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You Shall Not Pass! How the Dublin System Fueled Fortress Europe

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You Shall Not Pass!

How the Dublin System Fueled Fortress Europe

Ashley Binetti Armstrong*

Abstract

This Article examines the recent proliferation of walls and fences in Europe, fueled by the Dublin Regulation's failure to distribute responsibility for asylum seekers equitably among European states. Legal scholarship does not lack literature bemoaning the failures of the E.U.'s Dublin Regulation—which dictates, generally, that the country where an asylum seeker first enters the E.U. is responsible for processing his or her claim for protection. Yet scholarship on border walls and fences, and what induces European states to construct them, is not prominent in the literature. The critiques lodged against the Dublin Regulation have primarily focused on its futility and unworkability. This Article argues that Dublin has failed asylum seekers in a more insidious way—by catalyzing the construction of Fortress Europe. The actions of European states during the contemporary refugee “crisis” illustrate this phenomenon particularly well.

Section II of this Article examines the contours of the international principle of responsibility-sharing; a principle that is supported throughout the history of refugee law as an ideal modality for managing refugee flows. Section III provides an overview of the Dublin Regulation and how it distorts the international responsibility-sharing principle and violates E.U. law requiring “solidarity and fair sharing of responsibility” among member states. Section IV traces the proliferation of border walls and fences in Europe around the height of the recent refugee crisis, arguing that the Dublin Regulation's failure fueled European states to erect physical border barriers. It also explores the formidable combination of physical and legal barriers and how these mechanisms violate member states' non-refoulement obligation. Section V analyzes proposals for improving Dublin, including efforts to better protect refugee rights and achieve a

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more equitable sharing of responsibility for protection seekers. This Article concludes by questioning how the E.U. can move forward and uphold the right of all persons fleeing persecution to seek and enjoy asylum in Europe.

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I. INTRODUCTION

*Fortress Europe . . . has severely limited the safe and legal avenues of entry for refugees to the EU at the same time as an explosion in the global refugee population. [This] has inevitably generated considerable pressure on the EU's periphery states—particularly Greece and Italy, who are struggling to cope with the increase in arrivals of refugees and migrants . . . [and] reflect the need for both greater global solidarity, in response to the ever-growing refugee crisis, and greater internal solidarity between EU member states that currently share the responsibility for receiving asylum seekers unequally.*¹

In September 2015, shortly after Hungary completed construction of a fence on its border with Serbia, an image haunted the internet.² It was a photograph of a young boy, maybe three years old. He was visibly upset. A middle-aged man was holding the boy. The man was bleeding from his head—an injury he suffered during a clash with the police who were also featured in the photo, donning riot gear. The caption described how “Hungarian police fired tear gas and water cannons at migrants demanding to be allowed to enter from Serbia.”³ These were asylum seekers⁴ who were fleeing persecution, eager to apply for protection in Europe.

Even after the fall of the Berlin Wall, European states have continued to erect walls.⁵ States justify these barriers in the name of halting “illegal” immigration, protecting their country from terrorists, blocking economic migrants intent on stealing the jobs of their nationals, and maintaining the purity of their Christian, Western culture.⁶ But fences do not discriminate, they are designed to

¹ Amnesty Int'l, *Europe's Borderlands: Violations Against Refugees and Migrants in Macedonia, Serbia and Hungary*, at 67, AI Index EUR 70/1579/2015 (July 7, 2015), <http://perma.cc/N2YD-NNFZ>.

² See Liz Sullivan, *The Week in Pictures*, MACLEAN'S MAGAZINE (Sept. 18, 2015), <http://perma.cc/E79J-NRLD>.

³ See *id.*

⁴ China Global Television Network, *Refugees Clash with Police at Serbia-Hungary Border*, YOUTUBE (Sept. 16, 2015), <http://perma.cc/YLP2-WJ72> (“The clashes began as hundreds of asylum seekers asked the Hungarians to reopen [the border].”).

⁵ See, for example, Gabriela Baczyńska & Sara Ledwith, *How Europe Built Fences to Keep People Out*, REUTERS (Apr. 4, 2016), <http://perma.cc/Q3VV-A46M> (“[S]ince the fall of the Berlin Wall, European countries have built or started 1,200 km (750 miles) of anti-immigrant fencing.”); Jon Stone, *The E.U. Has Built 1,000km of Border Walls Since Fall of Berlin Wall*, THE INDEPENDENT (Nov. 9, 2018), <http://perma.cc/5PCA-Y6MY> (“[T]he EU has gone from just two walls in the 1990s to 15 by 2017 . . . with a sharp increase during the 2015 migration panic, when seven new barriers were erected.”).

⁶ See, for example, Ashley B. Armstrong, *Chutes and Ladders: Nonrefoulement and the Sisyphian Challenge of Seeking Asylum in Hungary*, 50 COLUM. HUM. RTS. L. REV. 46, 53, 73–75 (2019) (Hungarian Prime Minister Viktor Orbán is “defending European Christianity against a Muslim influx” and the Hungarian government paints immigrants “as terrorists and criminals.”).

block all migrants—including asylum seekers. European border barriers⁷ include earlier walls and fences installed before the height of the refugee crisis, such as the barrier Greece constructed on its land border with Turkey, completed in December 2012;⁸ and Bulgaria's fence on its border with Turkey, which it finished constructing in summer 2014.⁹ During the height of the refugee crisis in 2015, Europe witnessed an unprecedented proliferation of walls and fences including:¹⁰ Hungary's fences on its Serbian¹¹ and Croatian¹² borders; North Macedonia's fence on its border with Greece;¹³ Slovenia's fence on its border with Croatia;¹⁴ Austria's fence on its border with Slovenia;¹⁵ and Croatia's fence on its border with Serbia.¹⁶

⁷ This Article focuses on physical barriers constructed in response to the recent refugee crisis. This is not a comprehensive list of all physical borders in Europe. For a map of border walls and internal controls as of 2017, see U.N. High Commissioner for Refugees (UNHCR), *Border Fences and Internal Border Controls in Europe* (Mar. 2017), <http://perma.cc/5PCK-JQXH> (“In response to concerns regarding increased numbers of refugees and migrants arriving at their borders, several European States, including European Union (EU) Member States, have constructed fences along their borders and increased border controls, including internal border controls within the Schengen area.”).

⁸ Danae Leivada, *Why Greece Shut the Shortest, Safest Route for Migrants and Refugees*, HUFFINGTON POST (Sept. 24, 2015), <http://perma.cc/3NWZ-9EL8>.

⁹ *Bulgarian Defense Minister: Border Fence to be Finished in June*, SOFIA NEWS AGENCY (May 14, 2014), <http://perma.cc/AJA9-M26Z>; Rick Lyman, *Bulgaria Puts Up a New Wall, but This One Keeps People Out*, N.Y. TIMES (May 4, 2015), <http://perma.cc/TW9W-JDS2>.

¹⁰ For a comprehensive list of walls and fences erected in Europe during the crisis, see, for example, Ainhoa Ruiz Benedicto & Pere Brunet, *Building Walls: Fear and Securitization in the European Union*, CENTRE DELÀS D'ESTUDIS PER LA PAU Table 3 (Sept. 2018), <http://perma.cc/TQ8Q-NHTL>. Additionally, some of the barriers were later fortified with additional layers of fencing. See, for example, Marton Dunai, *Hungary Builds New High-Tech Border Fence - With Few Migrants in Sight*, REUTERS (Mar. 2, 2017), <http://perma.cc/W85M-Q9R2>.

¹¹ *Hungary: New Border Regime Threatens Asylum Seekers*, HUM. RTS. WATCH (Sept. 19, 2015), <http://perma.cc/AJ8A-LCKX>.

¹² *Migrant Crisis: Hungary Closes Border with Croatia*, BBC NEWS (Oct. 17, 2015), <http://perma.cc/M3WT-6HDZ>.

¹³ Cynthia Kroet, *Macedonia Builds Fence on Greek Border to Control Refugees*, POLITICO (Nov. 28, 2015), <http://perma.cc/AE8K-MEUC>. North Macedonia, while not an E.U. member state, is included in this list because of its prominent position on the Balkan route.

¹⁴ Barbara Surk, *Slovenia Starts Building Border Fence to Stem Flow of Migrants*, N.Y. TIMES (Nov. 11, 2015), <http://perma.cc/FT4Z-TJM7>.

¹⁵ *Austria Begins Erecting Fence on Border with Slovenia*, DEUTSCHE WELLE (July 12, 2015), <http://perma.cc/L32R-Q4TG>.

¹⁶ This fence was completed in summer 2016. See Sven Milekic, *Croatia Erects Serbian Border Fence to Deter Migrants*, BALKAN INSIGHT (June 30, 2016), <http://perma.cc/2VMZ-LNP3>. Serbia, while not an E.U. member state, is included in this list because of its prominent position on the Balkan route.

This Article explores how the E.U.’s¹⁷ Dublin Regulation¹⁸ facilitated the birth of Fortress Europe. It examines how Dublin’s responsibility-allocation mechanism has failed those in need of protection, and what happens when responsibility for asylum seekers is not equitably shared. Legal scholarship does not lack literature bemoaning the failures of the E.U.’s Dublin Regulation—which generally assigns responsibility for processing protection claims to the country where an asylum seeker first enters the E.U. Yet scholarship on border walls and fences, and specifically what has induced European states to construct them, is not prominent in the literature.¹⁹ The critiques lodged against the Dublin Regulation have primarily focused on its futility and unworkability.²⁰ Scholars have also criticized Dublin for harming refugee rights²¹ and rebuked Europe’s asylum

¹⁷ Reference to the E.U. herein includes European states who have agreed to Dublin and related regulations (i.e., Iceland, Norway, Liechtenstein, and Switzerland).

¹⁸ See generally Section III (discussing evolution of the 1990 Dublin Convention into the European Community Dublin Regulation (“Dublin II”), and subsequently into the E.U.’s current Dublin Regulation (recast) (“Dublin III”).

¹⁹ There are few scholarly legal articles that discuss border walls, let alone in terms of their use to stymie migration flows. For three examples of literature that analyze border walls in their relation to migration control, see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT’L L. 1, 2–5, 7–8 (2016) (discussing phenomenon of wealthy countries erecting border walls in response to human rights jurisprudence linking jurisdiction to physical presence or state control); Moria Paz, *The Law of Walls*, 28 EUR. J. INT’L L. 601, 602–03 (2017) (discussing how Western democracies have built walls to control migration in response to decisions of human rights courts and quasi-judicial bodies); Ayelet Shachar, *Bordering Migration/Migrating Borders*, 37 BERKELEY J. INT’L L. 93, 96–97 (2019) (discussing “the shifting border,” or legal barriers that states implement to restrict mobility).

²⁰ See, for example, Susan Fratzke, *Not Adding Up: The Fading Promise of Europe’s Dublin System*, MIGRATION POLICY INSTITUTE (2015) (evaluating Dublin II); Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 60–64, 129 (2016) (discussing the “injustice and inefficiencies caused by the European Union (EU) Dublin (III) Regulation” and arguing that the “current Dublin Regulation should be suspended.” The author particularly notes that “the transaction costs of the Dublin system are enormous,” with states often “exchang[ing] similar numbers of Dublin requests with each other.”); see also UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation* 151 (Aug. 2017), <http://perma.cc/9WB7-4PR8> (evaluating Dublin III and underscoring its many deficiencies, including the limited number of actual transfers, and further noting that the Regulation is not applied in a consistent manner); DG Migration and Home Affairs, *Evaluation of the Implementation of the Dublin III Regulation*, European Commission 56 (Mar. 18, 2016) (“[R]elative to the total number of Dublin outgoing requests and decisions, the number of outgoing transfers is very low”); Francesco Maiani, *Reforming the Common European Asylum System: The New European Refugee Law*, in 39 IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE 106–107 (Vincent Chetail, Philippe De Bruycker & Francesco Maiani eds., 2016) (“[O]nly a tiny minority of the hundreds of thousands of procedures carried out every year yields the tangible result of a transfer (in the order of 3%).”).

²¹ See, for example, Blanca Garcés-Masareñas, *Why Dublin “Doesn’t Work,”* 135 NOTES INTERNACIONALS CIDOB 2–3 (Nov. 2015), <http://perma.cc/A2HP-DQS8> (arguing that not only does Dublin not work fairly or efficiently, but also harms refugees’ rights); Violeta Moreno-Lax & Mariagiulia Giuffrè, *The Raise of Consensual Containment: From “Contactless Control” to “Contactless*

policies more broadly as a “market of deflection.”²² This Article argues that Dublin has failed asylum seekers in a more insidious way—by catalyzing the construction of Fortress Europe, which aims to prevent refugees from accessing protection altogether. The actions of European states during the recent refugee “crisis,”²³ in their construction of physical and legal barriers, illustrate this phenomenon particularly well.

While correlation should not be confused with causation, it is well within the realm of possibility that European states, as rational actors, would either want to prevent asylum seekers from setting foot on their territory or wave them through without fingerprinting to avoid triggering responsibility under the Dublin Regulation. E.U. member states that border the sea, such as Greece and Italy, have primarily turned to interdiction on the high seas²⁴ and other remote-control

Responsibility” for Forced Migration Flows, RESEARCH HANDBOOK ON INT’L REFUGEE LAW 2 (July 31, 2017) (Dublin is responsible for “ignit[ing] a race to the bottom in protection.”); Ségolène Barbou des Places, *Evolution of Asylum Legislation in the EU: Insights from Regulatory Competition Theory* 9–10, (European University Institute, Working Paper No. 2003/16, 2003).

²² See GREGOR NOLL, NEGOTIATING ASYLUM: THE E.U. ACQUIS, EXTRATERRITORIAL PROTECTION AND THE COMMON MARKET OF DEFLECTION 182–85, 595 (2000).

²³ This Article uses the term “crisis” because this is the label that the media, scholars, and other stakeholders commonly use to describe Europe’s refugee flows during this time. To qualify the term “crisis,” as it relates to roughly one million people arriving in Europe in 2015, note that in that same year developing regions hosted 85 percent of the world’s refugees, of which Least Developed Countries hosted 26 percent, or 4.2 million people. See UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015 2 (June 2016), <http://perma.cc/L2NY-84N7>. “Crisis” migrant flows in Europe comprised roughly .2 percent of the E.U.’s population. See Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L. J. 609, 618–19 (2017) (noting “[t]hese are wealthy destination nations whose financial capacity and expertise could enable them to process even larger numbers of migrants if they so chose.”). The following terms have also been used to describe this period of large-scale influx: “European migrant crisis,” “refugee crisis,” “asylum crisis,” and other related variations.

²⁴ While “interdiction” is often used in reference to the interception of migrants at sea, “[t]here is no legal definition of ‘interdiction’. The term is commonly taken to encompass all ‘measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.’” See Violeta Moreno-Lax, *Policy Brief 4: The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia*, KALDOR CENTRE FOR INT’L REFUGEE LAW 14, n.4 (May 2017), <http://perma.cc/9NYF-73GF> (citing UNHCR, INTERCEPTION OF ASYLUM-SEEKERS AND REFUGEES: THE INTERNATIONAL FRAMEWORK AND RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH 10, EC/50/SC/CRP.17 (June 9, 2000)). Relatedly, Italy’s Deputy Prime Minister Matteo Salvini has halted NGO “migrant search and rescue vessels” from docking in Italy. Salvini stated, “I take responsibility for being ugly, violent, bad, fascist, populist, Nazi, racist, but I do it because our children are safer on our streets.” Nick Miller, “No Way”: Italy’s Leader Takes Australian Cue on Refugees, SYDNEY MORNING HERALD (Aug. 24, 2018), <http://perma.cc/Z9TK-TG4C> (quoting Interview with Matteo Salvini (RTL radio broadcast Aug. 23, 2018), <http://perma.cc/Y2SP-ACBC> (“Mi faccio carico di essere per qualcuno brutto, violento, cattivo, fascista, populista, nazista, razzista, ma lo faccio perché i nostri figli stiano un po’ più tranquilli per le nostre strade.”)).

policies²⁵ to keep out refugees. Member states that form the land border of the E.U. and are themselves places of first arrival, or those states that have become the “new frontier” when refugees are waved-through or when original states of entry are not fit for Dublin returns,²⁶ have turned to erecting walls and fences, in addition to creating legal barriers.²⁷

This Article explains the recent proliferation of walls and fences in Europe as grounded in the Dublin Regulation’s failure to distribute responsibility for asylum seekers equitably among European states. Very few publications—legal or otherwise—examine Europe’s walls and fences in relation to stymying irregular migration. Even those publications that have attempted to describe this phenomenon have not connected the construction of walls and fences in Europe to the Dublin Regulation’s influence.²⁸ Some scholars have posited theories about the general rise in externalization policies, including securitization concerns, the influence of racism and politics, and the underlying incentive that territorialized asylum creates.²⁹ Others have asserted that the recent proliferation of border walls in Western democracies is a reaction to the decisions of “human rights courts and quasi-judicial bodies.”³⁰ This Article presents a different explanation that illuminates this phenomenon in the context of Europe’s failure to create an equitable, workable responsibility-allocation system for refugees. This theory is

²⁵ See, for example, Moreno-Lax & Giuffrè, *supra* note 21, at 3 (discussing examples of remote-control policies, or “contactless control,” such as the Italy-Libya Memorandum of Understanding, information campaigns, and readmissions agreements, among others).

²⁶ See Section III (discussing *M.S.S. v. Belg. and Greece*, Eur. Ct. H.R. (Jan. 21, 2011)).

²⁷ See, for example, Armstrong, *supra* note 6, at 49–51 (discussing Hungary’s fences and utilizing safe third country, deep border control policy, restricting asylum applications to two transit zones along Serbia’s border and only allowing one applicant per zone per workday to enter, arbitrarily detaining refugees in transit zone shipping containers while their applications are processed, and passing laws that criminalize assisting asylum seekers). While this Article focuses primarily on physical barriers, states employ a combination of physical and legal strategies to prevent entry. The argument presented in this Article regarding the failure of Dublin and its influence on the construction of Fortress Europe also applies to those legal “walls and fences.” While detailed analysis of those methods falls outside the scope of this Article, Section IV briefly discusses two examples and their broader implications for Fortress Europe: the E.U.–Turkey Deal and Hungary’s “Chutes and Ladders” asylum system.

