

Pushing Back Protection

HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM



NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

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Abbreviations & Terminology

Abbreviations

ACA	Asylum Cooperative Agreement
APD	Asylum Procedures Directive
CDC	The United States Centers for Disease Control and Prevention
CEAS	Common European Asylum System
DHS	Department of Homeland Security
DOJ	Department of Justice
ECRE	European Council on Refugees and Exiles
EU	European Union
IOM	International Organization for Migration
LCG	Libyan Coast Guard
LGBTQ+	Lesbian, Gay, Bisexual, Transgender, Queer, and other non-normative gender or sexual identities
MPP	Migration Protection Protocols, also known as “Remain-in-Mexico” program
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
PFS	Programa Frontera Sur
SAR	Search and Rescue
STCA	Safe Third Country Agreement
TPS	Temporary Protected Status
U.K.	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
U.S.	United States

Terminology

1967 Protocol: The Protocol Relating to the Status of Refugees is the most recent United Nations treaty on refugees. Entered into force in 1967, this treaty sought to eliminate the two limitations placed on the 1951 Convention Relating to the Status of Refugees (discussed further below): the temporal restriction on events happening before 1951 and the geographic limitation of events happening in Europe. Removing those limitations expanded asylum obligations worldwide for any country that acceded to or ratified the 1967 Protocol. The United States, Australia, and all European Union Member States, as well as the United Kingdom, have acceded to or ratified the 1967 Protocol.

Affluent nations/countries: Given the geographic scope of this report—covering asylum policies led by the U.S., European Member States, and Australia—many common terms such as Western or Northern nations fall short. Instead, we refer to these nations and collectives under the umbrella term of affluent nations, a short form to denote their shared status as developed, wealthy, and former colonial powers exerting wide influence on the rights and movement of migrants and asylum seekers. This term does not impute wealth onto the communities or inhabitants of these nations; rather, it is a reference to the historical, geopolitical, and economic power these nations hold at the international level.

Asylum Seeker: A person who is not yet legally recognized as a refugee, yet has fled their country of origin (or country of habitual residence) in search of protection from serious human rights violations and persecution.

Border Externalization: The enactment of domestic policies and bilateral/multilateral agreements that successfully enlist other countries, usually countries in the periphery of the State in question, in processing asylum seekers and enhancing their border controls with the ultimate goal of preventing asylum seekers from reaching the State enacting the putative externalization policies. This practice is discussed in further detail in Chapter 1.

Carrier Sanctions: Through significant financial penalties, carrier sanctions and accompanying legislation incentivize carriers such as airlines to prohibit individuals without required travel documents from traveling to a destination country. This practice is widely used by the affluent nations discussed in this report. For further details, see Chapter 1.

Detention: The practice of jailing or confining migrants or asylum seekers. This confinement can occur in a jail-like setting or in any location where migrants or asylum seekers' freedom of movement is restrained.

EU Member States: The 27 nations in the European continent that have agreed to share their sovereignty on certain aspects of government policy with the collective bloc through the institutions of the European Union. Since 2020, the United Kingdom is no longer an EU Member State, which allows it to set its own migration policy and restricts the free movement of people from the EU to the U.K.

Expulsion, Deportation, Removal, or Return: These different terms refer to the involuntary transfer of migrants or asylum seekers from a receiving nation's borders to another nation—oftentimes to a neighboring country or to the country of origin of the migrant or asylum seeker.

Externalization: The practice of shifting asylum processing or border control to another nation or territory. This practice is discussed in great detail in Chapter 1.

Extraterritorial Processing: A specific form of externalization policy which enlists a neighboring country or territory to detain or process asylum seekers. This practice usually leads to prolonged detention of asylum seekers and inadequate housing and living conditions.

First country of asylum: This concept aims to prevent asylum seekers who already received adequate refugee protections in one country from applying for asylum in another country. Nations with the first country of asylum written into their laws bar asylum seekers from qualifying for asylum if they already obtained it elsewhere. As explained in Chapter 1, this concept has been distorted and expanded to also bar asylum seekers who have not received protection in a country of transit from applying for asylum.

Jus cogens: Latin for “compelling law.” A special principle of international law where a specific norm, or State practice, is universally adopted and no State is exempt in its enforcement—regardless of whether that state acceded to or ratified the applicable international treaty.

Migrant: A person living outside of their country of origin due to any variety of reasons, including asylum seekers and persons who do not fit the legal definition of refugee but are unable to return to their country of origin.

Non-refoulement: French for “non-return.” A principle of international refugee law that prohibits any form of return (“*refouler*”) of refugees or asylum seekers to any country where their lives or freedom are endangered, and where they may face persecution or torture. This term is defined in more detail in Chapter 1.

Northern Triangle: Geographic term commonly used in the U.S. to refer to the Central American nations of Guatemala, Honduras, and El Salvador.

Offshoring: The practice whereby countries of destination for asylum seekers transfer them to other nations or territories, which in turn detain those individuals and/or process their claims—as well as effectuate removals or deportations. This transfer regime effectively outsources the country of destination's obligations under international law and seeks to deter future asylum seekers.

Push-backs: The practice of forcing asylum seekers back to the country they just left, either at sea through maritime interceptions or by land across the country's border.

Reception: The initial housing and living arrangements set up for asylum seekers when arriving to the country where they apply for asylum.

Refugee: An individual entitled to protection from persecution under international law prior to their entry in their country of destination. Unlike asylum seekers, refugees are processed outside the countries where they ultimately resettle. In turn, nations that resettle refugees exercise control over which refugees they select, the number of refugees they admit, and the manner and timing of their entry.

Refugee Convention: The Convention Relating to the Status of Refugees, a United Nations multilateral treaty signed in 1951 at Geneva, which sought to define who qualifies as a refugee and the rights and protections States must offer them. This treaty was a response to the lack of protections offered by the international community to Jewish refugees fleeing the Holocaust during World War II. Though it only applied to persons fleeing Europe who were affected by events taking place before 1951, the Refugee Convention provided the foundational framework of asylum protection operative in the 1967 Protocol and to-date, including the principle of non-refoulement.

Refugee Transfer: The practice of transporting asylum seekers to third countries as delineated by bilateral/multilateral agreements, with the presumed intention of ensuring the asylum seeker in question can seek protection in the recipient country, though these safeguards in practice often do not exist. This practice is discussed further in Chapter 1.

Safe third country concept: Part of safe country practices today, a concept that allows the transfer of asylum seekers from one State to another on the condition that the receiving State is safe and can afford them adequate protections commensurate with international standards. Recently, the concept has been used, controversially, to allow transfers of asylum seekers back to countries through which they transited en route to affluent nations. This practice is discussed further in Chapter 1.

Title 42: A short term referencing 42 U.S.C. § 265 of the Public Health Service Act of 1944, which was intended to provide U.S. health authorities with the ability to quarantine individuals entering the country. As of March 2020, the CDC used Title 42 to restrict migration at the U.S. border under the guise of preventing the spread of the COVID-19 pandemic. This novel use of Title 42 has ushered in nearly one million summary expulsions. This practice is discussed further in Chapter 5.

Trafficking/Smuggling: The unlawful trade or commerce of transporting adults or children from one country to another. Transported asylum seekers often fall prey to serious dangers, as they attempt to avoid closed or militarized migration routes. As discussed in this report, many offshoring or externalization practices are implemented under the guise of curbing trafficking; however, those practices often accentuate the dangers faced by migrants and asylum seekers and embolden trafficking networks.

Vacatur: Latin for “it is vacated.” It is a court decision where a previous ruling or a current law is nullified or invalidated.

Introduction

In the past few decades, affluent countries have ramped up efforts to halt migrants from reaching their shores, even when fleeing life-threatening harm. European Union Member States, Australia, and the United States are increasingly adopting policies that push asylum seekers from non-white majority nations away from their borders in order to deny them their lawful right to seek asylum. This places the responsibility of asylum processing and the granting of protections on other nations through practices often referred to as *offshoring* or *externalization*.

The 1951 Convention relating to the Status of Refugees (“Refugee Convention”)¹ and the 1967 Optional Protocol relating to the Status of Refugees (“1967 Protocol”)² defined individuals’ right to seek refuge. One of the core principles of these international instruments and the subsequent Convention Against Torture is that of *non-refoulement*. Non-refoulement prohibits the return of asylum seekers to territories where their lives are at risk. Throughout the world, nations are required not to violate non-refoulement, a principle born out of the atrocities that resulted from denying safe haven to World War II refugees, including Jewish refugees fleeing the Holocaust, and forcing them to return to territories where they faced almost certain genocide. Many prominent nations codified this principle in their own domestic laws, in honor of the moral and legal imperative to protect the right to asylum. However, recent decades have seen an uptick in policies and practices that seek to circumvent non-refoulement, offloading obligations onto less prosperous nations and sealing affluent nations’ borders from asylum seekers.

Recent decades have seen an uptick in policies and practices that seek to circumvent non-refoulement, offloading obligations onto less prosperous nations and sealing affluent nations’ borders from asylum seekers.

This report provides an overview of the legal vehicles that result in such offloading (Chapter 1), and then explores their harmful real-world consequences in three regional case studies. From the establishment of immigration enforcement proxy forces and off-site detention centers to the careful brokering of bilateral and multilateral agreements, the European Union and its Member States (Chapter 2), Australia (Chapter 3), and the United States (Chapters 4-5) have carefully crafted policies designed to evade international obligations and oversight. While pushing processing and enforcement onto other nations, these affluent nations have underinvested in their own domestic asylum systems, closed off their borders to asylum seekers, and poured millions of dollars into other countries’ enforcement and migrant detention systems. In some instances, litigators have succeeded

in holding states accountable for push-backs orchestrated outside their territory, including in international waters. Unfortunately, rather than ending these practices, affluent nations have sought to work around legal findings, forging new ways to externalize and offshore, regardless of the human consequences.

Affluent countries have worked to make conditions so abhorrent as to deter asylum seekers from reaching their territory; those who do are either detained or repudiated to another state, far away. As a result, asylum seekers are subjected to punitive policies that leave them stranded, isolated, and vulnerable to violence, including rape, torture, and death. Despite the continued cycle of cruelty inflicted on these individuals, deterrence policies have not worked. A 17-year-old Algerian asylum seeker, sleeping under a bridge in the northern French border town of Calais, spoke to the ineffectiveness of this approach, as well as its cruelty: “Their strategy is to weaken us. But if everything was fine in our countries, we wouldn’t have left. We don’t have the choice.”³

Externalizing and offshoring practices would not exist but for a systematic failure to learn the damage they have caused across the world. These policies’ history of failure is symptomatic of a broken outlook on asylum rights—one that smears asylum seekers as “traffickers,” “queue-jumpers,” or “criminals.” And yet, offshoring policies embolden the very trafficking networks policymakers claim they seek to dismantle. Politicians talk about the need for asylum seekers to “come the right way,” ascribing fault to asylum seekers for seeking protection at what they label inconvenient times or places. Meanwhile, these powerful nations attack and obstruct existing migration pathways, while falsely painting asylum seekers as national security and public health risks. As long as affluent nations approach migration and protection from a deterrence perspective, the rights of vulnerable people will suffer and efforts to create humane and effective asylum processing systems will stumble.

The cycle of brokered deals to offshore asylum seekers and externalize border enforcement must end, in favor of a new era where affluent nations champion rather than erode the principle of non-refoulement. **As a primary architect of offshoring and externalizing borders, we call on the U.S. to assert leadership in charting a new course. Our closing recommendations in Chapter 6 provide seven key principles to dismantle these harmful practices once and for all.** Tragically, although the Biden administration has reversed some of the harsh Trump-era deterrent policies, the United States continues to expel asylum seekers or otherwise prevent them from reaching its borders. New agreements with Mexico and Central America alarmingly echo offshoring and externalization tactics deployed by prior administrations.⁵ The United States can and must come into compliance with its obligations of non-refoulement, at its borders and beyond.

“Their strategy is to weaken us. But if everything was fine in our countries, we wouldn’t have left. We don’t have the choice.”

—17-year-old Algerian asylum seeker sleeping under a bridge in Calais, France.⁴

CHAPTER 1

Legal Vehicles for Externalization Regimes Under International Law

The codification of asylum protections in domestic and international law is a relatively recent development. Though fleeing from persecution is not new, modern nation states historically adopted blanket policies that ignored the specific vulnerability of forced migration. This late reckoning had tragic consequences. During World War II, tens of thousands of Jewish children, adults, and families fleeing the Holocaust were turned away by the U.S., ostensibly because they were viewed as a threat.⁶ This response resulted in a death sentence for many of these individuals. By the second half of the 20th century, consensus arose in the international community that turning back asylum seekers only compounded the atrocities which they fled.⁷ As a result, international refugee law was established with the adoption of a series of treaties and regional legal agreements that standardized who qualified as a refugee, and which codified their rights and benefits.

In recent decades, however, many countries have sought to seal their borders to asylum seekers and systematize push-backs to third countries. These actions represent a concerted effort by prominent affluent nations to externalize their border enforcement and asylum obligations to neighboring countries, so as to physically prevent people from reaching their territories and apply for asylum. Concurrently, these nations have begun dismantling their own domestic processes to receive and process asylum seekers.

Typical vehicles for systematized push-backs include refugee-transfer and border-externalization agreements. With transfer agreements, nations seek to displace responsibility for asylum processing onto neighboring countries. Despite substantial cash infusions and inflated promises from the transferring nation, conditions in the transferee nation usually fall far short of the safety and protections required for third-country transfers under international law. With border externalization, these affluent nations try to stop asylum seekers before they reach their borders by brokering deals with neighboring countries and private companies to act as proxy border agents. From a legal standpoint, these policies are legally dubious at best, and blatant violations of international law at worst. From a humanitarian standpoint, these costly agreements and policies have caused unimaginable human suffering and loss.

1.1. International Refugee Regime: the Principle of Non-Refoulement

Protections for asylum seekers are enshrined through various international and regional agreements and treaties. Article 14(1) of the 1948 Universal Declaration of Human Rights provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”⁸ Other regional agreements and human rights conventions also affirm the right for persons to seek refuge by addressing rights such as life, freedom from torture, liberty, security, and freedom of movement.⁹

The two most foundational international instruments that spell out a protection framework for asylum seekers are the Refugee Convention¹⁰ and the 1967 Protocol which removed geographical and temporal restrictions on protection included in the original Convention.¹¹ States which ratify these treaties must provide certain protections and rights to individuals determined to fit the definition of a refugee. Among these rights are the right to family life, equal justice, freedom of movement (including freedom to leave their country of nationality and freedom of movement within a host country), and, most importantly, the right of non-refoulement.¹² The principle of non-refoulement prohibits States from returning (“refouler”) an asylum seeker “in any manner whatsoever,” including “deportation, expulsion, extradition, informal transfer or ‘renditions,’ and non-admission at the border,” “to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”¹³ **Importantly, nations do not only violate non-refoulement by pushing asylum seekers back to their country of persecution; refoulement is also operative with expulsions or deportations to third countries where asylum seekers’ lives or freedom is endangered.**

Parties to the Refugee Convention, the 1967 Protocol and non-members.

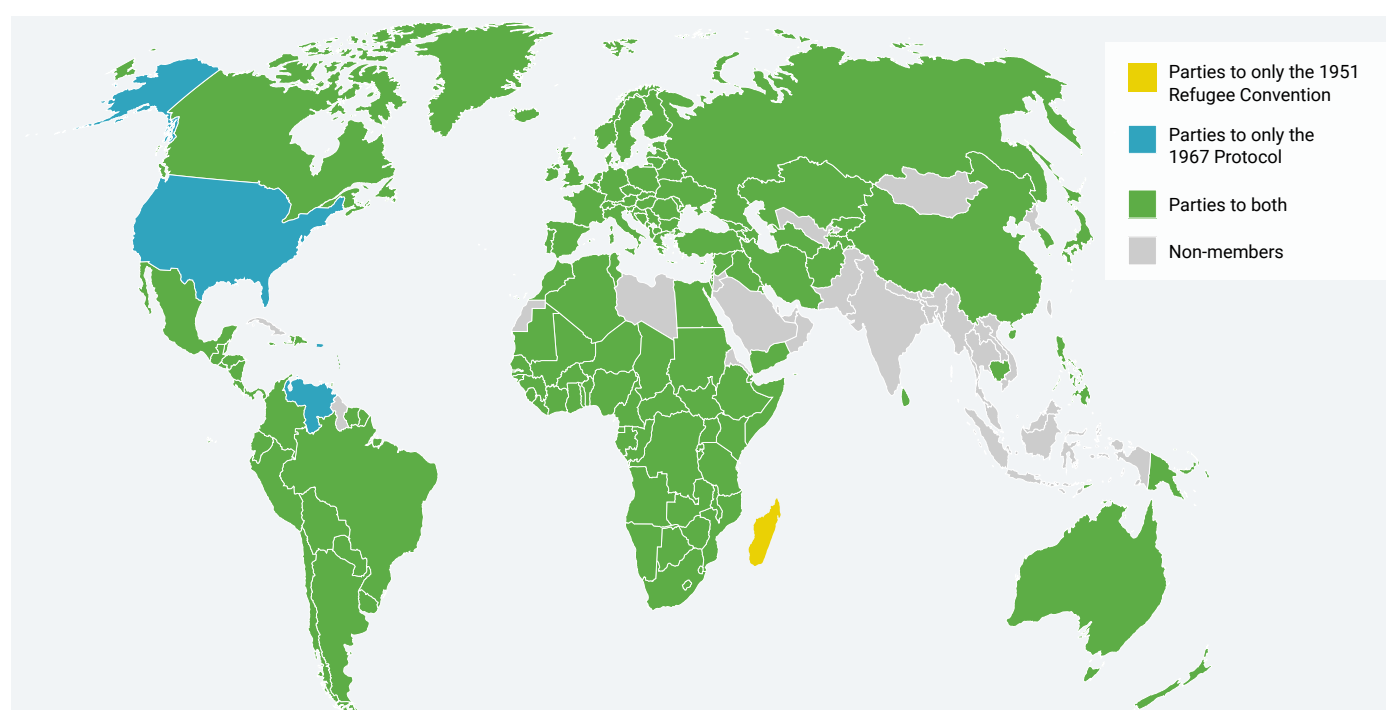


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By design, the principle of non-refoulement acts as a firewall to shield asylum seekers from harmful roll-backs of protection at the domestic or regional level. Some prominent legal scholars in fact claim that the principle of non-refoulement is a sufficiently established norm as to be considered peremptory or *jus cogens*, that is, a norm that is universally accepted in the international community and whose enforcement is mandatory. As such, any multilateral, bilateral, or domestic policy that violates a *jus cogens* norm is subject to *vacatur* in both domestic and international courts.¹⁴ If non-refoulement of asylum seekers is considered *jus cogens*, states do not have the discretion to apply the principle in a selective manner. UNHCR states that non-refoulement is “progressively acquiring the character of a peremptory rule of international law”¹⁵ and “is not subject to derogation.”¹⁶ Nevertheless, affluent nations have attempted to evade scrutiny through legally dubious agreements that transfer asylum seekers to other countries.

