

DROWNING POLICIES: A PROPOSAL TO MODIFY THE
DUBLIN AGREEMENT AND REDUCE HUMAN RIGHTS
ABUSES IN THE MEDITERRANEAN

TABLE OF CONTENTS

TABLE OF CONTENTS	335
I. INTRODUCTION	336
II. THE CURRENT EU APPROACH.....	338
<i>A. The Dublin Regulation</i>	338
<i>B. Inadequate National Policies and Mandatory Detention</i> ...	340
<i>C. Frontex</i>	342
III. THE MALTESE DILEMMA	344
<i>A. Boat People: The Immigrant Flood in Malta and the Mediterranean</i>	344
<i>B. Maltese Detention Centers</i>	347
<i>C. Malta's Search and Rescue Area and International Law</i> ...	351
<i>D. The Pinar Incident</i>	353
IV. THE REGION OF ORIGIN APPROACH	355
<i>A. The Root of the Immigration Problem: Crossing the Sea to Offer Help</i>	355
<i>B. Existing Bilateral Agreements</i>	362
V. MODIFICATIONS TO THE DUBLIN REGULATION AND FRONTEX: INCREASING ACCOUNTABILITY AND TRANSPARENCY IN THE EU	364
<i>A. A Proposal to Modify the Dublin Regulation</i>	365
<i>B. Fixing Frontex</i>	367
VI. CONCLUSION	367

I. INTRODUCTION

Eskedar T.W. awoke early one morning in August 2007 to find the Eritrean Army knocking on the door of her two-room stone house.¹ The army of Dictator Isayas Afewerki came to enlist Eskedar's brother, Huriyyah.² With his whereabouts unknown, Eskedar cautiously suggested she could not help.³ The troops gave her an ultimatum: find her brother in two days or die.⁴ With no other options, Eskedar fled with her niece to Libya where the two boarded a forty-foot rubber boat bound for southern Europe.⁵ Close to three weeks into the voyage, the boat, filled with almost fifty immigrants, ran out of gas and drifted aimlessly in the Mediterranean for days.⁶ While awaiting rescue from passing ships, tensions on the boat rose as food rations depleted, leading to several tragic events.⁷ Eskedar was raped while others watched aboard the small vessel; days later she watched helplessly as her niece succumbed to the extreme conditions on the raft.⁸ When the Maltese Search and Rescue ("SAR") finally plucked the immigrants from the sea, only around ten were still alive.⁹

The trek across the sea was only the beginning. Eskedar spent the next six months in one of Malta's military-guarded detention centers¹⁰ because Maltese immigration law prescribes mandatory detention for illegal immigrants.¹¹ Because most immigrants flee on short notice, they often arrive in Europe with no documentation.¹² Thus, the victims

1. Online Interview with Eskedar T.W. (Oct. 21, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See *Q&A: Maltese Lawyer Stands up for Boatpeople*, UNHCR NEWS STORIES, Sept. 21, 2007, available at <http://www.unhcr.org/46f3eaea4.html> [hereinafter *Q&A*] ("Most people are rescued at sea Whether they are brought in or they land here, they are taken to register with the immigration police After registration, they are transferred to a detention centre.").

12. *Africans Search for Better Lives in Europe* (PBS television broadcast May

of Africa's ongoing struggle become criminals of consequence, imprisoned merely for wanting to survive.

With immigrant arrivals into Europe reaching over two million each year, European Union ("EU") Member States' populations are transforming.¹³ In some areas, healthy economic growth and decreasing unemployment rates have mitigated concerns about the impact immigrants are having on mainstream Europe.¹⁴ Despite this, many leaders and citizens alike view immigrants as a problem rather than an opportunity.¹⁵

The EU is in a unique position to affect the fundamental rights of immigrants by revising its immigration policies.¹⁶ Current EU policy exacerbates the human rights problems arriving immigrants suffer by requiring those seeking asylum to remain in the EU nations they arrive in, thus overburdening the immigration systems of those Member States.¹⁷ In particular, the Dublin Regulation¹⁸ and other strictly bilateral agreements between EU nations and immigrant source countries¹⁹ pose the most severe threat to immigrant safety.²⁰ The solution to the immigrant human rights problem needs to entail a more supranational approach involving a mandatory burden-sharing

11, 2006), *available at* http://www.pbs.org/newshour/bb/africa/jan-june06/immigration_05-11.html [hereinafter *Africans*].

13. HUGO BRADY, EU MIGRATION POLICY: AN A-Z 4 (Centre for European Reform 2008), *available at* http://www.cer.org.uk/pdf/briefing_813.pdf.

14. *Id.*

15. *Id.*

16. Press Release, European Data Prot. Supervisor, Revision of EURODAC and Dublin Regulations: EDPS Welcomes Attention Devoted to Data Protection and Other Fundamental Rights (Feb. 18, 2009), *available at* http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Annualreport/2004/Annual_Report_2004_EN.pdf.

17. BRADY, *supra* note 13, at 7.

18. *See discussion infra* Part II.A.

19. *See discussion infra* Part IV.B.

20. *See generally Italy/Libya: Gaddafi Visit Celebrates Dirty Deal*, HUM. RTS. WATCH, June 9, 2009, <http://www.hrw.org/en/news/2009/06/09/italylibya-gaddafi-visit-celebrates-dirty-deal> [hereinafter *Gaddafi*]; *see also* David Herrera, *Blame it on Libya*, MALTA TODAY, Apr. 29, 2009, *available at* <http://www.maltatoday.com.mt/2009/04/29/t7.html> ("Libya is not a signatory of the 1951 Convention on the Status of Refugees."). Libya only recognizes economic immigrants; this means they can repatriate immigrants at will. *Id.* The massive deportation of immigrants raises grave concerns regarding human rights abuses. *Id.*

mechanism between all EU Member States. Only a coherent and comprehensive approach to immigration will be effective for the EU.

This Comment details the widespread human rights abuses seaborne immigrants face to illustrate the effect a change to the Dublin Regulation will have on immigration in Europe. Next, Part II identifies the EU's current approach to immigration concerns and the resulting inhumane consequences this approach produces. Then, Part III of this Comment analyzes current immigration trends by studying Malta's problem as a microcosm of the immigration crisis strangling Member States along the EU's southern border.

Part IV describes the countries from which immigrants constantly flee and the reasons for their journey across the sea. Without a mandatory burden-sharing mechanism, the current immigration policy exposes EU Member States along Europe's southern border to massive numbers of immigrants arriving each year.²¹ As a result, bilateral agreements are formed on a national level with North African countries.²² These agreements offer minimal protection for immigrants and impair harmonization amongst Member States regarding immigration policies.²³ Finally, Part V offers ideas to modify existing policies in an effort to combat human rights abuses, especially with regard to the Méditerranéan region.

II. THE CURRENT EU APPROACH

A. *The Dublin Regulation*

Because the EU's current immigration policy is both incoherent and unenforceable, the entire region handles immigration concerns inconsistently, resulting in little transparency and almost no accountability.²⁴ The controlling legislation for immigration in the EU is the Dublin Regulation.²⁵

21. See Matthew Vella, *Home and Away*, MALTA TODAY, June 8, 2008, at 3.

22. See discussion *infra* Part IV.B.

23. See discussion *infra* Part IV.B.

24. BRADY, *supra* note 13, at 7. If policies across the EU were consistent “[a] common asylum system should mean that all EU member-states provide refugees with the same essential services on arrival; assess their claims the same way; and use the same rules to grant and withdraw refugee status.” *Id.*

25. *Id.*

The first Dublin agreement, commonly referred to as the “Dublin Convention,” was signed by EU Member States in 1990 and ratified in 1997.²⁶ The initial convention outlined the criteria for determining the extent to which a Member State was responsible for an asylum seeker (potential refugee).²⁷ Soon after the Dublin Convention’s inception, issues surfaced that were not explicitly addressed in the convention.²⁸ One such issue garnering much attention was the issue of preventing asylum seekers from exercising a broad choice to live in any EU Member State.²⁹ “Such movement was viewed negatively since all Member States were considered to be safe, [asylum seekers] could claim asylum in any of them and further movement across Europe therefore indicated a clear choice based on motives other than seeking protection.”³⁰ These concerns resurfaced in European Commission publications and were embodied in a new agreement called the “Dublin Regulation.”³¹

Enacted in September 2003, the Dublin Regulation required a Member State to “be responsible for processing the immigrant’s asylum application” when an asylum seeker “[had] irregularly crossed the border into a Member State.”³² This regulation was enacted to prevent asylum seekers from taking advantage of relaxed asylum laws in one Member State in an effort to reach a different EU Member State with better working conditions, a practice referred to as asylum shopping.³³ Contrary to this concern, “recent studies into the movement of asylum seekers actually reveal that family and cultural relationships and, in some cases, the role of smugglers are more significant in determining the final country of asylum.”³⁴ As a result

26. Michael Collyer, *The Dublin Regulation, Influences on Asylum Destinations and the Exception of Algerians in the UK*, 17 J. REFUGEE STUD. 375, 377 (2004).

