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Migration, Border Externalization and Access to Humanitarian Protection

Concept Note

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International migration is a complex transnational phenomenon. International migrants often cross the borders of many countries en route to their destination. Under international law, all migrantsⁱ have fundamental human rights, regardless of the cause of or motivation for their migration. Some of these rights are shared by all human beings; other rights, needs and vulnerabilities are associated with or arise during migration (such as, in the case of refugees, upon exiting a country of origin).

In the context of migration, states have both sovereign rights and responsibilities: rights to regulate their borders and to exercise jurisdiction beyond their territory; responsibilities to protect the human rights of citizens and non-citizens in their territory or subject to their jurisdiction and to provide individuals in need with humanitarian protection. States also have obligations not to aid or assist other states in breaching international obligations.

This Concept Note considers these issues in the context of the phenomena of border externalization and suggests some of the ways in which this practice impacts the human rights of migrants, and particularly their access to humanitarian protection. It considers how states can ensure the protection of the rights of migrants even as they advance a range of policy priorities in

ⁱ For the purposes of this discussion, the term “migrant” refers to a person who is outside of a State of which the migrant is a citizen or national, or in the case of a stateless migrant, his or her State of birth or habitual residence. See, International Migrants Bill of Rights Initiative, *International Migrants Bill of Rights*, 28 GEO. IMMIGR. L.J. 14 (2003) (The International Migrants Bill of Rights (hereinafter “IMBR”) defines migrant in its Article 2(2)). This definition covers all categories of migrants, regardless of whether they might also be defined in or protected by a specific treaty regime or complementary body of law and standards, including refugees, labor migrants, those seeking family reunification and, of course, migrants with mixed motives.

response to the movement of people across borders. Part I will suggest a working definition of border externalization and describe some of the ways this phenomenon works in practice. Part II will discuss the rights of international migrants and how border externalization impacts these human rights in policy and in practice. Part III will present some recommendations that could strengthen protection of human rights in the context of border externalization and migration management and closes with a set of questions for discussion.

Part I: What is Border Externalization?

Border externalization is not a unitary phenomenon. Rather, it describes approaches to extraterritorial state actions, ranging from direct to bilateral and multilateral engagement, through which a state prevents the arrival of migrants at its legal or territorial borders.¹ These can include direct interdiction and preventive policies, including those implemented by private actors, as well as the provision of direct and indirect support for or assistance to security or migration management practices in and by third countries.ⁱⁱ

Numerous policy considerations drive the practice of border externalization. Externalization policies and practices first occurred regionally, in proximity to mass migrations resulting from conflict or natural disaster. Now, migration policy is an increasingly politicized issue, and externalization is often framed through a security lens.² Control of migration flows is cast as an effort to prevent “illegal” (or irregular) immigration or to protect migrants from the dangers of the journey.³ Extraterritorial actions to manage migration flows are also increasingly linked to the ineffectiveness (and politicization) of domestic migration policies. Over time, the phenomenon has expanded to commonly include systematic engagement with third countries with the explicit goal of preventing migrants – including (and at times, perhaps, particularly) those who would have a valid legal basis for claiming humanitarian relief upon arrival – from entering destination states and to prevent migration entirely or to encourage apprehension and return, rather than settlement, legal integration or onward migration.⁴

The goal of preventive protection also informs state, regional, and international approaches to migration policy. Preventive actions can come in the form of aid, capacity-building, and other actions seeking to improve rights protections in countries of origin, addressing the “root causes” of international migration (while also reducing migration pressure on destination states).⁵ However, preventive protection policies and practices can have the additional effect, even if only indirectly, of advancing or strengthening border externalization.

Border 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

ⁱⁱ In the context of migration and border externalization, it can be helpful to consider the distinctions between a migrant’s *country of origin* (the country from which a migrant departs though not always the state of which the migrant is a national or citizen), *destination states* (the migrant’s intended destination) and *third countries* (those states through which a migrant will or intends to transit en route).

practices. Externalization policies and practices may explicitly seek to prevent the entry of migrants into a destination state or have an indirect impact on migration.

