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No Refuge for the Sick: How the EU's Health-Based Non-Refoulement Standard Compounds the Exclusionary Nature of International Refugee Law

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No Refuge for the Sick: How the EU's Health-Based Non-Refoulement Standard Compounds the Exclusionary Nature of International Refugee Law

Cover Page Footnote

J.D. Candidate, University of Washington School of Law, Class of 2022. I would like to thank Gabrielle D. Schneck and Haiyun Damon-Feng for fostering my interest in immigration law, Professor Dana Raigrodski for providing guidance and review, and Kathryn Joy for shepherding this article through the publication process.

NO REFUGE FOR THE SICK: HOW THE EU’S HEALTH-BASED NON-REFOULEMENT STANDARD COMPOUNDS THE EXCLUSIONARY NATURE OF INTERNATIONAL REFUGEE LAW

Cassandra Baker*

Abstract: The COVID-19 pandemic poses grave threats to the life and health of asylum seekers in Europe. Many potential asylees are forced to reside in cramped, unsanitary facilities and do not have adequate access to medical treatment. On top of these dangers, many are likely to be denied asylum due to the stringency of international refugee law and European Union (“EU”) asylum procedures. As a result, a number of these asylum seekers will turn to Article 3 of the European Convention on Human Rights, which provides broader non-refoulement protections. However, even Article 3, as currently interpreted by the European Court of Human Rights (“ECtHR”), is unlikely to protect the majority of these asylum seekers. This article proposes ways in which the ECtHR may refine its health-based non-refoulement jurisprudence to protect more individuals. It concludes that the Court may retain its current high standard for qualifying for health-based non-refoulement and provide relief for individuals who contract COVID-19 while detained by EU member states during the asylum application process. Significantly, the ECtHR should hold that EU member states who detain asylum seekers and thereby expose them to COVID-19 have assumed a duty toward them and may not refole them for the duration of their illness and its lingering health effects.

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INTRODUCTION

Asylum seekers in European Union (“EU”) member states are contracting COVID-19,¹ but instead of care and recovery, they are likely to face medical and legal hardship. Many are forced to live in overcrowded facilities where sanitation measures are inadequate and social distancing is impossible. A Greek refugee camp with nearly 3,000 residents reported infections in early April 2020 and “was cut off from the world overnight.”² In September 2020, a refugee camp on the Greek island of Samos, intended to house approximately 700 people, had around 4,500 residents living “in squalid conditions.”³ It reported “dozens” of COVID-19 cases.⁴ In Germany, asylum seekers are required to live in reception centers, and authorities have reported outbreaks at multiple facilities.⁵ An administrative judge ruled that protections against the coronavirus were “inadequate” at a facility in the town of Rheine.⁶ One facility was placed on lockdown with a mix of infected and uninfected residents,⁷ an approach the European Centre for Disease

¹ Anna Doliwa-Klepcka & Mieczysława Zdanowicz, *The European Union Current Asylum Policy: Selected Problems in the Shadow of COVID-19*, INT. J. SEMIOT. L. (2020).

² *Id.*

³ Nektaria Stamouli, *Migration crisis upends Greece’s coronavirus strategy*, POLITICO (Oct. 1, 2020, 11:11 AM), <https://www.politico.eu/article/migration-crisis-upends-greeces-coronavirus-strategy-migrants-camps/>.

⁴ *Id.*

⁵ *Germany: Asylum-Seekers Tested Positive for COVID-19 in Reception Facility*, EUR. COUNCIL ON REFUGEES AND EXILES (May 22, 2020), <https://www.ecre.org/germany-asylum-seekers-tested-positive-for-covid-19-in-reception-facilities/> (reporting outbreaks at facilities in Bonn, Berlin, and other locations in May 2020).

⁶ *German court: COVID-19 protection ‘inadequate’ at refugee home*, DEUTSCHE WELLE (May 11, 2020), <https://www.dw.com/en/german-court-covid-19-protection-inadequate-at-refugee-home/a-53395710>; see also *Germany: Asylum-Seekers Tested Positive for COVID-19 in Reception Facility*, *supra* note 5.

⁷ Philip Oltermann, *Refugees in German centre fear lack of protection as Covid-19 cases soar*, THE GUARDIAN (Apr. 15, 2020, 8:35 AM), <https://www.theguardian.com/world/2020/apr/15/refugees-in-german-centre-fear-lack-of-protection-as-covid-19-cases-soar>.

Prevention and Control later deemed inappropriate.⁸ In Italy, reception centers lack sufficient space, ventilation, water, and electricity.⁹ The health and lives of thousands of detained asylum seekers are at risk.

While some EU member states have chosen to release individuals from detention, this has often left them homeless. In the early months of the pandemic, Belgium released approximately half of the migrants it had detained, leaving many homeless and dependent on assistance from private individuals.¹⁰ Spain also released migrants due to the pandemic—but not those “in packed transit centers on its island enclaves of Ceuta and Melilla.”¹¹ Ultimately, many asylum seekers in EU countries have contracted COVID-19 while detained, and more will continue to do so.

Unfortunately for many of these asylum seekers, their troubles will not end there. Due to the outdated, restrictive definition of “refugee” used in international law, and several structural problems with the EU’s common asylum system, many individuals currently seeking asylum in Europe are likely to be denied relief despite their genuine fear of serious harm or death upon return to their countries of origin. Those who have contracted COVID-19 may turn to Article 3 of the European Convention on Human Rights (“ECHR”) in a final attempt to protect themselves from being returned to countries where they face danger and a lack of adequate medical care. Yet Article 3, too, is unlikely to provide relief because the European Court of Human Rights (“ECtHR”) has interpreted it in a narrow manner that withholds protection from all but the most extreme cases when the harm is based on illness. This state of affairs could leave thousands of people unprotected—at risk of being returned to countries where they face persecution and even death.

This article assesses asylum seekers’ barriers to immigration relief and chances for success, seeking changes to the law that could prevent harm to people who are at risk now. It concludes that the ECtHR should change its jurisprudence on health-based non-refoulement under Article 3 of the ECHR by providing clearer standards for member states. The ECtHR should also

⁸ EUR. CTR. FOR DISEASE PREVENTION AND CONTROL, GUIDANCE ON INFECTION PREVENTION AND CONTROL OF CORONAVIRUS DISEASE (COVID-19) IN MIGRANT AND REFUGEE RECEPTION AND DETENTION CENTRES IN THE EU/EEA AND THE UNITED KINGDOM 14 (2020), <https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-guidance-refugee-asylum-seekers-migrants-EU.pdf>.

⁹ Giada Zampano, *Assisting migrants at risk as coronavirus strikes Italy*, ANADOLU AGENCY (Mar. 24, 2020), <https://www.aa.com.tr/en/europe/assisting-migrants-at-risk-as-coronavirus-strikes-italy/1777138>.

¹⁰ Monika Pronczuk, *I Could Be One of Them’: Belgians Help Migrants Amid Coronavirus*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/world/europe/belgium-migrants-coronavirus.html>.

¹¹ Karina Piser, *The End of Immigration Detention Doesn’t Mean the End of Fortress Europe*, FOREIGN POLICY (July 31, 2020, 11:02 AM), <https://foreignpolicy.com/2020/07/31/coronavirus-asylum-end-immigration-detention-spain-france-end-of-fortress-europe/>.

hold that EU member states who detain asylum seekers have assumed a duty toward them, and thus may not refole¹² any who contract COVID-19 while detained for the duration of their illness and any lingering health effects.

Part I of this article provides a short overview of the pandemic and restrictions imposed on those seeking asylum in the EU during the pandemic. It briefly reviews the health dangers and uncertainties surrounding COVID-19. Part II reviews the international law on asylum and the EU asylum framework. It outlines the gaps in this legal framework that leave many asylum seekers without protection. It concludes that current asylum law and EU procedures are likely to leave many asylum seekers without protection and at a high risk of contracting COVID-19. Part III starts with a jurisprudential review of non-refoulement and health-based non-refoulement under Article 3 of the ECHR. Part III then evaluates whether current non-refoulement jurisprudence may provide relief for individuals who are denied asylum but have developed long-term health consequences from COVID-19. Finally, it proposes changes to current jurisprudence to provide relief to more such individuals.

I. THE COVID-19 PANDEMIC CREATED HURDLES AND HEALTH HAZARDS FOR ASYLUM SEEKERS IN THE EU

Most simply, “COVID-19 is a disease caused by a virus called SARS-CoV-2.”¹³ “COVID-19 spreads when an infected person breathes out droplets and very small particles that contain the virus.”¹⁴ The first known cases were reported in Wuhan, China, in December 2019.¹⁵ As of February 2022, over 411 million cases have been reported worldwide, with over 5.8 million deaths.¹⁶ Europe has been particularly hard hit.¹⁷

Asylum seekers are disproportionately affected by the pandemic, and EU member states have curtailed their options for relief. On March 17, 2020, EU

¹² To refole an individual is to return him or her to a country where he or she faces persecution. See David Weissbrodt & Isabel Hörtreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 2 (1999).

¹³ *Frequently Asked Questions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited Nov. 28, 2021).

¹⁴ *Id.*

¹⁵ OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, UPDATED ASSESSMENT ON COVID-19 ORIGINS 1 (2021), <https://www.dni.gov/files/ODNI/documents/assessments/Unclassified-Summary-of-Assessment-on-COVID-19-Origins.pdf>.

¹⁶ *COVID-19 Dashboard*, CTR. FOR SYS. SCI. AND ENG'G AT JOHNS HOPKINS UNIVERSITY, <https://coronavirus.jhu.edu/map.html> (last visited Feb. 13, 2022).

¹⁷ *See id.*

countries closed their borders with non-EU countries for a period of 30 days.¹⁸ Although the European Commission included “[p]ersons in need of international protection or for other humanitarian reasons respecting the principle of non-refoulement” in its list of those who could still be permitted to enter,¹⁹ many EU countries temporarily stopped accepting asylum applications.²⁰ The number of applications dropped from almost 70,000 in January 2020 to fewer than 10,000 in April.²¹ Notably, the EU’s April 17, 2020, plan on lifting containment measures did not mention asylum.²² The number of asylum applicants in the EU ultimately decreased by 32.6% in 2020 compared to 2019.²³ In September 2020, Germany agreed to accept refugees who were left homeless after a fire at a refugee camp on a Greek island, but other EU member states did not follow suit.²⁴ In sum, most EU member states have shown particular unwillingness to accept refugees during the pandemic. Many EU countries resumed deportation flights to countries such as Afghanistan in late 2020.²⁵ Yet the European Asylum Support Office (“EASO”) believes the pandemic may ultimately lead more people to seek asylum in Europe due to resulting strife.²⁶

The EU’s treatment of asylum seekers during the pandemic is particularly important, as the consequences of COVID-19 are not fully known but have the potential to be severe. About 5% of those who contract COVID-

¹⁸ Communication from the Commission 2020/C 102 I/02 of 30 Mar. 2020, COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, 2020 O.J. 3, 1.

¹⁹ *Id.* at 4. The principle of non-refoulement provides that States may not return a refugee to a place where the refugee’s life will be in danger. Jill I. Goldenziel, *Checking Rights at the Border: Migrant Detention in International and Comparative Law*, 60 VA. J. INT’L L. 159, 168 (2019).

²⁰ Natalie Huet, *EU asylum claims drop to lowest level in 12 years amid COVID-19 border closures*, EURONEWS (June 12, 2020), <https://www.euronews.com/2020/06/12/eu-asylum-claims-drop-to-lowest-level-in-12-years-amid-covid-19-border-closures>; EUR. ASYLUM SUPPORT OFF. [EASO], EASO SPECIAL REPORT: ASYLUM TRENDS AND COVID-19, at 5 (June 11, 2020), <https://easo.europa.eu/sites/default/files/easo-special-report-asylum-covid-june-2020.pdf>; *Germany stops accepting refugees over coronavirus*, DEUTSCHE WELLE (Mar. 18, 2020), <https://p.dw.com/p/3Zedo>.

²¹ EASO, *supra* note 20, at 5.

²² Information from the European Commission 2020/C 126/01 of 17 Apr. 2020, Joint European Roadmap towards lifting COVID-19 containment measures, 2020 O.J. 1.

²³ EUROSTAT, ASYLUM APPLICATIONS (NON-EU) IN THE EU MEMBER STATES, 2008-2020 (Mar. 16, 2021), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics#Number_of_asylum_applicants:_decrease_in_2020.

²⁴ Melissa Eddy, *Germany to Take In 1,500 Refugees, Easing Burden on Greece After Fires*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/world/europe/germany-refugees-greece.html>.

