The Dublin Regulation and Systemic Flaws

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I. INTRODUCTION

Since the crisis in Syria began in 2011, Europe and many other nations have experienced a massive influx of refugees and asylum seekers fleeing their war-torn country.[1] The United Nations High Commissioner for Refugees ("UNHCR") estimated that Turkey hosted over one million Syrian refugees as of August 2014.[2]

Many Syrian refugees have also fled to Europe, where there has been a large spike in the number of asylum applicants, and that number has steadily grown since 2013.[3] Between January and July 2013, over 225,000 asylum applications were lodged in 38 European countries, which was a 23% increase from the same period in 2012; of these, over 192,000 applications were made in EU States.[4] The number of refugee applicants continues to climb according to Eurostat data, which reported that the number of first time asylum applicants increased by 86% in the first quarter of 2015, compared with the same quarter of the previous year.[5] Many of those asylum applicants are concentrated in European border counties, such as Italy, which has seen a 27% increase of asylum applications from 2014 to 2015, and Greece, which has seen a 30% increase of applicants over the same time period.[6] Hungary has also seen a large increase in asylum applicants. Hungary's number of asylum applications has doubled in 2014. The country has had nearly 150,000 arrivals since the beginning of 2015 and, at one point, up to 3,000 asylum seekers crossing the Hungary-Serbia border every day for a week.[7]

Because of the large number of refugees flooding into European border countries, the living conditions of the refugees once they reach those nations are below the nationally and internationally required standards.[8] According to Human Rights Watch, refugees who were waiting to be processed for

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1. *See* UNHCR, *Europe*, GLOBAL APPEAL 2015 UPDATE 130–31, http://www.unhcr.org/5461e5f80.pdf [https://perma.cc/73TS-4249].
2. *Id.*
3. *See* UNHCR, *Europe*, GLOBAL APPEAL 2014-2015 109, http://www.unhcr.org/528a0a1ab.pdf [https://perma.cc/3L2K-JE3N].
4. *Id.*
5. *See* Eurostat, *Asylum Quarterly Report* 1, http://ec.europa.eu/eurostat/documents/6049358/7005580/Q1_2015_SE+article.pdf [https://perma.cc/PKD7-5KKD].
6. Council Decision 2015/1601, Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015 O.J. (L 248) 80, 81 (EU) [hereinafter Provisional Measures].
7. *Hungary: Abysmal Conditions in Border Detention*, HUM. RTS. WATCH (Sept. 11, 2015), https://www.hrw.org/news/2015/09/11/hungary-abysmal-conditions-border-detention [https://perma.cc/8DZP-GZE7].
8. Eva Cosse, *Dispatches: Let Refugees on Buses, Greece*, HUM. RTS. WATCH (Sept. 11, 2015), https://www.hrw.org/news/2015/09/11/dispatches-let-refugees-buses-greece [https://perma.cc/6CX7-6YHC].

asylum in the Greek city of Mytilene had no toilets or showers to use, and had to buy their own tents, food, and water.[9] In Serbia, Human Rights Watch interviewed migrants and asylum seekers who described violent assaults, threats, insults, and extortion, as well as being denied the mandatory special protection for unaccompanied children.[10] In Hungary, police intercepted asylum seekers and placed them in tightly-packed hangars for detention.[11] While being held in these hangars, asylum seekers have been denied interpreters, given sparse access to food and bedding, and, due to the lack of drinkable water, forced to drink unclean water that is provided for washing.[12] The detainees are also denied medical attention, and some even described instances in which they saw other detainees experience heart attacks, insulin shock or seizures, and newborns with serious fevers.[13]

Border countries, such as Greece, Italy, and Hungary, have the unequal task and responsibility of caring for the asylum seekers due to the EU regulations that manage asylum, which are governed in large part by the Dublin Regulation.[14] The Dublin Regulation is a decision drafted by the European Parliament and the Council of European Union that assigns the responsibility of processing the asylum seekers application to the first EU Member State the asylum seeker enters.[15] If an asylum seeker moves to another nation, other than the nation he or she first entered, then the Dublin Regulation allows a state to ask the first state responsible for the application to take charge or to take back the asylum seeker.[16] This idea is based on the principle that responsibility primarily lies with the Member State that played the greatest role in the asylum seeker's entry into the EU.[17] Due to the hierarchical criteria and lack of burden-sharing provisions in the Dublin Regulation, asylum applications are not equally shared

9. *Id*.
10. *Serbia: Police Abusing Migrants, Asylum Seekers*, HUM. RTS. WATCH (Apr. 15, 2015), https://www.hrw.org/news/2015/04/15/serbia-police-abusing-migrants-asylum-seekers [https://perma.cc/C7B9-BC5A].
11. *Hungary: Abysmal Conditions in Border Detention*, *supra* note 7.
12. *Id.*
13. *Id.*
14. *See* Tina Van den Sanden, *Case Law: Joined Cases C411/10, N.S. v. Sec'y of State for the Home Dep't*, 19 COLUM. J. EUR. L. 143, 145–46 (2012).
15. Council Regulation 604/2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2013 O.J. (L 180) 31, 37 (EU) [hereinafter Dublin III].
16. Van den Sanden, *supra* note 14, at 147.
17. *Id.*

between all Member States.[18] Countries like Greece, Hungary, and Italy, are burdened with an unequal portion of the refugees,[19] which results in flaws in the way asylum seekers are processed.

This comment will discuss the systemic flaws in the Dublin Regulation and in the Member States' asylum procedures, as well as the need for specificity in the definition of the "systemic flaws" discussed in the Dublin Regulation. Section II will explain the history and source of obligation underlying the Dublin Regulation, and will also detail its development since its inception. Section III will explore the meaning of "systemic flaws" found in Article 3 of the Dublin Regulation. Section III will also discuss the cases decided by the European Court of Human Rights ("ECtHR") and the European Court of Justice ("ECJ"), pertaining to "systemic flaws" and how those cases have influenced the Dublin Regulation. Section IV will analyze the early warning mechanism found in Article 33 of the Regulation, and the role of mutual trust in EU law, and the impact on the function of the Regulation. Section IV will also explore the practical application of the Dublin Regulation, and the current solutions the EU has tried to implement in Greece, Italy, and Hungary. Lastly, Section V will propose changes to the Dublin Regulation, which includes a specific definition of what systemic flaws are, an automatic barring of sending refugees to a country that is found to have systemic flaws, and exploring a fair and equal sharing system to alleviate the burden on border countries.

