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ARTICLE

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"Systemic Violations" in EU Asylum Law: Cover or Catalyst?

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Abstract
The concept of a systemic fundamental rights violation refers to a particular set of violations that are both widespread and embedded, so their reoccurrence may be assumed to be likely. It takes on at least two distinctive roles in EU asylum law and policy. One role is linked with the functioning of the principle of mutual trust, a principle that obliges Member States to recognise each others' systems and decisions, presuming them to be legal, apart from exceptional cases. In this context, the principle sets the standard from when the presumption of legality is rebutted. In its conceptualisation and application, it is in tension with European human rights law, and, for a period, set up frictions between the CJEU (in *NS/ME* and *Opinion 2/13*) and the ECtHR (in *MSS and Tarakhel*). This tale of judicial frictions is not merely of historical interest. Its legacy is, we conclude, a thin concept of systemic breach, characterised by an over-individualized approach to assessing the human rights risks. The second role for the concept of systemic violations relates to embedded violations, including at the EU's external borders. We demonstrate the utility of this other invocation, in particular as systemic breaches often signal deeper rule of law issues both within particular national systems and embedded within the Common European Asylum System (CEAS). We illustrate that the CEAS itself brings about systemic human rights violations. Identifying and responding to the "systemic" in asylum increasingly relates to the credibility of the EU as a Union based on the respect for fundamental rights and the rule of law.

Keywords: Migration; Asylum; Refugees; EU Law; Fundamental rights; Non-refoulement; Court of Justice of the European Union; European Court of Human Rights

A. Introduction

Legal systems have diverse modes and rationales for classifying violations. Frequently, the law is concerned with the gravity of violations in terms of the extent of the harm inflicted or the culpability of the violator. Gravity may then inform the scope of the prohibited conduct, or the gravity of the punishment. Such approaches are typical in criminal law, including international criminal law. The definitions of specific international crimes, for example, notably that of crimes against humanity, depends on the "widespread or systematic nature" of the attack in question. Gravity qualifiers also play a role in relation to matters of proof, evidence, and remedies across public and private law. For example, we find gravity qualifiers in EU law on remedies, in determining which state breaches grant a right to a remedy in damages, with the circular notion of "sufficiently serious breach" being employed. Characterizing a violation as systemic is, we

contend, distinct from a gravity qualifier. Rather it connotes a particular set of violations that are both widespread and embedded, so their reoccurrence is likely.

As we demonstrate in section B, the concept has a long history in international human rights law (IHRL). We trace its place in the law and institutions of UN human rights, and its role in the caselaw of regional human rights courts, particularly the European Court of Human Rights (ECtHR). Against this backdrop, we revisit in section C the infamous frictions that emerged between the ECtHR, the Court of Justice of the European Union (CJEU), and national courts on the role of a "systemic breach" test in the caselaw on the EU's Dublin system. This system purports to allocate responsibility to particular states for processing asylum claims. It has long been understood as risking human rights violations in its operation. We demonstrate that for some time, EU law had misused the systemic breach concept in a troubling and legally unwarranted distortion, responding to Member State legal argumentation that their EU law obligations, underpinned by the principle of mutual trust, prevailed over human rights. The ECtHR ultimately in 2014 in *Tarakhel v Switzerland*[1] reasserted a human rights-based reasoning in Dublin transfer cases, rejecting the emergent EU law approach of treating 'systemic breach' as a necessary criterion to refuse Dublin transfers.

This tale of judicial frictions is not merely of historical interest. Its legacy is, we demonstrate, a somewhat empty concept of systemic breach which has led to an over-individualized approach to assessing the human rights risks in Dublin cases, and indeed more widely. By this, we mean that general factors tend not to lead to refusal to transfer asylum seekers, but rather the focus has come to be almost exclusively on their particular "vulnerability."[2] In this way, both the ECtHR and CJEU have come to obscure—perhaps even tolerate or enable—the widespread, systemic, human rights violations against asylum seekers and other protection seekers in Europe. We demonstrate this by reference to the now frequent findings of violations inherent in the Dublin system and EU border control practices in the UN human rights system, notably by the UN Treaty bodies.[3]

Beyond the interrelation between the concept of a systemic fundamental rights violation and the principle of mutual trust in the EU, the concept has also been invoked in EU law to connote embedded violations, including at the EU's external borders. An exemplar of this approach is the briefing by Greek civil society organizations to the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), covering systemic breaches of the rule of law and the EU acquis by Greek authorities, in the form of "routine unlawful removal of people seeking international protection from the national territory, contempt of court orders and discrediting of European and international bodies responsible for monitoring and safeguarding human rights."[4] In this sense, systemic fundamental rights violations signal deficits in the rule of law, an issue that we explore in section D.

Overall, we demonstrate the importance and utility of both identifying and remedying human rights violations that are systemic. To date, the EU has enabled its Member States to obscure such violations, while its role ought to be to oblige them to take systematic action to remedy and repair such violations, as well as examining how its own laws, policies and practices contribute to such violations.

[1] *Tarakhel v. Switzerland*, App. No. 29217/12 (Nov. 4, 2014), https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22Tarakhel%22],%22itemid%22:[%22001-148070%22]}. *See* Cathryn Costello & Minos Mouzourakis, *Reflections on Reading Tarakhel*, 10 Asiel & Migrantenrecht 404 (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548542.

[2] Ekaterina Yahyaoui Krivenko, *Reassessing the Relationship Between Equality and Vulnerability in Relation to Refugees and Asylum Seekers in the ECtHR: The* MSS *Case 10 Years On*, 34 Int'l J. Refugee L. (2022).

[3] BaşakÇalı, Cathryn Costello, & Stewart Cunningham Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies, 21 German L. J. 355 (2020).

