

# THE EUROPEAN UNION'S DUBLIN REGULATION AND THE MIGRANT CRISIS

## INTRODUCTION

In 2015, over one million migrants<sup>1</sup> arrived in the European Union (“EU”).<sup>2</sup> Many of the migrants were fleeing war and persecution in Syria, Afghanistan, Eritrea and other countries in Africa and the Middle East.<sup>3</sup> The majority of the migrants sought asylum in the EU, a haven where they believed they could find work and opportunities for a better life.<sup>4</sup> The EU, however, was financially and administratively unprepared for the unprecedented influx of migrants because it was recovering from a financial crisis.<sup>5</sup> The EU’s migration policy, embodied in its “Dublin Regulation III” (the “Dublin Regulation”), requires that migrants register and apply for asylum in the EU member state they enter first.<sup>6</sup> Consequently, EU member states (“Member States”)<sup>7</sup> closest in proximity

---

1 The term migrant refers to a person who moves from one place to another and includes both people who are seeking asylum and refugee status and people who are seeking new economic opportunities. The term asylum seeker refers only to the former of these two groups. See International Organization for Migration, *Key Migration Terms*, <https://www.iom.int/key-migration-terms>.

2 The European Commission, *The EU and the Migration Crisis*, (July 2017), <http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/>. Trafficking from Turkey to the Greek islands of Kos, Chios, Lesbos and Samos account for a large portion of this figure. See *infra* note 133.

3 The European Commission, *supra* note 2. See also *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), <https://www.bbc.com/news/world-europe-34131911>. Large numbers of migrants also came from Kosovo, Albania, Iraq, and Pakistan. *Id.*

4 The European Commission, *supra* note 2. Before Europe’s migration crisis, migrants sought asylum in nearby non-EU countries such as Jordan, Lebanon, and Turkey. King’s College London, *Why Do Refugees and Migrants Come To Europe, and What Must Be Done to Ease the Crisis?*, THE TELEGRAPH (Sept. 4, 2015), <https://www.telegraph.co.uk/news/worldnews/europe/11845205/Why-do-refugees-and-migrants-come-to-Europe-and-what-must-be-done-to-ease-the-crisis.html>. However, these Middle Eastern countries soon reached a point where they could no longer support the growing number of migrants with basic services like food and shelter. *Id.* Migrants have thus decided to move on to countries with more resources, like the UK, which at the time had a per capita eight times that of Jordan and similarly situated countries. *Id.* The UK also had just under 200,000 refugees, less than a quarter of the one million refugees in countries like Jordan. *Id.* In addition, wealthier Middle Eastern countries including Saudi Arabia, have shown an unwillingness to accept more refugees. *Id.* See also Matthew Weaver, *Syrian Refugees: More Than 5m in Neighbouring Countries Now, Says UN*, GUARDIAN (Mar. 30, 2017), <https://www.theguardian.com/world/2017/mar/30/syrian-refugee-number-passes-5m-mark-un-reveals> (describing the situation in Middle Eastern countries prior to the crisis in Europe).

5 Mark Koba, ‘A Cheat Sheet’ on the Europe Crisis, CNBC (June 13, 2012), <http://archive.is/bMQ4>. The EU suffered from a financial crisis beginning in 2009, which raged on as migrants began to flood into the EU. Countries like Greece and Spain were in billions of dollars of debt and banks throughout the union were failing. *Id.*

6 See *infra* notes 10-13.

7 Member states of the European Union must agree to the founding treaties of the EU and are bound by the EU’s laws and regulations. In return, member states are given representation in the EU legislature and judiciary. See *Countries*, EUROPEAN UNION, <https://europa.eu/european-union/about->

to Africa and the Middle East were placed under considerable economic strain during the influx.<sup>8</sup> As a result, the Dublin Regulation and its efficiency has been called into serious question.<sup>9</sup> Three years after the initial spike in migration, the migration numbers have fallen dramatically because the EU and other member states took a number of actions in attempts to quell the number of entering migrants, including the controversial building of border fences.<sup>10</sup> Nevertheless, many of the issues underlying the Dublin Regulation, such as the disproportionate strain placed on certain countries and the violation of the human rights of asylum seekers, still exist. Leaders and scholars alike continue to call for its reformation or complete overhaul.<sup>11</sup>

---

eu/countries\_en (last visited Feb. 24, 2020); *How EU decisions are made*, EUROPEAN UNION, [https://europa.eu/european-union/eu-law/decision-making/procedures\\_en](https://europa.eu/european-union/eu-law/decision-making/procedures_en) (last visited Feb. 24, 2020); *EU courts*, EUROPEAN E-JUSTICE,

[https://e-justice.europa.eu/content\\_eu\\_courts-15-en.do](https://e-justice.europa.eu/content_eu_courts-15-en.do) (last visited Feb. 24, 2020).

<sup>8</sup> See Park, *infra* note 65, at 4.

<sup>9</sup> See Regulation 604/2013, 2013 O.J. (L 180) 31 available at <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>. The migration crisis in Europe tested the limits of the current legislation, forcing the EU to brainstorm how to reform it once more. The European Commission proposed a Dublin IV Regulation in 2016, which would promote burden sharing by a “corrective allocation mechanism in cases of disproportionate pressure”, punish asylum shopping and other abuses of the asylum system, and further take into account the best interests of migrants. *Proposal for a Regulation of the European Parliament and of the Council 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)*, at 18, COM (2016) 270 final (May 4, 2016).

<sup>10</sup> Jon Henley, *What is the Current State of the Migration Crisis in Europe?*, GUARDIAN (June 15, 2018), <https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook>. See *infra* note 137. European governments made deportation agreements with non-EU countries that helped quell the migration flows into the EU. Patrick Kingsley, *Migration to Europe Is Down Sharply. So Is It Still a ‘Crisis’?*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/world/europe/europe-migrant-crisis-change.html>.

Turkey agreed to take back migrants who illegally enter the EU in exchange for almost seven billion euros in aid, visa free travel within the EU for Turkish citizens, and reopening of negotiations with Turkey on EU membership. James Kanter, *European Union Reaches Deal With Turkey to Return New Asylum Seekers*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/19/world/europe/european-union-turkey-refugees-migrants.html>.

After the agreement was made effective, migrant arrivals to Greece from Turkey dropped a drastic ninety-seven percent by 2018. European Commission, *EU-Turkey Statement - Two Years On*, at 1 (Apr. 2018), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207\\_eu\\_turkey\\_statement\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207_eu_turkey_statement_en.pdf). Similar deals have been made with Niger and Sudan. Adam Nossiter, *At French Outpost in African Migrant Hub, Asylum for a Select Few*, N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/world/africa/france-africa-migrants-asylum-niger.html>; Patrick Kingsley, *By Stifling Migration, Sudan’s Feared Secret Police Aid Europe*, N.Y. TIMES (Apr. 22, 2018), <https://www.nytimes.com/2018/04/22/world/africa/migration-european-union-sudan.html>.

<sup>11</sup> European Parliament, *EU Asylum Reform: Parliament’s Stance on Dublin Regulation* (June 6, 2018), <http://www.europarl.europa.eu/news/en/headlines/world/20180615STO05927/eu-asylum->

The Dublin Regulation designates which EU member state is responsible for reviewing and processing an asylum application.<sup>12</sup> It states in relevant part, “Member States shall examine any application for international protection by a third-country national or a stateless person . . . . The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.”<sup>13</sup> Further, “[w]here no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.”<sup>14</sup> The latter is usually the case for asylum seekers because asylum authorities do not give preference to family unity over criteria involving an asylum seeker’s documentation or country of entry as intended by the Dublin Regulation.<sup>15</sup> Thus the “first Member State in which the application for international protection was lodged,” also known as the state of first entry, is usually the responsible member state.<sup>16</sup> If all the member states had a proportionate amount of asylum seekers entering their borders to the member state’s resources and size, the “state of first entry” rule would be an efficient means to balancing out responsibility for asylum applications amongst the member states. In reality, a few EU member states consistently carry a heavier burden of responsibility for asylum applications.<sup>17</sup>

---

reform-parliament-s-stance-on-dublin-regulation (confirming the EU Parliament’s call for reform of the Dublin Regulation). Duncan Robinson, *How the EU Plans to Overhaul ‘Dublin Regulation’ on Asylum Claims*, THE FIN. TIMES (Jan. 20, 2016), <https://www.ft.com/content/d08dc262-bed1-11e5-9fdb-87b8d15baec2> (emphasizing the EU’s desire to reform or do away with the current Dublin Regulation); Laura Helena R. Suy, *The Dublin Regulation (2014)* (unpublished Master Thesis, Aalborg Universitet København) (on file with the Project Library, Aalborg Universitet København).

12 Regulation 604/2013, *supra* note 9, at 31.

13 *Id.* at 37. According to Chapter III of the Dublin Regulation, the member state where an unaccompanied minor’s family is legally located or where a person’s family has been afforded international protection or where a person’s family has submitted applications for international protection is responsible for that minor’s or person’s asylum application. *Id.* at 39.

14 *Id.*

15 Susan Fratzke, *Not Adding Up: The Fading Promise of Europe’s Dublin System* 4-5 (2015). The Dublin Regulation lists a hierarchy of criteria that asylum authorities are to use when evaluating which member state is responsible for an asylum seeker’s application. *Id.* At the top of the hierarchy are minors, who are the responsibility of the member state where his or her family members are legally present. *Id.* The second criteria states that a member state is responsible for an asylum seeker if he or she has family members in that member state, whether legally present or not. *Id.* See also Regulation 604/2013, *supra* note 9, at 39.

16 Regulation 604/2013, *supra* note 9, at 37; European Commission, *Country Responsible for Asylum Application (Dublin)*, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en).

17 Patrick J. Lyons, *Explaining the Rules for Migrants: Borders and Asylum*, N.Y. TIMES (Sept. 16, 2015), <https://www.nytimes.com/2015/09/17/world/europe/europe-refugees-migrants-rules.html>.

