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Divergent Paths, Similar Results: How African Asylum Seekers Have Been Failed in Both Israel and Malta Despite Varying Procedures and Treatment

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DIVERGENT PATHS, SIMILAR RESULTS: HOW AFRICAN ASYLUM SEEKERS
HAVE BEEN FAILED IN BOTH ISRAEL AND MALTA DESPITE VARYING
PROCEDURES AND TREATMENT

EDWARD N. KRAKAUER*

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Recent developments in the Horn of Africa – Eritrea, Sudan, and Somalia – have led to troubling humanitarian concerns. Forced conscription, violation of basic human dignities, and even genocide have led citizens of these countries to flee by any means necessary, seeking refuge in nations where they no longer fear a risk of persecu-

tion. To those escaping these horrid conditions, the nearest democratic states are the relatively small countries of Israel, the closest safe haven via land, and Malta, the closest safe haven via the Mediterranean Sea. Unfortunately for those seeking refuge, they often encounter many obstacles that are seemingly none of their fault, whether it be mandatory detention in substandard facilities in Malta or bureaucratic backlog in Israel. This article seeks to identify current asylum handling procedures in Israel and Malta while identifying deficiencies that have put those nations in violation of the 1951 Convention Relating to the Status of Refugees and its subsequent 1967 Protocol.

Malta and Israel experience very similar situations on the surface. Neither nation has had much experience with accepting asylum seekers prior to this most recent phenomenon. Additionally, both nations are relatively small and have limited resources available to them, and they are both located closest to the nations where the refugees originate.¹ However, as we shall see, the similarities between the nations' handling of asylum seekers are of a fairly short list. The differences between the two nations are great. This could be due to the legal procedures provided for asylum seekers (or lack thereof, in Malta's situation), ratios of asylum actually granted, or even the future paths Israel and Malta are seeking with asylum seekers. While Malta may be criticized for its lack of asylum procedures or harsh detention

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¹ Kenya, home to many refugee camps, is actually the closest country to the Horn of Africa that hosts refugees. However, it has been subject to a lot of concern regarding the safety of asylum seekers, especially in Kenyan police stations and other detention centers. See *Kenya: Flagrant Violations of Human Rights Against Asylum Seekers and Refugees; HRLHA Statement*, GADAA.COM, April 15, 2014, <http://gadaa.com/oduu/25402/2014/04/15/kenya-flagrant-violations-of-human-rights-against-asylum-seekers-and-refugees-hrlha-statement/>.

conditions, it still boasts some of the highest asylum grant rates in the European Union.² Comparatively speaking, Israel only granted asylum once in a span of two years from 2010–2011, while rejecting over 3,000 other applications.³

This article seeks to explore the conditions and procedures asylum seekers currently face in both Israel and Malta. It will begin by discussing the issues facing the citizens of Eritrea, Sudan, and Somalia, including findings by several prominent international sources, attesting to the fact most, if not all, asylum seekers originating from these countries are in need of international protection. The article will then briefly discuss the relevant provisions and protections asylum seekers shall be afforded under the 1951 Convention and subsequent Protocol, to which both Israel and Malta are signatories. Next, the article looks at the individual countries' histories with asylum seekers, the present status of asylum seekers in each country, discussing relevant law and procedures regarding asylum seekers, and critiquing the two nations' laws and procedures under the rights guaranteed under the Convention. The article will then conclude with a brief survey of one other country, Italy, which stands out as a geographically-proximate country that has greater resources, and a survey of statistics regarding Eritrean, Somalian, and Sudanese asylum seekers around the world. This will provide us a better understanding of how Israel and Malta compare to other nations and to each other.

I. THE TROUBLES IN ERITREA, SUDAN, AND SOMALIA

A relatively young state, Eritrea established formal independence from Ethiopia on April 27th, 1993, following an UN-monitored referendum on independence. Eritrea is currently a single party state

² European Commission, Eurostat: Asylum Statistics, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics [hereinafter European Asylum Statistics]. Malta returned positive decisions on over 90 percent of first-time asylum applications, highest in the European Union. However, it did return positive decisions on fewer than five percent of final decisions.

³ Hadas Yaron, Nurit Hasimshony-Yaffe, & John Campbell, "Infiltrators" or Refugees? An Analysis of Israel's Policy Towards African Asylum-Seekers, 51 INT'L MIGRATION J. 144 (2013).

governed by the People's Front for Democracy and Justice (PFDJ).⁴ The PFDJ was meant to serve as a transitional government until democratic elections were held.⁵ General multi-party elections were, however, postponed in 1998 due to the outbreak of war with Ethiopia. To this day, no democratic elections have been held, and the leader of the PFDJ, President Isaias Afewerki, has remained in his position unopposed.⁶

The situation in Eritrea is troubling. Torture, arbitrary detention, and severe restrictions on freedom of expression, association, and religion remain the norm in Eritrea.⁷ Perhaps most troubling is the forced labor and military restrictions the country imposes on its youth. Children may be forced into military training at the age of 14 as part of their school curriculum.⁸ If they refuse military training, the Eritrean youths risk their family members' arrest.⁹ Routine conscription round-ups, known as giffas, are conducted by police or military forces.¹⁰ Refusing to join the military may lead to on-the-spot execution, and desertion can lead to "shoot to kill" orders and detention for prolonged periods.¹¹ Eritrean law states that able-bodied adults between the ages of 18 and 40 must serve eighteen months of military service. However, government practice prolongs that period indefinitely. The national service conscripts are poorly fed, receive inadequate medical care, are underpaid (to the tune of less than 30 US

⁴ Karen Jacobsen, Laurie Lijnders, & Sara Robinson, Ransom, Collaborators, Corruption: Sinai Trafficking and Transnational Networks from Eritrea to Israel. A Case Study of the Eritrean Migration System 4 (Feinstein International Center, Tufts University: Medford, USA) (2013), available at <http://assaf.org.il/en/sites/default/files/Ransom-Collaborate-Corrupt-8-12.pdf>.

⁵ *Id.*

⁶ *Id.*

⁷ For detailed findings on the situation in Eritrea, see Human Rights Watch: Eritrea, <https://www.hrw.org/africa/eritrea> (last visited Mar. 12, 2014) [hereinafter Eritrea].

⁸ U.S. Department of Labor's 2010 Findings on the Worst Forms of Child Labor, <http://www.dol.gov/ilab/programs/ocft/PDF/2010TDA.pdf>.

⁹ Jacobsen, Lijnders, & Robinson, *supra* note 4, at 4.

¹⁰ For complete details on state repression and indefinite conscription in Eritrea, see Service for Life: State Repression and Indefinite Conscription in Eritrea (2009), http://www.hrw.org/sites/default/files/reports/eritrea0409web_0.pdf.

¹¹ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea 11 (2011), <http://www.refworld.org/docid/4d4fe0ec2.html>.

dollars per month), and, in the case of female conscripts, are subject to relentless sexual abuse by commanding officers.¹²

Many Eritreans lack basic legal rights. Residents are routinely subject to imprisonment without explanation, trial, or any form of due process. These terms of imprisonment often last indefinitely. Most basic human rights guarantees are restricted. Since 2001, no independent press has existed within Eritrea, and all domestic media is controlled by the government.¹³ The Isaias government acknowledges a right to exist for four “recognized” religious groups- the Orthodox Church, Sunni Islam, Roman Catholicism, and the Evangelical (Lutheran) Church. Those that do not affiliate themselves with one of the four recognized religions face arrest and torture that the government uses to compel them to recant their faith.¹⁴

In Sudan, citizens face equally heavy repression and fear for their safety, especially within the conflicted region of Darfur, where civil war and genocide has taken place since 2003. Within 29 months, 350,000 to 400,000 people were killed by means of violence, malnutrition, and disease. The groups targeted most in the genocide include non-Arab or African tribal groups, primarily the Fur, the Massaleit, and the Zaghawa, and, to a lesser extent, the Tunjur, the Birgid, the Dajo, and others. They have fallen victim to Arab militia raids on their villages while the National Islamic Front, the controlling regime of Sudan, sits idly by.¹⁵ This genocide remains separate from the atrocities that occurred in southern Sudan before that portion of the country became an autonomous state in 2005 and attained its independence in 2011. The situation in Darfur alone has led to the exile of over one million refugees,¹⁶ while claiming the lives of over 400,000, and displacing a total of over 2,500,000 people.¹⁷ The citizens of Sudan also

¹² Eritrea, *supra* note 7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Eric Reeves, *Genocide in Darfur - How the Horror Began*, SUDAN TRIBUNE, September 3, 2005, available at <http://www.sudantribune.com/spip.php?article11445>.

¹⁶ Brendan Koerner, *Who are the Janjaweed?: A Guide to the Sudanese Militamen*, SLATE, July 19, 2005, available at http://www.slate.com/articles/news_and_politics/explainer/2004/07/who_are_the_janjaweed.html.

¹⁷ United Human Rights Council: Genocide in Darfur, <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm> (last visited March 12, 2014) [hereinafter Genocide in Darfur]. As of April 2014, the situation in Darfur continues.

face basic human rights violations. The government infringes on rights to speech and assembly by cracking down on protests.¹⁸ Sudanese residents also face constant political repression and media restrictions. Those who are perceived to have ties to targeted opposition parties are detained, regardless of whether ties are real or not. Authorities censor articles, confiscate newspaper editions, and blacklist journalists for reporting on sensitive topics.¹⁹

Somalia, the largest country of origin for asylum seekers in Malta, has been subject to a long-running armed conflict that leaves civilians dead, wounded, and displaced in large numbers.²⁰ While the Islamist armed group al-Shabaab remains in control, al-Shabaab and the forces against it continue to commit abuses, including indiscriminate attacks and arbitrary arrests and detentions.²¹ Al-Shabaab is notorious for administering arbitrary justice and imposing harsh restrictions on basic rights.²²

Some authors have suggested that asylum seekers from Darfur be granted special treatment from other refugees, including those from Eritrea and Somalia.²³ For the purposes of this article, refugees from Eritrea, Somalia, and all regions of Sudan will be examined collectively under the Convention and Protocol Relating to the Status of Refugees, to which Israel and Malta are signatories. This article does not seek to assess the validity of the individual claims of asylum seekers from each country. It does appear, however, that there is indisputable evidence that most, if not all, have some legitimate claim after leaving these regions.

The international community is often criticized for its lack of efficient response to the crisis. See Tess Finch-Lees, *The International Response to the Continuing Genocide in Darfur is marred by Indifference and Incompetency*, THE INDEPENDENT, April 12, 2014, available at <http://www.independent.co.uk/voices/the-international-response-to-the-continuing-genocide-in-darfur-is-marred-by-indifference-and-incompetence-9255320.html>.

¹⁸ Genocide in Darfur, *supra* note 17.

¹⁹ *Id.*

²⁰ Human Rights Watch: Somalia, <https://www.hrw.org/africa/somalia> (last visited March 13, 2014).

²¹ *Id.*

²² *Id.*

²³ Holly Buchanan, *Escape from Darfur: Why Israel Needs to Adopt a Comprehensive Domestic Refugee Law*, 11 CHAP. L. REV. 601, 603 (2008).

II. THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES

Under the terms of the 1951 United Nations Convention Relating to the Status of Refugees (hereinafter referred to as the Convention), a refugee is defined as “any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”²⁴ The original Convention protected refugees that emerged in Europe prior to January 1, 1951, as a result of displacement during World War II. The subsequent 1967 Protocol removed the previous geographical and time limits that were part of the 1951 Convention.²⁵ As of April 1, 2011, there are 147 signatories to the either the Convention, Protocol, or both.²⁶

The Convention and Protocol list several grounds under which the refugee can no longer claim protection. This includes voluntarily re-availing himself of the protection of the country of his nationality, re-acquiring his nationality, the ability to return to the country of his nationality because the conditions that led to his refugee status has ceased, and acquiring a new nationality in a third country.²⁷ Persons of whom there are serious reasons to suspect that they have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside their country of refuge, or are guilty of acts contrary to the purposes and principles of the United Nations, will be excluded from protection.²⁸ Further, there is an important distinction between asylum seekers, refugees, and economic migrants for purposes of establishing protection under the terms of the Convention. “Asylum seekers are people who have moved across international

²⁴ UNHCR Convention and Protocol Relating to the Status of Refugees, Article 1, <http://www.unhcr.org/3b66c2aa10.html> [hereinafter Convention].

²⁵ UNHCR Convention and Protocol Relating to Status of Refugees, Frequently Asked Questions 1, <http://www.unhcr.org/4ec262df9.html> [hereinafter Convention FAQ].

²⁶ States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/3b73b0d63.html> (last visited March 13, 2014) [hereinafter States Parties].

²⁷ Convention, *supra* note 24, at art. 1C.

²⁸ *Id.*

borders in search of protection under the 1951 Refugee Convention, but whose claim for refugee status have not yet been determined.”²⁹

In contrast, economic migrants are motivated by employment opportunities and other economic and general considerations that may only be available outside their nation’s borders.³⁰ In sum, asylum seekers are those in the process of acquiring protection under the Convention, refugees are those that have already acquired protection outside their home countries under the auspices of the UNHCR, and economic migrants are those who may be motivated either in part or wholly by reasons other than the need to protect themselves from death or serious bodily harm. Economic migrants, because they do not fit the Convention criteria in regard to the bases of persecution, will be denied protections under the Convention.

The protections given to the refugees afforded protection under the Convention are abundant. These include the right not to be expelled except under certain, strictly defined conditions (Article 32); the right not to be punished for illegal entry into the territory of a contracting State (Article 31); the right to work (Articles 17 to 19); the right to housing (Article 21); the right to education (Article 22); the right to public relief and assistance (Article 23); the right to freedom of religion (Article 4); the right to access the courts (Article 16); the right to freedom of movement within the territory (Article 26); and the right to be issued identity and travel documents (Articles 27 and 28).³¹ However, the most important protection afforded the refugees, and the self-avowed cornerstone of the Convention, is the principle of *non-refoulement*, contained in Article 33. According to this principle, “a refugee should not be returned to a country where he or she faces serious threats to his or her life or freedom.”³² The protected refugee may not be returned to either his home country where he faces persecution or a third country where the refugee faces a risk either of persecution or of forcible return to the state of origin.

The extent to which these protections are provided vary with each and every refugee. This is because a state may deny the indivi-

²⁹ David A. Martin et al., *Forced Migration: Law and Policy* 9 (2007).

³⁰ Avi Perry, *Solving Israel’s African Refugee Crisis*, 51 VA. J. INT’L L. 157, 159 (Fall 2010).

³¹ Convention, *supra* note 24.

