OUTSOURCING OUR DIRTY WORK: ANALYZING MIGRATION CONTROL AND ASYLUM MANAGEMENT EXTERNALIZATION MODELS IN SPAIN, THE UNITED KINGDOM, AND THE UNITED STATES

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I. INTRODUCTION[1]

Pursuant to well-established international refugee law under the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), states that are party to these agreements have a legal obligation to offer refuge and the opportunity to apply for asylum to those fleeing harm. Consistent with these requirements, Article 33 of the 1951 Refugee Convention sets forth the principle of *non-refoulement*, prohibiting signatories from expelling or returning refugees and asylum seekers to a country where their life or freedom would be threatened.

Presently, all 27 Member States of the European Union (EU), the United Kingdom (UK) and the United States (U.S.) bear this legal obligation as signatories to these instruments.[2] However, in recent years, these jurisdictions have failed to abide by the principle of *non-refoulement* through actions preventing migrants from seeking international protection within their sovereign territories. Moreover, the externalization of migration control and asylum management has become "normalized" as a component of foreign policy, international relations and

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[1] On January 24, 2026, as this article was going to press, several news outlets reported that the Department of Homeland Security (DHS) under the Trump Administration planned to revive the Migrant Protection Protocols (MPP) program, also known as Remain in Mexico, with reports that the Trump administration planned to remove at least 400 individuals, including family units of parents and children being held at the ICE Family Detention Center in Dilley, TX. See Jake Traylor (@jake—traylor), X.com (Jan. 24, 2026), https://x.com/jake__traylor/status/2015252220930113746?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctterm%5E2015252220930113746%7Ctwgr%5E48b5a9a557ad81255cf853d86ee6ff563f5ac001%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.latintimes.com%2Fremain-mexico-program-set-resume-asylum-seeker-removals-this-week-report-593933; Héctor Ríos Morales, 'Remain in Mexico' Program Set to Resume Asylum Seeker Removals This Week: Report, THE LATIN TIMES, Jan. 28, 2026.

2. The United Kingdom and all 27 Member States of the European Union are signatories to the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, and the *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267. The United States, while not a signatory to the 1951 Refugee Convention, is a signatory to the 1967 Protocol. *See* U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 2–4 (listing parties to the Convention and Protocol).

cooperation between migrant-receiving countries in the Global North and migrant-sending and transit countries in the Global South. Equally troubling, this normalization of externalized migration enforcement has occurred in tandem with rising nationalist political movements in the U.S., UK and many EU member states marked by increasingly authoritarian rhetoric and policy.

Against this backdrop, this article presents a novel comparative case study examining the recent practices of Spain, the UK and the U.S. over the past decade to outsource and externalize migration control and the processing of asylum claims outside their sovereign territories. Through this analysis, utilizing legal and human rights methodology based on statutory, regulatory, judicial and literature review and secondary data analysis, the authors seek to compare similarities and differences in how these mechanisms have been implemented in each jurisdiction. Additionally, the authors will assess the legal consequences of these policies in each jurisdiction, especially the harmful impact on the principle of *non-refoulement,* and the limitations of judicial review to assess the legality of these policies under domestic and international law. Finally, the authors will conclude by recommending alternatives to ensure respect for the fundamental human rights of migrants.

II. EXTERNALIZATION OF MIGRATION CONTROL AND ASYLUM MANAGEMENT, DEFINED

Offshoring, extraterritorialization, remote migration control, extraterritorial processing, or outsourcing? Scholars have not reached a consensus on the terminology used to describe a complex phenomenon encompassing the different modalities of migration control carried out by a country outside its sovereign territory.[3] However, contemporary border enforcement regimes are increasingly applied to migrants within their own countries of origin, in transit, and before their arrival to the territory of the destination state. As these practices have increased, so has the presumption that they are a central and common feature of most border control regimes.[4]

Beyond the individual nuances of the above terms and practices, they all encapsulate the states' objective to shift border control and

3. *See, e.g.,* Joana Abrisketa Uriarte, *La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement* [*The external dimension of European Union law on refuge and asylum: an examination from the perspective of non-refoulement*], 56 REVISTA DE DERECHO COMUNITARIO EUROPEO [RDCE] 119, 125–26 (2017) (Spain).

4. *See e.g.,* BERNARD RYAN, *Extraterritorial Immigration Control: What Role For Legal Guarantees?*, *in* EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES 1, 3–4 (Bernard Ryan & Valsamis Mitsilegas eds., 2010).

enforcement outside their sovereign territory. Even so, this text opts to use the expression *externalization of migration control and asylum management*, to describe a set of practices that have become 'normalized' as a political mechanism in international relations and cooperation between countries receiving migrants in the Global North - among them Spain, the UK and the U.S., and countries of origin and transit of migrants in the Global South. In view of these considerations, this phrase aligns with the conceptual summary made by Nicolosi as follows:

> The externalization of migration and border controls refers to a series of practices whereby States attempt to manage migration flows and enforce immigration policies beyond their borders, often by collaborating with other countries or non-state actors. Externalization can involve various measures such as outsourcing border control functions, implementing agreements with neighboring or transit countries to intercept migrants before they reach the State's territory, and providing aid or incentives for other countries to prevent or reduce migration flows. Externalization practices are employed to shift the burden of migration management away from the receiving state and onto other actors or territories, often to limit responsibilities and on the assumption that human rights obligations only apply territorially.[5]

As systematized by Nicolosi, in general terms, the most common externalization techniques put in place by states for migration control outside their borders are: visa policies, carrier sanctions, border preclearance, high seas interdiction, and funding, equipping, and training in third countries. Pushback and pullback practices, as well as the offshoring of asylum processing aimed at extraterritorial processing of asylum requests with or without transfer of protection responsibilities, have also become increasingly common practices for the management of border controls both outside and inside a country's borders.[6]

Focusing on the externalization of migration and border control practiced by the EU, Moreno-Lax and Lemberg-Pedersen[7] examine the spatial, relational, functional and instrumental dimensions of this practice. They also note how externalization creates a physical and

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5. Salvatore Fabio Nicolosi, *Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law*, 71 NETH. INT'L L. REV. 1, 1 (2024).

6. *Id.* at 6.

7. Violeta Moreno-Lax & Martin Lemberg-Pedersen, *Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization*, 56 QUESTIONS OF INT'L L. 5, 5 (2019).

ethical distance for the EU and its Member States that allows these actors to evade or disengage from their international legal responsibilities, particularly concerning the human rights of migrants and refugee law.[8] While focused on the EU, these observations are also applicable to other Global North countries outside the EU, including the UK, a former EU Member State, and the U.S., Moreno-Lax and Lemberg-Pedersen describe it in the following terms:

> The externalization of European border control can be defined as the range of processes whereby European actors and Member States complement policies to control migration across their territorial boundaries with initiatives that realize such control extra-territorially and through other countries and organs rather than their own. The phenomenon has multiple dimensions. The spatial dimension captures the remoteness of the geographical distance that is interposed between the locus of power and the locus of surveillance. But there is also a relational dimension, regarding the multiplicity of actors engaged in the venture through bilateral and multilateral interactions, usually through coercive dynamics of conditional reward, incentive, or penalization. And there are functional and instrumental dimensions too, concerning the cost effectiveness of distance-creation (in both ethical and legal grounds) vis-à-vis the (unwanted) migrant, who, removed from sight, is no longer considered of concern to the supervising State, and the range of externalizing policy devices at the service of externalizing agents in terms of purpose, format, delivery, and ultimate control. European borders thus (re-)emerge as ubiquitous, multimodal and translational systems of coercion – as an interconnected network of "little *Guantánamos*". This, in turn, creates a distance, both physically and ethically, that is utilized to shift away concomitant responsibilities.[9]