²⁵ Benjamin Bathke, *European countries resume deportation flights to Afghanistan after 9-month coronavirus break*, INFOMIGRANTS (Dec. 16, 2020), <https://www.infomigrants.net/en/post/29138/european-countries-resume-deportation-flights-to-afghanistan-after-9-month-coronavirus-break>.

²⁶ Gabriela Baczyńska, *Coronavirus may push more asylum seekers toward EU: agency*, REUTERS (May 12, 2020, 2:18 AM), <https://www.reuters.com/article/us-health-coronavirus-eu-migration/coronavirus-may-push-more-asylum-seekers-towards-eu-agency-idUSKBN22O18A>; EASO, *supra* note 20, at 13.

19 become critically ill,²⁷ and medical professionals do not yet know all of the possible long-term effects of COVID-19.²⁸ One study found that 13.5% of participants were still using oxygen at home a month after discharge from the hospital.²⁹ The virus affects many organs besides the lungs, and the Centers for Disease Control (“CDC”) has emphasized the risk of heart damage.³⁰ Medical professionals who have studied COVID-19 patients also fear long-term damage to the immune system and brain.³¹ Potential long-term symptoms are not just physical: a small number of COVID-19 patients report a lasting inability to think clearly.³² Patients of all ages around the world have reported lingering symptoms over eight months after contracting COVID-19.³³ Thus, asylum seekers in the EU risk developing long-lasting health consequences. As discussed below, this is particularly problematic given the difficulty many will face in obtaining relief from being returned to their countries of origin.

II. ASYLUM FRAMEWORKS LEAVE MANY ASYLUM SEEKERS VULNERABLE TO REFOULEMENT AND COVID-19

International law and regional EU law provide substantive rights for refugees and a framework of procedures for seeking asylum. However, these rights and procedures routinely fall short, leaving many asylum seekers unprotected under the law and exposed to unhealthy conditions during the process. Thousands of people apply for asylum in the EU every year, and many of them are denied relief. In 2019, there were 721,075 applications for asylum filed in EU member states.³⁴ In addition, the EU recognized 2,712,477 refugees, defined as “people fleeing their home country to save their lives and

²⁷ *What we know about Long-term effects of COVID-19*, WHO (Sept. 9, 2020), https://www.who.int/docs/default-source/coronaviruse/risk-comms-updates/update-36-long-term-symptoms.pdf?sfvrsn=5d3789a6_2.

²⁸ *Long-Term Effects of COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> (last updated Sept. 16, 2021).

²⁹ *Id.*

³⁰ *Id.*

³¹ Michael Marshall, *The Lasting Misery of Coronavirus Long-Haulers*, NATURE (Sept. 14, 2020), <https://www.nature.com/articles/d41586-020-02598-6>.

³² Jennifer Couzin-Frankel, *From ‘Brain Fog’ to Heart Damage, COVID-19’s Lingering Problems Alarm Scientists*, SCI. MAG. (Jul. 31, 2020, 1:30 PM), <https://www.sciencemag.org/news/2020/07/brain-fog-heart-damage-covid-19-s-lingering-problems-alarm-scientists>.

³³ Andrea Salcedo, *A Canadian woman has been sick with covid-19 long-term effects for nearly 9 months: ‘I’m definitely worried it will be permanent,’* WASH. POST (Dec. 9, 2020, 3:38 AM), <https://www.washingtonpost.com/nation/2020/12/09/canadian-woman-long-hauler-coronavirus/>.

³⁴ European Parliament, *Asylum Applications in the EU* (2019), https://www.europarl.europa.eu/infographic/welcoming-europe/index_en.html#filter=2019 (last visited Sept. 18, 2020).

who have been accepted and recognized as such in their host country.”³⁵ The following countries received the majority of the asylum applications filed in 2019: Germany, France, Spain, Greece, the United Kingdom, and Italy.³⁶ All of these countries, other than the United Kingdom, granted asylum or another form of relief from deportation at widely varying rates in the first quarter of 2020.³⁷ Denial rates for those five countries ranged from a low of 40% in Spain to a high of 79% in France.³⁸ Ultimately, then, tens of thousands of asylum applicants did not receive protection.³⁹

As explained below, international non-refoulement law fundamentally fails to protect people fleeing certain forms of hardship, leaving them without protection. The EU’s common asylum system also suffers from procedural flaws that strain member states’ asylum systems and expose applicants to unsafe conditions. During the pandemic, these conditions put asylum applicants at a high risk of contracting COVID-19.

A. *The International Asylum Framework*

In theory, international law provides broad protections for refugees. The principle of non-refoulement—that states may not return a refugee to a country where his or her life will be in danger—is generally considered a *jus cogens* norm.⁴⁰ International law has, however, adopted a narrow definition of “refugee” that leaves many individuals unprotected.⁴¹ Reforms to international refugee laws are needed, but many of the proposed solutions would require consensus among the international community, which would be difficult to achieve and arrive too late to address the hardship asylum seekers currently face.

³⁵ *Id.*

³⁶ *Id.*

³⁷ EUROSTAT, ASYLUM QUARTERLY REPORT 10 (June 15, 2020), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_quarterly_report#Decisions_on_asylum_applications.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ A *jus cogens* norm is “a peremptory norm that no state can violate.” Goldenziel, *supra* note 19, at 168–69.

⁴¹ Leti Volpp, *Refugees Welcome*, 28 BERKELEY LA RAZA L.J. 71, 94 (2018); Silvia Pasquetti et al., *Law and Refugee Crises*, 15 ANN. REV. L. & SOC. SCI. 289, 291 (2019); Tally Kritzman-Amir, *The Shifting Categorization of Immigration Law*, 58 COLUM. J. TRANSNAT’L L. 279, 290 (2020).

1. *An overview of international law on refugees*

The 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) forms the foundation of international asylum law.⁴² Notably, the Refugee Convention only uses the word “asylum” in the preamble.⁴³ The Convention itself “lays down the principle of *non-refoulement*”⁴⁴ Ratified in the aftermath of World War II, the Refugee Convention originally applied only to events that occurred before 1951 in Europe, with the option for states to extend their obligations.⁴⁵ The Refugee Convention provides that, to qualify as a refugee, the individual must have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”⁴⁶ The Refugee Convention “has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention.”⁴⁷ The Protocol did not change the requirement that persecution be on account of one of the five grounds enumerated in the Refugee Convention, meaning that asylum applicants today must meet this requirement.⁴⁸

Every EU member state is a party to the Refugee Convention.⁴⁹ The EU incorporated the Refugee Convention and 1967 Protocol through its Charter of Fundamental Rights of the European Union.⁵⁰ EU directives related to asylum emphasize that the Refugee Convention and Protocol are the “cornerstone” for refugee protection.⁵¹

However, the EU has, from its inception, struggled to commit to human rights and equality as it continues to impose restrictions on asylum seekers. The Treaty on European Union (“TEU”) stated that the EU would “frame a common policy on asylum, immigration and external border control, based on

⁴² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S 137 [hereinafter Refugee Convention].

⁴³ *Id.* pmb1.

⁴⁴ Daniel Ghezlbash & Nikolas Feith Tan, *The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection 2* (Eur. U. Inst., Working Paper RSCAS 2020/55, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689093.

⁴⁵ Refugee Convention, *supra* note 42, art. 1, §§ A & B.

⁴⁶ *Id.* art. 1, § A(2).

⁴⁷ *Id.* intro. n.

⁴⁸ Protocol Relating to the Status of Refugees art. 1, § 2, Jan. 31, 1967, 606 U.N.T.S 267 [hereinafter Optional Protocol].

⁴⁹ Manuel P. Schoenhuber, *The European Union’s Refugee Deal with Turkey: A Risky Alliance Contrary to European Laws and Values*, 40 Hous. J. INT’L L. 633, 650 (2018).

⁵⁰ Charter of Fundamental Rights of the European Union art. 18, Dec. 18, 2000 O.J. (C 326) 391, 399.

⁵¹ *See, e.g.*, Directive 2011/95/EU, of the European Parliament and of the Council of 13 Dec. 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2011 O.J. (L 337) 9, 9 [hereinafter Qualification Directive].

solidarity between Member States, which is fair towards third-country nationals.”⁵² The TEU also stated, “[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”⁵³ By mentioning asylum and immigration in conjunction with crime, the treaty implied that asylum seekers could be a threat. Below, the article will further explore the tension between human rights and immigration controls, particularly focusing on detention.

2. *The shortcomings of international law on refugees*

The international refugee framework suffers from several well-documented shortcomings. The first is the narrow definition of “refugee” adopted in the Refugee Convention.⁵⁴ Because it requires that persecution be on account of one of five enumerated grounds, the Refugee Convention “does not protect those fleeing war, mass violence, or foreign aggression.”⁵⁵ Likewise, “economic refugees” (those fleeing poverty) do not fit into any of the five enumerated protected grounds,⁵⁶ nor do those fleeing environmental catastrophe.⁵⁷ Many individuals seeking asylum today have fled their countries of origin due to these unprotected reasons.⁵⁸ Thus, many people currently seeking asylum are likely to be denied relief. Second, by categorically excluding certain individuals from the protection asylum provides, the Refugee Convention perpetuates a “migrant/refugee binary” that defines individuals by the type of relief for which they are eligible, rather than by their individual stories.⁵⁹ As a result, individuals who have suffered greatly, but not on account of a protected ground, are viewed as less worthy of protection.⁶⁰

⁵² Consolidated Version of the Treaty on European Union art. 67, § 2, Oct. 26, 2012, 2012 O.J. (C 326) 73.

⁵³ *Id.* art. 3, § 2, at 17.

⁵⁴ Volpp, *supra* note 41, at 94; Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21 GER. L.J. 311, 313 (2020).

⁵⁵ Pasquetti, *supra* note 41, at 291. *See also* Goldenziel, *supra* note 19, at 53.

⁵⁶ *See* Volpp, *supra* note 41, at 95.

⁵⁷ Kritzman-Amir, *supra* note 41, at 290.

⁵⁸ Pasquetti, *supra* note 41, at 291; Alex Otieno, *Protecting Refugee Health and Human Rights in the Context of the COVID-19 Pandemic: Challenges and Pathways to Justice*, in 2 SOCIAL PROBLEMS IN THE AGE OF COVID-19 99 (Glenn W. Muschert et al. eds., 2020) (noting that fully one percent of the world’s population was displaced in 2019).

⁵⁹ Kritzman-Amir, *supra* note 41, at 284, 287–88.

⁶⁰ *Id.* at 288.

A third shortcoming of the current refugee framework is the unequal distribution of refugees among nations of the world.⁶¹ Under the current system, refugees are expected to apply for asylum in the first country they enter in which they may do so, rather than traveling through several countries to settle and apply where they prefer.⁶² As a result, some states may receive more refugees than they can adequately care for—or states may decide they do not wish to receive any more refugees.⁶³ For example, after accepting millions of Syrian refugees fleeing the Assad regime beginning in 2011, Turkey closed its borders to them beginning in March 2015, with an exception only for those with serious injuries.⁶⁴

3. *The shortcomings of proposals to reform international law on refugees*

Proposals to address the shortcomings of the international refugee framework frequently represent major political and diplomatic aspirations that would be difficult to achieve. To address the gaps in protection, Jill Goldenziel proposed a binding international agreement creating a new category of “displaced persons,” who would have different rights from refugees.⁶⁵ However, she stated that “[e]conomic migrants, climate change migrants, and IDPs [internally displaced persons]” should not be included in the definition.⁶⁶ Thus, many individuals would not receive protection under this proposal, and the international community would still be left with the problem of how to address their needs. States would likely reject a broad definition of “displaced persons” because it would require them to receive more individuals. In short, there is an inverse relationship between how many displaced persons the definition would protect and how likely nations would be to accept such a definition as part of a binding international agreement. Given that there has been no major binding international treaty on refugees since 1967,⁶⁷ it is unlikely that the international community will agree to a convention on displaced persons any time soon.

⁶¹ Maj. Yvonne S. Brakel et al., *50 Years Was Too Long to Wait: The Syrian Refugee Crisis Has Highlighted the Need for a Second Optional Protocol to the 1951 Convention Relating to the Status of Refugees*, 40 U. ARK. LITTLE ROCK L. REV. 51, 54 (2017).

⁶² *Id.*

⁶³ *Id.* at 59.

⁶⁴ *Id.* at 61.

⁶⁵ Goldenziel, *supra* note 19, at 71–72.

⁶⁶ *Id.* at 78.

