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Refugees and the Primacy of European Human Rights Law

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REFUGEES AND THE PRIMACY OF EUROPEAN HUMAN RIGHTS LAW

Maryellen Fullerton *

ABSTRACT

More than one million asylum seekers and refugees made their way to Europe in 2015. They came from Syria, Iraq, Afghanistan, and many other conflict zones. When they entered the European Union (EU), they encountered the Common European Asylum System. This EU legislation contains a broad guarantee of refuge for those fleeing persecution, and for those fleeing indiscriminate violence from armed conflict. However, one legislative provision, known as the Dublin Regulation, generally requires that asylum applications be evaluated by the first EU state an asylum seeker enters. Pursuant to the Dublin Regulation, wealthier EU states such as Germany and Austria have transferred many asylum seekers back to Greece and Italy, putting increased pressure on the under-resourced asylum systems in these and other states that form the southern frontier of the EU. The promise of protection enshrined in the EU asylum laws has been undercut by the Dublin Regulation, and by the dysfunctional implementation of the asylum system in poorer EU states.

In this setting, the European Convention of Human Rights, which does not provide a right to asylum, has emerged as a bulwark of protection for asylum seekers in Europe. All twenty-eight EU states are parties to the European Human Rights Convention, and they are bound by its prohibition against sending individuals to countries where they will face inhumane or degrading treatment. The European Court of Human Rights has interpreted this provision to forbid EU states from relying on the Dublin Regulation to return asylum seekers to Greece and to Italy, when their asylum systems are in such disarray that it is likely the asylum seekers will be treated inhumanely

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or in a degrading manner when they arrive. These rulings by the European Human Rights Court have provided an important judicial check on EU law and policy. Under the Court's jurisprudence, it is European human rights law, rather than European asylum law, that has more resolutely protected refugees.

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INTRODUCTION

Ethnic violence, armed conflict, civil war, and persecution stalked the globe in 2015. These horsemen of the apocalypse drove 65 million people from their homes onto the refugee trail, marking 2015 as a year of unprecedented forced displacement.¹ Refugees sought safety in virtually every part of the globe. In each country of refuge, they faced dislocation, trauma, and loss of control as well as unfamiliar social, political, and legal landscapes.

Headlines, images, and video footage in the media portrayed the desperation of the one million refugees who made their way to Europe in 2015. The picture, however, was complex: the media captured both the hostility of law enforcement officials stationed at borders and the hospitality of ordinary European citizens.² Focusing on the current situation faced by refugees

¹ UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015 (2016) [hereinafter UNHCR, GLOBAL TRENDS 2015], <http://www.unhcr.org/statistics/country/576408cd7/unhcr-global-trends-2015.html> [https://perma.cc/Z6CF-D3BT] (unprecedented 65.3 million individuals forcibly displaced; 5.8 million more than in prior year).

² Photograph of Hungarian tripping a refugee, in Ivo Oliveira, *Hungary's kicking camerawoman to sue refugee*, Facebook, POLITICO (Oct. 21, 2015), <http://www.politico.eu/article/kicking-hungarian-camerawoman-sues-refugee-facebook/> [https://perma.cc/HJ2Q-4SNC]; Video of Hungarian border guards beating back refugees, in *European migrants find no welcome in Hungary* (CNN online broadcast Aug. 27, 2015), <http://www.cnn.com/videos/world/2015/08/27/migrants-hungary-balkans-damon->

coming to Europe, this commentary explores the European legal framework in place to protect refugees and asylum seekers, and in particular its unique double judicial check feature.³

Part I examines the events that led up to the refugee crisis and summarizes the current situation in Europe. Part II describes and distinguishes the basic features of European Union (EU) asylum law and European human rights law. Part III analyzes how EU asylum law has responded to the mass influx of refugees and individuals seeking asylum. Part IV discusses the active role the European Court of Human Rights has played in addressing the problems related to the refugee crisis. This commentary argues that the European Court of Human Rights has become the primary guarantor of refugee rights in Europe, overriding and overshadowing the European Union's much vaunted common asylum system.

I. MASS DISPLACEMENT AND THE REFUGEE CRISIS IN EUROPE IN 2015

To understand the challenges faced by asylum seekers in Europe within the last two years, it is important to assess both the events that forced them to leave their homeland and the network of European laws that they must navigate.

First, the refugees. Europe currently faces its largest refugee crisis since World War II.⁴ Frontex, the EU border management agency, counted 1.8

[pkg.cnn](http://pkg.cnn.com/photos/europe/2015/09/13/heartwarming-scenes-of-europeans-cheering-for-refugees-arriving-by-bus-watch/) [<https://perma.cc/W6PD-9LQC>]; Photographs of Europeans welcoming refugees, in *3 Heartwarming Scenes of Europe Cheering for Refugees Arriving by Bus*, GOOD NEWS NETWORK (Sept. 13, 2015), <http://www.goodnewsnetwork.org/3-heartwarming-scenes-of-europeans-cheering-for-refugees-arriving-by-bus-watch/> [<https://perma.cc/6DFK-C849>]; Photographs of Europeans welcoming refugees, in Jay Akbar, Jennifer Smith, and Lydia Willgress, *Sleeping in his father's arms: After an epic journey by boat, on foot and by train a young Syrian boy is one of thousands of refugees to arrive in Germany as there are fresh calls for actions in Syria*, DAILY MAIL (Sept. 5, 2015), <http://www.dailymail.co.uk/news/article-3223222/4-000-migrants-arrive-Austria-Hungarian-government-lays-buses-refugees-Budapest-just-hours-thousands-started-walk-100-miles-border.html> [<https://perma.cc/WCA9-EDG5>].

³ See HÉLÈNE LAMBERT, JANE MCADAM & MARYELLEN FULLERTON, *THE GLOBAL REACH OF EUROPEAN REFUGEE LAW* 18-23 (2013) (the case law of both the European Human Rights Court and the Court of Justice of the European Union prominently examines whether European governments uphold the *non-refoulement* principle).

⁴ Lydia DePillis, Kulwant Saluja, & Denise Lu, *A Visual Guide to 75 Years of Major Refugee Crises Around the World*, WASH. POST (Dec. 15, 2015), <https://www.washingtonpost.com/graphics/world/historical-migrant-crisis/> [<http://perma.cc/SJ2X-8LCA>].

million asylum seekers crossing the EU frontiers in 2015.⁵ EU governments reported that 1.3 million individuals registered as asylum seekers,⁶ with 1.1 million registering in Germany alone.⁷ The unprecedented logistical challenges that this crisis presents are clear from comparisons with statistics from prior years: in 2012, the EU states registered 300,000 asylum seekers;⁸ in 2013, 400,000;⁹ in 2014, 627,000 (of which 200,000 filed asylum claims in Germany).¹⁰ The United Nations High Commissioner for Refugees (UNHCR) reports that most of the 1.1 million asylum seekers registered in Europe in 2015 came from countries experiencing war and persecution, suggesting that a high proportion have valid claims to asylum.¹¹

The Syrian civil war has been the central factor prompting this mass influx of people to Europe. As the war enters its sixth year, half of the country's pre-war population has been forcibly displaced.¹² This staggering proportion—the US equivalent would be 158 million people forced from their homes—has catapulted Syria to world leadership in suffering: one in every five displaced persons in the world today is Syrian.¹³ Of the 10.6 million Syrians who have fled their homes, 4.6 million have crossed Syria's borders to neighboring countries and registered as refugees.¹⁴ These neighbors have been generous. Turkey hosts 2.6 million registered Syrians.¹⁵ Lebanon, a country of 4 million, hosts 1.1 million Syrian refugees, while Jordan hosts

⁵ *Migratory Routes Map*, FRONTEX: EUROPEAN BORDER AND COASTGUARD AGENCY, <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> (last visited Oct. 7, 2016) [<http://perma.cc/2Y4T-VU6B>] (this number refers to number of border crossings and acknowledges that one person may have crossed multiple times).