[4] *Systemic Breaches of the Rule of Law and of the EU Asylum Acquis at Greece's Land and Sea Borders*, Refugee Support Aegean (June 23, 2022), https://rsaegean.org/en/greece_cso_briefing_libe/.

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B. "Gross and Systematic" Violations of Human Rights as IHRL Concept

In IHRL, the UN's initial role in relation to human rights was self-styled around "gross and systemic" or '"systematic" human rights violations. This term served as a loose jurisdictional threshold to legitimate a UN role, with key UN practices and even institutions—based on the UN Charter in particular—being conferred with a role focusing on such violations. As Damrosch explains, "In the case of especially egregious patterns of human rights abuses—what came to be known as gross and systematic violations—the 'domestic jurisdiction' constraint was more readily overcome."[5] The UN's initial foray into human rights, focusing on apartheid, was rationalised and legitimated in these terms, where "systematic" referred to a "consistent pattern of violations of human rights."[6] This term has also been employed to justify various special procedures within the UN system, both country specific and thematic. As well as legitimating the UN role, the UN has also set out principles and processes to remedy "gross violations." In 2005, the UN General Assembly approved guidelines on this topic.[7] In 2006, when the UN Human Rights Council was established, its mandate was also framed as to "address situations of violation of human rights, including gross and systematic violations, and make recommendations thereon."[8]

In international treaties too, gravity qualifiers are found that trigger further obligations: In the UN Arms Trade Treaty, for instance, arms exports are to be withheld if the arms would contribute to "serious human rights violations."[9] This reflects a practice in the external relations of many states and regional bodies to focus human rights-based foreign policy tools on such violations, sometimes framed in the language of "systematic violations."

In regional human rights law, we also find both gravity qualifiers and attempts to hone institutional responses based on the "systemic character" of the violation. For example, gravity qualifiers delineate the norm of non-refoulement in the caselaw of the ECtHR. The norm applies in the case of "substantial grounds" of a "real risk" of a violation of Article 3, 2 or—probably—4—rights that are "absolute," whereas a claimant seeking to prevent removal to face the violation of a qualified right—typically 6 or 8—has to show a "flagrant breach" or "flagrant denial."[10] In terms of an institutional threshold, the notion of "systemic breach" was employed in the development and delineation of the "pilot judgment" threshold, a mechanism developed to deal simultaneously with the overburdening of the Strasbourg court and repeat violations that demanded institutional remedies on the part of the violating state.[11] The 1981 African Charter on Human and Peoples' Rights also provides a mechanism for the African Commission on Human and Peoples' Rights (ACommHPR) to draw the attention of the Assembly of Heads of State and Government to "special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights" and for the Assembly to consider appropriate measures.

We note that the systematic character of human rights violations, although it is not a clearly defined concept, nonetheless, plays an established and multifaceted role in IHRL. It serves to

[5]Lori F. Damrosch, Gross and Systematic Human Rights Violations, Max Planck Encycs. Int'lL. para. 2 (Feb. 2011), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1732.

[6]Economic and Social Council Res. 1235 (XLII) (1967) (authorizing the UN Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities "to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid" and decided that the Commission could study "situations which reveal a consistent pattern of violations of human rights.").

[7]G.A. Res. 60/147 (Dec. 16, 2005).

[8]Human Rights Council Res. 60/251 (Mar. 15, 2006).

[9]What amounts to 'a serious violation of international human rights law'? (Geneva Acad. Int'lum Humanitarian L. & Hum. Rts. 2014), https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf.

[10]*See also* Cathryn Costello, *The Search of the Outer Edges of Non-refoulement in Europe*, *in* Human Rights and the Refugee Definition: Comparative Legal Practice and Theory (David Cantor & Bruce Berson eds., 2016).

[11]Renate Degener, *Pilot-Judgment Procedure: European Court of Human Rights (ECtHR)*, Max Planck Encyc. of Int'l Proc. L. [MPEiPro], https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1961.013.1961/law-mpeipro-e1961.

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delineate a UN role and trigger particular approaches to remedies and reparation. From a human rights perspective, characterizing violations as systemic has a double connotation: Repeat violations are likely, so remedying a past breach alone is not enough. Moreover, as the violation emerges from a set of practices embedded in the state practice, and usually administratively endorsed, preventing repetition demands political action at the international or supranational level.

C. The Distortion of "Systemic Breaches" in EU Law and the ECtHR Response

Against this backdrop, this section demonstrates that the incorporation of the notion of "systemic breach" from the caselaw of the ECtHR to the EU legal order was a distortion of a human rights concept. Initially, it seemed to lead to a fragmentation of human rights standards at the EU level. The interplay between the two regional courts the CJEU and the ECtHR, in this particular instance, appears to have resolved this fragmentation tendency and eventually played out to the benefit of human rights. However, as we illustrate, the resulting outcome has in fact effectively failed to protect human rights when manifestly systematic violations of human rights are at stake.

In EU asylum law, we find the initial incorporation of the notion of "systemic breach" from the Grand Chamber ruling of the ECtHR in *M. S.S. v Belgium and Greece*,[12] a case that broke new legal ground in many respects. The ECtHR ruled in *M.S.S. v Belgium and Greece* that the detention and living conditions in Greece, as well as lack of protection afforded by its asylum system, meant that there were substantial grounds to believe that returns there generally posed a real risk of treatment contrary to Article 3 ECHR. Greece's system was deemed to have "systemic deficiencies," evidently rebutting any presumption of safety it enjoyed as a participant in the Common European Asylum System.