II. DEVELOPMENT OF THE DUBLIN REGULATION

The obligation that each EU Member State has to accept asylum seekers is found in The Charter of Fundamental Rights ("The Charter"),[20] and, for EU Members that are part of the Council of Europe as well, simultaneously from an obligation under the European Convention of Human Rights ("ECHR").[21] The Dublin Regulation is a mechanism that assigns responsibility to Member States for asylum seekers.[22] The Dublin Regulation derives its authority from the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU").[23] The Dublin Regulation

18. *Id.*
19. *Id.*
20. *See* EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION 20 (2d ed. 2014), http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf [https://perma.cc/AV6F-X9VM] [hereinafter EU HANDBOOK].
21. *Id.* at 15–16.
22. *See* SUSAN FRATZKE, NOT ADDING UP: THE FADING PROMISE OF EUROPE'S DUBLIN SYSTEM 1 (2015).
23. *See* EU HANDBOOK, *supra* note 20.

has been revised twice in the 26 years since its inception in 1990,[24] and has been kept in compliance with the treaties and obligations listed above.[25]

A. Charter of Fundamental Rights and the European Convention of Human Rights

The EU is made up of 28 Member States.[26] Its two main treaties, the TEU and the TFEU, have been approved by all EU Member States and are referred to as "primary EU law."[27] The EU's regulations, directives, and decisions have been adopted by the EU institutions that have been given authority to do so under the treaties, and they are often referred to as "secondary EU law."[28] Under the EU treaties, the EU established its own court, the ECJ, which has since been renamed the Court of Justice of the European Union ("CJEU").[29]

In 2000, the EU promulgated the Charter of Fundamental Rights (CFR), and when the Treaty of Lisbon entered into force on December 1, 2009, the EU made the CFR legally binding.[30] As a result, according to Article 51 of the CFR, EU institutions, bodies, offices, agencies, and Member States are bound to comply with the CFR when implementing EU law.[31] The CFR contains a list of human rights inspired by the rights enshrined in EU Member States' constitutions and the ECHR.[32]

For the first time at a European-wide level, the CFR prescribed a right to asylum.[33] Article 18 in the CFR guarantees "[t]he right to asylum . . . with due respect for the rules of the Geneva Convention . . . relating to the status of refugees and in accordance with the Treaty establishing the European Community."[34]

Article 19 of the CFR grants protection in the event of removal, expulsion or extradition, and provides that "[c]ollective expulsions are prohibited,"

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24. *See* FRATZKE, *supra* note 22, at 3.
25. *See generally* Dublin III, *supra* note 15, at 31–35 (providing instances when regulation is in accordance with the CFR, ECHR, TEU, and TFEU).
26. *See* EU HANDBOOK, *supra* note 20, at 17.
27. *Id.*
28. *Id.*
29. *Id.* at 19.
30. *Id.* at 20–21.
31. Charter of Fundamental Rights of the European Union art. 51, 2010 O.J. (C 83) 389, 402 [hereinafter CFR].
32. *See* EU HANDBOOK, *supra* note 20, at 20.
33. *Id.* at 21.
34. *See* CFR, *supra* note 31, art. 18.

and that "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."[35]

Lastly, Article 52 of the CFR stipulates that the minimum protection afforded by the CFR provisions are those provided by the ECHR; nevertheless, the EU may apply a more generous interpretation of the rights than that put forward by the ECtHR.[36]

The 28 members of the EU that are part of the Council of Europe ("Council") have obligations to asylum seekers under the Council as well.[37] The Council was formed after the Second World War to unite the nations of Europe.[38] The Council adopted the ECHR in 1950.[39] The Council then created the ECtHR in order to enforce the laws of the ECHR.[40] As of December 2013, the Council was composed of 47 States, 28 of which were also members of the EU.[41]

The ECHR protects asylum seekers through Article 1 of the ECHR and Article 1 of Protocol 7 of the ECHR.[42] Article 1 requires states to "secure" the Convention rights to "everyone within their jurisdiction," which includes foreigners.[43] Article 1 of Protocol 7 of the ECHR provides procedural safeguards relating to expulsion of aliens, and states that "[a]n alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law" and gives the "alien" the right to have his or her case reviewed and to be represented in court.[44]

B. The Dublin Convention

In 1990, the Member States of the European Community, what is now known as the European Union, first negotiated the Dublin Convention ("Convention") in 1990.[45] It was negotiated in response to the implementation of the Schengen Agreement,[46] which was signed in 1985, and led to the

35. *See* CFR, *supra* note 31, art. 19.
36. *See* EU HANDBOOK, *supra* note 20, at 21.
37. *Id.* at 15.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 15–16.
43. *Id.* at 16.
44. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 11, 1984, C.E.T.S. 117, art. 1.
45. *See* FRATZKE, *supra* note 22, at 3.
46. *Id.* at 4.

abolition of internal border controls of participating EU Member States.[47] With the removal of the EU internal borders, asylum seekers could move around European countries easier, and disputes for who had the responsibility of filing asylum seeker's applications soon became an issue.[48] Therefore, the Convention was created to help determine which Member State had responsibility over an asylum seeker.[49] The Convention, however, was also created for two other important purposes: (1) to prevent delayed access to protection for an asylum seeker if no Member State claimed responsibility, and (2) to preclude asylum seekers from choosing a Member State they perceived as most favorable (asylum shopping).[50] Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom initially signed the Convention.[51] Austria later signed the Convention in 1997, and Finland signed in 1998.[52]

C. Dublin Regulation II and III

The Dublin Regulation ("Dublin II") replaced the Dublin Convention in 2003.[53] Dublin II was created to establish a mechanism to swiftly determine the Member State responsible for examining an asylum application, and to ensure that all asylum claims received a substantive examination.[54] It also introduced the use of EURODAC, which is a database for recording fingerprint data of asylum applicants.[55] All EU Member States except Denmark acceded to Dublin II.[56]

In 2013, the European Council and Parliament agreed upon a revision of the Dublin Regulation ("Dublin III") that came into effect in January 2014.[57] Dublin III clarified the hierarchy of criteria determining Member State responsibility and established a mechanism to warn of potential

47. *See* EU HANDBOOK, *supra* note 20, at 18.
48. *See* FRATZKE, *supra* note 22, at 4.
49. European Community, Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Aug. 19, 1997, 1997 O.J. (C 254) 1 [hereinafter Dublin Convention].
50. *See* FRATZKE, *supra* note 22, at 4.
51. *Id.* at 3.
52. *Id.*
53. *Id.*
54. *Id.* at 4.
55. *Id.* at 3.
56. *Id.*
57. *Id.*

problems with Member States' asylum systems.[58] Most importantly, Dublin III prohibited the transfer of asylum seekers to states with "systemic flaws,"[59] and it introduced an early warning and preparedness mechanism to identify deficiencies in Member States' asylum systems before they developed into a crisis.[60]

III. SYSTEMIC FLAWS

The term "systemic flaws," as it pertains to asylum seekers, first developed through the cases *M.S.S. v. Belgium & Greece* decided by the ECtHR, and the joint cases of *N.S. v. Secretary of State* and *M.E. v. Refugee Applications Commissioner*, decided by the ECJ (now the CJEU).[61] The language used in *N.S./M.E* was later used in the Dublin III recast,[62] however, Dublin III does not provide any further definition of a "systemic flaw" that would require Member States to halt transfers.[63]

A. M.S.S. v. Belgium & Greece

The Grand Chamber of the ECtHR decided *M.S.S. v. Belgium & Greece* in 2011.[64] It was the first time that socio-economic circumstances were considered in judging a violation of Article 3 of the ECHR,[65] which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[66]

The applicant in *M.M.S. v. Belgium & Greece* was an Afghan national who entered the EU through Greece before arriving in Belgium, where he applied for asylum.[67] Belgium asked the Greek authorities to take responsibility for the asylum applicant[68] in accordance with Article 10(1) of Dublin II because Greece was the first State of entry.[69] Despite a letter from the

58. *Id.*
59. *Id.* at 11.
60. *Id.* at 21.
61. *See* Van den Sanden, *supra* note 14, at 149–52.
62. *See* FRATZKE, *supra* note 22, at 11.
63. *Id.* at 22.
64. M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. 255 (2011), http://www.echr.coe.int/Documents/Reports_Recueil_2011-I.pdf [https://perma.cc/2UXH-QRZV].
65. *See* Van den Sanden, *supra* note 14, at 149.
66. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter ECHR].
67. M.S.S., 2011-I Eur. Ct. H.R. at 257.
68. *Id.*
69. *See* 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, art. 10(1), 2003 O.J. (L 50) 1 (EC) [hereinafter Dublin II Regulation].

