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A More Acceptable Solution: The Proposed European Union Agency of Asylum and Refugees

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A MORE ACCEPTABLE SOLUTION: THE PROPOSED EUROPEAN UNION AGENCY OF ASYLUM AND REFUGEES

*Sarah Katz**

This Note details the improvements that should be made to a recent proposal submitted by a group of scholars to the European Parliament. The scholars have suggested that the European Union create an independent organization to process asylum applications and to deal with refugee issues in the European Union. This Note agrees with this central proposal, but fleshes out more details that are missing from this initial proposition. The five aspects of refugee processing are detailed in turn: (1) defining a refugee; (2) assigning responsibility for dealing with asylum claims; (3) reception conditions; (4) temporary protection; and (5) long-term residence conditions. The new agency should clarify the scope of the definition of a refugee in order to create a more uniform asylum application process. The Dublin Convention should be abandoned as the determining doctrine for which State will process asylum applications. Reception sites should be given financial assistance and European Union representatives should be placed at the sites. Once a refugee is granted temporary protection, he or she should have the opportunity to move freely for employment. Each State should be encouraged to submit a survey detailing its needs to the new agency so that the agency can determine the best fit for the relocation of individual refugees. This Note also suggests that the proposed agency create programs that would promote tolerance and acceptance of refugees, and further emphasizes the need to find a solution that will be accepted by all Member States of the European Union. This Note aims to advance this acceptance by highlighting the needs of the Member States as an important factor in refugee relocation determination.

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I. INTRODUCTION

In 2015, the European Union (EU) received around one million asylum applications, making it the largest European refugee crisis since World War II.¹ The EU’s current policy on asylum granting has proven

1. Beatrice Cretu, *How Syria’s Neighbors and The European Union are Handling the Refugee Crisis*, ROMANIAN J. OF HISTORY AND INT’L STUDIES 2(2) 245, 255 (2015).

problematic. The EU has committed itself to creating a united plan on asylum,² but the structure that is currently in place, the Common European Asylum System (CEAS), is not implemented uniformly by the Member States. This has caused great stress on the Union.

Many solutions have been proposed to address the problematic nature of processing asylum seekers within the EU, but most of these proposals are burden-shifting proposals.³ The EU Member States have repeatedly attempted to shift the burden of processing and accepting refugees outside their sovereign borders. Rather than shifting the burden outside of the EU or to another Member State, the EU should form a cohesive plan that addresses how to share the burden. This plan should be devised so that it can be implemented relatively uniformly between Member States to relieve the current tension within the Union.

Recently, scholars have submitted a suggestion for such a unified response to the European Parliament.⁴ These scholars have suggested in their submission, entitled “Enhancing the Common European Asylum System and Alternatives to Dublin,” the creation of an independent organization that would centralize the refugee asylum determination process.⁵ This scholarly submission focuses on the refugees’ right to choose freely where they want to settle.⁶ This Note agrees with the proposition that an independent organization should be created. However, this Note suggests that the European Parliament should not focus on refugee freedom, but rather on a multi-factored analysis of the EU member States’ needs and obligations.

While the solution of creating an independent organization is a solid unifying suggestion, the emphasis on refugee free choice is not practical. One of the biggest reasons for the stress on the EU is that no State can afford to bear a disproportionate burden of refugee acceptance. Deferring to the preference of the refugees does not resolve this problem and is a solution that most States will not accept. This is not to say that the proposed agency should ignore refugee settlement preference entirely. Rather, refugee preference should only be a factor in a larger

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2. Under the Treaty on the Functioning of the EU (TFEU), the EU must 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.” Consolidated Version of the Treaty on the Functioning of the European Union art. 78(1), May 9, 2008, 2008 O.J. C 326/47, at 76 [hereinafter TFEU].
 3. These proposals are discussed in detail in Section III.C of this Note.
 4. *Study of the Committee on Civil Liberties, Justice and Home Affairs on Enhancing the Common European Asylum System and Alternative to Dublin*, at 1 (Jul. 2015), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/1/POL_STU\(2015\)519234_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/1/POL_STU(2015)519234_EN.pdf) [https://perma.cc/A6QN-BBBT] [hereinafter *LIBE Committee Study*].
 5. *Id.* at 58.
 6. *Id.* at 59.

evaluation process. Resettlement should not be entirely up to the individual applicant.

This Note argues that a more acceptable evaluation process will be one where the Member States of the EU are able to submit statistics regarding their needs and ability to accommodate immigrants. Any uniform plan must use administrative coordination to balance economic interests, State sovereignty, and human-rights interests. To disregard any of these factors is to develop an unsustainable plan. This Note fleshes out a model plan for an independent organization that will effectively balance these factors. Part I discusses the standard of international and EU refugee law. Part II addresses why the EU's previous tactics of externalizing the "refugee problem" have failed. And Part III outlines a proposal for the step-by-step process under which the suggested unified EU body should process refugee applications.

II. PART I: A UNIFIED RESPONSE HAS PROVEN PROBLEMATIC BECAUSE INDIVIDUAL EU MEMBER STATES HAVE BEEN SEPARATELY HANDLING THE REFUGEE APPLICATION PROCESS

Both international and EU agreements acknowledge the importance of protecting refugees. The EU has committed itself to attacking this issue with a unified response.⁷ But, immigration is an issue that individual States have handled. The tension between the unified goal and the nationalized policies has resulted in inefficient solutions to date. Each State does not see itself as a player in a unified front, but rather is looking out for its own citizens' interests. This is why any proposed unified plan must clearly lay out the roles of all Member States.

A. International Refugee Law Provides Definitions that Form the Basis of the Discussion of the Refugee Crisis

Before discussing refugee law in Europe, it is necessary to define the terms used in this field. The European system classifies migrants into two categories: economic migrants and asylum seekers. An "economic migrant" is a person who is relocating to a new country for the purpose of seeking a better life or more job opportunities.⁸ An "asylum seeker" is a person who has fled persecution or conflict and is seeking international protection under the 1951 Refugee Convention.⁹ Finally, "refugee" is the status granted to an individual after the proper authorities determine that the asylum seeker is indeed protected by the

7. TFEU, *supra* note 2.

8. Jeanne Park, *Europe's Migration Crisis*, COUNSEL ON FOREIGN RELATIONS, Sep. 23, 2015, at 2 <http://www.cfr.org/migration/europes-migration-crisis/p32874> [<https://perma.cc/6JZY-KMYZ>].

9. *Id.*

1951 Convention.¹⁰ Often the lines between these categories are blurred. The most important distinction between these two categories is that an economic migrant can be sent back to his or her country of origin, while a refugee cannot be sent back to his or her country of origin under the internationally accepted principle of *non-refoulement*.¹¹

International Refugee Law has taken its modern form through the 1951 *United Nations Convention on Human Rights* (Geneva Convention) and the 1967 *Protocol Relating to the Status of Refugees*. The 1951 Convention stated in Article 33 that “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.”¹² This is the principle of *non-refoulement*.¹³ The EU Charter of Fundamental Rights is legally binding on all EU institutions and Member States in the same way that EU treaties are binding.¹⁴ Article 18 of the Charter says that “the right to asylum shall be guaranteed with respect for the rules of the Geneva Convention.”¹⁵ This means that all EU Member States are required not to return an asylum seeker to a life-threatening situation.

