Transnational Migrant Deterrence

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TRANSNATIONAL MIGRATION DETERRENCE

ANITA SINHA

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TRANSNATIONAL MIGRATION
DETERRENCE

ANITA SINHA*

Abstract: The governance of global migration increasingly relies on what critical migration scholarship refers to as externalized control. Externalization encompasses limiting human mobility through the imposition of migration control measures by transit states, as well as by states that are geographically proximate to destination states. Destination states are at a minimum complicit in the creation and operation of these externalized migration control systems. To capture this phenomenon, this Article offers a reconceptualization of externalization as transnational migration deterrence. The objective of this nomenclature is to provide a framework that highlights the role of destination states, to build a lexicon of accountability for extraterritorial human rights violations against migrants. Transnational migration deterrence systems often arise through ad hoc policies and practices, typically as a response to a migration “crisis,” and continue thereafter as long-lasting mechanisms of regional migration control. Destination states typically provide assistance for less-resourced states to carry out migration control on their behalf through financial and logistical support, while also levying threats if they fail to deter migration. This Article begins with transnational migration deterrence in the Americas, describing first the historical context of the U.S.-Caribbean migrant deterrence system and then present-day migration control practices between the United States, Mexico, and Central America. It then turns to the transnational migration deterrence systems in Europe and Australia, chronicling arrangements of interdiction at sea and offshore detention in both regions. The Article concludes by exploring a framework of accountability that recognizes the relational nature of how externalized migration controls are operationalized, emphasizing the need for systems of accountability with respect to destination countries’ role in migration deterrence practices.

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INTRODUCTION

Our own era . . . seems to be that of space. We are in the age of the simultaneous, of juxtaposition, the near and the far, the side by side and the scattered.¹

—Michel Foucault

Neighbor is not a geographic term. It is a moral concept.²

—Rabbi Joachim Prinz

The relationship between responsibility and distance in the context of global migration must be reconceptualized in order to safeguard the rights of vulnerable migrants and preserve the integrity of the international human rights protection regime.³ Global North states that are migrants’ intended destination have been increasingly devising ways to prevent migrants from reaching their borders. As a result, developing states today accommodate 80% of the world’s refugees.⁴ Migration routes are increasingly more dangerous to traverse,⁵ and there are near-constant images and reports of migrant deaths in de-
serts and washed-up cadavers from drownings in rivers and seas. Migration detention practices have proliferated globally, and often are sites of deplorable and abusive conditions. The rhetorical repetition casting migration flows as “crises” inhibits the implementation of solutions that balance the needs of vulnerable migrants with state sovereignty.

In this context, externalization of migration control efforts has become the norm. Externalization describes extraterritorial state influence over, or involvement in, mechanisms that prevent migrants from crossing the physical border of a destination state. One prominent migration scholar, in analyzing migration in a “[t]ransnational [c]ontext,” notes that destination states can no longer rely on unilateral responses and instead have entered into cooperative agreements to deter migration. These agreements are a continuation of “long-standing” efforts to respond to migration via “extraterritorial responses.” Cooperative arrangements have the potential to go beyond “the traditional narrow focus on outsourced border control” and may include measures such as economic development aid to address the root causes of migration.

stop irregular migration is not supported by evidence. Instead, these measures have been found to divert migrants towards more dangerous routes, encouraging recourse to smuggling networks, and more generally, increasing the risk of deaths at sea,” (first citing Wayne A. Cornelius & Idean Salehyan, Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States, 1 REGUL. & GOVERNANCE 139 (2007); and then citing EUGENIO CUSUMANO & MATTEO VILLA, ROBERT SCHUMAN CTR. FOR ADVANCED STUDY, MIGRATION POL’Y CTR., SEAR RESCUE NGOs: A PULL FACTOR OF IRREGULAR MIGRATION? (2019), https://cadmus.cui.edu/bitstream/handle/1814/65024/PB_2019_22_MPC.pdf [https://penna.cc/V4WC-W8WX]); Clare Cummings, Julia Pacitto, Diletta Lauro & Marta Foresti, Why People Move: Understanding the Drivers and Trends of Migration to Europe 7 (Overseas Dev. Inst., Working Paper No. 430, 2015), https://cdn.odi.org/media/documents/10485.pdf [perma.cc/SZ42-XXN7].


7 See, e.g., infra notes 125–135 and accompanying text.

8 See infra notes 21–24 and accompanying text; see also E. Tendayi Achiume, Migration as Decolonization, 71 STAN. L. REV. 1509, 1517 (2019) (disputing “the logic of [the] dogmatic account of territorial nation-state sovereignty where encounters between Third World peoples and First World nation-states are concerned”).


10 Motomura, supra note 3, at 499.

11 Id. at 510.

12 Id. at 510–11. Professor Motomura raises this possibility with several caveats. See id. at 511–17. He ultimately concludes “that though economic development may seem promising as a major element in responses to migration, many arrangements are seriously flawed.” Id. at 517.
This Article reframes these arrangements as transnational migration deterrence to encourage a linguistic shift that expands the critical conversation about modern migration beyond this traditional narrow focus. Importantly, the framework of transnational migration deterrence, which captures the affirmative steps taken by states that seek to curb the mobility of migrants, contemplates accountability mechanisms that hold destination states responsible for human rights violations beyond their borders. Relatively wealthy destination states have increasingly made arrangements where other, less-resourced states do the work of migration control for them. These practices fall squarely within the definition of transnationalism proffered by geography scholars, namely “work of the state that crosses national boundaries.”

Transnational migration deterrence can involve a migrant’s country of origin—that is, the sending country—and increasingly includes deterrence systems in countries migrants travel through to reach their destination. As noted above, these transit states tend to be countries with far fewer resources than the destination state. Destination states also are increasingly enlisting non-transit neighboring countries to restrict migrants’ mobility. The United Nations International Law Commission describes the state actors involved in what are potentially transnational human rights violations as assisting (destination) states and acting (sending, transit, and/or neighboring) states. These various transnational arrangements have resulted in human rights violations against migrants, including violations of the principle of non-refoulement and exploitation and abuse by state and non-state actors.

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13 Thomas Gammeltoft-Hansen & James C. Hathaway, Non-refoulement in a World of Cooperative Deterrence, 53 Colum. J. Transnat’l L. 235, 241 (2015) (describing “the politics of non-entrée” as states instituting “policies that seek to keep most refugees from accessing their jurisdiction, and thus being in a position to assert their entitlement to the benefits of refugee law”).


15 Antje Missbach & Melissa Phillips, Reconceptualizing Transit States in an Era of Outsourcing, Offshoring, and Offfuscation, 3 Migration & Soc’y 19, 19 (2020) (“[T]ransit states can be understood as countries through which migrants . . . try to pass on their way to another destination country.”).

16 Destination states often initiate transnational migration control claiming that the intent is to assist these less-resourced states with migration control and management. See Bill Frelick, Ian M. Kysel & Jennifer Podkul, The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants, 4 J. Migration & Hum. Sec. 190, 194 (2016) (“Externalization occurs through formalized migration policies and visa regimes, through bilateral and multilateral policy initiatives between states, as well as through ad hoc policies and practices.”).

17 See infra notes 320–325 and accompanying text.

18 See infra notes 267–288 and accompanying text.
The scholarship analyzing the phenomenon of externalization with respect to migration control has accomplished the critically important work of presenting how states regionally and globally restrict migrants’ mobility beyond their territorial borders. There is a spectrum of theories about what physical borders now signify—from ubiquitous and multidirectional to shifting and even vanishing—with the growing global reliance on transnational migration deterrence. This Article builds upon this literature and addresses why and how to hold destination states accountable for human rights violations within systems that execute migration deterrence extraterritorially, given the central, and in many cases decisive, role these states play in the creation and/or operation of these mechanisms.

Transnational migration deterrence systems are typically instituted through “ad hoc policies and practices,” often as a response to a constructed “migration crisis.” Destination states often operationalize transnational deterrence mechanisms via financial and logistical support, or simply issue threats to withhold aid or impose tariffs. Transnational deterrence also is achieved through visa requirements. Notable examples include Canada mandating that Czech Roma refugees obtain visas to deter their migration in the late 1990s.

19 David Scott FitzGerald, Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence, 46 J. ETHNIC & MIGRATION STUD. 4, 5 (2020) (“There is no consensus on how far contemporary practices have reshaped classical understandings of borders and sovereignty.”); see David Lyon, The Border Is Everywhere: ID Cards, Surveillance and the Other, in GLOBAL SURVEILLANCE AND POLICING: BORDERS, SECURITY, IDENTITY 66, 78–94 (Elia Zureik & Mark B. Salter eds., 2005) (exemplifying the ubiquitous theory of borders); Cecilia Menjivar, Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization, 10 ANN. REV. L. & SOC. SCI. 353, 357 (2014) (“The externalization (or outsourcing) of borders . . . creates a situation in which admission decisions, which are normally the purview of immigration inspectors at ports of entry, or the frontline gatekeepers, are no longer confined to these spaces or at the physical border . . . .” (citing Janet A. Gilboy, Deciding Who Gets In: Decisionmaking by Immigration Inspectors, 25 LAW & SOC’Y REV. 571 (1991))); Ayelet Shachar, Bordering Migration/Migrating Borders, 37 BERKELEY J. INT’L L. 93, 100 (2019) (exemplifying the shifting theory of borders).

20 Frelick et al., supra note 16, at 194.

21 See Rebecca Hamlin, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE 124 (2021) (“The term ‘crisis’ in relation to border crossing situations is frequently deployed not in relation to the human suffering that is being experienced, but in relation to the reaction of citizens and politicians in wealthy receiving states.”); Catherine Powell, Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity, 24 UCLA J. INT’L & FOREIGN AFF. 133, 158 (2020) (describing the Trump Administration, in order to curtail migration, to have “manufactured a crisis at the U.S.–Mexico border as a basis for shifting borders outwards”); Anita Sinha, Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants, 50 COLUM. HUM. RTS. L. REV. 176, 187 (2019) (“[The] persistent characterization of the movement of people across borders as unpredictable crises justifies, often to the extent of necessitating, a securitization response to migration.”); Jaya Ranji-Nogales, Migration Emergencies, 68 HASTINGS L.J. 609, 613 (2017) (“[Migration] crises are constructed by the architecture of the international migration law framework, which is excessively dependent on the antiquated refugee regime.”).
Transnational Migration Deterrence
and European countries requiring visas for refugees from the Bosnian War. Finally, transnational migration deterrence can be executed by non-state actors, such as transportation carriers and private entities more broadly.

Migration detention increasingly has become an integral feature of transnational migration deterrence. Detention has proliferated in destination states, and is increasingly present in transit states and non-transit states geographically proximate to destination states. States have attempted to avoid the designation of this practice as migration detention by using euphemisms such as registration camps, reception centers, hot spots, and border zone camps. In a simi-


lar vein, mechanisms designated as “processing center[s]” are de facto detention centers,\textsuperscript{27} and refugee camps are often functionally open-air prisons.\textsuperscript{28} The proliferation of these sites, despite attempts to cloak the causal link by tweaking terminology, demonstrates in fact that border deterrence and detention are interrelated practices.\textsuperscript{29} Notably, the increased use of detention as a tool for migration control has not abated unauthorized migration.\textsuperscript{30}

\textsuperscript{27} Franziisa Zanker, \textit{Managing or Restricting Movement? Diverging Approaches of African and European Migration Governance}, COMPAR. MIGRATION STUD., May 8, 2019, at 1, 5 (quoting the African Union chair of a 2015 summit between the EU and African partners dedicated to migration: “processing centres, or whatever they may be called, are de facto detention centres that will constitute a serious violation of human rights and re-victimization of migrants” (quoting Chairperson Nkosazana Dlamini Zuma)); see also MARK AKKERMAN, OUTSOURCING OPPRESSION: HOW EUROPE EXTERNALISES MIGRANT DETENTION BEYOND ITS SHORES 4 (Niamh Ni Bhriain & Josephine Valeske eds., 2021), https://www.tni.org/files/publication-downloads/outsourcingoppression-report-tni.pdf [https://perma.cc/8PLA-Z6P9] (“There is a plethora of terms used to describe the facilities funded by the EU and its member states, from detention centres to accommodation settings to disembarkation platforms, but regardless of the chosen term, the underlying logic is the same—that unwanted migrants who are on the move towards Europe should be detained, contained and returned so that they do not become Europe’s problem.”).

