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# Cutting Off the Flow: Extraterritorial Controls to Prevent Migration

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## BACKGROUND

The world watched spellbound as societies across the Middle East and North Africa rose up to protest their political leaders in the ‘Arab Spring’ of 2011. Yet while wealthier states evacuated their citizens from unstable territories, another situation was forming – the extraterritorial immigration controls that European countries had negotiated with Libya and Tunisia were breaking down, and asylum-seekers and migrants began to leave North African ports for the shores of Europe. By late March, more than 25,000 people had arrived by boat on the Italian island of Lampedusa, causing Italian politicians to react with consternation and declare ‘an exodus of biblical proportions.’<sup>2</sup> Some E.U. governments began to call for changes to the E.U.’s internal open border regime, and the Danish center-right government went as far as reestablishing stringent controls on its borders with Germany and Sweden.<sup>3</sup>

Extraterritorial controls are measures that governments implement to push back migrants before they can reach destination countries. These controls have been a central plank of immigration management in developed nations and regions since the end of the Cold War and include both the offshoring of traditional controls – visas, detention, asylum processing – as well as physically preventing onward movement with maritime patrols, anti-smuggling operations and diplomatic agreements

with third states.<sup>4</sup> The stated benefits of pushing these controls outside of national borders are efficiency and effectiveness. Implementing extraterritorial controls “[t]o check the legality of people’s movement before they embark, with the help of the local authorities and with air or land carriers, avoids the painful and expensive problems in sending them back if they are not the one who should be traveling.”<sup>5</sup>

However, the Italy-Libya situation reveals a central problem with such mechanisms: they do not reduce the number of people who need to move and who may have valid claims for refugee status; they simply keep them in suspension, often in countries in which their rights may not be protected. In this way, they may expose migrants and asylum seekers to further danger and human rights violations, and offer fewer avenues for redress. This has led some scholars to argue that extraterritorial controls are essentially undermining the international protection system as we know it.<sup>6</sup>

This issue brief explores the extent to which the United States, Europe and European governments have implemented different extraterritorial controls.<sup>7</sup> Although we hear of such controls in the media, how common are they? Who is overseeing them? What do they involve? What are concerns with their use? To

\* LL.M., independent consultant on international human rights and migration. This issue brief was drafted as a background paper for the Chief Justice Earl Warren Institute on Law and Social Policy conference, *Cutting Off the Flow: Extraterritorial Controls to Prevent Migration*, held at Berkeley Law on April 22, 2011. The author thanks Aarti Kohli, Director of Immigration Policy at the Warren Institute for her advice and comments, and the many conference participants who shared their expertise on this issue.

2. James McKenzie, *Tiny Italian Island Grapples with Migrant Crisis*, REUTERS (March 25, 2011) available at <http://ph.news.yahoo.com/tiny-italian-island-grapples-migrant-crisis-20110325-082054-766.html>. Other European states, however, criticized Italian claims of catastrophe as exaggerated and noted that some states took tens of thousands of refugees as part of their regular asylum programs. See e.g. *EU Sluggish on Italian Migration Help*, EURONEWS (Feb. 24, 2011) at <http://www.euronews.net/2011/02/24/eu-sluggish-on-italian-migration-help/> (last accessed May 27, 2011); *Most EU States View Italy’s Concern Over Refugee Help as Exaggerated*, MIGRANTS AT SEA BLOG (Feb. 25, 2011) at <http://migrantsatsea.wordpress.com/2011/02/25/most-eu-states-view-italy%E2%80%99s-concerns-over-refugee-threat-as-grossly-exaggerated/> (last accessed May 27, 2011).

3. This decision was criticized by the E.U. and by individual E.U. governments such as Germany. See e.g. Judy Dempsey, *Denmark Reintroduces Border Controls*, INTERNATIONAL HERALD TRIBUNE (May 12, 2011).

4. Also referred to as non-arrival measures in Europe and offshore controls in Australia. ‘Extraterritorial’ has become the accepted term in the United States and is used as shorthand to refer to all immigration control mechanisms implemented outside of the jurisdiction of the implementing state. In many cases extraterritorial controls are put in place outside of the state’s territory, for example on the high seas or on the territory of a third country, however, in some cases they are implemented technically within a state’s territory but on land that is excised from judicial oversight or constitutional protections. The link between jurisdiction and territory is hotly contested.

5. Elspeth Guild and Didier Bigo, *The Transformation of European Border Controls*, in EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES (Bernard Ryan ed., 2010).

6. Lori Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625 (2009).

7. Europe is used in this paper to refer to the European Union of 27 member states. However, references to immigration policies of the United Kingdom should not be seen as representative of Europe as the UK has opted out of the Schengen Acquis and maintains full control of its own borders.

answer these questions, this brief presents information on key actors, including individual nation-states and their agents, and on the range of mechanisms used by both. A comparison of two major immigration destinations is included to consider similarities and differences in the use of extraterritorial controls by states.

A review of the literature and media reports finds that extraterritorial controls include a diverse range of measures by different actors, some of which have been extremely controversial, such as maritime interdiction and offshore detention, and others that are more accepted or less understood, such as visa controls and disruption of organized immigration crime. Further, while such controls are now ubiquitous in both regions, their design and implementation generally lack public oversight and accountability mechanisms. They may protect states from security threats, have the potential to provide early protection to people in need, and save traveling migrants in distress. But, if used primarily as an immigration deterrence mechanism, they can cause harm. Indeed they may provide states a means to evade their international obligations or lead to violations of international refugee law and human rights law.

In light of this, we recommend governments conduct a comprehensive and public review of the extraterritorial controls they have in place, taking into consideration international refugee and human rights commitments. We also urge governments to increase the transparency of their immigration control agreements with third parties, including private actors and other states.

Section one provides background information on the framing of extraterritoriality, and the responsible

agencies in the United States and Europe. Section two considers in detail the mechanisms and their potential problems as implemented in both jurisdictions. The final section summarizes human rights concerns and offers recommendations for reform.

## Regional Contexts

Europe and North America are both highly industrialized regions and are destinations for migrants and asylum seekers.<sup>8</sup> The United States is usually portrayed as built by immigrants and thus more welcoming to migrants than Europe, but both have instituted a complex array of immigration barriers and controls to greater or lesser extent over the past 100 years; indeed the U.S. and E.U. frequently share information about border control techniques.<sup>9</sup> However, key differences between the two have affected not only the kinds of mechanisms implemented, but also the scope for oversight and avenues for seeking accountability. These differences include the law-making structures, the framing of immigration and the need for controls, and the relevant actors.

*Framing of extraterritoriality and the border crisis:* Both the United States and Europe emphasize security in their immigration and border control policies, and border security is a common justification for the expansion of immigration measures offshore. In the U.S. the predominant discourse is protection from security threats, including so-called ‘non-traditional’ threats such as drugs, disease or terrorism. The immigration discourse has been increasingly militarized, since at least the Clinton administration, to guard against these threats. The War on Drugs in Latin America and more recently the Global War on Terror have also led to

8. Note, however, that most migrants move internally, and of those who do travel abroad, only one third move from a developing to a developed country: “Most of the world’s 200 million international migrants moved from one developing country to another or between developed countries.” United Nations Development Program, *Overcoming Barriers: Human Mobility and Development*, HUMAN DEVELOPMENT REPORT (2009).

