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Refugees Without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone

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NOTE

REFUGEES WITHOUT BORDERS: LEGAL IMPLICATIONS OF THE REFUGEE CRISIS IN THE SCHENGEN ZONE

*Bridget Carr**

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INTRODUCTION

Problems and concerns related to the flow of displaced persons into European states are not entirely recent phenomena, although they have been brought to the fore by the escalation of the Syrian and Iraqi conflicts. The current crisis has been identified as the worst since World War II,¹ but its contours are not defined merely by recently intensified fighting in the Middle East. Violence and destabilization caused by the invasion of Afghanistan and Iraq in the early 2000s laid the foundations for refugee flight

* J.D., May 2017, University of Michigan Law School. Along with the MJIL editorial members, I would like to thank Professors Ratner and Halberstam for their insightful comments. All views expressed herein remain my own.

1. Ville Saarinen & Juho Ojala, *The Flow Towards Europe*, LUCIFY, <http://www.lucify.com/the-flow-towards-europe/> (last updated Feb. 10, 2016).

en masse.² Human rights groups have also criticized European capacity to handle refugee flows since the Arab Spring, when the deposition of authoritarian leaders such as Muammar Gaddafi of Libya and Hosni Mubarak of Egypt caused indiscriminate violence in North Africa and triggered a significant influx of asylum-seekers to European shores as early as 2010.³

Reports of severe human rights violations occurring in countries within and outside the Schengen Zone⁴ provide a harrowing account of the obstacles faced by those fleeing violence in their home states.⁵ In order to properly manage the crisis, while maintaining both adequate security and protecting human rights, European leaders should be focused on dealing with significant logistical obstacles. These include the lack of necessary resources at external borders of the Schengen Zone,⁶ structural inequities in the Dublin Regulations' protocol for asylum-seekers,⁷ and perverse incentives, reinforced by the current system, to avoid incremental improvements in refugee treatment. However, administrative management of flows of displaced people has become a political minefield with anti-immigrant, anti-Muslim furor—compounded by recent terrorist attacks perpetrated in European cities by Islamic State affiliates⁸—making improved burden sharing amongst the member states challenging.⁹

2. Srecko Horvat, *The Roots of This Refugee Crisis Go Back Even Further Than the Arab Spring*, THE GUARDIAN (Sept. 24, 2015), <http://www.theguardian.com/commentisfree/2015/sep/24/refugee-crisis-arab-spring-europe-migration>.

3. *Id.*

4. The Schengen Zone is an open borders area between twenty-six European Union countries that allows for free movement throughout the entire Zone and utilizes a common visa policy.

5. See, e.g., Lisa De Bode, *Charity Groups Take Action Against French City over Refugee Treatment*, AL JAZEERA AMERICA (Oct. 29, 2015), <http://america.aljazeera.com/articles/2015/10/29/nonprofit-sues-french-city-for-mistreatment-of-refugees.html>.

6. “Greek officials warn that refugees might be stranded in the country for two years.” Jim Yardley, *A ‘High Degree of Miserable’ in a Refugee-Swollen Greece*, N.Y. TIMES (Mar. 17, 2016), <http://www.nytimes.com/2016/03/18/world/europe/greece-idomeni-refugees.html>.

7. “[P]roblems of delay, inefficiency and ineffectiveness have been present since the beginning and were supposed to have been addressed in the Dublin II Regulation,” although the European Union has already moved to its third iteration of this system (Dublin III), having made little progress in eliminating inefficiencies. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, REFUGEES AND DISPLACED PERSONS, AFTER DUBLIN—THE URGENT NEED FOR A REAL EUROPEAN ASYLUM SYSTEM (Sept. 10, 2015) [hereinafter COUNCIL OF EUROPE COMMITTEE ON MIGRATION].

8. See, e.g., Lilia Blaise & Alissa J. Rubin, *Tensions Erupt in Brussels, and Police in 4 Countries Make Arrests*, N.Y. TIMES (Mar. 27, 2016), <http://www.nytimes.com/2016/03/28/world/europe/brussels-attack-paris-italy-arrest.html>.

9. See, e.g., Lisa De Bode, *Refugee crisis may force EU to rethink, update open-borders policy*, AL JAZEERA AMERICA (Sept. 12, 2015), <http://america.aljazeera.com/articles/2015/9/12/refugee-crisis-forces-eu-to-rethink-open-borders.html>; Peter Foster, *Anti-Muslim sentiment on rise in Europe due to migration and Isis as continent rejects multi-cultural society*, TELEGRAPH U.K. (July 12, 2016), <http://www.telegraph.co.uk/news/2016/07/12/europe-rejects-multi-cultural-society-says-survey/>.

Schengen Zone Member States' (Member States) lack of confidence in existing infrastructure to manage flows of displaced people and identify those posing potential national security threats has led to a strategy of "refortification."¹⁰ States located along the exterior border of the Zone have erected hazardous barriers, such as razor-wire fences, and have physically beaten, threatened, and driven groups of asylum seekers back across the borders into neighboring states without giving them the opportunity to claim refuge—a right guaranteed by regional law, as well as customary and conventional international law.¹¹ Further, several countries within the Zone have closed their borders or portions of their borders with other Member States.¹² This measure, while permitted by the Schengen Borders Code temporarily and under defined circumstances, is not meant to be an oft-invoked safeguard.¹³

Although recent internal border re-introductions seem to have been conducted following the letter of the Schengen Borders Code, they have arguably failed to respect the *spirit* of both the Code and of European Union regional and international law, especially with regards to the protection of basic human rights and dignity.¹⁴ Indeed, it is nearly impossible

10. P.E. O'Neill, *The European Union and Migration: Security versus Identity?*, 6 DEFENSE STUDIES 322, 337-38 (2006) ("Securitising migration control . . . seals the EU's external borders but has prompted criticism that in doing so, it has created a 'fortress Europe' in which the legitimate rights of migrants are subordinated to security concerns." For example, one critic "accuses the EU of adopting migration control policies that 'reduce the ability of asylum-seekers to access the territory of EU member states', thereby depriving asylum-seekers of their rights and enabling the EU to avoid its international obligations under the United Nations Convention.") (citing Andrew Geddes, *International Migration and State Sovereignty in an Integrating Europe*, in 39 INTERNATIONAL MIGRATION 21, 33 (2001)).

11. *Fear and Fences: Europe's Approach to Keeping Refugees at Bay*, 17-19 AMNESTY INT'L (2015), <https://amnesty.org/#!/> [hereinafter *Fear and Fences*].

12. The Schengen Borders Code includes mechanisms governing the lawful re-introduction of internal borders within the Zone in response to specific events when more security may be required. Historically, the re-introduction measures authorized by Article 23 *et seq.* of the Code have been invoked for large international events like conferences or ceremonies, visits from foreign dignitaries, and important soccer matches. However, Member States have increasingly been using these measures in response to influxes of third-country nationals. From September 2015 through the time of writing, April 2016, Austria, Belgium, Denmark, France, Hungary, Malta, Norway, Slovenia, and Sweden have all invoked Article 23 *et seq.* for that reason. MEMBER STATES' NOTIFICATIONS OF THE TEMPORARY REINTRODUCTION OF BORDER CONTROL AT INTERNAL BORDERS (2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf.

13. The 2013 Amendment to the Schengen Borders Code provides some clarification regarding permissible situations for internal border closures but still allows for considerable flexibility in Member States' justifications for them. Schengen Borders Code, Regulation (EU) No. 1051/2013 arts. 23-27, 29-30, 2013 O.J. (L 295) [hereinafter 2013 Amendment to Schengen Borders Code]. See also Temporary Reintroduction of Border Control, EUROPEAN COMMISSION: MIGRATION AND HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm (last updated Mar. 15, 2016).