\textsuperscript{28} AKKERMAN, supra note 27, at 3, 11 (stating that the label of refugee camp to describe Moria on the Greek island of Lesbos “is deeply misleading—more accurately Moria was a squalid, overcrowded, open-air prison”). The Moria camp was built for three thousand refugees, but contained more than thirteen thousand refugees by the time it was destroyed in a fire September 2020. See \textit{Moria Migrants: Fire Destroys Greek Camp Leaving 13,000 Without Shelter}, BBC (Sept. 9, 2020), https://www.bbc.com/news/world-europe-54082201 [https://perma.cc/NUSP-XD54]; see also LOYD & MOUNTZ, supra note 14, at 4–6 (discussing various terms used for detention—including noncitizen detention, immigration detention, detention versus prison—and the implications of each); Brad Adams, \textit{Bangladesh Turning Refugee Camps into Open-Air Prisons}, HUM. RTS. WATCH (Nov. 26, 2019), https://www.hrw.org/news/2019/11/26/bangladesh-turning-refugee-camps-open-air-prisons# [https://perma.cc/KZF4-59HN] (describing Bangladesh’s increasing security measures at the Cox’s Bazaar refugee camp, including guards and barbed wire fences); Helena Smith, \textit{Adj Groups Condemn Greece Over ‘Prison’ Camps for Migrants}, THE GUARDIAN (Nov. 25, 2019), https://www.theguardian.com/world/2019/dec/25/aid-groups-condemn-greece-over-prison-camps-for-migrants [https://perma.cc/9E2Q-58PK] (reporting on Greece’s passage of measures to create “closed facilities” on Lesbos and Chios that, according to Non-Governmental Organizations (NGOs), would make the camps more like detention centers); HUM. RTS. WATCH, \textit{“AN OPEN PRISON WITHOUT END”: MYANMAR’S MASS DETENTION OF ROHINGYA IN RAKHINE STATE} 2–11 (2020), https://www.hrw.org/sites/default/files/media_2020/09/myanmar1020 web.pdf [https://perma.cc/ENW2-9FLF] (describing the large securitized camps in Rakhine state at which Myanmar places internally displaced Rohingya community members).

\textsuperscript{29} LOYD & MOUNTZ, supra note 14, at 6 (“We argue that border-enforcement and detention policies must be understood together and transnationally across onshore and offshore spaces where they operate.”).

however, migrants’ ability to reach their intended destinations, and has rendered migration significantly more perilous.\textsuperscript{31}

Reframing contemporary migration control from a system of externalization to a transnational system implicates, and could even centralize, the role of the destination state. Critical accompaniment to this reconceptualization are the levers and legal theories to hold assisting (destination) states responsible for human rights violations perpetuated within transnational migration deterrence systems. Part I of this Article begins by describing the archetypal modern transnational migration deterrence regime, namely the U.S.-Caribbean system assembled by the United States beginning in the late 1970s.\textsuperscript{32} It goes on to examine the development of migration deterrence mechanisms in Mexico and Central America, highlighting the critical role the United States has played in what is now a formidable transnational system across the region.\textsuperscript{33}

Part II of this Article turns to parallel efforts to deter migration in Europe and Australia, again, emphasizing the central role of destination states while also identifying the expanded use of migration detention in both regions.\textsuperscript{34} Part III proposes a theory of how international and regional human rights bodies can make jurisdictional links to states that create and provide ongoing support for transnational migration deterrence systems.\textsuperscript{35} It does so with the objective of rendering geographic distance irrelevant, or at least less relevant, vis-à-vis the protection of vulnerable migrants.

I. TRANSNATIONAL MIGRATION DETERRENCE IN THE AMERICAS

Scholars link modern transnational migration deterrence to the 1951 Refugee Convention.\textsuperscript{36} When the Convention established that states must provide migrants fleeing persecution, and present within their territory, the right to seek asylum, destination states began instituting migration control beyond their borders.\textsuperscript{37} One sociologist specifically identifies the 1967 Protocol to the Refugee Convention as the catalyst for propagating transnational migration deterrence, as the agreement expanded the 1951 Convention’s scope by eliminating the defini-

\textsuperscript{31} See supra note 5 and accompanying text.
\textsuperscript{32} See infra notes 36–78 and accompanying text.
\textsuperscript{33} See infra notes 79–170 and accompanying text.
\textsuperscript{34} See infra notes 171–266 and accompanying text.
\textsuperscript{35} See infra notes 267–343 and accompanying text.
\textsuperscript{36} DAVID SCOTT FITZGERALD, REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS 21 (2019) (citing THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 61 (2011)).
tion of a "refugee" as someone displaced by World War II. Given that World War II refugees were predominately from white European countries, the effect of the 1967 Protocol was to apply the protections provided by the 1951 Convention to non-white migrants. Beginning about a decade later, the U.S. government's multifaceted, prolonged, and regional approach to migration from the Caribbean provided a blueprint for modern transnational migration deterrence.

Section A of this Part describes the system implemented by the United States in order to deter migration from the Caribbean in the late 1970's. Section B explores systems of migration deterrence in other countries within the Americas.

A. The U.S.-Caribbean Migration Deterrence System

The U.S. government's transnational deterrence system in response to migration from Haiti and Cuba in the late 1970s relied on maritime interdiction, a tactic that the "United States is often credited with having pioneered." An Executive Order issued by President Ronald Reagan in 1981 authorized the U.S. Coast Guard to carry out these interdictions. A necessary corollary to the

38 FITZGERALD, supra note 36, at 44 ("An underappreciated explanation for the increase in remote control of asylum seekers is that it grew out of the 1967 Protocol that stripped away the 1951 Convention’s geographic and temporal limitations on who is considered a refugee.").

39 Id.

40 See ALISON MOUNTZ, THE DEATH OF ASYLUM: HIDDEN GEOGRAPHIES OF THE ENFORCEMENT ARCHIPELAGO 50 (2020) (“While many people today associate externalization with the border enforcement practices of the EU, contemporary forms of offshore enforcement can actually be traced back to U.S. interceptions in the Caribbean that began in the late 1970s . . . ”) (first citing Didier Bigo, When Two Become One: Internal and External Securitisation in Europe, in INTERNATIONAL RELATIONS THEORY AND THE POLITICS OF EUROPEAN INTEGRATION: POWER, SECURITY AND COMMUNITY 171 (Morten Kelstrup & Michael Williams eds., 2000); then citing Christina Boswell, The ‘External Dimension’ of EU Immigration and Asylum Policy, 79 INT’L AFFS. 619 (2003); then citing Mark Sahir, Passports, Mobility, and Security: How Smart Can the Border Be?, 5 INT’L STUD. PERSPS. 71 (2004); and then citing William Walters, Secure Borders, Safe Haven, Domopolitics, 8 CITIZENSHIP STUD. 237 (2004)).

41 See infra notes 44–75 and accompanying text.

42 See infra notes 73–167 and accompanying text.


44 Mountz & Loyd, supra note 43, at 394 (“President Reagan issued the offshore deterrence policy on 29 September 1981. Executive Order 12324 directed the Secretary of State to enter into bilateral agreements with foreign governments that would allow US Coast Guard vessels to stop, board, and return foreign vessels.” (citing Niels Frenzen, US Migrant Interdiction Practices in International and
capture of migrants en route to the United States was the construction of a migration detention regime, both within and outside U.S. borders. In this regard, the U.S. government’s efforts to deter migration from the Caribbean demonstrates how the management of transnational deterrence results in destination states performing both acting and assisting roles. The U.S.-Caribbean system was the first transnational deterrence regime created after the 1967 Protocol.

Subsection 1 of this Section describes the U.S. government’s attempts at creating an ad hoc migration detention system in response to increased migration from Haiti and Cuba. Subsection 2 explores the expansion of this system of migration deterrence beyond the borders of the United States.

1. U.S. Military Sites and the Construction of a Migration Detention System

An undeveloped interior migration detention system in the 1970s led to the U.S. government’s efforts to control migration from Haiti and Cuba through military sites and the ad hoc use of jails across the country. Haitians began arriving in the United States in greater numbers in that decade after tensions mounted between Haitian migrants and citizens of the Bahamas. The Carter Administration instituted a deterrence strategy that relied on detaining Haitian migrants in local jails. In 1978, the U.S. government began the operation of the bluntly named “Haitian Program,” which mandated the detention of Haitian migrants who could not afford bond and limited Haitians’ access to asylum.
Overlapping with the flow of migrants leaving Haiti, the Cuban "Mariel Boatlifts" brought over 125,000 migrants to the United States over a six-month period. The Reagan Administration, as one of its first executive actions in 1981, formalized a two-part deterrence strategy that added mandatory detention to the interdiction of migrants attempting to reach the United States by sea. As with the Haitians, the U.S. government repurposed military facilities to detain Cuban migrants.

The next year, President Reagan requested funding from the U.S. Congress for detention facilities dedicated to holding migrants. The funding led to the conversion of a former U.S. missile base, Krome (built after the 1963 U.S.-Cuban Missile Crisis) into a permanent migrant detention facility in Southern Florida. As a base, Krome held Haitian and Cuban migrants in tents and as a permanent detention facility, it was a key apparatus to deter migration from the Caribbean.
At this time, the U.S. government also built Oakdale, the first migration detention facility run jointly by the U.S. Bureau of Prisons and the then-Immigration and Naturalization Service. Amongst its first detainees were Mariel Cubans the U.S. was still attempting to repatriate. Violence and abuse were rampant in both the Krome and Oakdale facilities. By the early 1990s, the U.S. government had expanded its interior migration detention capacity to nine facilities, and contracted with private firms to operate another five facilities.

The expansion of interior migration detention became a significant part of the deterrence mechanisms aimed at deterring Caribbean migrants. The U.S. government continued, however, to pursue extraterritorial strategies. For example, it operationalized large-scale repatriations of Haitians through interdictions, by turning back those who did not pass screening interviews for asylum conducted aboard U.S. Coast Guard vessels. It also expanded its use of overseas U.S. military sites to deter migration in the Caribbean when it began to utilize its naval base at Guantánamo Bay, Cuba. The government opened the base comprised of two tents with the capacity of two thousand—one of the tents was for Haitian migrants, the other was for Cubans. Id.

See Loyd, supra note 48, at 7 (noting that the U.S. government detained many of the approximately twenty-five thousand Haitians fleeing by boat to seek asylum in Krome). Krome still operates as a migrant detention facility, housing approximately six hundred beds and detains non-U.S. citizens from all over the world. Mahoney, supra note 52.

Loyd & Mountz, supra note 50, at 80; Frances Frank Marcus, Prison for Aliens Opens in Louisiana, N.Y. TIMES (Apr. 9, 1986), https://www.nytimes.com/1986/04/09/us/prison-for-aliens-opens-in-louisiana.html [https://perma.cc/GB2L-TYND] (citing a lawyer in the lawsuit against the detention facility’s construction as asserting “that the Oakdale prison had been built as part of a Reagan Administration effort to deal with a flood of refugees from Cuba and Haiti”).

Loyd & Mountz, supra note 50, at 80.

See Chardy, supra note 57 (stating that during the 1980s and 1990s, there were “almost routine” reports of beatings and rapes of detainees held at the Krome facility); LOYD & MOUNTZ, supra note 14, at 80 (detailing the riots in both Krome and Oakdale).

Loyd & Mountz, supra note 50, at 80.

Professor Harold Koh describes the offshore detention of Haitians and Cubans in the 1990s as containing three unique features: (1) As part of a deliberate “buffer zone” strategy to impede refugees from reaching the U.S.; (2) Indefinite detention without opportunity to bring individual claims of asylum; and (3) The U.S. government’s claim that offshore detention sites are “rights-free zones,” i.e.,
base as a migration detention site in response to a new wave of refugees fleeing Haiti after the 1991 coup of President Jean-Bertrand Aristide. Within its first eighteen months of operation, the U.S. government detained over thirty-six thousand Haitians at Guantánamo. It was also a key site after the implementation of the Clinton Administration’s “wet foot, dry foot” policy, which allowed Cuban migrants who reached U.S. land to stay and petition for permanent residency status but subjected Cubans intercepted at sea to detention and repatriation.

