

# The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity

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## I. INTRODUCTION

The seams of solidarity that bind the member states of the European Union together are under intense strain. From one side pulls the ongoing euro debt crisis, with its torturous rounds of negotiations, tense late-night ministerial meetings, and increasingly stifling austerity measures. From the other side pulls a distinct, though not unrelated, crisis: the human rights emergency unfolding at the EU's borders and the inability of its deficient asylum system to cope. Just as the debt crisis threatens to destroy the painstakingly cultured solidarity of the EU, the disintegrating state of its patchwork asylum regime could prove fatal to the principles of mutual trust and cooperation that theoretically bind its member states.

Since February 2011, tens of thousands of individuals have inundated Europe's southern shores in flight from the violence and instability in North Africa. Although the dawn of the Arab Spring signaled a departure for millions from decades of tyrannical rule, it also forced many to flee their homes and seek safety in nearby countries. Since its beginning, the EU has experienced a dramatic rise in asylum applicants, with much of the surge originating from Libya, Egypt, Tunisia, and Syria. Once at the EU's borders, however, refugees are confronted by a deficient asylum regime that fails to ensure respect for fundamental human rights and tests the already strained relationships between EU member states.

The current configuration of the Common European Asylum System (CEAS) presents a triple threat to EU solidarity. First, it places a grossly disproportionate burden on the southern states—notably Greece, Italy, and Malta—that are already buckling under crippling austerity measures. The

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failure of the remaining states in the union to assist in processing and assimilating new refugee arrivals breeds resentment amongst the citizens of the south, creating a political climate that makes meaningful immigration reform at a national level more difficult and introducing further financial strain on their domestic economies during an unprecedented debt crisis. Specifically, the provision of the Dublin II Regulation requiring most asylum seekers to be processed by the first EU country in which they arrive (the “State of First Arrival rule”) creates asymmetrical obligations for which the northern states have failed to compensate. Aside from its negative impact on EU solidarity, this uneven allocation of responsibility may also be creating incentives for southern member states to employ controversial migrant interception measures that defy their human rights obligations under EU and international law.

Second, the current asylum system fails to ensure that member states adhere to common standards with respect to asylum seekers, a flaw that hinders the building of mutual trust between them. Due to these states’ intertwined responsibilities under the CEAS and EU law, such disparity in national asylum regimes creates conditions under which one member state can be held liable for the human rights violations of another, as declared by both the European Court of Human Rights and the Court of Justice of the European Union. Both courts have recently ruled that a member state sending an asylum seeker back to Greece under the State of First Arrival rule can be held liable for Greece’s violations of his rights. In its current form, therefore, the union’s patchwork asylum system is only as strong as the threads in its weakest patches—here, as in the debt crisis, Greece and Italy. This configuration creates a climate of mistrust and resentment on the part of states who have worked to bring their asylum systems in line with EU standards, yet remain exposed to liability for correctly complying with the State of First Arrival rule stipulated by the Dublin regulation. Furthermore, when sending member states know that they can be held liable for human rights violations, they must undertake inquiries into the treatment of asylum seekers in the weaker receiving states—a practice that the latter find contrary to the principles of mutual trust and solidarity that should underlie the union.

Third, the present CEAS framework limits the ability of Frontex, the EU external border control agency, to build solidarity between states. Although its mandate focuses primarily on protecting the EU’s visa-free Schengen zone, Frontex also has great potential to foment trust and unity between member states while simultaneously helping to align their understanding of fundamental human rights principles. However, its ability to do so has been limited by the agency’s lack of independence from state-level politics, human rights criticisms largely related to national border control practices, and the failure of member states to harmonize their asylum regimes. In spite of its increasing importance in the union and continued potential for

building solidarity, ultimately Frontex remains a mere coordinating body between national governments that can do little to soothe the inter-state tensions arising from the flaws in the CEAS, particularly the State of First Arrival rule.

Union efforts to remedy the deficits of the CEAS that threaten EU solidarity have so far failed to reach the root problems. The establishment of a European Asylum Support Office (EASO) to help coordinate between states and support those under particular strain may prove useful, to some degree, for harmonizing member state policies. The EASO, once fully operational, should be able to do so through research, information sharing, action plan development, and joint training sessions. However, it lacks the ability to enforce higher protection standards in member states, especially when political will for enhanced asylum requirements is absent at a national level. Merely establishing action plans for reform without creating concrete responsibility sharing mechanisms between states will fail to culture true solidarity.

In addition, recent reforms to Frontex's mandate and human rights policies might help assuage fears about rights violations at the fringes of the union, but these reforms do not effectively target the internal tensions created by the current configuration of the CEAS. Such reforms will no doubt be critical for a smoothly functioning common asylum system, but building additional frameworks and institutions like the EASO on the unstable foundation of the CEAS invites collapse and further damage to mutual trust in the union. It is the system's regulatory regime, in particular the State of First Arrival rule, that must be reformed before all else.

In order to create a universal European asylum system that respects human rights, complies with international law, and helps further the aim of building solidarity between EU member states, the union must undertake meaningful reform to the legal framework underlying the CEAS. To continue ignoring the core problems that plague it while attempting to provide patchwork solutions would be to risk further unraveling of the unity that the 27 states of the union have worked hard to develop and maintain. In light of the pressure exerted by the debt crisis, which has only been exacerbated by the immense refugee influx of the past two years, it is more critical than ever for the EU to take affirmative steps to reform its asylum regime.

Since the union is still just an alliance of sovereign states, however, commitment to reforming the asylum regime must ultimately begin at a national level. Reform efforts must grow from state recognition that the CEAS in its current form, including in particular the Dublin regulation's State of First Arrival rule, is untenable and fundamentally at odds with the European fundamental human rights regime. Demand for significant change to this system will require political courage and national level action even at a time when anti-immigration sentiment is on the rise across

Europe. Most importantly, reform will require that national leaders make a sustained and unwavering commitment to perhaps the most critical of the union's founding values: respect for fundamental human rights.

Part II of this Note begins with an overview of the refugee crisis in the European Union today and its particular implications for the southern EU member states. Part III then goes on to examine the legal framework coming to bear on the states with respect to their treatment of asylum seekers, in particular highlighting the Dublin Regulation and its role in creating a disproportionate burden on the southern member states for handling of asylum claims. This Part also gives an overview of the recent case law of the European Court of Human Rights and the Court of Justice of the European Union regarding the Dublin Regulation and the rights of asylum seekers under its provisions. Part IV follows by observing the widely varying practice of the member states under the CEAS, taking Italy as a case study for how the Dublin Regulation has contributed to questionable policies that have ultimately led to human rights violations. In addition, this Part discusses the failure by the northern states to help share responsibility for the burden on the southern states resulting from implementation of the Dublin Regulation. Part V situates Frontex in the current political and legal context, showing how its structure and limitations as a coordinating body for border protection have prevented its functioning in a solidarity promoting capacity. Finally, Part VI briefly addresses the fledgling European Asylum Support Office and its potential for contributing to harmonization of member state asylum systems, thereby strengthening EU solidarity. This Note ultimately concludes that the deficits of the CEAS and the threats they present to Union solidarity cannot be remedied through the creation of new institutions or superficial rights protection mechanisms; rather, they must be addressed by reforming the asylum system itself, beginning with the Dublin Regulation.

## II. THE REFUGEE CRISIS IN THE EU TODAY

The dawn of the Arab Spring led to a dramatic swell in asylum-seeking arrivals at the EU's southern borders, creating a disproportionate burden for the southern member states even as anti-immigration sentiment in these countries was on the rise. Over the course of 2011, more than 58,000 migrants arrived at the EU's Mediterranean shores, many in flight from the instability and violence in North Africa.<sup>2</sup> The journey is extremely danger-

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2. Briefing Notes, United Nations High Commissioner for Refugees (UNHCR), Mediterranean takes record as most deadly stretch of water for refugees and migrants in 2011 (Jan. 31, 2012), <http://www.unhcr.org/4f27e01f9.html>; see also MEDECINS SANS FRONTIERES, SWEET SIXTY?: THE 60TH ANNIVERSARY OF THE UN REFUGEE CONVENTION: REFUGEE CRISES IN 2011 AND CHALLENGES FOR THE FUTURE 6 (2011); PARLIAMENT FOREIGN AFFAIRS COMMITTEE, BRITISH FOREIGN POLICY AND THE 'ARAB SPRING': THE TRANSITION TO DEMOCRACY, 2010-12, AS 04, ¶ 2 (U.K.) (written evidence of

ous and many have died from drowning, starvation, or thirst during the crossing: the UNHCR estimated that over 2,000 perished between January and June of that year alone.<sup>3</sup> Although this sea route from North Africa to southern Europe has long been employed by economic migrants and refugees alike, the Arab Spring caused a substantial surge in the number of boat arrivals from affected countries. The relationship is clear from UNHCR's official data for 2011. That year, the member states of the EU collectively experienced a 59% increase in applications from Syrian nationals,<sup>4</sup> an 85% increase in Egyptian applications,<sup>5</sup> a 293% increase in Libyan applications,<sup>6</sup> and a 911% increase in Tunisian applications.<sup>7</sup>

The states at Europe's southern borders have borne a particularly heavy burden as a result of this increase.<sup>8</sup> Together, the governments of Albania, Cyprus, Greece, Italy, Malta, Portugal, Spain, and Turkey registered an 87% rise in asylum applications over the previous year.<sup>9</sup> Within the EU, Italy and Malta, whose asylum systems were strained even before the crisis, were hit particularly hard.<sup>10</sup> The rapidly multiplying numbers of asylum applications had a particularly stark impact in light of the ongoing financial crisis and related austerity measures. Yet assistance to these countries from other EU member states fell far short of need in spite of repeated appeals by the affected states and the European Home Affairs Commissioner.<sup>11</sup> The UK offered to absorb just 10 of the new asylum seekers in Malta, despite having a population over 150 times that of the tiny island

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William Hague, MP, Secretary of State), *available at* <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/writev/arab/as04.htm>.

3. UNHCR, GLOBAL APPEAL 2012-13: EUROPE, REGIONAL SUMMARY 90 (2011), *available at* <http://www.unhcr.org/4ec230f30.html>.

4. UNHCR, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2011: STATISTICAL OVERVIEW OF ASYLUM APPLICATIONS LODGED IN EUROPE AND SELECTED NON-EUROPEAN COUNTRIES 24 (2012).

5. *Id.*

6. *Id.*

7. *Id.* These figures probably underestimate the rise in applications of each of these groups, as the country of origin of 16,000 asylum seekers in Italy was unknown when UNHCR's 2011 statistics were published. *Id.*

8. See UNHCR, Update No. 30: Humanitarian Situation in Libya and Neighbouring Countries 3 (June 22, 2011), *available at* <http://www.unhcr.org/4e0201a09.html>. For a discussion of the refugee crisis in Europe before the outbreak of conflict in Libya and the surrounding region, see HUGO BRADY, CENTRE FOR EUROPEAN REFORM, EU MIGRATION POLICY: AN A-Z 19-20 (Feb. 2008), *available at* <http://www.cer.org.uk/publications/archive/essay/2008/eu-migration-policy-z>.

9. These states accepted 66,800 asylum applications in 2011. UNHCR, *supra* note 4, at 7-8.

10. Italy saw a 240% increase in applications since 2010 and the number of applications in Malta jumped by a staggering 1221%. The EU as a whole also experienced a significant increase in asylum applicants, receiving 277,370 asylum applications in 2011, a 15% increase over 2010. *Id.* at 20.

11. See *infra* section IV.c; see also Ivan Camilleri, *EU report confirms lukewarm reaction to Malta's appeal for burden-sharing*, TIMESOFMALTA.COM (June 3, 2011), <http://www.timesofmalta.com/articles/view/20110603/local/EU-report-confirms-lukewarm-reaction-to-Malta-s-appeal-for-burden-sharing.368694>; Ivan Camilleri, *EU Pressures members to resettle asylum seekers*, TIMESOFMALTA.COM (May 12, 2011), <http://www.timesofmalta.com/articles/view/20110512/local/EU-pressures-members-to-resettle-asylum-seekers.364942>.

country.<sup>12</sup> This response can hardly be said to constitute the solidarity in responsibility-sharing that should theoretically underlie the CEAS.<sup>13</sup>

At the same time, Europe has experienced a steady growth of anti-immigration sentiment, and many individual member states have developed policies to match.<sup>14</sup> Even before the crises in Tunisia, Libya, and elsewhere in the region began, certain southern member states responded to the increased burdens they bore under the CEAS by developing controversial interception procedures to prevent new arrivals. Today, however, under even greater financial strain and with constantly rising numbers of asylum seekers, the national-level political will to reform the asylum system is very weak indeed.<sup>15</sup>

### III. THE SCATTERED AND PROBLEMATIC LEGAL FRAMEWORK

Regardless of political appetite to do so, the member states of the European Union are bound by law to respect the rights of refugees. The legal obligations of EU member states with respect to asylum seekers stem from a set of overlapping, and often complex, laws and directives at the international, supranational, and domestic levels. For simplicity, it is helpful to conceptualize the legal framework as an inverted pyramid.<sup>16</sup> At its base, the smallest part, the pyramid consists of the international prohibition on *refoulement*—the return of an asylum seeker to a territory where he faces death or torture—enshrined in the Refugee Convention and customary international law, discussed below. At the broad top of the pyramid are the extensive sets of European Union-level directives—EU secondary law—providing specific guidance to member states on the domestic legislation they

12. Camilleri, *EU report confirms lukewarm reaction to Malta's appeal for burden-sharing*, *supra* note 11.

13. Consolidated Version of the Treaty on the Functioning of the European Union art. 80, Mar. 30, 2010 O.J. (C 83) 49, 78 [hereinafter TFEU] (“The policies of the Union set out in this Chapter [concerning border checks, asylum and immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”).

14. Certain southern EU border states such as Spain, Italy, Malta, and Greece have been subject to particular criticism for their expanding anti-immigration policies and practices. *See, e.g.*, Michael Campagna, *Effective Protection Against Refoulement in Europe: Minimizing Exclusionism in Search of a Common European Asylum System*, 17 U. MIAMI INT’L & COMP. L. REV. 125, 128–32 (2010); Aidan Lewis, *Italian Migration Policy Draws Fire*, BBC NEWS, Mar. 7, 2009, <http://news.bbc.co.uk/2/hi/europe/7880215.stm>; Briefing Notes, UNHCR, *As States Increase Border Controls, UNHCR Calls for Sensitivity for Those Fleeing Persecution* (Jan. 7, 2011), *available at* <http://www.unhcr.org/4d2713c19.html>; U.S. DEP’T OF STATE, HUMAN RIGHTS REPORT 2010: ITALY 14–15, *available at* <http://www.state.gov/documents/organization/160195.pdf>. For more information on the rise in anti-immigration rhetoric in Italy, see section IV.b.1 below.

15. Telephone Interview with Hugo Brady, Senior Research Fellow, Centre for European Reform (Mar. 9, 2012) [hereinafter Brady Interview] (noting that currently “there is no political appetite to reform the European asylum system at all.”).

16. This conceptual tool does not fully capture the complexity of these overlapping legal systems, but helps illustrate the hierarchy and relative weight of each of the relevant obligations.

must adopt regarding how asylum seekers are to be received, treated, and afforded protection. Forming the middle sections of the pyramid are other international and EU-level treaties, EU primary law, and the case law of the Court of Justice of the EU (“CJEU”) and the European Court of Human Rights (“ECtHR”). The complex configuration of this system, the awkward relationship between the different levels, and, above all, the State of First Arrival rule found in the Dublin regulation has led to human rights violations and severe strain to EU solidarity.

#### A. *The Dublin II Regulation: The Root of the Problem*

Situated in the middle part of the regulatory pyramid, the Dublin regulation (“the regulation” or “Dublin II”) is one of the main obstacles to a functional, fair asylum system in Europe. Dublin II was established in accordance with the Treaty on the European Union and the Tampere Conclusions<sup>17</sup> as a critical component of the CEAS and came into force in 2003, binding on all EU member states and a few non-member states.<sup>18</sup>

In theory, the regulation was intended to actually increase solidarity between member states.<sup>19</sup> The principal objectives animating its creation were 1) to ensure access to effective, time-efficient procedures for determining refugee status; 2) to prevent exploitation of the asylum system by parties attempting to make multiple claims in different EU member states; and 3) to identify in the shortest possible time a single member state responsible for examining a claim.<sup>20</sup> By eliminating the confusion and conflicting decisions of asylum adjudicators that arose when applicants filed in numerous EU states, the Dublin regulation has the potential to ease tensions and create a more efficient system that would benefit all member states.

