LUCK OF THE DRAW FOR ASYLUM SEEKERS IN EUROPE: WHY THE COMMON EUROPEAN ASYLUM SYSTEM IS A BREACH OF JUSTICE AND WHY A THIRD PHASE OF AMENDMENTS IS REQUIRED

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INTRODUCTION

In 2015, approximately 1.3 million refugees crossed into Europe in hopes of seeking asylum.[1] They arrived by sea and crossed devastated lands.[2] The majority of the refugees in 2015 hailed from Syria, Afghanistan, and Iraq—war-torn countries whose violence has spurred an exodus to the proverbial Promised Land.[3] But is Europe indeed a continent

1. *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016) [hereinafter *Migrant Crisis: Migration to Europe Explained in Seven Charts*], http://www.bbc.com/news/world-europe-34131911; EUROPEAN PARLIAMENT, THE IMPLEMENTATION OF THE COMMON EUROPEAN ASYLUM SYSTEM 8 (2016).

2. *Migrant Crisis: Migration to Europe Explained in Seven Charts*, *supra* note 1.

3. *Id.*

that will equitably cater to each of these refugees? It has certainly tried. And it has certainly failed.

In order to understand the Common European Asylum System ("CEAS"), one must understand the European Union's ("EU") various institutions and the role that each of them plays. To begin, the EU is comprised of 28 Member States[4] totaling approximately 500 million individuals.[5] The EU is based on treaties that set forth the objectives and rules that European institutions are required to follow.[6] The European institutions include the European Parliament ("Parliament"), the European Council ("Council"), and the European Commission ("Commission").[7] The Council defines the EU's priorities, but does not make law.[8] The Commission proposes new laws that conform to the Council's priorities.[9] The Parliament chooses to either veto or adopt the Council's proposed laws.[10] "Law" is used generally in this sense; the "law" in the European Union is promulgated in the form of regulations, directives, and decisions.[11] Regulations are legally binding on all Member States, but directives are different.[12]

The CEAS is primarily comprised of "directives" that are not immediately legally binding.[13] EU Member States are permitted to impose their own means to achieve the objective set forth in the Directive.[14] The CEAS's Directives were first implemented, or "casted," in 2000 and 2001.[15] Scholars, policymakers, politicians, and constituents criticized these Directives for "curtailing the rights of those seeking asylum in the EU."[16] As a result, the European Commission set a goal to issue a second phase of

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4. OLIVER PATEL & ALAN RENWICK, BREXIT: THE CONSEQUENCES FOR OTHER EU MEMBER STATES 1–2 (2016) (explaining that the United Kingdom's withdrawal from the European Union, commonly referred to as "Brexit," would result in 27 EU Member States).

5. EUROPEAN UNION, HOW THE EUROPEAN UNION WORKS: YOUR GUIDE TO THE EU INSTITUTIONS 3 (2014).

6. *Id.*

7. *Id.* at 5 (outlining that the European Parliament "represents the EU's citizens and is directly elected by them," that the European Council "consists of the Heads of State or Government of the EU Member States," and that the European Commission "represents the interests of the EU as a whole").

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; EUROPEAN COMM'N, A COMMON EUROPEAN ASYLUM SYSTEM 3 (2014).

14. EUROPEAN UNION, *supra* note 5, at 5.

15. Nadine El-Enany, *EU Asylum and Immigration Law Under the Area of Freedom, Security, and Justice*, *in* THE OXFORD HANDBOOK OF EUROPEAN UNION LAW 867, 873 (Anthony Arnull & Damian Chambers eds., 2015).

16. *Id.*

Directives by 2012.[17] While not each Directive was issued by the year 2012, each of the Directives was eventually amended, or "recasted," and set into force.[18] The second phase of Directives currently in force (along with two Regulations), include: the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin III Regulation, and the Eurodac Regulation.[19] Yet—the second phase of Directives has failed to establish a Common European Asylum System that is indeed *common*. As a result, it is imperative that the European Commission cast a "third phase" of amendments.

This Note will begin by providing an explanation of each of the Directives. Part I will summarize each Directive's purpose as well as its defining provisions. This analysis is important for understanding Part II of this Note, which will set forth my primary criticisms of each Directive. It is important to understand that the Common European Asylum System has not failed at providing a "common" asylum system because of just one failing. Instead, the CEAS is a sum of its parts, and unfortunately its parts—or Directives—are each uniquely flawed, and each uniquely contributes to what has become an *Uncommon* European Asylum System. An uncommon asylum system abridges the very rights that the CEAS guarantees: the promise that an asylum seeker will receive common treatment and common chances of obtaining asylum—regardless of the EU Member State in which they decide to lodge their application.[20] An asylum seeker should not have to perform research to determine their greatest likelihood of obtaining asylum in Europe before fleeing their dangerous country of origin. This will continue to be the case until a third phase of amendments is drafted.

Part III of this Note will set forth specific recommendations for the third phase of amendments to the CEAS. This proposal will set forth recommendations that include adding specific and clarifying language as well as making structural and substantive changes to the Dublin III Regulation in particular. The CEAS has attempted to heal its fundamental shortcomings on an ineffective, *ad hoc* basis. This third phase of amendments will render these temporary and short-cited remedies

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17. *Id.* at 875.

18. EUROPEAN COMM'N, *supra* note 13, at 4–8.

19. *Id.* The Eurodac Regulation established a fingerprint database to track an asylum seeker's lodged application. This Note will not analyze the Eurodac Regulation because it is limited in purpose and has posed few problems for the CEAS. Council Regulation 603/2013, 2013 O.J. (L 180) 1 (EU).

20. *Refugee Law and Policy: European Union*, LIBR. CONG., https://www.loc.gov/law/help/refugee-law/europeanunion.php (last visited Dec. 12, 2017) ("[The CEAS] guarantees a set of common standards and requires stronger cooperation by EU Members to ensure that asylum seekers are treated fairly and equally wherever they apply.").

unnecessary, and help the CEAS achieve an asylum system that is indeed *common*.

I. THE SECOND PHASE OF THE COMMON EUROPEAN ASYLUM SYSTEM DIRECTIVES

A. The Asylum Procedures Directive

The Asylum Procedures Directive ("Procedures Directive") sets standards for the very beginning of the asylum-seeking process: how the asylum seeker applies for asylum; how the application will be reviewed by the EU Member State; the aid rendered to the asylum seeker; the appeal process if an asylum seeker's application is declined; and the procedures for repeated applications.[21] The Procedures Directive can be thought of as *The Initial Procedural Criteria Directive*. The Procedures Directive was first cast on December 1, 2005 and recasted as part of the second phase of Directives on June 26, 2013.[22]

The overall purpose of the current Asylum Procedures Directive is "to establish common procedures for granting and withdrawing international protection" for asylum-seeking applications to EU Member States.[23] The European Commission sought to ensure that an asylum seeker's application would be processed efficiently and reviewed fairly—regardless of the State in which the asylum seeker lodged his or her application.[24] Some of the key amendments in the 2013 recasting seek to establish a common set of procedures.[25] For instance, after an asylum seeker submits an application, it must be registered within three working days.[26] Border patrol authorities and police must also have the requisite knowledge to advise asylum seekers with respect to where and how they can lodge their applications.[27] Further, examination of the application must be "concluded as soon as possible, without prejudice" and within six months—21 months maximum—from the date on which the asylum seekers lodged their application.[28] Asylum seekers are also limited to one reapplication before it is deemed

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21. EUROPEAN COMM'N, *supra* note 13, at 4.
22. Council Directive 2005/85/EC, 2005 O.J. (L 326) 13 (EU); Council Directive 2013/32/EU, 2013 O.J. (L 180) 60 (EU).
23. Council Directive 2013/32/EU, *supra* note 22, art. 1.
24. EUROPEAN COMM'N, *supra* note 13, at 4.
25. Council Directive 2013/32/EU, *supra* note 22, art. 1.
26. *Id.* art. 6.
27. *Id.*
28. *Id.* art. 31.

inadmissible,[29] and an asylum seeker is entitled to free legal assistance to appeal a declined application.[30] Finally, and of most relevance, an EU Member State may choose to accelerate the examination of an application to reach an expedited rejection.[31]

Also of importance, an asylum seeker's application will be deemed inadmissible if he or she is currently residing in a "safe country of origin,"[32] a "safe third country," or is currently living in a "first country of asylum," which is a non-EU Member State that is currently providing asylum for the asylum seeker, and the asylum seeker "can still avail himself/herself of that protection" or "he or she otherwise enjoys sufficient protection in that country . . . ."[33]

The European Commission claims that this recasted Asylum Procedures Directive is "much more precise" and "ensures that asylum decisions are made more efficiently and more fairly and that all Member States examine applications with a common high-quality standard."[34] This is simply not the case. The Asylum Procedures Directive remains riddled with deficiencies and has contributed to the inefficiencies, inequalities, and imbalances among the treatment and distribution of asylum seekers today.[35]

B. The Reception Conditions Directive

The Reception Conditions Directive ("Reception Directive") provides asylum seekers with a place to live as they wait to learn whether their

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29. *Id.* art. 40.

30. *Id.* art. 20.