2. Transnational Migration Detention in the Caribbean

As detailed above, the U.S.-Caribbean transnational migration deterrence effort relied on the creation of a “maritime buffer” authorized by the Reagan Administration via migrant interceptions by the U.S. Coast Guard. The subsequent Bush and Clinton Administrations expanded the coupling of interceptions with offshore detention, capitalizing on the presence of U.S. military bases across the Caribbean to design a transnational migration system. The use

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**Footnotes:**

66 WALIA, supra note 45, at 48.

67 Koh, supra note 64, at 140–41 (first citing Gerald L. Neuman, Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment, 33 VA. J. INT’L L. 503 (1993); then citing Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412 (11th Cir. 1995); then citing Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991); and then citing Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir. 1992)).

68 WALIA, supra note 45, at 48.

69 See supra notes 54–69 and accompanying text.

70 Loyd & Mountz, supra note 43, at 394. In the mid-1990s, “approximately forty thousand people were held on U.S. military bases in the Panama Canal Zone, Antigua, Dominica, St. Lucia, Suriname, and Turks and Caicos.” Mountz, supra note 40, at 42 (first citing Koh, supra note 64; and then citing Michael J. McBride, Migrants and Asylum Seekers: Policy Responses in the Unit-
of its own coast guard and military bases meant that the United States initially functioned as an acting state, albeit extraterritorially.

The U.S. government eventually expanded its extraterritorial reach to deter migrants in the Caribbean beyond actors and geographic sites under its control. In doing so, the U.S.-Caribbean system relied on the now prevalent transnational practice of enlisting states in the region to participate in the deterrence of migrants destined for the United States. These arrangements included agreements with sending states to repatriate their nationals, namely the intermittent agreements the United States made with Haiti and Cuba. The U.S. government also created agreements with Caribbean states under the “Safehaven plan” to detain Haitian and Cuban migrants intercepted at sea, in response to overcrowding at its military bases in the late 1980s. In the mid-1990s, the U.S. government expanded extraterritorial migration detention arrangements with Caribbean island states after public criticism of the U.S. government’s policy of involuntarily returning migrants to Haiti. The U.S. government did not, however, permit migrants who it placed in safe haven camps to apply for resettlement in the United States, which meant that if they wanted to seek asylum they would have to return to the places from which they fled persecution and attempt to re-enter the United States.

B. Migration Deterrence Across the Americas

While the U.S. government operated a transnational system aimed at deterring Haitian and Cuban migration, it also was securitizing its southern land

ed States to Immigrants and Refugees from Central America and the Caribbean, 37 INT’L MIGRATION 289 (2002)).

72 See LOYD & MOUNTZ, supra note 14, at 160 ("Far from being a project that the United States could accomplish alone, the Clinton administration had to work to create bilateral arrangements with countries in the [Caribbean].")

73 Loyd & Mountz, supra note 50, at 82; LOYD & MOUNTZ, supra note 14, at 160. The U.S. government’s transnational efforts even went beyond Caribbean states. See Heeren, supra note 68, at 772 (noting that after the 1991 coup in Haiti, the U.S. “sought to negotiate agreements with Belize, Honduras, Trinidad and Tobago, and Venezuela to house refugees with credible claims” (citing RUTH ELLEN WASEM, CONG. RSCH. SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 4 (2011))).

74 Mountz & Loyd, supra note 43, at 394–95.

75 LOYD & MOUNTZ, supra note 14, at 160.


78 Koh, supra note 64, at 153–54.
By the late 1980s, due largely to political unrest exacerbated by U.S. interference in Central America, there was a spike in the number of asylum seekers arriving at the U.S. southern border. The U.S. government’s response relied heavily on detention: the policy instituted was to make preliminary asylum determinations within twenty-four hours, mandating the detention of migrants who did not pass this screening. This response, along with the policies aimed to deter U.S.-Caribbean migration, morphed immigrant detention in the United States from a “modest system” to the largest detention system in the world.

There has been a clear racial and regional component to this expansion of detention, including the fact that the majority of those detained in the United States have been people of color from Central America.

In the context of migration policies, “securitization” is “a term that denotes the confluence of immigration policy with national security concerns and antiterrorism measures . . . .” Cecilia Menjivar, Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization, 10 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 353, 354 (2014) (first citing Avi Astor, Unauthorized Immigration, Securitization and the Making of Operation Wetback, 7 LATINO STUDIES 5 (2009); then citing Didier Bigo, Security Immigration: Toward a Critique of the Governmentality of Unease, 27 ALTERNATIVES 63 (2002); and then citing MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX (2002)); see also FITZGERALD, supra note 36, at 42 (defining securitization as “interpreting reality and creating policy through the master frame of protecting against violent threats to the state”).

See Heeren, supra note 68, at 770 (describing the Mexican border as “inundated with Central American asylum applicants” (citing David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. P.A. L. REV. 1247, 1251 (1990))).

Id. (“The approval rates in the 1980s for Salvadoran and Guatemalan asylum applicants were consistently around 1-3%. In comparison, the approval rates in the 1980s for applications from the USSR was 72.6%.” (first citing Deborah Anker, U.S Immigration and Asylum Policy: A Brief Historical Perspective, 13 DEF. ALIEN 74, 81 (1990); and then citing at 80)).


Id.; see also MOUNTZ, supra note 40, at 129 (“The United States today holds the largest population of detainees and the most expansive landscape of detention onshore with the greatest reach offshore.”); Lora Adams, State and Local Governments Opt Out of Immigrant Detention, CTR. FOR AM. PROGRESS (July 25, 2019), https://www.americanprogress.org/issues/immigration/news/2019/07/25/472535/state-local-governments-opt-immigrant-detention/ [https://perma.cc/9HLJ-6SU3] (“The number of immigrants detained in the United States has increased nearly every year for 25 years, ballooning from roughly 6,700 people in 1994 to nearly 53,000 [in July 2019]”).

See Hindupal Singh Bhui, The Place of Race in Understanding Immigration Control and the Detention of Foreign Nationals, 16 CRIMINOLOGY & CRIM. JUST. 267, 269 (2016) (arguing that modern detention practices in the United States should be understood through a lens of historical racism).

Beginning in the early 1990s, the U.S. government began enhancing its funding for border enforcement, particularly for border patrol agents across the Southwest U.S. border, facilitating the apprehension of a greater number of migrants. This aspect of the U.S. internal border securitization efforts, relative to the expanded use of detention, yielded equally significant results over the course of the next two decades: by 2012, there were five times the number of border agents as there were in 1993.

The securitization of the U.S.-Mexico border was also a transnational effort, as it included enhancing Mexico’s capacity to deter migrants from crossing the U.S. border. Today, Mexico’s migration control system has developed into what has been described as “the Mexican Transit Control Regime.” In 2001, prior to the 9/11 terrorist attacks, the United States and Mexico signed a bilateral agreement that constituted the Mexican government’s “commitment to Washington to reduce the flow of undocumented migrants arriving at the joint border.” The post-9/11 era witnessed a massive militarization of Mexico’s migration control system, supported by significant financial and technical support by the United States. Over a decade after 9/11, a U.S. federal government official described the Guatemala-Mexico border as the new U.S. southern border, despite the number of single migrants from the Northern Triangle only doubling from 2001-2016, the number of Northern Triangle migrants in family detention increased by thirteen times).

Christine Kovic & Patty Kelly, Migrant Bodies as Targets of Security Policies: Central Americans Crossing Mexico’s Vertical Border, 41 DIALECTICAL ANTHROPOLOGY 1, 3-4 (2017) (“The budget of the U.S. Customs and Border Patrol nearly tripled from 1993 to 2000 with significant funding going toward border enforcement in the US southwest.” (footnote omitted)).

Id. at 4 (“With the approval of the 2012 Department of Homeland Security Appropriation Bill, there are five times as many border patrol agents in place as there were in 1993.” (citing United States Border Patrol: Border Patrol Agent Nationwide Staffing by Fiscal Year, U.S. BORDER PATROL, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%202019%29.pdf [https://perma.cc/4ZCS-AYS8]). The funding was in conjunction with the launch of Operation Hold the Line in September 1993, with the objective of “restor[ing] the rule of law to the US–Mexico border.” Id. at 3 (quoting Alan Bersin, Assistant Sec’y of Int’l Affs., U.S. Dep’t of Homeland Sec.).

Amalia Campos-Delgado, Abnormal Bordering: Control, Punishment and Deterrence in Mexico’s Migrant Detention Centres, 61 BRIT. J. CRIMINOLOGY 476, 480 (2020).

The Trump Administration significantly enhanced border deterrence policies executed by Mexico, and threatened to raise U.S. tariffs on Mexican goods if the government did not stop migrants from entering the United States. The previous U.S. Administration also extended transnational migration deterrence efforts to the Northern Triangle states, using similarly coercive tactics to execute agreements to return asylum seekers to the region.

Subsection 1 details the growth of Mexico’s migration control system and the critical role of the U.S. government in this growth. Subsection 2 describes the conditions of Mexico’s detention system. Subsection 3 discusses migration deterrence efforts in other Northern Triangle countries.

1. Mexico’s Migration Deterrence System

The growth of the migration control capacity along Mexico’s southern border has been a phenomenon of transnational migration deterrence in the Americas that has received comparatively less attention than the heightening of immigration enforcement along the U.S. southern border. Packaged as security policies that aim to curtail criminal activities, such as the trafficking of arms, drugs, and humans, a focus on migration control efforts along the Mexican southern border began in 1998 with “Operation Seal the Border.” Initially, the operation was funded by the Mexican government and the U.S. government’s role was limited to information sharing. A few years later, however, the United States provided considerable, direct support—namely $11 million in funding—to bolster Mexico’s next major security policy: the Southern Plan (Plan Sur). Implemented in July 2001, the Southern Plan included: en-

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90 Kovic & Kelly, supra note 86, at 1, 3 (“The Guatemalan border with Chiapas is now our southern border.” (quoting Alan Bersin, Assistant Sec’y of Int’l Affs., Dep’t Homeland Sec.)).
92 See supra notes 79–87 and accompanying text.
93 See infra notes 96–121 and accompanying text.
94 See infra notes 122–149 and accompanying text.
95 See infra notes 149–170 and accompanying text.
96 VEGA, supra note 89, at 5 (“The attention given to [Mexico’s] southern border is a rather recent development, especially when compared with the focus paid to its counterpart in the north.”).
98 Id. at 7.
99 Id. at 8–9; see also VEGA, supra note 89, at 5 (“Mexican authorities began to launch policy instruments for the southern region in the late 1990s. Coincidentally or not, at that time security concerns also mounted in the United States and led to an increase in U.S. deportations due to the imple-
hancing checkpoints and the presence of migration control officers, including Mexican soldiers and police, along Mexico’s southern border; adding migration control to the Mexico-Guatemala border; and increasing maritime patrolling.\textsuperscript{100}

The Mérida Initiative, which Mexico began to implement in 2008, represented “a new level” of U.S. support provided to Mexico’s capacity for migration control.\textsuperscript{101} The U.S. and Mexican governments presented the Mérida Initiative as a “security cooperation package,”\textsuperscript{102} and through it the U.S. government has provided millions of dollars\textsuperscript{103} of migration control equipment, including helicopters, surveillance aircraft, and canine units, as well as technical assistance to Mexico and throughout Central America.\textsuperscript{104} Migration detention began to expand substantially, with the number of facilities doubling, particularly in the southern part of Mexico.\textsuperscript{105}

The U.S. and Mexican governments broadened the scope of the Mérida Initiative in 2011 by prioritizing Mexican institution building, including the
creation of a “21st-Century [U.S.-Mexico] Border.” Despite Mexico’s migration securitization efforts, a combination of social, political, environmental, and economic factors contributed to continual migration out of Central America, through Mexico, and into the United States. By 2014, with an unprecedented number of unaccompanied minors migrating into the United States from the region, the U.S. government declared the migration flow a humanitarian crisis. The Obama Administration approached then-Mexican President Enrique Peña Nieto and leaders from other Central American states about working together to “stem the flow of migrants” from the region. About a month later, Mexico announced the Southern Border Plan (Plan Frontera Sur or PFS). Through the PFS, Mexico’s migration enforcement efforts included opening internal checkpoints and closing migration routes, conducting raids along Mexico’s southern border, and cracking down on the operation of the


