I. INTRODUCTION

Few people can say they did not hear about the 2013 Lampedusa shipwreck where nearly 400 people seekers died off the coasts of Italy and Malta en route to Europe. The passengers, mostly Eritrean and Somali asylum-seekers, had left two days earlier from Misratah, Libya. When the boat’s motor stopped working, some passengers set fire to a blanket to attract the attention of passing ships. As the fire spread, several migrants moved to one side of the boat, causing the vessel to capsize. Sadly, this episode is not an isolated incident. To name a few examples, five other boats carrying almost 2,000 migrants sank in the Mediterranean Sea in April 2015, resulting in over 1,200 deaths. In April 2016, nearly 500 migrants have been feared dead when their boat capsized in the Mediterranean. The increasing occurrence of these episodes has created negative publicity, and forced the European leaders to reexamine the European Union’s (“EU”) migration policies.

Though fewer illegal migrants travel by sea than by air or land, the former is more problematic because of the associated risks of sea travel. Numerous migrants have drowned in the Mediterranean and Aegean Seas, at the Spanish enclave of Ceuta and Melilla, and in
Sicily’s coastal region, which is one of the outmost points of entry into the EU, with the island of Lampedusa (located 110 miles from Sicily) hosting a center tasked with processing newly arrived migrants.ii According to the United Nations Office of the High Commissioner for Refugees (“UNHCR”), 2014 and 2015 may be the most tragic years ever recorded in terms of lives lost at sea in the Mediterranean; 3,500 people died in 2014, a figure that had already been surpassed by the end of November, 2015.iii

While migration is a constant of human history, a person’s freedom to leave his or her country is not necessarily matched by the same liberty to enter another State.iv Here, the massive arrivals of irregular migrants have resulted in a polarized debate about the EU’s migratory policies and security. The overall conundrum can be summarized as follows: while States must treat migrants with dignity and respect, States also seek to further their security interests.v

Acknowledging the multifaceted nature of migration, this paper focuses on the specific topic of the treatment of migrants entering the EU by sea. Part II provides background information on how EU member states have tried to respond to increasing migration. Part III describes the applicable legal framework from international and regional treaties, and European tribunals. Lastly, Part IV analyzes the recent efforts put forth to offer a solution before turning to our conclusion.

II. BACKGROUND: MIGRATION TRENDS AND RESPONSES TO MIGRATION AT SEA

Proportionally speaking, the annual influx of migrants is not as significant as it seems.vi There are many reasons behind migration.vii Some scholars group migrants into two broad categories: (1) refugees and asylum seekers, and (2) economic migrants. Unlike internally displaced persons, refugees live outside their country of origin and are unable or unwilling to return home because of a “well-founded fear of persecution.”viii As such, refugees deserve international protection. On the other hand, economic migrants generally leave their country to improve their economic situation. While these two groups seem distinct from one another, migrants arriving at European seaports seldom belong to just one group of these two groups.ix This blurred distinction complicates the local authorities’ duty to identify migrants who qualify for refuge.

The phenomenon of irregular boat migration in the Mediterranean originated in the beginning of the 1990s, when Spain and Italy started requiring African nationals (particularly those from the Maghreb) to obtain entry visas.x Though the number of irregular migrants decreased between 1998 and 2010, EU member states continued their attempts to block these migrants.xi Additionally, EU member states further strengthened immigration control because of perceived ties between migration and transnational organized crime and terrorism.xii

In 2004, the EU created Frontex, an agency mandated to coordinate and implement cooperation with non-European countries. Frontex has since organized patrolling operations
involving several Member States. However, human rights defenders have criticized the agency, viewing its joint operations as lacking the appropriate safeguards necessary to protect immigrants. In 2005, European authorities also adopted an initiative called the “Global Approach to Migration and Mobility,” which served as an overreaching policy framework to allow partnerships between European countries and African nations involving the payment of development funds in exchange for migration enforcement.