31. *Id.* art. 31. An EU Member State may accelerate the rejection of an application for ten possible reasons: (1) the applicant presented irrelevant facts; (2) the applicant is from a "safe country of origin"; (3) the applicant has presented false information or withheld relevant information or documents; (4) the applicant destroyed a document that could have helped establish his or her identity or nationality; (5) the applicant made "clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information"; (6) the applicant "has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5)"; (7) the applicant submitted an application "merely" to frustrate the enforcement of an earlier decision; (8) the applicant entered the territory unlawfully "or prolonged his or her stay unlawfully"; (9) the applicant refused to provide a fingerprint, as required by the Eurodac Regulation; or (10) "the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law." *Id.*

32. EUROPEAN COMM'N, AN EU 'SAFE COUNTRIES OF ORIGIN' LIST 1–2 (2015). Importantly, however, EU Member States diverge on the countries they consider to be a "safe country of origin." *See infra* Part II.A (explaining why EU Member States diverge with respect to countries they consider "safe").

33. Council Directive 2013/32/EU, *supra* note 22, art. 35.

34. EUROPEAN COMM'N, *supra* note 13, at 4.

35. *See infra* Part II.A (outlining the primary criticisms of the Asylum Procedures Directive).

application for asylum was accepted or denied.[36] This Directive can be thought of as *The Waiting Game Directive*. The location where an asylum seeker lives as he or she awaits a determination on their application is a "reception," which essentially constitutes housing that may come in various forms or places within the EU Member State in which the applicant seeks asylum.[37] The Reception Directive was first cast on January 27, 2003 and was later recasted with the second phase of Directives on June 26, 2013.[38] The designated official "purpose" of the Reception Directive is relatively vague,[39] but the European Commission effectively summariz ed this Directive's objective in a later publication: "Asylum seekers waiting for a decision on their application must be provided with certain necessities that guarantee them a dignified standard of living," which "ensures that applicants have access to housing, food, healthcare and employment, as well as medical and psychological care."[40]

As a general rule, the Reception Directive guarantees asylum seekers a reception in the form of a traditional home or an "in kind" home, such as a flat or hotel.[41] "In duly justified cases," however, the EU Member State may provide reception conditions that deviate from this requirement "for a reasonable period" so long as the reception "in any event cover[s] basic needs."[42] Regardless of whether an asylum seeker's housing is a traditional home or a temporary reception, the Reception Directive *requires* that each reception meet minimum conditions in all EU Member States.[43] As a common denominator among all EU Member States, the Reception Directive aims to guarantee the following conditions for all applicants not detained:[44] preservation of the family unit;[45] providing the applicant with

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36. EUROPEAN COMM'N, *supra* note 13, at 5.

37. *Common European Asylum System*, EUR. COMM'N, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (last updated Dec. 12, 2017).

38. Council Directive 2003/9/EC, 2003 O.J. (L 31) 18 (EC); Council Directive 2013/33/EU, 2013 O.J. (L 180) 96 (EU).

39. *See* Council Directive 2013/33/EU, *supra* note 38, art. 1 ("The purpose of this Directive is to lay down standards for the reception of applicants for international protection ('applicants') in Member States.").

40. EUROPEAN COMM'N, *supra* note 13, at 5.

41. Council Directive 2013/33/EU, *supra* note 38, art. 18.

42. *Id.*

43. EUROPEAN COMM'N, *supra* note 13, at 5.

44. Council Directive 2013/33/EU, *supra* note 38, art. 8. An EU Member State may hold the applicant in "detention" "[w]hen it proves necessary and on the basis of an individual assessment of each case . . . ." *Id.* The Directive defines "detention" as "confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement." *Id.* art. 2. An applicant may be detained for the following reasons: to determine his or her identity; when information in the application is incomplete and there is a risk of the applicant absconding; to determine if the applicant has a right to remain on the EU Member State territory; and when the applicant may

medical screening;[46] providing education to minors similar to the EU Member State's education system;[47] providing access to the labor market within nine months of submitting an application; [48] providing access to vocational training;[49] and providing overall "material reception conditions,"[50] defined as "housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance."[51]

The European Commission claims that the Reception Directive "ensure[s] better as well as more harmoni[z]ed standards of reception conditions throughout the Union."[52] This is not true. As we will see, asylum seekers in some EU Member States, such as Italy and Greece, face reception conditions that have risen to the level of a human rights crisis.[53] This inequitable treatment of asylum seekers among EU Member States is in part a result of the enormous discretion each EU Member State is afforded to implement this Directive, thereby further contributing to the CEAS's failure to implement a Common European Asylum System that is indeed *common*.[54]

C. The Qualification Directive

The Qualification Directive sets the standards on which an EU Member State may base its decision to approve an application.[55] It is helpful to think of this Directive as *The Standards to Accept or Reject an Application Directive*. The Qualification Directive was first cast on April 29, 2004.[56] The second phase of this Directive was cast on December 13, 2011.[57] The

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pose a national security risk. *Id.* art. 8. Detained applicants are afforded rights similar to applicants who are afforded reception conditions within an area surrounding a residence or a territory. *Id.* art. 9. The greatest variability between EU Member States is their individual ability to determine what "proves necessary" to detain an applicant based on their specific facts and circumstances. *Id.* art. 8.

45. *Id.* art. 12.

46. *Id.* art. 13.

47. *Id.* art. 14.

48. *Id.* art. 15.

49. *Id.* art. 16.

50. *Id.* art. 17.

51. *Id.* art. 2.

52. EUROPEAN COMM'N, *supra* note 13, at 5.

53. *See infra* Part II.B (describing the refugee crisis that has disintegrated into human rights crises in Italy and Greece).

54. *See infra* Part II.B. (outlining the primary criticisms of the Reception Conditions Directive).

55. EUROPEAN COMM'N, *supra* note 13, at 6.

56. Council Directive 2004/83/EC, 2004 O.J. (L 304) 12 (EU).

57. Council Directive 2011/95/EU, 2011 O.J. (L 337) 9 (EU).

Directive's stated purpose "is to lay down 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."[58]

More specifically, the Qualification Directive requires each EU Member State to review every application on an "individual basis," taking into account factors such as the current laws and regulations of the applicant's origin country as well as the applicant's background, gender, and age. [59]

The most relevant factor is the EU Member State's determination of whether the applicant faced "serious harm" in his or her country of origin, which is assessed based on the personal statements the asylum seeker offers in his or her application.[60] This short phrase—"serious harm"—is responsible for precipitating the primary failing of the Qualification Directive.[61] If applicants did not face "serious harm" in their country of origin, then their application for asylum will likely be rejected.[62]

More generally, the second phase of the Qualification Directive attempted to clarify the criteria that EU Member States should use to examine an application, with the idea that this would "prevent Member States [from] 'exchanging' asylum-seekers under divergent rules regarding competence to examine the application without this actually being done."[63] According to the European Commission, the recasted Qualification Directive was successful and resulted in many "Key Achievements."[64] Admittedly, this amended Directive did effectively prioritize gender and age considerations.[65] However, the European Commission asserts that this Directive also "clarifies the grounds for granting international protection and leads to more robust determinations, thus improving the efficiency of the asylum process . . . ."[66] The European Commission is mistaken, for "clarified grounds" remains a goal that has yet to be achieved.[67]

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58. *Id.* art. 1.
59. *Id.* art. 4.
60. *Id.*
61. *See infra* Part II.C (expounding on criticisms of the "serious harm" provision).
62. Council Directive 2011/95/EU, *supra* note 57, art. 4.
63. FRANCESCO CHERUBINI, ASYLUM LAW IN THE EUROPEAN UNION 184 (2015).
64. EUROPEAN COMM'N, *supra* note 13, at 6.
65. *Id.*
66. *Id.*
67. *See infra* Part II.C (outlining the primary criticisms of the Qualification Directive).

D. The Dublin III Regulation

The Dublin III Regulation ("Dublin Regulation") was first cast on February 18, 2003 and recasted on June 26, 2013.[68] It can essentially be considered *The "Hot Potato"/Crisis Regulation*. This Regulation serves two primary purposes. The first purpose is to establish which EU Member State is responsible for examining a lodged application submitted by an asylum seeker.[69] Once an asylum seeker has lodged an asylum application, only one EU Member State may review that lodged application.[70] Several considerations determine which EU Member State bears responsibility for reviewing the application, such as where the applicant's family members may already live.[71] Therefore, an asylum seeker may choose to lodge his or her application with a particular EU Member State, but may be transferred to the appropriate EU Member State if certain factors are met.[72]

The second primary purpose of the Dublin Regulation is to prevent and manage crises.[73] The European Commission considers one particular provision—the "early warning, preparedness and crisis management" provision—to be a "Key Achievement" of the recasted Dublin Regulation.[74] This provision, Article 33, accounts for what the European Commission describes as "root dysfunctional causes of national asylum systems . . . ."[75] In other words, this Regulation aims to prevent, or if necessary manage, sudden or prolonged influxes of asylum seekers flooding to one particular EU Member State for refuge.[76] The purpose of the "early warning" and "preparedness" aspect of Article 33 is to prevent a sudden flow of asylum seekers from deteriorating into a crisis.[77] In an attempt to prevent a crisis, the provision directs EU Member States to work with the

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68. Council Regulation 343/2003, 2003 O.J. (L 50) 1 (EC); Council Regulation 604/2013, 2013 O.J. (L 180) 31 (EU).