1.2. Externalization Regimes: Safe Third Country Practices

Under international law, there is no requirement for asylum seekers to seek protection in the first country they encounter. However, in recent decades, some nations have campaigned to retroactively impose this requirement through domestic law and regional agreements. While there are 148 nations party to either or both the Refugee Convention and the 1967 Protocol,¹⁷ it has become increasingly commonplace for countries to adopt more restrictive migration regimes, including programs meant to prevent asylum seekers from reaching their borders. One set of common restrictive practices includes programs aimed at returning or transferring asylum seekers to third countries through bilateral agreements, commonly referred to as Safe Third Country Agreements (STCAs). Initially, such laws and agreements were touted as ways to promote sharing the responsibility for processing and granting asylum. However, they are far more regularly used with the intent to deter migration from particular parts of the world and to offload asylum processing.

Crucially, there is no settled consensus on the legality of such agreements under international law.¹⁸ The origins of safe third country practices arguably began with the 1989 Conclusion by the UNHCR Executive Committee,¹⁹ which sought to prevent the irregular migration of individuals who had *already* received refugee protections but wanted to receive protections elsewhere.²⁰ The 1989 Conclusion delineated what is known today as the “first country of asylum” principle, which was meant to apply only to individuals who had already received asylum protections and never to people who merely transited through another State en route to their final destination. In fact, an earlier UNHCR Executive Conclusion from 1979 clearly articulated that asylum could not be denied “solely on the ground that it could be sought from another State.”²¹

While the 1989 Conclusion was quite narrow, some States broadened its scope when entering into STCAs.²² With the “safe third country” principle, States argued that they could transfer asylum seekers to another country which could have afforded them similar protections, including to countries of transit or to countries with which a transfer arrangement was struck. They first came into use under national laws and bilateral and multilateral refugee agreements. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), for example, amended U.S. asylum law to add

safe third country agreements,²³ though until 2019 there was only one such bilateral agreement, with Canada,²⁴ which has since been subject to litigation. The Trump administration stretched this concept further, brokering agreements with Central American countries to transfer asylum seekers apprehended at its borders. In Europe, the Asylum Procedures Directive and the EU's Dublin Regulation purported to formalize safe third country concepts within the EU and beyond.²⁵

States that deployed such transfer agreements claimed that the legal authority for such actions rests on the assumption that individuals had already received refugee protections or could have sought them in another country.²⁶ Yet, the legal concepts of "safe third country" or even "first country of asylum" are nowhere to be found in the actual text of the Refugee Convention or the 1967 Protocol.²⁷ Some nations have exploited this vacuum to create a parallel externalization regime.

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Another legal justification for transfer agreements arose from a faulty interpretation of the Refugee Convention itself. Restrictionist policymakers have wrongly utilized Article 31(1) of the Refugee Convention to justify refugee-transfer agreements by focusing on two words: "coming directly."²⁸ The article reads: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." In other words, Article 31 calls upon states *not* to impose harsh conditions like detention or criminal prosecution for the mere act of seeking refuge; it does not narrow the eligibility criteria for prospective asylum seekers on the basis of their travel route. Nonetheless, policymakers transplanted these two words to another context: the eligibility criteria for asylum protections, requiring asylum seekers to apply for refugee status in the first country that could have offered them refugee protections after fleeing persecution.²⁹ This interpretation would insulate many affluent countries from receiving asylum seekers from non-neighboring countries, repeating the inhumane World War II policies of returning boats full of refugees to harm.

The UNHCR has proposed guardrails to prevent States from implementing agreements using safe third country principles that limit protections for asylum seekers.³⁰ The 2002 UNHCR Lisbon Expert Roundtable specified that there is no mandate under international law for refugees "to seek international protection at the first effective opportunity."³¹ Still, they conceded that refugees did not "have an unfettered right to choose the country" of asylum, and sought to establish conditions that must be met in order to ensure the best interest of refugees through guidance notes and conclusions documents from their Executive Committee. UNHCR also produced guidelines encouraging transferring States to ensure the transferee country be party to the Refugee Convention and 1967 Protocol

(or adhere to commensurate protections); that States codify such agreements under legally-binding treaties able to be enforced and reviewed under legal scrutiny; and, that States maintain responsibility for the rights of refugees even after being transferred (at minimum the obligation of non-refoulement of the refugee in question).³² In addition, the UNHCR instructs States to provide guarantees to each asylum seeker that would be resettled, including those outlined below.³³

UNHCR Guidelines and Legal Considerations for the Transfer of Asylum Seekers to Safe Third Countries:³⁴

- ✔ Individually assessed, including a continuous review, as to the appropriateness of a transfer³⁵
- ✔ Permitted entry into the receiving State
- ✔ Protection against refoulement
- ✔ A fair and efficient asylum process in the receiving country that adheres to international standards
- ✔ Allowed to remain in the receiving State during the time of adjudication
- ✔ Living conditions and treatment in line with international standards, including adequate reception conditions, access to health, education, basic services, self-reliance and employment, as well as protection from arbitrary detention
- ✔ If protection need is established, provided with asylum status or long-term, lawful status in line with the Refugee Convention

As the next Chapters demonstrate, few if any agreements discussed in this report implement these threshold requirements and guidelines. What's worse, these agreements allow some policymakers to misrepresent asylum seekers as opportunists, and fault transit countries for not restricting their travels.

1.3. Externalization Regimes: Outsourcing Enforcement Operations

Another tactic frequently used alongside externalization is that of preventing asylum seekers from ever reaching an affluent nation's borders. This tactic plays out in two ways. First, some affluent nations task countries of transit with halting, detaining, or pushing back asylum seekers before they reach their destination. Second, some nations enlist private companies to perform the duties of border agents, imposing sanctions on corporations that allow the entry of asylum seekers without visas. This, in turn, incentivizes companies to incorporate migration control into their daily operations. This public and private outsourcing ultimately shifts affluent nations' borders far from their physical territory, and forces asylum seekers to turn in desperation to more dangerous transit routes.

Outsourcing policies have been implemented throughout Europe and North America. Intergovernmental agreements aimed at propping up the border controls of countries of transit were established in recent years between Spain and Morocco and Italy and Libya.³⁶ These agreements, however, plainly enlist transit countries as border guards in exchange for money. The primary intent of these agreements is the deterrence of asylum seekers, and routine human rights violations are their inevitable byproduct.

In 2012, Italy's practice of intercepting migrants rescued at sea was brought to the European Court of Human Rights, resulting in a landmark decision halting the practice and deeming it illegal.³⁷ In *Hirsi Jamaa and Others v. Italy*, the Court considered the legality of the Italian Coast Guard's 2009 actions in intercepting more than 200 individuals who had departed Libya, and transferring them to Italian military vessels that returned them to Tripoli.³⁸ These individuals were unable to identify themselves and formally ask for protection. The Court held that Italy had failed to protect the migrants' rights and freedoms under the European Convention on Human Rights by putting the plaintiffs at risk of abuse in Libya and of being returned to Somalia or Eritrea where they had originally fled.³⁹ The court found that even though the event took place outside of Italy's territory, Italy had exercised control over these asylum seekers who were "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities," and therefore were under Italian jurisdiction.⁴⁰ Consequently, the state was obligated to secure their rights and freedom pursuant to Article 1 Section 1 of the European Convention on Human Rights.

The *Hirsi Jamaa* decision represents a rare glimmer of accountability for non-refoulement violations under European law. Unfortunately, Italy circumvented the decision by striking a deal with Libya through a Memorandum of Understanding wherein Italy provides support to Libyan maritime officials to intercept and return asylum seekers to detention facilities in the country.⁴¹ In essence, the Italian government sought to establish a proxy force in Libya that could physically carry out the same operations, while skirting legal scrutiny.

Mexico's National Guard at a checkpoint in Tapachula in southern Mexico, June 2019.



Image licensed via Reuters Pictures

Across the Atlantic in 2014, the United States also sought foreign assistance to substantially reduce the number of individuals arriving at its borders in response to the rise of asylum seekers fleeing widespread violence in Central America.⁴² The U.S. sought to increase Mexico's enforcement capabilities at the border and its interior.⁴³ Once again, the inherent goal of U.S. policy was to decrease the number of asylum seekers who would be able to reach the border in the first place.

Since the 1960s, Mexico had been the country of origin for most migrants reaching the U.S., yet it became a country of transit around 2013 when more than a quarter of a million non-Mexican asylum seekers were apprehended at the U.S.-Mexico border.⁴⁴ As a result, the Mexican government implemented a plan to strengthen its border-enforcement capabilities through the Programa Frontera Sur (PFS). While this was not the first such program, the PFS program specifically sought to curb migration at Mexico's southern border at the behest of the U.S., and with direct monetary assistance.⁴⁵ U.S. funding came primarily from the Merida Initiative, a program that started in 2008 with the aim of curbing organized crime in the region. Quietly conflating migration control and crime prevention, the U.S. transferred \$200 million of the Merida Initiative funds toward the PFS.⁴⁶ Consequently, there has been a dramatic increase in the militarization of Mexico's southern border and creation of "control belts" of interior enforcement that target common routes for asylum seekers, such as the freight trains known as "la bestia." These mechanisms only led migrants to find more dangerous routes north without any significant impact on the trade of illicit goods, one of the program's original aims.⁴⁷

In addition to outsourcing enforcement mechanisms to perimeter and southern governments, affluent nations have enlisted private corporations to prevent asylum seekers from reaching their territories at the point of embarkation. Legislation turning private carrier companies, such as airlines and other vessels, into *de facto* immigration enforcement agents⁴⁸ was widely adopted in the second half of the twentieth century. Under carrier sanction legislation in countries in Europe, Australia, and the United States,⁴⁹ private carriers are incentivized to block asylum seekers from boarding vessels such as planes through significant financial penalties. Penalties include bearing the cost of deporting individuals, covering related expenses including accommodation or detention, and additional fines.⁵⁰ As a result, private carrier companies bar asylum seekers, who frequently lack required travel documents, from safely reaching their country of destination and seeking refuge. This privatization of migration control yields another benefit for states eager to circumvent the principle of non-refoulement; because carriers are private companies and non-state actors, it is difficult to prove that their actions fall under the jurisdiction of the state, even if they are acting on behalf of said state.

Carrier sanctions drive asylum seekers into the hands of the very trafficking networks these policies are purported to stop. In many cases, asylum seekers cannot obtain the state-issued documentation required by the private carrier, particularly when the state is the persecuting actor from which they are fleeing. For example, a Black asylum seeker from Mauritania—the country with the highest rate of slavery in the world—may not be able to provide a passport or obtain a visa to present to an airline due to the fact that Black Mauritians are not recognized⁵¹ as citizens by their government. In this example, carrier sanction legislation would push Black asylum seekers from Mauritania back to their persecutors and leave them particularly vulnerable to smuggling networks.

Often masquerading as human rights protections, externalization regimes permit affluent nations to circumvent the core principle of non-refoulement. As Chapters 2-5 show, European Union Member States, Australia, and the United States have created such regimes, which violate their domestic and international obligations toward asylum seekers.

CHAPTER 2

The European Union and its Member States' Efforts to Prevent Asylum Seekers from Reaching their Borders

“Before the departure, some of the migrants told me that they had dreams. They were simple dreams. They just wanted to have a normal life. But instead of being able to pursue their dreams in their own country, they had to choose the path of exile. For them, it was the only solution. [...] When a European is the victim of a tragedy, the whole world mobilizes, but when hundreds of Africans drown, nobody seems concerned. Is humanity’s conscience dead?”

— Asylum seeker from Sudan who survived a shipwreck in the Mediterranean on April 22, 2021.⁵²

After colonizing most of Africa, the Middle East, and Asia, and leaving many countries in crisis, European Union Member States often work diligently to prevent migrants from reaching their shores.⁵³ Europe’s policies have had ripple effects, displacing countless people and driving them from their homes in search of protection. In 2015, more than one million people seeking refuge arrived in Europe,⁵⁴ forcing the EU to confront its broken migration and asylum system.⁵⁵

In Jean Raspail’s racist dystopian 1973 novel, “The Camp of the Saints,” Raspail depicts the arrival of Black and Brown refugees in France as an apocalyptic invasion of the Western world. Although far-right figures in Europe and the U.S. have previously used the book as a propaganda tool, it was catapulted to the world stage in 2015 by anti-immigrant and white nationalist figures such as Steve Bannon and France’s Marine Le Pen. Le Pen used the depictions in Raspail’s work to conjure up anti-immigrant racial animus toward asylum seekers arriving in Europe, warning of a “real migratory submersion.”⁵⁶ Although the National Rally leader would later lose the French Presidential race to Emmanuel Macron,⁵⁷ other campaign outcomes across Europe culminated in the United Kingdom

leaving⁵⁸ the EU, Hungary's far-right Prime Minister Viktor Orban winning his third term in office,⁵⁹ and the rise of far-right parties all over Europe.⁶⁰

The rise of far-right, nationalist, and anti-immigration parties in Europe as center-right parties find themselves in disarray has been disastrous.⁶¹ Even though public attitudes toward immigration in many European countries did not worsen during this time, mainstream political parties capitulated to the demands of the far-right and frequently adopted their anti-migration policy proposals.⁶² The EU and its Member States increasingly focused on migration prevention and externalization, despite vowing to implement non-refoulement policies throughout the bloc.

In recent years, Europe strove to close every route to its territory. Encouraged by EU Member States,⁶³ Western Balkans countries began to restrict travel through their borders in 2016, shutting out asylum seekers attempting to travel on land to interior countries in northern Europe.⁶⁴ This pushed many asylum seekers into more dangerous routes on land along the Western Balkans route, or by sea through the Mediterranean and Aegean seas. As discussed below, European nations then moved to block these routes altogether: EU Member States reached a deal with Turkey to deport "irregular" migrants to the neighboring nation, while Italy enlisted Libya to push back asylum seekers arriving via the Mediterranean. But these externalization and outsourcing practices were not exclusive to Europe's eastern and southern entry points, as illustrated by the brutal demolition of a refugee camp in northern France in 2016.

2.1. Failure to Uphold Rights of Asylum Seekers Enshrined in EU Law

EU law incorporated the Refugee Convention's core principle of non-refoulement in the European Convention on Human Rights⁶⁵ via the EU Charter of Fundamental Rights.⁶⁶ However, the EU has increasingly permitted Member States to impose limitations on the principle through externalization regimes—both within EU territory and beyond. These measures have put the rights of asylum seekers at risk and drawn scrutiny in courts.

In 1999, EU Member States agreed to streamline the processing of asylum claims by building a Common European Asylum System (CEAS) based on the Refugee Convention and the 1967 Protocol.⁶⁷ Though Member States retain discretion as to implementing asylum policies, the CEAS framework provides a minimum standard of treatment for asylum seekers including their registration, reception (where they are initially housed), and the processing of their applications.⁶⁸ Directives and regulations addressing minimum standards for asylum seekers, including their treatment, and the sharing of financial and processing responsibility were subsequently adopted by the EU. These include the 2003 Dublin Regulation and the 2005 Asylum Procedures Directive (APD) as well as their subsequent amendments.⁶⁹ These policies have provided the framework for some European Union Member States to further insulate themselves from perimeter countries and the African, Asian, and Middle Eastern asylum seekers arriving at their borders.

In theory, the APD and the Dublin Regulation were designed to share asylum processing responsibility among EU Member States. In practice, however, these procedures codified safe third country concepts within the EU, placing the collective burden on external border countries to process arriving asylum seekers and provide asylum. While the APD provides certain due process guarantees, including the right to a lawyer and an appellate process,⁷⁰ it also allows Member States to apply “safe third country” concepts in processing of asylum claims, provided protections are in accordance with Refugee Convention standards.⁷¹ The Dublin Regulation also relies on these concepts when determining which European Union country is responsible for processing an asylum claim. An increase in the numbers of arriving asylum seekers in 2014 and 2015 exposed basic vulnerabilities in this refugee-transfer model, including disputes among Member States regarding sharing asylum processing responsibility, overly lengthy procedures, and poor reception conditions for vulnerable people.