²⁸ See, for example, Benedicto & Brunet, *supra* note 10 (“Dublin” is only mentioned once in this 58-page report on walls in the E.U.); TIM MARSHALL, *THE AGE OF WALLS: HOW BARRIERS BETWEEN NATIONS ARE CHANGING OUR WORLD* (2018); Maryellen Fullerton, *Borders, Bans, and Courts in the European Union*, 23 ROGER WILLIAMS U. L. REV. 393, 396 (2018) (discussing how Dublin places “enormous pressures on E.U. Member States along the southern and eastern borders”).

²⁹ See generally, DAVID SCOTT FITZGERALD, *REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS* 41–57 (2019).

³⁰ See Paz, *The Law of Walls*, *supra* note 19, at 602–03.

not exclusive of other explanations, but it helps explain state behavior in the ever-growing Fortress Europe and lends itself to targeted legal and policy solutions.

Section II begins by examining the contours of the international principle of responsibility-sharing, a principle that is supported throughout the history of refugee law as an ideal modality for managing refugee flows. Section III provides an overview of the Dublin Regulation and how it distorts the international responsibility-sharing principle and violates E.U. law requiring “solidarity and fair sharing of responsibility” among member states.³¹ Section IV traces the proliferation of border walls and fences in Europe during the height of the 2015 refugee crisis, arguing that the Dublin Regulation’s failure fueled European states’ construction of physical border barriers. It also explores the formidable combination of physical and legal barriers and how these mechanisms violate member states’ non-refoulement obligation. Finally, Section V analyzes proposals for improving the Dublin system, including efforts to protect refugee rights more effectively and achieve a more equitable sharing of responsibility for protection seekers. This Article concludes by questioning how the E.U. can move forward and uphold the right of all persons to *seek* and *enjoy* asylum.³²

II. THE PRINCIPLE OF RESPONSIBILITY-SHARING IN INTERNATIONAL REFUGEE LAW

*On 28 July 1951, when the [Refugee] Convention was adopted, the world was recovering from a deeply traumatizing and destructive period of global war and human rights violations on a horrendous scale. The inspiration for the Convention was the strong international concern to ensure that the disregard for human life, the displacement and the persecution of the war years would not be repeated.*³³

States acknowledged the need for a protection regime for persons fleeing persecution when they adopted the 1951 Refugee Convention.³⁴ The 1951

³¹ Consolidated version of the Treaty on the Functioning of the European Union, art. 80, Mar. 25, 1958, 2012 O.J. (C 326) 47 (as amended by the Treaty of Lisbon, Dec. 17, 2007, 2007 O.J. (C 306), entered into force Dec. 1, 2009) [hereinafter TFEU].

³² One has a right to *seek* and *enjoy* asylum. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) [hereinafter UDHR]. E.U. member states also have a legal obligation to ensure the right to asylum under regional law. *See* Charter of the Fundamental Rights of the European Union, art. 18, 2012 O.J. (C 326/391).

³³ Exec. Comm. of the High Comm’r’s Programme, *Note on International Protection*, ¶2, U.N. Doc. A/AC.96/951 (Sept. 13, 2001), <http://perma.cc/3XSC-4524>.

³⁴ *See generally* 1951 Convention Relating to the Status of Refugees, art. 1, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention]. The Convention defines “refugee” as a person who asserts a well-founded fear of persecution based on her “race, religion, nationality, membership of a particular social group or political opinion” and is compelled to seek protection (asylum) outside of her home country. *Id.* at art. 1A(2).

Convention initially only protected those who became refugees because of the events in Europe occurring before January 1951, but persecution, war, and displacement did not end with World War II. Therefore, U.N. member states ultimately expanded the temporal and physical application of the Convention with the 1967 Protocol.³⁵ Heralded under the banner of “Never again!” this regime was born out of the failure of states to share responsibility effectively and protect refugees fleeing Nazi persecution, resulting in egregious consequences.³⁶ From early on in this protection regime, states recognized that no country alone should be responsible for the world’s refugees and that successful protection efforts required solidarity.³⁷ International and regional treaties and declarations have affirmed and reaffirmed support for the principle of responsibility-sharing in refugee law.

Effective responsibility-sharing aims to protect refugees and displaced persons by promoting durable solutions “while addressing undue burdens on host countries and communities.”³⁸ This Article focuses on the physical aspect of responsibility-sharing—in other words, processing protection claims and hosting refugees. This is the brand of responsibility-sharing that Dublin has perverted and that states seek to rectify by constructing walls and fences. States use these barriers to avoid their obligation to provide durable solutions to protection seekers by preventing them from entering their territory.

³⁵ See 1967 Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. For an overview of the “modern international refugee law regime,” see Andrew I. Schoenholtz, *The New Refugees and The Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT’L L. 81, 85–86 (2015).

³⁶ See, for example, *Timeline of Events: Evian Conference*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://perma.cc/W5DB-TZ6L> (describing the failure of the Evian Conference, July 6–15, 1938).

³⁷ See, for example, G.A. Res. 8(I), art. c(iii), Question of Refugees (Feb. 12, 1946); see also 1951 Convention, *supra* note 34, at pmb1. (“Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature *cannot therefore be achieved without international co-operation.*”) (emphasis added).

³⁸ See, for example, Susan F. Martin et al., *International Responsibility-Sharing for Refugees* 13 (Global Knowledge Partnership on Migration and Development, Working Paper No. 32, 2018) (acknowledging three core goals of responsibility-sharing: (1) prevent the causes of displacement; (2) protect refugees and internally displaced persons “while addressing burden on hosts and communities”; and (3) promote durable solutions (local integration, return, and resettlement)).

This Section establishes and reaffirms responsibility-sharing³⁹ as a principle of international refugee law.⁴⁰ First, it explores this principle in the context of the 1951 Refugee Convention and 1967 Protocol, U.N. General Assembly (UNGA) Resolutions, and UNHCR ExCom Conclusions. It then examines the more recent history of international responsibility-sharing as it has been incorporated in the New York Declaration for Refugees and Migrants and the 2018 Global Compacts.

A. Foundations of Responsibility-Sharing in International Refugee Law

The principles of interstate cooperation and responsibility-sharing are foundational to modern international law, dating back to their inclusion in the U.N. Charter.⁴¹ The 1951 Refugee Convention⁴² and the 1967 Protocol Relating to the Status of Refugees⁴³ establish that these concepts have been essential components of the international refugee protection regime since its inception. The importance of responsibility-sharing is one of the first principles highlighted in the 1951 Convention's preambulatory text: "[C]onsidering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without *international co-operation*."⁴⁴

³⁹ This article primarily uses the term "responsibility-sharing" as opposed to "burden-sharing." "Burden" carries a negative connotation, as opposed to "responsibility," which evinces the positive obligation of all states to assist refugees. For more on terminology, see Rebecca Dowd & Jane McAdam, *International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?*, 66 INT'L & COMP. L.Q. 863, 868–71 (2017); see also James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 145–48 (1997).

⁴⁰ Responsibility-sharing is a principle of international refugee law, if not yet a "critical norm." See, for example, J.-P. L. Fonteyne, *Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees*, 8 AUST. Y.B. INT'L L. 162, 184 (1978–80) (contending that the obligation of responsibility-sharing and solidarity in response to refugee protection rises to the level of customary international law). Compare Dowd & McAdam, *supra* note 39, at 879–80 (contending that responsibility-sharing is not customary international law but rather a "critical norm of international refugee law. . . [that] does not impose legally binding obligations on states").

⁴¹ U.N. Charter, art. 1, ¶ 3, arts. 55–56, Oct. 24, 1945, 1 U.N.T.S. 16 (on international cooperation and obligation to cooperate, respectively); see also G.A. Res. 26/25, pmbl., Declaration on Principle of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

⁴² 1951 Convention, *supra* note 34.

⁴³ 1967 Protocol, *supra* note 35.

⁴⁴ 1951 Convention, *supra* note 34, at pmbl. (emphasis added).

The 1951 Convention, however, did not set out a mechanism for achieving international cooperation.⁴⁵ While the Convention failed to provide concrete rules on responsibility-sharing, it delineated states' responsibilities to refugees.⁴⁶ The obligation to allow persons to apply for asylum⁴⁷ and *not* to send them back to places of persecution (*refouler*)⁴⁸ are chief among these responsibilities. Under international law's canons of construction, these obligations must be interpreted in light of the intent and purpose of the Convention, which is indicated in the treaty text "including its preamble and annexes."⁴⁹ As such, the principle of international cooperation underpins states' responsibilities to refugees, even if the Convention does not otherwise provide guidance on how states must engage in this practice.⁵⁰

⁴⁵ States ultimately rejected the U.N. Secretary-General's quota proposal, which would have obligated each state "to receive a certain number of refugees." See Memorandum from the Secretary-General to the U.N. Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, II, ch. 2, art. 3, E/AC.32/2 (Jan. 3, 1950), <http://perma.cc/5GNN-YZVS> ("The High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to person to whom paragraph 1 refers. They shall do so, inter alia, *by agreeing to receive a certain number of refugees in their territory.*") (emphasis added).

⁴⁶ See, for example, Dowd & McAdam, *supra* note 39, at 863 ("While countries that receive refugees have certain legal obligations to assist and protect them, the legal duties of other States to step in and help relieve this burden is less clear.").

⁴⁷ "Grounded in Article 14 of the Universal Declaration of Human Rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today." UNHCR, *Introductory Note to the 1951 Convention Relating to the Status of Refugees* (Dec. 2010), in the 1951 Convention, *supra* note 34; see also UDHR, *supra* note 32, at art. 14(1) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

⁴⁸ Non-refoulement is enshrined in Article 33 of the 1951 Convention: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 1951 Convention, *supra* note 34, at art. 33, ¶ 1. This Convention protection does not apply to individuals who are considered a "danger to the security of the country" or those who have been convicted of "a particularly serious crime." *Id.* at art. 33(2). Under the Convention Against Torture, however, the non-refoulement principle is non-derogable and applies broadly to any person who would suffer torture and/or inhuman and degrading treatment upon return. See U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture]; see also U.N. Committee against Torture, *Gen. Comment No. 2*, U.N. Doc, CAT/C/GC/2, ¶ 3 (Jan. 24, 2008), <http://perma.cc/S4BQ-6BY2>.

⁴⁹ Vienna Convention on the Law of Treaties, art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose* The context for the purpose of the interpretation of a treaty shall comprise, *in addition to the text, including its preamble and annexes.*") (emphasis added).

⁵⁰ See 1951 Convention, *supra* note 34, at pmb1.

Other sources of international law support the responsibility-sharing principle, including UNGA resolutions. While UNGA resolutions are not binding, they serve an advisory function in interpreting the meaning of binding international legal instruments.⁵¹ Several years after the passage of the 1951 Convention, states adopted the 1967 Declaration on Territorial Asylum, which underscored state responsibility to assist “in a spirit of international solidarity” when another state “finds difficulty in granting or continuing to grant asylum.”⁵² Additionally, in the 1993 Vienna Declaration on Human Rights and Programme of Action, UNGA member states echoed the 1951 Convention’s assertion that “a satisfactory solution” requires “international co-operation,”⁵³ and called upon states to institute a coordinated approach to assisting the world’s refugees.⁵⁴ UNGA again affirmed the “enduring importance”⁵⁵ of the 1951 Convention and called for a coordinated approach to assisting refugees in the 2001 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees: “[R]espect by States for their protection responsibilities towards refugees is strengthened by international solidarity . . . and . . . the refugee protection regime is enhanced through *committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among all States.*”⁵⁶ Many other

⁵¹ UNGA resolutions are categorized as recommendations, but they have interpretive value and assist in establishing and identifying customary international legal norms. *See, for example*, Volker Turk & Madeline Garlick, *From Burdens and Responsibilities to Opportunities: the Comprehensive Refugee Response Framework and a Global Compact on Refugees*, 28 INT’L J. REF. L. 656, 659 n.10 (2016) (Articles 10 and 14 of the U.N. Charter refer to UNGA resolutions as “recommendations,” and the International Court of Justice has stressed their advisory nature in numerous cases. However, they may provide evidence of states’ views, including on the nature of their legal obligations (*opinio juris*), which, together with a clearly established pattern of state practice, can become a source of customary international law.).

⁵² G.A. Res. 2312 (XXII), Declaration on Territorial Asylum, art. 2, ¶ 2 (Dec. 14, 1967).

⁵³ *Compare id.* (“Where a state finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that state.”) *with* 1951 Convention, *supra* note 34, at pmb. (“Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation . . .”).

⁵⁴ World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 23, U.N. Doc. A/CONF.157/23 (July 12, 1993), <http://perma.cc/QLJ2-V4WF>.

⁵⁵ G.A. Res. 57/187, Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, pmb. ¶ 2 (Dec. 31, 2001).

⁵⁶ *Id.* at pmb. ¶ 8 (emphasis added).

UNGA resolutions also call on member states to respect refugee rights⁵⁷ and promote international cooperation.⁵⁸

In addition to U.N. General Assembly resolutions, the Office of the U.N. High Commissioner for Refugees (UNHCR) Executive Committee (ExCom),⁵⁹ has continually underscored the importance of responsibility-sharing in implementing international refugee law. ExCom is comprised of representatives from 102 member states.⁶⁰ These expert representatives are selected “on the widest possible geographical basis” and for their “demonstrated interest in, and devotion to, the solution of the refugee problem.”⁶¹ One of the Committee’s core functions is to “advise the High Commissioner” on refugee-related concerns,⁶² which has manifested in a collection of ExCom Conclusions on international protection.⁶³ While ExCom Conclusions are not binding, they are a rich source of soft law and have interpretive significance, both in analyzing and clarifying the meaning of international refugee law.⁶⁴ ExCom has endorsed the principles of

⁵⁷ For a discussion of these resolutions, see Guy S. Goodwin-Gill, *The Language of Protection*, 1 INT’L J. REFUGEE L. 6, 14–16 (1989).

⁵⁸ See, for example, G.A. Res. 70/1, Transforming Our World: the 2030 Agenda for Sustainable Development, art. 29 (Sept. 25, 2015), <http://perma.cc/ST7Y-MPHV> (“We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons.”); see also AGNÈS HURWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 143 n.94 (2009) (listing UNGA resolutions discussing solidarity- and/or burden-sharing regarding refugee protection).

⁵⁹ UNHCR, *The Executive Committee’s Origins and Mandate*, <http://perma.cc/QJ3V-6XPS> (“The United Nations’ Economic and Social Council (ECOSOC) established the Executive Committee of the Programme of the United Nations High Commissioner for Refugees in 1958 [Resolution 672 (XXV)], and the governing body formally came into existence on 1 January 1959 Although established by ECOSOC, ExCom functions as a subsidiary organ of the General Assembly.”). See generally ECOSOC, Res. 672 (XXV), Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (Apr. 30, 1958).

⁶⁰ UNHCR, *ExCom Plenary Sessions: 2019 Executive Committee Session*, <http://perma.cc/7HPR-8LLU> (last accessed Feb. 22, 2019).

⁶¹ ECOSOC, *supra* note 59, at pmb1.

⁶² G.A. Res. 116 (XII), § 5(b), International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees (Nov. 26, 1957) (“ECOSOC’s purpose is “[t]o advise the High Commissioner . . . in the exercise of his functions under the Statute of his Office.”).

⁶³ See UNHCR Exec. Comm., *Conclusions on International Protection*, <http://perma.cc/9EPS-XF7R> (“International protection is included as a priority theme on the agenda of each session of the Executive Committee.”).

⁶⁴ See JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 112–13 (2005). This special status is accorded to ExCom’s conclusions because of its mandated advisory role, strengthened by its members’ expertise and consensus model of adopting conclusions. See *Conclusions on International Protection*, *supra* note 63.

burden- and responsibility-sharing in forty-three Conclusions since 1977.⁶⁵ The Conclusions have recognized responsibility-sharing as a precursor for “ensuring access to protection . . .”⁶⁶ and have reaffirmed the principle of international solidarity “as a primary condition for . . . the effective implementation of international protection.”⁶⁷ Several Conclusions have further emphasized that in particular contexts, such as in cases of large-scale influx, states under pressure should receive immediate assistance from other states “in accordance with the principle of equitable burden-sharing,” including by ensuring that the burden of the first country of asylum is “equitably shared” among them.⁶⁸

⁶⁵ From 1977 to 2017, forty-three ExCom conclusions (both general and thematic) refer to either “international solidarity” and/or “burden-sharing” and/or “responsibility-sharing.” *See, for example*, UNHCR Exec. Comm., *supra* note 64; *see generally* UNHCR Exec. Comm., *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975–2017* (Oct. 2017). A review of the ExCom conclusions reveals that the following conclusions refer to “international solidarity,” “burden-sharing” and/or “responsibility sharing:” No. 5 (1977), No. 11 (1978), No. 15 (1979), No. 19 (1980), No. 22 (1981), No. 23 (1981), No. 33 (1984), No. 36 (1985), No. 48 (1987), No. 52 (1988), No. 61 (1990), No. 62 (1990), No. 65 (1991), No. 67 (1991), No. 68 (1992), No. 71 (1993), No. 74 (1994), No. 77 (1995), No. 79 (1996), No. 80 (1996), No. 81 (1997), No. 82 (1997), No. 85 (1998), No. 87 (1999), No. 89 (2000), No. 90 (2001), No. 93 (2002), No. 94 (2002), No. 95 (2003), No. 98 (2003), No. 99 (2004), No. 100 (2004), No. 102 (2005), No. 104 (2005), No. 105 (2006), No. 107 (2007), No. 108 (2008), No. 109 (2009), No. 110 (2010), No. 111 (2013), No. 112 (2016), No. 113 (2016), No. 114 (2017).

⁶⁶ UNHCR Exec. Comm., Conclusion No. 102, § (k) (2005), *supra* note 65, at 269.

⁶⁷ UNHCR Exec. Comm., Conclusion No. 11, § (e) (1978), *supra* note 65, at 25; *see generally* No. UNHCR Exec. Comm., Conclusion No. 52 (1988), *supra* note 65, at 105–06; UNHCR Exec. Comm., Conclusion No. 109 (2009), *supra* note 65, at 315–20; No. UNHCR Exec. Comm., Conclusion No. 110 (2010), *supra* note 65, at 321–24; UNHCR Exec. Comm., Conclusion No. 112 (2016), *supra* note 65, at 329–32; UNHCR Exec. Comm. Conclusion No. 114 (2017), *supra* note 65, at 337–39.