69. EUROPEAN COMM'N, *supra* note 13, at 7.

70. Council Regulation 604/2013, *supra* note 68, art. 3; *see generally* Anuscheh Farahat & Nora Markard, *Forced Migration Governance: In Search of Sovereignty*, 17 GERMAN L.J. 923, 930–33 (2016) (explaining how the Dublin Regulation prevents the "refugees in orbit" issue by requiring an EU Member State "deeming itself not responsible for processing an application" to "request the responsible Member State to take back or take charge of that person").

71. Council Regulation 604/2013, *supra* note 68, arts. 8–9.

72. *Id.* arts. 8–15.

73. ELENA JURADO ET AL., EUROPEAN COMM'N, EVALUATION OF THE IMPLEMENTATION OF THE DUBLIN III REGULATION: FINAL REPORT 84 (2016).

74. EUROPEAN COMM'N, *supra* note 13, at 7; Council Regulation 604/2013, *supra* note 68, art. 33.

75. EUROPEAN COMM'N, *supra* note 13, at 7.

76. JURADO ET AL., *supra* note 73, at 84.

77. *Id.*

European Asylum Support Office ("EASO")[78] to establish a "preventive action plan" to help alleviate pressures and crises.[79] EU Member States do not generally take the initiative to draw up these preventative plans on their own; typically, if the European Commission detects a pressure on a particular EU Member State, they will request the EU Member State to formulate a plan.[80] Drawing up such as plan is not mandatory.[81] If, however, the European Commission detects a full-scale crisis, or the plan fails to remedy the pressure, then the European Union issues the EU Member State a compulsory order.[82] The EU Member State is then required to draw up a "crisis management action plan" to ensure that the fundamental rights of the applicants are not abridged.[83]

As of October 29, 2016, almost 170,000 people crossed the Mediterranean Sea to Greece in hopes of seeking asylum.[84] As of October 31, 2016, almost 160,000 individuals arrived by sea to Italy.[85] These are more than mere "pressures."[86] The mass influx of asylum seekers to Greece and Italy has deteriorated into not only an asylum system crisis, but also a human rights crisis.[87] While the Commission may consider the "early warning, preparedness and crisis management" provision to be the Dublin Regulation's crowning achievement, it is solely responsible for the European Union's inability to effectively manage the current refugee crisis, including the ongoing human rights crises in Greece and Italy.[88]

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78. *See What We Do*, EUR. ASYLUM SUPPORT OFF., https://www.easo.europa.eu/about-us/what-we-do (last visited Nov. 24, 2017) (setting forth the EASO's mission statement: "The European Union is working towards a Common European Asylum System. EASO supports its implementation by applying a bottom-up approach. The aim is to ensure that individual asylum cases are dealt with in a coherent way by all Member States").

79. Council Regulation 604/2013, *supra* note 68, art. 33.

80. *Id.*; JURADO ET AL., *supra* note 73, at 84;.

81. JURADO ET AL., *supra* note 73, at 84.

82. *Id.*

83. Council Regulation 604/2013, *supra* note 68, art. 33.

84. Phillip Connor, *Italy on Track to Surpass Greece in Refugee Arrivals for 2016*, PEW RES. CTR. (Nov. 2, 2016), http://www.pewresearch.org/fact-tank/2016/11/02/italy-on-track-to-surpass-greece-in-refugee-arrivals-for-2016/.

85. *Id.*

86. Council Regulation 604/2013, *supra* note 68, art. 33; *Migrant Crisis: Migration to Europe Explained in Seven Charts*, *supra* note 1.

87. *See* Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 99, 108 (2016) (indicating that Greece's refugee crisis has resulted in a human rights violation and that transferring any further asylum seekers to Italy would "violate their human rights").

88. *See infra* Part II.D (outlining the primary criticisms of the Dublin III Regulation).

II. A WARRANTED CRITIQUE OF THE COMMON EUROPEAN ASYLUM SYSTEM DIRECTIVES

A. The Asylum Procedures Directive: A Critique

The recasted Asylum Procedures Directive, or *The Initial Procedural Criteria Directive*, has spawned diverging interpretations of its objectives, and ultimately resistance. This is evidenced by the fact that 18 EU Member States failed to fully implement the second phase of the Asylum Procedures Directive.[89] When the European Commission issues a Directive, it is not automatically legally binding on all EU Member States.[90] EU Member States are instead given a specified amount of time to "transpose" a Directive into the EU Member State's national law.[91] Thus, the Directive does not become legally binding on the EU Member State until the State has transposed it.[92] The failure of 18 EU Member States to transpose this Directive into their national law spurred the European Commission to send an infringement letter to each of those EU Member States.[93] These numerous infringements are symbolic of a larger, systemic problem: the second phase of the Asylum Procedures Directive is inadequate because the terminology is vague and open to diverging interpretations.

The European Commission's stated goal for the second phase of amendments to the Procedures Directive, *before* it was recasted in 2013, was to create "a fundamentally higher level of *alignment* between Member States' asylum procedures . . . ."[94] This goal has not been met. Instead, the EU Member States have failed to both interpret and implement the Asylum Procedures Directive in *consistent* ways.[95] EU Member States have most widely departed on their interpretation and implementation of

89. EUROPEAN PARLIAMENT, *supra* note 1, at 75; European Commission Press Release IP/15/5699, More Responsibility in Managing the Refugee Crisis: European Commission Adopts 40 Infringement Decisions to Make the European Asylum System Work (Sept. 23, 2015) (explaining that Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Greece, Spain, France, Hungary, Lithuania, Luxembourg, Latvia, Malta, Poland, Romania, Sweden, and Slovenia "failed to communicate national measures taken to fully transpose the revised Asylum Procedures Directive (2013/32/EU)").

90. *See* EUR. ASYLUM SUPPORT OFFICE, AN INTRODUCTION TO THE COMMON EUROPEAN ASYLUM SYSTEM FOR COURTS AND TRIBUNALS: A JUDICIAL ANALYSIS 17, 66 (2016) (explaining that, unlike EU primary law, Member States adopt EU Directives through domestic law).

91. *Id.*

92. *Id.*

93. European Commission Press Release IP/15/5699, *supra* note 89.

94. *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, at 5, COM (2008) 360 final (June 17, 2008) (emphasis added) (elaborating that the "setting up of a single, common asylum procedure leaving no space for the proliferation of disparate procedural arrangements in Member States" will help achieve that goal).

95. EUROPEAN PARLIAMENT, *supra* note 1, at 75.

the "accelerated procedures" provision[96] and the "safe country of origin" provision.[97] First, "the accelerated procedures" provide ten optional justifications for an EU Member State to accelerate the rejection of an asylum seeker's lodged application.[98] This poses a critical problem, because it provides numerous optional justifications for an EU Member State to reject an application, which in turn leads to inequitable treatment of asylum seekers in different EU Member States. Further, EU Member States interpret these ten justifications differently.[99] This has resulted in EU Member States rejecting applications for what appear to be arbitrary and inconsistent reasons.[100] Yes, EU Member States should have the power to accelerate and reject applications. But these diverging interpretations and implementations have resulted in a Common European Asylum System that is no longer *common*. Asylum seekers should be rejected for the same clear and enumerated reasons—irrespective of the country in which they seek asylum.

The "safe country of origin" concept is admittedly compelling. It seems reasonable that an asylum seeker should be denied asylum if their country of origin is indeed safe. However, the CEAS faces a critical problem: EU Member States diverge on the countries they consider safe.[101] To further complicate the matter, EU Member States have established different criteria for determining a "safe" country of origin, and judicial review of safe countries of origin also varies within each EU Member State.[102] These diverging interpretations of the criteria for a "safe country of origin" have grave consequences for asylum seekers, because if their country of origin is considered safe, then the review of their application is accelerated and then rejected.[103]

To prevent these inequities, the European Commission in its recasted Procedures Directive attempted to set forth a more specific list of criteria

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96. *See supra* note 31 (outlining the factors an EU Member State may consider when deciding whether to accelerate the rejection of an application under the Asylum Procedures Directive).

97. Council Directive 2013/32/EU, *supra* note 22, art. 31(8).

98. *See supra* note 31 (outlining the factors an EU Member State may consider when deciding whether to accelerate the rejection of an application under the Asylum Procedures Directive).

99. EUROPEAN PARLIAMENT, *supra* note 1, at 77.

100. *See* EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION 99–100 (2015) (describing the CEAS's "arbitrary deprivation of liberty" with respect to asylum seekers and the ways in which this deprivation of liberty violates the European Convention on Human Rights).

101. EUROPEAN PARLIAMENT, *supra* note 1, at 76 ("According to the Commission, twenty-two Member States have implemented it into their domestic legislation, fifteen Member States apply it in practice, ten Member States have designated safe countries of origin and five Member States apply the 'safe country of origin' concept on a case-by-case basis.").