⁶ *Asylum Statistics*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Asylum_applicants (last visited Oct. 20, 2016) [<http://perma.cc/7M3H-7RVQ>].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Refugees/Migrants Emergency Response - Mediterranean*, UNHCR, <http://data.unhcr.org/mediterranean/regional.php> (last visited Oct. 7, 2016) [<http://perma.cc/D5NF-DB8A>].

¹² Mark Bixler & Michael Martinez, *War Forced Half of All Syrians From Home. Here's Where They Went*, CNN (Apr. 18, 2016), <http://www.cnn.com/2015/09/11/world/syria-refugee-crisis-when-war-displaces-half-a-country/> [<http://perma.cc/9WYP-B7Z9>].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

635,000.¹⁶ Many more refugees may be unregistered.

This generosity, however, has its limits. These countries have not granted Syrians permission to work.¹⁷ Thus, the refugees have had to deplete their savings, and then seek work in the informal labor market where they are underpaid and vulnerable.¹⁸ Even when Turkey agreed to authorize employment for Syrian refugees, as part of the March 2016 agreement with the EU to readmit all refugees who left Turkey for Europe,¹⁹ fewer than 0.1 percent of refugees gained access to the Turkish labor market.²⁰ The prohibition against employment is just one example of the precarious situation Syrians have confronted in their countries of first refuge. Refuge became even more untenable in September 2015 when a lack of resources led the World Food Program to eliminate food vouchers for one-third of the Syrian refugees in the Middle East.²¹ The downward spiral of the humanitarian situation in Syria, the seemingly endless civil war, and multiple other factors have also contributed to the decisions of many Syrians to seek safety in Europe.

The problems associated with this mass displacement have been compounded by the fact that the sudden arrival of thousands of Syrian refugees has coincided with increasing forced displacement in other countries, such as Afghanistan and Iraq. Approximately 500,000 Afghans fled their homes during the decade of intense conflict between 2002 and 2012.²² By the end of 2015, that number had increased to 1.2 million, with approximately 1000 Afghans fleeing their homes every day.²³ Meanwhile, warfare and

¹⁶ *Id.*

¹⁷ E.g., *Overview of Right to Work of Refugees, Syria Crisis Response: Lebanon and Jordan*, INT'L RESCUE COMMITTEE (Jan. 1, 2016), <http://www.rescue.org/sites/default/files/resource-file/IRC%20Policy%20Brief%20Right%20to%20Work%20for%20Refugees%20.pdf> [<http://perma.cc/6EJU-K2KE>].

¹⁸ Patrick Kingsley, *Fewer Than 0.1% of Syrians in Turkey In Line for Work Permits*, THE GUARDIAN (Apr. 11, 2016), <http://www.theguardian.com/world/2016/apr/11/fewer-than-01-of-syrians-in-turkey-in-line-for-work-permits> [<http://perma.cc/K9ZX-4PKZ>].

¹⁹ The European Council Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> [<http://perma.cc/658V-ZFU9>].

²⁰ Kingsley, *supra* note 18.

²¹ Associated Press, *Lack of Funds: World Food Programme Drops Aid to One-third of Syrian Refugees*, THE GUARDIAN (Sept. 4, 2015), <http://www.theguardian.com/world/2015/sep/05/lack-of-funds-world-food-programme-drops-aid-to-one-third-of-syrian-refugees>.

²² Mujib Mashal & Zahra Nader, *1,000 Afghans Each Day Are Fleeing Their Homes*, N.Y. TIMES (June 1, 2016).

²³ *Id.*; After more than three decades of conflict and displacement, the global Afghan

displacement gripped Iraq. In 2014 and 2015, as part of its violent campaign to take control of Iraqi cities such as Ramadi, the Islamic State (ISIS) was responsible for the displacement of more than 2.6 million Iraqis.²⁴

Most of the more than one million refugees and asylum seekers who crossed the Mediterranean Sea in 2015 to escape violent conflicts in their home countries, departed from Turkey and landed in Greece.²⁵ Fifty percent were Syrians; twenty percent were Afghan; and seven percent were Iraqi.²⁶ These sizeable numbers are a testament to the extreme warfare and suffering wreaking havoc in these countries. Other areas of conflict and human rights abuse, such as Eritrea, a notoriously oppressive one-party state,²⁷ were also responsible for a significant portion of the refugees who landed in Europe.²⁸

In short, armed conflict and political repression have reached a fever pitch in the region close to southeastern Europe. After five years or more of refuge in Turkey and surrounding areas, many Syrian and Iraqi refugees have become desperate to find a measure of stability. Joined by streams of asylum seekers from Afghanistan and Eritrea and other conflict zones in Africa and Asia, increasing numbers have set sail across the Mediterranean Sea. They hope to find legal protection and safety in Europe. They confront complex layers of European law.

II. OVERLAPPING LEGAL REGIMES: EU ASYLUM LAW AND EUROPEAN HUMAN RIGHTS LAW

Refugees arriving in Europe face two overlapping legal regimes: the laws created by the Council of Europe and those enacted by the EU. Forty-seven

refugee population amounted to 2.7 million in 2015. UNHCR, GLOBAL TRENDS 2015, *supra* note 1, at 16.

²⁴ Patrick Cockburn, *Refugee Crisis: Where are all These People Coming From and Why?*, THE INDEPENDENT (Sept. 7, 2015). See, e.g., Ben Hubbard, *Ramadi, Reclaimed by Iraq, is in Ruins After ISIS Fight*, N.Y. TIMES (Jan. 7, 2016).

²⁵ UNHCR reports that 1,000,573 asylum seekers entered Europe via the Mediterranean in 2015, with 150,000 landing in Italy and most of the rest landing in Greece. Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNHCR (Dec. 30, 2015), <http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> [<https://perma.cc/34S9-33QL>].

²⁶ *Id.*

²⁷ See, e.g., Jeffrey Gettleman, *Border Clashes Between Ethiopia and Eritrea Heighten Fears of War*, N.Y. TIMES, (June 13, 2016), <http://www.nytimes.com/2016/06/14/world/africa/border-clashes-between-ethiopia-and-eritrea-heighten-fears-of-war.html> [<https://perma.cc/KU2Y-FV8A>].

²⁸ *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34131911> [<https://perma.cc/EGR4-TYT6>].

European countries, stretching from the United Kingdom to Russia, and including Turkey,²⁹ are members of the Council of Europe and are state parties to the European Convention on Human Rights and Fundamental Freedoms (European Human Rights Convention).³⁰ This treaty prohibits states from exposing residents to torture or inhumane or degrading treatment or punishment.³¹ Furthermore, it forbids state parties from expelling individuals to another state where they will face inhumane or degrading treatment.³² Although it does not provide a right to asylum, the European Human Rights Convention protects asylum seekers from deportation to their home country if that country will subject them to inhumane treatment upon their return.³³ As a result of this protection, many asylum seekers petition the European Court of Human Rights to allow them to remain in Europe.

Twenty-eight of the Council of Europe states belong to the EU.³⁴ All EU members agree to abide by EU standards, enact EU laws as part of their national legislation, and enforce EU law.³⁵ EU law includes a Charter of Fundamental Rights that parallels the provisions of the European Human Rights Convention.³⁶ It is largely redundant; for example, it, too, prohibits

²⁹ All European countries other than Belarus are members of the Council of Europe. See *Our Member States*, COUNCIL OF EUR., <http://www.coe.int/en/web/about-us/our-member-states> (last visited Oct. 18, 2016) [https://perma.cc/TTK7-36V6].