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17. The Tampere Conclusions emerged as the product of the European Council meeting in Tampere, Finland, on October 15 and 16, 1999. In the Conclusions, the Council agreed to short-term targets for establishing a functional common asylum system, including procedures for determining the state responsible for examining an application, minimum reception conditions, and guidelines for determining refugee status. Presidency Conclusions, Tampere European Council (Oct. 15–16, 1999).

18. Denmark, Iceland, Norway, and Switzerland, are also participants in the Dublin II system. Council Decision 2006/188/EC, 2006 OJ (L 66) 37 (Denmark); Protocol to the 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 in Iceland or Norway, 2006 O.J. (L 57) 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) 5.

19. The principle of solidarity is among the fundamental values underlying the European Union, and represents the idea that members of the Union should equally share in both prosperity and burdens. Its importance is emphasized in the preamble to the Treaty on the Functioning of the European Union (“INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity. . .”). TFEU, *supra* note 13, preamble.

20. Council Regulation 343/2003, 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, 2003 O.J. (L 50) 1, preamble, paras. 3–4 [hereinafter Dublin II]; *see also* UNHCR, THE DUBLIN II REGULATION: A UNHCR DISCUSSION PAPER 9 (2006).

But Dublin II's ability to build trust and cooperation in this way is thwarted by its hierarchy of criteria for determining which state is responsible for processing a claim. The regulation states that preference for family unity and prior issuing of entry documents are the most important factors for assigning that responsibility, but where neither of these is applicable, responsibility falls to the state where the asylum seeker first entered the EU.<sup>21</sup> And although it lies at the lower end of this hierarchy, in the majority of cases this State of First Arrival rule<sup>22</sup> is usually the criterion by which the determination is made.<sup>23</sup>

Needless to say, especially in light of the situation in North Africa, this rule has shifted a grossly disproportionate share of the burden for handling claims to the southern EU border states—especially Greece,<sup>24</sup> Malta,<sup>25</sup> and Italy.<sup>26</sup> Under Dublin II, these states must process the applications not only of those asylum seekers who file with them first, but also those of “Dublin transferees”—asylum seekers who are physically sent back to them from other member states where they have attempted to file their applications. The movement of these individuals is tracked through Eurodac, the EU's fingerprint database, that raises a red flag when an asylum seeker files an application in the UK, for example, when she actually first entered the EU through Greece.<sup>27</sup> When this happens, under Dublin II, the UK files a

21. Dublin II, *supra* note 20, arts. 5–14. For further detail on the hierarchy of criteria and their application in practice, see generally UNHCR, *supra* note 20. See also Silas W. Allard, *Casualties of Disbarmony: The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System*, 24 EMORY INT'L L. REV. 295, 322–27 (2010). The determination of the State of First Arrival is usually made through fingerprint matches furnished by the Eurodac database, established for this express purpose. Dublin II, *supra* note 20, preamble, para. 10.

22. I have here termed this the “State of First Arrival rule” for simplicity of terminology; however, it is not officially or widely known by this title.

23. In 2009, for example, of a total of 15,389 “Taking Charge” requests (requests to the responsible member state to examine an asylum application pursuant to Dublin II), 14,883 (96.7%) were for “Documentation and Entry reasons,” while just 412 (2.7%) were for “Family reasons” and 94 (0.6%) were for “Humanitarian Reasons.” *Dublin Incoming Requests – Annual Data*, EUROPEAN COMMISSION: EUROSTAT DATABASE, [http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search\\_database](http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database) (Up-to-date Dublin transfer data can be found under “Database by Themes” – “Population and Social Conditions” – “Population” – “International Migration and Asylum” – “Asylum” – “Dublin Statistics”).

24. *EU: Put Rights at Heart of Migration Policy*, HUMAN RIGHTS WATCH (June 20, 2011), <http://www.hrw.org/en/news/2011/06/20/eu-put-rights-heart-migration-policy>.

25. Nicholas De Blouw, *Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean*, 40 CAL. W. INT'L L.J. 335, 344–47 (2010).

26. See *infra* notes 163–165 and accompanying text. The Eurostat statistics for Dublin transfers in 2009, the last year for which complete data is currently available, show that Greece and Italy received far more requests to accept Dublin transferees than any other member states, with 9,506 and 7,430 requests, respectively. The next highest number of requests was to Poland, at 4,862. Although the requests to Malta were fewer (1,125), given that the country's population is a mere 408,333, the number is quite significant. EUROPEAN REFUGEE FUND AND FORUM RÉFUGIÉS, DUBLIN TRANSNATIONAL PROJECT, TRANSNATIONAL ADVISORY AND ASSISTANCE NETWORK FOR ASYLUM SEEKERS UNDER A DUBLIN PROCESS, FINAL REPORT 19 (2011); CIA WORLD FACTBOOK: MALTA (July 2011 est.), <https://www.cia.gov/library/publications/the-world-factbook/geos/mt.html>.

27. See *Eurodac*, EUROPEAN DATA PROTECTION SUPERVISOR, <http://www.edps.europa.eu/EDP-SWEB/edps/Supervision/Eurodac> (last visited Apr. 3, 2012).



formal request with the Greek government to take responsibility for the applicant, to which Greece must generally respond in the affirmative if the fingerprint records are clear.<sup>28</sup> In any event, if Greece fails to respond to the request within two months (or within one month in urgent cases), the application is assumed to have been accepted by default and the UK sends the asylum seeker back to Greece for processing.<sup>29</sup>

Dublin II provides one notable clause that allows for divergence from this system. If the UK decides that the asylum seeker should not be sent back to Greece for “political, humanitarian, or practical reasons,” it can decide to process the claim itself under the “Sovereignty Clause.”<sup>30</sup> That said, the regulation specifies that all EU member states, by virtue of the assumption that they “respect the principle of non-*refoulement*,” are to be considered “safe third countries” for the purpose of transfers under Dublin II.<sup>31</sup> This means that, in the example above, the UK government should not refuse to send an asylum seeker back to Greece because it believes that Greece is not complying with its international human rights obligations. However, over the past three years, this has happened with increasing frequency, sparking intense debate and litigation and dealing a serious blow to mutual trust between EU member states.<sup>32</sup>

### B. *The Rest of the Pyramid: Human Rights Obligations*

How Dublin II interacts with the other parts of the legal pyramid is complex and under debate. To better understand its problematic nature, however, it is necessary to review at least the basic components of the applicable human rights law as well as the judgments of the European Court of Human Rights and the European Court of Justice that come directly to bear on the question.

#### 1. *1951 Refugee Convention*

Internationally, the 1951 Refugee Convention and its Protocols<sup>33</sup> are the most basic, and widely recognized, sources of legal obligations concerning

28. Dublin II, *supra* note 20, arts. 18(1)–(6).

29. *Id.* art. 18(7).

30. *Id.* art. 3(2). The clause itself provides only that any member state may examine an asylum application for which it is not responsible, but the preparatory document to the regulation clarifies the intended purpose of the clause: “The sovereignty clause allows a Member State, where an asylum application is lodged but who is NOT responsible under the criteria laid down in the Dublin Regulation, to nevertheless decide to examine the asylum application, for political, humanitarian or practical reasons.” *Accompanying Document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system*, COM (2007) 299 final (June 6, 2007).

31. Dublin II, *supra* note 20, preamble, para. 2.

32. See *infra* sections III.b.5–6.

33. U.N. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137; U.N. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267 [together hereinafter 1951 Refugee Convention].

asylum. All EU member states are party to the Convention,<sup>34</sup> and under EU treaty law, the CEAS must be consistent with its provisions.<sup>35</sup> The cornerstone of the Convention is its prohibition on *refoulement*:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>36</sup>

The prohibition on *refoulement* is recognized by legal scholars as a norm of customary international law as well as a critical component of the universal prohibition on torture.<sup>37</sup>

Although the Convention does not explicitly require that states grant protection to refugees or outline specific procedural obligations with which they must comply, the UNHCR and asylum law experts argue that Article 33 implicitly requires certain procedural safeguards,<sup>38</sup> including “ready access to an asylum procedure” guaranteeing “both confidentiality and an objective and independent analysis of the human rights situation in other countries,”<sup>39</sup> and a remedy with suspensive effect when there is a risk of *refoulement* to a country where the applicant could be exposed to ill-treatment or torture.<sup>40</sup>

The prohibition on *refoulement* encompasses not just direct returns to a country where an individual may face torture or other ill-treatment, but also “indirect” or “chain” *refoulement*, which entails returning an individual to a country that may send him on to a third country where such risk is

34. UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol as of April 1, 2011*, available at <http://www.unhcr.org/3b73b0d63.html>.

35. Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU), mandating the creation of the CEAS and establishing its underlying principles, states: “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

36. 1951 Refugee Convention, *supra* note 33, art. 33.

37. UNHCR, Note on International Protection, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001), available at <http://www.unhcr.org/refworld/docid/3bb1c6cc4.html>.

38. AGNÈS HURWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 181–82 (2010); UNHCR, GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION/THIRD TRACK: ASYLUM PROCESSES (FAIR AND EFFICIENT ASYLUM PROCEDURES) (2001), ¶ 4–5, available at <http://www.unhcr.org/3b389254a.pdf>.

39. “That procedure should involve an individual assessment of the risk of ill-treatment in case of expulsion of the person concerned to the country of origin or a third country.” Committee for the Prevention of Torture, *Rep. to the Italian Government on the Visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 27 to 31 July 2009*, ¶ 27, CPT/Inf (2010) 14 (April 28, 2010) [*hereinafter* CPT Report to Italian Government].

40. *See, e.g.*, Gebremedhin [Gaberamadhien] v. France, App. No. 25389/05, ¶ 58 (Eur. Ct. H.R., Apr. 26, 2007), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

present.<sup>41</sup> This means that an EU member state cannot, for example, send an Eritrean asylum seeker to Libya if there is reason to believe that the Libyan government will send him back to Eritrea and he will face torture or arbitrary killing there. Since this requirement implies an investigation of the conditions for asylum seekers in potential receiving states, the UNHCR has repeatedly emphasized that sending states must undertake such an examination in order to be in compliance with their human rights obligations.<sup>42</sup>

## 2. *European Convention on Human Rights*

The European Convention on Human Rights (“the Convention”)<sup>43</sup> is a multilateral treaty that, along with its numerous Protocols, sets forth basic human rights guarantees for individuals falling under the jurisdiction of its 47 states parties. The Convention also established its monitoring body, the European Court of Human Rights (“ECtHR”), which guarantees a unique degree of protection for the rights of individuals vis-à-vis governments.<sup>44</sup> Individuals suffering violations of any of the Convention’s enumerated rights while within a member state’s jurisdiction<sup>45</sup> can appeal directly to the ECtHR, whose judgments are binding on the parties involved.<sup>46</sup> For example, the court often hears cases brought by asylum seekers in EU member states alleging violations of their procedural or substantive rights by a state party to the Convention.

The Convention’s provisions come directly to bear on the rights of asylum seekers in Europe. Most important, perhaps, is Article 3, which prohibits torture or inhuman or degrading treatment or punishment.<sup>47</sup> It is settled ECtHR case law that this provision implies a prohibition on *refoule-*

41. HURWITZ, *supra* note 38, at 180. Hurwitz points out that this obligation is derived directly from Article 33, which prohibits return in “any manner whatsoever.” *Id.*

42. *See, e.g.*, UNHCR, Note on International Protection, ¶ 12, U.N. Doc. A/AC.96/975 (July 2, 2003); UNHCR, Background Note on the Safe Country Concept and Refugee Status Submitted by the High Commissioner to the Sub-Committee of the Whole on International Protection, ¶¶ 11–12, U.N. Doc. EC/SCP/68 (July 3, 1991).

43. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, Nov. 4, 1950, Europ. T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter *European Convention on Human Rights*].

44. *Id.* art. 13.

45. The European Court of Human Rights (ECtHR) recently affirmed its earlier ruling that an individual may fall within a state’s jurisdiction for the purposes of the Convention when she is under the state’s “authority and control.” *See, e.g.*, *Al-Skeini and others v. United Kingdom*, App. No. 55721/07, ¶ 137 (Eur. Ct. H.R., July 7, 2011), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>. (“It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored.’”). Therefore, an individual need not be on a Member State’s physical territory when the rights violation occurred in order for her to seek relief at the ECtHR.

46. *European Convention on Human Rights, supra* note 43, arts. 19, 34, 46.

47. *Id.* art. 3.

ment, returning a person to a country where she could be exposed to a “real risk” of torture, inhuman or degrading treatment or punishment.<sup>48</sup> This interpretation, broader than the Article 33 guarantee of the Refugee Convention, has been said to constitute a *de facto* right to asylum under the Convention, although it is not explicitly provided.<sup>49</sup> The recent case law of the ECtHR concerning Article 3 and asylum applicants is discussed below.

It is a requirement for all EU member states and candidates for membership to accede to the Convention, so Article 3, and the asylum right it implies, is fully in force in all the countries of the union.<sup>50</sup> In addition, under the Lisbon Treaty, which amends the Treaty on the European Union (“TEU”) and came into force in late 2009, the EU itself must become party to the Convention.<sup>51</sup> This means that individuals will be able to challenge not only the actions of national governments on fundamental human rights grounds, but also those of the union-level institutions; the EU, in turn, will be bound by the judgments of the ECtHR.<sup>52</sup> This is a major development and a significant step towards closing the lingering lacunae in the EU’s system of human rights protection.

The accession of the EU to the Convention also means that decisions of the Court of Justice of the European Union (“CJEU”), the ultimate authority on EU law, will be appealable to the ECtHR.<sup>53</sup> In addition, it means

48. “[E]xpulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.” *Sufi and Elmi v. United Kingdom*, App. Nos. 8319/07 and 11449/07, ¶ 212 (Eur. Ct. H.R., June 28, 2011), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; see also *Soering v. United Kingdom*, App. No. 14038/88, ¶¶ 87–88 (Eur. Ct. H.R., July 7, 1989), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Saadi v. Italy*, App. No. 37201/06, ¶ 125 (Eur. Ct. H.R., Feb. 28, 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

49. HURWITZ, *supra* note 38, at 190.

50. Secretariat of the Council of Europe, *Accession by the European Union to the European Convention on Human Rights: Answers to frequently asked questions* 1 (June 30, 2011), available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents/EU\\_accession-QA\\_2011\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/EU_accession-QA_2011_en.pdf) [hereinafter *Accession of the EU to the ECHR FAQ*].

51. “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.” Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, art.6(2), Dec. 13, 2007, 2007 O.J. (C 306), 1, 13 [hereinafter *Treaty of Lisbon*].

52. *Accession of the EU to the ECHR FAQ*, *supra* note 50, at 2–3. It should be noted, however, that the ECtHR will not thereby become a “superior” court to the CJEU in a general sense, but rather remains a court that specializes on a specific human rights instrument. Although its judgments are binding, the EU, as the other states parties to the European Convention on Human Rights, will retain the freedom to implement the Court’s orders by the means it deems appropriate. *Id.* at 7.

53. Before the Lisbon Treaty came into force, the two courts operated on a basis of “mutual recognition and co-operation,” but without any formal association. *Introduction*, EU CHARTER OF FUNDAMENTAL RIGHTS, [http://www.eucharter.org/home.php?page\\_id=66](http://www.eucharter.org/home.php?page_id=66) (last visited Mar. 31, 2012); *Accession of the EU to the ECHR FAQ*, *supra* note 50, at 7. For example, in its judgment in *N.S. v. UK*, discussed below, the CJEU relies upon the previous finding of the European Court of Human Rights in *M.S.S.* that member states of the EU may rely upon the reports of non-governmental organizations to determine the compliance of other member states with their fundamental human rights requirements. *Joined cases C-411/10, N.S. v. Sec’y of State for Home Dep’t, and C-493/10, M.E. et al. v. Refugee Appl. Comm’r & Min. for Justice, Equality, and Law Reform*, ¶ 91 (Dec. 21, 2011), available at <http://curia>.

that the actions of Frontex will be subject to review at the ECtHR, a critical step for protecting the rights of asylum seekers at the EU's external borders.<sup>54</sup> In spite of the Lisbon Treaty's requirement of EU accession to the Convention, however, the necessary legal framework dictating the procedure for doing so has yet to be completed. Although its finalization was originally projected for the end of 2011,<sup>55</sup> efforts by certain member states to block the conclusion of the process have caused its delay.<sup>56</sup>

### 3. *Charter of Fundamental Rights*

The Charter of Fundamental Rights ("Charter")<sup>57</sup> is the foundational source of human rights guarantees under EU law, and all national- and union-level legislative action is subject to scrutiny under its provisions.<sup>58</sup> It was signed in 2000 by the European Council and became part of EU primary law,<sup>59</sup> enforceable in national and EU-level courts, when the Lisbon Treaty entered into force in 2009.<sup>60</sup> The Charter carries the same legal weight as the founding treaties,<sup>61</sup> and its provisions are interpreted by the CJEU.