During the Arab Spring, the problems surrounding irregular migration by sea reached a new high when thousands of migrants fled North Africa for the EU. During 2011 alone, almost 60,000 migrants arrived at the EU’s Mediterranean shores, mainly through Italian waters. The conflict in Syria and other parts of the world exacerbated the situation, as the number of persons forcibly displaced worldwide reached a record high of almost 60 million in 2014, a level not seen since World War II.

In the wake of the October 2013 Lampedusa shipwreck, the Italian Government set up Operation Mare Nostrum. The Government tasked the operation with rescuing endangered boats off the coasts of Sicily. In its first year, more than 400 of these search and rescue missions rescued an estimated 150,000 people, detained an estimated 330 alleged smugglers, and seized five “mother ships.” Concurrently, the EU increased Frontex’s funding for its operations in the Mediterranean.

Similar actions were taken at the EU level. In October 2013, the European Commission created “Task Force Mediterranean,” comprised of EU Member States and EU agencies. Its main mission was identifying short and medium-term actions that could be implemented in order to prevent further tragedies, through a more efficient use of European policies and tools, while complying with international human rights standards; a December 2013 Report outlined thirty-seven concrete actions to be carried out in five main areas: (1) cooperation with third countries; (2) regional protection programs and reinforcement of legal ways to enter Europe; (3) cooperation in the fight against trafficking and smuggling of migrants; (4) reinforcement of border surveillance; and (5) assistance and solidarity with EU Member States dealing with high migration pressure.

The following year, the EU and Italian Governments began to streamline their efforts. In November 2014, the EU announced the implementation of Joint Operation “Triton,” while Italy declared Mare Nostrum would begin phasing-out. The fundamental difference between the Italian operation and the EU endeavour is that the latter is a border control operation, contrary to the former’s search and rescue scheme. Although Mare Nostrum proved effective at saving lives, the Government considered the operation too expensive to maintain, and further considered the operation to send wrong signals, encouraging increased arrivals outside of the traditional visa pathways. After the large number of deaths in April 2015, the EU presented its “European Agenda on Migration” to manage the growing influx of migrants.
III. LEGAL FRAMEWORK

Applicable Legal Instruments

The right to migration has developed over time. As early as 1215, the Magna Carta afforded certain travel and migration rights to merchants in Clauses 41 and 42. xxiv By 1948, Article 13 of the Universal Declaration of Human Rights provided additional movement rights. xxv In 1966, Article 12 of the International Covenant on Civil and Political Rights expanded on these rights. xxvi While these documents laid the groundwork, the right to migration is subject to limits.

At the international level, the most influential treaty in this area of the law is the 1951 United Nations Convention Relating to the Status of Refugees (“Refugee Convention”). xxvii The Refugee Convention is the key legal document defining who qualifies as a refugee, what rights refugees possess, and what states’ legal obligations are toward refugees. The Refugee Convention’s cornerstone is Article 33, which defines non-refoulement, stressing that no contracting State can expel or return a refugee when his life or freedom would be threatened based on his race, religion, nationality, or involvement in a social or political group. However, the Convention does not explicitly guarantee migrants a right to asylum proceedings, and the Convention lacks the procedural mandates to ensure the protections it explicitly guarantees. xxviii With regards to soft law and the status of migrants, the United Nations High Commissioner for Refugees issued an advisory opinion in January 2007, which establishes that the principle of non-refoulement is applicable wherever the State exercises its authority, including on the high seas. xxix