UNHCR, which criticized Greek asylum procedures and reception conditions of asylum seekers in Greece, the Belgian authorities found no reason to believe that Greece would fail to honor its obligations as the responsible Member State under EU law and its obligations under the 1951 Geneva Convention relating to the Status of Refugees.[70] On June 15, 2009, the applicant was transferred to Greece, where he was immediately placed in detention for four days in allegedly appalling conditions.[71] The applicant was eventually released, but was forced to live on the streets.[72] The applicant spent months living in a state of extreme poverty and lacked food, proper hygiene, and a place to live.[73] The applicant was also in constant fear of being attacked and robbed.[74]

The court found that Greece had violated Article 3 of the ECHR[75] when Greece detained the asylum seeker.[76] Generally, a state's treatment of an asylum seeker is "inhuman" under Article 3 when it is premeditated, applied for hours at a stretch, and causes either actual bodily injury or intense physical or mental suffering.[77] Article 3 also states that treatment is "degrading" when it: (1) humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or (2) arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, or (3) when a victim is humiliated in his or her own eyes, even if not in the eyes of others.[78] The court found that the conditions the applicant had experienced in detention, such as, the lack of sufficient ventilation, being forced to urinate in bottles, sleeping on the bare floor, and the lack of soap and toilet paper, amounted to a violation of Article 3 of the ECHR.[79]

The court also found that the Greek authorities violated Article 3 by not providing the applicant adequate living conditions.[80] The Court concluded that the applicant had been the victim of humiliating and disrespectful treatment, and that his situation of homelessness "aroused in him feelings

70. M.S.S., 2011-I Eur. Ct. H.R. at 266–67.
71. *Id.* at 258.
72. *Id.*
73. *Id.*
74. *Id.*
75. *See* ECHR, *supra* note 66, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").
76. *See* M.S.S., 2011-I Eur. Ct. H.R. at 312.
77. *Id.* at 308.
78. *Id.*
79. *Id.* at 311–12.
80. *Id.* at 318.

of fear, anguish or inferiority capable of inducing desperation."[81] The court further stated that the applicant's living conditions, combined with the prolonged uncertainty in which he had remained, and the lack of any prospects of his situation improving, amounted to a violation of Article 3.[82]

Lastly, the court found that there had been a violation of Article 13[83] of the Convention in conjunction with Article 3.[84] The court found a violation due to deficiencies in the Greek authorities' examination of the applicant's asylum request.[85] Because of these deficiencies, the applicant risked being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.[86]

The court concluded that Belgium had also violated Article 3 of the ECHR.[87] In regards to Belgium, the court concluded that, under Dublin II, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country (Greece) was not fulfilling its obligations under the ECHR.[88] The Court held that it was up to the Belgian authorities to first verify how the Greek authorities applied their legislation on asylum in practice. Had Belgium done this, they would have seen the risk of the degrading conditions in Greece that fell within the scope of Article 3.[89]

B. N.S. v. Secretary of State *and* M.E. v. Refugee Applications Commissioner

Following *M.S.S. v. Belgium*, the ECJ ruled on the compatibility of Dublin II transfers to Greece with fundamental rights for the first time through the joined cases of *N.S. v. Secretary of State* and *M.E. v. Refugee Applications Commissioner*.[90] The ECJ referred extensively to the ECtHR's decision in *M.S.S.* when assessing the factual situation of the asylum applicants in *N.S.* and *M.E.*[91]

81. *Id.*
82. *Id.*
83. *See* ECHR, *supra* note 66, art. 13.
84. *M.S.S. v. Belgium and Greece*, 2011-I Eur. Ct. H.R. at 312.
85. *Id.* at 64.
86. *Id.* at 65.
87. *Id.* at 75.
88. *Id.* at 71.
89. *Id.* at 75.
90. *See* Van den Sanden, *supra* note 14, at 150.
91. *Id.* at 152.

The asylum applicant in *N.S.* was an Afghan national who fled his native country, and arrived in the United Kingdom after traveling through Greece.[92] He was arrested in Greece on September 24, 2008, but he was unable to apply for asylum.[93] According to the applicant, Greek authorities detained him for four days, and then gave him an order to leave Greece within 30 days after his release.[94] When he tried to leave Greece, he was arrested by the police and was expelled to Turkey, and held there for two months.[95] He states that he escaped from detention in Turkey and eventually ended up in the UK on January 12, 2009, where he lodged an asylum application.[96]

Since Greece was the first EU entry point, the UK authorities requested that Greece take responsibility for the applicant pursuant to Dublin II, and after receiving no responses from Greece, the UK, in accordance with Dublin II, deemed that Greece had accepted responsibility of the applicant.[97] The applicant opposed this removal, claiming that his removal to Greece would violate his rights under the ECHR, and therefore, the UK should accept responsibility of his asylum claim under Article 3(2) of Dublin II.[98] The High Court rejected the applicant's appeal. The Court of Appeal, however, decided it was necessary to refer a number questions to the ECJ.[99]

The main question that the court asked was whether the decision by a Member State to examine an asylum claim it does not have responsibility to examine falls within the scope of EU law, specifically under of Article 6 of TEU and Article 15 of the ECHR.[100] Put another way, does Article 3(2), which is the decision by a Member State to examine an asylum claim it does not have responsibility for, fall within EU law as to bind the Member States? The other questions relate to human rights, and whether

92. Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't, 2011 ECJ Eur-Lex LEXIS 3290 at 34 (Dec. 21, 2011).
93. *Id.*
94. *Id.* ¶ 35.
95. *Id.*
96. *Id.*
97. *Id.* ¶ 36.
98. *Id.* ¶ 39–40; Dublin III art. 3(2) states "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure . . . resulting in a risk of inhuman or degrading treatment . . . the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible." Dublin III, *supra* note 15, art. 3(2).
99. Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't, 2011 ECJ Eur-Lex LEXIS 3290 at 50 (Dec. 21, 2011).
100. *Id.*

or not the obligation to observe EU fundamental rights precluded the operation of a "conclusive presumption" that the responsible State will observe an applicant's fundamental rights.[101]

The other case, C-493/10, *M.E.*, concerned five separate appellants who originated, respectively, from Afghanistan, Iran, and Algeria.[102] Each of them traveled through Greece and then to Ireland, where they claimed asylum.[103] Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, while the other two admitted they had previously been in Greece.[104] The EURODAC system confirmed that all five appellants had previously entered Greece, but none of them had claimed asylum there.[105] Each appellant resisted a return to Greece, and argued that the procedures and conditions for asylum seekers in Greece were inadequate.[106] The appellants also argued that Ireland was required to exercise its power under Article 3(2) of the Regulation to accept responsibility for examining and deciding on their asylum claims.[107] The High Court decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling.[108]

The Court's questions concerned whether the transferring Member State under the Regulation was obliged to assess the compliance of the receiving Member State with Article 18 of the CFR, and if the receiving Member State is found not to be in compliance with one or more of those provisions, whether the transferring Member Sate is obliged to accept responsibility for examining the application under Article 3(2) of the Regulation.[109]

The court concluded that the decision by a Member State, on the basis of Article 3(2) of the Dublin Regulation, to examine an asylum application that is not its responsibility according to the criteria laid down in Dublin II, implements EU law for the purposes of Article 6 of the TEU and/or Article 51 of the CFR, and therefore the Member State's decision to examine the applicant must be compatible with the CFR.[110] This means that the CFR will apply to the Member State, and Article 4 of the CFR provides that

101. *Id.*
102. *Id.* ¶ 51.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* ¶ 52.
107. *Id.*
108. *Id.* ¶ 53.
109. *Id.*
110. *See id.* ¶ 69.

