

*Defending national interests at Schengen borders:
how has Malta been shaping European migration and asylum policies*



Maltese Prime Minister Robert Abela and European Commissioner Ursula von der Leyen, Brussels, January 2020
Source: *Times of Malta*

‘The line Malta is walking is wanting EU support but not things like camps set up’¹ asserted Dr. Cetta Mainwaring during an interview about the Maltese/European relations regarding asylum

¹ Extract from an interview with Dr. Cetta Mainwaring, January 13th, 2021

and migration. In the 2010's, she analysed the place and role of Malta in shaping European migration and asylum policies and the tools that the island has been using against its responsibilities resulting from the 'distalisation'². The European strategy of delegating responsibility for migration and asylum to states at the periphery has paradoxically been used by these states to defend their national interests, and therefore resist distalisation.

Less covered than 'hospot' countries like Italy or Greece by European media and public opinion, the archipelago nevertheless plays a key role in the Mediterranean and within the community of states shaping the southern Schengen border. Malta is the smallest European member state, but has been active in defending its repressive migration policies since its accession to the EU in 2004, rejecting a large part of its duties.

Turning distalisation into externalisation, advocating for the recast of the Common European Asylum System (CEAS), supporting the setting of principles of 'solidarity' and 'burden-sharing' in EU's agenda along with European border states: this is how Malta has become an important element in shaping European vernacular regarding migration and asylum.

Moreover, the national strategies put in place, recurrently violating the fundamental rights of migrants, are almost never sanctioned by the Commission nor by European courts. The EU's *laissez-faire* attitude towards Malta is questionable, and it is necessary to understand the relationship between the island-state and the Union to propose a first explanation.

• **Tools and leverages**

In order to carry its national interests at European level, Malta uses various tools and leverages. A first category has been described by Cetta Mainwaring as 'nonmaterial power'³. We also identify a human leverage whereby the life, liberty and security of exiles are instrumentalised to pressurise European institutions and member states.

A) *Nonmaterial power*

'Symbolic capital', networking and choices of partners are the main strategies identified in Cetta Mainwaring's comparative paper between Malta and the Republic of Cyprus.

First, Malta uses its primary characteristics and politically displays them. Its 'symbolic capital' is composed by the annual number of immigrants arrivals per capita. In absolute terms, a paltry number of exiles disembark each year. But in relation to the number of inhabitants, the annual number of arrivals becomes particularly high. In 2019, the island recorded the highest rates in the EU with 56 immigrants per 1,000 persons⁴. In absolute figures, only 3,406 exiles disembarked that year⁵. Unlike other European countries composed of islands, Malta has no mainland. Thus, relocations of asylum-seekers disembarking are all the more complicated. This status of island-country goes along with the immobility of exiles on a small land surface. The archipelago is surrounded by a very large search and rescue (SAR) zone, one of the largest areas in the Mediterranean, i.e. 250,000 km² (65 times as large as its territorial waters). This zone is far from proportionate to the size of the country and its population. In terms of political representation, Malta is also limited with six MEPs when

² Mainwaring Cetta, 'Resisting Distalisation? Malta and Cyprus' influence on EU migration and asylum policies', *Refugee Survey Quarterly*, University of Waterloo, November 2017, p. 38

³ Mainwaring Cetta, Small States and Nonmaterial Power: Creating Crises and Shaping Migration Policies in Malta, Cyprus, and the European Union, *Journal of Immigrant & Refugee Studies*, 2014, 12:2, 103-122

⁴ <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf>

⁵ UNHCR, Malta Sea Arrivals, January-December 2019

https://www.unhcr.org/mt/wp-content/uploads/sites/54/2020/05/Malta-Sea-Arrivals-and-Asylum-Statistics-2019-UNHCRFactsheet_allyear.pdf

bigger member states such as Germany have 96. Defending its interests is all the more essential as the island-state is located 350 km away from the Libyan coast, constituting one of the main migration routes between Africa and Europe. These characteristics have been used by Maltese politicians, both from the Nationalist and Labour parties, to argue that the island has been bearing a 'disproportionate burden'⁶ as joining the Union and integrating the Schengen zone by 2007.