102. *Id.*

103. Council Directive 2013/32/EU, *supra* note 22, art. 31.

that EU Member States should use to determine whether a country is "safe."[104] EU Member States have nevertheless continued to make their own determinations. For example, in 2015, the United Kingdom decided to consider Eritrea a "safe" country, despite the fact that the United Nation's Commission of Inquiry reported that the country was responsible for "gross human rights violations" that "may constitute crimes against humanity."[105] The United Kingdom chose instead to lend credence to a contradictory 2014 Danish report suggesting that Eritrea was engaging in reforms to a degree that would warrant the safe return of asylum seekers that had fled the country.[106] As a result, the United Kingdom's grant of asylum to Eritrean asylum seekers decreased from 73% of applications in the first quarter of 2015, to 34% in the second quarter of 2015.[107] Evidently, the criteria have not been followed by each EU Member State. For instance, two asylum seekers from Eritrea who escaped the same living conditions can be considered either safe or persecuted, depending solely on the EU Member State in which they seek asylum.[108] The Asylum Procedures Directive requires substantive changes, especially with respect to clarifying vague terminology and requiring all EU Member States to strictly follow these criteria.[109]

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104. *Id.* art. 38 (outlining the following criteria to determine whether the applicant's origin country is "safe": (1) "life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion"; (2) "there is no risk of serious harm as defined in Directive 2011/95/EU"; (3) "the principle of *non-refoulement* in accordance with the Geneva Convention is respected"; (4) "the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected"; and (5) "the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention").

105. *UN Inquiry Reports Gross Human Rights Violations in Eritrea*, U.N. HUM. RTS. OFF. HIGH COMM'R (June 8, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16054&LangID=E; *UK Paves Way to Return Asylum Seekers to Eritrea*, REFUGEE COUNCIL (Aug. 27, 2015), http://www.refugeecouncil.org.uk/latest/news/4410_uk_paves_way_to_return_asylum_seekers_to_ eritrea; U.N. General Assembly, *Report of the Commission of Inquiry on Human Rights in Eritrea*, U.N. Doc. A/HRC/29/42 (June 4, 2015); EUROPEAN COUNCIL ON REFUGEES AND EXILES, "SAFE COUNTRIES OF ORIGIN": A SAFE CONCEPT? 5 (2015).

106. REFUGEE COUNCIL, *supra* note 105 (explaining that the Danish report "suggested that the Eritrean government may be carrying out reforms that would allow Eritrean asylum seekers fleeing Eritrea's abusive, indefinite national conscription program to be safely returned to the country").

107. *Id.*

108. *See* EUROPEAN PARLIAMENT, *supra* note 1, at 76 (explaining the various ways Member States interpret the "safe country of origin" concept).

109. *See infra* Part III.B.1 (setting forth recommendations to rectify the failings of the Asylum Procedures Directive).

B. The Reception Conditions Directive: A Critique

The Reception Conditions Directive, or *The Waiting Game Directive*, also contributes to the un-commonality of the Common European Asylum System, thereby necessitating a third phase of amendments. Before the second phase of Directives was recasted, the European Commission admitted that "[t]he Commission's evaluation report on the [Reception Conditions Directive] identified a number of problematic issues largely due to the amount of discretion allowed to Member States in a number of key areas."[110] Put another way, the original Reception Conditions Directive "negat[ed] the desired harmonization effect."[111] The second phase of Directives did not resolve these discretionary and harmonization issues.[112] However, before the inadequacies of this recasted Directive are explored, it is important to understand the underlying tension that exists between this Directive and the members of society living in the EU Member States. These tensions contribute to the controversy the European Commission will face if they consider amending this Directive.[113]

The reality is that many asylum seekers face inhumane treatment at their reception, which the Reception Conditions Directive categorizes as a mere "lack of dignified reception conditions . . . ."[114] Yet at the same time, "the public is often of the opinion that asylum seekers receive too much support, are a drain on the local resources or that such support comes at the expense of social security benefits for the local population."[115] Consequently, a palpable tension lies between nationals and newcomers, because local populations resist the distribution of asylum seekers into their personal communities.[116] As a result, the European Commission faces a difficult balancing act between affording EU Member States sufficient discretion to appease their constituents, while simultaneously ensuring that

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110. *Policy Plan on Asylum*, *supra* note 94, at 4 (explaining that the second phase of Directives must: "ensure greater equality and improved standards of treatment with regard to the level and form of material reception conditions"; "provide for simplified and more harmoni[z]ed access to the lab[or] market, ensuring that actual access to employment is not hindered by additional unnecessary administrative restrictions, without prejudice to Member States' competences"; and "incorporate procedural guarantees on detention").

111. El-Enany, *supra* note 15, at 876 (quoting European Commission, Report from the Commission to the Council and to the European Parliament on the Application of the Directive 2003/9/EC of 27 January 2003 (laying down minimum standards for the reception of asylum seekers)).

112. EUROPEAN PARLIAMENT, *supra* note 1, at 82–91.

113. *Id.* at 82.

114. *Id.*

115. *Id.*

116. *Id.*

each asylum seeker's fundamental human rights are met.[117] It is imperative that the local populations among EU Member States understand that many asylum seekers face substandard conditions as they await a determination on their application.[118] Therefore, while reception condition standards may face resistance from local populations, the CEAS *must* safeguard—at a minimum—the human rights of every asylum seeker as they await a decision on their lodged application.[119]

July 20, 2015 marked the EU Member States' deadline to transpose the recasted Reception Conditions Directives into their national law, after which the Directive became legally binding.[120] Similar to the Asylum Procedures Directive, the European Commission again instituted infringement proceedings—19 this time—against the EU Member States that failed to fully transpose this Directive.[121] The underlying cause of these proceedings is rooted in the primary challenge that EU Member States face with this recasted Directive: equitable and humane reception conditions, as demonstrated by the refugee crisis in Italy and Greece.[122]

Thousands of asylum seekers in Greece are forced to sleep the night through sub-zero temperatures—either in a tent, a warehouse, or barracks.[123] One camp in northern Greece, Camp Oreokastro, lacks heat and electricity.[124] Asylum seekers in another Greek camp, Camp Souda on Chios Island, are subjected to locals throwing rocks and Molotov cocktails into their camp.[125] The conditions asylum seekers face in Italy are also dire.[126] They're forced to live in camps where the conditions are well

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 83.

121. European Commission Press Release IP/15/5699, *supra* note 89.

122. EUROPEAN PARLIAMENT, *supra* note 1, at 86–87; *see* Tiril Skarstein, *Terrible Conditions for Refugees in Greece*, NORWEGIAN REFUGEE COUNCIL (Dec. 2, 2016), https://www.nrc.no/news/2016/des/terrible-conditions-for-refugees-in-greece/ (describing the inhumane living conditions asylum seekers face in Greece); Martin Kreickenbaum, *Refugees Face Catastrophic Conditions in Italy and Greece*, WORLD SOCIALIST WEBSITE (Nov. 7, 2016), https://www.wsws.org/en/articles/2016/11/07/refu-n07.html (describing the inhumane living conditions asylum seekers face in Italy and Greece); *see also* Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity*, 26 HARV. HUM. RTS. J. 217, 217 (2013) ("The current configuration of the Common European Asylum System (CEAS) presents a triple threat to EU solidarity. . . . [I]t places a grossly disproportionate burden on the southern states—notably *Greece*, *Italy*, and Malta . . . ." (emphasis added)).

123. Skarstein, *supra* note 122.

124. *Id.*

125. *Id.*

126. *See* Kreickenbaum, *supra* note 122 (providing multiple examples of the inhumane conditions asylum seekers face in Italy and Greece).

beyond undignified.[127] These asylum seekers have reported physical abuse from the Italian police, including beatings, electric shocks, and genital torture.[128] Italy and Greece have failed to provide housing, either traditional or in kind, and have also failed to meet the housing exception in instances of "duly justified cases"—for Italy and Greece have not "cover[ed] [the] basic needs" of their asylum seekers.[129] Such living conditions are not only undignified—they are inhumane.

The Reception Directive claims to "respect[] the fundamental rights and observe[] the principles recogni[z]ed in particular by the Charter of Fundamental Rights" and "ensure full respect for human dignity . . . ."[130] The Directive further provides that asylum seekers are entitled to "accommodation centres which guarantee an adequate standard of living."[131] The abhorrent conditions that asylum seekers in Italy and Greece face demonstrate that not all asylum seekers are provided an "adequate standard of living" as they await a determination on their lodged application.[132] Alain Homsy, the head of the Norwegian Refugee Council, has witnessed the inhumane conditions that asylum seekers in Greece are forced to tolerate.[133] Homsy emphasized that "[c]amps are never an ideal solution, especially not long term. Many of the camps in Greece are also far below humanitarian standards. There is an urgent need to ensure that people are moved into proper housing facilities, and that they receive necessary support, health services and education opportunities . . . ."[134] Evidently, the very rights asylum seekers are afforded by the Reception Conditions Directive—human dignity and an adequate standard of living—are blatantly and continuously abridged.[135]

EU Member States have not provided adequate reception conditions for asylum seekers, nor have they implemented the proper means to achieve the Reception Directive's objectives.[136] The humanitarian crises in Italy and Greece, as well as other receptions in Europe, demonstrate that the

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127. *Id.*

128. *Id.*

129. Council Directive 2013/33/EU, *supra* note 38, art. 18.

130. *Id.* pmbl.

131. *Id.* art. 18.