"[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[111]

The court further concluded that EU law precluded a conclusive presumption that the responsible Member State, which Dublin II indicates as responsible, observe the fundamental rights of the EU.[112] The court also stated that Article 4 of the CFR was interpreted to mean that Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible, within the meaning of the Regulation, where they cannot be unaware that *systemic deficiencies* are present in an asylum procedure."[113] Meaning that, if a Member State knows of systemic flaws in another Member State's asylum procedures, then the first Member State may not transfer an asylum seeker back to the flawed State.

The court further stated that there could be no transfer if the reception conditions of asylum seekers in that Member State afforded 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 that provision.[114] The court echoed similar language used in *M.S.S.* when using the words "inhuman or degrading treatment," and even referenced the *M.S.S.* decision when determining what would constitute a violation of the articles found in the CFR.[115]

C. Dublin III Recast

After the *N.S./M.E.* decision, there was a near universal halt in Dublin transfers to Greece,[116] Dublin II was recast, and Dublin III was created, which added a new provision echoing the language of the CJEU in *N.S./M.E.*[117] The new provision added in Dublin III prohibited transfers to states with "systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union."[118]

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111. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 9.
112. Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't, 2011 ECJ Eur-Lex LEXIS 3290 (Dec. 21, 2011) ¶ 105.
113. *Id.* ¶ 106.
114. *Id.*
115. *Id.* ¶ 112.
116. FRATZKE, *supra* note 22, at 11.
117. *Id.*
118. Dublin III, *supra* note 15, art. 3(2).

The application of this new provision, however, has been troublesome because the Dublin Regulation does not provide any further definition of systemic flaws.[119] Additionally, most member states have been reluctant or unable to apply the language of the court used in *N.S./M.E.* in situations such as the inadequate capacity to hold asylum applicants in states such as Italy or Bulgaria.[120]

D. ECtHR Cases After M.S.S. v. Belgium

Since the inception of Dublin III in 2014, there have been multiple cases decided by the ECtHR in which the court determined what did and what did not constitute a systemic flaw in a Member State's asylum procedures.[121] For example, the 2014 case of *Sharifi and Others v. Italy and Greece*, in a chamber judgment by the ECtHR, the court held that Greece had violated Article 13 (the right to an effective remedy) combined with Article 3 of the ECHR, and that Italy had also violated Article 3.[122]

The case concerned 32 Afghan nationals, two Sudanese nationals, and one Eritrean national, who had entered Italy illegally through Greece, and then returned to Greece immediately.[123] In Greece, they alleged they faced subsequent deportation back to their countries of origin that they were fleeing due to risk of death, torture, and inhuman or degrading treatment.[124]

The court found Greece had violated Article 13, combined with Article 3, because of the shortcomings of their asylum procedure, notably a shortage of interpreters and the absence of legal aid.[125] Greece had also violated Articles 13 and 3 because of "the state of precariousness and utter destitution" in the refugee camp, which lead to overcrowded makeshift camps and a lack of essential services.[126] The court found that Italy had violated Article 3 because of the lack of asylum procedures that put the applicants at a risk of being deported back to their countries of origin, where they were likely

119. *Id.* art. 22.
120. *Id.* art. 11.
121. *See generally* EUROPEAN COURT OF HUMAN RIGHTS, DUBLIN CASES (2016) [hereinafter Dublin Cases], http://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf [https://perma.cc/5F8X-QTBM] (ECHR factsheet of all cases that arose under Dublin since 2014).
122. EUROPEAN COURT OF HUMAN RIGHTS, INDISCRIMINATE COLLECTION EXPULSION BY THE ITALIAN AUTHORITIES OF AFGHAN MIGRANTS, WHO WERE THEN DEPRIVED OF ACCESS TO THE ASYLUM PROCEDURE IN GREECE 1 (2014), http://oppenheimer.mcgill.ca/IMG/pdf/Judgment_Sharifi_v-_Italy_and_Greece_Expulsion_of_Afghan_migrants_from_Italy_to_Greece.pdf [https://perma.cc/AQX6-8U2K] [hereinafter *Sharifi*].
123. *Id.*
124. *Id.*
125. *Id.* at 4.
126. *Id.*

to be subjected to inhuman and degrading treatment.[127] The applicants had also complained about ill treatment by the Italian police and crews when being transported back to Greece, but the court noted that the complaint had not been substantiated and the complaint was manifestly ill-founded because the applicants had not provided enough details on the location, the nature of the ill-treatment in question, the perpetrators, and the after effects the treatment had on them.[128]

Later that year, The ECtHR found similar violations in *Tarakhel v. Switzerland*, which was decided by the Grand Chamber. The applicants were an Afghan couple and their six children, who had first arrived in Italy from Iran.[129] The family left the Italian reception center and eventually ended up in Switzerland, where their case was reviewed and denied by Swiss authorities, and an order was placed for their removal to Italy.[130] The applicants contended that their living conditions in the Italian reception centers were poor, and included the lack of appropriate sanitation facilities, the lack of privacy, and violence among the other occupants.[131]

The court held that if the Swiss authorities were to return the applicants to Italy, the action would result in a violation of Article 3 of the ECHR.[132] In determining what conditions would fall within an Article 3 violation, the court held that the ill-treatment of asylum seekers must attain a minimum level of severity, and that the circumstances of the case, such as the duration of the treatment and its physical or mental effects, and, in some instances, the sex, age and state of health of the victim should be taken into account.[133] The court also held that particular care should be taken when asylum applicants are children, even when they are accompanied by their parents, and that the reception conditions for children seeking asylum must be suitably adapted to their age, to ensure that those conditions do not "create [. . .] a situation of stress and anxiety, with particularly traumatic consequences."[134]

The ECtHR has, however, decided cases where they found no violations of Article 3.[135] In *Mohammadi v. Austria*, a chamber decision in 2014, the

127. *Id.* at 6.
128. *Id.* at 5–6.
129. Tarakhel v. Switzerland, App. No. 29217/12, Eur. Ct. H.R. at 3–4 (2014).
130. *See id.* at 4.
131. *Id*.
132. *Id.* at 48.
133. *Id.* at 47.
134. *Id.* at 47–48.
135. *See generally* Dublin Cases, *supra* note 121 (courts found that there were no violations in *Mohammadi v. Austria*, *A.M.E. v. the Netherlands*, and A.*S. v. Switzerland*).