In *NS/ME*,[13] the CJEU followed the reasoning of the ECtHR ruling in the main, clarifying that also as a matter of EU law, return to contexts where there are "substantial grounds for believing that the asylum seeker would be subject to inhuman or degrading treatment" were precluded. However, it also adopted the concept of "systemic deficiency" as an element in assessing the compatibility with fundamental rights of the transfer of an asylum seeker to another Member State under the Dublin Regulation. The CJEU endorsed again this approach in Opinion 2/13 in the name of the fundamental importance that the principle of mutual trust holds in the EU legal order, especially in the areas of freedom, security, and justice.[14] Thus, while apparently endorsing the Strasbourg approach in *MSS*, the CJEU, on one reading, seemed to treat "systemic breaches" as a minimum legal requirement, Dublin returns were obligatory, unless there were systemic breaches of Article 3 ECHR.[15]

This argument ought to have never been seriously countenanced, given that it entails a dilution of an absolute human right—the right to protection against torture, inhuman and degrading treatment. The systemic deficiencies concept carried potential to fragment the absolute prohibition of refoulement. As Costello argued at the time, the only appropriate use of a systemic breach criterion is to alleviate or even remove entirely the applicant's burden of proof—no transfers should take place if the system is broken down in a systemic fashion.[16]

[12]53 Eur. Ct. H.R. (2011), https://hudoc.echr.coe.int/eng?i=001-103050.

[13]C-411-10, N.S. v United Kingdom and C-493-10, M.E. v Ireland, 2011 E.C.R.

[14]*See* Case C-2/13, Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU: C:2014:2454, paras. 191–95 (Dec. 18, 2014); B. de Witte & Š Imamovic, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, 40 EUR.L. REV. 683, 701–03 (2015); L. Halleskov Storgaard, *EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR*, 15 HUM. RTS. L. REV. 485, 507–10 (2015).

[15]*NS/ME*, *supra* note 13, at para. 94.

[16]Cathryn Costello, *The Ruling of the Court of Justice in NS/ME on the fundamental rights of asylum seekers under the Dublin Regulation: Finally, an end to blind trust across the EU?*, ASIEL-EN MIGRANTENRECHT 83-92 (2012). *See also* Cathryn Costello, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explore*, 12 HUM. RTS. L. REV. 287, 331 (2012).

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The CJEU, heeding strong interventions from the national governmental interveners, gave some credence to the notion of systemic breach as a requirement. For instance, in *Abdullahi*, it ruled that asylum seekers could only challenge Dublin deportations by "pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum" amounting to a violation of Article 4 EUCFR (Article 3 ECHR).[17] This ruling was in contrast to *MA*,[18] a case on unaccompanied minors, which held that giving due weight to the best interests of children, due to their vulnerability, "as a rule, unaccompanied minors should not be transferred to another Member State."[19]

In the wake of *MSS* and *NS/ME*, national courts and indeed the ECtHR itself—in its Rule 39 jurisdiction—failed to take a clear position on the standards for precluding Dublin returns. Italy was a particularly critical case. Some national courts did halt transfers to Italy, applying *MSS* and *NS/ME*.[20] The Strasbourg litigation tended to emphasize the particular vulnerabilities of the individuals in the face of an uneven and unreliable reception conditions. In *Mohammed Hussein v the Netherlands and Italy*,[21] the ECtHR rejected as inadmissible a claim that return to Italy would amount to a violation of Article 3 ECHR on the ground that the reception conditions in the country did not meet the exceptional *MSS* threshold. The ECtHR also permitted transfer in *Daytbegova&Magomedova v Austria*,[22] where it was held that Italy was aware and prepared to cater for the applicant's special reception needs. *Halimi v Austria*[23] and *Abubeker v Austria*[24] followed a similar pattern. Beyond Italy, the ECtHR rejected the application of *MSS* to suspend a transfer to Hungary in *Mohammed v Austria*.[25] While these cases mainly focused on factual analysis, legal uncertainty prevailed also as to the significance of the reference to "systemic breaches," and what sorts of evidence was required to rebut the presumption of safety accorded to Dublin states.

After *NS/ME*, some governments argued that in order to trigger Article 3 ECHR protections against removal, the asylum system in the state to which deportation was contemplated would have to be in "systemic failure." At its worst, this criterion was treated as an additional and necessary requirement to rebut the presumption of safety Dublin states enjoy. The EU co-legislators, i.e., the European Parliament and the Council, enhanced the potential for conflated interpretations through the recast Dublin Regulation adopted in 2013. This instrument includes a paragraph referring to the impossibility of transfers where there "are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union."[26] This paragraph in essence takes up the *NS/ME* factual

[17]Case C-394/12, Abdullahi v Bundesasylamt, 2013 E.C.R. I-0000 para. 60. For a cogent critique, see M. Hennessy, *The Dublin System and the Right to an Effective Remedy–The case of C-394/12 Abdullahi*, EUR. DATABASE OF ASYLUM L. (2013),–http://www.asylumlawdatabase.eu/en/journal/dublin-system-and-right-effective-remedy-–case-c-39412-abdullahi.

[18]Case C-648/11, MA v Secretary of State for the Home Department, 2013 E.C.R. I-0000.

[19]*Id.* at para. 55.

[20]*See, e.g.* Magdeburg Admin. Ct. July 26, 2011, 9 A 346/10 MD (Syrian applicant with five children); Karlsruhe Admin. Ct. Mar. 6, 2012, A 3 K3069/11 (risk of homelessness); Admin. Ct. Cologne June 28, 2013, 8L 794/13.A. *See also* AIRE, ECRE & Amnesty International, *Third Party Intervention in Tarakhel v Switzerland: Relevant Extracts from Selected ECRE Research on Practice and Caselaw on Dublin II Regulation Transfers in Europe* (2014), 14–27.

[21]Mohammed Hussein v. The Netherlands & Italy, App. No. 27725/10 (Apr. 2, 2013), https://hudoc.echr.coe.int/eng?i=001-118927.

[22]Daytbegova & Magomedova v. Austria, App. No. 6198/12, para. 66 (June 4, 2013), https://hudoc.echr.coe.int/eng?i=001-122033 (citing *Mohammed Hussein v Austria*, paras. 43-49).