111 Id.


113 Id.; see also Noquel A. Matos, Rectifying a Wrongful Reaction: Policy Alternatives to Family Detention and Expedited Migration Proceedings Without Representation for Unaccompanied Minors
The infamous “La Bestia,” a dangerous network that includes freight trains migrants use to travel through Central America into Mexico.\textsuperscript{11}\textsuperscript{14} By 2018, the United States spent over “$100 million in equipment and training” for the Mexican military to fortify the border.\textsuperscript{11}\textsuperscript{15}

One year after PFS went into effect, the rate of migrants apprehended by Mexican authorities skyrocketed.\textsuperscript{11}\textsuperscript{16} Some scholars have described Mexico’s role as one of a “migration manager” for the United States.\textsuperscript{11}\textsuperscript{17} Mexico has conducted migration control management, however, while committing serious human rights violations. Advocates, when documenting the treatment of migrants in Mexico after the implementation of PFS, found that migrants were “frequently victims of kidnappings and ransom demands, human trafficking, sexual assault, robbery, and even murder.”\textsuperscript{11}\textsuperscript{18}


\textsuperscript{114} Matos, supra note 113, at 217; see also Jeremy Doran, America’s Second Southern Border? Mexico’s 2014 Programa Frontera Sur and the Widening of North American Immigration Cooperation 8 (2019) (Ph.D. dissertation, University of Texas at Austin) (on file with the University of Texas Libraries, University of Texas at Austin) (detailing President Peña Nieto’s intentions to “silence[] the beast”); Rietig & Dominguez Villegas, supra note 112 (describing Mexico’s efforts to curb the use of “La Bestia” as a vehicle for stowaway migrants to reach the border).

\textsuperscript{115} Araiza et al., supra note 97, at 16. Although the exact amount of U.S. dollars that goes into supporting the PFS is unknown, there is evidence that the U.S. has provided considerable funding. Id. (noting that one day after then-Mexican President Peña Nieto announced PFS, “the Obama Administration requested emergency supplemental appropriations from the U.S. Senate Committee on Appropriations,” and that the State Department told the Appropriations Committee that “the United States was poised to support the Southern Border Program through [ ]$86 million dollars in funds”). The U.S. also likely provides funding for PFS informally through the Mérida Initiative. Id.; see also Doran, supra note 114, at 9 (“There is considerable evidence that much of [PFS’s] funding comes from the United States by way of the Mérida Initiative . . . .”); Rietig & Dominguez Villegas, supra note 112 (“Partly funded by the Mérida initiative, the interior checkpoints are modeled on the San Ysidro port of entry in San Diego, California and equipped with gamma ray detectors to inspect shipping containers and carriers, infrared sensors, police dogs, customs and military personnel, and immigration agents.”).

\textsuperscript{116} Doran, supra note 114, at 9 (citing Clare Ribando Seelke, Cong. Rsch. Serv., IF 10215, Mexico’s Recent Immigration Enforcement Efforts (2015)). Some say this deterrence is the program’s explicit goal. See Kovic & Kelly, supra note 86, at 5 (“The Southern Plan is supported by the USA with the explicit goal of detaining Central American migrants before they reach the USA.”).

\textsuperscript{117} Rietig & Dominguez Villegas, supra note 112; Vega, supra note 89, at 6.

ernment agents, including immigration enforcement agents, were perpetrators of or otherwise complicit in crimes against migrants. Impunity for crimes against migrants in Mexico is all but a guarantee. A significant cause of migrants’ vulnerability to criminal activity was what one cultural anthropologist calls “the violence of transit,” namely more perilous migration routes necessary to circumvent Mexico’s heightened security regime. Mexico’s migration detention practices—a growing component of this security system—has been another significant source of human rights abuses against migrants.

2. Migration Detention in Mexico

The securitization of Mexico’s migration control regime, achieved with the substantial funding the U.S. government provided, has led Mexico to now have one of the largest immigration detention systems in the world. One scholar has characterized Mexico's migration detention practices as “an externalization of U.S. border control.” Details about the conditions in Mexico’s migrant carceral system are difficult to obtain, as the government operations of

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Pridmore, Forms and Determinants of Migration and HIV/AIDS-Related Stigma on the Mexican-Guatemalan Border, 19 QUALITATIVE HEALTH RSCH. 1656 (2009)).


Wendy Vogt, The War on Drugs Is a War on Migrants: Central Americans Navigate the Perilous Journey North, 3 LANDSCAPES VIOLENCE, no. 1, 2015, at 1, 3.

According to the Global Detention Project, in 2019, Mexico detained more than 182,940 migrants, the highest number recorded in Mexico. In 2018, 131,445 persons were detained. GLOB. DET. PROJECT, COUNTRY REPORT: IMMIGRATION DETENTION IN MEXICO 27 (2021), https://www.globaldetentionproject.org/immigration-detention-in-mexico-between-the-united-states-and-central-america [http://perma.cc/642P-GNK8] [hereinafter GDP MEXICO REPORT]; see also Campos-Delgado, supra note 88, at 482 (describing the “mushrooming” of detention facilities in Mexico). Mexico had also reportedly planned to stop detaining children after 2015; however, in 2019, Mexico still detained more than fifty thousand children. GDP MEXICO REPORT, supra, at 8; see Kevin Sieff, Mexico Is Holding Hundreds of Unaccompanied Children Detained Before They Reach the U.S. Border, WASH. POST (Mar. 13, 2021), https://www.washingtonpost.com/world/the_americas/mexico-us-border-unaccompanied-children/2021/03/12/76155e10-829d-11eb-9ca6-54e187ce4939_story.html [https://perma.cc/QAB6-93X7].

Campos-Delgado, supra note 88, at 476.
the facilities lack transparency.\textsuperscript{124} The conditions of Mexico’s detention centers that have been disclosed tell of serious and systemic human rights violations.

Scholars describe the daily operation of Mexico’s migration detention facilities as seemingly “held together with pins: overcrowded facilities, unsanitary conditions, scarcity of material recourses and strategies of control, [and] discipline and punishment that rely on the discretionary powers of overworked personnel.”\textsuperscript{125} Despite being off-limits to the public, including journalists, details have emerged about the conditions one of Mexico’s detention centers, the Siglo XXI detention facility located in the city of Tapachula near the Mexico-Guatemala border.\textsuperscript{126} Siglo XXI, which means “twenty-first century” in Spanish, is the largest migration detention facility in Latin America.\textsuperscript{127} Described as “a prisonlike compound,”\textsuperscript{128} migrants at Siglo XXI have endured medical neglect\textsuperscript{129} that, in some instances, has resulted in death.\textsuperscript{130} Staff are abusive to detainees\textsuperscript{131} and there is severe overcrowding.\textsuperscript{132} The deplorable conditions of Siglo XXI have even deterred migrants from pursuing asylum claims.\textsuperscript{133} A journalist detained at the facility as a result of a visa issue when she tried to leave Mexico linked Siglo XXI to the broader history of U.S. financial and material support of the state’s migration control system.\textsuperscript{134} She observed that “operations at the detention facility are pretty much an exact example of the US telling Mexico what to do.”\textsuperscript{135}

The Trump Administration’s Migrant Protection Protocol (MPP),\textsuperscript{136} which mandated that migrants at the U.S.-Mexico border seeking asylum stay in

\textsuperscript{124} Id. at 486; Belen Fernandez, Siglo XXI: My 24 Hours in Mexico’s 21st-Century Migrant Prison, AL JAZEERA (July 22, 2021), https://www.aljazeera.com/opinions/2021/7/22/siglo-xxi-my-24-hours-in-mexicos-21st-century-migrant-prison [https://perma.cc/JLW7-2828].

\textsuperscript{125} Campos-Delgado, supra note 88, at 489.


\textsuperscript{127} Id.

\textsuperscript{128} Id.


\textsuperscript{130} Campos-Delgado, supra note 88, at 476.

\textsuperscript{131} Harrison-Cripps, supra note 129.

\textsuperscript{132} Associated Press, supra note 126.

\textsuperscript{133} Harrison-Cripps, supra note 129. In 2019, Mexico deported 99.8% of migrants detained. GDP MEXICO REPORT, supra note 122, at 27.

\textsuperscript{134} Fernandez, supra note 124.

\textsuperscript{135} Id.

\textsuperscript{136} Metering, which limited the number of asylum seekers processed by U.S. immigration agents at U.S.-Mexico ports of entry per day, was another policy that kept migrants in Mexico. See Fatma E. Maroof, Executive Overreaching in Immigration Adjudication, 93 Tul. L. Rev. 707, 763–68 (2019). The Obama Administration first used the practice of metering in response to the arrival of thousands
of Haitian migrants in Tijuana in 2016. James Fredrick, 'Metering' at the Border, NPR (June 29, 2019), https://www.npr.org/2019/06/29/737268856/metering-at-the-border [https://perma.cc/HU78-AKG6]; see also HILLEL R. SMITH, CONG. R.SCH. SERV., LSB10295, THE DEPARTMENT OF HOME-LAND SECURITY’S REPORTED “METERING” POLICY: LEGAL ISSUES 2 (2022) (quoting the Department of Homeland Security (DHS) Office of Inspector General report, which states that U.S. immigration officers have been regulating the entry of asylum seekers through a metering policy since 2016). Unlike MPP, however, migrants were not given a specific date and time to return to a port of entry, but instead were told to put their names on a wait list. Fredrick, supra. Under the Trump administration, metering became official policy in April 2018, and in mid-2019, there were around nineteen thousand names on the wait list. Id.


138 Heeren, supra note 68, at 788 (citing Innovation L. Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) (per curiam) and Doe v. Wolf, 432 F. Supp. 3d 1200 (S.D. Cal. 2020) as examples of lawsuits against MPP), SMITH, supra note 136 (discussing the litigation against metering); see also BEN HARRINGTON & HILLEL R. SMITH, CONG. R.SCH. SERV., LSB10251, “MIGRANT PROTECTION PROTOCOLS”: LEGAL ISSUES RELATED TO DHS’ S PLAN TO REQUIRE ARRIVING ASYLUM SEEKERS TO WAIT IN MEXICO 4-5 (2019) (arguing that the DHS does not have authority under the Immigration and Naturalization Act to deport most of the asylum seekers coming to the border and that the policy is unlawful because regulations were never promulgated).


structures in a park abutting the Rio Grande.”142 Out of necessity, migrants stayed in Matamoros, located directly across the border from Brownsville, Texas.143 Its proximity to the border meant migrants could quickly access the port of entry when they finally were called for their court hearing.144 During one period of MPP there were up to 3,000 migrants at one time in the Matamoros camp.145 The Mexican government put up fences to close off the Matamoros camp, allegedly for the migrants’ safety, and/or to cut off the encampment from the public.146 The site, now resembling more a detention center, became a symbol of human rights violations perpetuated by MPP.147 Migrants forced to stay in other parts of Mexico during MPP also faced danger and harm.148 The “Mexican Transit Control Regime”149 was built with the assistance, and at the insistence, of the United States in response to the rise of Central American migrants seeking asylum in the 1980s. The U.S. government’s efforts to stem migration from the region also has targeted the region’s sending states directly. These efforts have taken the form of development funding initiatives and, under the Trump Administration, bilateral agreements with governments from the Northern Triangle to adjudicate asylum claims for migrants who transited through their states.