9. See e.g. The Directorate-General – Justice, *Justice, Freedom and Security High on US-EU Transatlantic Agenda*, (2006), [http://ec.europa.eu/justice/policies/external/usa/fsj\\_external\\_usa\\_en.htm#part\\_1](http://ec.europa.eu/justice/policies/external/usa/fsj_external_usa_en.htm#part_1). The U.S. and E.U. are not alone, however. Australia and Canada also have extraterritorial controls in place, and indeed Australia has been a lead country in offshoring detention to third states, see e.g. Francesco Motta, *Between a Rock and a Hard Place: Australia’s Mandatory Detention of Asylum Seekers*, 20(3) REFUGEE 12 (2002). For Canada, see e.g., Alison Mountz, *SEEKING ASYLUM: HUMAN SMUGGLING AND BUREAUCRACY AT THE BORDER*, University of Minnesota Press, Minneapolis, 2010.

changes in immigration laws to protect the borders.<sup>10</sup>

In Europe, policy makers and anti-immigration advocates have framed immigration and asylum systems as threats to social, political and economic security. Central to this is the narrative of European integration.<sup>11</sup> The establishment of the Schengen Area in 1985 led to the gradual dismantling of borders within Europe (minus the United Kingdom and Ireland) for goods, services and people, and the internal Area of Freedom, Security and Justice. As a corollary to this internal integration, states argue that ever-stronger E.U. external borders are required.<sup>12</sup>

Asylum-seekers have been a particular target of E.U. border controls. Since the early 1990s, when Europe saw large movements of people westward from Eastern Europe and the former Yugoslavia, asylum-seekers have come to be perceived as threats in disguise – criminal elements, terrorists, or simply economic migrants seeking to abuse the system. Although asylum-seeker numbers have never reached the levels of the early 1990s, antipathy and control measures have increased rather than decreased.<sup>13</sup>

Although the security discourse is powerful in both the U.S. and Europe, it does not alone explain implementation of extraterritorial controls – after all, many states have highly restrictive immigration laws, but have not implemented these controls. Other explanations proposed by scholars are linked to the very fact that Europe, the United States, and also Australia and Canada, are liberal democratic states with histories of advocating human rights protection. It has been argued, for example, that off-shoring immigration controls allows liberal governments to escape the constraints placed on them

by active civil societies and a free press – a so-called ‘paradox of liberalism.’<sup>14</sup>

To the extent that this prevents people with valid asylum claims from reaching protection, and is done with little transparency or public oversight, it could be considered an illiberal response to ‘protecting’ the benefits of liberalism. At what point does keeping an asylum seeker at arms length become a violation of the right to seek asylum? It also raises questions about the nature of the international protection framework, cooperation between host and transit states and the systems of checks and balances within states that guard against regressive policy measures.

*Law-making institutions:* The entities responsible for immigration law and policy differ between the two regions, as does the mechanisms for oversight. The United States is a federation of 50 states, but the power to control immigration is exclusively vested in the federal government under the Plenary Power doctrine.<sup>15</sup> The legislature and executive thus design and implement extraterritorial measures, and the higher courts have a limited role as a check on policy; the Supreme Court has stated that Congress and the Executive have broad discretion over entry and expulsion as essential features of state sovereignty.<sup>16</sup>

In the E.U. Schengen Area, responsibility for immigration controls is more complex in that it is shared, not always easily, between individual states and the institutions of Europe. In general, nation-states have maintained control over long-stay visitors and applications for citizenship, and the E.U. has managed short-stays. The E.U. is asserting more control over asylum and immigration policy, however, including developing a Common European Asylum System and a Common Immigration Policy for Europe.<sup>17</sup>

10. David Martin, *Refining Immigration Law's Role in Counterterrorism*, Working Paper No. 6, Counterterrorism and American Statutory Law, BROOKINGS INSTITUTE (2009) at [http://www.brookings.edu/papers/2009/0310\\_immigration\\_martin.aspx](http://www.brookings.edu/papers/2009/0310_immigration_martin.aspx) (last accessed May 27, 2011).

11. Jef Huysmans, *The European Union and the Securitization of Migration*, 38 J. OF COMMON MARKET STUDIES 751 (2000).

12. The Schengen Area was decided upon in 1985 in the Schengen Agreement and then was folded into the EU by the Amsterdam Treaty 1999. All members of the EU, as well as some non-EU states, are part of the Schengen Area except for the United Kingdom and Ireland, which opted out.

13. See e.g. Liza Schuster, *The Exclusion and Inclusion of Asylum Seekers in Europe*, Working Paper No. 1, Centre on Migration, Policy and Society, University of Oxford (2004) at <http://www.compas.ox.ac.uk/fileadmin/files/pdfs/WP0401.pdf>.

14. See e.g. Matthew Gibney, *Beyond the Bounds of Responsibility: Western States and Measures to Protect Refugees*. Global Migration Perspectives No. 22, Global Commission on International Migration (2005).

15. The United States Constitution does not mention immigration, although it does vest the power of ‘naturalization’ in Congress. However, the federal courts have generally declined to interfere with the decisions of the legislature or the executive in the sphere of immigration.

16. The first case on this point established border control as an aspect of sovereignty: “That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.” *Chae Chan Ping v. United States* 130 U.S. 581 (1889), known as the “Chinese Exclusion Case.”



Within the European Commission, the principal actor for immigration control is the Directorate General for Home Affairs, responsible for security and for “putting solidarity at the heart of E.U. migration policy.”<sup>18</sup>

Further, unlike in the United States, regional courts including the European Court of Justice and the European Court of Human Rights have decided cases about immigration within their particular ambits, which have affected state policy.<sup>19</sup> This ensures some policy standardization across European states as well as providing a mechanism for review.

*Implementing Agencies:* In both Europe and the United States, the agencies responsible for extraterritorial controls have broad responsibility for border management, including screening for weapons, drugs, and nuclear material, as well as for undocumented migrants. In general, these entities have blurred administrative immigration functions with military, security, police work and foreign policy. This overlap is apparent in mechanisms for managing extraterritorial control of immigration.

The Immigration Act of 2001 created the Department of Homeland Security (DHS), which has combined immigration functions with anti-terrorism coordination, and new methods of identification and surveillance. Two DHS units have particular responsibility for external controls – the Immigrations and Customs Enforcement

(ICE) agency, and the U.S. Coast Guard, which is also a branch of the U.S. military. ICE has responsibility not only for preventing irregular migration but also for preventing terrorism, effectively equating the arrival of undocumented migrants with the threat of terrorism and dramatically underscoring the securitization of immigration policy.<sup>20</sup> It has an annual budget of \$5.7 billion, and more than 20,000 employees in offices in all 50 states and 47 foreign countries.<sup>21</sup> ICE acknowledges its external role in its 2010–2014 Strategic Plan: “Protecting and securing the borders involves ICE action overseas, at the border and ports of entry and inside the United States.”<sup>22</sup>

In Europe, the Justice and Home Affairs Council of the E.U. (a grouping of Home Affairs ministers from the E.U. states) created a single border-monitoring agency in 2004 known as Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union). Frontex both coordinates cooperation among member states and also has its own Rapid Border Intervention Teams for emergency situations.<sup>23</sup> Although Frontex is an autonomous body headquartered in Warsaw, it works alongside immigration agencies of member states, national navies, and border guards. It also has an external component – Frontex is authorized to cooperate with the border authorities of third states, and to coordinate cooperation between E.U. member

17. For all EU legislation in the field of Justice, Freedom and Security, see EU website: [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/index\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/index_en.htm)

18. European Commission Home Affairs, *Mission and History* (2011) [http://ec.europa.eu/dgs/home-affairs/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/index_en.htm)

19. The European Court of Justice has primarily considered rights of EU citizenship and freedom of movement within the EU, see e.g. *Metock and Others v. Minister for Justice, Equality and Law Reform*, C-127/08, European Union: European Court of Justice, 25 July 2008, available at: <http://www.unhcr.org/refworld/docid/48a574262.html> (last accessed 6 June 2011); The European Court of Human Rights considers challenges to immigration laws and decisions based on the European Convention of Human Rights 1950, see e.g. the prominent cases of *Soering v UK* (1989) and *Chahal v UK* (1996) which established that Article 3 of the ECHR could operate to prevent removal where there was a real risk of a future breach of human rights: *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, at: <http://www.unhcr.org/refworld/docid/3ae6b6fec.html> and *Chahal Family v. United Kingdom*, 22414/93, Council of Europe: European Commission on Human Rights, 27 June 1995, at: <http://www.unhcr.org/refworld/docid/402a28694.html> (both accessed 6 June 2011).