132. *Id.*; Skarstein, *supra* note 122; Kreickenbaum, *supra* note 122; *see also* Mario Savino, *The Refugee Crisis As a Challenge for Public Law: The Italian Case*, 17 GERMAN L.J. 981, 983 (2016) ("Italy and Greece have been at the epicenter of the European refugee crisis. The sharp increase in migration flows from the Middle East and Africa has resulted primarily from the deterioration of the security conditions in Syria and the lack of political stability in Libya.").

133. Skarstein, *supra* note 122.

134. *Id.*

135. Council Directive 2013/33/EU, *supra* note 38, pmbl., art. 18.

136. *Id.* pmbl., art. 1; EUROPEAN PARLIAMENT, *supra* note 1, at 84.

Reception Directive has failed to guarantee asylum seekers these fundamental rights.[137] Accordingly, the Reception Conditions Directive can more properly be referred to as *The Inequitable Waiting Game Directive*. As we will see, the EU Member States' failure to provide asylum seekers adequate accommodations at their reception is a function of structural issues within the Dublin Regulation.[138] It is crucial that the European Commission both understands and remedies this critical flaw.

C. The Qualification Directive: A Critique

In addition to thinking of the Qualification Directive as *The Standards to Accept or Reject an Application Directive*, this Directive is also appropriately referred to as a "protection lottery," despite its stated objective:[139]

> The main objective of this Directive is, on the one hand, to ensure that Member States apply *common criteria* for the identification of persons genuinely in need of international protection, and, on the other hand, *to ensure that a minimum level of benefits* is available for those persons in all Member States.[140]

The recasted Qualification Directive has failed to meet this objective.[141] Before outlining the primary ways in which this Directive has failed, it is important to highlight that, once again, the European

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137. *See, e.g.*, Cassandra Vinograd, *Europe's Refugee Crisis: Hungary Declares State of Emergency Over Migrants*, NBC NEWS (Mar. 9, 2016, 10:58 AM), http://www.nbcnews.com/storyline/europes-border-crisis/europe-s-refugee-crisis-hungary-declares-state-emergency-over-migrants-n534746 (reporting Hungary's decision to declare a state of emergency as a result of a "mass migration" of asylum seekers, which deteriorated into a refugee crisis); Herman Grech, *Migrant Crisis: Malta Seeks Solutions to Stem the Tide*, BBC NEWS (Apr. 21, 2015), http://www.bbc.com/news/world-europe-32389754 (describing the refugee crisis in Malta and the unwillingness of other EU Member States to "absorb" any of Malta's refugees).

138. *See infra* Part III.C (setting forth recommendations to rectify the failings of both the Reception Conditions Directive and the Dublin III Regulation).

139. *See, e.g.*, MINOS MOUZOURAKIS ET AL., EUROPEAN COUNCIL ON REFUGEES AND EXILES, COMMON ASYLUM SYSTEM AT A TURNING POINT: REFUGEES CAUGHT IN EUROPE'S SOLIDARITY CRISIS 18 (2015) ("Yet the risks of a 'protection lottery' in a heterogeneous CEAS of 28 national asylum systems do not seem to have been eradicated even in the light of second-phase standards on protection, as practice and data reveal that similar cases are not equally treated in every country.").

140. Council Directive 2011/95/EU, *supra* note 57, pmbl. (emphasis added).

141. EUROPEAN PARLIAMENT, *supra* note 1, at 71–74; MOUZOURAKIS ET AL., *supra* note 139, at 17–25.

Commission considers this Directive's amendment a success.[142] Further, as was the case with the preceding recasted Directives, some EU Member States failed to transpose the Directive by the European Commission's December 21, 2013 deadline.[143] In order for these Directives to improve over time, it is imperative—as a threshold matter—that the European Commission confronts and addresses each of the Directive's inadequacies, and also provides for ways to enforce the transposition of the Directives into each EU Member State's national law. This recommendation, along with proposed changes to this Directive, will be explored in the final section of this Note.[144]

The recasted Qualification Directive faces one primary challenge that the European Commission has failed to overcome: asylum seekers hailing from the same conditions in the same origin country do not have equal chances of obtaining asylum in each EU Member State.[145] This is widely referred to as an EU Member State's "recognition rate."[146] Asylum seekers from the same country of origin face tremendously variable recognition rates among EU Member States.[147] For example, imagine that, in 2014, four Syrian nationals with relatively similar origin-country circumstances and conditions each attempt to seek asylum in four different EU Member States. Asylum seeker number one lodges her application with Cyprus: she has a 100% chance of gaining asylum.[148] Asylum seeker number two lodges her application with Italy: she has a 64% chance of gaining asylum.[149] Asylum seeker number three lodges her application with Estonia: she has a 50% chance of gaining asylum. Asylum seeker number four lodges her application with Croatia: she has a 0% chance of gaining asylum.[150] Evidently, four Syrian nationals that flee the same living conditions face wildly different chances of obtaining asylum in a European country. Unless

142. EUROPEAN COMM'N, *supra* note 13, at 6 (emphasizing that the Qualification Directive "clarifies the grounds for granting international protection" and "approximates to a large extent the rights granted to all beneficiaries of international protection").

143. CHERUBINI, *supra* note 63, at 183; European Commission Press Release IP/15/5699, *supra* note 89 ("Despite letters of Formal Notice (the first formal step of an infringement procedure) sent to Bulgaria and Spain in June 2013 and January 2014 respectively, the two Member States have not transposed the Qualifications Directive, or in any event have not yet notified the Commission of the national transposition measures.").

144. *See infra* Part III.B.2 (setting forth recommendations to rectify the failings of the Qualification Directive).

145. EUROPEAN PARLIAMENT, *supra* note 1, at 72; MOUZOURAKIS ET AL., *supra* note 139, at 18.

146. MOUZOURAKIS ET AL., *supra* note 139, at 5.

147. *Id.* at 18–23.

148. *Id.* at 19.

149. *Id.*

150. *Id.*

they happen to research these statistics in advance, they take the luck of the draw.

This variability of recognition rates under the Qualification Directive—which is the case for asylum seekers from all origin countries, not just Syria—is largely a symptom of diverging interpretations of "serious" under Article 15(c), which informs the interpretation of "serious harm" under Article (4)(3)(b).[151] Article 4 specifies the criteria that each EU Member State should consider when deciding whether to grant or deny an individual's application for asylum, including whether the asylum seeker has faced "serious harm."[152] Article 4(3)stipulates the following:

> The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: . . . the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or *serious harm* . . . .[153]

Article 15(c) of the Qualification Directive defines "serious harm" as follows:

> Serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[154]

Several of the terms used to define "serious harm" could be interpreted differently. For example, terms such as "torture," "inhuman," and "degrading" could be subject to diverging interpretations depending on the EU Member State.[155] The issue is that the European Commission has failed to establish a common set of guidelines or definitions for these ambiguous terms.[156] As a result, each EU Member State may exercise its own discretion—based on its own definitions of ambiguous terms—to

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151. Council Directive 2011/95/EU, *supra* note 57, art. 15(c), 4(3)(b); EUROPEAN PARLIAMENT, *supra* note 1, at 72.

152. Council Directive 2011/95/EU, *supra* note 57, art. 4.

153. *Id.* art. 4(3) (emphasis added).

154. *Id.* art. 15(c).

155. *See infra* Part III.B.2 (setting forth a solution to these diverging interpretations).

156. EUROPEAN PARLIAMENT, *supra* note 1, at 72.

determine whether the facts and statements the asylum seeker has described in his or her application constitute having faced "serious harm" in his or her country of origin. Consequently, the recognition rates are variable, thereby contributing to yet more un-commonalities within the "Common" European Asylum System. A third phase of amendments is required.

D. The Dublin III Regulation: A Critique

As previously described, the Dublin Regulation, or *The "Hot Potato"/Crisis Regulation*, is an instrument that sets forth a hierarchical set of criteria that are used to determine which EU Member State is responsible for reviewing an asylum seeker's lodged application.[157] While the Dublin Regulation also attempts to provide for a long-term solution to unforeseen migration flows, the aforementioned "early warning, preparedness and crisis management" provision is inadequate. This is demonstrated by the Dublin Regulation's inability to swiftly and successfully respond to the mass influx of asylum seekers in Italy and Greece.[158]

As previously explained, under the "preventive action plan," the EU Member State is expected to "take all appropriate measures to deal with the situation of particular pressure on its asylum system or to ensure that the deficiencies identified are addressed before the situation deteriorates."[159] If the "preventive action plan" fails, or the European Commission detects a full-scale crisis, then the EU Member State is required to draft a "crisis management action plan."[160] The problem with these "action plans" is they place the onus solely on the EU Member State, requiring them to take the time to draft and troubleshoot the plan—crucial time that EU Member States like Italy and Greece do not have during times of crisis.[161] The Dublin Regulation lacks a provision that provides for an expedited process to help address full-scale crises.[162]

The failing of the Dublin Regulation is demonstrated by the current refugee crisis in Italy and Greece.[163] In 2015, the Dublin Regulation's

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157. Council Regulation 604/2013, *supra* note 68, art. 7; *see supra* Part I.D (explaining the primary purposes of the Dublin III Regulation).

158. Council Regulation 604/2013, *supra* note 68, art. 33.

159. *Id.* art. 33(1)–(2).

160. *Id.* art. 33(3).