³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953). 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. See *Full List: Chart of Signatures and Ratifications of Treaty 005*, COUNCIL OF EUR., http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=h3q1InPT (last visited Oct. 18, 2016) [https://perma.cc/82FJ-2XZ7].

³¹ ECHR, *supra* note 30, art. 3 (“No one shall be subjected to torture or to inhumane or degrading treatment or punishment”).

³² *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989), discussed *infra* notes 98–99.

³³ *E.g.*, *Cruz Varas & Others v. Sweden*, 1991 Eur. Ct. H.R. 26, discussed *infra* notes 100–103.

³⁴ The United Kingdom referendum on June 23, 2016, which registered a majority voting to leave the EU has not yet gone into effect. Article 50 of the EU Treaty of Lisbon permits Member States to withdraw from the EU, a process that starts when the withdrawing State files a formal notice and must conclude within two years of the formal withdrawal notice. If, and when the United Kingdom withdraws, there will be 27 Member States in the EU.

³⁵ “Once an applicant country meets the conditions for membership, it must apply EU rules and regulations in all areas.” *Joining the EU*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries/joining-eu_en [perma.cc/U3Q7-G4U4].

³⁶ Charter of Fundamental Rights of the European Union (2000/C 364/01) [hereinafter

inhumane or degrading treatment or punishment.³⁷

One significant difference, however, is that EU law expressly guarantees a right to asylum.³⁸ To explain this difference, it is necessary to revisit the history and development of EU asylum law. During the first half century of the EU, matters of migration and asylum were strictly within the sovereign control of individual EU member states.³⁹ By the end of the twentieth century, this had begun to change. In 1999, after concluding that a common asylum and migration policy was fundamental to the goal of transforming the EU into an area of freedom, security, and justice,⁴⁰ the EU countries committed themselves to developing an EU-wide statutory basis for asylum.⁴¹ The EU countries pledged to develop and enact a legal framework for a uniform asylum process between 2000 and 2005 as part of the first phase of the EU Common European Asylum System (CEAS). After lengthy negotiations, the EU accomplished this goal: by 2005, the EU had enacted asylum legislation that still applies in every EU state today.⁴²

The first law enacted as part of the CEAS was the 2000 EURODAC Regulation, which established a central registry of fingerprints for all asylum seekers.⁴³ The next year saw the enactment of EU legislation creating a mechanism to establish a temporary protection scheme in the event of a mass influx of migrants.⁴⁴ Two major pieces of CEAS followed in 2003: the

Charter].

³⁷ Charter, art. 4: "No one shall be subjected to torture or to inhumane or degrading treatment or punishment."

³⁸ Council Directive 2011/95/EU, art. 9-10, 2011 O.J. (L 337/9) (enacted in 2011 with two years for transposition into national legislation).

³⁹ Federal Republic of Germany and others v. Commission of the European Communities, Case C-281/85, [1987] E.C.R. 3203 (ruling that the Eu Commission had exceeded its authority by requiring EU member states to report data concerning workers who entered the EU from non-EU states).

⁴⁰ *Id.*

⁴¹ Tampere European Council, Presidency Conclusions, E.U. BULL., no. 10, (1999), http://www.europarl.europa.eu/summits/tam_en.htm [<http://perma.cc/8SLH-QAMA>].

⁴² Council Directive 2013/32/EU, 2013 O.J. (L 180/60) [hereinafter Parliament and Council Directive on Procedures for International Protection] (enacted in December 2005 with two years for transposition into national legislation, and revised legislation enacted in June 2013).

⁴³ Council Regulation 2725/2000/EC, 2000 O.J. (L 316/1) [hereinafter Eurodac Regulation]. A revised Eurodac Regulation, Council Regulation 603/2013/EU, 2013 O.J. (L 180/1), was enacted in 2013 and went into effect in 2015.

⁴⁴ Council Directive 2001/55, 2001 O.J. (L 212) 12 (EC) (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

Reception Conditions Directive, which sets standards for food, shelter, and other services that states must provide to individuals during the asylum process,⁴⁵ and the Dublin Regulation, which sets forth criteria for deciding which EU country is responsible for deciding an asylum claim.⁴⁶ Later, in 2004, the EU also adopted the Qualification Directive,⁴⁷ which guarantees asylum to two categories of individuals. Individuals in the first category are eligible for refugee status; they must show they fear persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.⁴⁸ Individuals in the second category are eligible for subsidiary protection, which typically involves a renewable residence permit for a shorter period than refugee status;⁴⁹ this group includes those fleeing other serious harm, such as indiscriminate violence resulting from armed conflict.⁵⁰ The last element of the CEAS came into place with the 2005 Asylum Procedures Directive.⁵¹ This law requires states to conduct personal interviews with asylum seekers,⁵² deliver notice concerning the asylum process in a language

the consequences thereof).

⁴⁵ 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). A revised Reception Conditions Directive, Directive 2013/33, 2013 O.J. (L 180) 96 (EU), went into effect in 2015.

⁴⁶ Council Regulation 343/2003, 2003 O.J. (L 50) 1 (EC) [Dublin Regulation] (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). A revised Dublin Regulation, Council Regulation 604/2013, 2013 O.J. (L 180) 31 (EU) [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), went into effect in 2014.

⁴⁷ Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC) on 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 [hereinafter Qualification Directive]. A revised Qualification Directive on the standards for 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 grants went into effect in 2013. *Supra* note 38.

⁴⁸ Qualification Directive, art. 9–14.

⁴⁹ *Id.* art. 24.

⁵⁰ *Id.* art. 15.

⁵¹ Parliament and Council Directive on Procedures for International Protection, *supra* note 42.

⁵² *Id.* arts. 12, 14–17.

asylum seekers can understand,⁵³ furnish interpreters,⁵⁴ and permit consultation with UNHCR and with legal counsel,⁵⁵ as well as ensuring other procedural safeguards. Thus, as the first phase of the CEAS drew to a close, legislation with detailed uniform standards for processing asylum claims was in place throughout the EU.

III. A DYSFUNCTIONAL SYSTEM: THE INABILITY OF THE EU ASYLUM SYSTEM TO RESPOND TO THE CURRENT REFUGEE CRISIS

Ten years after the foundational elements of EU asylum law were established, the common EU asylum system is in shambles. Gateway countries, such as Greece, Hungary, Slovenia, Italy, and Spain, have been required to uphold the EU right to asylum and subsidiary protection and simultaneously comply with the European human rights prohibition against inhumane and degrading treatment, a task which has proven virtually impossible given the mass influx of refugees in 2015. The large numbers of asylum seekers in Greece and Italy and other countries on the frontiers of the EU have strained those governments' resources to the breaking point. They have faltered in their attempts to provide shelter, food, clothing, medical care, and adequate legal proceedings to hundreds of thousands of new arrivals.⁵⁶ At times, asylum seekers have been left literally homeless, sleeping on the streets and in parks.⁵⁷ As a result of the disproportionately large numbers of refugees arriving in some of the EU countries, the situation of refugees and asylum seekers has varied dramatically between EU states. Rather than facing a uniform asylum system throughout Europe, many individuals have instead found themselves facing multiple state systems, with some of the frontline states offering little to no assistance. It has become apparent that the impressive enactment of numerous EU-wide asylum statutes in the initial CEAS phase has not been matched by equally effective implementation. The practice on the ground deviates significantly from the law on the books.

In retrospect, this was fated to happen. Since its inception, the CEAS had adopted a minimum standards approach, which only required each EU state to meet minimum standards set forth in the asylum legislation, and left it to the

⁵³ *Id.* art. 10(1)(a).

⁵⁴ *Id.* art. 10(1)(b).

⁵⁵ *Id.* arts. 19–23.

⁵⁶ See, e.g., Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. L.J. 57, 87–91 (2016) (describing deplorable conditions endured by asylum seekers in Italy and Greece).