Since the spike in migrant numbers in 2015, tensions between the member states with the most responsibility for asylum applications and the rest of the EU member states have increased dramatically.<sup>18</sup> Italy, a common state of first entry for migrants, has been at the fore in criticizing the EU's failure to control the migrant crisis because it has been forced to accept responsibility for a disproportionate amount of migrants compared to other member states.<sup>19</sup> In June 2018, Italy's Interior Minister Matteo Salvini promised Italians that, contrary to the Dublin Regulation, Italy would drastically decrease the number of migrants entering the country and increase the number of deportations of illegal migrants.<sup>20</sup> He proposed creating deportation centers and taking legal action against organizations that rescue migrants at sea and bring them to Italy.<sup>21</sup> Just days later, Salvini began to make good on his promise by banning ships carrying rescued migrants from docking at Italian ports.<sup>22</sup> Salvini refused to allow another boat of nearly two hundred migrants to disembark, urging the rest of the EU member states to take responsibility for the migrants on the boat.<sup>23</sup> Italy's Deputy Prime Minister, Luigi Di Maio, threatened to withhold twenty-three billion USD, or twenty billion euros, that Italy pays to the EU every year if other member states did not pledge to take

---

18 Alessandro Giovanni Borghese, *Why European Tension Is Rising Over Migrants (Again)*, BLOOMBERG BUSINESSWEEK (June 29, 2018), <https://www.bloomberg.com/news/articles/2018-06-22/why-european-tension-is-rising-over-migrants-again-quicktake>.

19 Soeren Kern, *Italy and Hungary Create 'Anti-Immigration Axis'*, GATESTONE INST. (Sept. 01, 2018, 5:00 AM), <https://www.gatestoneinstitute.org/12945/italy-hungary-immigration>.

20 *Italy Migrants: Matteo Salvini Calls For End to Sicily 'Refugee Camp'*, BBC NEWS (June 3, 2018), <https://www.bbc.com/news/world-europe-44346084>. Salvini was elected in the midst of a growing dissatisfaction with the previous government's response to the migration crisis. Ritula Shah, *Italian Election Dominated by Immigration Debate*, BBC NEWS (Feb. 26, 2018), <https://www.bbc.com/news/world-europe-43167699>.

21 BBC NEWS, *supra* note 20.

22 *Italy's Matteo Salvini Shuts Ports to Migrant Rescue Ship*, BBC NEWS (June 11, 2018), <https://www.bbc.com/news/world-europe-44432056>. The Aquarius held over six hundred migrants that were rescued at six different ports in Libya. The rescue ship is NGO sponsored and tasked with rescuing migrants and delivering them to the closest EU country. Antonio Denti, *Migrant Rescue Ship Aquarius Returns to Sea After Italy-Malta Dispute*, REUTERS (Aug. 1, 2018), <https://www.reuters.com/article/us-europe-migrants-ngo/migrant-rescue-ship-aquarius-returns-to-sea-after-italy-malta-dispute-idUSKBN1KM51V>. According to International Convention for the Safety of Life at Sea, the country responsible for taking in the migrants on the ship is the country responsible for operations in that area of the sea. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 3, V/7.1. In this case, Italy or Malta would have been required to allow the Aquarius to disembark on its shores. *Id.* However, Malta claimed that the ship fell within Italy's jurisdiction and that it was not responsible for it. Denti, *supra*. The ship was eventually taken in by Spain. *Id.*

23 BBC NEWS, *Italy Migrant Row: Rescue Ship Allowed to Disembark in Sicily* (August 26, 2018), <https://www.bbc.com/news/world-europe-45310479>. Italy eventually allowed the ship to disembark after six days at sea. The United Nations also stepped in and urged other member states to help. *Id.* Ireland and Albania finally agreed to rescue some of the migrants. *Id.*

responsibility for migrants in Italy.<sup>24</sup> Italy cites the lack of housing and employment opportunities available for its hard stance on anti-immigration.<sup>25</sup> It also complains that the country can barely provide for its own citizens, let alone hundreds of thousands of migrants.<sup>26</sup>

Other member states followed Italy's lead, resulting in the creation of the "Anti-Immigration Axis" in opposition to the EU's pro-immigration laws and policies.<sup>27</sup> The Anti-Immigration Axis consists of Italy, Hungary, Austria, Czech Republic, Slovakia and Poland.<sup>28</sup> Its goal was to reverse the EU's open-door migration policies by changing the political composition of pro-immigration EU institutions, such as the European Parliament and European Commission, in the 2019 elections.<sup>29</sup> The Anti-Immigration Axis and other far-right parties made large gains in some countries during the European Parliament elections, but suffered losses in others.<sup>30</sup> The undertaking was a moderate success, with far-right parties having more representation than in the past. These gains will also play a role in the make-up of the European Commission, which the members of the European Parliament must approve.<sup>31</sup> In response to the Anti-Immigration Axis' formation, the European Parliament voted to initiate Article 7 sanction proceedings against Hungary because Hungary passed

---

24 Kern, *supra* note 19.

25 BBC News, *Italy Migrants: Matteo Salvini Calls For End to Sicily 'Refugee Camp'*, *supra* note 20.

26 *Id.* The Italian economy has been declining since 2012. See also Shobhit Seth, *All About the Italian Economic Crisis of 2018*, INVESTOPEDIA (May 15, 2019), <https://www.investopedia.com/news/all-about-italian-economic-crisis-2018/>. It has one of the largest debts in Europe - over two trillion euros - and its unemployment rate has consistently been one of the highest in Western Europe. *Id.*

27 Kern, *supra* note 19.

28 *Id.*

29 *Id.* The right-wing, anti-immigration axis is expected to make considerable gains in the 2019 elections as xenophobic sentiments continue to dominate European politics. Paul Mason, *Will the Far Right Triumph in Europe in 2019?*, NEW STATESMAN AMERICA (Jan. 2, 2019), <https://www.newstatesman.com/world/europe/2019/01/will-far-right-triumph-europe-2019>. The results of the parliament election are crucial because both the European Parliament and the European Council choose the President of the European Commission, who implements European policies like the Dublin Regulation. European Union, *EU Presidents - Who Does What?* (Nov. 10, 2017), [https://europa.eu/european-union/about-eu/presidents\\_en](https://europa.eu/european-union/about-eu/presidents_en).

30 Shaun Walker, *European Elections: Far-Right 'Surge' Ends in a Ripple*, The Guardian (May 27, 2019), <https://www.theguardian.com/world/2019/may/27/european-elections-far-right-surge-ends-in-a-ripple>.

31 Elena Sánchez Nicolás, *The New European Commission: What's Next?*, EU Observer (Sep. 2, 2019), <https://euobserver.com/institutional/145782>.

new anti-immigration legislation, abusing the rule of law.<sup>32</sup> The proceedings could terminate Hungary's EU voting rights.<sup>33</sup>

While the crisis continues and the threat of disunity between the member states looms, there is hope for reform that will satisfy everyone involved. In his 2018 State of the Union address, the President of the European Commission propositioned several steps to assist member states with asylum procedures under the Dublin Regulation.<sup>34</sup> Some proposals include increasing the EU Asylum Agency budget and deploying more Migration Management Support Teams, especially to migration "hotspots"

---

32 Michael Peel, *Hungary Optimistic Over Swift End To 'Absurd' EU Rule-Of-Law Row*, Financial Times (Sep. 29, 2019), <https://www.ft.com/content/8285162a-de16-11e9-9743-db5a370481bc>

33 James McBride, *Europe Wrestles With Hungary's Populist Challenge*, COUNCIL ON FOREIGN RELATIONS (Sept. 21, 2018), <https://www.cfr.org/article/europe-wrestles-hungarys-populist-challenge>. See also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 7, December 13, 2007, 2007 O.J. (C 306) 1. Article 7 of the EU's founding treaty, the Lisbon Treaty, allows for disciplinary action on member states that threaten the EU's values as outlined in Article 2 of the same title. *Id.* Article 7 mandates that

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

2. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

*Id.* Article 7 has never been invoked before, which is why it has been coined the "nuclear option". Ginger Harvey & Emmet Livingstone, *What is Article 7*, POLITICO (Jan. 13, 2016), <https://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law/>.

34 European Commission, *European Commission Audio-visual Services, State of the Union 2018: New Commission Proposal for a Reinforced EU Asylum Agency* (Sept. 12, 2018), <https://www.easo.europa.eu/news-events/state-union-2018-new-commission-proposal-reinforced-eu-asylum-agency>.

like Italy and Greece.<sup>35</sup> In the meantime, the Dublin Regulation remains unchanged.<sup>36</sup> The first part of this note will examine the Dublin Regulation and its role in the European migration crisis. The second part will discuss the issues with the Dublin Regulation. The third part of this note will propose remedies for these issues and analyze proposals put forth by politicians, organizations, and scholars.

## I. BACKGROUND

The Dublin Regulation is a part of the EU's common asylum system.<sup>37</sup> Before the EU enacted the Dublin Regulation, a major approach to migration was the Schengen Agreement signed in 1985 by Germany, France, and three other European countries.<sup>38</sup> The Schengen Agreement removed any "obstacles to free movement at the common borders" of

---

35 Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and Repealing Regulation (EU) No 439/2010, *available at* [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-eu-agency-asylum-regulation-633\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-eu-agency-asylum-regulation-633_en.pdf). *See also*, European Commission, *The Hotspot Approach to Managing*

*Exceptional Migratory Flows*, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf). The term "hotspot country" is derived from the EU's "hotspot approach". The hotspot approach is defined as an approach where:

[t]he European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), Europol and Eurojust work on the ground with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU's external borders to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants.

*Id.*

36 Nikolaj Nielson, *Commission bins 'Dublin' asylum-reform proposal*, EU OBSERVER (Feb. 20, 2020), <https://euobserver.com/migration/147511>.

37 European Commission, Migration and Home Affairs, Common European Asylum System, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en). The Common European Asylum System is a European policy initiative that puts in place uniform minimum standards for asylum in the EU. *Id.* Aside from the Dublin Regulation, the European Refugee Fund (which was later replaced by the Migration and Integration Fund) and the Family Reunification Directive have come out of the policy. *Id.* *See* Regulation 516/2014, 2014 O.J. (L 150) 168 *available at* [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/financing/fundings/pdf/overview/regulation\\_eu\\_no\\_5162014\\_of\\_the\\_european\\_parliament\\_and\\_of\\_the\\_council\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/financing/fundings/pdf/overview/regulation_eu_no_5162014_of_the_european_parliament_and_of_the_council_en.pdf) (establishing the Asylum, Migration and Integration fund); Council Directive 2003/86, 2003 O.J. (L 251) 12 *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=EN> (extending the right to family reunification to refugees).