161. Derek N. White, *International Refugee Law*, 48 ABA YEAR REV. 359, 365 (2014) (highlighting that "the responsibility relies heavily with the [EU Member State] facing [the] crisis" with respect to the "early warning, preparedness and crisis management" provision of the Dublin III Regulation).

162. *See infra* Part III.C (recommending specific structural changes to the Dublin III Regulation).

163. *See supra* Part II.B (describing the refugee crisis in Italy and Greece).

"early warning, preparedness and crisis management" provision proved inadequate, forcing the European Commission to send a "dedicated team of Commission officials" to Italy and Greece to assess the situation.[164] From 2013 to 2014, the number of individuals seeking asylum in Italy increased 143%.[165] For the year 2015, as of August 31, 2015, 115,500 asylum seekers—primarily from Eritrea, Nigeria, Somalia, and Syria—crossed the Mediterranean Sea to Italy in hopes of seeking asylum; in April 2015 alone, 1,308 of those asylum seekers drowned or went missing.[166] The state of affairs in Greece was also dire: the State faced a 153% increase in asylum seekers between the years 2013 and 2014.[167] For the year 2015, as of August 31, 2015, 204,954 asylum seekers crossed the Mediterranean Sea; they were primarily Syrian asylum seekers that traversed Turkey before making the trip over water.[168] Italy and Greece are required to review these asylum seekers' lodged applications, so long as the applicants do not meet any hierarchical requirements that would warrant a transfer to another EU Member State.[169]

As a result of this mass influx and the Dublin Regulation's failure to anticipate and alleviate the pressures that Italy and Greece continue to face, the European Council issued two Council Decisions in September 2015 to address the crisis.[170] The Council's *ad hoc* solution was to "commit[] itself in particular to increasing emergency assistance to frontline Member States and to considering options for organi[z]ing emergency relocation between Member States on a voluntary basis . . . ."[171] More specifically:

> The provisional measures are intended to relieve the significant asylum pressure on Italy and on Greece, in particular by relocating a significant number of applicants in clear need of international protection who will have arrived in the territory of Italy or Greece following the date on which this Decision becomes applicable. Based on the overall number of third-

164. EUROPEAN COMM'N, MANAGING THE REFUGEE CRISIS, ITALY: STATE OF PLAY REPORT 1 (2015); EUROPEAN COMM'N, MANAGING THE REFUGEE CRISIS, GREECE: STATE OF PLAY REPORT 1 (2015).

165. Council Decision 2015/1523, pmbl., 2015 O.J. (L 239) 146, 147 (EU).

166. MOUZOURAKIS ET AL., *supra* note 139, at 26–28.

167. Council Decision 2015/1523, *supra* note 165, pmbl.

168. MOUZOURAKIS ET AL., *supra* note 139, at 27.

169. *See* Council Regulation 604/2013, *supra* note 68, arts. 8–9, 12–13 (explaining that if the applicant is not an unaccompanied minor and does not possess a valid residence document for another EU Member State, then the EU Member State is responsible for reviewing an application if the applicant arrived by irregular means, which includes by sea).

170. Council Decision 2015/1523, *supra* note 165; Council Decision 2015/1601, 2015 O.J. (L 248) 80 (EU).

171. Council Decision 2015/1601, *supra* note 170, pmbl.

> country nationals who have entered Italy and Greece irregularly in 2015, and the number of those who are in clear need of international protection, a total of [120,000] applicants in clear need of international protection should be relocated from Italy and Greece.[172]

The Council also stipulates that EU Member States have a two-year time limit—by September 26, 2017—to relocate these 120,000 asylum seekers.[173] The Decision also provides "operational support" for Italy and Greece by requiring the EASO[174] and Frontex[175] to help screen asylum seekers and process, prepare, and organize their lodged applications.[176] While this assistance may be helpful,[177] the actual relocation of the asylum seekers is imperative to relieving the increasing pressures on Italy and Greece. Despite financial compensation,[178] EU Member States have no incentive to assist Italy or Greece, and EU Member States are not required to alleviate their burdens.[179] Despite the Decision stipulating that EU Member States "shall" indicate the number of individuals that they can accommodate at least every three months, and that "[120,000] applicants *shall* be relocated," EU Member States are only required to assist on a "voluntary basis"—they face no obligation to help other EU Member States, such as Italy and Greece, during times of crisis.[180]

It should come as no surprise, therefore, that the EU Member States ultimately failed to help relocate 120,000 asylum seekers from Italy and

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172. *Id*. pmbl.

173. *Id*. pmbl., 17, art. 13.

174. Council Decision 2015/1601, *supra* note 170, art. 7; *see also* EUR. ASYLUM SUPPORT OFF., *supra* note 78 (setting forth the EASO's mission statement and describing its scope).

175. *See Mission and Tasks*, FRONTEX, http://frontex.europa.eu/about-frontex/mission-and-tasks/ (last visited Dec. 13, 2017) (explaining that Frontex is the European Border and Coast Guard agency whose mission is to "promote, coordinate and develop European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management").

176. Council Decision 2015/1523, *supra* note 165, art. 7.

177. *See* EUROPEAN COMM'N, EUROPEAN SOLIDARITY: A REFUGEE RELOCATION SYSTEM 2 (2015) (explaining that Greece and Italy will also receive € 500 "for each person relocated to cover transport costs").

178. *Id.* (indicating that each EU Member State that volunteers to take an asylum seeker will receive € 6,000 "for each person received").

179. Council Decision 2015/1601, *supra* note 170, art. 5.

180. *Id.* pmbl., arts. 4–5 (emphasis added); *see also* Kelsey Leigh Binder, *Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises*, 41 BROOK. J. INT'L L. 1339, 1344 (2016) ("In implementing the quota system, the Council tried to ensure that Member States were acting in solidarity and fairly sharing the responsibility in regards to examining and processing applications for international protection. Despite the EU's efforts, however, *some countries have resisted opening their borders*." (emphasis added)).

Greece by the September 26, 2017 deadline.[181] Since the Decision was issued in September 2015, only 19,244 asylum seekers were relocated from Greece, and only a mere 8,451 asylum seekers were relocated from Italy.[182] A total of 27,695 relocated asylum seekers amounts to only 23.1% of the European Council's goal of 120,000 relocations.[183] Perhaps most disturbing is the European Commission's silence with respect to this failure: their September 6, 2017 press release reporting these statistics is couched as "good progress" and includes only half-hearted reminders that the "Council Decisions on relocation apply . . . until 26 September 2017" and that "[i]t is crucial that Member States relocate all eligible candidates from Italy and Greece as swiftly as possible."[184] Evidently, the Dublin Regulation fails to provide for swift and effective aid to EU Member States in times of crisis. The European Commission instead handles crises on an ineffective, *ad hoc* basis.[185] A third phase of amendments should include a restructuring of the Dublin Regulation.[186]

III. RECOMMENDATIONS FOR A THIRD PHASE OF COMMON EUROPEAN ASYLUM SYSTEM AMENDMENTS

A. Recommendation One: Regulations, Not Directives

A third phase of amendments is required to create a *Common* European Asylum System that guarantees equitable treatment to each asylum seeker, regardless of the EU Member State in which he or she seeks asylum. The European Commission and the European Council cannot continue to permit diverging interpretations of fundamental criteria that directly determine whether an asylum seeker's lodged application will be granted. The current refugee crisis also cannot continue to be dealt with on an *ad hoc* basis—

181. European Commission Press Release IP/17/3081, European Agenda on Migration: Good Progress in Managing Migration Flows Need to Be Sustained (Sept. 6, 2017).

182. *Id.*

183. *Id.*; Council Decision 2015/1601, *supra* note 170, pmbl.

184. European Commission Press Release IP/17/3081, *supra* note 181; *see also EU: Countries Have Fulfilled Less Than a Third of Their Asylum Relocation Promises*, AMNESTY INT'L (Sept. 25, 2017), https://www.amnesty.org/en/latest/news/2017/09/eu-countries-have-fulfilled-less-than-a-third-of-their-asylum-relocation-promises/ (reporting that "European countries have utterly failed to fulfill their commitments to relocate asylum-seekers from Greece and Italy" and "calling on European governments to step up their efforts to fulfill their quotas").

185. Langford, *supra* note 122, at 219 ("To continue ignoring the core problems that plague [the CEAS] while attempting to provide patchwork solutions would be to risk further unraveling [] the unity that the 27 states of the union have worked hard to develop and maintain.").

186. *See infra* Part III.C (recommending specific structural changes to the Dublin III Regulation).

fundamental structural changes must be made to the Dublin Regulation.[187] However, before more specific recommendations are made in these respects, a fundamental change is required: the next phase of amendments to the Common European Asylum System should be in the form of *regulations*—not directives.

Directives, as legal instruments, lack teeth. This is one of the Common European Asylum System's central issues: EU Member States are not *required* to transpose the European Commission's Directives into their own national law.[188] Procedurally, an infringement proceeding will take place, but EU Member States will not face grave consequences despite the fact that the Directives are technically "binding."[189] Thus, while the language in each Directive uses terminology such as "shall" and "required," the EU Member State can simply fail to comply.[190] Instead, Directives should be thought of as "goals."[191] In essence, the EU Member State reads the Directive and then in turn decides—without conferring with other EU Member States—the precise "form and methods" to transpose into their national law that meet (or more often fail to meet) the Directive's desired result.[192] These diverging forms and methods have resulted in an uncommon Common European Asylum System, which has directly impacted asylum seekers in an inequitable—and inhumane—way.