applicant case, a minor, had lodged an asylum application in Austria, after crossing though Greece and Hungary.[136] The applicant told Austrian authorities that he did not want to go back to Hungary, because he had been arrested and detained for three days, was not given enough to eat, was abused by police, and was woken up during the night by officers.[137] Austria rejected the application, and ordered that the asylum seeker be sent the back to Hungary.[138] Austria took into account a letter that the UNHCR had sent them.[139] The letter by the UNHCR noted that there were problems with Hungary's technique of age assessment, the detention conditions for asylum seekers, and the practice of sending asylum-seekers to Serbia if their first proceedings were terminated.[140] Austria, however, noted a lack of sources in the UNHCR's letter, and referred to updated country information obtained by Austrian asylum authorities that did not indicate systemic deficiencies in the Hungarian asylum proceedings and reception conditions that would have warranted the use of the sovereignty clause in Dublin III.[141]

The ECtHR held that if the applicant was expelled to Hungary, he would not be at risk of treatment in contrary to Article 3 of the ECHR, and that the relevant country reports on the situation in Hungary did not indicate systemic deficiencies in the Hungarian asylum system.[142] The reports by the UNHCR indicated that detainees had complained about poor housing conditions, such as a lack of cleaning materials, inadequate water quality, difficulties in practicing their religion, and lack of access to specialist medical care, but also noted that, although the centers were usually at full capacity, there were no problems with overcrowding. Asylum-seekers had outdoor access during the day, each center was equipped with a fitness room and computers with internet access, and religious dietary requirements were always respected. Furthermore, lawyers, family members, and non-governmental organizations were able to access the detention centers.[143]

Considering the reports, the court reasoned that there is no legal remedy against detention in general, only a limit of no more than six months of detention, and the court held that, although there were shortcomings in some of the conditions of detention, there seemed to be an overall sign of improvement.[144] The court also mentioned the UNHCR had never put in

136. Mohammadi v. Austria, App. No. 71932/12, Eur. Ct. H.R. at 2 (2014).
137. *Id.*
138. *Id.* at 2–3.
139. *Id.* at 4.
140. *Id.*
141. *Id.*
142. *Id.* at 17.
143. *Id.* at 10.
144. *Id.* at 16.

their report that EU member states should refrain from transferring asylum seekers to Hungary under the Regulation.[145] Lastly, the court decided not to address Hungary's age assessment policy, because the applicant in the present case was no longer a minor,[146] and in regards to risk of refoulement to Serbia, Hungary had changed their policy and they now examined asylum applications of Dublin returnees on the merits, instead of automatically sending them to Serbia.[147]

A.M.E. v. the Netherlands was another case where the court found no Article 3 violation, and thus, no systemic flaws in the Member State's asylum procedures. In *A.M.E.*, the applicant, a Somali national born in 1994,[148] traveled to Italy where he applied for asylum in 2009; applicant filed as an adult, stating that he was born in 1985.[149] Italy granted the Somalian applicant a permanent residence status for three years,[150] but applicant left the reception center in Italy and applied for asylum, as minor, in the Netherlands.[151] The applicant's request for asylum in the Netherlands was denied,[152] and he was notified that he was to be sent back to Italy.[153] In subsequent hearings on his asylum request, applicant stated that he lied about his age in Italy because he was afraid that admitting he was a minor would separate him from his countrymen whom he had arrived with in Italy.[154] The applicant also stated that he was forced to leave the reception center in Italy because it was about to be closed down, and he was forced to live on the streets in horrendous circumstances.[155]

In its analysis, the court used the same principles it used in the case of *Tarakhel*, which held that whether ill-treatment falls within the scope of Article 3 depends on the duration of the treatment and its physical or mental effects, and the sex, age and state of health of the victim.[156] The court found that the applicant, if returned to Italy, faced no imminent risk

145. *Id.*
146. *Id.* at 15.
147. *Id.* at 17.
148. A.M.E. v. the Netherlands, App. No. 51428/10, Eur. Ct. H.R. at 1 (2015).
149. *Id.* at 2.
150. *Id.* at 3.
151. *Id.* at 2.
152. *Id.* at 3.
153. *Id.* at 4.
154. *Id.* at 4–5.
155. *Id.*
156. *See id.* at 6.

of hardship severe enough to fall within the scope of Article 3,[157] that the current structure and situation of reception arrangements in Italy could not themselves bar all removals of asylum seekers in Italy, and that conditions were not as bad as those in Greece when *M.S.S.* was decided.[158]

In its reasoning, the court noted that the reception center had not yet closed when the applicant had left, and that the applicant left on his own volition.[159] Furthermore, the court stated that, unlike the asylum seekers in *Tarakhel*, the applicant was not in a family with six minor children, and was instead a young man with no dependents.[160] The court concluded that because the applicant lied about his age and said that he was an adult, and because there was no proof that the Italian authorities acted in bad faith,[161] the Italian authorities were justified in treating him as if he was an adult.[162]

In one of the ECtHR's most recent decisions, *A.S. v. Switzerland*, the court found that the treatment to the applicant by the EU Member States did not amount an Article 3 violation, and that no systemic flaws were found in the State's asylum procedure. In *A.S.*, the applicant was a Syrian national who fled his country and traveled to Greece.[163] The applicant then moved to Italy, and then to Switzerland where his two sisters lived, and where he filed for asylum.[164] Switzerland rejected the applicant's asylum request because he had already filed in Greece, and because Italian authorities accepted a request from Swiss authorities to accept the applicant back into their country.[165]

Applicant claimed that sending him away from his sisters would violate Article 3 because he had regained emotional stability in his life, and if he were sent back to Italy, where he had no family medical care, his mental health problems would be aggravated.[166] The applicant produced a medical report showing that he suffered from severe post-traumatic stress disorder and the care from his sisters was an "absolute necessity" for him to gain some emotional stability for his ailment.[167]

The court held that to remove an alien suffering from a mental illness to another country where the treatment facilities are inferior to those available in the removing State, the removal might raise an issue under

157. *Id.* at 7–8.
158. *See id.* at 7.
159. *Id.*
160. *Id.*
161. *See id.* at 6.
162. *Id.* at 7.
163. *See* A.S. v. Switzerland, App. No. 39350/13, Eur. Ct. H.R. at 2 (2015).
164. *Id.*
165. *Id.* ¶ 6.
166. *Id.* ¶ 7.
167. *Id.* ¶ 9.

Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.[168] The court articulated what grounds qualified as compelling, and specifically gave the example of an applicant in *D. v. the United Kingdom*, where exceptional circumstances existed in that the applicant was critically ill and close to death, was not guaranteed any nursing or medical care in his country of origin, and had no family there able to provide him with food, shelter or social support.[169] In contrast, this court concluded that there was no indication that, if the present applicant were returned to Italy, he would lack appropriate psychological treatment and would not have access to anti-depressants of the kind that he was receiving in Switzerland.[170] Concerning the applicant's risk of suicide, the court held that a threat of suicide does not bar a state from transferring an applicant back to another state, as long as "concrete measures are taken to prevent those threats from being realized."[171]

E. Why the ECtHR's Opinion Matters

Dublin III declares that a systemic flaw is found when a State's asylum procedure and its reception conditions for applicants result in a "risk of inhuman or degrading treatment within the meaning of Article 4" of the CFR.[172] Article 4 of the CFR is identical to Article 3 of the ECHR,[173] which the courts applied in *M.S.S*, and subsequent cases, when determining whether to send an asylum applicant back to the State he initially entered.[174] An Article 3 violation would therefore amount to a systemic flaw under Dublin III.[175]

While it is the job of the CJEU to carry out EU law and Dublin III, Article 52 of the CFR, which is binding on EU Member states, provides that so far as the CFR contains rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those in the ECHR.[176] According

168. *See id.* ¶ 31.
169. *See id.*
170. *Id.* ¶ 36.
171. *Id.* ¶ 34.
172. Dublin III, *supra* note 15, art. 3.
173. CFR, *supra* note 31, art. 4; ECHR, *supra* note 66, art. 3 (both stating "No one shall be subjected to torture or to inhuman or degrading treatment or punishment").
174. ECHR, *supra* note 66, art. 3.
175. *See* M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. ¶¶ 367–68, HUDOC (Eur. Ct. H.R., Jan. 21, 2011) (holding that degrading treatment violated Article 3 of the UCHR).
176. CFR, *supra* note 31, art. 52.

to Article 52 of the CFR, the meaning and scope of Article 4 of the CFR and Article 3 of the ECHR are the same.