10. *Id.*

11. Livia Elena Bacaian, *The Protection of Refugees and Their Right to Seek Asylum in the European Union*, 20 (Jan. 26, 2011) (unpublished Master’s Thesis, European Institute of the University of Geneva) (on file with the University of Geneva), <https://www.unige.ch/gsi/files/6614/0351/6348/Bacaian.pdf> [<https://perma.cc/7M9J-QE76>].

12. *Convention Relating to the Status of Refugees art. 33*, Jul. 28, 1951, 189 U.N.T.S. 150.

13. U.N. High Commissioner for Refugees, *Note on Non-Refoulement*, U.N. Doc. EC/SCP/2 (Aug. 23, 1977), <http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> [<https://perma.cc/B548-QN63>].

14. Pavel Pyszko, *Feasibility of the Extra-Territorial Processing of Asylum Applications by Member States of the European Union*, 14 (Sept. 2015) (unpublished Master’s Thesis, Leiden University) (on file with Leiden Repository, Leiden University), <https://openaccess.leidenuniv.nl/handle/1887/36140> [<https://perma.cc/DFD8-BVW7>].

15. *Id.*

B. Current EU Refugee Law and Its Inadequate State

1. Law Requires that the EU Practice Nonrefoulement

The Charter of Fundamental Rights of the EU, which is legally binding upon the Member States, provides for (1) the right to asylum, and (2) prohibits *refoulement*.¹⁶

Even though the Charter provides for the right to asylum, it does not provide a system that facilitates asylum seekers' entry to the EU.¹⁷ Therefore, the EU is only obliged to protect asylum seekers once they have arrived on the shores of the EU, but has no obligations toward asylum seekers before that point. This is one of the reasons that much of the EU policy has focused on preventing asylum seekers from reaching the shores of the EU.

The EU States have agreed to create a common policy to facilitate asylum seekers entry, but have yet to successfully follow through on this agreement. Under the Treaty on the Functioning of the EU (TFEU), the EU must 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."¹⁸ Further, the policy must be in accordance with the 1951 Geneva Convention and the 1967 Protocol,¹⁹ which means that the policy must respect the principle of *non-refoulement*.

2. The Schengen Agreement and Its Effect on Asylum Claims

The Schengen agreement is an agreement that binds all participating States to common visa regulations.²⁰ Schengen allows member citizens of the EU to travel between borders for work or education without visas. Articles 30 through 34 of the Schengen Implementation Convention of 1990 established the concept that only one of the Schengen States could process an individual's asylum application to avoid having "refugees in orbit."²¹ These articles formed the foundation for the Dublin Convention.²² The Dublin Convention

16. Mikko Viljami Hakkarainen, *EU Visa Policy: A Bastion of Exclusion or Patron of Refugees—The Case of the Humanitarian Visa*, 10 (Aug. 2014) (unpublished dissertation, University of Helsinki) (on file with Digital Repository of the University of Helsinki), [https://helda.helsinki.fi/bitstream/handle/10138/157477/GraduHakkarainen\(final\).pdf?sequence=2](https://helda.helsinki.fi/bitstream/handle/10138/157477/GraduHakkarainen(final).pdf?sequence=2) [https://perma.cc/L5EM-M6CF].

17. *Id.* at 11.

18. TFEU, *supra* note 2, at art. 78(1).

19. TFEU, *supra* note 2, at art. 78(1).

20. Emek M. Ucarer, *Managing Asylum and European Integration: Expanding Spheres of Exclusion*, 2 INT'L STUDIES PERSPECTIVES 288, 296 (2001).

21. *Id.*

22. *Id.*

places responsibility for the examination of an asylum claim on the State that the asylum seeker first entered.²³

The Schengen structure has allowed asylum seekers to apply for refugee status in one State and then freely move to any other State in the EU afterward.²⁴ This free movement causes two significant problems in managing asylum cases.

The first problem is that the Schengen structure creates a greater risk that a refugee may be deported. While an individual asylum seeker may be approved for refugee status in one EU State, that individual might not be considered a refugee in another EU State.²⁵ This is because each State has a different standard by which it determines whether an individual asylum seeker qualifies as a refugee. The result is that if a “refugee” uses the open borders created by Schengen to travel among the EU States, then he or she may be considered an illegal immigrant susceptible to deportation upon reaching a new State.

Second, free movement of refugees creates a disproportionate burden on the countries that asylum seekers perceive to be more economically attractive.²⁶ Because refugees often want to move to countries that they view as more economically stable, refugees will tend to want to migrate away from the countries in which they arrive to more desirable countries.

C. The Tension between the EU Goals and EU Policies

The EU has tried to compensate for its Schengen policy as it applies to immigration and asylum through the Common European Asylum System (CEAS), but this System is poorly implemented.²⁷ The members of the EU follow the minimum standards set out by the CEAS to create

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23. *Dublin Regulation*, EUROPEAN COUNCIL ON REFUGEES AND EXILES, <http://www.unhcr.org/4a9d13d59.pdf> [<https://perma.cc/CAM5-9823>].
 24. Kiran Phull & John Sutcliffe, *Crossroads of Integration? The Future of Schengen in the Wake of the Arab Spring*, in *THE EU AND THE EUROZONE CRISIS: POLICY CHALLENGES AND STRATEGIC CHOICES*, 177–95, 183 (Finn Laursen, 2016).
 25. See Patricia Rodda, *Decision-Making Processes and Asylum Claims in Europe: An Empirical Analysis of Refugee Characteristics and Asylum Application Outcomes*, 23 *DECYZJE* 23, 24 (2015) (discussing how each European nation has a different process).
 26. See *id.* (explaining how by accepting more refugees, nations perceived to be more economically attractive began to feel fatigued).
 27. Joanne van Selm, *Are Asylum and Immigration Really a European Union Issue?*, *FORCED MIGRATION REV.* 51, 61 (Jan. 2016), available at <http://www.fmreview.org/destination-europe>; Esztella Varga, *Refugee Problem in Europe—Case Studies*, 3(4) *EURASIAN J. OF SOCIAL SCIENCE* 37, 38 (2015), <http://eurasianpublications.com/Eurasian-Journal-of-Social-Sciences/Vol.3-No.4-2015-4.pdf> [<https://perma.cc/GB5T-44AY>].

their own unique policies and procedures for dealing with asylum seekers.²⁸ Leaders continue to say that this is a “European issue,” but in actual policy and practice, the migration issues are dealt with at a national level, not in a cooperative union manner.²⁹ Critics are skeptical that an EU-level agreement regarding asylum can be reached or implemented.³⁰ In fact, Joanne Selms has said that “the insistence on the need for a European solution might be the most significant barrier to straightforward bilateral or multilateral agreements between Member States and their neighbors on border control.”³¹

While Selms insists that the best solution is for individual nation States to create appropriate independent policies that respect each State’s own demographics, individualized policies are not working for the EU. Such a “solution” causes stress on the Union and is not conducive to providing appropriate relief to refugees or to the Member States.

