

**ASYLUM CRISIS ITALIAN STYLE:
THE DUBLIN REGULATION COLLIDES WITH
EUROPEAN HUMAN RIGHTS LAW**

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ABSTRACT

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 EU Dublin Regulation. Glaring deficiencies in the asylum systems in EU States on the southern and eastern borders encourage asylum seekers to flee the EU States they first enter. In recognition of the dire conditions in some asylum systems, the European Court of Human Rights has forbidden States to rely automatically 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 seriously deficient asylum system. This creates enormous opportunities for satellite litigation and perverse incentives for Member States to respond to the Dublin Regulation proceedings by offering individualized relief to the litigants rather than to improve system-wide deficits. This cumbersome procedure is extremely inefficient and imposes great human costs on individual asylum seekers ensnared in the European system.

A bolder and simpler approach is warranted. 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 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, but very few actual transfers take place. Thus, most of the Dublin process is wasted effort. Of the Dublin transfers that occur, many are between States that send and receive asylum seekers from each other. These States should decide the substance of the applications rather than engage in an elaborate process to swap 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 have an additional profound policy impact on sharing responsibility for the reception of asylum seekers in the European Union.

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INTRODUCTION

Within sight of the island of Lampedusa, fire destroyed the overloaded fishing boat. As people rushed to escape the flames, the boat full of Eritrean refugees capsized. Those sleeping below deck never had a chance. 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 Italian Coast Guard came to the rescue. More than 350 people died on that day in October 2013, but 155 survived to claim asylum in Italy.¹

A small Italian island 70 miles off the Tunisian coast, Lampedusa 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,² a country infamous for its political prisoners and its years-long military conscription.³ In 2014 the numbers skyrocketed: 170,000 asylum seekers crossed the Mediterranean to Italy.⁴ Syrians, Eritreans, and others fleeing repressive regimes

¹ Zed Nelson, *Lampedusa Boat Tragedy: A Survivor's Story*, THE GUARDIAN, 21 Mar 2014.

² Of the 14,753 boat people who landed on Lampedusa in 2013, 9,834 were from Eritrea, *ibid.* More than 170,000 arrived in Italy by sea in 2014; the largest contingents were Eritreans and Syrians. UNHCR, *So Close Yet So Far From Safety* (Oct. 2014), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=54ad53b69&query=italy%20syria%20eritrea>.

³ Nelson, above n 1; U.S. Dep't of State, *Eritrea 2013 Human Rights Report*, <http://www.state.gov/documents/organization/220321.pdf>; Amnesty Int'l, Annual Report: Eritrea 2013 (May 2013), <http://www.amnestyusa.org/research/reports/annual-report-eritrea-2013?page=show>.

⁴ Elisabetta Povoledo, *Migrants in Rome Try to Recover After Ponte Mammolo Camp is Destroyed*, N.Y. TIMES, 15 May 2015.

continued to make the perilous crossing in 2015;⁵ the first quarter saw a fifteen percent increase over 2014.⁶ As more asylum seekers make their way to the Mediterranean, more tragedies occur. A ship overcrowded with migrants and asylum seekers sank off the coast of Libya in April 2015, with 900 human beings locked into the hold and feared dead.⁷ The 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 300 was sinking in the Mediterranean.⁸

Gruesome images flashed around the world, as headlines told the story of the deaths at Europe's door. Matteo Renzi, the Prime Minister of Italy, called for a European summit,⁹ and EU diplomats proposed military operations to destroy ships used by migrant smuggling rings.¹⁰ EU officials proposed a quota system to distribute asylum seekers among the Member States, a proposal opposed by Member States far from the Mediterranean coast where the boats are arriving.¹¹

This is not a new story, but the large-scale humanitarian crisis has shone a spotlight on the increasing dysfunction of the institution of asylum in Europe. Ten years after the launch of the much heralded

⁵ Somini Sengupta, *E.U. Is Prepared to Combat Migrant Smugglers*, *Official Says*, N.Y. TIMES, 11 May 2015.

⁶ Povoledo, above n 4.

⁷ Jim Yardley, *Rising Toll on Migrants Leaves Europe in Crisis; 900 May Be Dead at Sea*, N.Y. TIMES, 20 Apr 2015.

⁸ AFP, *Migrant Boat Disaster: EU Proposes a 10 Point Crisis Plan Following Hundreds of Deaths in the Mediterranean*, News.com.au, <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>.

⁹ AFP/Reuters, *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/>.

¹⁰ EU officials also promised that no refugees intercepted at sea would be sent back against their will. Somini Sengupta, *E.U. Is Prepared to Combat Migrant Smugglers*, *Official Says*, N.Y. TIMES, 11 May 2015.

¹¹ James Kanter, *E.U. Proposes Quota System to Address Migration Crisis*, N.Y. TIMES, 13 May 2015.

Common European Asylum System (CEAS), 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 first enter. In recognition of the inhuman and degrading conditions in some asylum facilities, the European Court of Human Rights (ECHR) has forbidden European States to rely automatically on the Dublin Regulation, the EU mechanism for transferring asylum seekers between Member States; the Court requires national tribunals to afford asylum seekers an opportunity to present evidence of deficient asylum systems in the EU States that they entered. Recent EU legislation has acknowledged the need to improve the Dublin Regulation, and has added greater procedural safeguards to it. Unfortunately, the amended Dublin Regulation, together with the evolving European human rights jurisprudence, has created a more cumbersome approach likely to impose greater human 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 claim, these new developments encourage EU States to devote more attention and effort to ancillary issues. Furthermore, a recent European Human Rights Court judgment has created perverse incentives for Member States to provide individualized relief to litigants whose cases reach the Court rather than to focus on improving system-wide deficiencies in their asylum systems.

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 instantly 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. However, very few actual transfers take place: only one-fifth of the requests result in transfers. Thus, eighty percent of the Dublin process is wasted effort. Furthermore, of the Dublin transfers that do take place, a good portion are between States that send and receive asylum seekers from each other. It would be far more efficient if the States decided the substance of the applications submitted to them, rather than engaging in an elaborate process to swap them for other 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 allow them to decide more quickly which applicants qualify for asylum or other forms of protection and which do not. Curtailing the satellite transfer litigation, with the attendant individualized hearings and appellate review, would save the States time and money. It would also benefit individual asylum seekers, who would more quickly receive decisions on their requests for protection and would remain uncertain about their status for shorter periods of time.

Furthermore, resources redeployed from Dublin hearings and from receiving transferees and reintegrating them into the receiving States' asylum systems could be put to more productive use. 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 the way to create a more equal and more just EU asylum system.

Moreover, suspending the Dublin Regulation could have a profound policy impact on sharing responsibility for the reception of asylum seekers in the European Union. Asylum seekers currently subject to Dublin transfers have almost always traveled from coastal and frontier States of the EU into the interior. 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, share responsibility more broadly within the European Union, and it would be accomplished without imposing a contentious quota system.

Using the Italian asylum system as a case study, this article lays bare the current impasse in the Common European Asylum Policy and underscores the injustice and inefficiencies caused by the Dublin Regulation. I begin with an overview of the Common European Asylum System. I discuss, 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. I then examine the Italian asylum system and the impact on it of the EU asylum law. Here I pay special attention to transfers requested pursuant to the Dublin Regulation and to the accommodations provided to applicants for protection.

I next turn to European human rights law and its *non-refoulement* prohibition, and the recent jurisprudential developments that limit transfers of asylum seekers to European States where the individuals would face a serious risk of inhuman or degrading treatment. I argue that the judgments of the European

Court of Human Rights in *M.S.S. v. Belgium and Greece*¹² and *Tarakhel v. Switzerland*¹³ have fractured the Common European Asylum System by ruling that EU Member States cannot rely on the Dublin Regulation to return asylum seekers to sister EU States with seriously deficient asylum systems. The first of these supranational judicial decisions essentially halted public transfers of asylum seekers to Greece, but it 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, and accordingly interrupted the process of transferring asylum seekers to Italy and other gateway EU States.

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 European Union. I examine a sample of these judicial opinions and also explore the 2013 legislative amendments to the Dublin Regulation and the Reception Conditions Directive. Although there have been improvements, major disparities between the national asylum systems have not abated. This enduring problem came to the fore again in late 2014 in *Tarakhel*, when the European Court of Human Rights concluded that unsatisfactory Italian reception conditions precluded Switzerland from relying on the Dublin Regulation to return asylum seekers to Italy.¹⁴ As a consequence of *M.S.S.* and *Tarakhel*, national courts are under a heightened duty to perform in-depth individualized examinations of the risks that

¹² *M.S.S. v. Belgium and Greece*, European Court of Human Rights, 2011, Application No. 30696/09.

¹³ *Tarakhel v. Switzerland*, European Court of Human Rights, Judgment of 4 November 2014, Application No. 29217/12.

¹⁴ 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. *Tarakhel*, above n 13, para. 121.

asylum seekers may face if transferred to other EU States.

I conclude that the *common* European asylum system is an illusion. Worse, the current CEAS framework guarantees a proliferation of 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 long run, it is crucial to the institution of asylum in Europe that national asylum 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 European Union began, immigration and asylum were matters left to the competence of the Member States.¹⁵ 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.¹⁶ In contrast, the movement of EU citizens between Member States was within the competence of the supranational organization, originally

¹⁵ 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 Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. Over the next five decades the original six Members grew to 28, 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. Prior to the European Economic Community, the European Coal and Steel Community (ECSC) had been founded in 1951; Treaty Establishing the Coal and Steel Community (Treaty of Paris).

¹⁶ The European Court of Justice emphasized the immigration competence of Member States, as opposed to the supranational European Economic Community, in *Case 281/85, Federal Republic of Germany and Others v. Commission of the European Communities*, 1987 E.C.R. 3203.

known as the European Economic Community.¹⁷ As a consequence, EU legislation set forth norms for movement from one EU State to another, while national laws defined who could immigrate from outside the European Union as well as who should qualify for asylum and other forms of humanitarian protection.

By 1999, the European Union had more than doubled in size to encompass 15 States. Furthermore, in the heady post-Cold War era the EU anticipated adding 10 formerly communist States in the near future, more than doubling in size and population.¹⁸ Refugee status and asylum had been major issues in the previous decade, with dissolution of the Soviet Union and the wars in former Yugoslavia sending many individuals to seek safety in various EU Member States.¹⁹ The inconsistencies of those refugee emergencies were fresh, and it was easy to foresee the inefficiencies, duplications, and complexities of having 25 different asylum laws in contiguous territory under harmonized visa policies. It was at this juncture that the European Union issued the Tampere Declaration, committing itself to developing a European asylum law that would be common throughout all Member States.²⁰ The fifteen years since Tampere

¹⁷ The European Economic Community was premised on four fundamental rights that citizens of Member States had with regard to other Member States: the freedom movement of goods, services, capital, and people. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. 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.

¹⁸ Ten 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 Countries*, EUR. UNION, <http://europa.eu/about-eu/countries/member-countries/> (last visited Mar. 10, 2014).

¹⁹ The war in former Yugoslavia displaced more than 500,000 Bosnians into other European countries. UNHCR, *Asylum in Europe: Summer of Sadness*, Refugee Magazine, Issue 101, 1 Sept. 1995, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b543ddd4&query=bosnian%20refugees%20in%20europe>.

²⁰ The Tampere European Council Presidency Conclusions, 15-16 October 1999.

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 designate which Member State should decide particular asylum claims,²¹ describe how asylum seekers should be cared for during the asylum process,²² detail the criteria for who is entitled to legal protection,²³ and set forth procedural rules regulating how the asylum decisions should be made.²⁴ These pillars of the Common European Asylum Policy (CEAS) became law via the EURODAC Regulation, enacted in 2000;²⁵ the Temporary Protection Directive, in 2001;²⁶ the Dublin Regulation, in 2003;²⁷ the Reception Conditions Regulation, also in 2003;²⁸ the Qualification Directive, in 2004;²⁹ and the Asylum Procedures Directive

²¹ Council Regulation (EC) No 343/2003 of 18 February 2003 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 (Dublin II Regulation), OJ L 50 of 25.2.2003.

²² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States (Reception Conditions Directive), OJ L 31 of 6.2.2003.

²³ Council Directive 2004/83/EC of 29 April 2004 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 (Qualification Directive), OJ L 304 of 30.9.2004.

²⁴ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status in the Member States (Procedures Directive), OJ L 326 of 13.12.2005.

²⁵ Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' [*European Dactyloscopy*] for the comparison of fingerprints for the effective application of the Dublin Convention (Eurodac Regulation), OJ L 316 of 15.12.2000.

²⁶ Council Directive 2001/55/EC of 20 July 2001 on 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, OJ L 212 of 7.8.2001 (Temporary Protection Directive). 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, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm.

²⁷ Dublin Regulation, above n 21.

²⁸ Reception Conditions Directive, above n 22.

²⁹ Qualification Directive, above n 23.

in 2005.³⁰ Most pertinent to my 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; I discuss them briefly below in their original versions to provide background for the asylum crisis in Italy. In a later section I highlight some of the important 2013 modifications.

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 if they desire.³¹ The result today: 28 different asylum systems in the EU.³² Each Member State dutifully transposes the EU legislation into its national law, but the local structures and the historical context mold the actual asylum process in that EU State. Moreover, Member States do not always enforce the law they have passed. Asylum seekers' experiences vary so significantly from State to State that, except at a great level of abstraction, it strains credulity to say that the 28 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 12 States.³³ All 12 were members of the EU, but they entered into the treaty separate from and parallel to – but not part of – their EU legal obligations. Later several

³⁰ Procedures Directive, above n 24.

³¹ 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 Jane McAdam, *The European Union Qualification Directive: the Creation of a Subsidiary Protection Regime*, 17 IJRL 461 (2005).

³² The 28 are listed in n 18 above.

³³ Signed in 1990 by Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Denmark, Greece, Ireland, the United Kingdom, Portugal, Spain; the Dublin Convention went into force in Sept. 1997 for the original 12 States, in 2008 for Switzerland, the most recent ratifying State, and at dates in between for the other States. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254) 1.

non-EU States, such as Norway, Iceland, and Switzerland, ratified the treaty.³⁴ 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 that debated which one was responsible for determining the asylum claim. It attempted to set forth criteria that enabled EU States to determine quickly which State is the most appropriate to render an asylum decision on the merits.

In 2003, the European Union incorporated the Dublin system as a core element of the Common European Asylum System.³⁵ The EU legislation, called the Dublin II Regulation in recognition of its origins,³⁶ set forth its premises:

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].³⁷

³⁴ 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, 2001 O.J. (L 112) 16; 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) 1.

³⁵ Dublin Regulation, above n 21, amended by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).

³⁶ Dublin I was the Dublin Convention; thus Dublin II refers to its second iteration, this time as part of EU law, and Dublin III refers to the 2013 revisions.

³⁷ Dublin II, preambular clause (1).

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.³⁸

[T]his system should include . . . a clear and workable method for determining the Member States responsible for the examination of an asylum application.³⁹

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.⁴⁰

The heart of the Dublin II Regulation sets forth criteria for determining which State is responsible for deciding the claim.⁴¹ For example, if the asylum seeker has a valid visa, the Member State that issued the visa is responsible for determining the asylum claim.⁴² If the asylum seeker has a family member who has received a residence permit based on refugee status, the Member State that issued the residence permit is responsible for deciding the asylum application.⁴³ If the asylum seeker is

³⁸ Dublin II, preambular clause (2).