III. THE SPANISH EXTERNALIZATION PRACTICE, ITS MAIN FEATURES AND TRENDS

Speeches and calls by high-level representatives of various EU Member States towards outsourcing asylum management and

8. *Id.* at 6.
9. *Id.* at 5–6.

migration control date back to the late 1980s and early 1990s.[10] Within the EU, Spain was one of the first EU Member States to implement practices to outsource migration control. Following its accession to the European Economic Community (EEC), now the European Union (EU), and the Schengen Area in 1985[11] and 1991[12] respectively, Spain was quick to move from discourse to the practice of effective externalization policy. The *1992 Agreement between Spain and Morocco on the movement of persons, transit and readmission of foreigners who have entered illegally*[13] represents an inaugural step in shifting Spanish policy toward external management of migratory flows.[14] A key element of Spain's policy shift was the underlying assumption that shared responsibility between countries of origin and transit for migrants and asylum seekers constitutes a central pillar of migration management.

After 1992, and especially from 2000 onwards, Spain increased its use of bilateral agreements with Morocco and other African countries of strategic importance, among them Mauritania and Senegal, to manage migration. Such agreements include both formal public agreements and informal agreements, chiefly memoranda of understanding between Spain and African countries, that are less accessible to the

10. SERGIO CARRERA ET AL., OPEN SOC'Y EUR. POL'Y INST., OFFSHORING ASYLUM AND MIGRATION IN AUSTRALIA, SPAIN, TUNISIA AND THE US: LESSONS LEARNED AND FEASIBILITY FOR THE EU 6 (2018), https:// www.ceps.eu/ceps-publications/offshoring-asylum-and-migration-australia-spain-tunisia-and-us/ [https://perma.cc/4JXX-5GSQ].

11. Treaty (signed on 12 June 1985) between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Communities) and the Kingdom of Spain and the Portuguese Republic concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, 1985 O.J. (L 302) 9, 9.

12. The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 2000 O.J. (L 239) 19, 19.

13. This bilateral agreement between Spain and Morocco was finalized in Madrid on February 13, 1992. AGREEMENT BETWEEN THE KINGDOM OF SPAIN AND THE KINGDOM OF MOROCCO ON THE MOVEMENT OF PEOPLE, THE TRANSIT AND THE READMISSION OF FOREIGNERS WHO HAVE ENTERED ILLEGALLY, B.O.E. n. 100, Apr. 25, 1992 [hereinafter SPAIN-MOROCCO BILATERAL AGREEMENT].

14. R. Zapapa-Barrero & J. Zaragoza Cristiani, *Externalización de las políticas de inmigración en España: ¿giro de orientación política en la gestión de fronteras y de flujos migratorios?* [*Outsourcing of Immigration Policies in Spain: A Shift in Political Orientation in the Management of Borders and Migratory Flows?*], 8 PANORAMA SOCIAL [PAN. SOC.] 186, 186 (2008) (Spain).

public.[15] All these agreements share a common feature: they are international migration cooperation frameworks that include clauses linking the readmission of irregular migrants returned by Spain to the payment of development aid.[16]

In the intervening years, the external dimensions of Spain's migration policy have become a model for externalization of migration control and asylum management that have been replicated by other EU Member States individually and by the EU as a bloc.[17] One such paradigmatic example is the 2016 EU-Turkey Deal, an agreement aimed at stopping the flow of irregular migration[18] via Turkey to the EU.[19] Under this landmark deal between the EU and Turkey to externalize migration control and asylum management, Turkey agreed to take back

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15. Producciones Translocales, *La externalización de la frontera sur. Control migratorio más allá de las fronteras oficiales de España y de la UE* [*The Externalization of the Southern Border: Migration Control Beyond the Official Borders of Spain and the EU*], 24 BOLETÍN ECOS 1, 6–7 (Sept.–Nov. 2013), https://www.fuhem.es/media/cdv/file/biblioteca/Boletin_ECOS/24/la-externalizacion-de-la-frontera-sur_PRODUCCIONES_TRANSLOCALES_28sept2013.pdf [https://perma.cc/R8F4-FEWU].

16. *See* Lorenzo Gabrielli, *La externalización europea del control migratorio ¿La acción española como modelo?* [*European externalisation of migration control. The spanish action as a model?*], ANUARIO CIDOB INMIGR. 126, 129 (2017) (Spain) (listing migration conditionality linked to development aid as one of six key elements of Spanish externalization); *see also* COMISIÓN ESPAÑOLA DE AYUDA AL REFUGIADO [CEAR], EXTERNALIZACIÓN DE FRONTERAS ESPAÑA-MARRUECOS [EXTERNALIZATION OF BORDERS SPAIN–MOROCCO] 1, 4 (2021), https://www.cear.es/wp-content/uploads/2021/04/FICHA_Externalizacion_Fronteras_Espana-Marruecos.pdf [https://perma.cc/TS4D-KM2Y] (explaining that Spain's Official Development Assistance (ODA) is conditional on migration control, and that this conditionality is present in international cooperation in various ways, including the signing of readmission agreements); *Agreements for the Readmission of Persons in an Irregular Situation*, MINIST. INCL., SEGUR. SOC. MIGR., https://www.inclusion.gob.es/web/migraciones/convenios-de-readmision-de-personas-en-situacion-irregular [https://perma.cc/5GHN-7YV3] (last visited Nov. 21, 2025) (listing numerous agreements for the readmission of persons in an irregular situation signed with European countries, 1993–2006).

17. Gabrielli, *supra* note 15, at 133.

18. *See* INT'L ORG. FOR MIGR. (IOM), GLOSSARY ON MIGRATION, Int'l Migration L. No. 34, at 116 (Alice Sironi et al. eds., 2019), https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf [https://perma.cc/T3A8-26BR] (defining "irregular migration" as international human mobility that occurs outside the scope of the laws, regulations, or international agreements governing entry into or exit from the country of origin, transit, or destination); *see also* MAURIZIO AMBROSINI & MAARTEN H. J. HAJER, *Defining and Explaining Irregular Migration*, *in* IRREGULAR MIGRATION, 15, 15–17 (2023) (explaining that "irregular migration" is the term used outside of the U.S. for what is domestically called "illegal entry" or "unauthorized border crossing").

19. European Council Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016).

asylum-seekers and migrants who cross into Greece in exchange for financial aid and political concessions.

While these actions may be viewed as politically necessary by EU leaders to mitigate the threat of far-right nationalist movements in Europe[20], there is no shortage of voices questioning Spain and the EU's use of externalization practices to control migration. Such critiques question both the practical feasibility of these measures[21] and the legality of these practices under relevant international human rights and refugee law.[22]

A. Immigration in Spain - Political and Historical Context

Spain's recent policy of externalizing migration control and asylum management is deeply linked to its status as a Southern EU Member State and geographical proximity to Africa, which make Spain a critical node in the migratory routes from the African continent to Europe. But this was not always the case. Historically, Spain had been characterized as a country of emigration, with high rates of migration from Spain to its former colonies in Latin America from the mid-nineteenth century to early twentieth century.[23] The last notable period of high Spanish emigration occurred in the second half of the twentieth century, between 1950 and 1970, when approximately 2 million Spanish nationals emigrated to other European countries, such as France, Germany and Switzerland, seeking economic opportunities abroad.[24]

In the 1980s and 1990s, Spain transitioned from being primarily a country of emigration to one of immigration. This increase in immigration was largely due to economic growth, increased political stability

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20. *See generally* TARA VARMA & SOPHIE ROEHSE, *Understanding Europe's Turn on Migration,* BROOKINGS (Oct. 24, 2024), https://www.brookings.edu/articles/understanding-europes-turn-on-migration/ [https://perma.cc/NV5B-5BXF] (noting that the electoral success of far-right parties has compelled mainstream European leaders to adopt more restrictive, hardline policies on migration to address public anxiety and counter xenophobic narratives).

