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Interdiction, Border Externalization, and the Protection of the Human Rights of Migrants

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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 migrants¹ 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 exit).

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 paper considers these issues in the context of the phenomena of border externalization and suggests some of the ways in which border externalization impacts the human rights of migrants. It considers and proposes a range of recommendations regarding how states can ensure the protection of the rights of migrants even as they advance a range of policy priorities in 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 highlight a few recent developments of concern in the Asia Pacific region, Europe, and the Americas. Part III will discuss the human rights of international migrants and how border externalization impacts these rights in practice, including the specific issue of the liability of destination states that pursue border externalization under international law regarding state responsibility. Part V will present some recommendations that could strengthen protection of human rights in the context of border externalization and migration management.

¹ 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.

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.² These can include direct interdiction and preventive policies,³ including those implemented by private actors, as well as more indirect actions, such as the provision of support for or assistance to security or migration management practices in and by third countries.⁴

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.⁵ 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.⁶ Extraterritorial actions to manage migration flows are also increasingly linked to the

² 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.

³ Some of the most direct mechanisms have been referred to 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).

⁴ 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).

⁵ 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 2 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>.

⁶ 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 those 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

ineffectiveness (and politicization) of domestic migration policies. Over time, the phenomenon has expanded to now commonly include systematic engagement with third countries with the explicit goal of preventing (and even interdicting) migrants – including migrants who would have a valid legal basis for international protection upon arrival – from entering destination states as well as to prevent migration entirely, or to encourage apprehension and return, rather than settlement, legal integration, or onward migration.⁷ Much of this engagement takes place in the context of transnational crime control efforts by states seeking to counter trafficking or smuggling, including by organized syndicates.

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 and address the “root causes” of international migration (while also reducing migration pressure on destination states).⁸ However, preventive protection policies and practices can have the additional effect, even if only indirectly,

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”).

⁷ 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 2 at ¶ 59 (highlighting a trend in European migration policy as more focused on stopping irregular migrants than protecting migrants’ rights).

⁸ *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 7 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>.

of advancing or strengthening border externalization, and are therefore worthy of distinct consideration in this context.

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

Externalization policies are often also pursued with the stated goal of assisting third countries with migration control and management. Examples of these schemes include policies and practices that encourage both third countries and countries of origin to prevent would-be migrants from migrating, through incentives for individuals 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;⁹ the development of readmission and incentive structures between third countries and countries of origin;¹⁰ financial and political support of migrant detention or interdiction practices by third countries or off-shore;¹¹ or partnerships to combat “illegal” (or irregular) migration or to build capacity of immigration or asylum systems in third countries.¹² 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 also include efforts aimed at diverting asylum-seekers to third countries, including to third-country processing centers or “protected areas” near countries of origin.¹³

⁹ 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).

¹⁰ *Id.* at 253.

¹¹ *Id.*

¹² Haddad, *External Dimension*, *supra* note 7 at 196.

¹³ 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 9 at 266.

Indirect externalization occurs through policies and practices that result in border externalization, although externalization is not the stated goal. A prominent example is law enforcement or military assistance designed to stop the flow of illicit materials 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 practices.¹⁴ 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.¹⁵

Part II: Regional Case Studies

There are more than 232 million migrants and nearly 20 million refugees worldwide.¹⁶ Actions by destination states in many regions include efforts to externalize border control and enforcement, many of which are troubling with regard to the rights of migrants.

Asia Pacific

In recent years, most migrants fleeing to Australia originated in Syria, Myanmar, Iraq, Sudan, Afghanistan, Iran, Sri Lanka, China, or Vietnam; many arrived directly by boat after travel through third countries or transit countries such as Cambodia, Thailand, Malaysia, and Indonesia.¹⁷ In

¹⁴ For example, the U.S. has recently given \$112 million in technological aid 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 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), available at <http://www.wola.org/files/mxgt/report/>.

¹⁵ *Regional study*, *supra* note 2 at ¶ 46, 56.

¹⁶ United Nations Population Fund, *Migration* (last accessed June 19, 2015) available at <http://www.unfpa.org/migration>; UN High Commissioner for Refugees, WORLD AT WAR: UNHCR GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014 available at <http://www.unhcr.org/556725e69.html>.