Another Maltese strategy has been to successfully settle at the crossroads of European solidarity initiatives. Chosen as the location of the European Asylum Support Office (EASO) headquarters in 2009, Valletta has become a place of a 'tacit admission' of an 'unequal pressure'⁷ on the peripheral states. Malta was also a driving force for the Quadro Group in early 2009, presenting a joint position along with Cyprus, Italy and Greece to support 'the Union's principle of solidarity and fair burden sharing'⁸. While this group has not remained active, it has helped fostering a coalition effort between southern states. They still regularly draft and publish joint notes, position papers and non-papers to the Council of Ministers, advocating for a permanent relocation mechanism away from a discretionary participation based on an *ad hoc* model. The Malta Declaration⁹, at the end of 2019, is a further step in this direction. Surrounded by strong allies - Germany, France and Italy - Malta was once again the stage for a joint effort for a predictable solidarity mechanism. This European networking is nonetheless counterbalanced by an extreme reluctance regarding any foreign intervention in the national asylum system or migration policy. As journalist Manuel Delia explained in an interview, Malta remains a formerly colonised island and displays a 'cultural hostility'¹⁰ towards foreign actors reminding the government of its human rights responsibilities, for example in terms of rescue at sea. This hostility can also explain the fact that the EASO has remained outside the Maltese asylum system for ten years, despite being based in Valletta¹¹. The first EASO operation plan was agreed in June 2019¹². This search for partners and use of European rhetoric and symbols do not prevent Malta from rejecting non-Maltese interventions that would go against its migration ideal.

B) Human leverage

Beyond nonmaterial power that Malta has been displaying, the archipelago has openly been using exiles themselves - before and/or after their arrival in Malta - to exert pressure on Brussels and European neighbours. Migrants have turned into hostages of a 'power game' with the EU, notably through *de facto* detention at sea and on land.

A large portion of political crises happening in the Central Mediterranean are caused by Malta's refusal to disembark migrants stranded in its SAR zone as long as no *ad hoc* relocation pledges are made by EU neighbours. Resulting from this strategy, exiles can be *de facto* detained at

⁶ Arena Jessica, '€22.5 million in EU migration aid since 2007', *Times of Malta*, January 25th, 2021 <https://timesofmalta.com/articles/view/225-million-in-eu-migration-aid-since-2007.847182>

⁷ Mainwaring Cetta, 'Resisting Distalisation? Malta and Cyprus' influence on EU migration and asylum policies', *Refugee Survey Quarterly*, University of Waterloo, November 2017, p. 56

⁸ Council of the European Union, note from the Cyprus, Greek, Italian and Maltese Delegations on Combating illegal immigration in the Mediterranean, 23 January 2009 (p.2) <https://data.consilium.europa.eu/doc/document/ST%205689%202009%20INIT/EN/pdf>

⁹ Joint Declaration of intent on a controlled emergency procedure - voluntary commitments by member states for a predictable temporary solidarity mechanism, Valletta, 23 September 2019 <https://www.statewatch.org/media/documents/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>

¹⁰ Interview with Manuel Delia, 20/01/2020

¹¹ Interview with Neil Falzon, Director of aditus foundation, 18/12/2020

¹² <https://www.easo.europa.eu/sites/default/files/OP-Malta-2019.pdf>

sea for varying periods of time. Between August and September 2020, a group of 27 people were forced to spend 40 days on a cargo ship required to stay at sea upon the Maltese RCC's orders¹³.

On land, illegal detention has been normalised as an answer to a lack of space in 'open centres' or reception facilities. Deprivation of liberty is used to attract EU's help, in theatrics where the victim isn't the person illegally deprived of their liberty, but the state ordering their detention with no legal ground. These theatrics have been rather successful: from 2007 to 2021, Malta received €22.5 million from the European Commission regarding migration and asylum aid¹⁴. Between 2016 and 2020, €5,250,000 were allocated by the AMIF fund to build a new open centre, whereby increasing the reception capacity with 400 new places¹⁵. But no new open centre has arisen by the beginning of 2021... The European DG Home team informed that €273,098 have been used so far to build a 'boundary wall' and a 'guardroom' in Hal Far area, where migrants are kept isolated from services, transportation and the rest of the population. No information regarding how the rest of the money has been spent by the government is currently available. Meanwhile, cases of *de facto* detention remain a reality on the island, as the Agency for the Welfare of Asylum-Seekers (AWAS) has been claiming that no space is available in open centres. Detention centres, some of which have been qualified as places where individuals suffer from inhuman and degrading treatment by the Council of Europe¹⁶, are used as places of accommodation. In 2020, several migrants were released from illegal detention through Habeas Corpus procedures. A Magistrate severely condemned this national policy, stating '*[Detaining people] against their will and simply because they have no alternative accommodation [is] abusive and farcical*'¹⁷.