⁵⁷ *Id.* at 82–87, 99–102.

states' discretion whether they would provide asylum seekers with the bare minimum or with more generous protections.⁵⁸ As a consequence of this limited approach, many EU states were able to tweak their national asylum laws in ways that more or less maintained the asylum processes in place prior to the effort to create a uniform EU system. Thus, the current common asylum system is, in reality, a patchwork of different asylum systems. Some states provide better accommodations; some states provide quicker asylum proceedings; some states have more judges and better trained judges; some state adjudicators are more likely to grant applications filed by Afghan asylum seekers; and so forth. For asylum seekers, this means that the reception conditions and the chances of being granted asylum vary enormously among the EU states.⁵⁹ These variations have created powerful incentives for applicants to file for asylum in the EU states where the chances of success are greater and the asylum accommodations are better.

In recognition of this looming problem, the CEAS enacted the Dublin Regulation, an instrument that prevents asylum seekers from choosing the EU country in which to apply for asylum.⁶⁰ As the EU venue statute for asylum cases, the Dublin Regulation sets forth "objective, fair criteria . . . [to] make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the [asylum] procedures."⁶¹ According to the Dublin Regulation, family ties, residence documents, and geographical location are the three major criteria that should determine which EU state is responsible for deciding the merits of an asylum application.⁶² If an asylum applicant has family members who have received asylum in an EU state⁶³ or family members whose asylum applications are pending in that state,⁶⁴ then the EU state where the family member resides is responsible for the new asylum

⁵⁸ *E.g.*, the 2003 Reception Conditions Directive, *supra* note 45, pmb. secs. 3, 15, states that the CEAS should include "common minimum conditions of reception of asylum seekers," and acknowledges that "[i]t is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals . . . who ask for [asylum]".

⁵⁹ *See, e.g.*, *M.S.S. v. Belgium and Greece*, 2011-I Eur. Ct. H.R. 255 (describing the inhumane asylum system in Greece); *Tarakhel v. Switzerland and Italy*, 2014-XI Eur. Ct. H.R. (describing systemic deficiencies in reception conditions in Italy); UNHCR, *ASYLUM IN THE EUROPEAN UNION: A STUDY OF THE IMPLEMENTATION OF THE QUALIFICATION DIRECTIVE*, 8 (Nov. 2007).

⁶⁰ Dublin III Regulation, *supra* note 46.

⁶¹ *Id.*, pmb. sec. 5.

⁶² *Id.*, arts. 9-13.

⁶³ *Id.*, art. 9.

⁶⁴ *Id.*, art. 10.

applicant. If an asylum applicant has residence documents or visas for an EU state, then the EU state that issued the documents is responsible for deciding the asylum claim.⁶⁵ If there are no family members or entry documents, then the first EU state the asylum seeker enters is responsible for determining the merits of the asylum application.⁶⁶ As a practical matter, this third-level criterion is the only one of significance. More than 90 percent of the asylum seekers whose cases are transferred between EU states pursuant to the Dublin Regulation fall into the last category.⁶⁷

Because EU law pushes asylum seekers with no family connection to an EU state back to the geographical location where they first crossed into the EU, the EU states on the southern and eastern borders, through which most asylum seekers travel, bear the brunt of the Dublin Regulation.⁶⁸ These states are typically poorer with less developed asylum systems, fewer state resources, and a lack of civil society institutions that are able to assist desperate and vulnerable individuals. Greece is the paramount example. More than 850,000 asylum seekers entered the EU via Greece in 2015,⁶⁹ a year in which Greek society was still reeling from its debt crisis. At the end of 2014, Greek government debt had reached 175 percent of gross domestic product, by far the highest percentage of debt in the EU,⁷⁰ and unemployment was at 25 percent, again the highest in the EU.⁷¹

While the unprecedented economic crisis in Greece has exacerbated the refugee problems there, the issues arising from design flaws in the CEAS extend far beyond Greece's borders. By assigning the responsibility of evaluating asylum claims to the countries through which an asylum seeker first enters Europe, the EU asylum system allows wealthier northern EU states to avoid determining asylum applications. As a result, these northern EU states send asylum seekers back to the poorer southern and eastern EU states, which are less equipped to manage large numbers of applicants. A look at comparative economic data emphasizes the disparities among EU states and

⁶⁵ *Id.*, art. 12.

⁶⁶ *Id.*, art. 13.

⁶⁷ See Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System*, MIGRATION POL'Y INST. EUR. 8 (Mar. 2015), <http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system> [<https://perma.cc/H84Z-LZEH>].

⁶⁸ *Id.*

⁶⁹ Clayton & Holland, *supra* note 25.

⁷⁰ *Explaining Greece's Debt Crisis*, N.Y. TIMES (June 17, 2016), http://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html?emc=eta1&_r=0 [<https://perma.cc/98Z3-CVRW>].

⁷¹ *Id.*

the irrationality of the EU asylum policy. Countries on the eastern border of the EU, such as Bulgaria, Romania, Croatia, Hungary, and Poland, report respective per capita gross domestic product rates of \$7851, \$10,000, \$13,475, \$14,026, and \$14,336.⁷² States on the southern periphery of the EU, including Greece, Spain, and Italy, report per capita gross domestic product figures ranging from \$21,672 to \$29,721 to \$35,222.⁷³ By contrast, central and northern EU states, which rely on the Dublin Regulation to transfer asylum seekers back to the EU state of entrance, are much wealthier. For instance, the per capita gross domestic product in Austria is \$51,122, in Belgium \$47,327, in Germany \$47,773, and in Sweden \$58,898.⁷⁴

Turning to the data reflecting the impact of the Dublin Regulation on the flows of asylum seekers across the EU, Germany, Switzerland, and Sweden were the three states that relied most heavily on the Dublin Regulation in recent years to shift responsibility to other EU states.⁷⁵ In total, Germany and Switzerland filed more than forty percent of the Dublin transfer requests in 2012;⁷⁶ Germany alone filed more than 43 percent of the requests in 2013.⁷⁷ On the receiving end, Italy, Poland, and Hungary were the three countries that were requested to accept the largest numbers of transfers of asylum seekers in 2013.⁷⁸ In total, Italy and Poland received more than forty percent of the Dublin transfer requests filed in 2012 and in 2013.⁷⁹ Clearly, the Dublin Regulation has enabled the wealthier EU countries to send asylum seekers back to the less wealthy EU countries. If these transfers were based on connections between the asylum seekers and family members currently in the receiving states, that might be sensible. But most of the Dublin transfers are justified solely by the geographical happenstance that the asylum seekers entered the EU by crossing the poorer frontier states that line its land and sea borders.

⁷² *GDP per Capita*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?page=1> [https://perma.cc/TB3C-QZT8]. For comparison, the World Bank reported the per capita GDP of the United States in 2014 as \$54,629. *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Fratzke, *supra* note 67, at 8. Switzerland, though not a member state of the European Union, has agreed via treaty, Council Decision, 2008/146, art. 1, 2008 O.J. (L 53) 1, 2 (EC), to participate in the terms of the Dublin Regulation.

⁷⁶ Fratzke, *supra* note 67, at 8.

⁷⁷ *Id.*

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 8.