Since the ECtHR's opinion has been considered when interpreting EU law under the CFR before,[177] particularly in *M.S.S.*, and because Article 3 of the CFR is identical to Article 3 of the ECHR, it would logically follow that the ECtHR's opinion should be considered in determining a set definition for what constitutes a "systemic flaw" in a country's asylum conditions and reception procedures.

F. The Meaning of Systemic Flaws

ECHR case law points to a definition of "systemic flaws" in a State's asylum procedure and reception conditions. A systemic flaw would exist if conditions in a Member State subject an asylum seeker to inhuman or degrading treatment.[178] Inhuman treatment is any treatment that causes either actual bodily injury or intense physical or mental suffering, is premeditated, and is applied for hours at a time.[179] Degrading treatment is any treatment that humiliates or debases an individual, diminishes his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[180] Inhuman and degrading treatment is more readily established for children than adults, and a country would be found systemically flawed if there is a situation where asylum seekers that are minors are exposed to any situations of such stress and anxiety that it would create traumatic consequences.[181]

More specifically, a systemic flaw would be found if asylum seekers have a lack of access to language interpreters, legal aid,[182] adequate medical care,[183] basic hygienic and sanitary facilities, or shelter.[184] A flaw would also be found if applicants are held in detention facilities for more than six months.[185] Lastly, if an applicant faces a risk of unfair deportation back

177. *See generally* Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't, 2011 ECJ Eur-Lex LEXIS 3290 (Dec. 21, 2011) (The court considers the ECtHR's decision in M.S.S.).

178. ECHR, *supra* note 66, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment").

179. *See* M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. ¶ 308.

180. *Id.*

181. Tarakhel v. Switzerland, App. No. 29217/12, ¶ 19, HUDOC (Eur. Ct. H.R., Nov. 4, 2014).

182. *Sharifi*, *supra* note 122, at 4.

183. *See* A.S. v. Switzerland, App. No. 39350/13, ¶ 31, HUDOC (Eur. Ct. H.R., June 30, 2015).

184. *See* M.S.S., 2011-I Eur. Ct. H.R. ¶¶ 311–312.

185. *See id.*

to the country where he or she was fleeing due to inhuman or degrading treatment then there would be a systemic flaw.[186]

The severity of inhuman or degrading treatment that would trigger a systemic flaw need only be minimum.[187] If a Member State has failed to meet these standards, that Member State would be barred from receiving asylum seekers transferred back to it by another Member State, similar to the present status of Greece.

The flawed State would not be free of responsibility, would still be in violation of the EHCR and CFR, and would still be required to meet minimum reception standards for asylum seekers. The point of barring a country from receiving transfer is not to absolve the Member State of its responsibilities to take in asylum seekers, but to provide acceptable conditions for the asylum seeker, and to disperse the responsibility of receiving asylum seekers that is mostly concentrated in EU border States.

G. Systemic Flaws or Unfortunate Events

One problem with finding systemic flaws in a State and then barring that State completely, is whether one should look at the quality and the severity of the flaws or whether one should look at the quantity of asylum seekers affected, such as the number of asylum seekers facing risk of deportation, or inhuman and degrading treatment.

Anna Lübbe, Professor at the University of Applied Sciences in Fulda, Germany, distinguishes violations of law caused by systemic flaws from violations of law caused by what she calls an unfortunate series of events.[188] Lübbe states that an actual "systemic flaw," as referred to in Dublin III, is a lack of structure in a State's asylum system that, for asylum cases passing through that State, lead to an error.[189] Furthermore, the lack of function in a State's asylum procedure is not dependent on the number of applicants that are affected by the error, but more on the foreseeability and regularity of the error in the system.[190] In contrast, Lübbe states that an "unfortunate series of events" is an error that cannot be anticipated or avoided completely

186. *See Sharifi*, *supra* note 122, at 6.
187. Tarakhel v. Switzerland, App. No. 29217/12, ¶ 118.
188. Anna Lübbe, '*Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?*, 27 INT'L J. REFUGEE L. 135, 137 (2015).
189. *See id*.
190. *See id.* at 137–38.

by changing the regular procedures with the system, because it is unforeseeable.[191]

Lübbe gives an example of her two types of errors by comparing a systemic flaw to a technical system in plant production that produces bad or spoiled plants due to insufficient protection against overheating.[192] She observes that a change in the regular procedures within that system could prevent a further spoiling of plants due to overheating.[193] In the case of an asylum seeker, an example of this type of systemic flaw would be a system that fails to look at asylum applicants individually, and subjects applicants to a risk of unfair deportation by mass or group deportation.

In contrast, an unfortunate series of events, would be an event such as the spilling of paint on the plants, causing them to spoil.[194] Lübbe says that such accidents cannot be avoided by changing the regular procedures within the system, and they may happen again, but not in a predictable manner.[195] In a more relevant example, she compares the unfortunate series of events to an asylum seeker who is subject to deportation due to mistaken identity (i.e. a human error or mistake of an officer processing asylum claims).[196]

Lübbe distinguishes an asylum system that lacks control mechanisms and thus regularly produces such errors, for example, an asylum system that constantly produces errors because five case officers are dealing with thousands of applications.[197] She concludes that the example of 5 officers would be a systemic flaw, because even though each error is unforeseeable alone, in the whole, the error of understaffed officers making a mistake is foreseeable and a change, such as more staff, could prevent those errors.[198] She combats this problem by arguing that the question of whether errors in law are due to systemic flaws or not depends—as far as accidental errors are concerned—on whether the error can be remedied by a fault prevention mechanism within an asylum system.[199] She concludes that the number and severity of incidents are important, but only as they pertain to accidents, such as mistaken identity or spilt paint, but since this concerns only accidental errors, severe or frequent incidents are not essential for an error to be a systemic flaw;[200] therefore, one could claim that there is a

191. *See id.* at 138.
192. *Id.* at 137.
193. *See id.*
194. *See id.*
195. *Id.*
196. *Id.*
197. *See id.* at 139.
198. *See id.*
199. *See id.* at 138.
200. *See id.* at 139.

systemic flaw in a country's asylum procedure, even if the flaw only affects a small number of applicants.