At a regional level, Article 3 of the 1950 European Convention on Human Rights (“ECHR”) prohibits any act of torture or inhumane or degrading treatment or punishment. xxx Further, the European Court of Human Rights (“ECtHR”), the enforcer of the ECHR, has determined that Article 3 implies a prohibition on refoulement if there are grounds to believe that the individual concerned, if deported, would face a real risk of being subjected to a treatment contrary to that provision. xxxi In 2000, the European Commission’s (“EC”) Charter of Fundamental Rights furthered international norms guaranteeing the right to asylum and the prohibition of refoulement. xxxii Additionally, the Council of Europe’s 2003 Dublin II Regulation (alternatively, “Dublin” or “Dublin Regulation”), which was slightly modified in 2013, ensures accessible and effective procedures for determining refugee status, and combats the exploitation of the asylum system by previously denied asylum applicants. xxxiii Through this system, the state whose territory the migrant first reaches is responsible for adjudicating their claim (usually Italy, Greece and Malta for arrivals by sea). xxxiv This is particularly interesting given the 1985 Schengen Agreement. The Schengen Agreement establishes a borderless zone, known as the Schengen Area, which now spans twenty-six European states. xxxv One of the aims of the Schengen Agreement is to facilitate the free movement of labor and goods, allowing an integrated system for managing the area’s external borders. xxxvi Regarding migration in the Schengen Area, once a migrant enters one of the Schengen countries, he or she is free to move to any of the other states. However, the system is complicated when countries shut their borders for security reasons.
The regional level also includes “Directives,” which are EU instruments helping Member States ensure a goal of a homogeneous body of law in certain areas, and requiring that States adapt their legislation to meet this goal.xxxvii Specifically, the 2004 Qualification Directive creates a uniform criterion for the identification of individuals in need of international protection.xxxviii The Qualifications Directive grants a minimum level of benefits for individuals in all member states, and is the first international instrument to ensure protection of persons that need it but fall outside the provisions of the 1951 Convention.xxxix The 2005 Asylum Procedures Directive establishes framework procedures for granting and withdrawing refugee status, which can be considered as a protection against refoulement.xl The 2003 Reception Conditions Directive, recast in 2013, provides standards for the reception of applicants seeking international protection.xli Lastly, the 2008 Return Directive outlines the norms and procedures applicable for the return of third country nationals who are irregularly on EU territory, protecting the migrants’ fundamental rights.xlii Together, these directives form an important area of consideration for migratory policies in the EU. Recent case law also provides important context for this topic.

### Recent Case Law

“Two European tribunals have established case law addressing irregular migration in Europe: (1) the Court of Justice of the EU . . . and (2) the ECtHR.”

Two European tribunals have established case law addressing irregular migration in Europe: (1) the Court of Justice of the EU, mandated to interpret and uniformly implement EU law in all member countries; and (2) the ECtHR, responsible for the application of the ECHR. The jurisprudence of the latter tribunal has adopted a functional approach: the ECtHR exports the concept of borders to places and instances where the state exercises enforcement action. The ECtHR does not consider the concept of personal or geographical control, but rather the specific power assumed by a state that acts extraterritorially. Therefore, a State’s action in international waters or in the territory of another State remains subject to human rights norms.xliii For instance, in Medvedyev and Others v. France, the ECtHR established that the ECHR applied to France’s extraterritorial enforcement actions in a case of suspected drug trafficking.xliv The Court rejected France’s argument that the interception of a ship on the high seas was an exception, as France’s argument implied that the legal system did not provide ECHR guarantees to the ship’s detained crew.xlv

The case of Hirsi Jamaa v. Italy involved eleven Somali and thirteen Eritrean nationals who left Libya with hundreds of other migrants hoping to reach the Italian coast.xlvi The Italian Revenue Police intercepted their boats thirty-five nautical miles south of the island of Lampedusa. The police then transferred these migrants onto ships returning to Libya, where local authorities met the group despite their requests for protection in Italy. In its judgment, the ECtHR established that although jurisdiction is in principle territorial, extraterritorial
jurisdiction accrues from a State’s effective control. The ECtHR found that Italy had effective control over the migrants from the moment the migrants boarded the Italian authorities’ ships to the moment they were handed over to the Libyan authorities. The Court also considered that Italy violated the prohibitions of inhumane and degrading treatment and refoulement, since the Libyan Government regularly subjected migrants to abuses at that time. Furthermore, the nationals of other states such as Eritrea and Somalia were also at risk of being sent back to unsafe countries, without the possibility of applying for asylum.