III. PART II: THE EU’S PREVIOUS PROPOSED SOLUTIONS TO THE REFUGEE CRISIS HAVE BEEN UNSUCCESSFUL DUE TO FOCUS ON EXTERNALIZATION

The EU has tried various measures to resolve the refugee crisis. Most of these measures have focused on externalizing the problem. “Externalization” occurs when a country shifts the burdens associated with migration, such as border controls and migration management, outside of the country’s jurisdiction.³² The term “externalization” has been used to define the system of offshoring the migration process.³³

Due to the unique nature of the EU as a union of sovereign States, this Note uses the term “externalization” in a more expansive sense to include any plan that would place the burden of asylum processing on another party. Shifting the burden of migration or asylum application processing to another Member State has a similar effect as shifting the burden out of the EU entirely. Both the EU as a whole and the individual Member States have externalized the refugee migration problem rather than provide solutions to the burdens on their own

28. Selms, *supra* note 27, at 62.

29. Selms, *supra* note 27, at 61.

30. Selms, *supra* note 27, at 62.

31. Selms, *supra* note 27, at 62.

32. Christina Boswell, *The ‘External Dimension’ of EU Immigration and Asylum Policy*, 79 INT’L AFFAIRS 619, 622 (2003).

33. Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MIGRATION POL’Y INST. (Oct. 16, 2014), <http://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing>.
[[<https://perma.cc/73T9-WP9G>].

shores. Tactics employed by the EU include preventing asylum seekers from arriving in the EU, returning asylum seekers to other safe countries, or allowing the burden of processing asylum seekers to lie with other Member States within the Union.³⁴

The EU could internalize the problem by focusing on solutions that assist in the processing and accepting of asylum seekers. A focus on externalizing rather than internalizing has caused the Union to have unclear and disparate standards in determining refugee status, accepting asylum seekers, and assimilating asylum seekers. This has put tension on the Union and threatens to break down much of what the Union has accomplished.

A. Europe has Attempted to Deal with the Crisis in International Waters

One externalizing tactic that the EU employed to deal with the refugee crisis was to approach the crisis in international waters. From October 2013–2014, Italy ran a search and rescue: Operation Mare Nostrum.³⁵ This operation was discontinued due to lack of funding and was replaced by Operation Triton.³⁶ The new operation, Operation Triton, focused on preventing refugees from reaching the border rather than on rescuing the refugees at sea.³⁷ This resulted in increased refugee deaths³⁸ and indirect *refoulement*.³⁹

Indirect *refoulement* occurs when asylum seekers are not physically deported to their countries of origin, but are prevented from making a meaningful plea for asylum.⁴⁰ When asylum seekers are prevented from reaching land and thereby prevented from the invoking of the Dublin Convention, it is an example of indirect *refoulement*.⁴¹

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34. One scholar has suggested that this externalization is a problem stemming from fear of economic, social, and political hardship that the EU Member States believe would accompany measures allowing resettlement of refugees in the EU. Paolo Biondi, *Human security and external burden-sharing: the European approach to refugee protection between past and present*, 20 THE INT'L J. OF HUMAN RIGHTS 2, 212–13 (2015).
35. Cretu, *supra* note 1, at 255; Varga, *supra* note 27, at 38.
36. Cretu, *supra* note 1, at 255.
37. Cretu, *supra* note 1, at 255.
38. Cretu, *supra* note 1, at 255.
39. Hirsi Jamaa and Others v. Italy, App. No. 27765/09 (2012) (holding that Italian authorities violated Article 3 of the European Convention on Human Rights because they returned a ship with 200 migrants to Libya without considering the risk that some of the migrants may qualify for asylum, and because Libya would not provide adequate protection for refugees); Hakkarainen, *supra* note 16, at 8.
40. Moira Sy, *UNHCR and Preventing Indirect Refoulement in Europe*, 27(3) INT J REFUGEE L. 457, 469 (2015).
41. *Id.*

Sanctions on carriers for transferring undocumented migrants have caused carriers to refuse to transport anyone without a passport or visa.⁴² Scholars have noted that this is a problem because the carriers are not trained nor do they have the means to make a determination regarding refugee status.⁴³ These tactics, again, externalized the problem by merely addressing who can and cannot arrive on the shores of the EU, but did not address what the refugees will do once they arrive on shore.

B. Europe has Suggested Establishing Off-Shore Processing Centers

Another tactic that has externalized the refugee crisis is the suggestion of off-shoring the problem by having a refugee processing area outside the EU borders. In the early 2000's Tony Blair (then United Kingdom Prime Minister) and Otto Schilly (then German Interior Minister) suggested that off-shore processing centers would be an appropriate solution.⁴⁴ Blair further suggested that asylum seekers could be sent back to these offshore centers.⁴⁵ The suggestion was based on Australia's systematic offshore processing. The plan was rejected as politically not feasible.⁴⁶ Not only was this suggestion not politically stable, but it could have led to human rights violations. There is extensive documentation of human rights violations in the Australian system.⁴⁷ Scholar Pavel Pyszko points out that Article 5 of the European Convention on Human Rights says that detention is only legal for non-compliance of a legal order of a court or for the purposes of securing legal obligations.⁴⁸ Pyszko says that this is one of the factors that prevents an off-shore center from being legally feasible.⁴⁹ Additionally, the tactic of pushing a problem elsewhere does not relieve the EU of its burdens under international law.

C. Europe has Sent the Refugees to Other Countries

The European doctrine of "Safe Third Country" stands for the idea that if an applicant had traveled through a listed safe country of origin, then they must apply in the State through which they passed.⁵⁰ "Safe Country" lists have led to indirect *refoulement*, because each EU State

42. Hakkarainen, *supra* note 16, at 14.

43. *LIBE Committee Study*, *supra* note 4, at 22.

44. *LIBE Committee Study*, *supra* note 4, at 36.

45. *LIBE Committee Study*, *supra* note 4, at 22.

46. Pyszko, *supra* note 14, at 2.

47. Pyszko, *supra* note 14, at 2.

48. Pyszko, *supra* note 14, at 20.

49. Pyszko, *supra* note 14, at 20.

50. Ucarer, *supra* note 20, at 294.

determines their own list of safe countries and there is no cohesive standard. Most EU states adopted Safe Country standards during the 1980s.⁵¹

D. The Quotas Approach Externalized the Problem by Abandoning All Standards

The “Quotas Approach” was the first attempt by the EU to internalize the influx problem. In response to the shipwreck disasters off the shores of Lampedusa in April 2015, the European Commission proposed a quota system in which 40,000 asylum seekers would be relocated from Italy and Greece to the other Member States.⁵² The Quotas Approach has been criticized for being unenforceable under the Schengen agreement. Additionally, many EU States will not agree to abide by the quotas prescribed by the EU.