14. Directorate General for Internal Policies: Policy Dep't. for Citizens' Rights and Constitutional Affairs, Internal border controls in the Schengen area: is Schengen crisis-

to determine if controls instituted are based on concrete, verifiable terror threats, or, rather, on a desire to control the influx of refugees and migrants who belong to a certain ethnic or racial group. Measures that disparately impact the legitimate right to movement by certain third-country nationals inside the Schengen Zone are not legally permissible, especially when adopted in response to such an amorphous threat.¹⁵

This Note will first examine current practices utilized by Member States and their strategic partners outside the Zone to manage flows of third-country nationals from the Middle East and North Africa. It will then explore how these practices are not compatible with principles of protection from degrading and inhuman treatment, non-refoulement, and non-discrimination as codified in the Schengen Borders Code, European Convention on Human Rights, and the Refugee Convention, among others. Finally, this Note will propose targeted reforms for the Schengen Zone's internal and external border management aimed at protecting the human rights of displaced persons and modifying incentive structures to promote harmonized Member State accountability, while still recognizing crucial national security interests.

Additionally, for purposes of analysis of the system used by Member States to handle a large influx of third-country nationals, this Note will assume that those entering Europe from the above-identified regions of the world will apply for asylum, without consideration as to whether their claims have merit.¹⁶ This assumption is realistic in light of the current circumstances for two reasons.

First, this assumption is based on the likely, rational actions of third-country nationals—without visas or other documentation, the best opportunity a person has to remain is to claim asylum. Furthermore, each person

proof? 8, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU\(2016\)571356_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU(2016)571356_EN.pdf) (asserting that the “spirit” of Schengen is not respected when Member States invoke “mass migration/refugee movements” or “risk of terrorism” as reasons for internal border reintroduction without providing sufficient detail or evidence that SBC principles of proportionality and necessity are satisfied). *See also* European Commission Press Release Memo/11/538, Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis (July 25, 2011), http://europa.eu/rapid/press-release_MEMO-11-538_en.htm?locale=EN (stating, in regards to treatment of Libyan asylum seekers, “[f]rom a formal point of view steps taken by Italian and French authorities have been in compliance with EU law. However, I regret that the spirit of the Schengen rules has not been fully respected”).

15. The Schengen Borders Code specifically prohibits discrimination on the basis of nationality in regards to the execution of internal and external border checks. Schengen Borders Code, Regulation (EC) No. 562/2006 art. 20, 2006 O.J. (L 105) [hereinafter Schengen Code] (“Internal Borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.”); art. 6 (“While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”).

16. This assumption is outlined primarily in recognition of the fact that (1) flows of displaced people are comprised of a mixture of asylees and migrants, (2) these distinct categories of people are owed different rights by receiving nations, and (3) every individual has a right to claim asylum upon arrival to another country.

who claims asylum has the right to have his or her individual claim adjudicated before any further action can be taken against him or her.¹⁷

Second, it is supported by recent case law. In a landmark decision, the Court of Justice of the European Union (CJEU) recently interpreted “international human rights ‘soft law’” as a crucial part of its analysis in determining proper procedures for detention of asylum seekers awaiting adjudication of claims.¹⁸ By indicating its willingness to apply United Nations High Commissioner for Refugees (UNCHR) guidelines, the CJEU affirmed that asylum seekers are entitled to the protections of Article 31 of the Geneva Convention, namely, that “refugees ‘coming directly’ from persecution cannot be penalized for irregular entry if they breach immigration law for ‘good cause’ . . . even if their refugee status has not yet been established.”¹⁹ Therefore, the practical consequences of conditions on the ground and the rights recognized by the CJEU support the reasonableness of applying the following analysis such that all arriving third-country nationals from affected regions should at least initially be treated as asylum seekers, entitled to all rights that attach therefrom.

I. MEMBER STATE PRACTICES IN BORDER MANAGEMENT

The Schengen Convention, signed in 1990, abolished internal borders between France, Germany, Belgium, the Netherlands, and Luxembourg, marking the end of the transition period of gradual reduction of border controls contemplated by the Schengen Agreement of 1985.²⁰ Since then, the Schengen Zone has expanded to include twenty-six countries, four of which are not European Union members.²¹ In 2006, the Schengen Borders Code was established and it remains the governing instrument dictating the administration of the Schengen Zone (and the movement of people within it), albeit with some modifications made by subsequent amendments.²²

Rights of third-country nationals seeking to enter and remain in Member States, like those fleeing violence in Syria and other nations, are governed by the regulations that comprise the Common European Asylum

17. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 4, art. 4 (ETS No. 046); Charter of Fundamental Rights of the European Union, art. 19, 2000 O.J. (364). See *infra* note 84.

18. Steve Peers, *Detention of Asylum-Seekers: The First CJEU Judgment*, EU LAW ANALYSIS (Mar. 9, 2016) (citing *J.N. v. Staatssecretaris van Veiligheid en Justitie*, No. C-601/16, CJEU, Feb. 15, 2016), <http://blogspot.com///-asylum-seekers-first-cjeu.html>.

19. *Id.*

20. See generally Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, Blg.-Fr.-F.R.G.-Lux.-Neth., 30 ILM 68 (1991); Schengen Acquis—Convention Implementing the Schengen Agreement, June 19, 1999, Blg.-Fr.-F.R.G.-Lux.-Neth., 43 ILM 239 (2000).

21. Schengen Area, EUROPEAN COMMISSION: MIGRATION AND HOME AFFAIRS, http://europa.eu///-do//borders-and-visas/schengen/index_en.htm (last updated Jan. 29, 2016).

22. See generally Schengen Borders Code, *supra* note 14.

System (CEAS). The legislative framework undergirding the CEAS²³ includes the Dublin Regulations,²⁴ the Reception Conditions Directive,²⁵ the Asylum Procedures Directive,²⁶ the Qualification Directive,²⁷ and the EURODAC Regulation.²⁸ This Note will largely focus on the Dublin Regulations because the Dublin system governs Member State actions and responsibilities regarding the initial registration and subsequent movements of asylum seekers as their claims are processed and adjudicated.

A. Understanding “Dublin”

There have been three iterations of the Dublin system of regulations. Initially, the Dublin Regulations were created to address problems like “asylum shopping” (submitting multiple asylum applications in different European Union countries) and “refugees in orbit” (inability for some asylum seekers to convince a single one of the Member States to adjudicate their petition).²⁹ Dublin II was subsequently designed to increase efficiency in processing applications, further develop remedies available for “refugees in orbit,” and improve burden sharing across Member States.³⁰ Dublin III reforms were enacted to focus on increased protections for asylum seekers (like a guaranteed right to appeal a negative asylum decision and limitations on detention pending adjudication) and greater harmonization and closer management of Member States’ asylum systems.³¹ These revisions represent progress in improving conditions for displaced persons seeking asylum, but have not satisfactorily addressed crucial weaknesses observed on the ground in the Schengen Zone, which stem from a lack of

23. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 8.

24. The Dublin Regulations provide mechanisms for identification of which States are responsible for processing asylum applications.

25. The Reception Conditions Directive sets minimum standards for protecting human rights and meeting asylum seekers’ basic needs upon arrival in the host country.

26. The Asylum Procedures Directive establishes standardized procedures for granting or withdrawing international protection of asylum seekers.