The Dublin Regulation requires one fair examination of an asylum application within the European Union, operating on the assumption that asylum practices in each country adhere to the same common standards.⁷² Under the agreement, certain criteria are applied in the examination process of an asylum claim in order to determine if an asylum seeker will remain in the EU country they are currently in, or if a Member State is to initiate a “transfer” request of that asylum seeker to another Member State. Family reunification is supposed to be the first criterion for determining which EU country is responsible for processing an asylum claim,⁷³ but many Member States do not follow this standard and, instead, Dublin “transfers” are usually initiated when secondary movement is detected or where an individual is found to have traveled through another country before reaching the country where they are requesting asylum.⁷⁴

In practice, the Dublin Regulation exposes asylum seekers to human rights abuses, including indefinite detention, family separation, and delays in access to protection.⁷⁵ The regulation forces already vulnerable people to wait for long periods of time in limbo without substantive appeals processes while EU Member States determine and agree on responsibility.

In practice, the Dublin Regulation exposes asylum seekers to human rights abuses, including indefinite detention, family separation, and delays in access to protection.

There are a number of reasons why asylum seekers often attempt to travel from European external border states such as Greece and Italy to interior countries like Germany, France, and the United Kingdom: in order to reunify with family members, or to have access to the labor market, housing, legal aid, and other direct services. Further, because external border countries within Europe are often the first countries through which asylum seekers transit, they may be responsible for processing and providing protection to more individuals than other destination Member States.⁷⁶ As a result, asylum seekers may attempt to bypass these countries in order to avoid prolonged detention and ensure that they have access to fair asylum proceedings. This imbalance was only exacerbated with the increase in migration in 2014 and 2015, as this broken system for processing asylum seekers fell apart and harsh deterrent policies were expanded upon.

External border states within the EU who are recipients of the largest share of arrivals

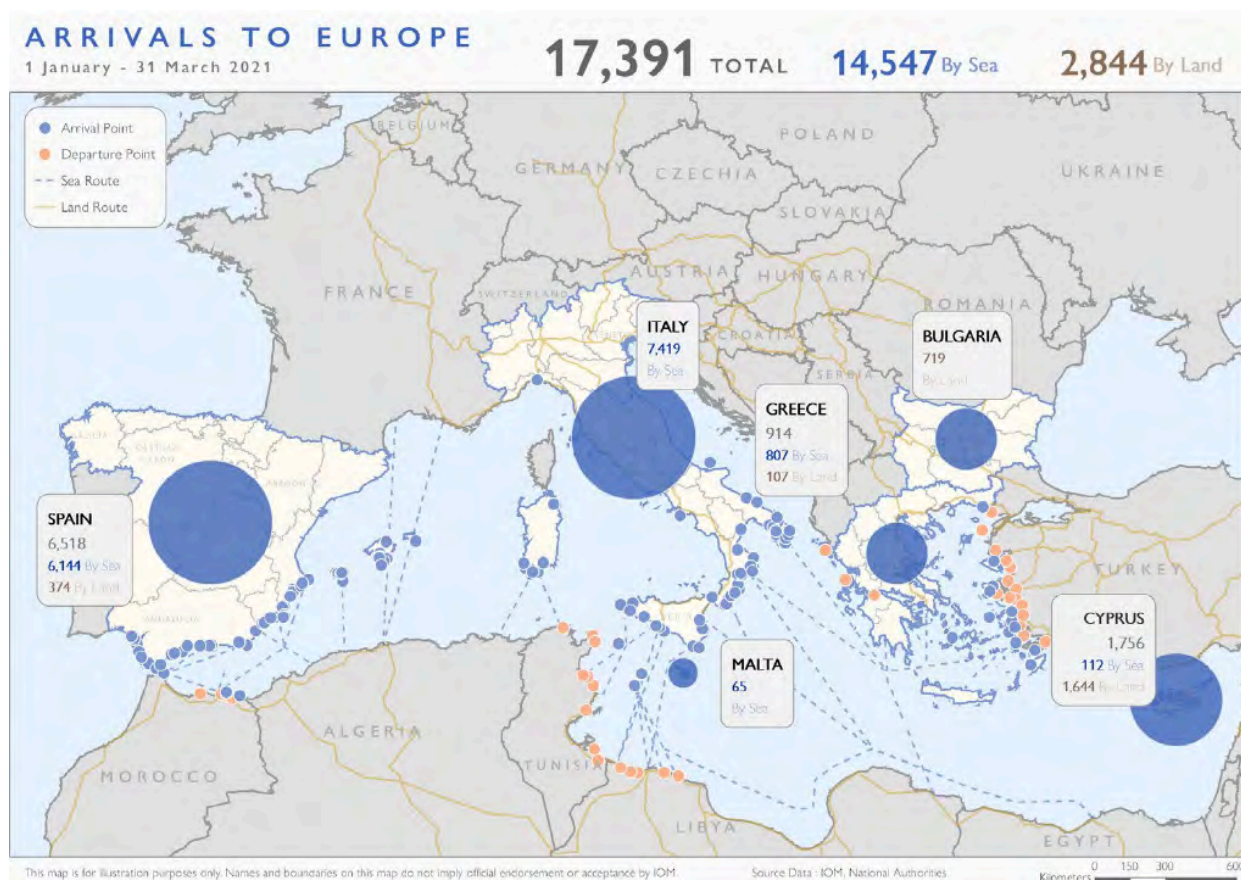


Image Credit: IOM's DTM Europe, Europe – Mixed Migration Flows to Europe, Quarterly Overview (January – March 2021)

2.2. Refoulement at Sea: The EU and Italy's Reliance on Libya to Prevent Asylum Seekers Arriving In Europe

For many asylum seekers, simply arriving in Europe and requesting asylum is becoming increasingly impossible, particularly for those who are pulled or pushed back to harm in the Mediterranean. Due to its location, Italy frequently becomes the default European gateway for asylum seekers from Sub-Saharan African countries, who arrive by sea on dangerous and overloaded boats. Rather than rise to the humanitarian challenge, Italy and the EU have accelerated their efforts to halt arrivals and push asylum seekers away from Italian ports.⁷⁷ After the European Court of Human Rights' *Hirsi Jamaa and Others v. Italy* decision created a legal barrier which prevented Italy from pushing back asylum seekers physically, Italy enlisted Libya to act as a border enforcement proxy. Under a Memorandum of Understanding first signed in 2017,⁷⁸ Italy and the EU have provided training, equipment, and additional support including a total of more than 500 million Euros to Libya, with the goal of preventing migration to the shores of Europe.⁷⁹ Most notably, Italy and the EU's efforts have gone toward the recruitment, training, and financing of the Libyan Coast Guard (LCG). The building up of the LCG, which in some instances involved recruiting coast guard officials from smuggling networks, has resulted in human rights violations and deaths at sea, revealing just how far EU Member States will go to prevent migration from the continent of Africa to Europe.⁸⁰

**40,000 people
including children
pulled back to
Libya in the first
three years of its
agreement with
Italy.⁸¹**

In the first three years of the agreement, at least 40,000 people, including children, were intercepted at sea and pulled back to Libya, where they faced indefinite detention and human rights abuses, including torture and slavery.⁸² The same year the MOU was reached, CNN published a report exposing the auctioning of migrants in Libya into enslavement.⁸³ Nevertheless, Italy renewed its Memorandum of Understanding on Migration with Libya in 2020,⁸⁴ without any amendments.⁸⁵

Historically, the European Union and Italy's use of Libya as a proxy border control agency predates this formal agreement. Libya is a primary transit country for asylum seekers from the continent of Africa.⁸⁶ Asylum seekers frequently flee war, conscription, and violent conflict, including state sanctioned violence and slavery, layered upon economic destitution. In the aftermath of colonialism and the carving up of the continent of Africa, Europe—and Italy in particular enlisted Libya to prevent asylum seekers from arriving at their shores.⁸⁷ In 2008, Italy reached a deal with Colonel Muammar al-Gaddafi pursuant to which Italy paid Libya \$5 billion over the course of 20 years in recognition of damage done to Libya by Italy during the colonial era.⁸⁸ In exchange, Libya would work to stop as many asylum seekers as possible from arriving in Italy. The agreement broke down with the Libyan dictator's fall from power and subsequent death, but not before he demonstrated the racist ideological underpinning of these mechanisms on the world stage.⁸⁹ Standing next to Italian Prime Minister Silvio Berlusconi in Rome in 2010, Gaddafi warned that "Europe runs the risk of turning black from illegal immigration... It could turn into Africa."⁹⁰

The International Organization for Migration (IOM) has described the Mediterranean Sea as "by far the world's deadliest border."⁹¹ Even if individuals have been able to withstand grueling overland journeys, including facing violence such as kidnapping, they are then packed onto rubber dinghies or shabby wooden boats without life vests and sent out to sea. Since 2014, at least 22,000 people have perished in the Mediterranean and the Atlantic en route to Europe.⁹² In 2020 alone, more than 2,200 lives were lost at sea,⁹³ including over 1,400 deaths in the Mediterranean.⁹⁴ These preventable tragedies have not slowed down, and as of June 2021, human rights observers have recorded 677 deaths of asylum seekers traveling from Libya to Europe.⁹⁵ In many instances, these deaths are the result of the EU and its Member States' generalized failure to agree on who has responsibility to rescue people in danger at sea. Instead of working to save lives, the EU and its Member States have halted government run search and rescue operations and interfered with and criminalized SAR NGOs.⁹⁶

Libyan Coast Guard officials drag a deflated rubber boat which had carried some of the 150 asylum seekers whose lives were lost in a shipwreck in the Mediterranean on July 25, 2019.



Image licensed via Getty Images

In May 2021, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a report on the state of search and rescue operations in the Mediterranean Sea. The report, titled “Lethal Disregard,”⁹⁷ condemns the failure of EU Member States to assist distressed migrants at sea, as well as push-backs, the LCG’s “pattern of reckless and violent behavior,” and the criminalization of SAR NGOs. As of December 2020, the OHCHR found that only 2 of the 15 SAR assets which normally save lives in the central Mediterranean were performing rescue operations, while the others were “either impounded or otherwise being prevented from undertaking their activities.”⁹⁸ In addition to halting EU SAR operations and interfering with the work of NGOs, Italy and the EU conspired with the Libyan Coast Guard, enlisting them to intercept asylum seekers at sea and return them to Libya.

Under the United Nations Convention on the Law of the Sea, EU and Italian authorities are obligated to alert whichever ship is in the best location to rescue a distressed vessel at sea.⁹⁹ In recent years, however, Italian authorities and the EU’s border agency, Frontex, have given preference to the LCG over non-governmental organizations to prevent disembarkation of asylum seekers in Europe.¹⁰⁰ Leaked transcripts detailing communications between Libyan and Italian Coast Guard officials revealed that Italian authorities were aware of Libya being “either unwilling or incapable of looking after migrant boats at sea.”¹⁰¹ In one instance, a LCG official told his Italian counterpart who had phoned to report 10 distressed dinghies that it was a holiday and “perhaps we can be there tomorrow.” In March 2017, Italian officials responded to calls for help from hundreds of distressed asylum seekers at sea by reaching out to the LCG, who in turn failed to act. According to evidence obtained by The Guardian, the Italian Coast Guard would subsequently lose contact with the distressed dinghies, resulting in at least 146 deaths.¹⁰²

Italy's and the EU's externalization policies with Libya compound layers of human suffering for asylum seekers who are intercepted by the LCG and returned to detention centers in the country. Conditions in Libyan detention centers are abhorrent, and the country, engulfed in a civil war, is not party to the 1951 Convention and has no asylum law.¹⁰³ Furthermore, Libya criminalizes irregular entry, stay, and exit, and individuals intercepted at sea or apprehended in the interior or at the borders of Libya are criminalized and detained.¹⁰⁴ Because of Libya's failed judicial system, asylum seekers are detained indefinitely without being charged or convicted. Twenty percent of detained asylum seekers in Libya are children, some of whom have been separated from their families or are unaccompanied.¹⁰⁵ Detained asylum seekers including children, are subjected to beatings, torture, forced labor, and sexual violence.¹⁰⁶ International human rights organizations have condemned the cooperation of the Italian government and the European Union with Libyan authorities, and have called for an end to the MOU and the release and evacuation of all asylum seekers detained in Libya.¹⁰⁷ In a report submitted to the UN Security Council on September 3, 2020, UN Chief Antonio Guterres urged the closure of immigration detention centers in Libya due to their "horrendous conditions."¹⁰⁸

The inhumane externalization policies of the European Union and Italy have increased pressure on asylum seekers to explore more dangerous migration routes including the Atlantic route to the Canary Islands in Spain.¹¹⁰ According to the IOM, one-third of migrant deaths at sea in 2020 were along the Atlantic route.¹¹¹ Loss of life in the Atlantic has persisted, with at least 126 deaths from January to April of 2021.¹¹² Like Italy and Greece, Spain is an external border state and a recipient of a larger number of arrivals. In 2020, more than 20,000 people mostly from the continent of Africa reached the Canary Islands after surviving dangerous journeys at sea, while at least 849 people died trying.¹¹³ This is more than four times the amount of deaths in 2019.

The Spanish government has struggled to process these vulnerable people, many of whom it has restricted in hotels and kept on the islands.¹¹⁴ At the end of 2020, when more than 8,000 people had been accommodated in hotels, the government asked for resettlement support from the European Union.¹¹⁵ Spain's Migration Secretary Hana Jalloul called on other EU Member States to share the responsibility of processing asylum seekers, stating: "We are the southern border of Europe, not of Spain."

“Detained migrants and refugees in Libya, both women and girls as well as men and boys, remain at high risk of sexual and gender-based violence, including rape, which is used as a form of torture, with some cases resulting in death.”

— Situation of migrants and refugees in Libya, United Nations Security Council Report of the Secretary-General¹⁰⁹

In December 2020, the European Union announced 43.2 million euros in aid for Spain to, according to the EU, go toward providing temporary shelter and additional assistance for migrants on the Canary Islands.¹¹⁶ Although many women and minors have reportedly been transferred to mainland facilities or put into the care of Spanish government officials,¹¹⁷ thousands of men are being held on the islands in unsanitary conditions with poor access to food, medical treatment and legal services, where they fear they are at risk of deportation.¹¹⁸ A 2020 Spanish Ombudsman report decried conditions for asylum seekers on the Canary Islands and called for an end of the practice of trapping of people on islands: “coastal areas in southern Europe cannot be turned into places where rights such as freedom of movement are denied, on the grounds of migration control and to avoid a so-called pull effect.”¹¹⁹ In addition to the devastating human consequences of Spain’s migration policies, trapping asylum seekers on islands in degrading conditions has not deterred new arrivals.¹²⁰

2.3. EU-Turkey Statement: Banishing Asylum Seekers to Turkey and Trapping them on Greek Islands

In March 2016, European Union Members States and the Turkish government reached an agreement to deport asylum seekers arriving on Greek islands “irregularly” to Turkey.¹²¹ According to the European Commission, the EU-Turkey Statement “sought to put an end to irregular migration from Turkey to the EU, improve living conditions for Syrian refugees in Turkey and open up organised, safe and legal channels to Europe for them.”¹²² The agreement postures as a hybrid between a safe third country agreement and border externalization and is predicated upon the false premise that Turkey is a safe country for asylum seekers.¹²³ Intentionally called a “statement” rather than a bilateral agreement, the EU-Turkey agreement also skirts judicial oversight because it implicates EU Member States, rather than the EU.¹²⁴

Under the Statement, in exchange for accelerated talks on accession to the EU, visa liberalization, and 6 billion Euros in refugee aid for Turkey,¹²⁵ Greece may deport asylum seekers to Turkey who are deemed inadmissible for transiting through the country en route to Europe. Additionally, the Statement provides that for every Syrian refugee deported to Turkey, one may be resettled in Europe. This outsourcing practice was suspended in early 2020 due to the coronavirus pandemic and a breakdown of relations between Turkey and Greece.¹²⁶

As the UNHCR has pointed out, the Statement relies on Article 33 in the Asylum Procedures Directive (APD) to deport individuals who traveled through both a first country of asylum and/or a safe third country.¹²⁷ Rooting the legality of deportations to Turkey in the APD is dubious, particularly because the Statement is not in compliance with Article 38 of the APD, which states that nations can only be considered safe third countries when they are compliant with certain measures, including the obligation to process and provide refugee protections in accordance with the Refugee Convention.¹²⁸

Although Turkey (which hosts the most refugees and asylum seekers worldwide¹²⁹) is party to the Refugee Convention and the 1967 Protocol, the country maintains the instrument’s original geographical limitations and therefore does not provide non-European individuals with all rights afforded by the Convention.¹³⁰ In Turkey, asylum seekers from non-European countries are granted

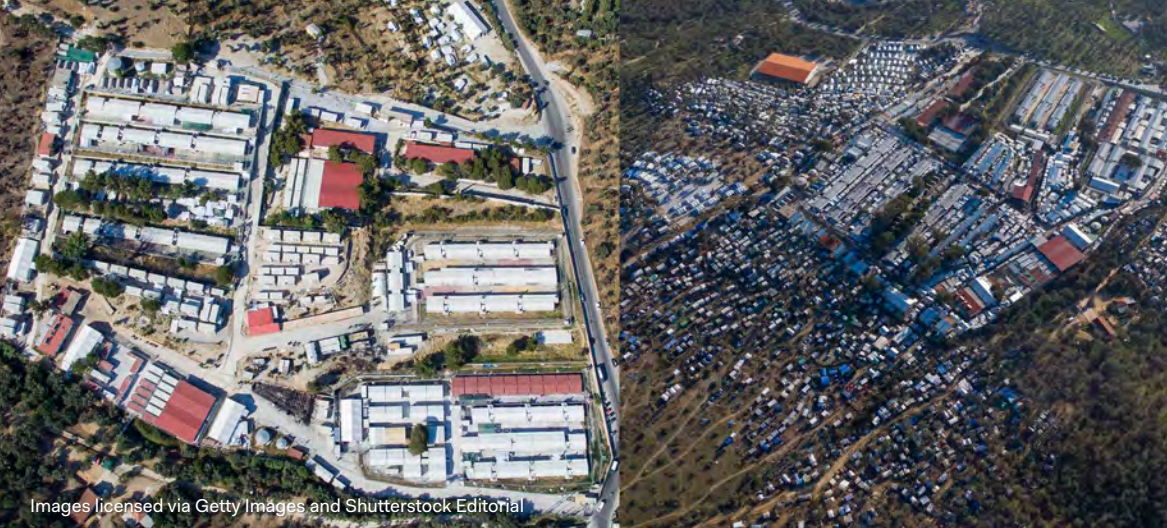
limited relief, must secure their own housing, and their access to the labor market and education is restricted.¹³¹ Further, they are subjected to deportation at any time because Turkey's protection regime for Syrians and other non-Europeans is non-binding.¹³² Overall, asylum seekers in Turkey experience high rates of homelessness¹³³ and are frequently forced to work in the underground economy,¹³⁴ conditions which worsened during the COVID-19 pandemic. Further, because the resettlement scheme in the EU-Turkey Statement applies to Syrians only, it reinforces disparities in Europe's protection regime among nationalities,¹³⁵ including those from Afghanistan, Iran, Iraq, and Sudan.¹³⁶ Turkey thus fails to meet the threshold requirements for safe third country processing.