Although it has been referred to as "the most modern codification of fundamental rights in the world,"<sup>62</sup> the Charter was not intended to create new rights, but restates and conglomerates numerous sets of existing obli-

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europa.eu/juris/liste.jsf?pro=& nat=&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-411%252F10&td=ALL&pcs=O&avg=&page=1&mat= or&jge=&for=&cid=3252262.

54. HUGO BRADY, OPEN SOCIETY FOUNDATIONS, HUMAN RIGHTS IN THE EU: HOW THE LISBON TREATY COULD HELP 11 (2011), available at [http://www.soros.org/initiatives/brussels/articles\\_publications/publications/lisbon-treaty-20110401](http://www.soros.org/initiatives/brussels/articles_publications/publications/lisbon-treaty-20110401).

55. *Accession of the EU to the ECHR FAQ*, *supra* note 50, at 8.

56. Press Statement, European Parliament, European Parliamentarians 'deeply concerned' at national moves to block EU accession to the European Convention on Human Rights (Jan. 25, 2012), <https://wcd.coe.int/ViewDoc.jsp?id=1899615&Site=DC>.

57. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter *Charter of Fundamental Rights*].

58. R (on the application of Saeedi) v. Sec'y of State for the Home Dep't, [2010] EWHC 705 (Admin), [50] (R v. SSHD became N.S. v. UK on appeal to the CJEU, discussed further below in section III.b.6); Viviane Reding, The EU's Accession to the European Convention on Human Rights: Towards a Stronger and More Coherent Protection of Human Rights in Europe, Comments at the Hearing of the European Parliament's Constitutional Affairs Committee, Brussels (Mar. 18, 2010), available at [http://ec.europa.eu/commission\\_2010-2014/reding/pdf/speeches/speech\\_20100318\\_1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf).

59. The primary law of the EU consists of treaties that lay out the foundation for the Union's organization, objectives, and operation. Secondary law is that which is developed by the EU institutions relating to the execution of their duties, specifically regulations, directives, decisions, recommendations and opinions. *Sources of European Union Law*, EUROPA: SUMMARIES OF EU LEGISLATION, [http://europa.eu/legislation\\_summaries/institutional\\_affairs/decisionmaking\\_process/114534\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114534_en.htm) (last visited Apr. 2, 2012).

60. Treaty of Lisbon, *supra* note 51, art. 6(1). For a comprehensive discussion of how the Treaty of Lisbon affects human rights in the EU, see generally BRADY, *supra* note 54.

61. Consolidated Version of the Treaty on European Union art. 6(1), March 30, 2010 O.J. (C 83) 19 [hereinafter TEU].

62. Reding, *supra* note 58.

gations for EU member states under international and European law. Unlike the 1951 Refugee Convention or the European Convention on Human Rights, the Charter explicitly guarantees a right to asylum, creating greater obligations for EU member states than the other two instruments alone.<sup>63</sup> In addition, the Charter restates the prohibition on *refoulement*, as found in the Refugee Convention and implicitly established by Article 3 of the European Convention.<sup>64</sup>

How does the Charter interact with the Convention? While the Charter technically occupies a more authoritative legal position than the Convention, it explicitly provides that rights found within it that correspond to Convention rights should be interpreted for consistency with the latter.<sup>65</sup> It also expressly prohibits the abridging of rights found in the Convention while allowing for states to provide even greater human rights guarantees at their discretion.<sup>66</sup> The Charter itself may therefore require greater protections than the Convention through certain provisions, but never less.

The official Explanations of the Charter elucidate the exact rights that are deemed equivalent in meaning and scope to those of the Convention. Among these is Article 19(2), which corresponds with Article 3 of the Convention, “as interpreted by the European Court of Human Rights.”<sup>67</sup> Therefore, when the courts of EU member states and the CJEU interpret the Charter’s 19(2) prohibition on *refoulement*, the case law of the ECtHR is a very persuasive, if not formally binding, authority. Consequently, the CJEU, when interpreting Charter rights corresponding with those of the Convention, regularly refers to the decisions of the ECtHR on those rights.<sup>68</sup> And although Article 19(2) does not explicitly provide more expansive protection than its corresponding Convention guarantee, European legal scholars argue that Articles 18 and 19 of the Charter, taken together, go beyond EU member states’ obligations under the Refugee Convention

63. “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.” Charter of Fundamental Rights, *supra* note 57, art. 18.

64. “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” *Id.* art. 19(2).

65. “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” *Id.* art. 52(3). *See also* R (on the application of Saeedi) v. Sec’y of State for the Home Dep’t, [2010] EWHC 705 (Admin), [56].

66. Charter of Fundamental Rights, *supra* note 57, art. 52(3).

67. Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303), 2, 34.

68. *See, e.g.*, Joined Cases C-92/09 & C-93/09, Volker und Markus Schecke GbR, Hartmut Eifert v. Land Hessen, ¶ 51 (Nov. 9, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0092:EN:HTML>; *see also infra* part III.b.5, which discusses relevant ECtHR case law.

and the European Convention on Human Rights by actually “creat[ing] an obligation for European border authorities to provide active protection.”<sup>69</sup>

#### 4. *The Asylum Directives*

Recognizing that widely divergent interpretations of the asylum right and the necessary procedural guarantees across member states was problematic for effective human rights protection, the European Council issued a series of directives between 2003 and 2005 laying down baseline standards to which member states must adhere with respect to asylum seekers. Directives adopted by the Council form part of the body of EU secondary law, which is below the status of treaties, but still binding on member states.<sup>70</sup> However, directives leave the determination of exact implementation methods up to national governments, which can vary from one state to another as long as the required result is ultimately achieved.<sup>71</sup>

Three directives comprise the bulk of these standards for national-level asylum policies: the Procedures Directive,<sup>72</sup> the Reception Conditions Directive,<sup>73</sup> and the Qualifications Directive,<sup>74</sup> each adopted by the Council in the course of developing the current embodiment of the CEAS. Together, these instruments establish baseline guarantees regarding the examination of asylum claims, the treatment that individual asylum seekers are granted while they await a determination of their status, and standardized requirements for determining refugee status, that must be provided by national-level governments. All member states<sup>75</sup> are required to transpose these provisions into domestic law within a given time frame, usually within about

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69. ANDREAS FISCHER-LESCANO & TILLMANN LÖHR, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, BORDER CONTROLS AT SEA: REQUIREMENTS UNDER INTERNATIONAL HUMAN RIGHTS AND REFUGEE LAW 21 (2007).

70. TFEU, *supra* note 13, art. 288.

71. *Id.*

72. Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13. The Procedures Directive lays down basic procedural guarantees for asylum seekers, such as the right to remain in the examining member state pending determination of refugee status, art. 7, legal assistance and representation, art. 15, and provisions for unaccompanied minors, art. 17.

73. Council Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18. The Reception Conditions Directive establishes baseline standards for the treatment that asylum seekers must be afforded by member states, including documentation identifying the asylum seeker as such, art. 6, the right to residence and freedom of movement while an application is pending (with exceptions for “legal reasons” or “reasons of public order”), art. 7, and access to education for minor children, art. 10.

74. Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12. The Qualifications Directive delineates the elements that qualify a person as a “refugee” under Union law. Among these are acts constituting persecution for the purpose of qualifying as a refugee, art. 9, factors that exclude an individual from refugee status, art. 12, and qualifications for subsidiary protection, arts. 15–19.

75. There are a few exceptions; for example, Denmark is exempted from the requirements of the Qualifications Directive. Council Directive 2004/83/EC, preamble, para. 40, 2004 O.J. (L 304) 12, 14.

two years of their adoption by the Council.<sup>76</sup> Member states are free to adopt legislation that is more favorable to asylum seekers than the directives require, but not less so.<sup>77</sup> This directives framework establishes minimum standards with which member states' domestic legislation must comply and also aims to achieve at least some degree of harmonization in asylum policy across the union.<sup>78</sup>

Although the directives theoretically help to harmonize treatment of asylum seekers across the EU, each has been subject to robust criticism by the European Commission, rights groups, and legal scholars, among others, for failing to set a high enough bar for minimum standards and thereby contributing to, rather than diminishing, disparities across member states.<sup>79</sup> As a result of these criticisms, recast versions of each directive have been developed to address some of the most egregious deficits; to date, however, only one has actually been adopted by the European Council.<sup>80</sup> Substantial political resistance has hindered the process of adopting additional recast versions, amid claims that the suggested revisions would compromise an individual government's ability to operate a functional and efficient asylum system.<sup>81</sup>

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76. See, e.g., Council Directive 2004/83/EC, art. 38(1), 2004 O.J. (L 304) 12, 23; Council Directive 2005/85/EC, art. 44, 2005 O.J. (L 326) 13, 32; Council Directive 2003/9/EC, art. 26, 2003 O.J. (L 31) 18, 25.

77. HEMME BATTJES, *EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW* 202–04 (2006).

78. *Id.*

79. See, e.g., European Commission, *Rep. from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, at 15, COM (2010) 465 final (Sep. 8, 2010) [hereinafter European Commission, 2010 Report on Procedures Directive]; European Commission, *Rep. from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection*, at 15, COM (2010) 314 final (Sep. 8, 2010); Cathryn Costello, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?*, 7 *EUR. J. MIG. & L.* 35, 36–37 (2005) (“[T]he [proposed Procedures] Directive embodies lowest common denominator lawmaking at its worst, as the varied exclusionary procedural practices of the Member States have come to be incorporated for the first time in a legally binding instrument.”).

80. Council 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), 2011 O.J. (L 337) 9; see also European Commission, *Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast)*, COM(2011) 319 final (June 1, 2011); European Commission, *Amended Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Asylum Seekers (Recast)*, COM (2011) 320 final (June 1, 2011).

81. The UK, for example, has staunchly resisted adoption of the recast Procedures and Reception Conditions Directives, arguing that “[t]he directives would have restricted our ability to run an asylum system which is both fair and efficient” and that doing so would “sen[d] out the wrong message, encouraging those who do not need our protection to make unfounded asylum claims.” Tellingly, in arguing against adoption of the Directives, the UK Immigration Minister flatly stated, “[t]his Government does not support a common asylum system in Europe. That is why we have not opted in to these directives and will not opt in to any proposal which would weaken our border.” *UK will not opt in to EU asylum directives*, UK HOME OFFICE, Oct. 13, 2011, <http://www.homeoffice.gov.uk/media-centre/news/EU-asylum>.



### 5. *The ECtHR's Case Law on the Dublin Regulation*

As explained above, the case law of the ECtHR is a critical piece of the legal puzzle coming to bear on member state action regarding asylum seekers. The court has examined several complaints of Article 3 violations relating to *refoulement* in recent years, and its standard for what reaches the threshold of violation has evolved somewhat over this time.<sup>82</sup> However, its judgments have made clear that a member state can be held in violation for returning an asylum seeker to any country where she faces a real risk of ill-treatment.<sup>83</sup>

#### *a. T.I. v. United Kingdom*<sup>84</sup>

In *T.I.*, the ECtHR ruled on the applicability of the “safe third country” presumption within the EU, as established by the Dublin Regulation. The case involved the transfer of a Sri Lankan asylum seeker from the UK to Germany in accordance with the Dublin Convention, the predecessor to Dublin II. The applicant claimed that he was at high risk of *refoulement* if returned to Germany, where his asylum application had previously been rejected on the basis that the ill-treatment he risked was not attributable to the state, but rather to an armed rebel group.<sup>85</sup>

Although the Court ultimately ruled the case inadmissible, it did find that a member state cannot “rely automatically . . . on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims.”<sup>86</sup> It found that the existence of international agreements and cooperative frameworks with implications for fundamental human rights cannot absolve states of their responsibility to ensure that their expulsion of an asylum seeker does not result in a violation of Article 3.<sup>87</sup> Although not directly pertaining to the State of First Arrival rule, this case raised a red flag regarding the feasibility

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82. For a more detailed analysis of this evolution, see HURWITZ, *supra* note 38, at 192–93; see also NUALA MOLE, *ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 38–42 (2010).

83. See, e.g., *N.A. v. United Kingdom*, App. No. 25904/07, ¶ 109 (Eur. Ct. H.R., July 17, 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Venkadajalarma v. The Netherlands*, App. No. 58510/00 (Eur. Ct. H.R., Feb. 17, 2004), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Hilal v. the United Kingdom*, App. No. 45276/99, ¶ 59 (Eur. Ct. H.R., Mar. 6, 2001), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Ahmed v. Austria*, 1996-VI Eur. Ct. H.R. 2206, ¶¶ 38–39. In addition, the Court recently affirmed its earlier conclusion that, in the case of general violence in a destination country, an applicant need not show any special distinguishing feature of his own case when he can show that the general violence is “of a sufficient level of intensity to create a real risk that any removal to that country would violate Article 3 of the Convention.” *Sufi and Elmi v. UK*, App. Nos. 8319/07 and 11449/07, ¶ 217 (Eur. Ct. H.R., June 28, 2011), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

84. *T.I. v. United Kingdom*, App. No. 43844/98, Decision on Admissibility (Eur. Ct. H.R., Mar. 7, 2000), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

85. *Id.* at 11.

86. *Id.* at 15.

87. The Court held that any other finding “would be incompatible with the purpose and object of the Convention.” *Id.*

of any arrangement that entitles member states to presume the compliance of others with their international and European human rights obligations.

*b. K.R.S. v. United Kingdom*<sup>88</sup>

In *K.R.S.*, the applicant was an Iranian national who challenged the UK's decision to return him to Greece, where he originally entered the EU, for asylum processing. Here, the court also ultimately found the complaint to be inadmissible, but it did note the evidence presented by the UNHCR concerning unacceptable conditions for asylum seekers in Greece. In spite of its assertion that the "independence, reliability, and objectivity" of the UNHCR were "beyond doubt," the court found that the agency's concerns about the conditions for asylum seekers in Greece couldn't be used as a basis for preventing the UK's transfer of the applicant to Greece.<sup>89</sup> It justified this conclusion by stating that, since Greece was a member of the EU and party to the Convention, the presumption must be that it was complying with its legal obligations to asylum seekers.<sup>90</sup>

In *K.R.S.*, therefore, the court indicated that, without sufficient evidence to the contrary, a member state sending an asylum seeker under the State of First Arrival rule can assume that the receiving state is complying with its Convention obligations. While this decision theoretically bolstered the principle of mutual trust between member states, it may also have fostered a practice of willful ignorance by sending states, a problem that came fully to light three years later in *M.S.S. v. Belgium and Greece*.

*c. M.S.S. v. Belgium and Greece*<sup>91</sup>

*M.S.S.* concerned an Afghan national who fled his country and arrived in Europe, claiming that he was at risk of persecution by the Taliban since he had worked as an interpreter for international air force troops in Kabul, and had in fact already survived a murder attempt.<sup>92</sup> He arrived first in Greece, where he was detained for a week and ordered to leave the country, then traveled on to Belgium and immediately applied for asylum.<sup>93</sup> In accordance with Dublin II's State of First Arrival rule, however, and over his persistent objections, he was sent back to Greece to have his claim processed.<sup>94</sup> There he was initially detained in conditions that did not meet the minimum standards laid out by the EU asylum directives; reports from the European Parliament, the UNHCR, and various NGOs at the time confirmed that asylum seekers in Greek detention centers were subjected to

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88. *K.R.S. v. United Kingdom*, App. No. 32733/08, Decision on Admissibility (Eur. Ct. H.R., Dec. 2, 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

89. *Id.* at 16–17.

90. *Id.* at 18.

91. *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011).

92. *Id.* ¶ 31.

93. *Id.* ¶¶ 9–11.