Externalization policies are often pursued with the stated goal of assisting third countries with migration control and management. Examples of these schemes include policies and practices that encourage third countries (and countries of origin) to prevent their citizens from migrating, through incentives for would-be migrants to remain in place and also through physical or legal barriers; policies and practices encouraging migrant apprehensions (interdictions, interceptions, or “turn-backs” – including on the high seas) through logistical, financial, or political support, or directly in exchange for aid;⁶ the development of readmission and incentive structures between third countries and countries of origin;⁷ financial and political support of migrant detention or interdiction practices by third countries or off-shore;⁸ or partnerships to combat “illegal” (or irregular) migration or to build capacity of immigration or asylum systems in third countries.⁹ They can also include measures implemented entirely through requirements imposed on the private sector, such as carrier sanctions, and which have the effect of preventing departure or transit of migrants to destination states. In the context of forced migration, externalization efforts may specifically divert asylum-seekers for processing in third countries, including in third-country processing centers or protected areas near countries of origin.¹⁰

Indirect externalization occurs through policies and practices that result in border externalization, although externalization is not be the stated goal. A prominent example is law enforcement or military assistance which may have the additional effect of sealing borders (both for exit and entry), encouraging push-backs, increasing apprehensions and/or reducing access to protection mechanisms in the context of apprehension and deportation.¹¹ There is increasing recognition by human rights experts that destination states seek “creative ways” to ensure that migrants, and even would-be migrants, do not reach their borders.¹²

Part II: The Impact of Border Externalization on the Right of Migrants

Border externalization policies and practices can implicate human rights in significant ways. First, by directing migrant flows to third countries, externalization influences the nature and duration of state legal obligations, as well as which states are charged under international law with the protection of the rights of migrants. Second, externalization can influence how and when migrants’ rights are impacted during migration, both decreasing the availability of some legal protections and increasing the likelihood of some rights violations.

Border externalization may prevent (and seek to prevent) migrants from ever coming under the jurisdiction of the destination state in an attempt to limit formal legal obligations to protect migrants’ rights.¹³ When the rights of migrants are then violated in third countries as a result of a destination state’s externalization efforts, this can raise complicated issues of state responsibility. Simply put, it is a violation of international law for states to directly support the internationally wrongful acts of another state.¹⁴ Thus destination states pursuing border externalization strategies may come to be responsible (as a matter of international law) for rights violations outside of their own territory if they exert control over the acts of third countries.¹⁵ Relatedly, externalization

policies and practices can place significant and unequal burdens on third countries, as often states with fewer resources are forced (by law and in practice) to seek to ensure the protection of migrants' rights.¹⁶

Externalization efforts can also directly or indirectly cause a reduction in the protection of migrants' rights. All migrants have human rights throughout the migration process and have both the right to leave any country and a right to return to their own country.¹⁷ Yet migration can be dangerous and a broad range of fundamental rights may be in jeopardy throughout the migration process. These include the right to life,¹⁸ the right to assistance and protection for victims of crime,¹⁹ the right to access legal assistance²⁰ and the right to due process,²¹ among others. In part by closing or restricting migration routes, border externalization may put migrants at increased risk during transit, as they seek to travel on unsafe migration routes, where they are at heightened risk of victimization, in order to evade detection.²² It can also shift their relationship with the authorities and make them less likely or able to seek the protection of third countries through which they seek to transit or are diverted.²³ Finally, such as, for example, in efforts to disrupt migrant smuggling or trafficking, externalization can bring migrants into contact with the state (or multiple states) through law enforcement or military operations.

Regardless of their status or location, migrants maintain fundamental rights to liberty and security of person, including a presumption against detention.²⁴ However, border externalization can increase both third country resources for and interest in apprehension of migrants, and this in turn can increase both the likelihood and duration of detention. Once deprived of liberty, both duration and conditions in detention can significantly compromise the fundamental rights of migrants, including rights against ill-treatment.²⁵ Migrants also have rights against arbitrary and collective expulsion²⁶ and a right to legal assistance before and during deportation proceedings.²⁷ Externalization practices and pressure can overburden third country immigration systems and significantly increase the likelihood that states violate these and other rights in an effort to process or deport migrants from third countries to countries of origin.