³² Convention FAQ, *supra* note 25, at 4.

dual refugee the protection of *non-refoulement* if it deems that individual, based on reasonable grounds or having been previously convicted of a particularly serious crime, a danger to the security of the country.³³ Refugees upon arrival are guaranteed certain rights as their claims are pending, including the right to be protected from *refoulement*.³⁴ The extent to which these protections have been given to the refugees by Israel and Malta will be explored later in this article, including the grounds which Israel and Malta have cited as to why they have denied most asylum seekers rights under the Convention.

III. THE HISTORY OF REFUGEES IN ISRAEL

Israel's foundation was a response to the persecution of Jews dispersed all over the world. Against the context of atrocities that claimed the lives of nearly six million Jews in the Holocaust, where Jews were persecuted simply for what the Nazis called their race, Israel was established as a home where Jews may reside without facing religious or racial persecution. The Declaration of the Establishment of the State of Israel reflects such a view, stating "After being forcibly exiled from their land, the people kept faith with it throughout their dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.... This right [to a Jewish homeland] is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State."³⁵ Its dedication to being a state for Jews free from persecution has guided the nation since its inception. In comparison to its history assisting Jewish refugees, Israel's history with non-Jewish refugees has practically been non-existent prior to the current waves of African migration. There have been three notable, though minor, occasions during Israel's history where it welcomed non-Jewish refugees. The first occurred in the 1970's, when Israel agreed to accept several dozen Vietnamese

³³ Convention, *supra* note 24, at Article 33. Sudan is considered an enemy of the State of Israel, and Israel cites this Article as part of its justification of denying proper treatment of asylum applications for Sudanese refugees.

³⁴ Convention FAQ, *supra* note 25, at 4.

³⁵ Israel Ministry of Foreign Affairs: Declaration of Establishment of State of Israel (translated), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>.

refugees who were rescued in open seas. The other two occasions involved rescuing roughly one hundred Bosnian refugees in 1993 and a similar number of Albanian Muslim refugees in 1999. However, these three occasions represent the exception rather than the rule in the context of Israeli immigration.³⁶ It is also notable that in all three previous occasions the refugees were abroad under U.N. Supervision rather than asylum seekers at the border or inside Israel.

The rise in African refugees seeking asylum in Israel is a fairly recent phenomenon, beginning in 2005. Most of these hailed from the Darfur region, having left in response to the atrocities being committed during the country's civil war. In response to the sudden migration into Israel, the Knesset (Israel's parliamentary body) re-enacted the seldom-used Prevention of Infiltration Law, which had originally gone into effect in 1954 to combat the illegal entry of former Arab residents into Israel from Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq, Yemen, or any part of Palestine that lies outside of Israel.³⁷ The law, enacted in 2011,³⁸ authorized the detention of these infiltrators, with penalties varying based on the purpose of the infiltration and whether or not the infiltrator is a repeat offender.³⁹ Perhaps most notable among the re-enactment's provisions is the fact that it lacks any sort of quasi-judicial review guarantee,⁴⁰ which is in clear contravention of the 1951 Convention.⁴¹ It is important to note the intent of the Prevention of Infiltration Law in attempting to put it in the right context. The law sought to protect Israel from any infiltrator (*mistanen* in Hebrew) who sought "to cause death or serious injury to a person,"⁴² though the law was wielded against Palestinians who had

³⁶ Perry, *supra* note 30, at 165.

³⁷ Prevention of Infiltration Law, 5714-1954, 16 SH 160 (1954) (Isr.).

³⁸ Rebecca Anna Stoil, *Anti-Infiltrator Law Passes First Reading in Knesset*, JERUSALEM POST, Mar. 30, 2011, available at <http://www.jpost.com/National-News/Anti-infiltrator-law-passes-first-reading-in-Knesset>.

³⁹ Prevention of Infiltration Law, *supra* note 37.

⁴⁰ Refugees' Rights Forum: Asylum Seekers and Refugees in Israel: February 2009 Update, <http://www.acri.org.il/pdf/refugees0209en.pdf> (last visited March 12, 2014) [hereinafter Refugees' Rights Forum].

⁴¹ Israel became a signatory to the 1951 Convention on October 1, 1954, and a signatory to the Protocol on June 14, 1968. States Parties, *supra* note 26.

⁴² Yaron, Hasimshony-Yaffe, & Campbell, *supra* note 3, at 2.

left what became Israel during the 1948-49 War and who now attempted to sneak back into their properties.

In 2007, as the numbers of African asylum seekers grew steadily, Israel began turning to more alternatives in their treatment. For the first time, many of the Sudanese were relocated to the southern city of Eilat, finding work predominantly in hotels in the city. Other asylum seekers were simply brought to the cities of Beersheva and Tel Aviv. The African Refugees Development Center rented bomb shelters in Tel Aviv for the asylum seekers.⁴³ Such actions by the individual cities in their treatment of the asylum seekers reflect their need to deal with the immediate consequences of national policy.

Perhaps no more important development occurred in 2007 than the institution of the “Hot Return” policy brokered between Israel and Egypt. The policy sought to combat the growing number of asylum seekers entering Israel through the Sinai region of Egypt.⁴⁴ Under the policy, the Israeli army was entitled to return to Egypt asylum seekers caught within the first twenty-four hours and within fifty kilometers of the Egyptian border.⁴⁵ Such a policy once again drew the ire of the United Nations as it was claimed to be a violation of the Convention because in many instances, the Israeli soldiers detaining the migrants deprived the migrants of due process and returned them to Egypt without further investigation. For Israel, this was viewed as a rejection at the border, despite the fact no inquiry was involved, rather than summary deportation, and therefore defended such actions as a means of securing its borders.⁴⁶ As a result of the “Hot Return” policy, on at least one occasion alone, fifty Sudanese refugees from Darfur were deported directly back to Egypt upon

⁴³ Refugees’ Rights Forum, *supra* note 40.

⁴⁴ Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1, 28–37 (Spring 2013).

⁴⁵ For a full policy determination of the Hot Return policy, *see* Egyptian Efforts to Combat Trespassing Across the International Borders with Israel, Arab Republic of Egypt Ministry of Foreign Affairs, <http://www.mfa.gov.eg/English/Ministry/News/Pages/NewsDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&newsID=4543900f-fd9b-446e-9c1f-ae66ae726eb5> (last visited March 12, 2014).

⁴⁶ Kritzman-Amir & Spijkerboer, *supra* note 4, at 29.

entering Israel.⁴⁷ Israel argues that they are entitled to send these asylum seekers back to their first country of refuge – in this case, Egypt – and that it has had assurances from the Egyptian Government that those fleeing will not be harmed or returned to Sudan.⁴⁸ Of note, Egypt became a signatory to both the Convention and Protocol on May 22, 1981.⁴⁹ However, at least one high ranking member of the Egyptian police told the Associated Press that Egypt would send the Sudanese back to Sudan, and that there were no assurances sought by Israel regarding their safety, Israel having simply stated “please take them.”⁵⁰ For these and others who have been turned over back to Egyptian authorities, there is a genuine fear for their lives, especially given the recent period of violent instability. Depending on how well-founded these fears of persecution in Egypt are, deporting asylum seekers to a third country is as much a violation of the non-refoulement doctrine espoused in the Convention as if it were a deportation back to their home nation. This move led at least one leading Israeli human rights organization, the Association for Civil Rights in Israel, to strongly condemn the government’s decision to deport these refugees “without following the internationally recognized procedures for determining whether they are refugees.”⁵¹ Under the Convention, such an action by Israel is a violation of two separate obligations: not to deport asylum seekers for exercising their rights under the Convention and to provide asylum seekers rights to individual hearings. More recently, Israel began sending asylum seekers to Rwanda and Uganda under their voluntary departure program without first determining their asylum status, continuing their violations under the Convention and Protocol.⁵²

⁴⁷ Ed O’Laughlin, *Israel Starts Driving Refugees From Darfur Horror Back into Egypt; Holocaust Legacy Invoked in Protest*, THE AGE (Melbourne, Australia), Aug. 21, 2007, at 9.

⁴⁸ *Id.*

⁴⁹ States Parties, *supra* note 26.

⁵⁰ O’Laughlin, *supra* note 47.

⁵¹ Isabel Kershner, *Israel Policy Sends Darfur Refugees to Egypt*, THE INTERNATIONAL HERALD TRIBUNE, Aug. 21, 2007, at 8.

⁵² Israel maintains that the asylum seekers leave voluntarily. However, asylum seekers are left no choice due to the treatment they receive, which is explained in further detail later in this article. The asylum seekers, upon leaving Israel, arrive in Rwanda and Uganda with no arranged status, are not granted basic rights, and do not have any

By the end of 2007, an additional 5,703 asylum seekers entered Israel, mainly from Sudan, Eritrea, and the Ivory Coast. While some were detained upon arrival and subsequently released on restrictive conditions, others were released unconditionally immediately on arrival due to the lack of prison space. Meanwhile, about one thousand asylum seekers lived in crowded conditions in the bomb shelters previously reserved by the African Refugees Development Center. For the first time, some of the Sudanese citizens were able to acquire work upon procuring documentation from the United Nations, and were to begin to live independently, which established the fact that Israel may have been originally receptive to the applications of asylum seekers.⁵³ In September 2007, Israeli Interior Minister Meir Sheerit even went so far as to announce that Israel would offer between 300 and 500 refugees from Darfur citizenship in an unprecedented move.⁵⁴ Perhaps it was due to its previous experiences with the temporary waves of immigration from Vietnam, Albania, and Bosnia, that Israel had expected the present wave of migrants to end early. "Israel, with its history, must offer assistance," Mr. Sheerit told activists during the announcement. "It can't stand by and shut its eyes. But a quota must be set."⁵⁵ Unfortunately, as shall be seen, this has been far from the norm for the African migrants residing within Israel. Based on figures to be explained later, perhaps the quota was set too low and too early on given this most recent wave of African refugees entering Israel.

In May 2008, the Knesset passed the amended version of the Prevention of Infiltration Law at its first reading, formalizing the "Hot Return" procedure and permitting the deportation of refugees to Egypt.⁵⁶ The amended law immediately drew the ire of the international community, most notably from leading human rights organizations such as Amnesty International, which stated:

official documents or permits. Ilan Lior, *Israel is Sending Asylum Seekers to Rwanda Without Status, Rights*, HA'ARETZ, Apr. 4, 2014, available at <http://www.haaretz.com/news/national/premium-1.583764>.

⁵³ Refugees' Rights Forum, *supra* note 40.

⁵⁴ Ilene R. Pusher, *Israel to Grant Darfur Refugees Citizenship*, CHRISTIAN SCIENCE MONITOR, Sept. 6, 2007, at World 5.

⁵⁵ *Id.*

⁵⁶ Refugees' Rights Forum, *supra* note 40.

The proposed criminalization of irregular entry, without taking into account the reasons for entry or the risk of removal, severely restricts the ability of individuals coming into Israel irregularly from seeking asylum and potentially criminalizes those who seek protection from persecution. The draft law also fails to protect the right of non-refoulement, as required under international treaties to which Israel is a State Party.⁵⁷

Further concerns of Amnesty International included the fact that the law favors the automatic detention of non-nationals who enter Israel irregularly; fails to provide adequate procedural guarantees to detainees facing deportation; severely restricts the ability of the detainee to challenge their expulsion; and effectively removes the ability of individuals to seek international protection in Israel.⁵⁸

Three years later, in 2011, the Knesset proposed further amendments to the Prevention of Infiltration Law. Proposed amendments included a minimum three-year prison sentence for illegal entrants, including their children. Further, the amendments provided for a five-year prison term for those offering to assist or provide aid to refugees. Once again, the declared purpose of the amendment was to deter asylum seekers.⁵⁹ The amendments were resoundingly passed by the Israeli parliament in January 10, 2012, drawing immediate backlash from the international community, including the Human Rights Watch. "Israeli officials are not only adding rhetorical fuel to the xenophobic fire, but they now have a new law that punishes refugees in violation of international law. The law should be amended immediately, and not enforced until necessary revisions are made," stated Bill Frelick, Refugee Program Director.⁶⁰ By treating all irregular border-crossers as infiltrators and handing down mandatory prison

⁵⁷ *Memorandum Concerning the Proposed "Prevention of Infiltration Law - 2008"*, Amnesty International 1 (June 20, 2009), <http://www.amnesty.org/en/library/asset/MDE15/024/2008/en/f418e992-4108-11dd-a280-615aa3eb3c6f/mde150242008eng.pdf>.

⁵⁸ *Id.* at 3–5.

⁵⁹ Jillian Kestler-d'Amours, *Citizens Flee from Dictatorship to Detention*, INTER PRESS SERVICE (Johannesburg, South Africa), Nov. 30, 2011.

⁶⁰ *Israel: Amend 'Anti-Infiltration' Law*, Human Rights Watch, June 10, 2012, available at <http://www.hrw.org/news/2012/06/10/israel-amend-anti-infiltration-law>.

sentences, Human Rights Watch argues Israel is in direct contravention of the Convention and Protocol to which it is a signatory.

In mid-2013, the United Nations High Commissioner for Refugees (UNHCR) estimated that a “population of concern” of 56,549 resided in Israel. This included 48,325 refugees, 7,889 asylum seekers, and 14 stateless persons.⁶¹ According to a more recent report concentrating solely on Eritreans and Sudanese, roughly 35,895 Eritreans and 15,210 Sudanese reside in Israel.⁶² 2013 also saw the proposal for an agreement between Israel and an unnamed third country to deport thousands of African migrants presently in Israel. Critics immediately denounced the deal as an abdication of responsibility by Israel and asserting that Israel will not be able to “properly monitor the migrants’ conditions once they are deported.”⁶³ It later emerged that Uganda was the third country that would accept the African migrants.⁶⁴

IV. THE PRESENT STATUS OF REFUGEES IN ISRAEL

Refugees from Sudan and Eritrea have a difficult time assimilating in Israel. There is often a stigma that is attached to these asylum seekers, prompting national concern and outrage from the local citizens of the major cities. Of the estimated 60,000 asylum seekers within Israel’s borders, most have been given renewable visas,⁶⁵ but are denied the right to work and are excluded from the benefit of any

⁶¹ 2014 UNHCR Regional Operations Profile - Middle East: Israel, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4864b6#> (last visited March 12, 2014).

⁶² P.J. Tobia, *Unpromised Land*, PBS Newshour, June 20, 2013, <http://www.pbs.org/newshour/spc/unpromised-land/> (last visited March 12, 2014).

⁶³ Max J. Rosenthal, *Israel to Send African Migrants to Third Country*, ASSOCIATED PRESS, June 3, 2013, available at <http://news.yahoo.com/israel-send-african-migrants-third-country-144541107.html>.

⁶⁴ *Israel to Deport African Migrants to Uganda: Report*, AGENCE FRANCE PRESSE-ENGLISH, Aug. 30, 2013.

