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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-

¹ Michel Foucault, *Of Other Spaces: Utopias and Heterotopias*, in *RETHINKING ARCHITECTURE: A READER IN CULTURAL THEORY* 330, 350 (Neil Leach ed., 1997) (emphasis added).

² Joachim Prinz, Speech at the March on Washington (Aug. 28, 1963) (transcript available at <https://jwa.org/media/rabbi-joachim-prinz-speech-at-march-on-washington> [<https://perma.cc/JWP4-WR2B>]) (emphasis added).

³ Scholars have been calling for a significant re-examination and overhaul of the governance of migration law. See ALEXANDER BETTS & PAUL COLLIER, *REFUGEE: TRANSFORMING A BROKEN REFUGEE SYSTEM* 201 (2017) ("The institutions created to protect the world's refugees are failing. Global governance exists to facilitate international cooperation, and yet with the highest number of refugees in the regime's history, we have the lowest levels of responsibility-sharing."); Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 458 (2020) ("Once every generation or so, entire fields of law require a full reset. . . . This moment has come for the law governing migration."). This Article endeavors to contribute to the effort to reconceptualize and reconfigure global migration governance.

⁴ Gurinder K. Bhambra, *The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism*, 23 EUR. L.J. 395, 396 (2017) (challenging the concept of "cosmopolitan Europe," noting that "Europe is the richest continent on the planet, yet it takes the smallest proportion of the world's refugees"); see also BETTS & COLLIER, *supra* note 3, at 128 ("Refugees are just over 0.3 per cent of the world's population. The challenge is not one of absolute numbers but of geographical concentration."); Matthew J. Gibney, *Refugees and Justice Between States*, 14 EUR. J. POL. THEORY 448, 450 (2015) (noting that developing countries receive over 80% of refugees globally, a figure that "is 10% higher than it was a decade ago"); Tally Kritzman-Amir & Yonatan Berman, *Responsibility Sharing and the Rights of Refugees: The Case of Israel*, 41 GEO. WASH. INT'L L. REV. 619, 624 (2010) (stating that the Global South and "the least politically and economically capable countries" have continued to disproportionately bear the burden of hosting migrants as the Global North increasingly restricts immigration).

⁵ Natascha Zaun & Olivia Nantermoz, *The Use of Pseudo-Causal Narratives in EU Policies: The Case of the European Union Emergency Trust Fund for Africa*, 29 J. EUR. PUB. POL'Y 510, 525 (2021) ("[T]he assertion that strengthening border control and ending rescue operations at sea will

serts and washed-up cadavers from drownings in rivers and seas.⁶ Migration detention practices have proliferated globally, and often are sites of deplorable and abusive conditions.⁷ The rhetorical repetition casting migration flows as “crises” inhibits the implementation of solutions that balance the needs of vulnerable migrants with state sovereignty.⁸

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.⁹ 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.¹⁰ These agreements are a continuation of “long-standing” efforts to respond to migration via “extraterritorial responses.”¹¹ Co-operative 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.¹²

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 STUD., MIGRATION POL’Y CTR., SEAR RESCUE NGOS: A PULL FACTOR OF IRREGULAR MIGRATION? (2019), https://cadmus.eui.eu/bitstream/handle/1814/65024/PB_2019_22_MPC.pdf [<https://perma.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> [<https://perma.cc/SZ42-XXN7>].

⁶ Marie McAuliffe, Adrian Kitimbo, Alexandra M. Goossens & Akm Ahsan Ullah, *Understanding Migration Journeys from Migrants’ Perspectives*, in INT’L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 2018, at 171, 171 (Marie McAuliffe & Martin Ruhs eds., 2018), <https://publications.iom.int/books/world-migration-report-2018> [<https://perma.cc/M4RL-YUT6>] (noting “the increasing visibility of dangerous and sometimes deadly migration journeys”); Cetta Mainwaring & Noelle Brigden, *Beyond the Border: Clandestine Migration Journeys*, 21 GEOPOLITICS 243, 243 (2016) (“Not a week goes by without media reports of migrant boats capsizing in the Mediterranean and corpses washing ashore . . . of people dying in hidden compartments in trucks or transport containers . . .”).

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”).

⁹ Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. H.R.L. REV. 629–30 (2009).

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.¹³ 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.”¹⁴

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 states¹⁵ tend to be countries with far fewer resources than the destination state.¹⁶ 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.¹⁷ 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.¹⁸

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”).

¹⁴ JENNA M. LOYD & ALISON MOUNTZ, *BOATS, BORDERS, AND BASES: RACE, THE COLD WAR, AND THE RISE OF MIGRATION DETENTION IN THE UNITED STATES* 15–16 (2018) (first citing Alison Mountz, *Specters at the Port of Entry: Understanding State Mobilities Through an Ontology of Exclusion*, 6 MOBILITIES 317 (2011); and then citing Alison Mountz & Nancy Hiemstra, *Chaos and Crisis: Dissecting the Spatiotemporal Logics of Contemporary Migrations and State Practices*, 104 ANNALS ASS’N AM. GEOGRAPHERS 382 (2013)).

¹⁵ Antje Missbach & Melissa Phillips, *Reconceptualizing Transit States in an Era of Outsourcing, Offshoring, and Obfuscation*, 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.¹⁹ 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,”²⁰ often as a response to a constructed “migration crisis.”²¹ 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 Ramji-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.”).

and European countries requiring visas for refugees from the Bosnian War.²² Finally, transnational migration deterrence can be executed by non-state actors, such as transportation carriers²³ and private entities more broadly.²⁴

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.²⁵ 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.²⁶ In a simi-

²² Satvinder Juss, *Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence*, 11 HARV. HUM. RTS. J. 311, 322 (1998); Gerald Kernerman, *Refugee Interdiction Before Heaven's Gate*, 43 GOV'T & OPPOSITION 230, 234 (2008).

²³ Gallya Lahav, *Migration and Security: The Role of Non-state Actors and Civil Liberties in Liberal Democracies*, in UNITED NATIONS, SECOND COORDINATION MEETING ON INTERNATIONAL MIGRATION 89, 102 (2013) https://www.un.org/en/development/desa/population/events/pdf/2/ITT_COOR2_CH16_Lahav.pdf [<https://perma.cc/6MKE-QWK7>] (exploring the role of airlines and other private transit companies as gatekeepers of transnational movement).

²⁴ Ana López-Sala & Dirk Godenau, *In Private Hands? The Markets of Migration and the Politics of Outsourcing*, J. ETHNIC & MIGRATION STUD., Dec. 14, 2020, at 1, 1–10, <https://www.tandfonline.com/doi/full/10.1080/1369183X.2020.1857229> [<https://perma.cc/48A7-5Y8Z>]; Daria Davitti, *The Rise of Private Military and Security Companies in European Union Migration Policies: Implications Under the UNGPs*, 4 BUS. & HUM. RTS. J. 33, 34–41 (2019). States have used private actors to deter migration starting as early as the eighteenth century, by fining shipmasters for not performing pre-boarding screenings for unauthorized migrants. Thomas Gammeltoft-Hansen, *Extra-territorial Human Rights Obligations in Regard to Refugees and Migrants*, in THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS 153, 154 (Mark Gibney, Gamze Erdem Türkelli, Markus Krajewski & Wouter Vandenhole eds., 2022).

²⁵ Michael Flynn, *How and Why Immigration Detention Crossed the Globe* 4 (Global Detention Project, Working Paper No. 8, 2014), <https://www.globaldetentionproject.org/wp-content/uploads/2014/04/How-and-Why-Immigration-Detention-Crossed-the-Globe-GDP-WP8-1.pdf> [<https://perma.cc/6D8C-MSBQ>] (“From Mexico to the Bahamas, Mauritania to Lebanon, Turkey to Saudi Arabia, South Africa to Indonesia, Malaysia to Thailand, detention has become an established *modus operandi* that counts on dedicated facilities and burgeoning institutional bureaucracies. Before the decade of the 1980s, on the other hand, detention appears to have been largely an ad hoc tool, employed mainly by wealthy states in exigent circumstances”); see also Admir Skodo, *How Immigration Detention Compares Around the World*, THE CONVERSATION, <https://theconversation.com/how-immigration-detention-compares-around-the-world-76067> [<https://perma.cc/9GP9-M5TS>] (Apr. 22, 2017) (“Since the 1980s, all major Western states practice what they call civil or administrative confinement of undocumented immigrants and non-citizens.”); Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. ON MIGRATION & HUM. SEC. 97, 101 (2013) (“The best evidence of the growing global population of detainees can be found in estimates of the total detention capacity for individual countries.”).

²⁶ OPEN ACCESS NOW, THE HIDDEN FACE OF IMMIGRATION DETENTION CAMPS IN EUROPE, at 2F (2014), <http://www.epim.info/wp-content/uploads/2018/10/1A-The-hidden-face-of-immigration-detention-camps-in-Europe-1.pdf> [<https://perma.cc/WY9T-GEBL>]; GLOB. DET. PROJECT, HUNGARY IMMIGRATION DETENTION PROFILE 18 (2016), https://www.globaldetentionproject.org/wp-content/uploads/2016/09/Hungary_immigration_detention_report_updated.pdf [<https://perma.cc/PU8X-A42X>] (describing a “transit zone” as a closed, fenced, heavily guarded complex that uses shipping containers near its border with Serbia).

lar vein, mechanisms designated as “processing cent[ers]” are de facto detention centers,²⁷ and refugee camps are often functionally open-air prisons.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.²⁹ Notably, the increased use of detention as a tool for migration control has not abated unauthorized migration.³⁰ It has affected,

²⁷ Franzisca Zanker, *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 Ní 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.”).

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 *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/NU5P-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, *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, *Aid Groups Condemn Greece Over ‘Prison’ Camps for Migrants*, THE GUARDIAN (Nov. 25, 2019), <https://www.theguardian.com/world/2019/nov/25/aid-groups-condemn-greece-over-prison-camps-for-migrants> [<https://perma.cc/9E2Q-85PK>] (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, “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).

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.”).

³⁰ PHILIPPE DE BRUYCKER, ALICE BLOOMFIELD, EVANGELIA (LILIAN) TSOURDI & JOANNA PÉTIN, ODYSSEUS NETWORK, *ALTERNATIVES TO IMMIGRATION AND ASYLUM DETENTION IN THE EU* 21 (Jan. 2015), <http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf> [<https://perma.cc/H78S-SEAG>]; Andrej Mahecic, *UNHCR Concerned at Detention of Asylum-Seekers, Releases New Guidelines*, UN REFUGEE AGENCY (Sept. 21, 2012), https://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=505c33199&query=detention&__cf_chl_jschl_tk_ [<https://perma.cc/EMR5-F8ZA>]. This Article uses the term “unauthorized” when

however, migrants' ability to reach their intended destinations, and has rendered migration significantly more perilous.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 archetypical modern transnational migration deterrence regime, namely the U.S.-Caribbean system assembled by the United States beginning in the late 1970s.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.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.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.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.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.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-

describing migration or migrants who do not have permission to enter the country they are traveling to or through.

³¹ See *supra* note 5 and accompanying text.

³² See *infra* notes 36–78 and accompanying text.

³³ See *infra* notes 79–170 and accompanying text.

³⁴ See *infra* notes 171–266 and accompanying text.

³⁵ See *infra* notes 267–343 and accompanying text.

³⁶ DAVID SCOTT FITZGERALD, *REFUGEE 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)).

³⁷ Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137.

tion of a “refugee” as someone displaced by World War II.³⁸ 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.³⁹ 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.⁴⁰

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.⁴¹ Section B explores systems of migration deterrence in other countries within the Americas.⁴²

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.”⁴³ An Executive Order issued by President Ronald Reagan in 1981 authorized the U.S. Coast Guard to carry out these interdictions.⁴⁴ 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 . . .” (citation omitted) (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 Salter, *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.