27. *Id.* at 375.

28. *Id.* at 378.

29. *Id.*

30. *Id.*

31. *Id.*

32. Summaries of EU Legislation, Dublin II Regulation, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133153_en.htm (2009) [hereinafter Summaries].

33. BRADY, *supra* note 13, at 7.

34. Collyer, *supra* note 26, at 375.

of the Dublin Regulation, Mediterranean Member States are required to deal with a disproportionate number of asylum seekers compared to other European states.³⁵

B. Inadequate National Policies and Mandatory Detention

A common immigration arrangement, which the Dublin Regulation purports to provide, should require all Member States to offer immigrants uniform services and refugee claim evaluation on arrival.³⁶ The regulation's current procedure assumes that the "laws and practices of the participating [s]tates are all based on the same common standards."³⁷ The regulation also treats all Member States as equals with respect to the resources available to deal with refugees.³⁸ In reality, immigration procedures among EU Member States differ greatly, leading to human rights problems, especially in Member States overflowing with refugee populations.³⁹

For the smaller countries located on the EU's southern border, resources to deal with the immigration problem remain inadequate.⁴⁰ Discord regarding the Dublin Regulation means decisions made by Member States at the national level often go unchecked, especially regarding asylum.⁴¹ The Dublin Regulation states "detention of . . . [refugees] should only be possible under very clearly defined exceptional circumstances."⁴² Importantly, Article 27 of the regulation

35. See generally BRADY, *supra* note 13, at 19-20 ("The EU member-states along Europe's Mediterranean coastline have all experienced mass migration to their shores in recent years.").

36. *Id.* at 7.

37. Press Release, United Nations High Comm'r for Refugees, EU Urged to Revise its Dublin II Regulation in Order to Protect the Rights of Refugees and Asylum Seekers (Apr. 20, 2006). However, the press release acknowledges that asylum policies and practices in the European Union vary across countries, "causing asylum-seekers to receive different treatment across Europe." *Id.*

38. See Q&A, *supra* note 11 ("There is an unfortunate tendency in Europe to push the issue of immigrants to the border states, which are the least equipped and experienced in dealing with this problem.").

39. See BRADY, *supra* note 13, at 7; see also Q&A, *supra* note 11.

40. Q&A, *supra* note 11.

41. BRADY, *supra* note 13, at 7.

42. *Opinion of the Meijers Comm., Standing Comm. of Experts on Int'l Immigration, Refugee and Criminal Law, The Proposals to Amend the Dublin*

notes detention should be “possible only if there is a ‘significant’ risk of . . . [the immigrant] ‘absconding.’”⁴³ Because the “risk of absconding” is not defined in the regulation,⁴⁴ some Member States treat all asylum seekers who fall under the Dublin Regulation’s umbrella as posing a risk, thus swallowing up the rule of “exceptional circumstances” usually required for detention.⁴⁵

This problem is intensified in the Mediterranean region because Member States such as Malta and Cyprus are usually at the receiving end of the immigrant flow.⁴⁶ That is, these Member States are required to take care of arriving asylum seekers as well as failed asylum seekers who are trying to reenter Europe at various stages.⁴⁷ This situation results in acts of human rights abuses because the Mediterranean Member States’ detention centers lack the capacity to cope with the high volume of immigrants.⁴⁸

The Commission of the European Communities addressed the Dublin Regulation’s “deficiencies” relating to “the lack of harmonization” in the current asylum system when proposing suggestions for a “Common European Asylum System.”⁴⁹ Rather than promote commonality, the current regulation pushes immigrants away from the center of the EU to the periphery; consequently distributing immigrants unevenly across Europe, hitting the Mediterranean Member States especially hard.⁵⁰ This disproportionate distribution leaves countless asylum seekers without the protection they desperately need.

Regulation, at 5, COM (2009) 0902 (Mar. 18, 2009).

43. *Id.*

44. *Id.* The Dublin Regulation briefly stipulates the risk of absconding must be based on objective criteria defined by law. *Id.*

45. *Id.*

46. Vella, *supra* note 21.

47. *Id.*

48. See discussion *infra* Part III.B.

49. See *Commission of the European Communities, Proposal for a Regulation of the European Parliament and of the Council, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-country National or a Stateless Person*, at 2-5, COM (2008) 820 final (Mar. 12, 2008).

50. See BRADY, *supra* note 13, at 7.

The critics' concerns regarding the Dublin Regulation solidified after members of the European Parliament recently visited detention centers in Malta. The members recognized the limited capacity the centers in Malta possessed and suggested the EU make every possible effort to assist Member States facing similar situations.⁵¹ Further, the members believed future changes to the Dublin Regulation should incorporate a "fair mechanism for sharing responsibilities among the Member States."⁵² Parliament members also called for a community immigration policy that would take into account the geographical location and hosting capacity of border states when determining responsibility for immigrants.⁵³

C. Frontex

In recent years the EU's internal borders have been nearly eliminated, leading to an increase in the control of its external borders.⁵⁴ A European agency called Frontex is aiding the EU with controlling its external borders. This entity was established to manage "[o]perational [c]ooperation at the [e]xternal [b]orders" of the EU.⁵⁵ The border agency, in theory, operates as an "intelligence-based, independent and depoliticized" entity.⁵⁶ However, because Member States are still primarily responsible for controlling and surveying their borders,⁵⁷ Frontex's capacity to act is overly dependent on

51. Resolution on the Situation with Refugee Camps in Malta, EUR. PARL. DOC. P6_TA (0136) (2006) ("[V]isits by delegations from its Committee on Civil Liberties . . . in Malta[] have shown that asylum seekers are detained in conditions that fall far below internationally recognized standards Particular concerns include physical conditions, as well as inadequate or non-existent access to basic services, such as medical care or social and legal assistance.").

52. *Id.*

53. *Id.*

54. Wies Maria Maas, *Fleeing to Europe: Europeanization and the Right to Seek Refugee Status* 39 (Inst. of Soc. Studies, Working Paper No. 454, 2008).

55. Council Regulation 2007/2004, Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1 (EC), *available at* <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:349:0001:0011:EN:PDF> [hereinafter Agency].

56. Maas, *supra* note 54, at 39.

57. Agency, *supra* note 55, at 4 ("Member States may continue cooperation at

cooperation from other Member States.⁵⁸ “In addition, there is a severe lack of democratic control over the agency’s activities,”⁵⁹ mainly because the European Parliament’s power over the organization is solely focused on allocating a budget.⁶⁰ Further adding to the lack of oversight is the fact that the risk assessments Frontex agents prepare, which form the basis for all joint operations, are kept secret from the public.⁶¹

Although the regulatory language establishing Frontex subjects the agency to protection obligations under the Refugee Convention,⁶² the agency’s mission is defined strictly in security terms.⁶³ The agency’s role is to assist Member States in training national border guards, to follow up on research relevant to the control and surveillance of external borders, to assist Member States in situations requiring increased technical and operational support to secure their borders, and, to provide Member States with the proper support regarding joint return operations.⁶⁴ Notably, absent from Frontex’s mission is the obligation to protect immigrants.

Importantly, Frontex’s policies aim to prevent immigrants from entering the EU rather than protect their rights.⁶⁵ Commentators compare Frontex’s efforts to “erecting a Berlin wall on water, controlling [the EU’s] border[s] while removed from public scrutiny.”⁶⁶ Unfortunately, the agency’s preventative approach has not

an operational level with other Member States and/or third countries at external borders, where such cooperation complements the action of the agency.”).

58. Maas, *supra* note 54, at 40 (citing Sergio Carrera, *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands* 9 (Ctr. for European Policy Studies, Working Document No. 261, 2007)).

59. Maas, *supra* note 54, at 40.

60. *Id.*

61. *Id.*

62. Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 655 (2009).

63. *See* Agency, *supra* note 55, at 1.

64. *Id.* at 4.

65. *See* Nessel, *supra* note 62 (“FRONTEX defines its mission in security terms – ‘to integrate national border security systems of Member States against all kinds of threats that could happen at or through the external border of the Member States.’”).

66. Nessel, *supra* note 62, at 656.

helped save immigrant lives.⁶⁷ In fact, data suggests that some immigrants purposefully avoid Frontex patrols and use more hazardous routes where Frontex is absent.⁶⁸

Another negative consequence of Frontex's presence in the region is that human traffickers capitalize on Frontex's patrols by using less expensive material when building the boats used to cross the Mediterranean.⁶⁹ The cheaper material decreases the chance of the boats returning, thereby reducing the traffickers' need to pay for fuel for return trips.⁷⁰ Even Frontex Chief Ilka Laitenen has admitted traffickers have benefitted from Frontex's presence in the Mediterranean: "traffickers force migrants to sink the boats they are sailing in, so that they will be rescued by Frontex vessels."⁷¹

III. THE MALTESE DILEMMA

A. Boat People: The Immigrant Flood in Malta and the Mediterranean

Notably, the majority of the 65,000 immigrants crossing the Mediterranean into Europe every year hail from Sub-Saharan Africa.⁷² Additionally, organized crime groups from Libya transport thousands of immigrants from their northern shores into Europe via central Mediterranean routes.⁷³ With Libyan officials unable and unwilling to control the flow of immigrants entering and leaving their country, Mediterranean EU Member States like Malta will continue to feel the

67. *Id.*

68. *Id.*

69. *Id.* at 652.