27. The Qualification Directive creates common standards for qualification for and establishes the contours of refugee or subsidiary protection. In *Elgafaji v. Staatssecretaris van Justitie*, Case C-465/07, 2009 E.C.R. I-00921, the European Court of Justice defines qualification for subsidiary protection (rather than traditional refugee status) as those having “suffered a ‘serious and individual threat’ due to indiscriminate violence” rather than having been “‘specifically targeted’ for harsh treatment” because of one’s identity or affiliation. *See e.g.*, William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 94, 138 (2014) (explaining that the definition of subsidiary protection is based on “language in the [Organization of African Unity] Convention, the Cartagena Declaration, and the UNHCR’s widened mandate to establish categories of persons deserving protection”).

28. The EURODAC Regulation identifies the conditions under which law enforcement is permitted to access the central database of asylum seekers’ fingerprints.

29. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 7.

30. *Id.* at 8. *See generally* Convention (EC) No. C254/1, 1997 O.J. (C 254).

31. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 8. *See generally* REGULATION (EC) No. 343/2003, 2003 O.J. (L 50).

adequate resources and infrastructure to handle the sheer number of people requiring assistance.

Recognizing weaknesses that still plague the system, the EU Commission (the Commission), in its discussions of potential reforms to Dublin II, proposed a mechanism to correct existing procedures that lead to “overburdening ‘certain Member States with limited reception and absorption capacities,’ as well as a lack of ‘adequate standards of protection . . . in particular in terms of reception conditions and access to the asylum procedure.’”³² This proposal was rejected, and Dublin III instead contained a provision creating a mechanism “for early warning, preparedness and crisis management,” designed to allow the EU Commission to identify Member States whose asylum systems are not functioning properly, and to supervise the creation of “crisis management action plan[s].”³³

One of the main foci of these crisis management plans is the maintenance of asylum procedures that respect the “fundamental rights of applicants for international protection.”³⁴ This mechanism—aimed at providing “early warning” of states’ inability to maintain proper border controls—is theoretically sound. It does not appear to actually help Member States cope with systemic deficiencies, nor has it strengthened the Commission’s oversight and sanction capacities. On the contrary,

[t]he fact that the Commission . . . tolerated the prevailing situation in Greece without referring the matter to the [CJEU] for failure to fulfill an obligation, despite regular warnings from the [European Court of Human Rights (ECtHR)], did not do the Commission any favours given the length and the seriousness of the humanitarian crisis in this Member State.³⁵

Indeed, the success of the Dublin system as it was intended to function, namely, in creating a mechanism for determining which Member State should be responsible for processing each asylum application, depends largely on the establishment and maintenance of harmonized standards for identifying, registering, and caring for persons who have a right to protection. However, in practice, the Dublin III system has inadequately established and maintained the standards necessary for this mechanism to function properly, and has therefore done little to increase cooperation through improved burden-sharing.³⁶ As a result, in 2014, for

32. Derek N. White et al., *International Refugee Law*, 48 Year in Rev.: An Ann. Publication ABA/Sec. Int’l L. 359, 365 (2014) (internal citation omitted).

33. Regulation (EU) No. 604/2013 art. 33, 2013 O.J. (L 180).

34. *Id.*

35. DIRECTORATE-GENERAL INTERNAL POLICIES, THE INFLUENCE OF ECJ AND ECtHR CASE LAW ON ASYLUM AND IMMIGRATION 12 (2012), [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/462438/IPOL-LIBE_ET\(2012\)462438\(SUM01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/462438/IPOL-LIBE_ET(2012)462438(SUM01)_EN.pdf) [hereinafter DIRECTORATE-GENERAL INTERNAL POLICIES, INFLUENCE OF ECJ].

36. See, e.g., Minos Mouzourakis, ‘We Need to Talk about Dublin’: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union 10-11 (Refugee Studies Centre, Working Paper No. 105, 2014) (“Under these criteria, Dublin

example, five states handled seventy-two percent of all asylum applications.³⁷ There also remains a large disparity in the efficiency and quality of processes for asylum-seekers, depending on where they file their applications,³⁸ even though Dublin III was designed to increase preparedness for large-scale claims processing, provide better information and guidance for applicants, and improve human rights protections.³⁹ This reality is so well known, in fact, that asylum-seekers report that they have purposefully avoided providing fingerprints (a crucial element of the process that helps assuage security concerns) at initial entry points in certain countries so that they can relocate to a Member State that they believe might have a more efficient or fair process to rejoin family members. This circumvention of process, although understandable, serves largely to undermine Dublin III's searching inquiry into point of first entry necessary to determine the Member State ultimately responsible for the asylum-seeker's application.⁴⁰

B. *Border Controls to Stem the Flow of Third-Country Nationals*

Official and unofficial modifications in Member State border policies have been implemented in response to flows of incoming third-country nationals.⁴¹ While some of the policies implemented are permissible under regional and international law, others, usually the ones implemented unofficially, represent clear violations.

As mentioned briefly in previous sections, the Schengen Borders Code does permit Member States to temporarily close internal borders and/or modify existing types of border controls. However, these types of actions are supposed to be employed as a last resort and not as a primary

responsibility therefore signals a degree of fault on the part of the responsible Member State, for it comes as 'a burden and a punishment for the Member State which permitted the individual to arrive in the Union.'" (internal citation omitted).

37. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 6.

38. *See, e.g.,* M.S.S. v. Belgium and Greece, App. No. 30696/09 Eur. Ct. H.R. at 75 (2011) (holding that Belgian authorities "must" have known about the deficiencies of Greek procedure and should not have assumed asylum-seekers transferred there would receive protections in accordance with the European Convention on Human Rights); *see also* N.S. v. Sec'y of State for the Home Dept., 2011 E.C.R. 865 (holding that there can be no conclusive assumption that all member states are respecting fundamental rights of the European Union).

39. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 8.

40. Rosie Scammell & Fotini Rantsiou, *The EU's Hotspot "Solution" Deepens Refugee Crisis*, IRIN (Oct. 23, 2015), <http://newirin.irinnews.org/hotspot-solution-deepens-refugee-crisis/>; *see generally* COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 12.

41. *See, e.g.,* Anton Troianovski, *Border Checks Return to Where Europe's Open Borders Began*, WALL ST. J. (Mar. 24, 2016, 2:14 PM) (stating that the temporary—and "increasingly common"—reinstatement of internal border controls is permissible under the Schengen Agreement); Matt Carr, *Paris, refugees, and Europe's hard borders*, POLITICO (Nov. 24, 2015, 5:58 AM) ("A majority of arrivals are Syrians and should automatically qualify for refugee protection, yet many are subjected to systemic police violence and repression in a number of European countries.").

method for controlling the flow of people between countries within the Zone.