The Czech Republic, Slovakia, and Hungary rejected this proposal as an infringement on State sovereignty.⁵³ It also troubled the Member States that Denmark, Ireland, and the U.K. would not be legally bound to this plan, because of opt-out clauses in the AFSJ.⁵⁴ Because of these issues, the European Council did not approve this plan.⁵⁵

The problem with the Quotas Approach is that, even though it is a step towards internalization, the plan doesn’t entirely internalize the problem. Assigning each country an amount of refugees that it must accept without providing any unifying standard for determining why or how the refugees are distributed doesn’t help the States figure out how to assimilate these refugees into their culture. The States still need to deal with asylum application processing, determine refugee status, and figure out how to assimilate long-term refugees. The Quotas Approach is not an integrated approach that provides long-term solutions to the problems faced by the States. This approach merely asks each country to abandon its current asylum application standards in favor of no standard at all.

E. The EU’s Current Unified Plan is Not Uniformly Implemented by All Member States

The EU is obligated under Article 78 TFEU to develop a uniform policy on international protection.⁵⁶ The current Asylum Procedures for the EU are governed by the Common European Asylum System (CEAS). This System is composed of five elements: (1) the Asylum

51. Ucarer, *supra* note 20, at 294.

52. Pyszko, *supra* note 14, at 7–8.

53. Pyszko, *supra* note 14, at 8.

54. Pyszko, *supra* note 14, at 8.

55. Pyszko, *supra* note 14, at 8.

56. *LIBE Committee Study*, *supra* note 4, at ii.

Procedures Directive; (2) the Reception Conditions Directive; (3) the Qualification Directive; (4) the Dublin Regulation; and (5) the Eurodac Regulation, which requires that all member States collect fingerprints of the asylum seekers and organize and record them in a central database.⁵⁷

The Asylum Procedures Directive provides three exceptions to consideration of asylum applications. The EU does not need to consider asylum applications from applicants if: (1) another country has granted asylum to the applicant or if the applicant has a pending asylum application in a non-EU State; (2) it is a subsequent application from a previously rejected applicant; or (3) the applicant has “sufficient connections” to a safe third country and “there are grounds for considering that the applicant will be admitted or readmitted to that country.”⁵⁸

Of these three exceptions, the third exception is most problematic. The Directive provides no definition of “sufficient connection.”⁵⁹ National law defines “sufficient connection.”⁶⁰ This allows countries to interpret these phrases very loosely.⁶¹ Additionally, the Directive specifies that a country may only be considered a “safe country of origin” if the applicant is of that country’s nationality or has habitually resided in that country.⁶² This only clarifies the definition of “origin.” The standards for qualifying as a “safe third country” that are outlined in the Directive only serve to prohibit *refoulement*, but it is open to the Member States and their national law to determine, on a case-by-case basis, which countries qualify as “safe.”⁶³ This leads to an inconsistent listing of countries to which asylum seekers may be safely returned.

The current “unified” plan implemented by the Justice and Home Affairs Council is another quota system.⁶⁴ This plan distributes 120,000 refugees across the EU States.⁶⁵ The plan includes family connections

57. Pyszko, *supra* note 14, at 18.

58. Pyszko, *supra* note 14, at 20–21.

59. 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)) 64, ¶44 [hereinafter *EU Directive*].

60. *Id.*

61. Pyszko, *supra* note 14, at 18.

62. *EU Directive*, *supra* note 59, at art. 36.

63. *EU Directive*, *supra* note 59, at art. 38.

64. Cretu, *supra* note 1, at 256.

65. Cretu, *supra* note 1, at 256.

and language skills in determining where a refugee will be sent.⁶⁶ Each EU State will receive 6000 euro per refugee from the EU funds.⁶⁷

Quota systems do not work because they are not helpful to the Member States. Instead of providing a uniform system to assist in the process of migration procedures, a quota system merely dictates what the result of individual State's systems must be. This leaves States with little incentive to participate. The U.K., Ireland, and Denmark have opted out of participating in this plan.⁶⁸ Hungary, the Czech Republic, Slovakia, and Romania all voted against the decision to implement this plan.⁶⁹ Hungary has constructed a razor-wire fence along its borders to keep refugees out.⁷⁰ Croatia, Slovenia, Austria, and Bulgaria are all considering doing the same.⁷¹

IV. PART III: PROPOSAL FOR A MORE COHESIVE PLAN

The past 20 years have brought up the same issues for discussion: (1) defining a refugee; (2) assigning responsibility for dealing with asylum claims; (3) reception conditions; (4) temporary protection; and (5) long-term residence conditions.⁷² These issues are organized in the temporal order in which the EU deals with a refugee case. This Note will address each of these issues in the same order and will describe how the proposed independent organization should more clearly develop each of these five issues.

In their 2015 CEPS Paper submitted to the European Parliament, scholars suggested the creation of an agency whose sole purpose would be to deal with asylum applications and refugee processing.⁷³ The Paper

66. Cretu, *supra* note 1, at 256.

67. Cretu, *supra* note 1, at 256.

68. Cretu, *supra* note 1, at 256.

69. Cretu, *supra* note 1, at 256.

70. Cretu, *supra* note 1, at 257.

71. Cretu, *supra* note 1, at 257.

72. Selm, *supra* note 27, at 61.

73. *LIBE Committee Study, supra* note 4, at iii; see Guy Goodwin-Gill, *Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action*, JMCEMIGRANTS (May 11, 2015), available at <http://www.jmcemigrants.eu/category/working-papers/> (suggesting the creation of an EU institution for uniformity between Member States); see also RICHARD WILLIAMS, *BEYOND DUBLIN—A DISCUSSION PAPER FOR THE GREENS/EFA IN THE EUROPEAN PARLIAMENT* 23 (2015), available at http://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Policy_papers/Migration_asylum/Beyond_Dublin_paper_final.pdf [<http://perma.cc/G4QK-FWZJ>] (suggesting the creation of a European Asylum Service for consistency throughout the Union).

suggests that the agency be funded by the Asylum, Migration, and Integration Fund (AMIF), or through support from the EU budget.⁷⁴ This scholarly suggestion is on the right track. An independent agency comprised of representatives from each country could unify the decision-making process regarding asylum applications and thereby accomplish the goals of the CEAS to develop a unified plan to deal with the refugee crisis.

The CEPS Paper places great emphasis on the refugee's right to self-determination.⁷⁵ These scholars propose that by giving asylum seekers the opportunity to apply to the State of their choice for asylum, the free-movement problems inherent in the Schengen structure will be resolved.⁷⁶ They posit that a focus on the refugee's desires will stop refugee movement because the refugees will be living where they want to live.⁷⁷

The first problem with this Paper lies in its attempt to focus asylum application processing on the refugees' preferences. While the suggestion of a unified independent organization is an excellent one that internalizes the problem of the refugee crisis, the scholars' focus on self-determination is not practical. A State cannot and will not accept an unlimited number of refugees. The number of refugees that desire to live in a certain State does not change that State's capacity to acquire new citizens. There are two or more parties involved in this decision. A successful process is one that considers more than one party's needs. It is essential that both the refugees and Member States have their needs weighed in any decision.

The second problem with the Paper is the lack of guidance. The 2015 CEPS Paper suggests that there be a creation of an independent organization, but does not delve into the details of how the organization should be structured.