³⁹ Dublin II, preambular clause (3).

⁴⁰ Dublin II, preambular clause (4).

⁴¹ Dublin II, art. 5- 14; Dublin III, art. 7-15.

⁴² Dublin II, art. 9(2); Dublin III, article 12(2).

⁴³ Dublin II, art.; Dublin III, art. 9.

an unaccompanied minor, special rules apply.⁴⁴ 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.⁴⁵ 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.⁴⁶ They can also choose, under what is known as the sovereignty clause, to exercise responsibility for the asylum claim even if not responsible under the Dublin criteria.⁴⁷

Few Member States appear to rely on either the humanitarian or the sovereignty clauses, but many 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; less than one percent involved humanitarian grounds, and roughly 97 percent concerned asylum seekers who had entered without documents.⁴⁸ Similar statistics characterize other States that file many Dublin transfer requests.⁴⁹ This places substantial burdens on the Member States that form the external border of the EU, and, in particular, on Italy and Greece.⁵⁰ Their asylum

⁴⁴ Dublin II, art. 6; Dublin III, art 8.

⁴⁵ Dublin II, art. 13; Dublin III, art. 13(1). There must be evidence or proof, as detailed in the Convention, art. 22(3), that the asylum seeker entered that portion of the EU first. The responsibility of the first country entered ceases after 12 months, art. 13(1); at that time the country where the asylum seeker has been most recently living for 5 or more months becomes responsible, art. 13(2).

⁴⁶ Dublin II, art. 15, the humanitarian clause refers to family reasons or cultural considerations; the asylum seeker must consent.

⁴⁷ Dublin II, art. 3(2).

⁴⁸ Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System*, Migration Policy Institute Europe, March 2015, Table 1, 8.

⁴⁹ *Ibid.*

⁵⁰ Of the 8,149 requests Italy received in 2013 to take charge of asylum seekers located in other States, 71 were based on family reasons, 8 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). *Ibid.*, Table 2, 9.

systems are foundering under their economic crises, inadequate asylum infrastructure, and the surging numbers of claimants. Many asylum seekers prefer to seek asylum elsewhere in the EU, and, as a consequence, many try to evade the Dublin system. They may move surreptitiously in order to avoid contact with authorities and their efforts to take the asylum seekers' fingerprints.

The Dublin II Regulation depends on EURODAC, the EU-wide fingerprint database of asylum seekers and irregular migrants.⁵¹ This system, launched in 2000, records the fingerprints, country of origin, and other personal data of asylum seekers.⁵² By the end of 2012, EURODAC contained fingerprints of more than 2.3 million individuals.⁵³ Member State 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. 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 shipped off to that other EU State. Many asylum seekers are aware of Dublin scheme and want to avoid being sent to States with substandard asylum systems. Accordingly, if they enter the EU through one of the poorer border States, they steer clear of the authorities and try to travel elsewhere before they present their asylum claim. If they encounter police officials 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,⁵⁴ for example, or protest via hunger strikes. If

⁵¹ EURODAC refers to European Dactyloscopy [fingerprint analysis], above n 25.

⁵² The original EURODAC Regulation of 2000, above n 25, became effective Jan. 2003; the recast Regulation, enacted in 2013, with an effective date in July 2015. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013, 2013 O.J. (L 180) 1.

⁵³ Chris Jones, *Eleven Years of Eurodac*, 14 Jan 2014, <<http://www.statewatch.org/analyses/no-235-eurodac.pdf>>.

⁵⁴ Eg, Nelson, above n 1; author's interviews, Initial Reception and First Aid Center (CPSA), Lampedusa, Feb. 2013.

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.

Legislative amendments to both EURODAC and the Dublin II Regulations passed in 2013 and, after a two year transition period, are due to come into effect in 2015. The amended EURODAC Regulation will include more information about asylum seekers as well as about all individuals 14 years or older who are apprehended “in connection with the irregular crossing by land, sea or air of the border of [a] Member State.”⁵⁵ Specifically, States will be required to submit the date on which they decided to examine an asylum application,⁵⁶ the date of the arrival of an individual transferred under the Dublin Regulation,⁵⁷ and the date when all persons subjected to a removal order actually left the territory.⁵⁸ Controversially, this supplemental information as well as the fingerprints and the data originally required for the EURODAC system will be made available to national law enforcement agencies and EUROPOL.⁵⁹

⁵⁵ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013, Art. 14(1), 2013 O.J. (L 180) 1, 11–12.

⁵⁶ *Ibid.*, Art. 10(e).

⁵⁷ *Ibid.*, Art. 10(a) & (b).

⁵⁸ *Ibid.*, Art. 10(c) & (d).

⁵⁹ *Ibid.*, Art. 19(1). National law enforcement agencies may request the supplemental information and fingerprint data only if: i) comparisons with certain databases did not lead to the establishment of the identity of the data subject, and ii) where the following conditions are met: (a) the comparison is necessary for the purpose of the prevention, detection or investigation of terrorist offences or of other serious criminal offences, which means that there is an overriding public security concern which makes the searching of the database proportionate; (b) the comparison is necessary in a specific case (i.e. systematic comparisons shall not be carried out); and (c) there are reasonable grounds to consider that the comparison will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question. Such reasonable grounds exist in particular where there is a substantiated suspicion that the suspect, perpetrator or victim of a terrorist offence or other serious criminal offence falls in a category covered

The revised Dublin Regulation, denominated “Dublin III,” is part of the second phase of the Common European Asylum System.⁶⁰ The European Commission circulated a proposed amendment in 2008 that included greater procedural protections for asylum seekers subject to the Dublin Regulation, such as the right to a personal interview, to receive information about the Dublin process, and to a pre-transfer challenge to a transfer decision. The 2008 Proposed Recast Dublin Regulation also included a mechanism that could trigger temporary suspension of transfers to Member States whose asylum systems were under great pressure.⁶¹ The temporary

by this Regulation. *Ibid.*, Art. 20. Similarly, EUROPOL may request the supplemental information and fingerprint data only if: i) comparisons with fingerprint data stored in any information processing systems that are technically and legally accessible by EUROPOL did not lead to the establishment of the identity of the data subject, and ii) where the following cumulative conditions are met: (a) the comparison is necessary to support and strengthen action by Member States in preventing, detecting or investigating terrorist offences or other serious criminal offences falling under Europol's mandate, which means that there is an overriding public security concern which makes the searching of the database proportionate; (b) the comparison is necessary in a specific case (i.e. systematic comparisons shall not be carried out); and (c) there are reasonable grounds to consider that the comparison will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question. Such reasonable grounds exist in particular where there is a substantiated suspicion that the suspect, perpetrator or victim of a terrorist offence or other serious criminal offence falls in a category covered by this Regulation. *Ibid.*, Art. 21.

⁶⁰ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).

⁶¹ Article 21, 2008 Recast Proposal:

The application of this Regulation may, in certain circumstances, create additional burdens on Member States faced with a particularly urgent situation which places an exceptionally heavy pressure on their reception capacities, asylum system or infrastructure. In such circumstances, it is necessary to lay down an efficient procedure to allow the temporary suspension of transfers towards the Member State concerned and to provide financial assistance, in accordance with existing EU financial instruments. The temporary suspension of Dublin transfers can thus contribute to achieve a higher degree of solidarity towards those Member States facing particular pressures on their asylum systems, due in particular to their geographical or demographic situation.

suspension mechanism, strongly opposed by some Member States, was a major sticking point.⁶² The European Parliament reviewed the Commission's proposal and adopted an alternative text in 2009. There was robust discussion and commentary among Member States, UNHCR, international nongovernmental organizations, academics, and others, but these texts were not 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 European Court of Human Rights and the Court of Justice for the European Union ruled in favor of applicants in 2011. This brought renewed urgency to the 2012 negotiations of the Recast Dublin Regulation (Dublin III). The European Parliament and the European Council agreed on a new text; the European Parliament and the Council enacted the Dublin III Regulation in June 2013,⁶³ with implementation to take place in 2014.⁶⁴ Because Dublin III includes provisions that attempt to cure deficiencies highlighted by the European Court of Human Rights and the Court of Justice of the European Union, I will address its new modifications after discussing the pertinent judicial rulings.

B. Reception Conditions Directive

⁶² State of Play: JHA Council, Nov. 2010: On a number of occasions, ministers voiced serious concerns regarding proposed suspension mechanisms for Dublin transfers in case of particular pressure on the asylum system of a Member State.

⁶³ The European Parliament adopted the Council text on 12 June 2013; final act signed, 26 June 2013; published in official journal, 29 June 2013; entered into force, 1 Jan 2014. The 2003 Dublin II Regulation was repealed when 2013 Dublin III Regulation went into effect.

⁶⁴ Dublin III, art. 49.

The Reception Conditions Directive, first enacted in 2003 and also revised in 2013,⁶⁵ requires all European Union (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.”⁶⁶ The Directive defines material reception conditions to include housing, food and clothing, and a daily expenses allowance.⁶⁷ 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.⁶⁸ The Directive requires States, in furnishing housing and other services, to take into account the 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.”⁶⁹

The Directive also requires that Member States promptly inform asylum seekers of benefits to which they are entitled, of the obligations with which they must comply, and of organizations or individuals who might provide them assistance and information about health care.⁷⁰ The applicants must receive emergency care and treatment for illness.⁷¹ Minor children must receive

⁶⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (recast), to be implemented by 20 July 2015.

⁶⁶ Recast Reception Conditions Directive, above n 65, art. 17.2.

⁶⁷ Recast Reception Conditions Directive, art. 2(g).

⁶⁸ Recast Reception Conditions Directive, art. 13(5), 17(5). Art. 13(5) makes express reference to providing goods via a combination of “in kind” and financial allowances/vouchers; no reference in the latter for a combination.

⁶⁹ Recast Reception Conditions Directive, art. 21.

⁷⁰ Recast Reception Conditions Directive, art. 5(1).

⁷¹ Recast Reception Conditions Directive, art. 19(1).

education under the same conditions as children of citizens of the Member State.⁷² 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.⁷³ 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. A similar two year transition period is allowed for the 2013 revision. As discussed below, even when national legislation has been amended in a timely fashion to include the EU norms, not all of the 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 at all during the pendency of their claims, the EU law mandating government-supplied accommodations for all asylum seekers while they wait for their asylum hearing appears startlingly big-hearted. In fact, the EU approach is at once both generous and utilitarian. The generosity of guaranteeing a “dignified standard of living”⁷⁴ to asylum applicants is part of the effort to assure that asylum seekers receive “comparable living conditions”⁷⁵ in all EU Member States, in order to “limit the secondary movements of applicants influenced by the variety of conditions for their reception.”⁷⁶

⁷² Recast Reception Conditions Directive, art. 14.

⁷³ Recast Reception Conditions Directive, art. 16 (vocational training) and 15 (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, art. 15(2). Once granted, employment permission cannot be withdrawn during the appeals process until the applicant receives notice of the negative appellate decision, art. 15(3).

⁷⁴ Recast Reception Conditions Directive, preambular clause (11).

⁷⁵ Recast Reception Conditions Directive, preambular clause (11).

⁷⁶ Recast Reception Conditions Directive, preambular clause (12).

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. Furthermore, the dismal reception conditions in some EU States – and the utter absence of accommodations in other EU States – have played a key role in the collision of European human rights law with European asylum law.

II. THE ITALIAN ASYLUM SYSTEM

The 155 refugees who survived the capsized and burning boat on the shore of Lampedusa in October 2013 were brought ashore. Their encounter with the Common European Asylum System (CEAS) began in Italy. They were fingerprinted and taken to reception centers for processing. Within six months, however, 153 of the 155 survivors had left Italy to try to start new lives in other European countries.⁷⁷ They didn't wait for their asylum decisions in Italy and they don't want to return there.⁷⁸ Their departures illuminate the crisis in the Italian asylum structures and the dysfunction in the Common European Asylum System.

A. *Historical Context*

Historical context is crucial to assessing the contemporary asylum policy in Italy. Mussolini had punished his opponents by exile, and persecution of political dissidents was a recent memory for those drafting Italy's Constitution in 1947. Mindful of the

⁷⁷ At the one-year anniversary of the Lampedusa tragedy, there was only one asylum seeker from the boat engulfed with flames in Italy, and he was living in an abandoned building in Rome after having been returned to Italy by Swedish asylum authorities. Juliane von Mittelstaedt and Maximilian Popp, 'Aren't We Human Beings?' *One Year After the Lampedusa Refugee Tragedy*, DER SPIEGEL ONLINE, 9 Oct 2014. See also Nelson, above n 1.

⁷⁸ 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.

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:

Foreigners who are, in their own country, denied the actual exercise of those democratic freedoms guaranteed by the Italian Constitution, are entitled to the right of asylum under those conditions provided by law.⁷⁹

The right to asylum is expressly embedded in the constitution and is expansive in scope. Asylum is not limited to those persecuted in their homelands. It extends to all those 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 Constitution of Italy.

In addition to embedding the right of asylum in the Constitution, post-war Italy also took action in the international sphere to protect those forced to flee dictators and autocratic rulers. Italy sent a delegation to the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,⁸⁰ and was one of the first nations to ratify the resulting 1951 Refugee Convention.⁸¹ For decades during the post-war years, Italy was a major way station for refugees on their way to

⁷⁹ Italian Constitution, Art. 10(3).

⁸⁰ UNHCR, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Record of the Tenth Meeting*, 21 Nov 1951, <<http://www.unhcr.org/3ae68cdc4.html>>.

⁸¹ Italy signed the 1951 Convention, Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, on 23 July 1952 and ratified it on 15 Nov 1954. *Convention Relating to the Status of Refugees*, U.N. TREATY COLLECTION, <https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTS&mtsg_no=V~2&chapter=5&Temp=mtsg2&lang=en>.

resettlement in the United States, Australia, Canada, and Israel.⁸²

Nonetheless, during the Cold War the asylum structures within Italy were weak and the legal underpinnings were practically nonexistent. By its terms, the constitutional guarantee of asylum depended on statutory measures, but the Italian parliament has never enacted implementing legislation. Thus, there are no procedures or facilities to furnish content to the constitutional right to asylum.⁸³ Rather, the Italian asylum system has developed in response to the terms of the 1951 Refugee Convention, which protects a substantially smaller category: those with a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.⁸⁴

Furthermore, when it ratified the 1951 Refugee Convention Italy adopted an even narrower right of asylum. Italy opted to limit the refugee definition to those who suffered a well-founded fear of persecution in Europe.⁸⁵ By adopting this geographic reservation, Italy ensured that individuals persecuted in most regions of the world – Africa, Asia, Latin America – had no legal claim to asylum in Italy. Moreover, even refugees from Europe

⁸² Eg. Fred A. Lazin, *Refugee Resettlement and “Freedom of Choice”: The Case of Soviet Jewry* (many Soviet Jews were processed in Rome for resettlement in Israel or the United States), <<http://cis.org/RefugeeResettlement-SovietJewry>>.