⁶⁸ UNHCR Exec. Comm., Conclusion No. 15, §§ (f)–(g) (1979), *supra* note 65, at 33–34; *see also* UNHCR Exec. Comm., Conclusion No. 19, § (b)(ii) (1980), *supra* note 65, at 42; UNHCR Exec. Comm., Conclusion No. 22, § (IV)(1–6) (1981), *supra* note 65, at 59; UNHCR Exec. Comm., Conclusion No. 61, § (g) (1992), *supra* note 65, at 126; UNHCR Exec. Comm., Conclusion No. 67, § (a) (1991), *supra* note 65, at 138; UNHCR Exec. Comm., Conclusion No. 74, § (h) (1994), *supra* note 65, at 160; UNHCR Exec. Comm., Conclusion No. 77, § (o) (1995), *supra* note 65, at 171; UNHCR Exec. Comm., Conclusion No. 79, §§ (h), (s) (1996), *supra* note 65, at 176, 178; UNHCR Exec. Comm., Conclusion No. 81, §§ (j), (r) (1997), *supra* note 65, at 184, 186; UNHCR Exec. Comm., Conclusion No. 82, § (e) (1997), *supra* note 65, at 188; UNHCR Exec. Comm., Conclusion No. 85 §§ (o)–(p) (1998), *supra* note 65, at 197; UNHCR Exec. Comm., Conclusion No. 90, § (f) (2001), *supra* note 65, at 213; UNHCR Exec. Comm., Conclusion No. 93, § (c) (2002), *supra* note 65, at 223; UNHCR Exec. Comm., Conclusion No. 94, § (f) (2002), *supra* note 65, at 227; UNHCR Exec. Comm., Conclusion No. 95, §§ (g)–(h) (2003), *supra* note 65, at 230; UNHCR Exec. Comm., Conclusion No. 99, § (e) (2004), *supra* note 65, at 248; UNHCR Exec. Comm., Conclusion No. 100 (2004), *supra* note 65, at 254; UNHCR Exec. Comm., Conclusion No. 102, § (l) (2005), *supra* note 65, at 269; UNHCR Exec. Comm., Conclusion No. 104, § (r) (2005), *supra* note 65, at 284; UNHCR Exec. Comm., Conclusion No. 108, § (m) (2008), *supra* note 65, at 312; *see generally* UNHCR Exec. Comm., Conclusion No. 87 (1999), *supra* note 65, at 203–07; UNHCR Exec. Comm., Conclusion

B. Contemporary Responsibility-Sharing in International Refugee Law: The Global Compacts

The principle of international responsibility-sharing returned to center-stage with the U.N. General Assembly's adoption of the New York Declaration for Refugees and Migrants in October 2016,⁶⁹ and two related Global Compacts in December 2018.⁷⁰ UNGA member states convened in September 2016 to discuss solutions to the refugee crisis.⁷¹ U.N. Secretary-General Ban Ki-moon emphasized that this high-level meeting was an opportunity “to strengthen and implement existing frameworks” to deal with the current refugee crisis,⁷² and noted the “urgent need” to share the responsibility of protecting refugees to ensure that “the impact of their flight is not borne disproportionately by some countries and regions on the basis of their proximity to countries of origin alone.”⁷³ The New York Declaration, which UNGA passed unanimously,⁷⁴ was heralded as a “political commitment at the highest level, grounded in international cooperation and refugee protection standards.”⁷⁵ The Declaration stressed that states have a “shared responsibility” to assist refugees and migrants.⁷⁶ While the Declaration also acknowledged states' rights to control their borders, it underscored that this right is not absolute, particularly when rejecting asylum seekers at the border would violate the non-refoulement obligation, which prohibits states from sending an individual to a place where s/he would risk facing serious harm.⁷⁷ The

No. 89 (2000), *supra* note 65, at 209–11; UNHCR Exec. Comm., Conclusion No. 100 (2004), *supra* note 65, at 253–59.

⁶⁹ G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Oct. 3, 2016).

⁷⁰ G.A. Res. 73/12 (Part II), Global Compact on Refugees (Aug. 2, 2018) [hereinafter Refugee Compact]; G.A. Res. 173/95, Global Compact for Safe, Orderly and Regular Migration. (Dec. 19, 2018) [hereinafter Migration Compact].

⁷¹ See New York Declaration for Refugees and Migrants, *supra* note 69, at pmb1, ¶¶ 5–6 (“We, the Heads of State and Government . . . meeting . . . on 19 September 2016 to address the question of large movements of refugees and migrants . . . reaffirm the purposes and principles of the Charter of the United Nations . . . [and] the Universal Declaration of Human Rights and recall the core international human rights treaties. . . . Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms.”).

⁷² U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, ¶ 6, U.N. Doc. A/70/59 (Apr. 21, 2016).

⁷³ *Id.* at ¶ 68. The Secretary-General also affirmed that “responsibility-sharing stands at the core of the international protection regime.” *Id.* at ¶ 102(b).

⁷⁴ UNHCR, *Comprehensive Refugee Response Framework*, <http://perma.cc/ES8D-D2MF>.

⁷⁵ Filippo Grandi, UNHCR, *Opening Statement at the 69th Session of the Executive Committee of the High Commissioner's Program* (Oct. 1, 2018), <http://perma.cc/YB77-65T3>.

⁷⁶ *Id.*; see also New York Declaration for Refugees and Migrants, *supra* note 69, at ¶ 11.

⁷⁷ *Id.* at ¶ 24.

Declaration also called for the creation of two Global Compacts to further delineate state commitments.⁷⁸

Following the New York Declaration, development of the Global Compact on Refugees⁷⁹ and the Global Compact for Safe, Orderly and Regular Migration⁸⁰ commenced. The UNHCR, in consultation with member states, NGOs, and international and regional organizations,⁸¹ developed the Refugee Compact, which UNGA adopted in December 2018.⁸² U.N. member states took the lead in drafting the Migration Compact, which the General Assembly also adopted in December 2018.⁸³ The two Compacts are complementary⁸⁴ but the Migration Compact is broader in scope, applying to all migrants—not only refugees. Both Compacts emphasize the importance of responsibility-sharing⁸⁵ and international cooperation,⁸⁶ yet they also give great deference to state sovereignty, allowing states to independently determine the extent and nature of their contributions.⁸⁷

⁷⁸ *Id.* at ¶ 21.

⁷⁹ Refugee Compact, *supra* note 70.

⁸⁰ Migration Compact, *supra* note 70.

⁸¹ UNHCR, *The Global Compact on Refugees – UNHCR Quick Guide 3–4*, <http://perma.cc/Y32B-6LYJ>. Over 500 contributions were submitted by a variety of stakeholders. *See* UNHCR, *Written Contributions*, <http://perma.cc/RT7Y-Y4GF>.

⁸² Press Release, General Assembly, General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights, U.N. Press Release GA/12107 (Dec. 17, 2018), <http://perma.cc/AB77-VWEP> (reporting 181 votes in favor, three abstentions—Eritrea, Liberia, and Libya—and two votes against the Compact—the U.S. and Hungary).

⁸³ Migration Compact, *supra* note 70, at 1; *see also* *General Assembly Officially Adopts Roadmap for Migrants to Improve Safety, Ease Suffering*, U.N. NEWS (Dec. 19, 2018), <http://perma.cc/8PU5-3WS5> (152 states voted in favor of the Migration Compact, while five states voted against the Compact: Czech Republic, Hungary, Israel, Poland, and the U.S. Twelve members abstained and 24 were not present for voting).

⁸⁴ *See* Migration Compact, *supra* note 70, at ¶ 3 (“The two global compacts, together, present complementary international cooperation frameworks.”).

⁸⁵ *See, for example*, Refugee Compact, *supra* note 70, at ¶ 1 (recognizing the “urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees.”); *id.* at ¶¶ 14–48 (detailing arrangements for burden- and responsibility-sharing among states); *see also* Migration Compact, *supra* note 70, at ¶¶ 11, 14.

⁸⁶ *See, for example*, Migration Compact, *supra* note 70, at 6–7 (The Migration Compact includes a list of objectives, including “[s]trengthen[ing] international cooperation and global partnerships.”). The Migration Compact also includes “international cooperation” among its “interdependent guiding principles.” *Id.* at ¶ 15(b); *see also* Refugee Compact, *supra* note 70, at ¶ 5 (naming “international solidarity” as one of the Compact’s guiding principles).

⁸⁷ Migration Compact, *supra* note 70, at ¶ 15(c) (recognizing the “sovereign right of States to determine their national migration policy . . . taking into account different national realities, policies, priorities . . . in accordance with international law.”); *see also* Refugee Compact, *supra* note 70, at ¶ 4 (stating that states will determine their contributions “taking into account their national realities, capacities and levels of development, and respecting national policies and priorities.”).

Additionally, the Compacts are not legally binding,⁸⁸ and thus depend on “mutual trust, determination and solidarity of States to fulfil the[se] objectives and commitments.”⁸⁹ These are important limitations; however, both Compacts have normative value as representations of “the political will and ambition of the international community”⁹⁰ and reaffirm the international principle of responsibility-sharing.

This robust collection of international treaties, declarations, and soft law documents establishes and reaffirms the principle of responsibility-sharing in international refugee law. Unfortunately, none of these sources tackle the greatest source of consternation since the principle’s inception: *What does responsibility-sharing consist of? How should states divide this responsibility equitably?*⁹¹ There is no binding, international mechanism that answers these questions. Responsibility-sharing is demonstrated as a core tenet of international law by its inclusion in foundational international legal texts like the U.N. Charter, 1951 Refugee Protocol and its progeny, as well as modern attempts to announce the importance of this principle, like the New York Declaration and the Global Compacts. While mechanisms and modalities might not be clearly articulated, the principle is undeniable. Thus, certain actions, laws, and policies unequivocally violate its spirit and intent—like implementing systems that allocate regional responsibility for refugees based on place of entry, and constructing border barriers that prevent refugees from seeking asylum and shift refugee flows to neighboring states.

III. THE DUBLIN REGULATION AND RESPONSIBILITY-SHIFTING IN EUROPE

*The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility.*⁹²

Responsibility-sharing has featured prominently not only in international legal texts, but also in foundational E.U. texts. The Treaty on the Functioning of the European Union (TFEU) explicitly states that “fair sharing of responsibility”

⁸⁸ See Migration Compact, *supra* note 70, at ¶ 15(b); Refugee Compact, *supra* note 70, at ¶ 4.

⁸⁹ Migration Compact, *supra* note 70, at ¶ 14.

⁹⁰ See, for example, Refugee Compact, *supra* note 70, at ¶ 4.

⁹¹ For a discussion of potential responsibility-sharing criteria, see, for example, Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT’L L. 355, 372–75 (2009) (referencing political theorist David Miller and identifying absorption capacity, solidarity between states, and cultural and ethnic concerns as potential responsibility-sharing criteria).

⁹² TFEU, *supra* note 31, at art. 80.

shall govern how the E.U. provides international protection to refugees.⁹³ As such, while the binding nature of responsibility-sharing under international law might be debatable, in the E.U. it is unquestionably a binding legal norm. It is even more curious, then, that the E.U. created a system for determining responsibility for processing protection claims (and hosting those afforded protection)⁹⁴ *completely at odds* with the principle of equitable sharing. This Section first presents a brief history of the Dublin Regulation, from the 1990 Dublin Convention to the current Dublin Regulation (recast). Next, it explains how Dublin determines state responsibility for asylum seekers, and how European Court of Human Rights (ECtHR) and European Court of Justice (CJEU) jurisprudence have influenced this calculus. It also assesses the realistic impact of those landmark decisions on responsibility-sharing and refugee protection. Finally, this Section critically analyzes how Dublin distorts responsibility-sharing by rendering Europe's border states disproportionately responsible for asylum seekers.

⁹³ *Id.* (“The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility. . . . Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”); *see also id.* at art. 78(1) (mandating the creation of the Common European Asylum System).

⁹⁴ Dublin ultimately determines which member state is responsible for hosting the asylum seeker if she warrants international protection. *See, for example, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, at 3, COM (2016) 197 final (June 4, 2016), <http://perma.cc/6UFD-ABU8> (“[Dublin] establishes the criteria and mechanisms for determining which Member State is responsible for examining an application for international protection. Those who seek, or have been granted, protection do not have the right to choose in which Member State they want to settle.”); CATHRYN COSTELLO, *THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW* 256 (2016) (“The Dublin Regulation does not simply allocate responsibility for processing asylum claims, but in effect determines in which Member State the refugee will have to make her home.”).

A. From Convention to Regulation

The Dublin system was first conceived of in the 1990s with the passage of the Schengen Implementing Convention⁹⁵ and the Dublin Convention,⁹⁶ which preceded the European Community's Dublin Regulation ("Dublin II")⁹⁷ and the E.U.'s Dublin Regulation (recast) ("Dublin III").⁹⁸ The 1990s marked a change when states began to shrink their responsibilities to refugees, and the Dublin Convention is "one of the early manifestations" of this change.⁹⁹ The Dublin Convention is "widely regarded as part of a retrenchment from generous asylum policies and acceptance of refugees in Europe."¹⁰⁰ Today, the Dublin system is comprised of the Dublin Regulation, which outlines the criteria for determining which member state is responsible for evaluating a particular asylum seeker's protection claim, and the EUODAC Regulation,¹⁰¹ which facilitates the

⁹⁵ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, 1985 O.J. (L 239). Currently, 26 states belong to the Schengen Area, 22 of which are E.U. member states. *See Schengen Area – The World's Largest Visa Free Zone*, SCHENGENVISAINFO, <http://perma.cc/MJ8C-MHEK> (listing the following Schengen countries: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland). Romania, Bulgaria, Croatia, and Cyprus are slated to join the Schengen area but are not yet members. *See id.*

⁹⁶ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254) (June 15, 1990) (entered into force Sept. 1, 1997), [hereinafter Dublin Convention].

⁹⁷ Council Regulation 343/2003 of 18 February 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) (entered into force Mar. 17, 2003) [hereinafter Dublin II].

⁹⁸ Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible For Examining an Application For International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast), 2013 O.J. (L 180) (entered into force July 19, 2013) [hereinafter Dublin III].

⁹⁹ Kathleen Newland & Demetrios G. Papdemetriou, *Managing International Migration: Tracking the Emergence of a New International Regime*, 3 UCLA J. INT'L L. & FOREIGN AFF. 637, 642 (1998).

¹⁰⁰ *Id.* at 643.

¹⁰¹ Council Regulation 603/2013 of 26 June 2013, Establishing Eurodac for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No. 604/2013, 2013 O.J. (L 180). Eurodac is intended to "facilitate the application of the Dublin Convention." *Id.* at Recital 13. *See also* Dublin III, *supra* note 98, at ¶ 30.

administration of the Dublin Regulation by requiring member states to fingerprint asylum seekers where they enter Europe.¹⁰²

The Dublin Regulation is an integral component¹⁰³ of the Common European Asylum System (CEAS)¹⁰⁴—part of the E.U.’s efforts to establish “an area of freedom, security and justice open to those who . . . legitimately seek protection in the Union.”¹⁰⁵ The dissolution of internal E.U. borders with the passage of the Schengen Agreement¹⁰⁶ influenced the development of the CEAS,¹⁰⁷ which was intended to “limit the secondary movements of applicants for international protection between Member States”¹⁰⁸ and to balance citizens

¹⁰² In addition to E.U. member states, these regulations also apply to the four European Free Trade Associates (EFTA) member states: Iceland, Norway, Liechtenstein, and Switzerland. *See* Council Decision 2001/258/EC, 2001 O.J. (L 93) 38 and Council Decision 2006/167/EC, 2006 O.J. (L 57) 15 (Iceland and Norway); Council Decision 2008/149/JHA, 2008 O.J. (L 53) 50 (Switzerland); Council Decision 2011/351/EU, 2011 O.J. (L 160) 37 (Liechtenstein).

¹⁰³ *See* Dublin III, *supra* note 98, at Recital 7 (noting that “the Dublin system remains a cornerstone in building the CEAS” and citing the European Council’s Stockholm Programme); *id.* at Recital 9 (“[A] well-functioning Dublin system is essential for the CEAS.”).

¹⁰⁴ CEAS is a collection of directives and regulations intended to harmonize how member states treat asylum seekers. These regional instruments include the: Asylum Procedures Directive, Reception Conditions Directive, Qualification Directive, Dublin Regulation, and EURODAC Regulation. *See* Migration and Home Affairs, *Common European Asylum System*, EUR. COMM’N, <http://perma.cc/PA2T-4L5L>. CEAS is “one of the most advanced regional protection frameworks,” but it is still an evolving “work in progress.” Eleni Karageorgiou & Vladislava Stoyanova, *Introduction: Putting Asylum to the “European Refugee Crisis” Test*, in *THE NEW ASYLUM AND TRANSIT COUNTRIES IN EUROPE DURING AND IN THE AFTERMATH OF THE 2015/2016 CRISIS* 3 (Vladislava Stoyanova & Eleni Karageorgiou eds., 2019). When states join the E.U., they must accept the E.U. acquis, signing on to this collection of regional instruments.

¹⁰⁵ *See* Dublin III, *supra* note 98, at Recital 2.

¹⁰⁶ Schengen Acquis - 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, 2000 O.J. (L 239) 13.

¹⁰⁷ For an overview of the development of the CEAS and its criticisms, *see* Vincent Chetail, *The Common European Asylum System: Bric-à-brac or System*, in *REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE LAW* 3–38 (Vincent Chetail et al. eds., 2016); Philippe De Bruycker & Evangelia (Lilian) Tsourdi, *Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension*, in *REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE LAW* 473–538 (Vincent Chetail et al. eds., 2016).

¹⁰⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 2013 O.J. (L 180) 60, Recital 13; *see also* Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 2011 O.J. (L 337) 9, Recital 13; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast), 2013 O.J. (L 180) 97, Recital 12.

enjoying free movement throughout the Union with appropriate border protections to control immigration and police transnational crime.¹⁰⁹ Under the TFEU, a responsibility-allocation mechanism—such as Dublin—is a legally required component of the CEAS.¹¹⁰ E.U. law also requires that the CEAS align with refugee law and human rights conventions—thus any related measures must respect refugee rights, including the principle of non-refoulement.¹¹¹

The Dublin system was intended to provide “a clear and workable method for determining the Member State responsible for the examination of an asylum application.”¹¹² It was designed to prevent asylum-seeker forum shopping and multiple applications by the same person across member states,¹¹³ as well as “refugees in orbit”—where no member state accepts responsibility for an asylum seeker.¹¹⁴ Initially, the UNHCR commended the Dublin system as a solution to these problems.¹¹⁵ Almost a decade later, however, it acknowledged a major flaw

¹⁰⁹ See Consolidated Version of the Treaty on European Union art. 3(2), Mar. 9, 2008, 2008 O.J. (C 115) 17 (“The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”).