⁶⁷ *See id.* at 61, 63–64.

To address the unequal distribution of refugees, Maj. Yvonne S. Brakel proposed that states adopt a second optional protocol to the Refugee Convention “to create a predictable and equitable refugee resettlement plan among the international community.”⁶⁸ Under such a protocol, nations could allocate refugees based on “soft quotas,” defined as an “equitable distribution of refugees based upon an index that considers individual country GNP and population density.”⁶⁹ Alternatively, nations could adopt a regional sharing model such as the one the EU employs.⁷⁰ However, as explored below, such a model has failed to solve the problem of the unequal distribution of refugees in the EU.⁷¹ In addition, for an optional protocol to function effectively, enough states would have to sign on to the treaty, which would require significant political and diplomatic negotiation.⁷² The process would be neither fast nor simple.

In contrast to the two preceding international law solutions, Stephen Meili proposed that states could instead emphasize a domestic constitutional basis of the right to asylum.⁷³ Countries such as Germany, France, and Italy have included the right to asylum in their constitutions, but in practice they rely on the Refugee Convention, and not on their constitutions, when adjudicating asylum claims.⁷⁴ This is not necessarily a problem, despite the shortcomings of the Refugee Convention. Emphasizing a constitutional basis of asylum would rely on the political will of dozens of nations around the world and would be unlikely to promote uniform standards of adjudication. Deemphasizing international law would also make it easier for states to decline to provide asylum as a matter of national prerogative or constitutional interpretation. For instance, Hungary has excluded virtually all asylum seekers for the stated rationale of protecting national identity.⁷⁵ Because Hungary is a member of the EU and thus bound by the Refugee Convention and 1967 Protocol as an EU member state, other EU nations have an additional basis on which to pressure Hungary.⁷⁶ To rely on domestic constitutions to protect the right to asylum would be to perpetuate the unequal distribution of refugees and leave states less accountable when they mistreat asylum seekers.

⁶⁸ Brakel, *supra* note 61, at 54.

⁶⁹ *Id.* at 89.

⁷⁰ *Id.* at 88.

⁷¹ *Id.*

⁷² *See id.* at 91.

⁷³ Stephen Meili, *The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law*, 41 *FORDHAM INT’L L.J.* 383, 384 (2018).

⁷⁴ *Id.* at 390.

⁷⁵ Hannah J. Sarokin, *Safeguarding Democracy in Europe: A Bulwark Against Hungary’s Subversion of Civil Society*, 44 *BROOK. J. INT’L L.* 889, 889 (2019).

⁷⁶ *See id.* at 890–91.

In sum, the international refugee framework fails to protect many individuals who face danger in their country of origin. Proposed solutions tend to be politically contentious structural reforms that may never be accepted by the international community. Even if they were, they would not be implemented in time to protect individuals currently facing refoulement. While reform is needed, the international community must consider more immediate solutions to provide relief for those currently seeking protection in another country, particularly during a global pandemic.

B. *The EU Common Asylum Framework*

For more than twenty-five years, the EU has tried to create a common asylum framework.⁷⁷ The current system relies on both national and international law: “migration into and within Europe is regulated by a combination of national law, EU law, the ECHR, the European Social Charter (“ESC”), and other international obligations agreed to by European countries.”⁷⁸ The common asylum framework applies to nations covered by the Schengen Borders Code, which regulates movement between EU countries, and between non-EU and EU countries.⁷⁹ The framework is a mix of regulations—which are directly legally binding—and directives, which the member states must transpose into their national law.⁸⁰ As discussed below, this framework suffers from several shortcomings: it is not truly common, it disproportionately burdens some member states, and it provides for excessive restrictions on asylum seekers’ freedom of movement. These shortcomings all contribute to the risk that asylum seekers will be denied asylum and will contract COVID-19 while in the custody of member states.

⁷⁷ *Fact Sheets on the European Union: Asylum Policy*, EUR. PARL., <https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy> (last visited Dec. 21, 2020); Presidency Conclusions, Tampere European Council (Oct. 16, 1999), ¶¶ 3, 13–17.

⁷⁸ Schoenhuber, *supra* note 49, at 637.

⁷⁹ Regulation 2016/399, of the European Parliament and of the Council of 9 Mar. 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), art. 1, 2016 O.J. (L 77) 1, 2 (EU). The Schengen Area provides for movement between covered States without security checks; it currently “encompasses most EU countries, except for Bulgaria, Croatia, Cyprus, Ireland and Romania. However, Bulgaria, Croatia and Romania are currently in the process of joining the Schengen Area and already applying the Schengen *acquis* to a large extent. Additionally, also the non-EU States Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area.” *Schengen Area*, EUR. COMM’N, https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area_en (last visited Oct. 17, 2021).

⁸⁰ Sabrina L. Camboulives, *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 Amendment is Required*, 42 VT. L. REV. 393, 416 (2017).

1. *An overview of the EU common asylum framework*

The EU's common asylum framework is governed by a combination of regulations and directives, with the principal ones briefly outlined here. Perhaps the most controversial is the Dublin Regulation, which tells EU member states how to determine which state is responsible for adjudicating an individual's asylum application and allows states to transfer asylum seekers to another member state.⁸¹ It provides that the determining EU member state "shall conduct a personal interview with the applicant" to determine which country is responsible for the application.⁸² The regulation lays out a hierarchy of criteria for states.⁸³ Significantly, the regulation provides that where an asylum seeker enters the EU "irregularly," the member state through which the individual entered is responsible for adjudicating the asylum application.⁸⁴ Where transfer to another member state is warranted, the regulation favors transferring applicants to a member state where they have family.⁸⁵ The Dublin Regulation intends to prevent asylum seekers from engaging in forum shopping between EU member states, to prevent applicants from filing multiple applications in different states, and to prevent member states from denying protection.⁸⁶ To address this last objective, the regulation outlines situations in which transfer of an asylum seeker to a different country is not appropriate, including where there is "a risk of inhuman or degrading treatment" in the state to which the individual would be transferred.⁸⁷

Also significant in the regulatory framework is the so-called Asylum Procedures Directive, which outlines procedures that EU member states must follow when granting or withdrawing international protection.⁸⁸ The Directive covers matters such as when a member state must register an application,⁸⁹ the right to an interpreter,⁹⁰ the right to a personal interview,⁹¹ and the right to

⁸¹ Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2013 O.J. (L 180) 31, 31 [hereinafter Dublin Regulation].

⁸² *Id.* ch. II, art. 5, § 1, at 38.

⁸³ *Id.* ch. III, art. 7, at 39.

⁸⁴ *Id.* ch. III, art. 13, § 1, at 40.

⁸⁵ *Id.* ch. III, art. 7, § 3, at 39.

⁸⁶ Kimara Davis, *The European Union's Dublin Regulation and the Migrant Crisis*, 19 WASH. U. GLOB. STUD. L. REV. 261, 268–69 (2020).

⁸⁷ Dublin Regulation, *supra* note 81, ch. II, art. 3, § 2, at 37.

⁸⁸ Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013 O.J. (L 180) 60 [hereinafter Asylum Procedures Directive].

⁸⁹ *Id.* ch. II, art. 6, § 1, at 67.

⁹⁰ *Id.* ch. II, art. 12, § 1, at 69.

⁹¹ *Id.* ch. II, art. 14, at 70.

free legal assistance for appeals.⁹² The European Asylum Support Office, established in 2010, is intended to facilitate member states' compliance with the common asylum procedures.⁹³ The EASO has "no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection."⁹⁴ Thus, member states exercise significant control over the process.

The EU has adopted a directive outlining standards for the reception of applicants for international protection ("Reception Conditions Directive").⁹⁵ The directive addresses matters including when detention is acceptable and the nature of detention,⁹⁶ as well as access to education,⁹⁷ employment,⁹⁸ and vocational training.⁹⁹ The directive also provides that applicants' living conditions should "protect their physical and mental health."¹⁰⁰ At minimum, applicants must receive "emergency care and essential treatment of illnesses and of serious mental disorders."¹⁰¹ In contrast, those who are approved for international protection "have access to healthcare under the same eligibility conditions as nationals of the Member State that has granted such protection."¹⁰²

In addition to its common asylum framework, the EU also has a directive intended to standardize the return of third-country nationals who are unlawfully present in a member state ("Returns Directive").¹⁰³ The Returns Directive allows member states to detain individuals subject to return procedures but sets a limit of six months.¹⁰⁴ Member states may extend the period for an additional twelve months only where the individual does not cooperate with removal or where there is a delay in obtaining documentation from third countries.¹⁰⁵

⁹² *Id.* ch. II, art. 20, at 73.

⁹³ Regulation 439/2010, of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, ch. 1, art. 1, 2010 O.J. (L 132) 11, 14.

⁹⁴ *Id.* ch. 1, art. 2, § 6, at 14.

⁹⁵ Directive 2013/33/EU, of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 2013 O.J. (L 180) 96 [hereinafter Reception Conditions Directive].

⁹⁶ *Id.* ch. II, art. 8, 10, at 101, 102–03.

⁹⁷ *Id.* ch. II, art. 14, at 104.

⁹⁸ *Id.* ch. II, art. 15, at 104.

⁹⁹ *Id.* ch. II, art. 16, at 104.

¹⁰⁰ *Id.* ch. II, art. 17, § 2, at 104.

¹⁰¹ *Id.* ch. II, art. 19, § 1, at 106.

¹⁰² Qualification Directive, *supra* note 51, ch. VII, art. 30, § 1, at 21.

¹⁰³ Directive 2008/115/EC, of the European Parliament and of the Council of 16 Dec. 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98 [hereinafter Returns Directive].

¹⁰⁴ *Id.* ch. IV, art. 15, § 5, at 105.

¹⁰⁵ *Id.* ch. IV, art. 15, § 6, at 105.

2. *The shortcomings of the EU common asylum framework*

The EU's asylum framework faces many challenges that lead to poor outcomes for applicants and place heavy burdens on some member states. These challenges will particularly affect applicants during the pandemic. First, because much of the framework consists of directives, which are not directly legally binding, member states determine the “forms and methods’ to transpose into their national law.”¹⁰⁶ Thus, the system is not truly common.¹⁰⁷

Second, the Dublin Regulation has failed to fairly allocate responsibility for adjudicating asylum applications among EU member states. In 2015, many asylum seekers first entered the EU through Greece and Italy, which were then responsible for adjudicating most of their asylum applications under the Dublin Regulation.¹⁰⁸ Both countries failed to cope with the increased number of asylum seekers, who suffered poor living conditions as a result.¹⁰⁹ The EU Council passed a plan to take in 120,000 Syrian refugees in 2015, but several countries objected to a mandatory refugee quota.¹¹⁰ The EU thus confronts a tension between its emphasis on solidarity between member states and its obligation to receive asylum seekers and evaluate their applications.¹¹¹

Several EU member states have opposed immigration to a degree that has tested solidarity between EU nations and left asylum seekers unprotected. Hungary, for instance, received more asylum applicants per 100,000 residents of the country than any other EU member state in 2015.¹¹² Three years later, the country's parliament passed a constitutional amendment that prohibits “the resettlement of foreign populations within Hungary and limits asylum

¹⁰⁶ Camboulives, *supra* note 80, at 416.

¹⁰⁷ *Id.*; see also Evangelia (Lilian) Tsourdi, *COVID-19, Asylum in the EU, and the Great Expectations of Solidarity*, 32 INT'L J. REFUGEE L. 374, 375 (2020). As an illustration, in 2020 the EASO published a report discussing differences among procedures EU member states used when receiving asylum seekers at the border: some States employed a single procedure, others employed two different procedures depending on the location of the port of entry, and still others did not use a border procedure at all. *EASO Highlights Differences on Asylum Application Procedures at National Borders of Member States* (Sept. 22, 2020), <https://www.schengenvisainfo.com/news/easo-highlights-differences-on-asylum-application-procedures-at-national-borders-of-member-states/>.

¹⁰⁸ Davis, *supra* note 86, at 272, 274.

¹⁰⁹ *Id.* at 273, 275.

¹¹⁰ GERARD McCANN & NADIA MAKARYSHYN, INTERNATIONAL HUMAN RIGHTS, SOCIAL POLICY AND GLOBAL DEVELOPMENT 60 (Gerard McCann & Féilim Ó hAdhmaill, eds., 2020).

¹¹¹ See Georgios Anagnostaras, *The Common European Asylum System: Balancing Trust Against Fundamental Rights Protection*, 21 GER. L.J. 1180, 1192 (2020); Valsamis Mitsilegas, *Trust*, 21 GER. L.J. 69, 69–70 (2020); Tsourdi, *supra* note 107, at 377–78.