According to Professor Lübbe, the best way to analyze a systemic flaw in a system would be to look at the internal mechanisms or structure of the system itself, and not necessarily the number or quantity of asylum applicants affected.[201] What sets the systemic flaw apart from an unfortunate series of events would the foreseeability. For example, the applicant in *A.S. v. Switzerland,* who claimed to be an adult, but was actually a minor, and who had sisters in Switzerland whom he needed for his medical condition would be a system coping with an unfortunate series of events. The Italian asylum system could have dealt with the applicant properly if he had told them he was a minor, and although the applicant needed his sisters for his mental medical condition, there was no reason to believe he would not receive proper medical care in Italy.[202] The foreseeability of the applicant's plight in *A.S.* is not significant enough to be considered a systemic flaw, and it more analogous to the Lübbe's spilt can of paint, or an unfortunate event.

An example of a systemic flaw would be the situation in *M.S.S.*, where Greek authorities were receiving a large number of applicants, and placing them in detention with lack of sufficient ventilation, forcing them to urinate in bottles, and to sleep on a bare floor.[203] This situation may be an unfortunate series of events, but due to the number and nature of the incidents, overall this would be a major lack in the Greek system which is unable to cope with the number of asylum seekers crossing into its borders, and it would amount to a systemic flaw within the meaning of Dublin III and the ECtHR.

IV. DUBLIN III'S LACK OF A SOLUTION

After the *M.S.S* and *N.S.* made the EU aware of the systemic flaws in the Greece asylum procedure, one might have expected that a solution would have been added to the new Dublin III recast that followed. That "solution" is found in Article 33 of Dublin III, but, Article 33 fails to solve the overall problem that plagues Dublin III and countries like Greece and Italy.

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201. *See id.* at 138.
202. *See* A.S. v. Switzerland, App. No. 39350/13, ¶ 7.
203. M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. ¶ 311, HUDOC (Eur. Ct. H.R., Jan. 21, 2011).

A. Dublin III and Mutual Trust

The entire Dublin system, including the I, II, and III models, is based on the principle of mutual trust between Member States.[204] The Dublin system functions with an allocation of responsibility for asylum seekers based on a take charge or take back rationale, and it assumes that each Member State will examine asylum seeker's claims and act in accordance with the relevant rules of national, European Union, and international law.[205] The Court in *N.S.* even states that "[c]onsideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States [. . .] observe fundamental rights [. . .] and that the Member States can have confidence in each other in that regard."[206] The court says later on in *N.S.* that "[a] transfer does violate Article 4 of the Charter, however, when Member States cannot be unaware that there are substantial grounds for believing that systemic flaws and deficiencies in the procedure and reception conditions for asylum seekers in the responsible Member State will result in a real risk that the asylum seeker will be subjected to inhuman or degrading treatment," challenges that same principle of mutual trust inherent in the Dublin Regulation.[207] By acknowledging that a Member State's asylum procedure and reception conditions are systemically flawed, a Member State can no longer mechanically rely on another Member State to be in accordance with EU laws and regulations.

Dublin III also mentions mutual trust in its proposed solutions to systemic deficiencies in a country's reception procedures and conditions. In its preamble, Dublin III says "[d]eficiencies in, or the collapse of, asylum systems . . . can jeopardise the smooth functioning of the system put in place under this Regulation, which could lead to a risk of a violation of the rights."[208] It goes on to say, "A process for early warning, preparedness and management of asylum crises serving to prevent a deterioration in, or the collapse of, asylum systems . . . should be established."[209] Lastly, it states, "Such a process should ensure that the Union is alerted as soon as possible when there is a concern that the smooth functioning of the system set up by this Regulation is being jeopardised as a result of particular pressure

204. Van den Sanden, *supra* note 14, at 165–66.
205. *Id.*
206. Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't, 2011 ECJ Eur-Lex LEXIS 3290 ¶ 78.
207. *Id.* ¶ 94.
208. Dublin III, *supra* note 15, ¶ 21.
209. *Id.* at ¶ 22.

on, and/or deficiencies in, the asylum systems of one or more Member States."[210]

This portion of Dublin III addresses that flaws in an asylum procedure may exist, and that a process should be in place to deal with this problem, however, it hardly makes any mention of what the solution could be, and instead it states that "[s]olidarity . . . goes hand in hand with mutual trust. By enhancing such trust, the process for early warning, preparedness, and management of asylum crises could improve the steering of concrete measures of genuine and practical solidarity towards Member States, in order to assist the affected Member States."[211]

Here, Dublin III, is trying to adhere to the original principle of mutual trust amongst the Member States, however, at this point the mutual trust has already been broken by the violating Member State. Therefore, the original mutual trust that the court in *N.S.* mentioned, and inherent in the original Dublin Regulation, should no longer be an independent factor when handing the management of asylum crises.

B. No Solution in Dublin III

Article 33 of Dublin III deals with the mechanism for early warning, preparedness and crisis management of asylum refugees. If there are problems in a Member State's asylum procedures, Article 33 requires that State to draw up a preventative action plan in order to overcome the pressure or problems in the functioning of its asylum system.[212] In its plan, the Member State concerned is required to address all appropriate measures to deal with the situation of particular pressure on its asylum system and to ensure that the deficiencies identified are addressed before the situation worsens.[213]

Article 33 further pronounces that when a Member State is drawing up a preventive action plan, the Member State may call for the assistance of the Commission, and other Member States,[214] and that "[t]he European Parliament and the Council may, throughout the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate."[215]

210. *Id.* ¶ 22.
211. *Id.*
212. Dublin III, *supra* note 15, ¶ 1.
213. *See id.* ¶ 2
214. *See id.* ¶ 1
215. *Id.* ¶ 4.

Article 33 does not mention the responsibility or obligation of the other Member States to aid the other struggling Member.[216] Furthermore, Article 33, and all the rest of Dublin III for that matter, makes no mention of the heightened pressure on border countries who, due to their location, take in more asylum seekers.[217] A practical solution for a country's flawed asylum procedures is not to be found in Article 33 of Dublin III.[218]

C. Recent Council Decision on Dublin III

An attempt to remedy the asylum crisis was made in an EU Council decision in September of 2015.[219] The decision took place as a result of a joint meeting of Foreign and Interior Ministers in April of 2015.[220] At the April meeting, the Commission presented a ten-point plan of immediate action to be taken in response to the crisis, which included a commitment to consider options for an emergency relocation mechanism.[221] The emergency relocation mechanism was put to paper in the EU Council decision of September of 2015, which was titled "establishing provisional measures in the area of international protection for the benefit of Italy and Greece."[222] The decision entailed the relocation of 120,000 applicants from Greece and Italy to other Member States.[223] The Council had authority to make such a decision under Article 78(3) of the TFEU, which says that "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council [. . .] may adopt provisional measures for the benefit of the Member State(s) concerned."[224]

Unlike Dublin III, the Council decision addresses the unequal burden on the southern border States.[225] The Council declares that there is a need for "fair sharing of responsibility and to step up its efforts in this area towards those Member States which receive the highest number of refugees and applicants [. . .]"[226] The Council also notes that "Several Member States [Greece and Italy] were confronted with a significant increase in the total

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216. *See id.* art. 33
217. *See generally* Dublin III, *supra* note 15.
218. *See id.* art. 33.
219. Council Decision 2015/1601, Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015 O.J. (L 248) 80 (EU) [hereinafter Council Decision].
220. *Id.*
221. *See id.*
222. *Id.* at 82.
223. *Id.* art. 4
224. *See id.* at 80.
225. *See id.*
226. *Id.*

number of migrants[. . .]" and that "[d]uring recent months, the migratory pressure at the southern external land and sea borders has again sharply increased [. . .] [i]n view of the situation, further provisional measures to relieve the asylum pressure from Italy and Greece should be warranted."[227]

Beside the relocation of asylum seekers, the decision mentions more aid options for Italy and Greece.[228] Article 7 mandates operational support to Italy and Greece in handling their asylum procedures such as fingerprinting, registration, and identification.[229] Article 10 also sets out a plan to provide financial support to Greece and Italy in a lump sum.[230]

While the actions in the Council Decision indicates good progress toward remedying the situations in Greece and Italy, the actions are only small steps toward solving the overall problem, and much more action is required in order for a significant change to take place.