142 Kriel, supra note 140.
144 Id.
146 Kriel, supra note 140 (citing the Mexican government’s statement that it fenced the camp for the migrants’ safety and to limit the growth of the camp); Valerie Gonzalez, ‘Only We Know What We’ve Seen’: Migrants Re-enter US After Biden Lifts Remain in Mexico, THE GUARDIAN (Mar. 5, 2021), https://www.theguardian.com/us-news/2021/mar/05/us-immigration-biden-remain-in-mexico-asylum-seekers [https://perma.cc/7V79-GZGK] (“Fences erected by the Mexican government keep the camp largely cut off from reporters and locals.”).
147 Gottesdiener, supra note 145 (“[T]he MPP program might have succeeded in obscuring the plight of these migrants from the American public if it were not for the Matamoros camp.”).
149 See supra note 88 and accompanying text.
3. The Northern Triangle and the U.S. Construction of “Protection Elsewhere” States

The United States has similarly incentivized and coerced the Northern Triangle states—Guatemala, Honduras, and El Salvador—to implement migration deterrence measures. The Central American Regional Security Initiative (CARSI), for example, began in 2010 to address regional factors causing the migration of unaccompanied minors to the United States. Though a portion of the funding for CARSI was designated for development projects, there was a substantial focus on securitizing the region. One CARSI-funded project, “Operation Rescue Angel,” involved U.S.-trained Honduran forces intercepting buses near the Guatemalan border to search for unaccompanied minors en route to the United States. CARSI eventually became part of the U.S. Strategy for Engagement in Central America (the Central America strategy). The Trump Administration would withhold humanitarian aid from the Central America strategy to incentivize Northern Triangle states to curb migration, and would re-release funds when it deemed that certain targets were met.

The former Administration, through a series of agreements called Border Security Arrangements, arranged for technical and tactical support to the Northern Triangle governments to bolster their migration control efforts. Beyond direct assistance, the Trump Administration brought these states into the regional transnational migration deterrence system through Asylum Cooperative Agreements (ACAs). ACAs constitute a type of “protection elsewhere”

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154 Id. Annual funding for the Central America strategy dropped approximately 33% during the Trump Administration. Id. at 1. President Biden, on the other hand, is seeking to build on the program as part of his Administration’s goal of addressing the root causes of migration in the region. Id. at 3.
regime, as they reflect “the principle that a refugee can be denied access to protection because they should or could access protection in another state.” They also embody the notion of “responsibility sharing” or “burden shifting.” After the signing of the ACA with the Honduran government, then-Secretary of State Michael Pompeo tweeted: “The Honduran government’s support in confronting this crisis in the region is critical. It is a key step in advancing our shared, regional approach to this challenge.”

The concept of responsibility sharing can represent a utilitarian approach to migration, as it benefits both global security and migrants. It can also be a guise, however, for more economically and politically powerful states that are effectively redistributing migration control to states that have minimal capacity to protect or host migrants. The latter describes the ACA agreements between the United States and the Northern Triangle states—in fact, a U.S. Senate Democratic Staff Report found that “[t]he White House and DHS pushed through the ACAs with bullying tactics and haste.” One tactic used by the

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157 The term “responsibility-sharing” is preferred over the term “burden-sharing” to reflect the responsibility that States hold to protect those seeking asylum. Savitri Taylor, The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing, ASIAN-PAC. L. & POL’Y J., Jan. 1, 2005, at 1, 39.


160 See Taylor, supra note 157, at 40 (discussing as an example the Pacific Solution, which the Australian government used to redistribute responsibility to smaller island nations in the region); see also Achiume, supra note 8, at 1520 (“[J]ustice in immigration from the Third World to the First World must, in important part, be a function of the distributive justice and remedial implications of the failures of formal decolonialization.”).

The Trump Administration was to withhold development aid aimed at addressing the root causes of migration from the region. The Report also describes an intensification of coercive tactics by then-President Donald Trump himself before the countries' leaders signed the respective ACAs.

The agreements allowed the U.S. government to remove arriving asylum seekers to one of the Northern Triangle states, provided the asylum seeker is not a national of the returning state. The Northern Triangle ACAs technically constitute “Safe Third Country agreements,” which provide that such agreements must give asylum seekers “access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”

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162 Id. (“In March 2019, President Trump disrupted relations with Guatemala, Honduras, and El Salvador by abruptly cutting off most U.S. foreign aid to the three countries, halting over $400 million for programs designed to address poverty, violence, and other drivers of migration to the United States.”)

163 Id. at 12 (detailing then-President Trump’s tweet threatening to institute a “BAN” against Guatemala, “Tariffs, Remittance Fees, or all of the above.”)


ter to the Trump Administration, however, twenty-one U.S. Senators wrote: “The notion that Guatemala or the other two Northern Triangle countries offers such a procedure strains credulity—their systems for determining asylum claims are, at best, deeply flawed and under-resourced, and at worst, practically non-existent.” Soon after taking office, the Biden Administration announced the suspension of the Northern Triangle ACAs.

The transnational migration deterrence regime in the Americas represents a system with “multidirectional” U.S. borders. It is one that has transformed the region into what has been described as “Fortress North America.” The system is one that serves the objective of the U.S. government to deter migration across its U.S. southern border, at a great cost to the lives, safety, and overall humane treatment of migrants.

II. TRANSNATIONAL MIGRATION DETERRENCE BY EUROPEAN STATES AND AUSTRALIA

Although the United States with the deterrence regime it developed in the Caribbean provided the blueprint for transnational migration deterrence, the systems created by Australia and European states are regularly cited as having of Appeal ruled in the Canadian government’s favor. See Amanda Ghahremani & Jamie Liew, Why the Safe Third Country Agreement Must Go, OPEN CAN. (June 1, 2021), https://opencanada.org/why-the-safe-third-country-agreement-must-go/ [https://perma.cc/M2ZC-H9XJ]. The STCA currently remains in effect as the claimants appeal the Federal Court of Appeal’s decision to the Supreme Court of Canada. Kd.


169 See supra note 19 and accompanying text.

originated bi- or multi-lateral migration control agreements. The regimes, spanning time and geography, have in common elements such as financial and other coercive ties between assisting and acting states, the use of migration detention, and the prevalence of human rights violations against migrants.

Section A\textsuperscript{171} and Section B\textsuperscript{172} of this Part discuss transnational migration deterrence efforts in Europe. Sections C\textsuperscript{173} and Section D\textsuperscript{174} detail Australia’s efforts to deter migration from Asia and Oceania.

A. Fortress Europe’s Reliance on Transnational Migration Deterrence

Transnational migration deterrence is a prominent feature of “Fortress Europe,”\textsuperscript{175} redrawing, as one geography studies Professor writes, “[t]he map of Europe . . . [with] the restructuring of border assemblages.”\textsuperscript{176} European states that were formerly transit states, including Spain, Italy, Malta, and Greece, have become final destination states, including sites where migrants’ journeys end in detention.\textsuperscript{177} The external border states of the EU have become effectively the region’s “outpost border guards.”\textsuperscript{178}

\textsuperscript{171} See infra notes 175–191 and accompanying text.
\textsuperscript{172} See infra notes 192–223 and accompanying text.
\textsuperscript{173} See infra notes 224–236 and accompanying text.
\textsuperscript{174} See infra notes 237–266 and accompanying text.

\textsuperscript{176} Martina Tazzioli, Containment Through Mobility: Migrants’ Spatial Disobediences and the Reshaping of Control Through the Hotspot System, 44 J. ETHNIC & MIGRATION STUD. 2764, 2764 (2018).
\textsuperscript{177} MOUNTZ, supra note 40, at 69.
\textsuperscript{178} AKKERMAN, supra note 27, at 6, see also MAURIZIO ALBAHARI, CRIMES OF PEACE: MEDITERRANEAN MIGRATIONS AT THE WORLD’S DEADLIEST BORDER 15 (2015) (“The southern outposts of immigration governance are . . . central to liberal democratic practices of national and EU self-legitimation . . . . They are at the heart of EU concerns over a mobile humanity that, once at sea, is difficult to contain.” (footnotes omitted)).
Prior to the recent migration "crisis," there was a "growing indifference and hostility to migrants attempting to reach the EU by sea," leading to scores of deaths in the Mediterranean. Migration to the region began intensifying in 2011, in the aftermath of the Arab Spring. With continued political unrest in the Middle East and Africa, the year 2015 was "the deadliest year on record for migrants" attempting to cross the Mediterranean Sea into Europe. It also was the year the EU tripled its budget for migration control.

The media portrayed discord amongst member states regarding how to respond to the spike in migration to the region. There has, however, been consensus throughout the EU regarding the centrality of transnational migration deterrence to migration control, including the expansion of maritime interdiction and using external EU states to prevent migrant mobility. Similar to the transnational systems imposed by the United States in Mexico and Central America, the EU systems have been predicated on a notion of "flexible sovereignty"—at least when it comes to the sovereignty of destination states, in-
cluding EU external border states and neighboring non-EU states that effectively have become migrants’ final destination or place of return.

Transnational deterrence of undesirable migrants, traveling by land or by sea, is both an established and a growing practice in Europe. A pioneering example is the readmission agreement between Spain and Morocco entered in 1992. The stated objective of the agreement was “to address the common concern of coordinating efforts to stop the illegal migration flow of foreigners” between the two countries. The agreement, which requires Morocco to readmit migrants deported from Spain, remains in place today. The Spain-Morocco agreement represents a transnational arrangement that imposes “upstream securitization”—one that sends migrants back to less-resourced states, and thus opposite the conventional flow of migration.

B. Migration Detention in Europe: The Present and Future

Even before the migration “crisis” in 2015, European states sought to limit migrants’ mobility. States constricted migration partially via the Dublin Regulation’s requirement—forcing migrants to seek asylum in the European country that they first enter—and through agreements with transit and neighbor-


190 WALIA, supra note 45, at 108.

191 Id.; see also Olivier Clochard & Bruno Dupeyron, The Maritime Borders of Europe: Upstream Migratory Controls, in BORDERLANDS: COMPARING BORDER SECURITY IN NORTH AMERICA AND EUROPE 19, 19 (Emmanuel Brunet-Jailly ed., 2007) (describing the concept as the EU “imposing[ ] cooperation on peripheral states in order to limit immigration overflows”).

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As such, transnational migration deterrence was an established feature of the region’s migration control efforts and was one that European states turned to with the influx of migration starting in 2015. In doing so, the use of migration detention in the region proliferated. Today, migrants destined for Europe are increasingly detained in offshore or transit state “facilities that are funded, built and resourced by the EU and its member states.”

The prevalent use of detention to deter migration into Europe has rendered the Mediterranean what one scholar calls a “carceral seascape.”

The creation of “hotspots” in EU external states is one significant part of this seascape. As described by one scholar, these sites by design deter migration: “Hotspots should be seen as chokepoints of mobility disruption for capturing and slowing down migration.”

The EU Parliament has characterized these facilities as “[l]ocated at key arrival points in frontline Member States, [and] designed to inject greater order into migration management by ensuring that all those arriving are identified, registered and properly processed.”

The EU formalized the hotspots approach to migration management in 2015, with the first site opening on the Italian island of Lampedusa in September 2015.

Hotspots blur the line between reception and detention and have been plagued with serious human rights concerns, including severe overcrowding.
Amnesty International found incidents in the Lampedusa facility “where it’s less ‘identify, screen and filter’ and more a case of ‘abuse, mislead and expel.’” Nonetheless, the EU continues to provide both financial and on-site operational assistance for hotspots.

Another significant component of the Mediterranean detention regime is the financial, tactical, and material support by Italy and the EU of the Libyan Coast Guard’s (LYCG) migration interdiction and detention system. Italy has enlisted Libya’s assistance in migration deterrence since 2000 through a series of bilateral agreements, and until 2012 the two states operated a system of joint patrols and migrant pushbacks. As described more fully below, when the European Court of Human Rights (ECHR) ruled in 2012 to hold Italy liable for human rights abuses committed in its cooperation with Libya, Italy’s response was to shift its role from patrolling with the LYCG to alerting them of the presence of migrant vessels from a maritime coordination center in Rome. The ECHR ruling notwithstanding, after heightened migration to the region in 2015, Italy and the EU memorialized a Memorandum of Understanding (MOU) in 2017 to provide training, equipment, and funding for the LYCG. In 2020, the states renewed the MOU for an additional three years. According to Amnesty International, between 2017 and 2020, “at least 40,000 people, including thousands of children, have been intercepted at sea, returned to Libya and exposed to unimaginable suffering.”

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202 MAJCHER ET AL., supra note 179, at 255 (2020) (noting that Frontex and EASO agents are present at hotspots).