⁸³ 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, since it is dedicated to those who receive seek and receive protection pursuant to the 1951 Refugee Convention, Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, and the Common European Asylum System.

⁸⁴ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, Art. 1.A(2).

⁸⁵ As a compromise, the drafters of the 1951 Convention had allowed Contracting States two options; they could limit the scope of the Convention to refugees caused by events occurring in Europe, art. 1.B.(1)(a) or events occurring in Europe or elsewhere, art. 1.B.(1)(b). In 1951 Italy selected the Europe-only option.

had legal claims that were largely theoretical: for the next four decades Italian law contained no procedures to determine who should be recognized as refugees and granted asylum. Finally, in 1990 Italy adopted legislation setting forth a procedure for those claiming asylum.⁸⁶ The legislation also deleted the geographical reservation,⁸⁷ thus expanding the refugee definition in Italy to encompass those fleeing persecution anywhere in the world.

Although Italy was slow in enacting asylum legislation, Italy had been active from the beginning in the process of forging a unified post-war Europe. Italy was one of the six founding members of the European Economic Community, the predecessor to the European Union, in 1960.⁸⁸ Italy was an early participant in the Schengen system to remove internal border controls in Europe.⁸⁹ Italy was one of the initial states to ratify the Dublin Convention.⁹⁰ When EU Member States concluded that migration and asylum were phenomena

⁸⁶ Law 39 of 28 Feb 1990 (Martelli law) [*Legge 28 febbraio 1990 n. 39 (Legge Martelli)*].

⁸⁷ The Martelli law, *ibid.*, incorporated into legislation the provisions of Decree Law No. 416 of 30 Dec 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. Article 1(1) of Decree Law No. 416 withdrew the Europe-only geographical reservation. 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. *Convention Relating to the Status of Refugees*, U.N. TREATY COLLECTION, <https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOLINE&mtsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en>.

⁸⁸ Treaty of Rome, above n 15.

⁸⁹ Five Member States created the Schengen Agreement, 1985, which Italy signed/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, L 239, 22/09/2000, p. 63-68. There are now 26 Members. *Schengen Area*, EUROPEAN COMMISSION, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm>.

⁹⁰ Dublin Convention, above n 33.

best dealt with by an EU-wide approach, Italy supported the Tampere Declaration.

B. Current Asylum System

The Common European Asylum System Regulations and Directives issued between 2000 and 2005 were transposed into Italian law from 2005 through 2008.⁹¹ As the components of the EU asylum legislation entered into force, they had a salutary effect on the asylum regime in Italy by transforming a rudimentary asylum system into one with more elaborate and robust structures. 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 their 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. The initial encounter generally results in fingerprinting and identification, but it does not include a discussion of the substance of the asylum claim. Asylum seekers then are scheduled for future appointments at the Questura, when a more formal inquiry and registration will take place. Due to the shortage of personnel, asylum seekers may report to the Questura office multiple times over several months before a Questura employee is available to record the details of the asylum seeker's claim. 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.⁹² The

⁹¹ Under EU law, regulations become effective immediately in Member States, whereas directives must be adopted as law in Member States by the national legislatures. 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.

⁹² 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. It is

asylum seeker also writes a short statement of the asylum claim in his or her native language to supplement the Questura's summary of the applicant's responses.

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. In theory, the Territorial Commission will interview the asylum seekers within 30 days, but in reality asylum seekers wait several months.⁹³ The Territorial Commissions, the administrative decisionmakers in the Italian asylum process, receive evidence, interview the applicants, and issue written decisions on the merits of each case. They can grant three alternative forms of protection: refugee status,⁹⁴ subsidiary protection status,⁹⁵ or a humanitarian residence permit.⁹⁶

Until late 2014 there were 10 Territorial Commissions and subcommissions, each responsible for the claims filed by asylum seekers living within a prescribed geographical area.⁹⁷ The massive increase in asylum seekers led the government to authorize the establishment of 10 additional Territorial Commissions, with a possibility of supplementary sub-commissions, if

commonly called the *verbale*. Maria de Donato, *Country Report: Italy*, January 2015, at 17, Asylum Information Database, <<http://www.asylumineurope.org/reports/country/italy>>.

⁹³ *Country Report*, above n 92, 16. In major cities, such as Rome, this portion of the process can take up to 10 months, *ibid.*, 20.

⁹⁴ Refugee status is defined in the Qualification Directive, above n 23; in Italy this entails a 5 year residence permit. Legislative Decree No. 18/2014 on Implementation of Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁹⁵ Subsidiary protection status is defined in the Qualification Directive, above n 23; Italian law, which used to provide a 3 year residence permit, has now changed the term to 5 years, the same as accorded refugees, Legislative Decree No. 18/2014.

⁹⁶ Legislative Decree 286 of 1998, art. 6(10); *Country Report*, above n 92, 21.

⁹⁷ *Country Report*, above n 92, 20.

needed.⁹⁸ Each Commission has four members: an official from the municipality where the Commission meets, an official of the national police, a staff member from the office of the UN High Commissioner for Refugees (UNHCR), and a Questura officer, who serves as the President of the Commission.⁹⁹ The Territorial Commission interviews each asylum applicant in person, with translators paid for by the Ministry of Interior, when necessary.¹⁰⁰ Applicants may bring a lawyer, but most don't.¹⁰¹ Typically, a single member of the Commission does the interview,¹⁰² and then drafts a recommended decision, which all members of the Commission discuss and vote on.¹⁰³ The asylum claimant receives a written decision explaining the rationale and the result.¹⁰⁴

Asylum seekers have the right to seek judicial review of negative decisions. There is a 30-day deadline to file appeals to the Civil Court,¹⁰⁵ a court of general jurisdiction, where one judge will review the file. The appeal suspends government expulsion orders.¹⁰⁶ Applicants can appeal negative judicial decisions to the Appellate Court, which sits in panels of three. Ultimately, they can appeal negative appellate decisions

⁹⁸ Law Decree No. 119/2014, art. 5.

⁹⁹ *Country Report*, above n 92, 20.

¹⁰⁰ *Country Report*, above n 92, 23.

¹⁰¹ *Country Report*, above n 92, 25.

¹⁰² Multiple interviews may take place simultaneously in the same room. Author's interview with Territorial Commission, Gorizia, 7 May 2013, and Territorial Commission, Milan, 30 May 2013.

¹⁰³ The decision is by majority vote; in the case of a tie, the President casts the deciding vote, *ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Legislative Decree No. 25/2008, art. 35, as modified by Legislative Decree No. 150/2011. Asylum applicants whose claims were rejected as "manifestly unfounded" have 15 days to appeal, as do certain others. *Country Report*, above n 92, 22.

¹⁰⁶ 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*, above n 92, 22.

to the Supreme Court.¹⁰⁷ The administrative process before the Territorial Commissions generally takes far longer to resolve than the 30-day goal; the subsequent judicial review, as it occurs within the general civil court system, can be unduly lengthy.¹⁰⁸

Pursuant to the EU Qualification Directive, Italy has embraced both subsidiary protection status and refugee status. Until 2014 applicants granted subsidiary protection receive renewable three-year residence permits; now they receive the same renewable five-year permits as those granted refugee status.¹⁰⁹ 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.¹¹⁰ Italy appears to grant protection to a greater percentage of asylum applicants than many other EU Member States. Frequently, Italy grants more than 50 per cent of the applications for protection. In 2012, for example, 2,000 received refugee status, 5,000 received subsidiary protection status, and 15,500 received humanitarian residence permits. In 2013, 3,000 received refugee status, 5,500 received subsidiary protection status, and 5,700 received humanitarian residence permits.¹¹¹ Statistics, of course, do not assure that the law is applied appropriately. Whether some of the individuals granted humanitarian residence or subsidiary protection status should instead have qualified as refugees is an unanswered question.

¹⁰⁷ *Country Report*, above n 92, 22-23.

¹⁰⁸ Legislative Decree No. 18/2014.

¹⁰⁹ Legislative Decree No. 18/2014.

¹¹⁰ Website of Italian Civil Protection Department - Presidency of the Council of Ministers, <http://www.protezionecivile.gov.it/jcms/en/che_cose.wp?contentId=APP26737>.

¹¹¹ In 2012, 2,050 received refugee status, 4,495 received subsidiary protection status, and 15,485 received humanitarian residence permits. In 2013, 3,080 received refugee status, 5,565 received subsidiary protection status, and 5,750 received humanitarian residence permits. Eurostat, First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded) [migr_asydcfstaj], extracted on 30 Nov 2014.

Nonetheless, the proportion of positive decisions by the Territorial Commissions is large. Counting the various forms of protection together, asylum applicants were successful in roughly 80 per cent of the decisions issued by Italian authorities in 2012 and 60 per cent in 2013.¹¹² This is a much higher percentage than received protection in decisions reached in 2013 in France (17%), Germany (26%) or Belgium (29%).¹¹³

Several other aspects of the Italian asylum system bear mention. Detention is rarely employed.¹¹⁴ Only those who do not request asylum until after they have received an expulsion order are detained.¹¹⁵ Furthermore, the Italian government has a liberal *non-refoulement* policy. It does not send individuals with expulsion orders back to Afghanistan, Iraq, Pakistan, Somalia, and Sudan.¹¹⁶

1. Dublin Regulation Transfers

When the Questura staff takes fingerprints of asylum seekers, they forward the fingerprints to EURODAC, the EU-wide asylum claimant database. If the EURODAC system already contains the fingerprints, this means the asylum seeker has previously been fingerprinted by another EU State. That other EU State may bear the responsibility for assessing whether the claimant is eligible for asylum, so the case is diverted from the normal asylum procedure to the Dublin Unit, an office within the Ministry of the Interior. This group

¹¹² This constituted an 80% success rate for the 27,290 decisions issued by Italian authorities in 2012, and a 61% success rate for the 23,565 decisions issued in 2013. Eurostat, First instance decisions on applications by citizenship, age and sex. Annual aggregated data (rounded) [migr_asydcfsta], extracted on 30 Nov 2014.

¹¹³ Eurostat, First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded) [migr_asydcfsta], extracted on 30 November 2014.

¹¹⁴ Interview, Christopher Hein, Director, Italian Council on Refugees (CIR), 28 Nov 2012.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

examines the case in light of the criteria set forth in the Dublin Regulation to see if the asylum application should be decided elsewhere. 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 shall be responsible for the asylum claim.¹¹⁷

Under the Dublin II Regulation, the asylum seeker does not have a hearing.¹¹⁸ The Dublin Unit considers the fingerprint records and the information about travel route and other details that the asylum seeker may have provided the Questura staff during earlier encounters. Based on this information, the Dublin Unit decides whether Italy or another EU Member State is responsible for evaluating the asylum claim. If the latter, the Dublin Unit issues an order transferring the asylum seeker to the other EU State. Once such an order is issued, the Italian asylum system no longer considers the merits of the case. At this point, the asylum seeker can appeal the transfer order in the Italian Administrative Courts, which have general jurisdiction over claims challenging government action.

In 2011, the most recent year for which statistics are available, Italy requested other EU States, primarily Greece and Malta, to shoulder responsibility for 1,275 asylum applicants.¹¹⁹ The other States agreed to assume responsibility for 196 cases, roughly 15 per cent of the requests.¹²⁰ Italy, however, only transferred 14 individuals, or 1 per cent, of the asylum seekers Italy

¹¹⁷ Dublin II, art. 10(1); Dublin III, art. 13.

¹¹⁸ The procedure described in the text has been modified by the Dublin III Regulation, which requires a personal interview in many instances before an asylum seeker may be transferred to another EU State. Dublin III, EU Regulation No. 604/2013 of 26 June 2013, art. 5.

¹¹⁹ European Council on Refugees and Exiles, *“Dublin II Regulation: National Report”: European network for technical cooperation on the application of the Dublin II Regulation - Italy*, 19 December 2012, at 21, <<http://www.refworld.org/docid/514054492.html>>. Italy wished to send 210 asylum seekers to Greece, 154 to Malta, 115 to Norway, and 101 to the UK.

¹²⁰ *Dublin II Regulation: National Report*, above n 119, 22.

sought to send elsewhere.¹²¹ This minuscule result was due to various delays and other procedural errors by the Dublin Unit, which led to 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 place within the 6 month period mandated by the Dublin Regulation.¹²² 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.¹²³ The Dublin Unit has not officially suspended transfers to Greece, despite the *M.S.S.* and *N.S.* judgments.¹²⁴ It has, however approved few such transfers, and many of those approved have been overturned by the Italian Administrative Courts.¹²⁵

In addition to determining whether to transfer asylum seekers *from* Italy, the Dublin Unit is responsible for replying to requests from other countries that want to send asylum seekers back *to* Italy. Indeed, most of the Dublin Unit's work concerns responding to requests, because for purposes of the Common European Asylum System Italy is primarily a Dublin transfer *receiving* State. For example, in 2011 Italy received 13,715 requests to take responsibility for determining the merits of asylum claims filed in other European States.¹²⁶ This is more than 10 times as many requests as Italy presented to other States, which gives some sense of the

¹²¹ *Ibid.*, 21.

¹²² *Ibid.*, 22-23. Regional Administrative Tribunal of Lazio Case # 5791/2010 (referring to Art. 20(2) of Dublin II).

¹²³ Italian judges were suspending transfers even pre-*M.S.S.* based on the lack of implementation of EU law in Greece. *Ibid.*, 25.

¹²⁴ *Ibid.*, 24.

¹²⁵ The Dublin Unit requested that Greece take responsibility for 210 cases in 2011; it appears that 2 of the 210 cases resulted in transfers. *Ibid.*, 24-25. See the Regional Administrative Court of Lazio, judgment # 1551/2012, of Feb. 15, 2012.

¹²⁶ *Dublin II Regulation: National Report*, above n 119, 24-5. Recently, Italy has opened several temporary centers to house those returned under the Dublin Regulation. They can shelter 450 individuals on a temporary basis; the majority of places are reserved for vulnerable persons. *Country Report*, n 92, 59.

disproportionate burden imposed on Italy by the Dublin Regulation. The majority of the Dublin requests came from Switzerland, Germany, and Sweden.¹²⁷

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, and this is the justification for almost all of the Dublin transfer requests.¹²⁸ The not so hidden secret is that 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 or Spanish or English, is more widely used elsewhere in the world. They fear harsh conditions in the Italian asylum centers; they are alarmed at the high unemployment rate of Italian citizens; they worry that there is not chance that they will have a decent life in Italy.

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 flowered in 2011. Their number of arrivals by boat exceeded 42,000 in 2013, and close to 170,000 in 2014.¹²⁹ As these asylum seekers, like the Lampedusa survivors, leave Italy and file applications elsewhere, they often face the Dublin Regulation. Now many of them contend that European human rights law protects them from being returned to Italy. They point to

¹²⁷ Switzerland made 5,806 requests; Germany made 2,005, and Sweden 1446. *Dublin II Regulation: National Report*, above n 119, at 21.

¹²⁸ Italy, along with Greece, Spain, and Malta, form the southern border of the European Union. France, Croatia, and Slovenia can also be said to form the southern EU border, but they are much more distant from Africa and the Middle East.

¹²⁹ Eurostat, <<http://ec.europa.eu/eurostat/documents/4168041/6742650/KS-QA-15-003-EN-N.pdf/b7786ec9-1ad6-4720-8a1d-430fcfc55018>>.