In addition to a core set of fundamental rights, some migrants may be protected by specific bodies of law that provide a higher standard of protection than is available to other migrants. For example, child migrants are recognized to have a special status and protection under international law, as are those fleeing rights abuses in countries of origin. At times, migrants also encounter situations during transit that increase vulnerability or trigger the attachment of additional rights – such as the rights of victims of crime or of trafficking.²⁸

Under international human rights law and refugee law, migrants who fear mistreatment in their countries of citizenship have a number of key rights that are implicated by border externalization – namely to seek and enjoy asylum²⁹ and against *refoulement*.³⁰ Refugees have the right to leave their country of citizenship, to seek and enjoy asylum and not to be punished for illegally entering a country to do so.³¹ Thus migrants have the right to screenings and examinations of any refugee or asylum claims, including in situations of mixed migratory flows where not all migrants may merit or require international protection.³² The right to seek and enjoy asylum includes the right to due process in the context of status determinations (a right which is also independently guaranteed under human rights law).³³ In addition, the use of detention as a deterrent to potential asylum-seekers is contrary to international law.³⁴ Externalization practices

can render effective protection of these rights significantly less likely in the context of heightened incentives to control migration and deport migrants to countries of origin. Indeed, there may be significant pressure on third countries to deemphasize international protection concerns, especially in the context of mixed flows.

Finally, states are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, such as violations of the right to life, or the right against torture or other cruel, inhuman or degrading treatment or punishment.³⁵ The right against *refoulement* prohibits states from returning refugees to places where they have reason to fear threats to life or freedom related to criteria under the Refugee Convention.³⁶ In most states in the Americas, the Cartagena declaration expands this obligation to prohibit return to situations of generalized violence.³⁷ *Refoulement* obligations protect not only refugees with formal status, but also apply to asylum-seekers and other migrants who have yet to have their status formally declared.³⁸ The right of *non-refoulement* also includes protection from ‘indirect *refoulement*,’ (also referred to as chain *refoulement* or *refoulement* by proxy). Perhaps most troubling, border externalization can result in increased risk of returning migrants to harm, sometimes resulting in *refoulement* of those who merit humanitarian protection, including asylum-seekers and refugees, contrary to international law. This may occur where third countries have limited resources for or motivation to determine the refugee status of migrants, though many may have valid claims.

Part III: Recommendations for Government Policies Protective of Human Rights

International law recognizes that migrants have a host of fundamental rights that protect them against abuses during the migration process. These include rights protections that can be impacted during transit, after apprehension and during deportation. They also include important rights to asylum and against *refoulement*, obligations which protect individuals from serious human rights violations when their countries are unable or unwilling to protect them. These international law obligations can attach to any state under whose jurisdiction a migrant falls. Border externalization policies and practices can make a range of rights violations more likely. And can cause legal liabilities to attach to both destination states which control or direct violations of the international human rights of migrants by third countries, and to third countries which fail to protect the rights of migrants. This discussion raises important questions about how states that pursue border externalization policies and practices incorporate fundamental rights into efforts to manage migration flows.

States can and should pursue preventive protection alongside the protection of human rights generally. There is ample scope for ensuring the protection of human rights in the context of migration policies among other security and policy priorities. In such discussions, including in the Americas, commentators have proposed a range of recommendations. These recommendations include calls to increase the protective capacity of authorities involved in migration control in third countries. This could include systematically and directly incorporating rights protections into migration management policies and practices, or conditioning destination-

state funding, training and other assistance to third countries on the direct incorporation and implementation of a minimum set of human rights protections.

Destination states and other donors may also pursue increased support to regional, international and inter-governmental organizations that provide or promote protection of migrants' rights in transit, in third countries and upon return. Such parallel resources could be directed to enhancing the capacity of third countries, including through robust training of immigration and border security officials in human rights and refugee protections. These could include advocacy and training efforts to ensure that officials without a human rights or refugee protection mandate, but whose work triggers or follows apprehension and processing of migrants, such as border guards, understand and respect the rights of the migrants they encounter.