70. *Id.*

71. Jim Brundsen, *Frontex Chief Warns About Failure to Reduce Migration*, EUROPEANVOICE.COM, Nov. 9, 2008, available at <http://www.europeanvoice.com/article/imported/frontex-chief-warns-about-failure-to-reduce-migration/62224.aspx>.

72. Alexander Betts, *Towards A Mediterranean Solution? Implications for the Region of Origin*, 18 INT'L J. REFUGEE L. 652, 652 (2006).

73. Roderick Pace, *European Parliament Election Briefing No. 27 the European Parliament Election in Malta*, EUR. PARTIES ELECTIONS AND REFERENDUMS NETWORK 1, 11 (June 6, 2009), available at http://www.sussex.ac.uk/sei/documents/no_27_epernep2009malta.pdf.

pressure of seaborne immigrants.⁷⁴

The Dublin Regulation and Frontex exacerbate the uncertainty for Mediterranean Member States, like Malta, dealing with immigration problems. Malta's increasing role in dealing with asylum seekers is in large part due to the nation's geographical location.⁷⁵ Sitting just 180 miles north of Africa and fifty-eight miles south of Sicily, the archipelago, made up of three islands,⁷⁶ has become the frontline for immigration since it joined the EU in 2004.⁷⁷ The problem is intensified because Malta is already one of the most urban and densely populated countries in the world.⁷⁸ Given Malta's small land area of 122 square miles (about twice the size of the District of Columbia)⁷⁹ and the roughly 400,000 inhabitants who dwell on the island,⁸⁰ immigration poses a tremendous strain on an already resource-limited country.⁸¹

Since the 1990s, the number of immigrants coming into the EU

74. *See id.* ("Libya claims it does not have the means to supervise its long land borders (4,348 km) to stop irregular immigrants from entering the country from sub-Saharan Africa, nor to control its extensive coastline (1,770 km) to stop them from trying to reach Europe.").

75. News Release, National Statistics Office-Malta, World Refugee Day (June 19, 2006), available at <http://www.nso.gov.mt/> (follow "world refugee day 2006"; then follow "World Refugee Day 2006" hyperlink under "news release or publication") [hereinafter News Release].

76. Health and Human Services in Malta, James Madison University, *About Malta: It's an Education and an Adventure Right in the Middle of the Mediterranean Ocean*, (Sept. 6, 2008), <http://www.iihhs.jmu.edu/malta/about.html>.

77. *See* Derrick Lutterbeck, *Small Frontier Island: Malta and the Challenge of Irregular Immigration*, 20(1) MEDITERRANEAN Q. 119, 119-20 (2009), available at <http://mq.dukejournals.org/cgi/content/abstract/20/1/119> (arguing that even though the number of seaborne immigrants coming to Malta's shores has been modest, given the countries geographic makeup and sheer numbers in population, the immigration issue stands as not only Malta's top priority, but also the EU's).

78. *Background Note: Malta*, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, U.S. DEP'T OF STATE (Oct. 2009), <http://www.state.gov/r/pa/ei/bgn/5382.htm>.

79. *Id.*

80. *Id.* This number equates to around 3000 people per square mile and is dramatically different than the United States' fifty-five people per square mile amount. *Id.*

81. *See id.* ("Possessing few indigenous raw materials and a very small domestic market, Malta's economic development since the beginning of the 1990s has been based on tourism.").

via boat has increased dramatically.⁸² What started as a slow leak of boat people into Malta in the early 2000s has quickly progressed into a steady stream of Africans showing up on the tiny island.⁸³ From 2002 through 2006, 142 boats arrived in Malta carrying over 5700 immigrants.⁸⁴ In the first nine months of 2008, close to 2600 boat people arrived from North Africa, 800 more than in the whole of 2007.⁸⁵

Just as the immigration problem in Malta is intensified due to minimal resources, scarce land area, and its proximity to Africa,⁸⁶ other Member States located “at the geographic periphery of the EU,”⁸⁷ such as Cyprus and Greece, face numbers of immigrants disproportionate to their availability of resources.⁸⁸ In 2004, the tiny Italian island of Lampedusa, which is the closest Mediterranean entry point for immigrants coming from North Africa,⁸⁹ encountered 600 immigrants in one night alone.⁹⁰ Since then, Italy has reversed its policy toward immigrants and deported hundreds back to Libya.⁹¹

82. Betts, *supra* note 72, at 652.

83. Shaun Ley, *Malta Struggles with Desperate Refugees*, BBC NEWS, May 9, 2009, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/8040797.stm>. In 2003, 500 people were rescued by the Maltese. *Id.* Six years later, that number increased to 3400 people arriving. *Id.*

84. News Release, *supra* note 75. These figures were calculated according to the following statistics: in 2002, twenty-one boats arrived carrying 1686 people; in 2003, twelve boats arrived carrying 502 people; in 2004, fifty-two boats arrived carrying 1388 people; in 2005, forty-eight boats arrived carrying 1822 people; and up to mid-June 2006, nine boats arrived carrying 378 people. *Id.*

85. *Dozens Dead or Missing in the Gulf of Aden; Boat People Figures Rise*, UNHCR NEWS STORIES, Nov. 4, 2008, available at <http://ocha-gwapps1.unog.ch/rw/rwb.nsf/db900sid/EGUA-7L3MNF?OpenDocument>.

86. See generally *Background Note: Malta*, *supra* note 78.

87. BRADY, *supra* note 13, at 7.

88. *Id.* Greece offers one of the EU’s most permeable places of entry for seaborne immigrants because its sizable shoreline extends out over an endless number of islands. *Id.* at 20. In 2007 the country faced an elevated number of illegal arrivals. *Id.*

89. *Id.* In 2006, 178 vessels carrying over 10,000 people arrived in Lampedusa. *Id.*

90. JOANNE VAN SELM & BETSY COOPER, THE NEW “BOAT PEOPLE”: ENSURING SAFETY AND DETERMINING STATUS 62 (Migration Pol’y Inst. 2006), available at http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf.

91. *Id.*

This has raised concerns with several human rights organizations, such as the United Nations Refugee Agency, because they are frequently denied access to these rejected immigrants and worry that Italian officials ignore necessary precautions to ensure the immigrants' safety upon their return to Libya.⁹²

B. Maltese Detention Centers

Calling the immigrant flow into Malta anything but a flood would be unfair because the number of immigrants arriving in Malta is equivalent to almost half of Malta's annual birthrate.⁹³ Considering Malta's size, the numbers are even more staggering: one immigrant landing in Malta is the equivalent of almost 1000 in Italy and over 1100 in Germany.⁹⁴ Because immigration procedures remain a national responsibility,⁹⁵ as opposed to a supranational one, the Maltese government feels forced to implement a detention policy to limit the effect the immigrants have on the country.⁹⁶ The EU's involvement in the matter has resulted in the creation of existing regulations, such as the Dublin Regulation, that "place a disproportionate responsibility on the states of southern Europe in the absence of a clear EU responsibility-sharing mechanism."⁹⁷ Although EU officials argue that a common asylum system like the Dublin

92. *Id.* at 62-63. UNCHR's is primarily concerned because:

Libya is not a signatory to the 1951 Convention relating to the Status of a Refugees and is widely documented for its abuses of human rights; There is no formal framework for dialogue and accountability in relations between EU and Libya; While the EU as a whole engages in developing a framework for dialogue with Libya on migration and other issues, the gravity of the expulsion practice by Italy is being ignored.

See also Eur. Consult. Ass'n., *Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers*, Doc. No. 11304 (2007) (stating that the UNCHR has developed a ten-point plan of action to address the immigrant problem in the Mediterranean).

93. European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report by the LIBE Committee Delegation on its Visit to the Administrative Detention Centres in Malta*, at 3, EUR. PARL. DOC. PV 613713 (March 30, 2006) (prepared by Giusto Catania) [hereinafter *Detention*].

94. *Id.*

95. VAN SELM & COOPER, *supra* note 90, at 47.

96. *Detention*, *supra* note 93, at 3.