All these elements tend to fuel the construction of a crisis discourse, entrenching policies laying on exceptionality. Malta depicts itself in a situation of extreme vulnerability, in which the leeway is so reduced that it often contravenes European asylum *acquis*. A relevant example would be the violation of the right to an effective remedy for large groups of asylum-seekers whose applications have been found to be 'manifestly unfounded' by the Maltese asylum office. Yet, this basic right is enshrined in Article 46, Chapter V of the European Asylum Procedures Directive (2013/32/EU)¹⁸

• Maltese objectives in the EU

Leading the overhaul of the Dublin Regulation and advocating for more 'burden-sharing': a Maltese responsibility-shifting?

Resisting distalisation requires to find the right balance between rejecting EU's model while asking for EU's help and support at the same time. Malta has been building and strengthening

¹³ Specia Megan, 'Tanker asked to rescue migrants off Malta is denied permission to dock', *The New York Times*, September 4, 2020

<https://www.nytimes.com/2020/09/04/world/europe/migrant-tanker-mediterranean.html>

¹⁴ Arena Jessica, '€22.5 million in EU migration aid since 2007', *Times of Malta*, January 25th, 2021

<https://timesofmalta.com/articles/view/225-million-in-eu-migration-aid-since-2007.847182>

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<https://eufunds.gov.mt/en/EU%20Funds%20Programmes/Migration%20Funds/Documents/AMIF%20and%20OISE/List%20of%20Projects%20-%20AMIF%20and%20OISE/list%20of%20projects%20-%20AMIF.pdf>

¹⁶ Council of Europe, Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 22 September 2020, Strasbourg, 10 March 2021

<https://rm.coe.int/1680a1b877>

¹⁷ Agius Matthew, 'Magistrate blasts 'abusive and farcical' migrant detention practice', *Malta Today*, November 30th, 2020

https://www.maltatoday.com.mt/news/court_and_police/106221/magistrate_blasts_abusive_and_farcical_migrant_detention_practice#.YG2_jRMzb-Y

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

diplomatic relations with its southern neighbours, within the European institutions, but also with third countries that are strategic for both its national interests and for the interests of the Union, such as Libya.

Although geographically isolated, the archipelago has managed to build itself a place within the European institutions. Maltese figures who have sat - or are sitting - in the European Parliament have been playing a major role in making the Schengen peripheral states heard in Brussels. Simon Busuttil (MEP from 2004 to 2013), Joseph Muscat (MEP from 2004 to 2008) and Roberta Metsola (current vice-president of the European Parliament) have been important spokespersons, successful at agenda-setting. The Maltese national priority being migration¹⁹, this issue is put at the centre of negotiations by the island's representatives in European institutions.

Following the European Pact on Immigration and Asylum adopted by the Council in 2008 - for which Malta was successful at lobbying to point out 'disproportionate influxes of immigrants' and call for 'better reallocation of beneficiaries [...] from member states to others'²⁰, Nationalist MEP Simon Busuttil presented his report on a Common Immigration policy for Europe²¹. This report emphasised on five main points, among which turning the burden-sharing mechanism introduced in the 2008 Pact into a legally binding instrument. In 2012, Busuttil participated in another paper for Cypriot Rapporteur Kyriacos Triantaphyllides, which was adopted and approved by the Parliament. Laying the foundations for the 2015 relocation scheme, the report introduced a 'distribution key'²² for the relocation of beneficiaries of international protection. This key is based on four indicators which are the member state's GDP, population, surface area and the beneficiaries' best interests and integration prospects. These indicators directly refer to the symbolic capital displayed by Malta, insisting on its important demography on a small territory, where integration of refugees is far from being the priority of the national agenda²³.