¹¹² Sarokin, *supra* note 75, at 895.

only to those who enter Hungary directly from their country of origin.”¹¹³ The country built a border fence and began prosecuting asylum seekers who crossed it without permission.¹¹⁴ Hungary also refused to adhere to the EU Council’s 2015 quota plan.¹¹⁵ Hungary’s Prime Minister, Viktor Orban, asserted that most asylum seekers were economic migrants.¹¹⁶ This argument attempts to remove these individuals from the Refugee Convention’s umbrella of protection.¹¹⁷ The United Nations High Commissioner for Refugees (UNHCR) concluded that Hungary’s prosecution of asylum seekers who enter the country unlawfully violated the Refugee Convention.¹¹⁸ Ultimately, Hungary’s refusal to evaluate asylum seekers’ claims forces neighboring EU member states to bear that responsibility.

Third, as noted above, EU member states that accept asylum seekers often detain them or require them to live in mass housing. In 2013, before the influx of Syrian refugees, at least twenty European states permitted or mandated detention of migrants to facilitate the adjudication and removal process.¹¹⁹ At present, 57% of EU member states limit detention to eighteen months.¹²⁰

In recent years, EU member states have further restricted asylum seekers’ freedom of movement. Germany, for instance, amended its Asylum Act in 2019 to require asylum seekers to reside in a “reception centre” until the Federal Office adjudicates the asylum application.¹²¹ If the Federal Office denies the asylum application, the applicant may be detained for up to eighteen months, until the person is deported.¹²² German states may extend the period to twenty-four months.¹²³ On its face, this twenty-four-month period conflicts with the Returns Directive.¹²⁴

¹¹³ *Id.* at 890.

¹¹⁴ U.N. High Commissioner for Refugees [UNHCR], *Hungary as a Country of Asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, at 4 (May 2016), <https://www.refworld.org/docid/57319d514.html>.

¹¹⁵ Sarokin, *supra* note 75, at 897.

¹¹⁶ Yvonne Kupfermann, *Hungary’s Refugee Crisis: Why a Uniform Approach is not the Solution*, 31 NOTRE DAME J.L. ETHICS & PUB. POL’Y 229, 232 (2017).

¹¹⁷ *Id.*

¹¹⁸ UNHCR, *supra* note 114, at 22.

¹¹⁹ Goldenziel, *supra* note 19, at 200.

¹²⁰ Izabella Majcher, *The Effectiveness of the EU Return Policy at all Costs: The Punitive Use of Administrative Pre-Removal Detention*, 81 IUS GENTIUM 109, 119 (2020).

¹²¹ *Germany: A Controversial Law Package Passes the Parliament*, ASYLUM INFORMATION DATABASE (AIDA) (June 14, 2019), <http://www.asylumineurope.org/news/14-06-2019/germany-controversial-law-package-passes-parliament-1>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See* Returns Directive, *supra* note 103, ch. IV, art. 15, §§ 5–6, at 105.

Beyond questions of liberty and the right to freedom of movement, the EU's detention of asylum seekers poses health risks. Many detention facilities are "at the EU's periphery."¹²⁵ In April 2020, in response to COVID-19, the European Commission released guidance suggesting member states reduce capacity of "specialised detention facilities" to reduce contamination and use "other appropriate facilities" to detain migrants.¹²⁶ The guidance did not, however, recommend releasing individuals from detention. As described above, many of the facilities where asylum seekers are detained cannot provide adequate sanitation and do not permit social distancing because they are overcrowded.¹²⁷ Significantly, as applicants for, rather than recipients of protection, asylum seekers are not entitled to the same level of healthcare as EU citizens.¹²⁸ Detained asylum seekers have a high risk of contracting COVID-19 and of receiving inadequate care once they do.

In sum, the international asylum framework leaves many people without protection, and the EU common asylum procedure directly heightens applicants' risk of contracting COVID-19 while they await adjudication. The Dublin system unequally distributes applicants among member states, who then sequester asylum seekers in detention facilities that are too often overcrowded and unsanitary. Denied asylum, ill with COVID-19, and afraid to return to their country of origin, many applicants will seek an alternate basis to remain in an EU member state.

III. ARTICLE 3 OF THE ECHR PROTECTS VERY FEW FAILED ASYLUM SEEKERS WITH COVID-19-RELATED HEALTH CONDITIONS FROM NON-REFOULEMENT

Many of the thousands of asylum seekers who do not receive asylum will turn to Article 3 of the European Convention on Human Rights to seek relief from refoulement. Unfortunately, most of those with COVID-19-related health conditions are likely to fail in their Article 3 claim, just as they failed

¹²⁵ Cathryn Costello, *Overcoming Refugee Containment and Crisis*, 21 GER. L.J. 17, 18 (2020).

¹²⁶ Communication from the Commission 2020/C 126/02 of 20 Apr. 2020, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, 2020 O.J. 12, 16.

¹²⁷ E.g., Doliwa-Klepcka, *supra* note 1 (Greece); Tsourdi, *supra* note 107, at 374–75 (Greece); *German court: COVID-19 protection 'inadequate' at refugee home*, *supra* note 6 (Ger.); Zampano, *supra* note 9 (It.).

¹²⁸ Compare Reception Conditions Directive, *supra* note 95, ch. II, art. 19, § 1, at 106 (requiring only "emergency care and essential treatment of illnesses and of serious mental disorders") with Qualification Directive, ch. VII, art. 30, § 1, at 21 ("Member States shall ensure that beneficiaries of international protection have access to healthcare under the same eligibility conditions as nationals of the Member State that has granted such protection.").

in their asylum claim. In the case of the ECHR, unlike the Refugee Convention, the problem lies not in the language of the treaty but in its application.

Nearly contemporaneous with the Refugee Convention, the European Convention on Human Rights dates to 1950.¹²⁹ The ECHR created the European Court of Human Rights to enforce the ECHR and its protocols.¹³⁰ EU member states are parties to the ECHR.¹³¹ The EU itself is still negotiating accession to the treaty.¹³² The ECHR does not apply extraterritorially.¹³³

The scope of non-refoulement under Article 3 of the ECHR depends on the type of harm suffered and the source of that harm. For health-based claims, non-refoulement jurisprudence imposes a high standard that most claimants cannot meet. Under this standard, most individuals suffering long-term health consequences from COVID-19 are unlikely to obtain relief. Therefore, the ECtHR should implement several changes to its jurisprudence to broaden the scope of protection for ill individuals. These changes include setting clearer standards for refoulement and recognizing a duty not to refoule where the EU member state exposed the individual to conditions that led to the illness.

A. *The Varying Scope of Non-Refoulement Under Article 3 of the ECHR*

The language of Article 3 of the ECHR suggests that protection should be broad, but in practice, it varies, depending on the source and nature of the harm. Article 3 of the ECHR provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹³⁴ The non-refoulement principle the ECtHR has developed from this article is distinct from the right to asylum derived from the Refugee Convention.¹³⁵ The ECtHR has repeatedly affirmed that Article 3 is absolute, allowing no exceptions

¹²⁹ European Convention on Human Rights, art. 59, Nov. 4, 1950, 1 E.T.S. No. 005.

¹³⁰ *Id.* art. 19.

¹³¹ Ton Zijldwijk, *M.S.S. v. Belgium and Greece (European Court of Human Rights): The Interplay Between European Union Law and the European Convention on Human Rights in the Post-Lisbon Era*, 39 GA. J. INT'L & COMPAR. L. 807, 819 (2011).

¹³² *EU accession to the ECHR*, Council of Europe, <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> (last visited Jan. 27, 2022).

¹³³ Vladislava Stoyanova, *How Exceptional Must 'Very Exceptional' Be? Non-Refoulement, Socio-Economic Deprivation, and Paposhvili v. Belgium*, 29 INT'L J. REFUGEE L. 580, 589 (2017).

¹³⁴ European Convention on Human Rights, art. 3, Nov. 4, 1950, 1 E.T.S. No. 005.

¹³⁵ Schoenhuber, *supra* note 49, at 651.

based on the conduct of the individual or national security concerns.¹³⁶ Article 3 is also non-derogable, meaning that EU member states may not deviate from its absolute prohibition, “even during a state of emergency.”¹³⁷ In contrast, the Refugee Convention allows states to expel a refugee “on grounds of national security or public order.”¹³⁸ In addition, while the Refugee Convention requires that harm be based on at least one of five enumerated protected grounds,¹³⁹ Article 3 imposes no similar requirement.¹⁴⁰ This makes it appear to be an attractive option for individuals who did not receive asylum because the harm they suffered did not fit within one of the five protected grounds. Unfortunately, despite the apparent breadth of Article 3, protection is difficult to obtain for health-based claims.

Article 3 imposes both positive and negative obligations on EU member states. The primary duty is “a negative obligation not to inflict ill-treatment.”¹⁴¹ Second, the duty to investigate alleged ill-treatment is positive.¹⁴² Third, under certain circumstances, member states have a positive obligation “to protect against ill-treatment inflicted by State agents and third parties.”¹⁴³ To fulfill this third obligation, they must “provide an adequate legal framework to deter . . . threats of ill-treatment” and “safeguard individuals from ill-treatment.”¹⁴⁴ Unlike the primary, negative obligation, the third obligation “is not absolute, and requires that the relevant body take proportionate or ‘reasonable’ steps to protect.”¹⁴⁵ As explored below, the ECtHR has not extended this positive obligation in the context of non-refoulement of noncitizens suffering from mental or physical illness.¹⁴⁶

¹³⁶ See, e.g., *Ireland v. United Kingdom*, Series A, No. 25, 2 Eur. H.R. Rep. 25, 79 (1978); *Aksoy v. Turkey*, App No. 21987/93, 23 Eur. H.R. Rep. 553, 585 (1996); *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 424, 463 (1996) (holding that the UK could not expel an Indian national who allegedly “publicly advocated violent methods in pursuance of the separatist campaign” in Punjab, India); *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 245 (reaffirming *Chahal*).

¹³⁷ ALAN GREENE, EMERGENCY POWERS IN A TIME OF PANDEMIC 46, 54 (2020); see also Merris Amos, Human Rights Law and the Covid-19 Pandemic in the United Kingdom Part 1 2 (Apr. 15, 2020) (unpublished article) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576496.

¹³⁸ Refugee Convention art. 32, § 1.

¹³⁹ *Id.* art. 1, § 2.

¹⁴⁰ See European Convention on Human Rights, art. 3, Nov. 4, 1950, 1 E.T.S. No. 005.

¹⁴¹ Stephanie Palmer & Stevie Martin, *Public Health Emergencies and Human Rights: Problematic Jurisprudence Arising from the COVID-19 Pandemic*, 5 EUR. HUM. RTS. L. REV. 488 (2020), <https://www.repository.cam.ac.uk/handle/1810/315369>; see also Stoyanova, *supra* note 133, at 593; *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 190.

¹⁴² Palmer & Martin, *supra* note 141, at 4; Stoyanova, *supra* note 133, at 593.

¹⁴³ Palmer & Martin, *supra* note 141, at 4; see also *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. at 190.

¹⁴⁴ Palmer & Martin, *supra* note 141, at 4.

¹⁴⁵ *Id.* at 6.

¹⁴⁶ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 188 (Dec. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-169662>

The ECtHR has held that to engage Article 3, “ill-treatment must attain a minimum level of severity.”¹⁴⁷ The Court has declined to set a uniform standard, stating that the required minimum “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”¹⁴⁸ The Court tends to set a lower minimum level where a government actor directly inflicts ill-treatment. For example, in *Bouyid v. Belgium*, the ECtHR held that Belgian police officers violated Article 3 when they slapped two youths they had detained at the police station.¹⁴⁹ The Court emphasized the fact that law enforcement officials had inflicted physical violence on individuals in their custody.¹⁵⁰

The ECtHR requires a higher minimum level of severity in non-refoulement cases, particularly those based on health reasons. In *Tarakhel v. Switzerland*, the Court stated, “[t]he source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person’s removal.”¹⁵¹ In practice, however, the minimum level of severity varies considerably based on the type of harm alleged and its source. The ECtHR has set a high minimum level for health-based non-refoulement cases, as explored in the next section of this article.