38 Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 14 June 1985, O.J. (L 239), 22/09/2000 13-18 [hereinafter Schengen Agreement], *available at* [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:42000A0922\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:42000A0922(01)). For further information on the history of the Schengen Agreement, *see* Schengen Visa Info, Schengen Agreement (Oct. 18 2018), <https://www.schengenvisa.info.com/schengen-agreement/>.

European countries.<sup>39</sup> The Schengen Agreement regulates internal migration.<sup>40</sup> The Dublin Regulation provided a solution for regulating migration originating in non-EU countries. It specifically regulates asylum applications from migrants seeking protection under the Geneva Convention, which outlines the rights of refugees and the obligations member states have to them.<sup>41</sup>

The Dublin Regulation was originally enacted by the EU in 1990.<sup>42</sup> One of the Dublin Regulation's main functions is to determine which member state is responsible for an asylum application.<sup>43</sup> Assigning responsibility to member states ensures that migrants are not in "orbit" because no member state will accept responsibility for his or her asylum application.<sup>44</sup> Should a member state determine that it is not responsible for an asylum seeker's application, the Dublin Regulation gives the member state the authority to return that asylum seeker to the member state that is actually responsible for their application.<sup>45</sup>

One of the Dublin Regulation's primary goals is to stop "asylum shopping," which is when asylum seekers submit asylum applications to member states with the most attractive benefits or member states more likely to accept them.<sup>46</sup> Instead of member states with weaker asylum systems and less opportunities being the ones overburdened with asylum applications, member states with stronger asylum systems and greater

---

39 Schengen Agreement, O.J. (L 239) 13.

40 *Id.*

41 For more information on the Geneva Convention, see *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, American Red Cross (April 2011), [https://www.redcross.org/content/dam/redcross/atg/PDF\\_s/International\\_Services/International\\_Humanitarian\\_Law/IHL\\_SummaryGenevaConv.pdf](https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf).

42 European Council, *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Deposited with the Government of Ireland)* (June 15, 1990), <http://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=1990090>.

43 Regulation 604/2013, *supra* note 9, at 42.

44 European Council on Refugees and Exiles, *The Road Out of Dublin: Reform of the Dublin Regulation*, <https://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-02.pdf> (last visited Nov. 5, 2019).

45 The process of sending a migrant back to the member state that is responsible for it is called a Dublin Transfer. European Commission, Migration and Home Affairs, *Dublin Transfer*, [https://ec.europa.eu/home-affairs/content/dublin-transfer\\_en](https://ec.europa.eu/home-affairs/content/dublin-transfer_en) (last visited Nov. 5, 2019). If the request for a Dublin Transfer is accepted, a "reasoned decision stating that the application is inadmissible in the State in which it was lodged and that there is the obligation to transfer the asylum seeker to the Member State responsible," must be sent to the applicant. European Court of Human Rights, *Dublin Cases*, [https://www.echr.coe.int/Documents/FS\\_Dublin\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf) (last visited Nov. 5, 2019).

46 FRATZKE, *supra* note 15, at 4.



opportunities will be overburdened as asylum applicants flock to them.<sup>47</sup> Asylum shopping leads to the opposite problem of the present system: potential increased strain on member states with the best benefits, like Germany.<sup>48</sup> At some point, those asylum systems will not be able to sustain the amount of migrants that apply there. They will end up with failing facilities and little funds, just like the asylum systems that migrants initially tried to avoid in the first place.<sup>49</sup>

Another goal was to prevent asylum seekers from submitting multiple applications to several member states with the hopes of increasing their chances of having their applications accepted or having many member states to choose from.<sup>50</sup> When asylum applicants do this, the system becomes backed up with duplicate applications, slowing down the asylum process for everyone.<sup>51</sup> In addition, it causes confusion since it is nearly impossible to figure out which member state is actually responsible for an asylum applicant who has submitted an application in more than one member state.<sup>52</sup>

The Dublin Regulation also sought to prevent member states from denying protection and pushing responsibility for asylum seekers onto other member states.<sup>53</sup> The principal of non-refoulement, or the refusal to send any asylum seeker to a state where he or she faces persecution, is recurrent in the Dublin Regulation.<sup>54</sup> For example, the Dublin Regulation requires that a Dublin Transfer must be precluded if substantial grounds show that an asylum seeker faces an actual risk of torture or inhumane

---

47 *Id.* at 11-13

48 *Infra* note 161.

49 *See infra* text accompanying notes 85-87 and 95-104.

50 FRATZKE, *supra* note 15, at 4.

51 Lauren Moses, *The Deficiencies of Dublin: An Analysis of the Dublin System in the European Union*, 6 JACKSON SCH. J. 6, 8 (Spring 2016).

52 *Id.* at 6.

53 FRATZKE, *supra* note 15, at 4.

54 Regulation 604/2013, *supra* note 9, at 31. The Non-Refoulement principle was first adopted at the 1951 Convention Relating to the Status of Refugees, which was a response to the increase in refugees created by World War II. The Convention prohibits any participating state from “expel[ing] or return[ing] (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” UN General Assembly, Convention Relating to the Status of Refugees art. 33, July 28 1951, 189 U.N.T.S 137. *See also* Linda Johansson, *The Impact of the Principle of Non-Refoulement on the Dublin Regulation and the Asylum Procedures Directive as Adopted by the European Union* (May 26, 2006) (unpublished Master Thesis, University of Oslo) (on file with Duo Research Archive, University of Oslo) (discussing the history behind the principle of non-refoulement and its implications).

treatment in the receiving state.<sup>55</sup> Non-refoulement protects asylum seekers from being sent to another member state arbitrarily.<sup>56</sup>

Since its enactment, the Dublin Convention, the original name of the regulation, has been reformed twice.<sup>57</sup> The latest reform, known as Dublin Regulation III, sought to increase the efficiency of the regulation and to ensure the needs of asylum seekers are met.<sup>58</sup> The European Parliament and Council of the European Union hoped to further the reach of the Common European Asylum System (CEAS) by enacting Dublin Regulation III.<sup>59</sup> The Dublin Regulation III somewhat achieved these goals in various ways. First, it addresses the pressure put on migration “hotspots” by establishing the European Asylum Support Office under CEAS, which provides asylum support teams through the Asylum Intervention Pool.<sup>60</sup> Second, it ensures free legal counsel for asylum seekers.<sup>61</sup> Third, it imposes strict limitations on the duration of detention

---

55 Pernilla Nordvall, *The Legality of Dublin Transfers* 15-16 (2015) (unpublished B.A. thesis, Lund University) (on file with Lund University Publications, Lund University); Regulation 604/2013, *supra* note 9, at 37; *See also*, *T.I. v. the United Kingdom*, 2000-III Eur. Ct. H.R. 435 at 18 (stating that a member state requesting a Dublin Transfer must take “appropriate regard to the existence of adequate safeguards . . . to avoid the risk of any inhuman or degrading treatment,” in the requested member state), *K.R.S. v. the United Kingdom*, 2008-IV Eur. Ct. H.R. 15 (holding that “in the absence of any proof to the contrary, it [is] to be presumed that [a requesting member state] would comply with its obligation to make the right of any returnee to lodge an application with the Court under Article 34 of the Convention . . . both practical and effective in respect of returnees . . .”).

56 Marlene L. Hakkebo, *Compliance of the Dublin Regulation with the Principle of Non-Refoulement*, UNIV. OF OSLO (2013), <https://pdfs.semanticscholar.org/dedf/41b793f5e54b205d1262c41d4e42753966b0.pdf>, at 21.

57 *See* Regulation 604/2013, *supra* note 9; Regulation 343/2003, 2003 O.J. (L 50) 1, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0343&from=EN>. *See also* Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, 1997 O.J. (C 254), *available at* [https://eur-lex.europa.eu/legal-content/EN/ALL/?jsessionid=TTTrpTsvTr1VHTFy9MgfSBLjMcpPCKDrmlcPFy6J4JhpSnhcxvrD2!-228044560?uri=CELEX:41997A0819\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?jsessionid=TTTrpTsvTr1VHTFy9MgfSBLjMcpPCKDrmlcPFy6J4JhpSnhcxvrD2!-228044560?uri=CELEX:41997A0819(01)).

58 UK VISAS AND IMMIGRATION, DUBLIN III REGULATION 6 (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/65666/dublin-iii-regulation-v1\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/65666/dublin-iii-regulation-v1_0.pdf).

59 Regulation 604/2013, *supra* note 9, at 31-32. *See also* EUROPEAN PARLIAMENT, *The Implementation of the Common European Asylum System* at 23 (May 2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL\\_STU\(2016\)556953\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU(2016)556953_EN.pdf).

60 Regulation 604/2013, *supra* note 9. *See also* Regulation 439/2010, 2010 O.J. (L 132) 11 *available at* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF> (establishing the European Asylum Support Office). The Asylum Intervention Pool consists of experts from every member state to assist the Support Office. Member states are also required to provide interpreters as part of their dispatch of experts.

61 European Commission, *supra* note 16.

in refugee camps and centers.<sup>62</sup> This list is not exhaustive.<sup>63</sup> Despite these changes, actual implementation has varied depending on the member state, leading to inefficient and divergent results.<sup>64</sup>

In 2014, a year after the Dublin Regulation was reformed, Europe experienced a surge of migrants entering its borders, many of whom were seeking asylum.<sup>65</sup> The migrants were mainly from Middle Eastern countries, especially Syria and Afghanistan.<sup>66</sup> The increase in migrants from Syria, who made up thirty-nine percent of migrants, stemmed from socio-political oppression in Syria.<sup>67</sup> Similarly, constant war and persecution have been cited as the causes of high numbers of Afghan migrants to the EU.<sup>68</sup> Migrants also came from countries in Africa, particularly Eritrea.<sup>69</sup>

---

62 *Id.*

63 *See, e.g., id.*

64 *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report* (Mar. 18, 2016), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_implementation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf). For example, the organizational structure of authorities dealing with Dublin Regulation cases differs in nearly every member state because the Dublin Regulation itself is silent on this issue. The many steps of an asylum procedure, including screening, conducting interviews, preparing and submitting transfer requests and implementing those transfers, are carried out by each member state in various ways. *Id.*

65 *See* Jeanne Park, *Europe's Migration Crisis*, COUNCIL ON FOREIGN RELATIONS (Sept. 23, 2015), <https://www.cfr.org/backgrounder/europes-migration-crisis>. *See also* EUR. PARL. MEMBER'S RESEARCH SERV., *Asylum in the EU: Facts and Figures* (2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551332/EPRS\\_BRI%282015%29551332\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551332/EPRS_BRI%282015%29551332_EN.pdf).