In contrast, a regulation has the immediate force of law on each EU Member State.[193] It must be "applied in its entirety across the EU," such as the regulation that governs the common rules for import in the European Union.[194] Therefore, if the CEAS Directives were instead issued in the form of regulations, the European Union would no longer struggle with the systemic problem of EU Member States consistently failing to transpose the

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187. *See* Binder, *supra* note 180, at 1344 ("The discordance among Member States' responses demonstrates that piecemeal, reactionary solutions are ineffective for these types of crises, and more meaningful, proactive, and uniform actions are needed to both alleviate the current crisis and address future migrant exoduses.").

188. *Regulations, Directives and Other Acts*, EUR. UNION [hereinafter *Regulations, Directives and Other Acts],* https://europa.eu/european-union/eu-law/legal-acts_en (last visited Dec. 13, 2017).

189. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47, 171 [hereinafter TFEU] ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."); *see also* EUROPEAN UNION, *supra* note 5, at 5 (explaining that directives are not legally binding instruments).

190. Council Decision 2015/1601, *supra* note 170, art. 5.

191. *Regulations, Directives and Other Acts*, *supra* note 188.

192. *Id.*; TFEU, *supra* note 189, art. 288.

193. TFEU, *supra* note 189, art. 288 ("A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.").

194. *Regulations, Directives and Other Acts*, *supra* note 188; Council Regulation 2015/478, art. 1, 2015 O.J. (L 83) 16, 18 (EU).

Directives into their respective national law.[195] Further, EU Member States would no longer be afforded the liberty to deviate from enumerated criteria. For example, the United Kingdom would not be permitted to use a Danish report as its guide to determine whether Eritrea is a "safe" country.[196] Instead, the United Kingdom, and every other EU Member State, would be required to use the criteria that the European Commission has enumerated to determine whether a country is indeed "safe." Finally, an additional benefit to issuing regulations instead of directives is that EU Member States would also be required to adhere to my next recommendation: clarifying explanations of ambiguous terminology. Importantly, this would preclude EU Member States from claiming that they adopted a diverging law because the regulation was ambiguous or undefined.

Admittedly, the proposition of issuing regulations instead of directives is a controversial one.[197] It is no coincidence that the majority of the European Union's policies are promulgated in the form of directives instead of regulations: EU Member States prefer "maximum leeway" to implement the law.[198] EU Member States prefer that European institutions[199] have "fewer powers to oversee [the] implementation of policy . . . ."[200] Therefore, EU Member States tend to resist regulations, which are not only binding, but also mandate the means of implementation.[201] However, the current CEAS is directly responsible for the ongoing human rights crisis among refugees in Europe—because of the very fact that EU Member States may implement the means of their choice to achieve the purpose of each Directive.[202] Not only has this resulted in variable interpretations of the CEAS Directives, but the objectives of each Directive have not been met as a result of this leeway.[203] Therefore, the gravity of the human rights crises in EU Member States such as Italy and Greece demonstrates the urgency with which the CEAS Directives should be recasted in the form of immediately binding regulations. In this instance, the EU Member States

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195. *See* European Commission Press Release IP/15/5699, *supra* note 89 (reporting on Member States' widespread refusal to adopt the Asylum Directives into their respective national laws).

196. *See supra* Part II.A (providing an example of diverging interpretations of the word "safe").

197. *See* ROBERT SCHÜTZE, EUROPEAN UNION LAW 112, 114 (2015) (emphasizing that EU Member States prefer the "indirect effects" of directives, as compared to regulations).

198. ALEX WARLEIGH, EUROPEAN UNION: THE BASICS 45 (2004).

199. *See supra* notes 7–10 and accompanying text (outlining the various European institutions).

200. WARLEIGH, *supra* note 198, at 45.

201. *Id.* at 46.

202. *See supra* Part I.A–D (explaining the primary purpose of each CEAS Directive).

203. *See supra* Part II.A–D (providing the primary criticisms of each CEAS Directive).

must set aside their aversion to legally binding requirements. [204] Fundamental human rights are at stake.[205]

B. Recommendation Two: Proposed Changes to Ambiguous Provisions

The European Commission should further define terms and phrases that prove to have diverging interpretations across EU Member States. This clarification, in tandem with the regulations' force of law, will foster more commonality in the Common European Asylum System.

1. Proposed Changes to the Asylum Procedures Directive

As previously analyzed, EU Member States may reference one or more criteria to justify accelerating the rejection of an application that an asylum seeker has lodged under *The Initial Procedural Criteria Directive*.[206] Upon reviewing the language of this provision under the Procedures Directive, it is evident that an EU Member State may interpret a term with the intent of tailoring that interpretation to its—as opposed to the Directive's—desired outcome.[207] To begin, an EU Member State may accelerate the rejection of an application if "the applicant has made *clearly* inconsistent and contradictory, *clearly* false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim *clearly* unconvincing . . . ." [208] At what point are the representations "clearly" inconsistent, "clearly" false, and "clearly" unconvincing? Does the asylum seeker have an opportunity to explain himself or herself to clarify what may not actually be a misrepresentation? To foster a more thoughtful review process, an investigation or correspondence with the applicant should be required to reach a "clear" conclusion. This factor should instead read as follows:

> [T]he applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing . . . .*To reach*

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204. WARLEIGH, *supra* note 198, at 45.

205. *See supra* Part II.B (describing the refugee crisis that has disintegrated into human rights crises in Italy and Greece).

206. Council Directive 2013/32/EU, *supra* note 22, art. 31.

207. *Id.*; Caitlin Katsiaficas, *The Common European Asylum System As a Protection Tool: Has the European Union Lived up to Its Promises?* 7, 10 (Bridging Europe, EU Migration Policy, Working Paper No. 7, 2014) (providing examples of instances when an EU Member State's interpretation of vague CEAS terminology has resulted in diverging interpretations and implementations).

208. Council Directive 2013/32/EU, *supra* note 22, art. 31(8)(e) (emphasis added).

> *a conclusion that an applicant's representations are "clearly inconsistent," "clearly false," or "clearly unconvincing," an investigation of the individual's application is required. An investigation is also required to "sufficiently verify" an applicant's country-of-origin. The reviewer must also make a reasonable effort to contact the applicant to discuss these inconsistencies, so as to provide the applicant an opportunity to explain his or her representations. Only then may a reviewer reach the determination that the individual's application is "clearly unconvincing." The reviewer must also document all justifications for reaching a conclusion of "clearly unconvincing."*[209]

This proposed change is important because it holds the EU Member State accountable for its decision to reject the asylum seeker's application. For example, imagine an applicant is from Eritrea and has lodged an application with an EU Member State. In her application, the applicant lists her town and country of origin and describes the war-torn conditions from which she escaped. She specifies that a bomb went off on March 2, 2015. The EU Member State believes this statement is false; there is no record of any detonations in Eritrea on that day. Instead of automatically accelerating the rejection of her application because the EU Member State believes the applicant is "clearly" not from Eritrea, this proposed language will require the reviewer to investigate the applicant's claim and make a reasonable effort to contact the applicant for more details.

This proposed language also affords applicants the justice they deserve if their representation was indeed credible, but unknown to the EU Member State. The proposed change also increases the probability that asylum seekers hailing from the same town and country will be afforded common treatment—regardless of the EU Member State in which they seek asylum. When multiple asylum seekers from the same town and country seek asylum in different EU Member States, they will have assurance that each EU Member State will conduct an investigation if their personal circumstances are unknown to the EU Member State, such as surviving a bomb detonation.

This recommendation would admittedly decrease the efficiency of the application review process.[210] However, there must be an ideal balance between a review process that is overly expeditious and a review process

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209. *Id.* (proposed language emphasized).

210. *See generally* Fullerton, *supra* note 87, at 129 (admonishing the CEAS's particular inefficiencies and emphasizing that those shortcomings "impose[] great delays on the asylum process[] and keep[] asylum seekers in prolonged suspense concerning their legal situations").

that is too meticulous.[211] The Asylum Procedures Directive's current review process is too expeditious; the process warrants increased "case-by-case" review to afford equitable treatment to asylum seekers facing similar origin-country circumstances.[212] This recommendation successfully tilts the application review process toward a more individualized and equitable determination before an application is automatically accelerated and then fatally rejected.[213] While it may be unattainable to afford perfectly equitable treatment to each asylum seeker, this recommendation is one step closer to the ideal balance.[214]

An EU Member State may also accelerate the rejection of an application if "the applicant may, for *serious reasons*, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law."[215] The Directive fails to define "serious reasons."[216] Accordingly, EU Member States may set an unreasonably high bar insofar as what conduct may constitute a "serious reason." Therefore, it is imperative to a *Common* European Asylum System that this Directive define "serious reason." My proposed definition is as follows:

> A "serious reason" is limited to the following circumstances as it relates to Article 31(8)(j) of this Directive: (1) the applicant has engaged in conduct that poses a danger to national security or the public order, and that conduct resulted in a risk of death to him or herself and/or others; (2) the applicant has made one or more threats to harm himself or herself or others; or (3) the applicant has exhibited reckless behavior, which is defined as a conscious disregard of a high risk of harm. If one or more of these provisions is applicable to the applicant, then the applicant is, for "serious reasons," considered a danger to the national security or public order of the Member State, unless there exists an extraordinary reason that surpasses the gravity of the foregoing list.