Non-refoulement jurisprudence under Article 3 developed through cases in which an individual contested extradition to a non-EU state. In *Soering v. The United Kingdom*, a German national accused of murder in the United States argued that the United Kingdom would violate Article 3 if it extradited him to the United States, where he could be placed on death row for an extended period of time.¹⁵² While the United Kingdom argued that it could not be responsible for acts occurring outside its jurisdiction, the ECtHR concluded that a member state could be responsible for “foreseeable consequences of extradition suffered outside [its] jurisdiction.”¹⁵³ The Court proceeded to consider several factors, including Soering’s age and mental state at the time of the alleged murders and how long he might be detained in the United States, before concluding that extradition would violate Article 3.¹⁵⁴ *Soering* thus established that refoulement could violate Article 3 where

¹⁴⁷ Ireland v. United Kingdom, 2 Eur. H.R. Rep at 79.

¹⁴⁸ *Id.*; Weissbrodt & Hörtreiter, *supra* note 12, at 30.

¹⁴⁹ Bouyid v. Belgium, 2015-V Eur. Ct. H.R. 457, 467, 494, 496.

¹⁵⁰ *Id.*

¹⁵¹ Tarakhel v. Switzerland, 2014-VI Eur. Ct. H.R. 195, 218.

¹⁵² Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 443–44 (1989).

¹⁵³ *Id.* at 465–66, 468.

¹⁵⁴ *Id.* at 475, 476–77, 478.

the receiving country was a developed nation with an independent legal system. The ECtHR has reaffirmed the principles of *Soering* over a period of decades.¹⁵⁵

The ECtHR has repeatedly held that even transfer from one EU member state to another may violate Article 3. In *Tarakhel v. Switzerland*, the Court held that Switzerland would violate Article 3 if it returned a family of Afghan asylum seekers to Italy without obtaining adequate guarantees from Italy.¹⁵⁶ Specifically, Switzerland needed guarantees from Italy “that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.”¹⁵⁷ In *M.S.S. v. Belgium and Greece*, the Court held that Belgium knowingly exposed an Afghan asylum seeker to degrading treatment when it returned him to Greece, a country Belgium knew had poor holding conditions for asylum seekers.¹⁵⁸ However, as discussed below, the Court displays less concern for individuals who have already been denied asylum and are seeking relief from removal under Article 3 based on illness.

The ECtHR has held that states must provide procedural due process when evaluating a non-refoulement claim under Article 3 due to the fundamental nature of the article.¹⁵⁹ Significantly, Article 3 imposes a duty on states to investigate possible breaches.¹⁶⁰ A failure to investigate may *itself* constitute a breach of Article 3, as was the case in *Tarakhel*.¹⁶¹ The Court’s analysis in *Soering* and *Tarakhel* indicates that the member state must consider both the conditions in the receiving country and the individual’s vulnerabilities. The following section further discusses how, until recently, the Court failed to require a similar level of individualized analysis when evaluating refoulement of noncitizens suffering from serious illness.

The ECtHR’s more general Article 3 jurisprudence thus indicates that the article provides strong protections for individuals facing a wide range of ill-treatment due to refoulement. However, as described in the next section, the Court has not extended its generous, expansive analysis in the context of health-based non-refoulement. Instead, the Court employs an analysis

¹⁵⁵ See, e.g., *Aswat v. United Kingdom*, App. No. 17299/12, ¶¶ 12–13, 20, 52 (Apr. 16, 2013), <http://hudoc.echr.coe.int/eng?i=001-118583> (holding that extradition of individual diagnosed with paranoid schizophrenia who was indicted in the U.S. for conspiring to establish a jihadist training camp in Oregon could violate Article 3 if the U.S. failed to address his mental health needs).

¹⁵⁶ *Tarakhel v. Switzerland*, 2014-VI Eur. Ct. H.R. at 223.

¹⁵⁷ *Id.*

¹⁵⁸ *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255, 312, 339–40, 343.

¹⁵⁹ Won Kidane, *Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Union Law: A Comparative Analysis*, 27 EMORY INT’L L. REV. 285, 300 (2013).

¹⁶⁰ Greene, *supra* note 137, at 56.

¹⁶¹ See, e.g., *Tarakhel v. Switzerland*, 2014-VI Eur. Ct. H.R. at 223.

designed to limit the number of ill noncitizens who may benefit from Article 3. This analysis contradicts the absolute character of Article 3.

B. The Narrow Scope of Non-Refoulement for Health-Based Harms Under Article 3 of the ECHR

Non-refoulement protection under Article 3 is hard to obtain where the harm is based on illness. The ECHR does not directly protect the right to health.¹⁶² The ECtHR has articulated a narrow range of situations in which refoulement of an ill person will be proscribed under the inhuman treatment prong of Article 3.¹⁶³ The Court has defined inhuman treatment as “intense physical and mental suffering.”¹⁶⁴ The Court has set a higher standard for inhuman treatment to trigger protection under Article 3 where the harm “emanate[s] . . . from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.”¹⁶⁵ It distinguishes such cases from the more standard situation where the harm comes “from the intentional acts or omissions of public authorities or non-State bodies.”¹⁶⁶ The Court also requires that the illness be “exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.”¹⁶⁷ The Court’s key health-based non-refoulement cases indicate that floodgates concerns—the fear that too many people would apply for and be granted non-refoulement under a less stringent standard—underlie its reasoning. This leads to results inconsistent with Article 3.

1. Origins of health-based non-refoulement jurisprudence and the “very exceptional circumstances” standard

Health-based non-refoulement jurisprudence under the ECHR originated in the 1990s during the AIDS epidemic, and many of the Court’s cases have concerned individuals whose claims were based on being HIV-

¹⁶² Sascha-Dominik Oliver Vladimir Bachmann & Joachim Sanden, *State Responsibility for the (Public) Right to Health and Security in Times of COVID Pandemic: A European Perspective*, 7 *INDON. J. INT’L & COMPAR. L.* 407, 411 (2020); Dallal Stevens, *Asylum seekers and the right to access health care*, 61 *N. IRE. LEGAL Q.* 363, 371 (2010).

¹⁶³ Bilal Khan, *From D. v. U.K. to Paposhvili v. Belgium: Assessing the Strasbourg Court’s Legal and Institutional Approach to the Expulsion of Seriously Ill Migrants Under Article 3 of the European Convention on Human Rights*, 25 *COLUM. J. EUR. L.* 222, 225 (2019).

¹⁶⁴ *Ireland v. United Kingdom*, 2 *Eur. H.R. Rep.* at 80; *see also* Khan, *supra* note 163, at 225.

¹⁶⁵ *N. v. United Kingdom*, 2008-III *Eur. Ct. H.R.* 227, 247.

¹⁶⁶ *Id.*

¹⁶⁷ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 175.

positive.¹⁶⁸ The earliest of these cases is *D. v. The United Kingdom*, a 1997 judgment in which the ECtHR held that the UK could not return a terminally ill citizen of St. Kitts to that nation, where he had no one to care for him and might not have been able to get a bed at one of two hospitals that cared for AIDS patients.¹⁶⁹ The Court feared that “the conditions of adversity which await him in St. Kitts will further reduce his already limited life expectancy.”¹⁷⁰ The Court termed the situation one of “very exceptional circumstances,” establishing the standard for showing a violation of Article 3 due to refolement of an ill individual.¹⁷¹ Given that D was “facing imminent death” even if not returned to St. Kitts, very few individuals qualify for relief under this standard.¹⁷²

Indeed, HIV-positive applicants in the ten years after *D* were uniformly denied protection under Article 3.¹⁷³ The ECtHR often held that the illness was not sufficiently advanced.¹⁷⁴ The Court placed great weight on the fact that AIDS medication was available in a country, without considering whether the individual applicant could actually obtain the treatment.¹⁷⁵ The Court also placed great weight on the presence of the applicant’s family members in the receiving country, without analyzing whether those family members would actually care for the applicant.¹⁷⁶ The Court applied similar reasoning to

¹⁶⁸ See, e.g., *D. v. United Kingdom*, App No. 30240/96, 24 Eur. H.R. Rep. 423, 428 (1997); *Karara v. Finland*, App. No. 40900/98, 26 Eur. H.R. Rep. Comm’n Supp. 220, 220 (1998); *B.B. v. France*, App. No. 47/1998/950/1165, ¶ 8 (Sept. 7, 1998), <http://hudoc.echr.coe.int/eng?i=001-58224>; *S.C.C. v. Sweden*, App. No. 46553/99, 2 (Feb. 15, 2000), <http://hudoc.echr.coe.int/eng?i=001-5079>; *Arcila Henao v. Netherlands*, App. No. 13669/03, 3 (June 24, 2003), <http://hudoc.echr.coe.int/eng?i=001-23281>; *Ndangoya v. Sweden*, App. No. 17868/03, 3 (June 22, 2004), <http://hudoc.echr.coe.int/eng?i=001-24018>; *Amegnigan v. Netherlands*, App No. 25629/04, 2 (Nov. 25, 2004), <http://hudoc.echr.coe.int/eng?i=001-67675>; *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. at 233; *S.J. v. Belgium*, App. No. 70055/10, 61 Eur. H.R. Rep. 585, 588 (2015).

¹⁶⁹ *D. v. United Kingdom*, 24 Eur. H.R. Rep. at 448.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 449.

¹⁷² *Khan*, *supra* note 163, at 227.

¹⁷³ *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. at 258 (Tulkens, Bonello, and Spielmann, JJ, dissenting).

¹⁷⁴ *Karara v. Finland*, App. No. 40900/98, 26 Eur. H.R. Rep. Comm’n Supp. 220, 221 (1998); *Arcila Henao v. Netherlands*, App. No. 13669/03, at 8; *Ndangoya v. Sweden*, App. No. 17868/03, at 12; *Amegnigan v. Netherlands*, App No. 25629/04, at 9.

¹⁷⁵ *S.C.C. v. Sweden*, App. No. 46553/99, at 8; *Arcila Henao v. Netherlands*, App. No. 13669/03, at 8; *Ndangoya v. Sweden*, App. No. 17868/03, at 12; *Amegnigan v. Netherlands*, App No. 25629/04, at 9.

¹⁷⁶ *S.C.C. v. Sweden*, App. No. 46553/99, at 8; *Arcila Henao v. Netherlands*, App. No. 13669/03, at 8; *Ndangoya v. Sweden*, App. No. 17868/03, at 12–13 (finding that ex-wife’s contacts with applicant’s family meant that “the family links have not been completely severed” and that the applicant could seek help from family upon return); *Amegnigan v. Netherlands*, App No. 25629/04, at 9.

applicants during this period who based their claims on mental illness.¹⁷⁷ In short, the Court applied a high standard that essentially required the applicant to be on death's doorstep and assumed the applicants would be able to access adequate care without requiring the EU member state to investigate and determine whether that was true.

On more than one occasion in the ten years after *D*, the Court also appears to have improperly considered countervailing factors in order to bolster its decision to deny relief. Despite the absolute character of Article 3, which, as noted above, does not permit EU member states to balance the reasons for removal against the harm to the applicant upon removal, the ECtHR appeared to do so. For instance, in *Amegnigan v. The Netherlands*, the Court detailed the applicant's history of filing fraudulent applications for asylum, dedicating as much of the decision to that procedural history as it did to its analysis of the applicant's Article 3 claim.¹⁷⁸ In *Ndangoya v. Sweden*, the Court emphasized the applicant's criminal history.¹⁷⁹ While the Court did not mention criminal history or immigration fraud while analyzing the applicants' claims for protection, by framing the case through a lens of criminality, the Court was at least implicitly indicating that the applicants were individuals who did not deserve protection. This approach contrasts sharply with cases such as *Soering*, where the Court focused more on the conditions Soering faced upon extradition and less on the homicide he allegedly committed, and considered his age and mental state as possible mitigating factors.¹⁸⁰ Health-based Article 3 claims under *D* faced both a higher threshold of severity and greater consideration of negative equities, the latter of which contradicts the article's absolute character. Given these demanding standards, it is no surprise that no applicant succeeded in the decade after *D*.

2. *Entrenching the "very exceptional circumstances" standard*

¹⁷⁷ See *Bensaid v. United Kingdom*, 2001-I Eur. Ct. H.R. 303, 310, 313, 319 (holding that returning man with schizophrenia to Algeria would not violate Article 3 despite the fact that his family in Algeria had no car and he would have to travel 75 to 80 kilometers for treatment); *Meho v. Netherlands*, App. No. 76749/01, 38 Eur. H.R. Rep. Supp. 250, 250–51, 255 (2004) (holding that returning man with psychotic disorder to Kosovo would not violate Article 3 because treatment was available in Kosovo, despite the fact that stopping his course of treatment would "cause an acute medical emergency").

¹⁷⁸ *Amegnigan v. Netherlands*, App. No. 25629/04, at 2–5, 8–9.

¹⁷⁹ *Ndangoya v. Sweden*, App. No. 17868/03, at 3–4.