¹¹⁰ TFEU, *supra* note 31, at art. 78(2)(3).

¹¹¹ See *id.* at art. 78(1) (“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”).

¹¹² Dublin III, *supra* note 98, at Recital 4 (referencing the Tampere Conclusions which noted CEAS would need such a system to be successful).

¹¹³ See, for example, *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 Stateless Person (Recast)*, COM (2008) 820 final (Dec. 3, 2008) [hereinafter Examination Mechanism Proposal] (“In an area without controls at the internal borders of the Member States, a mechanism for determining responsibility for asylum applications lodged in the Member States was needed in order, on the one hand, to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications and, on the other, to prevent abuse of asylum procedures in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his/her stay in the Member States.”).

¹¹⁴ Dublin III, *supra* note 98, at Recital 5 (“It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection.”). See generally Fratzke, *supra* note 20; see also Anuscheh Farahat & Nora Markard, *Forced Migration Governance: In Search of Sovereignty*, 17 GERMAN L.J. 923, 933 (2016) (“[O]ne of the most important achievements of the Dublin system is that Member States can no longer unilaterally deny their responsibility.”).

¹¹⁵ See, for example, UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, ¶ 14, U.N. Doc. EC/SCP/68 (July 26, 1991) (noting that the Dublin Convention is a “positive development[] in this regard”).

in the system: Dublin's responsibility-allocation criteria "place[] at a disadvantage countries bordering areas affected by refugee flows, and thus goes against the principles of responsibility-sharing and solidarity which are at the basis of the Union's endeavours in the field of asylum."¹¹⁶ Chief among Dublin's criticisms is that responsibility for processing an asylum seeker's application falls on the country of first entry—often at the E.U.'s southern and eastern borders.¹¹⁷

B. Determining State Responsibility

Under the current Dublin Regulation,¹¹⁸ state responsibility is determined through a hierarchy of criteria:¹¹⁹ (1) where the applicant has a family member legally present in a member state;¹²⁰ (2) where the applicant has received a visa or residence document from a member state;¹²¹ (3) where the applicant illegally entered the E.U.;¹²² (4) where a member state has waived the need for the applicant to have a visa;¹²³ or (5) where the applicant lodges a claim in an international transit area of an airport.¹²⁴ If none of these criteria apply, the member state where the

¹¹⁶ *Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper*, UNHCR at ¶ 4(v) (Jan., 19 2001), <http://perma.cc/L2GE-K8YZ> ("UNHCR considers it wholly inappropriate to derive any responsibility for considering an asylum application from the fact that the applicant has been merely present in the territory of a Member State. Mere presence in a territory is often the result of fortuitous circumstances, and does not necessarily imply the existence of any meaningful link or connection.").

¹¹⁷ See, for example, Maryellen Fullerton, *Refugees and the Primacy of European Human Rights Law*, 21 UCLA J. INT'L L. & FOREIGN AFF. 45, 56 (2017) ("[T]he EU asylum system allows wealthier northern EU states to avoid determining asylum applications. As a result, these northern EU states send asylum seekers back to the poorer southern and eastern EU states, which are less equipped to manage large numbers of applicants."); Madeline Garlick, *The Dublin System, Solidarity and Individual Rights, in REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE LAW* 164–65 (Vincent Chetail et al. eds., 2016) ("Successive policy documents have made clear that 'the Dublin system (Dublin and Eurodac Regulations) was not devised as a burden-sharing instrument.'"); Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of E.U. Solidarity*, 26 HARV. HUM. RTS. J. 217, 224, 238 (2013) ("[T]his rule has shifted a grossly disproportionate share of the burden for handling claims to the southern EU border states.").

¹¹⁸ For analysis of the original Dublin Regulation (Dublin II) compared to the recast version (Dublin III), see Steve Peers, *The Second Phase of the Common European Asylum System – A Brave New World or Lipstick on a Pig?* 220 STATEWATCH ANALYSIS 16 (2013) ("[A]s regards the Dublin rules in particular there have only been cosmetic changes to the previous objectionable legislation. This legislation in particular deserves the description of being merely 'lipstick on a pig.'").

¹¹⁹ Dublin III, *supra* note 98, at art. 7.

¹²⁰ *Id.* at arts. 8–11.

¹²¹ *Id.* at art. 12.

¹²² *Id.* at art. 13.

¹²³ *Id.* at art. 14.

¹²⁴ *Id.* at art. 15.

applicant first lodged his/her asylum application is responsible for processing the claim.¹²⁵ However, a state may elect *not* to transfer an applicant to the responsible state and process the claim itself,¹²⁶ or it may request that another state take charge of the applicant on the basis of family reunification or humanitarian grounds, even where it would not otherwise be responsible under Dublin.¹²⁷ These are known as Dublin's *discretionary clauses*.¹²⁸ A state, however, may not transfer an applicant to an otherwise responsible state if it would expose him or her to "a risk of inhuman or degrading treatment," given "systemic flaws in the asylum procedure and in the reception conditions for applicants" in that state.¹²⁹ In such a case, the state where the asylum seeker is currently located is responsible for examining the protection claim if no other member state is deemed responsible.¹³⁰

This exception to the Dublin criteria, codified for the first time in Dublin III, stems from ECtHR and CJEU jurisprudence. These courts have held that a member state's ability to transfer an asylum seeker under the Dublin Regulation is not absolute where implementing a transfer would violate the state's *non-refoulement* obligation. The TFEU,¹³¹ the Charter of the Fundamental Rights of the European Union (CFR),¹³² and the European Convention on Human Rights (ECHR)¹³³ all prohibit refoulement—sending persons to a country where they

¹²⁵ *Id.* at art 3.

¹²⁶ *Id.* at art. 17(1).

¹²⁷ *Id.* at art. 17(2).

¹²⁸ See, for example, Silvia Morgades-Gil, *The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum*, 3 INT'L J. REFUGEE L. 433 (2015).

¹²⁹ Dublin III, *supra* note 98, at art. 3(2).

¹³⁰ *Id.*

¹³¹ TFEU, *supra* note 31, at art. 78(1) (requiring that E.U. law on asylum comply with the principle of non-refoulement).

¹³² Charter of the Fundamental Rights of the European Union arts. 18-19, 2012 O.J. (C 326) 391 (announcing in Article 18 a "right to asylum" and prohibiting in Article 19 refoulement and collective expulsion).

¹³³ Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; see also Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Sept. 16, 1963, E.T.S. No. 46 ("Collective expulsion of aliens is prohibited."). The ECHR, under Article 3, prohibits subjecting an individual to "torture or to inhuman or degrading treatment or punishment," which the ECtHR has interpreted to prohibit refoulement. See, for example, *T.I. v. United Kingdom*, 2000-III Eur. Ct. H.R. 14 (2000) ("[T]he fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3 . . . imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3."); see also *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97, ¶ 114 (2012); *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Eur. Ct. H.R. 35, ¶ 112 (2017) ("Article 3 implies an obligation not to deport" where there is a real risk of the applicant being subjected to treatment contrary to Article 3 in the destination country.).

would face serious harm. In its 2011 landmark ruling, *M.S.S. v. Belgium and Greece*,¹³⁴ the ECtHR held that the member state effecting a transfer can be held responsible if the destination state exposes the asylum seeker to treatment in violation of ECHR Art. 3.¹³⁵ Similarly, the CJEU, in joined cases *N.S. v. Secretary of State for the Home Department* and *M.E., A.S.M., M.T., K.P., E.H. v. Refugee Applications Commission, Minister for Justice, Equality and Law Reform* held that if “systemic deficiencies”¹³⁶ in either the destination state’s asylum system or reception conditions give the current host state “substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment,” then the presumption of safety regarding the destination state is rebuttable, and a Dublin transfer to that state would violate CFR Art. 4.¹³⁷

Some scholars have argued that CJEU and ECtHR jurisprudence have resulted in *de facto* responsibility-sharing,¹³⁸ while others claim that human rights

¹³⁴ *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255, ¶¶ 233, 360 (2011) (holding that both detention and living conditions in Greece violated ECHR Article 3, and that Belgium also violated Article 3 by exposing applicants to these conditions). Additionally, the Court found that Greece and Belgium violated ECHR Article 13—the former for its inadequate asylum procedures, and the latter for not providing an adequate procedure to appeal transfer to Greece. *Id.* at ¶¶ 321, 396.

¹³⁵ *Id.* at ¶ 321 (holding transfer of an asylum seeker by Belgium to Greece under the Dublin Regulations violated international and European human rights obligations where Greece did not provide access to an effective remedy thus exposing the asylum seeker to the risk of refoulement). In *Tarakhel v. Switzerland*, the Court reaffirmed this general holding, concluding that a member state would be liable where it returned an asylum seeker under Dublin without first obtaining guarantees that the receiving state would not subject the applicant to torture or inhuman and/or degrading treatment. *Tarakhel v. Switzerland*, 2014-IV Eur. Ct. H.R. 195, 223 (2014) (holding transfer of applicants to Italy without Swiss authorities first obtaining individual guarantees that Italy would appropriately handle the minor applicants’ claims and not separate the family violates ECHR Article 3).

¹³⁶ Some scholars have criticized the *NS/ME* decision for requiring “systemic breach” to give rise to an Art. 4 CFR violation, which is a heightened threshold compared to the ECtHR’s ruling in *MSS v. Belgium and Greece*. See, for example, COSTELLO, *supra* note 94, at 273.

¹³⁷ Joined Cases C-411/10 and C-493/10, *N. S. v. Sec’y of State for the Home Dep’t*, 2011 E.C.R. I-13991, I-14027, ¶¶ 105–06 (“European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union. Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.”).

¹³⁸ Paulo Biondi, *Compliance with Fundamental Rights Demands Shared Responsibility*, in *THE NEW ASYLUM AND TRANSIT COUNTRIES IN EUROPE DURING AND IN THE AFTERMATH OF THE 2015/2016 CRISIS* 263, 275 (Vladislava Stoyanova & Eleni Karageorgiou eds., 2019) (arguing that Dublin III articles 3(2) and 17 are “compulsory derogations [that] can be considered a form of responsibility-sharing”).

courts have encouraged states to construct border walls as a means of immigration control.¹³⁹ Both assertions are not fully satisfying. On the former assertion, to label the outcome of these decisions “*de facto* responsibility-sharing” is an overgenerous description of their impact. CJEU and ECtHR have stepped in to rectify a wrong caused by Dublin’s shortcomings. This is not true responsibility-sharing, where states uphold their duty to equitably handle refugee flows. It is an *ad hoc*, remedial attempt at honoring human rights where Dublin’s assumption of “similarity between protection standards, procedures, and most importantly outcomes that simply does not exist.”¹⁴⁰ Not only is this judicial fix reactive, it places the onus on asylum seekers to vindicate their rights on a case-by-case basis.¹⁴¹ This is particularly problematic when both the ECtHR and CJEU are experiencing serious backlogs.¹⁴² There are also serious concomitant negative externalities to relying on courts to clean up Dublin’s mess. The current system rewards states for “systemic flaws,” inadequate reception conditions, and blatant human rights violations, allowing them to avoid responsibility under the Dublin regime. Regarding the latter assertion, from a human rights perspective, courts should be making rights-responsive decisions to protect asylees from being refouled. Claiming that human rights court and quasi-judicial decisions influence the construction of walls ignores the role that Dublin plays in this phenomenon. Dublin renders border states disproportionately responsible for processing asylum seekers, encouraging these states to fortify their borders to prevent entry. As European border states erect physical and legal barriers, refugee flows shift to neighboring states who are then incentivized to erect border barriers of their own to avoid responsibility. The line of human rights jurisprudence in Europe is rights-responsive, grounded in respect for the human rights of asylum seekers and the principle of non-refoulement. It is the underlying systemic issue, created by Dublin, that must be resolved.

¹³⁹ Paz, *The Law of Walls*, *supra* note 19, at 602 (“My claim is that human rights courts and quasi-judicial bodies have made border walls an attractive strategic solution for states that seek to regain their traditional control over immigration.”).

¹⁴⁰ COSTELLO, *supra* note 94, at 257.

¹⁴¹ See, for example, Fullerton, *Asylum Crisis Italian Style*, *supra* note 20, at 57 (“[ECtHR precedent] also creates perverse incentives for member states to respond to the Dublin Regulation proceedings by offering individualized relief to respondents rather than remedying system-wide deficits.”); see also *id.* at 133 (“The *Tarakbel* judgement will lead to amplified efforts to negotiate individualized guarantees to protect specific asylum seekers subject to transfer requests. This approach is likely to undermine efforts to repair and improve unsatisfactory reception conditions.”).

¹⁴² For example, heading into 2015, the ECtHR had a backlog of 69,900 cases. COSTELLO, *supra* note 94, at 324. Furthermore, “most cases submitted are deemed inadmissible.” *Id.* (“CJEU too is overburdened.”).

C. Shifting Responsibility

The Dublin Regulation criteria primarily place responsibility on the member state responsible for allowing the applicant to enter the E.U.,¹⁴³ and the most common criterion cited for transfer requests is “illegal entry.”¹⁴⁴ Illegal entry is often the only manner in which an asylum seeker can access Europe.¹⁴⁵ As such, under Dublin, responsibility is often predicated upon proximity to refugee hotspots—which has the greatest impact on southern and eastern E.U. border states. This corrupts a critical underpinning of the refugee protection regime: “Under the 1951 [Refugee] Convention . . . refugees are the responsibility of the world . . . Proximity doesn’t define responsibility.”¹⁴⁶ The recent refugee crisis fully exposed this pressure point, demonstrating Dublin’s unworkable nature. During the height of the crisis in 2015, over one million refugees applied for protection in Europe.¹⁴⁷ Even before the 2015 spike, the ECtHR noted that E.U. border states face “considerable difficulties in coping with the increasing influx of migrants and asylum seekers.”¹⁴⁸ While the Dublin Regulation sought to identify the member state responsible for processing an asylum application, it did not put any form of meaningful support in place for states receiving disproportionate numbers of applicants. Dublin III merely included a “mechanism for early warning, preparedness and crisis management,” where a member state under pressure would be “invit[ed] . . . to draw up a preventive action plan.”¹⁴⁹ Under the mechanism, member states were left to “take all appropriate measures to deal

¹⁴³ See, for example, Examination Mechanism Proposal, *supra* note 113, at 3 (“[T]he responsibility for examining an application should primarily lie with the Member State which played the greatest part in the applicant’s entry into and residence in the territories of the Member States, with some exceptions designed to protect family unity.”).

¹⁴⁴ Migration and Home Affairs, *The Dublin System*, EUR. COMM’N, <http://perma.cc/7T5S-5CVF>. “Illegal entry” is not a crime—asylum seekers may enter a state irregularly, as long as they swiftly indicate their intention to seek protection. 1951 Convention, *supra* note 34, at art. 31(1).

¹⁴⁵ See, for example, FITZGERALD, *supra* note 29, at 160 (“With very few legal routes, an estimated nine out of ten asylum seekers enter [Europe] without visas.”); VIOLETA MORENO-LAX, ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER E.U. LAW 466 (2017).

¹⁴⁶ Interview by U.N. News Centre with Peter Sutherland, U.N. Special Representative of the Secretary-General for International Migration (Oct. 2, 2015), <http://perma.cc/ME43-59GK> (affirming that North African refugees are not just Europe’s responsibility; however, the principle is applicable in the Dublin context, where the state of entry (by virtue of proximity) is held responsible for processing asylum applications).

¹⁴⁷ See *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RESEARCH (Aug. 2, 2016), <http://perma.cc/7P6W-C8UC> (“A record 1.3 million migrants applied for asylum in the 28 member states of the European Union, Norway and Switzerland in 2015.”).

¹⁴⁸ Hirsi Jamaa, 2012-II Eur. Ct. H.R. at ¶ 122 (citing M.S.S., 2011-I Eur. Ct. H.R. at ¶ 223).

¹⁴⁹ Dublin III, *supra* note 98, at art. 33(1).

with the situation of particular pressure on its asylum system or to ensure that the deficiencies identified are addressed before the situation deteriorates.”¹⁵⁰ This voluntary mechanism was “destined to be ineffectual”¹⁵¹ and left the E.U. to (unsuccessfully) employ remedial *ad hoc* efforts to redistribute asylum seekers from overburdened states—like the temporary 2015 relocation quota scheme.¹⁵² As of fall 2018, only 34,705 asylum seekers out of the agreed-upon 160,000¹⁵³ had been successfully transferred from Italy and Greece to other member states under the relocation plan.¹⁵⁴

¹⁵⁰ *Id.* at art. 33(2).

¹⁵¹ Fullerton, *Asylum Crisis Italian Style*, *supra* note 20, at 125–26 (discussing Dublin III’s new early warning system and the Commission’s proposed temporary suspension mechanism for states under pressure which “did not survive political negotiations”).

¹⁵² For an examination of the failure to implement this quota-based relocation mechanism, *see* Fullerton, *Borders, Bans, and Courts*, *supra* note 28, at 406–18; Farahat & Markard, *supra* note 114, at 934–37.

¹⁵³ On Sept. 14, 2015, the Council voted to relocate 40,000 asylum seekers from Italy and Greece. On Sept. 22, 2015, the Council agreed to relocate an additional 120,000 asylum seekers from Greece and Italy. *See* General Secretariat of the Council, Resolution of the Representatives of the Governments of the Member States Meeting within the Council on Relocating from Greece and Italy 40,000 Persons in Clear Need of International Protection, Council of the European Union (2015), <http://perma.cc/PL22-JK94>; Council Decision 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015 O.J. (L 248) 80, <http://perma.cc/6AW4-7NLY> [hereinafter 2015 Quota Scheme].

¹⁵⁴ *Member States’ Support to Emergency Relocation Mechanism*, EUROPEAN COMM’N (Oct. 30, 2018), <http://perma.cc/Q6MA-2D5Y>. The calculation for the distribution key includes population size, GDP, the average number of asylum applications, and the unemployment rate of the host country. *See Proposal for a Regulation of the European Parliament and the Council Establishing a Crisis Relocation Mechanism and Amending Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining a 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*, at 10, COM (2015) 450 final (Sept. 9, 2015), <http://perma.cc/WKF2-DGPW> (“a) Population – 40% weighting; b) Total GDP – 40% weighting; c) Average number of asylum applications over the 5 preceding years per million inhabitants with a cap of 30% of the population and GDP – 10% weighting; d) Unemployment rate with a cap of 30% of the population and GDP – 10% weighting”).