[23]Halimi v. Austria & Italy, App. No. 53852/11 (June 18, 2013), https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-109463%22]}.

[24]Abubeker v. Austria & Italy, App. No. 73874/11 (June 18, 2013), https://hudoc.echr.coe.int/eng?i=001-122459.

[25]Abubeker v. Austria & Italy, App. No. 73874/11 (June 6, 2013), https://hudoc.echr.coe.int/eng?i=001-146303.

[26]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), art. 3(2), 2013 O.J. (L 180) (EU).

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circumstances and crystallizes them to law. While in itself, this paragraph does not denote that systemic deficiencies are a requirement or the sole requirement to rebut the presumption of safety, the incorporation of a particular factual situation and type of breach in secondary law also fueled legal arguments in that direction.

The ECtHR Grand Chamber in *Tarakhel* effectively rejected this distortion of systemic breaches, making no reference to an additional systemic breaches test as part of its well established case law.[27] It then effectively rejected the need to demonstrate systemic breaches in the specific case.[28] In doing so, it set out the problematic *NS/ME* paragraph in full, while asserting that the "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."[29] It then emphasized that the presumption of safety "can *therefore* validly be rebutted" (emphasis added) on the normal ECHR test of "substantial grounds" and "real risk."[30]

The "therefore" is laden with significance.[31] It means that the pertinent paragraph in *NS/ME* cannot alter the ECHR test, so must not be read as an additional threshold. The ECtHR thus endorsed the ruling of the UK Supreme Court in *EM (Eritrea)*,[32] which explicitly rejected systemic breaches as an additional threshold or test.[33] The ECtHR has the interpretative hegemony over ECHR standards, even when the CJEU purports to interpret analogous EU guarantees. It thereby asserted its baseline jurisdiction, bolstered by the UK Supreme Court. It should be recalled that in *EM (Eritrea*), the UK Supreme Court held that "[v]iolation of article 3 does not require (or, at least, does not necessarily require) that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings."[34]

As Costello and Mouzourakis asked:

> Was it comity or cowardice for the ECtHR to keep its critique of the CJEU approach (or at least its interpretation by some national governments and lower national courts) somewhat *sotto voce*? Douglas-Scott long noted the lack of explicitness in much of the engagement between the CJEU and ECtHR even when they cite each-other.[35] By citing *EM (Eritrea)* in the operative part of the ruling, it makes its position clear to the initiated reader, which is perhaps as good as it gets in this context.[36]

Eventually, the CJEU resolved the discord in *C.K.* where it explicitly rejected the existence of an additional systemic deficiencies criterion for a real risk of inhuman or degrading treatment to be substantiated in the framework of Dublin.[37] It later reaffirmed this in two cases,[38] *Jawo* and

[27]Tarakhel, *supra* note 1, at para. 93–9.

[28]*Id.* at paras. 100–05.

[29]*Id.* at para. 104.

[30]*Id.*

[31]*Id.* at para. 105.

[32]EM (Eritrea) v. Secretary of State for the Home Department [2014] UKSC 12 (appeal taken from Eng.).

[33]*Tarakhel, supra* note 1, at para. 104.

[34]EM, *supra* note 32, at para. 42.

[35]Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 Common Mkt. L. Rev. 619, 660 (2006).

[36]Cathryn Costello & Minos Mouzourakis, *Reflections on Reading Tarakhel*, 5 Asiel & Migrantenrecht 404, 408 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548542.

[37]Case C-578/16, C. K. and Others v. Republika Slovenija, ECLI:EU:C:2017:127, paras. 91-94 (Feb. 16, 2017), https://curia.europa.eu/juris/liste.jsf?num=C-578/16.

[38]Case C-163/17, Jawov. Bundes republik Deutschland, ECLI:EU:C:2019:218 (Mar. 19, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-163/17; Case C-318/17, Ibrahim, et al. v. Bundesrepublik Deutschland & Bundesrepublik Deutschland v. Magamadov, ECLI:EU:C:2019:219 (Mar. 19, 2019) https://curia.europa.eu/juris/liste.jsf?num=C-297/17; *see also* M, Den Heijer, *Transferring a refugee to homelessness in another Member State: Jawo and Ibrahim*, 57 Common Mkt. L. Rev. 539 (2020).

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Ibrahim, which concerned individuals that had been granted protection before introducing an asylum application in a different Member State. The Court held that the absolute nature of the prohibition of refoulement meant that no differentiation could be made based on the procedural stage of their application, i.e., asylum seekers or recognized international protection beneficiaries. Nevertheless, it also found this concerned returns to a situation of "extreme material poverty" that does not allow the person to meet her most basic needs such as food, hygiene, and a place to live.[39]

In the years since *Tarakhel*, judicial challenges to Dublin returns have continued. In most cases, resisting return turns on individual asylum seekers successfully arguing that they have particular vulnerabilities that, even if proven, could be overcome by diplomatic assurances that they specifically will be guaranteed access to reception facilities adapted to their specific vulnerabilities.[40] Furthermore, the CJEU held that applicants can contest the wrongful application of the hierarchy of jurisdiction criteria the regulation contains.[41] Similarly, it held that applicants could contest their transfer based on procedural rules contained in the Dublin III Regulation, such as the expiration of time limits within which a transfer should have taken place.[42]

Insisting on individualized assessment when there is clear evidence of generalized deficiencies or systemic flaws seems to put too high a burden on applicants. While case-by-case assessment is a hallmark of a rights-compliant responsibility allocation system,[43] if particular individual vulnerabilities are always required even when general evidence of risk is compelling, we contend that the concept of systemic breach becomes empty. The concept, when properly construed, should serve to highlight when human rights violations are routine and repeated, and so can be assumed likely to recur, unless institutional action is forthcoming to remedy them.