94. *Id.* ¶¶ 12–33.

severe overcrowding, complete lack of sanitation, poor ventilation, insufficient and dirty mattresses, lack of access to toilets and other sanitary facilities, and physical violence and racist treatment by guards.<sup>95</sup> Once released, the applicant was forced to live on the street, without any means of subsistence, due to the lack of state-run reception facilities or provisions for asylum seekers.<sup>96</sup>

The ECtHR found Greece in violation of its Article 3 obligations due to the inhumane conditions that the applicant faced while in detention as well as to the degrading situation of abject poverty and homelessness that he was required to endure as an asylum seeker once released.<sup>97</sup> In making its determination of what constituted “inhumane or degrading treatment” for Article 3 purposes, the court gave particular weight to the applicant’s situation of special vulnerability as an asylum seeker, given the trauma he had already endured.<sup>98</sup> In addition, the court reasoned that, in light of the fact that the conditions the applicant described were consistent with those widely documented by numerous independent sources, there was no need for him to produce individual evidence of his exposure to ill-treatment for an Article 3 violation to be found.<sup>99</sup> In overruling the presumption of Greece’s compliance with international obligations that it established in *K.R.S.*, the ECtHR noted that “numerous reports and materials ha[d] been added to the information available” when it made the *K.R.S.* decision in 2008.<sup>100</sup>

Of primary significance to the question of solidarity between EU member states, the court went on to find that Belgium was *also* in violation of Article 3 of the Convention, since the Belgian authorities “knew or ought to have known” that the applicant “had no guarantee that his asylum application would be seriously examined by the Greek authorities.”<sup>101</sup> It based this conclusion on the fact that there existed numerous public sources of information that should have alerted the Belgian authorities to the risk of ill-treatment the applicant would face if transferred to Greece for asylum processing.<sup>102</sup> Furthermore, it stated that the existence of domestic laws, accession to international instruments regarding fundamental human rights, and diplomatic assurances were not enough to allow a state re-

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95. *Id.* ¶¶ 161–66.

96. *Id.* ¶¶ 34–37.

97. *Id.* ¶¶ 229–31, 263.

98. “[The Court] considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person’s dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant’s distress was accentuated by the vulnerability inherent in his situation as an asylum seeker. . . . There has therefore been a violation of Article 3 of the Convention.” *Id.* ¶¶ 233–34.

99. *Id.* ¶¶ 255, 258.

100. *Id.* ¶ 347.

101. *Id.* ¶ 358.

102. *Id.* ¶¶ 347–49.

turning an asylum seeker to the State of First Arrival to assume the latter's compliance with Convention guarantees in the face of ample evidence to the contrary.<sup>103</sup>

The *M.S.S.* decision was the first to directly challenge the assumption that mutual trust between member states meant ignoring obvious violations of the asylum directives and international human rights law. In this way, it raised complicated questions for the principle of solidarity between member states. Requiring states to examine the human rights compliance of fellow EU members hardly seems demonstrative of "mutual trust"; yet a government's knowledge that it can be held responsible for another's failings if it declines to undertake such an examination is likely to stifle any feeling of solidarity that a blind presumption might culture. The question of the automatic presumption was addressed directly by the CJEU less than a year later in *N.S.*

#### 6. *The CJEU's Case Law on Dublin II*

On December 21, 2011, the CJEU followed up on the ECtHR's treatment of Dublin II in the joined cases of *N.S. v. the United Kingdom and M.E. v. Ireland* ("*N.S.*").<sup>104</sup> *N.S.* concerned an asylum applicant who fled Afghanistan and lodged an asylum claim in the UK, stating that he feared persecution based on his conversion to Christianity.<sup>105</sup> Although he did not initially mention it, the authorities later discovered that his first point of entry into the EU had been Greece. There he had been kept in an overcrowded detention center for four days and afterwards caught and detained in Turkey for two months before finally making his way to the UK.<sup>106</sup>

After the Secretary of State for the Home Department ("*SSH*D") determined that, under the Dublin Regulation, Greece was the state responsible for examining the applicant's asylum claim, it prepared to return him there for processing.<sup>107</sup> The applicant appealed for judicial review in August, claiming, among other things, that his return to Greece would put him at risk of ill-treatment due to 1) the poor detention conditions; 2) the lack of adequate procedures or social assistance for asylum seekers; and 3) the danger of onward *refoulement* from Greece.<sup>108</sup> He claimed that by sending him back to Greece, the UK government would be in breach of its Article 3

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103. *Id.* ¶¶ 353–54.

104. Joined cases C-411/10, *N.S. v. Sec'y of State for Home Dep't*, and C-493/10, *M.E. et al. v. Refugee Appl. Comm'r & Min. for Justice, Equality, and Law Reform* (Dec. 21, 2011), available at <http://curia.europa.eu/juris/celex.jsf?celex=62010CC0411&lang1=en&type=NOT&ancre=>.

105. *R (on the application of Saeedi) v. Sec'y of State for the Home Dep't (SSH*D), [2010] EWHC 705 (Admin), [2]–[3].

106. *R v. SSH*D, at [5]–[6].

107. The Secretary of State for the Home Department learned of the applicant's presence in Greece through a Eurodac fingerprint match showing he had been there in late September 2008. *R v. SSH*D, at [7].

108. *R v. SSH*D, at [12].

obligation not to expose him to the risk of torture or inhuman or degrading treatment.

Similarly to *M.S.S.*, the primary questions at issue in *N.S.* were whether a member state may, in spite of the principles of sincere cooperation and solidarity enshrined in the founding treaties between EU member states,<sup>109</sup> pass judgment upon the compliance of fellow member states with their fundamental human rights obligations; and whether, in fact, a member state *must* do so before sending an asylum seeker to the territory of another under Dublin II.<sup>110</sup>

In its judgment, the CJEU echoed the ECtHR's previous holding in finding that member states are permitted to make such a judgment where a risk of fundamental rights violations is present. The court held that a member state may not transfer an asylum seeker under Dublin II to another member state if it

cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in [the receiving] 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 within the meaning of . . . the Charter.<sup>111</sup>

The CJEU therefore determined that any irrebuttable presumption by one member state of another's compliance with EU and international human rights law with respect to asylum seekers was incompatible with the Charter of Fundamental Rights.<sup>112</sup>

*N.S.*, like *M.S.S.* before it, provided helpful guidance for member states concerning conditions under which they should not return asylum seekers under the State of First Arrival rule. In so doing, each court indicated that there are situations in which the straightforward application of Dublin II, as part of the larger CEAS, might violate provisions of the Convention, the Charter, and international law.

The problem with these two judgments, however, is that they have created ambiguity and an awkward obstacle to the realization of EU solidarity. Member states are now caught in a double bind with respect to union cohesion, forced to choose between making inquiries into each other's human rights compliance, thereby violating the principle of mutual trust, or tak-

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109. Article 4(3) of the TEU provides: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." TEU, *supra* note 61, art. 4(3).

110. Case C-411/10, *N.S. v. Sec'y of State for Home Dep't* (Reference for a preliminary ruling from the Court of Appeal (England & Wales)), 2010 O.J. (C 274) 21, 22.

111. Joined cases C-411/10, *N.S. v. Sec'y of State for Home Dep't*, and C-493/10, *M.E. et al. v. Refugee Appl. Comm'r & Min. for Justice, Equality, and Law Reform*, ¶ 94 (Dec. 21, 2011), available at <http://curia.europa.eu/juris/celex.jsf?celex=62010CC0411&lang1=en&type=NOT&ancre=>.

112. *Id.* ¶ 99.

ing a leap of faith that exposes them to liability for human rights violations that could create even deeper resentment.

This is not to say that the ECtHR and the CJEU went too far with their decisions in these two cases; to the contrary, neither judgment went far enough to eliminate the risk to EU solidarity that the CEAS presents. By merely identifying certain problems that could arise from the correct application of the State of First Arrival rule, the courts missed the opportunity to identify the rule itself as the root of those problems. When taken together, these judgments made clear that the current state of the CEAS, and specifically the State of First Arrival rule of Dublin II, are incompatible with the fundamental human rights guarantees of the EU's legal regime. Until the governments of the EU and its supranational institutions realize this and correct the deficits, particularly Dublin II, the obstacle to achieving union solidarity will remain.

#### IV. INDIVIDUAL MEMBER STATES: MISMATCHED PATCHES

As the preceding section demonstrated, the policies of member states vis-à-vis asylum seekers are far from harmonized. Although the asylum directives establish the baseline standards to which all countries of the EU must theoretically abide, compliance is irregular and not well monitored. In reality, each state continues to receive asylum seekers and adjudicate their claims according to its own set of standards and constrained by the practical limits of its resources and capacities. This latter issue has been greatly exacerbated by the increased burden to southern states created by the State of First Arrival rule, the refugee crisis sparked by the Arab Spring, and the financial crunch experienced over the past four years.

Not surprisingly, in the debt-devastated southern countries, which also shoulder the greatest burden under the Dublin regime in the reception and processing of asylum seekers from North Africa and Asia, far too few resources have been allocated to bringing asylum standards up to par.<sup>113</sup> The EU's approach to this disparity has so far focused primarily on measures such as training programs for border and immigration personnel.<sup>114</sup> But this approach merely offers a patch and ignores the underlying structural deficits that must be addressed for an enduring solution. The misalignment of asylum policies in the EU, and the failure of the current CEAS to remedy it, poses a major obstacle to greater solidarity between member states.

Furthermore, the pressure exerted by the State of First Arrival rule may even be leading the southern states to enact new measures that violate international human rights law. When these states are aware that, under Dublin

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113. See HUGO BRADY, CENTRE FOR EUROPEAN REFORM, SAVING SCHENGEN: HOW TO PROTECT PASSPORT-FREE TRAVEL IN EUROPE 21–22 (2012), available at [http://www.soros.org/initiatives/brussels/articles\\_publications/publications/schengen-20110120/2012-01\\_Saving%20Schengen.pdf](http://www.soros.org/initiatives/brussels/articles_publications/publications/schengen-20110120/2012-01_Saving%20Schengen.pdf).

114. Brady Interview, *supra* note 15.

II, they will be forced to take responsibility for every new refugee who sets foot on their territory, they may seek out increasingly aggressive—perhaps even illegal—methods for preventing the arrival of these individuals. Perhaps the most telling illustration of this possibility can be seen in the behavior of the Italian government, whose statements and actions increased in anti-immigration undertones following the adoption of Dublin II—the provisions of which it vehemently protested—and finally culminated in 2009 in the summary return of hundreds of boat migrants to Libya under a dubious agreement with then-dictator Gaddafi.

The political and financial pressure to avoid taking on more asylum seekers is perhaps only natural given the inadequate responsibility-sharing that has thus far taken place between member states. Although the northern member states have wholeheartedly embraced the State of First Arrival rule laid out in Dublin II, they have shown far less affection for the TFEU's instruction that the development of the CEAS be carried out in accordance with the principle of "fair sharing of responsibility,"<sup>115</sup> resisting the imposition of union-wide relocation schemes on the basis that such mechanisms should be controlled at the individual state level.<sup>116</sup> Just twelve states participated in a relocation program for refugee arrivals in Malta—the sole example to date of such a concrete responsibility sharing mechanism—and since 2009 the project has succeeded in resettling only a handful of the thousands that continue to arrive on the overburdened island.<sup>117</sup>

Yet the overextension of struggling asylum systems in these southern states contributes to inadequate reception and processing, which leads to human rights violations under EU and international law. As described above, the ECtHR and CJEU have both declared that responsibility for these violations can be attributed not just to the hosting state, but also to the sending member states. The vicarious liability for sending states created by this situation further entrenches mistrust and widens the fractures in EU solidarity.

The bottom line is that the current configuration of the CEAS fails to take into account the disparate situations and widely varying capacities of member states in the processing of asylum claims. Yet each member state is still bound by the same international and European human rights obligations. Until the structural deficits of the CEAS are addressed, in particular the recognition that the State of First Arrival rule is untenable, the disparate human rights compliance of the member states will continue to pose a threat to European unity.

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115. TFEU, *supra* note 13, art. 80.

116. Toby Vogel, *Ministers to discuss asylum relocation plan*, EUROPEANVOICE.COM (Jan. 26, 2012), <http://www.europeanvoice.com/article/imported/ministers-to-discuss-asylum-relocation-plan/73314.aspx>.

117. Matthew Vella, *Solidarity dealt another blow, large-scale migrant relocation loses momentum*, MALTA TODAY (Jan. 28, 2012), <http://www.maltatoday.com.mt/en/newsdetails/news/national/Solidarity-dealt-another-blow-large-scale-migrant-relocation-loses-momentum-20120128>.

### A. Variations in Member State Compliance with the Directives

Member state compliance with the directives regime varies tremendously across the union.<sup>118</sup> The EU's Commissioner for Home Affairs has described the standards of protection as "radically different" from one country to another.<sup>119</sup> The disparity in national practice is seen at multiple levels, including in divergent interpretations of the standards laid out in the directives, the degree to which those interpretations have been effectively transposed into national law, and the implementation of national law once the standards have been transposed.<sup>120</sup>

Greece presents a particularly egregious example of a failure to align national asylum policies with the directives.<sup>121</sup> One need look no further than the official figures of Eurostat, the EU's population and immigration statistical bureau,<sup>122</sup> for evidence of the gross discrepancies between Greece and other member states. For example, in 2010, of all first instance asylum decisions made in the entire EU, about one in four applicants was found to qualify either for refugee status or some other form of international protection.<sup>123</sup> In Greece, by contrast, just three out of a hundred applicants were successful at the first instance.<sup>124</sup> The statistics on asylum seekers from areas of heavy conflict are similarly disparate: in 2010, the EU average first instance success rates for Afghan nationals was 44.5%, and for Iraqi nationals 52.4%; in Greece, the acceptance rates for these two groups were just 7.3% and 10.3%, respectively.<sup>125</sup>

118. See, e.g., European Commission, *2010 Report on Procedures Directive*, *supra* note 79, at 15 (noting that "some of the [Procedure] Directive's optional provisions and derogation clauses have contributed to the proliferation of divergent arrangements across the EU, and . . . procedural guarantees vary considerably between Member States."); see also JESUIT REFUGEE SERVICE, SAFE AND SECURE: HOW DO REFUGEES EXPERIENCE EUROPE'S BORDERS? 22–23 (Stefan Kessler ed., 2011).

119. Cecilia Malmström, EU Commissioner for Home Affairs, *quoted in* Press Release, European Commission, Common European Asylum System: Better Protection and Solidarity for People Seeking International Protection (June 1, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/665&format=HTML&aged=0&language=EN&guiLanguage=en>.

120. See, e.g., UNHCR, SAFE AT LAST?: LAW AND PRACTICE IN SELECTED EU MEMBER STATES WITH RESPECT TO ASYLUM-SEEKERS FLEEING INDISCRIMINATE VIOLENCE 30 (2011).

121. See Stavros Petsalakis, *The Transposition of EU Asylum Directives: The Case of Greece*, 67(4) EUR. J. SCI. RES. 492, 504 (2012).

122. *About Eurostat*, EUROSTAT, [http://epp.eurostat.ec.europa.eu/portal/page/portal/about\\_eurostat/introduction](http://epp.eurostat.ec.europa.eu/portal/page/portal/about_eurostat/introduction) (last visited Apr. 4, 2012).

123. ANTHONY ALBERTINELLI, EUROSTAT, ASYLUM APPLICANTS AND FIRST INSTANCE DECISIONS ON ASYLUM APPLICATIONS IN 2010, at 10 (May 2011), available at [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-11-005/EN/KS-QA-11-005-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-11-005/EN/KS-QA-11-005-EN.PDF).

124. *Id.*

125. In 2010, of 15,645 total decisions made by all 27 EU countries on the asylum applications of Iraqi nationals, 8,200 were successful at the first instance; 18,225 decisions on Afghan asylum applications across the EU yielded 8,115 positive results at the first instance. By contrast, in Greece, of 145 decisions made on the applications of Iraqi nationals, only 15 were successful, and likewise, just 15 Afghan applications out of 205 received a positive decision. *First Instance Decisions on Applications by Citizenship, Age and Sex – Annual Aggregated Data 2010*, EUROPEAN COMMISSION: EUROSTAT DATABASE, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asycdfsta&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asycdfsta&lang=en) (up-to-date first instance asylum application decision data can be found under "Database by Themes" – "Pop-



The foregoing data indicate, at least, worrying variation in the implementation of the qualification and procedures directives between Greece and the other EU member states. In reality, based on a substantial body of evidence produced by independent observers,<sup>126</sup> these gaps probably signal the existence of faulty procedures that reject meritorious claims, thereby violating the directives and international law.<sup>127</sup> These procedures create an undue risk of *refoulement* to countries where asylum seekers are at risk of death, torture, or other ill-treatment.<sup>128</sup>

Greece has also failed to establish the minimum acceptable reception conditions for asylum seekers laid out in the directives.<sup>129</sup> The ECtHR clarified at length these deficiencies in its *M.S.S.* judgment, noting in particular the severe overcrowding, “appalling” hygiene conditions, lack of sanitary facilities, and physical and verbal abuse to which asylum-seeking detainees are subjected in the country’s detention centers.<sup>130</sup> Rights groups have also documented the prolonged detention of minors under these same conditions, possibly in violation of the directives and international law.<sup>131</sup> And although, since the *M.S.S.* judgment, Greece has ostensibly taken steps to reform its asylum system,<sup>132</sup> these reforms have yet to be successfully

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ulation and Social Conditions” – “Population” – “International Migration and Asylum” – “Asylum” – “Decisions on applications and resettlement”).