IV. THE PROLIFERATION OF BORDER BARRIERS IN FORTRESS EUROPE

[I]nstead of a Europe without borders, [we] got a Europe with an iron curtain once again.¹⁵⁵

Even before the recent refugee crisis brought an unprecedented number of arrivals to Europe's shores, border states voiced concerns about the additional burdens they faced under Dublin's responsibility-allocation criteria.¹⁵⁶ The European Commission also acknowledged this shortcoming in its evaluation of the Dublin system,¹⁵⁷ particularly as it might affect border states during periods of large-scale influx.¹⁵⁸ The 2015 refugee crisis crystalized Dublin's failures, demonstrating its unworkability and precipitating a surge in the construction of border walls and fences throughout Europe. This Section first explains 2015's refugee flows and how European states responded. Next, it discusses how Dublin's "irregular entry" criterion has impacted states, both physically and psychologically, and the theory behind the desire to construct walls. Then, this Section evaluates Europe's Fortress, including the human rights and security concerns it has posed. Finally, the Section analyzes how states use "legal walls" to buttress the physical Fortress.

A. Responding to 2015's Refugee Flows

In 2015, 1,032,408 people arrived in Europe.¹⁵⁹ Many of these individuals had legitimate protection concerns, with 84 percent hailing from "the world's top 10 refugee producing countries."¹⁶⁰ Two frontline European countries

¹⁵⁵ *DACIC: Countermeasures If E.U. Does Not Solve Crisis*, MIN. OF FOREIGN AFF'S REPUBLIC OF SERBIA (Sept. 21, 2015), <http://perma.cc/SZ7F-SN2K> (Statement of Foreign Minister Ivica Dacic).

¹⁵⁶ *See generally* Minister of the Interior of the Republic of Cyprus et al., *Cyprus, Greece, Italy and Malta Paper* (Jan. 13, 2009), <http://perma.cc/PL8L-XMBY> (discussing the need for fair burden-sharing and solidarity, noting that the Dublin Criteria result in "added burden on frontline member states.").

¹⁵⁷ DG MIGRATION AND HOME AFFAIRS, *supra* note 20, at 11 ("The hierarchy of criteria for the allocation of responsibility does not take into account the Member States' capacity to provide protection and was not designed to distribute responsibility evenly. On the contrary, the criteria may even have exacerbated imbalances between Member States.").

¹⁵⁸ *Id.*

¹⁵⁹ U.N. High Comm'r Human Rights, *Operational Portal Refugee Situations: Mediterranean Situation*, UNHCR, <http://perma.cc/N8QZ-2462> (last updated Oct. 28, 2019) ("Arrivals include sea arrivals to Italy, Cyprus and Malta and both sea and land arrivals to Greece and Spain.").

¹⁶⁰ Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, U.N. High Comm'r Human Rights (Dec. 30, 2015), <http://perma.cc/Z5ZB-7JD9>.

experienced the lion's share of arrivals: Greece received 861,630,¹⁶¹ and Italy received 153,842.¹⁶² If the Dublin system were operating perfectly, under the irregular entry criterion Greece and Italy would have been responsible for processing protection claims for all of these individuals (and hosting them). Dublin, in its truest form, would have resulted in an incredibly disproportionate burden on these two states. Thus, Italy and Greece were incentivized to evade Dublin's reach.

One effective strategy for dealing with this large group of arrivals was simply not to fingerprint them,¹⁶³ employed by either necessity (because these states did not have the capacity to handle such refugee flows)¹⁶⁴ or choice (because it would mean that other European states could not definitively prove where the asylum seeker had entered Europe). Waving people through without fingerprinting enabled protection seekers to continue onward, deeper into Europe.¹⁶⁵ Another equally effective strategy was to maintain an asylum system with "systemic deficiencies" (again, either by necessity or choice) so that other states could not legally perform Dublin transfers to return asylum seekers.¹⁶⁶

Reported asylum application figures for Italy and Greece in 2015 demonstrate that there were indeed a large number of protection seekers who engaged in secondary movements. Greece only reported 17,211 asylum applicants

¹⁶¹ Of 861,630 refugees, 856,723 arrived by sea. *Operational Portal Situations: Mediterranean Situation – Greece*, U.N. High Comm'r Human Rights, <http://perma.cc/3EZJ-SJ7G> (last updated Oct. 27, 2019).

¹⁶² *Operational Portal Situations: Mediterranean Situation – Italy*, U.N. High Comm'r Human Rights, <http://perma.cc/736A-53GT> (last updated Oct. 28, 2019).

¹⁶³ See, for example, Maiani, *supra* note 20, at 111 (discussing Italy's failure to fingerprint arrivals during its Mare Nostrum operation, and citing accusations by other E.U. member states against Italy. "[I]n light of the skewed bargain underlying the Dublin criteria, [border states failing to fingerprint arrivals] is also an entirely predictable violation."); see also Barbie Latza Nadeau, *Italy's Latest Export Is Refugees, and the Rest of Europe Is Not Happy*, THE DAILY BEAST, <http://perma.cc/J3YB-MM22> (last updated Apr. 14, 2017) (quoting Bavarian Interior Minister Joachim Herrmann: "Italy in many cases intentionally does not take personal data and fingerprints from refugees to enable them to seek asylum in another country.").

¹⁶⁴ During Europe's "refugee crisis," at least one country explicitly asked the European Commission whether they could legally "wave people through" given the high volume of arrivals. See Elizabeth Collett & Camille Le Coz, *After the Storm: Learning from the E.U. Response to the Migration Crisis*, MIGRATION POLICY INST. EUR. 15 (2018) (discussing an interview with an anonymous diplomat whose question went unanswered by the Commission).

¹⁶⁵ A practice that upset other European states. See, for example, Florian Eder & Vassili Golod, *Austria's Kurz: Close E.U.'s External Borders, Not Internal Frontiers*, POLITICO (Apr. 19, 2019), <http://perma.cc/PC23-VAEC> ("[Austrian Chancellor, Sebastian] Kurz acknowledged that it was 'important to make progress' on migration . . . 'For years I have said: the practice of waving people through to the center of Europe must stop' . . . [T]he focus should be on 'proper external border protection.'").

¹⁶⁶ See *supra* Section III (discussing *M.S.S. v. Belgium and Greece* and related cases).

that year.¹⁶⁷ Similarly, Italy also received only a portion of asylum applicants compared to arrivals.¹⁶⁸ And, while this data captures how many individuals *applied*, it does not account for those who applied and absconded, fleeing deeper into Europe. Thus, other European countries became the new “frontline” for arrivals. In 2015, Hungary received over 400,000 arrivals.¹⁶⁹ These protection seekers¹⁷⁰ likely traveled on the Balkan (or Eastern Mediterranean) route, initially entering the E.U. irregularly in Greece before arriving in Hungary via Serbia.¹⁷¹ While Hungary has been characterized as a transit state, rather than a destination for refugees, it initially blocked individuals who wished to leave for Austria, trapping them in Hungary.¹⁷² That year, Hungary received the largest number of applicants per capita¹⁷³ and the second-highest number of asylum applications in absolute terms in the E.U.—177,340.¹⁷⁴ Hungary was not able to transfer these asylum seekers back to Greece under ECtHR and CJEU jurisprudence.¹⁷⁵ To mitigate this issue, Hungary constructed fences at its borders with Serbia¹⁷⁶ and Croatia¹⁷⁷—an easy “fix” to block entries altogether.¹⁷⁸ Shortly after Hungary closed its borders,

¹⁶⁷ 2015 U.N.H.C.R. Stat. Y.B. 51.

¹⁶⁸ Italy received 83,243 asylum applications. *Id.*

¹⁶⁹ *Migration Issues in Hungary*, INT’L ORG. FOR MIGRATION, <http://perma.cc/4N66-XSVA> (last updated June 29, 2018) (reporting that 441,515 people irregularly entered Hungary in 2015, most of whom were refugees fleeing war in their home countries).

¹⁷⁰ *Migration Flow to Hungary: 2016 Overview*, INT’L ORG. FOR MIGRATION (July 6, 2017), <http://perma.cc/9T45-4X75> (“Three out of four migrants left their country of origin because of war/conflict or political reasons.”).

¹⁷¹ Migrants traveled through Turkey to Greece via “the eastern Mediterranean route” and then often continued onward through North Macedonia, Serbia, Hungary, and Austria via “the western Balkan route.” After Austria, they would either head for Germany or Sweden. See FITZGERALD, REFUGEE BEYOND REACH, *supra* note 29, at 210.

¹⁷² See Anemona Hartocollis, *Traveling in Europe’s River of Migrants: Budapest’s Keleti Train Station Has Become a de Facto Refugee Camp*, N.Y. TIMES (Sept. 2, 2015), <http://perma.cc/VMP6-NUQF>.

¹⁷³ See *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, *supra* note 147 (noting that Hungary received 1,770 first-time applicants per 100,000 Hungarian citizens).

¹⁷⁴ 2015 U.N.H.C.R. Stat. Y.B. 51.

¹⁷⁵ See *supra* Section III, at note 134 (discussing *M.S.S. v. Belgium and Greece*).

¹⁷⁶ See *Hungary: New Border Regime Threatens Asylum Seekers*, *supra* note 11.

¹⁷⁷ See *Migrant Crisis: Hungary Closes Border with Croatia*, *supra* note 12. Hungary also contemplated erecting a wall on its border with Romania. See U.N. High Comm’r for Refugees, *Europe’s Refugee Emergency Response - Update #3* (Sept. 24, 2015), <http://perma.cc/VX26-9VU2>; but see *We Would Rather Help Romania Protect Its Eastern Border Than Build a Fence Along the Hungarian-Romanian Border*, MAGYAR TÁVIRATI IRODA (Oct. 4, 2017), <http://perma.cc/7BUM-7EQD>.

¹⁷⁸ Hungary began erecting border walls and legal barriers during the height of the 2015 refugee crisis to exclude asylum seekers. See Armstrong, *supra* note 6.

other states followed suit as migrant flows were diverted to their territory.¹⁷⁹ In this way, the Dublin system created an incentive to build fences and other barriers so that states could avoid becoming responsible for asylum seekers irregularly entering their countries. It was a predictable way to exclude persons seeking entry, rather than relying on a broken responsibility-allocation system.

B. Understanding the Fortress

The role that the Dublin system's "irregular entry" criterion has played in assigning responsibility has had a palpable impact on member states—both physically and psychologically. This criterion, and how it has manifested in overburdened European border countries during the 2015 crisis, encouraged states to implement barriers to prevent refugees from entering—both physical obstacles (like walls and fences) and legal barriers (like inappropriate use of the safe third country concept and push-backs at the border). And yet, this is essentially what Dublin was intended to do. As the European Commission has acknowledged, the irregular entry criterion was meant to encourage border states to protect the external E.U. border after Schengen removed internal border controls.¹⁸⁰ This fortress mentality, however, has kicked into overdrive, prohibiting genuine asylum seekers from accessing protection.¹⁸¹ Dublin's "irregular entry" criterion also appears to have affected the psychology of how European states view their responsibility to refugees. Regarding whether Austria would open a center to process asylum claims, Chancellor Sebastian Kurz balked, "Of course not . . . we are not a first arrival country, unless people jump with parachutes."¹⁸² As another contemporary example, Slovakia and Hungary went so

¹⁷⁹ For example, in summer 2016, Croatia finalized construction of a fence on its border with Serbia to block diverted migrant flows. *See* Milekic, *supra* note 16. Other walls and fences built in 2015 include North Macedonia's fence on its border with Greece, Slovenia's fence on its border with Croatia, and Austria's fence on its border with Slovenia. *See* Sullivan, *supra* note 2; China Global Television Network, *supra* note 4.

¹⁸⁰ "Reliance on this criterion [irregular entry] was based on the assumption that a linkage should be made between the allocation of responsibility in the field of asylum and the respect by Member States of their obligations in terms of protection of the external border." *Communication from the Commission, supra* note 94.

¹⁸¹ *See, for example, If There Were No Fence, Tens of Thousands of Migrants Would Be Arriving in Hungary Each Year*, KORMANY (Mar. 17, 2018), <http://perma.cc/3VE4-UF4P> (quoting Prime Minister Viktor Orbán: "This fence not only protects Hungary, but all of Europe.").

¹⁸² Jennifer Rankin & Daniel Boffey, *EU Leaders Defend Migration Deal as Doubts Emerge*, THE GUARDIAN (June 29, 2018), <http://perma.cc/7DF8-QXR4>. Other states, including France and Germany, also refused to open processing centers to assess protection claims. *See id.* ("EU leaders ended 10 hours of fraught talks on migration with a vague accord to set up 'controlled centres'" in Europe to assess asylum claims of people rescued in the Mediterranean. . . . But Austria, France, Germany and Italy made clear they had no immediate plans to open secure centres on their soil.").

far as to sue the European Union to avoid a shift in responsibility from what Dublin prescribed.¹⁸³

In addition to Dublin's physical and psychological impact on European states, explanations for the proliferation of border walls in Europe span both the political and the legal. Political scientist Wendy Brown contends that walls are both an act of the sovereign state, who legitimizes their construction in the name of sovereignty, and also a marker of "eroding state sovereignty" in an ever-globalizing world.¹⁸⁴ In effect, "[walls] establish something of an 'us' and a 'them' and [state] capacity to take control of situations."¹⁸⁵ While Brown acknowledges that states are still critical "global actors," particularly noting their importance as conduits for the assertion and realization of human rights,¹⁸⁶ she also recognizes their relative demise in the post-Westphalian world. States are responding to the conflict of "postnational and international assertions of law, rights and authority" by erecting walls.¹⁸⁷ The proliferation of walls, and legal barriers prohibiting entry, also logically tracks with the resurgence of populist nationalism in Western democracies throughout Europe—whether such barriers are justified by political leaders as cultural or economic preservation, or as a strategy to garner votes¹⁸⁸ and consolidate power by harnessing the electorate's discontent with the realities of

¹⁸³ Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, 2016 O.J. (L 38) 4 (Sept. 6, 2017) (Hungary and Slovakia sought the annulment of the Council's "Relocation Decision" to benefit Italy and Greece. The Court of Justice of the European Union ultimately threw out the case.).

¹⁸⁴ WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 25 (2010) ("[Walls are constructed] As responses to contested and eroding state sovereignty, the new walls project an image of sovereign jurisdictional power and an aura of the bounded and secure nation. . ."). *See also id.* at 32 ("Most walls continue to draw on the idea of nation-state sovereignty for their legitimacy *and* serve performatively to shore up nation-state sovereignty even as these barriers . . . are themselves sometimes monuments to the fading strength or importance of nation-state sovereignty.").

¹⁸⁵ Atossa Araxia Abrahamian, *Beyond the Wall: A Q&A with Wendy Brown*, *THE NATION* (Jan. 9, 2019), <http://perma.cc/QS2J-64HK>.

¹⁸⁶ "[States are] emblem[atic] of political belonging and political protection. The plight of refugees and other stateless peoples is a reminder of the extent to which states remain the only meaningful sites of political citizenship and rights guarantees, as well as the most during emblems of security." BROWN, *supra* note 184, at 68. *See also* HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 177 (Schocken Books, 3rd ed. 1968) (defining citizenship as the "right to have rights").

¹⁸⁷ Brown, *supra* note 184, at 22 ("Nation-state sovereignty has been challenged by a quarter century of postnational and international assertions of law, rights, and authority that sometimes openly aim to subvert or supersede the sovereignty of states.").

¹⁸⁸ Nahlah Ayed, *Walled World: Lessons from Europe's Border Barriers*, *CBC NEWS* (Jan. 18, 2019), <http://perma.cc/2WBV-5577> ("[B]order barriers have proven popular both among ordinary Europeans and the politicians looking to win their vote. . . . The fence, and Orban's views on immigration, are popular. He recently won a third term as the country's prime minister.").

globalization.¹⁸⁹ In an era of increasingly politicized racism, discrimination, and xenophobia, states are making it ever-more challenging for refugees to seek asylum: “Responsibility-sharing has been replaced by responsibility-shedding.”¹⁹⁰ As governments make their own borders more difficult to cross, other states follow suit to avoid the resulting influx of refugees who can no longer access their neighbors.¹⁹¹

C. Evaluating the Fortress

Evaluating the efficacy of border barriers is challenging; it is not easy to separate the effect of the walls from the influence of other laws and policies affecting migration routes. However, one clear observation is that walls and fences encourage a shifting of entry points, leading additional states to erect similar barriers. For example, the barrier that Greece constructed on its border with Turkey in 2012 precipitated an increase of migrants who then tried to enter Europe at Bulgaria’s border with Turkey.¹⁹² This promptly encouraged Bulgaria to erect a fence of its own.¹⁹³ Similarly, Hungary’s closure of its borders in fall 2015 resulted in Slovenia becoming the primary entry point for migrants traveling on the Balkan route.¹⁹⁴ Slovenia then built a wall.¹⁹⁵ This domino effect has penetrated further into E.U. territory, triggering member states including France, Germany, Austria, Denmark, Norway, and Sweden to reinstate border controls in the once-open Schengen area¹⁹⁶ and, in some cases, to construct physical barriers of their

¹⁸⁹ See, for example, Demetrios G. Papademetriou et al., *The Future of Migration Policy in a Volatile Political Landscape*, MIGRATION POLICY INST. (Nov. 2018); Demetrios G. Papademetriou et al., *In Search of a New Equilibrium: Immigration Policymaking in the Newest Era of Nativist Populism*, MIGRATION POLICY INST. (Nov. 2018).

¹⁹⁰ Grandi, *supra* note 75.

¹⁹¹ Newland & Papademetriou, *supra* note 99, at 637.

¹⁹² Amnesty Int’l, *The Human Cost of Fortress Europe: Human Rights Violations Against Migrants and Refugees at Europe’s Borders* (July 9, 2014), <http://perma.cc/W5H5-FCXG>.

¹⁹³ *Id.*

¹⁹⁴ *Strained Slovenia Weighs Border Fence of Its Own*, DEUTSCHE WELLE (Oct. 23, 2015), <http://perma.cc/3V9F-3DYE>.

¹⁹⁵ See Surk, *supra* note 14.