¹⁸⁰ *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 439, 443–44, 475, 476–77, 478 (1989).

The ECtHR largely reaffirmed *D* in its 2008 decision *N. v. The United Kingdom*, also making some of *D*'s implicit features explicit. In this case, the Court held that return of the HIV-positive applicant to Uganda would not violate Article 3, employing the “very exceptional circumstances” standard of *D*.¹⁸¹ The Court stated that “the Convention is essentially directed at the protection of civil and political rights” rather than social and economic rights.¹⁸² It then explicitly endorsed finding “a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”¹⁸³ The Court went on to say that Article 3 imposed no obligation on EU member states “to alleviate . . . disparities” in medical treatment between EU nations and other nations “through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.”¹⁸⁴ *N*, like many individuals with a health-based claim under Article 3, had previously applied for asylum and been denied.¹⁸⁵ The ECtHR’s concern for individuals with pending asylum applications disappears if the application is denied, underscoring how the migrant/refugee binary affects an applicant’s perceived worthiness.¹⁸⁶ By explicitly adopting a balancing test, the Court did not change its analysis but confirmed that it had been balancing interests in health-based cases since *D*. It also implied that Article 3 provides greater protection for some noncitizens than others based on their immigration status, despite the absolute character of the article.

Having established these principles, the Court found that returning *N* to Uganda would not violate Article 3.¹⁸⁷ The Court brushed aside *N*'s claim that her family in Uganda would not care for her, and that she would not be able to get the medication she needed in the rural part of Uganda where she would live.¹⁸⁸ The Court then declared, “The United Kingdom authorities have provided the applicant with medical and social assistance at public expense during the nine-year period it has taken for her asylum application and claims

¹⁸¹ *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. 227, 249.

¹⁸² *Id.* at 247–48.

¹⁸³ *Id.* at 248.

¹⁸⁴ *Id.*

¹⁸⁵ *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. at 233; *see also* *Amegnigan v. Netherlands*, App No. 25629/04, at 2–4; *S.J. v. Belgium*, App. No. 70055/10, 61 Eur. H.R. Rep. 585, 587 (2015); *Paposhvili v. Belgium*, App No. 41738/10, ¶¶ 18–22; *Meho v. Netherlands*, App. No. 76749/01, 38 Eur. H.R. Rep. Supp. 250, 250 (2004); *M.T. v. Sweden*, App. No. 1412/12, 65 Eur. H.R. Rep. 1029, 1031–32 (2017); *Tanko v. Finland*, App. No. 23634/94, 2 (May 19, 1994), <http://hudoc.echr.coe.int/eng?i=001-2534>; *S.H.H. v. United Kingdom*, App. No. 60367/10, 57 Eur. H.R. Rep. 531, 534 (2013); *Salkic v. Sweden*, App No. 7702/04, 2 (June 29, 2004), <http://hudoc.echr.coe.int/eng?i=001-24032>.

¹⁸⁶ *Kritzman-Amir*, *supra* note 41, at 288.

¹⁸⁷ *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. at 249.

¹⁸⁸ *Id.* at 248.

under [the ECHR] to be determined by the domestic courts and this Court.”¹⁸⁹ Yet *N* was not claiming a right to medical treatment but relief from return to Uganda.¹⁹⁰ That is, she claimed a negative right not to be refouled, not a positive right to be provided with medical care.¹⁹¹ The Court failed to distinguish the two rights. Continuing with its trend of leaving many aspects of its jurisprudence vague or implicit, the Court stated that “there may be other very exceptional cases [besides the situation in *D*] where the humanitarian considerations are equally compelling” but declined to suggest what those circumstances might be.¹⁹² *N*’s circumstances apparently did not qualify.

Ultimately, the Court’s decision in *N* continued the jurisprudence of *D*. More significant is the dissent of three out of fourteen judges, which correctly identified the majority’s reasoning as endorsing a floodgates argument. The dissent criticized the “very exceptional circumstances” standard in several respects.¹⁹³ It rejected the majority’s distinction between civil and political rights and social and economic rights,¹⁹⁴ and “strongly disagree[d]” with the balancing test.¹⁹⁵ Finally, the dissent observed that *N* was not claiming that Article 3 required EU member states to provide free, unlimited medical care to noncitizens without lawful status.¹⁹⁶ The dissent charged that the majority was in truth concerned that if *N* prevailed, it would “open up the floodgates to medical immigration and make Europe vulnerable to becoming the ‘sickbay’ of the world.”¹⁹⁷ The dissent then advocated investigating to see whether a particular applicant would actually have access to necessary treatment upon return.¹⁹⁸ Subsequent events supported the dissent’s approach: *N* was in fact returned to Uganda, where she died only months later.¹⁹⁹

Cases decided in the wake of *N* resulted in denials due to both the standard elaborated in *N* and the manner in which the ECtHR applied that standard. In a shift from the pre-*N* era, most cases concerned mental illness or physical ailments other than HIV/AIDS.²⁰⁰ The Court still applied the same

¹⁸⁹ *Id.* at 249.

¹⁹⁰ Khan, *supra* note 163, at 233–34.

¹⁹¹ *Id.* at 234.

¹⁹² *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. at 247.

¹⁹³ *Id.* at 251–52 (Tulkens, Bonello, and Spielmann, JJ, dissenting).

¹⁹⁴ *Id.* at 252.

¹⁹⁵ *Id.* at 253.

¹⁹⁶ *Id.* at 254.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 258.

¹⁹⁹ Khan, *supra* note 163, at 229.

²⁰⁰ *S.H.H. v. United Kingdom*, App. No. 60367/10, 57 Eur. H.R. Rep. 531, 534 (2013) (amputee with depression); *M.T. v. Sweden*, App. No. 1412/12, 65 Eur. H.R. Rep. 1029, 1031 (2017) (man with kidney problems requiring dialysis); *A.S. v. Switzerland*, App. No. 39350/13, ¶ 7 (June 30, 2015),

standard and reasoning in these cases, as illustrated by the 2015 case of *M.T. v. Sweden*. The applicant, a Uyghur from Kyrgyzstan, required blood dialysis to treat his kidney problems.²⁰¹ He was on the national waiting list for blood dialysis in Kyrgyzstan, but the public health system in the country currently could not offer any treatment due to a shortage of equipment.²⁰² The Court held that because the public system did have dialysis machines, and private health facilities offered dialysis at a cost, it was “established that the applicant would be able to receive dialysis treatment in his home country.”²⁰³ The Court placed the burden on the applicant to show he could not pay for private treatment.²⁰⁴ Perhaps recognizing the precariousness of the applicant’s situation and its own analysis, the Court also “attache[d] significant weight” to Sweden’s pledge to help the applicant “ensure that his dialysis treatment is not interrupted and he has access to the medical care he needs upon return to his home country.”²⁰⁵

M.T., like *N* itself and other post-*N* cases, also featured a dissent, indicating that many judges were dissatisfied with the jurisprudence.²⁰⁶ The *M.T.* dissent argued that non-refoulement should apply equally regardless of whether the harm comes from a naturally occurring illness or a more traditional state source.²⁰⁷ It then stated that the applicant had shown he would not immediately be able to get dialysis upon return to Kyrgyzstan and criticized the majority’s assumption that he could and reliance on the government’s assurances.²⁰⁸ The increasing frequency of dissents after *N* ultimately foreshadowed the case in which the Court confronted the high standard and narrow scope that *D* and *N* set forth.

3. *Marginally expanding the “very exceptional circumstances” standard and imposing a duty to investigate on member states*

<http://hudoc.echr.coe.int/eng?i=001-155717> (man with post-traumatic stress disorder); *Tatar v. Switzerland*, App. No. 65692/12, 62 Eur. H.R. Rep. 416, 419 (2016) (man with paranoid psychosis unable to live independently).

²⁰¹ *M.T. v. Sweden*, 65 Eur. H.R. Rep. at 1031.

²⁰² *Id.* at 1034, 1036.

²⁰³ *Id.* at 1040.

²⁰⁴ *Id.* at 1041.

²⁰⁵ *Id.* at 1042.

²⁰⁶ *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. 227, 251; *S.H.H. v. United Kingdom*, App. No. 60367/10, 57 Eur. H.R. Rep. 531, 560 (2013); *M.T. v. Sweden*, 65 Eur. H.R. Rep. at 1043; *S.J. v. Belgium*, App. No. 70055/10, 61 Eur. H.R. Rep. 585, 594 (2015); *Tatar v. Switzerland*, App. No. 65692/12, 62 Eur. H.R. Rep. 416, 428 (2016).

²⁰⁷ *M.T. v. Sweden*, 65 Eur. H.R. Rep. at 1043 (De Gaetano, J., dissenting).

²⁰⁸ *Id.* at 1044.

In 2016, the ECtHR partially retreated from the methodology of *N*, making it somewhat easier for ill applicants to show that refoulement would violate Article 3. *Paposhvili v. Belgium* concerned a Georgian national with numerous health conditions who ultimately died before the ECtHR decided his case.²⁰⁹ While in prison in Belgium, he “was diagnosed with chronic lymphocytic leukaemia in Binet stage B” and was ultimately transferred to a prison hospital.²¹⁰ In addition, the applicant had previously suffered from active pulmonary tuberculosis and developed chronic obstructive pulmonary disease.²¹¹ He also suffered a stroke that left one arm permanently paralyzed.²¹²

The Court allowed two third parties to intervene, indicating that it was willing to consider a new approach. The Georgian government intervened to provide information about the state of medical treatment in the country.²¹³ The Human Rights Centre of Ghent University intervened to argue that the standard of *N* was too restrictive and inconsistent with the absolute nature of Article 3.²¹⁴ The Human Rights Centre proposed a test requiring courts to examine whether the applicant would actually have access to necessary medical treatment.²¹⁵ Under this test, Article 3 would impose a procedural obligation on the authorities of the EU member state to seek assurances from the receiving state that the individual would actually have access to necessary medical treatment.²¹⁶

While adhering to the “very exceptional circumstances” standard, the Court ultimately adopted the Human Rights Centre’s recommendations to a large degree. First, the Court acknowledged that the standard of *D* and *N* “has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of” Article 3.²¹⁷ It went on to state that “other very exceptional cases” as referred to in *N*

should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of

²⁰⁹ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 1.

²¹⁰ *Id.* ¶¶ 34–35.

²¹¹ *Id.* ¶¶ 49–50.

²¹² *Id.* ¶ 53.

²¹³ *Id.* ¶¶ 159–164.

²¹⁴ *Id.* ¶¶ 165–69.

²¹⁵ *Id.* ¶¶ 170–71.

²¹⁶ *Id.*

²¹⁷ *Id.* ¶ 181.

appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.²¹⁸

Second, the Court explicitly placed on EU member states the obligation to determine whether the applicant would actually have access to medical treatment upon return. While the applicant bears the initial burden to demonstrate “substantial grounds” to believe that refoulement would violate Article 3, once the applicant has met that burden, the EU member state’s authorities then bear the burden “to dispel any doubts raised by” the applicant’s evidence.²¹⁹ The Court explicitly stated that member states’ primary obligation was a negative one “not to expose persons to a risk of ill-treatment proscribed by Article 3.”²²⁰ It also imposed the narrower obligation of investigating medical treatment available in the receiving country.²²¹ EU member states were to “consider the extent to which the individual in question will actually have access” to medical care and facilities in the receiving state.²²² The Court cabined this obligation by stating that “[t]he benchmark is not the level of care existing in the returning state” and that Article 3 does not provide “a right to receive specific treatment in the receiving State which is not available to the rest of the population.”²²³ The Court did say that where the returning state’s investigation does not resolve doubts about whether the individual would receive treatment, it “must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible.”²²⁴

Under this reformulated standard, the already deceased Paposhvili was the first person to prevail in his Article 3 health-based non-refoulement claim since *D*.²²⁵ However, the Court based its decision on narrow grounds. The Belgian government, it stated, had not conducted “any assessment . . . of the risk facing the applicant” if he were returned to Georgia.²²⁶ Thus, the victory was essentially procedural: because Belgium had not fulfilled its obligation to

²¹⁸ *Id.* ¶ 183. The Court noted that no examples of “other very exceptional cases” were present in the caselaw. *Id.* ¶ 178.

²¹⁹ *Id.* ¶¶ 186–87.

²²⁰ *Id.* ¶ 188.

²²¹ *Id.* ¶¶ 189–90.

²²² *Id.* ¶ 190.

²²³ *Id.* ¶ 189.

²²⁴ *Id.* ¶ 191.