After the initial *MSS* and *NS/ME* case law, both European courts' approaches in Dublin cases tended to downplay the general situation and overwhelmingly focus on individual circumstances and procedural rules underpinning the functioning of the Dublin system. Even in *AS* and *Jafari*,[44] cases which concerned the potential disapplication of the Dublin III Regulation during the refugee crisis in the wake of significant-initially tolerated "secondary movements" of asylum seekers within the EU territory, the Court rejected the arguments of Advocate General Sharpston advancing a disapplication of the Dublin Regulation in these circumstances. The Court's restrained approach reflects the political salience and controversy surrounding solidarity and fair sharing in asylum. Yet, as the next section argues, systemic asylum-related violations are persisting and challenging the rule of law in the EU. An indicator of the shortcomings of the legal status quo is that litigants in Europe have started to have recourse to UN treaty bodies concerning non-refoulement. In their views, such bodies have found violations of fundamental rights in EU border practices, including Dublin returns.[45]

[39]*Jawo*, Case C-163/17 at para. 92.

[40]*See, e.g.* Ali and ors. v. Switzerland & Italy, App. No. 30474/14 (Oct. 27, 2016), https://hudoc.echr.coe.int/eng?i=001-168401; AME v. Netherlands, App. No. 51428/10 (Jan. 13, 2015), https://hudoc.echr.coe.int/eng-press?i=003-5006911-6145069.

[41]*See, e.g.*, C-63/15, Ghezelbashv. Staatssecretaris van Veiligheid en Justitie, ECLI:EU:C:2016:409 (June 7, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-63/15; Case C-155/15, Karim v. Migrationsverket, ECLI:EU:C:2016:410. (June 7, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-155/15.

[42]*See, e.g.*, CJEU, *Shiri*, C-201/16, ECLI:EU:C:2017:805, https://curia.europa.eu/juris/liste.jsf?num=C-201/16 & language=EN; CJEU, *Mengesteab*, C-670/16, ECLI:EU:C:2017:587, https://curia.europa.eu/juris/liste.jsf?num=C-670/16.

[43]Minos Mouzourakis & Cathryn Costello, *Effective Judicial Protection of Migrants and Refugees? The role of Europe's supranational courts in protecting and generating rights*, *in* Research Handbook in EU Migration and Asylum Law (Evangelia Tsourdi & Philippe De Bruyckereds., 2022).

[44]*See* C-490/16, A.S. v. Slovenia, ECLI:EU:C:2017:585 (July 26, 2017), https://curia.europa.eu/juris/liste.jsf?num=C-490/16; Case C-646/16, Jafari, ECLI:EU:C:2017:586 (July 26, 2017), https://curia.europa.eu/juris/liste.jsf?num=C-646/16.

[45]Çalı, Costello, & Cunningham, *supra* note 3.

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D. Full or Vicious Circle? Systemic Violations in the CEAS and the Rule of Law

Fundamental rights and rule of law are deeply embedded in the EU legal order, as Tsourdi has analyzed extensively elsewhere.[46] The links between the massive human rights violations of asylum seekers and refugees, and Europe's rule of law decay and authoritarian legalism are complex and are now attracting the scholarly attention they are due.[47]

In this section, we explore the links between systemic violations and the rule of law. Evidently, not all violations are systemic in character. Asylum legislative harmonization has left a significant level of discretion to Member States.[48] In this context, this has resulted in fundamental rights violations at the national level as evidenced by CJEU case law. These violations could be understood as particular, isolated, instances. For example, drawing from the principle of human dignity and the prohibition of torture, inhuman or degrading treatment, the Court has fleshed out the notion of a "dignified standard of living" included in the Reception Conditions Directive. On this basis, the CJEU has barred the practice of depriving asylum seekers subject to a "Dublin transfer" of material reception conditions,[49] or withdrawing said conditions as a sanction for breaching the rules of a reception center.[50] Similarly, it has found that where reception conditions are offered as financial allowances, they must ensure subsistence by enabling asylum seekers to obtain housing on the private rental market, if necessary.[51]

In contrast, systemic violations could be related to generalized non-implementation of EU norms, including in Member States that are subject to rule of law backsliding and constitutional capture. Systemic violations related to routine non-implementation of EU norms, often go unremedied, either through individual or Commission enforcement actions.[52] Diagnosing the roots of the implementation gap is complex. While the fair sharing of responsibility is required by EU law, in practice, its responsibility allocation system, the Dublin system,[53] allocates more responsibility to states at the Union's external borders.[54] Worse, it fails to reinforce asylum provision as a regional public good.[55] Instead, once responsibility is assigned, it is for the

[46]*See* E. Tsourdi, *Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?* 17 EUR. CONST. L. REV. 471, 477–80(2021).

[47]*See id.*; MIGRANTS' Rights, Populism and Legal Resilience IN EUROPE (V. Stoyanova & S. Smet eds., 2022).

[48]*See, e.g.*, Cathryn Costello, *The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles*, *in* WHOSE FREEDOM, SECURITY AND JUSTICE?: EU IMMIGRATION AND ASYLUM LAW AFTER 1999 151 (A. Baldaccini, E. Guild and H. Toner eds. 2007); Evangelia (Lilian) Tsourdi, *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?*, *in* REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE LAW 271 (Vincent Chetail, Philippe De Bruycker, & Francesco Maiani eds., 2016).

[49]ECJ, Case C-179/11, Cimade & GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, ECLI:EU:C:2012:594 (Sept. 27, 2012), https://curia.europa.eu/juris/liste.jsf?num=C-179/11.

[50]ECJ, Case C-233/18, Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers, ECLI:EU:C:2019:956 (Nov. 12, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-233/18.