⁴³ Leti Volpp, *Pushing Out and Bleeding In: On the Mobility of Borders*, in AYELET SHACHAR, *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY* 158, 162 (Antony Simon, Peter Niesen & David Owen eds., 2020); A. Mountz & J. Loyd, *Transnational Productions of Remoteness: Building Onshore and Offshore Carceral Regimes Across Borders*, 69 *GEOGRAPHICA HELVETICA* 389, 389 (2014) (“These practices [of interception and offshore ‘processing’ of asylum claims] began in the United States in the early 1980s in response to Haitian and Cuban migration by sea, and became more extensively used around the globe in the 1990s and 2000s.”).

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.⁴⁵ 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.⁴⁶ Subsection 2 explores the expansion of this system of migration deterrence beyond the borders of the United States.⁴⁷

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.⁴⁸ Haitians began arriving in the United States in greater numbers in that decade after tensions mounted between Haitian migrants and citizens of the Bahamas.⁴⁹ The Carter Administration instituted a deterrence strategy that relied on detaining Haitian migrants in local jails.⁵⁰ 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.⁵¹

Territorial Waters, in EXTRATERRITORIAL IMMIGRATION CONTROL 375 (Bernard Ryan & Valsamis Mitsilegas eds., 2010)).

⁴⁵ *Id.* at 389 ("Forcible confinement is a central element of [interception] to regulate migration both on mainland territory and offshore."); see also HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 45–46 (2021) ("The interdiction and detention of Haitian refugees during the 1980s and 1990s laid the groundwork for the US onshore and offshore immigration detention system in place today.").

⁴⁶ See *infra* notes 48–69 and accompanying text.

⁴⁷ See *infra* notes 70–78 and accompanying text.

⁴⁸ Jenna M. Loyd, *Carceral Citizenship in an Age of Global Apartheid*, OCCASION, Aug. 31, 2015, at 1, 11 ("Haitian asylum seekers were confined not only to Krome and the few other INS facilities that existed in the 1980s but were also routinely transferred to jails in Florida, Louisiana, Texas, and elsewhere.").

⁴⁹ Frenzen, *supra* note 44, at 375; Michael Craton, *The Bahamian Self and the Haitian Other: The Migration of Haitians to and Through the Bahamas, 1950–2000*, 14 IMMIGRANTS & MINORITIES: HIST. STUD. ETHNICITY, MIGRATION & DIASPORA 265, 265 (1995).

⁵⁰ Jenna Loyd & Alison Mountz, *The Caribbean Roots of U.S. Migration Policy*, 51 NACLA REPORT ON THE AMERICAS 78, 79 (2019).

⁵¹ Loyd, *supra* note 48, at 6–7 (describing the Program as designed by the U.S. Departments of Justice and State with the objective of "driving out Haitians already in South Florida and discouraging future refugees from migrating to the United States" (quoting A. Naomi Paik, *Carceral Quarantine at Guantánamo: Legacies of US Imprisonment of Haitian Refugees, 1991–1994*, 115 RADICAL HIST. REV.

Overlapping with the flow of migrants leaving Haiti, the Cuban “Mariel Boatlifts”⁵² brought over 125,000 migrants to the United States over a six-month period.⁵³ 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.⁵⁴ As with the Haitians, the U.S. government repurposed military facilities to detain Cuban migrants.⁵⁵

The next year, President Reagan requested funding from the U.S. Congress for detention facilities dedicated to holding migrants.⁵⁶ 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.⁵⁷ As a base, Krome held Haitian and Cuban migrants in tents,⁵⁸ and as a permanent detention facility, it was a key apparatus to deter migration from the Caribbean.⁵⁹

142, 147 (2013)); see WALIA, *supra* note 45, at 47 (contrasting the U.S. policy of immediately detaining “economic migrants” from Haiti with its policy of welcoming and resettling refugees from other nations). A legal challenge to the Haitian Program forced its termination. Loyd, *supra* note 48, at 7.

⁵² “Mariel Boatlifts” was a reference to the port opened by Fidel Castro in 1980 that allowed Cubans to leave. See Lawrence Mahoney, *Dead End on Krome Avenue for the Haitians, There Is No Ellis Island. Their Road to Freedom Ends in the Everglades.*, SUN-SENTINEL (Jan. 12, 1986), <https://www.sun-sentinel.com/news/fl-xpm-1986-01-12-8601030563-story.html> [<https://perma.cc/RP3Z-54FA>] (“On April 21, 1980, Fidel Castro opened the little port of Mariel and announced that any Cuban who wanted to emigrate to America could go. He added, ‘Good riddance, scum.’ Florida was flooded with more than 125,000 Cubans who did not fit into the model of Caribbean Socialist society.”).

⁵³ Loyd, *supra* note 48, at 7.

⁵⁴ Loyd & Mountz, *supra* note 50, at 80; see also LOYD & MOUNTZ, *supra* note 14, at 3 (explaining how the government deployed “deterrence doctrine in the Caribbean during the Cold War, designed to prevent unwanted arrivals of asylum seekers from Haiti and Cuba” by “ma[king] mandatory detention a central component of federal strategy and practice in the Caribbean and elsewhere”); Smita Ghosh, *How Migrant Detention Became American Policy*, WASH. POST (July 19, 2019), <https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/> [<https://perma.cc/3FLR-VH4R>] (detailing how the Reagan Administration’s solution to a perceived “unending Caribbean refugee problem” was to detain all arriving migrants); Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT’L L. 151, 157 (1984) (describing the rationale behind the mandatory detention policy).

⁵⁵ Loyd & Mountz, *supra* note 50, at 79. The Cuban migrants were detained as they were being processed by the U.S. government as “entrants” with “status pending,” meaning that though they “were physically present in confined settings, their presence was not yet legal.” *Id.*

⁵⁶ LOYD & MOUNTZ, *supra* note 14, at 87.

⁵⁷ Mahoney, *supra* note 52; see also Alfonso Chardy, *A Look Inside Krome: From Cold War Base to Immigrant Detention Facility*, MIA. HERALD, <https://www.miamiherald.com/news/local/immigration/article38001279.html> [<https://perma.cc/5MLS-QM2M>] (Oct. 11, 2015) (“The only visible remnants from that tense time [the U.S.-Cuban Missile Crisis] are three diamond-shaped pads where Nike missiles once stood, ready to thwart an attack from Cuba.”).

⁵⁸ THE S. POVERTY L. CTR. & AMS. FOR IMMIGRANT JUST., PRISON BY ANY OTHER NAME: A REPORT ON SOUTH FLORIDA DETENTION FACILITIES 17 (2019), https://www.splcenter.org/sites/default/files/cjr_fl_detention_report-final_1.pdf [<https://perma.cc/6MHF-4HFY>]. The former military

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.⁶⁰ Amongst its first detainees were Mariel Cubans the U.S. was still attempting to repatriate.⁶¹ Violence and abuse were rampant in both the Krome and Oakdale facilities.⁶² 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.⁶³

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.⁶⁴ 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.⁶⁵ 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.*

⁵⁹ 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.

⁶⁰ 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").

⁶¹ Loyd & Mountz, *supra* note 50, at 80.

⁶² 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).

⁶³ Loyd & Mountz, *supra* note 50, at 80.

⁶⁴ Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 142–43 (1994). ("[U.S. immigration officers] with little knowledge of political conditions in Haiti conducted 'credible fear' interviews generally lasting no more than five minutes aboard Coast Guard cutters, under conditions of little or no privacy." (citing Lowerstein Int'l Hum. Rts. Clinic, *Aliens and Duty of Nonrefoulement: Haitian Ctrs. Council, Inc. v. McNary*, 6 HARV. HUM. RTS. J. 1, 2 n.4 (1993))). The Haitian Refugee Center and individual Haitian refugees in 1991 filed a lawsuit in the U.S. District Court for the Southern District of Florida to stop this practice based on the First Amendment right of association and right to counsel and the right of non-refoulement under Article 33 of the 1967 U.N. Protocol Relating to the Status of Refugees. The district court issued injunctions twice, and both times the Eleventh Circuit overturned the decision. *Haitian Refugee Ctr., Inc. v. Baker*, No. 91-2653, 1991 WL 330942 (S.D. Fla. Nov. 19, 1991); *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552 (S.D. Fla.), *remanded*, 949 F.2d 1109 (11th Cir. 1991), *reh'g denied*, 954 F.2d 731 (11th Cir. 1992).

⁶⁵ 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.⁶⁶ Within its first eighteen months of operation, the U.S. government detained over thirty-six thousand Haitians at Guantánamo.⁶⁷ It was also a key site after the implementation of the Clinton Administration's "wet foot, dry foot" policy,⁶⁸ 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.⁶⁹

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.⁷⁰ The subsequent Bush and Clinton Administrations expanded the coupling of interdictions with offshore detention, capitalizing on the presence of U.S. military bases across the Caribbean to design a transnational migration system.⁷¹ The use

"where refugees lack any legal rights cognizable under U.S. law and American citizens lack First Amendment rights to communicate with them." 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)).

⁶⁶ WALIA, *supra* note 45, at 48.

⁶⁷ Koh, *supra* note 64, at 143.

⁶⁸ LOYD & MOUNTZ, *supra* note 14, at 160–61. The policy was in response to another wave of migration from Cuba. *Id.* In July 1994, Castro proclaimed that Cubans were free to leave the country, prompting approximately thirty thousand Cubans to embark on boats to the United States. Loyd, *supra* note 48, at 10; *see also* Geoffrey Heeren, *Distancing Refugees*, 97 DENV. L. REV. 761, 774 (2020) ("In 1994, a wave of Cuban asylum seekers set out for Florida, and U.S. Coast Guard cutters intercepted and delivered about 32,000 Cubans to Guantánamo Bay." (citing SERGIO CARRERA ET AL., OPEN SOC'Y EUR. POL'Y INST., OFFSHORING ASYLUM AND MIGRATION IN AUSTRALIA, SPAIN, TUNISIA AND THE US: LESSONS LEARNED AND FEASIBILITY FOR THE EU 38 (2018), <https://www.ceps.eu/ceps-publications/offshoring-asylum-and-migration-australia-spain-tunisia-and-us/> [<https://perma.cc/4JXX-5GSQ>])).

⁶⁹ LOYD & MOUNTZ, *supra* note 14, at 160–61; Lupe S. Salinas, *Lawless Cops, Latino Injustice, and Revictimization by the Justice System*, 2018 MICH. ST. L. REV. 1095, 1121; Aaron Klein & Jake E. Marcus, *United States-Cuba Normalized Relations and the MLB Influence: The Baseball Coalition Committee*, 47 U. MIA. INTER-AM. L. REV. 258, 277–78 (2016). The policy represented both declining public support for Cuban migration to the United States and public objection to the disparate favorable treatment of Cuban migrants vis-à-vis Haitian migrants. Heather M. Kolinsky, *A Fine Line, Redefined: Moving Toward More Equitable Asylum Policies*, 40 U. BALT. L. REV. 649, 675 n.172 (2011).

⁷⁰ *See supra* notes 54–69 and accompanying text.

⁷¹ Mountz & Loyd, *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.⁷² 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.⁷³ These arrangements included agreements with sending states to repatriate their nationals, namely the intermittent agreements the United States made with Haiti and Cuba.⁷⁴ The U.S. government also created agreements with Caribbean states under the “Safehaven plan” to detain Haitian and Cuban migrants intercepted at sea,⁷⁵ in response to overcrowding at its military bases in the late 1980s.⁷⁶ 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.⁷⁷ 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.⁷⁸

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.

⁷⁶ Jenna M. Loyd, Emily Mitchell-Eaton & Alison Mountz, *The Militarization of Islands and Migration: Tracing Human Mobility Through US Bases in the Caribbean and the Pacific*, 53 POL. GEOGRAPHY 65, 71 (2016) (noting that the U.S. government began constructing camps in Antigua, Dominica, St. Lucia, Suriname, and the Turks and Caicos).

⁷⁷ MARK P. SULLIVAN, CONG. RSCH. SERV., IB92047, CARIBBEAN-U.S. RELATIONS: ISSUES FOR CONGRESS 11 (1994).