¹⁹⁶ See *Border Checks Are Undermining Schengen*, THE ECONOMIST (Oct. 25, 2018), <http://perma.cc/7H6Z-TYHP> (“[S]ince the refugee crisis of 2015, “temporary” border controls have become more or less permanent in [these] six European countries.”); see also Sergio Carrera et al., *Analysis of Schengen State Notifications on the Reintroduction of Border Controls at the Internal Borders of the Schengen Area (Updated), September 2015 - December 2017 Annex 3*, in THE FUTURE OF THE SCHENGEN AREA: LATEST DEVELOPMENT AND CHALLENGES IN THE SCHENGEN GOVERNANCE FRAMEWORK SINCE 2016 62, <http://perma.cc/9R5X-H5YR> (noting that Austria, Belgium, Denmark, France, Germany, Norway, Poland, Portugal, Slovenia, and Sweden reinstated internal border controls).

own.¹⁹⁷ Not only do these barriers violate a refugee’s right to seek asylum, but Schengen’s evisceration jeopardizes one of the most valued characteristics of the Union—“the free movement of people, goods and services” within it.¹⁹⁸

Critics have also rebuked Fortress Europe for the human and security costs it imposes.¹⁹⁹ Some argue that asylum seekers are not necessarily dissuaded by walls; they are simply compelled to find another way to Europe—typically a more “dangerous route[]”²⁰⁰ as safer options for entry dwindle. In this vein, critics have derided walls as “spectacularly expensive political gestures” that do not necessarily stop border crossings, but simply make them “longer, more expensive, and harrowing . . .”²⁰¹ At least initially, that argument comported with the data: there were 1,204,280 first-time asylum applications lodged in Europe in 2016,²⁰² comparable to 2015’s 1,255,640 applications.²⁰³ Forcing people to take covert routes creates problems from a security standpoint, as governments then have less visibility to monitor (and control) who is entering the country. It also has resulted in systemic violations of human rights and refugee law. Alternative pathways have often meant travel by sea, and have resulted in the deaths of tens of thousands of migrants.²⁰⁴

¹⁹⁷ See, for example, *Austria Begins Erecting Fence on Border with Slovenia*, *supra* note 15.

¹⁹⁸ See, for example, European Comm’n, *Standard Eurobarometer* 83, 31 (July 2015), <http://perma.cc/8MLR-FDL3> (57 percent of respondents identified “free movement of people, goods and services” as the “most positive result[] of the EU in the eyes of Europeans.”).

¹⁹⁹ See, for example, Caitlin Katsiaficas, *Asylum Seeker and Migrant Flows in the Mediterranean Adapt Rapidly to Changing Conditions*, MIGRATION POLICY INST. (June 22, 2016), <http://perma.cc/V35Q-8VHY> (“Rather than deterring migration altogether, early evidence suggests increased enforcement of land borders has frequently served to increase maritime migration, with flows adapting to changing enforcement conditions. Maritime migration is both more dangerous for those migrating—who frequently turn to smugglers for assistance—and more difficult for policymakers and authorities to manage.”).

²⁰⁰ Lizzie Dearden, *Refugee Crisis: Fences Failing to Stop Asylum Seekers Arriving in Europe as Migrants Take Covert Routes*, THE INDEPENDENT (Sept. 8, 2016), <http://perma.cc/5NK5-LKSM>.

²⁰¹ BROWN, *supra* note 184, at 91; see also Abrahamian, *supra* note 185 (“[Walls are] theatrical performances of a nation-state sovereignty severely eroded by globalization.”).

²⁰² *Asylum Applicants in the EU: 2016*, EUROSTAT, <http://perma.cc/5BP4-7IYY> (last updated Mar. 2017).

²⁰³ *Asylum Applicants in the EU: 2015*, EUROSTAT, <http://perma.cc/L4FA-MLR3> (last updated Feb. 2016).

²⁰⁴ See, for example, Niamh McIntyre & Mark Rice-Oxley, *It’s 34,361 and Rising: How the List Tallies Europe’s Migrant Bodycount*, THE GUARDIAN (June 20, 2018), <http://perma.cc/JL3B-MTLG> (A boat carrying more than 500 people capsized off Lampedusa, Italy, in May 2017.); Lori Hinnant & Bram Jassen, *56,800 Migrant Dead and Missing: They Are Human Beings*, AP REPORT (Nov. 2, 2018), <http://perma.cc/W7C8-ENCP> (“[M]ore than 800 people died in an April 2015 shipwreck off the coast of Italy, Europe’s deadliest migrant sea disaster. An Associated Press tally has documented at least 56,800 migrants dead or missing worldwide since 2014.”).

[Migration control policies have] made it impossible for migrants to take the easy corridors, forcing them instead to venture longer and more dangerous crossings, because desperate asylees are still willing to take the risk, for the chance of living a life of dignity, finding a safe haven. In what seems to be a self-sustaining dynamic, every new route prompts new control initiatives and vice versa.²⁰⁵

Walls have elicited additional human rights costs, including preventing asylum seekers from accessing protection, refouling individuals to places where they risk serious harm, abuse at the hands of border guards and other government agents, and use of the threat of detention as a deterrent, among others.²⁰⁶

D. Buttressing the Fortress

While there was not a huge dip in applications from 2015 to 2016, first-time applicants in Europe decreased significantly in 2017 (649,855 applicants)²⁰⁷ and 2018 (580,845 applicants).²⁰⁸ This phenomenon appears to be the result of newly-implemented legal barriers to entry, in combination with existing physical barriers. While a comprehensive exploration of Europe's legal barriers is beyond the scope of this Article, the "failure of Dublin" argument posited herein applies to both physical and legal barriers: walls and fences have established the physical manifestation of Fortress Europe, and legal barriers have fortified it. E.U. border states like Hungary have perverted the Safe Third Country doctrine to relieve itself from responsibility for refugees, and the E.U. as a whole has done the same through the E.U.–Turkey Deal. Other laws and policies preventing refugees from entering Europe include push-backs and push-back laws (both at land and sea borders) and state of emergency laws, among others.

The two types of barriers—physical and legal—form a formidable combination. The E.U.–Turkey Deal²⁰⁹ is one example of a "legal wall." It is deemed responsible for the dramatic decrease in asylum seekers that Europe witnessed in 2017 and 2018.²¹⁰ While the E.U.–Turkey Deal did not stop all

²⁰⁵ THOMAS GAMMELTOFT-HANSEN, *The Refugee, the Sovereign, and the Sea: European Union Interdiction Policies*, in SOVEREIGNTY GAMES: INSTRUMENTALIZING STATES SOVEREIGNTY IN EUROPE AND BEYOND 172 (Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen eds., 2008).

²⁰⁶ See *The Human Cost of Fortress Europe*, *supra* note 192, at 11; *Europe's Borderlands*, *supra* note 1, at 35.

²⁰⁷ *Asylum Applicants in the E.U.: 2017*, EUROSTAT, <http://perma.cc/KZ6H-T8NA> (last updated Mar. 2018).

²⁰⁸ *Asylum Applicants in the E.U.: 2018*, EUROSTAT, <http://perma.cc/R5R8-NLGM> (last updated Mar. 2019).

²⁰⁹ Press Release, European Council, E.U.–Turkey Statement (Mar. 18, 2016), <http://perma.cc/4ELL-BCW4> [hereinafter European Council Press Release].

²¹⁰ See, for example, Elena Becatoros, *3 Years On, What's Become of the E.U.–Turkey Migration Deal?*, ASSOCIATED PRESS (Mar. 20, 2019), <http://perma.cc/Z8EJ-HCQP> ("On a very basic level of

arrivals on Greek Islands, the “numbers are far lower than the thousands per day in 2015 and early 2016.”²¹¹ The Deal created an arrangement whereby “all new irregular migrants crossing from Turkey into Greek islands . . . will be returned to Turkey . . . [and] Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU.”²¹² Turkey has a vested interest in performing its gate-keeping role to prevent migrants from leaving Turkey for Greece, including incentives such as the E.U.’s promise of six billion euros and visa-liberalization for Turkish nationals.²¹³ Human Rights watchdogs have decried the E.U.–Turkey Deal for violating the principle of non-refoulement and refugee rights more broadly.²¹⁴ Additionally, UNHCR and the International Organization for Migration have reported that the death rate for those attempting to cross the Mediterranean has risen since the passage of the E.U.–Turkey Deal as the remaining “available” routes to Europe become more dangerous, even though the total number of asylum seekers attempting to reach Europe has decreased.²¹⁵

reducing the number of asylum-seekers heading to other European countries, the deal was very effective.”).

²¹¹ See *id.*; see also European Commission, *E.U.–Turkey Statement: Two Years On*, at 1 (Apr. 2018), <http://perma.cc/8W2K-4FYG> (“Two years later, irregular arrivals remain 97% lower than the period before the Statement became operational.”).

²¹² European Council Press Release, *supra* note 209. The Deal also provided that “[f]or every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU,” however this has not provided effective protection for asylum seekers, nor has it been implemented effectively. See, for example, Gloria Fernández Arribas, *The E.U.–Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, 1 EUR. PAPERS 1097–1104 (2016), <http://perma.cc/8LVU-L9CF> (noting difficulties that non-Syrians face in gaining protection in Turkey or Europe; that Syrians who tried entering Greece irregularly “have been banned” from benefiting from this provision; the limited number of spaces available through the plan that also “depend on the good will of the [E.U.] States”; and the small number of refugees who have been resettled under this scheme).

²¹³ European Council Press Release, *supra* note 209.

²¹⁴ See, for example, Dearden, *supra* note 200 (“Human rights groups have been raising concern about the E.U.–Turkey deal, which sees all migrants arriving on Greek islands detained in camps and threatened with deportation if their asylum claims fail.”); Kondylia Gogou, *The E.U.–Turkey Deal: Europe’s Year of Shame*, AMNESTY INT’L (Mar. 20, 2017), <http://perma.cc/959T-2QKR> (“The premise on which the deal was constructed—namely that Turkey is a safe place for refugees—was flawed. In the months following the deal, Greece’s asylum appeals committees ruled in many instances that Turkey does not provide effective protection for refugees.”); Greece: *Government Defies Court on Asylum Seekers, Reinstates Containment Policy That Keeps People Trapped on Islands*, HUM. RTS. WATCH (Apr. 25, 2018), <http://perma.cc/CLJ6-S4DY> (“By the latest government count, more than 15,400 asylum seekers are on the Greek islands. Many are living in crowded and filthy processing centers, and many spent the winter in lightweight tents or even sleeping outside on the ground.”).

²¹⁵ See, for example, UNHCR, *Mediterranean Crossings Deadlier Than Ever, New UNHCR Report Shows* (Sept. 3, 2018), <http://perma.cc/S5GF-PW8F> (“In the Central Mediterranean, one person died or went missing for every 18 people who crossed to Europe between January and July 2018, compared to one death for every 42 people who crossed in the same period in 2017.”); *Missing Migrants Project*,

For a country-specific example, the Hungarian government's actions since summer 2015 illustrate the combined power of physical and legal walls. Hungary has used a wide range of strategies to block entries, reject the small number of refugees who are actually able to make asylum claims, and deter people from coming in the first place. It has “made seeking asylum like a game of *Chutes and Ladders*—where the ladders are few and far between, and the chutes are plentiful.”²¹⁶ The Hungarian government employed a number of laws and policies to augment its border fences since 2015, including: “(1) naming Serbia a safe third country and issuing inadmissibility decisions on that basis; (2) relying on a *push-back* law that provides that anyone found in Hungary without status can be immediately expelled over the Southern border in the direction of Serbia—even if they wish to claim asylum; (3) restricting asylum applications to two transit zones on the border with Serbia and only allowing one applicant per zone per workday to enter; and (4) arbitrarily detaining refugees in the transit zone shipping containers while their applications are processed.”²¹⁷ The rapidly decreasing rate of asylum seekers in Hungary from 2015–2018 demonstrates the success of this combination of strategies. While there were 177,135 asylum seekers in 2015, by 2016, there were only 29,432 asylum seekers in Hungary.²¹⁸ In 2017, the number of asylum seekers fell to 3,397.²¹⁹ In 2018, Hungary received only 670 asylum applications.²²⁰

The E.U.–Turkey Deal roughly halved the number of asylum applicants Europe received from 2015–2016 to 2017–2018. Although this was a significant decrease, some asylum seekers were able to find alternative, albeit more dangerous, routes to Europe. This excluded individuals who were not physically able to make the journey and those who could not afford the assistance of smugglers in navigating more covert pathways. Hungary's actions, on the other hand, ensured that almost no one could apply for asylum. Just as physical walls beget more walls, legal walls will influence the development of additional legal barriers as asylum seekers are re-routed to neighboring countries in Europe. If this trend continues, the total number of asylum seekers who are able to lodge

INT'L ORG. FOR MIGRATION, <http://perma.cc/9E8E-5DGZ> (last updated July 31, 2019) (noting that the “proportion of deaths” versus “attempted crossings” increased from 2.3 percent in 2018 to 3.15 percent in 2019.).

²¹⁶ Armstrong, *supra* note 6, at 49.

²¹⁷ *Id.* at 50; *see also id.* at 46–72 (discussing Hungary's fences, use of safe third country, deep border control policy, and constitutional amendments, among other externalization methods).

²¹⁸ *Id.* at 77 (Table 1: Protection Decisions in Hungary, 2014–2017).

²¹⁹ *Id.*

²²⁰ Hungarian Helsinki Committee, *Statistics, Hungary: Applications and Granting of Protection Status at First Instance: 2018*, ASYLUM INFORMATION DATABASE, <http://perma.cc/7Y5V-N232> (last accessed July 31, 2019).

protection claims in Europe will likely decrease dramatically, just as in Hungary. Fortress Europe will be nearly impenetrable.

Walls and fences—whether physical or legal—do not exempt states from upholding their international and regional legal obligations. As I have discussed elsewhere, sovereignty does not, *cannot*, justify state action to prevent asylum seekers from applying for legal protection.²²¹ While states generally retain control over their borders,²²² this power is not absolute. The right of a state to control its borders is circumscribed by international and regional treaties,²²³ as well as customary international law²²⁴ and *jus cogens*.²²⁵ One of the fundamental exceptions to blocking access at the border is invoked when the result would be a violation of the non-refoulement principle. Non-refoulement is a customary international legal norm that “clearly place[s] limits on what states may lawfully do” to persons seeking protection in their territory.²²⁶ The 1951 Refugee Convention prohibits states from “[returning] a refugee *in any manner whatsoever to the frontiers* of territories where his life or freedom would be threatened.”²²⁷ This includes both *direct refoulement* and *chain refoulement*, or onward expulsion.²²⁸ International and regional

²²¹ Armstrong, *supra* note 6, at 27–29.

²²² See, for example, U.N. Charter art. 2, ¶¶ 1 (sovereign nation principle), 7 (noninterference).

²²³ “[These obligations are] binding upon the parties . . . and must be performed by them in good faith.” Vienna Convention, *supra* note 49, at art. 26; see also Abdulaziz, Cabales and Balkandali v. U.K., App. No. 9214/80, 9473/81, and 9474/81, Eur. Ct. H.R. ¶ 67 (1985) (noting that the ability to control the entry of non-nationals onto one’s territory is limited by a State’s “treaty obligations”).

²²⁴ Customary international law is binding and represents “well-established state practices to which a sense of obligation has come to be attached.” JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 5, 29 (Cornell Univ. Press 3d ed. 2013). Further, “customary international norm[s] binds all governments whether or not they have accepted it so long as they have not expressly and persistently objected to its development.” CONNIE DE LA VEGA, DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW 34 (2013).

²²⁵ See U.N. Committee against Torture, *supra* note 48; see also Vienna Convention, *supra* note 49, at art. 53 (noting that *jus cogens* is “a peremptory norm of general international law . . . a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .”).

²²⁶ Guy S. Goodwin-Gill, *Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT’L J. REF. L. 443, 444 (2011); see also Goodwin-Gill, *The Language of Protection*, *supra* note 57, at 7 (“trac[ing] the emergence and development of the concept of international protection”).

²²⁷ 1951 Convention, *supra* note 34, at art. 33(1) (noting that, under refugee law, the risk must be based on account of the individual’s race, religion, nationality, membership of a particular social group or political opinion).

²²⁸ The principle of non-refoulement “protects persons from being transferred to a State which may not itself threaten the individual, but which would not effectively protect the person against onward transfer in violation of the principle of non-refoulement (called indirect, chain or secondary refoulement).” Tilman Rodenhäuser, *The principle of non-refoulement in the migration context: 5 key points* (March, 30 2018), ReliefWeb, <http://perma.cc/8G3S-BV4C>.

human rights law also prohibits refouling individuals to any State where they would be “in danger of being subjected to torture” or inhuman and degrading treatment.²²⁹ Respecting the principle of non-refoulement prohibits rejection at the border without first assessing an asylum seeker’s protection claim; a state cannot be certain that its actions will not amount to refoulement before evaluating an individual’s protection needs.²³⁰ The ECtHR has supported this conclusion, underscoring that states are responsible wherever they exercise “effective control and authority.”²³¹ Thus, when states erect physical and legal barriers that prevent

²²⁹ See Convention against Torture, *supra* note 48, at arts. 3, 16 (Article 3 prohibits refouling an individual to where they risk being tortured; article 16 expands refoulement to where there is a risk of inhuman or degrading treatment). Note that this conception of non-refoulement is broader than under the 1951 Convention, which requires the risk of harm to be based on account of one of five protected grounds. The ECHR also prohibits subjecting an individual to “torture or to inhuman or degrading treatment or punishment.” ECHR, *supra* note 133, at art. 3. The ECtHR has interpreted this as prohibiting refoulement. See, for example, *Hirsi Jamaa and Others v. Italy*, *supra* note 133, at ¶ 114; *Ilias and Ahmed v. Hung.*, *supra* note 133, at ¶ 112; see also *N. S. v. Secretary of State for the Home Department and M.E. and Others*, *supra* note 137 (If “systemic deficiencies” in either the destination State’s asylum system and/or reception conditions give the current host State “substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment,” transfer to that state would violate CFR article 4).

²³⁰ See, for example, Exec. Comm. of the High Comm’r’s Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (II) (2) (XXXII), U.N. Doc. A/36/12 (Oct. 21, 1981) (“In all cases the fundamental principle of non-refoulement including non-rejection at the frontier-must be scrupulously observed.”); Exec. Comm. of the High Comm’r’s Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, No. 81(h) (XLVII), U.N. Doc. A/52/12 (Oct. 17, 1997) (“[A] comprehensive approach to refugee protection comprises, *inter alia*, respect for all human rights; the principle of non-refoulement; access, consistent with the 1951 Convention and the 1967 Protocol, of all asylum seekers to fair and effective procedures for determining status and protection needs; no rejection at frontiers without the application of these procedures.”); Exec. Comm. of the High Comm’r’s Programme, *Conclusion on Safeguarding Asylum*, No. 82(d)(iii) (XLVIII), U.N. Doc. A/52/12 (Oct. 17, 1997); Exec. Comm. of the High Comm’r’s Programme, *Conclusion on International Protection*, No. 85(q) (XLIX), U.N. Doc. A/53/12 (Oct. 9, 1998); Exec. Comm. of the High Comm’r’s Programme, *General Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, No. 99 (I) (LV), U.N. Doc. 12A/59/12 (Oct. 8, 2004) (“while ensuring full respect for the fundamental principle of non-refoulement, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs”). Scholars have also supported this assertion. See, for example, Costello, *supra* note 94, at 236 (“The weight of authority is now that [non-refoulement] also applies to rejection at the frontier.”); FITZGERALD, *supra* note 29, at 33 n.58; see also *id.* at 170 (citing THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 74 (2011)) (“Notably, EU member states have established the non-refoulement obligation to apply in border situations.”).