Articles 26 through 30 of the Schengen Borders Code supply the criteria for permissible border closures, allowing for States to take into account the impact of perceived threats on public policy and internal security, but requiring them to assess whether the measure is “likely to adequately remedy the threat” and to evaluate “the proportionality of the measure in relation to the threat.”⁴² In the last year, Member States have provided largely conclusory justifications for closing their borders, stating that the closures are necessary to respond to the large influx of “migrants” and their effect on public order and internal security.⁴³ Some states, like Sweden, have stated outright that they believe the flows are “mixed” and may include “potential criminals.”⁴⁴ The Commission has deemed this type of reasoning adequate, however, in doing so, it contradicts certain provisions within the Code. In its October 2015 assessment, the Commission found that the measures enacted by Germany constituted an acceptable response to the “uncontrolled influx” of third-party nationals even though the Commission was “not satisfied, however, that the possibility of ‘radicalised people’ hiding among the refugees has been established and considered that such a suggestion would need further substantiation before it could be considered sufficient to constitute a serious threat.”⁴⁵

Because it seems the Commission based its opinion entirely on the number of arrivals rather than any specific terrorist threat to public policy and internal security, this result is puzzling based on provisions written directly into the Schengen Borders Code. In the 2013 amendment to the Code, drafted in response to refugee-related issues in 2011, Member States specifically added Recital 5, which states that “[m]igration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.”⁴⁶ This acknowledgement that asylum seekers, and indeed, even migrants, should not be considered a threat based on numbers alone directly contradicts the Commission’s October 2015 opinion. The Commission did address this criticism in its aforementioned assessment but reiterated that “sheer number[s]” validated German and Austrian border closures.⁴⁷

Another troubling aspect of the decision on Germany’s controls included a line of reasoning that the Commission had not received any com-

42. See Schengen Borders Code, *supra* note 14, arts. 26-30.

43. Elspeth Guild et al., *What is Happening to the Schengen Borders?*, CENTER FOR EUROPEAN POLICY STUDIES 9, https://www.ceps.eu/system/files/No%2086%20Schengenland_0.pdf.

44. *Id.* at 5-10.

45. *Id.* at 9.

46. 2013 Amendment to Schengen Borders Code, *supra* note 12.

47. Commission Opinion on the Necessity and Proportionality of the Controls at Internal Borders Reintroduced by Germany and Austria, C(2015) 7100 Eur. Commission, §§ 33, 40.

plaints from EU citizens regarding negative effects of re-introduced border controls on their own ability to travel within the EU.⁴⁸ While this is an undeniably positive result for EU citizens, that assertion serves to highlight the fact that these policies are discriminatory against the most vulnerable group—the asylum seekers. If border checks are conducted such that EU citizens may avoid inconvenience, detention, or ill treatment, politicians in Member States have incentives to continue to implement and execute these policies that benefit their constituents, while obstructing the people that they may want to keep out anyway. It would be naïve to ignore the fact that the use of impermissible ethnic and racial profiling at border checks is an expedient way to achieve this goal.⁴⁹

Based on these results, it is unlikely that Member States will have to provide more sophisticated analyses to substantiate their internal border closings. Without some change in approach regarding oversight mechanisms by the Commission, the state of open internal borders within the Zone will remain in flux. Likewise, Member States are creating increasingly strict external border policies that have resulted in even more overt and injurious discrimination against third-country nationals.

Some provisions to increase security at external borders are not necessarily antithetical to the protection of the human rights of those seeking to enter the Schengen Zone. Regional and international law does not prohibit states erecting fences as a way to funnel people into official checkpoint areas at external borders, though the method may be crude and the optics unflattering. In fact, some procedures, like an increase in naval patrols in the Mediterranean, have improved the chances of asylum seekers reaching land safely. Their treatment after reaching shore may, admittedly, be a different matter entirely.⁵⁰ However, many measures implemented in recent months have resulted in decidedly inhumane treatment.

Spain, for example, built a series of fence systems in 2005, which have been upgraded over the years but still use razor wire as a deterrent to those trying to climb over the barriers from the Moroccan side. These razor wire fences have caused significant injuries to people who still attempted to climb them and represent “unnecessary physical dangers” that should be avoided, according to the U.N.’s General Provision 2 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁵¹

48. *Id.* § 36.

49. *See, e.g.,* Henry Foy & Zosia Wasik, *Bridge linking Poland to Germany is now a barrier against migrants*, *Fin. Times* (Apr. 21, 2016), <https://www.ft.com/content/d6b05b8c-0634-11e6-a70d-4e39ac32c284>, (“But Slubice, with its makeshift border guards and racial profiling, shows the depth of public opposition to, and even fear of, migrants in Poland.”).

50. *See, e.g.,* *German Navy Ship ‘Berlin’ Rescues Refugees in Mediterranean*, *DEUTSCHE WELLE* (Dec. 25, 2015), <http://www.dw.com/en/german-navy-ship-berlin-rescues-refugees-in-mediterranean/a-18941502>.

51. *Fear and Fences*, *supra* note 10. Although the Basic Principles on the Use of Force is not binding international law, it still provides a useful and reasonable standard for how states should conduct law enforcement efforts.

Hungary has erected barbed-wire fences and, like Spain with Morocco, has created partnerships and agreements with neighboring states in an attempt to stem the tide of new arrivals. Hungary's agreement with Serbia mandates that all asylum applicants who cross over the border from Serbia shall be automatically denied and sent back to Serbia because Hungarian officials have deemed Serbia to be a "safe [third] country."⁵² These types of agreements can result in indirect refoulement, amounting to a clear breach of regional and international law from which there is no allowable derogation.⁵³ Even some Member States have been declared unsafe, so mere geographic proximity to and membership in the European Union is not dispositive of humane conditions for asylum seekers or protection from being sent back to conflict zones.

The European Union's newly signed agreement with Turkey may also result in direct or indirect refoulement. Even though the European Union appears to have deemed Turkey a "safe third country" to receive asylum seekers, there have already been reports of human rights abuses perpetrated by Turkish authorities in the forms of physical violence, detention of asylum seekers without access to lawyers, and forcible expulsion of displaced persons back to Iraq and Syria.⁵⁴

Not only have Member States turned a blind eye to the hazardous conditions created by physical barriers and the neglect of State administrations outside the Zone, some have even codified the mistreatment of third-country nationals. For example, Hungary's new border laws allow army officials to respond to perceived "illegal" border crossings with weapons like rubber bullets and tear gas grenades.⁵⁵ Spain passed a law in 2015 that, in effect, legalized the collective expulsion of migrants and refugees.⁵⁶ The European Union itself has recognized the concept of "safe third countries," codified in its Asylum Procedures Directive, allowing Member States to deny a full examination of asylum applications if the applicant traveled through a "safe third country" to enter the Zone.⁵⁷ This

52. Michelle Chen, *European Countries Closing Their Borders to Refugees Is Collective Punishment*, THE NATION (Nov. 18, 2015), <http://www.thenation.com/article/european-countries-closing-their-borders-to-refugees-is-collective-punishment/>.

53. See KEES WOUTERS ET AL., INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 140-44 (2002).

54. *Refugees Endangered and Dying Due to EU Reliance on Fences and Gatekeepers*, AMNESTY INT'L (Nov. 17, 2015), <https://www.amnesty.org/en/latest/news/2015/11/refugees-endangered-and-dying-due-to-eu-reliance-on-fences-and-gatekeepers/>.

55. See Art. 54/D of Act CXLII/2015; see also *Fear and Fences*, *supra* note 10, at 75-76.

56. This law did not mention "collective expulsion" by name, however, based on reports from human rights groups, in practice, expulsions authorized by the law have been executed summarily. The law was further amended in March of 2015 to differentiate between "expulsion" and "border rejections," both of which are supposed to be undertaken in compliance with international law. The amendment did not, however, address *how* officials would ensure compliance for "border rejections" procedures. See Articles 58 and 60 of Organic Law 4/2000; *Fear and Fences*, *supra* note 10, at 36-40.

57. *Fear and Fences*, *supra* note 10, at 80.

policy is ripe for abuse, especially as these “safe third countries” become overwhelmed with applicants themselves.