20. ICE’s Strategic Plan sets out the following objectives in its border protection role: “(1) dismantling organized alien smuggling; (2) targeting drug trafficking organizations; (3) pursuing international money laundering and bulk cash smuggling; (4) countering international weapons trafficking; (5) targeting human trafficking and trans-national sexual exploitation; and (6) invigorating intellectual property rights investigations to protect lawful commerce.” See US Immigration and Customs Enforcement, ICE STRATEGIC PLAN FY 2010–2014 (2010), 4, at <http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf> [hereinafter ICE Strategic Plan]

21. US Immigration and Customs Enforcement [hereinafter ICE], *Overview*, <http://www.ice.gov/about/overview/>

22. ICE Strategic Plan, 5.

23. Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133216\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133216_en.htm) (last accessed May 27, 2011). The RABITs were introduced by additional legislation in 2007, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/114124\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/114124_en.htm) (last accessed May 27, 2011). See also Frontex, *Tasks*, (2006) [http://www.frontex.europa.eu/origin\\_and\\_tasks/tasks/](http://www.frontex.europa.eu/origin_and_tasks/tasks/) (last accessed May 27, 2011).

states and third states.<sup>24</sup> Since it began operations in 2005, Frontex's budget has grown exponentially from 6 million Euros (US\$8.5m) in 2005 to just under 90 million Euros (US\$127.5m) in 2009 and 2010.<sup>25</sup>

## MECHANISMS OF EXTRATERRITORIAL CONTROL

Mechanisms that can be considered extraterritorial, in that they push immigration controls outside of territorial jurisdictions, include a wide range of policies. They include extending and strengthening visas regimes, offshore detention centers and offshore asylum processing, coastal patrols of the high seas and the waters of third countries, military and intelligence operations and bilateral agreements. Although these mechanisms are discussed separately in this brief, in reality they operate concurrently – for example people without the correct visa may be interdicted, detained and then returned, in accordance with bilateral accords.

### Visa Controls

Visas are the longest-standing and perhaps most accepted 'front-door' control. The basic visa framework has remained the same for many years and has always had an extraterritorial element - the majority of the world's people first come into contact with the borders of Europe and the U.S. at a consulate abroad during the visa application process.<sup>26</sup> Since September 11, however, substantial changes have taken place in visa administration to push more of the process offshore. Changes have included expanded interview requirements at consulates, additional security checks on visa applicants, new special registration programs and biometric identifiers.<sup>27</sup> "The objective has

become to allow [immigration control] professionals to make [entry] decisions as early as possible during an individual's (or a cargo's) travel, as far from reaching the border as possible."<sup>28</sup>

This development arguably increases passenger and state convenience by preventing situations where individuals are returned from the border at their own or the airline's expense. Three principle concerns have arisen from further extraterritorialization of visa controls, however: expansion of administrative discretion, privatization of visa security, and the use of personal information gathered during the visa collection process.

In respect to the first, the offshoring of visa processes is supported by new networks of immigration officers working in origin and transit states. These officers check passengers' identities *before* they depart, rather than at the border. For example, the U.K. Border Agency has a Risk and Liaison Overseas Network (RALON) of Immigration Liaison Managers in foreign airports and British consulates who train and give on-the-spot advice to the check-in staff of flights departing for the United Kingdom.<sup>29</sup> ICE also has officers posted abroad to support the work of consular officials, including in 14 classified Visa Security Units. These officers "focus on selected applicants and any connection the applicants may have to terrorism", and conduct extensive investigations into suspected individuals.<sup>30</sup> The concern with such checks is the lack of reviewability of visa decisions – individuals refused boarding at foreign ports have little recourse against errors or arbitrary decisions.

As well as more permanent arrangements, security agencies have carried out specific screening operations extraterritorially, as part of efforts to stop organized immigration crime. U.S. Operation Firm Grip, for example,

24. As at February 2011, Frontex states it had concluded working arrangements with authorities in 13 third countries, mostly in Eastern Europe: the Russian Federation, Ukraine, Croatia Moldova, Georgia, the Former Yugoslav Republic of Macedonia (FYROM), Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada and Cape Verde as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans. [http://www.frontex.europa.eu/external\\_relations/](http://www.frontex.europa.eu/external_relations/). The content of these agreements is not public information, however.

25. Frontex, *Budget and Finance* (undated), [http://www.frontex.europa.eu/budget\\_and\\_finance/](http://www.frontex.europa.eu/budget_and_finance/).

26. Elspeth Guild, *Moving the Borders of Europe*, lecture delivered during the official ceremony on the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, the Stichting Steunfonds Juridisch (Post) Doctoraal Onderwijs (May 30, 2001).

27. Stephen Yale-Loer, Demetrios Papademetriou and Betsy Cooper, *Secure Borders, Open Doors: Visa Procedures in the Post-September 11 Era*, MIGRATION POLICY INSTITUTE (2005).

28. Demetrios Papademetriou and Elizabeth Collett, *A New Architecture for Border Management*, MIGRATION POLICY INSTITUTE, Washington D.C. (2011), 2.

29. These officers cannot deny the right to board or arrest criminals, they can only advise airlines and local authorities. See: *How the Risk and Liaison Overseas Network Can Help You*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/transportindustry/rlon/howrloncanhelp/> (last accessed May 27, 2011).

30. *Visa Security and Passenger Pre-Screening Efforts in the Wake of Flight 253, Hearing Before the House Committee on Homeland Security, Subcommittee on Border, Maritime and Global Counterterrorism*, 110th Cong. (2010) (statement of Raymond R. Parmer, Director, Office of International Affairs U.S. Immigration and Customs Enforcement, Department Of Homeland Security).

screened passengers on 800 international flights at foreign airports in Asia and Europe.<sup>31</sup> Agents reportedly arrested 45 migrant smugglers, and intercepted 415 migrants on false document offenses.<sup>32</sup>

The imposition of carrier sanctions on airlines has essentially privatized part of the offshore visa regime in that it has made having a valid visa essential to board a commercial flight or ship. The United States introduced carrier sanctions in the Immigration Act of 1990 by imposing fines per irregular passenger that arrived in the United States, the responsibility for holding passengers and paying their detention costs in some situations, and for transporting them back to their ports of embarkation.<sup>33</sup> According to Elspeth Guild, this places commercial companies in the role of visa monitors and pushes out the border. Effectively, carriers have a dual role of policing a state's border abroad through the visa system and "to form the border abroad for those persons who do not require visas."<sup>34</sup>

All of the above changes mean that relatively untrained individuals are making decisions that may have enormous consequence for a potential traveler. These decisions are usually unreviewable, and take place at the check-in counter. In addition, the externalized checks also reduce opportunities for individuals at risk of persecution to reach asylum – first, they may be refused entry on the carrier or by the immigration officer at the point of origin. Even if they do arrive in the host state without correct papers, however, the impetus is for carriers to return people quickly so they are not saddled with expensive detention fees.<sup>35</sup>

Finally, the new visa regime has involved the use of biometric identifiers and other personal information,<sup>36</sup> so that nationality is now just one aspect "of a broader and ever-expanding set of individual characteristics and behaviors used to determine whether a person can travel."<sup>37</sup> These technologies have been adopted by both the United States and the EU.<sup>38</sup> A number of scholars have raised ethical and privacy objections to the collection, use and sharing of this information. Human rights advocates have also critiqued these identifiers for their use in racial profiling cases – for example only targeting particular nationalities, ethnicities or religions.<sup>39</sup> Extraterritorializing the process makes specific cases of discrimination or arbitrary decision-making hard to identify and to challenge.