66 EUR. PARL, *supra* note 59, at 2.

67 Park, *supra* note 65. Syrians were escaping from civil war in Syria. By 2015, the civil war in Syria had been raging for nearly five years. The conflict had left more than one hundred thousand people dead and millions displaced. Further, the war has destroyed the Syrian economy and proliferated hyperinflation, making life for Syrian citizens miserable and unsustainable. For more background on the Syrian Civil War, *see* Zachary Laub, *Syria's Crisis and the Global Response*, COUNCIL ON FOREIGN RELATIONS (Sept. 11, 2013), <https://www.cfr.org/backgrounder/syrias-crisis-and-global-response>.

68 *See, e.g.,* Park, *supra* note 65. Afghanistan, the source of the second largest group of migrants entering Europe, has been at war for over four decades. Crippling poverty and a lack of opportunity has driven millions of Afghans to seek refuge in Europe. For more information on the crisis in Afghanistan, *see* Matthew Willner-Reid, *Afghanistan: Displacement Challenges in a Country on the Move*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/article/afghanistan-displacement-challenges-country-move>.

69 BBC NEWS, *supra* note 3. *See generally* Human Rights Council Rep. of the Detailed Findings of the Comm'n of Inquiry on Human Rights in Eritrea 409A/HRC/29/CRP.

Eritreans were fleeing gross human rights violations in Eritrea, including forced labor and imprisonment, under a totalitarian government.

The number of migrants more than doubled from 562,680 in 2014 to over 1.2 million in 2015.<sup>70</sup> Member states such as Italy, Greece and Hungary were overburdened by this increase because of their geographic proximity to many of the source countries.<sup>71</sup> These member states were often the state of first entry for migrants.<sup>72</sup> These countries were also identified as “hotspots” requiring extra assistance from the European Asylum Support System through the Dublin Regulation.<sup>73</sup>

Greece saw a 750% increase in the number of migrants entering the country from 2014 to 2015 because of its being a country on Europe’s border with easy access to the rest of Europe.<sup>74</sup> Nearly all those arriving on Greek shores were fleeing Syria, Iraq, and Afghanistan.<sup>75</sup> As migrants continued to flow onto the Greek islands, resources dwindled.<sup>76</sup> Refugee camps were described as filthy and falling apart, with many refugees having no roof over their heads.<sup>77</sup> Children were also at a high risk of being exploited and catching disease because of the inadequate facilities.<sup>78</sup> At the same time, Greece was recovering from its own financial crisis that plunged the country into staggering debt just a few years prior.<sup>79</sup> The crisis left Greece unable to adequately provide shelter and necessities for

---

70 Eurostat, *Record Number of Over 1.2 Million First Time Asylum Seekers Registered in 2015* (Mar. 4, 2016), <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6>.

71 Park, *supra* note 65.

72 *Id.*

73 *See* note 35 and the accompanying text.

74 Matina Stevis & Manuela Mescio, *How Money, Race and Religion Determine the Fate of Europe-Bound Migrants*, WALL ST. J. (Aug. 16, 2015), <https://www.wsj.com/articles/for-migrants-origins-often-determine-fate-1439769526>.

75 *Migrant 'Chaos' on Greek Islands - UN Refugee Agency*, BBC NEWS (Aug. 7, 2015), <https://www.bbc.com/news/world-europe-33818193>.

76 Niki Kitsantonis, *Greece's Biggest Migrant Camp Is a Mental Health Crisis, Aid Groups Say*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/world/europe/greece-migrant-camp-mental-health.html>.

77 Joanna Kakissis, *'Europe Does Not See Us As Human': Stranded Refugees Struggle in Greece*, NPR (Mar. 9, 2018, 5:01 AM), <https://www.npr.org/sections/parallels/2018/03/09/589973165/europe-does-not-see-us-as-human-stranded-refugees-struggle-in-greece>.

78 *Migrant 'Chaos' on Greek Islands - UN Refugee Agency*, *supra* note 75.

79 The Greek economy collapsed in 2009 due to excessive regulation, which prevented domestic growth. Rachael E. De Orio, Note, *Seeking Sanctuary Across the Sea: Why the Influx of Refugees and Asylum Seekers to Greece Requires Major Policy Changes*, 41 SUFFOLK TRANSNAT'L L. REV. 51, 60, 60 n.25 (2018). Ongoing corruption, like political parties pumping borrowed money into the public sector to gain political support, buried the country in debt. *Id.* at 60-61. The Greek government seemed to turn a blind eye to the crumbling economy. For more background on Greece’s financial crisis, *see generally* De Orio, *supra*.

migrants.<sup>80</sup> In 2015, several EU member states closed their borders to migrants, leaving many stranded in Greece and other border states.<sup>81</sup> Closing off these borders also proliferated the decrease in housing and other resources that migrants needed.<sup>82</sup> The Greek asylum system was also burdened, because it was understaffed.<sup>83</sup> As a result, asylum applications were often delayed and the process was lengthy.<sup>84</sup>

Greece has been criticized for its management of the migrant crisis, specifically the condition of migrant camps and detention centers.<sup>85</sup> In 2016, the European Commission made recommendations that Greece fully implement the Dublin Regulation and comply with its standards after the European Court of Human Rights (“ECHR”) and the European Court of Justice (“ECJ”) found evidence of human rights violations within the Greek asylum system.<sup>86</sup> These recommendations included establishing “open reception facilities” that are in adequate condition, ensuring that the Greek asylum system is adequately staffed, and providing access to free legal aid.<sup>87</sup>

Many of the migrants entering Hungary came in through Serbia, which is not an EU member state, making Hungary the first country of entry under the Dublin Regulation for hundreds of thousands of migrants.<sup>88</sup> After experiencing an over massive increase in asylum seekers in 2015, the Hungarian government built a four-meter-high fence on its border with Serbia.<sup>89</sup> Later that year, it built another fence along its border with

---

80 Press Release, United Nations High Comm’r for Refugees, UNHCR Warns of Deepening Refugee Crisis in Greece and Calls for Urgent and Bold Action (Aug. 7, 2015), <https://www.unhcr.org/en-us/news/press/2015/8/55c48ea69/unhcr-warns-deepening-refugee-crisis-greece-calls-urgent-bold-action.html>.

81 Sarah Almukhtar, Josh Keller & Derek Watkins, *Closing the Back Door to Europe*, N.Y. TIMES (lasted updated Oct. 16, 2015), <https://www.nytimes.com/interactive/2015/09/15/world/europe/migrant-borders-europe.html>. Hungary, Bulgaria and a few others closed their borders by erecting fences and using other means to stifle irregular migration.

82 Kakissis, *supra* note 77.

83 *Id.*

84 *Id.*

85 De Orio, *supra* note 79, at 51, 82-83. The European Court of Human Rights held Greece was in violation of Dublin Regulation Article III’s prohibition of degrading treatment because of the asylum seeker’s detention and living conditions. *M.S.S. v. Belgium*, 2011-I Eur. Ct. H.R. 255, 354-355.

86 European Commission Press Release IP/16/2182, Commission Adopts Second Recommendation Identifying Steps to Restore Dublin Transfers to Greece, (June 15, 2016).

87 *Id.*

88 Park, *supra* note 65.

89 Marton Dunai, *Hungary to Fence off Border with Serbia to Stop Migrants*, REUTERS (June 17, 2015, 6:02 AM), <https://www.reuters.com/article/us-hungary-immigration/hungary-to-fence-off->

Croatia.<sup>90</sup> In early 2016, Hungary declared a state of emergency, which it later extended into 2018,<sup>91</sup> and tightened its border control after both Serbia and Croatia closed their borders to migrants.<sup>92</sup> The reasoning behind these actions include the EU's failure to create a better plan for dealing with the influx of migrants and Greece's failure to stem the amount of migrants entering through Greece, many of which travel on from Greece to Hungary.<sup>93</sup> In addition, Hungary has defended its actions in the name of protecting its Christian roots since many of the migrants are Muslim, whom Hungarians believe bring an increased threat of terrorism.<sup>94</sup>

Italy, another major "hotspot," saw a sharp increase in migrants starting in 2014.<sup>95</sup> Migrants traveled to Italy through the Central Mediterranean passage, which became the most popular route to Europe.<sup>96</sup> Migrants taking this route usually bought their way onto tiny, smuggler-provided boats costing upwards of \$5,000.<sup>97</sup> Thousands of migrants died at sea especially after Italy's Mare Nostrum, a search-and-rescue program, was

---

border-with-serbia-to-stop-migrants-idUSKBN0OX17I20150617. The Schengen Borders Code allows member states to temporarily reintroduce internal border controls when there is a serious threat to public policy or internal security. European Comm'n, *Temporary Reintroduction of Border Control*, [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en) (last visited on Nov. 5, 2019)

90 Rick Lyman, *Hungary Seals Border with Croatia in Migrant Crackdown*, N.Y. TIMES (Oct. 16, 2015), [https://www.nytimes.com/2015/10/17/world/europe/hungary-croatia-refugees-migrants.html?\\_r=0](https://www.nytimes.com/2015/10/17/world/europe/hungary-croatia-refugees-migrants.html?_r=0).

91 *Orbán's Cabinet Again Extends State of Emergency Due to Migration Crisis*, DAILY NEWS HUNG. (Feb. 17, 2018), <https://dailynewshungary.com/orbans-cabinet-extends-state-emergency-due-migration-crisis/>. See also Press Release, Ministry of Interior, Hungarian government declares state of emergency due to mass migration (Mar. 9, 2016), <https://www.kormany.hu/en/ministry-of-interior/news/hungarian-government-declares-state-of-emergency-due-to-mass-migration>.