126. See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011), ¶¶ 159–60 (listing the “main reports” that have been produced by “national, international and non-governmental organisations deploring the conditions of reception of asylum seekers in Greece.”); see also *infra* notes 129–130.

127. See AMNESTY INTERNATIONAL, *THE DUBLIN II TRAP: TRANSFERS OF ASYLUM SEEKERS TO GREECE* 11–34, AI Index EUR 25/001/2010 (2010) (enumerating the violations of EU and international law occurring due to deficits in Greece’s asylum system); see also *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011), ¶ 401 (finding a violation of Articles 3 and 13 of the ECHR “because of the shortcomings in the asylum procedure as applied to the applicant and the risk of *refoulement* to Afghanistan without any serious examination of his asylum application and without his having had access to an effective remedy . . .”).

128. AMNESTY INTERNATIONAL, *supra* note 127, at 29.

129. See generally *id.*; UNHCR, *Position on the return of asylum-seekers to Greece under the Dublin Regulation*, ¶ 24 (Apr. 15, 2008); HUMAN RIGHTS WATCH, *GREECE: UNSAFE AND UNWELCOMING SHORES* (2009); European Committee for the Prevention of Torture, *Report prepared following its visit to Greece from 23 to 28 September 2008* (June 30, 2009); PRO ASYL, *THE TRUTH MAY BE BITTER BUT MUST BE TOLD: THE SITUATION OF REFUGEES IN THE AEGEAN AND THE PRACTICES OF THE GREEK COAST GUARD* (2007).

130. *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011), ¶¶ 161–66; see also Kondylia Gogou & Giorgos Kosmopoulos, *Enough is Enough: End Appalling Migrant Detention Conditions in Greece*, AMNESTY INTERNATIONAL (July 8, 2011), <http://livewire.amnesty.org/2011/07/08/enough-is-enough-end-appalling-migrant-detention-conditions-in-greece/>; UNHCR, *Asylum Conditions in Greece Including for Dublin II Transferees* 6–7 (Jan. 31, 2011); *Greece: End Inhumane Detention Conditions for Migrants*, HUMAN RIGHTS WATCH (Dec. 6, 2010), <http://www.hrw.org/en/news/2010/12/06/greece-end-inhumane-detention-conditions-migrants>; *Greece: Migrants Detained in Inhumane Conditions*, MEDECINES SANS FRONTIERES (June 16, 2011), [http://www.msf.org.uk/Greece\\_migrant\\_detention\\_20110616.news](http://www.msf.org.uk/Greece_migrant_detention_20110616.news).

131. See, e.g., UNHCR, *supra* note 129, at ¶ 21; UNHCR, *supra* note 130, at 6–7; Gogou & Kosmopoulos, *supra* note 130; *Greece: End Inhumane Detention Conditions for Migrants*, *supra* note 130.

132. BRADY, *supra* note 113, at 21.

implemented, leaving a disconcerting gap between the situation for asylum seekers in Greece and that in other countries of the union.<sup>133</sup>

Greece is not the only culprit where harmonization of asylum standards is concerned, however. Rights groups have also documented the failure of the Italian government to provide adequate procedure and reception conditions for refugees, in violation of the minimum standards of the asylum directives and possibly the principle of non-*refoulement*.<sup>134</sup> Malta has also been criticized by the Council of Europe for failing to provide reception conditions on par with the requirements of the directives.<sup>135</sup>

At a minimum, the wide variation in compliance with the asylum directives seen in the cobbled-together national policies of EU member states presents a grim scenario for asylum seekers. In light of the State of First Arrival rule, although a refugee might have a much better chance of receiving protection in Germany than in Italy, she is bound to the state where she first landed in the EU. Where *refoulement* is a potential outcome of a country's deficient procedural regime, this limitation can mean the difference between life and death. Aside from the dire implications for asylum-seeking individuals, however, this misalignment also challenges the culturing of EU member state unity and threatens the principles upon which the union is based.

#### B. *Dublin II's Incentives for Violation: The Case of Italy*

Aside from its possible failure to comply with the standards established by the asylum directives, Italy may actually have been incentivized by the State of First Arrival rule to develop anti-immigration policies that are fundamentally at odds with its international obligations, including the Article 3 prohibition on inhuman or degrading treatment and the prohibition on *refoulement*. Although the Italian government was recently condemned by the ECtHR for the "push-back" policy it undertook after the adoption of Dublin II, in light of the redoubled numbers of refugees arriving in the country following the Arab Spring, it has less reason than ever to comply with international law.

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133. Committee on Migration, Refugees and Population, Council of Europe, Parliamentary Assembly, *Asylum seekers and refugees: sharing responsibilities in Europe*, Doc. No. 12630 (June 6, 2011), at 11; see also BRADY, *supra* note 113, at 20–21.

134. See, e.g., MARIA BETHKE & DOMINIK BENDER, PRO ASYL, THE LIVING CONDITIONS OF REFUGEES IN ITALY (2011), available at [http://www.proasyl.de/fileadmin/fm-dam/q\\_PUBLIKATIONEN/2011/Italyreport\\_en\\_web\\_ENDVERSION.pdf](http://www.proasyl.de/fileadmin/fm-dam/q_PUBLIKATIONEN/2011/Italyreport_en_web_ENDVERSION.pdf).

135. See, e.g., Press Release, Council of Europe, Malta: European solidarity needs to be matched by strong efforts at national level to protect the human rights of migrants (Mar. 28, 2011), [http://www.coe.int/t/commissioner/News/2011/110328Malta\\_en.asp](http://www.coe.int/t/commissioner/News/2011/110328Malta_en.asp) (describing the findings of the Council of Europe Commissioner for Human Rights during a visit to Malta: "According to the Commissioner, Malta needs to move away from a reactive approach to migration and establish a system that is fully in line with European standards concerning the human rights of immigrants and asylum seekers.").

### 1. *Italy's Reaction to Dublin II*

From the outset of negotiations on Dublin II, the Italian government protested the burden that the regulation's provisions would inevitably place upon the nation.<sup>136</sup> At the planning sessions that eventually led to the regulation's adoption, the government worried about the financial and practical costs that the State of First Arrival rule would create.<sup>137</sup> The objections of Italy and Greece did eventually lead to the development of the "taking responsibility" clause,<sup>138</sup> providing that any member state that has hosted a refugee for more than 5 months must process his claim, regardless of where he first entered the union; however, Italy was frustrated in its initial request for a shorter three-month time limit.<sup>139</sup>

At the same time that the details of Dublin II were under debate in the European Parliament, the policies and rhetoric of Italian politicians exhibited an increase in anti-immigrant sentiment. In 2002 the government adopted the controversial "Bossi-Fini" law, which imposed sweeping new restrictions on immigration and lowered bars to deportation of irregular migrants.<sup>140</sup> In June 2003, Umberto Bossi, one of the bill's namesakes, chairman of the conservative Lega Nord party, and then-Minister of Federal Reforms, suggested in an interview that the government should fire on refugee boats with cannons.<sup>141</sup> During this period his party gained traction in Italian politics and exercised considerable influence over the Berlusconi government.<sup>142</sup> In response to the increasing anti-immigration rhetoric, the Council of Europe decried in a 2002 report the use of "racist and xenophobic" propaganda in Italian politics, particularly by Bossi's party.<sup>143</sup>

In spite of outside criticism, however, the disproportionate burden imposed on Italy by refugee arrivals apparently continued to bear on its politics and policies. In March 2005, the frustrated mayor of Lampedusa appealed to other EU countries for help in handling the problem, saying, "[I]end us a hand to tackle an emergency that is not only our island's, but

136. *Justice and Home Affairs Council: Ministers Agree Deadlines for Measures to Tackle Illegal Immigration*, EUR. REP., June 15, 2002, available at LEXISNEXIS.

137. *Justice and Home Affairs Council: Who Will Pay for Border Control and Repatriation Plans?*, EUR. REP., Nov. 27, 2002, available at LEXISNEXIS.

138. Dublin II, *supra* note 20, art. 10(2).

139. *Justice and Home Affairs Council: Who Will Pay for Border Control and Repatriation Plans?*, *supra* note 137.

140. Domenico Paparella & Vilma Rinolfi, *New Legislation Regulates Immigration*, EUR. INDUS. REL. OBSERVATORY ONLINE (Sept. 26, 2002), <http://www.eurofound.europa.eu/eiro/2002/09/feature/it0209103f.htm>.

141. *Intervista: Basta rinvii, cacciare i clandestini con la forza*, CORRIERE DELLA SERA, June 16, 2003, available at [http://www.corriere.it/Primo\\_Piano/Politica/2003/06\\_Giugno/16/bossi\\_intervista.shtml](http://www.corriere.it/Primo_Piano/Politica/2003/06_Giugno/16/bossi_intervista.shtml).

142. Jason Horowitz, *A Small Northern Party Has a Sizable Presence in Italian Politics*, N.Y. TIMES (Dec. 29, 2003), <http://www.nytimes.com/2003/12/29/world/a-small-northern-party-has-a-sizable-presence-in-italian-politics.html>.

143. European Commission Against Racism and Intolerance, Council of Europe, *Second Report on Italy*, ¶ 73 (Apr. 23, 2002).

Europe's as a whole."<sup>144</sup> No assistance from others was forthcoming, however, and over the following two years Italy adopted increasingly aggressive policies towards combating immigration, including questionable detention practices and summary deportations of migrants that were likely in violation of international law.<sup>145</sup> The European Parliament eventually issued a statement condemning the government's treatment of refugees in Lampedusa,<sup>146</sup> but absent any meaningful reform of the asylum system or offers of assistance from other EU member states, the Italian government continued to develop policies to shirk its responsibilities under Dublin II.

## 2. Agreement with Libya and "Push-Backs"

In 2008, Italy signed a "Friendship and Cooperation" treaty with Libya, agreeing, among other things, that Libya would strengthen border controls in order to prevent illegal immigration to Italy.<sup>147</sup> As part of the deal, Italy provided the Libyan authorities with patrol boats and a plan to set up a radar system for monitoring the African country's desert borders.<sup>148</sup> The Italian government also committed to invest \$5 billion in Libya over the following 25 years in return for its assistance in curbing immigration.<sup>149</sup> The following spring, Italy began implementing its controversial *rispingimento* ("push-back") practice in cooperation with the Libyan authorities.

The legality of these operations under European and international law was called into question in a case argued at the European Court of Human Rights in June 2011.<sup>150</sup> *Hirsi et al v. Italy* concerned the first of the push-back operations, carried out by the Italian authorities in May 2009 in international waters south of the island of Lampedusa.<sup>151</sup> The basic facts were undisputed: on the evening of May 6, within the search and rescue jurisdiction of Malta, an Italian Guardia di Finanza vessel approached three small boats containing over 200 African migrants, bound from Libya to Lampe-

144. *Italy repatriates 180 boatpeople*, BBC NEWS (Mar. 18, 2005), <http://news.bbc.co.uk/2/hi/europe/4360683.stm>.

145. See, e.g., FRANCESCO MESSINEO, AMNESTY INTERNATIONAL, ITALY: LAMPEDUSA, THE ISLAND OF EUROPE'S FORGOTTEN PROMISES, AI Index EUR 30/008/2005 (2005), <http://www.amnesty.org/en/library/info/EUR30/008/2005/en>; Press Release, Amnesty International, Italy: Asylum-seekers and migrants have rights too (June 20, 2005), AI Index EUR 30/007/2005, <http://www.amnesty.org/en/library/info/EUR30/007/2005/en>; *Immigrants allege Italian abuses*, BBC NEWS (June 20, 2005), <http://news.bbc.co.uk/2/hi/europe/4111924.stm>.

146. Resolution on the Situation in Lampedusa, EUR. PARL. DOC. B6-0252/2005 (2005).

147. Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista [Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya], It.-Lib., art. 1, Aug. 30, 2008, 40 G.U. 5.

148. Bill Frelick, *Treating refugees as refuse*, THE GUARDIAN (June 14, 2009), <http://www.guardian.co.uk/commentisfree/2009/jun/14/gaddafi-berlusconi-refugees-human-rights>.

149. *Id.*

150. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, ¶ 158 (Eur. Ct. H.R., Feb. 23, 2012), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

151. Statement of facts, *Hirsi et al. v. Italy*, App. No. 27765/09 (Eur. Ct. H. R., Nov. 18, 2009) (French only).

dusa and evidently in distress.<sup>152</sup> The occupants of the boats, without food or water and some of whom had been burned by an overturned fuel receptacle, were taken on board the Italian vessels and, according to eyewitnesses, led to believe that they were being taken to Lampedusa for processing.<sup>153</sup>

Sometime en route to Lampedusa, however, the ship's commander received a phone call from the Italian Interior Ministry instructing him to transport the migrants back to Libya, which he did, without informing them of their final destination. They were taken to Tripoli and disembarked into the hands of the Libyan authorities, never having been identified or questioned by the Italians as to their countries of origin, individual situations, or desire to apply for asylum in Europe.<sup>154</sup> An Italian photojournalist who happened to be aboard one of the Italian Coast Guard vessels during the operation photographed the procedure taking place, including the refugees' protests at disembarkation and their rough handling by the Italian and Libyan authorities at the dock.<sup>155</sup> After the incident, the photographer was contacted by the Italian authorities and told that he "shouldn't talk too much" about what he witnessed.<sup>156</sup>

In early 2012, the ECtHR ruled on the case, finding that Italy had violated, *inter alia*, Article 3 of the Convention by turning the intercepted individuals over to the Libyan authorities.<sup>157</sup> While recognizing the "considerable difficulties" that the EU border states were experiencing in light of "the increasing influx of migrants and asylum seekers,"<sup>158</sup> the court nevertheless found that Italy's actions exposed the applicants to the risk of ill-treatment that the Convention prohibits.<sup>159</sup> The court pointed to the existence of numerous publicly available sources indicating that refugees in Libya were systematically subjected to various forms of ill-treatment, including torture, racism, and *refoulement*.<sup>160</sup> Therefore, in implementing its push-back policy, the Italian government *knowingly* returned the refugees to a country where they could be subjected to torture or other inhuman or degrading treatment in breach of the Convention and other international

152. UNHCR, Submission in the Case of *Hirsi and Others v. Italy*, App. No. 27765/09 (Mar. 2010), available at <http://www.unhcr.org/refworld/docid/4b97778d2.html>; *Hirsi et al v. Italy*, App. No. 27765/09, ¶¶ 9–10 (Eur. Ct. H.R., Feb. 23, 2012), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

153. RESPINTI (Riccardo Iacona 2009) (Italian only).

154. CPT Report to the Italian Government, *supra* note 39, ¶ 18; UNHCR, Submission in the Case of *Hirsi and Others v. Italy*, App. No. 27765/09, *supra* note 152, ¶ 2.2.4.

155. Enrico Dagnino's photographs of the operation were featured in a report by Human Rights Watch entitled PUSHED BACK, PUSHED AROUND: ITALY'S FORCED RETURN OF BOAT MIGRANTS AND ASYLUM SEEKERS, LIBYA'S MISTREATMENT OF MIGRANTS AND ASYLUM SEEKERS (2009), available at [http://www.hrw.org/sites/default/files/reports/italy0909web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf).

156. RESPINTI, *supra* note 153 (translation by author).

157. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, ¶ 158 (Eur. Ct. H.R. Feb. 23, 2012), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

158. *Id.* ¶ 122.

159. *Id.* ¶¶ 137–38.

160. *Id.* ¶ 125.

obligations.<sup>161</sup> In addition, in the absence of any operational asylum system in Libya, the applicants were at serious risk of being *refouled* to their countries of origin, where, as established by a variety of sources, they faced the risk of torture and other inhuman or degrading treatment.<sup>162</sup>

### 3. *Decreasing Incentives for Compliance with European Standards*

Italy's disproportionate burden for handling asylum claims has only continued to grow since it began employing the push-back policy, a reality that creates dwindling incentives for its government to comply with EU asylum standards. In 2011 Italy experienced a 240% increase in asylum applications compared to 2010, registering 34,100 new applicants.<sup>163</sup> New arrivals are concentrated particularly on Lampedusa, closer to North Africa than to mainland Europe.<sup>164</sup> By June 2011, the thousands of new asylum seekers who had landed on the tiny island since the outbreak of conflict in Tunisia and Libya had overwhelmed Lampedusa's processing capacity and placed further pressure on Italy's strained asylum system.<sup>165</sup> The crisis led some groups of enraged Lampedusa citizens to physically prevent the landing of refugee boats.<sup>166</sup>

Although the Italian authorities appealed, throughout the first months of the crisis, for help from other EU member states in accommodating the refugees, no other government offered assistance and Dublin II prevented asylum seekers from traveling on to file elsewhere.<sup>167</sup> In frustration, the Italian government granted permits to some 22,000 migrants, mostly of Tunisian origin, for travel almost anywhere within the EU; the French government responded by closing its border in violation of the Schengen agreement,<sup>168</sup> which is a cornerstone of the development of an "ever closer union."<sup>169</sup>

161. *Id.* ¶ 137.