¹⁷ *See* Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary 7*, AUSTRALIAN GOVERNMENT, Mar. 31, 2015, available at <http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-mar2015.pdf> (“People in Immigration Detention by Nationality”); Department of Immigration and Border Protection, *Australia’s Offshore Humanitarian Programme: 2013 – 14* at 8, AUSTRALIAN GOVERNMENT, 2014, available at

2012-13, over 18,000 people arrived by sea seeking refugee status,¹⁸ and the rate of valid refugee claims for maritime arrivals was reportedly as high as 90%.¹⁹ Yet rather than strengthening protections for potential refugees, as part of “The Pacific Solution,” a collection of new legislation and policies, the Australian government has expanded efforts to interdict sea vessels, fast-track refugee screenings at sea, detain migrants in offshore processing centers and third countries, and expand resettlement programs to other countries.

The Parliament even amended Australian immigration law to explicitly exclude most references to the 1951 Refugee Convention.²⁰ Prime Minister Tony Abbott is promoting his “stop the boats” policies as a model for other countries confronting the challenge of irregular migration, including European countries.²¹

Australia has continued and expanded the Pacific Solution under the Abbott Government.²² This expansion includes a regional plan by Australia, Indonesia, Sri Lanka, and Malaysia to deter migration by sharing intelligence and information about the identities of migrants, cooperating on naval patrols and border security, launching media campaigns to dissuade migration, and increasing the speed at which migrants are deported.²³ The Abbott Government’s part in this plan

<http://www.immi.gov.au/pub-res/Documents/statistics/australia-offshore-humanitarian-program-2013-14.pdf>
(refugee visa applications by country of birth).

¹⁸ Department of Immigration and Border Protection, *Asylum Trends: Australia 24*, AUSTRALIAN GOVERNMENT, 2013, available at <https://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf>.

¹⁹ E.g., Glenda Kwek, *90% of asylum seekers win refugee status*, THE SYDNEY MORNING HERALD, Apr. 22, 2009, available at <http://www.smh.com.au/national/90-of-asylum-seekers-win-refugee-status-20090422-af2d.html>; see also *Asylum Trends: Australia*, supra note 18, at 27 (“About 68 per cent of asylum seekers who arrived by sea whose claims were considered and decided in the first instance by officials were found to be refugees.”).

²⁰ See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 6.

²¹ See, e.g., Jane Norman, *Tony Abbott urges Europe to adopt stronger border protection policies following migrant boat sinkings*, RADIO AUSTRALIA, Apr. 21, 2015, available at <http://www.radioaustralia.net.au/international/2015-04-21/tony-abbott-urges-europe-to-adopt-stronger-border-protection-policies-following-migrant-boat-sinking/1439284>.

²² See generally Riona Moodley, *The Revival of the Pacific Solution: An Analysis of the Legal Parameters of Offshore Processing in Australia*, UNSWLJ Student Series No. 13-03 (2013); *Timeline of Events*, ASYLUM SEEKER RES. CENTRE, last accessed Apr. 23, 2015, available at <http://www.asrc.org.au/resources/fact-sheet/timeline-of-events/> (compiling a timeline of important developments in Australia’s interdiction and detention policies).

²³ See *The Coalition’s Policy for a Regional Deterrence Framework to Combat People Smuggling* 9-18, Aug. 2013, available at <http://www.nationals.org.au/Portals/0/2013/policy/13-08->

is directed by the military-led Operation Sovereign Borders, which includes a joint agency task force aimed at preventing “people smuggling.”²⁴ Under Operation Sovereign Borders, migrants who are not returned to their “sending” country continue to be detained for offshore processing in substandard conditions.²⁵ Importantly, Australia did attempt to use Malaysia as a country to detain and process migrants, but the Australian High Court found that choice to be procedurally invalid because of Malaysia’s poor refugee protections and the risk of *refoulement*.²⁶

At the beginning of last month, the first four asylum-seekers were resettled to Cambodia from Nauru, the result of a \$40m development deal.²⁷

Europe

In recent years, states in Europe, in a coordinated effort led by the European Union, have pursued efforts to externalize border controls and prevent arrivals. EU migration policy has historically relied heavily on readmission agreements, cooperation and enforcement coordination, as well as the use of development aid and visa facilitation.²⁸ The close to two thousand migrant deaths so far this year and unprecedented number of asylum seekers arriving in the EU has escalated aspects of these externalization efforts. This eventually prompted enhanced maritime search and rescue operations and requests for Security Council approval for the use of force against migrant smuggling rings in Libya’s territorial waters, and a proposal from the European Commission to

[23%20The%20Coalition%20E2%80%99s%20Policy%20for%20a%20Regional%20Deterrence%20Framework%20to%20Combat%20People%20Smuggling.pdf](#).