With the EU-Turkey Statement, European Union Member States employed Greek islands to hold asylum seekers it intends to remove to Turkey off of the mainland. This approach is designed to make it as difficult as possible for people to gain protection in Europe, and as easy as possible for them to be returned to Turkey. As a peripheral member state, Greece has therefore been tasked with guarding Europe's borders, and since the EU-Turkey Statement went into effect, it has effectively served as a mass detention center for the EU. The Statement has trapped asylum seekers in camps on the Greek islands with mandatory detention,¹³⁷ fast-track asylum procedures,¹³⁸ due process deficiencies, and a disregard for family reunification.¹³⁹

According to the UNHCR, as of September 2020 more than 21,000 people resided in overcrowded camps on the Greek Aegean islands.¹⁴¹ That month, the Greek Moria refugee camp on Lesbos island caught fire and was destroyed. At the time of the fire, the camp (built to house 3,000 people) had a population of 13,000.¹⁴² The Moria camp had been plagued by unsanitary and unsafe conditions. Its destruction displaced thousands of asylum seekers, with many forced into even worse conditions.¹⁴³ A temporary shelter erected on Lesbos to house more than 7,000 asylum seekers displaced by the Moria fire has been described as susceptible to strong winds and flooding, with poor sanitation and lack of power and adequate protection for residents. Additionally, the Greek government confirmed in January 2021 that the camp (built on a repurposed firing range) has dangerous levels of lead in the soil, endangering both asylum seekers and aid workers.¹⁴⁴

**“I thank Greece
for being our
European ασπίδα
[English: shield]
in these times.”**

**— European
Commission President
Ursula von der Leyen,
March 3, 2020¹⁴⁰**



Images licensed via Getty Images and Shutterstock Editorial

**Photos taken of
Moria Refugee
camp in July 2017
and January 2020.**

In addition to trapping people in unsafe conditions off of mainland Greece, Greek authorities have engaged in systematic illegal push-backs at sea. In 2020, 9,741 asylum seekers, including children, were involved in push-back incidents.¹⁴⁵ The Greek government also began to criminalize asylum seekers, for example, in late 2020 Greek authorities charged an Afghani father with endangerment because his 6-year-old son died at sea en route from Turkey.¹⁴⁶ With the goal of minimizing migration to Europe, the EU and its Member States, including Greece, have subjected asylum seekers to a system of punishment for daring to protect themselves and their families. Whether it be push-backs at sea, offshore detention, or deporting people to Turkey where they are not provided full refugee rights and are at risk of refoulement, the EU-Turkey Statement demonstrates the deadly human suffering caused by externalization regimes.

Whether it be push-backs at sea, offshore detention, or deporting people to Turkey where they are not provided full refugee rights and are at risk of refoulement, the EU-Turkey Statement demonstrates the deadly human suffering caused by externalization regimes.

Demolition of the Jungle refugee camp in Calais, France.



Image licensed via Reuters Pictures

2.4. U.K. and France Border Enforcement: Raids, Surveillance and More Deaths at Sea

In addition to the European Union's disturbing push-backs and other externalization policies, the continent also has yet to provide safe conditions for asylum seekers internally—and this failure is often intentional. Member States participate in a variety of programs and policies designed to make conditions so difficult as to incentivize “self-deportations.”

The northern French city of Calais has for years been an embarkation point for asylum seekers trying to reach the U.K. In 2016, the French government sent bulldozers to demolish the ‘Jungle,’ a refugee camp located in Calais, evicting thousands.¹⁴⁷ Conjuring images of colonial violence, France wielded its police and military might intentionally to deter other would-be asylum seekers and “secure” its border with the U.K. The demolition of this refugee camp was followed by a crackdown on informal refugee camps and settlements, as well as on the ability of charitable organizations to provide food and housing, particularly in northern France.

There are approximately 2,000 vulnerable people, including hundreds of unaccompanied children, living on the streets in the French border towns of Calais and Dunkirk.¹⁴⁸ Inhumane living conditions, lack of reception space, barriers to work authorization, hostility toward asylum seekers, and challenges surrounding family reunification, drive asylum seekers to attempt to reach the U.K. from France.¹⁴⁹ Police raids and the constant displacement and brutalization of asylum seekers living in informal settlements have made surviving already unsafe and unsanitary conditions even more difficult. In 2020, the non-profit Human Rights Observers found that nearly 1,000 police evictions took place at refugee camps.¹⁵⁰ A field director at the organization described the French government's strategy as being designed to wear down and tire asylum seekers, and to “take away their hope. It's like torture.”¹⁵¹ An asylum seeker from Chad who escaped Libya and survived a perilous journey at sea thought his life might get better when he reached Europe. Instead, his misery

persisted. He recalled: “I feel like my mind is slipping. I can’t remember the last time I’ve slept... I ask the police for help, but they just beat us and take us to jail.” Another asylum seeker from Nigeria said of the raids, “You think they are coming for war.”¹⁵²

France is not alone in this repressive conduct. For years, the U.K. has pumped hundreds of millions of pounds into French border enforcement in order to prevent asylum seekers and migrants from arriving on Britain’s shores.¹⁵⁴ Following the Brexit transition, the British government is reportedly planning to “radically beef-up the hostile environment” approach for immigrants and asylum seekers.¹⁵⁵ Because the U.K.’s Brexit deal with the EU did not contain provisions similar to the Dublin regulation, the U.K. cannot make requests to “transfer” individuals to an EU state that asylum seekers may have traveled through before arriving in Britain.¹⁵⁶ This has driven the British government to explore new methods for reducing the processing of asylum seekers on its territory.

Although the United Kingdom’s Home Office previously distanced itself from reports in September 2020 that it was exploring offshoring asylum processing to Moldova, Morocco and Papua New Guinea,¹⁵⁷ the government agency proposed new legislation in July 2021 to establish an offshoring system.¹⁵⁸ On July 6, 2021, Home Office Secretary Priti Patel introduced The Nationality and Borders Bill to permit the processing of asylum seekers outside of the U.K., and make it a “criminal offence to knowingly arrive in the U.K. without permission.” If enacted the new legislation would limit the types of protection and benefits available to asylum seekers who arrive between ports of entry and who may have traveled through a third country en route to the U.K.

Due to increased police presence in Northern France, it is all but impossible for asylum seekers to arrive in the U.K. by the Channel Tunnel, the railway tunnel connecting the two countries.¹⁵⁹ Instead, asylum seekers are driven to pay exorbitant fees to smugglers who put them in boats and dinghies and into the world’s busiest shipping lane - the English Channel. In 2020, at least 8,000 asylum seekers crossed the Channel, though many more perished at sea.¹⁶⁰ In October 2020, a boat with asylum seekers sank, killing two children ages 5 and 8 and leaving a baby missing.¹⁶¹ Just over a month later, the U.K. and France reached an agreement doubling police presence along the French coast and increasing surveillance measures.¹⁶² The agreement failed to contain safe and legal procedures for individuals to arrive in the U.K. and apply for asylum, ensuring that crossings and deaths at sea will likely continue.¹⁶³ Further, the continued militarization of northern France has only emboldened and enriched traffickers there, who have found new more dangerous routes and charged asylum seekers more to journey along them.¹⁶⁴

**“They come
at 5am, circle
around your tent
and cut it with
knives... It has
happened to me
so many times.
They treat us
like animals, not
humans.”**

— Abdul, a 20-year-old from Sudan on the French police evictions.¹⁵³

2.5. Looking Forward: Europe's Continued Focus on Externalization and Returns

EU Member States have intensified their already harsh deterrent practices under the guise of responding to the COVID-19 pandemic. Unable to halt the departures of asylum seekers through other measures, EU Member States pushed back at least 40,000 vulnerable people during the pandemic.¹⁶⁵ This resulted in an estimated 2,000¹⁶⁶ deaths on land and at sea, and demonstrated the willingness of EU Member States to violate the non-refoulement principle in order to prevent asylum seekers from entering their territories.

In September 2020, the European Commission unveiled a new proposed Pact on Migration and Asylum,¹⁶⁷ representing a capitulation to anti-immigrant heads of state in Hungary and Poland. The pact contains some positive measures for asylum seekers, including an expanded definition of family for reunification purposes, but overall, fails to ground the new policy in humanitarian principles, and diminishes existing EU protections for vulnerable people. The proposal would replace the Dublin regulation with a new system for determining state responsibility, though effectively the first countries in which asylum seekers arrive will bear most obligations. The pact solidifies Europe's practice of establishing inter-country deals to halt migration, and expands detention and deportation measures.¹⁶⁸ Under this pact, the practice of incentivizing third countries to accept deportations and readmissions through visas and development assistance continues.¹⁶⁹ The new proposal would also allow countries to opt out of relocating asylum seekers processed by the European-wide system, and instead show "solidarity" with peripheral countries by taking charge of deportations.

This proposal will continue to drive asylum seekers to take even more dangerous routes in search of safety, with long-term deleterious effects on refugees' health.¹⁷⁰ Humanitarian organizations led by the European Council on Refugees and Exiles (ECRE) have noted two flawed presumptions on which the new pact is based: first, "that the majority of people arriving in Europe do not have protection needs;" and second, "that assessing asylum claims can be done easily and quickly."¹⁷¹ As ECRE observes, both are unfounded. The majority of people claiming asylum in Europe over the past three years, have, in fact, received a form of protection. Europe's efforts to externalize asylum processing and border enforcement are depriving vulnerable people of their right to protection, and unnecessarily subjecting them to human rights abuses and death.

"...we want to share with you what we have, we hope to live in dignity. But this dream comes at a high cost for all the migrants who drown."

— Asylum seeker from Sudan who survived a shipwreck in the Mediterranean on April 22, 2021.¹⁷²

On April 22, 2021, at least 130 asylum seekers from African countries died in a shipwreck in the Mediterranean off the coast of Libya.¹⁷³ As Marie Naas, Head of Advocacy in Germany and the EU at the SAR NGO Sea-Watch points out, “Imagine a boat in distress with 90 people on board, 15 children, 3 pregnant women, all European or U.S. passport holders. Can you imagine what an impressive flotilla would search day and night for the boat in distress, supported by military and helicopters and live tickers of all big news agencies? This reality is the greatest demasking of the so-called European values.” Were Europe to live up to its self-described human rights ideals, it would have to reckon with its treatment of asylum seekers and migrants on land and at sea, at its borders and beyond, and end its punishment and banishment of human beings fleeing war, persecution, and other dangers.

As Marie Naas, Head of Advocacy in Germany and the EU at the SAR NGO Sea-Watch points out, “Imagine a boat in distress with 90 people on board, 15 children, 3 pregnant women, all European or U.S. passport holders. Can you imagine what an impressive flotilla would search day and night for the boat in distress, supported by military and helicopters and live tickers of all big news agencies? This reality is the greatest demasking of the so-called European values.”

CHAPTER 3

The Pacific Solution: Australia's Insular Approach to Asylum Seekers

“The White Australia policy, which officially ended in 1973, continued under another guise. The colonial habit continues in Australia, with the government using Nauru and Papua New Guinea for exiling undesirable people.”

— Behrooz Boochani, a Kurdish-Iranian asylee and award-winning journalist previously detained on Manus Island.¹⁷⁴

During much of the 20th century, the White Australia Policy primarily narrowed migration to individuals of European descent, deliberately curbing the entry of Asian and Muslim migrants.¹⁷⁵ This migratory policy even extended to Australian citizens of non-European heritage, who were subjected to forms of immigration restrictions that their white peers did not endure.¹⁷⁶ Though Australia's refugee policy was not racially restrictive on its face, the government's favoring of resettled refugees over arriving asylum seekers became a new iteration of its historical control of migration. Unlike asylum seekers whose arrival is not controlled by their country of refuge, refugees are carefully selected, their arrivals planned, and their numbers capped by the receiving nation.¹⁷⁷ Similar to the United States' presumptive detention policy that began around this time,¹⁷⁸ Australia adopted a formal mandatory detention policy in 1992 that applied to everyone who enters Australia without authorization, including asylum seekers. This policy was later aimed at deterring so-called “illegal maritime arrivals”—disproportionately punishing those who faced the most perilous journey to reach Australia's shores.¹⁷⁹

Australia's offshoring policy stands out for its cruelty, which has resulted from its active campaign of vilifying mostly Asian, African, Middle Eastern and Muslim asylum seekers as a threat to its borders and national identity. From forcible turnbacks to the suspension of its own laws, Australia has conducted a two-decade project of stranding tens of thousands of asylum seekers in abhorrent offshore conditions. Its conversion of two former colonies—Nauru and an island in Papua New Guinea named Manus—into proxy detention centers has proven not only costly, but lethal. To date, asylum seekers remain stranded on these islands without recourse.

3.1. Australian Push-Backs and Territorial Excision

For decades, Christmas Island—a territory between Australia's mainland and Indonesia, which Australia annexed in the 19th century—acted as the Australian border for arriving asylum seekers. Christmas Island became the center of a controversy that launched Australian offshoring when, in August 2001, a Norwegian container ship called the MV Tampa rescued 433 Muslim asylum seekers fleeing Afghanistan.¹⁸⁰ The asylum seekers' small boat, the KM Palapa, had been stranded in international waters on its way from Indonesia; the Norwegian ship pressured the Australian authorities to permit these asylum seekers, many of whom faced dire medical emergencies, onshore. Despite their likely eligibility for asylum in Australia, a standoff ensued as then Prime Minister John Howard refused to allow the asylum seekers onto land. The following week, Howard stated in an interview, "I believe that it is in Australia's national interest that we draw a line on what is increasingly becoming an uncontrollable number of illegal arrivals in this country."¹⁸¹

Howard oversaw the passage of the 2001 Border Protection Bill, which authorized Australian authorities to board vessels, remove people, and make arrests. The bill retroactively justified¹⁸² actions taken during the MV Tampa incident, and created legal pathways to halt future boat arrivals, an issue which had not up to that point been a priority for the Australian public.¹⁸³ These swift changes to asylum processing became law as a chorus of Australian leaders began describing asylum seekers arriving by boat as "queue jumpers," "criminals," or "terrorists."¹⁸⁴

The Howard administration's hostile response to asylum seekers arriving at sea escalated from here. A cascade of policies were deployed to halt the arrival of new asylum seekers by boat. First, the Australian government elected to suspend asylum protections on Christmas Island (even though it is part of Australia) so as to permit turn-backs of boats and asylum seekers. This excision effectively converted parts of Australian territory into offshore processing locations, where domestic and international obligations not to turn back asylum seekers no longer applied.¹⁸⁵ Additionally, Australian authorities launched "Operation Relex," wherein its naval forces turned back boats of asylum seekers in contravention of the Refugee Convention.¹⁸⁶ Alarming, the Australian government often conducted these push-backs in international waters. A similar policy introduced in 2013, "Operation Sovereign Borders," further codified the policy of push-backs as Australia's maritime response to all migrants, including asylum seekers.¹⁸⁷

Australian authorities also spent tens of millions of dollars on a campaign to deter asylum seekers from reaching its shores.¹⁹¹

How the U.S. and Australia Traded Offshoring Tactics

Australia did not build its maritime interdiction policy in former colonies in a vacuum. Though unique in its insular geography, Australia tested and explored the limits of these interdiction policies in bilateral and multilateral forums, where Australian authorities shared and received information with their U.S. counterparts about the architecture of offshoring and push-back policies they used in the Caribbean—further discussed in Chapter 4.¹⁸⁸ As one former Australian official described it, those forums provided an opportunity for Australian policymakers to discuss the "margins" of the Refugee Convention.¹⁸⁹

This information-sharing and communication on interception tactics were well underway by the time the MV Tampa was on every headline. As they troubleshooted their response, Australian officials were in daily contact with a senior U.S. policymaker, who consulted with them about the U.S. response to Haitian asylum seekers intercepted at sea in the 1980s and 1990s.¹⁹⁰ For more on these policies, see Chapter 5.