Finally, destination states and other donors could provide increased support to civil society actors whose work directly or indirectly supports protection of the basic needs and rights of migrants, including to humanitarian protection. These efforts could also be targeted to civil society actors well-positioned to ensure pressure on third countries to protect migrants' rights. This could include support for documentation and monitoring of compliance with international law and standards, promoting domestication of human rights law and other efforts to promote accountability for those border externalization policies and practices which violate human rights.

Questions for Discussion

- What is the situation on the ground in the Americas regarding the ability of migrants to access humanitarian protection and enjoy the protection of other related fundamental human rights? What are the trends?
- How are states in the Americas or other regions affecting the protection of the rights of migrants, particularly access to humanitarian protection through border externalization practices?
- What is the scope and nature of U.S. bilateral and multilateral migration and security assistance in the Americas or elsewhere that may implicate access to humanitarian protection (i.e., programs to increase apprehension or border securitization)? How does the U.S. government ensure access to international protection and fundamental human rights protections in the context of such bilateral and multilateral migration and security assistance?
- What specific actions do multilateral organizations like UNHCR take with governments in the Americas or elsewhere to ensure access to international protection and protection of related fundamental human rights when developed, refugee-receiving destination states take actions to strengthen enforcement or migration management policies or practices in sending or transit countries?
- Are there good practices globally or in the Americas region – or key actions that states can take – to ensure that overseas migration and security assistance does not negatively affect access to international protection or the protection of related fundamental rights?
- How are the rights of particularly vulnerable migrants, including those vulnerabilities that are caused by or exacerbated in the context of migration, implicated by issues of border

externalization? In particular, how are the rights of children and women migrants implicated?

- What changes in US law, policy and practice would enhance rights protection and increase access to humanitarian protection in the Americas or elsewhere?
- What additional statutory authorities or appropriations or what new executive branch programs could the US develop to ensure access to humanitarian protection and the protection of other related fundamental human rights, and particularly in the context of US assistance and support in the Americas?

¹ See, generally, THOMAS GAMMELTOFT-HANSEN, *ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALIZATION OF MIGRATION CONTROL* (Cambridge, 2011). See also, Special Rapporteur on the human rights of migrants, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, ¶ 5, U.N. Doc. A/HRC/23/46 (Apr. 24, 2013) available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf. Another strain in the commentary refers to these as “non-entrée” policies. See, e.g., Lecture by Thomas Gammeltoft-Hansen available at <http://www.rsc.ox.ac.uk/events/the-law-and-politics-of-non-entree>; JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 291 (2005).

² As politicization of migration has occurred, it has become more common to refer to migration policies as forms of migration “control,” which presumes an inherent security risk stemming from migration. Contemporary migration controls frequently also criminalize migration, which reinforces states’ goals of preventing “illegal” immigration by emphasizing these presumed security concerns. Special Rapporteur on the human rights of migrants, *Regional study, Supra note 1 at ¶ 5*. See also, Thomas Spijkerboer, *Moving Migrants, States, and Rights: Human Rights and Migrant Deaths*, 7 L. & Ethics of Hum. Rts. 213 (2013) available at <http://thomasspijkerboer.eu/wp-content/uploads/2014/12/Moving-Migrants-States-and-Rights-2013.pdf>.