⁷⁸ Koh, *supra* note 64, at 153–54.

border.⁷⁹ 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.⁸⁰ 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.⁸¹ This response, along with the policies aimed to deter U.S.-Caribbean migration, morphed immigrant detention in the United States from a "modest system"⁸² to the largest detention system in the world.⁸³ There has been a clear racial and regional component to this expansion of detention,⁸⁴ including the fact that the majority of those detained in the United States have been people of color from Central America.⁸⁵

⁷⁹ 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 ANN. REV. L. & SOC. SCI. 353, 354 (2014) (first citing Avi Astor, *Unauthorized Immigration, Securitization and the Making of Operation Wetback*, 7 LATINO STUD. 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 U.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").

⁸⁰ 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. PA. L. REV. 1247, 1251 (1990))).

⁸¹ *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 *id.* at 80)).

⁸² Emily Kassie, *Detained: How the U.S. Built the World's Largest Immigrant Detention System*, THE GUARDIAN (Sept. 24, 2019), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump> [<https://perma.cc/T4RU-CFNQ>] ("A modest system holding fewer than 3,000 migrants a day at the end of the 1970s, detention has now morphed into a sprawling machinery ensnaring immigrants across the [United States].").

⁸³ *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/3HLJ-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].").

⁸⁴ See Hindpal 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).

⁸⁵ Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1857 n.5 (2020) ("Detentions of individuals from Mexico and the 'Northern Triangle' countries of El Salvador, Guatemala, and Honduras constituted 83% of the total [detainees in fiscal year 2017].") (citation omitted); Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 830 (2018) (stating that

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,⁸⁶ 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 1993.⁸⁷

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."⁸⁸ 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."⁸⁹ 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

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).

⁸⁶ 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)).

⁸⁷ *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%201992%20-%20FY%202019%29_0.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.).

⁸⁸ Amalia Campos-Delgado, *Abnormal Bordering: Control, Punishment and Deterrence in Mexico's Migrant Detention Centres*, 61 BRIT. J. CRIMINOLOGY 476, 480 (2020).

⁸⁹ *Id.* at 481 (citing Juan Manuel Sandoval Palacios, *Los Esfuerzos Antiinmigrantes Estadounidenses Se Regionalizan al Norte y al Sur de Continente Americano* [Anti-American Immigration Efforts Regionalize North and South America], in UNESCO, DERECHOS HUMANOS Y FLUJOS MIGRATORIOS EN LAS FRONTERAS DE MÉXICO [HUMAN RIGHTS AND MIGRATORY FLOWS AT THE BORDER OF MEXICO] 95 (2003), <https://www.casede.org/BibliotecaCasede/migracionydh.pdf> [<https://perma.cc/NSU8-A3XM>])). The agreement, the Plan of Action for Cooperation and Border Safety, was signed on June 22, 2001. *Id.* This agreement is also known as "Plan Sur." LUIS ALFREDO ARRIOLA VEGA, MEX. CTR., POLICY ADRIFT: MEXICO'S SOUTHERN BORDER PROGRAM 7 (2017), <https://scholarship.rice.edu/bitstream/handle/1911/97772/MEX-pub-FronteraSur-062317.pdf?sequence=1&isAllowed=y> [<https://perma.cc/NS5V-W8Z5>]).

border.⁹⁰ 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.⁹¹ 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.⁹²

Subsection 1 details the growth of Mexico's migration control system and the critical role of the U.S. government in this growth.⁹³ Subsection 2 describes the conditions of Mexico's detention system.⁹⁴ Subsection 3 discusses migration deterrence efforts in other Northern Triangle countries.⁹⁵

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.⁹⁶ 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."⁹⁷ Initially, the operation was funded by the Mexican government and the U.S. government's role was limited to information sharing.⁹⁸ 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)⁹⁹ Implemented in July 2001, the Southern Plan included: en-

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.)).

⁹¹ Makini Brice, *Trump Threatens More Tariffs on Mexico Over Part of Immigration Deal*, REUTERS, June 10, 2019, <https://www.reuters.com/article/us-usa-trade-mexico/trump-threatens-more-tariffs-on-mexico-over-part-of-immigration-deal-idUSKCN1TB182> [<https://perma.cc/7AN8-GMKT>].

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.").

⁹⁷ OMAR ARAIZA, HOLLY BUTTREY, VICTORIA ROSSI & SARAH SPALDING, POL'Y RSCH. PROJECT, CENTRAL AMERICA & MEXICO POLICY INITIATIVE: THE IMPLEMENTATION AND LEGACY OF MEXICO'S SOUTHERN BORDER PROGRAM 3 (2019), https://www.strauscenter.org/wp-content/uploads/prp_208_the_implementation_and_legacy_of_mexicos_southern_border_program_2019.pdf [<https://perma.cc/J99J-W7CV>].

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.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.¹⁰¹ The U.S. and Mexican governments presented the Mérida Initiative as a "security cooperation package,"¹⁰² and through it the U.S. government has provided millions of dollars¹⁰³ of migration control equipment, including helicopters, surveillance aircraft, and canine units, as well as technical assistance to Mexico and throughout Central America.¹⁰⁴ Migration detention began to expand substantially, with the number of facilities doubling, particularly in the southern part of Mexico.¹⁰⁵

The U.S. and Mexican governments broadened the scope of the Mérida Initiative in 2011 by prioritizing Mexican institution building, including the

mentation of tougher immigration regulations, particularly the Illegal Immigration Reform and Immigrant Responsibility Act of 1996." (first citing Jaqueline Hagan, Karl Eschbach & Nestor Rodríguez, *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64 (2008); and then citing Nestor Rodríguez & Jacqueline Maria Hagan, *Fractured Families and Communities: Effects of Immigration Reform in Texas, Mexico, and El Salvador*, 2 LATINO STUD. 328 (2004))).

¹⁰⁰ ARAIZA ET AL., *supra* note 97, at 9.

¹⁰¹ *Id.* at 16; Kovic & Kelly, *supra* note 86, at 4.

¹⁰² Kovic & Kelly, *supra* note 86, at 4. The Mérida Initiative began appropriating funds in 2008, and is part of the "Security and Prosperity Partnership" (SPP) billed as "providing security aid to 'counter-narcotics, counter-terrorism, and border security measures.'" *Id.* The SPP of North America was a trilateral initiative amongst Canada, Mexico, and the United States between 2005 and 2008. One of SPP's issues was border security, albeit related to goods not people, as its focus was to balance post 9/11 heightened security measures with efficient movement of cargo across borders. M. ANGELES VILLARREAL & JENNIFER E. LAKE, CONG. RSCH. SERV., RS22701, SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: AN OVERVIEW AND SELECTED ISSUES 7–8 (2009); *see also* CLARE RIBANDO SEELKE, CONG. RSCH. SERV., IF10578, MEXICO: EVOLUTION OF THE MÉRIDA INITIATIVE, 2007–2021, at 1 (2021) (noting that the Merida Initiative emphasized the idea of "shared responsibility").

¹⁰³ Edward Hunt, *The U.S. Has Spent Billions Trying to Fix Mexico's Drug War. It's Not Working*, WASH. POST (Mar. 15, 2021), <https://www.washingtonpost.com/politics/2021/03/15/us-has-spent-billions-trying-fix-mexicos-drug-war-its-not-working/> [https://perma.cc/QNQ8-2ESM]; Thomas A. Shannon, Assistant Sec'y of State, Remarks on U.S. Policy for the Americas (Apr. 2, 2008) (transcript available at <https://www.as-coa.org/articles/us-asst-secretary-state-western-hemisphere-affairs-thomas-shannon> [https://perma.cc/9TXR-B7KE]).

¹⁰⁴ Kovic & Kelly, *supra* note 86 at 4.

¹⁰⁵ VEGA, *supra* note 89, at 6 ("During the 1990s, Mexico had 25 migrant detention centers; the following decade, twice as many had emerged, most of them located in the southern part of the country." (citing Rodolfo Casillas R., *Entre la Política Deseada, la Práctica y los Flujos Migratorios Emergentes: Repuestas en Construcción y Desafíos Duraderos* (Migración en Tránsito, Working Paper No. 4, 2016))).

creation of a “21st-Century [U.S.-Mexico] Border.”¹⁰⁶ 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.¹⁰⁷ By 2014, with an unprecedented number of unaccompanied minors migrating into the United States from the region,¹⁰⁸ the U.S. government declared the migration flow a humanitarian crisis.¹⁰⁹ 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.¹¹⁰ About a month later, Mexico announced the Southern Border Plan (Plan Frontera Sur or PFS).¹¹¹ Through the PFS, Mexico’s migration enforcement efforts included opening internal checkpoints and closing migration routes,¹¹² conducting raids along Mexico’s southern border,¹¹³ and cracking down on the operation of the

¹⁰⁶ SEELKE, *supra* note 102, at 1 (emphasis omitted); *see also* CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RSCH. SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 19–21 (2017) (discussing the “21st-Century Border” pillar of the Mérida Initiative).

¹⁰⁷ Paul J. Angelo, *Why Central American Migrants Are Arriving at the U.S. Border*, COUNCIL ON FOREIGN RELS. (Mar. 22, 2021), <https://www.cfr.org/in-brief/why-central-american-migrants-are-arriving-us-border> [<https://perma.cc/U93K-X9PA>]. *See generally* Ragini Shah, *No Matter What: The Inevitability of Mexican-U.S. Migration, and Its Lessons for Border Control Strategies*, 55 WAYNE L. REV. 1851, 1852 (2009) (“[S]tudies make clear that the massive increases in spending and personnel to secure the border and increase interior enforcement have not had any appreciable effect on the number of people entering the United States without authorization.”).

¹⁰⁸ Katharine M. Donato & Blake Sisk, *Children’s Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects*, J. ON MIGRATION & HUM. SEC. 58, 59 (2015); DAN RESTREPO & ANN GARCIA, CTR. FOR AM. PROGRESS, THE SURGE OF UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: ROOT CAUSES AND POLICY SOLUTIONS (2014), <https://americanprogress.org/wp-content/uploads/2014/07/CentAmerChildren3.pdf?ga=2.8065842.1611522648.1648404614-523856764.1648227168> [<https://perma.cc/2SD2-B7HA>].

¹⁰⁹ ARAIZA ET AL., *supra* note 97, at 12 (noting that President Barack Obama declared the migration of Central American unaccompanied minors an “urgent humanitarian situation” (citing Press Release, The White House, Off. of the Press Sec’y, Presidential Memorandum—Response to the Influx of Unaccompanied Alien Children Across the Southwest Border (June 2, 2014), <https://obama.whitehouse.archives.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr> [<https://perma.cc/T4DH-THH8>])).

¹¹⁰ *Id.* (quoting Press Release, The White House, Off. of the Press Sec’y, Letter from the President—Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border (June 30, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle> [<https://perma.cc/GH2Z-PDDA>]).

¹¹¹ *Id.*

¹¹² Victoria Rietig & Rodrigo Dominguez Villegas, *Changing Landscape Prompts Mexico’s Emergence as a Migration Manager*, MIGRATION POL’Y INST. (Dec. 10, 2014), <https://www.migrationpolicy.org/article/changing-landscape-prompts-mexicos-emergence-migration-manager> [<https://perma.cc/P88S-TXT5>].

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*

infamous “La Bestia,” a dangerous network that includes freight trains migrants use to travel through Central America into Mexico.¹¹⁴ By 2018, the United States spent over “\$100 million in equipment and training” for the Mexican military to fortify the border.¹¹⁵

One year after PFS went into effect, the rate of migrants apprehended by Mexican authorities skyrocketed.¹¹⁶ Some scholars have described Mexico’s role as one of a “migration manager” for the United States.¹¹⁷ 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.”¹¹⁸ Mexican local and federal gov-

and Other Migrants Seeking Asylum, 23 CARDOZO J.L. & GENDER 215, 217 (2016) (describing Mexico’s increased patrols of shelter cities).

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).