The rest of this Note describes with greater detail a suggested framework for an independent EU refugee organization. Further, this Note posits that for a unified plan to succeed, all of the EU member States must accept the plan. To this end, this Note promotes a shift in focus from a refugee-determined relocation process to an EU-balanced determination process. This Note emphasizes that a successful organization should focus on balancing economic incentives with the

74. *LIBE Committee Study*, *supra* note 4, at iii.

75. *See LIBE Committee Study*, *supra* note 4, at 35–36 (reiterating that the system respects asylum seekers' fundamental rights).

76. *See LIBE Committee Study*, *supra* note 4, at 36 (explaining how complete free choice will protect asylum seekers and provide them with a range of options not available under the current system).

77. *See LIBE Committee Study*, *supra* note 4, at 36 (explaining that allowing refugees to participate in deciding where to live will reduce secondary movement).

needs of the EU Member States to encourage all Member States to accept the new plan.

A. A Uniform Definition of "Refugee" Will Remove the Disparate Granting of Refugee Status

The first major issue that the EU faces during the refugee application process is determining whether an asylum seeker is classified as a refugee, and therefore entitled to protection from deportation.⁷⁸ The problem the EU faces on this front is that each State uses its own interpretation of the official definition of "refugee." Each State has sovereignty over immigration.⁷⁹

The 1951 Geneva Convention on the Status of Refugees defines a "refugee" as:

any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The U.N. released a Handbook on Procedures and Criteria for Determining Refugee Status in 1979, but this handbook merely acts as guidance because EU States have sovereignty and are not bound to follow the criteria in the handbook.⁸⁰

Because immigration decisions in the EU are made at the national level, there have been disparate decisions regarding whether an asylum seeker is a refugee.⁸¹ Some States may determine that an asylum seeker is motivated by economic reasons rather than fear of persecution, while another State may not. Often an asylum seeker has both economic reasons for immigration and a fear of persecution.

The creation of a singular EU body that makes determinations of refugee status based on uniform criteria would resolve this disparate treatment. There would not be multiple interpretations, but one

78. Ucarer, *supra* note 20 ("The two cardinal rules of the refugee protection regime are the definition of a refugee and the practice of *nonrefoulement*, which obligates recipient states not to return asylum-seekers to a territory where they might face danger.").

79. J. McAdams, *Interpretation of the 1951 Convention, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 75, 111 (2011).

80. *Id.*

81. See Rodda, *supra* note 25, at 25 (describing the tension between national and regional interests concerning asylum).

unifying standard for the definition of a refugee. Additionally, if the EU creates one body to determine refugee status, then the refugee will automatically have the same status in every Member State. This will resolve one of the problems inherent in the Schengen structure. There will no longer be a question regarding whether a refugee has refugee status in a given EU State. This will protect the refugee even if he or she chooses to move within the EU States.⁸²

The agency could further clarify the definition of a refugee by elaborating on some of the terms within the Geneva Convention. The agency should define “persecution.” For example, can someone be persecuted through economic means or does it only include the threat of bodily harm? Finally, a clear standard should be developed for the burden of proof that the asylum seeker must provide to establish a “well-founded fear.” Once these standards have been agreed upon, the new organization should also be sure to provide arriving asylum seekers with an opportunity to be counseled on these legal standards as part of the reception program.

Beyond clarifying the definition of a refugee, the proposed unified body could also resolve other issues stemming from the lack of clear definitions. The agency should determine the definition of a “sufficient connection” to a safe third country. The agency should also come up with a singular list of “safe third countries.”

B. Asylum Applications Should Not Be Processed Under the Policies of The Dublin Convention

One of the benefits of having one unified processing center is that it would provide the EU with the ability to abandon the rules of the Dublin Convention, which currently governs the responsibility for processing asylum claims. This standard has been highly criticized as ineffective and the European Commission plans to reevaluate the latest iteration of the Dublin Convention (Dublin III Regulation) in 2016.⁸³

One failure of the Dublin Convention is that it overly burdens the border States, which will necessarily receive the most migrant entries. The Dublin Convention says that a refugee must remain in the State in which the refugee first arrives and that the migrant can be returned to that first-arrival State if he or she has traveled elsewhere.⁸⁴ This puts stress on the border countries such as Greece, Italy, and Hungary.⁸⁵

82. See *LIBE Committee Study*, *supra* note 4, at 37 (suggesting that a central system will provide uniform status for refugees). It is important to note that a refugee will continue to be subject to the same standards as other EU citizens. This is discussed in further detail later in this Note.

83. *LIBE Committee Study*, *supra* note 4, at 1.

84. Cretu, *supra* note 1, at 256.

85. Cretu, *supra* note 1, at 256.

Another failure of the Dublin Convention is that it leads to indirect *refoulement*. The Dublin Convention demands that only the first country in which the asylum seeker lands can process the asylum seeker's application. This country, however, may have stricter standards for determining refugee status. By sending a refugee back to another country that, due to stricter standards for determining refugee status, has a higher likelihood of returning the refugee to their country of origin, the EU is committing indirect *refoulement*.⁸⁶

The Dublin Convention presumes that all member States provide equal protections from *refoulement*.⁸⁷ However, the *MSS v. Belgium and Greece* case illustrated that this is not true. The European Court of Human Rights found that Greece and Belgium violated articles 3 and 13 of the Convention when Belgium returned asylum seekers to Greece to be processed.⁸⁸ Greece's asylum-application system was insufficient to prevent *refoulement*. Greece had application periods of up to four years and granted asylum in only .04% of first applications and only 2.06% of appeals.⁸⁹ The high likelihood that Greece would deny a refugee application made both Greece and Belgium guilty of indirect *refoulement* by processing the application in Greece.

In light of the latest refugee crisis, it has become clear that the Dublin Convention is an insufficient tool. This is not only because the Dublin Convention results in indirect *refoulement* in violation of EU refugee principles, but also because the Convention is impractical. It does not sufficiently account for the border-free nature of the EU. Many asylum seekers wish to apply for asylum in Member States other than the State in which they first arrive. Due to the ease of travel among EU States granted by the Schengen agreement, many asylum seekers are able to reach other States before submitting an asylum application. The Italian Refugee Council reported that in 2014 only 64,625 of the 170,000 irregular arrivals in Italy applied for refugee status in Italy.⁹⁰ Scholars believe that this indicates that asylum seekers are moving through Italy to apply for asylum in other Member States in violation

86. See *REVISITING THE DUBLIN CONVENTION: Some reflections by UNHCR in response to the Commission staff working paper*, UNHCR (Jan. 2001), <http://www.unhcr.org/en-us/protection/operations/43662b3e2/revisiting-dublin-convention-reflections-unhcr-response-commission-staff.html> (explaining how the disparities in the Dublin system aid in indirect refoulment).

87. Convention Relating to the Status of Refugees, *supra* note 12 (defining *refoulement* as “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”).