[51]ECJ, Case C-79/13, Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others, ECLI:EU:C:2014:103 (Feb. 27, 2014), para. 42, https://curia.europa.eu/juris/liste.jsf?num=C-79/13.

[52]Costello, *supra* note 48; Violeta Moreno-Lax, et al., The EU Approach on Migration in the Mediterranean 26–69 (European Parliament 2021); ECRE, The Implementation of the Dublin III Regulation in 2018 (ECRE 2019); Amandine Marie Anne Scherrer, Dublin Regulation on international protection applications 642. 813 (Eur. Parliamentary Rsch. Serv. 2020); EASO, Annual Report on the Situation of Asylum in the European Union (Eur. Union Agency for Asylum 2021); Catheryn Costello & Elspeth Guild, *Fixing the Refugee Crisis: Holding the Commission Accountable*, VerfBlog (Sept. 9, 2016), https://verfassungsblog.de/fixing-the-refugee-crisis-holding-the-commission-accountable/.

[53]Regulation 604/2013, *supra* note 27 (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)).

[54]Treaty on the Functioning of the European Union, July 7 2016, 2016 O.J. (C 202) art. 80; Evangelia Tsourdi, *Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System*, 24 MAASTRICHT J. EUR. & COMPAR. L. 673–75(2017).

[55]Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action*, 11 J. R REFUGEE STUD. 396 (1998); Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, CORNELL UNIV. PRESS 29 (2009).

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individual Member State to provide for the refugee.[56] Refugee immobility permeates the system, hindering further redistributive efforts. EU support measures such as funding are limited. In addition, Member States have different levels of economic development and conceptualizations of welfare, entailing differences in protection capacity. These factors are intertwined and lead to deficient implementation; sometimes this leads to grave violations of fundamental rights, including inhuman or degrading treatment.[57] Combined with these structural factors pertaining to the CEAS, political scapegoating of asylum seekers and refugees, as well as outright opposition to refugee protection, is prevalent in many EU Member States.

Rule of lawproblems often lead to systemic violations. The system of decentralized administration on which the EU is based assumes that national administrations and courts function well and can guarantee the effectiveness of EU law. However, EU law is rendered ineffective when, as Von Bogdandy and Ioannidis have argued, "the institutions of a Member State are unwilling or unable to observe the rule of (domestic) law—be it due to endemic corruption, weak institutional capacities, or insufficient resources at the administrative or judicial levels."[58] The resultant violations will generally be systemic in the sense of being widespread and embedded in the system.

The case of Greece is illustrative. As analyzed above, as early as 2011, the ECtHR in *MSS* identified structural deficiencies in Greece's asylum procedures and reception conditions:

> Those persons who have no family or relations in Greece and cannot afford to pay rent just sleep on the streets. As a result, many homeless asylum-seekers, mainly single men but also families, have illegally occupied public spaces .... Many of those interviewed reported a permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.).[59]

These structural deficiencies were conceivably due to Greece's inability and unwillingness to protect asylum seekers and refugees. Arguably, the Dublin system, which Greece perceived as unfair, incentivized these breaches of EU asylum policy. Greece has slowly been improving its national asylum system, for example through the establishment of a dedicated national administrative authority.[60] Nonetheless, deficiencies in asylum processing, and most notably in reception conditions, persist. The coronavirus brought asylum conditions in Greece back in focus with thousands residing in hotspots facing unsanitary conditions.[61] Beyond the COVID responses, by the end of 2022, there were reports of substandard reception conditions in different parts of the country. In the mainland, temporary camps initially created as emergency accommodation facilities, continued to operate. Some of the main issues reported are the remote location of the mainland camps, limited access to rights and services for residents, lack of sufficient equipment

[56]Elspeth Guild, *The Europeanisation of Europe's Asylum Policy*, 18 Int'l J. Refugee L. 630 (2006).

[57]*See, e.g.* Joined Cases C-411 & 493/10, NS v. United Kingdom, ECLI:EU:C:2011:865 (Dec. 21, 2011), https://curia.europa.eu/juris/liste.jsf?num=C-411/10.

[58]*See* Armin von Bogdandy & Michael Ioannidis, *Systemic Deficiency in the Rule of Law: What it Is, What Has Been Done, What Can Be Done*, 51 Common Mkt. L. R. 59, 64(2014).

[59]M.S.S. v. Belgium & Greece, App. No. 30696/09, para. 169-70 (Jan. 21, 2011), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR & id=001-103050.

[60]First established through Law No. 3907/2011 (Jan. 26, 2011), *Official Gazette of the Greek Government*, A:7, 19, *et seq.* (Greece).

[61]*See, e.g.*, Evangelia Tsourdi, *COVID-19, asylum in the EU, and the great expectations of solidarity*, 31 Int'J J. Refugee L. 374 (2020); Greek Council for Refugees and Oxfam, *Lesbos COVID-19 briefing: Update on the EU 'hotspot' Moria by the Greek Council for Refugees and Oxfam*, Greek Council for Refugees (Apr. 1, 2020), https://www.gcr.gr/en/news/press-releases-announcements/item/1420-oxfam-gcr-briefing-for-lesvos-amidst-the-coronavirus.

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and electricity shortages, limited access to education for children, and the construction of the high concrete walls around a number of mainland camps, exacerbating the feeling of isolation.[62]

Similarly, systemic violations may emerge in the more extreme cases of constitutional capture[63] referred to by Pech and Scheppele as "rule of law backsliding." These authors understand rule of law backsliding as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party."[64] In these instances, the systemic violations could also reflect a deliberate targeting of asylum seekers and refugees for inhuman and degrading treatment, flagrant flouting of basic human rights norms, and a recurrent denial of the duty to respect EU and human rights norms in this field.