92 Cassandra Vinograd, *Europe's Refugee Crisis: Hungary Declares State of Emergency over Migrants*, NBC NEWS (Mar. 9, 2016, 9:58 AM), <https://www.nbcnews.com/storyline/europes-border-crisis/europe-s-refugee-crisis-hungary-declares-state-emergency-over-migrants-n534746>.

93 Park, *supra* note 65.

94 Steven Erlanger & Dan Bilefsky, *Migrant Chaos Mounts While Divided Europe Stumbles for Response*, N.Y. TIMES (Sept. 3, 2015), [https://www.nytimes.com/2015/09/04/world/europe/hungary-train-station-migrant-crisis.html?hp&action=click&pgtype=Homepage&module=a-lede-package-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2015/09/04/world/europe/hungary-train-station-migrant-crisis.html?hp&action=click&pgtype=Homepage&module=a-lede-package-region&region=top-news&WT.nav=top-news&_r=0). See also Nick Thorpe, *Migrant Crisis: Hungary Denies Fueling Intolerance in Media*, BBC NEWS (Dec. 22, 2015), <https://www.bbc.com/news/world-europe-35162515>. Hostility towards Muslims also manifested itself amongst Hungarian citizens who, in a survey conducted by the Median agency, voiced their fear of Muslims would become the majority in Europe and "impose their religion" on Europeans. *Id.*

95 Press Release, Int'l Org. for Migration, *Migrant Arrivals by Sea in Italy Top 170,000 in 2014*, (Jan. 16, 2015), <https://www.iom.int/news/migrant-arrivals-sea-italy-top-170000-2014>.

96 Park, *supra* note 65.

97 See Press Release, Int'l Org. for Migration, *supra* note 95.

shut down and replaced with Operation Triton.<sup>98</sup> Like Greece, Italy received a large amount of migrants because of its close proximity to Africa and the Middle East. However, migrants from Eritrea, Nigeria and sub-Saharan Africa made up the majority of migrants entering Italy.<sup>99</sup> In an effort to stem the number of arrivals, especially migrants attempting to reach Italy in smuggling boats, the Italian Government has worked out an agreement with the Libyan Government to voluntarily return migrants who do not qualify for asylum back to their home countries, even though migrants were escaping inhumane conditions in both Libya and their original countries.<sup>100</sup>

Italian detention centers have also been cited for human rights violations by several human rights organizations, including Amnesty International.<sup>101</sup> In fact, the ECHR held in *Khlaifia v. Italy* that Italy violated articles three through five of the European Convention on Human Rights when it detained migrants in unacceptable conditions at one of its detention centers and then sent them all back to Tunisia without examining every individual's case.<sup>102</sup> Migrants have also reported that officials in the detention centers used force and torture to get them to provide fingerprints mandated by the Dublin Regulation.<sup>103</sup> In 2018, Italy's Interior Minister began to block entry into Italy by migrants, challenging the EU to reform its policies so that border member states are not overburdened with the migrant crisis.<sup>104</sup>

---

98 Adam Taylor, *Italy ran an operation that saved thousands of migrants from drowning in the Mediterranean. Why did it stop?*, WASH. POST, Apr. 20, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/?utm\\_term=.8ae65a344510](https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/?utm_term=.8ae65a344510).

99 Park, *supra* note 65.

100 See *Italy Says Up To 10,000 Refugees Could Be Relocated to EU From Libya*, TRT WORLD Dec. 24, 2017, <https://www.trtworld.com/mea/italy-says-up-to-10-000-refugees-could-be-relocated-to-eu-from-libya-13583>. Libya has long been a "transit hub", where unscrupulous smugglers would sell spaces on boats headed to Europe to migrants from other countries; Stephanie Kirchgaessner & Lorenzo Tondo, *Italy's Deal With Libya to 'Pull Back' Migrants Faces Legal Challenge*, GUARDIAN (May 8, 2018), <https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations>.

101 *Italy Immigration Detention*, GLOB. DET. PROJECT, <https://www.globaldetentionproject.org/countries/europe/italy>.

102 *Khlaifia vs. Italy*, App. No. 16483/12, Eur. Ct. H.R. (2016).

103 HOTSPOT ITALY: HOW EU'S FLAGSHIP APPROACH LEADS TO VIOLATIONS OF REFUGEE AND MIGRANT RIGHTS 6 (2016), AMNESTY INT'L, <https://www.amnesty.org/download/Documents/EUR3050042016ENGLISH.PDF>.

104 See *supra*, notes 22-25.

In 2016, the European Commission responded to the migrant crisis by proposing to revise the Dublin Regulation a fourth time in what would be called “Dublin Regulation IV.”<sup>105</sup> The aim of the proposed recast is to reduce the number of migrants seeking refuge in the EU.<sup>106</sup> Dublin Regulation IV would implement stricter rules for migrants, including stringent sanctions on migrants when they travel to EU Member States illegally.<sup>107</sup> These rules are geared towards discouraging migrants from going to other member states and trying to file more than one asylum application or from coming to the EU in the first place because strict rules will prevent them from going to their preferred member state.<sup>108</sup> Another proposal, advanced by the European Parliament, is to establish a central asylum application collection effort.<sup>109</sup> Under this proposal, an asylum seeker’s application would be for protection provided by the EU and not by an individual member state.<sup>110</sup> From there, a central system would allocate responsibility to a specific member state.<sup>111</sup> Dublin IV Regulation has faced disapproval from advisory committees, national parliaments, and other stakeholders for being “inadequate,” not in compliance with certain principles, and for other shortcomings.<sup>112</sup> According to its critics, the Dublin Regulation IV fails to take into account the preferences of migrants and the conditions they face in certain member states.<sup>113</sup> Others, particularly Italy, Hungary and other eastern European member states, prefer a more local process over a centralized one.<sup>114</sup> Disagreement over the Dublin Regulation IV has prevented it from moving forward and becoming law.<sup>115</sup>

In addition to proposing a recast of the Dublin Regulation, the EU government has attempted to mediate the crisis in a number of other ways. In 2015, EU governments agreed to resettle 120,000 migrants from Italy

---

105 European Commission, *Examination of Applicants*, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en); European Council on Refugees and Exiles, *supra* note 44, at 2.

106 *Id.*

107 *Id.*

108 *See generally, id.*

109 EUROPEAN PARLIAMENT, *Reform of the Dublin System*, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS\\_BRI%282016%29586639\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%29586639_EN.pdf) (last visited Nov. 5, 2019).

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*



and Greece in twenty-three other member states.<sup>116</sup> The resettlement, although hotly contested by five member states, was set to take place over a period of two years.<sup>117</sup> The European Commission later conceded that the relocation effort “was not working”.<sup>118</sup> Another controversial scheme is the “hotspot” approach.<sup>119</sup> While the “hotspot” approach identified member states in need of assistance with irregular migratory flows and sent aid in various forms to those member states, it is still rife with flaws.<sup>120</sup>

## II. PROBLEM

The migration crisis has clearly had a strong impact on both the migrants seeking a better life in the EU and the EU member states, particularly Greece, Hungary, and Italy.<sup>121</sup> The Dublin Regulation is often blamed for many of the issues surrounding the migrant crisis.<sup>122</sup> First, it fails to protect migrants entering the EU seeking asylum.<sup>123</sup> Secondly, it is inequitable in its distribution of responsibility for asylum applications amongst member states, leaving just a few member states to handle the bulk of the work associated with the migrant crisis.<sup>124</sup> Third, the Dublin Regulation is overly expensive and its benefits do not appear to exceed its benefits.

The Dublin Regulation guarantees that every asylum seeker’s application will be reviewed.<sup>125</sup> However, many asylum seekers wait up to

---

116 Ian Traynor & Patrick Kingsley, *EU Governments Push Through Divisive Deal to Share 120,000 Refugees*, GUARDIAN, (Sep. 22, 2015), <https://www.theguardian.com/world/2015/sep/22/eu-governments-divisive-quotas-deal-share-120000-refugees>.

117 *Id.*

118 Press Release, European Parliament, MEPs Debate Relocation, Hotspots, Schengen and Dublin Rules With Avramopoulos (Jan. 13, 2016) (on file with author); UN Refugee Agency, *Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively*, <https://www.unhcr.org/569fad556.pdf>. By the second year of the plan, only a little over three hundred of the agreed 120,000 migrants had been relocated from Italy and Greece to other member states.

119 *See supra* note 35.

120 Stephanie J. Silverman, *The EU’s Hotspot Approach: Questionable Motivations and Unreachable Goals*, E-International Relations (Apr. 17, 2018), <https://www.e-ir.info/2018/04/17/the-eu-hotspot-approach-questionable-motivations-and-unreachable-goals/>.

121 Fratzke, *supra* note 15, at 8-20.

122 Patrick Smyth, *Migration and ‘Dublin Regulation’ Concerns Continue to Simmer*, IRISH TIMES, May 10, 2018. <https://www.irishtimes.com/news/world/europe/migration-and-dublin-regulation-concerns-continue-to-simmer-1.3489383>.

123 Fratzke, *supra* note 15, at 16-20.

124 *See supra* notes 69-72 and accompanying text.

125 PAUL McDONOUGH, MAGDALENA KMAK, & JOANNE VAN SELM, SHARING RESPONSIBILITY FOR REFUGEE PROTECTION IN EUROPE: DUBLIN RECONSIDERED 4-5 (2008).

six months before their applications are reviewed, which is a direct contradiction of the Dublin Regulation's objective of "rapid processing of applications for international protection."<sup>126</sup> The Dublin Regulation slows down the asylum process because for every application filed, it must be determined what member state is responsible for it and whether, if applicable, a Dublin Transfer is needed.<sup>127</sup> Further, some member states treat certain groups differently when examining their asylum applications, leading to vastly different results based on where the application is filed.<sup>128</sup> For example, Syrian asylum seekers filing an application in Italy or Germany were granted asylum over ninety percent of the time in 2015.<sup>129</sup> On the other hand, those filing an application in Hungary were only successful about sixty percent of the time.<sup>130</sup> These results hurt the migrants seeking asylum because they have very little say in where they must file an application and thus must put their fates in the hands of whatever country they happen to enter first.<sup>131</sup>

Human rights violations such as detainment in dilapidated migrant centers, separation of family members, inadequate protection for children, and lack of healthcare for the ill are prevalent in a number of member states, especially in the hotspots of Italy and Greece.<sup>132</sup> The Dublin Regulation proliferates this treatment because it overburdens hotspot member states who cannot financially support building more adequate

---

126 *Id.* See also Regulation 604/2013, *supra* note 9, at 31.