21. *See, e.g.,* CARRERA ET AL., *supra* note 9, at 6 (analyzing the feasibility of extraterritorial asylum processing in the EU context).

22. *See, e.g.,* J Abrisketa Uriarte, *supra* note 2, at 120 (confirming the necessity of more precise legal answers regarding the compatibility between the external dimension of refugee and asylum of the EU and the principle of non-refoulement).

23. *See* Claudia Finotelli & Sebastian Rinken, *A Pragmatic Bet: The Evolution of Spain's Immigration System,* MIGR. POL'Y INST. (Apr. 18, 2023), https://www.migrationpolicy.org/article/spain-immigration-system-evolution [https://perma.cc/TW2T-4SFP] (noting that from the mid-nineteenth century until the mid-twentieth century, about 2.5 million people left Spain for former colonies in Latin America).

24. *See id.* (explaining that between 1950 and 1970 about 2 million Spanish workers moved to other European countries such as Germany or Switzerland).

following the end of the Franco dictatorship and transition to democracy, and Spain's accession in 1985 to the EU (then the European Economic Community).[25] This increase in immigration to Spain at the end of the twentieth century was primarily economic, driven by labor demand in the agriculture, construction and service industries, with a portion of this immigration including irregular migrants.[26] By the late 1990's, the increased number of irregular migrants[27] in Spain became a growing concern, resulting in a steady evolution of Spain's migration system to incorporate strategies outsourcing migration control to third countries.[28]

The foregoing makes it necessary to recall that by joining the EU and, principally, the Schengen Area of free movement of people, Spain

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25. *See* Joaquín Arango, *Becoming a Country of Immigration at the End of the Twentieth Century: The Case of Spain*, in *Eldorado or Fortress*? MIGRATION IN SOUTHERN EUROPE 253, 266–67 (Russell King, Gabriella Lazaridis, & Charalambos Tsardanidis eds., 2000) (noting that the second half of the 1980s and the beginning of the 1990s witnessed a large influx of immigrants attracted to Spain's vigorously expanding economy and that a more receptive stance toward immigrants in Spain after 1985 stemmed from the political and civic culture which developed in Spain during the years of transition to democracy); Martin Baldwin-Edwards, *The Emerging European Immigration Regime: Some Reflections on Implications for Southern Europe*, 35 J. COMMON MKT. STUD. 497, 497–98, 503 (1997) (noting southern European states, like Spain, developed new immigration policies in the 1990s with little prior experience, immediately following accession to the EU in 1985).

26. *See* Finotelli & Rinken, *supra* note 22 (noting that after the Franco dictatorship, Spain began to attract increasing numbers of foreigners aiming to fill occupations that had become unappealing to natives, that immigrants in Spain are overrepresented in low-paying sectors with tough work conditions such as agriculture, catering, and domestic service, and that a root cause of irregular migration was a mismatch between Spain's need for foreign workers and a lack of adequate recruitment channels).

27. For reference, in the EU, UK and other countries outside the U.S., immigrants who lack authorization to live and work in a country, either because they entered the country unlawfully or overstayed their period of lawful admission, are referred to as "irregular migrants." This term is roughly equivalent to phrase "undocumented immigrants" commonly used in the U.S. to refer to immigrants present in the U.S. without authorization or lawful status. *See id.* (discussing how irregular migration in Spain occurs through a combination of unauthorized border crossings and visa overstays and using the term "irregular migrants" do describe immigrants present in Spain without authorization or legal status). explaining that though irregular status was endemic in Spain during the 1980s and 1990s, Spain's immigration management has matured to expand the possibility of legal immigration and noting that in contrast to the United States where regularization is a subject of heated political debate, Spanish institutions and stakeholders agreed that an increasing immigrant population with irregular status was problematic).

28. *See id.* (explaining Spain's border management evolved to include cooperation frameworks with transit and sending countries, specifically noting the use of bilateral agreements from 2004 to 2008 to provide rewards and aid to African nations actively involved in controlling irregular migration).

and the other EU Member States agreed to the abolition of internal border checks within the Schengen zone.[29] To make freedom of movement within the Schengen zone feasible, EU Member States also committed themselves to the principle of 'solidarity and fair sharing of responsibilities'[30] for the surveillance of external borders, which are assumed to belong to all of them. In this regard, it should be understood that Spain's externalization policy reflects the EU's policies and practices as defined in the Area of Freedom, Security and Justice (AFSJ).[31] Spain's use of externalization policy for migration management is also largely in response to pressures unique to Spain as a country on the EU's "southern border" and, with its enclaves of Ceuta and Melilla, as the only EU Member State with territory on the African continent. Accordingly, Spain has been deemed a 'strategic place in the Southern European Migration Subsystem' due to its geographical proximity and relations with countries on the African continent, especially in the southwestern Mediterranean and Sahel regions.[32]

However, despite pressures to adopt migration control measures to protect the EU's external borders, Spain's migration policy also includes a pragmatic component, *arraigo,* that allows irregular migrants physically present in Spain to legalize their status by showing sufficient social or labor ties to the country.[33] Unlike the U.S., where proposals to legalize the roughly 11 million undocumented immigrants living in

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29. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 21, Oct. 26, 2012, 2012 O.J. (C 326) 57 [hereinafter TFEU] (providing that every citizen of the EU "shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.").

30. *See* TFEU art. 80 (providing that the policies of the EU and their implementation "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.").

31. AFSJ is regulated under TFEU. *See* art. 67–89 (establishing EU-wide rules on asylum, immigration, and external border management, including integrated border-control systems, common asylum procedures, and mechanisms for burden-sharing, thereby supplying the legal–policy basis for Member States' externalization practices).

32. Naranjo Giraldo & Gloria Elena, *Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España-Marruecos* [Deterritorialization of Borders and the Externalization of Migration Policies: Irregular Migration Flows and External Border Controls at the Spain–Morocco Border], 45 ESTUDIOS POLÍTICOS 13, 15 (2014) (Spain).