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 both at the beginning and the end of the Italian procedure; in some instances it can also occur while the asylum process is underway. 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 also occurring elsewhere within the Common European Asylum System. Italy transposed the terms of the EU Reception Conditions Directive into Italian law in 2005 by adopting standards that correspond to the EU measures.¹³⁰ Italy, however, has not translated the law into reality, nor has it taken action to incorporate the 2013 revision of the EU Reception Conditions Directive into national legislation.¹³¹ In the ten years since the Italian reception conditions law 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. They have been literally homeless, reduced to begging for a place to sleep and foraging for food.

There are several components of 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

¹³⁰ Legislative Decree No. 140/2005.

¹³¹ As of January 2015 the Italian government reported it was considering measures to implement the 2013 revisions of the Reception Conditions Directive and the Procedures Directive, but no draft texts had been released. *Country Report*, above n 92, 13.

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 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 Common European Asylum System.

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 Common European Asylum System. The Directive requires Member States to make reception conditions available to asylum applicants "when they make their application for asylum."¹³² The Italian practice treats the *verbalizzazione* interview with the Questura, one step in the bureaucratic procedure, as the point at which the individual "makes an application for asylum." The scheduling of the *verbalizzazione* is totally up to 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

¹³² Recast Reception Conditions Directive, art. 13(1).

therefore denies them the protections mandated by the Common European Asylum System.¹³³

The Italian practice is an illogical and illegitimate interpretation of the Reception Conditions Directive. Turning first to the text, Article 3 states that the Directive applies to those who “make an application for asylum at the border or in the territory.”¹³⁴ Although the phrase “make an application” is not expressly 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 staffs. 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. There is no need to interpret the text to refer only to elaborate, formal procedures in which the substance of asylum claims are fully amplified.

Similarly, if asylum seekers do not speak to a border guard but rather encounter Italian authorities for the first time at a Questura office within Italy, Article 3’s “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

¹³³ 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. Interview, Christopher Hein, Director, Italian Council on Refugees (CIR), 28 Nov 2012. Officials at the airport give the returned asylum seeker a paper telling them the Questura to which they should report. In recent years Italy has opened a few temporary shelters for Dublin returnees, *Country Report*, above n 92, 59, but frequently they are not eligible for accommodations in the reception facilities, *ibid.*, 29-30.

¹³⁴ Recast Reception Conditions Directive, art. 3(1).

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 have permission in order to enter and remain within its territory. EU law authorizes all EU Member States to move freely within the EU. Noncitizens with entry visas also have permission to enter, as do individuals from States that have special entry agreements with Italy. But noncitizens who lack visas or other special permission to enter and remain in Italy are barred – 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. The Questura officials typically issue them temporary residence permission and then schedule them to come back to for the *verbalizzazione* interview. If the Questura did not think they were asylum seekers, the Questura would lack grounds for granting them permission to remain in Italy. Accordingly, apart from those who tell a border guard they want asylum, individuals should be considered to have made an application for asylum by their first visit to the Questura when they obtain both temporary residence and a subsequent appointment with the Questura.

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.¹³⁵ States must do this within three days after an application is “lodged.”¹³⁶ This requirement ensures that asylum

¹³⁵ *Ibid.*, art. 6(1).

¹³⁶ *Ibid.*

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 15 days of lodging their asylum claim of the benefits and obligations related to their reception as asylum seekers.¹³⁷ States must furnish information on organizations that may provide assistance to asylum seekers concerning food and shelter and health and other related services.¹³⁸ In fact, the Italian practice is to distribute leaflets with this type of information long before the *verbalizzazione* interview.¹³⁹ It would defy common sense to think that these EU obligations do not come into play until 15 days *after* several weeks of waiting for the *verbalizzazione* 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 orders Member States to allow asylum seekers to move freely within the territory or within an area assigned by the Member State.¹⁴⁰ Under the Italian interpretation of “make an application for asylum,” the Directive would not allow Italy to limit individuals’ movements to an assigned area in the weeks or months before the *verbalizzazione* interview, because they are not yet asylum seekers no

¹³⁷ *Ibid.*, art. 5(1).

¹³⁸ *Ibid.*

¹³⁹ *Country Report*, above n 92, 36.

¹⁴⁰ Recast Reception Conditions Directive, art. 7(1).

matter what they requested from officials at the border. In contrast, the Italian understanding of the Directive would authorize the authorities only to regulate the geographical locations of individuals once the *verbalizzazione* interview had taken place.

In addition to the text and structure of the Reception Conditions Directive, the policy behind the EU asylum law renders the Italian practice unsupportable. 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.”¹⁴¹ Those forced to seek protection within Italy report to the Questura, return on the dates scheduled, and frequently are re-scheduled 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.

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. If Member States can refrain from acknowledging that individuals have lodged asylum claims until late in the process, Member States can artificially shorten the time period during which they must furnish food and 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,”¹⁴² Member States would simply need to declare that asylum seekers only “make an application for asylum” when they provide evidence at the

¹⁴¹ *Ibid.*, preambular clause (2).

¹⁴² *Ibid.*, art. 13(1).

hearing on the merits of their asylum claim. Then States would then be 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.

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 and 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; 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 places 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, almost 16,000 in 2012, 42,000 in 2013, and 170,000 in 2014. In 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 can shelter 20,000 asylum seekers.¹⁴³ In addition, by January 2015 an emergency shelter system established by local authorities in response to the large numbers arriving by sea provided housing to 35,000.¹⁴⁴ Clearly, the institutional capacity is far below the necessary level.

Aside from the sheer 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 Aid Centers (CPSA),¹⁴⁵ Accommodation Centers for Asylum Seekers (CARA),¹⁴⁶ Short-term Accommodation Centers (CDA),¹⁴⁷ and Centers for the Protection of Refugees and Asylum Seekers (SPRAR).¹⁴⁸ In theory, asylum seekers spend

¹⁴³ *Country Report*, above n 92, 12.

¹⁴⁴ *Country Report*, above n 92, 12. It should be noted that during the 2011 Arab spring, Italy received three times as many asylum seekers as in the prior year. Italian authorities funded a large number of emergency shelters, but did not expand the reception system to keep up with the changing reality. Instead, the government created an ad hoc plan that expired when that crisis ended, apparently hoping that large-scale emergencies would not reappear in the future.

¹⁴⁵ Centers for First Aid and Assistance [*Centri di Primo Soccorso ed Assistenza*] (CPSA) are located near the major landing sites for boat arrivals. European Migration Network, *Focused Study: The Organization of Reception Facilities for Asylum Seekers in Different Member States*, 2-3, <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>.

¹⁴⁶ Centers for Reception of 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 30 days while waiting for access to the formal administrative asylum procedure. *EMN Focused Study*, n 145, 2-3.

¹⁴⁷ The Reception Centers [*Centri di Accoglienza*] (CDA) were established for irregular migrants, not specifically for asylum seekers, but asylum seekers sometimes receive accommodations. *Ibid.*

¹⁴⁸ 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 concerning amendments on immigration and asylum, provides publicly funded shelters sponsored by local authorities and nonprofits organizations. Presidential Decree No. 303/2004 provides for a variety of

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 35 days while their identities are checked. Afterwards, they transfer to the SPRAR centers, where they spend 6 months.¹⁴⁹ 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/CDA Centers,¹⁵⁰ were built as temporary processing centers through which substantial numbers would pass during a short time. Because they were envisioned as temporary way stations, they are not equipped with education, health, and other services that help individuals respond to their precarious situations. Further, they tend to be large institutions that house up to 2,000 individuals and are isolated from the local community.¹⁵¹ In contrast, the 174 SPRAR Centers are much smaller, are jointly run with municipalities and local groups, and provide multiple support services for the residents.¹⁵²

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 7,800 in the CARA/CDA centers, and until recently approximately 3,000 in the SPRAR system.¹⁵³ On the face of it, this did not make sense. How would asylum seekers

assistance and integration services. These are smaller shelters designed for longer stays. *EMN Focused Study*, above n 145, 1.

¹⁴⁹ *EMN Focused Study*, above n 145, 3, n 1 discusses timing at the different centers.

¹⁵⁰ *Country Report*, above n 92, 58.

¹⁵¹ *EMN Focused Study*, above n 145, 1; *Country Report*, above n 92, 55.

¹⁵² *EMN Focused Study*, above n 145, 1.

¹⁵³ 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. *Country Report*, above n 92, 12, 53.

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 30-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. The inappropriateness of the setting was compounded by the length of the stay. Many asylum seekers remained in the CARA Centers far longer than the 35 day maximum,¹⁵⁴ due to lack of capacity in the SPRAR facilities. Stays of six months or longer in the CARA Centers were routine,¹⁵⁵ 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.¹⁵⁶

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.¹⁵⁷ Several are huge facilities. For example, 3,000 asylum seekers can be housed in the CARA Center in Mineo in Sicily and up to 2,000 in the CARA Center Crotona in Calabria in southern Italy.¹⁵⁸ This is essentially a large warehouse of foreigners, far

¹⁵⁴ Legislative Decree 25/2008, art. 20: 20 days maximum if no documents; 35 if false documents.

¹⁵⁵ *Country Report*, above n 92, 59. Legislative Decree 140/2005, art. 6, permits extended stays if no support for asylum seekers and no accommodations in SPRAR.

¹⁵⁶ *Country Report*, above n 92, 12, 53.

¹⁵⁷ *Country Report*, above n 92, 58.

¹⁵⁸ *Country Report*, above n 92, 63.

from home, unschooled in Italian, and vulnerable to violence and crime. There have been reports of poor sanitary conditions, with only three toilets for 100 individuals, of no laundry facilities other than the showers, of no heat, of payment requested to receive a pillow or a blanket.¹⁵⁹

Some asylum seekers are never assigned to a shelter and others leave shelters due to the dehumanizing conditions.¹⁶⁰ Italian law provides that asylum seekers who are not placed in CARA or SPRAR centers should receive a financial allowance for living expenses.¹⁶¹ Again, the reality diverges from theory. Asylum seekers who do not find accommodations in the CARA or SPRAR centers 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.¹⁶² 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.¹⁶³

Italy has struggled to respond to the large numbers of asylum seekers who have arrived during the past decade. Specific crises have elicited ad hoc responses. This has resulted in overlapping and uncoordinated systems to shelter asylum seekers. The lack of long-term planning and the lack of a coordinated and rational plan for accommodating asylum seekers have exacerbated the

¹⁵⁹ *Country Report*, above n 92, 63; also see discussion in *Verwaltungsgericht Braunschweig, Urteil vom 21 Feb 2013, 2A 126/11, 5*.

¹⁶⁰ Eg, *Verwaltungsgericht Braunschweig*, above n 159, 5; *Tarakhel v. Switzerland*, European Court of Human Rights, Judgment of 4 November 2014, Application No. 29217/12, above n 13.

¹⁶¹ Legislative Decree 140/2005, Art. 6(7). The first payment of the allowance totals Euro 557.80 for the first 20 days; the second payment amounts to Euro 418.35.

¹⁶² Elisabetta Povoledo, *Palace of Squatters is a Symbol of Refugee Crisis*, N.Y. TIMES, 14 June 2014; also Povoledo, *Migrants in Rome*, above n 4.

¹⁶³ Interview, Christopher Hein, above n 114; author's interviews, St. Paul Outside the Walls, Rome, January 2013.

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 may 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.

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; are 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. Once the Italian asylum process 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 this group lies behind the idea that Member States must provide decent reception conditions for asylum seekers.

But that's the rub. 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.

Again, it is a cramped reading of the Reception Conditions Directive that 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.”¹⁶⁴ 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. Accordingly, they can no longer claim a right to adequate reception conditions. There is a certain symmetry in the Italian interpretations of the Reception Conditions Directive. The Italian authorities assign individuals to a pre-asylum limbo between the time they arrive in Italy and the date their formal *verbalizzazione* interview occurs. At the end of the process, they remove from the system those who have successfully pressed their claims for protection under EU law. Their right to accommodations evaporates when they receive a positive decision on their application.

A literal reading of the text may support the Italian government’s interpretation that the scope of the Reception Conditions Directive extends only to applicants with pending claims and not to applicants whose claims have been decided. To adopt such a limiting view of the Directive is illogical, however, and contrary to the development of a common European asylum policy. 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 granting them protection in Italy. Their rights under EU and international law, now that they have been acknowledged by the authorities, deserve at least as much support as provided earlier.

Furthermore, it cannot possibly make sense to increase the vulnerability and heighten the challenges to

¹⁶⁴ Article 2(b), 2013 Recast Reception Conditions Directive, art. 2(b); 2003 Reception Conditions Directive, art. 2(c).

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 casts doubt on the EU's stated commitment to "absolute respect of the right to seek asylum."¹⁶⁵

Moreover, it is self-defeating. Refugees and others granted protection will be able to become self-supporting and to contribute to Italian society if they obtain the basic necessities and can participate in the social structures of Italian life. They need some avenues through which they can do so. Granting them 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 logical approach would be to provide 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 of the Italian centers open to asylum seekers will, in the end, assist refugees to support themselves and become part of the fabric of life in Italy.

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 by looking to 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,¹⁶⁶ social security,¹⁶⁷ labor protection,¹⁶⁸ and public education.¹⁶⁹ With regard to

¹⁶⁵ Tampere European Council Presidency Conclusions, 15 & 16 October 1999, para. 13.

¹⁶⁶ 1951 Convention, above n 81, art. 23.

¹⁶⁷ *Ibid.*, art. 24.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, art. 22.

employment,¹⁷⁰ self-employment,¹⁷¹ practicing a profession,¹⁷² and access to housing,¹⁷³ Contracting States must treat refugees in the most generous ways that they treat noncitizens. Italy argues that refugees have the same rights as Italian citizens. They can apply for jobs and try to rent apartments and go grocery shopping to feed themselves. 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. In contemporary times the applicants for protection tend to be new arrivals, not members of communities that have long established footholds in Italy. The new arrivals generally do not speak Italian fluently, and were not educated in Italy. They lack the family and neighborhood networks that Italian citizens generally have. Raised in different cultures with different expectations, they lack the training and cultural fluency that the native-born possess. 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 cynical in the extreme.

Most fundamentally, Italy’s view that successful applicants lose the protections mandated by the Reception Conditions Directive totally undermines the Common European Asylum System. 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.”¹⁷⁴ When Italian authorities decide that the applicants that “justifiably” sought access to Italy no longer fall within the scope of the Common European Asylum System, their actions make the right to

¹⁷⁰ *Ibid.*, art. 17.

¹⁷¹ *Ibid.*, art. 18.

¹⁷² *Ibid.*, art. 19.

¹⁷³ *Ibid.*, art. 21.

¹⁷⁴ Tampere Declaration, introductory para. 2 and para. 3.

