany-reinstates-dublin-rules-for-syrian-refugees/a-18842101> [https://perma.cc/3GDN-SUDS] [hereinafter *Germany Reinstates Dublin Rules*].

Greece, Germany's formal reinstatement of the Dublin Regulation had no impact on them.⁵⁵¹ Moreover, although Germany's reinstatement of the Dublin Regulation did not explicitly exempt other EU states—such as Bulgaria, Hungary, or Croatia—that asylum seekers may have transited on their way to Germany, European human rights jurisprudence will not countenance transfers to countries with serious system-wide problems with their asylum systems. It remains to be seen whether German officials will initiate the individualized hearings European human rights law requires for every asylum seeker under the Dublin Regulation.

Germany's public experiment with a modified CEAS (EU standards and procedures, but few intra-EU transfers) heralds the future. In light of the European human rights prohibition against transferring asylum seekers to EU states whose asylum structures have serious systemic failings, the time has come to adjust the Dublin system. The default position should be that the state with custody of the asylum seeker should assess whether the individual warrants international protection. The Dublin Regulation should continue to apply when states ascertain transfer is warranted due to the presence of the asylum seeker's family members in other member states⁵⁵² or on humanitarian grounds.⁵⁵³ The Dublin transfer requests based on the first EU country an asylum seeker irregularly entered should cease.⁵⁵⁴ Instead, the presumption should be the same as with unaccompanied minors: the member state where the individual has lodged an application for international protection should be responsible.⁵⁵⁵ Since more than ninety-five percent of the total Dublin transfer requests are grounded on the irregular entry provision, this effectively would constitute a suspension of the Dublin Regulation.⁵⁵⁶

Suspending the routine use of the Dublin III Regulation would result in one fact-intensive proceeding (the merits of the claim), rather than two (the conditions in the receiving country, followed by the merits of the claim) or three (the conditions in the receiving country, followed by individualized transfer guarantees, followed by the merits) evidentiary hearings. It would achieve a measure of efficiency that the CEAS needs. It would also devote resources to the asylum claim itself, rather than to the more peripheral issues.

EU member states will no doubt disagree with this proposal to suspend the routine use of Dublin III.⁵⁵⁷ They may argue that asylum seekers do not

551. See, e.g., Nicole Triantafyllidis, *Thousands of Arriving Refugees Overwhelm Greece's Island Villages*, FRANCE 24 (Sept. 24, 2015), [France24.com/en/20150924-greece-lesbos-molyvos-migrants-refugees-outnumber-locals](https://perma.cc/en/20150924-greece-lesbos-molyvos-migrants-refugees-outnumber-locals) [https://perma.cc/en/20150924-greece-lesbos-molyvos-migrants-refugees-outnumber-locals].

552. *Germany Reinstates Dublin Rules*, *supra* note 549.

553. Dublin III, *supra* note 16, art. 9.

554. *Id.*

555. *Id.* art. 17(2).

556. *Id.* art. 13.

557. *Id.* art. 8(4) ("In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the member state responsible shall be that where the unaccompanied minor has

have the right to choose their country of asylum and that the current Dublin system reduces “asylum shopping” and secondary movements of asylum seekers. The appropriate response is a pragmatic one. It is abundantly clear that under the Dublin III regime secondary movements occur in substantial numbers. Most commonly, asylum seekers who have filed claims in Italy or other EU border states with substandard reception conditions relocate to states with stronger asylum systems, such as Germany, Austria, and Switzerland.⁵⁵⁸ Indeed, the judicial opinions discussed earlier bear witness to the secondary movements and to the human rights norms that justify the secondary movements.⁵⁵⁹

EU states may argue that the Dublin system reduces some secondary movements, even though it does not halt them. It is hard to gauge the effectiveness of the deterrence that may occur, but it is clear that there are extensive secondary movements. Asylum seekers choose destinations for many reasons, chief among them the presence of friends and family who can ease their entry into a new living situation. The availability of such networks is useful from the member states’ perspective, because of the obvious benefits of a more cohesive and supportive migrant community. Member states’ worries that asylum seekers choose destinations based on benefits that are more generous or more expansive notions of asylum have not been empirically confirmed.⁵⁶⁰ Moreover, the magnitude of the flows of asylum seekers in 2014 and 2015 have made it clear that these concerns can only be addressed in a serious fashion if there is a truly common European asylum policy. Asylum law should be applied uniformly across the EU. It will take substantial political will and transfer of resources to the weaker EU states to make that happen. It will also require common action by EU states in face of the current humanitarian crisis. The September 2015 EU Council decisions to relocate asylum seekers from Greece and Italy to other EU states were an important first step. Further collective responses are necessary.