### Extraterritorial Detention

Detention of undocumented migrants and asylum seekers is among the most visible and criticized elements of immigration enforcement in liberal democracies – grounds for detention, conditions of detention and the high cost of detaining people are all controversial. For these reasons, governments have found placing detention centers offshore in less accessible locations or outside of civil protections an attractive proposition. This has been achieved in a number of ways, although they have been subject to criticism on civil, human and refugee rights grounds.

The United States pioneered extraterritorial immigration detention in 1991 when it used the Guantanamo Bay

31. "Operation Firm Grip was a coordinated effort by INS working with host country law enforcement organizations and airline security officers to target global alien smugglers in Colombo, Sri Lanka; Mumbai and New Delhi, India; Bangkok, Thailand; Kuala Lumpur, Malaysia; Amsterdam, Netherlands; and Singapore." Joseph Greene, *U.S. and Multinational Coalition Disrupts Migrant Smuggling Operations*, 6:2 GLOBAL ISSUES - AN ELECTRONIC JOURNAL OF THE DEPARTMENT OF STATE 12-14 (Feb. 2001).

32. *Id.*

33. Immigration Act of 1990, (Pub.L. 101-649, 104 Stat. 4978, enacted November 29, 1990), § 1227.

34. Elspeth Guild, *Moving the Borders of Europe*, *Supra* note 26, 46.

35. A 1997 study of INS and airline cooperation at a US airport found that the system created an urgency to put migrants on return flights as soon as possible to avoid both the costs and additional paperwork of detention, but also the opportunity for migrants to challenge their exclusion or contact a relative or legal adviser for help. Officials noted it was much harder for migrants to challenge an exclusion decision from mid-air. Janet Gilboy, *Implications of "Third-Party" Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines*, 31(3) J. L. SOC'Y 505 (1997), 512.

36. "A biometric or biometric identifier is an objective measurement of a physical characteristic of an individual which, when captured in a database, can be used to verify the identity or check against other entries in the database. The best known biometric is the fingerprint, but others include facial recognition and iris scans." The use of biometrics became mandatory under the Enhanced Border Security and Visa Entry Reform Act of 2002. *Safety and Security of U.S. Borders*, U.S. DEPARTMENT OF STATE, [http://travel.state.gov/visa/immigrants/info/info\\_1336.html](http://travel.state.gov/visa/immigrants/info/info_1336.html) (last accessed May 27, 2011)

37. Papademetriou and Collett, *A New Architecture*, *Supra* note 28, 3.

38. *Id.* See also Rey Koslowski, *The Evolution of Border Controls as a Mechanism to Prevent Illegal Migration*, MIGRATION POLICY INSTITUTE, (2011).

39. Francois Crépeau and Delphine Nakache, *Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection*, 12(1) IRPP CHOICES (Feb. 2006).

naval base to detain 34,000 Haitian asylum-seekers fleeing a coup in Haiti. The detention site began as a ‘tent shelter’ surrounded by barbed wire and guarded by the U.S. military. In 1993 the first Bush administration forcefully repatriated almost all of the detainees to Haiti, but in 1994 a new camp was built to hold 30,000 Cubans detained while trying to reach the U.S. by sea. The conditions were very poor, and the Haitians and Cubans protested with hunger strikes, riots, law-suits and suicide attempts.<sup>40</sup>

Since this time, the Guantanamo Bay naval base has retained an offshore immigration detention center, the Migrant Operations Center. In 2003, the Pentagon sub-contracted the management of the facility to the GEO Group. The contract describes the center as: “a facility at which undocumented aliens seeking to enter the United States who are interdicted at sea or otherwise encountered in the Caribbean region are provided custody, care, safety, transportation and other needs pending a determination of their immigrant status and transfer.”<sup>41</sup> The facility has permanent structures for 100 migrants and space for temporary accommodation for 300 more (‘surge capacity’).<sup>42</sup> In 2006 the GEO Group contract was renewed. In 2007, media outlets reported the Pentagon had ordered construction of a new immigration detention center on Guantanamo with 10,000-person capacity for “massive numbers of migrants on the Caribbean Sea” thought to be leaving Cuba. The Government neither confirmed nor denied this story.<sup>43</sup>

The advantage of holding migrants in Guantanamo Bay is the uncertainty of the applicable law – although

technically on Cuban territory leased by the U.S. ‘in perpetuity’ since 1903, the U.S. maintains complete control over the base. This has given the United States room to deny constitutional rights such as the right to legal representation to the Haitian asylum-seekers.<sup>44</sup> In the European context, similar examples are the Spanish enclaves of Ceuta and Melilla on the Moroccan mainland, which, if entered, do not give any right to travel to the Spanish mainland. France has even declared its own borders and airports as extraterritorial zones that do not give a right to protection.<sup>45</sup>

Europe’s concept of offshore detention became highly controversial when the United Kingdom proposed a New Vision for Refugees in 2003 that would have had all refugee detention offshore in ‘source regions.’<sup>46</sup> Although public condemnation was too great and the proposal was scuttled, it has nevertheless been implemented in other ways. First, instead of the E.U. building and managing offshore centers, it now works with transit country governments to fund their construction and management, for example in Ukraine and Belarus. Similarly, individual states have worked with transit country governments to build and fund detention centers, for example claims of Italian financed centers in Tunisia, although this information is generally not public.<sup>47</sup>

Evidence has been presented about similar U.S. actions in Central America. According to one scholar, the U.S. funded several detention centers in Guatemala in the late 1990s. The Guatemalan authorities held migrants from not only Central America in these detention centers, but also from other regions. In 2002 an Indian detainee, one

40. J. Scott Orr, *Boiling Point: Guantánamo Seethes with Tension*, STAR-LEDGER, (Sep. 3, 1994); *Cubans Protest at Guantánamo*, AP, (Sep. 10, 1994); *Cuban Killed in Accident During Protest*, NEW YORK TIMES, (Sep. 13, 1994); Jim Loney, ‘Let the Children Go,’ *Cuban Refugees Say*, REUTERS, (Nov. 7, 1994); *Cubans Attempt Escape from Refugee Camp*, REUTERS, (Nov. 8, 1994); *39 Cuban Refugees Flee Guantánamo*, AP, (Nov. 8, 1994).

41. The GEO Group manages 118 detention sites around the United States, and describes itself as, “a leader in the delivery of private correctional and detention management, community re-entry services as well as behavioral and mental health services to government agencies around the globe.” The GEO Group, <http://www.thegeogroupinc.com/> (last accessed May 27, 2011).