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 substantial 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, or a few, installs a dramatically less desirable support framework for those granted asylum than the other Member States, this will reduce the numbers of individuals who want to be there. 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, of course, 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 their judicial systems will 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. 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 that the Reception Conditions Directive applies only to asylum seekers and provides no assurances to those granted protection, then the European Union must amend the Common European Asylum System. A common system cannot exist if the end results are so disparate – homelessness for those granted refugee status in one EU

State and state-provided accommodations in another. This will fuel destabilizing secondary movements. And 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.¹⁷⁵

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

A. *The Non-refoulement Norm*

Almost 50 European States, including all 28 EU Member States, have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁷⁶ 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.¹⁷⁷

The European Court of Human Rights has interpreted this provision to oblige State Parties to refrain from returning individuals to countries where they face a real risk of torture or inhuman or degrading treatment.¹⁷⁸ The treaty thus has extraterritorial effect: rejected Chilean asylum seekers in Sweden fell within ECHR jurisdiction when they challenge Sweden's decision

¹⁷⁵ *Verwaltungsgericht Giessen Urteil vom 24 Januar 2013*, Nr 6 K 1329/12.GI.A; see discussion in text accompanying n 225-38.

¹⁷⁶ 213 UNTS 222, European TS No. 5. The European Human Rights Convention was signed on November 4, 1950, came into force on September 3, 1953, has been expanded, modified by 17 Protocols. There are currently 47 State Parties to the convention. COUNCIL EUR., *European Convention on Human Rights*, <<http://human-rights-convention.org/>>.

¹⁷⁷ ECHR, Article 3.

¹⁷⁸ *Soering v. United Kingdom*, Judgment of 7 July 1989.

to return them to their homeland.¹⁷⁹ Somali asylum seekers, too, 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.¹⁸⁰

In addition to the broad reach of the 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. European human rights law forbids the return of anyone – not just refugees – to a State where there are serious risks of inhuman or degrading treatment – not just risks to their lives or freedom. Consequently, asylum seekers in Europe have sometimes been able to obtain relief under the European Human Rights Convention that they might not have been eligible for under refugee law principles. This has led to a rich and varied jurisprudence to which rejected asylum seekers in Europe frequently turn. It is important to note, however, that European human rights law and European asylum law form parallel systems with different remedies. The European Human Rights Court can forbid deportation, which will yield permission to stay in Europe while the inhuman and degrading conditions remain in the homeland. Only the asylum system, however, can determine whether an individual satisfies the refugee criteria and is entitled to a renewable residence permit and the other legal protections guaranteed by EU law to those in need of international protection.

After the Common European Asylum System came into effect, asylum seekers in Europe began to rely on European human rights law to challenge elements of the

¹⁷⁹ *Cruz Varas & others v. Sweden*, Judgment of 20 March 1991.

¹⁸⁰ *Salah Sheekh v. Netherlands*, Judgment of 11 January 2007.

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 its premise that all EU Member States are safe countries for asylum seekers was faulty. 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 as a consequence would send asylum seekers to countries where they faced persecution, torture, inhuman treatment, or worse. 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 EU. Both of these assertions were present in the case filed by an Afghan asylum seeker who protested the Belgian authorities' reliance on the CEAS in sending him back to Greece. In the landmark *M.S.S. v. Belgium and Greece* judgment in 2011, the European Human Rights Court ruled that Greece was not a safe country and that Belgium could not apply the Dublin Regulation to send an asylum seeker to Greece. Within one year, the Court of Justice of the European Union came to a similar conclusion. These two opinions seriously impaired the Dublin Regulation, one of the structures that undergird the Common European Asylum System. Together, they foreshadowed *Tarakhel v. Switzerland*, the 2014 judgment that has thrown the functioning of the CEAS into doubt.¹⁸¹

*B. Judicial Enforcement of European
Human Rights Law*

¹⁸¹ *Tarakhel v. Switzerland*, European Court of Human Rights, Judgment of 4 November 2014, Application No. 29217/12; see discussion in text accompanying n 309-343.

1. The European Court of Human Rights

During the last few decades of the twentieth century the European Human Rights Court's jurisprudence gradually expanded protection afforded to asylum seekers in Europe, though an actual grant of asylum was beyond its purview. The Court's interpretations of human rights law developed on a parallel track to European Union law. But as the European Union increasingly gained competence over migration and asylum matters, the intersection of European Union law and European human rights law became more likely. As the European Union developed the Common European Asylum System and elements of it came into effect, which they did piecemeal, litigants mounted human rights challenges to the CEAS framework.

A pivotal case came before the European Court of Human Rights shortly after the final pillar of the Common European Asylum System, the Asylum Procedures Directive, became law.¹⁸² Mr. K.R.S., a citizen of Iran, arrived in the United Kingdom in 2006 and filed an asylum claim.¹⁸³ The U.K. 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 U.K. courts, but ultimately was unsuccessful.¹⁸⁴ He was ordered to be deported to Greece in July 2008.

¹⁸² The Asylum Procedures Directive, above n 24, was the final pillar to become law. It was enacted in 2005 and Member States had until 1 Dec 2007 to implement the terms of this directive into national legislation (except Member States had until 1 Dec 2008 to implement art. 15 regarding right to legal assistance and representation), art. 43.

¹⁸³ These facts are taken from *K.R.S. v. United Kingdom*, Decision as to the Admissibility of Application no. 32733/08, 2 Dec 2008.

¹⁸⁴ *K.R.S.*, 2-3.

One week before his expulsion, he sought an emergency stay from the European Court of Human Rights. 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 European Court granted the request, known as a Rule 39 measure,¹⁸⁵ and informed the U.K. authorities that Mr. K.R.S. should not be expelled to Greece pending the Court's review of his case. 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."

¹⁸⁵ Under Rule 39 of its Rules of Court, the European Court of Human Rights 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." ECHR Rules of Court R. 39(1), <http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>. 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., 1 (Jan. 2013), <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf>.

[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.¹⁸⁶

This was hardly a unique situation. The European Court reported that it had issued 80 provisional stays under Rule 39 suspending removals from the U.K. to Greece during the four months in 2008 when Mr. K.R.S. filed his stay request.¹⁸⁷ The large number of emergency stays issued by the European Court of Human Rights 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 Common European Asylum System.¹⁸⁸ New asylum legislation in Greece gave comfort to the European Court, which ruled that the U.K. could rely on the Common European Asylum System, and on the Dublin Regulation in particular, and send Mr. K.R.S. to Greece, where he could submit an asylum request. Accordingly, as of late 2008 the U.K. and all other EU Member States were reaffirmed in their view

¹⁸⁶ *K.R.S.*, 3.

¹⁸⁷ *K.R.S.*, 3-4.

¹⁸⁸ *K.R.S.*, 17. 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.” *K.R.S.*, 18.

that the Dublin Regulation would allow them to deflect asylum seekers found in the interior of the EU to Member States that form the EU's external borders.

A mere two years after the unanimous decision in *K.R.S. v. the United Kingdom*, the European Court of Human Rights did an about-face. In *M.S.S. v. Belgium and Greece*,¹⁸⁹ 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. The fact that Greece had adopted the Common European Asylum System provisions into national legislation did not warrant a presumption that Greece would abide by EU law. 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. 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.

Mr. M.S. S., an Afghan asylum seeker, entered Greece in 2008, was detained for one week, and left Greece without applying for asylum. He traveled to Belgium, where he filed an asylum claim based on his work as an interpreter for international forces in Kabul. When he provided documents supporting his work as an interpreter, the Belgian authorities refused to review them because pursuant to the Dublin Regulation Greece was responsible for determining his asylum application. His attorney attempted to appeal this decision in Belgium and also to seek an emergency stay from the European Court of Human Rights under Rule 39, but Belgian authorities promptly transferred Mr. M.S.S. to Greece.¹⁹⁰ While his attorney in Belgium pursued the legal proceedings, Mr. M.S.S. was detained in Greece in a small

¹⁸⁹ *M.S.S. v. Belgium and Greece*, European Court of Human Rights, 2011, Application No. 30696/09

¹⁹⁰ *M.S.S.*, para. 386-392

room with 20 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.¹⁹¹ After three days, he was released from detention and he applied for asylum.¹⁹² He had nowhere to live, so he went to a park where other homeless asylum seekers had gathered. Unprotected from the elements and from criminal acts, he managed to survive six weeks of homelessness, at which point he tried to leave Greece.¹⁹³ 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.¹⁹⁴

In reviewing these facts, the European Court of Human Rights 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

¹⁹¹ *M.S.S.*, para. 206.

¹⁹² *M.S.S.*, para. 35.

¹⁹³ *M.S.S.* para. 37, 43.

¹⁹⁴ 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. *M.S.S.*, para. 43- 5.

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.¹⁹⁵

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 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.¹⁹⁶

Further, the Court noted, 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.

¹⁹⁵ *M.S.S.*, para. 223.

¹⁹⁶ *M.S.S.*, para. 254.

Like the applicant, a large number of them live in parks or disused buildings.¹⁹⁷

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.¹⁹⁸

The European Court of Human Rights also examined the conditions of detention in which Mr. M.S.S. was held. It noted that prior European Human Rights Court 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

¹⁹⁷ *M.S.S.*, para. 258.

¹⁹⁸ *M.S.S.*, para. 263.

treatment.¹⁹⁹ Mr. M.S.S. had been detained for significantly less than two months, though he had been detained on two or three occasions. 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 3.²⁰⁰

Accordingly, the European Court of Human Rights ruled that the Mr. M.S.S. had experienced massive and substantial violations of his human rights while an asylum seeker in Greece.

Furthermore, the Court emphasized that Belgium, as well as Greece, had also violated European human rights law. The Belgian authorities' reliance on the Dublin Regulation did not preclude their responsibility under the European Convention on Human Rights.

[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.²⁰¹

¹⁹⁹ *M.S.S.*, para. 222, referring to *S.D. v. Greece*, *Tabesh v. Greece*, and to *A.A. v. Greece*.

²⁰⁰ *M.S.S.*, para. 222.

²⁰¹ *M.S.S.*, para. 366-7

Significantly, though the Court ruled that both Greece and Belgium had violated Article 3, the Court assessed greater damages against Belgium than against Greece.²⁰²

The *M.S.S. v. Belgium and Greece* judgment effectively fractured the Common European Asylum System. 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 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. If the Member State responsible according to the Dublin criteria would not be, in actuality, safe for the asylum seeker, the Dublin transfer could not proceed. The EU State with custody of the asylum seeker would need 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 Court of Justice for the European Union (CJEU) considered a similar case and reached a similar result regarding the Dublin Regulation and the Common European Asylum System. Significantly, in *N.S. v. Secretary of State for the Home Department*,²⁰³ the CJEU grounded its conclusion in a different source of law. Rather than arguing that European human rights law trumped aspects of the EU asylum system, the asylum seeker asserted that EU law itself prohibited the Member States' automatic reliance on the EU Common European Asylum System. Specifically, the asylum seeker claimed that the EU Charter of

²⁰² The Court awarded 24,900 Euro in non-pecuniary damage against Belgium, *M.S.S.*, para. 411, and 1,000 Euro against Greece, para. 406.

²⁰³ CJEU, Judgment of 21 December 2011, Cases C-411/10 and C-493/10.

Fundamental Rights prohibits a conclusive presumption that Member States are in compliance with the Common European Asylum System and that a Member State can rely on the Dublin Regulation to transfer asylum seekers to another Member State.²⁰⁴

The Charter of Fundamental Rights, a human rights document, was proclaimed by the European Parliament, European Commission, and Council of Ministers in 2000, but its legal status was uncertain for a decade. It officially became European Union law as part of the Lisbon Treaty in 2009. 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 European Convention on Human Rights, states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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.

It was against this backdrop that *N.S. v. Secretary of State for the Home Department* developed. Mr. N.S., an Afghan asylum seeker entered the European Union via Greece, where he was arrested and detained.²⁰⁵ He did

²⁰⁴ *N.S. v Secretary of State for the Home Department*, C-411/10, para. 48.

²⁰⁵ *N.S.*, para. 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, para. 51. They argued that the asylum procedures and reception conditions in Greece invalidated the decision to deport them to Greece.

not claim asylum, was expelled to Turkey, where he was imprisoned, and eventually traveled to the United Kingdom, where he immediately filed for asylum.²⁰⁶ U.K. authorities relied on the Dublin Regulation to order him deported to Greece, while the asylum seeker protested that the inadequate reception conditions and substandard asylum procedures in Greece would violate his fundamental rights under EU law. He challenged this decision in the U.K. courts, which, ultimately, referred the case to the Court of Justice for the European Union (CJEU). 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.²⁰⁷ 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.²⁰⁸

Specifically, the national courts asked the Court of Justice of the European Union for a preliminary ruling concerning the interaction of the EU Charter and the Common European Asylum System. These questions capture the heart of the matter:

[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

²⁰⁶ *N.S.*, para. 35.

²⁰⁷ The President of the CJEU joined *M.E. v. Refugee Applications Commissioner*, C-493/10, and *N.S. v. Secretary of State for the Home Department*, C-411/10, as companion cases on 16 May 2011, para. 54.

²⁰⁸ None of the individuals had filed asylum applications in Greece. *N.S.*, para. 51-2.

Directive, and Asylum Procedures Directive]?²⁰⁹

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?²¹⁰

The CJEU noted that the structure of the Common European Asylum System, and particularly the Dublin Regulation, is premised on “mutual confidence” that all Member States are treating asylum seekers in compliance with the legislative provisions.²¹¹ 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.²¹²

Once the Court acknowledged the divergence between theory and practice in European asylum law, it

²⁰⁹ *N.S.*, para. 50(3). The first question posed by the U.K. 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, para. 50 (1)-(7).

²¹⁰ *N.S.*, para. 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, para. 51-3.

²¹¹ *N.S.*, para. 79.

²¹² *N.S.*, para. 81.

struggled to delineate when the discrepancy would become too great. It emphasized that minor violations of the Common European Asylum System 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.²¹³ But, 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.²¹⁴

Accordingly, the Court ruled that EU States cannot presume conclusively that Member States will comply with the fundamental guarantees imposed by EU law,²¹⁵ because ratification of refugee and human rights conventions does not necessarily entail compliance with the treaty provisions.²¹⁶ As a consequence, 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.²¹⁷ In response to concerns that Member States lacked tools to

²¹³ *N.S.*, para. 82-5.

²¹⁴ *N.S.*, para. 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. . . . " para. 106, and again in CJEU's ruling on Question 2, para. 2.

²¹⁵ *N.S.*, para. 99.

²¹⁶ *N.S.*, para. 102-103.

²¹⁷ *N.S.*, para. 106.

determine accurately the asylum conditions in sister States, the CJEU observed that reports by UNHCR, international ngo's, and international and regional institutions would provide trustworthy data.²¹⁸

If a Member State becomes aware of systemic deficits in a sister State that precludes transfer to that sister 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.²¹⁹ 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.²²⁰

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.²²¹ The Member State where the asylum seeker is present must determine the merits of the asylum claim.²²² Based on this analysis, the CJEU expressly ruled that EU law itself precludes a conclusive

²¹⁸ *N.S.*, para. 90-91.

²¹⁹ *N.S.*, para. 96.

²²⁰ *N.S.*, para. 98.

²²¹ Above n 47 and accompanying text.

²²² *N.S.*, para. 107. If the Dublin Regulation criteria suggest that a third Member State may be responsible for deciding the asylum application, the EU State with custody of the asylum seeker may employ the Dublin Regulation procedures to ascertain whether the third Member State will accept responsibility for the case, para. 107. But the Court warned that the Member State where the asylum seeker is present cannot take an unreasonable length of time to identify and persuade third Member States to take over the case, and therefore should be ready to decide the claim itself, para. 108.

presumption that the Common European Asylum System is actually in effect in all EU Member States.