88. Sy, *supra* note 40, at 471.

89. Sy, *supra* note 40, at 469.

90. *LIBE Committee Study*, *supra* note 4, at 34.

of the Dublin Convention.⁹¹ The five countries that receive the most refugee applications are Germany, Sweden, the U.K., France, and Italy.⁹² Enforcing the Dublin Convention appears to be impractical when individuals are free to move between States.

When the European Parliament meets to revisit the Dublin Convention, it should abandon the structure entirely. It is not practical under the Union structure and merely serves to sow animosity among States who disproportionately share the burden of processing asylum applications. Instead, financial aid should be given to the border countries who necessarily carry a disproportionate burden of asylum processing. Also, the new, unified agency should create a standardized procedure by which a refugee can be directed to States other than the State of first arrival for asylum-application processing. Following an initial determination at reception sites, an asylum seeker should be able to be redirected to a new location if the agency deems it appropriate.

C. Reception Facilities Should Focus on Speedy Processing by Working with National and EU Officials

The structure of reception centers throughout the EU differs greatly between Member States.⁹³ Based on the demand on a given reception center, a State may have more or fewer resources to devote to reception processes. In June 2015, the European Council suggested creating an increased number of reception facilities with official assistance from EASO, Frontex, and Europol in Member States that are the EU entry points (“hotspots”).⁹⁴ The CEPS Paper authors believe that, while reception conditions are important to promote humanitarian goals and to “speed up” the application process, creating more reception centers is an insufficient solution to the refugee problem.⁹⁵ This is because “hotspot” facilities do not have the time to process and fully determine protection status.⁹⁶

“Hotspot” facilities can be further problematic in that they can lead to violations of human rights. The European Court of Human Rights held that the detention conditions in Greece were inhumane in violation of Article 3 of the European Convention on Human Rights.⁹⁷ The Court of Justice of the EU also held that there were “systemic deficiencies in

91. *LIBE Committee Study*, *supra* note 4, at 25.

92. Varga, *supra* note 27, at 39.

93. *LIBE Committee Study*, *supra* note 4, at 13–14.

94. *LIBE Committee Study*, *supra* note 4, at 15.

95. *LIBE Committee Study*, *supra* note 4, at 16.

96. *LIBE Committee Study*, *supra* note 4, at 16.

97. *MSS v Belgium and Greece*, App. No. 30696/09 (2011).

the asylum procedure and in the reception conditions of asylum seekers in Greece.”⁹⁸

Because reception facilities have failed to provide proper protection or sufficient processing, the EU should not merely increase the number of facilities, but rather the EU should change the structure of the facilities. Reception facilities at the “hotspots” should be two-fold. First, the facilities should have a nationally-run immigration branch. Second, the facilities should have an EU-run asylum reception branch. This means that the reception sites would have both national representatives and EU representatives. The State would still be responsible for immigration generally, but if a migrant is determined to be a person seeking asylum, then they are sent to the EU representatives for further processing.

The national officials should still perform the first line of processing. The national officials will first determine if a migrant is a security risk before allowing any further processing. If the person is a security risk, then the State may follow its national security procedures. If the person is not a security risk, the national official will assess whether the migrant is seeking asylum. If the migrant is seeking asylum, then he or she will be sent to the EU-appointed officials to deal with the application process.

The EU appointed officials would then begin the asylum process. These officials should conduct a pre-application survey that includes interviewing the asylum seeker to determine in which country he or she should be considered for asylum. This survey should include gathering information such as where the asylum seeker has family within the EU, what skills the asylum seeker possesses, the asylum seeker’s habits and needs, and the asylum seeker’s preference for resettlement. These should be weighed against profiles created by the Member States to find the best match for processing the application. The highest weight should be given to reuniting the asylum seeker with family.

After this determination, the asylum seeker should be scheduled for relocation to the “temporary-stay country” while the asylum application is processed. The “temporary-stay country” is the country in which the asylum seeker will be granted temporary stay upon approval of his or her asylum application. Note that under this system there would be one agency that processes asylum applications, so the temporary-stay country would not also process the asylum application, but rather the EU asylum agency would be processing the application.

There should also be a time limit for the length of this initial pre-application process, so that the asylum seekers are not merely waiting in detention facilities or camps at the border States. It is important to

98. Case C-411/10 *N.S. v. Secretary of State for the Home Department and Case C-493/10 M.E. and others v. Refugee Applications Comm’n, Minister for Justice, Equality and Law Reform*, 2011 E.C.R. I-13993.

allow the asylum seekers begin to integrate into the temporary-stay countries as quickly as possible.

Finally, it is important to consider the power that will still remain with the Member States. If States are granted veto power over the organization's decisions, then this could cause "refugee in limbo" problems. This means that the refugee would be stuck without a home at a "hotspot." However, it seems unlikely that the Member States would agree to entirely relinquish power in the decision to allow people to settle in their country. This would certainly be an aspect of the plan that the European Parliament would have to hash out.

D. An Asylum Seeker Should Be Required to Remain in One Country Prior to Refugee Determination, but Should Be Afforded the Same Citizen Rights Once Temporary Protection is Granted

The policies of Syria's neighboring countries regarding refugees have been short-term policies based on the assumption that the Syrian conflict would be short-lived and that the displacement would be temporary.⁹⁹ The policy of the EU at present certainly has more long-term sustainability, but there are still many holes in the long-term asylum policies.

One of the problems with the long-term asylum policy of the EU is created by the Schengen structure of the EU. Currently, refugees are required to remain in one Member State for five years following a grant of asylum before they may travel to another State.¹⁰⁰ Scholars have argued that refugees should have the rights of a State citizen and that restricting movement is not appropriate. The 2015 CEPS Paper suggested that if the EU is able to create a system of "mutual recognition" of refugee status, where each State would accept the determination of another Member State, this should allow for unlimited movement.¹⁰¹

As presented, the 2015 CEPS Paper suggestion for mutual recognition of refugee status still presents a problem. Allowing refugees to apply for refugee status, having the status granted in one State, and then allowing this same refugee to move to another State where he or she believes there are better job prospects could lead to an overflow of refugees in countries like Germany. This is exactly the type of problem of which the EU Member States are complaining. Adoption of the CEPS Paper's simply stated suggestion could lead to EU countries disapproving of the idea of an independent asylum agency.

Additionally, allowing unrestricted free movement would also undermine the entire purpose of my proposed pre-application process of determining where to relocate a refugee. This proposed pre-application process is meant to tackle what the EU considers to be a

99. Cretu, *supra* note 1, at 254.

100. *LIBE Committee Study*, *supra* note 4, at 23.

101. *LIBE Committee Study*, *supra* note 4, at 23.

problem: secondary movement. I agree, however, that it would be contrary to the concept of Schengen to disallow free movement.

The key to making this idea work is the creation of a uniform organization that would determine not only where to relocate asylum seekers, but also refugee status under a uniform definition. If all EU States accepted the same standard for determining whether an asylum seeker was a refugee, then there would necessarily be mutual recognition.