These measures of external and internal border control may, to varying degrees, appear to be reasonable responses to a crisis of this magnitude. However, in times of crisis, when people are most vulnerable, the importance of revisiting foundational texts for guidance on how to protect human rights is at its apex. According to Article 3 of the Schengen Borders Code, “[t]his Regulation shall apply to any person crossing the *internal or external* borders of Member States, *without prejudice to*: (a) the rights of persons enjoying the right of free movement under Union law; (b) the rights of *refugees and persons requesting international protection*, in particular as regards *non-refoulement*.”⁵⁸ Therefore, by adjusting border policies in ways designed to limit the movement of and withhold security guarantees from third-country nationals who have a codified right to seek international protection, Member States remain in violation of one of the most basic principles of their Code.

C. National Security and Border Control Re-Introduction

Some European citizens are concerned about dangerous entrants to the Zone exploiting the chaos created by States’ inability to process the multitudes of legitimate asylum seekers. These concerns are indeed realistic based on an informed understanding of asymmetric campaigns that target civilians such as those executed by terrorist groups like the Islamic State. However, French and Belgian *nationals*, not refugees or asylum seekers, carried out the two recent attacks in Paris and Brussels—an observation that did not escape the consciousness of the Commission.⁵⁹ Therefore, reestablishing tight controls or entirely closing internal borders in response to an influx of asylum-seekers within the Schengen Zone would have had no effect on the ability of officials to prevent these attacks or dismantle terrorist networks, unless efforts were coupled with impermissible ethnically-targeted searches and detentions at transit points.⁶⁰ These measures only serve to make the administration of the European Union more costly and complex.⁶¹ In fact, cooperation-minded reforms conforming to the spirit and purpose of legislation like the Schengen

58. Schengen Borders Code, *supra* note 14, art. 3 (emphasis added).

59. “In view of the latest terrorist attacks in the EU, it can be noted that the perpetrators have been mainly EU citizens or foreigners residing and living in the Member States with official permits. Usually there has been no information about these people or their terrorist connections in the registers” Commission of the European Communities, SEC (2008) 153, Feb. 13, 2008.

60. Schengen Borders Code, *supra* note 14, art. 20 (“Internal Borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.”); art. 6 (“While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”).

61. Yves Bertoncini & Antonio Vitorino, Schengen, le Terrorisme et la Sécurité, LE HUFFINGTON POST (Apr. 14, 2015), http://www.huffingtonpost.fr/yves-bertoncini/schengen-terrorisme-securite_b_6660644.html?utm_hp_ref=France#.

Borders Code—designed to maintain free movement throughout the Schengen Zone and protect human rights within the European Union—have a more realistic chance of leading to successful preemptive action against terrorist threats.⁶²

In regards to external border controls, conflating a desire to prevent “irregular migration” with that of combatting terrorism unfairly presents the third-country nationals seeking to enter the Schengen Zone as potential terrorists. This undeserved label can contribute to ethnic marginalization in multicultural societies⁶³ that may, over time—paradoxically, given that the goal of these measures is to prevent terrorism—lead to increased radicalization of the marginalized populations.⁶⁴ Linking the two goals has discriminatory implications for those who desire to live and work legally in the Zone, yet the Council of the European Union has included several increasingly strengthened border control measures in its Plan of Action on Combating Terrorism that contribute little to the actual fight against terrorism.⁶⁵ That is not to say that increased cooperation of external border states through the activities of agencies like Frontex (established in the wake of September 11th as part of Europe’s counter-terrorism strategy) is an inherently illegitimate goal. What is problematic is the specific linking of the aim to combat terror with efforts to keep out newcomers to the Zone when Frontex’s “main competences are in the area of border security rather than counter-terrorism.”⁶⁶

Using these prejudices to drive the formulation of border policies leads to disordered and selectively enforced regulations that negatively impact the basic safety of those escaping violence. By rejecting asylum seekers en masse on the basis of security concerns associated with specific ethnic/racial/religious groups (tacitly, or sometimes even explicitly, linking them to radical terrorist groups), some countries within the Zone are engaging in a type of “collective punishment.”⁶⁷ In short, the contours of

62. Michael Birnbaum, *A Terror Attack Exposed Belgium’s Security Failings. Europe’s Problem Is Far Bigger*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/world/europe/a-terror-attack-exposed-belgiums-security-failings-europes-problem-is-far-bigger/2016/03/28/47be66ac-f39d-11e5-a2a3-d4e9697917d1_story.html; Bertocini & Vitorino, *supra* note 60.

63. See Elspeth Guild, *International Terrorism and EU Immigration, Asylum, and Borders Policy: The Unexpected Victims of 11 September 2001*, 8 EUROPEAN FOREIGN AFF. REV. 331, 335-36 (2003) (“Hence the immigration controls take on a new significance in the war on terrorism . . . This transformation of the face of the enemy into an individual identifiable on the basis of racial profiling has been one of the most controversial of the post 11 September effects.”).

64. See generally, Sarah Lyons-Padilla et al., *Belonging Nowhere: Marginalization & Radicalization Risk Among Muslim Immigrants*, BEHAVIORAL SCIENCE & POLICY ASSOCIATION, Winter 2015.

65. See Sarah Leonard, *The Use and Effectiveness of Migration Controls as a Counter-Terrorism Instrument in the European Union*, 4 CENT. EUR. J. INT’L AND SECURITY STUD. 32, 35-36 (2010).

66. *Id.* at 37.

67. See generally Chen, *supra* note 51.

systems and regulations designed to address movement of third-country nationals into and within the Schengen Zone have been stretched and even wholly abandoned by some Member States in response to the perceived national security crisis of incoming refugees. These actions have resulted in violations of international law, which will be addressed in the next section.

II. REGIONAL AND INTERNATIONAL LAW GOVERNING DISPLACED PERSONS

According to the text of its founding document, the European Union was created based on principles of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”⁶⁸ These shared values are important to remember when analyzing European responses to the massive influx of third-country nationals to the continent. Indeed, these shared values are echoed and expanded in key regional agreements guiding Member States’ treatment of displaced persons, including the Schengen Borders Code, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter). International law, which informs European Union law, also provides protections for human rights, especially in regards to the vulnerable populations of displaced persons, in instruments such as the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the U.N. Convention Against Torture (CAT), and the Universal Declaration of Human Rights (UDHR). Together, these bodies of regional and international law delineate the contours of acceptable treatment of new arrivals to Europe in the wake of regional upheaval.

A. *Violations of Prohibition Against Cruel, Degrading, and Inhuman Treatment*

Based on foundational protections mandated by regional and international instruments, Member States have a duty to prevent torture and cruel, degrading, and inhuman treatment. Member States’ accession of the ICCPR and the CAT constitutes an obligation on the part of these signatories to enforce the prohibition of such treatment, a responsibility which finds its roots in the customary international law principle expressed in Article 5 of the UDHR.⁶⁹ In Article 4 of the Charter and Article 3 of the ECHR, European regional instruments echo this prohibition.