In another ECtHR case, M.S.S. v. Belgium & Greece (hereinafter “M.S.S”), an Afghan national who fled his country claimed he risked Taliban persecution because he worked as an interpreter for international troops stationed in Kabul. Upon arrival in Greece, he was detained and ordered to leave the country. He then traveled to Belgium where he applied for asylum. Pursuant to the Dublin II Regulation, he was sent back to Greece to have his asylum claim processed. In Greece, he was detained in conditions that did not meet minimum standards established in the EU Asylum Directive. The ECtHR determined that the inhumane conditions of his detention violated Greece’s obligations under Article 3 of the ECHR. The Court also established that Belgium had violated the same provision, since authorities of that country knew or should have known that the applicant had no guarantee that Greek authorities would properly examine his asylum application.

Jurisprudence of the Court of Justice of the EU provides similar standards. For instance, N.S. v. United Kingdom and M.E. v. Ireland involved applicants alleging religious persecution in Afghanistan. The applicants entered the EU through Greece. They later reached and sought asylum in the United Kingdom. Paralleling the ECtHR’s decision in M.S.S., the Court of Justice established that an EU country may not transfer an asylum seeker to another member state “where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.”

IV. ANALYSIS: TOWARDS A NEW POLICY FRAMEWORK

Considering the applicable case law and legal instruments, EU Member States have specific legal obligations to individuals on their territory, and at their land and sea borders. Therefore, these States must craft an adequate response to the ongoing migrant crisis. In June 2015, the UN Special Rapporteur on the Human Rights of Migrants criticized the EU’s lack of cohesion in its migration policy. The Special Rapporteur suggested that the current policy does not provide the necessary support to the frontline states first receiving the migrants. He also suggested the policy should be redefined to ensure a human rights based approach, given that repression of irregular migration is counterproductive, as it empowers smuggling rings. Ultimately, an enduring response to the migration crisis must encompass three main aspects of the phenomenon: (1) solidarity and burden sharing; (2) cooperation with third states to address the root of the problem; and (3) increasing the number of channels for legal entry.
Solidarity and Burden Sharing

Article 80 of the Treaty of Lisbon, and few other provisions of EU law, refer to the need to foster solidarity between Member States. However, no mandatory mechanisms exist to provide concrete obligations of equitable burden sharing and coordination among states in migratory matters, a subject that Italy and other affected countries have long asked the EU to address. During the 2011 refugee crisis associated with the Arab Spring, when no other European government offered its assistance, Italy granted approximately 22,000 permits for migrants to move about the EU. At this time, France anticipated that many Francophone migrants would try to reach the territory of their former colonial power. In response, France closed its borders in violation of its legal obligations. Italy and France’s respective responses underscored the existence of two separate categories of States: (1) States directly faced with the maritime migration challenge, who assume additional obligations along their coastline; and (2) States with less accessible borders, and fewer obligations than coastal States.

Comparing 2011 and 2014, the situation remains the same. In 2014, just five States processed 72% of all asylum applications in the EU. Some scholars believe that the EU must rework Dublin to improve the human rights situation of migrants. In the context of this large-scale crisis, these same scholars suggest that Dublin has shown its limits, and become a symbol of injustice and the lack of solidarity among EU member states, some of which display selfish behavior and complicate the enforcement of the Dublin Regulation. For instance, Hungary’s iron curtain erected at its border with Serbia is just one example of measures that could ultimately jeopardize the Schengen Area. A much-needed evaluation of the Dublin System, which was designed when Europe faced influxes of a very different nature and scale, is planned for 2016.

A mandatory relocation system for refugees that creates quotas for Member States is also essential. However, as the September 2015 Extraordinary Justice and Home Affairs Council (“Council”) demonstrated, this task is complicated. The States present at the Council discussed the emergency relocation of 120,000 persons in need of international protection from Italy and Greece. However, the States were unable to come to a consensus, as some countries opposed the measure. With States like Hungary, Poland, and Romania opposing these measures, a binding relocation scheme seems difficult to achieve.