As far as the free movement of the refugees is concerned, there should not be a time limit on the movement.¹⁰² The asylum seeker should not be allowed to move among the States while the application is being processed, but once the asylum seeker is determined to be a refugee, then the refugee should be allowed the same movement rights as other citizens of the EU. This means that they can move to another State for work or education. If the refugee is able to gain employment or entrance to school, then the second State has less room to argue that it is overly burdened by this secondary movement. Because there would be a centralized asylum application process, refugees could not apply for asylum in another Member State. If the refugee moved to another member State where he or she couldn't find work, then he or she would most likely not stay there for long and the Member State would also have the right to deport the refugee to the State under which they were granted refugee status.

E. The Proposed Agency Should Conduct a Campaign to Promote Tolerance of Long-Term Refugee Residence

There is definitive resistance to the idea of long-term EU residency of refugees. Many countries are concerned that the refugees will not integrate into their country culturally and that they will be an economic drain. This resistance will make it difficult to get such countries to agree to a unified plan. Some EU States have suggested that they have a problem with accepting Muslim refugees.¹⁰³ Slovakia has said that because there are no mosques in their country, they can only accept Christian refugees.¹⁰⁴

Refugees only make up about 0.37% of the total EU population.¹⁰⁵ Critics say that refugees could boost the economy by bringing young

102. Currently, a refugee is not allowed to move from the country that granted the status for five years. *Already in the EU?*, EU Immigration Portal, EUROPEAN COMMISSION (last visited Apr. 22, 2017), http://ec.europa.eu/immigration/who-does-what/what-does-the-eu-do/already-in-the-eu_en [https://perma.cc/4USN-F8AR].

103. Pyszko, *supra* note 14, at 11.

104. Pyszko, *supra* note 14, at 2.

105. Cretu, *supra* note 1, at 259.

people into the workforce in aging populations.¹⁰⁶ Regardless of this information, the resistance will be difficult to overcome.

The proposed agency should initiate an active campaign to educate resistant States about the benefits they may receive by participating in this program. Further, the campaign should highlight that the Member States are able to create a profile of their needs, so that they are taking the refugees who can most contribute to their society and their economy. It should be noted that an outright ban of a religious group should not be acceptable on a country profile, but it will be important to weigh the safety of the refugees with the need for even burden sharing when dealing with States that have taken positions of limited tolerance.

*F. The Proposed Agency May Need to Allocate Additional Funding to
“Hotspot” Locations*

Currently, the AMIF is used to fund the Asylum System. The AMIF requires Member States to adopt national programs to support the CEAS, create integration strategies, and develop assisted voluntary return.¹⁰⁷ The EU has not offered much guidance on how to fulfill these requirements. Annex IV published by the European Commission, however, lists “common indicators” for how to measure these specific objectives.¹⁰⁸ This vagueness could be resolved by re-allocating these duties to an independent European asylum agency.

Redirecting these funds to a unified organization should not be difficult. There may, however, need to be additional funds acquired from the EU to distribute to “hotspot” locations where most initial reception costs are being incurred.

Finally, there is currently a 6000-euro-per-refugee incentive program. Negotiating the entrance of each and every individual refugee is likely to produce excess administrative costs. If the independent asylum organization is given the authority to determine where to send asylum seekers, then administrative costs could be lowered. Instead of compensating a country for taking each individual refugee, the organization could compensate a country by offering certain amounts for accepting certain totals of refugees. This would likely lessen the time spent negotiating with a country to take individual refugees and would hopefully incentivize countries to take in larger numbers of refugees.

106. Cretu, *supra* note 1, at 259.

107. *LIBE Committee Study*, *supra* note 4, at 45.

108. *Annex to the Communication from the Commission to the European Parliament, the European Council and the Council: Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration*, COM (2015) 490 final/2 (Sep. 29, 2015), available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_managing_the_refugee_crisis_annex_4_en.pdf [<https://perma.cc/BHN4-5ZXF>].

This is almost the flip-side of a quota system. Rather than being penalized for not taking in a certain number of refugees, a country is compensated more for taking in more refugees.

V. CONCLUSION

The entire process of refugee determination should be a series of steps organized through one independent organization composed of representatives from each member country. First, upon reception, there should be a determination on whether the applicant poses any threat to security. This determination should initially be conducted by a Member State's national immigration authority. However, the EU agency representatives should also make this determination during their pre-application process. There should be a designated location for processing potential-security-threat cases. If the asylum seeker does not pose a security threat, then the receiving government should assess whether the asylum seeker has family ties in any EU country. Family ties should be highly influential on the final determination of a temporary-stay location. If the asylum seeker has no family ties, then the next consideration should be the types of skills that the asylum seeker possesses. For example, is the asylum seeker a carpenter or a doctor? Does the asylum seeker speak multiple languages? These factors could be matched with the needs of the Member States. Each Member State should create a profile of the types of skill sets that would benefit their country. Perhaps one country needs more medical professionals, for example, while another needs more elementary-school teachers. This would also allow the asylum seekers to integrate more easily into the society by being able to find a job and contribute to the economy of the country of temporary stay. In the case of the "unskilled," the old, and the young, additional compromise would be needed to determine the number of people in these groups that each country would take. Ideally, the organization would also assess where the asylum seeker hopes to be located while concurrently assessing where the asylum seeker could be most easily integrated.

After this pre-application process, the asylum seeker should be sent to the country that best suits the marriage of these factors while the asylum seeker's application is processed. The asylum seeker should be confined to that country until an official determination is made.

Some may question whether this process would waste EU funds. It is true that it would cost the EU money to transport all of the asylum seekers to the various countries while they await determination. But, it would also provide relief to the border States. After all, refugees have to reside somewhere while they await a determination on their refugee status. This process would relieve the burden on the border States while also resolving the issue of secondary movement, thereby benefitting the entire Union.

An independent organization that can uniformly manage refugee applications is the most effective way to deal with the great influx of

refugees. The fairest way to structure this organization is to have it work with States' national interests to find a balance between economic and human-rights needs.

VI. CODA: RECENT DEVELOPMENTS

Since spring 2016, the EU has updated much of its asylum policy. Although not comprehensive, this section will highlight some of the developments.

Recently, the European Commission submitted a proposal to the European Parliament that detailed suggested reforms to the Common European Asylum System.¹⁰⁹ On July 13, 2016, a proposal for a new reception-condition directive was introduced, which is part of an EU plan to produce a more “holistic EU migration policy.”¹¹⁰ Also on July 13, 2016, the European Commission created a proposal for the creation of a regulation for a uniform status for refugees.¹¹¹

109. *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final (Apr. 6, 2016), available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf [<https://perma.cc/H7D3-EA92>].

110. *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM 2016 465 final (Jul. 13, 2016), available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection_en.pdf [<https://perma.cc/RF5C-N2QE>]; *Reception Conditions*, EUROPEAN COMMISSION, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/reception-conditions_en [<https://perma.cc/3NMW-KJDX>] (“For the first time, detailed common rules have been adopted on the issue of detention of asylum seekers, ensuring that their fundamental rights are fully respected.”).

111. *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, COM (2016) 466 final (Jul. 13, 2016), available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_beneficiaries_of_international_protection_-_subsidiary_protection_eligibility_-_protection_granted_en.pdf [<https://perma.cc/SS2N-E5JV>].