204 See infra notes 292–298 and accompanying text.

205 See infra notes 299–302 and accompanying text.


208 Id. (quoting Marie Struthers, Req’l Dir. E. Eur., Amnesty Int’l). These returns took place within the context of an unprecedented number of migrants stranded in Libya since the civil war and after “European borders . . . hardened since the 2015–16 migration crisis.” Katie Kuschminder, Once a Destination for Migrants, Post-Gaddafi Libya Has Gone from Transit Route to Containment, MIGRATION POL’Y INST. (Aug. 6, 2020), https://www.migrationpolicy.org/article/once-destination-migrants-post-gaddafi-libya-has-gone-transit-route-containment [https://perma.cc/C9KZ-H95F]. According to 2018 estimates by the International Organization for Migration, approximately 600,000 migrants in Libya could be victims of human rights violations. Id.
Transnational Migration Deterrence

In addition to support for interdictions, the MOU includes provisions for “temporary reception camps in Libya” with financial support from Italy and the EU.\textsuperscript{210} The funding supports the approximately twenty-seven official detention centers in Libya and likely also the unofficial facilities under the control of armed groups.\textsuperscript{211} The United Nations has described the conditions in Libyan detention facilities as inflicting “unimaginable horrors,” including torture and other mistreatment, forced labor, and rape.\textsuperscript{212} Others have described unhygienic and overcrowded conditions, physical abuse, extortion, malnutrition, and work exploitation.\textsuperscript{213} There is no domestic judicial oversight of Libyan detention facilities.\textsuperscript{214}

Despite well-documented evidence of the human rights violations caused by the Italy-Libya agreement, the momentum regionally is to replicate this model. In 2020, the European Commission published the New Pact on Migration and Asylum, which includes proposing the prescreening of migrants by intercepting their boats and placing them at an external border facility while their cases are processed.\textsuperscript{215} The Pact also eliminates the principle that migration detention should only be utilized as a last resort.\textsuperscript{216} Advocates have criticized the EC’s Pact as encouraging the proliferation of transnational migration

\begin{itemize}
\item \textsuperscript{209} Kuschminder, \textit{supra} note 208.
\item \textsuperscript{210} Dastyari & Hirsch, \textit{supra} note 203, at 451–52.
\item \textsuperscript{211} Id. at 453.
\item \textsuperscript{214} Dastyari & Hirsch, \textit{supra} note 203, at 453.
\item \textsuperscript{215} AKKERMAN, \textit{supra} note 27, at 42.
\item \textsuperscript{216} The Pact on Migration and Asylum: To Provide a Fresh Start and Avoid Past Mistakes, Risky Elements Need to Be Addressed and Positive Aspects Need to Be Expanded, HUM. RTS. WATCH (Oct. 8, 2020), https://www.hrw.org/news/2020/10/08/pact-migration-and-asylum [https://perma.cc/PH78-NWN7].
\end{itemize}
detention, characterizing its objective of providing a “fresh start” for migration control in the region “as a ‘fresh start’ only for human rights violations.”

Along these lines, in 2021, Denmark passed a law permitting the government to relocate asylum seekers to non-EU third countries while their cases are processed. Thereafter, the Danish government signed an agreement with Rwanda to build a migrant “processing” facility.

Today, the EU and its member states directly participate in the construction and operation of migration detention in at least seventeen countries in Africa, Eastern Europe, the Balkans and West Asia. There have been documented human rights abuses in many of the facilities, but the degree of involvement by the EU with these states with respect to migration detention varies. The future investment by the EU for migration control, including building its transnational migration deterrence system, is significant: between 2021 and 2027, the EU budget has allocated $38.4 billion for migration controls.

C. Australia’s Transnational Migration Deterrence System

Prior to becoming a commonwealth, the Australian colonies followed Britain’s more lenient migration policy, which generally allowed noncitizen

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217 ROMEO, supra note 200, at 4; see also DAPHNE PANAYOTATOS, REFUGEES INT’L, UNDERMINING PROTECTION IN THE EU: WHAT NINE TRENDS TELL US ABOUT THE PROPOSED PACT ON MIGRATION AND ASYLUM 5 (2021), https://www.refugeesinternational.org/reports/2021/6/1/undermining-protection-in-the-eu-what-nine-trends-tells-us-about-the-proposed-pact-on-migration-and-asylum [https://perma.cc/WAY9-9THS] (arguing that the Pact “is likely to reproduce the conditions that created” the previous tragedies that it is purportedly trying to avoid in the future); Kemal Kirisci, M. Murat Erdogan & Nihal Eminoğlu, The EU’s “New Pact on Migration and Asylum” Is Missing a True Foundation, BROOKINGS: ORDER FROM CHAOS (Nov. 6, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/11/06/the-eus-new-pact-on-migration-and-asylum-is-missing-a-true-foundation/ [https://penna.cc/WE9Z-LLQR] (asserting that to be successful, the Pact must recognize that developing countries host most refugees). Though the EU has yet to agree on the Pact, the European Commission has moved forward with the implementations of its provisions. PANAYOTATOS, supra, at 3.


219 See id.

220 AKKERMAN, supra note 27, at 15. The states are Azerbaijan, Belarus, Bosnia and Herzegovina, Egypt, Georgia, Jordan, Lebanon, Libya, Mauritania, Moldova, Morocco, Niger, North Macedonia, Senegal, Tunisia, Turkey, and Ukraine. Id.

221 Id. at 28–31 (documenting human rights abuses in EU-funded detention and border control operations in Belarus, Moldova, and Ukraine). For a timeline of Europe’s path toward transnational migration detention spanning from 2004 to the 2020 European Commission’s New Pact on Migration and Asylum, see id. at 13.

222 Direct influence of migrant detention policies in these states include “fund[ing] the construction of detention centres, detention related activities such as trainings, or advocation[ing] for detention in other ways such as through aggressively pushing for detention legislation or agreeing to relax visa requirements for nationals of these countries in exchange for increased migrant detention.” Id. at 1.

223 WALLA, supra note 45, at 108.
The increased arrivals of Chinese migrants to the colonies in the mid-nineteenth century, however, led to the enactment of explicitly discriminatory restrictive migration policies. In its first legislative act, the newly formed Australian Commonwealth passed the Immigration Restriction Act of 1901, which set out provisions to exclude non-white migrants and those who the government considered politically objectionable.

Migration flows by sea toward Australia intensified in the 1970s, in large part due to the “Indochinese exodus” beginning in 1975. Starting in 1979, the governments of Indonesia and the Philippines agreed to temporarily host migrants while they were processed and prepared for resettlement in Australia and elsewhere. This arrangement was a prelude to the modern-day practice by Australia of restricting migrants’ mobility by placing migrants in states that are not their destination points.

The Australian government expanded its extraterritorial migration deterrence efforts in the late 1990s, when it began collaborating with Indonesian enforcement authorities to collect intelligence and apprehend migrants destined for Australia. Around this same time, Australia enhanced significantly its onshore enforcement policy by subjecting migrants who entered without authorization to mandatory and indefinite detention.

The Australian government began building what has become a formidable transnational deterrence regime with the implementation of the “Pacific Solution” in the months following 9/11. Conservative then-Prime Minister John Howard used the 9/11
attacks to garner support for the policy, which, coupled with the recently enacted Border Protection Act, deployed Australian Navy ships to intercept migrants and send them to offshore detention sites. Like the United States, the Australian government has used “responsibility sharing” as a rationale for building a transnational migration control system, which includes prolonged or indefinite detention of migrants offshore in other states. Influenced by the U.S.-Caribbean model, Australia has expanded considerably its transnational migration deterrence system over the past two decades.

D. Migration Detention Across Asia and Oceania

Australia’s reliance on island states to detain migrants has been a critical element of its transnational migration deterrence regime. Similar to its counterparts across the Americas and Europe, the Australian transnational system has exposed migrants to serious human rights violations. Australia’s offshore migration detention centers have official names suggesting they are “processing” centers, which is deceptive nomenclature “because no genuine resettlement ever takes place.”

As mentioned above, Australia relied on Indonesia to help manage migration from Southeast Asia starting in the 1970s, following the rise of Communist governments in the region. Indonesia, as a “key transit country” for unauthorized migration to Australia, has played an increasingly important role in Australia’s transnational migration deterrence system. In 2000, the two states signed an agreement through which Australia funded the International Organization for Migration (IOM)’s efforts in Indonesia to control unauthorized migration. 

[References cited in the text are not shown here.]

234 WALIA, supra note 45, at 99–100.
235 Taylor, supra note 157, at 7–8.
236 See discussion supra Part I.A; Frelick et al., supra note 16, at 204 (“[T]here is evidence to suggest that Australian officials examined the US playbook in devising the Pacific Solution. . . .”).
239 See supra notes 237–239 and accompanying text.
241 Id.
thorized migration, including funding migration detention centers.\textsuperscript{242} Australia’s continued financial and material support to Indonesia for migration control has led Indonesia to expand considerably its migration detention capacity. Today Indonesia’s migration detention system is funded entirely by Australia.\textsuperscript{243} The conditions in these facilities have been reported to be violent, overcrowded, and otherwise in violation of international human rights norms.\textsuperscript{244} There also have been many reported migrant deaths in these detention centers.\textsuperscript{245}

As part of the Pacific Solution, Australia began funding efforts to prevent boats from leaving Indonesia, rendering the state another example of Australia’s “incentivised policy transfer” system.\textsuperscript{246} Australia has proposed a system of intercepting asylum seekers in the future, one that would transfer migrants to Indonesia, and the Indonesian government would assume the responsibility for processing their cases.\textsuperscript{247} Indonesia receives ongoing financial incentives and training from Australia “to construct detention centers and enhance its border control measures.”\textsuperscript{248}

The Australian government commenced the detention of migrants on the island states of Nauru, Papua New Guinea (PNG), and Christmas Island, an Australian territory in the Indian Ocean, in 2001. The state’s arrangement with Nauru, the smallest island state in the world, was instigated by an event one month prior to the 9/11 terrorist attacks:

\textsuperscript{242} Id.
\textsuperscript{244} Dastyari & Hirsch, supra note 203, at 444 (noting that Human Rights Watch reported that the conditions of Indonesian detention centers include “detainees being exposed to violence; collective punishment by guards; mental harm; restrictions on their freedom of movement and communication; unreliable and inadequate education programmes; overcrowding; delays in accessing emergency medical assistance; and insufficient nutrition, particularly for children” (first citing Amy Nethery, Brynna Rafferty-Brown & Savitri Taylor, \textit{Exporting Detention: Australia-Funded Immigration Detention in Indonesia}, 26 J. REFUGEE STUD. 88, 104 (2012)); and then citing Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia, HUM. RTS. WATCH (June 23, 2013), https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia [https://perma.cc/Q3RK-JQ3J]; Hirsch & Doig, supra note 243, at 691 (stating that the detention centers in Indonesia likely violate Article 7 of the International Covenant on Civil and Political Rights, Article 7 of the Conventions on the Rights of the Child, and Article 16 of the Convention against Torture).
\textsuperscript{245} Dastyari & Hirsch, supra note 203, at 444.
\textsuperscript{246} WALLIA, supra note 45, at 100–01 (“Indonesia was pulled into the geopolitical orbit of White Australia and colonial carcerality.” (citing Amy Nethery & Carly Gordyn, \textit{Australia-Indonesia Cooperation on Asylum-Seekers: A Case of Incentivised Policy Transfer}, ‘68 AUSTL. J. INT’L AFFS. 177, 177–93 (2014))).
\textsuperscript{248} WALLIA, supra note 45, at 100–01.
In August 2001, a Norwegian freighter, MV *Tampa*, rescued 433 mostly Afghan refugees and entered near the waters off Christmas Island. After a tense standoff, during which Australia refused to accept the refugees, Australia struck a deal with Nauru and forcibly transported most of the refugees there like cargo. Nauru, whose ecology and economy was devastated through extractive colonialism, received a sizable thirty-million-dollar aid package in exchange. 249

By 2014, Nauru’s single largest source of income was Australian funding for detention. 250 At that time, the island state’s detention facility held over 1,200 migrants who had hoped to seek asylum in Australia. 251 One scholar characterizes Nauru as having “sold its sovereignty” by exchanging financial support for the responsibility of detaining and transferring refugees for Australia. 252 The United Nations, the Australian Human Rights Commission, and other human rights organizations reported severe mental health issues among the children and adult migrants held indefinitely at the Nauru center, as well as mistreatment including sexual assault and poor living conditions. 253 Nauru was closed in 2008 but reopened in 2012. 254 Due in part to an agreement with the United States to resettle many of the migrants, the detention facility was again closed in March 2019. 255

249 Id. at 99 (citing Richard Wazana, *Fear and Loathing Down Under: Australian Refugee Policy and the National Imagination*, 22 REFUGEE 83, 83–95 (2004)).