Australian Government



NO WAY

YOU WILL NOT MAKE AUSTRALIA HOME

Image Credit: © homeaffairs.gov.au

A poster displayed during Australia's media campaign to deter migrants and asylum seekers, which cost Australian taxpayers AUD\$ 22.5 million in 2013–2014.

3.2. From Former Colonies to Asylum Jails

Neither its deterrence campaign against asylum seekers and migrants, nor the legal excision of its own territory, nor boat push-backs represented Australia's most extreme response to those seeking refuge. Australia's ultimate offshoring vehicle, dubbed the "Pacific Solution," was to strong-arm two Pacific islands to jail asylum seekers indefinitely. Nauru and Manus, which Australia previously controlled as protectorates¹⁹² or colonies,¹⁹³ became jails where asylum seekers intercepted at sea were detained indefinitely—approximately from 2001 to 2008, and then again from 2012 to the present day

Nauru is a small island with a population of about 10,000. Australia took control of Nauru in 1914 during the First World War, and maintained control until Nauruans claimed their independence in 1968. During this time, Australia oversaw the mining of phosphate, a valuable commodity and important fertilizer to catalyze Australia's agriculture industry.¹⁹⁴ Following its independence, Nauru briefly became one of the wealthiest nations in the world per capita upon taking control of its own natural resources.¹⁹⁵ However, by the 1990s, the phosphates deposits were nearly exhausted and Nauru found itself with mismanaged investments, an environmental disaster, and an economic crisis.¹⁹⁶

Papua New Guinea was also held under Australian control from the First World War until 1975. One of its small islands, Manus, has approximately 60,000 inhabitants, most of whom relied on subsistence farming and fishing.¹⁹⁷ Papua New Guinea has its own tumultuous past, including the nine-year Bougainville civil war,¹⁹⁸ during which Bougainville island inhabitants started rebelling against the exploitation of the land by mining companies. Over 20,000 people died during this conflict,¹⁹⁹ and it was only in 2001 that a peace agreement was reached in which a

Map depicting immigration detention facilities in and outside of Australia as of 2016

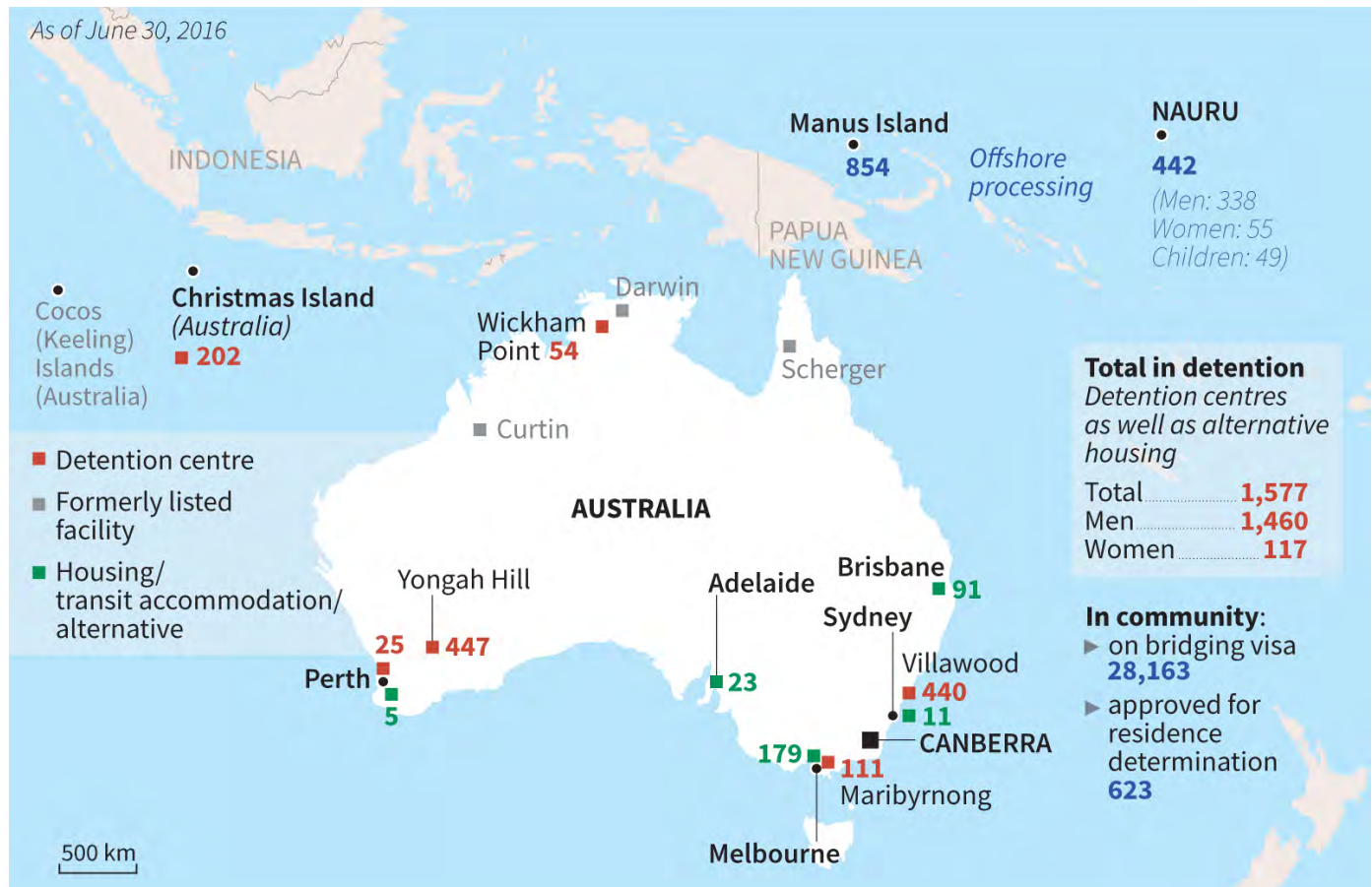


Image Credit: © AFP

ceasefire would be overseen by neighboring countries. Further, Manus Island faces extreme risk from climate change, and is highly vulnerable to rising water levels that have repeatedly flooded homes, destroyed animal habitats, and forced people to relocate.²⁰⁰

Both Nauru and Manus Islands were highly vulnerable as a result of economic, environmental, and political exploitation and they were not in a position to refuse an offer for development aid tethered to Australia's demand that they jail asylum seekers.²⁰¹ In return, Australia poured tens of millions of dollars into Nauru's economy and funded major upgrades of Manus' infrastructure, and fast-tracked Australian aid.²⁰² Despite formal memoranda of understanding,²⁰³ the rushed character of these agreements was hard to miss. Nauru did not even join the Refugee Convention and the 1967 Protocol until 2011, while Papua New Guinea failed to provide any definition of asylum processing or incorporate the Convention and 1967 Protocol into its domestic law decades after ratification.²⁰⁴

During a brief change of leadership, the islands ceased to receive new asylum seekers from 2008 to 2012. However, calls in Australia for a return to offshore processing increased with a number of boat arrivals of asylum seekers labeled "illegal maritime arrivals."²⁰⁵ In response, then-candidate for prime minister Kevin Rudd ran on a campaign of stopping the boats on security grounds, citing 9/11.²⁰⁶

When he won, Rudd made the historical announcement that none of the asylum seekers intercepted at sea, and placed on the islands by Australian authorities, would be settled in Australia.²⁰⁷ This policy specifically targets asylum seekers arriving by boat; as the Australian Department of Home Affairs bluntly notes, “No one who attempts illegal maritime travel to Australia will be settled here.”²⁰⁸ Rudd formalized an arrangement with Nauru and Manus, committing the small islands to “enhance[e]” their capacity as processing centers to receive asylum seekers transferred from Australian authorities, while arranging for the asylum seekers’ resettlement outside of Australia.²⁰⁹ Fueling this policy was a rhetorical focus on trafficking prevention,²¹⁰ deterrence, and mitigating Australians’ distress at watching the deaths of boat travelers.

Australia’s preoccupation with curbing asylum seekers arriving by boat has proved costly. Australia has spent \$7.6 billion for the transfer of 3,127 asylum seekers to Nauru or Manus since 2013.²¹¹

This staggering figure does not include cash poured into resettlement deals with other countries or contractors retained to stretch the island’s modest infrastructure systems into full asylum processing centers.²¹² In practice, Australia’s money did little to improve the filthy and devastating²¹³ conditions to which these asylum seekers were subjected. Additionally, Australia ignored alternative, and more cost-effective, ways to process and protect asylum seekers onshore.²¹⁴

Due to Australia’s own manufactured crisis, 30,000 asylum seekers were left in legal limbo in Australia, with only the prospect of receiving temporary protection visas following Rudd’s 2013 announcement.²¹⁵

3.3. Impact on Asylum Seekers

It is hard to understate the devastating, deadly impact on the mental and physical health of asylum seekers stranded in legal limbo in Australia’s offshore processing. Physically, these offshore detention centers are dirty, under-resourced, rife with cockroaches and rats,²¹⁶ and are ill-prepared to provide sufficient medical care. Individuals on offshore processing islands report harrowing journeys that include child births in detention, indefinite jailing, suicides, and deaths.²¹⁷ Longer term, this indefinite detention, with no trial date and no end in sight, causes both physical and emotional damage on adults and children,²¹⁸ which has led to extensive self-harm and suicide²¹⁹ on both islands.

Despite numerous deaths due to inadequate medical care, Australia refused to transfer offshored asylum seekers to its hospitals until 2019. Even then, it first restricted the transfer of ailing asylum seekers to Christmas Island;²²⁰ while Australia recognized a duty of care to asylum seekers offshore, urgent transfers require litigation before asylum seekers can access the medical treatment they need on the mainland.²²¹



Image Credit: Amnesty International

**Children
detained
in Nauru
protest their
confinement in
March 2015.**

The Refugee Council of Australia calls the conditions on Nauru a “man-made crisis.”²²² In 2013, they reported that “children as young as 7 and 12 are experiencing repeated incidents of suicide attempts, dousing themselves in petrol, and becoming catatonic. At least two people have killed themselves, and three others have died. Many more are trying to kill or harm themselves. People are losing their hope and their lives on this island. This is Australia’s man-made refugee crisis in the country it still treats as a colony, Nauru.”²²³

In Manus, asylum seekers staged a protest when their detention center finally closed. Rather than facilitating their transfer to Australia, the Papua New Guinean authorities expected them to transfer to Nauru’s camp or integrate with the general population in the archipelago. Hundreds of people refused to leave the center, citing fear of what might happen to them in the local community, given that relationships between locals and the asylum seekers could be tense and violent at times.²²⁴ The asylum seekers were left with no food, water, or electricity, with authorities raiding and destroying their belongings and shelters, until their forcible transfer to new facilities on the island.²²⁵ Years of legal limbo, indefinite jailing, and hopelessness continued, causing some observers to compare these practices to those used on detained asylum seekers held at Guantánamo Bay.²²⁶

An overwhelming number of asylum seekers subjected to offshore processing were Middle Eastern, Asian, or African.²²⁷ Today, amidst the COVID-19 pandemic, the Australian Home Affairs Department estimates that about 239 asylum seekers still remain in Nauru and Manus, while hundreds were transferred onshore to receive medical treatment.²²⁸ Despite the relatively small number left on the islands, Australia expects to spend approximately \$3.4 million per asylum seeker in 2021-2022.²²⁹ Unfortunately, those high costs have not resulted in improved conditions, as the abuse and mistreatment of asylum seekers continues.²³⁰ Meanwhile, Australia continues to push back incoming asylum seekers intercepted in Australian and international waters.²³¹

Additionally, Christmas Island continues to act as a large domestic onshore site, as well. The Australian government built a sprawling prison for asylum seekers on the island to the tune of \$185 million.²³² This site first opened in 2018 and at least one asylum seeker has died there. Though it closed briefly in 2019, the prison recently reopened in 2020 at the cost of an additional \$26 million, only to house a Sri Lankan couple and their two small children.²³³ The skyrocketing costs of these offshore sites, whether on Australia's Christmas Island or in the Pacific, have done little to dissuade Australia from its punitive and carceral approach to asylum seekers arriving by sea.

Behrouz Boochani, a Kurdish-Iranian asylee and award-winning journalist previously detained on Manus Island, underscored the irony of Australia—a former penal colony for white Europeans—subjecting primarily Muslim, Asian, Middle Eastern, and Africans to the same fate. “Sometimes I feel that Manus and Nauru are like a mirror,” Boochani said. “Australia sees its real face on that mirror, and they hate it. Because we are boat people. They call us boat people. But you are boat people, too.”²³⁴

Pitting Refugees Against Asylum Seekers

Unlike the United States and the European Union, Australia's geographic isolation in the Pacific Ocean naturally limits migration. While Australia resettles a great number of refugees,²³⁵ it has taken a particularly harsh stance against asylum seekers reaching its shores. Australia has created a hierarchy between refugees and asylum seekers, favoring refugees because of Australia's ability to control their numbers and arrival versus asylum seekers, whose arrival is driven by the urgency of their sudden flight.²³⁶ An important element of Australia's refugee program is that it “allows Australia to choose who it will accept,” and it “favors young, healthy and skilled applicants,” resulting in few admissions from refugee camps in Africa and the Middle East²³⁷ and an overwhelming preference for Christian refugees.²³⁸ In addition, Australia uses its refugee resettlement numbers as political capital to try to rebut reasonable critiques of its asylum policies.

Australia and the United States have also used refugee resettlement as a bargaining chip to send more than one thousand Nauru and Manus refugees to the U.S., while Australia accepted Central American refugees.²³⁹ The deal exemplifies the two nations' attempt to control migration and deter future asylum seekers' aspirations to seek protection in their country of destination.

CHAPTER 4

Laying the Foundation Of U.S. Offshoring: From Angel Island to Guantánamo Bay

“This court cannot close its eyes, however, to a possible underlying reason why these plaintiffs have been subjected to intentional ‘national origin’ discrimination. The plaintiffs are part of the first substantial flight of black refugees from a repressive regime to this country. All of the plaintiffs are black.”

— Senior U.S. Federal District Judge James Lawrence King²⁴⁰

Though the U.S.’s offshoring policy did not begin until later in the twentieth century, the policy to push migrants to the periphery of U.S. land is not new. Hyper-focused on deterring non-European migration and for a period of time migration from southern and eastern Europe,²⁴¹ the United States has long concentrated on pushing maritime arrivals away from its mainland. This goal drove policymakers to expand upon U.S. island quarantine stations at the turn of the century, eventually evolving into militarization of the U.S.-Mexico border, as well as the conversion of leased Cuban land into an indefinite offshore jail for Haitians.

4.1. The Incipient Stage Of U.S. Offshoring: Public Health as Racial Exclusion From Angel Island to the U.S.-Mexico Border

Ellis and Angel Islands became the site of a new experiment in the late 19th century as millions of people migrated from Europe and Asia to the U.S. Part of U.S. territory facing the Atlantic and Pacific oceans,²⁴² the islands morphed into quarantine detention centers where the U.S. piloted its first offshoring: keeping migrants away from the domestic mainland while they were subjected to intrusive medical screenings.²⁴³ These medical screenings, though ostensibly promoting public health, were in reality tactics of racial exclusion which aimed to ban migrants who were carrying “loathsome and contagious disease” and to rid the U.S. of other “undesirable” populations.²⁴⁴ The percentage of Europeans excluded from the U.S. was much lower than non-Europeans.²⁴⁵ In

El Paso
 “disinfection”
 plant blueprints
 from 1916.