In 2009, the first intra-EU relocation initiative was adopted following European Council Conclusions²⁴. The Maltese islands piloted EUREMA project in 2011, based on a non-binding participation of twelve states including France, Germany, Luxembourg, Romania and the United Kingdom²⁵. A second phase was led in 2012. Despite the EU co-financing and a financial incentive for receiving countries, only 227 people were relocated from Malta in the first phase of the pilot

¹⁹ European Commission, 'What are the priorities of the Maltese Presidency', 10/01/2017

https://ec.europa.eu/malta/news/what-are-priorities-maltese-presidency_en

²⁰ Council of the European Union, *European Pact on Immigration and Asylum*, EU Doc. 13440/08 ASIM 72, 24 Sep. 2008.

<https://data.consilium.europa.eu/doc/document/ST-13440-2008-INIT/en/pdf>

²¹ European Parliament (2009), Report on a Common Immigration Policy for Europe: Principles, actions and tools (2008/2331(INI))

<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0251+0+DOC+PDF+V0//EN>

²² European Parliament (2012), Report on enhanced intra-EU solidarity in the field of asylum (2012/2013 (INI)), p. 12

https://www.europarl.europa.eu/doceo/document/A-7-2012-0248_EN.pdf

²³ Nimführ S., Otto L., Samateh G. (2020) Denying, While Demanding Integration: An Analysis of the Integration Paradox in Malta and Refugees' Coping Strategies. In: Hinger S., Schweitzer R. (eds) Politics of (Dis)Integration. IMISCOE Research Series. Springer, Cham.

https://link.springer.com/chapter/10.1007/978-3-030-25089-8_9#citeas

²⁴ Council of the EU (2009), Presidency Conclusions of the Brussels European Council (18/19 June 2009), 11225/2/09 REV 2, p. 14

https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf

²⁵ Malta Home Affairs, EUREMA I Pilot Project for Intra-EU re-allocation from Malta <https://homeaffairs.gov.mt/en/MHAS-Information/EUREMA/Pages/EUREMA-I.aspx>

project²⁶. If Malta ended up being excluded from the 2015 relocation scheme, distribution of disembarked asylum-seekers are still a priority for the island. An outside-of-legal-scope-programme has thus become a pattern since mid-2018. Financed by the European Commission through the AMIF fund, *ad hoc* relocations work on voluntary pledges made by European states, mostly France and Germany.

These relocations, may they fall within or outside any EU legal frame, are a symptom of a mechanism of ‘internalisation’, as opposed to the externalisation of migration responsibilities towards non-EU countries, outside Schengen borders. By delegating its responsibilities for disembarkation, asylum registrations, reception of exiles to close neighbours like Italy or northern EU member states, Malta has turned an official EU ‘solidarity’ request into a privilege to openly disregard its responsibilities. This ‘responsibility-shifting’ has definitely been leading to constant ill-treatments, as ECRE already warned about at the beginning of the 2010’s, regarding the lack of ‘clear conditions and criteria regarding the treatment of asylum-seekers and beneficiaries of international protection in the country concerned’²⁷.

A certain form of flexibility serving relocation programmes was brought about by the 2013 recast of the Dublin Regulation, introducing discretionary and exemption clauses in Article 17. Although these clauses are rarely used by European states, they seem to be a relevant tool for the *ad hoc* relocations from Malta (i.e. *ad hoc* relocations factsheet). These clauses, requested *inter alia* by Malta, endorse exceptions to the rules of the Dublin Regulation as it had been followed since 1997. A new step, supported and represented by European Parliament vice-president Roberta Metsola, is the impetus to abandon the Dublin system in favour of the New Pact proposed by Commissioner Ursula von der Leyen on September 23rd, 2020. Metsola has warmly welcomed these propositions and her position could be a new opportunity for Malta to eventually achieve the adoption of a legally binding burden-sharing mechanism.

Malta’s role in European’s externalisation policy to Libya

In addition to this ‘internalisation’, Malta has been participating in an externalisation policy since the beginning of the 21st century. In the Central Mediterranean, a political triad has been shaped by Italy, Malta and Libya. Integrating Gaddafi’s Jamahiriya as a stakeholder in European migration policies has been a Maltese priority. Between 2003, when Prime Minister Lawrence Gonzi took advantage of the lifting of the embargo on Libya to propose the installation of detention ‘centres’ for ‘irregular’ migrants²⁸, and the recent Memorandum of Understanding agreed by Robert Abela and Fayez Al-Sarraj, the Maltese-Libyan relationship has been one of the driving forces behind the European policy of externalising migration controls towards Libya.