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

The *M.S.S. v. Belgium and Greece* judgment by the European Court of Human Rights and the *N.S. v. Secretary of State for the Home Department* judgment by the Court of Justice of the European Union created major challenges for the Common European Asylum System. They ruled that the asylum procedures and reception conditions for asylum seekers in Greece were so seriously deficient that other EU Member States could not return them there. Both courts undertook detailed analyses of the actual, rather than theoretical, 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.”²²³ And both courts evaluated the conditions in Greece to determine if they constituted inhuman or degrading treatment.

These judgments cast a particularly broad shadow on Italy and other Member States at the external borders of the European Union. Many asylum seekers and other applicants for protection have entered the EU via Italy. Many other Member States, when they locate in their territory asylum seekers or recognized refugees whose journey took them through Italy, want to return them to Italy. The individuals have relied on European human rights law and the EU Charter of Fundamental Rights to protest their transfer. 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 grant of refugee status. In their view human rights norms countermand Dublin Regulation transfers to Italy only if asylum

²²³ *N.S.*, para. 86.

seekers can demonstrate the Italian asylum system is totally and thoroughly dysfunctional.

A. *Jurisprudential Developments*

A growing number of courts, both at the national and supranational level, have wrestled with these issues. 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. There is no way to know how representative these cases are, but they reveal deep concerns about reception conditions in Italy. Each of these five courts 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.

In January 2013 the Administrative Court in Giessen considered the appeal of an Eritrean family against the decision to rely on the Dublin Regulation to send them back to Italy.²²⁴ The applicants were a married couple who had fled military conscription in Eritrea and escaped to Sudan. They married in Sudan, had one child there, and traveled through several countries before they entered Italy.²²⁵ They filed asylum claims and received protection and one-year residence

²²⁴ *Verwaltungsgericht Giessen Urteil vom 24 Januar 2013*, Nr 6 K 1329/12.G.I.A.

²²⁵ 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, para. 2.

permits.²²⁶ They lived in an Italian refugee center for six months, after which they were homeless.²²⁷ A nun took them in and provided temporary shelter for two months, while they ate at soup kitchens.²²⁸ They learned of a house where they could live, six adults per room.²²⁹ 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.²³⁰ German authorities ruled that they should be sent back to Italy, pursuant to the Dublin Regulation, and Italian officials agreed to take them back.²³¹ The applicants appealed.²³²

The Giessen court ruled that returning the applicants to Italy would place them at serious risk of exposure to inhuman or humiliating treatment.²³³ In light of the *M.S.S.* judgment by the European Court of Human Rights, 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. The court noted that, in theory, health care is guaranteed to those with residence permits, but that bureaucratic restrictions and the difficulties of establishing a permanent residence make it hard to obtain, in practice.²³⁴ 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

²²⁶ The opinion refers to their recognition as refugees, para. 2, but under Italian law in effect at the time refugees received 5-year residence permits, those with subsidiary protection received 3-year residence permits, and those protected on humanitarian grounds received 1-year residence permits. See above at n 94-5.

²²⁷ *VG Giessen*, para. 7.

²²⁸ *VG Giessen*, para. 2.

²²⁹ *VG Giessen*, para. 7.

²³⁰ They filed for protection in Germany in December 2011, *VG Giessen*, para. 1.

²³¹ *VG Giessen*, para. 4-5, 20

²³² *VG Giessen*, para. 9.

²³³ *VG Giessen*, para. 22.

²³⁴ *VG Giessen*, para. 28.

financial assistance from the government and have to depend on seeking accommodations in government facilities.²³⁵ The court weighed, along with these structural deficiencies, the particular circumstances of the asylum seekers. They could not speak Italian.²³⁶ They were a family of four with two small children.²³⁷ They had previously experienced homelessness and hunger in Italy. The court concluded that sending these particularly vulnerable individuals to Italy would violate their human rights.

The next month the Administrative Court in Braunschweig took a similar approach.²³⁸ 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.²³⁹ Relying on the Dublin Regulation, German authorities ordered him to be sent back to Italy, where his fingerprints had been registered.²⁴⁰ He reported that he had encountered terrible conditions in Italy.²⁴¹ 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. There were three toilets and three showers for 100 people, and the hygienic conditions were bad. People could only wash their clothes in the showers. No heat was provided, and blankets and pillows were only available to those who paid for them.²⁴² There were insufficient interpreters to explain the procedures.²⁴³ When he received an identity card and permission to leave the center after ten days, he

²³⁵ *VG Giessen*, para. 25.

²³⁶ *VG Giessen*, para. 27.

²³⁷ *VG Giessen*, para. 27.

²³⁸ *Verwaltungsgericht Braunschweig, Urteil vom 21 Feb 2013, 2A 126/11.*

²³⁹ *VG Braunschweig*, 3-4.

²⁴⁰ *VG Braunschweig*, 4, referring to *Bescheid vom 10.05.2011.*

²⁴¹ *VG Braunschweig*, 4- 5.

²⁴² *VG Braunschweig*, 5.

²⁴³ *VG Braunschweig*, 5.

traveled north to Germany, where the police stopped him.²⁴⁴

The Braunschweig court looked to the standard set by the Court of Justice of the European Union in 2011 and inquired whether there was a serious risk that returning the asylum seeker to Italy would constitute inhuman and degrading treatment.²⁴⁵ To this end, the court reviewed information and reports concerning reception conditions in Italy submitted by the German Foreign Office, the United Nations High Commissioner for Refugees, from nongovernmental organizations, and from experts. 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.²⁴⁶ Noting that homelessness also occurred among those who had received protection in Italy and that homelessness made it especially challenging to access the health system, the Braunschweig court granted the asylum seeker's petition not to return to Italy.

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.²⁴⁷ The claimant had broken his leg, and the tribunal concluded that he would not have access to adequate medical care in Italy. Accordingly, the court ruled that Germany should not rely on the Dublin Regulation to send him back to Italy. Instead, the claimant should be permitted to pursue his asylum claim in Germany.

²⁴⁴ *VG Braunschweig*, 5.

²⁴⁵ Rather than referring on the *M.S.S. v. Belgium and Greece* judgment by the European Court of Human Rights, the Braunschweig Administrative Court relied on the *N.S. v. United Kingdom* judgment issued by the Court of Justice of the European Communities, *VG Braunschweig*, 9.

²⁴⁶ *VG Braunschweig*, 10-12.

²⁴⁷ *Verwaltungsgericht Frankfurt am Main*, Urteil 18 Apr 2013 Nr. 9 K 28/11.F.A.

In June 2013 the Administrative Court of Düsseldorf came to a similar decision.²⁴⁸ A Kurdish asylum seeker from Iran entered Germany in November 2010 after spending one night in Italy where he was fingerprinted. He filed a handwritten asylum claim in Germany, while challenging the decision by the German authorities to return him to Italy pursuant to the Dublin Regulation. 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. The Düsseldorf court evaluated the complaint to determine whether there were systematic deficiencies in the asylum system in Italy that would threaten this particular claimant with inhuman or degrading treatment. 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; 80% of those returned to Italy pursuant to the Dublin Regulation during 2011²⁴⁹ 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; the applicant was particularly vulnerable to homelessness in that young men without families were the lowest priority in terms of accommodations.²⁵⁰ In light of this evidence, the court concluded that returning this individual to Italy exposed him to a serious risk of inhuman and degrading

²⁴⁸ *Verwaltungsgericht Düsseldorf, Urteil vom 24 Juni 2013, Nr 22 K 2471/11.A.*

²⁴⁹ Of the 2,046 asylum seekers transferred under the Dublin Regulation to the Rome airport, only 416 received accommodations. *VG Düsseldorf, 7.*

In the first eight months of 2012, only 20% of the 1,148 Dublin transferees received accommodations, *ibid.*

²⁵⁰ *VG Düsseldorf, 7-9.*

treatment.²⁵¹ 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.²⁵²

One month later, in July 2013, the Administrative Court in Frankfurt am Main reviewed another appeal against a Dublin transfer to Italy.²⁵³ The Afghan asylum seeker had traveled through Iran, Turkey, Greece, Italy, and France before arriving in Germany.²⁵⁴ He presented evidence that he suffered from post-traumatic stress disorder and needed psychiatric treatment.²⁵⁵ 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.²⁵⁶ Italian authorities reported that in addition to providing fingerprints he had filed an asylum application.²⁵⁷ 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,²⁵⁸ and reasoned that this evidence on its own was not evidence of an asylum claim. 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.²⁵⁹ Thus, there was no evidence that Italy had provided accommodations to the applicant or granted him protection.

²⁵¹ *VG Düsseldorf*, 9.

²⁵² *VG Düsseldorf*, 9-13.

²⁵³ *Verwaltungsgericht Frankfurt am Main*, Judgment of 9 July 2013, Nr. 7 K 560/11.F.A.

²⁵⁴ *VG Frankfurt am Main*, para. 4.

²⁵⁵ *VG Frankfurt am Main*, para. 7.

²⁵⁶ *VG Frankfurt am Main*, para. 7.

²⁵⁷ *VG Frankfurt am Main*, para. 13.

²⁵⁸ *VG Frankfurt am Main*, para. 22.

²⁵⁹ *VG Frankfurt am Main*, para. 22.

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.²⁶⁰ The Frankfurt Administrative Court carefully examined reports by the Italian government, by the European Commissioner for Human Rights, and by nongovernmental organizations concerning reception conditions in Italy. The court concluded that the Italian authorities issued contradictory reports concerning the capacity of the various shelters,²⁶¹ but that year after year the Italian reception accommodations fell far below the number of asylum seekers that Italy received.²⁶² The insufficient capacity led to long waiting lists,²⁶³ which, in turn, led to asylum seekers and refugees living as squatters in desolate urban slums.²⁶⁴ It also led to scenes of asylum seekers turned out of reception centers after six months, who then slept on the center's doorstep.²⁶⁵ 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.²⁶⁶

In contrast to several 2013 rulings by the European Court of Human Rights, 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.²⁶⁷ As to the undisputed fact that Italy – in contrast to Greece – has an established set of structures and reception centers, the

²⁶⁰ *VG Frankfurt am Main*, para. 26, 44

²⁶¹ *VG Frankfurt am Main*, para. 28.

²⁶² *VG Frankfurt am Main*, para. 28-9, 32.

²⁶³ *VG Frankfurt am Main*, para. 33, 36.

²⁶⁴ *VG Frankfurt am Main*, para. 37.

²⁶⁵ *VG Frankfurt am Main*, para. 39.

²⁶⁶ *VG Frankfurt am Main*, para. 41-2.

²⁶⁷ *VG Frankfurt am Main*, para. 60.

Frankfurt court pointed out that the existence of structures does not guarantee that inhuman and degrading treatment has been eliminated.²⁶⁸ 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 50% did not receive the accommodations mandated by EU law.²⁶⁹ 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.²⁷⁰ 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. The European Court of Human Rights

As national courts reconsidered the Dublin Regulation in light of *M.S.S. v. Belgium and Greece* and *N.S. v. the United Kingdom*, similar challenges reached the supranational courts. In 2013 and 2014 the European Court of Human Rights addressed multiple claims concerning the sufficiency of the reception conditions and asylum procedures in Italy.²⁷¹ The Court was slow to

²⁶⁸ *VG Frankfurt am Main*, para. 61.

²⁶⁹ *VG Frankfurt am Main*, para. 62.

²⁷⁰ *VG Frankfurt am Main*, para. 68- 71.

²⁷¹ Early in 2013, in February, the European Court of Human Rights 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. *Isse and Mousa v. Germany*, Application No. 81498/12, 13 February 2013, Informationsverbund Asyl und Migration, http://www.asyl.net/fileadmin/user_upload/redaktion/Dokumente/20456.pdf. 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?" This case is not discussed in the text because the record does not indicate the response filed by Germany or the

conclude that the Italian system fell below minimum human rights standards. In fact, it ruled against the asylum seekers in all three of the 2013 cases. The next year, though, the Court reached the opposite result; the *Tarakhel* judgment forbade the planned transfer of asylum seekers to Italy under the Dublin Regulation.

In April 2013, the European Human Rights Court decided *Mohammed Hussein v. the Netherlands and Italy*,²⁷² 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.²⁷³ At one point, she said that she had been raped and that Italian authorities had left her homeless;²⁷⁴ at another, she said she had received a short-term residence permit.²⁷⁵ 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,²⁷⁶ Ms.

subsequent proceedings, but the Court's official query conveyed serious trepidation about the asylum system in Italy.

²⁷² *Mohammed Hussein v. the Netherlands and Italy*, European Court of Human Rights, Decision of 2 April 2013, Application No 277725/10.

²⁷³ *Mohammed Hussein*, para. 8-11.

²⁷⁴ Ms. Mohammed Hussein said Italian authorities transferred her to Florence, but left her at the railroad station and did not provide food or shelter, para. 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, *ibid.*

²⁷⁵ 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, para. 11.

²⁷⁶ *Mohammed Hussein*, para. 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, *ibid.*

Mohammed Hussein conceded the accuracy of these details.²⁷⁷

Not surprisingly, 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. In these circumstances, said the Court, Ms. Mohammed Hussein's treatment in Italy did not constitute a violation of Article 3.²⁷⁸ Accordingly, the Court dismissed Ms. Mohammed Hussein's complaint as manifestly ill-founded and inadmissible.²⁷⁹

Several months later, in June 2013, the European Human Rights Court rejected as inadmissible two other applications contending that the return of asylum seekers to Italy would violate their human rights. The first case, *Abubeker v. Austria and Italy*,²⁸⁰ 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,²⁸¹ was rejected as a refugee, but was then granted a humanitarian residence permit for one year.²⁸² He left the center and traveled to Germany, which relied on the Dublin Regulation to send him back to Italy in April 2008.²⁸³ 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.²⁸⁴

²⁷⁷ 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, para. 24.

²⁷⁸ *Mohammed Hussein*, para. 75.

²⁷⁹ *Mohammed Hussein*, para. 79.

²⁸⁰ *Abubeker v. Austria and Italy*, European Court of Human Rights, 18 June 2013, Application no. 73874/11.

²⁸¹ *Abubeker*, para. 4.

²⁸² *Abubeker*, para. 5.

²⁸³ *Abubeker*, para. 5-6.

²⁸⁴ *Abubeker*, para. 8.

Mr. Abubeker next traveled to Austria where he applied for asylum in early 2011.²⁸⁵ 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.²⁸⁶ The Austrian authorities rejected Mr. Abubeker's challenge, and the European Court of Human Rights 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.²⁸⁷ 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.²⁸⁸

The *Halimi v. Austria and Italy*²⁸⁹ case, decided the same day as *Abubeker*, posed significantly different facts. Nasib Halimi, an Afghan who said he had fled Taliban persecution in Afghanistan in 2008, had been smuggled into the EU, where he was discovered by Italian police in 2010, interrogated, and released.²⁹⁰ He did not apply for asylum, but after five days in Italy, left for Austria, where he immediately sought asylum.²⁹¹ Six months later Austrian officials sent him back to Italy pursuant to the Dublin Regulation. After twelve days in Italy, Mr. Halimi returned to Austria and filed a second asylum application

²⁸⁵ *Abubeker*, para. 9.