162. *Id.* ¶¶ 156–58; see also CPT Report to the Italian Government, *supra* note 39, ¶¶ 41–47.

163. UNHCR, *supra* note 4, at 9. This figure may, in fact, be an underestimate, since at the time of writing the Italian government is still processing 2011 applications. *Id.*

164. *EU migrants: Lampedusa Italy now main entry point*, BBC NEWS (June 14, 2011), <http://www.bbc.co.uk/news/world-europe-13766454>.

165. *Italy's Lampedusa left in crisis after Arab Spring*, BBC NEWS (June 14, 2011), <http://www.bbc.co.uk/news/world-europe-13747558>.

166. *Id.*

167. See Harriet Grant & John Domokos, *UK failing to share burden of migration crisis, says southern Europe*, THE GUARDIAN (Oct. 7, 2011), <http://www.guardian.co.uk/world/2011/oct/07/uk-migration-crisis-southern-europe>.

168. Devorah Lauter, *France blocks Italian train carrying Tunisian migrants*, L.A. TIMES (Apr. 19, 2011), <http://articles.latimes.com/2011/apr/19/world/la-fg-tunisia-refugees-20110419>; *The Next European Crisis: Boat People*, ECONOMIST (Apr. 11, 2011), [http://www.economist.com/blogs/charlemagne/2011/04/north\\_african\\_migration](http://www.economist.com/blogs/charlemagne/2011/04/north_african_migration).

169. TFEU, *supra* note 13, preamble. For an illuminating and detailed discussion of the current threats to the Schengen system, see generally BRADY, *supra* note 113.

### C. Member States' Failure to Share Responsibility

The response by other governments to Italy's desperate situation can hardly be said to embody the spirit of solidarity and responsibility sharing upon which the CEAS framework was premised.<sup>170</sup> The strain on Italy created by the wave of new refugee arrivals, its unheeded appeals for assistance, and its subsequent decision to issue the controversial permits presents a pattern illustrative of the tension created by the CEAS between member states. However, the conspicuous lack of responsibility sharing among union members is not unique to the Italian case.

Since the onset of the Arab Spring, in addition to the southern states themselves, numerous EU-level actors have called upon the northern states to extend greater support to their southern neighbors for handling the refugee crisis. In April 2011, the Council of the European Union reminded member states of "the need for genuine and concrete solidarity towards Member States most directly concerned by migratory movements" and called for increased assistance for those affected.<sup>171</sup> The Parliamentary Committee on Migration, Refugees, and Population similarly called on member states to share the responsibility of extending international protection.<sup>172</sup>

The sole responsibility-sharing mechanism to emerge to date as a result of these pleas was the European Relocation Malta (Eurema) Project, initiated in 2009, through which twelve EU member states agreed to relocate around 300 of the thousands of asylum seekers then in Malta.<sup>173</sup> While Germany offered the greatest relative assistance, agreeing to absorb 100 of the refugees (around 0.0001% of its population), some of the participating states agreed to relocate just five or ten individuals.<sup>174</sup>

In 2011, in response to the even greater influx of asylum seekers to Malta following the onset of the Arab Spring, the European Commission pleaded with northern member states to agree to further voluntary relocation of refugees in their territory.<sup>175</sup> Talks on increasing the scale of the project to align appropriately with Maltese capacity have broken down, however, as

170. TFEU, *supra* note 13, art. 80.

171. Council of the European Union, Council Conclusions on the Management of Migration from the Southern Neighbourhood, 3081st Justice and Home Affairs Council Meeting, ¶ 3 (Apr. 11–12, 2011), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/jha/121479.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/121479.pdf).

172. Committee on Migration, Refugees and Population, *supra* note 133, at 7 ("[I]f individual countries find it difficult to cope with the administrative burden of processing applications for international protection arising in their own country, they should not refrain from asking other countries to come to their assistance. They should be encouraged to take responsibility for arranging such bilateral or multilateral arrangements on their own initiative.")

173. Press Release, European Commission, Over 300 Refugees in Malta to Be Relocated in Other European Countries (May 12, 2011), [http://ec.europa.eu/malta/news/over\\_300\\_refugees\\_resettled\\_en.htm](http://ec.europa.eu/malta/news/over_300_refugees_resettled_en.htm).

174. Belgium, Slovakia, Hungary, and Poland made such "token" pledges. Camilleri, *EU Pressures members to resettle asylum seekers*, *supra* note 11.

175. *Id.*

have proposals to suspend the State of First Arrival rule.<sup>176</sup> Clearly, a showing of true solidarity between northern and southern member states in handling the refugee crisis is yet to be seen.

To the contrary, some far-right groups and media sources have seized upon the crisis as an opportunity to create further rifts between union nations, framing the refugee issue as one of illegal economic migration and calling for tighter border controls even within the Schengen zone.<sup>177</sup> As the emergency deepens, government leaders around the union point fingers and distort official figures to avoid taking responsibility.<sup>178</sup> The refusal to fairly share burdens and exploitation of the situation for political gain exemplify the divisive nature of the current asylum regime and the tension it generates within a union that is premised, in theory, upon principles of mutual trust and cooperation.

#### D. *M.S.S. and N.S.: The End of the Blind Eye Approach*

Although substantial, the threat to EU solidarity presented by the current system does not end with the resentment and anger in the states that shoulder the greatest burden. As the ECtHR and the CJEU made clear in *M.S.S.*<sup>179</sup> and *N.S.*,<sup>180</sup> even states that refuse to accept responsibility for asylum seekers and instead send them south, in accordance with the State of First Arrival rule, can be held liable for human rights violations that occur as a result.

The *N.S.* decision, in particular, laid bare the inherent tension that Dublin II presents for building mutual trust between member states, on the one hand, while adhering to fundamental human rights standards, on the other. In addition to the two respondent states, eleven other EU governments intervened in the case to argue in defense of the regulation, many insisting that the principles of mutual trust and cooperation underpinning the EU must entitle each member state to an irrebuttable presumption that other EU members are complying with their human rights obligations.<sup>181</sup> Ulti-

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176. *EU ministers turn down expanded migrant-relocation programme*, MALTA TODAY (Jan. 26, 2012), <http://www.maltatoday.com.mt/en/newsdetails/news/national/EU-ministers-turn-down-expanded-migrant-relocation-programme-20120126>.

177. See generally, e.g., WILLIAM WHEELER, PULITZER CENTER ON CRISIS REPORTING, WAVES UPON WAVES: ARAB SPRING REFUGEES CROSS THE MEDITERRANEAN (2011), <http://pulitzercenter.org/reporting/arab-spring-refugee-border-control-frontex-lampedusa>; Jack Shenker, *An escape from the Arab Spring: one migrant's voyage to Europe*, THE GUARDIAN (May 8, 2011), <http://www.guardian.co.uk/world/2011/may/09/escape-arab-spring-migrant-voyage>.

178. Bruce Crumley, *Official Statistics Mock The Sarkozy-Berlusconi Offensive Against Schengen*, TIME GLOBAL SPIN (Apr. 27, 2011), <http://globalspin.blogs.time.com/2011/04/27/official-statistics-mock-the-sarkozy-berlusconi-offensive-against-schengen/#ixzz1h68eS4on>.

179. See *supra* section III.b.5.iii.

180. See *supra* section III.b.6.

181. In their observations to the CJEU, the British and Irish governments vigorously argued against a finding that member states must monitor each other's compliance with human rights standards, asserting that to do so would violate the principle of mutual trust. The Polish government went further, asserting that such an assessment of one member state by another would violate EU law, since



mately the court disagreed, finding that mutual trust cannot provide a basis for a state's willful ignorance of the human rights abuses of another.<sup>182</sup>

In fact, the Dublin II's State of First Arrival rule is likely eroding the very mutual trust and cooperation that it originally sought to strengthen. Just as the *laissez-faire* approach of some EU member states to the reckless spending habits of the Greek government contributed to the current debt crisis, their willful ignorance approach to the deficient human rights practices of certain states, and consequent vicarious liability for those practices, can only serve to widen the fissures in union solidarity. *M.S.S. and N.S.* demonstrate not just the untenability of the willful ignorance approach; they also suggest that more, not less, engagement between member states will be required for the development of mutual trust and an ever closer union. Such deeper integration will inevitably require reform of the CEAS, especially the State of First Arrival rule, and commitment to true responsibility sharing measures.

## V. FRONTEX: A COMMON THREAD?

Individual member states are not, however, the only relevant actors in today's European asylum system. The birth of Frontex eight years ago signaled recognition on the part of the union's members that, due to the unique fluidity of international travel within the passport-free Schengen zone, external border protection represented a critical issue for the union as a whole.<sup>183</sup> Initially conceived as a coordinating agency, with the ultimate responsibility for border control lying with individual member states, Frontex has become increasingly central to the discourse on European border management.

As a body that works to align states' practice and facilitate transnational border control operations, Frontex has great potential to help build unity among the member states. Indeed, "promoting solidarity" was among the primary articulated purposes of the agency at its establishment.<sup>184</sup> Its vision of a pan-European border control training regime and fully integrated ex-

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Article 7 of the Treaty on the EU provides a mechanism—the European Commission—for determining Member States' breaches of EU fundamental values, including human rights. Oral arguments, Joined Cases C-411/10, *N.S. v. Sec'y of State for Home Dep't*, and C-493/10, *M.E. et al. v. Refugee Appl. Comm'r & Min. for Justice, Equality, and Law Reform* (June 28, 2011) (hearing notes on file with author).

182. Joined cases C-411/10, *N.S. v. Sec'y of State for Home Dep't*, and C-493/10, *M.E. et al. v. Refugee Appl. Comm'r & Min. for Justice, Equality, and Law Reform*, ¶¶ 94, 99, 118–22 (Dec. 21, 2011), available at <http://curia.europa.eu/juris/celex.jsf?celex=62010CC0411&lang1=en&type=NOT&ancre=>.

183. Council Regulation 2007/2004, Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1.

184. *Id.*, preamble, para. 5.

ternal border management operations,<sup>185</sup> if realized, would go a long way towards regaining some of the mutual trust that was undermined by the euro debt crisis.

Yet, although its budget has multiplied by a factor of 15 since its establishment, Frontex's ability to realize the goal of solidarity-building has been stymied in several respects. In particular, its progress was hindered from the outset by intense criticism from rights groups, who expressed alarm at the apparent lack of accountability, transparency, and rights protections that its joint operations encompassed.<sup>186</sup> Allegations of rights violations against asylum seekers in operations facilitated by the agency raised questions about how liability should be allocated when border teams act under the direction of an EU-level coordinating body. In response to these criticisms, the European Parliament and the Council recently granted Frontex increased autonomy and ordered it to implement new measures aimed at ensuring its compliance with fundamental human rights guarantees.<sup>187</sup>

Merely increasing the independence and ostensible human rights guarantees of Frontex will not, however, diminish the threat to European solidarity presented by the structural deficits of the CEAS. The European Parliament's increased attention to human rights concerns within the agency signals a positive step towards closing the liability gap, and could potentially reduce some of the inter-governmental tension created by allegations of abuse in joint operations. However, Frontex was conceived as a coordinating agency that operates under the management of individual EU government representatives, and will remain so in spite of the revisions to its regulation. Even assuming that it will now adopt human rights protection as a central priority—which is far from clear—Frontex lacks any mechanism by which to force state-level compliance with international and EU human rights law. It is, in fact, the discordant domestic asylum policies of the member states it coordinates that pose the greatest threat to Frontex's successful operation. Without reform of the CEAS that will bring a level of consistency and fair burden-sharing between the states of the EU, Frontex, as an external border watchdog, will pursue an impossible task in attempting to foster trust and solidarity between them.

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185. Telephone Interview with Michal Parzyszek, Frontex Spokesperson (Mar. 22, 2012) [hereinafter Parzyszek Interview].

186. See, e.g., HOUSE OF LORDS EUROPEAN UNION COMMITTEE, 9TH REPORT OF SESSION, 2007–08, FRONTEx: THE EU EXTERNAL BORDERS AGENCY 30–31, 55 (U.K.); SKA KELLER ET AL., MIGREUROPE, FRONTEx AGENCY: WHICH GUARANTEES FOR HUMAN RIGHTS? 23–24 (2011); HUMAN RIGHTS WATCH, THE EU'S DIRTY HANDS: FRONTEx INVOLVEMENT IN ILL-TREATMENT OF MIGRANT DETAINEES 53–54 (2011).

187. Press Release, European Parliament, FRONTEx: New human rights watchdog, new powers (Sept. 13, 2011), <http://www.europarl.europa.eu/news/en/pressroom/content/20110913IPR26455/html/FrontEx-new-human-rights-watchdog-new-powers>.

### A. *Structure and Capacity for Solidarity-Building*

Created in 2004 by European Council Regulation 2007/2004,<sup>188</sup> Frontex exists, first and foremost, to strengthen security at the EU's external borders by coordinating between state-level agencies.<sup>189</sup> It does so primarily through: coordinating joint border patrol operations, staffed by "guest officers" from state-level border patrol agencies; conducting risk analyses with data gathered from individual member states; creating and implementing common European border patrol training standards; and managing shared EU resources for interventions in exceptional border-related crises.<sup>190</sup> Since its establishment the body has expanded with incredible rapidity, its budget ballooning from €6 million in 2005,<sup>191</sup> the first year of its full operation,<sup>192</sup> to €86 million in 2011, with another €43.9 million increase approved by the European Parliament and the Council in September 2011.<sup>193</sup>

Among the other key goals envisioned in the agency's establishing regulation was promoting solidarity between member states,<sup>194</sup> and Frontex sees this as an important part of its mandate.<sup>195</sup> To this end, in its capacity as a coordinating agency, Frontex stresses an ultimate goal of "interoperability," which refers to the development of harmonized standards across EU border personnel training that reflect common values, including "social and communication skills, knowledge of human rights and the related legislation, awareness of and sensitivity to diversity issues, security, fairness and incorruptibility."<sup>196</sup> On a micro level, common training programs and joint operations with international guest officers in Frontex help to create person-to-person linkages between countries and establish shared understandings of best practices and international law.<sup>197</sup>

188. Council Regulation 2007/2004, Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1.

189. Frontex defines its primary purpose as the "[c]oordination of intelligence driven operational cooperation at EU level to strengthen security at external borders." *More about Frontex*, FRONTEX, [http://www.frontex.europa.eu/more\\_about\\_frontex/](http://www.frontex.europa.eu/more_about_frontex/) (last visited Mar. 15, 2012).

190. *Tasks*, FRONTEX, [http://www.frontex.eu.int/origin\\_and\\_tasks/tasks/](http://www.frontex.eu.int/origin_and_tasks/tasks/) (last visited Apr. 2, 2012).

191. Press Release, Council of the European Union, New Rules on Frontex Adopted: Strengthening the European Border Controls Agency, at 2 (Oct. 10, 2011), [http://consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/124999.pdf](http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/124999.pdf).

192. *More about Frontex*, FRONTEX, [http://www.frontex.europa.eu/more\\_about\\_frontex/](http://www.frontex.europa.eu/more_about_frontex/) (last visited Mar. 15, 2012).

193. Press Release, Council of the European Union, New Rules on Frontex Adopted: Strengthening the European Border Controls Agency, *supra* note 191, at 2.

194. Council Regulation 2007/2004, preamble, para. 5, 2004 O.J. (L 349) 1, 1.

195. Parzyszek Interview, *supra* note 185.

196. *Frontex training unit*, FRONTEX, [http://www.frontex.europa.eu/more\\_about\\_frontex/](http://www.frontex.europa.eu/more_about_frontex/) (last visited Mar. 15, 2012).

197. Parzyszek Interview, *supra* note 185.

### B. *Obstacles to Promoting Solidarity*

In spite of its clear potential for helping to strengthen trust and cooperation between member states through joint operations and common training programs, Frontex has faced daunting obstacles to the full realization of that potential.