The CEAS reform-proposal paper submitted in April 2016 discussed the “significant structural weaknesses and shortcomings in the design and implementation of the European asylum and migration policy, which the crisis has exposed.”¹¹² The paper insisted that for a European asylum policy to be successful, a system must be created that is “grounded on the principles of responsibility and solidarity.”¹¹³

The paper discussed the many problems with the current asylum system.¹¹⁴ The paper highlighted the same problems addressed in the above commentary, including the fact that Member States often diverge in their treatment of asylum seekers due to the discretion provided in “the current Asylum Procedures Directive and Reception Conditions Directive.”¹¹⁵ The paper lists the European Commission’s top five priorities for improving the Common European Asylum System.¹¹⁶ These are: (1) “establishing a sustainable and fair system for determining the Member State responsible for asylum seekers;” (2) “reinforcing the Eurodac system;” (3) “achieving greater convergence in the EU asylum system;” (4) “preventing secondary movements within the EU;” and (5) “a new mandate for the EU’s asylum Agency.”¹¹⁷

To address the problems inherent in the Dublin Convention’s directive that the first State of entry is the State to process an asylum application, the paper makes two suggestions.¹¹⁸ One suggestion, which is quite similar to my own above, is the creation of a “distribution key” where the “relative size, wealth, and absorption capabilities of the Member States” would be weighed with factors such as “family or dependency links, the best interest of [a] child, and possession of a visa or residence permit” and which would be implemented by a central EU-level agency.¹¹⁹ The second suggestion is that the Dublin Convention be supplemented by a “corrective fairness mechanism” to account for States that have a disproportionate amount of asylum applicants.¹²⁰

112. *Reform of the Common European Asylum System*, *supra* note 109, at 2.

113. *Reform of the Common European Asylum System*, *supra* note 109, at 2.

114. *Reform of the Common European Asylum System*, *supra* note 109, at 2.

115. *Reform of the Common European Asylum System*, *supra* note 109, at 4–5.

116. *Reform of the Common European Asylum System*, *supra* note 109, at 5–6.

117. *Reform of the Common European Asylum System*, *supra* note 109, at 6.

118. *Reform of the Common European Asylum System*, *supra* note 109, at 7–8.

119. *Reform of the Common European Asylum System*, *supra* note 109, at 8.

120. *Reform of the Common European Asylum System*, *supra* note 109, at 7.

The fairness mechanism would only kick in once a Member State reached a pre-defined limit in the number of applicants for that State.¹²¹

In addition to a “distribution key,” the paper emphasizes the usefulness of acquiring skilled labor by integrating refugees into societies that need them. The paper says that the EU should use a “more proactive labour migration policy to attract the skills and talents it needs to address demographic challenges and skill shortages.”¹²² The paper mentions that “Europe is an ageing continent with a declining working-age population, expected to shrink by 18 million in the next decade.”¹²³ The paper also mentions that the high employment rate among youths in the EU is due to a lack of diversity of skills in each Member State.¹²⁴ These statistics support the proposition that bringing in migrants with diversified skills will be necessary for the future of the EU. These statements further support my proposal to take both the needs of the Member States and the skills of the asylum seekers into account when determining where an asylum seeker should be relocated.

While the paper emphasizes that the Eurodac system should be reinforced, the paper does not explain in what way this should occur nor does the suggestion seem to add much value to the goal of improving the asylum system.¹²⁵

Also, similar to the suggestions above, the paper proposes that “safe third country” lists be established by EU-wide regulation.¹²⁶

There are still problems with the proposal, however. The paper suggests preventing the secondary movements of asylum seekers within the EU by imposing an obligation on Member States to return asylum seekers to the State in which the applicant is designated to remain, enforcing detention conditions, and potentially revoking the right of the asylum seeker to remain in the EU.¹²⁷ As previously discussed, the likelihood of secondary movement would likely decrease if asylum applicants were processed in the States where they are most likely to remain after they have been approved for asylum. Another potential problem is that requiring States to return refugees under Schengen would likely be difficult for the Member States. The States would have to search actively and constantly for and interrogate asylum seekers in order to determine if they are *lawfully* awaiting asylum determinations in their country. The proposed directive bears the additional risk of encouraging harassment of asylum seekers. It is much more practical to

121. *Reform of the Common European Asylum System*, *supra* note 109, at 8.

122. *Reform of the Common European Asylum System*, *supra* note 109, at 14.

123. *Reform of the Common European Asylum System*, *supra* note 109, at 16.

124. *Reform of the Common European Asylum System*, *supra* note 109, at 17.

125. *Reform of the Common European Asylum System*, *supra* note 109, at 9.

126. *Reform of the Common European Asylum System*, *supra* note 109, at 10.

127. *Reform of the Common European Asylum System*, *supra* note 109, at 11.

attempt to prevent secondary movement by settling asylum seekers in the location in which they are most likely to remain.

Another problem that arose in 2016–17 illustrates why an independent agency that is in charge of asylum issues in Europe is so essential. This year, Greece failed to winterize its refugee camps.¹²⁸ This occurred because the Greek migration ministry has no funds of its own to disperse.¹²⁹ Furthermore, “[n]o single actor has overall control of all funding and management decisions in the camps.”¹³⁰ The *Guardian* claims that due to the lack of organization regarding funding in Greece, the EU, UNHCR, and NGOs continue to avoid taking on their promised responsibilities, thereby forcing smaller charity groups to attempt to pick up the bill.¹³¹ If there was an independent asylum agency, there would be a centralized entity that was specifically in charge of distributing funds.

Finally, the new plans to address the EU’s refugee crisis have drawn criticism.¹³² John Dalhuisen of Amnesty International has said that these plans are smokescreens for what the European Commission “is really trying to do,” which he says is to “resettle some refugees so they can return more.”¹³³ The criticism is based on the perception that these new plans are focused on solving the problem of secondary movement and not on refugees’ needs. This criticism is similar to one of my own. The emphasis must always be on internalizing the problem. What can the EU do to help refugees within its borders and help its nations to thrive? The emphasis should not be on externalizing the refugee crisis by removing the problem from EU shores. Obviously, the EU cannot accept an endless stream of refugees, but it is more important and more effective to address the problem rather than to try to avoid it. The EU must focus its attentions on creating a proactive, long-term plan that provides assistance to those in need, that serves the Member States’ interests, and that improves the EU’s economic stability as a whole.

128. Patrick Kingsley, *Thousands of refugees left in cold, as UN and EU accused of mismanagement*, GUARDIAN (Dec. 22, 2016, 6:30 AM), <https://www.theguardian.com/world/2016/dec/22/thousands-of-refugees-left-in-cold-as-un-and-eu-accused-of-mismanagement> [https://perma.cc/S49R-CNG4].

129. *Id.*

130. *Id.*

131. *Id.*

132. Patrick Kingsley, *EU officials finalise common asylum system to resettle refugees*, GUARDIAN (Jul. 13, 2016 11:02 AM), <https://www.theguardian.com/world/2016/jul/13/eu-officials-finalise-common-asylum-system-resettle-refugees> [https://perma.cc/Z72S-QXL4].

133. *Id.*