42. Department of Homeland Security, Contract with Wackenhut Corrections Corporation, GEO Group, Aug. 20, 2003, available at [http://www.ice.gov/doclib/foia/contracts/acb-3-c-0008\\_wackenhut\\_corrections\\_corporation\\_%2805-foia-1767.pdf](http://www.ice.gov/doclib/foia/contracts/acb-3-c-0008_wackenhut_corrections_corporation_%2805-foia-1767.pdf) (last accessed May 27, 2011).

43. “New Guantanamo Facility for Detained Immigrants,” UNIVISION ONLINE (May 10, 2007), available at [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=ec07a045912446951c404069933fb36c](http://news.newamericamedia.org/news/view_article.html?article_id=ec07a045912446951c404069933fb36c) (last accessed May 27, 2011)

44. *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993); *Rasul v. George W. Bush*, 124 S.Ct. 2686 at 2691 (2004).

45. See Chowra Makaremi, *Governing Borders in France: From Extra-Territorial to Humanitarian Confinement*, 24(3) CANADIAN J. L. SOC’Y 411.

46. The New Vision was by no means the first such proposal, merely the first one put to public discussion. Noll describes the genesis of the concept and finds that as early as 1986 Denmark made a similar proposal to the UN, but failed to garner sufficient support. See Gregor Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, 5(3) EUR. J. OF MIGRATION & L. 303 (2003).

47. The Global Detention Project, which monitors detention facilities around the world, notes, “Tunisia has been extremely secretive about its criminal and administrative detention estate.” The newspaper El Watan has apparently reported 13 detention centers in the country, which it claims are financed by Italy. Naima Benouaret, *300 harraga détenus dans des centres en Tunisie*, EL WATAN (Aug. 26, 2010) at [http://www.elwatan.com/regions/est/annaba/300-harraga-detenus-dans-des-centres-en-tunisie-26-08-2010-87600\\_133.php](http://www.elwatan.com/regions/est/annaba/300-harraga-detenus-dans-des-centres-en-tunisie-26-08-2010-87600_133.php) (last accessed Feb. 17, 2011)



of a large group returned from detention in Mexico, committed suicide. At this point U.S. authorities reportedly inspected the sites, found them to be “not acceptable” and discontinued funding.<sup>48</sup> Little public information has been released regarding these facilities and the current U.S. role in detention in Central America remains unclear.

Extraterritorial detention, as well as bringing cost-savings, also facilitates the offshoring of refugee status determination. The most radical vision of offshore processing was again set out in Blair’s proposed New Vision. If accepted, it would have had refugee status determination carried out in the regional processing centers in source regions rather than by individual states, and even those who arrived on E.U. shores would be sent back to these centers. Those found to be a genuine refugee would be eligible for “managed refugee resettlement programs.” This process may have made it easier for people to receive immediate protection by reducing the time and distance needed to reach an asylum processing center. However, in all likelihood it would have increased the numbers of refugees sitting for years in detention or camps awaiting resettlement because states could have the option of picking and choosing which refugees to accept, rather than following the normal course of accepting any individual granted refugee status on their territory.<sup>49</sup>

Although increasing, offshore processing is still controversial in international law because the states through which migrants may be transiting often do not have robust refugee determination systems. The UNHCR has confirmed that under international refugee law, “claims for international protection made by intercepted persons are in principle to be *processed in procedures within the territory of the intercepting State*. This will usually be

the most practical means to provide access to reception facilities and to fair and efficient asylum procedures – core components of any protection-sensitive entry system – and to ensure protection of the rights of the individual.”<sup>50</sup> It is possible then that offshore processing may result in violations of human rights or refugee law, if protection and fair and efficient procedures are not provided, as is the case in intercepting states such as Libya and Tunisia.

### Coastal Patrols of Transit Countries and Maritime Interdictions

Being smuggled by sea is highly dangerous and often the resort of poorer migrants, for whom airline routes and the associated bribes are out of reach. Some drown or are lost at sea, and those that arrive often do not have documents and then make lengthy claims for asylum. For humanitarian reasons, deterrence, and security, states have invested significant resources into coastal controls and patrols, and interdictions at sea. These efforts undoubtedly save lives, but again, questions of protection for refugees and transparency and accountability in interdiction operations arise.

Coastal protection began with militarizing states’ own coastlines and patrolling with naval or coastguard ships. Spain’s SIVE program (Sistema integrado de vigilancia exterior), one of the first, cost more than 200 million Euro, and includes “fixed and mobile radars, infrared sensors as well as boats, helicopters and airplanes” for detecting irregular boat arrivals.<sup>51</sup> Boats without proper paperwork are usually brought onto land and the individuals on board processed.

More controversial practices have been the extraterritorial patrolling of the high seas to interdict boats as they travel,

48. Michael Flynn, *U.S. Immigration Policy: The Double Standard*, CHICAGO TRIBUNE, (Dec. 1, 2002), available at <http://internationalreportingproject.org/stories/detail/u.s.-immigration-policy-the-double-standard/> (last accessed May 27, 2011); and Michael Flynn, *Where’s the U.S. Border: Portrait of an Elastic Frontier*, Prepared for delivery at the 2006 Meeting of the Latin American Studies Association, San Juan, Puerto Rico (March 15-18, 2006).

49. Noll, *Visions of the Exceptional*, *Supra* note 46. Note that Australia effectively implemented this system in 2001 when it sent all asylum applicants arriving by boat to the Pacific Island of Nauru for processing and then resettlement. In 2010 it began calling for another such processing center to be opened in Timor Leste, and more recently has been negotiating a transfer deal with Malaysia. See e.g. *Timor-Leste and the Processing Center: All Process and No Solution*, THE ECONOMIST (Mar. 30, 2011); Andrew Herd, *Australia’s Refugee Dilemma*, EAST ASIA FORUM (Jun. 3, 2011), <http://www.eastasiaforum.org/2011/06/03/19323/> (last accessed 6 July 2011)

50. UN High Commissioner for Refugees, CONCLUSION ON PROTECTION SAFEGUARDS IN INTERCEPTION MEASURES, (Oct. 10, 2003), No. 97 (LIV) - 2003, available at <http://www.unhcr.org/refworld/docid/3f93b2894.html> (last accessed 11 April 2011). Emphasis in original.

51. Derek Lutterbeck, *Policing Migration in the Mediterranean*, 11 MEDITERRANEAN POLITICS 59 (2006), 2.

and monitoring the coasts of origin and transit countries to stop boats before they depart. These latter methods raise complex humanitarian and legal questions about states' powers to act on the high seas (traditionally an area of freedom) and about their obligations to individuals encountered in these zones.<sup>52</sup> Interdiction of boats on the high seas was led by the United States in 1981 pursuant to an agreement between the U.S. and Haiti. The United States Coast Guard was granted authority to stop Haitian vessels on the high seas, and to send migrants back if they could not demonstrate a "credible fear." Most infamously, President George H.W. Bush ordered in May 1992 that Haitians fleeing the brutal Cedras dictatorship be picked up in the high seas and returned on U.S. Coast Guard cutters back to their persecutors, without any effort to determine whether they would be in danger once returned.<sup>53</sup> In 1993, rather than scrapping the practice, President Clinton expanded it by directing the Coast Guard to cooperate with other law enforcement agencies to combat smuggling.<sup>54</sup>

In Europe, the high seas are patrolled by Frontex as well as by the navies of the Mediterranean countries. Among European states, Spain and Italy have been among the most active in maritime interdiction in the Mediterranean. In 2009, Human Rights Watch reported that Italy's action was the first time since World War II that a European state had interdicted and forcibly returned boats without screening passengers to determine whether they had a need for protection.<sup>55</sup> Italy argued that this practice was legitimate because once in Libya, the migrants and asylum-seekers were screened by international agencies such as the United Nations High Commissioner for Refugees (UNHCR). However, it raises similar questions to those above about offshore processing and access to asylum.