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 [J]\$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]’ funding comes from the United States by way of the Mérida Initiative”); Rietig & Dominguez Villegas, *supra* note 112 (“Partly funded by the Merida 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.”).

¹¹⁶ Doran, *supra* note 114, at 9 (citing CLARE RIBANDO SEELKE, CONG. RSCH. SERV., IF10215, 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.”).

¹¹⁷ Rietig & Dominguez Villegas, *supra* note 112; VEGA, *supra* note 89, at 6.

¹¹⁸ Maureen Meyer, *Migrants in Transit Face Crimes and Human Rights Abuses*, WASH. OFF. ON LATIN AM. (Nov. 15, 2016), <https://www.wola.org/analysis/migrants-transit-face-crimes-human-rights-abuses-mexican-government-prioritizes-detention-deportation-protection/> [https://perma.cc/SEK5-ABTC]; *see also* Edson Servan-Mori et al., *Migrants Suffering Violence While in Transit Through Mexico: Factors Associated with the Decision to Continue or Turn Back*, 16 J. IMMIGRANT MINORITY HEALTH 53, 53 (2014) (“Stigmatization, discrimination, human rights violations and violence are constant problems that [undocumented] migrants [in Mexico] face.” (first citing César Infante et al., *Violence Committed Against Migrants in Transit: Experiences on the Northern Mexican Border*, 14 J. IMMIGRANT MINORITY HEALTH 449 (2012); and then citing Cesar Infante, Peter Aggleton & Pat

ernment agents, including immigration enforcement agents, were perpetrators of or otherwise complicit in crimes against migrants.¹¹⁹ Impunity for crimes against migrants in Mexico is all but a guarantee.¹²⁰ A significant cause of migrants' vulnerability to criminal activity was what one cultural anthropologist calls "the violence of transit,"¹²¹ 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.¹²² One scholar has characterized Mexico's migration detention practices as "an externalization of U.S. border control."¹²³ Details about the conditions in Mexico's migrant carceral system are difficult to obtain, as the government operations of

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

¹¹⁹ Meyer, *supra* note 118; see also *World Report 2015: Mexico: Events of 2014*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2015/country-chapters/mexico> [<https://perma.cc/S8B5-TQM9>] (citing "complicity of prosecutors and public defenders" as a factor in the Mexican criminal system's failure to provide justice for victims).

¹²⁰ See XIMENA SUÁREZ, ANDRÉS DÍAZ, JOSÉ KNIPPEN & MAUREEN MEYER, ACCESS TO JUSTICE FOR MIGRANTS IN MEXICO: A RIGHT THAT EXISTS ONLY ON THE BOOKS 4 (2017), https://www.kinoborderinitiative.org/wp-content/uploads/2017/12/Access-to-Justice-for-Migrants_July-2017.pdf [<http://perma.cc/QT25-9JB3>] (reporting that, between 2014–2016, 99% of the crimes committed against migrants did not yield criminal sentences or punishments for the alleged perpetrators).

¹²¹ 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.

¹²² 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> [<https://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/2021/03/12/76155c10-829d-11eb-9ca6-54e187ee4939_story.html [<https://perma.cc/QAB6-93X7>].

¹²³ Campos-Delgado, *supra* note 88, at 476.

the facilities lack transparency.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 resources and strategies of control, [and] discipline and punishment that rely on the discretionary powers of overworked personnel."¹²⁵ Despite being off-limits to the public, including journalists, details have emerged about the conditions of one of Mexico's detention centers, the Siglo XXI detention facility located in the city of Tapachula near the Mexico-Guatemala border.¹²⁶ Siglo XXI, which means "twenty-first century" in Spanish, is the largest migration detention facility in Latin America.¹²⁷ Described as "a prisonlike compound,"¹²⁸ migrants at Siglo XXI have endured medical neglect¹²⁹ that, in some instances, has resulted in death.¹³⁰ Staff are abusive to detainees,¹³¹ and there is severe overcrowding.¹³² The deplorable conditions of Siglo XXI have even deterred migrants from pursuing asylum claims.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.¹³⁴ She observed that "operations at the detention facility are pretty much an exact example of the US telling Mexico what to do."¹³⁵

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

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].

¹²⁵ Campos-DeGado, *supra* note 88, at 489.

¹²⁶ Associated Press, *Overcrowding, Abuse Seen at Mexico Migrant Detention Center*, NBC NEWS (June 17, 2019), <https://www.nbcnews.com/news/latino/overcrowding-abuse-seen-mexico-migrant-detention-center-n1018231> [https://perma.cc/FLF7-H49J].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Alex Harrison-Cripps, *Mexico's Hidden Barriers to Asylum Seekers a Successful Deterrent*, MEX. NEWS DAILY (Mar. 25, 2020), <https://mexiconewsdaily.com/news/mexicos-hidden-barriers-to-asylum-seekers/> [https://perma.cc/7YDS-NYYJ].

¹³⁰ Campos-DeGado, *supra* note 88, at 476.

¹³¹ Harrison-Cripps, *supra* note 129.

¹³² Associated Press, *supra* note 126.

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

¹³⁴ Fernandez, *supra* note 124.

¹³⁵ *Id.*

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. Marouf, *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

Mexico until their immigration court hearing date,¹³⁷ exemplifies the link between border deterrence and the detention, albeit ad hoc, of migrants in Mexico. MPP, also known as the “‘Remain in Mexico’ policy,” faced legal challenges¹³⁸ and wide criticism,¹³⁹ and yet it forced approximately seventy-one thousand migrants to stay in Mexico during its almost thirteen months of operation.¹⁴⁰ Many of the migrants subjected to MPP, from Central America and elsewhere, were compelled to wait in Mexico’s dangerous border state of Tamaulipas.¹⁴¹ In one of its cities, Matamoros, the presence of thousands of migrants created a makeshift camp described as “a collection of ramshackle tent

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. RSCH. SERV., LSB10295, THE DEPARTMENT OF HOMELAND 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.*

¹³⁷ AM. IMMIGR. COUNCIL, THE “MIGRATION PROTECTION PROTOCOLS” (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols_0.pdf [<https://perma.cc/X5RH-KXWY>].

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. RSCH. 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).

¹³⁹ See, e.g., Kathryn Hampton et al., *Forced into Danger: Human Rights Violations Resulting from the U.S. Migrant Protection Protocols*, PHYSICIANS FOR HUM. RTS. (Jan. 19, 2021), <https://phr.org/our-work/resources/forced-into-danger/> [<https://perma.cc/2VZV-CW7V>].

¹⁴⁰ Lomi Kriel, *The People We Left Behind: How Closing a Dangerous Border Camp Adds to Inequities*, TEX. TRIB.-PUBLIC INVESTIGATIVE UNIT (Mar. 18, 2021), https://www.texastribune.org/2021/03/18/asylum-mexico-border-migrants/?utm_campaign=trib-social-buttons&utm_source=email&utm_medium=social [<https://perma.cc/2ATM-PNX8>]. The Trump Administration initiated MPP by on January 25, 2019, and the Biden Administration terminated it on February 11, 2021. Kevin Sieff, *They Missed Their U.S. Court Dates Because They Were Kidnapped. Now They’re Blocked from Applying for Asylum.*, WASH. POST (Apr. 24, 2021), <https://www.washingtonpost.com/world/2021/04/24/mexico-border-migrant-asylum-mpp/> [<https://perma.cc/TP4P-935K>]. COVID-19 has led to postponement of MPP hearings, exacerbating the problem. Stephen Meili, *Asylum Under Attack: Is It Time for a Constitutional Right?*, 26 BUFF. HUM. RTS. L. REV. 147, 171 (2019–2020).

¹⁴¹ HUM. RTS. FIRST, ORDERS FROM ABOVE: MASSIVE HUMAN RIGHTS ABUSES UNDER TRUMP ADMINISTRATION RETURN TO MEXICO POLICY 1 (2019), <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf> [<https://perma.cc/6RXE-Q3M3>] (“[T]he U.S. State Department has designated the state of Tamaulipas a Level 4 threat risk—the same warning as Afghanistan, Iraq, Syria, Somalia, North Korea, and Yemen.”).

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.

¹⁴³ Nicole Narea, *The Abandoned Asylum Seekers on the US-Mexico Border*, VOX (Dec. 20, 2019), <https://www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-usiom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez> [<https://perma.cc/M2X3-3GRP>].

¹⁴⁴ *Id.*

¹⁴⁵ Kriel, *supra* note 140; Laura Gottesdiener, *Mexican Camp That Was Symbol of Migrant Misery Empties Out Under Biden*, REUTERS, Mar. 7, 2021, <https://www.reuters.com/article/us-usa-immigration-mexico-feature/mexican-camp-that-was-symbol-of-migrant-misery-empties-out-under-biden-idUSKBN2AZ0GB> [<http://perma.cc/NQ55-K2JP>].

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-G2GK>] (“Fences erected by the Mexican government keep the camp largely cut off from reporters and locals.”).

¹⁴⁷ Gottesdiener, *supra* note 145 (“[The] MPP program might have succeeded in obscuring the plight of these migrants from the American public if it were not for the Matamoros camp.”).

¹⁴⁸ HUM. RTS. FIRST, *supra* note 141, at 5–6. Generally, MPP has caused over 1,500 reported cases of murder, rape, and other violent assaults. *Delivered to Danger: U.S. Government Sending Asylum Seekers and Migrants to Danger* (Feb. 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico> [<http://perma.cc/3QEB-GYZA>]; HUM. RTS. FIRST, HUMAN RIGHTS FIASCO: THE TRUMP ADMINISTRATION’S DANGEROUS ASYLUM RETURNS CONTINUE (2019), <https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf> [<http://perma.cc/DEW7-5G3G>]; see also Nicole Hallett, *Immigrant Women in the Shadow of #MeToo*, 49 U. BAL. L. REV. 59, 74–77 (2019) (detailing incidents of gender-based violence caused by MPP).

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.¹⁵⁰ Though a portion of the funding for CARSI was designated for development projects, there was a substantial focus on securitizing the region.¹⁵¹ 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.¹⁵² CARSI eventually became part of the U.S. Strategy for Engagement in Central America (the Central America strategy).¹⁵³ 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.¹⁵⁴

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).¹⁵⁵ ACAs constitute a type of “protection elsewhere”

¹⁵⁰ Michael A. Clemens & Hannah M. Postel, *Deterring Emigration with Foreign Aid: An Overview of Evidence from Low-Income Countries*, 44 POPULATION & DEV. REV. 667, 669 (2018).

¹⁵¹ See Press Release, The White House, Off. of the Press Sec’y, FACT SHEET: United States Support for Central American Citizen Security (May 4, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/04/fact-sheet-united-states-support-central-american-citizen-security> [https://perma.cc/67VP-YAQY] (discussing the US government’s motivations for supporting CARSI).

¹⁵² Nancy Hiemstra, *Pushing the US-Mexico Border South: United States’ Immigration Policing Throughout the Americas*, 5 INT’L J. MIGRATION & BORDER STUD. 44, 49 (2019).

¹⁵³ See PETER J. MEYER, CONG. RSCH. SERV., IF10371, U.S. STRATEGY FOR ENGAGEMENT IN CENTRAL AMERICA: AN OVERVIEW 1–2 (2021).

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.

¹⁵⁵ See Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 83,597 (Dec. 22, 2020); Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, 84 Fed. Reg. 64,095 (Nov. 20, 2019); Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 25,462 (May 1, 2020). The Trump Administration reportedly sought an additional agreement with Panama, but it never materialized. See Nick Miroff, *U.S. Seeks Deal to Send Asylum Seekers from Africa and Asia to Panama*, WASH. POST (Aug. 21, 2019), <https://www.washingtonpost.com/news/immigration/wp/2019/08/21/us-seeks-deal-to-send-asylum-seekers-from-africa-and-asia-to-panama/>.