127 MCDONOUGH, *supra* note 125, at 11-12.

128 *Id.* at 5.

129 Martina Burmann & Madhinee Valeyatheepillay, *Asylum Recognition Rates in the Top 5 EU Countries* 49 (2017), <https://www.cesifo-group.de/DocDL/dice-report-2017-2-burmann-valeyatheepillay-june.pdf>.

130 *Id.*

131 Blanca Garcés-Masareñas, *Why Dublin Doesn't Work*, BARCELONA CTR. FOR INT'L AFFAIRS (Nov. 2015), [https://www.cidob.org/en/publications/publication\\_series/notes\\_internacionales/n1\\_135\\_por\\_que\\_dublin\\_no\\_funciona/why\\_dublin\\_doesn\\_t\\_work](https://www.cidob.org/en/publications/publication_series/notes_internacionales/n1_135_por_que_dublin_no_funciona/why_dublin_doesn_t_work).

132 See *supra* notes 76-82, 86-87, 101-103 and accompanying texts; MCDONOUGH, *supra* note 125, at 10. The Dublin Regulation provides that the best interests of children should be a primary consideration when applying the regulation, in accordance with the 1989 United Nations Convention on the Rights of the Child. Regulation 604/2013, *supra* note 9, at 32. A child's best interest is determined by taking into account the child's "well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background." *Id.* In addition, unaccompanied minors, who are particularly vulnerable, are to be afforded special protection. *Id.* See Karolina Tagaris, *Refugees' Health Problems in Greece Mostly Unmet: Medical Charity*, REUTERS (Oct. 3, 2017), <https://www.reuters.com/article/us-europe-migrants-greece-health/refugees-health-problems-in-greece-mostly-unmet-medical-charity-idUSKCN1C81KW>.

facilities or provide healthcare for all of the migrants.<sup>133</sup> These member states are forced to crowd migrants into detention centers beyond their capacity.<sup>134</sup> While the EU has supplied aid in the form of funding and staffing, it has not been enough to keep up with the demand.<sup>135</sup>

Because migrants are made aware that the country of first entry (i.e. the country where they are first fingerprinted) is the member state that will be responsible for their asylum application under the Dublin Regulation, the migrants may avoid this process by traveling to other countries in order to get to their preferred Member State or not going through the legal asylum process at all.<sup>136</sup> This leaves them unprotected from human trafficking and other exploitations.<sup>137</sup> Criminal networks play a major role in the exploitation of migrants attempting to get around being fingerprinted in the country of first entry.<sup>138</sup> Criminal organizations provide migrants with fake documents that allow them to travel to and work in other countries, but often at a hefty price.<sup>139</sup> These criminal organizations often use blackmail and threats to control the migrants they help enter illegally.<sup>140</sup> When a migrant cannot pay right away, these organizations hold a debt over their heads.<sup>141</sup> Another service criminal organizations provide is

---

133 See *supra* text accompanying notes 25-26, 79-81, 101-104.

134 Jon Henley, *EU's Migrant Centres Could Breach Human Rights, Say Campaigners*, GUARDIAN (June 29, 2018), <https://www.theguardian.com/world/2018/jun/29/eus-migrant-centres-could-breach-human-rights-say-campaigners>; See also European Court of Auditors, *EU Response to the Refugee Crisis: the 'Hotspot' Approach*, at 27 (June 2017), [https://www.eca.europa.eu/Lists/ECADocuments/SR17\\_6/SR\\_MIGRATION\\_HOTSPOTS\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR17_6/SR_MIGRATION_HOTSPOTS_EN.pdf) (reporting on the overcrowded, desolate migrant centers in Greece). The centers in Greece are so inadequate that migrants have been forced to create makeshift dwellings around the centers. For example, Moria, Greece's largest detention center faces closure amid reports that it holds nearly triple its official capacity of 2,000. Public health inspectors reported high risks of disease transmission because of the conditions at the center. The UN Refugee Agency has attempted to step in by recommending that Greece transfer some of the migrants to mainland Greece. UNHCR Briefing Notes, UNHCR urges Greece to Address Overcrowded Reception Centres on Aegean Islands (Aug. 31, 2018) (summarizing the conditions at Moria and recommendations for Greece).

135 See Matteo Garavoglia, *Why Europe Can't Handle the Migration Crisis*, BROOKINGS (Oct. 5, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/10/05/why-europe-cant-handle-the-migration-crisis/>.

136 MCDONOUGH, *supra* note 125, at 16.

137 *Id.*

138 Eliza Galos, Laura Bartolini, Harry Cook & Naomi Grant, *Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes* 5 (2017), [https://publications.iom.int/system/files/pdf/migrant\\_vulnerability\\_to\\_human\\_trafficking\\_and\\_exploitation.pdf](https://publications.iom.int/system/files/pdf/migrant_vulnerability_to_human_trafficking_and_exploitation.pdf).

139 *Id.* at 18.

140 *Id.*

141 *Id.*

transportation to other member states.<sup>142</sup> The methods of transport used often carry health risks.<sup>143</sup>

Although one of the Dublin Regulation's aims was to promote member state solidarity and equitable distribution of responsibility for asylum applications, it has done the opposite.<sup>144</sup> Member states along Europe's southern and eastern borders saw more migrants entering than leaving their countries, as compared to the more interior states, which saw more migrants leaving through Dublin transfers than entering.<sup>145</sup> Allowing member states to send back migrants to their original country of entry exacerbates the pressure on hotspot countries because even without the transfers, they must deal with an extraordinary amount of incoming migrants.<sup>146</sup> In 2015, for example, Italy received almost 25,000 transfer requests from other countries.<sup>147</sup> The large number of external transfer requests reflects Italy's inability to handle the amount of migrants entering the country, as many of them were able to leave Italy and apply for asylum elsewhere without being registered and fingerprinted.<sup>148</sup>

---

142 *Id.* at 5. See also Vladimir Banic and Saphora Smith, *Inside Europe's People-Smuggling Networks: A journey from Afghanistan to Germany*, NBC NEWS (July 19, 2018), <https://www.nbcnews.com/news/world/inside-europe-s-people-smuggling-networks-journey-afghanistan-germany-n888926> (detailing the journey of a migrant who was smuggled from one member state to another to reach his intended destination). The billion-dollar smuggling industry often uses trucks to transport migrants between member states. The trucks are usually packed with migrants who do not always survive the trip. See Carlo Angerer and Alastair Jamieson, *71 Dead Refugees Found in Truck on Austria Highway: Officials*, NBC NEWS (Aug. 28, 2015), <https://www.nbcnews.com/storyline/europes-border-crisis/71-dead-refugees-found-truck-austria-highway-officials-n417536> (migrants smuggled in a refrigerated truck are abandoned and left to die); *Migrant Truck Crash Kills 22 in Turkey*, VOA NEWS (Oct. 14, 2018), <https://www.voanews.com/a/migrants-killed-when-truck-plunges-into-river-in-turkey/4612762.html> (truck accident kills several migrants smuggled from Turkey).

143 Galos, *supra* note 138, at 5.

144 Fransje Molenaar, Irregular migration to the EU, in CLINGENDAEL STATE OF THE UNION 2018: TOWARDS BETTER EUROPEAN INTEGRATION 48 (Jan. 2018), available at [https://www.clingendael.org/sites/default/files/2018-01/Report\\_Clingendael\\_State\\_of\\_the\\_Union\\_2018.pdf](https://www.clingendael.org/sites/default/files/2018-01/Report_Clingendael_State_of_the_Union_2018.pdf).

145 MCDONOUGH, *supra* note 125, at 13.

146 *Id.*

147 Andreas Høglund, *The Implementation of the Dublin Regulations in Greece, Italy and Spain* 1, 61 (2017) (unpublished Master thesis, University of Bergen) (on file with Bergen Open Research Archive, University of Bergen).

148 See *id.* at 61. Migrants must be fingerprinted when applying for asylum in the EU. Chloe Lyneham, *EU's Migrant Fingerprinting System EURODAC Under Review*, DEUTSCHE WELLE (Sep. 11, 2017), <https://www.dw.com/en/eus-migrant-fingerprinting-system-eurodac-under-review/a-41311572>. The fingerprints are then stored in the EURODAC central system to avoid asylum shopping and multiple applications from an asylum seeker. It also determines which member state is responsible for an applicant. *Id.* Incoming migrants avoid being fingerprinted in order to travel on to another member state. Migrants who have already been fingerprinted and want to file another application have

Hotspot countries also tend to be countries with the least developed asylum systems and the least wealth<sup>149</sup> amongst the member states.<sup>150</sup> This is evidence that these particular member states are burdened not only because of the number of entering migrants, but because they simply cannot afford to support the large number of migrants and are unprepared to do so.<sup>151</sup> The EU sends assistance to hotspot countries in the form of identification, registration, and removal assistance through FRONTEX (The European Border and Coast Guard Agency); assists with the registration of asylum claims, preparation of files, and relocation of asylum seekers through EASO (European Asylum Support Office); and helps investigate and prosecute crimes through EUROPOL (European Union Agency for Law Enforcement Cooperation) and EUROJUST.<sup>152</sup> However, the aid the EU has provided so far has not been enough.<sup>153</sup>

The Dublin Regulation attempted to stop migrants from applying for asylum in more than one member state by making the country of first entry responsible for applicants.<sup>154</sup> Migrants are still applying in more than one

---

damaged their fingers, sometimes by burning them, in order to appear as a new person. Andrew Higgins, *Migrants Who Survived Shipwreck Are Grateful, but Disillusioned*, N.Y. TIMES (Sept. 7, 2015), <https://www.nytimes.com/2015/09/08/world/europe/migrants-europe-lampedusa-sinking.html>. See also FRONTEX, *Risk Analysis for 2016*, (2016), [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf) (outlining the difficulties border states encounter in fingerprinting and registering incoming migrants).