#### 1. *Independent and Autonomous?*

First, Frontex has operated with incomplete autonomy in determining the best practices and standards by which to coordinate member states. Although technically an independent EU-level body, the extent of the agency's independence and insulation from national politics is murky, at best.<sup>198</sup> Its establishing regulation defines it as a "Community body" with legal personality and autonomy in planning its budget and operations.<sup>199</sup> But concerns about state sovereignty weighed heavily in the determination of its architecture, as national governments were reluctant to cede power to a supranational institution in this field.<sup>200</sup> As a result, in spite of its liaising position at the EU level, Frontex still operates ultimately at the behest of national governments. The agency is overseen by a Management Board comprising representatives from each member state and a minority—two—from the European Commission.<sup>201</sup> This managerial body is responsible for appointing Frontex's Executive Director and adopting the agency's annual work plan.<sup>202</sup> The Executive Director should in theory be "completely independent in the performance of his duties," which include facilitating cooperation between Frontex and the agencies of member states, third countries, and international organizations, as well as determining the agency's "strategic objectives."<sup>203</sup> Yet he is held accountable for all his actions by the Management Board.<sup>204</sup> Given these somewhat contradictory provisions for agency autonomy, then, it is questionable whether Frontex exercises any meaningful independence from national-level politics. It hardly can be expected to help build mutual trust and solidarity between member states within the highly contentious realm of immigration policy if it lacks the power to determine objective standards for EU-level training and border control operations.

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198. Brady Interview, *supra* note 15; KELLER ET AL., *supra* note 186, at 24.

199. Council Regulation 2007/2004, preamble, para. 14, 2004 O.J. (L 349) 1, 2.

200. SERGIO CARRERA, CENTRE FOR EUROPEAN POLICY STUDIES, THE EU BORDER MANAGEMENT STRATEGY: FRONTEX AND THE CHALLENGES OF IRREGULAR IMMIGRATION IN THE CANARY ISLANDS 9 (2007).

201. *Management Board*, FRONTEX, [http://www.frontex.eu.int/structure/management\\_board/](http://www.frontex.eu.int/structure/management_board/) (last visited Mar. 22, 2012).

202. *Id.*

203. *Executive Director*, FRONTEX, [http://www.frontex.eu.int/structure/management\\_board/](http://www.frontex.eu.int/structure/management_board/) (last visited Mar. 22, 2012).

204. *Id.*

## 2. *Human Rights Criticisms and Reform*

Human rights concerns have presented another serious limiting factor to Frontex's ability to promote member state solidarity. Since its creation, the agency has been subject to robust criticism surrounding the lack of adequate human rights safeguards<sup>205</sup> and opaque nature<sup>206</sup> of its joint operations. Its approach to joint immigrant interception operations, in which it has left all responsibility for complying with asylum obligations to participating member states, has been referred to as a policy of "willful ignorance" by one expert commentator.<sup>207</sup> Advocacy group Migreurop has similarly criticized the agency for failing to fully respect the right to asylum.<sup>208</sup>

The 2010 Rapid Border Intervention Team (RABIT)<sup>209</sup> operation in Greece was the subject of particular criticism by rights groups, who claimed that the agency knowingly exposed refugees to inhuman or degrading treatment by transferring them to Greek detention facilities.<sup>210</sup> At the request of the Greek government and in alignment with its mandate, in November 2010 Frontex deployed a team of 175 guest officers—personnel lent from the border control agencies of 24 participating European states—to the Greece-Turkey border to assist with a heavy influx of migrants to the region.<sup>211</sup> Although the agency emphasized that a "zero tolerance" policy was to be observed throughout the operation regarding the infringement of human rights,<sup>212</sup> its participation was met with severe criticism by Human Rights Watch, who accused it of complicity in the human rights violations that were occurring in Greek detention centers.<sup>213</sup> The EU Agency for Fundamental Rights (FRA), while conversely finding that Frontex's deployment to the region had a net positive impact, in particular by "reduc[ing]

205. See, e.g., KELLER ET AL., *supra* note 186, at 10–21.

206. See, e.g., HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *supra* note 186, at 30.

207. Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement* 12, in JESUIT REFUGEE SERVICE, *supra* note 118.

208. KELLER ET AL., *supra* note 186, at 10–12.

209. RABIT operations differ from normal Frontex-coordinated joint border patrol operations in several respects, notably in that they grant greater law enforcement powers to participating officers, and the contribution by member states of human and financial resources to support RABIT operations is compulsory. European Parliament Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office*, at 20 (2011) [hereinafter *Directorate-General Study on Frontex, Europol, and EASO*].

210. See, e.g., HUMAN RIGHTS WATCH, *supra* note 186.

211. Press Release, Frontex, Frontex to Deploy 175 Specialist Border-Control Personnel to Greece 1–2 (Oct. 29, 2010), <http://www.frontex.europa.eu/media-centre/press-releases>; see also Press Release, Frontex, Frontex Deploys Rapid Border Teams to Greece (Oct. 25, 2010); Press Release, Frontex, Frontex Executive Director Signs Decision to Deploy RABITS (Oct. 26, 2010).

212. HUMAN RIGHTS WATCH, *supra* note 185, at 24 (quoting Press Release, Frontex, Greece RABIT 2010 Deployment (Oct. 29, 2010)).

213. See generally HUMAN RIGHTS WATCH, *supra* note 186.

the risk of informal push-backs to Turkey,”<sup>214</sup> still strongly criticized the “dire conditions” for migrants in detention in the Greek Evros region.<sup>215</sup>

In spite of the criticism it has received, however, Frontex’s role may be more that of a scapegoat rather than a perpetrator where individual instances of human rights abuse during joint border operations are concerned.<sup>216</sup> As suggested by the contrasting assessments of Human Rights Watch and the FRA as regards Frontex’s responsibility for violations, it can be unclear whether Frontex eases human rights risks or exacerbates them. In some cases, Frontex has been blamed for human rights abuses occurring in operations in which it firmly asserts it took no part, such as the 2009 Italian push-back operations described above.<sup>217</sup> One expert comments that Frontex has merely brought human rights violations to light, rather than actively contributing to them.<sup>218</sup>

For its part, the agency has enacted certain measures aimed at ensuring that its operations are in compliance with fundamental rights standards. In 2008, Frontex established an official working relationship with the UN High Commissioner for Refugees (UNHCR) that includes “regular meetings and capacity building initiatives” aimed at enhancing the “protection perspective” of the border patrol agency and increasing its understanding of human rights and the EU’s international obligations.<sup>219</sup> In May 2010, Frontex also entered into a cooperation arrangement with the FRA in an effort to “establish a cooperation framework” between the two “with the overall objective of strengthening the respect of fundamental rights in the field of border management and in particular in Frontex activities.”<sup>220</sup> The role of the FRA is envisaged in the agreement as that of a part-time consultant or advisor to Frontex on issues of fundamental rights. It also stipu-

214. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *COPING WITH A FUNDAMENTAL RIGHTS EMERGENCY: THE SITUATION OF PERSONS CROSSING THE GREEK LAND BORDER IN AN IRREGULAR MANNER* 8 (2011).

215. *Id.* at 25–27.

216. Parzyszek Interview, *supra* note 185.

217. For example, compare the allegations of Human Rights Watch in *PUSHED BACK, PUSHED AROUND*, *supra* note 155, at 37 (“On June 18, 2009, for the first time in its history, a Frontex operation resulted in the interdiction and push back of migrants in the central Mediterranean Sea to Libya.”), with the Frontex response (“Frontex would like to state categorically that the agency has not been involved in diversion activities to Libya (these are based on a bilateral agreement which Italy signed with Libya in May this year). The Frontex operation referred to in the report, Operation Nautilus 2009, was underway on June 18th 2009, but in a different operational area.”). *Quoted in Directorate-General Study on Frontex, Europol, and EASO*, *supra* note 209, at 104.

218. Brady Interview, *supra* note 15.

219. *Q&A: Working for refugees on Europe’s outer borders*, UN HIGH COMMISSIONER FOR REFUGEES (May 18, 2010), <http://www.unhcr.org/4bf29c8b6.html>; *see also* Briefing Notes, UNHCR, UNHCR Agreement with Frontex (June 17, 2008), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4857939e2&query=frontex>.

220. Cooperation Arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights art. 1 (May 26, 2010), *available at* [http://fra.europa.eu/fraWebsite/attachments/Cooperation-Agreement-FRA-Frontex\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/Cooperation-Agreement-FRA-Frontex_en.pdf).

lates that the FRA will assist Frontex in the development of fundamental rights curricula and the training of its officers in this regard.<sup>221</sup>

The practical effect of these partnerships is far from clear. Representatives from the UNHCR have questioned whether the human rights trainings it provides have had any impact, noting that the limited accessibility of information on Frontex's operations, particularly those on the high seas, makes impact assessment difficult.<sup>222</sup> Rights groups have also doubted the value of these partnerships, noting that it is "impossible" to determine the impact of rights training during real operations, particularly those at sea.<sup>223</sup> In addition, under the partnership agreements, the recommendations of neither the UNHCR nor the FRA are binding upon Frontex.<sup>224</sup>

In response to ongoing criticism of its human rights guarantees, in March 2011 the Management Board of Frontex approved a Fundamental Rights Strategy (FRS) for the agency.<sup>225</sup> The eight-page document explicitly acknowledges Frontex's obligations under EU and international law<sup>226</sup> and declares that "[r]espect for fundamental rights is an essential part of integrated border management."<sup>227</sup> It requires, among other things, that Frontex take particular account of the situation for vulnerable peoples in its risk analyses,<sup>228</sup> incorporate a chapter on fundamental human rights into its transnational border guard training curriculum,<sup>229</sup> and establish a Code of Conduct for its staff and guest officers.<sup>230</sup> However, the strategy also makes clear that ultimate responsibility for respecting international and EU law during joint operations lies with the member states themselves.<sup>231</sup> In addition, in situations where rights violations are alleged during joint operations, the strategy requires only that Frontex "follow[ ] up" on the allegations by "communicating and clarifying the situation in cooperation

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221. *Id.* art. 5. For more detail on specific initiatives pursued under the cooperation agreement between Frontex and FRA, see Letter from Morten Kjaerum, Director, EU Agency for Fundamental Rights, to Nikiforos Diamandouros, European Ombudsman (Sept. 26, 2012), available at <http://fra.europa.eu/en/news/2012/fra-responds-european-ombudsman-inquiry-fundamental-rights-frontex>.

222. Q&A: *Working for refugees on Europe's outer borders*, *supra* note 219 (quoting Michele Simone, UNHCR Liaison Officer to Frontex).

223. See, e.g., KELLER ET AL, *supra* note 186, at 30.

224. See, e.g., HUMAN RIGHTS WATCH, *supra* note 186, at 16.

225. *Management Board Endorses Frontex Fundamental Rights Strategy*, FRONTEx (Apr. 4, 2011), <http://frontex.europa.eu/news/management-board-endorses-frontex-fundamental-rights-strategy-FBIEQL>.

226. European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), *Frontex Fundamental Rights Strategy, Endorsed by the Frontex Management Board on March 31, 2011*, ¶¶ 4–12 [hereinafter *Frontex Fundamental Rights Strategy*].

227. *Id.* ¶ 1.

228. *Id.* ¶ 14.

229. *Id.* ¶ 23.

230. *Id.* ¶ 31.

231. *Id.* ¶ 13 ("Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations (JOs) and therefore also for the respect of fundamental rights during these activities.") (emphasis in original; citations omitted).

with the competent national authorities.”<sup>232</sup> Under the FRS, therefore, Frontex itself assumes no responsibility to enact corrective measures where rights violations have been alleged.

Ultimately, these features of the FRS merely highlighted, rather than remedied, one of the main problems with Frontex vis-à-vis human rights guarantees, that is, determination of liability when violations are alleged. Confusion over responsibility allocation stems from Frontex’s questionable independence from national state policies, as discussed above; contradictory statements from the agency itself; and lacunae in the overlapping regulatory texts pertaining to the agency, which one commentator has referred to together as a “legal monster.”<sup>233</sup> While, as an independent EU agency with legal personality, Frontex is in theory legally liable for its actions, the Executive Director of Frontex has himself made clear that decisions regarding fundamental rights “are the responsibility of the Member States.”<sup>234</sup> A member of the European Commission has also testified that national border guards participating in joint operations under the auspices of Frontex will remain accountable to their own countries.<sup>235</sup> Migreurop argues that the combination of these factors has diluted responsibility for rights violations and left a dangerous gap for asylum seekers seeking redress.<sup>236</sup>

A recent set of revisions to the Frontex regulation sought to diminish some of these concerns. In September 2011, the European Parliament and the Council adopted a new regulation that will strengthen the independence of Frontex and expand its human rights safeguards.<sup>237</sup> The preamble of the regulation specifically highlights the need to ensure that the agency is “fully respect[ing] fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*.”<sup>238</sup> The amended regulation also requires, as mandated by the FRS, that the agency adopt a Code of Conduct that will establish procedures to ensure compliance with fundamental rights obligations, particularly those of vulnerable individuals.<sup>239</sup>

The amended regulation contains an entirely new article, “Fundamental Rights Strategy,” which requires that Frontex 1) “further develop and implement” the FRS; 2) establish a Consultative Forum in which the European Asylum Support Office, the FRA, the UNHCR, and other “relevant” organizations will be invited to participate and which will draw up an annual report on its activities; and 3) designate, through its Management

232. *Id.* ¶ 19.

233. KELLER ET AL., *supra* note 186, at 24.

234. *Id.* at 22.

235. *Id.*

236. *Id.* at 23–24.

237. Parliament and Council Regulation amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, EUR. PARL. DOC. (PE-CONS 37/11) (2011).

238. *Id.* preamble, para. 9.

239. *Id.* para. 4 (amended art. 2(a)).



Board, a “Fundamental Rights Officer” (“FRO”) who will report regularly to the Board and Consultative Forum.<sup>240</sup> The regulation is silent as to the exact responsibilities, working method, resources, or powers of the FRO, as well as to the nature or specific provisions of the expanded FRS.

Perhaps most importantly for ensuring human rights guarantees even in the face of disparate member state compliance, the amended regulation grants Frontex the power to terminate joint operations or pilot projects with member states when it determines that “the conditions to conduct [such operations] are no longer fulfilled,” including situations in which the Executive Director judges that human rights violations “of a serious nature” or those which “are likely to persist” are occurring.<sup>241</sup> The new rules also grant Frontex enhanced independence from member states, stipulating that the agency may only receive funding from an individual state for its operations on condition that the granting state is fully in compliance with the Charter of Fundamental Rights.<sup>242</sup>

Although promising, the extent to which these measures will address the human rights concerns that limit Frontex’s solidarity-building capacity is dubious. First of all, the agency only recently began making concrete steps towards implementing the Fundamental Rights Strategy. In early March 2012, a year after the approval of the FRS and almost six months after the new regulation’s adoption, the European Ombudsman, P. Nikiforos Diamandouros, submitted a letter to Frontex questioning its precise plan for the amended regulation’s implementation.<sup>243</sup> In it he expressed particular interest in the agency’s progress towards realizing the FRS, the precise responsibilities and powers of the new Fundamental Rights Officer, the conditions and criteria for terminating joint operations in case of human rights violations, and whether there would be a mechanism established for individuals complaining of rights abuses in Frontex operations.<sup>244</sup> On May 17, 2012, Frontex director Ilkka Laitinen responded to the Ombudsman’s inquiry,<sup>245</sup> highlighting the agency’s affirmative steps towards enacting the new fundamental human rights standards and offering a detailed annex<sup>246</sup> outlining the specifics of its efforts in this regard. Among other facets of

240. *Id.* para. 26 (amended art. 26(a)(1)–(4)).

241. *Id.* para. 5 (amended art. 3(1)(a)).

242. *Id.* para. 15 (amended art. 9(1)).

243. P. Nikiforos Diamandouros, European Ombudsman, Letter to Mr. Ilkka Laitinen, Executive Director, Frontex (Mar. 6, 2012), available at <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark>; see also Press Release, European Ombudsman, Ombudsman Investigates Frontex’s Fundamental Rights Implementation (Mar. 13, 2012), <http://europa.eu/rapid/pressReleasesAction.do?reference=EO/12/4&type=HTML>.

244. Diamandouros, *supra* note 243, at 2–3.

245. Letter from Ilkka Laitinen, Director, Frontex, to Nikiforos Diamandouros, European Ombudsman (May 17, 2012), available at <http://www.frontex.europa.eu/news/frontex-responds-to-the-european-ombudsman-mHw81x>.

246. Annex 1, Letter from Ilkka Laitinen, Director, Frontex, to Nikiforos Diamandouros, European Ombudsman (May 17, 2012), available at <http://www.frontex.europa.eu/news/frontex-responds-to-the-european-ombudsman-mHw81x>.