First, the 120,000 migrants to be relocated, while substantial, is only a fraction compared to the number of migrants seeking asylum in the EU. In its September decision, the Council says that since the beginning of 2015, approximately 116,000 migrants have arrived in Italy, and 211,000 have arrived in Greece in less than a year's time.[231] Second, the operational and financial support mandates are suitable as supplements, but by themselves may distract from larger solutions, such as reallocating more refugees.

Lastly, even after the decision requiring the allocation of migrants, there is no assurance that the other Member States will comply. Hungary, who built a fence to deflect migrants from crossing its borders, along with the Czech Republic, Poland, and Slovakia, have all rejected the EU's quota plan for distributing migrants across the continent, and have instead called for tighter border controls and other steps to reduce the migrant influx.[232]

V. FINDING A SOLUTION

Progress toward finding a solution may come with finding a set definition of what "systemic flaws" are, and once a Member State, a southern border State most likely, reaches the level of flawed, then that Member State

227. *See id.* at 81.
228. *Id.*
229. *See id.* at 90–91.
230. *See id.* at 91.
231. *See id.* at 81.
232. *Czech, Slovak PMs the Latest to Slam Greece on Migrant Crisis*, YAHOO NEWS (Jan. 26, 2016), http://news.yahoo.com/slovak-pm-says-eu-migrant-policy-ritual-suicide-105419285.html [https://perma.cc/TMZ2-UW5S].

would be automatically barred from taking refugees back from other States, and released from the responsibility of having to relocate that asylum seeker within its own borders. This release of responsibility would be due to the unequal share of refugees the flawed Member State has to process. Implementing such procedures would require other changes such as streamlining the process, relying on joint task forces rather than national authorities, and finally recognizing the unequal share of burden to Member States that lie on the border, and assigning different responsibilities to the border and central countries.

A. Automatic Barring of "Systemically Flawed" Member State

Since the *M.S.S.* and *N.S.* decisions, the ECtHR has virtually banned any transfer of asylum seekers back to Greece.[233] The ECtHR and the CJEU have not been as consistent with other countries, however, as seen in cases dealing with Italy. In *Tarakhel*, the court found an Article 3 violation if the applicant were sent back to Italy;[234] yet, in *A.M.E.*, which was decided a year later, the court said, "that the current structure and situation of reception arrangements in Italy could not themselves bar all removals of asylum seekers in Italy, and that conditions were not as bad as those in Greece when *M.S.S.* was decided."[235] A solution to this inconsistency would be an elaborated definition of "systemic flaws" of a Member State's reception procedure, and then a system that would automatically bar transfers to that Member State after it is found not meeting that standard. The Commission has originally proposed a mechanism similar to this, that would have automatically required Member States to halt Dublin transfers, on a temporary basis, to countries where asylum seekers would likely face poor reception conditions, but strong objections from other Member State governments prohibited the inclusion of this barring mechanism.[236] Due to the increasing number of refugees coming into Europe, however, the Member States that once opposed the mechanism may be more receptive to it.

Having a Member State automatically barred puts other EU Members on notice not to send asylum seekers back to that country, rather than having to weigh the situation and putting as asylum seeker at risk of in human or degrading treatment. Further, having these countries flagged as "flawed" indicates a target for where resources and manpower should be allocated.

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233. FRATZKE, *supra* note 22, at 11.
234. Tarakhel v. Switzerland, App. No. 29217/12, ¶ 121.
235. A.M.E. v. the Netherlands, App. No. 51428/10, ¶ 35, HUDOC (Eur. Ct. H.R., Jan. 13, 2015).
236. FRATZKE, *supra* note 22, at 21.

B. Additional Measures

Even if a Member State has been barred, refugees would not stop seeking asylum in that country; therefore, in order to resolve the deficiencies in a Member States asylum procedures, other solutions would be required. The first step in this process would be creating a joint agency that would truly share in the asylum process. Scholars agree that while Dublin III was not created as a burden-sharing mechanism, procedures that would implement sharing responsibility could possibly be what Dublin III needs in order to succeed.[237] Susan Fratzke, Policy Analyst for Migration Policy Institute, suggests expanding cooperation mechanisms such as inserting liaison officers, and pooling reception facilities together as a way to increase the size and scope of sharing integration and reception capacity.[238]

A large part of the solution might rely on creating a supranational agency that can move throughout the EU and is not part of any one government. This agency could create reception centers in border countries that have been deemed "systemically flawed," and it would be tasked with moving the asylum seekers out of the inundated border states to the other central Member States. In order to prevent asylum shopping, a lottery system or bidding process could be put in place when deciding where to transfer the asylum seeker. Creating such an agency may take years, however, and interim measures may be required until then; such measures may include, creating a temporary agency that consists of the closest surrounding Member States, or designating specific roads and railways as refugee transports that could alleviate the flooded border countries. Further, once a Member State has been marked as "flawed," it may be beneficial to mark the next closest State as the new "reception center," and move refugees through to that State.[239]

Implementing this system would require Member States to give up some of their sovereign power, which could prove problematic in the future. At a recent summit, a measure to create an EU border and coastguard with power to overrule national governments when EU borders are deemed insecure, was met with strong support from big countries like Germany and France, but many of the other Member States viewed it as an assault on national sovereignty.[240] Those countries who are concerned about

237. *Id.* at 24.
238. *See id.* at 25.
239. For example, moving refuges through Italy straight to France, Austria, or Switzerland.
240. *See* Ian Taylor, *Refugee Crisis: EU Summit Exposes Impotence and Unfulfilled Pledges*, GUARDIAN (Dec. 17, 2015), http://www.theguardian.com/world/2015/dec/17/

national sovereignty, however, may risk exposure to Dublin III violations without the extra measures proposed at the summit. Since, the *M.S.S.* decision, the ECtHR and CJEU have held, not only that "systemically flawed" States are accountable, but that other Member States attempting to transfer the asylum seeker back to the country with the flawed asylum procedure are as well.[241] Following this logic, a Member State cannot escape responsibility simply because it was not initially responsible for an asylum seeker, thus creating a need for better mechanisms of equal burden sharing.

Implementing these changes to the Dublin Regulation and the EU asylum process will require Member States to compromise, and to make changes to their own national procedures. While giving up some national sovereignty has met opposition in the past, there have been great strides and purposeful changes made in the Dublin Regulation in the past, demonstrated by the Dublin II and Dublin III recasts, and it is possible that new, constructive changes could be implemented in a Dublin IV recast in the future.

refugee-crisis-eu-summit-exposes-impotence-and-unfulfilled-pledges [https://perma.cc/M7QG-MX7R].

241. *See generally* M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. 255 (2011).