33. *See* Finotelli & Rinken, *supra* note 22 (providing that Spain's immigration system incorporates a pragmatic regularization mechanism, arraigo, which allows irregular migrants present in the country to obtain legal status by demonstrating employment history or social integration).

the country[34] have proven politically unviable, Spanish institutions have taken a practical approach by adopting legalization programs that allow migrants to work lawfully, pay taxes and contribute to social welfare programs.[35] This view of migration was reflected in recent commentary by Spanish Prime Minister, Pedro Sanchez, during his visit to Mauritania in August 2024, who surprised some by stating "although [migration] brings certain challenges, [it] is not a problem, but a necessity for the Spanish economy." This significant statement, although quite unusual by a governing politician in Europe, fully aligns with the 2018 Global Compact for Safe, Orderly and Regular Migration[36] and the general view among migration scholars of the net positive economic benefits of legal migration. Indeed, with a few exceptions during the financial crisis of 2008 and the hiatus imposed by the COVID-19 pandemic, since the end of the 1990s, Spain has found immigration an essential driving force for its economy.[37] So much so that "without immigrants, Spain would today be a country with a population in free fall and a dwindling labor force unable to meet the needs of its productive sector." [38]

Data compiled by the (Spanish) National Statistics Institute (INE) and published in 2022 reveals that the immigrant population residing in Spain stands at 12% of the total population (47, 432, 805 inhabitants). By continent, most immigrants in Spain come from Latin America, representing up to 45% of foreign-born residents in Spain, with Colombia, Venezuela, Ecuador and Argentina leading the way. With 30% of the foreign-born population, Europe occupies second place on the immigration map for Spain, mostly comprised of nationals of other

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34. *See* Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR. (July 22, 2024), https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the us/#:~:text=The%20unauthorized%20immigrant%20population%20in%20the%20United%20States%20grew%20to,2022%20are%20the%20Center's%20latest [https://perma.cc/UZ4Z-H4EZ] (providing demographic information for the undocumented immigrant population in the U.S. as of mid-2022 which notes that an estimated 11 million undocumented immigrants live in the U.S., representing 23% of the foreign-born population in the U.S. and 3.3% of the total U.S. population).

35. *See* Finotelli, *supra* note 22 (providing that Spain has repeatedly regularized unauthorized migrants and later institutionalized *arraigo*, allowing them to gain legal status, work formally, and contribute to tax and social welfare systems).

36. G.A. Res. 73/195, ¶¶13–15 (Dec. 19, 2018).

37. Alvaro Merino, *El mapa de la inmigración en España según su origen* [The Map of Immigration in Spain by Origin], EL ORDEN MUNDIAL (Sept. 2024), https://elordenmundial.com/mapas-y-graficos/mapa-inmigracion-espana-origen/#:~:text=As%C3%AD,%20el%20mapa%20de%20la%20inmigraci%C3%B3n%20en%20Espa%C3%B1a%20revela%20un [https://perma.cc/2BFJ-MKZU].

38. *Id.*

EU Member States. Representing up to 18% of foreign-born residents, Africa occupies third place on the map, with Morocco standing above all other African countries and accounting for 13% of foreign-born residents in Spain. Asia occupies fourth place on the Spanish immigration map, with 7% of Spain's foreign-born residents.[39]

B. Features of Spain's Externalization Policy

Understandably, the influence of the EU's common policies on immigration, external border control and asylum on Spain's national migration policy are impossible to ignore. Yet it is worth noting that Spain is the only European country with territorial enclaves and a land border on the African continent. As such, Spain is widely regarded as a pioneer of externalization, which today characterizes the EU's common migration and asylum policy.[40]

1. Bilateral Agreements Between Spain and African Countries of Origin and Transit on Externalized Migration Enforcement

As previously indicated, Spain first enacted measures to externalize migration enforcement in 1992 through a bilateral agreement with Morocco on the readmission of third country nationals (TCN) following irregular entry.[41] Under this 1992 bilateral agreement, Spain and Morocco agreed to a framework allowing both States to return third country nationals who had entered their territory in an irregular manner

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39. Press Release, Instituto Nacional de Estadística [INE], Cifras de Población (CP) a 1 de enero de 2022 y Estadística de Migraciones (EM) [Population Figures as of January 1, 2022 and Migration Statistics] (June 21, 2022), https://www.ine.es/prensa/cp_e2022_p.pdf [https://perma.cc/3Q5H-EKBC].

40. *See also* Cristina Fuentes Lara & Gonzalo Fanjul, *Externalisation: Chaos, Corruption and Migration Control Under the Guise of European Cooperation*, FUNDACIÓN PORCAUSA (2024) https://porcausa.org/wp-content/uploads/2024/05/InformeExternaliz_ENG-COMPL.pdf [https://perma.cc/2G4P-89ST] (explaining Spain, responsible for managing the African border enclaves of Ceuta and Melilla, developed bilateral cooperation agreements with African countries that served as the model for the European Union's later externalization policies).

41. In the context of the EU, third country nationals (TCN) refers to nationals of States that are not member States of the EU. However, in the context of bilateral agreements between Spain and Morocco, TCN refers to migrants who are neither a national of Spain or Morocco. Additionally, in the case of Spain, as an EU member state that is part of the Schengen Zone, nationals of other EU member states would also be excluded from the definition of TCN that would be subject to expedited returns under these bilateral agreements between Spain and Morocco. This definition of TCN is also used in the context of other bilateral and multilateral migration externalization agreements between EU member states and non-EU migration transit countries. Spain-Morocco Bilateral Agreement, *supra* note 12, art. 1–3.

by making a request for readmission to the other State ten days prior to executing the return.[42] While both Spain and Morocco had the right to request the return and readmission of third country nationals, in practice, this right was almost exclusively exercised by Spain to return unauthorized third country nationals to Morocco.[43] Additionally, although the 1992 bilateral agreement exempts refugees and asylum seekers from return, several human rights NGO's have noted this provision can be bypassed due to the short ten-day timeframe for return of third country nationals before they are able to exercise their right to request asylum.[44]

Despite concerns raised by human rights NGO's, Spain's 1992 bilateral agreement with Morocco was deemed an "exemplary" and outstanding outsourcing model that was soon replicated by Spain with other countries of origin and transit of migrants.[45] These included bilateral agreements with countries of origin, including Algeria[46], Guinea[47], and Guinea-Bissau,[48] for expedited repatriation of their nationals, and the 2003 agreement with the transit country of

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42. *Id.* art. 2.

43. *See* EUROMED RIGHTS, RETURN MANIA: MAPING POLICIES AND PRACTICES IN THE EUROMED REGION, CHAPTER 2: RETURNS FROM SPAIN TO MOROCCO, 11 (Apr. 2021) [hereinafter EUROMED RIGHTS 2021 REPORT], https://euromedrights.org/wp-content/uploads/2021/04/EN_Chapter-2-Returns-Spain-to-Morocco_Report-Migration.pdf [https://perma.cc/DS4K-VUHM] (documenting the readmission mechanism's asymmetrical patterns of cooperation, which results in the policy being predominantly applied by Spain to send third-country nationals back to Morocco).

44. *Id.* at 12.

45. MIGREUROP, EXTERNALIZACIÓN DE LAS POLÍTICAS MIGRATORIAS ESPAÑOLAS: MARCO LEGAL [EXTERNALIZATION OF SPANISH MIGRATION POLICIES: LEGAL FRAMEWORK] (2019), https://migreurop.org/IMG/pdf/ficha_3_esp-def-2.pdf [https://perma.cc/N2UD-EGKU].

46. PROTOCOL BETWEEN THE GOVERNMENT OF SPAIN AND THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR GOVERNMENT OF ALGERIA ON THE MOVEMENT OF PERSONS, Jul. 21, 2002, B.O.E. n. 37, 6350–52 (Feb. 12, 2004) (entered into force Feb. 18, 2004), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2004-2584 [https://perma.cc/ZC67-Z6DK].

47. PROVISIONAL APPLICATION OF THE COOPERATION AGREEMENT ON IMMIGRATION BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF GUINEA, Oct. 9, 2006, B.O.E. n. 26, 4155–59 (Jan. 30, 2007), https://www.boe.es/buscar/doc.php?id=BOE-A-2007-1886 [https://perma.cc/N2S9-FNQ9].