149 See also Garavoglia *supra* note 135.

150 Høglund, *supra* note 147, at 61.

151 *Id.*

152 Frontex, the EU's Border and Coast Guard Agency, instituted Operation Triton in 2014 to assist Italy with rescuing migrants at sea. It also coordinated requests to other member states for aircraft and patrol vessel donations as well as staff to help with the rescue effort. See Memorandum from the European Comm. on Frontex Joint Operation 'Triton' – Concerted Efforts to Manage Migration in the Cent. Mediterranean (Oct. 7, 2014) (on file with author). EASO is an agency created by the Dublin II Regulation to enhance CEAS. It helps member states with the asylum process by providing practical, technical, and operational support. *About Us*, EASO, <https://www.easo.europa.eu/about-us> (last visited Jan. 12, 2019). EUROPOL's central role during the crisis has been investigating migrant smuggling, which manifests itself in the form of false documentation, visa free travel and more, and is still rampant in 2018. In 2016, EUROPOL established the European Migrant Smuggling Centre to support "cross-border investigations to disrupt and prosecute organised crime groups." Press Release, European Union Agency for Law Enforcement Cooperation, All You Need To Know About Migrant Smuggling in the EU (Apr. 20, 2018) (on file with author). EUROJUST is an EU agency composed of prosecutors, magistrates and law enforcement agents from each member state. Its primary goal is to investigate and prosecute serious organized crimes. *History of EUROJUST*, EUROJUST, <http://www.eurojust.europa.eu/about/background/Pages/history.aspx>.

153 See Garavoglia *supra* note 135.

154 See *supra* notes 46-47 and accompanying text.

country though, despite the Dublin Regulation's rules.<sup>155</sup> The result is "inefficiencies, duplicate files, delays and additional costs."<sup>156</sup> Lodging multiple applications in multiple countries is also often perceived as abuse of the asylum system and consequently reduces political and public support for providing asylum.<sup>157</sup>

Critics charge the Dublin Regulation with ignoring the migrants' wishes and therefore being inefficient.<sup>158</sup> Migrants often have a preference based on language, whether they know people in the member state, and job prospects.<sup>159</sup> Differences in reception in each member state also influence migrants' wishes.<sup>160</sup> Migrants are well aware of the conditions in border countries like Italy and Greece and often attempt to go to countries like Germany where migrants and refugees are more readily recognized by the government and where there are more opportunities.<sup>161</sup> The Dublin

---

155 Anja Radjenovic, *Secondary Movements of Asylum- Seekers In The EU Asylum System*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Oct. 2017), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS\\_BRI\(2017\)608728\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf) (statistics for 2016 show that the number of migrants submitting multiple applications increased from 2015).

156 *Id.* at 3.

157 U.N. High Comm'r for Refugees, *Onward Movement of Asylum-Seekers and Refugees: Discussion paper prepared for the Expert Roundtable on Onward Movement 1-2* (2015), <http://www.unhcr.org/562f81c39.pdf>.

158 Mascareñas, *supra* note 131. Critics also dub the Dublin Regulation as coercive at its core with high human costs for migrants seeking asylum. Ska Keller et al., *The Green Alternative to the Dublin System: A Preference Based Allocation System for Asylum Seekers Within the EU 3* (Feb. 2016), [https://www.skakeller.de/fileadmin/material/Migration/pdf/DublinPaper\\_2016\\_EN.pdf](https://www.skakeller.de/fileadmin/material/Migration/pdf/DublinPaper_2016_EN.pdf). Even though the Dublin Regulation states that family and social ties will be taken into account, the decision to accept an asylum seeker is ultimately a subjective one based on the preferences of the member states. *Id.* at 3-4; *see also* Regulation 604/2013, *supra* note 9 at 39., at 39 (stating that Member states should take into account family and social ties). The Greens, a political group within the EU Parliament, has suggested treating migrants more like people, rather than goods being transported across state lines by creating a Dublin Regulation that is built around migrants' preferences. Keller, *supra*.

159 Mascareñas, *supra* note 131, at 2.

160 Jan-Paul Brekke and Grete Brochmann, *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation*, 28 J. REFUGEE STUD. 145 (2015). Integrating a largely minority and Muslim population into many European countries is one of the biggest difficulties imposed by the migrant crisis. *See* Park, *supra* note 65. European citizens in countries like Denmark and France have expressed concern over the admittance of Middle Eastern and African migrants after the terrorist shootings in Paris and Copenhagen in early 2015. *Id.* Other countries have shown a strong preference for non-Muslim migrants. Slovakia announced that it would only accept Christian refugees in 2015. *Id.* Both Hungary and Poland have also used anti-Muslim rhetoric in describing the criteria used for asylum decisions. *Id.* *See also supra* text accompanying note 90.

161 Germany is one of the most desired member states for migrants. Germany has the largest economy in Europe and the second lowest unemployment rate, making it an easy economic choice. *Which Member States have the largest share of EU's GDP?*, EUROSTAT (May 11, 2018)

Regulation incorrectly assumes that migrants are indifferent to where they are granted asylum.<sup>162</sup>

Finally, the Dublin Regulation is very expensive.<sup>163</sup> The Dublin Regulation incurs several direct and indirect costs.<sup>164</sup> Some of its direct administrative and procedural costs include staff, IT systems such as EURODAC, migrant transfers, and court fees.<sup>165</sup> Indirect costs are comprised of accommodations, healthcare, and return fees for denied asylum applications.<sup>166</sup> The overall costs were estimated to be one billion euros in 2014.<sup>167</sup> While it is difficult to determine the exact costs imposed by the Dublin Regulation on a country-by-country basis,<sup>168</sup> the evidence suggests that the costs are crippling to less wealthy member states.<sup>169</sup>

---

<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1?inheritRedirect=true>; *Unemployment Statistics*, EUROSTAT (Nov. 2018) [https://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics). Germany's Asylum-Seekers' Benefits Act requires it to provide food, healthcare accommodations, clothes, and "essential personal needs". Asylbewerberleistungsgesetz [AsylbLG] [Asylum-Seekers' Benefits Act], Jun. 30, 1993, BUNDESGESETZBLATT [BGBl.] at 57 2022 (Ger.). See also Rebecca Staudenmaier, *Refugee Benefits in Germany are 'Quite High,' Interior Minister de Maiziere Says*, DEUTSCHE WELLE (Sept. 9, 2017), <https://www.dw.com/en/refugee-benefits-in-germany-are-quite-high-interior-minister-de-maiziere-says/a-40426704>.

162 Mascareñas, *supra* note 131.

163 *Id.*

164 Sheila Maas et. al., *Evaluation of the Dublin III Regulation* 1, 11 (Dec. 4, 2015), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf).

165 *Id.* at 11. Dublin Transfers are the most expensive part of the Dublin Regulation, with escorted/supervised transfers being the costliest form of transport. See Fratzke, *supra* note 15, at 15.

166 Maas, *supra* note 164. Member states that detain migrants regularly have higher costs than those that do not. Fratzke, *supra* note 15, at 16. Further, detention costs make up one of the highest expenditures for member states that utilize detention centers. *Id.*

167 Maas, *supra* note 164, at 11.

168 Fratzke, *supra* note 15, at 15-16.

169 See also Garavoglia *supra* note 135.

### III. APPROACH

The Dublin Regulation should be reformed a fourth time because it does not conform with the EU's migration goals.<sup>170</sup> In addition, the "state of first entry" rule should be invalidated because it places an unfair burden on a minority of member states.<sup>171</sup> In its place, a new rule that equitably distributes responsibility should be enacted. For there to be equitable distribution, the reformed Dublin Regulation should give each member state a minimum number or percentage of asylum seekers it is responsible for based on the ability of its asylum system to meet the needs of asylum seekers, the member state's wealth, and the overall number of migrants entering the EU.

These factors are appropriate for determining a member state's responsibility for a number of reasons. First, a country with an efficient asylum system is better equipped to assist migrants.<sup>172</sup> It follows that, those member states can probably support more migrants than other member states. Second, as has been seen in Greece, a country's wealth affects both the country's reception of migrants as well as the efficiency of its asylum system.<sup>173</sup> Wealthier countries, who in the past took on less responsibility than less wealthy countries, should be responsible for a larger share of the migrants entering Europe and applying for asylum.<sup>174</sup> Finally, the overall number of migrants entering the EU should be a factor, because this number has fluctuated over the past few years.<sup>175</sup> In fact, the numbers have dropped in 2018.<sup>176</sup> The minimum number of asylum seekers that each member states accepts responsibility for should be adjusted semi-annually or annually to reflect any changes in the previously

---

170 See also *supra* text accompanying notes 101-109.

171 See *supra* notes 15-16 and accompanying text.

172 Germany, Sweden and France are amongst the member states regarded to have excellent asylum systems. Diana Hodali & Astrid Prange, *Asylum Benefits in the EU: How Member States Compare*, DEUTSCHE WELLE (June 19, 2018), <https://www.dw.com/en/asylum-benefits-in-the-eu-how-member-states-compare/a-44298599>. See also *supra* note 157.

173 See *supra* notes 79-80 and accompanying text.

174 The exception to this is Germany, which opened its borders to over a million migrants regardless of whether Germany was the state of first entry. Adam Taylor, *Germany's Small, Yet Important Change to the Way it Treats Syrian Refugees*, WASH. POST (Aug. 26, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/08/26/germanys-small-yet-important-change-to-the-way-it-deals-with-syrian-refugees/>.

175 Migration to Europe in Charts, BBC NEWS (Sept. 11, 2018), <https://www.bbc.com/news/world-europe-44660699>. More than 800,000 migrants entered Greece in 2015. That number has been reduced to less than 21,000 in 2018. Italy's numbers have also decreased to similar levels, receiving about 20,000 migrants in 2018. *Id.*

176 *Id.*



mentioned factors. A maximum is not encouraged, because it can lead to many people being shut out of the asylum process.<sup>177</sup> Also, it is impossible to know how many migrants will enter the EU seeking asylum.<sup>178</sup> Estimates could be incorrect, especially because of the migrants' lack of documentation and illegal border-crossing by migrants.<sup>179</sup>

Equitably distributing responsibility for asylum applications solves the issue of border states being overwhelmed, which leads to asylum officials in those member states not registering and fingerprinting migrants or getting backed up with applications, slowing down the process.<sup>180</sup> Equitable distribution also disincentives member states from building fences or closing off their borders.<sup>181</sup> Even if there are a large number of migrants entering a member state due to its location at Europe's external border, the majority of migrants will not stay in that country. Their claims and applications would be sent to the country responsible for them and will result in either transfer to the member state where the asylum seeker's application is pending, has been accepted, or has been denied. In the case where an asylum seeker's application has already been denied, the responsible member state would have responsibility of sending the applicant back to their home country.<sup>182</sup>

Equitable distribution of responsibility would also solve the problem of overcrowding in hotspot migrant centers, thus reducing the possibility of human rights violations. Much of the concern over the condition of migrant centers, such as inadequate space, food, and healthcare, is tied to the extraordinary amount of migrants being sent to them.<sup>183</sup> With fewer migrants to support, these migrant centers would likely have sufficient room and accommodations so that migrants are given adequate care.