⁶⁵ Asylum seekers are given (2)A(5) visas, which serve to only protect them from deportation. They do not constitute a work permit and does not grant social benefits and non-emergency medical treatment. HIAS Israel: Asylum Seekers and Refugees in Israel: Frequently Asked Questions, <http://www.hias.org.il/pdf/FAQ-s-Asylum-in-Israel.aspx> (last visited April 8, 2014) [hereinafter HIAS Israel].

social services aside from schooling for their children.⁶⁶ It is estimated that approximately 2,500 asylum seekers are held in detention in Israel at any time, primarily in the Ktziot and Givon detention facilities.⁶⁷ The majority of African asylum seekers not in detention reside in South Tel Aviv, an area known for low-income housing where they compete with other low-income residents for employment.⁶⁸ These migrants are said to come within the ambit of a “temporary group protection.”⁶⁹ Due to a lack of rights afforded to those falling within the temporary group protection status, many leading experts have referred to this type of protection as “weak,” which has left most refugees vulnerable to frequent changes of policies and a lack of stability.⁷⁰ The grant of temporary residence to a group of asylum seekers, based solely on the date of their entry into the country, contravenes Israel’s obligations to put into place procedures to assess individual applications and is deeply problematic.⁷¹ The only thing preventing these refugees from further embroilment are protection papers handed to them by the UNHCR, which are often, though not always, respected as proof of a person’s needs for protection, and will only occasionally make them vulnerable to mass detentions and small-scale deportations.⁷² Most seek work in low income sectors, usually in restaurants and hotels. Originally, Prime Minister Netanyahu had stated that he would not prosecute employers who hire these refugees,⁷³ but with the

⁶⁶ Patrick Martin, *African Migrants Influx to Israel Sparks Race Riots; Citizens Worry Asylum-Seekers Could Become Permanent Residents and Stretch Limited Resources*, GLOBE AND MAIL, June 4, 2012 [hereinafter Martin, *African Migrants*].

⁶⁷ HIAS Israel, *supra* note 65. This number referred to the number held in closed detention centers prior to the overturning of Amendment No. 3 to the Prevention Infiltration Law. The Holot open detention center has since opened, which can house over 3,000 detainees. As of January 2014, fewer than a thousand asylum seekers were in the center.

⁶⁸ HIAS: Asylum Seekers in Israel, <http://www.hias.org/en/pages/asylum-israel> (last visited April 16, 2014).

⁶⁹ Tally Kritzman-Amir, *Otherness as the Underlying Principle in Israel’s Asylum Regime*, 42 ISR. L. REV. 603, 616 (2009).

⁷⁰ *Id.* at 616–17.

⁷¹ Yaron, Hasimshony-Yaffe, & Campbell, *supra* note 3, at 2.

⁷² Kritzman-Amir, *supra* note 69, at 617.

⁷³ Martin, *African Migrants*, *supra* note 66.

implementation of a newer amendment, the government has inaugurated a reversal of policy regarding employers.⁷⁴

Once refugees cross the border, they deal with further scrutiny and prejudice from the local citizenry- and the Israelis may have some well-founded concerns. For many, the notion of a Jewish state is not a theory, but rather a way of life, providing justification for not accepting foreigners of any kind into their midst. Some residents are concerned about a lawless society that may ensue, as some view the African migrants as having “no care about the law at all.”⁷⁵ There are conflicting reports as to the effect the African refugees have on crime rates. By one account, the asylum seekers are involved in “some 40 percent of the crimes committed in the Tel Aviv,” but according to at least one other account, “[l]ess than 1 percent of criminal files opened by police in Tel Aviv in 2010 were against Africans.”⁷⁶ Considering the population of Israel in July 2013 stood at approximately 7,707,000,⁷⁷ and the number of African migrants at that time in Israel numbered approximately 50,000, even the one percent estimate may represent a relatively high number crimes per capita among the African refugees. Official statistics reported by Israeli police state that in 2011 it opened 1,200 criminal files against African infiltrators for felonies, and the number nearly doubled in 2012, including 100 sex offenses.⁷⁸

Since the completion of most of the border along Egypt in January 2013,⁷⁹ the entrance of refugees from Eritrea and Sudan has come to a virtual halt.⁸⁰ The fence, erected along the 140 mile border Israel shares with Egypt, took approximately two years to complete

⁷⁴ *Illegal Immigrants Threaten Israel's Economy, Security: PM*, XINHUA GENERAL NEWS SERVICE, Dec. 4, 2011, available at http://news.xinhuanet.com/english/world/2011-12/05/c_122374216.htm. [hereinafter *Illegal Immigrants*]

⁷⁵ Ben Hartman, *Hatikva Residents Feel Abandoned by State, Court Ruling*, JERUSALEM POST, Sept. 18, 2013, at 1.

⁷⁶ Martin, *African Migrants*, *supra* note 66.

⁷⁷ Central Intelligence Agency: The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/fields/2119.html> (last visited March 12, 2014).

⁷⁸ Amotz Asa-El, *Into Africa*, JERUSALEM POST, Jan. 10, 2014, at 15.

⁷⁹ Batsheva Sobelman, *Israel Completes Most of Egypt Border Fence*, LOS ANGELES TIMES, Jan. 2, 2013, <http://articles.latimes.com/2013/jan/02/world/la-fg-israel-africa-immigration-20130103>.

⁸⁰ נתוני זרים בישראל [Data on Foreigners in Israel], http://piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/foreign_stat_032013.pdf (last visited March 12, 2014) [hereinafter *Data on Foreigners*].

and seeks to prevent the “unfettered flow of illegal infiltrators ... [and] the smuggling of drugs and weapons,” according to a statement from the Defense Ministry, which oversaw the four-hundred million dollar engineering project.⁸¹ According to official Israeli government publications, 2,752 refugees entered Israel leading up to 2006; this number was followed by 5,124 refugees in 2007, 8,857 refugees in 2008, 5,259 refugees in 2009, before ballooning to 14,715 in 2010 and 17,298 in 2011.⁸² In 2012, the final year before the completion of the fence, 10,440 refugees entered Israel.⁸³ As of September 30, 2013, only 36 refugees entered Israel in 2013, including none in both August and September, proving the effectiveness of the fence and agreements with Egypt.⁸⁴ Of the 53,636 “infiltrators” in Israel as of September 30, 2013, 13,249 hail from Sudan, along with 35,987 originating in Eritrea.⁸⁵

V. OVERTURNING OF AMENDMENT NO. 3 TO THE PREVENTION OF INFILTRATION LAW

On September 16, 2013, an extended panel of nine Justices of the Supreme Court deliberated the constitutionality of the Prevention of Infiltration Law as it stood amended and held, unanimously, that the arrangement is unconstitutional because it disproportionately limited the constitutional right to liberty in Basic Law: Human Dignity and Liberty.⁸⁶ Basic Law: Human Dignity and Liberty’s stated purpose is to “protect human dignity and liberty, in order to establish a Basic Law that reflects the values of the State of Israel as a Jewish and democratic state.”⁸⁷ As amended, the Basic Law stated that “Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all

⁸¹ Sobelman, *supra* note 79.

⁸² Data on Foreigners, *supra* note 80.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The term “infiltrators” is used directly by the Israeli government in their publications regarding these African refugees. *Id.*

⁸⁶ See Summary of the Judgment: HCJ 7146/12 *Adam v. the Knesset*, Regarding the Constitutionality of Amendment no. 3 to the Prevention of Infiltration Law, http://elyon1.court.gov.il/files_eng/12/460/071/b24/12071460.b24.pdf [hereinafter *Adam*].

⁸⁷ Basic Law: Human Dignity and Liberty, 5752-1992, 2086 HC 60 (1992) (Isr.)

persons are free.”⁸⁸ The court determined that the intent of the Prevention of Infiltration law as it stood was to deter future infiltrators from entering Israel, and not to punish any individual asylum seekers. Therefore, the law acted as a limitation on the individual’s dignity as a person.⁸⁹ In what could be compared to the strict scrutiny test applied in the United States, Justice Arbel, writing for the majority, reasoned that the law as it stood did not employ the narrowest means possible, or, as Justice Arbel described, least harmful means. “To the extent that the purpose of the amendment is deterrence, there are considerable chances that the border fence between Israel and Egypt will be sufficient.”⁹⁰ Further, imprisoning the infiltrators for a total of three years, “a long period,” serves a critical and disproportionate blow to the infiltrators’ rights.⁹¹ Previously, courts of Israel have noted that “the needs of one group, important as they may be, cannot be satisfied by limiting the needs and rights of another group in the population.”⁹² Finally, Justice Arbel espoused the intent of the Jewish state of Israel by reminding the court of the moral duty to every person, as they are etched in the basic pattern of the state of Israel as a Jewish and democratic state.⁹³ Overturning the previous Amendment, the Court then ordered all African migrants held in mandatory detention be released immediately, and that individual examination of all those in custody be completed within a period of 90 days from the day of its judgment.⁹⁴

VI. AFTERMATH OF ADAM V. THE KNESSET

Shortly after the decision to strike down Amendment No. 3 to the Prevention of Infiltration Law, the Knesset passed a new amendment that reduced time of detention without trial from three years to one, reallocated funds for construction of a new remote detention

⁸⁸ Basic Law: Human Dignity and Liberty- Amendment, 5754-1994, SH No. 1454 90 (1994) (Isr.)

⁸⁹ *Adam*, *supra* note 86, at 3.

⁹⁰ *Id.* at 4–5.

⁹¹ *Id.* at 5.

⁹² FH 10007/09 *Gluten v. The National Labor Court*, ¶ 29 (2013) (Isr.).

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 1.

facility, and provided for more officers to deal directly with infiltrators.⁹⁵ Passed on November 24, 2013, it further provided for an increased incentive for infiltrators to return to their home country by increasing their departure incentive to \$3,500 from the previous \$1,500. Prime Minister Netanyahu quickly expressed contentment with the new amendment, stating that

The steps that we unanimously approved today are proportionate and necessary for maintaining the Jewish and democratic character of the state, and to restore Israeli citizens' security while following High Court guidelines and international law. The new decisions include combined actions designed to encourage illegal migrants to leave Israel and return to their countries of origin, increase personal security for residents of Israel and reduce the presence of migrants in city centers.⁹⁶

The new bill was set to cost Israel approximately 440 million shekels (roughly \$125 million).⁹⁷ Most of this cost stemmed from an "open" jail for immigrants that was to open in the Negev.⁹⁸ For both humanitarian agencies and asylum seekers, the fear associated with the "open" detention facility is that it would be confused for a closed jail- the type of incarceration that had been struck down by the court in *Adam*.⁹⁹ The new holding facility includes lineups and headcounts, and those held within it are barred from working. Coupled with the fact that it is run by the Israeli Prison Service led at least MK Michal Rozin to state that it "sounds awfully like a jail."¹⁰⁰ The facility itself is open

⁹⁵ Omri Efrain, *State Ratifies Amendment to Prevention of Infiltration Law*, YNET NEWS, Nov. 24, 2013, <http://www.ynetnews.com/articles/0,7340,L-4457427,00.html>.

⁹⁶ *Id.*

⁹⁷ Omri Efrain, *New "Infiltration Prevention Bill" to Cost State NIS 440 Million*, YNET NEWS, Nov. 22, 2013, <http://www.ynetnews.com/articles/0,7340,L-4456699,00.html>.

⁹⁸ Omri Efrain, *State to Build "Open" Jail for Migrants Adjacent to Saharonim*, YNET NEWS, Oct. 30, 2013, <http://www.ynetnews.com/articles/0,7340,L-4447545,00.html> [hereinafter Efrain, *State to Build*].

⁹⁹ *Id.*

¹⁰⁰ *Id.*

during the day but closed during the nighttime,¹⁰¹ including three mandatory daily roll calls.¹⁰² Although Prime Minister Netanyahu had previously stated that he would not prosecute Israeli employers of infiltrators, with the implementation of the new Prevention of Infiltration law, as well as the open detention facility, the Population, Immigration, and Borders Authority stated it would begin to implement both fines and indictments against those found illegally employing African migrants.¹⁰³ In this new facility, detainees are able to leave, but are not able to work legally in Israel. Additionally, they must report for three daily roll calls in the morning, midday, and at night, and are not able to leave from 10 p.m. to 6 a.m., in essence placing great restrictions on their freedoms.¹⁰⁴ Conversely, the detainees are still allowed to keep cell phones and wear their own clothes, differentiating the open facility from the previous jail where they were detained.¹⁰⁵ It would appear that the sole reason the asylum seekers are brought to the open detention center is that they are refugees.¹⁰⁶

The amended bill led to immediate protest by the African migrant community. The law, which allowed authorities to detain migrants without valid visas indefinitely, was passed in mid-December 2013, and by January 5, 2014, more than 300 people had been arrested.¹⁰⁷ The protests prompted a rare and strongly worded statement from the United Nations refugee agency, which said that

¹⁰¹ Efraim, *State to Build*, *supra* note 98.

¹⁰² Ben Hartman, *For African Migrants Now Calling It Home, Holot "Open Prison" Is a Prison All the Same*, JERUSALEM POST, Feb. 9, 2014, available at <http://www.jpost.com/National-News/For-African-migrants-now-calling-it-home-Holot-open-prison-is-a-prison-all-the-same-340804>. [hereinafter Hartman, *For African Migrants*]

¹⁰³ Ben Hartman, *Israel to Begin Using "Open" Detention Facility for Migrants*, JERUSALEM POST, Dec. 12, 2013, available at <http://www.jpost.com/National-News/Israel-to-begin-using-open-detention-facility-for-migrants-334768>.

¹⁰⁴ Hartman, *For African Migrants*, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ Robert Tait, *Israeli [sic] to Open Migrant 'Detention Centre'*, THE TELEGRAPH, Dec. 12, 2013, available at <http://www.telegraph.co.uk/news/worldnews/middle-east/israel/10513977/Israeli-to-open-migrant-detention-centre.html>.

¹⁰⁷ Migrants in Israel Protest Law for Detention, Reuters, NEW YORK TIMES, Jan. 5, 2014, available at http://www.nytimes.com/2014/01/06/world/middleeast/migrants-in-israel-protest-law-for-detention.html?_r=0.