²⁴ Australian Customs and Border Prot. Serv., *supra* note 17.

²⁵ See generally *Australia asylum: Why is it controversial?*, BBC NEWS, Dec. 5, 2014, available at <http://www.bbc.com/news/world-asia-28189608>; Nikki Ostrand, *Immigration Control beyond Australia’s Border*, CENTER FOR MIGRATION STUDIES, Dec. 15, 2014, available at <http://cmsny.org/immigration-control-beyond-australias-border/>.

²⁶ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

²⁷ *Australia’s rejected refugees arrive in Cambodia for resettlement*, BBC NEWS, June 4, 2015, available at <http://www.bbc.com/news/world-australia-33002291>.

²⁸ Special Rapporteur on the human rights of migrants, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants* ¶ 37-40, U.N. Doc. A/HRC/29/36 (May 8, 2015) available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_36_ENG.doc.

strengthen the powers of the European Union border agency to detain and expel migrants. The recent strain on the region from large numbers of asylum seekers arriving in Europe has only hastened several countries' attempts at finding ways to stop migrants from arriving in their territory.

Americas

Over the past two years, extreme gang violence and poverty in the Central American countries of Honduras, Guatemala, and El Salvador have caused tens of thousands of people in these countries, many of them unaccompanied minors, to flee to the U.S. and Mexico. In reaction to this surge in migration, U.S. and Mexican officials have increased efforts to intercept, or interdict, migrants, particularly along Mexico's southern border. Additionally, the U.S. has provided funding and training for programs in Honduras and Guatemala to prevent people from leaving these countries. Although many of the interdicted migrants likely qualify for international protection due to persecution, torture, and trafficking, they are often summarily returned to their home countries without being screened for protection needs.

In June of 2014, three Honduran law enforcement units trained by and supported with funding from the U.S. State Department's Bureau of International Narcotics and Law Enforcement (INL) launched an operation to intercept children and families attempting to cross the border from Honduras into Guatemala. These Special Forces units (the Group of Special Tactical Operations (GOET), the Comprehensive Troup of Government Response for Special Security (TIGRES) and the Transnational Unit of Criminal Investigations (UTIC)) joined forces for two tactical operations, Operation Rescue Angel and Operation Coyote 1. All three units received equipment and special training from U.S. Border Patrol, U.S. Immigration and Customs Enforcement, or other U.S. migration control and law enforcement entities.²⁹

²⁹ *Honduras amuralla con militares las fronteras hacia Guatemala*, LA TRIBUNA, July 29, 2014, available at <http://www.latribuna.hn/2014/07/29/honduras-amuralla-con-militares-las-fronteras-hacia-guatemala/>; *Elite Honduran Unit Works to Stop flow of Children to the U.S.*, LOS ANGELES TIMES, July 9, 2014, available at <http://www.latimes.com/world/mexico-americas/la-fg-ff-honduras-border-20140709-story.html#page=1> ; *Wrenches Thrown into Careful Plans to flee Honduras*, LOS ANGELES TIMES, Oct. 12, 2014, available at <http://www.latimes.com/world/mexico-americas/la-fg-ff-honduras-journey-narrative-20141012-1-story.html#page=1>.

Additionally, the United States government has been a significant supporter of the Mexican government's border security operations. One of the "four pillars" of U.S. security assistance to Mexico through the Mérida Initiative is support to "create a 21st century border," (pillar 3). This assistance is to "[fa]cilitate legitimate commerce and movement of people while curtailing the illicit flow of drugs, people, arms, and cash."³⁰ While this assistance has primarily focused on Mexico's Northern border with the United States, much of the assistance currently being allocated is being delivered to Mexico's Southern border.

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

Border externalization policies and practices can directly affect the human rights of migrants—and state obligations to protect them—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. Indeed, border externalization may prevent (and seek to prevent) migrants from ever coming under the jurisdiction of destination states in an attempt to limit formal legal obligations to protect migrants' rights.³¹ Such externalization policies and practices can then place significant and unequal burdens on third countries; often states with fewer resources are forced (in practice and by law) to seek to ensure the protection of migrants' rights.³² When the rights of migrants are then violated in such third countries as a result of a destination state's externalization efforts, this can raise complicated issues of state responsibility for both

³⁰ The U.S. Embassy- Mexico, "Fact Sheet: the Merida Initiative, An Overview," July 2014, *available at* <http://photos.state.gov/libraries/mexico/310329/july2014/Merida-Initiative-Overview-jul14.pdf>

³¹ 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*. 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).