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.”¹⁵⁶ They also embody the notion of “responsibility sharing” or “burden shifting.”¹⁵⁷ 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.”¹⁵⁸

The concept of responsibility sharing can represent a utilitarian approach to migration, as it benefits both global security and migrants.¹⁵⁹ 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.¹⁶⁰ 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.”¹⁶¹ One tactic used by the

www.washingtonpost.com/immigration/us-seeks-deal-to-send-asylum-seekers-from-africa-and-asia-to-panama/2019/08/20/30bbde66-c37f-11e9-9986-1fb3e4397be4_story.html [https://perma.cc/N838-BCGY] (reporting on Trump’s efforts to establish an agreement with Panama).

¹⁵⁶ Daniel Ghezelbash, *Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees*, 68 AM. J. COMPAR. L. 479, 496 (2020) (citing Colloquium, *The Michigan Guidelines on Protection Elsewhere*, 28 MICH. J. INT’L L. 207 (2007)).

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.

¹⁵⁸ *U.S. and Honduras Address Migration Challenges*, SHAREAMERICA (Sept. 30, 2019), <https://share.america.gov/u-s-and-honduras-address-migration-challenges/> [https://perma.cc/783D-EMLF] (emphasis omitted).

¹⁵⁹ Kritzman-Amir & Berman, *supra* note 4, at 625–26. On December 10, 2018, 164 members of the U.N. General Assembly signed the Global Compact for Regular Migration with the aim, in part, to create greater sharing of responsibility for migration flows. Felipe A. Filomeno, *Who Is Responsible for Migrants?*, THE CONVERSATION (Dec. 18, 2018), <https://theconversation.com/who-is-responsible-for-migrants-108388> [https://perma.cc/4JY8-AMU2]. The agreement has been criticized, however, because it is not binding and does not require states to do more than what they already are doing. Lex Rieffel, *The Global Compact on Migration: Dead on Arrival?*, BROOKINGS (Dec. 12, 2018), <https://www.brookings.edu/blog/up-front/2018/12/12/the-global-compact-on-migration-dead-on-arrival/> [https://perma.cc/NT6Q-P85Z].

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.”).

¹⁶¹ U.S. SENATE DEMOCRATIC STAFF, CRUELTY, COERCION, AND LEGAL CONTORTIONS: THE TRUMP ADMINISTRATION’S UNSAFE ASYLUM COOPERATIVE AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR 10 (2021), <https://www.foreign.senate.gov/imo/media/doc/Cruelty,%20Coercion,%20and%20Legal%20Contortions%20--%20SFRC%20Democratic%20Staff%20Report.pdf> [https://perma.cc/78L2-UZXB].

Trump Administration was to withhold development aid aimed at addressing the root causes of migration from the region.¹⁶² The Report also describes an intensification of coercive tactics by then-President Donald Trump himself before the countries' leaders signed the respective ACAs.¹⁶³

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.¹⁶⁴ The Northern Triangle ACAs technically constitute "Safe Third Country agreements,"¹⁶⁵ 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."¹⁶⁶ In a let-

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." (first citing Reuters Staff, *U.S. Ending Aid to El Salvador, Guatemala, Honduras Over Migrants*, REUTERS, Mar. 30, 2019, <https://www.reuters.com/article/us-usa-immigration-aid/u-s-ending-aid-to-el-salvador-guatemala-honduras-over-migrants-idUSKCN1RB0OR> [<https://perma.cc/V3UF-EMDD>]; and then citing MEYER, *supra* note 153)).

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." (first quoting Donald Trump (@realDonaldTrump), TWITTER (July 23, 2019), <https://twitter.com/realDonaldTrump/status/1153641906699681795> [<https://perma.cc/C8GG-3NR3>]; and then quoting Donald Trump (@realDonaldTrump), TWITTER (July 23, 2019), <https://twitter.com/realdonaldtrump/status/1153641907781873664> [<https://perma.cc/HCR8-HSNY>])).

¹⁶⁴ In January 2020, several Central American asylum-seekers and immigrant advocacy groups filed a complaint for declaratory and injunctive relief for violations of the Refugee Act, Immigration and Nationality Act, Administrative Procedure Act, Foreign Affairs and Restructuring Act of 1998, and the Suspension Clause. Complaint at 1–13, *U.T. v. Barr*, No. 1:20-cv-00116 (D.D.C. Jan. 15, 2020). Among other things, the complaint alleges that the ACA countries are extremely dangerous and unfit for asylum seekers; the ACAs are inconsistent with international law regarding safe third country agreements; and the ACA countries are unprepared to receive asylum seekers. *Id.* at 2–4.

¹⁶⁵ Susan Gzesh, "Safe Third Country" Agreements with Mexico and Guatemala Would Be Unlawful, JUST SEC. (July 15, 2019), <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/> [<http://perma.cc/TQ6Q-L38Z>]; *Asylum Cooperative Agreement Background*, JUST. FOR IMMIGR., <https://justiceforimmigrants.org/what-we-are-working-on/asylum-cooperative-agree-ment-background/> [<https://perma.cc/TL33-PDDZ>].

¹⁶⁶ 8 U.S.C. § 1158(a)(2)(A). Canada and the United States have had a Safe Third Country Agreement (STCA) that has been in effect since December 29, 2004. See *Canada-U.S. Safe Third Country Agreement*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html> [<https://perma.cc/8V3C-B593>] (July 23, 2020). Amnesty International, the Canadian Council for Refugees, the Canadian Council of Churches, and individual claimants challenged STCA in the Federal Court of Canada. KIRSTEN MOSEY, PROJECT PLOUGHSHARES, THE SAFE THIRD COUNTRY AGREEMENT IN 2021, at 1 (2021), <https://ploughshares.ca/wp-content/uploads/2021/03/SCTATimelineSpotlightV3.pdf> [<https://perma.cc/MP76-84EE>] (noting that, in 2005, the international claimants first challenged STCA, but their case was overturned in 2008 on technical grounds). In July of 2020, the Canadian Federal Court ruled the STCA unconstitutional. See April Yeung & Ibnat Islam, Opinion, *The Safe Third Country Agreement Hurts Refugees. Canada Needs to Ditch It.*, IPOLITICS (Mar. 5, 2021), <https://ipolitics.ca/2021/03/05/the-safe-third-country-agreement-hurts-refugees-canada-needs-to-ditch-it/> [<https://perma.cc/BVF9-Q7J3>]. The Canadian government appealed, and the Federal Court

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.”¹⁶⁷ Soon after taking office, the Biden Administration announced the suspension of the Northern Triangle ACAs.¹⁶⁸

The transnational migration deterrence regime in the Americas represents a system with “multidirectional” U.S. borders.¹⁶⁹ It is one that has transformed the region into what has been described as “Fortress North America.”¹⁷⁰ 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. *Id.*

¹⁶⁷ Letter from Senator Robert Menendez et al., Regarding the “Asylum Cooperative Agreements,” to Secretary Michael R. Pompeo et al. 3 (Feb. 5, 2020), <https://www.foreign.senate.gov/imo/media/doc/Annex%20-%20Correspondence.pdf> [<https://perma.cc/4QL5-3SEU>]; see also HUM. RTS. WATCH: REFUGEES INT’L, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE US-GUATEMALA ASYLUM COOPERATIVE AGREEMENT 1 (2020) (arguing that Guatemala “does not meet the standard required in US law for a ‘safe third country’” (quoting 8 U.S.C. § 1158(a)(2)(A)), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#_ftn1 [<https://perma.cc/F6HG-RN3X>]); GRACE FUSCOE ET AL., GEO. L. HUM. RTS. INST., DEAD ENDS: NO PATH TO PROTECTION FOR ASYLUM SEEKERS UNDER THE GUATEMALA ASYLUM COOPERATION AGREEMENT 12 (2020), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2020/06/Dead-Ends-Report_web.pdf [<https://perma.cc/KFJ3-HMET>] (asserting that the agreement violates U.S. law and does not protect the rights of migrants seeking asylum as required by international law).

¹⁶⁸ Press Statement, Antony J. Blinken, Sec’y of State, U.S. Dep’t of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/> [<https://perma.cc/4P7R-TCEW>].

¹⁶⁹ See *supra* note 19 and accompanying text.

¹⁷⁰ Ernesto Castañeda, Michael Danielson & Jayesh Rathod, *Fortress North America: Theorizing a Regional Approach to Migration Management* (2021) (unpublished manuscript), https://www.academia.edu/46708197/Fortress_North_America_Theorizing_a_Regional_Approach_to_Migration_Management [<https://perma.cc/9UT5-ZUPV>].

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 A¹⁷¹ and Section B¹⁷² of this Part discuss transnational migration deterrence efforts in Europe. Sections C¹⁷³ and Section D¹⁷⁴ 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,"¹⁷⁵ redrawing, as one geography studies Professor writes, "[t]he map of Europe . . . [with] the restructuring of border assemblages."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.¹⁷⁷ The external border states of the EU have become effectively the region's "outpost border guards."¹⁷⁸

¹⁷¹ See *infra* notes 175–191 and accompanying text.

¹⁷² See *infra* notes 192–223 and accompanying text.

¹⁷³ See *infra* notes 224–236 and accompanying text.

¹⁷⁴ See *infra* notes 237–266 and accompanying text.

¹⁷⁵ The Dublin Regulation and the Schengen Convention, both ratified in 1990, gave rise to the term "Fortress Europe" to connote criticism of the region's heightened migration control. See Ashley Binetti Armstrong, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, 20 CHI. J. INT'L L. 332, 336 (2020) (discussing the Dublin Regulation's connection to the term); Hassan Ould Moctar, *A Brief History of Fortress Europe*, JADALIYYA (July 18, 2016) (presenting a history of the policies that led to "Fortress Europe"), <https://www.jadaliyya.com/Details/33411> [<https://perma.cc/QSD3-ZE7J>]; see also John Reynolds, *Fortress Europe, Global Migration & The Global Pandemic*, 114 AM. J. INT'L L. UNBOUND 342, 342 (2020) ("In the EU institutional worldview, Europe must be 'shielded' from the threats of human mobility."); Paul Strauch, Comment, *When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation to Combat Smuggling in Libya's Territorial Sea*, 126 YALE L.J. 2421, 2423 (2017) ("The term 'Fortress Europe' is now commonplace." (citing *Abdullahi Elmi v. Malta*, App. Nos. 25794/13 & 28151/13, ¶ 3 (Nov. 22, 2016), <https://hudoc.echr.coe.int/FRE#%7B%22itemid%22%3A%22001-168780%22%7D> [<https://perma.cc/R3CG-6Y9K>])).

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).

¹⁷⁷ MOUNTZ, *supra* note 40, at 69.

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,”¹⁷⁹ there was a “growing indifference and hostility to migrants attempting to reach the EU by sea,”¹⁸⁰ leading to scores of deaths in the Mediterranean.¹⁸¹ Migration to the region began intensifying in 2011, in the aftermath of the Arab Spring.¹⁸² With continued political unrest in the Middle East and Africa,¹⁸³ the year 2015 was “the deadliest year on record for migrants” attempting to cross the Mediterranean Sea into Europe.¹⁸⁴ It also was the year the EU tripled its budget for migration control.¹⁸⁵

The media portrayed discord amongst member states regarding how to respond to the spike in migration to the region.¹⁸⁶ 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.¹⁸⁷ 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”¹⁸⁸—at least when it comes to the sovereignty of destination states, in-

¹⁷⁹ The characterization of a migration “crisis” accelerated both interior and transnational migration detention in Europe. See generally IZABELLA MAJCHER, MICHAEL FLYNN & MARIETTE GRANGE, *IMMIGRATION DETENTION IN THE EUROPEAN UNION: IN THE SHADOW OF THE “CRISIS”* (Elwood D. Carlson & Stuart Gietel-Basten eds., 2020) (ebook) (detailing how the label of crisis normalized the expansion of migrant detention in the region).

¹⁸⁰ LOYD & MOUNTZ, *supra* note 14, at 216.

¹⁸¹ Between 1993 and 2015, twenty thousand migrants died trying to cross the Mediterranean Sea. *Id.* Over seven thousand of those deaths occurred in 2014 and 2015. *Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015*, UNITED NATIONS INT’L ORG. FOR MIGRATION (Dec. 31, 2015), <https://www.iom.int/news/over-3770-migrants-have-died-trying-cross-mediterranean-europe-2015> [https://perma.cc/8XUJ-U2L2].