Israel's incarceration of migrants caused "hardship and suffering" and was "not in line" with the intentions of the 1951 Convention.¹⁰⁸

VII. ASYLUM PROCEDURES IN ISRAEL

For refugees entering Israel, acquiring recognition as a valid asylum seeker is an arduous task. During the 1970's a delegation of the UNHCR was established with the role of examining asylum claims, which would then pass on their recommendations to the Minister of Interior.¹⁰⁹ In 2001, the Ministry of Justice drafted a new procedure entitled "The Procedure for Handling Asylum Seekers in Israel," which created a hybrid system whereby the examination of an asylum application was conducted by UNHCR and the final decision was taken by the Ministry of Interior.¹¹⁰ In 2008, the gradual process of handing over the authority to examine asylum applications in Israel from the UNHCR to the Ministry of Interior began, and by July 2009, all stages of handling asylum applications had been transferred to the Ministry of Interior.¹¹¹

The present asylum procedure requires applicants to apply within a year of entering Israel or risk having their application dismissed out of hand.¹¹² A foreign subject arriving at the Ministry of Interior Population Immigration and Border Authority (hereinafter referred to as the Border Authority) must submit an application, which includes both registration and identification components.¹¹³ If a suspicion arises as to the truthfulness of the application, his matter will be referred to the consideration of a head of a team in the Refugee Status Determination department. If no suspicion arises, the applicant

¹⁰⁸ *Id.*

¹⁰⁹ Yonatan Berman, *Until Our Hearts are Completely Hardened: Asylum Procedures in Israel 12* (Shevy Korzen, trans.), <http://hotline.org.il/en/publication/until-our-hearts-are-completely-hardened-asylum-procedures-in-israel/>.

¹¹⁰ *Id.* at 13.

¹¹¹ *Id.* at 14–15.

¹¹² State of Israel Ministry of Interior Population Immigration and Border Authority, *Procedure for Handling Political Asylum Seekers in Israel*, at ¶ 1a, 1b, <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> [hereinafter *Procedure for Asylum Seekers in Israel*].

¹¹³ *Id.* at ¶ 2a

will immediately undergo a basic interview.¹¹⁴ All interviews, by law, are to be conducted in the applicant's native language.¹¹⁵ At the conclusion of the basic interview, the interviewer will decide, immediately, whether to refer the applicant to a comprehensive interview or – if the applicant has failed to establish what is considered a “colorable claim” – to refer the application to a process of dismissal out of hand.¹¹⁶ A dismissal out of hand, or a summary removal,¹¹⁷ occurs when “the claim and facts on which the application is based, even if all of them were to be proven, do not constitute any of the elements set out in the refugee convention.”¹¹⁸ If the applicant survives another process of dismissal, he is then referred to a comprehensive interview.¹¹⁹ It is at this time the applicant receives, for the first time, paperwork that can establish a right to legal presence. The applicant receives a license pursuant to section 2(a)(5) of the Entry into Israel Law, which will be in effect until the date set for the comprehensive interview. The very definition of a 2(a)(5) license is a “temporary visitor permit issued to an individual who resides in Israel illegally and whose deportation has been ordered – until his departure from Israel or his deportation.”¹²⁰ However, it may be extended as long as necessary until an administrative decision is made.¹²¹ The applicant may be subject to one more dismissal procedure, but if the applicant completes the comprehensive interview to the satisfaction of the administrator, his file is then turned over to the plenum of the advisory committee on refugees to the Interior Minister.¹²² The Committee's recommendations are then referred to the Interior Minister.¹²³ The Interior Minister alone may

¹¹⁴ *Id.* at ¶ 3a.

¹¹⁵ *Id.* at ¶ 3b(1).

¹¹⁶ *Id.* at ¶ 3c.

¹¹⁷ Dallal Stevens, *Between East and West: the Case of Israel in The Global Reach of European Refugee Law*, edited by Helene Lambert, Jane McAdam, Maryellen Fullerton 132, 138 (Helene Lambert, Jane McAdam, & Maryellen Fullerton eds., 2013).

¹¹⁸ Procedure for Asylum Seekers in Israel, *supra* note 112, at ¶ 4a.

¹¹⁹ *Id.* at ¶ 5a.

¹²⁰ Reuven Ziegler, *A Matter of Definition: On 'Infiltrators' and 'Asylum Seekers' in Israel*, The Israel Democracy Institute, Jan. 26, 2011, <http://en.idi.org.il/analysis/articles/a-matter-of-definition-on-infiltrators-and-asylum-seekers-in-israel>.

¹²¹ Procedure for Asylum Seekers in Israel, *supra* note 112, at ¶ 5a.

¹²² *Id.* at ¶ 7a.

¹²³ *Id.* at ¶ 7c.

decide whether it is appropriate to recognize the applicant as a refugee.¹²⁴ Should the Interior Minister decide to recognize him as a refugee, the Applicant will be granted a residency license of the a/5 type for one year.¹²⁵ Applicants who are turned away at any point may apply for reconsideration, but must do so within a two week period.¹²⁶ Once an asylum seeker is officially recognized by the state of Israel, he must apply to the Population Authority Bureau with a request to extend his license no later than four months prior to the expiry of the license. The Director may, in his discretion, extend the refugee's license. The first such extension lasts one year, the second extension lasts two years, while all other extensions last for three years.¹²⁷ Finally, once an asylum seeker has attained such a license, he may submit a request to be granted residency licenses for his spouse and minor children.¹²⁸

VIII. CRITIQUE OF THE ASYLUM PROCEDURES IN ISRAEL

The Hotline for Migrant Workers, a self-described “non-partisan, non-profit association that works to protect the rights of migrant workers and to eradicate the trafficking of human beings in Israel,” published a report in 2011, in the wake of the passage and introduction of the latest asylum procedures, regarding the inherent flaws in the asylum procedures in Israel.¹²⁹ The inherent flaw in the asylum procedure lies with the intrinsic attitude Israeli officials have towards asylum seekers. In mid-June 2009, then-Head of the Population, Immigration, and Borders Authority, Yaakov Ganot, declared that “[i]n our examinations, I would say that 99.9 percent of them are here for work. They’re not asylum seekers, they are not at any risk.”¹³⁰ It is evident that an undercurrent of hostility towards asylum seekers has pervaded the relevant governmental departments, which has led to the

¹²⁴ *Id.* at ¶ 7d.

¹²⁵ *Id.* at ¶ 7f.

¹²⁶ *Id.* at ¶ 9a.

¹²⁷ *Id.* at ¶ 11d.

¹²⁸ *Id.* at ¶ 12a.

¹²⁹ Berman, *supra* note 109.

¹³⁰ Nurit Wurgaft, Closing the Holes and the Loopholes, HA'ARETZ, 21 June 2009, available at <http://www.haaretz.com/print-edition/features/closing-the-holes-and-the-loopholes-1.278503>.

risk of a “trickle down” effect to the employees examining the applications.¹³¹

The Ministry of Interior refuses to conduct individual examinations of asylum applications made by nationals of Eritrea and Sudan. Instead, a person claiming to be a national of either country undergoes an identification interview, but does not undergo the basic or the comprehensive interview. The asylum applicant is then given temporary group protection, which is effectively the implementation of a policy of non-refoulement for the time being.¹³² Those claiming to be nationals of either country are not given any opportunity to present arguments pertaining to their individual claims. Further, the one year limit on applications poses a substantial risk of asylum seekers losing their eligibility for asylum. However, many of these applicants submit applications after the year-long limit due to various reasons, including, but not limited to, fear of authorities, being unaware of their right to protection, or being unaware of the proper asylum procedure.¹³³

The Hotline for Migrant Workers have identified several deficiencies once an asylum seeker actually makes it to the application stage. The procedure for summary dismissal, or dismissal out of hand, also poses major problems in the asylum procedure, notably the fact that a short and basic interview will not reveal the fact that the asylum seeker has grounds for protection under the Refugee Convention.¹³⁴ Presently, the Entry to Israel Law is silent about the rights afforded under the 2(a)(5) permit, thereby frustrating the purpose of granting the asylum seekers the rights they are afforded under the Convention.¹³⁵ Additionally, the unit in charge of the asylum procedure is not required to disclose the information used in rejecting an asylum application, which is unlawful according to present Israeli case law when the level of interest of the person requesting the information carries significant weight, such as in the case of an asylum seeker.¹³⁶ Additional problems arise in section 10 of the asylum procedure,

¹³¹ Berman, *supra* note 109, at 8.

¹³² *Id.* at 9.

¹³³ *Id.* at 18.

¹³⁴ *Id.* at 21.

¹³⁵ *Id.* at 23.

¹³⁶ *Id.* at 24, citing to AdminA 9135/03 *The Council for Higher Education v. Ha'aretz Newspaper Publishing*, 60(4) PD 217 [2004] (Isr.).

which states that the State of Israel reserves the right not to absorb into Israel and not to grant permits to stay in Israel to subjects of enemy or hostile states.¹³⁷ This is especially problematic for asylum seekers from Sudan, as Israel presently has no diplomatic ties with the country, which is in direct contravention of Article 1(1) of the Convention (prohibiting discrimination on the basis of national or ethnic origin).¹³⁸ Significant issues also arise due to the strict 72 hour time limit that applicants whose procedure has been rejected out of hand endure. Asylum seekers who receive a rejection letter are unable to exercise their rights to appeal within this 72 hour period. Finally, the procedure does not explicitly reference the non-refoulement principle espoused under the Convention, albeit the fact that the High Court of Justice in Israel has ruled that the principle of non-refoulement applies not only to successful asylum applicants, but to all persons in Israel who risk being returned to a place where their life or liberty is threatened.¹³⁹ In practice, problems persist in the interview methods, methods employed to assess credibility, limits on research and information on country of origin, inadequate rejection letters, insufficient summary evaluations, and problems in translation.¹⁴⁰

The issues underlying the asylum system begin with the interviewing methods and last through rejection and its aftermath. During the interview process, the underlying assumption is that the applicant is lying, and that the aim of the process is to uncover these lies.¹⁴¹ The interviews extend for long hours, as they focus on peripheral matters and insignificant and marginal details that no person can be expected to remember. Every mistake or lapse of memory is attributed to lack of credibility, which consequently justifies rejecting the asylum claim.¹⁴²

¹³⁷ Procedure for Asylum Seekers in Israel, *supra* note 112, at ¶ 10. The United States outlines its regulations for asylum procedure in the Immigration and Nationality Act §208, and makes a specific reference to the banning of non-refoulement in § 241(b)(3). United States asylum policy will be referenced throughout this article due to it being the author's residence. Additionally, the United States is known for being modal in immigration policy and its rather comprehensive immigration policy, and is therefore worth noting for its policies.

¹³⁸ Convention, *supra* note 24, at Art. 1(1).

¹³⁹ HCJ 4702/94 *Al-Tai v. Minister of the Interior*, 49(3) PD 843, 848 [1995] (Isr.).

¹⁴⁰ Berman, *supra* note 109, at 28–51.

¹⁴¹ *Id.* at 28.

¹⁴² *Id.* at 30.

The Questioning and Identification unit, responsible for the basic interviews, is not in any way supposed to ascertain whether the asylum seeker is credible, but to work on the assumption that the applicant's statements are true. Nevertheless, many applications are dismissed out of hand after the Questioning and Identification unit determines that the asylum seeker is not credible.¹⁴³ Once rejected, the rejection letters usually do not allow the asylum seekers to understand the full considerations for rejecting the application.¹⁴⁴ Additionally, any mistake in translation may lead to the rejection of an asylum claim.¹⁴⁵

The limited resources available to migrants also poses a major problem. Despite the fact that migrants have the right to assistance of counsel under the asylum procedures in Israel, very few, if any, actually receive legal aid.¹⁴⁶ The Hotline for Migrant workers and the Tel Aviv University law clinic, established in 2002, provide two of the few legal resources for asylum seekers.¹⁴⁷ The Tel Aviv University law clinic, established in 2002, also provides legal assistance to refugees and asylum-seekers.¹⁴⁸ Simply put, due to the lack of legal resources available to migrants, they are not able to fully pursue the limited rights available to them under the law.

The vast majority of asylum claims are not assessed, including, most notably, the group granted temporary protection status.¹⁴⁹ In 2008–2009 only three individuals out of approximately 3000 cases the Ministry of the Interior reviewed were granted asylum; from 2010–2011, the government approved only one claim while rejecting 3,692 other claims.¹⁵⁰ According to the UNHCR, of 2,243 decisions made regarding asylum applications in 2012, only 30 were given a positive decision, just over 1% of applications, which were all given full Convention protection.¹⁵¹

¹⁴³ *Id.* at 41.

¹⁴⁴ *Id.* at 43.

¹⁴⁵ *Id.* at 48.

¹⁴⁶ Yaron, Hasimshony-Yaffe, & Campbell, *supra* note 3, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 7.

¹⁵⁰ *Id.*

¹⁵¹ United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).

IX. ISRAEL'S JUSTIFICATIONS IN DENYING HEARINGS TO AFRICAN REFUGEES

Israel has maintained, facially, that it is committed to the Convention, and seeking out viable solutions to deal with the African refugee crisis. At the 2011 United Nations High Commissioner for Refugees Ministerial Meeting, Israeli Deputy Foreign Minister Daniel Ayalon echoed such sentiment. Citing Israel's history as a shelter for Jewish refugees, its role in the Convention, and previous acceptance of refugees from Vietnam and Darfur, Ayalon reiterated Israel's commitment to the Convention, stating Israel is devoted to

continu[ing] expanding Government capacity and refugee status determination expertise; [t]o assuming greater responsibility for refugee status determination; [t]o reaffirm [Israel's] commitment to the internationally recognized principle of non-refoulement; [t]o provide the necessary assistance and medical care to victims of human trafficking.¹⁵²

However, Ayalon made it clear he would stop short of most forms of assistance to the refugees. The foreign minister pointed to Israel as a "small country," indicating it is unable to accept all illegal migrants and asylum seekers due its severe implications on "society, economy, demography, and security."¹⁵³ This comment, which was perhaps outweighed by the sheer quantity of comments directed towards Israel's commitment to assisting the refugees, is perhaps most revealing of the true Israeli stance towards the African refugees.