97. Betts, *supra* note 72, at 654.

Regulation will eradicate human rights abuses and ensure immigrants the necessary protections, so far these regulations have only fueled human rights abuses in the central Mediterranean.⁹⁸

Many immigrants coming into Mediterranean Member States from Africa are rescued at sea.⁹⁹ However, tragedy frequently strikes and transforms the Mediterranean's clear blue waters into a graveyard.¹⁰⁰ The death toll of immigrants crossing the Mediterranean from Africa, between 1993 to 2003, was approximated to be at least 10,000.¹⁰¹ Yet even when the immigrants survive the journey across the sea, many possess no legal paperwork upon arrival, thus they are not able to successfully enter Europe.¹⁰²

Typically, immigration procedures are left to the national governments of EU Member States,¹⁰³ and Member States like Malta have formed immigration policies to account for its "inability to receive the foreigners arriving in successive waves, and inability to settle them."¹⁰⁴ Notably, Malta's Immigration Act of September 21, 1970 and the Refugees Act of October 1, 2001, provide the basis for Malta's generalized detention policy.¹⁰⁵ Maltese law dictates that

98. BRADY, *supra* note 13, at 7.

99. *See Q&A*, *supra* note 11 ("Most people are rescued at sea; there are incidents when only a small number of people survive.").

100. *Between the Devil and the Deep Blue Sea: Mixed Migration to Europe*, UNHCR NEWS STORIES, Oct. 5, 2007, available at <http://www.unhcr.org/470658fe4.html> [hereinafter *Migration*] ("[H]undreds of migrants and refugees continue to drown or simply disappear while attempting the perilous crossings. 'Rarely a week goes by without some news of an unseaworthy boat that has sunk with its passengers on board, dead bodies being washed ashore on the holiday beaches of southern Europe,' said UNHCR's Assistant High Commissioner for Protection Erika Feller.").

101. Maurizio Albahari, *Death and the Modern State: Making Borders and Sovereignty at the Southern Edges of Europe* 3 (The Center for Comparative Immigration Studies, Univ. of Cal., San Diego, Working Paper No. 137, 2006). This number is purely speculative since many immigrant deaths go undocumented because the boat and all the evidence sinks with them. *Id.* at 2 n.5-6.

102. *Africans*, *supra* note 12.

103. BRADY, *supra* note 13, at 7.

104. INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, LOCKING UP FOREIGNERS, DETERRING REFUGEES: CONTROLLING MIGRATORY FLOWS IN MALTA 7 (Sept. 2004), available at <http://www.fidh.org/IMG/pdf/mt403a.pdf> [hereinafter LOCKING UP FOREIGNERS].

105. *Id.* The Immigration Act of 1970 was amended in 2002 "to restrict,

while illegal entry into Malta is not a criminal offense, it continues to be considered an administrative one.¹⁰⁶ Further, the punishment for this offense is detention pending repatriation.¹⁰⁷

Before 2005, the length of detention in Maltese immigration centers was not defined.¹⁰⁸ However, currently, the time spent in these centers cannot exceed eighteen months.¹⁰⁹ Immigrants and asylum seekers are detained in one of four detention centers located on the island: “Safi Barracks, a military structure which contains three compounds for detainees; Hal Far Immigration Reception Centre; Ta’ Kandja Detention Centre[,] which is inside the headquarters of the police Special Assignment Group . . . [and] Lyster Barracks [in] Hal Far, another military compound.”¹¹⁰ An army colonel from the Maltese Military oversees the centers.¹¹¹

The conditions in the administrative centers fall well below normal decency standards. For example, toilets and showers are all shared and doors are not equipped with locks.¹¹² Representatives of Malta’s Immigrants’ Commission stated, at the time the centers were created, their sole purpose was to accommodate equipment, not people.¹¹³ The Commission also stated most of these centers lacked respect for human rights.¹¹⁴

control and regulate immigration into Malta and to make provision for matters ancillary thereto.” *Id.* The Refugees Act of 2001 is meant “to make provisions relating to and establishing procedures with regard to refugees and asylum seekers.” *Id.*

106. *Detention*, *supra* note 93, at 2.

107. *Id.*

108. *Id.*

109. *Id.* For asylum seekers waiting for the results of their appeals, the maximum time is twelve months. *Id.* Because Malta has limited resources, detainees at these “closed” centers can wait up to nine months before their first interview with the Maltese Commission for Refugees. *Id.*

110. Jesuit Refugee Service, *Detention in Malta*, <http://www.jrsmalta.org/detention.html> (last visited Apr. 14, 2010).

111. *Detention*, *supra* note 93, at 2.

112. *Q&A*, *supra* note 11.

113. *Detention*, *supra* note 93, at 3.

114. *Id.* Upon arrival the immigrants are not interviewed and are given a form to fill out in English. *Id.* Even at the first interview, which sometimes occurs months later, an interpreter may not be present to lend any services if there has been a massive influx of asylum seekers. *Id.*

350 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 40]

Further, in the men's Hal-Safi detention center, which has been described as a "cage,"¹¹⁵ there are no sheets on the beds and the mattresses are broken and dirty.¹¹⁶ Detainees have no access to an outside area for fresh air and there is no heating in the center for cold nights.¹¹⁷ In addition, the immigrants are presented with deplorable conditions: the showers are broken, there is no hot water available, the toilets do not have doors and are in total disrepair, and there is dirt everywhere throughout the facility.¹¹⁸

Moreover, trained military personnel guard the detainees and, because regulations are silent as to how the centers should operate, especially with regard to prisoner rights and the guards' decision-making powers, many decisions on prisoner treatment are discretionary.¹¹⁹ In fact, "information concerning these facilities . . . is not made public. It can only be checked indirectly by talking to the few people (lawyers, NGOs [nongovernmental organizations], religious representatives) who have access to them or have lived there."¹²⁰

Malta's cautious behavior towards releasing information about the closed centers has drawn complaints from the United Nations Human Rights Commission.¹²¹ These centers, some of which are merely converted military barracks, are crowded with African immigrants, some of whom are from opposite warring factions back home.¹²² One official's remarks show the gravity of the detention centers' problems: "The conditions are really horrible, shameful . . . I'm embarrassed to be Maltese and have this situation here."¹²³ Additionally, a twenty-

115. AMNESTY INT'L, AMNESTY INT'L REPORT 2007: HUMAN RIGHTS IN REPUBLIC OF MALTA.

116. *Id.* "A delegation of the [EU Committee on Civil Liberties, Justice and Home Affairs], visiting four detention centres, found that the Hal-Safi detention centre 'was like a cage.'" *Id.*

117. *Id.*

118. *Id.*

119. See LOCKING UP FOREIGNERS, *supra* note 104, at 11.

120. *Id.*

121. Jennifer Carlile, *Malta Offers a Station to Nowhere*, MSNBC.COM, June 20, 2007, http://www.msnbc.msn.com/id/18982936/ns/world_news-frontier_europe.

122. *Id.*

123. *Id.* This statement can be attributed to the head of UNHCR's Malta office, Neil Falzon. *Id.*

four-year-old immigrant from Chad described the conditions in Malta: “[i]t’s no better than Chad, but we can’t do anything. We can’t go forward and we can’t go back. We can do nothing.”¹²⁴

C. Malta’s Search and Rescue Area and International Law

Malta is situated directly in the central Mediterranean Sea, thus maritime traffic is unavoidable. Importantly, the responsibility to save people who are at risk on the high seas is a maritime obligation explicit in multiple international laws; the duty one owes after rescue, however, remains unclear.¹²⁵ Notably, the United Nations Convention on the Law of the Sea (“UNCLOS”) imposes a duty on the “flag state”¹²⁶ to render assistance to any persons who are in distress on the high seas.¹²⁷ Significantly, Article 98(1) of UNCLOS, dealing with the duty to render assistance, reads:

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him¹²⁸

Additionally, the Geneva Convention on the High Seas of 1958, and the London Convention on the Safety of Life at Sea (“SOLAS”), also afford protection to distressed persons at sea.¹²⁹

While Malta is dwarfed in size by other nations, the Maltese Search and Rescue Region (“SRR”) area is vast, covering more than

124. *Id.*

125. Nessel, *supra* note 62, at 632.

126. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N.T.S., art. 98(1). “Flag state” refers to the state under whose flag the rescuing ship sails. *See id.* The flag state must assume jurisdiction under its internal law over each ship flying its flag and over technical and social matters concerning the ship. *Id.* art. 94(2)(b).

127. *Id.* art. 98(1).

128. *Id.*

129. Michael Pugh, *Europe’s Boat People: Maritime Cooperation in the Mediterranean*, INST. FOR SEC. STUD. WEU 3, 56 (2000), http://www.aei.pitt.edu/501/01/chai41e.html#_ftn94.