²⁸⁶ *Abubeker*, para. 9.

²⁸⁷ *Abubeker*, para. 59-60.

²⁸⁸ *Abubeker*, para. 61.

²⁸⁹ *Halimi v. Austria and Italy*, European Court of Human Rights, 18 June 2013, Application No. 53852/11.

²⁹⁰ *Halimi*, para. 4.

²⁹¹ *Halimi*, para. 4.

there.²⁹² He alleged that he has been mistreated by the Italian police, that he had been turned away from a refugee center, that he had been homeless and had subsisted on food donations from churches, but that he had not applied for asylum in Italy.²⁹³ 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.²⁹⁴

The Court noted that Mr. Halimi had never applied for asylum in Italy and, as a consequence, had not been eligible to access the Italian asylum system in his prior times there.²⁹⁵ Instead, he had been treated as an unlawful immigrant and had received apparently valid expulsion orders.²⁹⁶ Accordingly, the Court concluded that there was no evidence that Italy had done anything in the past in violation of the European Convention on Human Rights.²⁹⁷ 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.²⁹⁸ The Court acknowledged reports of “de facto obstacles to the lodging of asylum applications in Italy”²⁹⁹ and of “shortcomings [in] living conditions for asylum seekers in Italy,”³⁰⁰ 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*.”³⁰¹ Accordingly, the Court denied Mr. Halimi’s application.

In all three cases the Court focused on the particular details of the individual applicant’s prior

²⁹² *Halimi*, para. 11

²⁹³ *Halimi*, para. 11

²⁹⁴ *Halimi*, para. 16-19.

²⁹⁵ *Halimi*, para. 62, 64.

²⁹⁶ *Halimi*, para. 63.

²⁹⁷ *Halimi*, para. 65.

²⁹⁸ *Halimi*, para. 69.

²⁹⁹ *Halimi*, para. 68.

³⁰⁰ *Halimi*, para. 68.

³⁰¹ *Halimi*, para. 68.

experience in Italy. In two of the cases, Italy had provided the applicants with accommodations and with residence permits, and in the third case the applicant had not applied for asylum in Italy. Consequently, these applicants did not present sympathetic claims. Furthermore, in each of the cases the Italian authorities promised they would provide special individualized attention to the applicants if they were returned to Italy. The Court placed great weight on these assurances. 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. 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.³⁰²

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. 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.³⁰³ 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

³⁰² *Halimi*, para. 77.

³⁰³ *Halimi*, para. 48.

in Italy, they generally are not provided accommodations.³⁰⁴

Although the European Human Rights Court's jurisprudence places on the applicant the burden of showing systemic failings in a country's asylum system, the Court accorded little weight to reports submitted by the UNHCR, the Council of Europe Commissioner of Human Rights, and nongovernmental organizations detailing longstanding inadequacies in the reception conditions in Italy.³⁰⁵ The reports were unanimous that the reception facilities lacked the capacity to accommodate thousands of the asylum seekers that arrive annually, a fact the 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. 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*."³⁰⁶ The bottom line seemed to be that the asylum system in Italy wasn't as horrible as that in Greece. Italy had created a detailed asylum structure, whereas Greece had not. And the Italian reception conditions, as bad as they were, were better than the appalling reception situation that M.S.S. faced in Greece.³⁰⁷

Taken together, the European Human Rights Court's 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

³⁰⁴ *Halimi*, para. 49.

³⁰⁵ *Mohammed Hussein*, para. 43-4, 47-50.

³⁰⁶ *Mohammed Hussein*, para. 78.

³⁰⁷ The Court also referred to recent government plans to make improvements to the reception system, para. 78.

treatment.”³⁰⁸ 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. And the Court was receptive to individualized guarantees provided by government authorities to the rare asylum seeker who had the resources to propel his or her case all the way to the European 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 European Human Rights Court did an about-face. The *Tarakhel v. Switzerland* judgment, issued by the Grand Chamber composed of seventeen judges, differed in both approach and result from the prior cases.³⁰⁹ 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, and nongovernmental organizations, as well as considered observations submitted by other European governments. 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,³¹⁰ are originally from Afghanistan but they had

³⁰⁸ In *Halimi*, para. 57, the Court described its task:

“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.”

³⁰⁹ *Tarakhel v. Switzerland*, European Court of Human Rights, Judgment of 4 November 2014, Application No. 29217/12.

³¹⁰ *Tarakhel*, para. 1. The youngest child was born in 2012 after the family arrived in Europe, para. 10.

lived in Iran for fifteen years.³¹¹ They landed on the coast of Italy in 2011, were fingerprinted, and placed in a reception center for 10 days.³¹² They were 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.³¹³ They left two days later and went to Austria, where they immediately applied for asylum.³¹⁴ Austria rejected their application and decided to return them to Italy pursuant to the Dublin Regulation.³¹⁵ Three months later the Tarakhel family applied for asylum in Switzerland.³¹⁶

Switzerland, though not a Member State of the European Union,³¹⁷ has concluded a separate agreement with the European Union to apply the Dublin Regulation.³¹⁸ Relying on the Dublin Regulation, the Swiss rejected the Tarakhel family's asylum claim and ordered them returned to Italy.³¹⁹ Multiple rounds of appeals ensued, first to the Federal Administrative Court, then to the Federal Migration Office, which forwarded the case again to the Federal Administrative Court.³²⁰ At each stage, the court and the migration officials rejected

³¹¹ *Tarakhel*, para. 9. The father first left Afghanistan for Pakistan, where he married his wife, and then the family went to Iran.

³¹² *Tarakhel*, para. 10.

³¹³ *Tarakhel*, para. 11.

³¹⁴ They departed the CARA center in Bari, Italy without permission on 28 July 2011; they were registered in Austria via the EURODAC system on 30 July, and applied for asylum, para. 12.

³¹⁵ *Tarakhel*, para. 12.

³¹⁶ *Tarakhel*, para. 13.

³¹⁷ Switzerland has been a Party to the European Human Rights Convention since 1974 and is bound by its prohibition against returning individuals to torture or inhuman or degrading treatment.

³¹⁸ Association Agreement of 26 October 2004 between the Swiss Confederation and the European Community, OJ L 53 of 27.2.2008.

³¹⁹ *Tarakhel*, para. 15-16. The Swiss Federal Migration office interviewed the Tarakhel parents on 15 Nov 2011, requested the Italian authorities to accept the Tarakhels on 22 Nov, and formally rejected the Tarakhel asylum application on 24 Jan 2012 and ordered them removed to Italy, para. 14-16.

³²⁰ The Tarakhel family appealed to the Federal Administrative Court on 2 Feb 2012, which rejected their appeal on 9 Feb 2012. They requested the Federal Migration office to reopen their proceedings on 13 Mar 2012, a request rejected by the Federal Administrative Court on 21 Mar 2012.

the Tarakhel family's contention that it would be inhuman and degrading treatment to return them to Italy.³²¹ 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 asylum seekers.³²² The Tarakhel family then asked the European Human Rights Court to bar their return to Italy.³²³

The Tarakhel family stressed four major points concerning reception conditions in Italy: (1) 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; (2) the woeful mismatch between the annual number asylum seekers and the accommodations for them; (3) the dismal living conditions in some of the accommodations that are available; and (4) 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.³²⁴

The Swiss government, supported by the Italian, Dutch, Norwegian, Swedish, and UK governments, did not respond to the complaint about the insufficient assistance provided during the time that elapses between arrival in Italy and formal application for asylum.³²⁵ With regard to the lack of capacity, the governments argued that Italy had plans to dramatically increase the

³²¹ *Tarakhel*, para. 17.

³²² *Tarakhel*, para. 18.

³²³ *Tarakhel*, para. 20. The Chamber to which the case was originally assigned issued a preliminary stay, para. 21; the Chamber later relinquished jurisdiction to the Grand Chamber, which proceeded to consider the merits of the claim, para. 5.

³²⁴ *Tarakhel*, para. 57-67.

³²⁵ *Tarakhel*, para. 69, 76-7. The Italian government did comment that the average asylum procedure took 92 days in 2013 compared to 72 days in 2012, and that efforts were being made to expedite the process, para. 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.

accommodations for asylum seekers,³²⁶ that UNHCR had not called for a halt in Dublin transfers to Italy,³²⁷ and that prior rulings by the European Court of Human Rights had not concluded that the substantial shortage of shelters for asylum seekers constituted a human rights violation.³²⁸ They argued that the conditions in the Italian reception centers must not be so bad because no EU States had suspended Dublin transfers to Italy,³²⁹ that the European Asylum Support Office was working to improve reception conditions in Italy,³³⁰ and that the violent outbursts in the reception center had ended before the Tarakhel family arrived.³³¹ Italy contended that asylum seeker families were not always split up in Italian facilities,³³² and that special accommodations could be made for families with children.³³³

The Grand Chamber of the European Court of Human Rights 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.³³⁴ Rather, the core of the Court's analysis concentrated on the inadequate number of accommodations and the conditions of those accommodations. In particular, the Court emphasized the human rights norms that require States to place special prominence on the extreme vulnerability of children.³³⁵ In assessing the accommodations, the Court relied heavily on the 2013 UNHCR report on the Italian asylum structures, the 2012 report by the European Human Rights Commissioner, as well as analyses submitted by the International Organization of Migration and various

³²⁶ *Tarakhel*, para. 70, 78.

³²⁷ *Tarakhel*, para. 71, 79.

³²⁸ *Tarakhel*, para. 70.

³²⁹ *Tarakhel*, para. 71.

³³⁰ *Tarakhel*, para. 80.

³³¹ *Tarakhel*, para. 86.

³³² *Tarakhel*, para. 86.

³³³ *Tarakhel*, para. 86.

³³⁴ *Tarakhel*, para. 107.

³³⁵ *Tarakhel*, para. 99.

other groups. The Court acknowledged that the parties debated the accurate statistics, but noted that everyone agreed that there were many more asylum seekers and refugees than accommodations,³³⁶ and that waiting lists were so long the most of those on the list had no realistic chance of obtaining the desired accommodations.³³⁷ The Court noted that the reports and recommendations also indicated that those who found accommodations were likely to face seriously overcrowded, unhealthy, and sometimes violent conditions.³³⁸ Accordingly, the evidence gave rise to concerns that asylum seekers returned to Italy might face serious risks of inhuman or degrading treatment.³³⁹

Turning to the Tarakhel applicants themselves, the Court emphasized the unique vulnerabilities of child asylum seekers and the special protection obligations these impose on governments.³⁴⁰ The Court reiterated the major deficiencies in the current reception system in Italy, and emphasized the grave risks these would likely pose to child asylum seekers. The Court observed that 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,³⁴¹ but also noted conflicting evidence concerning routine separation of family units in some Italian cities.³⁴² Due to the real risk that the Tarakhel 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

³³⁶ *Tarakhel*, para. 108-110.

³³⁷ *Tarakhel*, para. 108.

³³⁸ *Tarakhel*, para. 111-15.

³³⁹ *Tarakhel*, para. 115.

³⁴⁰ *Tarakhel*, para. 118-19.

³⁴¹ *Tarakhel*, para. 120.

³⁴² *Tarakhel*, para. 66. There was evidence that this occurred systematically in Milan.

provide accommodations appropriate to the age of the children and would keep the family together.³⁴³

The *Tarakhel* judgment differs from the earlier European Human Rights Court 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,”³⁴⁴ 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 is on the risks the specific individuals will face if returned to Italy.³⁴⁵ Hence, the plight of child asylum seekers was particularly salient in *Tarakhel*.

Furthermore, although the *Tarakhel* judgment reached the opposite result, it followed the earlier cases in embracing the Italian government’s willingness to craft guarantees regarding specific applicants. In effect, this approach rewards exceptional treatment promised to a few fortunate litigants. While gratifying for the individuals involved, personal solutions in a handful of cases should not be the benchmark for evaluating whether Dublin returns run afoul of the prohibition against inhuman or degrading treatment.

V. THE FRACTURED EUROPEAN ASYLUM SYSTEM

As the tenth anniversary of the Common European Asylum System arrived, the *M.S.S. v. Belgium and Greece* judgment by the European Court of Human Rights and the *N.S. v. Secretary of State for the Home Department*

³⁴³ *Tarakhel*, para. 122.

³⁴⁴ *Tarakhel*, para. 114.

³⁴⁵ *Tarakhel*, however, showed less concern about the applicants’ actual prior experiences in Italy than did *Mohammed Hussein, Abubeker, and Halimi*.

judgment by the Court of Justice of the European Union 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. As a consequence, States must carefully assess each asylum seeker's case to determine if they would face a real risk of experiencing inhuman or degrading treatment in the receiving country. Asylum seekers must be able to appeal, or seek reconsideration, of such momentous decisions. Accordingly, each transfer pursuant to the Dublin Regulation must include the possibility of multiple assessments of the facts specific to each individual 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 v. Switzerland* judgment cast further doubt on the viability of the EU asylum system. 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 European Human Rights Court 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."³⁴⁶ *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

³⁴⁶ *Tarakhel*, para. 120.

asylum facilities and processes. Member States on the periphery of the European Union are frequently the destination of transfers under the Dublin Regulation, and these States are among the most vulnerable to human rights challenges.

Furthermore, *Tarakhel's* emphasis on thorough individualized assessments of the suitability of the reception conditions the Italian authorities guaranteed to the *Tarakhels* ensures that the Dublin process will become even more time consuming. 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 Common European Asylum System, 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 2005,³⁴⁷ the second phase, a period devoted to assessment and improvement, began. This second phase, slated to take place between 2005 and 2010, took several more years than planned. It concluded in 2013, by which time five of the six CEAS laws had been revised.³⁴⁸ Its

³⁴⁷ The enactment of the Asylum Procedures Directive, 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, above n 24.

³⁴⁸ The Temporary Protection Directive of 2001 has never been utilized and has not been modified. The Recast Qualification Directive was adopted in 2011, with the effective date of December 2013. The Recast Reception Conditions Directive 2013/33/EU enacted in 2013, the Recast Asylum Procedures 2013/32/EU enacted in 2013, and the Recast EURODAC Regulation No. 603/2013, all are due to become effective in July 2015. The

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.

...

[The new] EU rules have now been agreed, setting out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply.³⁴⁹

The amendment process of the Dublin II Regulation began in serious in 2008, five years after its adoption. The European Commission proposed a series of amendments, with the goal of improving its efficiency yet protecting the rights of asylum seekers.³⁵⁰ This 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.³⁵¹ This proposal preceded the *M.S.S.* and *N.S.* judgments, but concerns about Dublin transfers to Member States with weak asylum systems were

Recast Dublin Regulation No. 604/2013 was enacted in 2013 and entered into force in January 2014.

³⁴⁹ EU Commission, DGS, Migration and Home Affairs, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm.

³⁵⁰ 2008 Proposal, Explanatory Memorandum, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF>>

³⁵¹ 2008 Proposal, chap. VII, art. 31.

already well known. Indeed, in 2008 alone, the European Court of Human Rights issued 80 provisional stays of transfers to Greece.³⁵²

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.³⁵³ The 2013 Recast Dublin Regulation, or Dublin III, acknowledged the dire circumstances that threatened the European-wide system.