³² 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/>.

destination states and third countries.³³ Indeed, 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, including at a minimum, if they exert control over the acts of third countries.

Second, externalization may trigger one or more categories of rights violations. Regardless of their status or location, migrants have a range of fundamental rights that can be implicated by border externalization practices and which protect migrants against abuse throughout the migration process. These include rights that are implicated during transit, including while on the high seas and over land, if and when apprehended as well as during the expulsion or deportation process. In addition to this core set of rights, some migrants may be covered 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 under international law, as are those fleeing rights abuses in their countries of citizenship, such as refugees and asylum-seekers. At times, migrants also encounter situations during transit that increase their vulnerability or trigger the attachment of additional rights, such as the rights of victims of crime or of trafficking.³⁴

The perilous journey undertaken by many migrants, including on the high seas, as well as clandestine efforts by some to cross increasingly militarized (and sometimes closed) borders, can expose them to violations of the right to life and the right to seek and enjoy asylum and can also implicate their rights as victims of crime and abuse (such as by traffickers). Border externalization can also increase demand for both third country resources for and interest in apprehension of migrants, and this, in turn, can increase the likelihood of apprehension and both the likelihood and

³³ Simply put, it is a violation of international law for states to directly support the internationally wrongful acts of another state. 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.

³⁴ 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). *See also*, IMBR Initiative, *International Migrants Bill of Rights*, 28 GEO. IMMIGR. L.J. 14 (2013) (The IMBR Article 4 recognizes and protects the rights of vulnerable migrants).

the duration of detention. Yet, throughout this entire process, migrants maintain fundamental rights, including to liberty and security of person (including a presumption against detention on the basis of migration status) and, if deprived of liberty, rights against torture and ill-treatment.

In addition to being associated with increased enforcement practices (and detention of migrants), externalization can implicate asylum rights and prohibitions against *refoulement*. 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.³⁵ Perhaps the most important obligation, that of *non-refoulement*, prohibits states from returning a refugee to territories where her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion or to a state in which they face torture. In some regions and circumstances, those fearing mistreatment are also protected under human rights law from return to a broader set of harms, including generalized violence or serious deprivation of a range of human rights. These obligations require that states provide migrants access to screening and examination of any refugee or asylum claims, including in situations of mixed migratory flows (where not all migrants may merit or require international protection).³⁶ Enforcement pressures on third countries can increase the difficulty of crossing borders for asylum-seekers and refugees as well as the ability to seek or access procedures for determining refugee status. Given that states are forbidden to practice “indirect” or “chain” *refoulement*—in which refugees are returned to a third territory where they face persecution, harm, or the serious threat of being returned to their home country or another territory to face persecution or torture—border externalization can implicate the very cornerstone of the human rights regime.³⁷

³⁵ Refugee Convention, *supra* note 6, art. 31(1).

³⁶ The right to seek and enjoy asylum and the refugee protection regime also provides the right to due process in the context of status determinations (a right which is also independently guaranteed under human rights law) and prohibits the use of detention as a deterrent to potential asylum-seekers.

³⁷ States’ *non-refoulement* obligations apply to their actions within and beyond their own territory. *See, e.g.*, U.N. HIGH COMMISSIONER FOR REFUGEES (UNHCR), ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 12 at ¶ 43 (2007), available at <http://www.unhcr.org/4d9486929.html>.

Part IV: Recommendations for Government Policies Protective of Human Rights

There is ample scope for ensuring the protection of human rights among other security and policy priorities in the context of migration policies. Efforts to counter harmful border externalization policies and practices have drawn on a range of recommendations. These include calls to ensure access to territory and protection of the right of any person to exit their country of nationality or any other country in addition to the development of comprehensive migration and asylum policies at the national and regional levels. Reforms of migration management laws, criminal law, policies, and practices could systematically and directly incorporate rights protections into migration management (including through increasing the protective capacity of authorities involved in migration control in third countries) as well as 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.

Rather than promoting border externalization, destination states and other donors can also pursue increased support to regional, international, and inter-governmental organizations that provide or promote the 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.