¹⁸² Sinha, *supra* note 21, at 180.

¹⁸³ *Id.*

¹⁸⁴ *Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015*, *supra* note 181.

¹⁸⁵ Nikolas Feith Tan & Thomas Gammeltoft-Hansen, *A Topographical Approach to Accountability for Human Rights Violations in Migration Control*, 21 GERMAN L.J. 335, 335 (2020).

¹⁸⁶ WALIA, *supra* note 45, at 126–27 (“News headlines frequently decry the end of the EU. We are told that the Schengen Agreement is breaking down with internal walls going up; core and peripheral countries are squabbling about the Dublin Regulation; technocrats are debating how to best manage migration flows; and far-right and liberal-centrist parties are divided on refugee quotas.”).

¹⁸⁷ *Id.* at 127. This does not take into account, however, the fact that the “Brexit” movement that ultimately led to the United Kingdom leaving the European Union was significantly driven by anti-immigrant sentiments during the period of heightened migration into the region. Amanda Garrett, Commentary, *The Refugee Crisis, Brexit, and the Reframing of Immigration in Britain*, EUROPE NOW (Aug. 1, 2019), <https://www.europenowjournal.org/2019/09/09/the-refugee-crisis-brexit-and-the-reframing-of-immigration-in-britain/> [https://perma.cc/X563-45T9].

¹⁸⁸ ALBAHARI, *supra* note 178, at 15 (describing his project as an exploration of “the geopolitical fulcrum of a flexible sovereignty that—through Frontex patrols, Eurosur surveillance, bilateral agreements, and EU border assistance missions—reaches unapologetically beyond national and EU boundaries, from Tunisia to Belarus”).

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.¹⁸⁹ The agreement, which requires Morocco to readmit migrants deported from Spain, remains in place today.¹⁹⁰ The Spain-Morocco agreement represents a transnational arrangement that imposes "upstream securitization"¹⁹¹—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 enter¹⁹²—and through agreements with transit and neighbor-

¹⁸⁹ Acuerdo Entre el Reino de España y el Reino de Marruecos Relativo a la Circulación de Personas, el Tránsito y la Readmisión de Extranjeros Entrados Ilegalmente [Agreement Between the Kingdom of Spain and the Kingdom of Morocco on the Movement of People, the Transit and the Readmission of Foreigners Who Have Entered Illegally], B.O.E. n. 100, Feb. 13, 1992, at 13969, translated in FPizzutelli, *The 1992 Spain-Morocco Readmission Agreement *in English and Spanish*, THE RTS. ANGLE (Dec. 19, 2013), <https://therightsangle.wordpress.com/tag/morocco/> [<https://perma.cc/J3ZT-RR4H>].

¹⁹⁰ WALLIA, *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 "impos[ing] cooperation on peripheral states in order to limit immigration overflows").

¹⁹² Jan-Paul Brekke & Grete Brochmann, *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Difference, and the Dublin Regulation*, 28 J. REFUGEE STUD. 145, 146 (2014). The 1990 Dublin Convention created the Dublin Regulation with the goal of preventing migrants from seeking asylum in multiple EU states. Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. L.J. 57, 66 (2016). There are considerable concerns with the Dublin Regulations related to its effect on international human rights protections for migrants. See, e.g., James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719, 726 (1993) ("Because there is no procedural or substantive harmonization of affirmative norms of refugee law in Europe, recognition rates for persons with comparable claims differ quite significantly from country to country." (first citing AMNESTY INT'L, EUROPE: HUMAN RIGHTS AND THE NEED FOR A FAIR ASYLUM POLICY 12–15 (1991); then citing KAY HAILBRONNER, MÖGLICHKEITEN UND GRENZEN EINER EUROPÄISCHEN KOORDINIERUNG DES EINREISE-UND ASYLRECHTS [POSSIBILITIES AND LIMITS OF EUROPEAN COORDINATION OF ENTRY AND ASYLUM LAW] 126 (1989); and then citing UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), UNHCR (Aug. 16, 1991), <https://www.unhcr.org/en-us/protection/operations/>).

ing states that deterred migrants from reaching the region's shores.¹⁹³ 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."¹⁹⁴ The prevalent use of detention to deter migration into Europe has rendered the Mediterranean what one scholar calls a "carceral seascape."¹⁹⁵

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."¹⁹⁶ 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."¹⁹⁷ The EU formalized the hotspots approach to migration management in 2015, with the first site opening on the Italian island of Lampedusa in September 2015.¹⁹⁸ Hotspots blur the line between reception and detention¹⁹⁹ and have been plagued with serious human rights concerns, including severe overcrowding.²⁰⁰

43662e942/unhcr-position-conventions-recently-concluded-europe-dublin-schengen-conventions.html [https://perma.cc/QJE6-XCPR]); Cathryn Costello, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?*, 7 EUR. J. MIGRATION & L. 35, 42 (2005) ("Most academic commentary on the Dublin Convention has been overwhelmingly negative. It simply does not work." (citing Alberto Achermann & Mario Gattiker, *Safe Third Countries: European Developments*, 7 INT'L J. REFUGEE L. 19, 22 (1995))).

¹⁹³ Michael Flynn, *There and Back Again: On the Diffusion of Immigration Detention*, 2 J. ON MIGRATION & HUM. SEC. 165, 185–86 (2014).

¹⁹⁴ AKKERMAN, *supra* note 27, at 3.

¹⁹⁵ Maurice Stierl, *The Mediterranean as a Carceral Seascape*, 88 POL. GEOGRAPHY, no. 102417, 2021, at 1, 1.

¹⁹⁶ Tazzioli, *supra* note 176, at 2765.

¹⁹⁷ MOUNTZ, *supra* note 40, at 61 (citation omitted). The term "hotspots" originated in the context of criminology. See Tazzioli, *supra* note 176, at 2766 ("Hotspot" is not a term that designates migration control hubs only. The nomenclature of hotspots had been firstly used in the 1990s in literature on criminology and then had been adopted by the EU for designating 'logistical hotspots' of crime." (footnote omitted) (citing Mark Neocleous & Maria Kastrinou, *Commentary, The EU Hotspot: Police War Against the Migrant*, RADICAL PHIL., Nov./Dec. 2016, at 1)).

¹⁹⁸ Tazzioli, *supra* note 176, at 2764.

¹⁹⁹ *Id.*

²⁰⁰ GAIA ROMEO, EUROMED RTS., THE NEW PACT ON MIGRATION AND ASYLUM: THE GLOBAL IMPACT 23 (Euromed Rights' Migration & Asylum Programme eds., 2021), https://euromedrights.org/wp-content/uploads/2021/05/EN_4AnalysisPACT.pdf [https://perma.cc/KXM6-N34G] (noting that the hotspot "facilities are so horribly overcrowded that many people live in tents or makeshift shelters akin to 'slums' located in the area next to the proper hotspot," for example, "the occupancy rates at the end of 2019 [in the Greek hotspots] ranged from 290% in Leros to 1200% in Samos").

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.’”²⁰¹ Nonetheless, the EU continues to provide both financial and on-site operational assistance for hotspots.²⁰²

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.²⁰³ 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,²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ In 2020, the states renewed the MOU for an additional three years.²⁰⁷ 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.”²⁰⁸ The International Organi-

²⁰¹ *Hotspot Italy: Abuses of Refugees and Migrants*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/campaigns/2016/11/hotspot-italy/> [https://perma.cc/L9J9-P929].

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

²⁰³ Azadeh Dastyari & Asher Hirsch, *The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy*, 19 HUM. RTS. L. REV. 435, 446–47 (2019).

²⁰⁴ See *infra* notes 292–298 and accompanying text.

²⁰⁵ See *infra* notes 299–302 and accompanying text.

²⁰⁶ Lorenzo Tondo, *Italy to Renew Anti-migration Deal with Libya*, THE GUARDIAN (Oct. 31, 2019), <https://www.theguardian.com/world/2019/oct/31/italy-to-renew-anti-migration-deal-with-libya> [https://perma.cc/M7QG-VXRN].

²⁰⁷ *Libya: Renewal of Migration Deal Confirms Italy’s Complicity in Torture of Migrants and Refugees*, AMNESTY INT’L (Jan. 30, 2020), <https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/> [https://perma.cc/XWD4-RTPL].

²⁰⁸ *Id.* (quoting Marie Struthers, Reg’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.*

zation for Migration reported that amidst the COVID-19 pandemic in 2020, “71 percent of migrants in Libya claimed to have limited or no access to health services.”²⁰⁹

In addition to support for interdictions, the MOU includes provisions for “temporary reception camps in Libya” with financial support from Italy and the EU.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.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.²¹² Others have described unhygienic and overcrowded conditions, physical abuse, extortion, malnutrition, and work exploitation.²¹³ There is no domestic judicial oversight of Libyan detention facilities.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.²¹⁵ The Pact also eliminates the principle that migration detention should only be utilized as a last resort.²¹⁶ Advocates have criticized the EC’s Pact as encouraging the proliferation of transnational migration

²⁰⁹ Kuschminder, *supra* note 208.

²¹⁰ Dastyari & Hirsch, *supra* note 203, at 451–52.

²¹¹ *Id.* at 453.

²¹² U.N. SUPPORT MISSION IN LIBYA & OFF. OF THE HIGH COMM’R FOR HUM. RTS., DESPERATE AND DANGEROUS: REPORT ON THE HUMAN RIGHTS SITUATION OF MIGRANTS AND REFUGEES IN LIBYA 4 (2018), <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf> [<https://perma.cc/3JUG-MMZ9>].

²¹³ *Nowhere Safe: Cycle of Abuses Against Refugees and Migrants in Libya*, AMNESTY INT’L (Sept. 2020), <https://www.amnesty.org/en/latest/campaigns/2020/09/nowhere-safe-cycle-of-abuses-against-refugees-and-migrants-in-libya/> [<https://perma.cc/5D9M-6N34>]; Stierl, *supra* note 195, at 5 (documenting Bangladeshi migrants describing “being incarcerated shortly after arriving in Libya and tortured by ‘the mafia’ as they referred to the criminal networks operating within Libya”); Dastyari & Hirsch, *supra* note 203, at 452–53 (describing the overcrowded and unhygienic conditions and reports of physical and sexual abuse); AKKERMAN, *supra* note 27, at 4 (describing the conditions endured by migrants in Libyan detention centers as “deeply inhumane”).

²¹⁴ Dastyari & Hirsch, *supra* note 203, at 453.

²¹⁵ AKKERMAN, *supra* note 27, at 42.

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>].

detention, characterizing its objective of providing a “fresh start” for migration control in the region “as a ‘fresh start’ only for human rights violations.”²¹⁷

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.²¹⁸ Thereafter, the Danish government signed an agreement with Rwanda to build a migrant “processing” facility.²¹⁹ 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.²²⁰ There have been documented human rights abuses in many of the facilities,²²¹ but the degree of involvement by the EU with these states with respect to migration detention varies.²²² 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.²²³

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

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 Kirişçi, M. Murat Erdoğan & Nihal Eminoglu, *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://perma.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.

²¹⁸ *Denmark Asylum: Law Passed to Allow Offshore Asylum Centres*, BBC NEWS (June 3, 2021), <https://www.bbc.com/news/world-europe-57343572> [<https://perma.cc/Z3VY-RPVB>].

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 advocat[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 WALIA, *supra* note 45, at 108.

entry.²²⁴ 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.²²⁵ 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.²²⁶

Migration flows by sea toward Australia intensified in the 1970s,²²⁷ in large part due to the “Indochinese exodus” beginning in 1975.²²⁸ 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.²²⁹ 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.²³⁰

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.²³¹ Around this same time, Australia enhanced significantly its onshore enforcement policy by subjecting migrants who entered without authorization to mandatory and indefinite detention.²³² The Australian government began building what has become a formidable transnational deterrence regime with the implementation of the “Pacific Solution” in the months following 9/11.²³³ Conservative then-Prime Minister John Howard used the 9/11

²²⁴ Asher Lazarus Hirsch, *The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls*, 36 REFUGEE SURV. Q. 48, 55 (2017) (stating that the new colonies followed Britain’s Aliens Act of 1836).