Throughout Israel's tumultuous history, one guiding principle has endured: the idea of a Jewish state, which is embodied in Israel's Declaration of Independence and Israel's Law of Return- the preeminent 1950 immigration law that allows for the near-automatic citizenship of all Jews wishing to come to Israel as olim (Jewish immigrants coming to Israel). "An oleh's visa shall be granted to every Jew who

¹⁵² *Remarks by Israeli Deputy Foreign Minister Daniel Ayalon at the UNHCR Ministerial Meeting (As Released by the Israeli Ministry of Foreign Affairs) Location: Geneva, Switzerland, Federal News Service, Dec. 8, 2011.*

¹⁵³ *Id.*

has expressed his desire to settle in Israel, unless the Minister of Immigration is satisfied that the applicant" is either engaged in activities directed against the Jewish people or is likely to endanger the public health or security of the State.¹⁵⁴

"Push-pull" factors are one of the prevailing principles of immigration law. Simply explained, certain countries have factors that attract residents of other countries, otherwise known as pull factors. Meanwhile, negative factors in a resident's home country push residents out. One of the fears of Israeli ministers is that by relaxing requirements and accepting larger numbers of refugees through the Egyptian border will create a "tsunami" of incoming African migrants.¹⁵⁵ In turn, it would create a major pull factor for future possible African refugees.¹⁵⁶

Another concern for Israel lies in its economy. There is much anxiety that impoverished African refugees resettled in Israel may become wards of the state.¹⁵⁷ Israel's experience with the relocation of Jewish Ethiopians posing persistent socioeconomic problems since the 1980's has caused trepidation among Israeli officials.¹⁵⁸ Today, sixty-two percent of Ethiopian families live in poverty with no independent income, including seventy-two percent of Ethiopian children.¹⁵⁹ In a 2011 speech, Prime Minister Netanyahu blamed the illegal immigrant flow on the global economic crisis and regional upheavals.¹⁶⁰ It would appear there is an economic undertone to how the Prime Minister views the African migrants. Additionally, the Prime Minister proclaimed he would seek out additional venues to quash the pull of migration into Israel, most notably seeking out harsher punishments for employers that hire illegal employees.¹⁶¹ Most African migrants live in poor neighborhoods where residents see them as competition under conditions of scarcity. Explicit racism toward Blacks is also an issue,

¹⁵⁴ Law of Return, 5710-1950, SH No. 51 p.159 §2(b) (Isr.).

¹⁵⁵ Roni Sofer, *Olmert: We Must Curb Infiltrations from Egypt*, YNET NEWS, Mar. 23, 2008, <http://www.ynetnews.com/articles/0,7340,L-3522476,00.html>.

¹⁵⁶ Perry, *supra* note 30, at 177.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 177-78, referencing IAEJ Employment Initiative, Isr. Ass'n for Ethiopian Jews, <http://tinyurl.com/23mgpfv> (last visited Mar. 12, 2014).

¹⁶⁰ *Illegal Immigrants*, *supra* note 74.

¹⁶¹ *Id.*

and many poorer, dark-skinned Israelis of North African descent fear being undermined by being lumped together with “real” Africans.

X. ASYLEES OR ECONOMIC MIGRANTS?

Another key argument Israeli officials have advanced in their refusal to accept African asylum seekers is the belief many refugees are simply economic migrants who seek protections as asylum seekers. The most recent trend sees African migrants leaving the country. A total of 1,705 African migrants agreed to leave Israel voluntarily in February 2014.¹⁶² This number follows a steady increase which saw 765 asylum seekers who voluntarily repatriated themselves in January, 325 in December, and 63 in November.¹⁶³ Israeli Interior Minister Gideon Sa'ar credits this exodus to the new anti-infiltration amendment, the introduction of the “open” detention facility, greater enforcement against Israelis hiring illegal migrants, and the one-time grant increase from \$1,500 to \$3,500 to those who voluntarily depart.¹⁶⁴ It has since emerged that two African countries, which have remained unidentified, are willing to accept the asylum seekers.¹⁶⁵ Those leaving include asylum seekers who are brought directly from the closed detention center in Saharonim, which has been said by the United Nations to indicate that they are not acting out of free will.¹⁶⁶

For some leading commentators, this is simply affirmation that the Eritreans and Sudanese came to Israel as economic migrants, and not due to a well-founded fear of persecution. 85 percent of African migrants coming to Israel are young men, which may be characteristic of economic migrants.¹⁶⁷ The minimum wage in Israel is over 30 times

¹⁶² Ben Hartman, *Israel Sees Record Number of Asylum Seekers Leave Country in February*, JERUSALEM POST, Feb. 27, 2014, available at <http://www.jpost.com/National-News/Israel-sees-record-number-of-asylum-seekers-leave-country-in-February-343805>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Ilan Lior, *Two African Countries Taking in Asylum Seekers Leaving Israel*, HA'ARETZ, Mar. 12, 2014, available at <http://www.haaretz.com/news/national/premium-1.579270>. [hereinafter Lior, *Two African Countries*]

¹⁶⁶ *Id.*

¹⁶⁷ Yonatan Jakubowitz, Opinion, *It's the Money, Stupid*, JERUSALEM POST, Nov. 18, 2013, at 29.

the average wage in Eritrea.¹⁶⁸ The European Union itself only recognizes 30% of Eritreans and Sudanese as legitimate asylum seekers, a paltry number in comparison to those actually claiming asylum.¹⁶⁹ Additionally, all migrants coming to Israel must pass through at least one other country in which there is an active branch of the UNHCR, Egypt.¹⁷⁰ Article 31 of the UN charter explicitly states that the rights enumerated in it should be awarded only to refugees who come directly from the country in which they were being persecuted.¹⁷¹ Such is also the sentiment of Prime Minister Netanyahu, who has repeatedly restated his pledge to crack down on the “illegal immigrants flowing to his country.”¹⁷² Netanyahu has stated that he views “the flooding illegal, job-seeking immigrants as threats to our economy, society, security and the delicate demographic fabric which Israel is built on.... We are determined to protect our border and our citizens’ jobs.”¹⁷³

Others, including leading activists, believe the combination of measures put in place against the migrants has reduced some to utter despair, essentially forcing them to leave the country.¹⁷⁴ For them, implementation of the latest procedures, especially the opening of the newest detention center, are “designed to force them into leaving.”¹⁷⁵ Regardless of the ultimate determination regarding these migrants, Israel owes them under the Convention to which it is a signatory, at the very least, a screening process that determines whether or not they are, in fact, eligible for asylum protections under the Convention, or

¹⁶⁸ *Id.*

¹⁶⁹ Yonatan Jakubowitz, Opinion, *Illegal Infiltration to Israel: It's the Economy, Stupid!*, JERUSALEM POST, Jan. 8, 2014, at 15.

¹⁷⁰ Egypt is a signatory to the Convention and Protocol. However, it has not yet developed national asylum procedures and institutions, the functional responsibilities for all aspects of registration, documentation, and refugee status determination are carried out by UNHCR under the 1954 Memorandum of Understanding with the Government of Egypt. 2014 UNHCR Country Operations Profile - Egypt, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486356>.

¹⁷¹ Convention, *supra* note 24, at Article 31.

¹⁷² *Illegal Immigrants*, *supra* note 74.

¹⁷³ *Id.*

¹⁷⁴ Aldo Baquis, *Israel: 1700 African Migrants Give Up and Leave; 'Voluntary Returns' Says Interior Minister; Not So, Says Activist*, ANSAMED- ENGLISH, Feb. 28, 2014, http://www.ansamed.info/ansamed/en/news/sections/politics/2014/02/28/Israel-1700-African-migrants-give-up-leave_10160725.html.

¹⁷⁵ Tait, *supra* note 106.

whether they are merely cloaking themselves in the veil of asylum seekers in order to seek more desirable economic opportunities.

XI. HISTORICAL AND PRESENT STATUS OF ASYLUM SEEKERS IN MALTA

The tiny Mediterranean nation of Malta became a signatory to the Convention on June 17, 1971, and became a signatory to the Protocol on September 15, 1971.¹⁷⁶ Malta lies in a unique position similar to Israel due its geographical proximity to the origin nations of the at-risk refugees. Malta, which joined the European Union in 2004, has become, along with Israel, one of the preferred destinations for refugees leaving the Horn of Africa. The majority of the 65,000 immigrants crossing the Mediterranean into Europe every year originate from sub-Saharan Africa.¹⁷⁷ Malta rests just 180 miles north of Africa, closer than any other democratic body of land aside from Israel.¹⁷⁸ Many of the Sub-Saharan refugees depart Africa through Libya, which has been either unwilling or unable to supervise its long land borders to stop irregular immigrants from entering the country from sub-Saharan Africa, and has further been unable to control its extensive coastline.¹⁷⁹

In 2013, 2,008 asylum seekers arrived from Libya via 24 boats, a slight increase from the 1,890 individuals who arrived by boat in 2012. This figure was comprised of 50% Somalians and 23% Eritreans. As of the end of 2013, around 500 individuals remained in detention, and 1,499 asylum seekers and beneficiaries of protections lived in open centers.¹⁸⁰ Approximately 2,025 decisions were made in Malta regarding asylum applications in 2012, the last year for which final

¹⁷⁶ States Parties, *supra* note 26.

¹⁷⁷ Alexander Betts, *Towards A Mediterranean Solution? Implications for the Region of Origin*, 18 INT'L J. REFUGEE L. 652, 652 (2006).

¹⁷⁸ Health and Human Services in Malta, James Madison University, *About Malta: It's an Education and an Adventure in the Middle of the Mediterranean Ocean*, September 6, 2008, <http://www.iihhs.jmu.edu/malta/about.html>

¹⁷⁹ 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.

¹⁸⁰ Beneficiaries of protection denote individuals who are recognized to have a colorable claim and are protected from *refoulement*, but have not been granted unilateral asylum protection by the state.

statistics are available.¹⁸¹ This number includes 1,590 first instance decisions, of which 1,435 were positive decisions.¹⁸² Only 155 rejections were made regarding applications of asylum seekers. Of the 1,435 positive decisions made in the first instance, only 35 were afforded full asylum protection. Of the approximate 435 final, non-first instance decisions that were made regarding asylum applications, only 20 positive decisions were made. UNHCR estimates that around 30% of the 18,625 individuals who arrived by boat from Libya since 2002 remain in Malta, while approximately 2,242 beneficiaries of secondary protection¹⁸³ resettled or relocated elsewhere since 2005.¹⁸⁴ Although an influx of asylum seekers numbering approximately 2000 may not appear to be much, it represents a sizeable portion compared to the general population of approximately 419,000.¹⁸⁵ Comparatively speaking, it would represent an influx of approximately 2.5 million extra people to the United Kingdom.¹⁸⁶ Over 450,000 asylum applications were made in Europe in 2013,¹⁸⁷ meaning asylum applications in Malta represented approximately .44% of the total asylum applications in Europe. Comparatively speaking, the total European Union population as of January 1, 2014, stood at over 507 million,¹⁸⁸ meaning Malta's population represented less than .1% of the total population in the European Union, the smallest population of any country in the European Union. Malta's share of asylum applications is

¹⁸¹ European Asylum Statistics, *supra* note 2.

¹⁸² Positive decisions include both full Convention protection and complementary protection which provides that the applicant cannot be returned to his home country, but is not afforded asylum status in the country of application.

¹⁸³ Secondary protection indicates that the asylum seeker received recognition as having a colorable claim regarding a legitimate fear of persecution in their home country, but do not receive full asylum protections from the country in which they applied.

¹⁸⁴ UNHCR: 2013 Malta Asylum Trend, <http://www.unhcr.org/mt/component/content/article/722>.

¹⁸⁵ BBC News: Malta Profile, <http://www.bbc.com/news/world-europe-17597837>.

¹⁸⁶ Colin Freeman, *Malta Drowns under Flood of Immigrants; As the Boats Continue to Arrive on Its Shores, the Island Issues a Cry for Help*, THE SUNDAY TELEGRAPH, July 21, 2013, at 25.

¹⁸⁷ *Over 450,000 Asylum Applications in Europe in 2013*, EU OBSERVER, Feb. 5, 2014, available at <http://euobserver.com/tickers/123015>.

¹⁸⁸ Europa: Living in the EU, http://europa.eu/about-eu/facts-figures/living/index_en.htm.

therefore five times greater than its share of the EU population. "Right now we cannot cope with these numbers, they are unsustainable," echoed Malta's Prime Minister, Joseph Muscat. "Malta is the smallest state in the EU, and we are carrying a burden that is much bigger than any other country."¹⁸⁹ It appears Muscat is endorsing the sentiment that due to Malta's minute stature, it is incapable of handling the enlarged influx of refugees. As recently as 2009, Malta had the third highest relative asylum application rate, behind only Cyprus and Liechtenstein, averaging 7.806 asylum applications per thousand of population.¹⁹⁰

In its search to cope with the flow of migrants, Malta has, in the past, considered plans to eject asylum seekers. On July 9, 2013, Malta was rebuffed by the European Union Court of Human Rights in its efforts to board 45 would-be refugees under police guard on flights to Libya.¹⁹¹ Home affairs commissioner Cecilia Malmstrom had previously been informed that Malta would most likely be in violation of its *non-refoulement* obligation if it did not give the asylum seekers the chance to file asylum requests and give them due consideration prior to expelling them.¹⁹²

XII. EUROPEAN UNION REGULATIONS AND DIRECTIVES CONCERNING MALTA

Because Malta is a member of the European Union, it is guided by several regulations and directives that formulate the Common European Asylum System. According to the European Commission, the member states "have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar."¹⁹³ However, the

¹⁸⁹ Freeman, *supra* note 186.

¹⁹⁰ Meher Talib, *Numbers Versus Rights: State Responsibility Towards Asylum Seekers and the Implications for the International Refugee Regime*, 27 GEO. IMMIGR. L.J. 405, 414–15 (Winter 2013).

¹⁹¹ Andrew Rettman, *Outrage Over Malta's Plan to Kick Out Asylum Seekers*, EU OBSERVER, July 10, 2013, available at <http://euobserver.com/justice/120817>.

¹⁹² *Id.*

¹⁹³ A Common European Asylum System, European Commission - MEMO/13/532, June 12, 2013, http://europa.eu/rapid/press-release_MEMO-13-532_en.htm.

current system has been criticized as posing a “triple threat” to EU solidarity by placing a “grossly disproportionate burden on the southern states,” including Malta, “fail[ing] to ensure that member states adhere to common standards with respect to asylum seekers,” and “limit[ing] the ability of Frontex, the EU external border control agency.”¹⁹⁴

The first such regulation is the Dublin Regulation, which was modified in 2003 after its original conception in 1990. The self-avowed purpose of the Dublin Regulation is “to identify as quickly as possible the Member State responsible for examining an asylum application, and to prevent abuse of asylum procedures.”¹⁹⁵ Among its guiding principles is the regulation’s view that only one member state is responsible for examining an asylum application; in essence stating that asylum seekers should not be sent from one nation to the next nor should asylum seekers be allowed to apply to numerous countries.¹⁹⁶ This is known as asylum shopping, a measure the Dublin Regulation sought to prevent. The baseline rule states that the first member state where a refugee applies for asylum becomes the member state’s responsibility, including those member states into which asylum seekers have crossed illegally. Other criteria may dictate what member state is responsible for the asylum applicant, including the family reunion provision (where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire);¹⁹⁷ the Member State which granted valid residence document or visa;¹⁹⁸ and five months’ residency in a different member state, among

¹⁹⁴ Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity*, 26 HARV. HUM. RTS. J. 217, 217–18 (Spring 2013).

¹⁹⁵ Council Regulation 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1 (EC).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at art. 7 & 8.