Furthermore, Article 6 of Schengen Borders Code mandates that “[b]order guards shall, in the performance of their duties, fully respect human dignity” and Recital 7 of the Code states that “[b]order checks should be carried out in such a way as to fully respect human dignity . . . in

68. Consolidated Version of the Treaty on European Union art. 2, Oct. 26, 2012, O.J. (C 326) 1.

69. The ICCPR addresses torture and cruel, degrading, and inhuman treatment in Article 7, and the CAT does so in Article 16.

a professional and respectful manner and be proportionate to the objectives pursued.”⁷⁰ A 2011 reform (retained in the 2016 consolidation of the Code and its amendments) refined Article 4’s insistence on respect for the protections enumerated by the Charter and the Refugee Convention, and directed Member States to maintain “full compliance” with these laws, especially concerning “access to international protection” and “fundamental rights.”⁷¹ In fact, this strengthened language in the Borders Code specifically referencing respect for governing regional and international law on human rights resulted from disagreements between France and Italy regarding the treatment of Tunisian refugees attempting to enter Europe in 2011.⁷²

Although neither the Human Rights Committee (monitoring compliance with the ICCPR) nor the Committee Against Torture (the equivalent body for the CAT) itemized a list of prohibited acts that define torture or cruel, degrading, and inhuman treatment,⁷³ the ECtHR and the CJEU have provided guidance as to what such treatment entails, specifically with respect to displaced persons. In *M.S.S. v. Belgium and Greece*, the ECtHR held that extreme material poverty could be considered degrading and inhuman treatment based on “official indifference [of a state administration] when in a situation of serious deprivation or want incompatible with human dignity” and that squalid and unsafe living conditions regulated by a Member State qualified as violations of Article 3 of the ECHR.⁷⁴ In *N.S. v. Secretary of State for the Home Department*, the CJEU held that where conditions for asylum-seekers were described as “inadequate,” i.e., “applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food,” this treatment does qualify as inhuman or degrading under Article 4 of the Charter.⁷⁵

As previously discussed, in many camps stretching across the European Union, living conditions are dire: residents often lack access to basic sanitation and medical care, may be provided only one meal per day, and are subject to extreme violence at the hands of security forces without provocation.⁷⁶ In fact, because of staggering deficiencies in Greece’s ability to maintain basic standards of humane treatment, the European high

70. Schengen Borders Code, *supra* note 14, art. 6 & recital 7.

71. Regulation (EU) 1168/2011 art. 1, O.J. (L 304); Schengen Borders Code, *supra* note 14, art. 4.

72. Guild et al., *supra* note 42, at 3.

73. Office of the High Commissioner for Human Rights, CCPR General Comment No. 20: Art. 7 (Mar. 10, 1992).

74. *M.S.S. v. Belgium and Greece*, App. No. 30696/09 Eur. Ct. H.R. ¶¶ 251-60 (2011) (citing *Budina v. Russia*, Dec. No. 45603/05 (2009)).

75. *N.S. v. Sec’y of State for the Home Dept.*, 2011 E.C.R. 865 ¶¶ 44, 86.

76. See, e.g., *France: Migrants, Asylum Seekers Abused and Destitute*, HUMAN RIGHTS WATCH (Jan. 20, 2015); Alexandra Sims, *Czech Republic Under Fire for ‘Stripping Refugees to Take Their Money to Pay for Their Involuntary Detention,’* THE INDEPENDENT (Oct. 24, 2015), <http://www.independent.co.uk/news/world/europe/czech-republic-under-fire-for-strip-ping-refugees-to-take-their-money-to-pay-for-their-involuntary-a6707291.html>.

courts have determined that it can no longer receive incoming transfers of asylum seekers through the Dublin III system.⁷⁷ Special arrangements must also be made to complete Dublin transfers to Italy.⁷⁸ It is therefore clear that some Member States are in breach of their international obligations to protect displaced persons from inhuman and degrading treatment.

B. *Violations of the Non-Refoulement Principle and Pushbacks as Collective Punishment*

Building on the UDHR's Article 14 principle that all people have a right to seek asylum from persecution, the Refugee Convention, CAT, and the Charter all recognize that individuals have a right to be safe from being returned a place where their human rights could be violated. However, the exact definition of this concept, called non-refoulement, varies across these regional and international law instruments.⁷⁹ The Refugee Convention contemplates protection against return to a territory where a person's "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion," while the CAT prohibits an individual's expulsion or return to a State "where there are substantial grounds for believing that he would be in danger of torture."⁸⁰ Effective protection of human rights for displaced persons, based on standards articulated by the United Nations High Commissioner for Refugees, requires, among other things, that Member States ensure the third state maintains adequate safeguards against torture or cruel, inhuman or degrading treatment, risk to life, deprivation of liberty without due process, and further transfer to another state in which the person would not receive these same protections (i.e., indirect refoulement).⁸¹

The European Union, in its Charter, appears to have drawn from and expanded upon the protections from the codified sources in formulating its own policy against refoulement, stating that collective expulsions are not permitted 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."⁸²

77. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 12.

78. *Id.*

79. WOUTERS, *supra* note 52, at 2.

80. The Refugee Convention, July 25, 1951, 189 U.N.T.S. 33; G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 (June 26, 1987).

81. Dept. of International Protection, Office of the U.N. High Commissioner for Refugees, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers (Feb. 2003) 3, ¶ 15, <http://www.refworld.org/docid/3fe9981e4.html>.

82. Charter of Fundamental Rights of the European Union, arts. 18-19, 2000 O.J. (364) (recognizing the right to asylum respecting the rules of the Refugee Convention).

These protections against refoulement are particularly important to observe in light of the mechanics of the Dublin III system, which encourages transfer of asylum seekers back to their country of first entry.⁸³ Many countries where refugees are most likely to have made their first entry are those who are the most overwhelmed by flows of displaced persons. They are also the least likely to have the proper resources to fairly deal with asylum applicants on a case-by-case basis, as required by regional and international law.⁸⁴ This lack of resources can result in direct refoulement occurring within the Schengen Zone if Dublin transfers return asylum seekers to a country where treatment of third-country nationals is considered cruel, degrading, or inhuman.⁸⁵ At external borders, institutional shortcomings are most often manifested by the use of pushbacks, or collective expulsion of entire groups of third-country nationals from the Member State without individualized review of appropriate travel documents, consideration of asylum applications, or opportunity to appeal their forcible removal.⁸⁶ These group pushbacks are a violation of Protocol No. 4, Article 4 of the ECHR, and Article 19 of the Charter, which state that “collective expulsion of aliens is prohibited.”⁸⁷ A 2013 amendment to the Schengen Borders Code guarantees, “decisions under this Regulation shall be taken on an individual basis” and directs Member States to act in accordance with protections of fundamental rights and the principle of non-refoulement.⁸⁸ The ECtHR reinforced the authority of this prohibition in *Conka v. Belgium*, when it described collective expulsion as “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”⁸⁹

The proscriptions against pushbacks and refoulement are interrelated in terms of their relevance to treatment of asylum seekers because pushbacks can result in direct or indirect refoulement, especially when Member States conduct collective expulsions that send people back to non-Zone countries. The ECtHR analyzed this exact combination of is-

83. See generally Regulation (EU) No. 604/2013 art. 33, 2013 O.J. (L 180).

84. Lessons learned from conflict in Kosovo illustrate it is not state practice to deny rights to an influx of refugees, nor is it sanctioned by international law. Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 24-25 (2000).

85. See, e.g., *M.S.S. v. Belgium and Greece*, App. No. 30696/09 Eur. Ct. H.R. ¶¶ 251-60, (2011) (citing *Budina v. Russia*, Dec. No. 45603/05 (2009)). The ECHR does not use the word “refoulement” in connection with Dublin transfers, but based on the judicially recognized inhumane conditions at refugee camps in Greece, transfer of refugees back to these camps would fall under the definition of indirect refoulement under the Charter.

86. WOUTERS, *supra* note 52, at 137-38.

87. Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 4, art. 4 (ETS No. 046); Charter of Fundamental Rights of the European Union, art. 19, 2000 O.J. (364).