48. COOPERATION AGREEMENT BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF GUINEA BISSAU, Jan. 27, 2008, B.O.E. n. 134, 46508–18 (June 3, 2009), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2009-9177 [https://perma.cc/B5BW-AD5V].

Mauritania,[49] similar to the 1992 agreement with Morocco, permitting the return and "readmission" of third country nationals following their irregular entry. These bilateral agreements also included cooperative initiatives to increase migration enforcement in Africa to prevent irregular migrants from reaching Spanish territory at the enclaves of Ceuta and Melilla by land or the Canary Islands by sea.[50] Ultimately, by 2006, these bilateral agreements on migration became a priority for Spain in its foreign policy in Africa, resulting in the intensification of Spain's institutional and military presence on the continent.[51] To date, Spain has entered into bilateral agreements to externalize migration control with a variety of countries in the north, Sahel, and western regions of the African continent.[52] However, the agreements with Morocco, Senegal, and Mauritania[53] are particularly noteworthy and even paradigmatic because of their age and comprehensive coverage of the elements and mechanisms of externalization described further below.

It is also important to note that the strategies that make up the Spanish practice of externalization of migration control are not exclusive to Spain and have been adopted by other countries in the EU and the Global North more broadly, including the turnback and metering policy by the U.S. discussed in a later section of this article. Even so, it is possible to identify and outline some of the key elements or characteristic features of these bilateral agreements by Spain to outsource and externalize migration enforcement to African countries of origin and transit. As articulated by Valsamis Mitsilegas, the outsourcing

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49. PROVISIONAL APPLICATION OF THE AGREEMENT BETWEEN THE KINGDOM OF SPAIN AND THE ISLAMIC REPUBLIC OF MAURITANIA ON IMMIGRATION, Jul. 1, 2003, B.O.E. n. 185, 30050–53 (Aug. 4, 2003), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-17627 [https://perma.cc/AWJ3-SZ6M].

50. *See, e.g.,* CARRERA ET AL., *supra* note 9, at 19 (analyzing Spanish model of externalization, which pioneered bilateral readmission agreements and cooperative measures with third countries, such as Morocco, to prevent irregular entries at Ceuta, Melilla, and the Canary Islands).

51. MIGREUROP, *supra* note 44.

52. Gabrielli, *supra* note 15, at 131.

53. *See also* CEAR, EXTERNALIZACIÓN, *supra* note 15 (examining the legal framework and consequences of Spanish border externalization agreements with Morocco); CEAR, EXTERNALIZACIÓN DE FRONTERAS ESPAÑA-SENEGAL [EXTERNALIZATION OF BORDERS SPAIN-SENEGAL] (2020), https://www.cear.es/wp-content/uploads/2020/09/Externalizacion_Fronteras_Espan%CC%83a_Senegal.pdf [https://perma.cc/6WPW-YJDM] (detailing the bilateral agreements and security cooperation between Spain and Senegal); CEAR, EXTERNALIZACIÓN DE FRONTERAS ESPAÑA-MAURITANIA [EXTERNALIZATION OF BORDERS SPAIN-MAURITANIA] (2021), https://www.cear.es/wp-content/uploads/2021/04/Ficha_Externalizacion_Espana_Mauritania.pdf [https://perma.cc/F7BB-3JG3] (discussing the historical and legal framework of migration cooperation between Spain and Mauritania).

mechanisms that Spain has adopted since 1992 consist of a multi-level framework and a complex infrastructure of migration control, systematized through five levels of externalization:

> *criminalization* (via the adoption of criminal offences and sanctions for conduct related to human smuggling and irregular entry); *securitization* (via the growing focus on the smuggler as a security threat); *privatization* (via the co-option or compulsion of the private sector, including increasingly civil society to co-operate and comply with state requirements on immigration control); *militarization* (via the use of military and defense mechanisms in addition to traditional border control avenues for the purposes of immigration control); and *agencification and inter-agency co-operation* (via the proliferation of EU agencies and bodies involved in the externalization of immigration control, backed up by the use of technology).[54]

Yet, characterizing Spanish practices, dating back to 1992 and utilized with greater frequency since 2006, migration control can be boiled down to two key mechanisms: *bilateral agreements* and *operational initiatives* adopted and implemented by Spain in cooperation with several African countries. These bilateral agreements and operational initiatives have three key objectives: preventive deterrence, aimed at dissuading potential migrants from emigrating; coercive deterrence, which seeks to control and contain irregular migrants in transit or at Spain's external borders; and repressive deterrence, using expedited returns to control and prevent irregular migrants from settling once in Spanish territory.[55] This broad scheme of bilateral agreements and operational initiatives also includes both formal and informal agreements, with informality - consisting of diplomatic instruments such as memoranda of understanding or an exchange of letters - seeming to prevail over formalized agreements.[56] However, the informal structure of these agreements accentuate the opacity of migration deals, making them difficult or impossible to access for purposes of monitoring their legality, transparency and impact on human rights.

With respect to the last objective, *repressive deterrence*, this is achieved by the mechanisms contained in the bilateral agreements,

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54. Valamis Mitsilegas, *Cartografía de la externalización del control migratorio. Ideas a partir del régimen de la UE sobre tráfico ilícito de migrantes* [*Mapping the Externalization of Migration Control: Ideas Based on the EU's Regime on the Illicit Trafficking of Migrants*], 73–74 REVISTA ESPAÑOLA DE DERECHO EUROPEO [REDE] 23, 25 (2020).

55. CARRERA ET AL., *supra* note 9, at 19.

56. Gabrielli, *supra* note 15, at 131–32.

described above, which allow Spain to quickly expel and return irregular migrants who entered Spanish territory without authorization to their country of origin or to Morocco or Mauritania as third countries of transit. In addition to formalized return and readmission agreements, since 2005 there have been reports of pushbacks or "hot returns" of migrants from Spanish territory in Ceuta and Melilla to Morocco through informal coordination between Moroccan authorities and the Spanish Guardia Civil.[57] Because these pushbacks of migrants have historically occurred through informal internal *operative protocols* between the Spanish Guardia Civil and Moroccan authorities and had no basis in Spanish domestic law prior to 2015, the Spanish authorities keep no records of these expulsions and no official data exists documenting the total number of migrants returned to Morocco through pushbacks.[58]

To achieve the goal of *coercive deterrence,* Spain has taken various actions via bilateral cooperation to outsource migration control which include joint maritime, air and coastal-land surveillance patrols.[59] Migration control measures also include multilateral initiatives authorizing the European Border and Coast Guard Agency (Frontex) operations pertaining to surveillance and control of departures, interception, detection and return of migrants, namely "migrants *en route*" before they reach EU territory.[60] As Gabrielli rightly points out, agreements on these matters generally "tend to be less formal and structured and more operational, aiming at filtering transit mobility, controlling the departure of third-country nationals and citizens at third-country borders

57. *See* EUROMED RIGHTS 2021 REPORT, *supra* note 42, at 6 (explaining that most pushbacks, or "hot returns," of migrants from Spain to Morocco occur at the land borders of Ceuta and Melilla, but that they also take place in the Alboran Sea, where the Spanish Guardia Civil stops migrant boats from reaching Spanish territory until Moroccan authorities recover the vessel and return those on board.).