²²⁵ *Id.* Such policies included migrant carrier sanctions. *Id.* at 59–60.

²²⁶ *See id.* at 56 (describing the 1901 Immigration Restriction Act as “the cornerstone of Australia’s ‘White Australia Policy’, a policy which remained until the 1970s”).

²²⁷ Gabrielle Holly, *Challenges to Australia’s Offshore Detention Regime and the Limits of Strategic Tort Litigation*, 21 GERMAN L.J. 549, 551 (2020).

²²⁸ U.N. HIGH COMM’R FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION 79 (2000) (“The upheavals which followed the communist victories in 1975 in the former French colonies of Indochina—Viet Nam, Cambodia, and Laos—caused more than three million people to flee these countries over the next two decades.”).

²²⁹ Antje Missbach, *Waiting on the Islands of ‘Stuckedness.’ Managing Asylum Seekers in Island Detention Camps in Indonesia: From the Late 1970s to the Early 2000s*, 6 AUSTRIAN J.S.-E. STUD. 281, 288 (2013). A neighbor to Australia, the most popular destination country for migrants in the Asian-Pacific region, Indonesia was a natural buffer to intercept migrants with its more than seventeen thousand islands, of which two-thirds are uninhabited. *Id.* at 283.

²³⁰ *Id.* at 283.

²³¹ Dastyari & Hirsch, *supra* note 203, at 441.

²³² WALIA, *supra* note 45, at 98. This legislative change was in 1992, The Australian Human Rights Commission reported in 2019 that the average length of detention in Australia’s onshore detention facilities is five hundred days. *Id.*

²³³ *Id.* at 99; Holly, *supra* note 227, at 551.

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.²³⁴ 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.²³⁵ Influenced by the U.S.-Caribbean model, Australia has expanded considerably its transnational migration deterrence system over the past two decades.²³⁶

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.²³⁷ 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.”²³⁸

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.²³⁹ Indonesia, as a “key transit country” for unauthorized migration to Australia,²⁴⁰ has played an increasingly important role in Australia’s transnational migration deterrence system.²⁴¹ In 2000, the two states signed an agreement through which Australia funded the International Organization for Migration (IOM)’s efforts in Indonesia to control unau-

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 . . .”).

²³⁷ Offshore detention is not just for arriving migrants: “Australia’s tough immigration laws also allow it to lock up what it terms ‘unlawful non-citizens’ like the Murugappans in detention for an indefinite length of time—a policy that has also been strongly criticised by the UN and human rights groups.” Biloela: *Australia Pressured to Free Refugee Family Detained on Christmas Island*, BBC NEWS (June 9, 2021), <https://www.bbc.com/news/world-australia-57405107> [<https://perma.cc/R7MF-BUXU>]; Rachael Bongiorno, *Australia Detained This Family on a Remote Island—Alone*, Posting to Refugees, THE WORLD (Mar. 24, 2020), <https://www.pri.org/stories/2020-03-24/australia-detained-family-remote-island-alone> [<https://perma.cc/6VHA-SBP2>].

²³⁸ Ben Doherty, *A Short History of Nauru, Australia’s Dumping Ground for Refugees*, THE GUARDIAN (Aug. 9, 2016), <https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees> [<https://perma.cc/H8AQ-TLFT>].

²³⁹ See *supra* notes 237–239 and accompanying text.

²⁴⁰ Francesca Mussi & Nikolas Feith Tan, *Comparing Cooperation on Migration Control: Italy–Libya and Australia–Indonesia*, 10 IRISH Y.B. INT’L L. 87, 96–97 (2015).

²⁴¹ *Id.*

thorized migration, including funding migration detention centers.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.²⁴³ The conditions in these facilities have been reported to be violent, overcrowded, and otherwise in violation of international human rights norms.²⁴⁴ There also have been many reported migrant deaths in these detention centers.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.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.²⁴⁷ Indonesia receives ongoing financial incentives and training from Australia "to construct detention centers and enhance its border control measures."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:

²⁴² *Id.*

²⁴³ Asher Lazarus Hirsch & Cameron Doig, *Outsourcing Control: The International Organization for Migration in Indonesia*, 22 INT'L J. HUM. RTS. 681, 691 (2018) (noting that Australia funds the detention of asylum seekers in thirteen detention centers, twenty makeshift detention facilities, and forty-two community housing facilities across Indonesia).

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, *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).

²⁴⁵ Dastyari & Hirsch, *supra* note 203, at 444.

²⁴⁶ WALIA, *supra* note 45, at 100–01 ("Indonesia was pulled into the geopolitical orbit of White Australia and colonial carcerality." (citing Amy Nethery & Carly Gordyn, *Australia-Indonesia Cooperation on Asylum-Seekers: A Case of 'Incentivised Policy Transfer'*, 68 AUSTL. J. INT'L AFFS. 177, 177–93 (2014))).

²⁴⁷ Samuel Tyrer, *An Australia-Indonesia Arrangement on Refugees: Exploring the Structural, Legal and Diplomatic Dimensions*, 38 ADELAIDE L. REV. 113, 122–23 (2017).

²⁴⁸ WALIA, *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 "[s]old [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.

²⁵¹ Julia Hollingsworth & Angus Watson, *Taking Australia's Asylum Seekers Was a 'Deal with the Devil': Former Nauru Leader*, CNN (Apr. 18, 2019), <https://www.cnn.com/2019/04/18/australia/nauru-former-president-intl/index.html> [<https://perma.cc/4S6C-SM8C>].

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).

²⁵³ *Australia Urged to Evacuate Offshore Detainees Amid Widespread, Acute Mental Distress*, U.N. NEWS (Oct. 12, 2018), <https://news.un.org/en/story/2018/10/1022972> [<https://perma.cc/6XD7-YBDJ>]; *Pathways to Protection: A Human Rights-Based Response to the Flight of Asylum Seekers by Sea*, AUSTRALIAN HUM. RTS. COMM'N (Sept. 13, 2016), <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/pathways-protection-human-rights-based-response> [<https://perma.cc/57QL-PRR7>]; *Australia: Appalling Abuse, Neglect of Refugees on Nauru*, HUM. RTS. WATCH (Aug. 2, 2016), <https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru> [<https://perma.cc/5EQ8-VTXL>].

²⁵⁴ James Grubel, *Australia Reopens Asylum Detention in Nauru Tent City*, REUTERS, Sept. 14, 2012, <https://www.reuters.com/article/us-australia-asylum/australia-reopens-asylum-detention-in-nauru-tent-city-idUSBRE88D07120120914> [<https://perma.cc/A2WV-2YKS>].

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.²⁵⁶ Journalists have described PNG's facility, the Manus Island Regional Processing Centre, as a "tropical purgatory" and "Australia's greatest modern controversy."²⁵⁷ 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.²⁵⁸ Like the United States and European states, Australia tied development aid to PNG's ability to support Australia's border deterrence measures.²⁵⁹ 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.²⁶⁰

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.²⁶¹ The Christmas Island facility temporarily closed in 2018 but reopened in 2019.²⁶² In early 2021 a riot erupted, ren-

²⁵⁶ S.L., *The Grim History of Christmas Island*, THE ECONOMIST (Jan. 31, 2020), <https://www.economist.com/the-economist-explains/2020/01/31/the-grim-history-of-christmas-island> [https://perma.cc/PQ3T-PDWH]; *Manus: Timeline of Controversial Australian Detention Centre*, BBC NEWS (Oct. 31, 2017), <https://www.bbc.com/news/world-australia-41813219> [https://perma.cc/7Y7Z-Z5NB].

²⁵⁷ Helen Davidson, 'Six Years and I Didn't Achieve Anything': Inside Manus, A Tropical Purgatory, THE GUARDIAN (July 20, 2019), <https://www.theguardian.com/australia-news/2019/jul/21/six-years-and-i-didnt-achieve-anything-inside-manus-a-tropical-purgatory> [https://perma.cc/ZMH8-WCNF].

²⁵⁸ *Id.*; see *Manus: Timeline of Controversial Australian Detention Centre*, *supra* note 239.

²⁵⁹ Larking, *supra* note 252, at 89.

²⁶⁰ The Supreme Court found that the forceful detention of asylum seekers in Manus was "unconstitutional and illegal" under the state's constitution and ordered the PNG and Australian governments to end the detention of the asylum seekers. *Namah v. Pato* [2016] PGSC 13, para. 74 (Papua N.G.).

²⁶¹ Paul Karp, *Fresh Disturbance at Christmas Island Detention Centre Due to 'Inhumane' Conditions*, *Advocates Say*, THE GUARDIAN (Jan. 10, 2021), <https://www.theguardian.com/australia-news/2021/jan/10/fresh-disturbance-at-christmas-island-detention-centre-due-to-inhumane-conditions-advocates-say> [https://perma.cc/7QAT-6HWC].

²⁶² *Statistics on People in Detention in Australia*, REFUGEE COUNCIL OF AUSTL., <https://www.refugeecouncil.org.au/detention-australia-statistics/3/> [https://perma.cc/K4VA-59Y3] (Mar. 24, 2022). The Christmas Island repetitive closures and reopenings demonstrate that in reality Australia's assisted migration detention systems are "embedded in a reiterative pattern of openings and closures which mark the persistence, and indeed *expansion*, of confinement and punishment, rather than its 'end.'" Maria Giannacopoulos & Claire Loughnan, 'Closure' at Manus Island and Carceral Expansion in the Open Air Prison, 17 GLOBALIZATIONS 1118, 1119–20 (2020) ("By tracking the patterns of penal closures and openings which are utilized by the state to expand the boundaries of refugee punishment we draw from and build on a significant body of literature that has for at least two decades connected border violence of the Australian state with the imperial control of subjugated populations." (citations omitted)). The Australian Human Rights Commission, citing overcrowded conditions in the Island's detention centers, called for its closure particularly in the context of the COVID-19 pandemic. Youssef Saudie, *Christmas Island Should Be Closed in Case of a COVID Outbreak*, *Australian Human Rights Commission Says, but No Cases to Date*, ABC NEWS (June 18, 2021), <https://www.abc.net.au/news/2021-06-19/human-rights-commission-close-christmas-island-detention-centre/100223052> [https://perma.cc/HZA5-XYHL].

dering conditions at the center to be “like a warzone.”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.²⁶⁴ For 2021–2022, Australia has earmarked almost \$812 million for its “offshore processing regime.”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.”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*.²⁶⁷

²⁶³ Karp, *supra* note 261 (quoting Filipa Payne, Campaigner for New Zealanders in Australian Detention).

²⁶⁴ Press Release, Paul Power, CEO of the Refugee Council of Austl., Govt Chooses Detention Over Hope for World’s Refugees in Budget (May 21, 2021), <https://reliefweb.int/report/australia/govt-chooses-detention-over-hope-world-s-refugees-budget> [<https://perma.cc/TS56-7V5Z>].

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.

²⁶⁶ AKKERMAN, *supra* note 27, at 12; see also Elahe Zivardar & Omid Tofighian, *The Torture of Australia’s Offshore Immigration Detention System*, OPEN DEMOCRACY (Mar. 16, 2021), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/the-torture-of-australias-offshore-immigration-detention-system/> [<https://perma.cc/6TNH-8JBJ>] (“[Australia’s] influence is inspiring and it facilitates crimes against humanity on a global scale.”).

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.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.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.²⁷⁰

There is not a designated court or mechanism to bring human rights abuse grievances perpetuated within transnational migration deterrence systems.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.²⁷² Australia’s domestic courts, for example, have denied state responsibility for the conditions of offshore detention sites.²⁷³ In 2020, the U.S. Supreme Court held in *Hernandez v. Mesa*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 *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.