In 2010, the European Commission agreed on a Memorandum of Understanding with Libya on ‘illegal migration’²⁹, providing for EU technical assistance and cooperation for two years. This agreement was welcomed by the island, which ‘had long been pushing the EU to reach a deal with

²⁶ EASO (2012), EASO fact finding report on intra-EU relocation activities from Malta, July 2012, p. 4
<https://www.refworld.org/pdfid/52aef8094.pdf>

²⁷ European Council on Refugee and Exiles (ECRE), *Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, January 2013, p. 46
https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Enhancing-intra-EU-solidarity-tools_January-2013.pdf

²⁸ Farrugia Massimo, « PM in Libya to discuss migration », *Times of Malta*, 6 October 2004
<https://timesofmalta.com/articles/view/pm-in-libya-to-discuss-migration.110756>

²⁹ https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1281

Tripoli' according to national media³⁰. In 2013, operation 'Seahorse Mediterraneo' was approved by the Commission to increase controls on North African coastal and land borders³¹.

Malta's EU presidency in 2017 was a new opportunity to stress the importance of Libya and the funding of its border management. The final Malta Declaration focused on reinforcing training, equipment and support to the so-called Libyan Coast Guards and on 'reception capacity' of migrants in Libya, as well as support border management capacity. In line with the Valletta Action Plan of 2015, another €200 million were added to the EU Trust Fund for Africa, focusing on migration-related projects in Libya³². This declaration is framed by a long-standing Euro-Libyan cooperation initiated by Italy, which signed a Memorandum of Understanding with Al-Sarraj the same year. Italian action had already begun with technical, technological and financial support focusing on the management of the southern border, the so-called 'reception centres', the training of Libyan personnel and the coordination of the Libyan SAR zone, which would be created the following year.

In June 2020, Malta signed a Memorandum of Understanding with the same Libyan government. The non-binding document calls on the Commission and European member states to provide financial support to the Government of National Accord (GNA) to 'secure the southern borders' and to provide the technology necessary for maritime control, so that crossings to Malta are eventually made impossible³³. Malta also calls on the EU to fund new vessels to expand the fleet of so-called Libyan Coast Guards (LYCG). In an interview³⁴ a representative of the Maltese Home affairs Ministry stated that *'the exclusion of Libya from discussions [on migration] wouldn't be fair to Libya but also to migrants themselves'*³⁵.

Despite the unanimous recognition that Libya cannot offer a safe port, Italian and Maltese states have made Libya a key player and led the rest of the EU in this direction. On June 13th, 2020, MEP Erik Marquardt submitted a question to the European Commission regarding the Maltese-Libyan new MoU³⁶, emphasising on a potential EU funding to Libya for additional vessels and border surveillance technology. As a reply, Home affairs Commissioner Yvla Johansson reiterated the Commission's support to Malta in addressing migration challenges in the Mediterranean, 'including as regards cooperation with southern neighbours, in particular with Libya', while recalling that Libya 'doesn't currently meet the conditions to be considered a 'place of safety' for disembarkation³⁷. Not only are the pushbacks resulting from these interceptions passed over in silence nor condemned by Brussels or the European Court of Human Rights (since 2013), but the EU is openly willing to support Malta in its externalisation policy to war-torn Libya.

³⁰ Camilleri Ivan, « Libya, EU sign crucial accord », *Times of Malta*, 6 October 2010

<https://timesofmalta.com/articles/view/libya-eu-sign-crucial-accord.330026>

³¹ EUROMED RIGHTS, « The Seahorse Mediterraneo Maritime Surveillance Programme: EU security dangerously off-beam? », September 27, 2013

<https://euromedrights.org/publication/the-seahorse-mediterraneo-maritime-surveillance-programme-eu-security-dangerously-off-beam/>

³² Council of the European Union, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route', 03/02/2017

<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/pdf>

³³ 'Memorandum of Understanding Between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the Field of Combatting Illegal Immigration'

<https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>

³⁴ Extract from an interview with an official from the Ministry of Home Affairs, National Security and Law Enforcement, March 4th, 2021

³⁵ *idem*

³⁶ https://www.europarl.europa.eu/doceo/document/E-9-2020-003556_EN.html

³⁷ https://www.europarl.europa.eu/doceo/document/E-9-2020-003556-ASW_EN.html