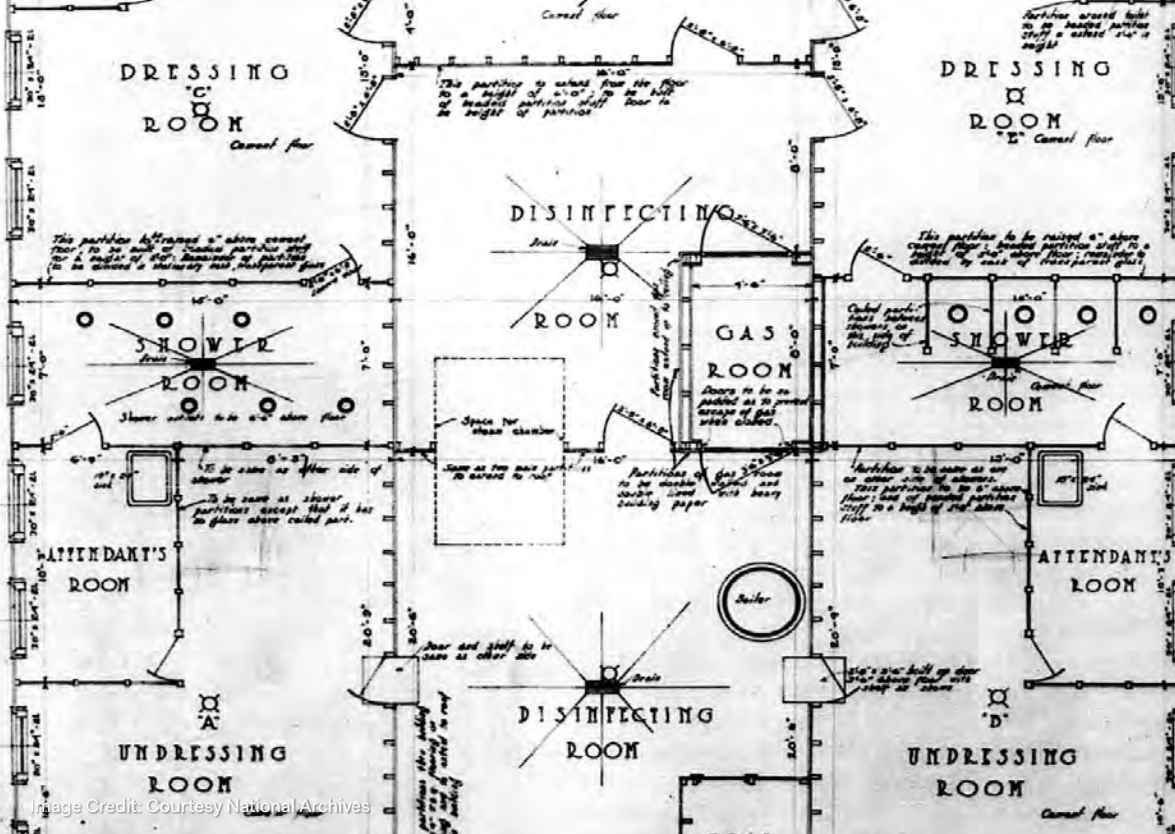


Image Credit: Courtesy National Archives

contrast to Ellis Island, Angel Island, which is located in the San Francisco Bay, served as the primary arrival point or official gateway for Chinese and other Asian immigrants.²⁴⁶ In fact, the construction for an immigration facility on the West Coast was the direct consequence of two pieces of legislation designed to block or limit Chinese migrants from coming to the U.S. mainland: the Page Act of 1875, and the Chinese Exclusion Act of 1882.²⁴⁷

This experiment ushered in a lasting shift at another periphery for the first half of the 20th century, the U.S.-Mexico border, where Mexican laborers were also subjected to humiliating health screenings and “cleansing” procedures that included being forced to strip, as well the use of gas chambers to fumigate their clothes.²⁴⁸ Combined with a new law that created criminal penalties for border crossings (a law used widely to this day and originally championed by a U.S. Senator who proudly defended lynching, segregation, and nativist policies against Mexican laborers),²⁴⁹ the U.S. government laid the groundwork for massive push-backs at the southern border. This marked a shift from comparatively fluid movement across the U.S.-Mexico border, emanating from the relatively recent U.S. annexation of large portions of Mexican land. While erecting a new infrastructure of border control, state police and vigilantes terrorized Mexicans they encountered. Lynchings of Mexican migrants from the late 19th century until the first half of the 20th century range between hundreds and several thousands.²⁵⁰

The southern border remains a deadly place for migrants to this day.²⁵¹ But the southern border did not become the primary springboard for push-backs and offshoring until the 2000s. Until then, the U.S. returned to the insular laboratory; Angel Island, it turns out, was the prologue for Guantánamo Bay, a near colonial territory of the United States in Cuba.

4.2. Guantánamo Bay: From a Naval Station to a Detention Center for Asylum Seekers

Guantánamo Bay transformed into a makeshift U.S. detention center for asylum seekers in response to a twofold situation: the exodus of tens of thousands of Haitians fleeing a brutal military dictatorship²⁵⁷ and increasing panic among policymakers over the HIV/AIDS epidemic in the U.S.—culminating with the Centers for Disease Control and Prevention’s (CDC) designation of Haitians as a high-risk group in 1983 and an immigration ban on individuals living with HIV/AIDS in 1987.²⁵⁸ In the early 1990s, the U.S. began detaining Haitian asylum seekers intercepted at sea *en masse* away from the U.S. mainland, even if they were not HIV-positive,²⁵⁹ veering sharply from the policy formally adopted by the U.S. in the 1950s of not incarcerating migrants.²⁶⁰

Large numbers of Haitians fled by boat to the United States in 1980—the same year that the U.S. codified non-refoulement in its domestic asylum code, the Refugee Act of 1980. One year later, President Ronald Reagan struck a deal with Haiti’s government to return anyone apprehended at sea who travelled “illegally.”²⁶¹ Though Reagan pledged not to return asylum seekers, only 6 out of 21,000 Haitians received asylum hearings over the course of nine years.

While Reagan paid lip-service to the principle of non-refoulement, his successor George H.W. Bush explicitly limited its scope.²⁶² Beginning in late 1991, the Bush administration re-directed boats toward Guantánamo Bay, stating that the influx of rafts would be overwhelming for the U.S. Coast Guard.²⁶³ By the end of the year, the U.S. Coast Guard “screened-in” approximately 10,500 Haitians who had a credible fear of returning to Haiti and detained them at Guantánamo Bay.²⁶⁴ Then, in the spring of 1992, President Bush issued an executive order stating that the U.S. obligation not to refoul—i.e., not to return refugees to harm—did not apply to asylum seekers intercepted outside of the U.S.²⁶⁵ Within eighteen months, the U.S. Coast Guard intercepted more than 34,000 asylum seekers attempting to escape the military regime in Haiti.²⁶⁶

When Bill Clinton was elected President, he originally vowed to reverse this policy, but went on to continue intercepting asylum seekers at sea after relabeling it as a “humanitarian mission” to rescue them, and claiming that a lack of space in the U.S. made offshore detention necessary.²⁶⁷ In reality, asylum seekers were trapped in a legal black hole: forcing asylum seekers to return to Haiti would have violated domestic and international law, yet many were barred from entering the U.S. under the 1987 prohibition on HIV-

History of U.S. Control of Guantánamo Bay Within the Broader Context of U.S.-Cuba Relations

A number of the “Founders”—including George Washington, James Madison, and Thomas Jefferson—readily professed ambitions of expanding the “American Empire.” Jefferson thought Cuba “the most interesting addition which could ever be made to our system of States,” and told John C. Calhoun in 1820 that the United States “ought, at the first possible opportunity, to take Cuba.” John Quincy Adams, James Monroe’s Secretary of State and his successor in the White House, considered the annexation of Cuba “indispensable to the continuance and integrity of the Union itself.”²⁵²

This expansionist approach brought the U.S. Senate to advocate for the purchase of Cuba from Spain in the mid-1850s.²⁵³ By the end of the century, the Cuban government struck a deal to lease Guantánamo Bay to the U.S. in exchange for its independence.²⁵⁴ Fidel Castro’s government viewed the continued U.S. occupation of the Bay as illegal.²⁵⁵ Though the U.S. acquired “an empire of military bases” across the Caribbean and later colonized the Philippines in the Pacific,²⁵⁶ Guantánamo Bay was unique in becoming an extension of U.S. border processing—permitting offshore, indefinite detention and interceptions at sea at a ‘safe’ distance from the mainland.

positive foreigners from entering the country.²⁶⁸ Asylum seekers languished in detention because the U.S. continued to use public health as an immigration tool to repress Haitian asylum seekers.

This led to the mass detention of Haitian asylum seekers in shocking conditions at Guantánamo Bay. The detention center (limited to a maximum of 12,500 persons) reached capacity numerous times between 1991 and 1992.²⁶⁹ Asylum seekers were housed in tents covered in garbage bags, which barely protected them from the rain, and enclosed by barbed wire fencing.²⁷⁰ They were forced to eat spoiled and sometimes maggot-filled food in extreme heat.²⁷¹ Asylum seekers' physical and mental health declined significantly, resulting in some suicide attempts.²⁷²

Medical care was also inadequate, especially for the hundreds of HIV-positive refugees detained. For the tens of thousands of refugees detained at Guantánamo Bay, there were only a handful of medical personnel on site and a small number of hospital beds.²⁷³

The rest of the world denounced these conditions, which the Doctors of the World called a “disgrace.”²⁷⁴ Haitians protested their detention conditions and harsh treatment by marching through the detention camp, but were met by military police in riot gear.²⁷⁵ News outlets across the globe reported refugees protesting in a weeks-long hunger strike.²⁷⁶

Following this public outcry, the number of asylum seekers detained at Guantánamo declined. In 1992, approximately 300 Haitians remained, more than 230 of whom were HIV-positive.²⁷⁷ The U.S. government determined that all 300 asylum seekers were “bona fide” refugees but did not process their asylum cases because of the 1987 HIV ban.²⁷⁸ A federal court later noted that the U.S. enforced the HIV ban against only Haitian refugees.²⁷⁹

At the same time, two court battles ensured that the U.S. government could continue the practice. A federal district court determined that asylum seekers were deprived of due process by being denied the opportunity to speak to their own attorneys and adequate medical care.²⁸⁰ The court ordered the government to release the refugees to anywhere but Haiti, and the government ultimately transferred many asylum seekers to the U.S.²⁸¹ The Clinton administration later settled the case, stripping the decision of any legal precedent.²⁸²

In *Haitian Centers Council v. Sale* in 1993, the U.S. Supreme Court determined that neither section 243(h) of the Immigration and Nationality Act nor Article 33 of the 1951 Refugee Convention prohibited the U.S. from intercepting refugees beyond U.S. territory and forcing repatriation.²⁸³ So long as these interceptions did not occur within U.S. territory, the U.S. had carte blanche to refoul asylum seekers.

Emboldened by their win before the Supreme Court, the U.S. government later made clear that *Sale* empowers them not only to push-back at will on international waters, but to offshore asylum seekers.



Image licensed via AP Images

**Hangar where
Haitian asylum
seekers were
detained in
Guantánamo
Bay.**

As they stated before the Inter-American Commission on Human Rights,

“[Non-refoulement]... is a limited obligation, only relevant with respect to refugees who have reached the territory of a contracting state, and does not apply to persons interdicted on the high seas. In addition, the obligation does not prevent a contracting state from sending a refugee to any place other than the country of persecution.”²⁸⁴

Sale helped pave the way for the government to test further the boundaries of international obligations through various iterations of offshoring and externalization regimes.

Months after *Sale*, the Clinton administration continued re-directing asylum seekers to Guantánamo Bay after then- President Fidel Castro lifted the emigration ban and thousands of Cubans fled to the U.S.²⁸⁵ Until this point, Cuban refugees were granted asylum in the U.S., but thousands of Cuban asylum seekers were now intercepted and detained.²⁸⁶ The total detained population at Guantánamo Bay, including Haitian and Cuban refugees, peaked in 1994, when around 12,000 Haitians with credible fear of persecution were detained—the vast majority of whom were eventually denied asylum in the U.S.²⁸⁷

By 1994, political pressure mounted for then-President Clinton to wind-down detention at Guantánamo Bay and compel the military regime in Haiti to stop oppressing asylum seekers.²⁸⁸ Ultimately, the U.S. deported approximately 25,000 Haitians from 1991-94, subjecting them to brutal harm and repression.²⁸⁹

The exact human toll of these U.S. policies is unknown. However, the U.S. treatment of Haitians also cemented a new era of offshoring, long after the U.S. committed to non-refoulement under domestic and international law. The U.S. briefly reached agreements with Jamaica and the United Kingdom in the Caribbean and the West Indies²⁹⁰ to process interdicted Haitians on a boat off the coast of Jamaica and to the Turks and Caicos Islands. Under Operation “Safe Haven,” the U.S.

sought agreements with Honduras, Belize, and Venezuela, signaling a new infrastructure for offshoring asylum seekers far from the U.S. border.²⁹¹ Though intercepted in international waters, the U.S. Coast Guard took hundreds of Haitians to these Central and Latin American nations, all but dooming these asylum seekers' chances to obtain protection.²⁹² Far from the public eye and judicial scrutiny in domestic courts, the U.S. dubbed these sites "safe havens" to sidestep political fallout while bolstering deterrence practices.²⁹³

This deterrence policy was bipartisan. The Clinton administration employed the same tactics as its predecessors in the Bush administration while offshoring Haitians, warning on the radio that, "Leaving by boat is not the route to freedom."²⁹⁴ U.S. border enforcement became much more visible, involved interconnected militarization and policing practices in the Caribbean, discriminated against Black migrants, and forced migrants away from long-standing migration routes into more dangerous routes in their attempts to avoid detention.

Although Operation Safe Haven has since wound down, the U.S. continues to intercept Haitian refugees abroad to be held in detention offshore—though it primarily engages in such interceptions by proxy, externalizing its border enforcement.²⁹⁵ As of 2020, Panama detained many transcontinental asylum seekers, including 2,000 Haitians in its southern Darien province.²⁹⁶ Panama's migration enforcement apparatus receives significant support from the U.S. Department of Homeland Security (DHS). Under the guise of fighting crime and various forms of trafficking, DHS and Panama created a joint migration task force in 2018 to control the flow of migrants traveling from South America to the U.S.²⁹⁷

The unfettered use of push-backs in maritime interceptions that led to Guantánamo's first use as a migrant prison camp had another effect: pushing asylum seekers to journey through South America to try and enter the U.S. by land.²⁹⁸ This, in turn, brought the focus back to the fortification of the southern border, which became the locus of a new era of offshoring.

Haitian Interdictions in the 21st Century

Starting in the 1980s and peaking in the early 1990s, the U.S. Coast Guard intercepted tens of thousands of Haitians arriving by boat. Though this practice slowed down after 1994, it did not end. In the past two decades, the U.S. Coast Guard has routinely interdicted at sea more than 1,000 Haitian migrants, and sometimes more than 3,000 Haitian migrants, each year.²⁹⁹ Between fiscal years 2000 and 2004, sea interdictions rose from 1,113 to 3,229 Haitian migrants, respectively. In the next six years, interdictions at sea remained somewhat steady at a lower rate: the U.S. Coast Guard interdicted an approximate average of 1,500 Haitian migrants annually from fiscal years 2005–2010.

The deadly 2010 earthquake in Haiti and continuing political turmoil resulted in a higher rate of Haitian migrants trying to enter the U.S. in the following decade.³⁰⁰ Although various reports estimate different numbers of Haitian migrants interdicted each year,³⁰¹ data show that the U.S. Coast Guard has consistently interdicted more than 1,000 Haitian migrants annually in the last decade.³⁰² In 2013, for example, more than 2,100 Haitian migrants were interdicted at sea.³⁰³ Between fiscal years 2017 and 2019, interdictions increased from approximately 1,850 Haitian migrants in 2017 to more than 3,400 in 2019.³⁰⁴ The trend continues today: 181 Haitian migrants have been interdicted so far from October 2020 to February 2021.³⁰⁵ Four decades later, this deterrence policy has yet to achieve its intended goals.

Ongoing U.S. Coast Guard interceptions have not resulted in systematic use of Guantánamo Bay's asylum prison, named the Migrant Operations Center. However, the site remains open for the detention of migrants³⁰⁶ and held eight Cuban and Haitian asylum seekers as recently as March 2016, in conditions similar to those of their unfortunate predecessors in the early 1990s.³⁰⁷ Questions remain as to whether it will reopen for the offshoring of asylum seekers³⁰⁸—especially as DHS has retained private contractor MVM to service the Migrant Operations Center.³⁰⁹

CHAPTER 5

Moving the Border South: the United States' Offshoring of Asylum Processing and Immigration Enforcement to Mexico and Central America

“It was Haitians then, but tomorrow it could be any other group.”

— Patricia Lespinasse³¹⁰

The United States' cruel treatment of migrants and asylum seekers worsened under the Trump administration. In addition to seeking to end Temporary Protected Status (TPS) for Haitians in the U.S., a temporary form of relief granted following Haiti's 2010 earthquake, then-President Trump conveyed his racist disdain for Black and Central American immigrants, openly.³¹¹ White House Senior Advisor Stephen Miller and other hardline political appointees recruited government officials from anti-immigrant organizations and relied on externalized enforcement measures and other punitive policies to prevent asylum seekers from arriving at the United States' borders and accessing the asylum system.³¹² Those who did arrive at the United States' borders were criminalized and separated from their children or frequently faced expulsion under the guise of public health.

The Trump administration attempted to keep asylum seekers from non-white majority countries as far away from the U.S. as possible. Some of the most harmful policies the Trump administration implemented included:³¹³

- A “zero-tolerance policy” that separated thousands of families, prosecuted and deported parents for seeking asylum, and inflicted potentially life-long trauma on their children;³¹⁴
- The systematic detention of asylum seekers, forcing them to remain incarcerated indefinitely;³¹⁵
- The push-back of asylum seekers to Mexico through the Migrant Protection Protocols (MPP) or “Remain-in-Mexico” program, where asylum seekers were forced to wait for years in life-threatening conditions while their cases were adjudicated in tent courts along the border;³¹⁶

- Formal Safe Third Country Agreements brokered with El Salvador, Honduras, and Guatemala, whose governments are alleged persecutors or complacent in the harms against many asylum seekers arriving in the U.S.;³¹⁷
- A proposed ban to bar asylum seekers from relief on the basis of travel through a transit country, even where they had no realistic opportunity to seek protection or firmly resettle in those nations;³¹⁸
- The CDC's March 2020 order during the COVID-19 pandemic appealing to Title 42 of the U.S. Code to close the border to all, including asylum seekers, leading to nearly one million expulsions, claiming that the processing of asylum seekers would be a danger to U.S. public health.³¹⁹

These coercive tactics driven by the punitive playbook³²⁰ of anti-immigrant groups founded and funded by white nationalist and eugenics proponent John Tanton,³²¹ denied hundreds of thousands of people, including children and infants, their legal right to seek asylum. Importantly, not every tool in Trump's anti-asylum toolkit was new. The Trump administration built on externalization policies of prior Republican and Democratic administrations, expanding the punitive push-back regimes of Haitian interceptions to apply to all asylum seekers, including those who traveled by land through the southern border. These externalization practices are often employed by policymakers in an attempt to avert the potential political fallout of enforcement actions at the U.S. border such as “zero-tolerance” or family separation, which sparked global outrage.