³ The term “illegal immigrant” is sometimes used by government officials or others in an effort to distinguish between economic migrants and migrants seeking asylum or with refugee status, therefore implying that economic migrants are all illegal. However, migration flows are generally mixed, and migrants themselves travel with mixed motives, making such simple characterizations generally inaccurate and unhelpful. See, e.g., Heikki S. Mattila, *Protection of Migrants’ Human Rights: Principles and Practice*, 38 INT’L MIGRATION 53 (2000). The UN system uses the term irregular migrant to underscore that migrants have rights regardless of their legal status. See, e.g., G.A. Res. 3449 (XXX), U.N. GAOR, 30th Sess., U.N. Doc. A/RES/3449 (Dec. 9, 1975). Migrants’ rights are implicated in key human rights laws and treaties, including the Universal Declaration of Human Rights, pmb. ¶ 1, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (hereinafter, “UDHR”), International Covenant on Civil and Political Rights pmb. ¶ 2,, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (hereinafter, “ICCPR”), International Covenant on Economic, Social and Cultural Rights pmb. ¶ 2, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3. 6 I.L.M. 360 (hereinafter, “ICESR”), International Convention on the Elimination of All Forms of Racial Discrimination pmb. ¶ 2, Dec. 21, 1965, 660 U.N.T.S. 195 (hereinafter, “ICERD”), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmb. ¶ 2, G.A. Res. 39/46, Annex, art. 3, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) (hereinafter “CAT”), Convention on the Rights of the Child pmb. ¶ 1, 1577 U.N.T.S. 3 (Nov. 20, 1989) (hereinafter, “CRC”), Convention Relating to the Status of Refugees art. 1A, 189 U.N.T.S. 150 (Jul. 28, 1951) (hereinafter “Refugee Convention”), amongst others, including regional human rights declarations and treaties. The International Convention of the Protection of the Rights of All Migrant Workers and of Their Families, 2220 U.N.T.S. 93 (Dec. 18, 1990) (hereinafter “ICRMW”).

⁴ Emma Haddad, *The External Dimension of EU Refugee Policy: A New Approach to Asylum?*, 43 GOVT. & OPPOSITION 190, 199 (2008) (contending that border externalization encourages apprehension and return, rather than resettlement, assuming that most migrants can be deported). See also Special Rapporteur on the Human Rights of Migrants, April 24, 2013, Special Rapporteur on the human rights of migrants, *Regional study, supra note 1 at ¶ 59* (highlighting a trend in European migration policy as more focused on stopping irregular migrants than protecting migrants’ rights).

⁵ See, e.g. Statement, UN High Comm’r. for Refugees, to the Third Committee of the United Nations General Assembly, Statements by High Commissioner, <http://www.unhcr.org/3ae68f8be0.html>, (Nov. 20, 1995). See also Haddad, *External Dimension, supra note 4 at 200-02, 204*, Presidency Conclusions, Brussels European Council (Dec. 15-16, 2005) available at <http://www.statewatch.org/news/2005/dec/eu-summit-concl-dec-05.pdf>.

⁶ Examples of European border externalization include an 8.5 billion Euro program through which the European Union signs agreements with countries which agree to readmission of nationals who are illegally present on the

territory of a member state. Jennifer Hyndman & Alison Mountz, *Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe*, 43 GOVT. & OPPOSITION 249, 266 (2008).

⁷ *Id.* at 253.

⁸ *Id.*

⁹ Haddad, *External Dimension*, *supra* note 4 at 196.

¹⁰ Rutvica Andrijasevic, *DEPORTED: The Right to Asylum at EU's External Border of Italy and Libya*, 48 INT'L MIGRATION 148 (2010), Hyndman & Mountz, *Another Brick in the Wall*, *supra* note 6 at 266.

¹¹ For example, the U.S. has recently given \$112 million in technological to Mexico for border security. This support is being allocated to three security lines north of Mexico's border with Guatemala and Belize. The stated goal is to counter "human trafficking and drug running from the region." Under the Merida Initiative, Pillar III, the Department of State focuses support on Mexico's efforts to establish a secure southern border, with the stated goal of permitting free flow of licit goods and people while deterring illicit flows. For FY2016, the DOS requested \$39 million for Mexico under Merida to address security threats from drug trafficking and violent crime. Additional funding comes from the DOD counter-drug budget. *See* Bureau of Int'l. Narcotics and Law Enforcement Affairs, U.S. Dep't. of State, Program and Budget Guide FY2013 220 (2012). *See also*, Adam Isaacson, et. al., Washington Office on Latin America, *Mexico's Other Border: Security, Migration, and the Humanitarian Crisis at the Line with Central America*, 24 (June 2014), <http://www.wola.org/files/mxgt/report/>.