The Dublin Regulation's pressure on the weaker EU states and the minimum standards approach that has yielded significant variability in asylum systems within the EU, are major design flaws in the CEAS. They are, however, emblems of a more fundamental problem: the absence of political will to address asylum as a collective responsibility. In September 2015, news headlines around the world dramatized this core failure of the CEAS—the lack of recognition that Europe must take collective action to respond to those who need asylum—as EU states criticized and stalled proposals by the European Commission President Jean-Claude Juncker⁸⁰ and by European Council President Donald Tusk.⁸¹ Finally, the European Union, over the opposition of the Czech Republic, Hungary, Romania, and Slovakia, voted to relocate 120,000 refugees from Greece, Italy, and Hungary to other EU countries over two years.⁸² Slovakia immediately threatened to defy the EU refugee relocation plan,⁸³ leading an Italian diplomat to warn that the refugee crisis is “more dangerous than the Greek drama and more serious than the euro, because it challenges fundamental European accomplishments and beliefs.”⁸⁴ Thus far, the warning has not led to a change of heart. By March 2016, EU countries had relocated fewer than one thousand refugees from Greece and Italy.⁸⁵ Three months later, the numbers relocated are still small, and the European Commission has proposed a € 250,000 penalty per person on EU states that fail to meet their refugee relocation obligations.⁸⁶

⁸⁰ *Migrant Crisis: EU's Juncker Announces Refugee Quota Plan*, BBC NEWS (Sept. 9, 2015), <http://www.bbc.com/news/world-europe-34193568> [https://perma.cc/2EWW-YR36].

⁸¹ James Crisp, *Tusk Calls Emergency Summit on Refugee Crisis*, EURACTIV.COM (Sept. 17, 2015), <http://www.euractiv.com/section/justice-home-affairs/news/tusk-calls-emergency-summit-on-refugee-crisis> [https://perma.cc/6L4C-URS3].

⁸² European Commission Press Release MEMO/15/5698, *Refugee Crisis – Q & A on Emergency Relocation* (Sept. 22, 2015) [hereinafter *Refugee Crisis Q & A*]; *Migrant Crisis: EU Ministers Approve Disputed Quota Plan*, BBC NEWS (Sept. 22, 2015), <http://www.bbc.com/news/world-europe-34329825> [https://perma.cc/H3YS-SM4U] (relocating 40,000 had been recommended in May 2015, for a total of 160,000 refugees relocated within the EU).

⁸³ Steven Erlanger & James Kanter, *Plan on Migrants Strains the Limits of Europe's Unity*, N.Y. TIMES (Sept. 22, 2015), <http://www.nytimes.com/2015/09/23/world/europe/european-union-ministers-migrants-refugees.html> [https://perma.cc/9AZZ-F3J3].

⁸⁴ *Id.*

⁸⁵ Jon Henley, *EU Refugee Relocation Scheme Is Inadequate and Will Continue to Fail*, THE GUARDIAN (Mar. 4, 2016), <https://www.theguardian.com/world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-continue-to-fail> [https://perma.cc/M78A-LNUW].

⁸⁶ *Migrant Crisis: EU Plans Penalties for Refusing Asylum Seekers*, BBC NEWS (May 4, 2016), <http://www.bbc.com/news/world-europe-36202490> [https://perma.cc/38ZB-VEJY].

Ironically, despite the fears of uncontrolled migration featured in the June 2016 Brexit campaign, the EU refugee relocation decision has had no impact on refugees in the United Kingdom.⁸⁷ Because the British government had previously negotiated the right to opt out of EU emergency relocation schemes, the EU 2015 relocation plan effort assigned no refugees to the United Kingdom.⁸⁸ Prior to the EU Council's September 2015 mandatory refugee relocation plan, the United Kingdom had launched the Vulnerable Person Relocation scheme. Pursuant to this program, the United Kingdom granted asylum to 187 Syrian refugees.⁸⁹ This minuscule number of refugees arrived pursuant to a UK decision, not as a result of EU action.

Meanwhile, the European Union responded to the 2015 surge in refugees by negotiating with Turkey, where the majority of refugees had departed en route to Europe. In March 2016, Turkey agreed that all refugees crossing from Turkey to Greece as of March 20, 2016 would be returned to Turkey, and in exchange, the EU agreed to allow refugees from camps in Turkey to resettle in the EU.⁹⁰ After the agreement went into effect, the numbers of arrivals in Greece plummeted from 6800 per day in October 2015 to 50 per day in May 2016.⁹¹ The drop in the number of new arrivals has not been coupled with an increase in the number of those being returned to Turkey, however. Greece has returned only 390 migrants to Turkey since the pact became effective.⁹² Furthermore, many asylum seekers in Greece have charged that it would be unsafe for them to return to Turkey. By early summer, Greece had only reviewed 318 applications of those filed by the 8500 asylum seekers who had arrived since late March.⁹³ The combination of slow processing times and court rulings that Turkey is not a safe country to which the claimants can be returned is worrisome for those who initially believed the EU-Turkey deal would reverse the refugee flows to Europe.⁹⁴

⁸⁷ *Refugee Crisis Q & A*, *supra* note 82.

⁸⁸ *Id.*

⁸⁹ Sam Ashworth-Hayes, *How Many Syrian Refugees Are There in the UK*, FULL FACT (Feb. 17, 2016), <https://fullfact.org/immigration/how-many-syrian-refugees-are-there-uk/> [<https://perma.cc/ZA6L-EJKS>].

⁹⁰ European Commission Press Release MEMO/16/1221, *Implementing the EU-Turkey Agreement – Questions and Answers* (Apr. 4, 2016).

⁹¹ Nektaria Stamouli, *Greece Struggles to Return Migrants Under EU-Turkey Deal*, WALL STREET J., (May 19, 2016, 6:27 AM), <http://www.wsj.com/articles/greece-struggles-to-return-migrants-under-eu-turkey-deal-1463653671> [<https://perma.cc/FPA5-TBZ8>].

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

While it is still too early to provide a definitive assessment of the future development of the common EU asylum structures, the outlook is bleak. Attacks by terrorists and mentally unstable individuals in France,⁹⁵ Belgium,⁹⁶ and Germany⁹⁷ have heightened fears across the continent, and stories that some of the assailants mingled with the throng of asylum seekers who entered Europe in 2015 have inspired xenophobia and anti-refugee sentiments.⁹⁸ Thus far, the EU has not been able to devise an effective approach to the major humanitarian challenge posed by the current refugee crisis. The exceedingly slow implementation of the March 2016 EU-Turkey plan and the apparent lack of EU resources offered to assist Greece with the overwhelming numbers of its asylum seekers broadcast an aura of incompetence and a lack of political will.

It must be said that there is some good news, even though it has received far less attention from the media. Many EU countries, Germany in particular, have been able to feed and house the more than one million asylum seekers who arrived in a few short months.⁹⁹ Though the reception has not been

⁹⁵ *Truck Attack in Nice, France: What We Know, and What We Don't*, N.Y. TIMES (July 14, 2015), http://www.nytimes.com/2016/07/15/world/europe/nice-france-truck-attack-what-we-know.html?_r=1 [<https://perma.cc/85PC-JW9C>]; Liz Alderman & Jim Yardley, *Paris Terror Attacks Leave Awful Realization: Another Massacre*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/world/europe/paris-terror-attack.html> [<https://perma.cc/J86Y-EFLK>].

⁹⁶ Alissa J. Rubin, Aurelien Breeden & Anita Raghavan, *Strikes Claimed by ISIS Shut Brussels and Shake European Security*, N.Y. TIMES (Mar. 22, 2016), <http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html> [<https://perma.cc/W4PZ-N7C2>].

⁹⁷ Rukmini Callimachi & Melissa Eddy, *Munich Killer Was Troubled, But Had No Terrorist Ties, Germany Says*, N.Y. TIMES (July 23, 2016), <http://www.nytimes.com/2016/07/24/world/europe/munich-shooting-attack.html> [<https://perma.cc/8GDG-7HH3>]; Melissa Eddy & Boryana Dzhambazova, *Refugee or Jihadist? Leaders Can't Always Say*, N.Y. TIMES, Aug. 5, 2016, at A3.