Hungary is a case in point. Since 2015, the Hungarian government has dismantled refugee protection through a series of legislative amendments. A detailed analysis goes beyond the scope of this article;[65] the measures touched every aspect of the national asylum system. Among other things, they curtailed procedural rights under normal procedures; abolished integration measures for recognized beneficiaries; introduced a fully informal removal mechanism first within an eight-kilometer distance of the fence with Serbia and later throughout the whole territory; criminalized the crossing of the 175 kilometer fence; and established that a "crisis situation" permits the deprivation of liberty of asylum seekers in transit zones during the entire refugee status determination procedure.[66]

As Nagy has explained, this established that during a "crisis situation caused by mass immigration"—which the Hungarian government immediately instated and has repeatedly renewed without objective indicators to justify it—all asylum seekers are obliged to submit themselves to a forced—and escorted—removal from within Hungarian territory to the Serbian side of the fence, depriving them of effective access to the procedure.[67] Only three exceptional categories of individuals were granted access to a regular procedure: Those in detention, those who regularly stayed in Hungary, and those under fourteen years of age.[68] The official narrative is that removed persons could then walk along the fence to reach the Hungarian transit zone and wait for admission, with no water, sanitation or shelter provided.[69] Admissions to the transit zone were extremely limited, benefiting just one person per day in January 2018.[70] Within the transit zone, asylum seekers were deprived of a number of procedural rights and reception conditions, as well as their liberty.[71]

[62]*See Asylum Information Database, Country Report: Greece*, ECRE, https://asylumineurope.org/reports/country/greece/ (last visited Apr. 13, 2023).

[63]J.-W. Müller, *Should the EU Protect Democracy and the Rule of law Inside Member States*, 21 Eur. L. J. 141 (2015).

[64]Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 Cambridge Y.B. Eur. Legal Stud. 3, 10 (2017).

[65]*See* Boldizsár Nagy, *From Reluctance to Total Denial: Asylum Policy in Hungary 2015-2018*, *in* The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis 17 (Vladislava Stoyanova & Eleni Karageorgiou, eds. 2019); K. Juhász, *Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies*, 13 Pol. Cent. Eur. 35 (2017); Hungarian Helsinki Committee, *Two Years After: What's Left of Refugee Protection in Hungary?* (2017).

[66]Nagy, *supra* note 65.

[67]*Id.* at 38.

[68]Hungarian Asylum Act, Art. 80/J.

[69]Nagy, *supra* note 65, at 38.

[70]*Hungary: UNHCR Dismayed Over Further Border Restrictions and Draft Law Targeting NGOs Working with Asylum-Seekers and Refugees*, UNHCR (Feb. 16, 2018), http://www.unhcr.org/news/press/2018/2/5a86dcff4/hungary-unhcr-dismayed-further-border-restrictions-draft-law-targeting.html.

[71]ECJ, Joined Cases C-924/19 and C-925-19, FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, ECLI:EU:C:2020:367 (May 14, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-924/19.

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These amendments led to systemic violations of asylum seekers' fundamental rights as apparent through a host of references for preliminary rulings by Hungarian courts. These, for example, led the ECJ to find that the EU *acquis* and the right to an effective remedy of the Charter precluded national practices such as an eight-day time limit for lodging appeals,[72] or first instance authorities refusing to comply with the assessment of the appeals court.[73] The *FMS* judgment allowed the ECJ to scrutinize conditions within the transit zones, and to find multiple violations of the substantive asylum and return *acquis* on detention standards—i.e. arbitrary deprivation of liberty—alongside related procedural standards—i.e. no possibility of judicial review of detention.[74] It was an infringement action initiated by the Commission that allowed the ECJ to holistically examine the dismantling of the national asylum and return systems.[75] The Court found that the "automatic removals" of asylum seekers from Hungarian territory, the drastic limitation of the number of applicants allowed to enter the transit zones, and the system of detention in transit zones, breached a number of the EU's asylum and return *acquis* provisions and the fundamental rights under the Charter—notably Arts. 6, 18 and 47.

Apart from the non-implementation of EU norms, systemic violations emerge out of the tension between the commitment to protection and efforts to deflect protection obligations. As we have argued elsewhere, this tension is a structural feature of the CEAS that entails policies and practices that are nearly certain to expose protection-seekers to recurrent human rights violations, in particular the failure to ensure legal routes to claim asylum, and the inclusion of carriers' liability and smuggling prohibitions that render travel without proper documentation life-threatening.[76] In contemporary Europe, as a result, border controls entail massive human rights violations.[77] Border violence at Europe's physical borders is well-documented, at the Spanish border in North Africa, in Greece, and at Poland's border with Belarus in particular. The term "pushback" has been commonly employed to characterize the practice of violent returns of individuals without access to fair procedures, generally a violation of the norm of non-refoulement, and under some circumstances the prohibition of collection expulsion. These practices are systemic, in that they are now routine and likely to recur. While not confined to the Member States most closely associated with rule of law backsliding and democratic decay, they connote a collective refugee protection backsliding in the EU which affects the rule of law.

A key legal question is whether these violations are matters of purely national law, or whether there is an EU dimension. EU asylum procedures apply in Member States' territory and their territorial waters, so no question some of these practices violate EU secondary norms and EU human rights. Many of the practices at the root of border violence have been challenged before the CJEU, but that court has evaded acknowledging the EU legal issue at stake.

One such case is the humanitarian visas case.[78] It had long been argued that fundamental rights obligations govern the visa policy as it is regulated by EU law in the Visa Code and would require

[72]ECJ, Case C-564/18, LH v. Bevándorlásiés Menekültügyi Hivatal, ECLI:EU:C:2020:218 (Mar. 19, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-564/18.

[73]ECJ, Case C-556/17, Torubarov v. Bevándorlásiés Menekültügyi Hivatal, ECLI:EU:C:2019:626 (July 29, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-556/17.

[74]*See FMS and Others*, *supra* note 71, at 136.