²²⁵ *Id.* ¶ 206.

²²⁶ *Id.* ¶ 205.

investigate, refoulement would violate Article 3. The Court implicitly left open the possibility that refoulement may have been proper after an investigation. Given Paposhvili's numerous health conditions and their advanced state, the decision does not appear to represent much of a retreat from the high standard in *N*.

In sum, to prevail on a health-based non-refoulement claim, the applicant must show "very exceptional circumstances." To satisfy this standard, the applicant must either be near death or face "a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."²²⁷ Where the applicant meets his or her initial burden of proof, the returning state must attempt to rebut it, and must investigate whether the applicant would actually have access to medical care in the receiving country and obtain individual assurances from the receiving country if necessary. As described below, the Court's jurisprudence in this area remains quite stringent and is unlikely to protect many individuals who have been denied asylum and seek non-refoulement due to complications from COVID-19.

C. Critique of the Current Non-Refoulement Standard for Health-Based Claims

In the five years since *Paposhvili* was decided, scholars have disagreed on the degree to which it departs from *D* and *N*. Calling the case a "reversal" of *D* and *N*,²²⁸ Bilal Khan wrote that the case "significantly develops and improves the law on medical expulsion."²²⁹ In contrast, Vladislava Stoyanova viewed the "other very exceptional cases" standard the Court developed as "a very slight opportunity" and stated that "*N v UK* has not been reversed."²³⁰ Ultimately, Stoyanova's view is correct, particularly in light of the pandemic.

Fundamentally, the Court has retained the "very exceptional circumstances" standard, which it refers to as "a high threshold for the application of Article 3."²³¹ The Court itself has indicated that it does not believe many individuals should qualify for relief from refoulement based on illness.²³² It is true that the Court no longer requires the applicant to be on death's doorstep, but the fact that different situations are called "other very

²²⁷ *Id.* ¶ 183.

²²⁸ Khan, *supra* note 163, at 249.

²²⁹ *Id.* at 236.

²³⁰ Stoyanova, *supra* note 133, at 583, 584.

²³¹ Paposhvili v. Belgium, App No. 41738/10, ¶ 183.

²³² *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. 227, 247; Paposhvili v. Belgium, App No. 41738/10, ¶ 175.

exceptional cases” places them in a catchall category. This structurally implies that they do not fit within the core of protection. Until a post-*Paposhvili* case applies this standard, it is hard to say what factual scenario is required to meet it. Regardless, this framework will make it easier for the ECtHR and other courts to deny applicants, particularly given how often the Court fails to give the underlying reason for its decisions.²³³

Since its decision in *D*, the ECtHR has often left its methodology implicit to leave itself room to maneuver. As discussed above, the Court was implicitly balancing individual and community interests before it made this explicit in *N*. In *Paposhvili*, the Court did not explicitly disavow the balancing test, instead stating that “the approach offered hitherto should be clarified.”²³⁴ The Court implicitly rejected the balancing test by noting that the Human Rights Centre deemed it “in glaring contradiction” to non-refoulement cases that do not concern illness.²³⁵ The Court adopted many of the Human Rights Centre’s suggestions, indicating that it generally agreed with the arguments. By stating that the obligation not to refoule is negative, the Court theoretically left no room for a balancing test.²³⁶ However, because the Court did not expressly reject the balancing test, it may more easily employ it in the future. The pandemic, which has strained healthcare systems and required EU member states to spend billions of euros on COVID-19-related health measures,²³⁷ may tempt the Court to return to the balancing test.

The new procedural requirements *Paposhvili* imposes on member states provide welcome protection for applicants but are also sufficiently malleable to allow a finding that refoulement would not violate Article 3. Khan asserts that the procedural requirements—requiring the state to rebut a prima facie showing of risk and to investigate actual access to medical care in the receiving country, and to obtain assurances from the receiving country where necessary—must be read with the revised “very exceptional” test.²³⁸ While this is true, the procedural requirements will leave many applicants unprotected. First, the burden remains with the ill applicant to provide sufficient evidence of a violation of Article 3. This is appropriate given that the applicant is claiming relief, but it represents a significant challenge to an

²³³ See, e.g., Khan, *supra* note 163, at 242–244 (discussing how the English Court of Appeal deemed *Paposhvili* to change the jurisprudence only slightly, in contrast to the author’s opinion).

²³⁴ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 182; see also Stoyanova, *supra* note 133, at 604 (stating that the *Paposhvili* Court may not have rejected the balancing test).

²³⁵ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 169; see also Stoyanova, *supra* note 133, at 596.

²³⁶ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 188.

²³⁷ ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], HEALTH AT A GLANCE: EUROPE 2020, STATE OF HEALTH IN THE EU CYCLE 43, 48 (OECD Pub., Dec. 2020), <https://doi.org/10.1787/82129230-en>.

²³⁸ Khan, *supra* note 163, at 237.

individual who is ill, likely has no lawful status, and may lack funds or command of the lingua franca of the country. The high standard makes this burden more difficult to sustain.

Second, the state's obligation to investigate medical treatment in the receiving country (the "medical investigation requirement") was established with so many caveats that it will be easy for states and courts to find that it has been satisfied.²³⁹ The test is a welcome departure from the previous standard of relying on the general availability of medicine and treatment within the country without regard to the specific applicant. However, the *Paposhvili* Court limited the requirement's efficacy by stating that "[t]he benchmark is not the level of care existing in the returning state."²⁴⁰ The Court further stated that Article 3 does not provide "a right to receive specific treatment in the receiving State which is not available to the rest of the population."²⁴¹ The first limitation leaves unresolved what the benchmark is: is it a global average? A regional average? The median level of care available in the receiving country? If the benchmark varies depending on the receiving country, then individuals with the same medical condition and same inability to pay for private care who are from different countries would essentially face different standards. That result may be at odds with the absolute character of Article 3 and the Court's other jurisprudence on Article 3.

The second limitation may facilitate refoulement of individuals from poorer, less developed countries, essentially adopting floodgates reasoning and functioning similar to the *N* balancing test. An individual with a medical condition for which no one in his or her country of origin may obtain treatment may, by the Court's reasoning, be returned to that country to face the fate of others with the same illness. In contrast, an individual who cannot access treatment that is available in the country, perhaps due to an inability to pay, may be able to prevail under the Court's reasoning. In the context of the current pandemic, someone could be returned to a country where vaccines and other treatments are largely unavailable to the general population, but not to a country where they are generally available but the individual applicant faces barriers to access. Current jurisprudence may protect poor individuals from less poor nations, but not poor individuals from very poor nations. Thus, the

²³⁹ See Stoyanova, *supra* note 133, at 605 (seeing "tensions and ambiguities" in the standard); *contra*, Khan, *supra* note 163, at 238–39.

²⁴⁰ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 189.

²⁴¹ *Id.*

Court is still accommodating its floodgates concerns in a manner similar to the balancing test of *N*.²⁴²

These possible results are inconsistent with Article 3. The Court cabined the obligation to investigate for the same reason it adopted the balancing test in *N*: out of a desire to limit member states' medical costs.²⁴³ Yet the scarcity of resources is irrelevant in the context of negative obligations such as the obligation not to refoule.²⁴⁴ Thus, the Court has tied the consideration of resources to the narrower obligation to investigate medical conditions when evaluating refoulement, which 'feels' more like a positive obligation. The Court appears to view it as part of the overall negative obligation it identifies, though it was vague on this point.²⁴⁵ By doing so, the Court has taken a 'one hand giveth and the other taketh away' approach in which it imposes a new obligation on EU member states, thus appearing to provide greater protection to ill noncitizens, while at the same time limiting the scope of the obligation. Ultimately, as Stoyanova notes, the Court shows more concern for procedural guarantees than for substantive protection.²⁴⁶ And because the Court significantly limited those procedural guarantees, many individuals will not benefit from them in the end.

D. Prospects for Protection for Migrants Suffering Long-Term Effects from COVID-19

The current standard on non-refoulement for individuals suffering serious illness is unlikely to protect many asylum seekers who lose their asylum cases and suffer long-term health complications from COVID-19. The ECtHR has adopted a test that is difficult to pass due to both its high standard and its malleability. This section discusses these limitations as well as some openings created by *Paposhvili* where the Court might provide more protection for ill individuals claiming relief from refoulement.

Many individuals suffering from long-term effects of COVID-19 are unlikely to meet the "very exceptional circumstances" standard. On a practical level, ill migrants subject to detention may struggle to produce sufficient evidence to make a prima facie showing that they can meet this high standard. The only successful applicants so far are D, who was near death, and

²⁴² See Elaine Webster, *Medical-Related Expulsion and Interpretation of Article 3 of the European Convention on Human Rights*, 6 INT'L AM. & EUR. HUM. RTS. J. 36, 43 (2013) (a pre-*Paposhvili* analysis that is still applicable post-*Paposhvili*).

²⁴³ See Khan, *supra* note 163, at 233.

²⁴⁴ Palmer & Martin, *supra* note 141, at 6.

²⁴⁵ See *Paposhvili v. Belgium*, App No. 41738/10, ¶¶ 188–90.

²⁴⁶ Stoyanova, *supra* note 133, at 613.

Paposhvili, who died before the case was decided. Many long-term effects of COVID-19 will not reach the level of severity of those cases. Individuals who need regular oxygen and would not have access in their home country may succeed under the slightly more generous “other very exceptional cases” standard. *M.T.*, the case of the Kyrgyz national who needed dialysis, relied heavily on the fact that dialysis machines existed in the receiving state, without analyzing whether M.T. would actually be able to access one.²⁴⁷ Since *Paposhvili*, the Court may not rely on such assumptions, which may help individuals who rely on oxygen machines or other major medical equipment that is not generally available to use at home in many countries. However, individuals with heart issues or lethargy, other common long-term effects medical experts have identified, likely cannot show that their illness is severe enough.

The COVID-19 pandemic, like the AIDS epidemic in the 1980s and 1990s, may present the Court with many cases of individuals whose ailments have a common origin. Being one of many where the standard is called “very exceptional” will not help these applicants. Those with very unusual health effects may be more likely to prevail by virtue of uniqueness, which will make them stand out and assuage floodgates concerns. The underlying policy rationale of protecting member states from strain on their healthcare systems will be stronger in the context of the pandemic.

The medical investigation requirement is likely to provide only limited substantive protection. Countries around the world are still developing vaccines and treatments for COVID-19 and determining how they should be administered.²⁴⁸ Poorer nations lag far behind wealthier ones in vaccination.²⁴⁹ Because EU member states do not have the obligation to alleviate differences in treatment availability between nations, it may be easier to return individuals to countries where treatment is less available. Furthermore, any benchmark for the availability of care is likely to be lower in the context of the COVID-19 pandemic because nations around the world are struggling to contain it and to provide treatment. The level of treatment by any metric will be lower than

²⁴⁷ *M.T. v. Sweden*, App. No. 1412/12, 65 Eur. H.R. Rep. 1029, 1040 (2017).

²⁴⁸ See, e.g., *What's New in the Guidelines*, NAT'L INSTS. OF HEALTH, <https://www.covid19treatmentguidelines.nih.gov/whats-new/> (last updated Oct. 19, 2021); *Treatments and vaccines for COVID-19*, EUR. MED. AGENCY, <https://www.ema.europa.eu/en/human-regulatory/overview/public-health-threats/coronavirus-disease-covid-19/treatments-vaccines-covid-19> (last visited Oct. 23, 2021) (showing that vaccines and treatments in Europe may be under review, in the process of approval, or authorized for use).

²⁴⁹ As of early August 2021, eighty-four percent of all vaccine doses administered had gone to wealthy and middle-income nations. *'Absolutely Unacceptable' COVID-19 Vaccination Rates in Developing Countries*, THE WORLD BANK GROUP [WBG] (Aug. 3, 2021), <https://www.worldbank.org/en/news/podcast/2021/07/30-absolutely-unacceptable-vaccination-rates-in-developing-countries-the-development-podcast>.

it would be for a disease for which medical science has established a reliable course of treatment.

However, the same floodgate concerns that will leave many without protection on substantive grounds may also increase the likelihood that some applicants will receive protection on procedural grounds. Paposhvili prevailed in his Article 3 claim because Belgium did not adequately investigate whether he would receive the treatment he needed in Georgia.²⁵⁰ If the COVID-19 pandemic gives rise to a flood of health-based non-refoulement claims, EU member states will have to investigate each of these claims on an individual basis as the Court required in *Paposhvili*. If some states struggle to manage the burden of investigation or cannot obtain adequate information from the receiving state, some applicants may prevail on procedural grounds. However, if the member state later conducts an adequate investigation, it could try once more to refole the applicant.