250 Id. at 89.


252 Hirsch, supra note 224, at 78; see also WALIA, supra note 45, at 100 (“The first two years after the implementation of the Pacific Solution, Australia ... increased aid to Nauru, amounting to one-third of the country’s GDP.”); Emma Larking, *Controlling Irregular Migration in the Asia-Pacific: Is Australia Acting Against Its Own Interests?*, 4 ASIA & PAC. POL’Y STUD. 85, 89 (2017) (noting that in the past two decades, states have become reliant on the funding provided by Australia to assist in migration control).


255 Hollingsworth & Watson, supra note 251.
Australia also opened detention centers in PNG and the Christmas Island in 2001, soon after the implementation of the Pacific Solution. Journalists have described PNG’s facility, the Manus Island Regional Processing Centre, as a “tropical purgatory” and “Australia’s greatest modern controversy.” Manus at one time held more than two thousand detainees, and was plagued with mass hunger strikes and riots, murders, overcrowding, medical negligence, and incidents of detainee self-harm. Like the United States and European states, Australia tied development aid to PNG’s ability to support Australia’s border deterrence measures. The public condemnation in PNG for the detention facility, however, was considerable, and in 2016 the PNG Supreme Court issued a judgment that ultimately forced the closure of Manus.

The detention facility in Christmas Island is characterized by the island’s extreme remote location, where detainees do not have reliable access to cell phone reception or internet connection. The Christmas Island facility temporarily closed in 2018 but reopened in 2019. In early 2021 a riot erupted, ren-
dering conditions at the center to be “like a warzone.”\textsuperscript{263} The Australian government has allocated $464.7 million over the next two years to increase its migration detention capacity and to keep the Christmas Island detention facility operating.\textsuperscript{264} For 2021–2022, Australia has earmarked almost $812 million for its “offshore processing regime.”\textsuperscript{265}

Juan Mendez, then-U.N. Special Rapporteur on torture and other forms of cruel, inhumane, or degrading treatment or punishment, found that the detention facilities funded by Australia “amounted to a systemic violation of the Convention against Torture.”\textsuperscript{266} Despite this and considerable evidence that Australia is assisting in the perpetration of grave human rights violations against migrants, the transnational migration deterrence regime it orchestrates persists virtually undeterred. Australia, European states, and the United States have built a global migration control system that has fundamentally challenged the international human rights protection regime. These states’ future plans to enhance these mechanisms should be met with endeavors by international and regional human rights bodies to intervene on behalf of vulnerable migrants.

III. A FRAMEWORK FOR ACCOUNTABILITY

Arrangements that constitute transnational migration deterrence involve a close and cooperative relationship between assisting and acting states. They are systems, however, that often contravene the protections provided by the Refugee Convention and the international law principle of non-refoulement.\textsuperscript{267}

\textsuperscript{263} Karp, supra note 261 (quoting Filipa Payne, Campaigner for New Zealanders in Australian Detention).


\textsuperscript{265} Ben Doherty, Budget Immigration Cost: Australia Will Spend Almost $3.4m for Each Person in Offshore Detention, THE GUARDIAN (May 11, 2021), https://www.theguardian.com/australia-news/2021/may/12/australia-will-spend-almost-34m-for-each-person-in-offshore-detention-budget-shows [https://perma.cc/FK5J-RCJC]. Though there is funding from Australia to the states in which migration detention facilities are located, in the form of development aid and other sources, most profits benefit contractors and corporations—particularly given that private contractors operate all of Australia’s migration detention facilities, including the offshore facilities. Mussi & Tan, supra note 240, at 92.


\textsuperscript{267} The principle of non-refoulement prohibits states from returning a noncitizen to a territory where “there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.” U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, THE PRINCIPLE OF NON-REFOULEMENT UNDER INTER-
At the same time, transnational deterrence regimes have allowed states, in particular assisting states, to evade judicial scrutiny for these and other violations of law.\textsuperscript{268} In fact, scholars have described transnational deterrence as “contactless control” to convey how assisting states design migration deterrence in a manner that eludes jurisdictional links to the acting state.\textsuperscript{269} One example, discussed infra, is Italy’s decision to halt use of its military ships to assist Libyan authorities in the interception of migrants while continuing to play a coordinating role.\textsuperscript{270}

There is not a designated court or mechanism to bring human rights abuse grievances perpetuated within transnational migration deterrence systems.\textsuperscript{271} Domestic courts, in both assisting and acting states, constitute one set of venues where migrants have brought legal actions. Courts in assisting states, unsurprisingly perhaps, have limited the application of extraterritorial jurisdiction in cases alleging human rights violations outside their physical borders.\textsuperscript{272} Australia’s domestic courts, for example, have denied state responsibility for the conditions of offshore detention sites.\textsuperscript{273} In 2020, the U.S. Supreme Court held in 	extit{Hernandez v. Mesa}\textsuperscript{274} that the parents of a Mexican teenager, who was on the Mexico side of the border when a U.S. border agent standing on the U.S. side shot him dead, did not have the right to pursue a domestic damages claim. Through the 	extit{Hernandez} decision, the Court demonstrated the extent to which domestic courts are weary of holding its government officials liable for extraterritorial claims involving migration control.

\textsuperscript{268} Tom De Boer, \textit{Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection}, 38 J. REFUGEE STUD. 118, 119 (2014) (stating that “extraterritorialization . . . does not just restrict the protection of refugees within the international refugee law regime, [i]t actually serve[s] to evade the regime as a whole, including the judicial scrutiny of courts”).


\textsuperscript{270} See infra notes 293–304 and accompanying text.

\textsuperscript{271} Gammeltoft-Hansen, supra note 24, at 155 (“The absence of a dedicated international court or other supranational supervisory mechanism in the field of migration and refugee law further meant that concrete legal challenges to transnational migration control were largely dependent on national avenues for adjudication.”).

\textsuperscript{272} Id. at 156; see also Monika Heupel, \textit{Indirect Accountability for Extraterritorial Human Rights Violations}, 21 INT’L STUD. PERSPS. 172, 174 (2020) (“Domestic publics tend to lack the motivation to hold their own governments to account for rights violations that harm foreigners only, not nationals.”).

\textsuperscript{273} Holly, supra note 227, at 549–69 (detailing Australia’s complex political and legal environment, rendering it difficult to prevail on human rights claims against its “offshore detention regime”).

\textsuperscript{274} 140 S. Ct. 735, 739 (2020).
Given the power imbalance that exists in transnational migration deterrence arrangements, domestic courts in acting states are, as a general matter, unreliable venues for accountability for human rights violations carried out in these systems. The one notable exception is the Papua New Guinea Supreme Court decision that forced the closure of the Manus migration detention center.275 There are other instances, however, as in the case in Libya, where the domestic courts do not even have the power to review the detention system.276 Consequently, there is a need for international accountability mechanisms in order to ensure that international human rights norms are respected. Conceptualizing jurisdiction in a manner that recognizes the critical, and often decisive, role of assisting states in the creation and operation of transnational migration deterrence systems is key for this type of human rights review, and for judicial bodies to assume a meaningful oversight role.

Section A of this part discusses the possibility of expanding our concept of jurisdiction in order to allow international human rights bodies to hold states accountable for transnational human rights violations.277 Section B posits several factors that could be useful in determining responsibility for transnational offenses.278

A. International Human Rights Bodies and Extraterritorial Jurisdiction

International and regional human rights bodies represent possible venues for holding states accountable within transnational migration deterrence systems. In these venues, there have been important developments regarding jurisdiction and territoriality that favor accountability.

The law of jurisdiction has evolved beyond exclusively territorial control.279 The U.N. Human Rights Committee280 and the International Court of Justice281 both have recognized the importance of extraterritorial jurisdiction in international human rights law. Refugee law, particularly the principle of non-refoulement, supports a concept of jurisdiction in the context of migration con-

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276 See supra note 214 and accompanying text.
277 See infra notes 279–304 and accompanying text.
278 See infra notes 305–343 and accompanying text.
279 Gammeltoft-Hansen & Hathaway, supra note 13, at 243.
280 The U.N. Human Rights Committee made its statement with respect to states’ obligations under the International Covenant on Civil and Political Rights. Id. at 259–60 (citing U.N. Hum. Rts. Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004)).
281 Id. at 260 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 109 (July 9)).
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control that reaches beyond territorial state borders. In this vein, a 2017 joint comment by the Committee on the Rights of the Child (CRC) and the Committee on the Rights of Migrant Workers emphasized that the principle of non-refoulement applies everywhere that a state exercises full or partial jurisdiction, “including in international waters or other transit zones where States put in place migration control mechanisms.” This legal interpretation provides an opportunity to hold assisting states accountable for human rights violations against migrants before U.N. bodies. For example, advocates could utilize the complaint procedure under the CRC to hold Libya, Italy, Mexico, Australia, and Indonesia accountable for violations of the Convention on the Rights of the Child, including Articles 3 and 6, committed in the course of the states’ transnational migration deterrence mechanisms.

The ECHR has taken a gradual path toward the acknowledgement of extraterritorial jurisdiction for human rights violations. In a case involving the bombing of the former Yugoslavia by North Atlantic Treaty Organization (NATO) states resulting in civilian deaths, the ECHR in Banković v. Belgium in 1999 held that human rights protection should be extended beyond territorial jurisdiction only in “exceptional” cases that demonstrate “special justification.” A decade later in 2011, however, the ECHR in Al-Skeini v. United Nations—Legal and Practical Implications of Extraterritorial Extraterritorial Jurisdiction

282 Id. at 257–58 (“While the majority of rights are explicitly reserved for refugees who are physically present in the territory or who have some higher level of attachment to the host state, a few core rights—including the duty of non-refoulement—are intentionally said to apply without territorial or other qualification.”); see Gammeltoft-Hansen, supra note 271, at 160 (“Non-refoulement today constitutes the single most petitioned issues across all UN human rights committees . . . .” (citing Başak Çali, Cathryn Costello & Stewart Cunningham, Hard Protection Through Soft Courts? Non-refoulement Before the United Nations Treaty Bodies, 21 GERMAN L.J. 355, 360 (2020))).


284 See supra note 216 and accompanying text.

285 See supra note 216 and accompanying text.

286 See supra notes 116–117, 130 and accompanying text.

287 See supra note 252 and accompanying text.

288 See supra note 252 and accompanying text.

289 The Committee on the Rights of the Child permits individual complaints or communications, but the Committee on the Rights of Migrant Workers’ ability to facilitate similar complaints awaits approval by state parties (in accordance with Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families). The United States has signed, but has not ratified, the Convention on the Rights of the Child.

Kingdom recognized the need to modify its position to provide for more accountability, given that states "exercise human rights jurisdiction beyond their territory in an increasing number of situations."

Soon after the Al-Skeini ruling, the ECHR issued a ruling that attached liability for human rights violations to an assisting state in the context of transnational migration deterrence, specifically concerning the arrangement between Italy and Libya. In 2012, in Hirsi Jamaa v. Italy, which was the first ECHR ruling involving interceptions at sea, the applicants were eleven Somali migrants and thirteen Eritrean migrants who had tried to reach Italy by boat in a group of around 200 migrants. Italian police and coast guard intercepted their vessel, transferred the migrants onto Italian military ships, and later handed them over to Libyan authorities. The court found that the forced return of the migrants without any individual processing constituted several violations of the European Convention on Human Rights, including Article 3’s prohibition of inhuman and degrading treatment. The ECHR ruled that the violations fell within Italy’s jurisdiction given that the applicants first embarked upon ships of the Italian armed forces with crews composed entirely of Italian military personnel who then transferred the applicants to Libyan authorities.