The Trump administration built on externalization policies of prior Republican and Democratic administrations, expanding the punitive push-back regimes of Haitian interceptions to apply to all asylum seekers, including those who traveled by land through the southern border.

Under Trump, the U.S. government's anti-asylum strategies fell in two general categories: a hybrid offshoring system that pushed asylum seekers back to Mexico while they awaited their opportunity to seek asylum in the United States, and an attempt to stage safe third country agreements with Central American nations. Neither strategy complied with U.S. obligations under domestic and international law; however, they signaled continued reliance on offshoring as a permanent tool to deter and push back asylum seekers to date.

5.1. Metering and Migrant Protection Protocols: Stranding Asylum Seekers in Dangerous Border Territories

After decades of interceptions of Haitians, the U.S. government explored new avenues to push back asylum seekers directed to its southern border. Like its Democratic predecessors, the Obama administration viewed the increase³²² of Haitians requesting asylum at the U.S. border as a problem to solve with increased border control. In 2016, they piloted the metering policy on Haitian migrants along the southern border.³²³ Under Trump, the metering policy expanded exponentially. Foreshadowing the implementation of MPP, metering turns back asylum seekers at the border before they are allowed to request asylum, placing their name on informal lists or queues and stranding them in dangerous conditions in Mexican border towns, where they are subjected to extreme violence. As of May 2021, there were at least 18,680 asylum seekers on metering lists waiting in Mexican border cities.³²⁴ This harmful policy set the stage for the Remain in Mexico program.

Importantly, the Trump administration turned to metering as a step toward its larger externalization plan. According to a leaked DHS and Department of Justice (DOJ) memo, the Trump administration acknowledged that it could take years to enter into a safe third country agreement with Mexico because of its lack of capacity and ability to process asylum claims and protect human rights.³²⁵ First through metering and next with MPP, the Trump administration successfully pushed back tens of thousands of asylum seekers into Mexico, as a backdoor alternative to creating a bilateral agreement.

The U.S. first proposed the “Remain in Mexico” policy as a bilateral deal.³²⁶ After some resistance, Mexico allowed a pilot program of the policy to move ahead. The Mexican government initially tried to push back against President Trump and his administration’s coercive tactics³²⁷ and repeatedly refused to enter into a bilateral safe third country agreement with the U.S.³²⁸ Shortly thereafter, in the face of continued public attacks, tariff threats, and other economic pressure,³²⁹ Mexican President Andrés Manuel López Obrador returned to the militarization tactics of his predecessor. The following month, the head of the National Institute for Migration,³³⁰ resigned and was replaced with Mexico’s head of its Prisoner Reentry Commission,³³¹ demonstrating the country’s move to expand punitive migration policies.

In a joint declaration between the two countries on June 7, 2019,³³² Mexico agreed to expand MPP to additional ports of entry and to deploy the National Guard throughout Mexico, including 6,000 troops to its southern border with Guatemala.³³³ According to the Washington Post, Mexico reportedly described its plan put forth to the U.S. to stave off tariff threats as “the first time in recent history that Mexico has decided to take operational control of its southern border as a priority.”³³⁴ Additionally, the joint declaration contained a supplementary agreement between the two countries to begin discussions on third country processing of asylum seekers. The United States and Mexico would “immediately begin discussions to establish definitive terms for a binding bilateral agreement to further address burden-sharing and the assignment of responsibility for processing refugee status claims of migrants.”³³⁵

**Children
at a migrant
camp in
Matamoros,
Mexico.**



Image licensed via Getty Images

Despite this history, the Mexican government has referred to MPP as an unilateral policy by the United States, and as the UNHCR has pointed out, MPP is not a legally binding and enforceable bilateral agreement.³³⁶ Further, UNHCR has concluded that the policy “is not consistent with United States’ non-refoulement obligation.”³³⁷ The failure of the United States to comply with its federal laws and international obligations has put tens of thousands of asylum seekers at risk of refoulement. MPP forced more than 71,021³³⁸ vulnerable people, including thousands of children, to languish in dangerous conditions in Mexican border towns for the duration of their immigration court proceedings. There are at least 1,300 documented cases of asylum seekers in MPP subjected to violence including kidnapping, extortion, torture, rape, and murder.³³⁹ As a result, many children were forced to leave their parents and travel to the border on their own as unaccompanied minors. Rather than release these vulnerable children into the custody of family members, the Trump administration rushed to deport them.³⁴⁰

MPP amplified a larger problem endemic to U.S. border control; though many of the policies introduced purport to curb trafficking, they have enriched and expanded trafficking networks profiting from the U.S.’ offshoring and border externalization measures. By refusing to process asylum seekers at its borders and cutting nearly all other avenues for people seeking protection to come to the United States, the U.S. actually forces vulnerable people into the hands of traffickers. According to an April 2021 VICE World News investigation, kidnapping migrants over the last ten years generated nearly \$800 million in ransom payments for trafficking networks in Mexico.³⁴¹ The U.S.’ policy of pressuring Mexico and countries in Central America to prevent people from arriving at its borders not only enriches these networks but it pushes asylum seekers to take more dangerous routes.

In addition to coercing the Mexican government into deploying their National Guard throughout the country, the U.S. moved its enforcement even further south when it engaged in an unauthorized enforcement action with Guatemalan border police in January 2020.³⁴⁶ DHS violated an interagency agreement with the State Department when it secured unmarked vehicles and drivers to carry out a joint operation in which the U.S. and Guatemalan authorities physically moved Honduran asylum seekers across the Guatemala-Honduras border. The U.S. Senate Foreign Relations Committee found that DHS had lied to the State Department about their misuse of International Narcotics Control and Law Enforcement funding, which paid for the enforcement action.³⁴⁷ Under the interagency agreement, U.S. personnel can provide guidance and mentorship but they cannot carry out immigration enforcement operations. Further, DHS did not have proper protocols to screen individuals for protection needs or to prevent the refoulement of asylum seekers, as is mandatory under U.S. and international law.

5.2. Asylum Cooperative Agreements: Deporting Asylum Seekers to Unsafe Third Countries

In another effort to dismantle the U.S. asylum system, the Trump administration used coercive tactics to enter into third country agreements with Northern Triangle countries.³⁴⁸ In March 2019, the State Department announced³⁴⁹ that the U.S. would cut \$450 million in foreign assistance programs for El Salvador, Honduras and Guatemala at the request of President Trump after he claimed that they were not doing enough to curb migration to the U.S.³⁵⁰ Only months later, in July, the United States and Guatemala signed an Asylum Cooperative Agreement (ACA).³⁵¹ The U.S. would go on to sign similar agreements with Honduras and El Salvador thereafter.³⁵² By October 2019, President Trump announced on Twitter that the U.S. would restart targeted aid in all three countries: “Guatemala, Honduras & El Salvador have all signed historic Asylum Cooperation Agreements and are working to end the scourge of human smuggling. To further accelerate this progress, the U.S. will shortly be approving targeted assistance in the areas of law enforcement & security.”³⁵³

Impact of the United States’ Coercive Tactics on Black Asylum Seekers

Mexican President López Obrador’s militarization of Mexico’s borders, particularly its southern border with Guatemala, has been uniquely cruel for asylum seekers who endure transcontinental journeys en route to the United States, especially Black asylum seekers.³⁴² Many Black asylum seekers remain stranded at Mexico’s borders. At Mexico’s southern border in Tapachula, Black migrants face prolonged detention rife with violence and medical neglect, anti-Black racism, and other disparate treatment.³⁴³ Further, because of restrictive visa and entry/exit policies, carrier sanction legislation, and increased enforcement by Mexican authorities, Black immigrants and asylum seekers often face some of the harshest offshoring and externalization measures.³⁴⁴ The deportations of Haitians living in Mexico increased by 2,330 percent from 2018 to 2019 as a result of the increase in harsh enforcement measures.³⁴⁵

Asylum seekers from the continent of Africa protest their entrapment and detention in southern Mexico.



Image licensed via Getty Images

U.S. domestic law has specific provisions regarding safe third country agreements, which the Trump administration openly flouted. The Immigration and Nationality Act requires that in order for the United States to enter into a compliant safe third country agreement, the Attorney General must determine that the “life or freedom” of an individual subjected to said agreement “would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion,” and where the individual, “would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”³⁵⁴ In a report on the ACAs, the Senate Foreign Relations Committee found that then-Attorney General William Barr and Acting DHS Secretary Kevin McAleenan’s determination that Guatemala provided a full and fair asylum procedure was “based on partial truths and [had] ignored State Department concerns.”³⁵⁵

As the Senate Foreign Relations Committee noted, the U.S.’s third country agreements or ACAs with Guatemala, El Salvador, and Honduras were reached without regard for U.S. and international law.³⁵⁶ The ACAs include a formal, bilateral commitment to comply with the principle of non-refoulement “as outlined in the 1951 Convention and the 1967 Protocol, as well as the Convention against Torture.”³⁵⁷ **However, not one of these Northern Triangle countries employed a full-time staff member dedicated to asylum as of January 2021.³⁵⁸ Of the 945 asylum seekers transferred to Guatemala under the ACA, not one was granted asylum.³⁵⁹** Despite prompt legal challenges,³⁶⁰ U.S. transfers of asylum seekers to Guatemala resulted in “deportation[s] with a layover” for these asylum seekers, most of whom were women and children.³⁶¹

In addition to lacking capacity to process asylum seekers, Guatemala, Honduras, and El Salvador suffer from widespread violence and human rights abuses with high murder rates, femicide, and violence perpetuated against LGBTQ+ individuals. These conditions have caused hundreds of thousands of asylum seekers to seek refuge in the U.S., and would make it nearly impossible for the non-refoulement principle enshrined in U.S. and international law to be respected in the context of third country agreements with these nations.³⁶²

Ironically, the ACAs are not the first safe third country agreements involving the U.S. that have been called into question in the courts. After years of negotiation and with input from human rights experts, the United States entered into a safe third country agreement with Canada in December 2002.³⁶⁴ In July 2020, the agreement was found invalid by a federal judge in Canada for violating the Canadian Charter of Rights and Freedoms, after asylum seekers whom Canada had returned to the United States alleged that they were not safe there largely due to their heightened risk of detention in alarming conditions.³⁶⁵ However, in April 2021, a Canadian appeals court sided with the Canadian government and overturned the lower court's ruling.³⁶⁶ At the time of this writing, litigators representing the asylum seekers were considering the possibility of appealing to the Supreme Court of Canada.³⁶⁷ Nonetheless, the United States' apparent failure to comply with this agreement domestically raises questions as to its ability to assist other countries, including Mexico and nations in Central America, in the development of their own asylum systems.

Policies such as MPP and the ACAs have set a dangerous precedent of illegal and inhumane offshoring practices for future administrations, and vulnerable people are still waiting for relief. In the early months of the Biden administration, the U.S. State Department³⁶⁸ and the Department of Homeland Security³⁶⁹ announced the suspension and termination of MPP, ACAs, and a review of other harsh immigration measures. As of May 2021, the Biden administration had admitted 10,000 asylum seekers with active MPP cases to the United States to pursue their asylum claims, though a majority of individuals with active cases were still waiting in Mexico.³⁷⁰ The Biden administration later expanded³⁷¹ eligibility to asylum seekers whose cases had been closed by the Trump administration. However, asylum seekers awaiting processing are still languishing in dangerous cities along the U.S.-Mexico border. For 19-year-old Cuban asylum seeker Cristian San Martín Estrada, MPP cost him his life;³⁷² Estrada was tragically shot dead just days before his chance to enter the United States. Undoing the harms of MPP and the ACAs not only requires expeditious processing, but also dismantling the lasting effects of U.S. border externalization in Mexico and Central America.

Sophia Sought Asylum in the U.S. From Honduras, Only to be Sent to Guatemala

After her brother was killed by a gang that subsequently threatened to take her life in Honduras, Sophia traveled more than 2,000 miles on foot to the U.S. Instead of offering Sophia a chance to apply for asylum in the U.S., DHS transferred Sophia to Guatemala, a country with one of the highest murder rates in the world: "They put me on a plane I thought was taking me back to Honduras, but then we landed in Guatemala. I was told I could seek asylum there instead. I was completely lost. [...] Safe in Guatemala? What's safe about that place? It's the same as Honduras. I don't know anyone in Guatemala. I had to come home."³⁶³

U.S Offshoring and Externalization Policies

BY THE NUMBERS (2017-2021)

948,631

expulsions of children and adult migrants and asylum seekers under Title 42³⁷³

71,021

vulnerable migrants and asylum seekers pushed back to Mexico under MPP³⁷⁴

1,300

documented cases of people in MPP subjected to violent acts; murder, kidnapping, torture, rape and extortion³⁷⁵

18,680

asylum seekers on metering lists as of May 2021³⁷⁶

945

asylum seekers transferred to Guatemala under the ACA



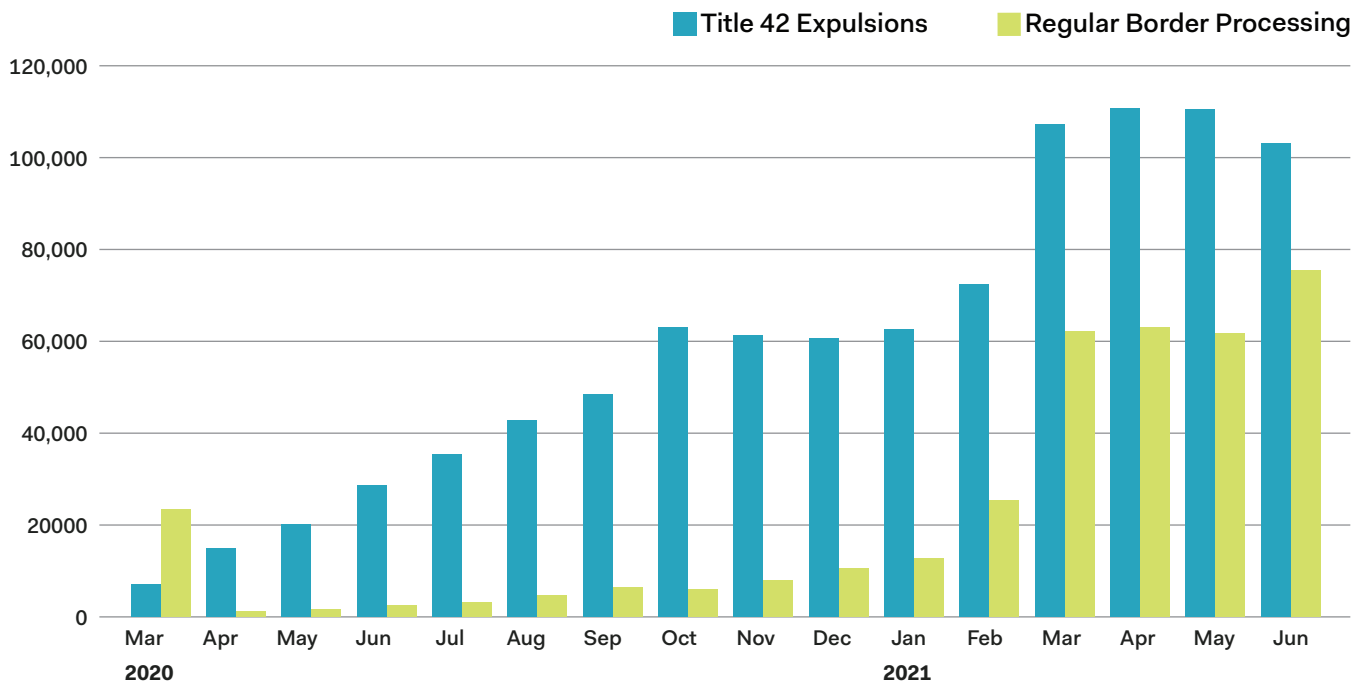
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granted asylum³⁷⁷

5.3. Title 42 Expulsions: a Recycled Pretext For Refoulement Under the Guise of Public Health

In March 2020, the CDC issued an unprecedented order that resulted in the expulsions of asylum seekers and children seeking protection. At the behest of then-Vice President Mike Pence and White House Senior Advisor Stephen Miller, the CDC morphed an obscure quarantine provision of the Public Health Service Act of 1944 under Title 42 of the U.S. code into a near impenetrable tool to prevent migration, steamrolling the subsequent six decades of supervening domestic and international obligations toward asylum-seeking adults and children. Emboldened by the CDC, U.S. Customs and Border Protection proceeded to expel migrants and asylum seekers en masse.³⁷⁸ The Biden administration has since failed to end its use of this policy, and at the time of this report, Title 42 remained in effect despite the change in administration—and has continued amidst resounding opposition from public health experts. As of July 2021, the United States carried out 948,631 expulsions of migrants and asylum seekers under Title 42. This number includes repeated attempts of many individuals, with no other viable means to pursue asylum.