⁹⁸ See, e.g., Aurelien Breeden & Kimiko De Freytas-Tamura, *Third Body Is Found in Rubble of Police Raid near Paris*, N.Y. TIMES (Nov. 20, 2015), <http://www.nytimes.com/2015/11/21/world/europe/paris-attacks.html> [<https://perma.cc/D7VW-SWNZ>]; Rick Lyman, *Regulating Flow of Refugees Gains Urgency in Greece and Rest of Europe*, N.Y. TIMES (Nov. 25, 2015), <http://www.nytimes.com/2015/11/26/world/europe/regulating-flow-of-refugees-gains-urgency-in-greece-and-rest-of-europe.html> [<https://perma.cc/DEE8-TQLB>]; Adam Nossiter & Liz Alderman, *After Paris Attacks, a Darker Mood Toward Islam Emerges in France*, N.Y. TIMES (Nov. 16, 2015), <http://www.nytimes.com/2015/11/17/world/europe/after-paris-attacks-a-darker-mood-toward-islam-emerges-in-france.html> [<http://perma.cc/4XSH-TSXX>].

⁹⁹ See, e.g., Katrin Bennhold, *German City by the Danube Is Tested by a Different Kind of Flood*, N.Y. TIMES (Nov. 7, 2015), <http://www.nytimes.com/2015/11/08/world/europe/german->

entirely seamless, EU countries have provided shelter to large numbers of people who suddenly have appeared at their borders. Nonetheless, the bad news predominates. The lack of acknowledgment by EU governments that they need to work collectively in response to asylum seekers, combined with the absence of a functioning EU plan, broadcasts the view that the EU cannot handle this crisis. The critics of the EU response to the refugee crisis are in sync with the public mood. The magnitude of the refugees' needs will continue to present profound challenges to Europe, and the common European asylum system appears broken.

IV. THE RISE OF THE EUROPEAN HUMAN RIGHTS LAW

In contrast to the growing dissatisfaction with the EU in general, and the EU asylum system in particular, the European Court of Human Rights has been increasing in power and legitimacy. In the early years, the European Human Rights Court issued very few judgments, only 160 in the first thirty years after its founding in 1959.¹⁰⁰ Initially, individuals could not directly file petitions; only the States or the European Human Rights Commission were permitted to file cases with the Court.¹⁰¹ The Court became more active in the last decade of the twentieth century, when it issued close to 800 judgments.¹⁰² At the end of the twentieth century, when the Court was reorganized to allow individuals to file petitions on their own,¹⁰³ the volume

city-by-the-danube-is-tested-by-a-different-kind-of-flood.html [http://perma.cc/BRY6-RR36] (noting that Passau volunteers welcome refugees; government finds shelter); Philip Oltermann, *Germany Unveils Integration Law for Refugees*, THE GUARDIAN (Apr. 14, 2016), <https://www.theguardian.com/world/2016/apr/14/germany-unveils-integration-law-for-refugees-migrants> [http://perma.cc/ECB5-S7Q9] (noting that after receiving more than one million new arrivals in 2015, the numbers have decreased in 2016; Germany has introduced new legislation and policies to increase employment for refugees and to enhance integration into German society).

¹⁰⁰ European Court of Human Rights, *Survey: Forty Years of Activity, 1959–1998*, 27–38 (Sept. 1998), http://www.echr.coe.int/Documents/Survey_19591998_BIL.pdf [https://perma.cc/5X9W-PJGM].

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 4.

¹⁰³ *Id.* Protocol No. 9 to the European Human Rights Convention permitted the European Human Rights Court to hear claims filed by individuals so long as the Contracting State had consented. ECHR, *supra* note 30, Protocol No. 9. It went into effect in 1995. European Court of Human Rights, *supra* note 100, at 1. Protocol 11 accomplished a wholesale reorganization of the European human rights machinery, abolished the European Human Rights Commission, increased the judges and staff of the European Human Rights Court, and authorized individuals to file suit. *Id.*

of the Court's work increased dramatically.

The European Human Rights Court has become known as an activist court, one that has generally taken an expansive view of the scope of its jurisdiction and competence. Government compliance with adverse rulings is high, and voluminous books and articles detail the Court's history, the content of its rulings, and its significance in the development of human rights law around the world. This Part highlights two aspects of the Court's jurisprudence: (1) its expansion of the geographical scope of its jurisdiction and (2) its insistence that EU asylum law be scrutinized under European human rights standards.

As mentioned above, Article 3 of the European Human Rights Convention prohibits governments from subjecting citizens and residents to inhumane or degrading treatment or punishment.¹⁰⁴ In 1989, the European Human Rights Court interpreted this provision to forbid the UK government's extradition of Jens Soering, a German national, to the United States to stand trial for murdering his girlfriend's parents.¹⁰⁵ The Court concluded that, in light of Soering's age and mental condition, the prison conditions and the lengthy period he might spend on death row constituted inhumane or degrading treatment.¹⁰⁶ Although the UK government itself did not treat Soering cruelly or inhumanely, the Court ruled that Article 3 prevented the United Kingdom from relying on its extradition law in this case because European human rights law also protected European citizens from potentially inhumane treatment in the United States.

Two years later the European Human Rights Court applied this interpretation of Article 3 to Sweden's expulsion of a Chilean asylum seeker.¹⁰⁷ Hector Cruz Varas was a political dissident in Pinochet's Chile who claimed he was active in anti-Pinochet groups in Sweden. The Swedish government denied his claim and deported him to Chile in October 1989,¹⁰⁸ one year after Pinochet had lost a referendum paving the way for democracy to return.¹⁰⁹ Again, the European Human Rights Court examined the

¹⁰⁴ ECHR, *supra* note 30, art. 3.

¹⁰⁵ *Soering v United Kingdom*, 11 EHRR 439, (1989), Judgment of 7 July 1989.

¹⁰⁶ Virginia gave assurances that Soering would not face the death penalty, the UK extradited him, he was convicted of capital murder and sentenced to two life terms in prison.

¹⁰⁷ *Cruz Varas and Others v. Sweden*, *supra* note 33.

¹⁰⁸ *Id.* at para. 33.

¹⁰⁹ Chile lifted the Pinochet dictatorship's state of emergency in 1988 and allowed political exiles to return. A referendum in October 1988 rejected Pinochet's government. A new constitution was adopted in 1989, followed by democratic elections in December 1989. *Id.* at para. 34.

inhumane or degrading treatment that the applicant might face outside of Europe in its analysis of whether Article 3 restrained the actions of a European government.¹¹⁰ After an exhaustive review of the facts and applicable laws, the Court concluded that Sweden's deportation of Cruz Varas had not subjected him to cruel or inhumane treatment upon his return to Chile.¹¹¹ But the Court did not hesitate in examining the circumstances in Chile to ascertain Sweden's obligation under the European Human Rights Convention. As in *Soering*, the *Cruz Varas* judgment effectively added a *non-refoulement* obligation¹¹² to the terms of Article 3, thus expanding the geographical scope of the European human rights law.

In 2012, the *Hirsi Jamaa v. Italy* decision extended the reach of the European Human Rights Convention to the high seas.¹¹³ Roughly 200 Somali and Eritrean asylum seekers had left Libya on small boats heading for safety in Europe.¹¹⁴ Italian patrol boats intercepted the migrants' boats in international waters, loaded the migrants onto Italian military ships, and returned them to Libya, without providing any opportunity for the individuals to seek asylum.¹¹⁵ The situation in Libya was chaotic and dangerous, with no functioning asylum law.¹¹⁶ As a consequence, Italy had breached the prohibition against degrading or inhumane treatment.¹¹⁷ The Court ruled that the extraterritorial effect of the European human rights law not only applies to expulsion decisions made by migration officials in Europe, but also extends

¹¹⁰ After an exhaustive review of the facts and the applicable laws, the Court ultimately ruled that Sweden's expulsion of Cruz Varas had not violated Art. 3. *Id.* at paras. 82, 84.

¹¹¹ *Id.* at para 86.