Beyond relocation policies, States must follow a clear policy on the return of migrants not qualifying for international protection to their country of origin, which implies a more consistent implementation of the Return Directive. In that sense, the EC has proposed a

“During the 2011 refugee crisis associated with the Arab Spring, when no other European government offered its assistance, Italy granted approximately 22,000 permits for migrants to move about the EU.”
common EU list of “safe countries of origin,” which would allow faster returns to such States (even though States would still assess applications on an individual basis). In sum, the measures described above may likely lead to the establishment of a European Refugee Agency, which could ensure uniform standards in granting asylum to migrants, and implement a European refugee status scheme.

Cooperation With Third States to Address the Root of the Problem

A sustainable solution to the migration crisis must address the roots of the phenomenon, instead of focusing entirely on its symptoms. Some researchers, including some EC actors and authors of the Task Force Mediterranean Report, recall that the elimination of the need for migration by sea will help avoid future tragedies at sea. As such, most of the adopted EU documents aim to strengthen cooperation with third countries. This cooperation seeks to counter irregular migration and tackle human trafficking in both member States and migrants’ States of origin and transit. Further, cooperation aims to negotiate readmission agreements whereby third countries commit to retaking their own nationals or citizens from other countries, or stateless individuals in transit through their territory. To date, seventeen such agreements are in force, including one with Turkey, a key stakeholder in the ongoing crisis.

Italy was one of the first countries to establish partnerships with developing states to mitigate its migration problems. In 2008, Italy signed a treaty of friendship and cooperation with Libya where Libya committed to controlling illegal emigration to Italy. In exchange, the Italian Government pledged to invest five billion dollars in Libya over a period of twenty-five years, and provide Libya with patrol boats.

To build a more cohesive and comprehensive EU policy addressing the root causes of irregular migration, a better dialogue with States of origin and transit must transcend the security-based approach that has been relied on so far. The EU should strengthen its ties with African Union and Arab League Member States to more generally promote democracy, human rights and the rule of law. For instance, the Valletta Summit of November 2015 brought together European and African Heads of State and Government in an effort to bolster cooperation, address the challenges caused by migration, and look at promoting economic and equal opportunities, security and development. As a result of the Summit, the participating States agreed to establish a 1.8 billion Euro trust fund aimed at financing economic programs that generate employment opportunities, projects ensuring food and nutrition security, and improving migration management. In total, the participating States intend to launch sixteen priority initiatives before the end of 2016.

Increasing the Number of Channels for Legal Entry

Some observers emphasize the need to implement a differentiated approach between asylum and economic migration, with separate policies and instruments. Contrary to common belief,
refugees do not usually come from the poorest economic strata of their country of origin, and are often skilled workers. As the European labor force is ageing and shrinking, migrants could help maintain a strong workforce and return important remittances to countries of origin. Additionally, greater legal channels to enter the EU would likely translate to a significant reduction in Mediterranean crossings.\textsuperscript{lxvi}

The EC intends to present this type of initiative in 2016. Regarding asylum seekers, lifting some visa requirements for individuals in need of international protection could be an interesting option. The EC may also consider implementation of “Protected Entry Procedures”, which would allow individuals to request the authorities of a potential host country outside its territory, and be granted an entry permit if the claim of international protection is recognized.\textsuperscript{lxvii}

V. CONCLUSION

Migration remains one of the toughest challenges of the international political spectrum in this twenty-first century. The international community appears to acknowledge the grave nature of this phenomenon and its consequences.\textsuperscript{lxviii} While statistics on the number of lives saved seem encouraging, the efforts deployed and the results achieved are mixed. As such, much more needs to be done to solve the on-going crisis.