---

177 Melissa Eddy, *Germany's Angela Merkel Agrees to Limits on Accepting Refugees*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/world/europe/germany-merkel-refugees.html>. In 2017, Germany agreed to limit the number of migrants allowed to enter the country and apply for asylum to 200,000. *Id.* This decision came after Germany suspended the Dublin Regulation in 2015, allowing over a million migrants into Germany despite what their state of first entry was. *Id.* This angered many Germans and is partly responsible for the rise in popularity of far-right political parties. *Id.*

178 *Migration and Asylum*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, <https://www.europarl.europa.eu/thinktank/infographics/migration/public/index.html?page=intro> (last visited Nov. 5, 2019).

179 *Id.*

180 Moses, *supra* note 51, at 12-13.

181 Moses, *supra* note 51, at 11.

182 Regulation 604/2013, *supra* note 9.

183 *See supra* text accompanying note 120-22.

Another alternative to the “first entry” rule is to allow migrants to list their preferences upon registration. This will likely reduce the number of multiple applications submitted by migrants and illegal entrances into other member states. As previously discussed, migrants have preferences based on a number of factors, including language and job prospects.<sup>184</sup> These wishes should be respected. Some European organizations have suggested possible approaches to respecting migrants’ preferences. For example, Pro Asyl, a German pro-immigration organization, proposed that the free choice of the applicants be used for distribution by replacing the country of first arrival with that of the applicant’s first choice.<sup>185</sup> Migrants who enter the EU through another country other than their first choice, would be given a permit and funding to travel within Europe to their intended destination.<sup>186</sup> As attractive as this proposal seems, it can lead to another type of inequitable distribution between countries, one where countries with better reception and wealth will be doing the most lifting.<sup>187</sup> Pro Asyl recommends that compensation be offered to these countries.<sup>188</sup> If the costs of this approach are much less than those of the current Dublin Regulation rules, it may be worth looking into. Other approaches to taking into account the preferences of migrants include instituting a quota that

---

184 Mascareñas, *supra* note 131.

185 Memorandum, Pro Asyl, For a Free Choice of Host Country in the EU Respecting Refugees’ Interests (Aug. 2015), [https://www.proasyl.de/wp-content/uploads/2015/12/PRO\\_ASYL\\_Memorandum\\_free\\_choice\\_english\\_June\\_2015.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Memorandum_free_choice_english_June_2015.pdf). Pro Asyl addressed the issue of too many migrants concentrating in just a few member states. *Id.* Many migrants seek to end up in member states like Germany and the United Kingdom because they have elite asylum systems. *Id.* These member states developed a tradition of migration after the large influx of labor migrants entered their borders in the 1950s in search of work. Christof Van Mol & Helga de Valk, *Migration and Immigrants in Europe: A Historical and Demographic Perspective*, in INTEGRATION PROCESSES AND POLICIES IN EUROPE 31 (Blanca Garcés-Mascareñas, Penninx R. eds., 2016). This familiarity with large scale migration has allowed these member states to engineer asylum systems that could handle the numbers arriving in the 2015 migration crisis. Pro-Asyl at 14-15. Thus, other member states must be allowed more time to develop the necessary structures that are similar to those in the highly sought out member states and can handle the high volume of migration, otherwise the standards of reception laid down by European law will continue to be unattainable and migrants will continue to seek out member states with the best reception. *Id.*

186 Memorandum, Pro Asyl, Allocation of Refugees in the European Union: For an Equitable, Solidarity - Based System of Sharing Responsibility (2013), [https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum\\_Dublin\\_engl.pdf](https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum_Dublin_engl.pdf).

187 *Id.*

188 *Id.* at 7. Pro Asyl suggested that a compensation fund be set up for receiving member states to incentivize more member states to improve their asylum procedures and reception conditions. *Id.*

balances the preferences of both the refugees and each member state and allowing the free movement of migrants within the EU.<sup>189</sup>

Border states will more than likely always receive a disproportionate number of migrants entering to that of interior states, because they are more convenient for migrants to get to.<sup>190</sup> Whether migrants stay in a border state or move on to another country, resources are needed in the border states, like Italy, for when these migrants arrive.<sup>191</sup> Increased, targeted funding should be sent to the border states to help maintain migrant centers and help with registering or transferring migrants. This suggestion, however, is likely to be negatively received since the Dublin Regulation is already costly to administer.<sup>192</sup> While it solves the problem of inadequate resources for migrants, it would increase costs. In addition to funding, more manpower is needed to process applications that are already in the system. The lack of staffing has led to lengthy asylum application processes.<sup>193</sup> As with providing more financial aid to member states, this suggestion will increase the Dublin Regulation's staggering costs.

Increasing resources will likely decrease the number of migrants leaving poor conditions in border states and illegally entering interior member states in search of better conditions. The same is true if the asylum centers are better staffed. Migrants will not feel as much of a need to leave or file multiple asylum applications if applications are being processed much faster. Border states will be less likely to allow migrants to fall through the cracks because of no funding and lack of staffing. There would be less tension among the member states and protesting among the

---

189 Rapoport et al., *Tradable Refugee-admission Quotas: a Policy Proposal to Reform the EU Asylum Policy* (European Univ. Inst., Working Paper RSCAS 101, 2014), [http://cadmus.eui.eu/bitstream/handle/1814/33097/RSCAS\\_2014\\_101.pdf](http://cadmus.eui.eu/bitstream/handle/1814/33097/RSCAS_2014_101.pdf) (Proposing a Tradable Refugee Quota System that takes into account both migrants' preferences for particular member states and member states' preferences for certain types of migrants). This system would allow European Governments to decide how many migrants they each want to receive commensurate with the costs of receiving them. *Id.* After coming up with a quota, the governments have the option of trading quotas with each other. They can opt to receive migrants in excess of their quota at a given price and vice versa; Guild et al., *Enhancing the Common European Asylum System and Alternatives to Dublin* (2015), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf) (advocating for the free movement of refugees after being granted asylum).

190 *See supra* text accompanying notes 71-73.

191 Dan Ruetenik, *Italy Overwhelmed*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/world/europe/italy-overwhelmed-migrant-crisis.html>.

192 *See supra* text accompanying notes 163-169.

193 *See supra* notes 71-73 and accompanying text.

citizens of the member states that is often influenced by the lack of assistance with the crisis from the EU and other member states.

The EU has already increased staffing during the height of the crisis, but this did little to ease the burden.<sup>194</sup> Increased funding and staffing should be requisite to the severity of the crisis.<sup>195</sup> Now that there has been a decrease in migrants, these resources are not as necessary as they were back in 2015 and 2016.<sup>196</sup> However, the EU should be better equipped with these resources for the next potential wave of migrants.

Another alternative would be to completely repeal the Dublin Regulation. All member states should convene and decide on a universal system that is premised on burden sharing and actually protecting migrants fleeing war and persecution. The Dublin Regulation's original goals should remain intact, but a more efficient means of achieving those goals is necessary.<sup>197</sup> Including some of the suggestions discussed previously in a new system is advisable.

#### CONCLUSION

In order to preserve unity within the EU and provide sufficient support to migrants in legitimate need of humanitarian protection, the EU must consider reforming its current migration system. The Dublin Regulation has failed to adequately provide migrants with a fair chance at asylum because it overburdens the member states with the most incoming migrants, thus opening the floodgates to delayed asylum application processes and arbitrary denials of asylum.<sup>198</sup> Migrants await decisions on their applications in dilapidated, overcrowded detention centers that they often describe as "prisons."<sup>199</sup> However, the blame cannot be placed on "hotspot" member states. They lack proper resources to begin with, and

---

194 *Migrant Crisis: One Million enter Europe in 2015*, BBC NEWS (Dec. 22, 2015), <https://www.bbc.com/news/world-europe-35158769> (EU beefs up Frontex border patrol staff in Greece); Sergio Carrera et al., *The EU's Response to the Refugee Crisis*:

*Taking Stock and Setting Policy Priorities* 7 (2015) (EU member states supply nearly three hundred officials to assist in hotspot countries and Frontex supplies sixty new border control staff at the cost of €1.3 million).

195 Park, *supra* note 65. Although the European Commission has approved over two billion euro in aid to Italy and Greece in 2015 to cover its migrant rescue efforts for the next six years, it is not enough to combat the growing migrant crisis in those member states.

196 See BBC NEWS *supra* note 156.

197 See *supra* notes 38-48 and accompanying text.

198 Park, *supra* note 65.

199 See *supra* notes 86-87, 101-103, and accompanying text.

aid from the EU has barely addressed their needs.<sup>200</sup> They have reacted by taking matters into their own hands and blocking entry into their countries.<sup>201</sup> The migrant crisis has tested the Dublin Regulation's limits and has exposed its biggest weaknesses. Now that the crisis has subsided, the EU must do something about its migrant policy so that they are prepared for future crises. Several proposals have been put forward, including imposing minimums and completely invalidating the Dublin Regulation and starting from scratch.<sup>202</sup> It is unclear what path the EU will take, but change is imminent.<sup>203</sup>

*Kimara Davis\**

---

200 *See supra* note 175 and accompanying text

201 *See supra* notes 21-29 and accompanying text.

202 *Supra* text accompanying notes 166-191

203 *See supra* note 100 and accompanying text.

\* Executive Articles Editor, Washington University Global Studies Law Review; J.D. Candidate (2020), Washington University School of Law; B.A. (2017), majoring in Political Science and History, City University of New York Baruch College.