¹² *Regional study*, *supra* note 1 at ¶ 46, 56.

¹³ There are at least some circumstances in which state practice suggests a deliberate effort to limit rights protections available to migrants through the way in which border externalization efforts are pursued. For example, states may direct migration to third countries which are not parties to the 1951 Refugee Convention, and thus migrants benefit from fewer formal legal protections, particularly regarding *refoulement*. Hyndman & Mountz, *Another Brick in the Wall*, *supra* note 6.

¹⁴ States may not knowingly "aid or assist" another state in the commission of an internationally wrongful act if the underlying act would be internationally wrongful if committed by the former state. Int'l. Law Comm'n., *Draft Articles on State Responsibility*, art. 16., presented at GAOR 53rd Sess. A/56/10 (2001) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. This is in addition to any legal obligations that may restrict state extraterritorial actions. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, ¶ 10, CCPR/C/21/Rev.1/Add.13 ("The ICCPR applies to those within the power or effective control . . . of a State Party acting outside of its territory, regardless of the circumstances in which such power or effective control was obtained").

¹⁵ Int'l. Law Comm'n., *Draft Articles*, *supra* note 14 at Art. 16. *See also*, Spijkerboer, *Moving Migrants*, *supra* note 2 at 228.

¹⁶ This can result in unfair 'burden sharing' with only limited political or financial support. *See, e.g.*, Red Cross EU and International Federation of Red Cross and Red Crescent Societies, *Shifting Borders: Externalising Vulnerabilities and Rights?* 7 (Nov. 6, 2013), <http://www.redcross.eu/en/News-Events/NEWS-ROOM/PREVIOUS-NEWS/RCEU-Publication-Shifting-Borders-booklet/>.

¹⁷ Regarding migrants rights generally, *see* International Migrants Bill of Rights Initiative, *International Migrants Bill of Rights, with Commentary*, 28 GEO. IMMIGR. L.J. 23 (2013). Regarding the right to leave, *see* UDHR art. 13; ICCPR art. 12; ICMW art. 8.

¹⁸ ICCPR art. 6(1); CRC art. 6; IMBR art. 5.

¹⁹ International Migrants Bill of Rights Initiative, *International Migrants Bill of Rights, with Commentary*, *supra* note 17 at 61.

²⁰ ICCPR art. 14 (protecting the presumption that one is innocent until proved guilty, provision of defense during criminal trials, and assistance of an interpreter in criminal trials). *See also* ICCPR art. 2 par. 3, ICRMW art. 83, ICERD art. 6, CAT art.14, CPED art. 8(2), ECHR art. 13, ACHR art. 25. *See, generally*, International Migrants Bill of Rights Initiative, *International Migrants Bill of Rights, with Commentary, supra note 17* at 56.

²¹ International Migrants Bill of Rights Initiative, *International Migrants Bill of Rights, with Commentary, supra note 17* at 57-61 (“The IMBR goes further than other international instruments to give specific content to the implications of personhood for migrants before the law,” explicitly providing the rights detailed in ICCPR art. 13 for all migrants. Access to counsel in criminal proceedings, as per ICCPR art. 13, and in civil proceedings).

²² For example, migrants through Mexico may transit on dangerous routes, using *La Bestia*, the train, or attempting to cross the Rio Grande, where there have been reported drowning. Injuries of migrants traveling along *La Bestia* in Mexico, though illegal, include loss of limbs, as well as death, and lack of food and water. Spijkerboer, *Moving Migrants, supra note 2*, Isaacson, *Mexico’s Other Border, supra note 11* at 8, Briefing Note, UN High Comm’r. on Refugees, “UN concerned over ending of rescue operation in the Mediterranean,” Oct. 17, 2014, <http://www.unhcr.org/5440ffa16.html>; <http://www.unhcr.org/54db82536.html> (expressing concern that the Italian naval program, *Mare Nostrum*, was tasked with rescuing migrants in transit to Lampedusa, and had much success until the program ended). Special Rapporteur on the Human Rights of Migrants, April 24, 2013, *Regional study, supra note 1* at ¶ 20 (finding that dangers at border crossings are especially relevant, as this is where the most egregious human rights abuses appear to take place).