58. *See* EUR. CTR. CONST. & HUM. RTS., *ND and NT v. Spain, A Major Setback for Refugee Protection: ECtHR Dismisses Complaint Against Spain,* https://www.ecchr.eu/en/case/nd-and-nt-v-spain/ [https://perma.cc/8WJE-VVJZ].

59. *See* CARRERA ET AL., *supra* note 9, at 19, 24 (describing how Spain, through bilateral cooperation with Moroccan and Mauritanian authorities, has implemented binational coordination commissions and joint sea surveillance patrols, further reinforced by multilateral Frontex operations such as Operation Hera, and Operation Indalo using maritime and aerial patrols, that employ advanced monitoring technologies, and Mauritanian police force patrols of harbors and costal areas to intercept migrants embarking on unauthorized crossings by sea and patrol of Mauritania's land borders with Senegal and Mali to prevent the entry of migrants into Mauritania as a country of transit) .

60. *Id.*

and, in some cases, limiting the departure of boats from coastal areas."[61]

Among the coercive deterrence measures, the Nouadhibou Detention Center in Mauritania stands out. The Nouadhibou Detention Center was opened in April 2006 as a "reception center" for migrants detained in transit to Europe or returned and "readmitted" from Spain under the 2003 bilateral agreement with Mauritania.[62] According to CEAR, Nouadhibou was a former abandoned school refurbished with the support of the Spanish army, through development cooperation funds.[63] That facility remained open until 2012, despite receiving heavy criticism for subpar living conditions and treatment of detainees.[64] The Nouadhibou Center and the migration control activities of the Spanish and Mauritanian authorities have also given rise to complaints of human rights abuses. These criticisms include the lack of any legal process for migrant detainees, arbitrary arrests of migrants within Mauritania, and the deportation of migrants returned from Spain or detained in Mauritania to Mali and Senegal without legal basis or any form of judicial review.[65]

2. *Economic Incentives for African Countries to Enter into Migration Externalization Agreements with Spain and Other EU Member States*

Another important mechanism within the aforementioned scheme is Spanish diplomatic action, which is articulated both through organized and grouped actions within the so-called Africa Plan.[66]

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61. Gabrielli, *supra* note 15, at 130.

62. *See* CARRERA ET AL., *supra* note 9, at 17, 20 (noting that despite being termed a "reception centre," the Nouadhibou facility functioned as a short-term detention site for migrants intercepted en route to or returned from Spain, under conditions harsh enough to earn the nickname "Guantanamito").

63. *Id.*; *see also ¿En qué consiste la externalización de Fronteras?* [*What is border externalization?*], CEAR (Oct. 20, 2020), https://www.cear.es/destacados/externalizacion-de-fronteras/ (last visited Nov. 26, 2025) (describing Spanish development aid in Mauritania, including a refurbished center in Nouadhibou, as a component of externalized migration control).

64. *Id.*

65. *See* CARRERA ET AL., *supra* note 9, at 17 (noting that the Nouadhibou centre operated as an internment site with inadequate conditions, no legal process for detainees, arbitrary arrests in Mauritania, and unlawful deportations to Mali and Senegal without judicial review).

66. *See generally,* MINISTERIO DE ASUNTOS EXTERIORES, UNIÓN EUROPEA Y COOPERACIÓN DE ESPAÑA [MAEUEC], PLAN ÁFRICA 2019 [AFRICA PLAN 2019] (2019), https://www.exteriores.gob.es/es/PoliticaExterior/Documents/2019_PLA

Likewise, it is worth noting a characteristic element of the Spanish migration outsourcing policy includes something known as "the migration control industry". Those who coined this expression – the *porCausa* Foundation[67] - use this term to refer to the network of industries and service providers that financially benefit from migration policy, particularly enforcement and exclusion policies. [68] Furthermore, they explain that "this sector has its origins in the control policies of the European Union and its Member States and is a multi-million dollar business financed with public money". Moreover:

> The main players in the industry of migration control are the security and defense industry. However, it is also possible to find other economic actors including private security companies, technology corporations, airlines and logistics providers. Thus, a small number of companies sell immigration control products and services to the State, ranging from border fences, security cameras and detention centers to uniforms and translators.[69]

Another central element of the Spanish externalization policy of migration control is conditionality, by which cooperation and official development aid are tied to the third country's acceptance and

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N%20AFRICA.pdf [https://perma.cc/FXQ6-8QEF] (identifying the 2019 Africa Plan, also known as the "Third Africa Plan" as a comprehensive strategy by the Spanish government in its relations with the African continent which included economic development and cooperative agreements on migration and security objectives); CEAR, COOPERACIÓN AL DESARROLLO Y ACCIÓN EXTERIOR DE LA UE Y ESPAÑA EN MATERIA MIGRATORIA EN ÁFRICA: PRINCIPALES INSTRUMENTOS E IMPACTOS [COOPERATIVE DEVELOPMENT AND EXTERNAL ACTION OF THE EU AND SPAIN ON MIGRATORY MATTERS IN AFRICA: PRINCIPAL INSTRUMENTS AND IMPACTS] (2022), https://www.cear.es/wp-content/uploads/2022/04/INFORME-MARCO_ES_05-04_baja.pdf [https://perma.cc/772L-KG8L] (discussing how, while the 2019 Third Africa Plan was more comprehensive and offered more benefits to Africa compared to the First Africa Plan (2006-2008) and Second Africa Plan (2009-2012) which primarily benefited Spain's national interests, the 2019 Plan still had significant shortcomings, including its framing of migration and population growth in Africa as negative factors or threats to Spain and the EU).

67. *See* PorCausa, https://porcausa.org/en/ (last visited Nov. 27, 2025).

68. FUNDACIÓN PORCAUSA, MIGRATION CONTROL INDUSTRY 1, WHO ARE THE PAYMASTERS? (2020), https://porcausa.org/wp-content/uploads/2020/07/Migration-Control-Industry-1-Who-are-the-paymasters.pdf [https://perma.cc/CXX5-NCEC] .

69. CRISTINA FUENTES LARA ET AL., FUNDACIÓN PORCAUSA, INDUSTRIA DEL CONTROL MIGRATORIO (ICM): MANUAL DE INSTRUCCIONES [MIGRATION CONTROL INDUSTRY (MCI): INSTRUCTION MANUAL] 4 (2022), https://porcausa.org/wp-content/uploads/2022/07/Manual-de-Instrucciones-de-ICM-2022.pdf [https://perma.cc/K25N-2BDV].

satisfaction of Spain's (and the EU's) migratory control interests.[70] Spain is also widely considered a pioneer in the EU in terms of development cooperation 'instrumentalized' through externalization policy which conditions its Official Development Aid (ODA) to migration control, prevention and repression.[71] This conditionality approach permeates Spain's entire foreign policy and international cooperation with African countries.

Connecting development aid to cooperation in migration enforcement is not a new tool and has been an essential component of the "old approach" or traditional toolkit of the EU's external migration governance set forth in the 2005 Global Approach to Migration and Mobility (GAMM).[72] However, in recent years the use of conditionality of aid and economic incentives tied to migration management by Spain and the EU bloc has been emphasized as an effective strategy in the "new approach" or Migration Partnership Framework, adopted in 2016, as a communitarian response to the so-called Syrian "refugee crisis."[73] This "more-for-more and less-for-less" partnership approach has effectively normalized using positive incentives and sanctions to induce third countries to cooperate on migration management, chiefly

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70. *See generally* TUULI RATY & RAPHAEL SHILHAV, OXFAM, THE EU TRUST FUND FOR AFRICA – TRAPPED BETWEEN AID POLICY AND MIGRATION POLITICS (Jan. 2020), https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620936/bp-eu-trust-fund-africa-migration-politics-300120-en.pdf?sequence=1[https://perma.cc/KZ7E-5ASU] (describing how the EU Trust Fund for Africa, a fund intended to promote stability and addressing the root causes of migration in the African continent, has disproportionately funded migration enforcement and how Official Development Assistance (ODA) from the fund is increasingly tied to the EU's desire to stop irregular migration).