352 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 40]

250,000 square kilometers.¹³⁰ The SRR is approximately the same size as Great Britain and spans from Tunisia to Greece.¹³¹ Many boats entering Malta's SRR are overflowing with immigrants aboard crafts that are rarely seaworthy.¹³² With international maritime law obligating the Maltese authorities to assist boats in distress in Malta's SRR,¹³³ many of these immigrants reach Malta when the Armed Forces of Malta rescue them at sea.¹³⁴

Coupled with the EU's Dublin Regulation, Malta's SRR adds more people to an island already swollen with immigrants.¹³⁵ Various Maltese officials have proposed to reduce the SRR, claiming its current size is "hindering the country's ability to handle the illegal immigration problem effectively."¹³⁶ However, Malta's government has vetoed this suggestion.¹³⁷ Maltese officials have also rejected Italian requests for Malta to relinquish segments of its SRR in an effort to reduce immigrant arrivals via rescues at sea.¹³⁸

The feud over the SRR between Malta and Italy has little to do with a desire to acquire more immigrants. The nations seek benefits from patrolling larger regions including financial services for their respective coastal agencies, a potential increase in lucrative fishing

130. Search and Rescue (SAR) in Malta, Search and Rescue Training Centre, http://sarmalta.gov.mt/sar_in_Malta.htm (last visited Apr. 14, 2010).

131. Herman Grech & Kurt Sansone, *Shrinking Malta's Search and Rescue Area is 'Not an Option,'* TIMES OF MALTA, Apr. 26, 2009.

132. *See Migration, supra* note 100.

133. *See Nessel, supra* note 62, at 632.

134. *See* Search and Rescue (SAR) in Malta, *supra* note 130 ("The primary responsibility for the co-ordination of all SAR cases within the Maltese SRR lies with the Armed Forces of Malta.").

135. *See* discussion *infra* Parts II.A., III.A.

136. *See* Grech & Sansone, *supra* note 131 ("Prof. Cassola maintains that Malta should relinquish a large part of its search and rescue region until it is given sufficient financial and human resources to man it."). The same official asks "Why should we [Malta] risk taking on a bigger chunk of the immigration problem to get some money in return?" *Id.*

137. *See id.* ("The [Maltese] Cabinet had shot down a proposal . . . to shrink the SAR area by some 70 per cent.").

138. *Id.* ("Dr. Mifsud Bonnici [Malta's Foreign and Home Affairs Minister] said: 'There is no discussion on the size of our search and rescue area. It would be wrong to argue that Malta should give up its search and rescue zone because of the current problem with illegal immigration.'").

and more importantly, potential oil exploration.¹³⁹ In addition, Malta's reluctance to surrender portions of its SRR to Italy is logical because Malta receives millions of Euros every year in air traffic control fees for allowing aircrafts to utilize its airspace.¹⁴⁰

Other officials argue, however, that profits from the airspace do not outweigh the glaring human risks associated with taking on more immigrants.¹⁴¹ These officials propose to yield parts of the SRR until adequate financial and human resources are in place to maintain it.¹⁴² In the alternative, the international community could intervene because international maritime law requires coastal states make arrangements to provide adequate services in their coastal waters.¹⁴³

D. The Pinar Incident

April 2009 brought more debate between Italy and Malta regarding their respective search and rescue zones and the duties owed under international law, specifically under the Search and Rescue Convention.¹⁴⁴ A Turkish cargo ship named *Pinar*, which was packed with approximately 140 immigrants, was granted access to disembark on the island of Sicily based on humanitarian grounds, following the Maltese government's refusal to accept the ship.¹⁴⁵ The immigrants lingered in international waters for three days while the two Member States disputed who was responsible for taking them in.¹⁴⁶ As the two Member States feuded, a fifteen-year-old girl and a pregnant woman who needed to be evacuated off the ship passed away amidst the

139. *Id.* ("Benefits range from funding for the Italian Guardia Costiera, to fishing zones, and even oil exploration.").

140. *Id.*

141. *Id.*

142. *Id.* Professor Arnold Cassola has stated that Malta should not risk taking on more of the immigration problem just to receive some money in return. *Id.*

143. International Convention on Maritime Search and Rescue, ch. 2.1.1., Apr. 27, 1979, S. Treaty Doc. No. 96-45.

144. *See Italy: Immigrants Land in Sicily After Rejection by Malta*, ADNKRONOS INT'L, Apr. 20, 2009, available at <http://www.adnkronos.com/AKI/English/Security/?id=3.0.3233123625#> [hereinafter *Italy*].

145. *Id.*

146. *Id.*

extreme conditions aboard the vessel.¹⁴⁷

The tragedy started when the two boats carrying the immigrants began to take on water.¹⁴⁸ *Pinar*, which was passing nearby, plucked the drowning immigrants from the sea.¹⁴⁹ A spokesperson from the Maltese Army Rescue Coordination Center stated that because *Pinar* was the closest ship to the immigrants, the Maltese requested the ship intervene.¹⁵⁰ Italy argued that because *Pinar* rescued the immigrants in Malta's SRR, the Maltese were responsible for the immigrants.¹⁵¹ Malta responded by pointing to international conventions, saying the safest and closest port of call, the Italian island of Lampedusa, owed the duty to the rescued immigrants.¹⁵²

The *Pinar* incident underscores a major concern regarding the proper interpretation of countries' duties under the Search and Rescue Convention. Italy's insistence that Malta take in any and all rescued in Malta's SRR signals a troubling and dangerous change in immigration policies from Malta's neighbors that would make Malta responsible for all persons rescued in its SRR regardless of whether a safer port of call exists (e.g., the Italian island of Lampedusa in the *Pinar* case).¹⁵³ Therefore, the immigrants' final destination in the *Pinar* case was extremely important for Malta because accepting the immigrants would have appeared as an admission that Italy's revised reading of the Search and Rescue Convention was correct.¹⁵⁴

International law currently requires that rescuers transport persons to the nearest and safest port of call.¹⁵⁵ Recently, Member States along the EU's southern border, such as Italy and Spain, have been advocating for modification within the International Maritime

147. Raphael Vassallo, *Politics, Legal Wrangling at Heart of Malta-Italy Standoff*, MALTA TODAY, Apr. 19, 2009, available at <http://www.maltatoday.com.mt/2009/04/19/t10.html>.

148. *Italy*, *supra* note 144.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Vassallo, *supra* note 147.

154. *Id.*

155. *Irregular Migration by Sea: Frequently Asked Questions*, ASYLUM IN THE UN, May 28, 2009, <http://www.unhcr.org/4a1e48f66.html>.

Organization.¹⁵⁶ This modification would result in the coordinating Member State (the Member State's SRR in which the immigrants are rescued) rather than the safest port of call, holding responsibility for the immigrants.¹⁵⁷ Malta's vehement objection to its neighbors' ideas is reflected in its reluctance to ratify changes to international maritime law.¹⁵⁸ Many involved in the EU believe the positions embraced by Italy and Spain are an effort to pressure Malta into ceding its profitable SRR.¹⁵⁹

IV. THE REGION OF ORIGIN APPROACH

A. The Root of the Immigration Problem: Crossing the Sea to Offer Help

Prior approaches to immigration in the Mediterranean have focused mainly on the symptoms, rather than examining the reasons for so many Africans migrating north.¹⁶⁰ A survey conducted in 2000, representing a small portion of immigrants, shows where immigrants come from and why.¹⁶¹ A majority of immigrants stated they migrated to the EU because of what many would call "push factors," economic and political hardships forcing them to leave their home countries.¹⁶²

Most of the human rights violations African immigrants suffer, as well as the Africans' subsequent migration into Europe, occur for

156. See generally International Maritime Organization, <http://www.imo.org/HOME.HTML> (last visited Apr. 14, 2010) ("The Convention establishing the International Maritime Organization (IMO) was adopted in Geneva in 1948. . . . IMO's main task has been to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping.").

157. Grech & Sansone, *supra* note 131.

158. *Id.*

159. *Id.*

160. Betts, *supra* note 72, at 653. Even less prevalent is the idea of instituting a more comprehensive approach centered on engagement with the region of origin. *Id.*

161. *Id.* at 657 ("[T]he civil war in Sierra Leone [,] . . . the ethnic and religious conflict in Nigeria, the civil conflict in the Ivory Coast, the onward movement of Liberians [,] . . . and the widespread insecurity in the DRC, in particular, all point to how many are likely to have been fleeing a well founded fear of persecution.").