¹⁹⁸ *Id.* at art. 9.

others.¹⁹⁹ Perhaps most importantly, the Dublin Regulation states that the member state designated as responsible for the asylum application must take charge of the applicant and process the application.²⁰⁰

Under the Dublin II Regulation, there are only two provisions that allow for the return of an applicant from one Member State to another. Article 4(5) provides that if an asylum seeker lodges an application in a second state after withdrawing his or her application from the first, the applicant shall be returned to the first member state in which he or she lodged the application.²⁰¹ Additionally, pursuant to Article 16, a Member State may also call upon another to take charge of and take back an applicant who rightfully should be processed there. Further, the Dublin II Regulation established a “safe third country” provision, which grants that any Member State has the right to return an asylum seeker to a third country so long as it is in accordance with the 1951 Geneva Convention.²⁰² Due to the many provisions allowing states to send asylum seekers elsewhere and how they wish to accept them, it would appear that the Regulation leaves the process decentralized and in the hands of the Member States to sort out in accordance with “their own laws and political will.”²⁰³

Because the baseline rule provides that the state that receives the original asylum applicant is responsible for his application and well-being, the Regulation has been criticized as creating “asymmetrical obligations for which the northern states have failed to compensate.”²⁰⁴ This has led the southern states such as Malta to employ controversial migrant interception measures that “defy ... human rights and obligations under EU and international law.”²⁰⁵

There are two other regulations and directives handed down by the European Union that are worth considering. The first, the

¹⁹⁹ *Id.* at art. 10.

²⁰⁰ *Id.* For examples, *see* art. 3, 16, 17.

²⁰¹ *Id.* at art. 4(5).

²⁰² *Id.* at art. 3(3). The United States has a similar provision. Immigration and Naturalization Act §241(b)(3).

²⁰³ Barry Junker, *Burden Sharing or Burden Shifting? Asylum and Expansion of the European Union*, 20 GEO. IMMIGR. L.J. 293, 301 (2006).

²⁰⁴ Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity*, 26 HARV. HUM. RTS. J. 217, 218 (Spring 2013).

²⁰⁵ *Id.*

“Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status,” set out certain minimum standards on timing, as well as providing for an accelerated asylum application provision for dealing with manifestly unfounded applications.²⁰⁶ The second, the 2003 Council Directive on Minimum Standards for the Reception of Asylum Seekers, sought to both afford applicants comparable living conditions in all member states and also to limit secondary movements.²⁰⁷ This includes allowing the applicant to stay in the territory of the Member State during processing, but only to the extent that the Member State provides them guaranteed access to all benefits under the Directive.²⁰⁸

XIII. MALTA’S DOMESTIC IMMIGRATION & ASYLUM LAWS

While the Dublin II Regulation and other directives provided by the European Union provide the guidelines for its Member States to follow, it is up to the individual country to legislate its own asylum and refugee laws. While Malta does have its own Refugees Act²⁰⁹, it includes very little regarding asylum procedures and detention. It does, however, include explicit references to its obligations under the Dublin II Regulation, which include the right to not be removed from Malta pending application,²¹⁰ provides the means for how to deal with manifestly unfounded applications,²¹¹ and prohibits *refoulement*,²¹² among other provisions.²¹³ While the Refugees Act lays out a proce-

²⁰⁶ Proposed Council Directive 578/2000, Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2001 O.J. (C 62E), as amended by 2002 O.J. (C 291 E).

²⁰⁷ Council Directive 9/2003, Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18 (EC).

²⁰⁸ *Id.* at art. 7.

²⁰⁹ Refugees Act, Chapter 420 of the Malta Laws [hereinafter Refugees Act].

²¹⁰ *Id.* at art. 10(1): “Notwithstanding the provisions of any other law to the contrary, an asylum seeker shall not be removed from Malta before his application is finally determined in accordance with this Act.”

²¹¹ *Id.* at art. 18(1).

²¹² *Id.* at art. 9(1).

²¹³ The Refugees Act provides varying treatment for asylum seekers and refugees. The procedure for asylum application is outlined in Article 8, while Article 10 outlines the rights and treatment afforded to asylum seekers, while the rights and treatments afforded to recognized refugees are outlined in Article 11.

cedure for handling asylum applications, it still leaves many questions regarding the treatment of the arrival of an asylum seeker, who enters Malta, technically speaking, as an illegal entrant. This leaves Malta's Refugees Act vulnerable to much criticism. Malta uses its Immigration Act as a guideline for how to deal with all illegal entrants, regardless of their claims for asylum. Therefore, under the Immigration Act, the position of asylum-seekers who enter irregularly is identical to that of any other migrant who enters irregularly.²¹⁴

While the Refugees Act is supplemented by the Reception of Asylum Seekers Regulation,²¹⁵ neither document references specific procedures for asylum seekers. Asylum seekers who enter illegally and do not receive clearance for leave from the Principal Immigration Officer pursuant to Article 5 of the Immigration Act are termed "prohibited migrants,"²¹⁶ and are therefore treated the same as all other illegal entrants. Under the Immigration Act, detention is the automatic consequence of a refusal to grant admission to national territory,²¹⁷ the alternate being the issuance of a removal order in respect of a particular individual.²¹⁸ Further, the Immigration Act makes no reference to the concept of *non-refoulement*, leaving asylum seekers who are grouped with other illegal entrants at risk of expulsion. The Immigration Act also provides for power to arrest without a warrant any individual who is in Malta without the required leave from the immigration authorities or who is reasonably suspected of being in Malta without the authorization of the Principal Immigration Officer.²¹⁹ In practice, the immigration authorities in Malta systematically issue removal orders to all persons arriving irregularly by boat from Libya, who constitute the majority of asylum-seekers on the island.²²⁰ Further, illegal entrants against whom a removal order is issued are typically

²¹⁴ UNHCR's Position on the Detention of Asylum-Seekers in Malta 4, Sept. 18, 2013, <http://www.unhcr.org/mt/news-and-views/press-releases/698> [hereinafter UNHCR's Position].

²¹⁵ Reception of Asylum Seekers (Minimum Standards) Regulations, Chapter 420.06 of the Laws of Malta [hereinafter *Reception Regulations*].

²¹⁶ Article 5 of the Immigration Act, Chapter 217 of the Laws of Malta [hereinafter Immigration Act].

²¹⁷ *Id.* at art. 10.

²¹⁸ *Id.* at art. 14(2).

²¹⁹ *Id.* at art. 16.

²²⁰ UNHCR's Position, *supra* note 214, at ¶ 23.

not informed of the consideration leading to the order, nor are they given an opportunity to present information or documentation in support of a request for a period of voluntary departure.²²¹

Prior to December 2003, Malta had employed a policy of blanket mandatory and indefinite detention of persons found entering or staying in Malta in an irregular, or illegal, manner, including asylum seekers. However, in January 2005, with the adoption of the *Irregular Immigrants, Refugees, and Integration Policy Document*, Malta began self-imposing a maximum period of 18 months in detention, or until a party's asylum application is processed, whichever occurs sooner.²²² However, the 2005 policy document makes no specific reference to asylum seekers; rather, it continues to treat all irregular migrants the same way. All illegal entrants, including asylum seekers, retain remedies to challenge their detention, including remedies under the Criminal Code, various remedies under the Immigration Act, a remedy under the EU Returns Directive, and a remedy through constitutional proceedings. However, as shall be seen, all remedies are marked by procedural deficiencies, and therefore are not proper for considering an asylee's rights.

XIV. CRITICISMS OF MALTA'S ASYLUM PROCEDURES

Because detention is automatic for all illegal entrants despite their claims, Malta is in clear contravention of Article 31 (on non-penalization of refugees who enter or stay illegally in the country of refuge) of the 1951 Convention. Article 31 of the Convention espouses the idea that every refugee shall enjoy the fundamental right to liberty and security of person. Asylum seekers who enter Malta having not previously received permission to enter are grouped together with other illegal entrants and are termed "prohibited migrants," and are therefore subject to mandatory detention under Article 10 of the Immigration Act. In practice, asylum seekers remain at the mercy of the Office of the Refugee Commissioner, subject to release only after

²²¹ *Id.*

²²² National Legislative Bodies, *Malta: Irregular Immigrants, Refugees and Integration Policy Document*, 2005, <http://www.refworld.org/docid/51b197484.html>.

obtaining a form of protection from the Office.²²³ The UNHCR has consistently held that detention is considered arbitrary where there is a lack of reasonability that would indicate that the detention is proportionate to a legitimate objective.²²⁴ Furthermore, failure to consider less coercive or intrusive means could also render detention arbitrary.²²⁵ Malta's guidelines for detention therefore fail as a matter of being arbitrary and capricious, as there is no legitimate purpose for the mandatory detention, nor are alternative measures considered. The European Court of Human Rights has consistently held that detention for the purposes of removal should only occur after the asylum claim has been rejected, and the asylum seeker is subject to proper removal grounds.²²⁶ The only mandatory detention that is permissible under United Nations guidelines is for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim.²²⁷ In essence, detention can only be applied for a legitimate purpose in the individual case. Without such a purpose, detention will be arbitrary, even if entry was illegal.²²⁸

Further, asylum seekers in mandatory detention are subject to harsh and crippling conditions. The UNHCR position paper on the treatment of asylum seekers in Malta has concluded that "[t]he negative and at times severe physical and psychological consequences of detention are well documented, yet appear to have had limited impact on national policy-making on the detention of asylum-

²²³ Refugees Act, *supra* note 209, at Article 8(1). Asylum seekers in Israel also may receive assistance from the UNHCR, albeit to limited extents. Of the 6,460 pending asylum applications in Israel at the beginning of 2012, only 765 received assistance from the UNHCR. United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).

²²⁴ UNHCR Detention Guidelines, 2012, ¶ 18, <http://www.unhcr.org/505b10ee9.html> [hereinafter Detention Guidelines].

²²⁵ *Id.*

²²⁶ See *Lokpo and Touré v. Hungary*, App. No. 10816/10, ECHR (2011), available at <http://www.unhcr.org/refworld/docid/4e8ac6652.html>.

²²⁷ UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) - 1986, para. (b), available at <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

²²⁸ *A v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), April 3, 1997, para. 9, available at <http://www.refworld.org/docid/3ae6b71a0.html>.

seekers.”²²⁹ The horrid conditions have led to riots and injuries among the detainees.²³⁰ While most detention centers were found to have adequate facilities, the open facilities, which houses refugees, beneficiaries of subsidiary protection, asylum seekers, and persons whose asylum claims have been rejected, were found to be clearly substandard.²³¹ The centers all suffered from overcrowding and severely limited resources.²³² Additionally, vulnerable groups of people (families with children, unaccompanied minors, persons with disabilities, and others) were also subject to mandatory detention. While some of the more visible of the vulnerable groups were allowed early leave, the procedure for securing the release of other vulnerable groups took longer while detention was accordingly prolonged.²³³

Additionally, Malta’s laws relating to asylum seekers violate the labor protections that asylum seekers receive under both European law and the Convention. Article 17 of the Convention stipulates that asylum seekers shall receive “the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment” so long as their claim has not yet been rejected.²³⁴ Further, the EU Reception Conditions Directive 2013 stipulates that Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was

²²⁹ UNHCR’s Position, *supra* note 214, at ¶ 7. For more detail on the effects of the harsh conditions as they lead to trauma by the inmates, see Jesuit Refugee Service, *Europe: Becoming Vulnerable in Detention*, June 2011, <http://www.unhcr.org/refworld/docid/4ec269f62.html>.

²³⁰ *Detained Migrants Riot in Malta*, DEUTSCHE PRESSE-AGENTUR, Feb. 25, 2014.

²³¹ Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, *Report Following His Visit to Malta from 23 to 25 March 2011*, June 9, 2011, <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1858117&SecMode=1&DocId=1749792&Usage=2>. It is important to note that when the Commissioner conducted his visit to Malta’s facilities, the influx of migrants fleeing through Libya had not yet occurred. There were only 49 detainees in the detention centers and 2,231 migrants held in the open detention centers.

²³² *Id.*

²³³ *Id.*

²³⁴ Convention, *supra* note 24, at art. 17.

made.²³⁵ According to Malta's Receptions Regulations, the only guarantee made regarding the availability of employment to asylum seekers is that within 12 months shall the Ministry make a decision regarding the issuance of employment licenses.²³⁶ The Regulations in no way guarantee that employment eligibility will be secured within the one year period, as it remains within the discretion of the Ministry as to whether or not they will be given permission to work.²³⁷

All detainees have a number of procedural remedies for challenging their detention, including remedies under the Criminal Code, various remedies under the Immigration Act, a remedy under the EU Returns Directive, and a remedy through constitutional proceedings. This is another area where it can be seen that asylum seekers are treated the same as all other illegal entrants for administrative and procedural purposes. Unfortunately, all the remedies contain procedural deficiencies, and therefore are not adequate for considering an asylum seeker's rights. Under Article 409A of the Criminal Code, a detained person may seek recourse before the Court of Magistrates and request it to examine the lawfulness of the detention and order release from custody.²³⁸ However, in the 2004 case of *Karim Barboush v. Commissioner of Police*, when an asylum seeker challenged his detention, it was held that it is not within the competence of the Courts to examine whether there are other circumstances which could render the detention illegal.²³⁹ This was due to the fact the Court held that since there was a national law authorizing detention, which imposes no limit on the amount of time a person may spend in detention, such detention is lawful.²⁴⁰

There also remedies available directly under the Immigration Act, as Article 25A provides an Immigration Appeals Board that has

²³⁵ Directive 2013/33/EU, EU Reception Conditions Directive Laying Down Standards for the Reception of Applicants for International Protection, 2013 OJ (L 180) 96 (EC), at art. 15. In the United States, applicants are eligible to work 180 days after applying for asylum. Immigration and Naturalization Act §208(d)(2).

²³⁶ Reception Regulations, *supra* note 215, at art. 10.

²³⁷ This power also remains discretionary in the US.

²³⁸ Article 409A, Criminal Code, Chapter 9, Laws of Malta [hereinafter *Criminal Code*].

²³⁹ *Karim Barboush v. Commissioner of Police*, Criminal Court, Case No. 2/2004, Chief Justice Vincent De Gaetano (Nov. 5, 2004).