²³¹ *Hirsi Jamaa and Others v. Italy*, *supra* note 133, at ¶ 69 (stating that the test for state responsibility is whether a person falls “under the effective control and authority of that State”); see also *id.* at ¶ 60 (Pinto de Albuquerque, J., concurring) (“Immigration and border control is a primary State function and all forms of this control result in the exercise of the State’s jurisdiction. The full range of conceivable immigration and border policies . . . all constitute forms of exercise of the State

asylum seekers from lodging their protection claims and force them back to unsafe places, they violate their non-refoulement obligation.²³² Regarding the two examples above, both Hungary's actions and the E.U.–Turkey Deal have been denounced for violating the principle of non-refoulement.²³³

V. SOLVING EUROPE'S "DUBLIN CRISIS"

For over twenty-five years now, the EU and its Member States have been attempting to get the Dublin system to work. The continued abject failures of those attempts to get this pig to fly never seem to deter the next attempt to launch its aviation career.²³⁴

The Dublin system has failed in many ways, but it is particularly egregious in how it has facilitated the construction of Fortress Europe, encouraging European states to erect walls and other barriers to keep refugees out. This Article does not attempt to offer a comprehensive solution to this very complex problem; its project is much more limited in scope. This Article does, however, explore several proposed solutions, critiquing shortcomings and identifying characteristics of an ideal solution. This Section begins with game theory's explanation of why achieving consensus on Dublin reform is an incredibly difficult undertaking. It then describes and evaluates the E.U. Commission's Proposal and UNHCR's recommended modifications, the European Parliament Committee's amended proposal, flexible solidarity, and free choice.

function of border control and a manifestation of State jurisdiction, wherever they take place and whoever carries them out.”).

²³² See, for example, *id.* at ¶ 73 (Pinto de Albuquerque, J., concurring) (“The *non-refoulement* obligation has two procedural consequences: the duty to advise an alien of his or her rights to obtain international protection and the duty to provide for an individual, fair and effective refugee status determination and assessment procedure.”).

²³³ See, for example, Armstrong, *supra* note 6 (arguing that Hungary's “Chutes and Ladders” asylum system violates its non-refoulement obligations, as Hungary expels or pushes back almost all asylum seekers to Serbia, which cannot be deemed a safe third country); Jenny Poon, *E.U.–Turkey Deal: Violation of, or Consistency with, International Law?* 1 EUR. PAPERS 1195 (2016), <http://perma.cc/CN7L-QMMW> (arguing that Turkey is not a “safe third country” and that the E.U.–Turkey Deal violates international law); Enzo Rossi & Paolo Iafrate, *The E.U. Agreement with Turkey: Does it Jeopardize Refugees' Rights?*, CTR. FOR MIGRATION STUD. (Dec. 16, 2016), <http://perma.cc/L23L-TYEZ> (arguing that the E.U.'s agreement with Turkey violates the rights of refugees and the E.U. prohibition on collective expulsions; noting that the Deal risks violating the principle of non-refoulement and leading to forcible returns; and expressing doubt that Turkey could be considered a “safe third country” since Turkey maintains a geographic limitation to its ratification of the 1951 Convention, in addition to other factors).

²³⁴ Farahat & Markard, *supra* note 114, at 943 (internal citation omitted).

A. Failure to Cooperate

The unprecedented volume of asylum seekers arriving in Europe during the height of the recent refugee crisis overwhelmed border countries like Italy and Greece²³⁵ and highlighted the need to reform the Dublin system. The temporary relocation scheme meant to alleviate these two frontline states, mentioned earlier, illustrates that ad hoc, unenforceable quota mechanisms will likely not achieve desired results.²³⁶ Game theory's "Suasion/Rambo" game²³⁷ helps explain why a satisfactory solution is difficult to attain and further demonstrates why this issue will require political compromise. The Suasion/Rambo game predicts that cooperative states will be unable to coerce uncooperative states to reach an agreement. The states that support cooperation are those who receive large numbers of refugees and would benefit from an equitable responsibility-sharing mechanism. The states that oppose cooperation are those that do not typically receive many asylum seekers. They benefit from the current state of affairs and have no incentive to agree to a system that would make them responsible for additional refugees. Given this preference for the status quo, these states act as "rambos," imposing their dominant strategy (noncooperation) on other states who would prefer cooperation.²³⁸ To change the game's equilibrium, cooperative states must "sweeten the deal" by including incentives ("issue-linkage") to persuade noncooperative states to change their position.²³⁹

²³⁵ See Resolution of 18 May 2017 on Making Relocation Happen, EUR. PARL. DOC. 2017/2685(RSP) (2017); *Communication from the Commission to the European Parliament, the European Council and the Council, Progress Report on the Implementation of the European Agenda on Migration*, COM (2018) 301 final (May 16, 2018).

²³⁶ See, for example, 2015 Quota Scheme, *supra* note 153.

²³⁷ See, for example, THOMAS DIEZ, INGVLID BODE & ALEKSANDRA FERNANDES DA COSTA, KEY CONCEPTS IN INTERNATIONAL RELATIONS 71 (2011) ("[S]uasion games are useful to analyse situations with pronounced asymmetrical interests of the players." The player dubbed the "Rambo" has "defection as the dominant strategy" and "determines the game's outcome, leaving the other player dissatisfied." They only way to reach a different equilibrium is to alter the Rambo's preferences "through either issue-linkage or side-payments.").

²³⁸ Natascha Zaun, *Member States as "Rambos" in E.U. Asylum Politics: The Case of Permanent Refugee Quotas, in THE NEW ASYLUM AND TRANSIT COUNTRIES IN EUROPE DURING AND IN THE AFTERMATH OF THE 2015/2016 CRISIS* 218–19 (Vladislava Stoyanova & Eleni Karageorgiou eds., 2019) (explaining the Suasion/Rambo game).

²³⁹ *Id.* at 231–32 ("Game theory suggests that the Suasion/Rambo Game dynamics can be overcome only through issue-linkage, i.e. if Member States in favour of the quota system and the Commission find a potential package deal that the opponents of permanent refugee quotas could agree to."). The "purse" is one potential pressure point for compliance; for example, Hungary received \$5.5 billion from the E.U. in 2016. See Griff Witte and Michael Birnbaum, *In Eastern Europe, the E.U. Faces a Rebellion More Threatening than Brexit*, WASH. POST (Apr. 5, 2018), <http://perma.cc/5XCK-8CRT>.

B. Dublin IV

When the E.U. Commission realized that it would be unable to achieve consensus on a permanent distribution quota in 2016,²⁴⁰ it proposed an amendment to the Dublin system (“Dublin IV”) that would facilitate redistribution in times of mass influx. In its 2016 report, the Commission listed a “fair system for determining the Member State responsible for asylum seekers” as one of its five CEAS reform priorities.²⁴¹ To achieve a fairer system, the Commission initially proposed amending Dublin, either by adding a “corrective fairness mechanism,” or by establishing “a new system based on a distribution key.”²⁴² Under either option, the state where an asylum seeker entered the E.U. would still be responsible for registration and fingerprinting, and “returning those not in need of protection.”²⁴³ The first option would essentially maintain the current system but allow for redistribution if a certain threshold is reached in a member state. The second option would establish a new system, where responsibility would not depend on where an asylum seeker first entered the E.U., but on a “distribution key reflecting the relative size, wealth and absorption capacities of the Member States.”²⁴⁴ The Commission also introduced a longer-term solution whereby the E.U. could centrally process asylum seekers and then distribute them among member states based on a distribution key, but it acknowledged that the time was not yet politically ripe for such a mechanism.²⁴⁵ The Commission ultimately proposed the corrective mechanism solution, which would apply when a member state receives asylum applications exceeding 150% of its assigned “reference key.”²⁴⁶ Under the proposal, a member state’s reference

²⁴⁰ See, for example, Eszter Zalan, *E.U. Migrant Quota Idea is Finished, Fico Says*, E.U. OBSERVER (Sept. 27, 2016), <http://perma.cc/VQP9-TX7L> (“Slovak prime minister Robert Fico, whose country holds the rotating presidency of the EU, has declared the idea of migration quotas ‘politically finished.’”).

²⁴¹ *Communication from the Commission*, *supra* note 94, at 6.

²⁴² *Id.* at 6–9.

²⁴³ *Id.* at 7 (further acknowledging that this might require E.U. financial assistance to border countries in the spirit of “solidarity”).

²⁴⁴ *Id.* at 8.

²⁴⁵ *Id.* at 8–9 (“[I]n the long term, consideration could be given to the possibility of transferring responsibility for the processing of asylum claims from the national to the EU level.”); see also ELSPETH GUILD, CATHRYN COSTELLO, MADELINE GARLICK, VIOLETA MORENO-LAX, & MINOS MOUZOURAKIS, *NEW APPROACHES, ALTERNATIVE AVENUES AND MEANS OF ACCESS TO ASYLUM PROCEDURES FOR PERSONS SEEKING INTERNATIONAL PROTECTION* 50–59 (2014).

²⁴⁶ *Commission 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)*, COM (2016) 270 final/2 (May 4, 2016), <http://perma.cc/CES7-LP9G> [hereinafter *Commission Proposal for Member State Responsibility*].

key would be based on two criteria with equal weighting: population size and GDP.²⁴⁷ The Commission believed this solution would successfully support member states experiencing a “disproportionate number of asylum seekers”²⁴⁸ and “ensure a fair sharing of responsibility between Member States.”²⁴⁹

In response to the Commission’s proposal, in December 2016 the UNHCR recommended several “important modifications” to achieve a “fair and workable” relocation mechanism for states receiving a disproportionate number of asylum claims.²⁵⁰ The UNHCR’s approach for aiding member states under pressure started with employing a common registration system and piloting “Registration and Processing Centres” in the main countries of entry.²⁵¹ Then, to improve the speed of dealing with large numbers of arrivals, UNHCR suggested processing both manifestly unfounded claims²⁵² and manifestly well-founded claims²⁵³ in an accelerated procedure in the country of arrival, with the support of E.U. agencies.²⁵⁴ For cases that were neither manifestly unfounded nor well-founded, distribution would occur immediately, and the receiving member state would evaluate the asylum claim. Distribution would be based on the reference key “deemed fair” by member states, and applicants would be offered the opportunity

²⁴⁷ *Id.* at 18.

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.* at 18.

²⁵⁰ UNHCR, *Better Protecting Refugees in the E.U. and Globally: UNHCR’s Proposals to Rebuild Trust Through Better Management, Partnership and Solidarity*, 14 (Dec. 2016), <http://perma.cc/7HEN-RZCQ>. This UNHCR publication offers proposals on several topics, including addressing drivers of migration, facilitating safe pathways for those in need of protection, dealing with situations of large-scale refugee influx, improving the current asylum system, and integrating refugees. Here, I specifically discuss UNHCR’s proposal related to a “distribution mechanism for E.U. Member States under pressure.” *Id.* at 3; *see also id.* at 1–15, 21.

²⁵¹ *Id.* at 10–11 (Countries of entry would be assisted by E.U. agencies in operating these centers, and such a mechanism would “[b]uild[] on the lessons learned from the E.U. ‘hotspot’ Approach.”); *see also* Collett & Le Coz, *supra* note 164, at 11–12 (noting implementation and reception condition issues with the E.U.’s use of “hotspots” in 2015 to manage arrivals).

²⁵² UNHCR defines manifestly unfounded claims as those “applications from persons who clearly have no valid claim to international protection based on established criteria or which are clearly fraudulent or abusive.” *Better Protecting Refugees*, *supra* note 250, at 15 n.23.

²⁵³ UNHCR defines manifestly well-founded claims as those that “clearly indicate the applicant meets the criteria for international protection. Such cases are likely to have claims linked to specific profiles that have been established as giving rise to a well-founded fear of persecution or serious harm owing to the situation in the country [sic] origin.” *Id.* at 15 n.25.

²⁵⁴ For the unfounded claims, return would be executed with “increased E.U. Agency support.” For well-founded claims, distribution to another member state would occur after protection is granted. *Id.*

to provide “relevant information”²⁵⁵ and have their preferences “taken into account to the extent possible”²⁵⁶ prior to transfer. Arguably, the UNHCR proposal’s most important improvement upon the E.U. Commission’s plan was that the corrective mechanism would activate once a member state reached the E.U.-determined capacity (“reference share”) and would only cease once the situation in the member state under pressure had “normalized.”²⁵⁷ The UNHCR recommendation also included a special procedure for dealing with unaccompanied and separated children,²⁵⁸ and noted the need for incentives to ensure compliance by both member states and applicants.²⁵⁹ The UNHCR maintains these recommendations today as the E.U. continues working on CEAS reform.²⁶⁰

In October 2017, the European Parliament Committee adopted a report on the Commission’s proposal and offered an amended proposal of its own—a “permanent and automatic relocation mechanism, without thresholds.”²⁶¹ This mechanism prioritized relocation based on links to member states—such as the presence of family members or states where the applicant has studied in the past.²⁶²

²⁵⁵ UNHCR, *UNHCR Comments on the European Commission 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 32, COM (2016) 270, (Dec. 2016), <http://perma.cc/HQM7-UZRW> (“[A]n applicant should be given an effective possibility to provide relevant information to the benefiting Member State, whilst no personal interviews are specifically foreseen prior to a transfer under the corrective allocation mechanism.”).

²⁵⁶ *Id.* at 34 (“Objective factors should be considered, including the “presence of extended family, any previous regular stay in a Member State, study, work or concrete employment possibilities . . .”).

²⁵⁷ *Id.* (“If it is to have a real corrective effect, the threshold for cessation of the allocation mechanism should be lower than the threshold for its activation. Additionally, UNHCR proposes the activation of the corrective allocation mechanism as soon as a Member State reaches the reference share.”).

²⁵⁸ See *Better Protecting Refugees*, *supra* note 250, at 16; *UNHCR Comments on the European Commission Proposal*, *supra* note 255, at 33 (noting concerns about children, particularly unaccompanied children, accessing the asylum procedure).

²⁵⁹ *Id.* at 16–17.

²⁶⁰ UNHCR still maintains its recommendations in *Better Protecting Refugees*. See, for example, UNHCR, *UNHCR’s Recommendations for the Finnish Presidency of the Council of the European Union (EU)*, June 2019, <http://perma.cc/3AQD-3YSA> (“These priorities form the foundation of UNHCR’s full recommendations for the Finnish Presidency, and are to be read in conjunction with UNHCR’s ‘Better Protecting Refugees in the E.U. and Globally.’”).

²⁶¹ Report on the 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), EUR. PARL. DOC. (COM 0270) 112, amend. 25 (2017), <http://perma.cc/4G5K-73NL> [hereinafter Report on Proposal for Member State Responsibility].

²⁶² *Id.* at amend. 11.

Applicants that lack such links would be relocated through the proposed “corrective allocation system”—which automatically applies, as opposed to the Commission proposal that would require a state to reach 150 percent of its designated absorption capacity.²⁶³ The corrective mechanism distribution key would be calculated in the same manner as the Commission’s proposal (that is, equal weighting of the member state’s population size and GDP),²⁶⁴ and applicants would be able to choose where they were relocated among the four states with the fewest applicants “in relation to their fair share.”²⁶⁵ The Parliament proposal also included several carrots and sticks²⁶⁶ to ensure both applicant and member state compliance:

1. Incentivizing applicant registration in the state of entry: Applicants must register in the first state of entry to take advantage of distribution based on links to a member state or, where a link does not exist, to enjoy the option of choosing among the four least-burdened states.²⁶⁷ If the applicant fails to register in the first state of entry, he will be relocated to the least-burdened country by default.²⁶⁸
2. Combating the “pull factor” associated with having a choice between four host states: Applicants will not know in advance the identity of the four least-burdened countries.²⁶⁹
3. Dissuading economic migrants from taking advantage of the system: Applicants who have “very low chances” of receiving asylum will not be relocated but processed in the state of entry. That member state will receive E.U. funds to offset processing costs.²⁷⁰
4. Financial incentives: Member states will receive E.U. funds for reception and transfer costs.²⁷¹
5. Ensuring Member State cooperation: Member states that fail to register incoming applicants will be sanctioned.²⁷²

²⁶³ Compare *id.* at amend. 25 with Commission Proposal for Member State Responsibility, *supra* note 246.

²⁶⁴ Report on Proposal for Member State Responsibility, *supra* note 261, at 20, amend. 25.

²⁶⁵ *Id.* at amend. 69.

²⁶⁶ *Id.* at amend. 12 (“[P]rocedures should be put in place to ensure the cooperation of applicants and Member States, with a clear system of incentives and disincentives to ensure compliance.”).

²⁶⁷ *Id.* at amend. 11.

²⁶⁸ *Id.* at amend. 152.

²⁶⁹ *Id.* at 113 (“[The] ‘lowest amount’ member states will be constantly changing as applicants are registered in the system, [so] it will not be possible for an applicant to know which four member states will be available to choose from when deciding to seek protection in Europe.”).

²⁷⁰ *Id.* at amend. 8.

²⁷¹ Commission Proposal for Member State Responsibility, *supra* note 246, at amends. 8, 104, 165, 200.

²⁷² *Id.* at amend. 202 (“Suspension of the corrective allocation mechanism,” amended art. 43a; “Coercive measures,” amended art. 43b).

- a. Applicants will not be relocated from member states of first entry who fail to register incoming applicants; and
- b. Member states will lose the ability to use E.U. funds to return rejected asylum applicants if they fail to accept relocated applicants in their country.

In a number of ways, the Committee's proposal heeded the UNHCR's recommendations, including prioritizing refugee links to member states when considering relocation, providing refugees without links some choice in where they would be transferred, immediate activation of the corrective allocation system once a member state reaches capacity (as opposed to the Commission's 150% threshold), and employing carrots and sticks to ensure compliance by both member states and applicants.