Frontex manages patrols and has missions in a number of states that hold military hardware for surveillance. For example, Frontex has a mission in Senegal led by Spain, consisting in 2010 of two Spanish Guardia Civil patrol boats, a Spanish National Police helicopter, and a private airplane leased by the Spanish Defence Ministry. One Frontex

patrol boat also operates from Nuadibú, Mauritania.<sup>56</sup> In the western hemisphere, the U.S. Coast Guard states that it has patrolled the coast of Ecuador in 1999 and 2000 to stop boats on their way to Mexico and Central America for humanitarian reasons, because "most of these vessels do not have the proper conditions to transport these migrants and lack the safety equipment in the event of an emergency."<sup>57</sup> It is not clear whether those on board the boat were screened for asylum claims before being taken to the nearest port, or whether they ever had the opportunity to claim asylum.

Given the serious human rights concerns with maritime interdictions, advocacy groups and political leaders have instigated reviews and challenges in both jurisdictions recently, indicating that change may not be far off. In the United States, Senator Leahy and Rep. Lofgren have introduced the Refugee Protection Act 2011, which among other things, would direct DHS to promulgate uniform standards for all aliens, including those interdicted at sea, who have expressed a fear of return. These asylum-seekers would be interviewed by an asylum officer before return or repatriation.<sup>58</sup> In the E.U., the European Court of Human Rights is presently hearing a challenge by migrants intercepted at sea by the Italian Navy on May 6, 2009 and returned to Libya on the basis that it may have violated European states' non-refoulement obligation.<sup>59</sup>

## Surveillance and Intelligence Operations

The interception of migrants crossing land borders or traveling by boat is often based on intelligence and surveillance of border regions. National immigration agencies in Europe and the United States, as well as Frontex, have responsibility for intelligence and surveillance as well as for interventions when people are already on the move. Available information suggests that they carry out intelligence operations, usually in the form of 'anti-migrant smuggling' operations, both independently and in coordination with authorities in origin and transit states. While these efforts validly interrupt organized criminal

52. See e.g. Nessel, *Externalized Borders*, *Supra* note 6.

53. See Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

54. Presidential Decision Dir. 9 (June 18, 1993), available at <http://www.fas.org/irp/offdocs/pdd9.txt>.

55. Human Rights Watch, *Italy/Libya: Pushed Back, Pushed Around*, feature page, (Sep. 18, 2009) available at <http://www.hrw.org/en/features/italylibya-pushed-back-pushed-around>

56. *Spain and Senegal Renew Agreement to Permit Frontex to Operate from Dakar*, TELEMADRID (May 2010), available on Migrants at Sea blogspot, <http://migrant-satsea.wordpress.com/2010/05/24/spain-and-senegal-renew-agreement-permitting-frontex-to-operate-from-dakar/> (last accessed May 27, 2011).

57. *Alien Migrant Interdiction*, UNITED STATES COAST GUARD (Apr. 20, 2009), <http://www.uscg.mil/hq/cg5/cg531/amio.asp> (last accessed May 27, 2011).

58. Refugee Protection Act 2011, S. 1202 and H.R. 2185, 112th Congress, 2011.

59. *Hirsi and others v Italy*, Requête no 27765/09, ECHR.

networks, the security imperative overshadows any individual needs and rights under international law – such concerns are simply never mentioned in public documents. Further, the implementation of so-called intelligence operations by security and intelligence services precludes public oversight.

An early example of intelligence operations against migrant smugglers was Operation Global Reach launched by the United States in 1996. This operation involved, “the deployment of greater enforcement assets overseas.” In the Western Hemisphere, Global Reach was undertaken through Operation Disrupt. The INS reported to Congress in 1997 that Operation Disrupt I and II were joint operations between the INS in Mexico City and Mexican authorities “to gather intelligence and disrupt alien smuggling activity in the Caribbean.” A third operation was undertaken in the Dominican Republic with other federal agencies and the Dominican Republic government. Four smugglers were arrested and 400 migrants were reportedly prevented from leaving the Dominican Republic.<sup>60</sup>

ICE now has responsibility for all cross-border crime, including immigration crime and has integrated its work with intelligence agencies. It claims that, “Partnering with others, we are using a broad range of authorities, including the most sophisticated investigative tools available, such as certified undercover operations and electronic surveillance operations, to disrupt and dismantle these networks.”<sup>61</sup>

Similarly, the United Kingdom has a system it calls “juxtaposed controls” by which British immigration officials can carry out “immigration control” in “control zones”, namely ports of embarkation on the territories of other states, such as the Port of Calais or in the Channel

Tunnel.<sup>62</sup> Immigration control is defined as “arrangements made in connection with the movement of persons into or out of the United Kingdom *or another State* and includes the investigation of offences relating to immigration.”<sup>63</sup> These controls employ the latest technologies. The British Government, describing its operations in the French port city of Calais, reported heartbeat sensors, CO<sub>2</sub> probes to detect exhaled breath and “passive millimetre wave” scanners that can “see” through vehicles.<sup>64</sup>

The detail of U.S. surveillance and intelligence operations is not public information, although some reports give hints. A U.S. Government cable reported, for example, that, “On a positive note, Mexico’s domestic intelligence agency has allowed U.S. government officers to interview foreign nationals detained at Mexican immigration detention centers dispersed around the country for potential CT (counterterrorism) information.”<sup>65</sup> This again demonstrates the overlap between anti-terrorism and anti-immigration efforts in U.S. action and raises similar questions about detainee treatment. There is no evidence that the U.S. officers acted improperly, but it is unclear what standards and oversight would operate during these interrogations. These questions are particularly serious given that Mexico’s prison conditions are, “almost without exception very poor” and that allegations of torture and mistreatment continue.<sup>66</sup>

Intelligence agencies of Ukraine reportedly have tortured migrants in efforts to discover smuggling routes and smuggler identities. Human Rights Watch reported in 2010 that:

*Ukrainian officials in civilian clothing who work closely with the State Border Guard Service either as its own intelligence-gathering arm or as part of Ukraine’s security apparatus appear*

60. *Combating Illegal Immigration: A Progress Report, Hearing Before the House Committee on the Judiciary Subcommittee on Immigration and Claims*, 105th Cong. (Apr. 23, 1997). (Statement of George Regan, Acting Associate Commissioner, Enforcement, Immigration and Naturalization Service) available at <http://judiciary.house.gov/legacy/658.htm>

61. *Law Enforcement Responses to Mexican Drug Cartels, Hearing before the Senate Committee on the Judiciary*, 111th Cong. (Mar. 17, 2009), (Statement of Kumar Kibble, Deputy Director Office of Investigations U.S. Immigration and Customs Enforcement, Department of Homeland Security)

62. Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order of 2003.

63. *Id.*, § 2. Emphasis added.

64. *Lords Warn About Calais Fencing*, BBC NEWS (Mar. 5, 2008), available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7277771.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7277771.stm) (last accessed May 27, 2011).