NATIONAL HUMAN RIGHTS LAW (2018), <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [https://perma.cc/45S8-DVHE].

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

²⁶⁹ Mariagiulia Giuffrè & Violeta Moreno-Lax, *The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows*, in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 82, 87 (Satvinder Singh Juss ed., 2019).

²⁷⁰ See *infra* notes 293–304 and accompanying text.

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.”).

²⁷² *Id.* at 156; see also Monika Heupel, *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.”).

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”).

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-

²⁷⁵ Giannacopoulos & Loughnan, *supra* note 262, at 118; Nikolas Feith Tan, *The Manus Island Regional Processing Centre: A Legal Taxonomy*, 20 EUR. J. MIGRATION & L. 427, 428 (2018).

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)).

trol that reaches beyond territorial state borders.²⁸² 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.”²⁸³ 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,²⁸⁴ Italy,²⁸⁵ Mexico,²⁸⁶ Australia,²⁸⁷ and Indonesia²⁸⁸ 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.²⁸⁹

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.”²⁹⁰ A decade later in 2011, however, the ECHR in *Al-Skeini v. United*

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))).

²⁸³ Comm. on the Prot. of the Rts. of All Migrant Workers and Members of Their Fams. & Comm. on the Rts. of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the context of International Migration, ¶ 12, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).

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.

²⁹⁰ *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 352; see also Violeta Moreno-Lax, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers*, S.S. and Others v. Italy, and the “Operational Model,” 21 GERMAN L.J. 385, 398 (2020) (“In *Bankovic* the Court likened the term ‘jurisdiction’ to the concept of a legal title under international law, thus affirm-

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.”²⁹¹

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,²⁹² specifically concerning the arrangement between Italy and Libya. In 2012, in *Hirsi Jamaa v. Italy*,²⁹³ which was the first ECHR ruling involving interceptions at sea,²⁹⁴ 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.²⁹⁵ Italian police and coast guard intercepted their vessel, transferred the migrants onto Italian military ships, and later handed them over to Libyan authorities.²⁹⁶ 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.²⁹⁷ 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.²⁹⁸

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*,²⁹⁹ they argued that Italy’s coordination role in a res-

ing that “the jurisdictional competence of a State is primarily territorial.” (citing *Banković*, 2001-XII Eur. Ct. H.R. at 351–52)).

²⁹¹ Gammeltoft-Hansen & Hathaway, *supra* note 13, at 261 (citing *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99). The Court in *Al-Skeini v. United Kingdom* held that the European Convention on Human Rights applied to British soldiers acting not just on the British military base in Iraq, but also in the areas surrounding the base in Basrah. Wells Bennett, *The Extraterritorial Effect of Human Rights: The ECHR’s Al-Skeini Decision*, LAWFARE (July 12, 2011), <https://www.lawfareblog.com/extraterritorial-effect-human-rights-echrs-al-skeini-decision> [https://perma.cc/C2NG-RMPB].

²⁹² In cases of extrajudicial rendition, the ECHR has held states in which U.S. intelligence agents captured individuals responsible for their detention and torture even though the U.S. 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://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-162280%22]}) [https://perma.cc/UK35-L74N].

²⁹³ *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97.

²⁹⁴ Marie-Bénédicte Dembour, *Interception-at-Sea: Illegal as Currently Practiced—Hirsi and Others v. Italy*, STRASBOURG OBSERVERS (Mar. 1, 2012), <https://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/> [https://perma.cc/G44M-EAYV].

²⁹⁵ *Hirsi Jamaa*, 2012-II Eur. Ct. H.R. at 99.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 133, 134–39.

²⁹⁸ Dembour, *supra* note 294.

²⁹⁹ *S.S. v. Italy*, App. No. 21660/18 (May 3, 2018), <https://hudoc.echr.coe.int/eng?i=001-194748> [https://perma.cc/6MFP-8YXE#{%22itemid%22:[%22001-194748%22]}]. The Global Legal Action

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.³⁰⁰ 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].”³⁰¹ A rescue boat operated by a humanitarian organization was able to save fifty-nine migrants, bringing forty-seven of them back to Libya.³⁰²

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.³⁰³ 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*.³⁰⁴

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

Network, the Italian Association for Juridical Studies, and the Human Rights Clinic at Yale Law School filed the petition.

³⁰⁰ See Moreno-Lax, *supra* note 290, at 388.

³⁰¹ Andreina De Leo, *S.S. and Others v. Italy: Sharing Responsibility for Migrants Abuses in Libya*, PUB. INT’L L. & POL’Y GRP. (Jan. 6, 2020), <https://www.publicinternationallawandpolicygroup.org/lawyer-journalism-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya> [<https://perma.cc/9RDE-XVF5>].

³⁰² *Id.*

³⁰³ Amnesty Int’l, *Amnesty International Public Statement*, AI Index EUR 30/1392/2019 (Nov. 13, 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/EUR3013922019ENGLISH.pdf> [<https://perma.cc/7KC8-V4TV>]. Amnesty International and Human Rights Watch submitted the intervention jointly. A third-party intervention in *S.S. v. Italy* was also filed by the International Commission of Jurists, the European Council on Refugees and Exiles, the Dutch Refugee Council, and the AIRE Centre. See *ICJ and Others Intervene in Mediterranean Sea Search and Rescue Case Before European Court—Video Interview*, INT’L COMM’N OF JURISTS (Nov. 11, 2019), <https://www.icj.org/icj-and-others-intervene-in-mediterranean-sea-search-and-rescue-case-before-european-court/> [<https://perma.cc/6HP8-GDKZ>].

³⁰⁴ *Italy Shares Responsibility for Libya Abuses Against Migrants*, HUM. RTS. WATCH (Nov. 13, 2019), <https://www.hrw.org/news/2019/11/13/italy-shares-responsibility-libya-abuses-against-migrants> [<https://perma.cc/4ACS-JBR7>] (emphasis added); *ICJ and Others Intervene in Mediterranean Sea Search and Rescue Case Before European Court—Video Interview*, *supra* note 303.

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.”³⁰⁵ Subsection 2 examines the idea of labeling states as “co-perpetrators of wrongful conduct.”³⁰⁶ Subsection 3 considers applying the extraterritorial effects doctrine to the migration context.³⁰⁷

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”³⁰⁸ 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,”³⁰⁹ 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.”³¹⁰ A second factor is whether the assisting state maintained significant influence over the transnational operation, including providing funding and other material support.³¹¹ The last factor determinative for functional jurisdiction is whether the assisting state maintained overall control.³¹²

Moreno-Lax describes the functional jurisdiction approach as providing more predictability than alternative approaches insofar as outcomes.³¹³ Perhaps more importantly, this conceptualization moves reviewing and adjudicating bodies away from a territorially bounded interpretation of jurisdiction.³¹⁴ 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

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 subrogate Italian proxy for interdiction and pull-back at sea."³¹⁵ 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,³¹⁶ despite the fact that none of the states had a functioning asylum adjudication system.³¹⁷ 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,³¹⁸ and the Australian government to Indonesia,³¹⁹ 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."³²⁰ Article 16 address-

³¹⁵ Moreno-Lax, *supra* note 290, at 412.

³¹⁶ See *supra* notes 155–168 and accompanying text.

³¹⁷ See *supra* note 167 and accompanying text.

³¹⁸ See *supra* notes 96–121 and accompanying text.

³¹⁹ See *supra* notes 224–266 and accompanying text.

³²⁰ Gammeltoft-Hansen & Hathaway, *supra* note 13, at 277 (first citing HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE* (2013); then citing JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* (2013); then citing Jillian Button, *Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 FLA. J. INT'L L. 531

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.”³²¹ As “co-perpetrators or co-participants,” the objective of Article 16 is to hold both assisting and acting states accountable.³²² 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.³²³

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,³²⁴ 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 above³²⁵ or by the extraterritorial effects doctrine discussed below.

(2007); then citing Mark Gibney, Katarina Tomaševski & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267 (1999); then citing Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101 J. INT’L L. & DIPL. 1 (2002); then citing Georg Nolte & Helmut Philipp Aust, *Equivocal Helpers—Complicit States, Mixed Messages and International Law*, 58 INT’L & COMPAR. L.Q. 1 (2009); and then citing John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 1986 BRIT. Y.B. INT’L L. 77). Though the ILC Articles are not binding, Article 16 has “garnered wide support as a matter of state practice and *opinio juris*.” *Id.* (citing AUST, *supra*, at 107–91).

³²¹ Report of the International Law Commission on the Work of Its Fifty-Third Session, 56 U.N. GAOR Supp. No. 10, at 66, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. INT’L L. COMM’n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

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.³²⁶ The doctrine, which is both a domestic and international legal principle,³²⁷ 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.³²⁸ 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,³²⁹ cybersecurity,³³⁰ and anti-trust.³³¹ The International Court of Justice (ICJ) also has applied the doctrine specifically in cases involving environmental damage.³³²

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."³³³ 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,

³²⁶ See *infra* notes 326–329 and accompanying text; see also Nadja Airaksinen, State Jurisdiction in Search and Rescue Operations: The Extraterritorial Reach of the European Convention on Human Rights and *S.S. and Others v. Italy* 2 (2020) (LLM thesis, Lund University) (on file with the Lund University) (applying the extraterritorial effects doctrine to *S.S. v. Italy*).

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).

³²⁸ *State v. Jack*, 125 P.3d 311, 319 (Alaska 2005); Jason Coppel, Student Contribution, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 LEIDEN J. INT'L L. 73, 73 (1993); Najeeb Samie, *Extraterritorial Enforcement of U.S. Antitrust Laws: The British Reaction*, 7 INT'L TRADE L.J. 58, 59 (1981).

³²⁹ Harry Arthurs, *Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, 21 STAN. L. & POL'Y REV. 527, 538 (2010).

³³⁰ Mireille Hildebrandt, *Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace*, 63 U. TORONTO L.J. 196, 218 (2013).

³³¹ Tony A. Freyer, *Restrictive Trade Practices and Extraterritorial Application of Antitrust Legislation in Japanese-American Trade*, 16 ARIZ. J. INT'L & COMPAR. L. 159, 160 (1999); Coppel, *supra* note 328, at 74; Samie, *supra* note 328, at 61.

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 "interconnectedness 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."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,³³⁵ and is an accountability concept recognized by international law bodies, including the U.N. Human Rights Committee.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."³³⁷ The French law also gives victims a right of action to seek compensation for damages.³³⁸

Due diligence, in essence, encompasses "a standard of conduct required to avoid a likely or foreseeable undesirable outcome."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.³⁴⁰ In the human rights context, a state's capacity to influence another state has a di-

³³⁴ Carla Ferstman, *Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya*, 21 GERMAN L.J. 459, 466 (2020). For a history of how human rights due diligence obligations was formulated, see Holly Cullen, *The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond*, 48 GEO. WASH. INT'L L. REV. 743, 749–62 (2016).

³³⁵ See Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L. 323, 323 (2021); Michael K. Addo, *Is Business and Human Rights Suitable for the Compliance Function?*, UNIV. CHI. L. REV. ONLINE, Jan. 7, 2020, at *4, *6, <https://lawreviewblog.uchicago.edu/2020/01/07/is-business-and-human-rights-suitable-for-the-compliance-function-by-michael-k-addo/> [<https://perma.cc/K7SD-KPFL>]; Ronald C. Brown, *Due Diligence "Hard Law" Remedies for MNC Labor Chain Workers*, 22 UCLA J. INT'L L. & FOREIGN AFF. 119, 120–22 (2018).

³³⁶ Ferstman, *supra* note 334, at 467.

³³⁷ Robert McCorquodale, Lise Smit, Stuart Neely & Robin Brooks, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. & HUM. RTS. J. 195, 202 (2017).

³³⁸ *Id.*

³³⁹ Ferstman, *supra* note 334, at 464.

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.³⁴¹ 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,³⁴² for example, would be accompanied by a duty to address the serious human rights violations reported in these sites.³⁴³ 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.