Deficiencies in, or the collapse of, asylum systems, often aggravated or contributed to by particular pressures on them, can jeopardize the smooth functioning of the [Common European Asylum System], which could lead to a risk of a violation of the rights of applicants [under EU, human rights, and refugee law].³⁵⁴

Nonetheless, the temporary suspension mechanism had not survived political negotiations. Instead, Dublin III's response to the impending crises was a cumbersome early warning crisis management system.³⁵⁵ The

³⁵² *K.R.S. v. United Kingdom*, Decision as to the Admissibility of Application no. 32733/08, 2 Dec 2008, 3-4.

³⁵³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).

³⁵⁴ (Dublin III), preambular clause 21.

³⁵⁵ Where, on the basis of . . . the information gathered by the EASO [European Asylum Support Office]. . . the Commission establishes that the application of this Regulation may be jeopardized due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a member State, it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a preventive action plan.

The Member State concerned shall inform the Council and the Commission whether it intends to present a preventive action plan in order to overcome the pressure and/or problems in the functioning of its asylum

European Commission would invite Member States facing crises in transferring asylum seekers to “draw up a preventive action plan”³⁵⁶ 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.”³⁵⁷ In light of the disastrous situations identified by national courts and the European Court of Human Rights 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.³⁵⁸ There is a sovereignty clause that permits a Member State to examine the merits of an asylum claim even if the State is not responsible under the Dublin criteria.³⁵⁹

system while ensuring the protection of the fundamental rights of applicants for international protection.

Where the Commission establishes, on the basis of EASO’s analysis, that the implementation of the preventive action plan has not remedied the deficiencies identified or where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis. . . , the Commission . . . may request the member State concerned to draw up a crisis management action plan and, where necessary, revisions thereof.

The Member State concerned shall submit its crisis management action plan and shall report, at least every three months, on its implementation to the Commission and other relevant stakeholders, such as EASO, as appropriate.

Throughout the entire process for early warning, preparedness and crisis management . . . , the Council shall closely monitor the situation and may request further information and provide political guidance, in particular as regards the urgency and severity of the situation and thus the need for a Member State to draw up either a preventive action plan or, if necessary, a crisis management action plan. The European Parliament and the Council may, throughout the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate. Dublin III, art. 33.

³⁵⁶ Dublin III, art. 33(1), para. 1.

³⁵⁷ Dublin III, art. 33(1), para. 1.

³⁵⁸ Dublin III, art. 17 (2).

³⁵⁹ Dublin III, art. 17(1); formerly Dublin II, art. 3(2).

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 now must provide a personal interview to every asylum seeker evaluated under the Dublin criteria,³⁶⁰ must furnish free legal assistance if requested,³⁶¹ must guarantee the right to appeal a Dublin transfer order,³⁶² must allow a request to stay the execution of the transfer order pending the decision on the appeal,³⁶³ and must provide special protections for asylum seekers who are minors.³⁶⁴ It 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 II encourages Member States to find another Member States that might have responsibility. 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.

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining member State shall continue to examine the criteria set out in [the Dublin III Regulation] in order to

³⁶⁰ Dublin III, art. 5(1).

³⁶¹ Dublin III, art. 27(6).

³⁶² Dublin III, art. 27(1).

³⁶³ Dublin III, art. 27(3)(a).

³⁶⁴ Dublin III, art. 6.

establish whether another Member State can be designated as responsible.³⁶⁵

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the [Dublin criteria] or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.³⁶⁶

Perhaps it can be considered an advance that Dublin III expressly admits that European human rights law trumps the Common European Asylum System. This is hardly a surprising addition, however, in light of the European jurisprudence. On the other hand, the absence from Dublin III of effective tools to respond to the deepening 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. Instead they will be likely to avert their eyes from the plight of asylum seekers returned to sister States that are ill equipped to provide a satisfactory asylum process.

³⁶⁵ Dublin III, art. 3(2), para. 2.

³⁶⁶ Dublin III, art. 3(2), para. 3.

B. Suspending the Dublin III Regulation

Those Member States whose asylum systems fall far below the standards set forth in the Common European Asylum System are generally poor, are frequently swamped with asylum seekers making their entry into the European Union, and lack the political will to treat asylum seekers as the law requires. Italy is a prime example, as is Greece. But they are not alone. There have been repeated calls to halt Dublin transfers to Bulgaria.³⁶⁷ National courts have refused to apply the Dublin criteria to send asylum seekers to Hungary,³⁶⁸ Poland,³⁶⁹ Malta.³⁷⁰

³⁶⁷ UNHCR, Observations on the Current Situation of Asylum in Bulgaria, 2 Jan 2014, <<http://www.refworld.org/docid/52ca69a84.html>>; European Council on Refugees and Exiles, ECRE joins UNHCR in a call for the suspension of Dublin transfers to Bulgaria, 8 Jan 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>>; <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/611-mep-delegation-calls-for-suspension-on-returns-of-asylum-seekers-to-bulgaria-under-dublin-regulation.html>>; <<http://www.dublin-project.eu/dublin/Dublin-news/ECRE-reaffirms-its-call-for-the-suspension-of-transfers-of-asylum-seekers-under-the-recast-Dublin-Regulation>>.

³⁶⁸ ECRE Jan. 2014 statement. *Council d'Etat* [CE] [highest administrative court], 16 Oct 2013, No. 372677 (Fr.), <<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028105162&fastReqId=1602842439&fastPos=4>>. For a discussion in English of the French court's decision, see *Dublin: France, Suspension of Transfers*, AIDA, <<http://www.asylumineurope.org/reports/country/france/asylum-procedure/procedures/dublin>>.

³⁶⁹ ECRE Jan. 2014 statement. *Rechtbank's-Gravenhage* 18 juni 2013, AWB 13/11314 (voorlopige voorziening) (Neth.), <<http://www.hfhr.pl/wp-content/uploads/2013/09/2013-06-18-Rb-Haarlem-13-11314-Rusland.pdf>>. For a discussion in English of the Dutch court of appeal's decision, see *Netherlands: Court of Appeal Suspends Dublin Transfer to Poland*, EDAL (4 Oct 2013), <<http://www.asylumlawdatabase.eu/en/content/netherlands-court-appeal-suspends-dublin-transfer-poland-awb-1311314-art-47-charter>>.

³⁷⁰ ECRE Jan. 2014 statement. *Verwaltungsgericht Minden* [VG] [Administrative Trial Court of Minden] 12 Jan 2015, 1 L 551/14.A (Ger.), <http://www.asyl.net/fileadmin/user_upload/dokumente/22570.pdf>. For a discussion in English of the German court's decision, see *Dublin Transfer to Malta Suspended on Grounds of Serious Shortcomings in Reception Conditions and Procedures*, AIDA (4 Feb 2015),

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 European Court of Human Rights 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 European Union. States with custody of asylum seekers must gather thorough and accurate reports of reception conditions in EU border States. 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. This multi-layered human rights approach may yield greater protection to individual asylum seekers. It will accomplish this, however, at the expense of the Common European Asylum System. 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.

This not only makes sense logically, it makes sense empirically. Examination of the numbers of requested Dublin transfers, the numbers of actual transfers, and the States most deeply involved in Dublin transfers reveals that a phenomenal amount of energy is expended with very small results. It is simply a bad bargain to invest so many resources --- and cause so many months of delay in individuals' lives – in the Dublin system of deflecting

asylum seekers back to EU States at the borders. At first glance, the current Dublin system seems massive. Roughly 17 percent of the asylum applications filed in Europe from 2008 to 2013 triggered a request that another State exercise responsibility for assessing the claim.³⁷¹ This amounts to 300,000 requests out of 1.7 million asylum applications.³⁷² Very few requests, however, actually result in transfers. For example, in 2012 Germany issued 11,574 requests under the Dublin Regulation to transfer asylum seekers to other States.³⁷³ Of these, 3,062 transfers took place.³⁷⁴ Switzerland had similar results: 11,029 requests to transfer asylum seekers,³⁷⁵ and 4,637 actual transfers.³⁷⁶ 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 numbers actually transferred.³⁷⁷ Overall, only one-fifth of the transfer orders submitted by States led to transfers.³⁷⁸ Roughly 80 percent of the time and 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 active in terms of receiving and processing requests to accept asylum seekers from other States. For example, in 2012 the top five States sending Dublin

³⁷¹ Fratzke, *Not Adding Up: The Fading Promise of Europe’s Dublin System*, above n 48, 6. These data reflect both EU States and non-EU States, such as Switzerland, that have become part of the Dublin system.

³⁷² *Ibid.*

³⁷³ *Ibid.*, Table A-1, Appendix, 26.

³⁷⁴ *Ibid.*, Table A-3, Appendix, 27. Of the 11,574 German requests, 7,916 were accepted, but only 3,062 actually occurred.

³⁷⁵ *Ibid.*, Table A-1, Appendix, 26.

³⁷⁶ *Ibid.*, Table A-3, Appendix, 27. Of the 11,029 Swiss requests, 9,328 were accepted, but only 4,637 actually occurred.

³⁷⁷ *Ibid.*, Table A-1 and A-3, 26-7.

³⁷⁸ *Ibid.*, 11. In 2013, 76,358 transfer requests resulted in 56,466 positive responses, which led to 15,938 transfers. This is a 20.8 percent success rate.

requests included Germany, Sweden, and Belgium.³⁷⁹ Together these three States sent 23,498 transfer requests, which comprised almost 50 percent of the European total.³⁸⁰ During the same year Germany, Sweden, and Belgium also were among the top five States receiving Dublin requests.³⁸¹ Together, these three States received almost 10,000 Dublin transfer requests.³⁸² 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 especially true if, as the Dublin data show, 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.³⁸³ Similarly, Belgium sent 355 requests to France, and in the same year received 562 requests from France.³⁸⁴ Sweden sent 627 transfer requests to Norway, while receiving 403 requests from Norway.³⁸⁵ The transaction costs of the Dublin system are enormous.

These data expose the inefficiency of the Dublin system in its actual operations. The Dublin premise, that CEAS States can rely on simple objective criteria to make

³⁷⁹ *Ibid.*, Table A-1, Appendix, 26. Germany, Sweden, Belgium, Switzerland, and France together sent 39,916 Dublin transfer requests of the European total of 53,439. These five States sent 75% of the total.

³⁸⁰ *Ibid.* Germany sent 11,574 Dublin transfer requests; Sweden sent 7,805; Belgium sent 4,119.

³⁸¹ *Ibid.*, Table A-2, Appendix, 26. Germany, Sweden, Belgium, Italy, and Poland together received 30,230 Dublin transfer requests of the European total of 53,439. These five States received 55% of the total.

³⁸² *Ibid.* Germany, Sweden, and Belgium received roughly 17% of the total. Italy, with 15,618 (30%), received the highest number of transfer requests, and Poland, with 5,533 (10%), received the second highest number. Together these five States received 30,185 or 55% of the total.

³⁸³ *Ibid.*, 13.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

quick and accurate decisions about which State is responsible for adjudicating asylum claims, is no longer valid. The European human rights jurisprudence now mandates that Dublin States must invest resources into investigating particularized details about the applicant as well as about the reception conditions and the asylum procedures in the potential transferee State. These are necessarily fact-intensive inquiries. And, pursuant to Dublin III, States must arrange for the asylum seeker to obtain legal counsel, must schedule a personal interview with the asylum seeker, just permit an appeal, and must provide for motions to suspend enforcement of the transfer order. Furthermore, an additional fact-intensive discussion may have to take place with government authorities in the receiving State concerning the specific treatment the asylum seeker will receive if returned. When (or if) the asylum seeker is transferred to another State, the subsequent evaluation there of the merits of the asylum application will also necessitate a fact-intensive inquiry.

It makes no sense to have a system with triplicate layers of individualized fact-finding. It 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. This is compounded by the redundancies in the States that both send and receive large numbers of Dublin transfer requests. Rather, in light of the human rights obligations of European States, 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 States³⁸⁶ or on humanitarian grounds.³⁸⁷ The Dublin

³⁸⁶ Dublin III, art. 9

³⁸⁷ Dublin III, art. 17(2).

transfer requests based on the first EU country an asylum seeker irregularly entered should cease.³⁸⁸ Instead, the presumption should be the same as with unaccompanied minors: the Member State where the individual has lodged an application for international protection shall be responsible.³⁸⁹ Since more than 95 percent of the total Dublin transfer requests are grounded on the irregular entry provision, this effectively would constitute a suspension of the Dublin Regulation.³⁹⁰

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 desires and needs. It would also devote resources to the asylum claim itself, rather than to the more peripheral issues.

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

³⁸⁸ Dublin III, art. 13.

³⁸⁹ “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 lodged his or her application for international protection, provided that it is in the best interests of the minor. Dublin III, art. 8(4).

³⁹⁰ For 2013 statistics on the different bases for Dublin requests, see Fratzke, above n 48, 8-9.

systems, such as Germany, Austria, and Switzerland.³⁹¹ Indeed, the judicial opinions discussed earlier bear witness to the secondary movements and to the human rights norms that justify the secondary movements.

EU States may argue that the Dublin system reduces some secondary movements, even though it doesn't 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, too, because of the obvious benefits of a more cohesive and supportive migrant community. Member States' worries that asylum seekers choose destinations based on more generous benefits or more expansive notions of asylum have not been empirically confirmed. Moreover, 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 European Union. It will take substantial political will and transfer of resources to the weaker EU States to make that happen.

In the meantime, the costs of the current Dublin Regulation's approach to transferring individuals back to countries through which they first entered the European Union are extremely high. The stark fact remains: more than 80 percent of the asylum seekers involved in Dublin procedures in 2012 never were transferred.³⁹² 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 roughly the same number of transfer requests with each other should decide the substance of the asylum claims before them, rather than

³⁹¹ Fratzke, above n 48, 13-15.

³⁹² Fratzke, above n 48, 11.

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. The *Tarakhel* 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 important, the human suffering of individuals caught in lengthy drawn out preliminary stages must not be forgotten. These most 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 their experience of suffering and persecution and other serious harm is what impelled many to seek refuge in the EU in the first place. Reducing the time and 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.³⁹³

CONCLUSION

A level playing field, with equivalent conditions in all Member States, is the goal, but it is not the reality. Until the wealthier EU States transfer substantial funds and other support to help the weaker States develop satisfactory asylum systems, the playing field will remain grossly uneven, and asylum seekers will flee the inadequate and inhumane conditions they encounter.³⁹⁴ The political will necessary to transform the existing CEAS into a truly *common* European asylum system is not currently visible. Accordingly, the European Union must respond to the contemporary situation as it is. It 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 go forward, but Dublin transfers should be otherwise suspended. It would be more efficient, as well as more humane, for the State where the asylum seeker filed an application simply to examine and decide the merits of the asylum claim.

³⁹³ Commission of the European Communities, Green Paper on the Future Common European Asylum System, 6 June 2007, 2.

³⁹⁴ See Richard Ball, *The Legitimacy of the European Union Through Legal Rationality: Free Movement of Third Country Nationals*, Routledge, 2013, 95-7.