Frontex's FRS, the annex elucidates somewhat the responsibilities of the soon-to-be-appointed Fundamental Rights Officer, including "making observations" on joint Frontex operations, "regular reporting and monitoring activities," identifying potential measures for correcting and preventing violations in joint operations, keeping a record of "possible fundamental rights incidents" arising from Frontex operations, and overseeing implementation of the FRS.<sup>247</sup> Three months later, in late September 2012, Frontex appointed Spanish lawyer and human rights expert Inmaculada Arnaez Fernandez to fill the role.<sup>248</sup> Ms. Fernandez's appointment and articulation of her responsibilities signal positive and laudable steps towards ensuring Frontex's compliance with EU and international law. However, the extent of her ability to significantly influence respect for human rights standards in joint operations, particularly given that she reports directly to the member state-controlled Management Board<sup>249</sup> and lacks the power to compel compliance, is yet to be seen.

In addition, there are indications that the commitment to human rights values articulated in the FRS may not have permeated the agency as a whole. For example, its February 2012 Situation Update on "Operation Hermes," a joint operation occurring in the area south of Lampedusa, does not appear to integrate the concern and recognition for vulnerable individuals—particularly asylum seekers—required by the FRS. In the update, the agency describes the dramatically increased "migratory wave" arriving in Lampedusa following the start of the conflict in North Africa.<sup>250</sup> While mentioning that the outbreak of civil war in Libya had led to a changed demographic composition of the "migrant groups" arriving at the Italian island—notably now including families with women and small children, rather than only "young, single men," as before<sup>251</sup>—the update makes no reference to the asylum right or refugees. In light of the fact that, based on Frontex's own description of these individuals, it is likely that at least some of them would qualify as refugees under the Refugee Convention,<sup>252</sup> the agency's failure to use this terminology or make note of its measures to ensure protection of their rights may call into question the effective diffusion of its new human rights-conscious approach throughout the agency.

247. *Id.* at 4.

248. *Management Board Designates Fundamental Rights Officer*, FRONTEx (Sep. 27, 2012), <http://www.frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-zqofRR>.

249. Frontex's description of the FRO as "an independent staff member reporting directly to the Management Board" (emphasis added) seems somewhat contradictory in this regard. See Annex 1, Letter from Ikka Laitinen, Director, Frontex, to Nikiforos Diamandouros, European Ombudsman, *supra* note 246.

250. *JO Hermes – Situational Update*, FRONTEx (Feb. 21, 2012), <http://www.frontex.europa.eu/news/jo-hermes-situational-update-ukYVF1>.

251. *Id.*

252. Article 1 of the Refugee Convention, as amended by the 1967 Protocol, defines a refugee as one who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Refugee Convention, *supra* note 33, art. 1.

### 3. *Disharmony in Member State Practice*

Arguably the most serious threat to Frontex's ability to build solidarity between union members is the states' own lack of investment in harmonization. On the one hand, Frontex is well-equipped to assemble border teams for intercepting and processing migrant flows, an important component in promoting transnational cooperation and cohesion. The European Commission recognized this ability at the onset of the Arab Spring, praising the agency's rapid assembly of Operation Hermes to assist the Italian authorities in "managing the influx of migrants from North Africa" and calling the operation "a clear signal of solidarity between Member States."<sup>253</sup> In addition, Frontex's rapidly multiplying budget is a sign that member states value its contribution as a coordinator and protector of a common good, that is, the security of the Schengen zone.<sup>254</sup>

On the other hand, Frontex is virtually powerless to influence harmonization of state policy at the level where EU solidarity is most threatened: national-level asylum policies. As detailed above, the failure by some member states to bring their asylum systems into alignment with the EU-level directives, as well as the refusal by others to help share responsibility for the overwhelming asylum backlogs resulting from the State of First Arrival rule, have together seriously compromised the principles of mutual trust and cooperation underlying the union. While Frontex may be making good-faith efforts to build a common understanding of human rights guarantees and international law between member states, Frontex is ultimately unable to force the type of solidarity between them that is required in times of crisis.

Furthermore, even given the increased degree of discretionary freedom from the policies of member states that it has been granted under the new Parliament regulation, Frontex will continue to be, as it always has been, animated by the governments that it comprises. As described above, the entire agency is overseen by a Management Board dominated by member state representatives. Further down the hierarchy, each officer and agent of

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253. Press Release, European Commission, The European Commission's Response to the Migratory Flows from North Africa 3 (Apr. 8, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/226>.

254. See Press Release, European Parliament, Parliament Votes Growth-stimulating Budget for 2012 (Oct. 26, 2011), <http://www.europarl.europa.eu/news/en/pressroom/content/20111026IPR30364/html/Parliament-votes-growth-stimulating-budget-for-2012> ("Parliament disagreed with cuts proposed by the Council on the EU Refugee Fund, Return Fund and External Border Fund (€ 45 million). The budget for the EU border agency Frontex should be increased by a reserve of € 25 million, they said, because this money might be needed for maritime border controls in the Mediterranean and for stepping up surveillance at the Greek-Turkish border. Just last month extra money was added to the 2011 budget for these purposes and MEPs feel that matters may not improve by the end of the year.") See also Remarks of Jerzy Miller (Poland), EUR. PARL. DEB., (Sept. 13, 2011) (video), <http://www.euro-parl.europa.eu/ep-live/en/plenary/video?debate=1315899544962> ("The European Council. . . ha[s] recently called several times for the strengthening of Frontex. Recent events in northern Africa and the resulting increased influx of immigrants via southern EU sea borders have additionally demonstrated the significance of strengthening the agency's operational capacities.").

Frontex is an EU national, and as such will inevitably carry with her, to some extent, the values, beliefs, and politics of her home country. Where disagreements arise among Frontex decision makers, whether on a macro level (e.g., deciding whether to participate in a proposed border control mission) or a micro level (e.g., deciding whether a specific individual may be turned away from an EU border under the prohibition on *refoulement*), the ultimate outcome will be determined by the decision maker's understanding of the law. If properly implemented, Frontex's plan to develop a common understanding amongst European border agencies of fundamental human rights guarantees would certainly help to ensure consistency in these types of decisions. However, true harmonization will still require significant investment from the member states themselves. Until and unless they bring their divergent asylum regimes into alignment, the job of homogenizing their understanding of human rights obligations will present an extremely challenging task for Frontex.<sup>255</sup>

Finally, when rights violations do occur during joint operations as a result of member states' disparate human rights compliance, Frontex lacks both a mechanism to punish offenders and the authority to correct the deficient practices.<sup>256</sup> Just as the European Central Bank is without the ability to compel member states to abandon irresponsible spending practices, even with its newly enlarged powers, Frontex ultimately remains a coordinating agency, not an enforcer. The limitations on the authority of the newly appointed Fundamental Rights Officer, whose role will include primarily "monitoring" and "making observations,"<sup>257</sup> is telling. As one official within Frontex has pointed out, it is difficult to imagine any eventual fundamental rights regime that will be able to monitor individual cases of rights violations by national border control agencies participating in joint operations.<sup>258</sup> In addition, where Frontex observes violations of fundamental rights by national border guards, it is still dependent upon the competent authorities of the responsible member state to investigate the incident and discipline the offending individual—it cannot do so on its own.<sup>259</sup> At best, under the new amendments to its regulation, Frontex can terminate a joint operation where "violations of fundamental rights or of international protection obligations occurred in the course" of the joint operation and "are

255. Parzyszek Interview, *supra* note 185.

256. The extent of Frontex's power in case of violations, as articulated in its Fundamental Rights Strategy, is limited to referring the case to national authorities. Frontex Fundamental Rights Strategy, *supra* note 226, ¶ 19 ("Alleged violations of human rights reported either by national or Frontex officers or third parties, when substantiated, will be followed up by Frontex by communicating and clarifying the situation in cooperation with the competent national authorities without prejudice to any resulting administrative or penal procedures.").

257. Letter from Ilkka Laitinen, Director, Frontex, to Nikiforos Diamandouros, European Ombudsman, *supra* note 245.

258. Parzyszek Interview, *supra* note 185.

259. *Id.*; see also Frontex Fundamental Rights Strategy, *supra* note 226, ¶ 19.

of a serious nature or are likely to persist.”<sup>260</sup> While a step in the right direction, the power to terminate operations in case of violations is no substitute for the power to identify and discipline individual officers who are responsible for those violations in the course of Frontex activities.

In sum, from a human rights perspective, evidence that Frontex is striving towards compliance with international and EU rights standards is welcome and encouraging, even if its public statements do not always reflect this shift. Frontex’s stated commitment to establish a common pan-European system of border control principles through training programs that promote a standardized system of values and objectives,<sup>261</sup> in particular, is laudable. However, even assuming the success of such a gargantuan ambition—taking into account substantial disparities in individual member states’ border situations, resources and, probably, understandings of human rights—it still does not address the central threats to EU solidarity that the current asylum regime has nurtured. And, most importantly perhaps, at the end of the day Frontex’s *raison d’être* remains the protection of the EU’s external borders; asylum issues do not fall within the agency’s mandate.<sup>262</sup> While full incorporation of respect for fundamental human rights in its operations is necessary, it would be neither appropriate nor effective to ask the border control agency to act as a human rights watchdog for all the member states it coordinates. As a result, until the CEAS is reformed to bring member states’ asylum policies into alignment and ensure the fair allocation of responsibility for asylum seekers in the EU, Frontex will be seriously compromised in its ability to build solidarity between them.

#### VI. EUROPEAN ASYLUM SUPPORT OFFICE: POSITIVE STEP OR LAST RESORT?

After Frontex, another potentially promising development for the harmonization of asylum policy across Europe was the establishment of the European Asylum Support Office (EASO) in 2010. The EASO was created to “support the development of solidarity” in the EU, especially in situations where certain member states face disproportionate strain on their asylum systems.<sup>263</sup> In particular, the office exists to deal with large, unexpected influxes of non-EU nationals who seek asylum in the union.<sup>264</sup> Its three primary tasks are: 1) to “support[ ] practical cooperation on asylum;”<sup>265</sup> 2)

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260. Annex 1, Letter from Ilkka Laitinen, Director, Frontex, to Nikiforos Diamandouros, European Ombudsman (May 17, 2012), *supra* note 246, at 9.

261. Parzyszek Interview, *supra* note 185.

262. *Id.*

263. Council and Parliament Regulation 439/2010, preamble, para. 7, 2010 O.J. (L 132) 11, 11.

264. *European Asylum Support Office*, EUROPA: SUMMARIES OF EU LEGISLATION, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/jl0022\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0022_en.htm) (last visited Mar. 24, 2012).

265. Council and Parliament Regulation 439/2010, arts. 3–7, 2010 O.J. (L 132) 11, 14–16.

to provide support to those member states which are “subject to particular pressure”<sup>266</sup>; and 3) to “contribut[e] to the implementation of the CEAS.”<sup>267</sup>

The EASO is still in the early stages of its operation, so its potential impact is difficult to assess. Among the priorities the agency identified in its 2012 Action Plan is the fulfillment of an “Operating Plan” for Greece,<sup>268</sup> which establishes targets for bringing the country’s asylum system up to par with European standards.<sup>269</sup> As part of the Operating Plan, the EASO has deployed Asylum Support Teams to Greece which are to “provide assistance on subjects such as training, screening, backlog management, general management of asylum and reception facilities, expertise on vulnerable groups and IT-expertise.”<sup>270</sup> However, the impact of the Greek Operating Plan has yet to be evaluated.

It could very well be that through the plan for Greece and similar efforts, the EASO will be able to contribute significantly to the harmonization of member state asylum systems;<sup>271</sup> however, like Frontex, the agency will be ultimately unable to remedy the core deficits that plague the CEAS framework. While such endeavors to bring lagging states up to par may be helpful, the office ultimately lacks the power to compel member state compliance with the directives or punish violations. In cases such as that of Greece, where the violations are occurring not simply due to a lack of political will, but as a result of inadequate financial resources and a failure on the part of other member states to share responsibility for accommodating asylum seekers, the EASO’s efforts could prove largely fruitless. In addition, although its Support Teams can lend expertise and advise national asylum officers, they are unable to intervene in individual cases where the rights of an asylum seeker are at risk.<sup>272</sup> This particular deficiency renders the EASO incapable of addressing the threat to EU solidarity that arises when the violations of one member state can impart liability on others within the union.

266. *Id.*, arts. 8–10, at 16.

267. *Id.*, arts. 11–12, at 17.

268. European Asylum Support Office, *Work Programme 2012*, at 4, EASO/MB/2011/25 (Sept. 2011).

269. Press Release, European Asylum Support Office, European Asylum Support Office Delegation Visits Greece to Discuss Progress Made Since the Deployment of Asylum Support Teams (Jan. 19, 2012), [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/easo\\_press\\_release/\\_easo\\_press\\_release\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/easo_press_release/_easo_press_release_en.pdf).

270. *Frequently Asked Questions: The European Asylum Support Office*, EUROPA PRESS RELEASES RAPID, at 2, MEMO/11/415 (June 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/415&format=HTML&aged=0&language=EN&guiLanguage=en>.

271. For an optimistic assessment of EASO’s ability, if limited, to positively impact member state asylum systems, see *Directorate-General Study on Frontex, Europol, and EASO*, *supra* note 209, at 32; see also FLORA A.N.J. GOUDAPPEL & HELENA S. RAULUS, *THE FUTURE OF ASYLUM IN THE EUROPEAN UNION: PROBLEMS, PROPOSALS AND HUMAN RIGHTS* 10 (2011).

272. Council and Parliament Regulation 439/2010, art. 2(6), 2010 O.J. (L 32) 11, 14.

In sum, the EASO shows some promise for helping bring member states' asylum systems into compliance with international law, but in its current form it falls far short of the mark. The creators of the agency envisioned its role, like that of Frontex, as one of coordination and support, but not enforcement. Furthermore, concerns about state sovereignty are likely to ensure that it remains toothless into the indefinite future. The establishment of the EASO therefore represents yet another patch on a deteriorating framework of cooperation.

## VII. TOWARDS A SYSTEM OF TRUE SOLIDARITY

Under the current CEAS framework, the EU member states are embarking on an impossible task in trying to sew up the holes that proliferate with increasing rapidity through the fabric of union solidarity. As the number of asylum seekers arriving in Europe continues to rise, the disintegrating state of the CEAS combined with deep-cutting austerity measures will ensure that the rips continue to spread much faster than they can be mended.

The current flawed state of the CEAS presents a trio of hazards to mutual trust and cooperation in the union. Of particular concern is the State of First Arrival rule, which places disproportionate burdens on the southern states for processing asylum seekers while failing to ensure that the northern states share responsibility for their assimilation. Widely varying compliance with the asylum directives across the union is also a serious threat, as rights violations occurring in one state can be attributed to the actions of another, generating mistrust and resentment between member states. Finally, the ability of Frontex to fulfill its mandated objective of promoting union solidarity is compromised by a number of factors relating to the clashing domestic policies of the member states themselves.

New measures by the European Parliament, specifically the establishment of the EASO and reforms to Frontex to enhance human rights safeguards, will no doubt provide helpful patches to the system, but they fail to address the root causes of its deterioration. As demonstrated above, the biggest threats to European cohesion concern rights violations resulting from practice and procedure falling squarely within the sovereign spheres of member states.

As the decisions in *M.S.S.* and *N.S.* demonstrated, member states can no longer simply turn a blind eye to the rights abuses of others and call it "mutual trust." As with the debt crisis, the path to mutual trust and a stronger future union will necessarily entail deeper integration, not withdrawal. Fomenting greater unity will sometimes require that member states make complex inquiries that lack simple solutions, asking difficult questions of themselves and each other. It will also require national governments to make honest assessments of other members' compliance with EU

and international law and exert appropriate diplomatic pressure when needed to prevent violations.

Finally, and perhaps most importantly, achieving true unity will require that states take seriously the union's founding principle of "sincere cooperation." Reforming the Dublin regulation, in particular by replacing the State of First Arrival rule with a fairer and more realistic burden-sharing agreement, will be critical. Not only must member states recognize when rights violations are occurring in the territory of others, they must also be willing to step forward and offer assistance to help remedy the deficits. This may mean striking agreements to relocate substantial numbers of refugees, providing assistance in shoring up asylum infrastructure, and sharing technical, legal, and human resources with others. As with the debt crisis, this will probably require national governments to swallow some costs of reform, both financial and political. This will not be easy in an era of increasing anti-immigration sentiment in Europe. Without making such sacrifices, however, the member states of the EU risk deeper internal disharmony, increasing human rights violations, and the ultimate unraveling of greater European unity.