The situation is bound to become increasingly complex, as violent international conflicts bolster the existing fears associating migration with terrorism. Indeed, the equilibrium between the preservation of State security, the struggle against human trafficking, and the respect for human rights seems hard to define.\textsuperscript{lxix} However, the construction of a new narrative will be key to the successful future integration of migrants, as the number of migrants to Europe continues to grow, and the need for durable solutions becomes more urgent. As EC President Jean-Claude Juncker stated, for the time being, “[t]here is not enough Europe in this Union. And there is not enough Union in this Union.”\textsuperscript{lxx} In order to provide an efficient response, individual states must therefore display stronger efforts to implement existing legal instruments and work towards harmonizing applicable norms.\textsuperscript{lxxi}
ENDNOTES


iii Mediterranean Updated, Missing Migrants Project, http://missingmigrants.iom.int/sites/default/files/Mediterranean_Update_24_November_1.jpg, (last visited Sept. 15, 2016) (noting how in 2015, Greece surpassed Italy as the first EU country of arrival for illegal migrants, contributing to an overwhelming flow of individuals moving through the Western Balkan countries).


viii Keely, *supra* note iv, at 26 (distinguishing refugees from asylum seekers based on the defining characteristic that asylum seekers make their claim for protection upon arrival in a receiving country, and not in their country of origin or a third country).

ix Mallia, *supra* note v, at 6.


xv Mann, *supra* note xiii, at 336.


xviii Id. (describing mother ships as vessels normally used for transportation of migrants for the greater part of the journey, after which they are transferred to smaller fishing boats near the shore so that the mother ship may return to its port of origin).


(xxiv) presenting short term actions to be implemented, as well as four priority areas: (1) reducing incentives for irregular migration; (2) border management to save lives and secure external borders; (3) a common asylum policy; and (4) a new policy on legal migration).


xxvi In this sense, it could be argued that the policy of asking North African countries to prevent people from leaving their territory for the EU creates a tension with those provisions. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).


Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1; Langford, supra note xiv, at 229-30.


Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990; Six EU countries (the United Kingdom, Ireland, Cyprus, Bulgaria, Romania and Croatia) are not covered by the “Schengen Area,” which additionally includes four associated non-EU states (Liechtenstein, Iceland, Switzerland and Norway).


See generally Pieter Boeles et al., European Migration Law Part III (2d ed., 2014) (analyzing applicable Directives).


Campagna, supra note xxvii, at 138. (noting how the Directive makes specific reference to non-state actors of persecution (Article 6), thus broadening the definition of refugee and allowing for protection from persecution by groups such as clans, tribes, or rebel groups; it also introduced the category of “person eligible for subsidiary protection,” an individual who, while not qualifying as a refugee, is believed to be in real risk of danger if returned to his place of origin).


Mitsilegas, supra note xii, at 44.

See id. at ¶ 67, 101-02.


See id. at ¶¶ 125, 137-138, 158.


See id. at ¶¶ 161-166, 358.


Id. at ¶¶ 94, 99.


Langford, supra note xiv, at 246.

Id. at 223-25.


See Langford, supra note xiv; see also Nessel, passim.


Francesca De Vittor, Il Diritto di Traversare il Mediterraneo… o Quantomeno di Provarci, 8(1) Diritti Umani E Diritto Internazionale 63, 67 (2014).

Id. at 76.
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https://www.brookings.edu/research/not-likely-to-go-home-syrian-refugees-and-the-challenges-to-turkey-and-the-international-community/; see European Council, statement, Meeting of Heads of state or government with Turkey - EU-Turkey statement, U.N. No. 870/15, ¶6 (Nov. 29, 2015), http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/ (detailing how Turkey had hosted over 2.2 million Syrians under temporary protection and had spent eight billion dollars in that effort by November 2015, when the EU then pledged to support Turkey with an additional €3 billion at a meeting on November 29, 2015, to limit the flow of refugees into the continent and provide better living conditions for the Syrians, such as access to work and schooling).

lxiii Langford, supra note xiv, at 244-45.

lxiv Marcello Di Filippo, Irregular Migration across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea, 1 Paix Et Sécurité Internationales 53, 75-76.


lxviii Neri, supra note i, at 153.

lxix Id.