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211. *Cf.* Thomas Wischmeyer, *Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust,"* 17 GERMAN L.J. 339, 381 (2016) (emphasizing the general principle of balancing application review by "lay[ing] down hard and fast rules" and reviewing applications on a "case-by-case basis," ultimately concluding that decisions must be made on a "case-by-case basis").

212. *Id.*

213. Council Directive 2013/32/EU, *supra* note 22, art. 31.

214. Wischmeyer, *supra* note 211, at 381.

215. Council Directive 2013/32/EU, *supra* note 22, art. 31(8)(j) (emphasis added).

216. *Id.*

This proposed language precludes EU Member States from arbitrarily accelerating the rejection of an application by citing to Article 31(8)(j). It instead fosters a *common* system for determining which applicants pose a "serious reason" to be considered a "danger to the national security or public order." EU Member States would no longer be permitted to point to relatively benign behavior and declare it a "serious reason"—especially if the Directive is promulgated as a regulation.

2. Proposed Changes to the Qualification Directive

The two primary failings of the Qualification Directive, or *The Standards to Accept or Reject an Application Directive*, are: (1) an EU Member State's diverging interpretation of "serious harm"; and (2) an EU Member State's ability to simply ignore, as opposed to interpret, the criteria used to define "serious harm."[217] Requiring the European Commission to amend the CEAS Directives into legally binding regulations provides a solution to the second failing.[218] Further clarifying what specifically constitutes "serious harm" would rectify the first failing. Specifying the term "serious harm" is of critical importance, because whether an applicant faced "serious harm" in his or her country of origin serves as one of the criteria upon which an EU Member State may rely to decide whether to grant or deny an asylum seeker's application.[219] The current definition of "serious harm" is too vague. I propose the following changes:

> Serious harm consists of: (a) death penalty or execution; (b) torture* or inhuman** or degrading*** treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate or discriminate violence in situations of international or internal armed conflict. *EU Member States are limited to the criteria set forth in this provision to determine whether the applicant faced "serious harm" in their country of origin. *"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession";*[220] ***"inhuman treatment"*

217. *See supra* Part II.C (analyzing the primary critiques of the Qualification Directive).

218. *See supra* Part III.A (recommending regulations because they carry the immediate force of law).

219. *See supra* Part II.C (setting forth and describing the "serious harm" provision).

220. *See The Legal Prohibition Against Torture*, HUM. RTS. WATCH (Mar. 11, 2003, 3:51 PM) https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#What (setting forth a definition of "torture").

> *is defined as "physical or mental cruelty so severe that it endangers life or health";* [221] ****"degrading treatment" is defined as "acts that humiliate or violate the dignity of the individual. The age, sex, and vulnerability of the individual may help make a determination, but are not dispositive."*[222]

Including this proposed language in a third phase of regulations is imperative because it precludes an EU Member State from using diverging definitions for torture, inhuman treatment, and degrading treatment.[223] Providing definitions by which EU Member States must abide encourages commonality of treatment among lodged applications—regardless of the EU Member State in which the application was lodged. In turn, this will help rectify the variable recognition rates.[224]

C. Recommendation Three: Proposed Structural Changes to the Dublin Regulation

The future success of the Reception Conditions Directive, or *The Inequitable Waiting Game Directive*, depends on the structural and substantive changes that must be made to the Dublin Regulation, or *The "Hot Potato"/Crisis Regulation*. The Dublin Regulation dictates a hierarchy of criteria that each EU Member State uses to determine whether it is responsible for reviewing a lodged application.[225] Thus, the distribution of asylum seekers—especially during times of crisis—in turn dictates whether an asylum seeker will in fact be guaranteed an "adequate standard of living" in their accommodations, as guaranteed by the Reception Conditions Directive.[226]

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221. *Inhuman Treatment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

222. Council Directive 2011/95/EU, *supra* note 57, art. 15(c) (proposed language emphasized); *see Torture and Cruel, Inhuman or Degrading Treatment*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90 (last visited Dec. 13, 2017) (providing workable definitions of "torture," "inhuman treatment," and "degrading treatment").

223. Katsiaficas, *supra* note 207, at 10.

224. *See supra* Part II.C (explaining the variable "recognition rates" that have resulted from the failings of the Qualification Directive).

225. Council Regulation 604/2013, *supra* note 68, art. 3.

226. Council Directive 2013/33/EU, *supra* note 38, art. 18; *see also* Catherine Tinker, *Saving Lives and Building Society: The European Migration Agenda*, 22 ILSA J. INT'L & COMP. L. 393, 401 (2016) (explaining the interrelatedness of the Dublin Regulation and the Reception Conditions Directive by emphasizing that "[t]he application of the Dublin regulations has resulted in some individuals having been housed for several years in detention centers or camps in states such as Italy, Greece, and now Bulgaria, for example, absent prompt processing of their applications or hope of a decision which would allow a refugee to live, work and travel anywhere within the European Union").

The current Dublin Regulation is inadequate because it fails to provide effective procedures to address mass influxes of asylum seekers, as evidenced by the EU Member States' failure to meet the Council Decision's relocation quota and the consequential ongoing refugee crisis in Italy and Greece.[227] The provision that does take these pressures into account places the onus on EU Member States by requiring them to draw up plans, test those plans, and then implement the new, final plan.[228] During crises, time is of the essence, and this provision fails to take the time constraints of the situation into account. Therefore, in lieu of the "early warning, preparedness and crisis management" provision, I propose the following provision in its place:

> Crisis Management Plan. (1) Member States should take the following action once a potential or actual crisis concerning asylum seekers has been detected or is reasonably certain to occur: (a) The Member State must send a memorandum to the European Asylum Support Office explaining the crisis or potential crisis. The Member State must also specify the aid they anticipate needing from the Council or Commission, even if the aid is not required at that time; (b) Within seven days, the Council and Commission will send the Member State a series of recommendations to handle the crisis, as well as confirm and specify the aid they will grant; and (c) The Member State may reply by stating their decision to comply with these recommendations and accept the aid. Alternatively, the Member State may reply with its proposed changes to the recommendations and either decline the aid or propose a modification to the aid. The Member State's reply must be submitted within seven days.

This recommendation for a crisis management plan solves several existing issues within the current crisis management plan. First, it opens the dialogue between the Member State, the European Commission, and the European Council. As the crisis management plan stands now, EU Member States are required to draw up their own plans, with little help from the Commission or the Council.[229] While EU Member States may appreciate this freedom, this proposed plan affords EU Member States the liberty to

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227. *See supra* Part II.B, II.D (describing the refugee crisis that has disintegrated into human rights crises in Italy and Greece, as well as the EU Member States' failure to relocate 120,000 asylum seekers from Italy and Greece by September 26, 2017).

228. *See* Council Regulation 604/2013, *supra* note 68, art. 33 (detailing requirements of preventive action and crisis management plans).

229. *Id.*

modify the recommendations that the Commission or the Council makes. Second, the seven-day requirement expedites the process to address and remedy a situation during a time of crisis. The current plan requires troubleshooting a preliminary preventive action plan and then drafting a crisis management plan, which takes far too much time.[230] This proposed plan instead results in a series of recommendations that are appropriate for the reality of the situation and moves the process along in a timely fashion. Finally, this plan encourages a productive rapport between the EU Member State, the Council, and the Commission. As opposed to frustrations mounting as the EU Member State is left to its own devices, this plan will instead foster a productivity that may make it more likely for all EU Member States to come to each other's aid during times of crisis. As the CEAS currently stands, the refugee crises in Greece and Italy will endure, and all the while, asylum seekers will continue to face inhumane conditions.[231]

CONCLUSION

A third phase of amendments is required to achieve a Common European Asylum System that is indeed *common*. First, the amendments should be in the form of regulations, not directives. This will prevent EU Member States from deviating from the enumerated criteria set forth in each Directive and choosing to instead use their own set of determinations. Second, vague terms and provisions require clarification in the third phase of amendments. This will make the Common European Asylum System more *common*. Finally, it is imperative that structural changes are made to the Dublin Regulation: the proposed change would expedite the relief that is afforded to EU Member States during times of crisis, as well as remedy the failing Reception Conditions Directive.

While EU Member States may resist a third phase of amendments that result in an impingement on their freedom, there is an important policy consideration: the fundamental rights of asylum seekers take precedent. Asylum seekers should not be forced to live in inhumane or undignified conditions once they arrive in an EU Member State in hopes of seeking asylum. While these proposed changes are not the final solution to rendering this *Uncommon* European Asylum System more common, they will certainly help. What is for certain is that the Common European Asylum System cannot continue to permit EU Member States to simply

230. Wischmeyer, *supra* note 211, at 381.

231. *See supra* notes 182–84 and accompanying text (showing that little progress has been made to alleviate the refugee crises in Greece and Italy).

ignore the Directives—for they are each, in their own singular way, contributing to a system that is failing. The refugee crisis is just that—a crisis. A third phase of amendments is required to achieve the primary purpose of the CEAS: an asylum system that equitably and commonly caters to each and every asylum seeker.

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