Title 42 Expulsions vs. Regular Border Processing



Source: U.S. Customs and Border Protection

President Biden's continued use of Title 42 expulsions imperil the administration's compliance with the principle of non-refoulement. Under the Trump administration, Stephen Miller attacked migrants, asylum seekers, and refugees through a storm of policy changes, including the exploitation of public health as a pretext to prevent migration.³⁷⁹ Between the CDC order and the Biden administration's continued expulsions, Miller's scheme is thriving. The Biden administration has far exceeded Trump's monthly expulsion rate and is rapidly nearing one million expulsions to date. Tragically, this number includes many people who have been previously expelled or turned back;³⁸⁰ Title 42 not only violates asylum seekers' rights; it fails to meet its own goal to deter migration.³⁸¹

Expelled asylum seekers have been subjected to rape, kidnapping, and assault in Mexico;³⁸² LGBTQ+ and Black asylum seekers are particular targets for violence as the Biden administration pushes them back to Mexico.³⁸³ This policy has also been an informal vehicle for family separations, harming children whose parents either lose hope of entering in the U.S. or suffer abductions.³⁸⁴

Meanwhile, three federal judges have determined that Title 42 does not permit the expulsion of unaccompanied children, nor does it supersede domestic asylum law incorporating non-refoulement.³⁸⁵ UNHCR has joined the call to end this harmful policy, citing “[g]uaranteed access to safe territory and the prohibition of pushbacks of asylum-seekers” as core principles of the Refugee Convention.³⁸⁶ A group of 170 public health experts have debunked any scientific rationale for the policy, calling mass expulsions “xenophobia masquerading as a public health measure.”³⁸⁷ While health screenings are advised, there is no evidence that walling off asylum seekers will mitigate the spread of infectious diseases.³⁸⁸ Public health experts and epidemiologists have offered to support the CDC in addressing public health concerns while protecting asylum seekers.³⁸⁹ Yet, the Biden administration has failed to harness this expertise to mitigate the spread of communicable diseases without compromising asylum law.

During the first five months of Biden’s presidency, over 3,250 migrants and asylum seekers have reportedly suffered kidnappings or other violence as U.S. authorities blocked their entry or expelled them to Mexico. This continued use of Title 42, with few exceptions and carve-outs, is a troubling reminder of the health screenings previously used as pretext to push back non-European migrants and Haitian asylum seekers.

President Biden has stated that he is working to achieve a “fair, orderly, humane” immigration system.³⁹⁰ And yet, his administration has doubled down on Title 42, which targets primarily Black, Brown, and Indigenous asylum seekers and presents them as a threat to U.S. public health. Expulsions have disproportionately harmed Haitians again, sending thousands of Haitian families, including small children, back to danger.³⁹¹ During the first five months of Biden’s presidency, over 3,250 migrants and asylum seekers have reportedly suffered kidnappings or other violence as U.S. authorities blocked their entry or expelled them to Mexico.³⁹² This continued use of Title 42, with few exceptions³⁹³ and carve-outs,³⁹⁴ is a troubling reminder of the health screenings previously used as pretext to push back non-European migrants and Haitian asylum seekers.³⁹⁵

These expulsions are not the only vehicle the Biden administration contemplates to halt the arrival of asylum seekers. The U.S. has continued negotiations with Central American nations and Mexico to further militarize and seal these countries’ borders.³⁹⁶ On April 12, 2021, Reuters reported that the United States had reached agreements with Mexico, Honduras, and Guatemala to “place more troops on their borders,”³⁹⁷ while plans to pave the way for new ACAs may lay dormant within proposed partnerships with Central American nations.³⁹⁸

CHAPTER 6

Closing Recommendations: Learning the Lessons of Failed, Deadly, and Costly Offshoring and Externalization Practices Across the World

“I keep waiting, but there is no answer... The truth is I don’t feel safe here. There’s nothing for me and my family here. But I don’t have anywhere else to go.”

— Honduran asylum seeker sent by the U.S. to Guatemala, where not a single asylum seeker was granted protection.³⁹⁹

The recent asylum policies of the EU, Australia, and the U.S. have one fundamental flaw: their apparent forgetting of the moral and political failures that made the principle of non-refoulement a vital necessity in the aftermath of the Holocaust. Despite ratifying the Refugee Convention and/or 1967 Protocol and incorporating their principles into domestic law, these affluent nations continue to respond with callous push-backs. In particular, offshoring and externalization practices betray these affluent nations’ desire to circumvent humanitarian obligations, offload their duties on less fortunate, peripheral, or remote nations, and villainize asylum seekers.

Though they are oceans away from each other, these affluent nations use the same playbook. Framing primarily Black and Brown asylum seekers as a threat, they adopt policies that make safe routes to their nations nearly impossible to access. The few remaining routes become dangerous bottlenecks that incentivize the exploitation of asylum seekers and generate desperation. When this desperation comes knocking, a few hundred or thousand asylum seekers become a “crisis” for these affluent and populous nations. Governmental leaders fixate on the physical border and how to push back asylum seekers to peripheral countries, while international and domestic laws suddenly appear malleable. Affluent nations turn outward to halt migration and erect indefinite offshore facilities abroad. Meanwhile, their domestic asylum systems remain underfunded, outdated, and

ill-equipped to meet the needs of asylum seekers. Rather than funding domestic asylum processing and complying with non-refoulement, officials hope to deter asylum seekers through presumptive detention onshore, or expulsions and indefinite detention offshore.

The impact on asylum seekers is predictably devastating, exposing them to physical violence, torture, trafficking, mental health crises, and even death. Nevertheless, this grim record has done little to deter affluent nations from pursuing these harmful policies. Restrictionist policies remain widespread, repeating historical patterns across the globe. It is no coincidence that the violations of international law on one side of the globe—e.g., Haitians jailed indefinitely in Guantánamo Bay—become a blueprint⁴⁰⁰ for similar programs on the other—e.g., Australia’s “Pacific solution,” or offshoring aspirations in the U.K. Given their powerful status, affluent nations’ anti-asylum policies set harmful precedents that undermine protection for asylum seekers worldwide—even beyond their active exchange of proposals and consultation on adapting externalization policies at the local level.⁴⁰¹ Unsurprisingly, the U.S. has been a lead architect for offshoring practices, even guiding Australia on maritime push-back and externalization policies.

The impact on asylum seekers is predictably devastating, exposing them to physical violence, torture, trafficking, mental health crises, and even death. Nevertheless, this grim record has done little to deter affluent nations from pursuing these harmful policies.

How can we avert a new iteration of Nauru and Manus? Guantánamo and the ACAs? Or Turkey and Libya’s agreements with Europe? If a blueprint is emerging, so are the lessons that the U.S. must finally learn:

- 1. Harsh deterrence policies do not work, because asylum seekers do not leave their homes voluntarily.** These measures, which bolster offshoring and externalization, perpetuate chaos and are shown to produce no discernable drop in migration, because asylum seekers flee from greater harms.⁴⁰² Preventing asylum seekers from reaching the United States continues to inform the Biden administration’s approach,⁴⁰³ even while they unwind MPP and rescind the ACAs. The continued expulsions under a specious public health rationale foreshadows further offshoring/externalization practices, particularly as it relates to the militarization of Mexico’s southern border. **Abandoning harsh deterrence policies is key to ending offshoring and border externalization once and for all.**

- 2. Third country agreements with less affluent nations are not the solution either.** The U.S. exerts significant political control over its neighbors and other developing nations. Whether coercive or seemingly voluntary, these agreements export border militarization and bargain with the right to asylum. They also compound the harms asylum seekers suffer, as seen most recently in Turkey and Mexico. Most importantly, these agreements serve short-term political ends, not international obligations. As UNHCR’s basic threshold of protection shows (see Chapter 1), qualifying as a “safe” third country requires significant measures to ensure the welfare of asylum seekers. **Rather than investing in costly externalization or offshoring agreements, the U.S. should ensure that it does not offload its obligations onto ill-equipped nations** with limited capacity or no capacity at all to process asylum seekers.
- 3. There is no “right way” to seek asylum.** Affluent nations fixate on “lawful” ways to seek refuge, at times pitting refugees against asylum seekers, or discriminating between asylum seekers who arrive by sea and land from other noncitizen travelers. The mode of entry of asylum seekers is irrelevant to the protection they seek. That is why ongoing sea interdiction, expulsions, and unequal treatment toward individuals entering between ports of entry must end. Historically, the fixation on unauthorized migration has been selective, and deeply discriminatory. **The U.S. cannot abide by the principle of non-refoulement by ascribing fault to asylum seekers depending on their mode of entry.**⁴⁰⁴
- 4. Closing legal loopholes that skirt non-refoulement obligations is key to enforcing asylum protections.** Sea interdictions, expulsions, and other forms of push-backs over the past decades have relied on workarounds to suspend this fundamental protection owed to asylum seekers. The principle of non-refoulement does not disappear because U.S. authorities block asylum seekers’ arrival. Unlike *Hirsi Jamaa v. Italy* in the EU context, *Sale v. Haitian Refugee Centers* opened the door for the U.S. Coast Guard and DHS to push back migrants outside of U.S. territory. **Restoring the broad scope of non-refoulement obligations is key to fulfilling U.S. obligations under international law—as is granting asylum seekers access to justice when the U.S. refouls them.**
- 5. Proxy border control, where the U.S. seeks to halt the arrival of asylum seekers through agreements with governments or with private carrier companies, breeds trafficking and deadly journeys.** Like Australia and the EU, the U.S. has invested extensive resources into externalization regimes in the public and private sector. Those agreements have proven deadly, as other nations brutalize asylum seekers on the U.S.’ behalf.⁴⁰⁵ Though outsourced, this interference with asylum seekers on their journey—while they flee life-threatening harm—turns asylum law on its head. **The U.S. should end proxy migrant control regimes, such as DHS’ agreement with Panama, or the recent agreement that the U.S. brokered with Central American nations and Mexico to “place more troops on their borders”— and expand safe pathways for asylum seekers to come to the United States.**

- 6. Asylum offshoring thrives on the presumption of detention; we cannot end one without ending the other.** The recent legal challenge to the U.S.-Canada safe third country agreement, though subject to ongoing litigation, named the elephant in the room: even among affluent nations, safe third country agreements may violate asylum seekers' rights if repressive detention policies are commonplace. Unsurprisingly, the U.S. has built the largest detention apparatus in the world;⁴⁰⁶ the system, built in tandem with the brutal repression of Haitian asylum seekers, taps into the same racism that has fueled the mass incarceration of Black and Brown people in communities across the United States. In the 21st century, this warped logic continues to justify anti-asylum policies, such as a deliberate misinterpretation of Title 42, which returns asylum seekers to harm. Individuals seeking asylum in the United States should be processed in the United States in accordance with domestic and international law. **Instead of incarcerating asylum seekers, the U.S. can unlearn its instinct to detain, and shift resources toward community-based civil society organizations to support asylum seekers—hundreds of which are waiting at the ready.**⁴⁰⁷
- 7. Managing asylum policy through a lens of political crisis management endangers the right to asylum and the U.S. asylum system and permits government leaders to perpetuate thinly veiled racism.** Affluent nations' leaders frequently criminalize and vilify predominantly Black, Brown, and Indigenous asylum seekers as representing an external threat or a "foreign invasion." The existence of people seeking asylum is not a crisis to quickly repress, but representative of binding legal obligations. **Divesting from a crisis-management response and investing in domestic asylum processing systems will shield asylum seekers and the United States from short-term politically motivated policies which are dangerous and ineffective.**

The Biden administration has a unique opportunity to build a new humanitarian asylum system not built upon the primacy of deterrence, enforcement, and detention—tried and failed policies that have spelled immeasurable harm for asylum seekers. These same policies, paired with a history of white supremacy, have also made offshoring and border externalization possible. As our report shows, U.S. offshoring and border externalization long predates the now-rescinded ACA with Guatemala, and has returned in many iterations since the early 20th century. No deterrence policy will end the arrival of asylum seekers. Every dollar spent on offshoring or externalization practices is one less dollar to build humane and efficient asylum processing domestically.

Only by investing in a robust domestic humanitarian reception system that treats asylum seekers fairly and with dignity can we avert a return to offshoring and externalization policies in the long term—in the U.S. and worldwide.⁴⁰⁸

Endnotes

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394. Upon assuming office, the Biden administration agreed not to subject unaccompanied children to Title 42 expulsions following litigation initiated under Trump. In June 2021, news that families will also be carved out of the order were also reported. See Eileen Sullivan and Zolan Kanno-Youngs, "Biden Officials Consider Phasing Out Rule That Blocked Migrants During Pandemic," *New York Times*, June 24, 2021, <https://www.nytimes.com/2021/06/24/us/politics/biden-title-42-migrants-coronavirus.html?referringSource=articleShare>. These carve-outs or exceptions simply shift the target from one population to another, in this case leaving adults (including LGBTQ+ individuals, kinship caregivers, and many transcontinental asylum seekers) in the bull's eye of this summary expulsion policy.
395. "Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions," *Columbia Mailman School of Public Health*, May 18, 2020, <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers> (Public health measures in the United States have moved on from the days when individuals with communicable diseases were treated merely as vectors of disease and immigrants were scapegoated for outbreaks and barred from the United States. Just ten years ago, the CDC lifted an immigration ban on individuals living with HIV—first adopted in the 1980s when there were more known cases of HIV/AIDS in the United States than anywhere else in the world—acknowledging that the restrictions were not an effective or necessary public health measure. The United States should not repeat past mistakes by adopting another discriminatory and ineffective ban on the pretext of public health.)
396. Delmer Martínez and Claudio Escalon, "Hundreds of migrants set out from Honduras, dreaming of US," *Associated Press*, March 30, 2021, <https://apnews.com/article/guatemala-honduras-latin-america-united-states-1dd5b1c6f4b75f0c3eb5ffcef024f70a>.
397. "Mexico doubles migrant detentions with troop surge, White House says," *Reuters*, April 12, 2021, <https://www.reuters.com/article/us-usa-immigration-troops/mexico-honduras-guatemala-to-increase-troops-along-borders-white-house-official-idUSKBN2BZ1V2>.
398. "Readout of Secretary Mayorkas's Trip to Guatemala," *Department of Homeland Security*, July 8, 2021, <https://www.dhs.gov/news/2021/07/08/readout-secretary-mayorkas-s-trip-guatemala> ("While in Guatemala City, [DHS] Secretary Mayorkas and President Giammattei discussed their strong bilateral partnership. Secretary Mayorkas thanked President Giammattei for his efforts to provide support for returned migrants, for opening a new refugee center to offer protection to those who qualify...").
399. Kevin Sieff and Mary Beth Sheridan, "The U.S. sent Central American asylum seekers to Guatemala to seek refuge. None were granted asylum, report says," *Washington Post*, January 16, 2021, https://www.washingtonpost.com/world/the_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207_story.html.
400. Azadeh Dastyari, "Refugees on Guantanamo Bay. A Blue Print for Australia's 'Pacific Solution?'," *Academia*, 2008, https://www.academia.edu/3733774/Refugees_on_Guantanamo_Bay_A_Blue_Print_for_Australias_Pacific_Solution.
401. Ghezelbash, *Refugee Lost*, 171-74.
402. Giulia Laganà, "Policy Brief: Does Offshoring Asylum and Migration Actually Work?; What Australia, Spain, Tunisia and the United States Can Teach the EU," *Open Society European Policy Institute*, September 2018, <https://www.opensocietyfoundations.org/uploads/3c397d87-5348-41de-9e92-d1a2108dabb1/does-offshoring-asylum-and-migration-actually-work-20180921.pdf>.
403. Priscilla Alvarez, "'Don't put your kids' lives at risk': US ramps up ad campaign in Latin America fighting against disinformation," *CNN*, April 3, 2021, https://amp.cnn.com/cnn/2021/04/03/politics/border-radio-ad-campaign-latin-america-smugglers/index.html?__twitter_impression=true.
404. Ironically, the U.S.'s current insistence on "lawful" entry for asylum seekers stands in sharp contrast with its position as a key member negotiating the terms of the 1951 Convention; back then, the U.S. "vigorously" argued for an expansive notion of non-refoulement, regardless of the asylum seeker's status upon entry. See UNHCR, "Advisory Opinion," para. 30-31. (quoting U.S. representative as stating: "Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.")
405. Alfredo Peña and Mark Stevenson, "History of abuse for Mexican police unit in migrant massacre," *Associated Press*, February 10, 2021, <https://apnews.com/article/police-mexico-victoria-massacres-texas-ea8622410ccdc3fc9b0eb11dd974b8a8>.
406. Emily Kassie, "Detained: How the United States created the largest immigrant detention system in the world," *The Marshall Project and The Guardian*, September 24, 2019, <https://www.themarshallproject.org/2019/09/24/detained>.
407. "Community Support for Migrants Navigating the U.S. Immigration System," *American Immigration Council and Women's Refugee Commission*, February 26, 2021, <https://www.americanimmigrationcouncil.org/research/community-support-migrants-navigating-us-immigration-system>.
408. "Letter to Attorney General and DHS Secretary on Asylum System Reforms," *Human Rights First*, April 15, 2020, <https://www.humanrightsfirst.org/resource/letter-attorney-general-and-dhs-secretary-asylum-system-reforms>.