The requirement that the returning state seek individual assurances from the receiving state under certain circumstances may also provide protection for some applicants. Some states may be unable or unwilling to provide the kind of individual assurances the ECtHR requires, particularly during a pandemic.²⁵¹ If the ECtHR determines that the EU member state needed to obtain assurances and failed to do so, then the state may not refole the applicant. However, because assurances of this type between nations may rely on broader diplomatic concerns between particular countries, it is difficult to predict how this process will work generally.

The highly contagious nature of COVID-19 does provide another basis for asylum seekers to argue for non-refoulement. Asylum seekers who contract COVID-19 while subject to mandatory detention may argue that they became ill due to government action. They may frame the act of detaining them as a government action and highlight the inadequate measures against the pandemic in many facilities. Because the ECtHR has indicated that cases involving government action will more easily merit protection,²⁵² this framing would situate the case more firmly within the traditional scope of Article 3. However, the individuals would still need to meet the “very exceptional circumstances” standard because they would still be arguing that refoulement would violate Article 3 due to their ill health.

²⁵⁰ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 205.

²⁵¹ Afghanistan is an example of a country that may be willing to accept deportees but whose assurances may not satisfy EU requirements. See Jamie Dettmer, *Six EU Countries Want to Maintain Deportations of Afghan Asylum-Seekers*, VOICE OF AM. NEWS (Aug. 11, 2021, 8:58 AM), https://www.voanews.com/a/europe_six-eu-countries-want-maintain-deportations-afghan-asylum-seekers/6209431.html.

²⁵² See *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. 227, 247.

In sum, current health-based non-refoulement jurisprudence is unlikely to protect many failed asylum seekers seeking to remain in the EU due to complications from COVID-19. Many applicants will fail to meet the “very exceptional circumstances” standard. In the next section, this article suggests areas in which the EU might develop its jurisprudence to clarify the standard and protect more ill individuals.

E. Proposed Changes to the Jurisprudence to Increase Protections for Ill Applicants

The most obvious way to protect more ill applicants would be for the ECtHR to abandon the high standard of “very exceptional circumstances.” Given that the Court has repeatedly affirmed this standard over a period of approximately twenty years, such a change is unlikely, particularly during a pandemic. The article therefore suggests other changes to the jurisprudence that answer questions *Paposhvili* left unresolved.

- 1. Set a “floor” for the standard of medical care available in the receiving country that forbids refoulement even if the ultimate effect is to alleviate the disparity between the level of care in the EU member state and the receiving country*

The ECtHR’s repeated statement that EU member states are not responsible for alleviating the disparity in medical treatment available between the returning country and the receiving country will, at a certain point, contradict the absolute character of Article 3. It is also difficult to reconcile with the duty to investigate to see if an individual would receive medical treatment in the receiving country. Accordingly, the Court should provide a “floor” below which the medical care available in the receiving country will be deemed insufficient.

The Court has already implicitly adopted a minimum standard of medical care, even before *Paposhvili*. For instance, in *M.T.*, the case of the Kyrgyz national who required dialysis, the Court observed that the country did have blood dialysis machines.²⁵³ The Court thus implied that if there were no dialysis machines, return would violate Article 3. The Court’s jurisprudence has long set an (unofficial) minimum standard of medical care available in the country. The Court should make this more explicit and provide

²⁵³ *M.T. v. Sweden*, 65 Eur. H.R. Rep. at 1040.

illustrations of circumstances that would and would not establish that a minimum standard of care was available. The minimum standard would vary depending on the applicant's health conditions and medical needs, and thus would avoid creating a situation in which a particular country never reached the minimum standard of medical care. This would assuage the floodgates concerns that underlie the Court's decisions in this area of law, and tailor the standard to the applicant's actual medical condition.

2. *Set a benchmark for the standard of medical care that is not tied only to the level of care available in the receiving country*

The *Paposhvili* Court did not set a benchmark for the standard of care that EU member states should use when investigating the feasibility of refoulement. It only stated that the standard of medical care available in the returning country would not be the benchmark.²⁵⁴ In a future case, the Court should establish a benchmark that is not tied only to the standard of care in the receiving country. Such a benchmark would contradict the absolute nature of Article 3 and is also inconsistent with the Court's other Article 3 jurisprudence. In *Soering*, a key non-refoulement case, a German national argued that his extradition to the United States would violate Article 3 because he would be exposed to the death penalty and extended detention on death row.²⁵⁵ The Court agreed, applying European, not American, standards on capital punishment and extended detention prior to execution.²⁵⁶

While a lack of medical treatment is not the same as detention and execution, the Court must affirm the fundamental principles underlying Article 3, particularly its absolute, non-derogable nature. The Court should set a benchmark for the standard of care that is not tied to a particular country or region's level of healthcare but instead looks at the actual probability that the individual will die or face "a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or [] a significant reduction in life expectancy."²⁵⁷ If an individual meets the "very exceptional circumstances" standard because treatment for her illness is not available to anyone in her home country, an EU member state should not be allowed to refoule her on the basis that it does not have the obligation to alleviate

²⁵⁴ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 189.

²⁵⁵ *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 443–44 (1989).

²⁵⁶ *Id.* at 473–74, 475–76, 478; *see, cf.*, Stoyanova, *supra* note 133, at 598 (arguing that living and health conditions in the receiving state are irrelevant under the negative obligation not to refoule).

²⁵⁷ *Paposhvili v. Belgium*, App No. 41738/10, ¶ 183.

disparities between healthcare systems. Such an argument contradicts the absolute character of Article 3.

It is true that this benchmark would likely shift the burden to care for some individuals from the receiving state to the returning (EU) state. Some individuals who may be refouled under current standards could not be refouled under the type of benchmark recommended here. However, establishing a clearer benchmark would also help both returning and receiving states to understand their responsibilities in a given case, and would make it easier to see if the receiving state could make the proper assurances that it could care for the individual. Ultimately, concerns about increased burdens on EU member states cannot justify refusing to set a benchmark, as Article 3 is absolute and does not permit balancing of hardships.

3. *Recognize a duty not to refoule where the applicant was a bona fide asylum seeker who contracted COVID-19 while in a migrant detention facility or reception center*

EU member states should not be allowed to refoule seriously ill asylum seekers who contracted COVID-19 while detained by the member state. Because many EU member states impose mandatory detention or otherwise restrict asylum seekers' housing choices, they should bear responsibility for the consequences of those policies. As outlined above, individuals who seek asylum out of genuine fear for their safety are exercising a right under international law that EU member states have agreed to recognize as parties to the Refugee Convention. Many asylum applicants fail in their claims, not because they committed fraud or have no genuine fear of return, but because their fear of persecution is not tied to one of the five protected grounds. By choosing to detain these individuals in government facilities, EU member states assume a duty toward them.

Both the EU asylum framework and the ECtHR have recognized this duty. The Reception Conditions Directive provides that detained asylum seekers are entitled to a minimum level of healthcare.²⁵⁸ According to the ECtHR, "Article 3 also imposes requirements on State authorities to protect the health of persons deprived of liberty."²⁵⁹ The Court has shown concern for conditions asylum seekers face in detention and reception facilities.²⁶⁰ This concern should continue even if the individual does not prevail on his or her asylum claim. Where the conditions of mandatory detention cause an

²⁵⁸ Reception Conditions Directive, ch. II, art. 19, § 1.

²⁵⁹ *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 190.

²⁶⁰ *See, e.g., Zuijdwijk*, *supra* note 131, at 815.

individual to contract COVID-19, and serious health consequences result, the member state's duty should be extended beyond the period during which the government evaluates the individual's asylum claim. Because the Returns Directive allows member states to detain individuals for up to eighteen months after their asylum claims are denied,²⁶¹ the member state's duty to the individual will also extend beyond the period during which the asylum claim is pending in many cases. The member state's decision to detain an individual, not its adjudication of the asylum claim, forms the basis of the duty.

This proposed duty not to refole is consistent with Article 3 jurisprudence because it arises from actions taken by member states. Detaining individuals and holding them in facilities constitute government actions. As discussed above, many EU member states have chosen to continue to detain asylum seekers during the pandemic, thereby exposing them to conditions that facilitate COVID-19 transmission.

Because the duty not to refole proposed here would be tied to specific government actions, it is narrower in scope than the duty to rescue, which the ECtHR has not adopted. In the wake of the *N* decision, Virginia Mantouvalou, a professor of human rights and labor law, proposed that the ECHR be read to impose a duty to rescue the nearby needy.²⁶² Others have agreed that states may owe greater obligations to individuals who are nearby than to those who are distant.²⁶³ The Court has given no indication that it is willing to read such a duty into Article 3. Such a duty provides a limiting principle based on proximity, which the Court may fear would lead people to travel to EU member states to receive medical treatment.²⁶⁴ Furthermore, a duty to rescue does not distinguish between government-inflicted harm and harm from other sources, which a majority of judges on the ECtHR have continued to do. The duty proposed here, in contrast, requires a link between government action and the harm suffered.

The state's obligation to protect detained asylum seekers' health may be more properly considered a separate, positive obligation under Article 3.²⁶⁵ As noted above, such an obligation "is not absolute, and requires that the relevant body take proportionate or 'reasonable' steps to protect."²⁶⁶ Just as the *Paposhvili* Court imposed on member states the obligation to investigate

²⁶¹ Returns Directive, ch. IV, art. 15, § 6.

²⁶² Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy?*, 72 MOD. L. REV. 815, 822 (2009).

²⁶³ See, e.g., Stevens, *supra* note 162, at 383–84.

²⁶⁴ *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. 227, 254 (Tulkens, Bonello, and Spielmann, JJ, dissenting).

²⁶⁵ See *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 190.

²⁶⁶ Palmer & Martin, *supra* note 141, at 6.

reception conditions and seek assurances without explicitly stating that it was creating a separate positive obligation,²⁶⁷ the Court may choose to simply observe that a member state owes a duty to individuals it has detained. This vagueness would allow the Court room to maneuver, and would allow individuals seeking non-refoulement to argue that the obligation is absolute as part of the negative obligation not to refoule. If the Court recognized a separate positive obligation, it would clarify member states' responsibilities, but would also allow them to argue that the steps they took to protect asylum seekers' health were reasonable. A less than absolute obligation could still protect many detained asylum seekers because it would provide incentives to detain fewer applicants, or at least to improve their living conditions in detention. Under either approach, the key to improving individuals' chances for relief is to link the state's decision to detain an asylum seeker to the harm the individual will face upon refoulement, even if that harm comes most immediately from a naturally occurring illness.

This duty not to refoule would be limited in duration. If an individual completely recovers from COVID-19, the argument for non-refoulement based on health disappears, and the member state may attempt to return the individual as the law permits. The duty would essentially relax the "very exceptional circumstances" standard for the period of the individual's illness on the basis that government action caused the individual to become sick with a contagious disease; therefore, the harm is not due to a naturally occurring illness alone. Ultimately, member states that improved sanitary conditions in detention facilities or chose to detain fewer individuals would face fewer claims based on this duty. They would thus have more control over refoulement under this duty than they would under a duty to rescue. In sum, the proposed duty ties non-refoulement to specific government actions, which narrows its scope and gives member states more control. At the same time, it has the potential to help save lives.

²⁶⁷ Paposhvili v. Belgium, App No. 41738/10, ¶¶ 188–90; *see also* Stoyanova, *supra* note 133, at 604 (noting that the ECtHR "has explicitly avoided" creating a framework to distinguish positive and negative obligations).

CONCLUSION

The international community must reform current refugee law to address gaps in protection, and the European Union should reform its common asylum framework to ease the strain on both member states and asylum seekers. However, such changes will take time and negotiation. The COVID-19 pandemic requires a more immediate solution to protect individuals with genuine fear of refoulement who are denied asylum, contract the virus while detained, and suffer long-term health consequences.

Article 3 of the ECHR should protect these individuals. The European Court of Human Rights should apply the article in a manner consistent with its absolute character rather than the floodgates concerns that have historically characterized the Court's health-based non-refoulement jurisprudence. While the Court is unlikely to abandon the "very exceptional circumstances" standard, it can and should impose additional safeguards. The Court should recognize that there is a standard of medical care below which no one should fall and should not tie its benchmark for acceptable care to the standard of care in the receiving country alone. Finally, the Court should impose on EU member states a duty not to refoule ill asylum seekers whose applications have been denied and who contracted COVID-19 while in the member state's custody. These measures would allow the Court to retain its high standard while ensuring that individuals are not refouled to life-threatening situations.