²³ Human Rights Watch reports that, in Mexico, “authorities have not taken adequate steps to protect migrants, or to investigate and prosecute those who abuse them. The government has also failed to implement protective measures... for migrant shelters’ staff, who face threats and harassment from criminal groups and officials.” Human Rights Watch, World Report 2015, Mexico, 283-84 (2015) available at <http://www.hrw.org/world-report/2014/country-chapters/mexico>.

²⁴ ICRMW art. 16, ICCPR art. 9, U.N. High Comm’r for Refugees, *Detention of Refugees and Asylum-Seekers*, Conc. 44/37 (Oct. 13, 1986) <http://www.unhcr.org/3ae68c43c0.html>. *See also*, *Regional study, supra note 1* at ¶ 53 (discussing European Court of Justice jurisprudence for the proposition that European Union member states cannot hold an irregular migrant for the sole reason that he or she is irregularly staying in country, even if there is an order to leave). Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protection of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO IMMIGR. L.J. 513 (2010) (stating that migrants in detention have the right to individualized determination of the need for detention or other restrictions on liberty, prompt review by an independent court of the decision to detain, periodic review of the continuing necessity of detention, and detention only in facilities that are non-punitive and appropriate to the migrants’ status), UN Special Rapporteur on the human rights of migrants, *Special Rapporteur on the human rights of migrants concludes second country visit in his regional study on the human rights of migrants at the borders of the European Union: Visit to Turkey*, (June 29, 2012) (stating: “Alternatives to detention must always be explored, especially when families and children are concerned. I have observed that the EU focus on heightening border security has led to an increased prioritization of detention as a solution, including plans for the funding.”).

²⁵ CAT art 3.

²⁶ In addition to a presumption against expulsion, international law prohibits collective expulsion, in which nationals being deported to home country/third country where they sought to enter the outsourcing country.

²⁷ ICCPR art. 13, ICRMW art. 22 par. 2, IMBR art. 11.

²⁸ G.A. Res, *2000 Protocol Against the Smuggling of Migrants by Land, Sea And Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, art. 16, ¶1, 55th Sess. A/RES/55/25 (Nov. 15, 2000), available at <http://www.unhcr.org/refworld/docid/479dee062.html>. CERD art. 6, CRC arts. 3, 9, 7, 29, 33-37, 40, IMBR arts. 4, 8, 22. Migrants may also not fall into any specific category of vulnerable group recognized by existing international law, but there is growing recognition of various categories of “survival migrants,” or those who are forced to leave their countries of origin as a result of impacts of climate change, environmental degradation, natural

disaster or serious economic and social distress. *See, e.g.*, Alexander Betts, *Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants*, 22 INT'L J. REFUGEE L. 209, 11 (2010).

²⁹ Refugee Convention art. 33(1), CAT art. 3, IMBR art. 13.

³⁰ Refugee Convention art. 33(1), CAT art. 3, IMBR art. 13.

³¹ Refugee Convention art. 31(1).

³² *See, e.g. discussion in* Haddad, *External Dimension*, *supra note 4* at 205.

³³ *See, e.g. discussion in* Jesuit Refugee Services and Washington Office on Latin America, *U.S. Support and Assistance for Interdictions, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to Protection*, 12 (2014), http://jesuits.org/Assets/Publications/File/US_Border_Externalization_2014_v1.pdf (highlighting that Inter-American Commission on Human Rights has stated that asylum seekers at a minimum have a right to a hearing to determine his refugee status).

³⁴ Refugee Convention art. 31.

³⁵ UN High Commissioner on Refugees, *Advisory Opinion on the Extraterritorial Application of Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, ¶ 17, (Jan. 26, 2007).

³⁶ *Id.* at ¶ 7.

³⁷ Cartagena Declaration on Refugees, *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, comm. (c), Nov. 22, 1984, *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev.1 (1984-85).

³⁸ UN High Commissioner on Refugees, *Advisory Opinion*, *supra note 35*, at ¶ 6.