162. *Id.*

political reasons.¹⁶³ The problems are exacerbated by the fact that many African nations are unable to sustain democratic governments due to continuous cycles of vicious coups and military dictatorships.¹⁶⁴ Consequently, glaring human rights abuses occur in several parts of Africa, often supervised by the state.¹⁶⁵ Countries where severe human rights abuses are well documented include the Democratic Republic of the Congo (“DRC”), Sierra Leone, Liberia, Sudan, and Côte d’Ivoire.¹⁶⁶

Political instability in Africa has had an impact across the Mediterranean as well because it increases African immigration into the EU.¹⁶⁷ Southern Europe is especially familiar with this phenomenon; since the early 1990s, a flood of North Africans have attempted to make the perilous trek across the Mediterranean to reach mainland Europe.¹⁶⁸ In addition, since 2000, there has been an increase in irregular immigration from sub-Saharan Africans, who now make up the “largest category of irregular boat migrants.”¹⁶⁹ In response to the increased immigration, “European states intensified border controls and have attempted to ‘externalize’ these policies by pressuring certain North African countries to clamp down on irregular migration.”¹⁷⁰ The European response to irregular immigration has failed to prevent immigration and has resulted in “increasing violations of migrants’ rights and a diversification of trans-Saharan

163. See generally FIONA TEXEIRE, AT THE GATE OF FORTRESS EUROPE: IRREGULAR IMMIGRATION IN MALTA 23-24 (2006), available at <http://www.alternattiva.org.mt/filebank/documents/Fiona%20TEXEIRE-%20At%20the%20Gate%20of%20Fortress%20Europe.pdf>.

164. *Id.* at 23.

165. *Id.* at 23-24 (“[G]reat instability . . . was mainly the result of marginalization of certain ethnic groups and graft under . . . leaders. Many politicians have used the positions of power to ignite ethnic conflicts that had been exacerbated, or even created, under colonial rule.”).

166. *Id.* at 24.

167. See HEIN DE HAAS, IRREGULAR MIGRATION FROM WEST AFRICA TO THE MAGHREB AND THE EUROPEAN UNION: AN OVERVIEW OF RECENT TRENDS 9 (2008) (“[T]here has been an incontestable increase in regular and irregular West African migration to Europe over the past decade.”).

168. *Id.*

169. *Id.*

170. *Id.* at 10.

migration routes.”¹⁷¹

Some scholars propose that a comprehensive engagement with the countries of origin is the best solution to combating immigrant human rights abuses in the EU.¹⁷² This approach applies both preventative and mitigating procedures that relate to immigrants and the causes of their “distress[ed] migration.”¹⁷³ Reconstruction and peace building initiatives are suggested as specific procedures for fixing the root cause of African immigration.¹⁷⁴ Proponents of this approach argue that if the root cause of immigration is addressed, then more incentives will be put into place for immigrants to stay in their countries of origin.¹⁷⁵ The EU applied this method when it committed troops to de-escalate the conflict in the DRC and provided funding for institution building.¹⁷⁶ However, cooperation between service providers and other humanitarian efforts was limited and often problematic.¹⁷⁷

The regional solution approach, while idealistic in nature, fails to overcome the problems associated with a lack of international cooperation and humanitarian aid. The regional approach naively assumes a robust relationship between coordinating agencies in Africa, the EU, and national governments, despite the fact that successful international cooperation on refugee policy in Africa has

171. *Id.*

172. *See* Betts, *supra* note 72, at 654-55.

173. *Id.* at 669:

In the context of a Mediterranean Solution, comprehensive engagement with countries of origin needs to imply both preventative and palliative measures. . . . [E]ngaging with the country of origin is the most crucial but also the most complex element of a viable long-term solution. It requires a coordinated approach that spans the areas of migration, development, peace-building, and post-conflict resolution.

174. *Id.* at 670.

175. *Id.*

176. *See* DAVID MCKEEVER ET AL., FOREIGN TERRITORY: THE INTERNATIONALISATION OF EU ASYLUM POLICY 107 (2005) (“The EU is active in a wide range of sectors, from infrastructure to health, food security, policing, and justice. In addition, the EU played a prominent role in conflict reduction through its deployment of Operation Artemis in Ituri district in mid-2003.”).

177. *See id.* (“Despite the large numbers of Congolese refugees and asylum seekers in Europe, the DRC has not been the focus of specific grants through the migration co-operation budget.”).

been “extremely rare.”¹⁷⁸ Logically, the regional solution’s success relies heavily on substantial coordination amongst the proper governmental and non-governmental agencies.

For example, Operation Artemis (“Operation”)¹⁷⁹ depicts the high level of coordination needed when adopting a region of origin approach to resolve conflict in Africa. In 2003, the EU sent troops to the DRC to help stabilize the region.¹⁸⁰ While the French military represented a majority of the forces involved, the EU determined the Operation’s planning and rules of engagement.¹⁸¹ While the headquarters for the Operation were based in Paris and included eighty officers gathered from all over Europe, the military command center was based in Entebbe, Uganda, “serv[ing] as a logistical hub to dispatch the necessary forces to Bunia.”¹⁸² The Political and Security Committee was responsible for the political control and strategic direction of the Operation, “including the power to amend the operational plan, the chain of command and the rules of engagement.”¹⁸³ This layered approach, involving numerous parties situated in different geographic regions, produced questionable results.¹⁸⁴ Some shortcomings included “the need for better and secure means for long-distance communications, better information technology, intelligence sharing and the need to improve the

178. See Betts, *supra* note 72, at 671.

179. Kees Homan, *Operation Artemis in the Democratic Republic of Congo*, in *FASTER AND MORE UNITED? THE DEBATE ABOUT EUROPE’S CRISIS RESPONSE CAPABILITIES* 151, 151 (2007):

In June 2003, the EU sent Operation [Artemis], to the Democratic Republic of Congo. . . . The objective of Operation Artemis was to contribute to the stabilisation of the security conditions in Bunia, capital of Ituri, to improve the humanitarian situation, and to ensure the protection of displaced persons in the refugee camps in Bunia.

180. MCKEEVER ET AL., *supra* note 176 (“[T]he EU resumed formal development cooperation with the DRC in 2003. The EU is active in a wide range of sectors, from infrastructure to health, food security, policing and justice [T]he EU played a prominent role in conflict reduction through its deployment of Operation Artemis.”).

181. Homan, *supra* note 179, at 152.

182. *Id.*

183. *Id.* at 153. The Political and Security Committee is under the responsibility of the European Council to which it reports regularly. *Id.*

184. See MCKEEVER ET AL., *supra* note 176, at 77.

interoperability of European armed forces.”¹⁸⁵

Another example of the shortcomings of the region of origin approach in Africa is reflected by the problems relief agencies face. The EU agency responsible for humanitarian aid in crisis regions, the European Commission Humanitarian Aid Department (“ECHO”), provides relief supplies and services through intermediary organizations.¹⁸⁶ Logically, without UN troops keeping these crisis regions secure, ECHO’s ability to provide food assistance, vaccinations, road and house reconstruction, and other aid related programs in countries like the DRC would certainly be limited and probably nonexistent.¹⁸⁷ With UN troops in the DRC incapable of night flights and faced with a shortage of ammunition on the weekends, one commanding UN general stated “the UN will not be able to protect the tens of thousands of refugees there” if rebels attack.¹⁸⁸ Without agencies facilitating aid in an organized and coordinated effort, a region of origin approach will ultimately fail.

Assuming interagency collaboration results in improved peace talks and healthier, sustainable living conditions, any respite in conflict is typically short-lived due to Africa’s political instability.¹⁸⁹ After the Operation demilitarized the city of Bunia, the transition to “Bangladeshi-led MONUC forces” had mixed success.¹⁹⁰ The arms

185. Homan, *supra* note 179, at 154.

186. UNITED NATIONS REGIONAL INFORMATION CENTRE FOR WESTERN EUROPE (UNRIC), HOW THE EUROPEAN UNION AND THE UNITED NATIONS COOPERATE (2007), available at http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatOrgane/VereinteNationen/Downloads/Leporello_EU-VN_e.pdf.

187. See generally European Commission Humanitarian Aid & Civil Protection, *Democratic Republic of Congo: Posing Significant Humanitarian Challenges*, http://ec.europa.eu/echo/aid/sub_saharian/rdc_en.htm (last visited Apr. 14, 2010). Other services funded by ECHO in the DRC include: “survival kits for 83,000 displaced people; repatriation of 20,000 refugees . . . improved access to clean water for 110,000 people; seeds and tools support to 56,000 households; [and] care for 9800 victims of sexual violence.” *Id.*

188. Andrew Mitchell, *DCR’s Stricken People Need More UN Aid*, INDEPENDENT, Nov. 23, 2008, available at <http://www.independent.co.uk/opinion/commentators/andrew-mitchell-dcrs-stricken-people-need-more-un-aid-1031033.html>.