²⁴⁰ *Id.*

“the jurisdiction to hear and determine appeals or applications in virtue of the provisions of [the Immigration] Act or regulations made thereunder or in virtue of any other law.”²⁴¹ Appeals under the Immigration Act fall under three categories: appeals against removal orders, applications requesting release on the grounds of unreasonableness, and applications requesting release on bail. However, there is currently no system in place to ensure that legal aid lawyers visit detention centers to offer legal services for the purposes of providing access to legal proceedings to challenge detention.²⁴² Article 25A(9) also provides that the Immigration Appeals Board has the “jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation or removal order to be released from custody pending the determination of any application under the Refugees Act of otherwise pending their deportation.”²⁴³ However, it is important to note that under Article 25A(10), the Immigration Appeals Board may only make a decision on the unreasonableness of the detention, not the legality of the detention, and therefore, appellants under this category may not challenge the validity of the detention itself.²⁴⁴ The third and final category of appeals under Article 25, applications requesting release on bail, also presents a number of problems.²⁴⁵ Often times, the Immigration Appeals Board will set a number of conditions which most asylum-seekers are unable to fulfill, including bond being set at around €1000, a sum which they usually cannot afford;²⁴⁶ requiring a guarantor who would provide subsistence and accommodation; and prohibiting the person released on bond from working for up to a

²⁴¹ Immigration Act, *supra* note 216, at art. 25A(1)(c).

²⁴² UNHCR’s Position, *supra* note 214, at ¶ 46. For more detail on the effects of the harsh conditions as they lead to trauma by the inmates, see Jesuit Refugee Service, *Europe: Becoming Vulnerable in Detention*, June 2011, <http://www.unhcr.org/refworld/docid/4ec269f62.html>.

²⁴³ Immigration Act, *supra* note 216, at art. 25A(9).

²⁴⁴ *Id.* at art. 25A(10). The difference between a detention being unreasonable and illegal is challenging the conditions of the detention instead of challenging the detention itself.

²⁴⁵ *Id.* at art. 25A(6).

²⁴⁶ According to procedure, upon arrival, the immigration authorities confiscate any money which the detainee may have had with him, further frustrating their ability to fulfill bond obligations. *See* UNHCR’s Position, *supra* note 214, at ¶ 53.

year.²⁴⁷ Asylum seekers also have a remedy under the Returns Regulations, but are essentially precluded from being able to exercise it due to the fact they arrive by boat.²⁴⁸ The final proceeding asylum seekers have available is the ability to file an application before the Civil Court in its Constitutional Jurisdiction, as well as the ability to appeal to the Constitutional Court. However, the European Court of Human Rights has consistently held that such a procedure is cumbersome and does not provide the speedy review necessary for such an application.²⁴⁹ It would appear all venues offered to asylum seekers to challenge their detention are faulty or partial, and do not provide the procedural safeguards asylum seekers need.

XV. AFRICAN REFUGEES AROUND THE WORLD

In order to juxtapose them and to determine whether Israel and Malta represent anomalies among signatories to the Convention, it is important to note efforts made around the world in coping with asylum seekers and refugees. In 2012, according to the UNHCR, 915,023 total decisions were made regarding asylum applications, including 437,969 rejections, 210,851 applications receiving Convention protection, and 51,058 applications receiving complementary protection.²⁵⁰ Complementary protection is a term used to describe asylum applications who are not refugees as defined within the Convention, but who cannot be returned to their home country because there is a real risk that the person will suffer certain types of harm that would

²⁴⁷ *Id.*

²⁴⁸ Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations. Subsidiary Legislation 217.12, Legal Notice 81 of 2011 (better known as the Returns Regulations), Regulation 11(10), gives asylees a cause of action to institute proceedings before the Board to contest that lawfulness of detention. However, Regulation 11(1) provides that such special proceedings are not accessible to asylees “apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta.” *Id.* Due to Malta’s geographical position as an archipelago of three islands in the middle of the Mediterranean Sea, most asylees are intercepted in such a matter, and are therefore precluded from exercising their right under the Returns Regulations.

²⁴⁹ See *Louled Massoud v. Malta*, Application No. 24340/08, European Court of Human Rights, 27 July 2010, at ¶ 20.

²⁵⁰ United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).

implicate their right to *non-refoulement*. To broaden the comparison, I have chosen to mention asylum procedures in Italy (due to its proximity to Africa and membership in the European Union) and asylum statistics of Eritreans, Somalians, and Sudanese around the world.

A. Italy

Perhaps no country has drawn more ire in its handling of asylum seekers than Italy. The nation has received threats from the European Union's top migration official, Cecilia Malmstrom, that EU aid to Italy could be at risk because it could not continue to support the deplorable conditions in its migrant detention centers.²⁵¹ Italy's detention centers have been blasted by human rights groups and opposition politicians as little better than concentration camps.²⁵² Previously, Italy was forced to transfer migrants from at least one detention center on the island of Lampedusa which was at the heart of a controversy over unsanitary conditions and mistreatment.²⁵³ The residents of Italy, after having dealt with thousands of Tunisians after unrest broke out in their home country, have hosted protests and isolated possible asylees.²⁵⁴ Italy registered a record of 2,156 migrants in January 2014 alone, which was followed by a period of 1,123 migrants that were saved through naval operations in the first week of February.²⁵⁵ Italy (more specifically Lampedusa and Sicily) is now the top destination of asylum seekers from Africa.

²⁵¹ *Top EU Official Threatens Action over Italy's Treatment of Migrants*, DEUTSCHE PRESSE-AGENTUR, Dec. 18, 2013.

²⁵² *Italy Pledges to Improve Conditions at Migrant Detention Centers*, UPI, Feb. 6, 2014.

²⁵³ *Italy Transfer Migrants from Scandal-Hit Centre*, AGENCE FRANCE PRESSE - ENGLISH, Dec. 24, 2013.

²⁵⁴ Frances D'Emilio, *Africans Aboard Boats from Libya Reach Italian Islands; Residents Protest on Mainland*, THE CANADIAN PRESS, Mar. 27, 2011.

²⁵⁵ *Italian Navy Rescues Over 1,000 Immigrants in 24 Hours*, XINHUA GENERAL NEWS SERVICE, Feb. 6, 2014, <http://www.finlandtimes.fi/europe/2014/02/07/4672/> Italian-navy-rescues-over-1,000-migrants-in-24-hours. Most boats that head to Italy originate in Libya, and many migrants are often subject to smuggling along the route. See Matina Stevis, *Behind Lampedusa Shipwreck: A Journey of Perils and Profits; Vast and Lucrative Migrant-Smuggling Business Defies Europe's Crackdown Efforts*, The Wall Street Journal Online.

Italy has been especially criticized for its notorious use of deportations, having both employed the tactic to send asylum seekers to other European Union Member States and back to Libya, among other nations. Prior to the recent turmoil in Libya, Italy had agreed to a bilateral treaty with Libya that took effect in March 2009, which allowed Italy to “push back” African immigrants without first screening them for asylum claims.²⁵⁶ In *Hirsi-Jamaa & Others v. Italy*, the European Court of Human Rights struck down such an agreement, and called for restitution to the group of twenty-four Eritrean and Somali immigrants who were interdicted in the Mediterranean Sea and subsequently returned to Libya due to the fact they faced the risk of repatriation to their home countries in violation of *non-refoulement*.²⁵⁷ In another instance, when Italy sought to return asylum seekers to abusive conditions in Greece, pursuant to the Dublin II Regulation, without reviewing their claims, they were rebuffed due to the fact that Greece had been unable to provide the individuals with basic requirements of safety and shelter.²⁵⁸ In essence, Greece had been found to be an unsafe third country.

Despite the tumultuousness the asylum seekers face in Italy, and the criticism Italy has received in its implementation of asylum law, Italy statistically ranks towards the top of the European Union in both first instance decisions and final decisions. Italy returned a positive decision on approximately 80.7 percent of first time, colorable claim decisions in 2012, second only to Malta.²⁵⁹ Additionally, out of Member States that made over 350 final decisions on asylum

²⁵⁶ Valarie Blake, *Mass African Migration Into Europe: Human Rights and State Obligations*, 32 *HAMLIN J. PUB. L. & POL'Y* 135, 152 (2010).

²⁵⁷ *Hirsi-Jamaa & Others v. Italy* [GC], App. No. 27765/09, ECHR, at 58–59 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>. For a summary of the case, see Ross K. Holberg, *Current Development: Developments in the International Field: Italy's Policy of Pushing Back African Migrants on the High Seas Rejected by the European Court of Human Rights in the Case of Hirsi Jamaa & Others v. Italy*, 26 *GEO. IMMIGR. L.J.* 467 (Winter 2012). The United States has espoused such a summary view of Haitian migrants. Attorney General John Ashcroft has encouraged that the United States summarily deport or detain Haitian migrants entering irregularly. *In re D-J-*, 23 I&N Dec. 572 (A.G. 2003), United States Attorney-General, 17 April 2003, available at <http://www.refworld.org/docid/3f5734684.html>.

²⁵⁸ *Column: Region: Europe: Italy's Return of Asylum Seekers to Greece Raises Human Rights Concerns*, 20 *HUM. RTS. BR.* 63 (Spring 2013).

²⁵⁹ European Asylum Statistics, *supra* note 2.

applications in 2012, Italy ranked second, returning approximately 64 percent positive decisions.²⁶⁰ However, the United Nations has published figures that shed Italy in a much less flattering light regarding its asylum applications decisions. According to the UNHCR, of the 22,442 decisions Italy made during 2012 (including both first instance and final decisions), 13,898 were summarily rejected.²⁶¹ In any event, Italy continues to violate the Convention by placing asylum seekers in detention, severely restricting many of their rights. Further, through their actions in the past, Italy has teetered with the possibility of violating *non-refoulement* by returning asylum seekers to countries that run the risk of violating their rights or repatriating them to the nations they came from.

B. Asylum Statistics of Asylees from Eritrea, Somalia, and Sudan

Eritrea's asylum recognition rate is among the highest in the world.²⁶² Eritrea's recognition rate, including both refugee status and other complimentary protection status, rated sixth-highest in the world in 2012, behind only South Sudan, Maldives, Cayman Islands, Syrian Arab Republic, and Andorra.²⁶³ Maldives, Cayman Islands, and Andorra all had 20 or fewer decisions returned.²⁶⁴ Israel returned a 70.4 percent recognition rate on asylum applications from Eritrea.²⁶⁵ However, this number was based on only 27 decisions in 2012, a low number that reflects how Israel chooses to systematically defer decisions regarding the asylum status of applicants. Malta returned an 81.0 percent recognition rate, a number that is not far below the international recognition rate.²⁶⁶ However, both countries' positive decision

²⁶⁰ *Id.*

²⁶¹ United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).

²⁶² *Id.*

²⁶³ *Id.* Total recognition rate is determined by the UNHCR by adding recognized plus other positive decisions, divided by total number of recognized, other positive decisions, and rejected.

²⁶⁴ *Id.* For specific asylum statistics that takes into account both country of origin and country of application, see United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

rates rank among the lowest in the world.²⁶⁷ In total, 26,711 decisions were made in 2011, including 19,779 positive decisions that granted full Convention status upon asylum seekers from Malta, 1,781 decisions granting complimentary status, and 2,586 rejections.²⁶⁸

Somalia's asylum recognition rate stood at 79.1 percent for 2012, although Convention status was only given in 55.0 percent of asylum applications.²⁶⁹ Somalia's asylum recognition rate ranked eleventh in the world in 2012.²⁷⁰ Of the 30,318 decisions made regarding asylum applications of Somalians in 2012, only 4,939 were outright rejections. Of the positive decisions returned, 13,013 granted full Convention rights upon the asylees, and 5,717 granted complimentary status.²⁷¹ Malta returned a relatively high recognition rate for asylum applications from Somalians, returning a positive decision on 98.5 percent of applications.²⁷² Malta's shortcomings in its treatment of Somalians do not lie in its recognition rate, but rather the process it undertakes in reaching its rate.

Sudanese asylum applications have a 71.8 percent recognition rate, including a 68.2 percent recognition rate of full Convention

²⁶⁷ *Id.* Of note, Italy returned an 89.8 percent recognition rate, Sudan returned a 99.7 percent recognition rate, United Kingdom returned an 88.5 percent recognition rate, and the United States returned an 86.9 percent recognition rate. Canada, Djibouti, Kenya, Sweden, Switzerland, and Yemen all returned recognition rates of 90 percent or higher. In reporting specific recognition rates from countries, the UNHCR provides different numbers based on what is available for every country. In the instance of Eritreans in Israel and Malta, the numbers provided were based solely on first instance decisions. The numbers provided for Italy, Sudan, and the United Kingdom also reflected recognition rates for first instance decisions, while the numbers provided for the United States reflected numbers provided by the US Executive Office of Immigration Review.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* Only Bhutan, Cayman Islands, Central African Republic, Eritrea, Estonia, Maldives, Myanmar, Qatar, South Sudan, and the Syrian Arab Republic.

²⁷¹ *Id.*

²⁷² *Id.* Of the countries to return a significant number of decisions on asylum applications, only Indonesia, Mozambique, Sudan, and Uganda returned higher recognition rates. Comparatively, Canada returned a 92.7 percent recognition rate, Italy returned a 96.5 percent recognition rate (including only a 28.5 percent Convention status recognition rate), the United Kingdom returned a 43.4 percent recognition rate, and the United States returned a 65.5 percent recognition rate.

status.²⁷³ Of the 17,258 decisions returned in 2012, 7,058 granted full Convention status upon the asylees, 371 granted complimentary status, while 2,918 were rejections and 6,891 decisions were otherwise closed. The UNHCR did not provide specific statistics for decisions regarding Sudanese asylum applications in Israel and Malta for 2012. In Israel, this may be attested to the overall trend that the government does not make decisions regarding substantive numbers of applications. In order to be included as a country of asylum application for any specific origin nation, a country must have returned a minimum number of asylum decisions. Nations with the highest number of Sudanese asylum applications return a wide range of recognition rates, ranging from 8.5 percent recognition rate of first instance decisions in France to 100.0 percent recognition rate of first instance appeal decisions in Chad.²⁷⁴

XVI. CONCLUSION: COMPARING ISRAEL'S AND MALTA'S ASYLUM PROCEDURE PITFALLS

Although Malta and Israel are often grouped together due to their geographical proximity to refugees from the Horn of Africa, it is apparent that the two nations differ greatly in their treatment of asylum applications. In Israel, theoretically, the proper asylum procedures are in place; practically, however, they are never practiced in line with the procedures the Convention requires. Israel has provided the guidelines for individual asylum hearings, but Inversely, Malta fails to even have procedures put in place for asylum applicants. Instead, as previously mentioned, Malta must fall back on its own Immigration Law to handle illegal entrants, which include, per Malta's procedures, asylum seekers.

Prior to the overturning of Amendment No. 3 to the Anti-Infiltration Law, Israel employed mandatory detention for asylum seekers who came across their borders, which is in clear contravention of Article 31 of the Convention. Additionally, under the "Hot Return" policy Israel implemented with Egypt, Israel ran afoul of *non-refoulement* as espoused by Article 33 of the Convention because Israel

²⁷³ *Id.*

²⁷⁴ *Id.*

had not taken the time to screen or determine whether the returned refugees would face grave danger to their lives or safety.