In the meantime, the costs of the current Dublin Regulation’s approach to transferring individuals back to countries through which they first entered the EU are extremely high. The stark fact remains: more than eighty percent of the asylum seekers involved in Dublin procedures in 2012 never were transferred.⁵⁶¹ Surely, member states would have had a net savings in financial and institutional resources if they had simply decided those asylum applications on the merits. Furthermore, EU states that exchange

lodged his or her application for international protection, provided that it is in the best interests of the minor.”).

558. See FRATZKE, *supra* note 19, at 8–9 (citing 2013 statistics on the different bases for Dublin requests).

559. See, e.g., *Mother Angela: Merkel’s Refugee Policy Divides Europe*, DER SPIEGEL (Sept. 21, 2015), <http://www.spiegel.de/international/germany/refugee-policy-of-chancellor-merkel-divides-europe-a-1053603.html> [<https://perma.cc/WDT4-4JKR>].

560. See FRATZKE, *supra* note 19, at 13–15.

561. See *id.*

roughly the same number of transfer requests with each other should decide the substance of the asylum claims before them, rather than engage in the Dublin procedure. That would be both sensible and cost-efficient.

Furthermore, the Dublin Regulation currently imposes significant other costs—both financial and moral—on the asylum authorities in member states. European human rights law effectively requires multiple claims and court challenges if Dublin III continues to apply as written.⁵⁶² The *Tarakbel* judgment will lead to amplified efforts to negotiate individualized guarantees to protect specific asylum seekers subject to transfer requests. This approach is likely to undermine efforts to repair and improve unsatisfactory reception conditions. Rather than using resources in the most efficient and effective manner to make system-wide improvements to the accommodations and services provided to asylum seekers, the receiving states will divert their energy and funds to respond to individual cases awaiting transfer from sister states. Expending so much energy in responding to a series of somewhat random individual crises will undermine efforts to carry out systemic upgrades.

Most importantly, we must not forget the human suffering of individuals caught in lengthy, drawn-out preliminary stages. These more serious costs are the hardest to quantify. The losses and dislocations experienced by vulnerable people and fragile families are often overlooked. This is doubly ironic since the experience of suffering, persecution, and other serious harm impelled many to seek refuge in the EU in the first place. Reducing the time, anxiety, and redundancy that the Dublin system imposes would bring the European asylum system more in line with its fundamental purpose: protecting those in need of international protection. As the European Commission proclaimed:

The ultimate objective [of the CEAS is] to establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection.⁵⁶³

CONCLUSION

The CEAS has not yet achieved its goal of establishing equivalent conditions in all member states. Until the wealthier EU states transfer substantial funds and other support to help poorer and less developed states build

562. See, e.g., Soraya Sarhaddi Nelson, *Denmark Wants to Become “A Little Bit Less Attractive” to Refugees*, NPR (Jan. 25, 2016), <http://www.npr.org/sections/parallels/2016/01/25/464300740/denmark-wants-to-become-a-little-bit-less-attractive-to-refugees> [https://perma.cc/568X-YPJE].

563. See FRATZKE, *supra* note 19, at 11.

satisfactory asylum systems, asylum conditions will remain grossly uneven, and asylum seekers will flee the inadequate and inhumane conditions they encounter.⁵⁶⁴ Collective action to respond to the humanitarian crisis is necessary, but the political will to transform the existing CEAS into a truly *common* European asylum system does not currently exist. Accordingly, the EU must respond to the contemporary situation. The EU should acknowledge that the minimum standards approach adopted by the CEAS has resulted in uneven and, in some cases, inadequate asylum systems. European human rights law demands that the Dublin III Regulation take cognizance of this reality. Dublin transfers for family reasons or humanitarian grounds should continue, but otherwise Dublin transfers should be suspended. A system in which the state where the asylum seeker files an application examines and decides the merits of the claim would be more efficient and more humane.⁵⁶⁵

564. *M.S.S.*, *supra* notes 274–299 and accompanying text, and *Tarakbel*, *supra* notes 450–489 and accompanying text, require individualized hearings concerning the particularized claims of the asylum seekers concerning their treatment if returned via the Dublin Regulation, and the Dublin III Regulation requires asylum seekers to receive free legal assistance, personal interviews, right to appeal a Dublin transfer, and the right to request a stay of a transfer order. See Part V.A., *supra* notes 492–496 and accompanying text.

565. *Commission Green Paper on the Future Common European Asylum System*, at 2, COM (2007) 301 Final (June 6, 2007).