189. See TEXEIRE, *supra* note 163, at 23.

190. Homan, *supra* note 179, at 153.

smuggling continued, and women and children were massacred in an attack on the outskirts of the city.¹⁹¹

Applying interagency collaboration to develop a comprehensive approach to handling immigration concerns in a particular region is not impossible, depending on the region's political atmosphere. In fact, the International Conference for Refugees in Central America ("CIREFCA") resulted in some success.¹⁹² This initiative "sought solutions for a regional refugees situation based on, firstly, inter-state cooperation and, secondly, inter-agency collaboration across issue-areas."¹⁹³

During the 1970s and 80s, Central America was ravaged "by war, civil strife and widespread human rights abuses that forced nearly 2 million people from their homes."¹⁹⁴ Faced with this situation, leaders of these Central American countries began to pursue regional solutions concerning refugees.¹⁹⁵ After the regional leaders established refugee concerns as a top priority, the United Nations High Commissioner for Refugees ("UNHCR") and other agencies were afforded a unique opportunity to convert this priority into concrete humanitarian aid.¹⁹⁶ The UNHCR "utilized political developments in the region, seeing it as a chance to start talking about real long-term solutions to refugee problems, and not just assistance programmes."¹⁹⁷ Without political cooperation in the region, it is hard to imagine UNHCR and CIREFCA's platform being successful.¹⁹⁸

191. *Id.*

192. See generally Ron Redmond, *The Human Side of CIREFCA*, REFUGEES MAG., Mar. 1, 1995, available at <http://www.unhcr.org/publ/PUBL/3b5426de4.html> ("CIREFCA was a highly successful international effort that . . . spelled hope for hundreds of thousands of refugees, returnees, displaced persons and undocumented aliens in seven Latin American countries.").

193. Betts, *supra* note 72, at 665.

194. Redmond, *supra* note 192.

195. *Id.* (stating that after the Central American leaders signed the "Esquipulas II" accords, CIREFCA was created to attend to the high volumes of refugees and displaced persons, who were a direct result of conflict in the region).

196. *Id.* (explaining that this aid consisted of protection and assistance in employment, health, education and, most importantly, security). CIREFCA also helped with repatriation and resettlement as long as it was voluntary and individually expressed. *Id.*

197. *Id.*

198. See *id.* ("[T]he real success of CIREFCA is due to the commitment of

CIREFCA's approach and its subsequent success in Central America, while somewhat inspiring, offers little hope for a comprehensive refugee solution in the Mediterranean region. The EU problem (for Member States like Malta, Cyprus, and Greece) presents two distinguishing obstacles that were not present in Central America during the 1980s. First, refugees crossing the Mediterranean come from various African countries; thus the solution would need to entail a multifaceted approach involving cooperation between many national governments.¹⁹⁹ The destination, transit, host, and origin countries would all need to cooperate fully to resolve the refugee crisis.²⁰⁰ This is unlike the Central American situation, where refugees stayed within the region instead of traveling through countries to a different continent.²⁰¹

Second, unlike the regional leaders in Latin America, who labeled the refugee crisis a grave concern, African leadership faces political instability and other related problems.²⁰² This is due in large part to the fact that African governments constantly change due to a cycle of civil wars plaguing the region.²⁰³ For example, rebel groups in Angola and Sierra Leone are funded through "conflict diamonds" and act contrary to the international community's objectives of restoring peace.²⁰⁴ Historically, the Sierra Leonean rebel group Revolutionary United Front ("RUF") has waged war on citizens and intimidated the government.²⁰⁵ Liberia, another war-torn country, as recently as 2003,

Central American leaders, who finally said enough is enough and decided to work together for peace and development.").

199. Betts, *supra* note 72, at 667.

200. *Id.* at 666 ("[S]tates at each of these levels would have specific roles and responsibilities.").

201. *See* Redmond, *supra* note 192 ("CIREFCA was a highly successful international effort that over the past five years spelled hope for hundreds of thousands of refugees, returnees, displaced persons, and undocumented aliens in seven Latin American countries.").

202. ANTONY OTIENO ONG'AYO, POLITICAL INSTABILITY IN AFRICA WHERE THE PROBLEM LIES AND ALTERNATIVE PERSPECTIVES (African Diaspora Pol. Ctr. 2008).

203. TEXEIRE, *supra* note 163, at 23.

204. UN Dept. of Pub. Info.: *Conflict Diamonds*, <http://www.un.org/peace/africa/Diamond.html> (last visited Apr. 14, 2010).

205. *Id.* A seventeen-year-old boy lost both of his hands to a rebel's machete at the waterloo camp in Sierra Leone. *Id.*; *see also* GlobalSecurity.org,

experienced massive civil strife when an armed opposition group, Liberians United for Reconciliation and Democracy (“LURD”), launched an incursion on the government.²⁰⁶ While the fighting ensued, a new faction broke off from the LURD opposition group and joined the fight.²⁰⁷

Because it is unclear who has the authority to organize and direct humanitarian efforts in the countries creating the highest amounts of migratory exodus,²⁰⁸ a comprehensive approach involving the region of origin is not only daunting, but naïve and unrealistic. The better alternative to reduce human rights abuses in the EU is a comprehensive approach involving national and supranational cooperation amongst all EU Member States.

B. Existing Bilateral Agreements

With immigration into the EU still increasing,²⁰⁹ “many outside Europe presume there would be a pan-EU approach to this issue.”²¹⁰ In reality, the actual handling of immigration, especially by sea, still concerns national governments.²¹¹ Among EU Member States, only Italy and Malta possess specific bilateral agreements concerning immigration issues with Libya.²¹² These agreements come as a response to Malta and Italy being the two EU Member States most impacted by seaborne immigrant arrivals.²¹³

Italy’s bilateral agreement with Libya, for example, permits Italy

Revolutionary United Front (RUF), <http://globalsecurity.org/military/world/para/ruf.htm> (last visited Apr. 14, 2010) (describing the RUF’s nine-year armed struggle against Sierra Leone’s corrupt government).

206. WATCHLIST ON CHILDREN AND ARMED CONFLICT, NOTHING LEFT TO LOSE: THE LEGACY OF ARMED CONFLICT AND LIBERIA’S CHILDREN 6-7 (2004), available at <http://www.watchlist.org/reports/pdf/liberia.report.pdf>.

207. *Id.* The new faction for Democracy in Liberia (MODEL) was backed by the government of Côte d’Ivoire. *Id.* The LURD faction was allegedly supported through funds from the government of Guinea. *Id.*

208. See generally discussion *supra* Part II.

209. See discussion *supra* Part IV.A.

210. VAN SELM & COOPER, *supra* note 90, at 17.

211. *Id.* at 16.

212. *Id.* at 64. The agreements focus on the procedures of immigrant readmission into the transit country of Libya. *Id.*

213. *Id.* at 46.

to patrol Libya's massive coastline.²¹⁴ Further, Italy provides financial backing to Libya for holding camps and for removing immigrants from Libya back to their original countries of origin.²¹⁵ Libya's leader, Gaddafi, traveled to Italy in June of 2009 to celebrate the ratification of an Italian-Libyan "Friendship Treaty" that has already resulted in joint naval patrols.²¹⁶ As part of the "Friendship Treaty," Italy has agreed to return immigrants to Libya and donate more than 200 million dollars over the next twenty-five years for infrastructure projects in Libya.²¹⁷ Critics of this and other agreements have said the EU is turning a blind eye and allowing national governments to run roughshod over immigrants' rights.²¹⁸ They have the right to be skeptical: Libya is not a party to the Refugee Convention and has no common asylum system.²¹⁹ Furthermore, immigrants interviewed by Human Rights Watch confirmed their exposure to inhumane conditions and indefinite detention by Libyan authorities.²²⁰

Bilateral agreements such as the "Friendship Treaty" offer little clarity about the treatment of immigrants who are returned to Africa. Further, both the European Parliament and the European Court of Human Rights have expressed concern by demanding greater transparency in such bilateral agreements between Libya and other African countries.²²¹

Although these agreements may be portrayed as a step towards correcting human rights abuses by politicians, closer examination reveals that they are merely used as a vehicle to dump immigrants

214. *Id.* at 48.

215. *Id.*

216. *See Gaddafi, supra* note 20.

217. *Id.*

218. *Id.*; *see generally* Sara Hamood, *EU-Libya Cooperation on Migration: A Raw Deal For Refugees And Migrants?*, 21 J. REFUGEE STUD. (2008) (discussing Libya's actions of returning immigrants to countries of danger and systematically disregarding the rights of immigrants).

219. *Id.*; *see also* Herrera, *supra* note 19.