71. *See* Fuentes Lara & Fanjul, *supra* note 39, at 15–18 (describing how Spain served as a testing ground for bilateral migration cooperation agreements with African countries that condition receipt of economic aid to migration enforcement, now commonplace throughout the EU).

72. *See Communication for the Commission to the European Parliament, the Council, the European Economic and Social Committee and Committee of the Regions on The Global Approach to Migration and Mobility*, at 4, COM (2011) 743 final (Nov. 18, 2011) (noting that through GAMM, the EU should adopt an overarching framework on external migration policy that is connected to the EU's foreign policy goals and development aid).

73. *See, e.g.,* ELIZABETH COLLET & ALIYYAH AHAD, MIGR. POL'Y INST., EU MIGRATION PARTNERSHIPS: A WORK IN PROGRESS 10 (Dec. 2017), https://www.migrationpolicy.org/sites/default/files/publications/TCM-EUMigrationPartnerships-FINAL.pdf [https://perma.cc/QF82-C7QN] (describing how the EU deployed large financial instruments, such as the Syria Regional Fund, the Facility for Refugees in Turkey, and new trust-fund mechanisms, to pool resources and incentivize partner-country cooperation on migration management).

curbing irregular immigration and readmitting third-country nationals returned from the EU countries.[74]

All indications are that with the EU Pact on Migration and Asylum entering into force on June 11, 2024[75] the European practice of externalizing borders and migration control to third countries has gained renewed momentum and has been further reinforced as a central pillar of the EU's management of asylum and migration. Recent EU migration agreements with Egypt, Tunisia and Mauritania may be illustrative in this regard.[76] However, critics see this as a consolidation of the EU's migration strategy, which promotes border security and deterrence at the expense of protecting people and guaranteeing their

74. *See* Nicole Koenig, JACQUES DELORS INSTITUTE, THE EU'S EXTERNAL MIGRATION POLICY: WIN-WIN-WIN PARTNERSHIPS IN EU MIGRATION POLICY 5-6 (April 6, 2017), https://institutdelors.eu/content/uploads/2025/04/externalmigrationpolicy-nkoenig-jdib-april17-4.pdf [https://perma.cc/D8NW-F7HZ] (describing the emphasis on conditionality in the Migration Partnerships Framework).

75. *See* European Commission Press Release, Commission Presents the Common Implementation Plan for the Pact on Migration and Asylum (June 11, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3161 [https://perma.cc/3C8U-NA9E] (describing key components of the EU Pact on Migration and Asylum including streamlined processing of asylum claims at external borders and return of migrants deemed ineligible for international protection, enhanced security measures and vetting of migrants and increased resources for external migration enforcement through FRONTEX and other agencies).

76. The media have reported extensively on this issue. *See also* Lara Villalón, *La UE sella su alianza con Egipto con 7.400 millones de euros para control migratorio y energía* [*The EU Seals Its Alliance With Egypt With 7.4 Billion Euros for Migration Control and Energy*], EL MUNDO (Mar. 17, 2024), https://www.elmundo.es/internacional/2024/03/17/65f73b61e9cf4a75798b45a4.html [https://perma.cc/A393-6HYW] (describing recent EU migration agreement with Egypt); Juan Sanhermelando, *Túnez, Mauritania, Egipto y ahora Líbano: la UE avanza en externalizar el control migratorio* [*Tunisia, Mauritania, Egypt, and Now Lebanon: The EU Moves Forward in Outsourcing Migration Control*], EL ESPAÑOL (May 3, 2024), https://www.elespanol.com/mundo/europa/20240503/tunez-mauritania-egipto-ahora-libano-ue-avanza-externalizar-control-migratorio/852164991_0.html [https://perma.cc/QW93-UA2A] (describing migration agreements between the EU and Egypt, Tunisia, and Mauritania); Marc Ferrà, *La Unión Europea formaliza con Mauritania su alianza para frenar la inmigración irregular* [*The European Union Formalizes Its Alliance With Mauritania to Curb Irregular Immigration*], ELPERIÓDICO (Mar. 7, 2024), https://www.elperiodico.com/es/internacional/20240307/union-europea-formaliza-mauritania-alianza-frenar-inmigracion-99156428 [https://perma.cc/4UYN-2JMV] (describing the migration agreement between the EU and Mauritania); Jorge Liboreiro, *15 países de la UE piden la externalización de la política de migración y asilo* [*15 EU Countries Call for the Externalization of Migration and Asylum Policy*], EURONEWS. (May 16, 2024), https://es.euronews.com/my-europe/2024/05/16/15-paises-de-la-ue-piden-la-externalizacion-de-la-politica-de-migracion-y-asilo [https://perma.cc/64SJ-H2CJ] (describing migration agreements between the EU and Tunisia and Egypt).

rights inside and outside European borders. [77] In essence, the only thing that seems to count is preventing people from reaching the EU so as not to have to take responsibility for them. This is, at the same time, the increasingly widespread formula for responding to the challenges posed by migratory movements and resolving the profound inter-state differences and shortcomings that are all too evident regarding the fundamental principle of solidarity and fair sharing of responsibility, regulated in Article 80 of the Treaty on the Functioning of the EU.

C. Legality of Spain and the EU's Externalized Migration Model and Legal Challenges to these Practices

From what has been described thus far, Spain and the EU's migration control policy in the twenty first century has been marked by a shift from a traditional model where States exercise sovereign control within their borders over the admission of migrants and asylum seekers to a multilateral cooperative model outsourcing migration control outside their territories. Under this externalized migration control framework, pioneered by Spain and adopted by other EU Member States, the surveillance and control of migratory flows, managed from a distance, are transferred to third countries in the Global South before migrants reach EU territory.[78] In addition to creating geographical distance, the outsourced model of migration control also creates moral distance regarding the measures adopted by African third countries to curb migration. These measures, undertaken with the tacit approval of Spain or other EU Member States under these agreements, often violate international human rights law and hinder migrants' right to seek asylum. However, because these violations of international human rights law are perpetrated by African third countries, albeit under these agreements, it affords Spain and EU Member States a degree of plausible deniability. While Spain and the EU may prefer to turn a blind eye to these concerns, it raises several fundamental questions. Specifically, are the externalized migration practices by Spain described above permissible under relevant international human rights law? Additionally, what responsibility does Spain bear in ensuring externalized migration control practices by third countries, pursuant to bilateral and

77. NURIA DÍAZ ET. AL., CEAR, EL PACTO EUROPEO SOBRE MIGRACIÓN Y ASILO: RETOS Y AMENAZAS PARA LOS DERECHOS HUMANOS [THE EUROPEAN PACT ON MIGRATION AND ASYLUM: CHALLENGES AND THREATS TO HUMAN RIGHTS] 26–30 (2024), https://www.cear.es/wp-content/uploads/2024/04/Pacto-Europeo-de-Migracion-y-Asilo-retos-y-amenazas.pdf [https://perma.cc/87EU-LRJS].