88. Regulation (EU) 610/2013 art. 1, § 3, O.J. (L 182).

89. Case of *Conka v. Belgium*, App. No. 51564/99 Eur. Ct. H.R. at 19 (2002) (emphasis added).

sues in *Jamaa v. Italy* when the Court ruled that Italy's use of pushbacks on asylum seekers' boats in the Mediterranean was a violation of the ECHR based on the collective nature of the action and the risk of indirect refoulement to the asylum seekers.⁹⁰ The Court further stated that Italy was not relieved of its duties under the ECHR merely because the third-country nationals did not expressly request asylum—representing an important reason why the distinction that Member States have tried to make between “migrants” and “asylum seekers” does not release them from regional and international legal obligations.⁹¹

In terms of the implications of states' national security interests on individualized review of claims and protection of asylum seekers, it should be noted that international instruments such as the Refugee Convention do allow states to refuse protection to asylum seekers on the basis of national security or public order risk.⁹² However, the European Court of Justice's decision in the joined cases of *Bundesrepublik Deutschland v. B* and *Bundesrepublik Deutschland v. D*, has been interpreted to hold that “‘terrorist’ status alone cannot be a bar to an individualized refugee status determination when applying the usual criteria for such a status under international law.”⁹³ This holding provides a substantive requirement of individualized review that could help prevent discriminatory abuses within Member States' asylum systems.

However, as is evident from reports of processes actually being conducted on the ground, just because a Member State is obligated by law to provide individualized review does not mean that authorities necessarily comply with these directives.⁹⁴ This type of discrimination against asylum seekers based on factors like country of origin or religion, which have become proxies for national security risk, can even be considered a type of “collective punishment.” Admittedly, customary international law prohibiting collective punishment—“sanctions and harassment of any sort, administrative, by police action or otherwise” against a group without evaluating “individual criminal responsibility”—is predominantly dis-

90. Hirsi Jamaa and Others v. Italy, App. No. 27765/11, 77-79, Eur. Ct. H.R. (2012).

91. *Id.* at 37.

92. G.A. Res. 2198(XXI), Convention and Protocol Relating to the Status of Refugees, art. 32, § 1-2, (2010). While section 1 does allow for expulsion on the basis of national security or public order, section 2 requires that this action must be taken “only in pursuance of a decision reached in accordance with due process of law.”

93. William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT'L L. 94, 149-50 (2014) (citing Judgment, *Bundesrepublik Deutschland v. B*, Case C-57/09 1990 E.C.R. & *Bundesrepublik Deutschland v. D*, Case C-101/09 2010 E.C.R., ¶ 99 (Sept. 11, 2010)) (“terrorist’ status ‘does not automatically constitute a serious reason for considering that a person has committed ‘a serious non-political crime’ or ‘acts contrary to the purpose and principles of the United Nations,’” which would ordinarily bar a person from seeking asylum).

94. See generally *Fear and Fences*, *supra* note 10. See also Jaya Ramji-Nogales, *Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights*, AM. SOC. OF INT'L LAW (Jan. 4, 2016), <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights>.

cussed in the context of international armed conflicts (IACs) and non-international armed conflicts (NIACs).⁹⁵ Nevertheless, this acknowledgment of individual rights and non-discrimination principles in customary international law buttresses similar prohibitions against border police's collective action against asylum seekers as outlined in the Refugee Convention. It also legitimates the importance of preventing collective punishment of these individuals in retaliation for terrorist attacks to which they have no genuine connection.

In conclusion, the current system does not prevent asylum seekers within the Schengen Zone or at its external borders from being subjected to conditions that violate the prohibitions against non-refoulement and collective punishment through expulsion, and it should be reformed. The existing use of formal agreements that codify and supposedly establish the appropriate use of collective action against third-country nationals seeking to cross Schengen Zone borders, such as the most recent one between the European Union and Turkey, make this task of meaningful reform more difficult. These types of agreements are unlikely to adequately provide for protections of individualized procedural rights owed to asylum seekers. Further, in the case of Turkey specifically, its designation by the EU as a "safe third country" is questionable, and does not inspire confidence in the EU's assessments. Turkey has been repeatedly accused of human rights abuses involving asylum seekers over the last three decades, including arbitrary detentions and torture.⁹⁶ Recently, it has also been accused of secondary pushbacks of asylum seekers into Syria and Iraq, a clear example of refoulement.⁹⁷ It is difficult to see how Member States can continue to defend the prudence and legality of strategies involving the designation of "safe third countries" to receive asylum seekers, given the improper collective action and willful blindness towards risk of degrading and inhuman treatment observed in both the Zone itself and in neighboring states.

III. RATIONAL REFORMS

The main issue with the Dublin III regulations is that the system would still respond poorly to a massive refugee crisis even if all Member States followed its directives flawlessly. Dublin III, by design, inherently does not encourage equitable burden sharing of even the most basic system management tasks like registry and application processing. Because the Member State that initially receives an asylum seeker is required to adjudicate the application, the system is set up such that the only possible

95. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 33, Oct. 21, 1950; Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 50, Hague, Oct. 18, 1907.

96. See Steve Peers & Emanuela Roman, *The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?*, EU LAW ANALYSIS (Feb. 5, 2016), <http://eulawanalysis.blogspot.de/2016/02/the-eu-turkey-and-refugee-crisis-what.html>.

97. *Id.*; see also, e.g., Case of S.A. v. Turkey, App. No. 74535/10, 1-3; 11-12 Eur. Ct. H.R. (2015).

outcome results in external border states becoming overwhelmed by a massive influx of people. To wit, people fleeing from indiscriminate violence do not fly into Europe's interior and disperse evenly such that their numbers are manageable in light of each state's processing capabilities. Instead, they arrive by boat or by foot at the exterior border. The relatively few Member States situated on external borders cannot, at present, logistically handle the demands of new arrivals, producing a multitude of negative consequences.

First, people who allow themselves to be processed in these external border countries are often subject to deplorable conditions due to a lack of monetary and spatial resources. This results in significant human rights violations, and therefore violations of international law.⁹⁸ Second, people attempt to circumvent initial registration in these states to escape significant hardship and end up traveling through the interior of the Schengen Zone virtually unmonitored. This results in the emergence of rational national security concerns.

I soundly reject the notion that unregistered and unmonitored asylum seekers from the Middle East and North Africa represent an inherent national security risk. However, the failings of the current system certainly increase the chance that a single person with terrorist designs could evade detection—due to the inefficacy of overwhelmed border control systems in states like Spain, Italy, or Greece—and then be allowed to travel freely throughout the Schengen Zone. As such, steps can and should be taken to reform the system in ways that better protect displaced persons and acknowledge potential security risks in a non-discriminatory fashion.

A. *Reasonableness of Maintaining Adequate Human Rights Protections in Current Climate*

The goal of maintaining respect for fundamental human rights in the midst of a massive influx of asylum seekers is attainable, though Dublin III does not adequately provide Member States with the tools they need to achieve it. Member States have shown in the past that they are capable of responding to these types of crises. For example, states did not refole or refuse to accept asylum seekers from Kosovo in the late 1990s, even though they arrived at the borders en masse. While the scope of that influx was not as extensive as the current situation, state practice has recognized that “[n]on-refoulement as a principle of non-rejection . . . applies equally to cases of mass influx and individual cases.”⁹⁹

Further, in regards to states preventing cruel, inhuman, or degrading treatment, it is important to realize that the threshold for that type of activity established by the European high courts is actually remarkably high. While the ECtHR and the CJEU respectively held that the appellants in *M.S.S. v. Belgium and Greece* and *N.S. v. Secretary of State for the Home Department* were subjected to inhuman treatment violative of interna-

98. See *infra* Section II.

99. Boed, *supra* note 82, at 25.

tional law, these courts held in several other related cases that the mistreatment was not a breach of states' legal obligations. For example, in *A.M.E. v. Netherlands*, the ECtHR ruled that because the conditions in Italy were not comparable to those in Greece at the time of the M.S.S. judgment, the appellant had not sufficiently established that he faced "real and imminent risk of hardship severe enough to fall within the scope of Article 3 [of the ECHR]" if transferred from the Netherlands to Italy.¹⁰⁰ In *A.S. v. Switzerland*, the ECtHR held that there was no reason to think that the appellant would not receive the appropriate treatment for his PTSD if he were returned to Italy, even though in *Tarakhel v. Switzerland*, the Court expressed concern about the capabilities of the Italian reception system.¹⁰¹ The results of these cases illustrate that maintaining conditions not *legally violative* of basic human rights is not unreasonably difficult. However, Member States should clearly strive to remain well above this threshold of unacceptable treatment.