¹¹² *Refoulement* is the French term for returning refugees to persecution. DAVID A. MARTIN, T. ALEXANDER ALENIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *FORCED MIGRATION LAW AND POLICY* 57, 88 (2d ed. 2013). Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137 (prohibiting states from returning refugees to territories where their lives or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group). The *non-refoulement* obligation set forth by Article 33 is the linchpin of refugee law. *Id.* Other human rights treaties, such as the Convention Against Torture, Dec. 10, 1984, 1468 U.N.T.S. 85, also include an explicit prohibition against *refoulement*. As described in the text above, the jurisprudence of the European Human Rights Court includes a prohibition against returning individuals to countries where they will face threats of torture or inhumane or degrading treatment or punishment.

¹¹³ *Hirsi Jamaa & Others v. Italy*, App. No. 27765/09, Eur. Ct. H.R. (2012).

¹¹⁴ *Id.* at para. 9

¹¹⁵ *Id.* at paras. 10–12.

¹¹⁶ *Id.* at paras. 15–17, 33.

¹¹⁷ *Id.* at paras. 138, 158.

to interceptions made beyond Europe's borders.

During the decades in which its rulings expanded the geographical scope of European human rights law, the European Human Rights Court also developed an expansive jurisprudence concerning the circumstances under which Article 3 requires *non-refoulement* protection for asylum seekers. For example, the Court ruled that the Netherlands could not return an asylum seeker to a "relatively safe" area of Somalia where there was a real risk that the unstable situation would force her to move to unsafe areas of the country.¹¹⁸ Nor could the United Kingdom rely on national security grounds to return a Sikh separatist accused of violence to India, when there was a serious risk that he would face inhumane or degrading treatment or punishment.¹¹⁹ Further, the Court held that Sweden could not return a rejected asylum seeker to Afghanistan due to the inhumane or degrading treatment she would confront based on her decision to divorce her Afghan husband while they were living in Sweden.¹²⁰ Despite the lack of a right to asylum in the European Human Rights Convention, the Court's rulings have protected many asylum seekers and allowed them to remain in Europe.

As the EU common asylum laws gradually took effect during the first decade of the twenty-first century, many disappointed asylum seekers challenged aspects of the EU system by petitioning the European Human Rights Court. At first, the European Human Rights Court was reluctant to condemn the nascent EU asylum arrangements. Not only might the European Human Rights Court have considered it wise to allow new structures time to mature, but the EU court system had mechanisms to challenge its own laws. Deference to the Court of Justice of the European Union (CJEU)¹²¹ appeared a wise course of action in 2009 when the CJEU issued the landmark *Elgafaji* decision expanding asylum to a broader group of refugees than only those who feared persecution.¹²² *Elgafaji v. Staatssecretaris van Justitie* ruled that EU law furnished a judicially enforceable right to asylum in the EU to those who fear serious harm, defined to include indiscriminate violence from armed

¹¹⁸ *Salah Sheekh v. Netherlands*, App. No. 1948/04, Eur. Ct. H.R. paras. 143-149 (2007).

¹¹⁹ *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. (1996).

¹²⁰ *N v. Sweden*, App. No. 23505/09, Eur. Ct. H.R. (2010).

¹²¹ The Court of Justice of the European Union consists of one judge from each EU country, plus 11 Advocates General. It issues binding interpretations of EU law that must be applied in each EU country. *Court of Justice of the European Union (CJEU)*, EUROPEAN UNION, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Oct. 25, 2016) [<http://perma.cc/D68A-6N64>].

¹²² Case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R. I-921..

conflict.¹²³ The CJEU ruling provided greater protection than the European Human Rights Court could have. The Elgafaji family had a right to a renewable residence permit,¹²⁴ not simply a *non-refoulement* order that left them in limbo. The CJEU had checked the government of the Netherlands when it attempted to deny protection to the Elgafaji family, as the European Human Rights Court had checked the government of Sweden when it denied asylum to Cruz Varas.

Despite the positive developments in EU law, such as the *Elgafaji* judgment, human rights challenges continued to mount against the negative elements of the EU asylum system. Litigation challenging the pernicious aspects of the Dublin Regulation grew apace, especially decisions by EU countries to transfer asylum seekers to Greece where they had first entered the EU. The petitioners acknowledged that according to the Dublin Regulation criteria Greece was the EU state responsible for addressing the merits of the asylum claim,¹²⁵ but they argued that the abysmal conditions in Greece ensured that they would suffer cruel and inhumane conditions.¹²⁶ Accordingly, they asked the European Court of Human Rights to rule that their transfers to Greece would violate human rights law. The European Human Rights Court did not rush to rule on the EU Dublin regulation, but the Court indicated it was wary of the Dublin transfers to Greece. During a four-month period in 2008 the Court issued orders in eighty cases, provisionally staying removals from the United Kingdom to Greece while the parties had further time to develop their arguments before the Court.¹²⁷

Despite the large number of emergency stays of Dublin transfer orders, as well as multiple negative reports on the human rights situation of asylum seekers in Greece,¹²⁸ the European Court of Human Rights decided in 2009 that “the presumption must be that Greece will abide by its obligations under [the EU asylum system].”¹²⁹ In this decision, *K.R.S. v. United Kingdom*, the Court also presumed that Greece would abide by the European Human Rights Convention: “Greece, as a Contracting State, has undertaken to abide by its Convention obligations and to secure to everyone within their jurisdiction the

¹²³ *Id.* at para. 43.

¹²⁴ Qualification Directive, Art. 24.

¹²⁵ Dublin III Regulation, *supra* note 46, arts. 7, 13.

¹²⁶ *See, e.g., K.R.S. v. United Kingdom*, App. No. 32733/08, Eur. Ct. H.R. (2008).

¹²⁷ *Id.* at paras. 3-4.

¹²⁸ *Id.* at paras. 11-14 (referring to reports filed by Amnesty International, Norwegian Helsinki Committee, Greek Helsinki Monitor, UNHCR, the Committee against Torture, and others).

¹²⁹ *Id.* at paras. 17-18.

rights and freedoms defined therein, including those guaranteed by Article 3.”¹³⁰ In light of these presumptions, the European Court of Human Rights refused to rule that Dublin Regulation transfers of asylum seekers to Greece violated human rights.

The reprieve for the Dublin Regulation was short-lived, however. Conditions for asylum seekers in Greece did not improve, and UNHCR continued to call on EU governments to halt Dublin transfers to Greece.¹³¹ Two years later, in 2011, the European Court of Human Rights did an about-face and issued the momentous *M.S.S. v. Belgium and Greece* judgment,¹³² ruling that Belgium’s reliance on the EU Dublin Regulation to return an asylum seeker to Greece violated the prohibition against cruel and inhumane treatment.¹³³ Notwithstanding the presumptions that Greece would uphold human rights and European asylum law, the Court could tolerate the abuses no longer. The Court noted that the EU law greatly burdened states on the external borders of the EU, like Greece,¹³⁴ but it emphasized the absolute *non-refoulement* prohibition of Article 3.¹³⁵ After detailing the shocking and inhumane conditions awaiting asylum seekers in Greece—detention in overwhelmingly crowded and unhygienic conditions,¹³⁶ living on the streets for months at a time with ever-present fear of attack or robbery,¹³⁷ the practical inability to receive an asylum hearing,¹³⁸ the infinitesimal chance of a favorable result¹³⁹—the Court concluded that both Greece and Belgium had committed multiple violations of Article 3 and other European human rights provisions.¹⁴⁰ Tellingly, the Court assessed higher damages against Belgium, which had transferred Mr. M.S.S. to Greece, than against Greece.¹⁴¹

The *M.S.S.* decision sent shockwaves through the EU, as a sister institution had publicly condemned the deplorable asylum system in Greece. Since many EU states were poised to rely on the Dublin Regulation to transfer

¹³⁰ *Id.*

¹³¹ UNHCR, UNHCR POSITION ON THE RETURN OF ASYLUM-SEEKERS TO GREECE UNDER THE “DUBLIN REGULATION” (Apr. 15, 2008), <http://www.unhcr.org/482199802.pdf>.