65. Mark Stephenson, *Leaked diplomatic cable: Mexico allowed US to question detained migrants*, ASSOC. PRESS (Jan. 24, 2011) available at <http://www.1310news.com/news/world/article/173639--leaked-diplomatic-cable-mexico-allowed-us-to-question-detained-migrants>

66. See the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman and Degrading Treatment, Report on the Visit to Mexico, UN Doc. CAT/OP/MEX/1. (May 31, 2010) at [www2.ohchr.org/english/bodies/cat/opcat/docs/ReportMexico\\_en.doc](http://www2.ohchr.org/english/bodies/cat/opcat/docs/ReportMexico_en.doc) (last accessed May 27, 2011).

*to be committing torture—causing severe pain purportedly to illicit information—against migrants who are caught attempting to cross Ukraine’s western border or after being returned from bordering E.U. countries. Torture is most likely to occur during interrogations aimed at getting migrants to identify pictures of smugglers and to give information about smuggling routes.*<sup>67</sup>

Again, it is not suggested that E.U. officials had knowledge of or have been complicit in this behavior, but it does raise question about the securitization of migration and enlisting the assistance of countries such as Ukraine and Mexico in preventing irregular border crossings.

### Diplomatic and Cooperation Initiatives

As the above discussion highlights, many extraterritorial actions taken by Europe and the United States are not unilateral – they have been achieved with the cooperation of origin or transit states close to their borders.

This approach has emerged since direct enforcement programs, such as the New Vision, have been heavily criticized. Third countries themselves may welcome the assistance, either because they wish to have better control of their borders, or they hope for reciprocal benefits from the industrialized nation. As the DHS stated in 2005, “border-related crime affects communities on both sides of our land boundaries, and a shared approach is imperative to disrupting criminal groups and saving lives.”

The cornerstone of diplomatic initiatives are readmission agreements - agreements that put the onus on origin states to take back their citizens, and sometimes on transit states to take back third-country nationals who have passed through their territories. Destination countries implement safe third-country agreements alongside changes in their domestic laws known as Safe Country of Origin and Safe Third Country provisions. These provisions shift

the burden for refugee status determination to transit states.<sup>68</sup> At the E.U. level, the corollary is the Dublin II Regulation, which provides that an E.U. member state can return a migrant back to the first European country he or she entered.<sup>69</sup> According to the E.U., “The system is designed to prevent “asylum shopping” and, at the same time, to ensure that each asylum applicant’s case is processed by only one Member State.”<sup>70</sup> However, critics argue that the system cannot be just or represent true burden sharing until all E.U. states have harmonized asylum systems and an asylum-seeker would have equal chance of being granted protection in each state.<sup>71</sup> It has also placed the largest burden on those states on the edges of the E.U., particularly Spain, Italy and Greece, as well as the Czech Republic and Poland which are generally the first to receive migrants.

In addition, states are also signing bilateral cooperation agreements to prevent the departures of migrants from transit states in the first place. Spain and Morocco signed such an agreement in 2003 in which Morocco agreed to give full cooperation in return for \$390 million in aid. This caused an outcry in 2005 when Moroccan soldiers and Spanish guards shot at migrants trying to scale the fence into Ceuta and Melilla, killing 11 and injuring many more.

The most controversial of such agreements is the Friendship Pact signed between Libya and Italy in August 2008. Libya, after years of negotiations, agreed to increase cooperation in “fighting terrorism, organized crime, drug trafficking, and illegal immigration” and to let the Italian navy patrol Libyan waters and set up a control center in Tripoli. In return Gaddafi received a promise of \$5 billion (\$200 million per year for 25 years) in investment and a number of patrol boats. By mid-2009 more than 500 migrants had been interdicted by Italian boats and towed back to Libya, “without even a cursory screening to determine whether any need protection or are particularly vulnerable, such as sick or injured persons, pregnant women, unaccompanied children, or victims of trafficking.”<sup>72</sup>

67. *Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine*, (2010), HUMAN RIGHTS WATCH, available at <http://www.hrw.org/en/node/94366/section/8> (last accessed May 27, 2011)

68. A Safe Third Country provision allows a state to return an asylum-seeker back to the first country he or she could have safely applied for refugee status and potentially been accepted. See Kjaergaard above.

69. Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National, Official Journal of the European Union, 25 February 2003, L50/1(‘Dublin II’).

70. *Dublin II Regulation*, EUROPA, (Jun. 24, 2009), available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33153\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33153_en.htm)

71. *Report on the Application of the Dublin II Regulation in Europe*, EUROPEAN COUNCIL ON REFUGEES AND EXILES (March 2006), <http://www.ecre.org/files/ECRE%20Dublin%20Report%2007.03.06%20-%20final.pdf>



Third countries have also been convinced to change domestic legislation to crack down on irregular migration on their own, rather than allowing other states on their territories. For example, Ann Kimball documented in 2007 how both Mexico and Morocco had adopted “a restrictive stance toward transit migration to appease northern neighbors.” Reviewing migration policies is a strategic move on the part of the transit state. By cracking down on transit migration, Morocco is hoping to win the favor of the EU.<sup>73</sup> Migreurop has recently documented similar policy changes in Mauritania.<sup>74</sup> While border controls may also be in the security, as well as the political, interests of these states, it is somewhat disingenuous to say they have made these changes independently. In many cases, the resources have come almost entirely from foreign sources after much negotiation.

U.S. funding of immigration enforcement abroad is controversial. Kimball reported great sensitivity in the Mexican government about perceptions of “bowing to U.S. pressure” or becoming an extension of the U.S. border.<sup>75</sup> The Mexican government denied accepting American funds to pay for the deportation of transit migrants or the construction of detention centers despite Congressional records reporting that funds had been openly allocated to Mexico to pay for interdiction and deportation in 1999.<sup>76</sup>

Mexican immigration authorities did, however, report receiving training from the U.S. border patrol. For example,

the regional director of border unit Grupo Beta reported, “we have gone to some workshops, aquatics, repelling, rescue in the mountains, physical training, this sort of thing.”<sup>77</sup> Mexican officials have also traveled to the U.S. for training. For example, in 2010, 24 Mexican customs officers graduated from a new program - Mexican Customs Investigator Training (MEXIT) in Charleston, South Carolina. The program was reportedly ten weeks and was modeled on the ICE Special Agent Training Program to train Mexican officials “to more effectively fight crime along the southern border and within Mexico.”<sup>78</sup>

It might be argued that training immigration and border officials is a good thing if one assumes better training will lead to more efficient immigration control and better protection of migrant rights. However, this overlooks evidence of widespread corruption among enforcement agencies in Mexico, including direct and indirect involvement of authorities in abuses against irregular migrants, including kidnappings and extortion, beatings and sexual assaults.<sup>79</sup> Amnesty International, for example, found through extensive interviews, “in many cases that would appear at first glance to be the work solely of criminal gangs, there is evidence that state officials are involved at some level, either directly or as a result of complicity and acquiescence.”<sup>80</sup> U.S. training of officials without a demand for investigation of abuses and concerted efforts to reduce corruption may only give legitimacy to wrongdoing.

72. Human Rights Watch, *Italy/Libya: Gaddafi Visit Celebrates Dirty Deal*, press release, 9 June 2009, available at: <http://www.unhcr.org/refworld/docid/4a39e90c2c.html> (last accessed 6 June 2011).

73. Ann Kimball, *The Transit State: A Comparative Analysis of Mexican and Moroccan Immigration Policies*, Working Paper 150, CCIS University of San Diego (2007), 140.