B. *Proposed Reforms to Encourage Compliance with Regional and International Law*

This time of crisis provides challenges and opportunities for Member States. If these States can focus on the opportunities by properly harnessing political will, they can improve conditions for asylum seekers and implement lasting reform in the entire system. The Dublin System needs to be amended to reflect the cooperative nature of the Schengen Zone and practical security measures must be put in place to address national security concerns created by unfettered free movement by untraceable individuals.

In regards to the Dublin System, Member States should abandon the current stipulations that the state that initially registers a third-country national is responsible for processing his or her asylum application. After the initial biometric and documentary screenings are conducted per current procedures, third-country nationals who state their intention to apply for asylum should receive documented provisional status as "European asylum seekers." This status confers a European Union-wide (or at least Schengen Zone-wide) recognition of their desire to seek protection and imposes upon each Member State an obligation to process the application of any asylum seeker who files an application there. Such a provisional status should be valid for a fixed period of time, which must be sufficient to give asylum seekers the opportunity to travel to their reception country of choice, but also to prevent third-country nationals from merely declaring their intention to seek asylum and then avoiding getting their claim adjudicated. If a "European asylum seeker" loses provisional status, Mem-

100. *A.M.E. v. Netherlands*, App. No. 51428/10, § 36 Eur. Ct. H.R. (2015) (noting that "real and imminent risk of hardship" can be considered sufficiently severe to fall within the Scope of Article 3 whether evaluated from a "material, physical or psychological" perspective).

101. *A.S. v. Switzerland*, App. No. 39350/13 Eur. Ct. H.R., §§ 35-38 (2015); *Tarakhel v. Switzerland*, App. No. 29217/12 Eur. Ct. H.R. §§ 103-06; 115 (2014).

ber States can then treat him as an irregular migrant, subject to an appeal where he has the opportunity to show good cause as to why he has not yet filed his application.¹⁰²

Although this system also does not ensure equitable burden-sharing any better than the current system, it does at least provide asylum seekers with some agency in their choice of recipient country and shifts the burden away from external border states whose resources are currently exhausted, resulting in the human rights violations discussed above. Current estimates of asylum-seeker flows and submitted applications show that, in practice, states are allowing third-country nationals to file an application in their country of choice by abandoning attempts to utilize the Dublin transfer system.¹⁰³ Some states have adopted this strategy by necessity due to inability to detain (and subsequently determine the state responsible for processing applicants) masses of asylum seekers; this practice further contributes to the cycle of registration avoidance.¹⁰⁴

By creating some degree of flexibility in the current system, this reform would incentivize external border states to conduct appropriate screening and initiation processes without having to accept the responsibility to process applications as well. In turn, this will hopefully result in third-country nationals' diminished ability and incentive to avoid registration at external borders, ameliorating national security concerns regarding unregistered persons freely navigating throughout the Schengen Zone. While states realistically cannot stop the flows of asylum seekers into and throughout the Schengen Zone, abandoning Dublin III stipulations regarding responsibility for application processing would "relieve states of a costly, cumbersome and somewhat ineffectual administrative burden, whilst avoiding much of the human cost to asylum seekers."¹⁰⁵

Additionally, Member States should suspend their use of "safe third country" designations within and without the Schengen Zone until the Commission has decided that the flows of third-country nationals are manageable enough such that individualized determinations about safe recipient destinations can be made. The risk of serious human rights violations made possible by transfer of asylum seekers to a country where they may be subject to cruel, degrading, or inhuman treatment greatly outweighs the cost and strain on Member States' national and regional resources. The suspension of this practice should reduce the risk of refoulement resulting from the use of collective expulsions without due process for each individual applicant.

102. See COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 14.

103. *Id.* at 10.

104. *Id.* at 3 (discussing asylum seekers' right not to be detained arbitrarily); *Danish Police: Refugees Can Travel on to Sweden*, THE LOCAL SE (Sept. 10, 2015), <http://www.the.local.se/20150910/danish-police-allow-refugees-to-continue-on-to-sweden>; Guild et al., *supra* note 42, at 10-12 (noting that the Hungarian Prime Minister declared that Dublin was dead, but Schengen remained alive).

105. COUNCIL OF EUROPE COMMITTEE ON MIGRATION, *supra* note 6, at 11.

Finally, Member States should institute a robust common complaint mechanism that asylum seekers can use to report human rights abuses. The establishment of an independent European Union border monitor agency to investigate these claims and report findings to the Commission should accompany this new mechanism.¹⁰⁶ At present, asylum seekers are not easily able to protest conditions and practices violative of human rights, even though the Treaty of Lisbon was intended to provide greatly improved protection for individuals in the area of freedom and justice. This phenomenon can be partially explained by the fact that Member States rarely refer matters in this area to the CJEU, even though there is a special mechanism in place for the Court to decide urgent cases regarding individuals facing detention.¹⁰⁷ The Commission should therefore encourage Member States to refer cases to high courts like the CJEU and the ECtHR, which are likely to be more impartial and better adapted to consider questions about the interaction of national, regional, and international law obligations in the arena of human rights than individual Member State courts.

These proposed alterations to the current system, while ambitious, are reasonable reforms to execute, especially when one considers the grave consequences for the legitimacy of Member States' claims of respect for human life and dignity if no action is taken. Member States have an opportunity to prove that the European Union's emphasis on harmonization of state practices regarding human rights protections, as codified in regional instruments, is not defined by hollow platitudes.

CONCLUSION

The solution to this issue depends on a political will to cooperate. The European Union has recently weathered a significant financial crisis, and has taken necessary steps to ensure that economic coordination within the Euro Zone remains intact. Member States must come to a collective solution to avoid systemic collapse, because the flows of displaced persons will not stop—even with the dutiful erection of more physical barriers, and/or a deliberate failure to provide basic resources for people who are able to cross Europe's external borders.

States are better equipped to handle terrorist threats through coordination of law enforcement efforts and pooling of resources, rather than pursuing a strategy of "refortification," given the right to freedom of movement of European nationals who live inside the Schengen Zone. As previously noted, the terrorist threat is largely emanating from *within* the Schengen Zone countries from nationals who live in and move legally throughout Europe. Mistrust of Member States' abilities to handle terrorist threats and subsequent reestablishment of internal border controls is unproductive, and may cause the Schengen Zone to collapse. Such reac-

106. See Guild et al., *supra* note 42, at 21.

107. DIRECTORATE-GENERAL INTERNAL POLICIES, INFLUENCE OF ECJ, *supra* note 34, at 8-12.

tionary measures only serve to disrupt the economic, social, and political interests of the vast majority of law-abiding European Union citizens and asylum seekers, while hampering law enforcement's ability to prevent future terrorist attacks. Even if Member States wish to shirk their responsibilities in regards to displaced people under regional and international law, from a *realpolitik* standpoint, it is not in their best interest to do so.