[75]ECJ, Case C-808/18, Commission v. Hungary, ECLI:EU:C:2020:1029 (Dec. 17, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-808/18.

[76]Evangelia (Lilian) Tsourdi & Cathryn Costello, *The Evolution of EU Law on Refugees and Asylum*, *in* THE EVOLUTION OF EU LAW (Paul Craig & Gráinne de Búrca, eds., 4th ed. 2021).

[77]*See generally* Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations* 21 GERMAN L. J. 311(2020); EvangeliaTsourdi, Andrea Ott, & Zvezda Vankova, *The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration* 7 EUR. PAPERS 87–108 (2022).

[78]*See* Case C-638/16 PPU, X and X v. État belge, ECLI:EU:C:2017:173 (Mar. 7, 2017), https://curia.europa.eu/juris/liste.jsf?num=C-638/16. *See also* Cathryn Costello & Minos Mouzourakis, *Effective Judicial Protection of Migrants and Refugees? The role of Europe's supranational courts in protecting and generating rights*, *in* RESEARCH HANDBOOK IN EU MIGRATION AND ASYLUM LAW (Evangelia (Lilian) Tsourdi & Philippe De Bruycker, eds., 2022).

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the issuance of a form of 'humanitarian visa' if the applicants' human rights would otherwise be violated.[79] The CJEU, however, ruled that the issue of humanitarian visas does not fall within the scope of either the EU Visa Code or of the EU asylum acquis and thus Member States are not "implementing EU law" when they are issuing such visas. Another relevant example is a case concerning the consequences of the EU-Turkey statement.[80] This Statement, or "deal" as it is commonly called, sought to curb irregular arrivals of—particularly Syrian—refugees in Greece, by requesting Turkey to prevent the departure of asylum seekers from its territory and to swiftly readmit those managing to arrive in the Greek islands. In exchange, Turkey was offered greater financial support, and promises of visa free travel to the EU for Turkish nationals, amongst other incentives. When asked to assess the compatibility of this text with EU fundamental rights, the EU's General Court affirmed that it lacked jurisdiction to examine its legality as it was not authored by the EU, but rather by "the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister" in an intergovernmental framework instead of the EU institutional framework.[81] The CJEU dismissed an appeal against this decision as manifestly inadmissible.[82] The conclusion that the EU did not author the agreement absolved the CJEU from an obligation to scrutinize its compatibility with EU fundamental rights. In both cases the CJEU effectively refused to acknowledge the systemic character of the linkage between the EU actions and the measures in question.

It is important to understand the role of EU law in creating the conditions for systemic breaches, rather than focusing only on the rule of law deficits at national level. Where the CEAS leads to systemic human rights violations, then its reform is the appropriate response. On the contrary, where non-implementation also relates to defiance for ideological or political reasons, the response cannot remain policy specific. As part of broader patterns of dismantling the rule of law at national level, these failings should be examined through processes seeking to probe risks to EU values, such as Article 7 TEU procedures, infringement proceedings of a systemic nature that other commentators have conceptualized, [83] or the Commission's rule of law framework.

E. Conclusion

The concept of 'systemic breach' has different functions in different legal orders. In the EU, we contend it would be appropriate to interpret it in a manner that enables individuals to vindicate their human rights and rebut presumptions of safety regarding other EU (and third) states based on the existence of breaches that are likely to recur. In such cases, demanding additional 'vulnerability' to human rights violations in inapt. To this extent, we contend that although there is now apparently convergence between the ECtHR and the CJEU on systemic breaches in the Dublin context, the overall tendency tends to downplay the existence of systemic breaches.

We also demonstrate a potentially wider dual role for the concept of systemic breach. Systemic breaches often signal deeper rule of law issues within national systems. Asylum-related failings

[79]*See, e.g.*, Ulla Ibsen-Jensen, *Humanitarian visas: option or obligation?*, Study for the LIBE Committee (European Parliament, 2014), https://www.europarl.europa.eu/cmsdata/226741/Session_2_-_Study_Humanitarian_visas.pdf.

[80]European Council Press Release SN 38/16, EU-Turkey statement (Mar. 18, 2016).

[81]Case T-192/16, NF v. European Council, ECLI:EU:T:2017:128 (Feb. 28, 2017), https://curia.europa.eu/juris/liste.jsf?num=T-192/16; Case T-193/16, NG v. European Council, ECLI:EU:T:2017:129 (Feb. 28, 2017), https://curia.europa.eu/juris/liste.jsf?num=T-193/16; Case T-257/16 NM v. European Council, EU:T:2017:130, para. 73, https://curia.europa.eu/juris/liste.jsf?num=T-257/16.

[82]CJEU, Joined Cases C-208/17 P to C-210/17, P NF & Others v. European Council, ECLI:EU:C:2018:705 (Sept. 12, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-208/17.

[83]Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, *in* Reinforcing Rule of Law Oversight in the European Union 105 (Dimitry Kochenov & Carlos Closa eds., 2016).

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should therefore be identified as rule of law issues and be incorporated in processes seeking to probe risks to EU values. Additionally, we demonstrated that the CEAS itself brings about systemic human rights violations. In this sense, policy-specific reform at legislative and operational levels is necessary. To date, both the EU and individual Member States have obscured the systemic nature of fundamental rights violations in asylum. This has led some commentators to herald the emergence of "Lawlessness Law" in the policy area of migration.[84] Identifying and responding to the "systemic" in asylum increasingly relates to the credibility of the EU as a Union based on the respect of democracy, fundamental rights, and the rule of law.

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[84]*See* Dimitry Kochenov & Sarah Ganty, *EU Lawlessness Law: Europe's Passport Apartheid: From Indifference To Torture and Killing*, (NYU L. Sch., Jean Monnet Working Paper No. 2/2022, 2023).

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