Since the adoption of the most recent Amendment to the Anti-Infiltration Law, mandatory detention has been replaced. However, the current practice of asylum procedures in Israel beg the question whether procedures that are theoretically permissible, but practically impossible, are still illegal under the Convention violating the spirit and perhaps also the letter of the law. The purpose of the Convention is to protect refugees in their quest for asylum, regardless of how it is implemented.²⁷⁵ Therefore, Israel's implementation of policies causes it to fail to fulfill its obligations under the Convention. The fact remains the current system in Israel makes it nearly impossible for asylum seekers to pursue their rights under the Convention. For example, Israel is in contravention of Article 34 by bureaucratically delaying any possibility most refugees have for naturalization. By affording group protection of all refugees, Israel may not be in contravention of *non-refoulement*, one of the essential pillars of the Convention.²⁷⁶ As is evident by the fact Israel makes minimal effort to determine final status, asylum seekers entangled in group protection status are not given any opportunity to receive other rights under the Convention. Until asylum seekers receive Convention protection, they are not given the right to keep or seek gainful employment, which violates Article 17 of the Convention.²⁷⁷ It is nearly impossible for the poverty-stricken asylum seekers to gain self-employment due to their status.²⁷⁸ This is also due to the emergence of a new unofficial Israeli policy not to renew the visas of African asylum seekers.²⁷⁹ Israeli officials also institute procedures that make it near impossible to renew their visas. For

²⁷⁵ Convention, *supra* note 24, Introductory Note.

²⁷⁶ Convention, *supra* note 24, at art. 33.

²⁷⁷ This is in contravention of Article 17 of the Convention. Convention, *supra* note 24, at art. 17. However, the most recent position by the government is that it will not prosecute employers who employ 2(a)(5) license holders. Technically, the asylum seekers must also acquire a B/1 work visa, which may or may not be issued. HIAS Israel, *supra* note 65.

²⁷⁸ This is in contravention of Article 18 of the Convention. Convention, *supra* note 24, at art. 18.

²⁷⁹ *African Asylum Seekers in Israel Denied Visas*, YNET NEWS, Dec. 29, 2013, <http://www.ynetnews.com/articles/0,7340,L-4470908,00.html>.

example, many visa offices close, putting the asylum seekers at risk of arrest.²⁸⁰

Further, in practice, Israel has not lived up to the promises it has made within its own asylum procedures. As noted, very few venues are provided for administrative assistance, including lack of legal assistance to allow the asylum seekers the opportunity to challenge their rejection.²⁸¹ Asylum seekers who hold the aforementioned 2(a)(5) license permits are not eligible for social benefits,²⁸² non-emergency medical treatment,²⁸³ and are not permitted to work.²⁸⁴ Those asylum seekers kept in the open detention center may, facially, retain most rights under the Convention, but due to the harsh conditions and requirements of residing in the distant open detention center, it becomes nearly impossible for those asylum seekers to exercise their rights under the Convention. Three roll calls a day, along with the overnight period when the center closes, make it virtually impossible for detainees to gain employment²⁸⁵ or exercise their right to freedom of movement.²⁸⁶ Their rights are especially curbed as it compares to nationals of Israel, which is contravention of the Convention.²⁸⁷ The fact that these asylum seekers are being held in the open

²⁸⁰ Gabriel Avner, *Asylum Seekers Face Harsh Obstacles for Visas*, Mar. 12, 2014, JERUSALEM ONLINE, <http://www.jerusalemonline.com/news/in-israel/local/watch-asylum-seekers-face-harsh-obstacles-for-visas-4224>.

²⁸¹ Yaron, Hasimshony-Yaffe, & Campbell, *supra* note 3, at 7.

²⁸² This is in contravention of Article 24 of the Convention. Convention, *supra* note 24, at art. 24.

²⁸³ This is in contravention of any of a number of articles of the Convention, depending on how you interpret the Article. For example, see Convention, *supra* note 24, at art. 23, 25.

²⁸⁴ Declining to give work permits to certain asylum seekers is in contravention of Article 17 of the Convention. Convention, *supra* note 24, at art. 17.

²⁸⁵ This is in contravention of Article 17 of the Convention. Convention, *supra* note 24, at art. 17. However, those held in the open detention center may apply to work at the center. 179 detainees had applied for jobs, and 78 had been hired to work there. This still severely restricts the rights of the detainees to seek out lawful employment, and therefore is still in contravention of Article 17. Lior, *Two African Countries*, *supra* note 166.

²⁸⁶ This is in contravention of Article 26 of the Convention. Convention, *supra* note 24, at art. 26.

²⁸⁷ Under the Convention, asylum seekers are to be afforded the same rights as nationals of the application country. For examples, see Convention, *supra* note 24, art. 22, stating “The Contracting States shall accord to refugees the same treatment as is

detention center solely for entering the country illegally, have their right to non-penalization under Article 31 of the Convention denied.²⁸⁸ Further, those taken directly from detention out of the country have been said to have their rights breached, according to the United Nations.²⁸⁹ In sum, it appears that Israel's asylum procedures on paper would fulfill its obligations under the Convention. However, in practice, Israel has failed in its responsibilities. It is not the law a signatory to the Convention puts in place that releases a country from its obligations, but rather in practice how it provides the rights necessary to asylum seekers. Israel, in this respect, has failed its Convention obligations.

Malta, in comparison to Israel, has taken a substantially different path in its treatment of asylum seekers. Due to its lack of formal procedures regarding asylum seekers, the government treats all illegal entrants the same way under the Immigration Act, including asylum seekers. Under the Immigration Act, any entrants who enter Malta irregularly are subject to automatic detention.²⁹⁰ Therefore, any asylum seeker who enters Malta is automatically detained simply due to the fact he is entering the country illegally, which is in clear contravention of Article 31 of the Convention.²⁹¹ It is important to note that under the relevant articles of the Convention, asylum seekers are to be guaranteed some of the same rights and opportunities as though they were a national of the country in which they are seeking asylum.²⁹² While in

accorded to nationals with respect to elementary education"; Convention, *supra* note 24, art. 20, stating "Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals."

²⁸⁸ Convention, *supra* note 24, at art. 31. Israel maintains that the asylum seekers are being held for not following legal procedures regarding their asylum, which they maintain is permissible. However, the asylum seekers are jailed due to nearly impossible conditions of continuing their legal residency, which would be as much a violation of the Convention as if they were arrested simply for arriving illegally.

²⁸⁹ Lior, *Two African Countries*, *supra* note 166.

²⁹⁰ Immigration Act, *supra* note 216, at art. 5.

²⁹¹ Convention, *supra* note 24, at art. 31.

²⁹² For examples, see Convention, *supra* note 24, art. 22, stating "The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education"; Convention, *supra* note 24, art. 20, stating "Where a rationing system exists, which applies to the population at large and regulates the

detention, this is impossible. Many of their rights are severely undercut, including their rights to movable and immovable property,²⁹³ public education,²⁹⁴ both wage-earning and self-employment,²⁹⁵ and freedom of movement.²⁹⁶ Further, Malta's systematic and automatic detention of all asylum seekers is administered in an arbitrary and capricious manner, which violates accepted European law.²⁹⁷ Additionally, due to the fact remedies provided to asylum seekers in Malta are procedurally deficient, Malta has not ensured that the refugees have full access to the courts.²⁹⁸

There is no dispute regarding Israel and Malta's violations of the Convention and Protocol. However, the reasons Israel and Malta provide for their treatment of asylum seekers should perhaps not be summarily dismissed. Malta has, for example, cited its lack of area as a chief concern in allowing asylum seekers to live in the country freely. However, Malta has recently begun allowing wealthy foreigners the right to purchase European Union citizenship if they choose to do so.²⁹⁹ Malta has therefore decided to claim that it cannot to open its borders to poor asylum seekers, but is able to do so for those that can contribute financially to the country. This appears to counter Malta's argument that it is unable to accommodate any new citizens. Malta has also cited its inability to cope with such large numbers of asylum application as is required of them under the Dublin II Regulation. This argument may carry greater weight, as there has been an unequal

general distribution of products in short supply, refugees shall be accorded the same treatment as nationals."

²⁹³ This is in contravention of Article 13 of the Convention. Convention, *supra* note 24, at art. 13. Upon arrival, the immigration authorities confiscate any money which the detainee may have had with him. See UNHCR's Position, *supra* note 214, at ¶ 53.

²⁹⁴ This is in contravention of Article 22 of the Convention. Convention, *supra* note 24, art. 22. For example, in the Hal-Far tent village detention center, the entire center has access to only one classroom. Hammarberg, *supra* note 231.

²⁹⁵ This is in contravention of Articles 17 and 18 of the Convention. Convention, *supra* note 24, art. 17 & 18.

²⁹⁶ This is in contravention of Article 26 of the Convention. Convention, *supra* note 24, art. 26.

²⁹⁷ Detention Guidelines, *supra* note 224, at ¶ 18.

²⁹⁸ This is in contravention of Article 16 of the Convention. Convention, *supra* note 24, art. 16.

²⁹⁹ Dan Bilefsky, *Treasure for Sale in Malta: Citizenship for the Rich*, INTERNATIONAL NEW YORK TIMES, Feb. 3, 2014, at 4.

share of asylum applications in the southern European Union nations that border the Mediterranean Sea.³⁰⁰ It would appear Malta's chief reasoning for denying proper treatment for asylum seekers has at least some gap.

Israel's justifications in denying proper treatment to African refugees also carries some weight. Israel has stated time and again its intention to remain a Jewish state, which is embodied in its Declaration of Independence and Law of Return. This principle has guided Israel's policy towards immigrants, allowing Jews from outside of Israel to return to Israel to make Aliyah. Due to this, Israel has rejected African asylum seekers, but has orchestrated operations to rescue Jews from all over the world, most notably Ethiopia.³⁰¹ However, Israel continues to maintain itself as a democratic state. There is an inevitable contradiction between a purely religious state and a purely democratic state. In Israel's case, by excluding and denying rights to non-Jews, it is curtailing the democratic characteristic of the state by encroaching on individual freedoms. "[H]armonizing Jewish law with complete freedom religious coercion is impossible."³⁰² Despite its commitment to a Jewish state, Israel has recently begun curbing the religious rights of some Jews by passing a bill curbing exemptions for the national draft that would mandate ultra-Orthodox Jews be subject to conscription.³⁰³ This has led to the ultra-Orthodox Jews fearing that they will be exposed to

³⁰⁰ Junker, *supra* note 203.

³⁰¹ From November 2010 to August 2013, Israel engaged in Operation Dove's Wings, the government's attempt to bring around 7,000 Jews to Israel from Ethiopia. By the time the operation had finished, the Jewish community in Ethiopia had grown extinct. *Ethiopia; The Last Jews of Ethiopia?*, AFRICA NEWS, Oct. 21, 2013.

³⁰² Basehva E. Genut, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT'L L.J. 2120, 2178 (June 1996). For a competing view that states it is possible to overcome this gap, see Elazar Nachalon, *Structural Models of Religion and State in Jewish and Democratic Political Thought: The Inevitable Contradiction? The Challenge for Israel*, 22 TOURO L. REV. 613 (2006).

³⁰³ Isabel Kershner, *Israel Passes Bill Curbing Exemptions for the Draft*, INTERNATIONAL NEW YORK TIMES, Mar. 14, 2014, at 8. Israel mandates military service for all able-bodied Jews starting at age 18. It was until this recent decision by the Israeli Parliament that ultra-Orthodox Jews had been exempt from the military draft.

secularism.³⁰⁴ It appears to be somewhat contradictory for Israel to expose Jews to influences that go against what their religion stands for. Additionally, Israel approves approximately 70,000 foreign workers' visas each year.³⁰⁵ It would appear Israel can afford to open its borders to foreign workers of its choosing, but yet chooses not to do so for asylum seekers. Israel's chief reasoning as to why it refuses proper treatment to asylum seekers, therefore, is lacking.

In sum, it appears that substantively both Malta and Israel subject their asylum seekers to the same violations of the Convention, but procedurally they do so in very different ways. Malta's violations occur as a result of its mandatory detention under the Immigration Act, and its lack of asylum procedure, whereas Israel's violations stem from a systematic effort to deny asylum seekers their procedural rights while remaining facially committed to the articles of the Convention. Malta does eventually provide rulings on asylum applications, as is evidenced by statistics from both the European Union and United Nations, whereas Israel does not meet this requirement.³⁰⁶ While the procedure employed by Malta is in clear violation of the Convention, the end result appears to be satisfactory, especially considering the overall negative global trend regarding asylum applications.³⁰⁷ Of note especially is that Malta's asylum recognition rate is well above that of similarly situated countries on the southern edge of the European continent.³⁰⁸ Moreover, Malta's ill treatment is unfortunately common-

³⁰⁴ Nathan Jeffay, *Fear and Loathing Hands Over the Army's 'Abyss of Depravity'; Ultra-Orthodox Jews Worry that the Loss of Their Exemption from Conscription will Expose Them to the Dangers of Secularism*, Reports Nathan Jeffay, THE TIMES (London), Mar. 22, 2014, at 64.

³⁰⁵ Shallya Scher and Hailey Dilman, Opinion, *Discovering the Truth About Israel's Asylum-Seekers Amid the Myths and Distortions*, JERUSALEM POST, Jan. 13, 2014, available at <http://www.jpost.com/Opinion/Op-Ed-Contributors/Discovering-the-truth-about-Israel's-asylum-seekers-amid-the-myths-and-distortions-338068>.

³⁰⁶ Theoretically, as previously mentioned, Israel does have the proper groundwork to apply correct asylum procedures that are in line with their obligations under the Convention, but, in practice, fails to do so.

³⁰⁷ United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).

³⁰⁸ Greece, notorious for its ill treatment of asylum seekers, provided positive decisions on only 627 asylum applications (only 217 of which provided complete Convention protection) compared to 12,214 rejections in 2012. Cyprus had an equally low positive decision rate, providing 128 positive decisions (including 85 decisions granting full

place among signatories, as is evidenced by comparing Malta's procedures and attempted solutions with those of Italy. Israel, meanwhile, not only employs procedures that are in violation of the Convention, but also ensures results that do not live up to the responsibilities of a Convention signatory. It is evident that combating the issues asylum seekers face in both Israel and Malta requires two very separate analyses and understandings. Despite the similarities of the two nations, there is no uniform solution to the issues both nations face with their asylum seekers. As substantive as their reasoning may be for denying proper treatment to asylum seekers, both countries must tackle their specific differences and live up to their obligations as signatories to the Convention Relating to the Status of Refugees.

Convention protection) compared to 2,561 rejections in 2012. United Nations High Commissioner for Refugees: Statistical Yearbook 2012 (2013).