¹³² *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R., para. 255 (2011).

¹³³ *Id.* at para. 424.

¹³⁴ *Id.* at para. 223.

¹³⁵ *Id.*

¹³⁶ *Id.* at paras. 230-33.

¹³⁷ *Id.* at para. 254.

¹³⁸ *Id.* at paras. 300-301.

¹³⁹ *Id.* at para. 302.

¹⁴⁰ *Id.* at para. 424 (3), (5), and (7) [Greece]; para. 424 (10), (12), and (13) [Belgium].

¹⁴¹ *Id.* at para. 411 (24,900 Euros against Belgium); para. 406 (1000 Euros against Greece).

asylum seekers back to Greece, the *M.S.S.* judgment upended their plans. More fundamentally, however, the European Court of Human Rights had sat in judgment on EU legislation, and had publicly proclaimed that it violated human rights.

The immediate aftermath was three-fold. First, EU states stopped transferring asylum seekers to Greece. Second, within several months the CJEU echoed the European Court of Justice. The CJEU ruled in *N.S. v. Secretary of State for the Home Department* that neither Ireland nor the United Kingdom could transfer asylum seekers back to Greece under the Dublin Regulation.¹⁴² Third, asylum seekers threatened by transfer to other EU states with unacceptable conditions relied on *M.S.S.* to challenge their transfers. When state officials rejected their challenges to the Dublin transfer system, individual asylum seekers began litigating these rejections in national courts systems.¹⁴³ Judges in Germany, Italy, the Netherlands, and other EU states recognized that they were bound both by EU asylum law and by European human rights law.¹⁴⁴ A small but steady number of jurists relied on *M.S.S.* to block Dublin transfers to Hungary, Bulgaria, and Italy.¹⁴⁵

In light of the *M.S.S.* judgment, the European Human Rights Court continued to receive petitions challenging Dublin Regulation transfers to other countries. Multiple individuals protested transfers to Italy, another EU border state reeling with large numbers of asylum seekers. In 2013, the European Court rejected three major attacks on Dublin transfers to Italy, each time emphasizing that, in contrast to the situation in Greece, the Italian asylum system was still functioning, despite the defects in accommodations provided to asylum seekers.¹⁴⁶

By 2014, three years after the *M.S.S.* judgment, the European Court of

¹⁴² 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-N.S.

¹⁴³ For example, in 2013 German Administrative Courts in Giessen, Braunschweig, Düsseldorf, and Frankfurt am Main overruled government decisions to transfer asylum seekers to Italy. See, e.g., Verwaltungsgericht [VG] Giessen [Administrative Trial Court] Jan. 24 2013, 2013 OPENJUR 5398 (Ger.), <https://openjur.de/u/601080.html> [<https://perma.cc/9UUE-RMET>].

¹⁴⁴ See, e.g., Verwaltungsgericht [VG] Giessen [Administrative Trial Court], *supra* note 132, para. 19-21 (discussion of application of Dublin Regulation), paras. 23-26 (discussion of application of European Human Rights Convention).

¹⁴⁵ *Id.* For a more detailed examination of these cases, see Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 107-12 (2016).

¹⁴⁶ *Hussein & Others v. Netherlands & Italy*, App. No. 27725/10, Eur. Ct. H.R. (2013); *Abubeker v. Austria & Italy*, App. No. 73874/11, Eur. Ct. H.R. (2013); *Halimi v. Austria & Italy*, App. No. 53852/11, Eur. Ct. H.R. (2013).

Human Rights was dissatisfied with the lack of improvement in the situation for asylum seekers in Italy. In *Sharifi and Others v. Italy and Greece*, the Court ruled that Italian border authorities on the Adriatic Sea frequently violated Article 3 when ferry boats arrived from Greece.¹⁴⁷ When Italian authorities found undocumented individuals on the boats, they immediately placed them in the custody of the ferry boat captains who returned them to Greece without a hearing in Italy.¹⁴⁸ The Court condemned this practice as a human rights violation, warning that it exposed individuals to the risk of *refoulement* from Greece to Afghanistan.¹⁴⁹

More significantly, the European Human Rights Court ruled for a second time that EU asylum legislation violated the prohibition against cruel and inhumane treatment. In *Tarakhel v. Switzerland and Italy*,¹⁵⁰ the Court prohibited Switzerland from relying on the Dublin Regulation to transfer an Afghan family to Italy.¹⁵¹ *Tarakhel* clarified that the inhumanity of Dublin transfers was not confined to cases involving the dismal and desperate conditions in Greece. Rather, the European Human Rights Court reemphasized that EU asylum law can (and has) run afoul of European human rights law. As a consequence, EU states can no longer simply apply EU asylum legislation. Instead, they must examine the common asylum laws through the prism of the prohibition against cruel and inhumane treatment to determine whether their application may result in a violation. *Tarakhel* has conclusively ended the automatic legitimacy accorded to EU law.

As a practical matter, the *Tarakhel* judgment has also had other far-reaching consequences: it has raised the human rights floor. As in *M.S.S.*, the European Human Rights Court maintains focus on the systemic failures of a state's asylum law; but *Tarakhel* also ensures that states with functioning, though seriously impaired, asylum centers and procedures will not escape human rights scrutiny. Despite acknowledging that "the situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment,"¹⁵² the Court still condemned the Italian treatment of asylum seekers.

¹⁴⁷ *Sharifi & Others v. Italy & Greece*, App. No. 16643/09, Eur. Ct. H. R. (2014).

¹⁴⁸ *Id.* at paras. 101-104, 215.

¹⁴⁹ *Id.* at para. 235.

¹⁵⁰ *Tarakhel v. Switzerland & Italy*, 2014-XI Eur. Ct. H.R. (2014).

¹⁵¹ Although Switzerland is not an EU state, it is a party to the European Human Rights Convention and it has entered an agreement adopting the Dublin system of transfers of asylum seekers, *supra* note 67, at n.1, 3.

¹⁵² *Tarakhel v. Switzerland*, *supra* note 150, at 114.

Furthermore, the *Tarakhel* judgment signals a special concern for the human rights vulnerabilities of child asylum seekers. A major element of the *Tarakhel* reasoning was the absence of suitable accommodations in Italy for asylum seekers like the *Tarakhel* parents and their six minor children.¹⁵³ In light of the large numbers of young asylum seekers and the growing flow of unaccompanied youth, the Court's sensitivity to special vulnerabilities and its insistence that human rights law requires an individualized examination of an asylum seeker's circumstances are important bench marks in the ongoing development of European human rights law.

CONCLUSION

At this point, the future of asylum in Europe looks opaque: the British have voted to leave the EU; some of the formerly Communist EU countries continue to protest the relocation of refugees; and the fate of the March 2016 EU-Turkey refugee agreement is questionable, both in terms of its human rights implications and its practical effect. The European Court of Human Rights, however, has been a constant and vigorous defender of the rights of individuals by creating substantial protections for asylum seekers in Europe. Under the Court's vision, European human rights law has more resolutely protected refugees than European asylum law. As its jurisprudence interpreting the prohibition against inhumane and degrading treatment has developed and deepened, the European Court of Human Rights has ensured that asylum seekers in Europe cannot be deported to states where there is a real risk of cruel or inhumane treatment or punishment. With the EU common asylum system in disarray, the European Human Rights Court has stepped in to ensure that the human rights of asylum seekers are protected. European human rights law has assumed primacy in protecting refugees in Europe.

¹⁵³ *Id.* at paras. 64, 66, 122.