In response to ECHR’s ruling, Italy halted the use of its military ships in migrant vessel interdiction efforts with Libya. Still, advocates went back to the ECHR and, in S.S. v. Italy, they argued that Italy’s coordination role in a resisting that ‘the jurisdictional competence of a State is primarily territorial.’ (citing Banković, 2001-XII Eur. Ct. H.R. at 351–52)).

In cases of extrajudicial rendition, the ECHR has held states in which U.S. intelligence agents carried out human rights abuses outside the states’ borders. E.g., El-Masri v. the Former Yugoslav Republic of Macedonia, 2012-VI Eur. Ct. 263, 267; Nasr & Ghali v. Italy, App. No. 44883/09 (Feb. 23, 2016), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-162280%22]} [https://perma.cc/UK35-L74N].


Id.

Id. at 133, 134–39.

Dembour, supra note 294.

cue operation—where the Libyan coast guard mistreated migrants and caused several to die—renders Italy liable for the human rights violations. S.S., which is still pending before the ECHR, involves the LYCG’s interception of a migrant boat after the Italian Maritime Rescue Coordination Centre (MRCC) informed the LYCG of its location. The arrival of the LYCG, which was via a patrol vessel given by Italy, and the subsequent obstruction by the LYCG of rescue attempts by a NGO vessel, caused “the death of at least twenty [migrants].” A rescue boat operated by a humanitarian organization was able to save fifty-nine migrants, bringing forty-seven of them back to Libya.

A joint third-party intervention submitted by nongovernmental organizations (NGOs) to the court provided findings on the continuing inhumane conditions and abuses against migrants, including indefinite detention, committed or permitted by Libyan authorities. Importantly, the intervention argues that Italy remains liable for these abuses because it “plays a decisive role in supporting and influencing Libyan migration control to pursue the same policies of intercepting migrants [at] sea and returning them to Libya” as when the court issued its opinion in Hirsi Jamaa.

B. Factors to Hold Assisting States Accountable

As the NGOs’ intervention in S.S. suggests, factors such as support and influence by an assisting state in the operation of transnational migration deterrence systems should render the assisting state liable for human rights violations caused by such systems. The consideration of factors outside territorial

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300 See Moreno-Lax, supra note 290, at 388.
302 Id.
presence to determine liability in migration control efforts would allow human rights bodies to more comprehensively protect vulnerable migrants in this era of transnational deterrence regimes.

This Section explores potential standards to determine when a state should be subject to extraterritorial jurisdiction. Subsection 1 discusses the factors of “functional jurisdiction and decisive impact.” Subsection 2 examines the idea of labeling states as “co-perpetrators of wrongful conduct.” Subsection 3 considers applying the extraterritorial effects doctrine to the migration context.

1. Functional Jurisdiction and Decisive Impact

Professor Violeta Moreno-Lax presents the S.S. case as demonstrative of extraterritorial acts by Italy that provide the ECHR “functional jurisdiction” over Italy for human rights violations carried out by Libyan officials. The first factor, the concept of functional jurisdiction, examines whether the assisting state has “effective control,” defined as “when [the control] is determinative of the material course of events unlocked by the exercise of jurisdiction, even when the relevant activity takes place from a distance.” A second factor is whether the assisting state maintained significant influence over the transnational operation, including providing funding and other material support. The last factor determinative for functional jurisdiction is whether the assisting state maintained overall control.

Moreno-Lax describes the functional jurisdiction approach as providing more predictability than alternative approaches insofar as outcomes. Perhaps more importantly, this conceptualization moves reviewing and adjudicating bodies away from a territorially bounded interpretation of jurisdiction. The factors Moreno-Lax lays out to determine whether functional jurisdiction is applicable are, however, over-restrictive, given that assisting states’ liability depends on whether they perform either a coordination or operational role. As

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305 See infra notes 308–319 and accompanying text.
306 See infra notes 320–325 and accompanying text.
307 See infra notes 326–343 and accompanying text.
308 Moreno-Lax, supra note 290, at 387, 401.
309 Id. at 387 (citation omitted). Moreno-Lax also used the term “situational control,” and defines this as “the exercise of public powers, such as those ordinarily assumed by a territorial sovereign, taking the form of policy delivery and/or operational action.” Id. (footnote omitted) (citing Al-Skeini v. United Kingdom, 2011-IV Eur. Ct. H.R. 99, 172).
310 Id. at 403 (citing Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97).
311 Id. at 408–11.
312 Id. at 411–13.
313 The alternative approaches identified include analyzing relative control and the “cause-and-effect relationship” and relying on whether the obligation in question involves positive or negative duties. Id. at 386.
314 See Shachar, supra note 19, at 101.
Moreno-Lax describes, in S.S. the level of Italy’s involvement Libya was essentially “a surrogate Italian proxy for interdiction and pull-back at sea.” The Italy-Libya example, however, should not be the benchmark for finding assisting states accountable for human rights violations of migrants in transnational migration deterrence arrangements.

Instead, assisting states should be held liable in situations where they have had a decisive impact on the creation and continued functioning of a transnational migration deterrence mechanism. Decisive impact could take the form of diplomatic, political, and/or economic pressure. The Trump Administration’s leverage of these tactics, for example, compelled the Northern Triangle states to enter into ACAs to process claims of migrants returned by the United States, despite the fact that none of the states had a functioning asylum adjudication system. Under a decisive impact analysis, the United States may face liability for human rights violations endured by migrants who it returned under the ACAs.

Financial incentives, including development aid, may also be characterized as having a decisive impact on the creation and ongoing operation of a transnational migration deterrence system. Similarly, capacity-building assistance, such as the provision of equipment and training, may constitute decisive impact. The substantial funding and support the U.S. government has provided to Mexico and the Australian government to Indonesia may also render these acting governments responsible for human rights violations, for example, in Mexican and Indonesian migration detention facilities. In a decisive impact framework, assisting states’ role in the existence and ongoing operation of a transnational deterrence mechanism is determinative, instead of applying a threshold of coordination or operational involvement.

2. Co-Perpetrators of Wrongful Conduct

Article 16 of the United Nation International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts represents “an emerging consensus that international law will hold state responsible for aiding or assisting another state’s wrongful conduct.” Article 16 address-
es assisting state liability in "cases where one State provides aid or assistance to another State with a view to assisting the commission of a wrongful act by the latter."

As "co-perpetrators or co-participants," the objective of Article 16 is to hold both assisting and acting states accountable. The Article limits the scope of acts that meet its definition of responsible transnational conduct in three ways:

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State international wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

The Italy-Libya arrangement created by the 2017 bilateral agreement likely would render the states co-perpetrators under Article 16. The dismal human rights conditions in post-civil war Libya generally are well-documented, and the ECHR judgment in Hirsi Jamaa specifically renders Italy aware of human rights violations of migrants in Libya. The facts of the S.S. case, as compiled by the research institute Forensic Oceanography, demonstrate that Italian authorities acted with a view to facilitate the return of migrants to Libya, and actually did so. Lastly, the circumstances causing migrant deaths at sea in S.S. and the mistreatment of the applicants returned to Libya would have been wrongful if committed by Italy itself. Assisting states' conduct that does not fall under Article 16 still could be captured by a decisive impact test as discussed above or by the extraterritorial effects doctrine discussed below.

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322 Id. ("Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State.").

323 Id.

324 Moreno-Lax, supra note 290, at 388.

325 See supra notes 320–325 and accompanying text.
3. The Extraterritorial Effects Doctrine and Human Rights Due Diligence

There is a growing call for the application of the extraterritorial effects doctrine in relation to migration control. The doctrine, which is both a domestic and international legal principle, recognizes that a court may exercise jurisdiction over conduct committed within a state’s borders when that conduct has, or is intended to have, an effect outside its boundaries. Importantly, it does not require that the assisting state act extraterritorially. Tribunals have applied the extraterritorial effects doctrine in a range of areas, including labor, cybersecurity, and anti-trust. The International Court of Justice (ICJ) also has applied the doctrine specifically in cases involving environmental damage.

Scholars have called for more research on the doctrine’s applicability to transnational migration deterrence arrangements, recognizing the viability of extraterritorial effects jurisdiction established by “a combination of funding, training and directing migration control performed by third State authorities.” In this regard, a reconceptualization of assisting states’ liability through extraterritorial effects has broader applicability than functional jurisdiction. It also has a more expansive reach vis-à-vis assisting states’ accountability than International Law Commission (ILC)’s Article 16. For example,

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327 For an example of the doctrine as applied between U.S. states, see Keselica v. Commonwealth, 480 S.E.2d 756, 759 (Va. 1997); see also Susan Lorde Martin, The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead, 100 MARQ. L. REV. 497, 502–14 (2016) (discussing examples of U.S. cases that have implicated extraterritoriality).


332 In Legality of the Threat of Use of Nuclear Weapons, the ICJ held that, states must “ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 27 (July 8) (citation omitted). In 2010, in the Pulp Mills case, the ICJ upheld this idea, acknowledging the “interconnectness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection”). Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, ¶ 177 (Apr. 20).

333 Gammeltoft-Hansen, supra note 271, at 159.
under an extraterritorial effects analysis, the U.S. government’s development and security aid to Mexico and Central America may render the United States responsible for human rights violations of migrants in the region. The inhumane conditions of the ad hoc detention sites caused by U.S. officials returning migrants to Mexico under the Migrant Protection Protocol (MPP) may also be the U.S. government’s responsibility under an extraterritorial effects analysis.

Human rights due diligence obligations constitute another approach particularly to assist in the prevention of extraterritorial migration control arrangements that “thrive on willful blindness.”\textsuperscript{334} Due diligence obligations have gained significant traction in the context of holding corporations accountable for ensuring that transnational business practices do not involve human rights abuses,\textsuperscript{335} and is an accountability concept recognized by international law bodies, including the U.N. Human Rights Committee.\textsuperscript{336} A law enacted in France in 2017 provides a model for mandating corporate human rights due diligence because it “applies to the company’s own activities, activities of companies under its control (such as subsidiaries), as well as activities of third parties such as contractors and suppliers.”\textsuperscript{337} The French law also gives victims a right of action to seek compensation for damages.\textsuperscript{338}

Due diligence, in essence, encompasses “a standard of conduct required to avoid a likely or foreseeable undesirable outcome.”\textsuperscript{339} The obligation to exercise due diligence was pivotal to the ICJ’s decision in The Corfu Channel Case, where the Court held that Albanian authorities were obligated to disclose the presence of a minefield and to warn those at risk of imminent danger.\textsuperscript{340} In the human rights context, a state’s capacity to influence another state has a di-


\textsuperscript{336} Ferstman, supra note 334, at 467.


\textsuperscript{338} Id.

\textsuperscript{339} Ferstman, supra note 334, at 464.

\textsuperscript{340} The Corfu Channel Case (United Kingdom v. Albania), Judgment, 1949 I.C.J. 4, 22 (Apr. 9).
rect relationship to the level of diligence that should be required. The imposition of human rights due diligence on assisting states in the context of transnational migration deterrence would render these states affirmatively responsible for ensuring that migration control mechanisms operated by acting states do not involve human rights abuses. The Australian government’s funding for approximately seventy-five migration detention facilities in Indonesia, for example, would be accompanied by a duty to address the serious human rights violations reported in these sites. Coupled with an oversight and accountability mechanism, human rights due diligence potentially can significantly improve the treatment of migrants in transnational migration control systems.

CONCLUSION

The modern global migration control system increasingly relies on transnational arrangements that both restrict human mobility and create greater conditions for human rights violations. The operationalization of these systems, which have included the proliferation of migration detention practices, rely on substantial and ongoing support from destination states to adjacent and neighboring states to do the work of migration control for them. Despite their critical role, assisting states largely have evaded responsibility for deaths caused by and serious abuses perpetrated within transnational migration deterrence systems. Persistent impunity against these offenses incentivizes states to further the global trend of reproducing and fortifying these systems. The framework of transnational migration deterrence promotes a linguistic shift that reconceptualizes externalized border control which, when accompanied by accountability mechanisms, is positioned to hold destination states accountable for human rights violations beyond their borders.

341 Ferstman, supra note 334, at 466.
342 See supra note 251 and accompanying text.
343 See supra note 252 and accompanying text.