Unfortunately, one major obstacle to reforming the current Dublin system is the lack of E.U. solidarity in the context of rising populist nationalism. However, in its report, the European Parliament Committee underscored the Council's power to decide this matter, even if resisted by noncooperative member states: "The Council is clearly allowed to decide on this regulation by majority voting and their focus must now be on finding a system that will work on the ground, and not only one that can reach unanimity in the Council."²⁷³ It remains unclear how the E.U. will effectively compel noncooperative states to participate, or admonish those who refuse to comply. Given these political difficulties, former E.U. President and Slovak Prime Minister Robert Fico advocated that member states should engage in "flexible solidarity," "whereby countries that do not want to take migrants could contribute to the EU's migration policy with other means, financially."²⁷⁴ However, the UNHCR has affirmed unequivocally that "[f]ull participation in the mechanism needs to be secured" for it to be successful.²⁷⁵

C. Falling Short and Best Interests

The proposed solutions, including permanent quotas, the Commission's Dublin IV redistribution mechanism, Parliament's amended redistribution plan, and "flexible solidarity," all fall short. Flexible solidarity is problematic because poorer E.U. states (typically those on the border) who cannot afford to "buy" their way out of hosting refugees would remain responsible for processing an unfair share of asylum seekers. Solutions focused only on the provision of financial resources, without attention to *physical* responsibility-sharing, would still

²⁷³ *Id.* at 112.

²⁷⁴ Zalan, *supra* note 240.

²⁷⁵ UN High Commissioner for Refugees (UNHCR), *UNHCR's Recommendations to the Federal Republic of Austria for its Presidency of the Council of the European Union (EU)* 2, June 2018, <http://perma.cc/668U-3X7P>.

force certain member states to serve as the E.U.'s "refugee camp,"²⁷⁶ and experience indicates that this strategy will not succeed in managing refugee flows and protecting refugee rights.²⁷⁷ This would also continue to breed dissatisfaction in those states that would bear an unfair physical burden, potentially fueling nationalist sentiment. Moreover, this strategy would contradict conceptions of equality where states have repeatedly identified that it is desirable and good to share responsibility for refugees—including, but *not limited to*, financial sharing.²⁷⁸ Furthermore, such buy-out "flexibility" would enable states to deny entry to asylum seekers based on xenophobic, nationalist policies.²⁷⁹ A successful responsibility-sharing regime cannot allow member states to "buy their way out" of hosting persons in need of protection.

The Commission's proposal for Dublin IV—based on the failed 2015 relocation quota—is also not an ideal solution. It would require that states reach an incredibly high threshold (150%) to activate its protections, and it has been criticized as "administratively unworkable" and unenforceable.²⁸⁰ It would also continue to result in border states confronting an unfair share of the responsibility

²⁷⁶ See, for example, Willa Frej, *The Popularity of Europe's Far-Right Is Surging Even as Migrant Arrivals by Sea Plummet*, HUFFINGTON POST (June 27, 2018), <http://perma.cc/TW2V-Q2DP> (quoting Matteo Salvini, Deputy Prime Minister, telling his European partners that Italy will no longer be the bloc's "refugee camp").

²⁷⁷ For example, between 2011 and 2013 the European Commission provided Greece with €12,220,969 for refugee reception, and €227,576,503 to "enhance border control measures and increase detention facilities." This did not stymie pushbacks or abuse of asylum seekers. Amnesty Int'l, *Greece: Frontier of Hope and Fear* 7 (2014), <http://perma.cc/8WNA-UNG8>; see also European Commission, *Factsheet: Managing the Refugee Crisis - Greece: State of Play Report* (Feb. 2016), <http://perma.cc/SE3D-GU6F> (explaining that the E.U. Commission has provided Greece with almost €28 million in emergency funding throughout the "refugee crisis").

²⁷⁸ See, for example, TFEU, *supra* note 31, at art. 80 ("The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, *including* its financial implications between Member States.") (emphasis added); *Annex I- The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, in PRESIDENCY CONCLUSIONS, Doc. 14292/04, at ¶ 1.2 (Nov. 2004) (noting that CEAS should "be based on solidarity and fair sharing of responsibility *including* its financial implications") (emphasis added).

²⁷⁹ See, for example, Hardeep Matharu, *Slovakian Prime Minister Says "Islam Has No Place in This Country" - Weeks Before it Takes over E.U. Presidency*, THE INDEPENDENT (May 27, 2016), <http://perma.cc/5EGH-9BEQ> (noting that Prime Minister Fico—the same individual who proposed "flexible solidarity"—said "he would not accept 'one single Muslim' migrant into the country" and has also stated "Islam has no place in Slovakia. I think it is the duty of politicians to talk about these things very clearly and openly. I do not wish there were tens of thousands of Muslims.").

²⁸⁰ Francesco Maiani, *The Reform of the Dublin System and Dystopia of "Sharing People,"* 24(5) MA. J. EU. AND COMP. L., 622, 633 (2017) (citing E.U. *Immigration and Asylum Law and Policy*, ODYSSEUS NETWORK (2016)); see also Constantin Hruschka, *Dublin is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission*, E.U. IMMIGR. & ASYLUM L. & POLY (May 17, 2016), <http://perma.cc/3W2A-N6QCEU>; Resolution of 18 May 2017, *supra* note 235.

to process refugees,²⁸¹ without support in place to assist with this financial burden.²⁸² Parliament’s proposal, on the other hand, is better aligned with the spirit and intent of European solidarity, the international principle of responsibility-sharing, and UNHCR recommendations. Yet, even Parliament’s solution has concerning flaws. First, it would still require a financial burden on the state of first entry.²⁸³ Second, it curiously limits transfer choice to the four least-burdened states rather than to all member states who are “below quota.”²⁸⁴ Third, its mechanism for state compliance would likely be ineffective in practice, “especially for border/first application” member states.²⁸⁵ Finally, enforcing transfers—which would become the rule rather than the exception—would also prove challenging.²⁸⁶

In addition to addressing these criticisms, any strong, viable proposal should give serious consideration to the best interest of the individuals seeking protection.²⁸⁷ Placing appropriate weight on asylum seekers’ needs and wishes would ultimately reduce secondary movements and increase the chances of successful integration. The UNHCR has long supported this approach, arguing that “the intentions of the asylum-seeker” should be taken into account “as regards the country in which he wishes to request asylum . . . as far as possible.”²⁸⁸ UNHCR has further noted that “the responsibility for considering an asylum claim lies with the Member State with which and in whose jurisdiction the claim

²⁸¹ See, for example, *Position Paper of Cyprus, Greece, Italy, Malta and Spain on the Proposal Recasting the Dublin Regulation*, <http://perma.cc/ZLQ5-2AT3> (highlighting the disproportionate burden Cyprus, Greece, Italy, Malta, and Spain claim they will continue to confront under the Commission’s reform proposal).

²⁸² UNHCR, *Comments on the European Commission Proposal*, *supra* note 255, at 35 (criticizing the Commission plan for lacking mechanisms for “financial solidarity” regarding costs of identifying, registering, screening, and returning or transferring applicants).

²⁸³ See, for example, Maiani, *supra* note 280, at 638 (The state of first entry would still be required to “cover reception costs for other ‘screened out cases,’ Dublin processing costs, costs of processing and return for screened out cases.”).

²⁸⁴ *Id.* at 639.

²⁸⁵ *Id.* at 638 (“[T]he ‘sanction’ of exclusion from the allocation system . . . is both ineffectual and short-sighted. Ineffectual, in that the threat is to take away a remedy that is already not functioning. Short-sighted, in that the step of ‘disabling’ the default criterion of allocation would leave applicants in a limbo without a clearly identified responsible state.”).

²⁸⁶ *Id.* at 639–40 (discussing the difficulties of effectuating “coercive transfers”).

²⁸⁷ See, for example, Garcés-Mascareñas, *supra* note 21 (“A distribution system that does not take the asylum seekers’ preferences into account is not only ethically reprehensible but also terribly inefficient.”).

²⁸⁸ Exec. Comm. of the High Comm’r’s Programme, *Refugees without an Asylum Country*, No. 15(h)(iii) (XXX), U.N. Doc. A/34/12 (Oct. 16, 1979). However, UNHCR has also underscored that there is no “unfettered right to choose one’s country of asylum.” UNHCR, *Comments on the European Commission Proposal*, *supra* note 255, at 34.

is lodged,” and that transfers should only be executed where there are “meaningful links” with another state.²⁸⁹ Related to this issue, the European Council on Refugees and Exiles argued for “free choice as an alternative to Dublin”²⁹⁰ when Europe was considering Dublin II reform, and German NGO ProAsyl recently made the same recommendation for the next iteration of Dublin.²⁹¹ Legal scholars have also advocated for free choice—that “the default position should be that the state with custody of the asylum seeker should assess whether the individual warrants international protection,” and transferring applicants should only occur in the context of family reunion or for humanitarian reasons.²⁹²

Entirely “free choice” has been met with genuine concern—namely, that states would continue to share responsibility for refugees unequally under such a regime.²⁹³ While this is a valid observation, until Europe has forged a truly uniform asylum system where the same level of protection is offered in every member state, Europe must “respond to the contemporary situation.”²⁹⁴ The international refugee law regime exists for refugees to seek and enjoy protection, and allowing refugees to choose member states that guarantee them the best chance of protection fulfills that mandate. Concurrently, the E.U. must continue to work on harmonizing protection standards to ensure all member states are equally committed to providing asylum seekers refuge.²⁹⁵ There are also a number of benefits to honoring refugee choice, including obviating the need for a responsibility assessment and system of distribution altogether and quashing the incentive for secondary movements. The E.U. should seriously assess how a system of responsibility-allocation that honors asylum seeker choice to the greatest extent possible could improve upon the present experience for both

²⁸⁹ UNHCR, *Revisiting the Dublin Convention*, *supra* note 116, at 5.

²⁹⁰ European Council on Refugees and Exiles, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, at 29–30 (March 2008), <http://perma.cc/79W8-MUBA>.

²⁹¹ PRO. ASYL. ET AL., FOR A FREE CHOICE OF HOST COUNTRY IN THE E.U. – RESPECTING REFUGEES’ INTERESTS (2015).

²⁹² *See, for example*, Fullerton, *Asylum Crisis Italian Style*, *supra* note 20, at 131 (noting that this would essentially be a “suspension” of the regulation, “[s]ince more than ninety-five percent of the total Dublin Transfer requests are grounded on the irregular entry provision.”). The author also notes that a “system in which the state where the asylum seeker files an application examines and decides the merits of the claim would be more efficient and more humane.” *Id.* at 134.

²⁹³ *See, for example*, PRO ASYL ET AL., *supra* note 291, at 14–15 (analyzing the “objection of unequal distribution of refugees”).

²⁹⁴ *See* Fullerton, *Asylum Crisis Italian Style*, *supra* note 20, at 134.

²⁹⁵ The “huge disparities between Member States as to the rate of refugee status” recognition provide the most concrete manifestation of the failure to establish a truly common asylum system. As observed by UNHCR, “the chances of an individual asylum-seeker to find protection in the E.U. can vary nearly seventy-fold, depending on where he or she applies.” Chetail, *supra* note 107, at 16.

member states and protection seekers, and what complementary systemic changes would be needed to make this feasible.²⁹⁶

Currently the E.U. is at an impasse on Dublin reform²⁹⁷ and next steps will depend on the newly elected, and very fragmented, European Parliament.²⁹⁸ The ideal solution should be binding and enforceable, equitably distribute responsibility to process and host refugees among member states, enable asylum seekers' access to protection, and honor asylum seekers' preferences. It is, of course, easier to identify the characteristics of an ideal proposal than it is to implement a plan with these features in the current political climate. For example, the Visegrad Group strongly opposes any "mandatory and automatic distribution system."²⁹⁹ Unfortunately, populist nationalism both favors the construction of walls and disfavors reaching an agreement that would engender equitable solutions.³⁰⁰ In this setting, game theory suggests that the only way to persuade noncooperative states is to change the game's equilibrium by linking issues or creating incentives for cooperation.³⁰¹ The new Commission will begin its work in

²⁹⁶ The European Commission briefly analyzed free choice as an alternative to Dublin when it developed the Dublin Convention into Community legislation in 2000. The Commission recognized that such a system would be "clear and workable in relation to the objectives of speed and certainty, avoiding refugees in orbit, tackling multiple asylum applications and ensuring family unity." Commission of the European Communities, *Revisiting the Dublin Convention: Developing Community Legislation for Determining which Member States is Responsible for Considering an Application for Asylum Submitted in One of the Member States*, at 522, ¶ 59, SEC (2000). However, the Commission noted several concerns, including that this model would remove the "link between responsibility for controlling the external frontier"; fail to address forum shopping; and, relatedly, that it "would rely on harmonization in other areas such as asylum procedures, reception conditions, interpretation of the refugee definition and subsidiary protection to reduce any perceived incentives" if asylum seekers were to choose among member states. *Id.* at ¶¶ 56, 59.

²⁹⁷ See, for example, Georgi Gotev, *Juncker Commission Gives up on Dublin Asylum Reform*, EURACTIV (Dec. 4, 2018), <http://perma.cc/99HQ-PH5Z> ("Faced with the opposition of member states from the Visegrad group, the Juncker Commission made it plain on Tuesday (4 December) that it has given up on one of its declared goals: completing the reform of the Common European Asylum System.").

²⁹⁸ See, for example, Steven Erlanger, *European Election Results Show Growing Split Over Union's Future*, N.Y. TIMES (May 26, 2019), <http://perma.cc/6AQC-7L2L> (reporting on the outcome of the May 6, 2019 Parliamentary elections and observing "the decline of mainstream parties and increased fragmentation").

²⁹⁹ Visegrad Group, *Responsible Handling of the Migration Crisis in 2017–2018 Hungarian Presidency* 11, <http://perma.cc/MV62-JASN> (The Visegrad Group—which includes the Czech Republic, Hungary, Poland, and Slovakia—opposes any "mandatory and automatic distribution system in line with the corrective distribution system in the Dublin proposal.").

³⁰⁰ There is also a connection between "opposition to the European Union, Euroscepticism, and a growth in support for far-right parties . . . [but] it would be overstating the evidence to suggest that European integration is responsible for the resurgence of such parties." Gráinne de Búrca, *Is E.U. Supranational Governance a Challenge to Liberal Constitutionalism?*, 85 U. CHI. L. REV. 337, 352 (2018).

³⁰¹ Zaun, *supra* note 238, at 231–32.

Fall 2019, when it will again consider how to effectively implement a solution that will promote equitable responsibility-sharing among all member states while guaranteeing refugee rights.³⁰²

VI. CONCLUSION

*Refugees have no protection from their own state – indeed it is often their own government that is threatening to persecute them. If other countries do not let them in . . . then they may be condemning them to death.*³⁰³

Attempts to avoid responsibility for assisting refugees are not new,³⁰⁴ and these attempts are often exacerbated when responsibility is not distributed clearly or equitably—especially in the context of mass influx, protracted crises, irregular onward movement, mixed movement, and rescue at sea. The Dublin system was created during a time when European solidarity, the political climate, and refugee flows were much different.³⁰⁵ It was never intended as a responsibility-sharing mechanism, and the recent mass influx of refugees arriving in Europe crystalized how Dublin places undue burden on E.U. border states and ultimately led several European states to erect border barriers. These barriers have resulted in a domino effect, encouraging other states deeper in Europe to erect walls and fences or reinstitute border controls to stave off responsibility. These fences and walls, along with the strategic use of legal barriers, have led to the realization of Fortress Europe. They have also resulted in a breach of the non-refoulement obligation.

Effective responsibility-sharing is needed to maintain a robust protection regime that is able to accommodate large numbers of asylum seekers and guarantee them the protection that international and regional law mandates—including access to a fair and efficient asylum procedure and protection from refoulement. First, from a human rights perspective, “the only way to protect people from . . . atrocities is to ensure that [they] are able to find protection.”³⁰⁶ Second, from a statist perspective, Europe’s responsibility-sharing failure wrecks

³⁰² Interview by Demetrios G. Papademetriou with António Vitorino, Director General, International Organization for Migration, in Washington, D.C. (Mar. 6, 2019) (Papademetriou explains that this issue will be considered by the new Commission.) (notes on file with author).

³⁰³ *Refugees*, UNHCR CENTRAL EUROPE (Dec. 14, 2016), <http://perma.cc/K7UC-8A4C>.

³⁰⁴ *See, for example*, Hathaway & Neve, *supra* note 39, at 115–16 (“[M]any governments are withdrawing from the legal duty to provide refugees with the protection they require. While governments proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, they appear committed to a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants.”).

³⁰⁵ *See, for example*, European Commission, *A European Agenda on Migration*, at 13, COM (2015) 240 final (May 13, 2015) (“When the Dublin system was designed, Europe was at a different stage of cooperation in the field of asylum. The inflows it was facing were of a different nature and scale.”).

³⁰⁶ Martin et al., *supra* note 38, at 7.

havoc on the entire project of a united Europe. The failure of the Dublin system has exacerbated “national cleavages and pit[ted] Member States against each other”³⁰⁷ at a historical moment where Europe is experiencing a dangerous rise in populist nationalism that further fuels fragmentation.³⁰⁸ Dublin has resulted in shifting, rather than sharing, responsibility, and has failed to realize all of its major objectives—including fostering a clear and workable method to determine the state responsible for processing a protection-seeker’s claim, and preventing asylum seekers in orbit and secondary movements.

Europe needs a new modality of responsibility-allocation for asylum seekers that engenders and reinforces equitable sharing, unlike the current system that exacerbates tensions and promotes unequal distribution. Any system of responsibility-allocation should be equitable, enforceable, permanent, and reflect the best interests of protection seekers. The international human rights and refugee rights regimes announce state obligations to rightsholders. When a systemic flaw in the international or regional system contributes to or incentivizes the violation of those duties, that flaw must be addressed. For the refugee rights regime to fulfill its promise to those fleeing persecution, access to territory must be guaranteed. The Dublin system has fueled the development of Fortress Europe—a collection of walls and fences, fortified by legal barriers, that aim to keep refugees out. Until Europe’s asylum seeker allocation system is better aligned with the international principle of responsibility-sharing and respect for refugee rights, it will continue to exacerbate regional tensions and promote a system where asylum seekers face great difficulty availing themselves of the 1951 Convention’s protections.

³⁰⁷ COSTELLO, *supra* note 94, at 26.

³⁰⁸ See, for example, Stone, *supra* note 5 (“The erection of the barriers has also coincided with the rise of xenophobic parties across the continent.”).