220. *See Gaddafi, supra* note 20. A twenty-four-year-old Eritrean immigrant describes his account of abuse, beatings, and ill treatment while in prison. *Id.*

221. *See id.* ("The UN High Commissioner for Refugees expressed 'deep concern' regarding the fate of the interdicted migrants . . . saying that they were returned to Libya 'without proper assessment of their possible protection needs.'"). Human Rights Watch has also expressed its concern for the treatment of immigrants who are arrested trying to flee Libya. *Id.*

back in Africa while ignoring their obvious fate upon return.²²² The main problem lies in other EU Member States labeling seaborne immigrants as an Italian or Maltese problem because the impact of immigration is not felt the same way by all Member States.²²³ As long as immigrants are funneled back to Africa through these agreements and immigration procedures are left to the national governments, human rights abuses will continue until a comprehensive solution involving all Member States is implemented.²²⁴

V. MODIFICATIONS TO THE DUBLIN REGULATION AND FRONTEX: INCREASING ACCOUNTABILITY AND TRANSPARENCY IN THE EU

Although individual Member States' policies appear mindful of immigration concerns,²²⁵ the EU community should implement a supranational approach in order to truly increase Member States' accountability to arriving immigrants. Current bilateral agreements on a national level and collaboration with the region of origin will do little to combat the serious humanitarian challenge that African immigrants present.²²⁶ Furthermore, existing EU policies addressing the issue, including the Dublin Regulation, perpetuate the problem by forcing immigrants to remain in the EU Member States in which they first arrive, disproportionately pushing immigrants into Mediterranean Member States.²²⁷ As a result, an immigration crisis which should be treated as a European dilemma is reverted to a national one that is only felt in the Mediterranean.²²⁸ This problem has only been intensified by the fact that international law is unclear as to the

222. See *Gaddafi*, *supra* note 20:

Italy's summary return of boat people to Libya also indicates that it may be reneging on its own obligations under international law not to return people to places where their lives or freedom would be threatened . . . or where they would face inhuman and degrading treatment Accounts from immigrants about brutal treatment and the lack of asylum law and procedures in Libya raise grave concerns about the safety of the immigrants that Italy returns to Libyan shores.

223. VAN SELM & COOPER, *supra* note 90, at 47.

224. See *generally id.* at 47.

225. See discussion *supra* Part II.

226. See discussion *supra* Part IV.

227. See discussion *supra* Part II.A.

228. VAN SELM & COOPER, *supra* note 90, at 47.

obligations owed to immigrants following a rescue at sea.²²⁹

A. A Proposal to Modify the Dublin Regulation

The EU should make it a top priority to ensure the safe arrival of asylum seekers into Europe. To date, the standards employed to protect immigrants entering the EU have raised serious concerns.²³⁰ In particular, the Dublin Regulation, which places responsibility for assessing immigrants' asylum claims on individual Member States,²³¹ is intrinsically flawed for the reasons discussed below. This proposal does not intend to replace the existing regulation but instead aims to alleviate the current strains caused by various inadequacies in the regulation. The proposal will address two main problems in the Dublin Regulation and offer solutions.

The first major issue with the current Dublin Regulation is that it does not comprehensively address detention policies, even though many EU Member States "are increasingly using detention in order to enforce transfer under the Dublin system"²³² and the "available information suggests the system is expensive, inefficient, and places disproportionate pressures on Member States that make up the EU's external southern . . . borders."²³³ Detention also negatively affects immigrants' rights because asylum seekers in detention often have no access to procedural safeguards such as legal advice.²³⁴ This problem is illustrated in the Maltese context, where asylum seekers often wait nine months until speaking with anyone about leaving detention.²³⁵

Furthermore, many asylum applicants come from countries where

229. Nessel, *supra* note 62, at 632.

230. See discussion *supra* Parts II-IV.

231. See Summaries, *supra* note 32.

232. EUROPEAN COUNCIL ON REFUGEES AND EXILES, REPORT ON THE APPLICATION OF THE DUBLIN II REGULATION IN EUROPE 3 (2006), available at <http://www.detention-in-europe.org/images/stories/ecre%20report%20dubii.pdf> [hereinafter REGULATION].

233. EUROPEAN COUNCIL ON REFUGEES AND EXILES, COMMENTS FROM THE EUROPEAN COUNCIL ON REFUGEES AND EXILES ON THE EUROPEAN COMMISSION PROPOSAL TO RECAST THE DUBLIN REGULATION 3 (2009), available at http://www.ecre.org/files/ECRE_Response_To_Recast_Dublin_Regulation_2009.pdf [hereinafter COMMISSION].

234. REGULATION, *supra* note 232, at 162.

235. *Detention*, *supra* note 93.

they have been previously detained and beaten, and additional detention would likely cause serious psychological harm.²³⁶ Accordingly, explicit language in the regulation should preclude Member States from detaining asylum seekers arbitrarily to reduce detention costs and to ensure the detainees' fundamental rights to freedom.

Even in situations where detention is deemed proper by Member States, procedural safeguards such as time limits and access to legal assistance should be adopted to ensure the detained immigrants' legal rights are preserved. This means once a person is detained, the responsible Member State should be required to inform the detainee of the steps necessary to leave detention. An ideal proposal would require the Member State to inform detainees of these rights within thirty days of detention or face sanctions from the EU.

The second major issue with the Dublin Regulation is its lack of emphasis on a solution to the detention crisis in the Mediterranean that involves cooperation between all Member States. Small nations like Malta, with minimal capacity to take in immigrants, deserve help from other Member States, especially if mandatory detention policies are eradicated in the future. The cooperation between Member States would also allow the EU to implement a *per se* policy forbidding bilateral agreements between individual Member States and African countries that are not signatories to the 1952 Refugee Convention. This would eliminate concerns about human rights abuses inflicted on immigrants who are returned to Africa.

The first step the EU should take in order to reduce the tensions caused by detention and repatriation is to propose temporary suspensions of immigrant transfers to Member States with no capacity to hold asylum seekers.²³⁷ This would both lighten the load on the Mediterranean Member States located on the frontline of the immigrant flow and ensure that asylum seekers are afforded proper procedural safeguards and decent living conditions. The next step the EU should take is to implement a mandatory burden-sharing mechanism that not only allows bilateral agreements between EU Member States, but also compels Member States to facilitate the

236. REGULATION, *supra* note 232, at 162.

237. Monika Zaleska, *The Proposed EU Asylum Reforms*, T.M.C. ASSER INST. 1, 1 (2009).

transfer of immigrants from overburdened Member States like Malta.

B. Fixing Frontex

Until now, the EU's main concern has been patrolling its borders through the use of Frontex.²³⁸ As a result, a "mistrust of formal migratory channels" has promoted dangerous smuggling practices by human traffickers.²³⁹ Frontex has engaged in operations with almost no transparency, and reports suggest its presence only increases human rights abuses.²⁴⁰ Its role should focus on both aiding boats in distress, and more importantly, helping rescued immigrants who need to be taken from Member States facing a full capacity of immigrants.

If the EU implements a mandatory burden-sharing mechanism, Frontex patrols would no longer have to be concerned about Member States feuding over taking in boat people. Member States, like Malta and Italy, could avoid conflicts like the *Pinar* incident because even if they took in sea-stranded immigrants, the revised Dublin proposal would not force these Member States to be responsible for the immigrants in the long term.

The EU should next allocate the authority and responsibility for compiling statistical and social data to determine which Member States can no longer take in immigrants. Although it is important for Member States to have their sovereign powers, the EU needs to delegate authority to supranational organizations. These organizations should have the ability to penetrate European detention centers in an effort to determine if particular Member States have the capacity to take on more immigrants. Such a policy would promote transparency and ensure that any human rights abuses would come to light. This sort of policy would particularly help minimize concerns regarding the detention policies in Malta and other coastal Mediterranean Member States.

VI. CONCLUSION

Modifying the Dublin Regulation is the most important step to eradicating human rights abuses in Southern Europe. The

238. See discussion *supra* Part II.A.

239. COMMISSION, *supra* note 233, at 4.

240. See discussion *supra* Part II.A.

modifications would also lessen the immigration burden on coastal Mediterranean Member States. This is particularly important because the immigrant flood into the EU shows no signs of decreasing or stopping anytime soon.²⁴¹ The EU now needs to shift its focus to implementing a comprehensive solution that involves the cooperation and collaboration of all Member States, regardless of their location in the region. If the Dublin Regulation remains in its current form, the limited capacity of coastal Mediterranean Member States to house immigrants will result in these Member States sending immigrants back to Africa.²⁴²

The proposed modifications discussed in this Comment are a step towards harmonizing current EU immigration law. Because an immigration solution involves multiple players in numerous national governments, the process of harmonization will take years, maybe decades. However, the EU should no longer turn a blind eye and treat humans as objects to be shipped back and forth. A new approach is needed. As one Chief of the Refugee Council in the UK noted, “[a]sylum seekers are being treated as packages to be processed and removed rather than as very vulnerable human beings.”²⁴³ Until this practice is stamped out, the voice of asylum seekers in the EU will be drowned out by existing immigration policies.

*Nicholas De Blouw**

241. See generally *Boat People Arrivals in the Mediterranean, Gulf of Aden Already Top 2007*, UNHCR NEWS STORIES, Nov. 4, 2008, available at <http://www.unhcr.org/4910397810.html>.

242. See discussion *supra* Part IV.B.

243. Zaleska, *supra* note 237.

* J.D. Candidate, May 2011, California Western School of Law; B.A., Wayne State University, 2008. Thank you to Saida Khanukayev and the staff of the *California Western International Law Journal* for their constant support and hard-work on this Comment. Thanks to Professor Ruth Hargrove for her endless encouragement and friendship. I dedicate this Comment to my parents and grandparents, everything I am, or have the opportunity to be, results from their love and guidance. Finally, thanks to the Lord for giving me life.