74. *European Borders: Controls, Detention and Deportations* (2010), MIGREUROP, available at [http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en\\_-2-121110.pdf](http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-2-121110.pdf) (last accessed May 27, 2011).

75. Kimball, *The Transit State*, *Supra* note 73, 30.

76. *Id.*, 107.

77. *Id.*, 109. Grupo Beta was an elite Mexican federal police unit that trained with U.S. Border Control in the 1990s, until it faltered under allegations of corruption. Today it operates as an unarmed humanitarian organization helping northbound migrants in distress. U.S. Border Control agents are still, however, training with Mexican federal police to limit irregular immigration into Arizona. Sebastian Rotello, *Border Patrol and Mexican Police Make History at Arizona Border*, PROPUBLICA (Feb. 18, 2010) available at <http://www.propublica.org/article/border-patrol-and-mexican-police-make-history-at-arizona-border-218> (last accessed May 27, 2011).

78. DHS, ICE and Mexico honor graduates of Mexican Customs Investigator Training Program: Mexican Customs officials embrace learning ICE investigative and crime-fighting techniques, ICE, press release (Oct. 22, 2010) available at <http://www.ice.gov/news/releases/1010/101022northcharleston2.htm> (last accessed May 27, 2011).

79. See Report of the UN Special Rapporteur on the human rights of migrants, Jorge Bustamante – Addendum - Mission to Mexico (Mar. 24, 2009), U.N. Doc A/HRC/11/7/Add.2 at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/11/7/Add.2&Lang=E> (accessed May 27, 2011); and *Informe Especial sobre los Casos de Secuestro en contra de Migrantes*, COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (June 2009) at <http://www.endh.org.mx/INFORMES/Especiales/infEspSecMigra.pdf>; *Invisible Victims: Migrants on the Move in Mexico*, AMNESTY INTERNATIONAL (2010) at <http://www.amnesty.org/en/news-and-updates/report/widespread-abuse-migrants-mexico-human-rights-crisis-2010-04-27> (last accessed May 27, 2011).

80. Amnesty 2010, *Id.*, 9.

## CONCLUSION AND RECOMMENDATIONS

The above review demonstrates both similarities and differences between the U.S. and European approaches to extraterritorial controls. Both have introduced extraterritorial elements to almost all aspects of immigration control, from visas, to border patrols, to detention and refugee status determination. On the U.S. side, a more militarized approach has meant that precise details of many activities are unclear – the extent of cooperation with Latin American countries and the role of intelligence agencies, for example. In Europe, the approach has been more collaborative, both at a regional level and with third states. However, this raises questions about the human rights record of Europe's partners.

The fact that all major destination states, including the most liberal democratic states, are instituting extraterritorial controls means it is unlikely any will become a champion for human rights in the context of border protection. Civil society, academia and the judiciary have been left to provide the only public voices of dissent, whether based on effectiveness, efficiency or impact on human and refugee rights. Scholars and advocates have described and analyzed separately many of these policies and practices and only recently have begun to investigate the broad spectrum of state controls to prevent the arrival of migrants and asylum-seekers. A more comprehensive picture of the range of measures and their appearance on both sides of the Atlantic (as well as in other major destination states) reveals the immense and complex barriers now in place for any refugee seeking protection. It also makes clear the low priority given to human and refugee rights in the larger picture of immigration and security.

While states do have a right to police their borders, this right is not absolute – they must balance this right with upholding their international obligations to protect human rights and refugee rights and to respect the sovereignty of other states.<sup>81</sup> Reducing the human costs of increased migration controls, particularly those away from our borders, must also be a priority. Given that the United States and Europe

have been intimately involved with some of the crises that are causing flight – such as the wars in Afghanistan and Iraq, these obligations become even more important. Some of the greatest concerns for those advocating better human rights protections are the following:

- *Protecting the fundamental right to non-refoulement.* In a number of cases, states have violated this right by sending individuals back to places in which persecution is known to be taking place, without undertaking any screening whatsoever, such as the U.S. interdiction of Haitians in the 1990s. However, even sending migrants back to transit countries may have a similar effect if that country does not respect the obligation of *non-refoulement*, or does not have a credible refugee status determination process.
- *Protecting the right to protection from inhuman and degrading conditions of detention.* Building and funding detention centers in countries that do not have a strong record of human rights protection or of transparency and accountability, such as Libya, risks exposing both migrants and asylum-seekers to inhuman and degrading conditions. This was demonstrated through research conducted by Human Rights Watch in key transit countries of Ukraine, Libya and Greece, and has recently been confirmed by the European Court of Human Rights in *MSS v Belgium and Greece*.<sup>82</sup>
- *Maintaining both the spirit and practice of the refugee protection framework.* As well as potential or actual violations, advocates and scholars have expressed concern that extraterritorialization undermines the spirit and purpose of the international protection system. This framework relies on an asylum-seeker's ability to reach safe territory in order to apply for refugee status, but if it becomes impossible to cross increasingly militarized borders from the point of origin, this right essentially becomes meaningless.
- *Protection of Privacy.* New systems of biometric data raise questions about who has access to personal

81. See Nessel *Externalized Borders*, *Supra* note 6.

82. *M.S.S. v Belgium and Greece*, ECHR, Application no. 30696/09, 21 January 2011. This case was remarkable in that it found that Greece, despite the undue burden of asylum processing it bears, nevertheless has a responsibility to provide humane treatment to asylum-seekers in Greece and to offer them a credible asylum processing system. Similarly, Belgium was found to have an obligation to consider the potential risk of *refoulement* or inhuman and degrading treatment before it returns an asylum-seeker to another state for processing.

information, how it is used and shared, and how individuals can protect their information. The rights of data-owners are still unclear, as is the potential for redress if data is used to racially or religiously profile potential immigrants.<sup>83</sup>

- *Transparency and Accountability.* Relevant to all of the above, the ability to improve the treatment of people moving across borders requires knowing what is happening in a timely way. The trend toward extraterritoriality prevents this by designing and implementing policies in the least transparent forums – as part of military and intelligence operations, through private commercial agreements, or through diplomatic negotiations and bilateral cooperation and funding agreements. Increasing transparency and oversight of extra-territorial measures is essential to increasing accountability.

### Recommendations for Policymakers

The following list of recommendations was drawn from a workshop with scholars and activists from the United States and Europe on April 22, 2011.<sup>84</sup>

1. Review immediately all interdiction policies and practices on the high seas or in the coastal waters of transit and origin states. Undertake an independent audit to determine whether there have been cases of rights violations.
2. In no case whatsoever, return an asylum-seeker to her place of embarkation without allowing access to the asylum system in the intercepting state, and otherwise ensuring against refoulement.
3. Incorporate human rights protections into all readmission and third-country agreements, so that any individual returned to a country for asylum processing is guaranteed fair and humane treatment.
4. Incorporate human rights and refugee protections into all commercial agreements with security and detention contractors.
5. Increase transparency of extra-territorial immigration initiatives by subjecting third country agreements to parliamentary or congressional scrutiny, by making public the details of funding, cooperation and development assistance projects undertaken with third states to limit migration, and by encouraging monitoring and oversight of offshore detention facilities, processing and interdictions.
6. Support research on the policies and practices of transit states towards migrants and asylum seekers. How are they implementing their international obligations and what kinds of monitoring mechanisms do they have in place?
7. Build relationships between civil society organizations in destination states, and also with organizations in origin or transit states to strengthen transparency and accountability mechanisms.

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83. See e.g. Papademetriou and Collett, *A New Architecture*, *Supra* note 28.

84. See note 1 for detail on the workshop.