78. *See* Abrisketa Uriarte, *supra* note 2 at 122 (describing the practice of Member States managing migration remotely, before migrant populations reach Member States' borders).

multilateral agreements, respect the fundamental rights of migrants and applicable international human rights law?

With respect to the latter question, regarding attribution of responsibility for human rights violations occurring in third countries in the context of externalized migration control, relevant case law from the European Court of Human Rights (ECtHR) makes clear that, in certain cases, countries can be held responsible for actions outside their sovereign territory. In the *Loizidou*,[79] *Al-Saadoon and Mufdhi*,[80] and *Al-Skeini*[81] cases, the ECtHR gives an expansive interpretation of the concept of extraterritorial jurisdiction that supports imposition of relevant legal constraints and responsibilities on European Global North Countries for actions taken pursuant to bilateral agreements to externalize migration control. This position is particularly evident in the 2012 ECtHR landmark ruling in *Hirsi Jamaa and Others v. Italy,* a case involving Eritrean and Somali migrants who were rescued at sea by Italian vessels and returned by an Italian military ship to Libya pursuant to a bilateral agreement on migration between Italy and Libya permitting return of third country nationals rescued at sea to Libya.[82] While Italian authorities argued that ECtHR jurisdiction over Italy did not extend outside its territory to Italian military ships in the context of rescue at high seas, the Court held that extraterritorial jurisdiction applies where State agents, here Italian military ships at sea, exercised control over individuals outside the State's sovereign territory.[83] In reaching this conclusion, the ECtHR notes that "whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the European Convention on Human Rights (ECHR)] to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual".[84]

However, some scholars have noted that one limitation of the *Hirsi* ruling is that extension of extraterritorial jurisdiction to European

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79. Loizidou v. Turkey, App. No. 15318/89, ¶ 62 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58007%22]} [https://perma.cc/UA9J-XTGA].

80. Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, ¶¶ 135, 140, 155 (June 30, 2009), https://hudoc.echr.coe.int/eng?i=001-93398 [https://perma.cc/RVB3-5C56].

81. Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, ¶¶ 135–142 (July 7, 2011), https://hudoc.echr.coe.int/fre?i=001-105606 [https://perma.cc/Z2YH-W5K4].

82. Hirsi Jamaa and Others v. Italy, App. No. 27765/09, ¶¶ 9–14 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre?i=001-109231 [https://perma.cc/4P8P-VTV8].

83. *Id.* ¶¶ 72–82.

84. *Id.* ¶ 74.

countries outside of their sovereign territory only applies in cases of direct action by the country's agents over migrants and does not extend to actions by third countries pursuant to bilateral migration agreements.[85] As a result, this limit on extraterritorial jurisdiction may incentivize Spain and other EU Member States to continue cooperative bilateral agreements delegating migration enforcement to third countries, which allow them to avert responsibility for any violation of migrants' human rights perpetrated by these third country actors.[86]

Nonetheless, because the overwhelming evidence establishes that externalized migration control inevitably leads to human rights violations against migrants, under Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Spain bears responsibility for aiding or assisting unlawful acts by third states committed with its actual or constructive knowledge.[87] Such a conclusion is consistent with the *Hirsi* ruling because, as has been noted by other scholars, a contrary interpretation limiting Spain's international responsibility for violations of human rights occurring in the context of outsourced migration control would create the very gaps in the rule of law that the ECtHR sought to address in the *Hirsi* case.[88] Additionally, one cannot ignore the fact that Spain conditioning official development aid to African countries on cooperation with migration control is "a key instrument of pressure for the conclusion of agreements." [89] This use of development aid to African countries as an incentive to cooperate

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85. Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law,* 29 EUR. J. INT. LAW, 347, 357 (2018).

86. *See* Juan Santos Vara & Laura Pascual Matellán, *The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries*, *in* THE EVOLVING NATURE OF EU EXTERNAL RELATIONS LAW 326 (W. Th. Douma et al. eds., 2021) (for the consequences of human rights violations occurring as a result of "assistance" provided to countries to control migration flows).

87. Purusant to Art. 16 of the Draft Articles of Responsibility of States for Internationally Wrongful Acts, codifying principles of customary international law, *A State which aids or assists another state in the commission of an internationally wrongful act by the later is internationally responsible for doing so if: that state does do with the knowledge of the circumstandes of the internationally wrongful act; and the act would be internationally wrongful if committed by the state.* G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001).

88. *See* Valsamis Mitsilegas, *Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade* (Queen Mary Sch. of L. Legal Studies, Research Paper No. 278/2018, 2018) at 14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3182455 [https://perma.cc/7LHW-J35U] (arguing that limiting State responsibility only to third countries for cooperative migration control would create the very gaps in the rule of law that the ECtHR attempted to address).

89. Gabrielli, *supra* note 15, at 133.

on migration control creates an asymmetrical relationship, invariably in Spain's favor, along with the threat of economic sanctions against countries that fail to fulfil their role as Europe's border *gendarmes,*[90] further supporting arguments that such agreements are an assertion of control outside their territory. Yet, judicial action and other measures to hold Spain accountable for human rights abuses against migrants perpetrated outside its territory by the governments of Morocco, Mauritania, Senegal and other countries party to bilateral migration control agreements remain elusive.

With respect to the question of whether actions by Spain, through bilateral agreement or some other mechanism, to externalize migration enforcement to third countries in Africa are lawful, many scholars argue that these policies, particularly expedited returns and pushbacks, may violate the principle of *non-refoulement.* This principle, enshrined in Article 33 of the 1951 Refugee Convention, prohibits the return of asylum seekers and refugees to a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular group, or political opinion.[91] Relatedly, Article 3 of the ECHR prohibits the return of an individual to a country where they may face torture or degrading treatment[92] and Article 4 of Protocol No. 4 of ECHR specifically prohibits collective expulsions of migrants.[93] In particular, the collective expulsions of migrants is specifically prohibited under Protocol 4 of the European Convention because such expulsions executed *en masse* prevent the individual screening of migrants to ensure they are not returned to a country where they would face danger, in violation of the *non-refoulement* principle. principle.

When analyzing Spain's bilateral agreements permitting expedited return of migrants to their country of origin and agreements with Morocco and Mauritania permitting readmission of third country nationals, one cannot ignore the underlying presumption that most migrants returned by Spain are economic migrants who are not entering to pursue an asylum claim. Additionally, considering that the migration flows in question are generally of a mixed nature, consisting of both

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90. FUENTES LARA ET AL., *supra* note 68, at 14, 24.

91. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

92. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter European Convention on Human Rights].

93. Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 16, 1963, E.T.S. 46 [hereinafter Protocol 4].

asylum seekers and economic migrants, this often leads to asylum seekers being viewed with skepticism when they assert a fear of return at the time of entry. Taken from Spain's perspective as a Southern EU Member State with a land border on the African continent, these externalization practices were implemented out of necessity to allow it to quickly return or pushback economic migrants. However, in its rush to quickly return perceived economic migrants, Spain may be failing to meet its obligations under the *non-refoulement* principle as a signatory to the 1951 Refugee Convention and ECHR by failing to conduct adequate asylum screenings before executing these returns.

Turning to relevant ECtHR caselaw, the previously referenced *Hirsi* ruling, which involved a bilateral agreement permitting the return of third country nationals similar to Spain's agreements with Morocco and Mauritania, found such agreements may violate the principle of *non-refoulement* and the European Convention on Human Rights. After establishing extraterritorial jurisdiction over Italy in the *Hirsi* case, the Court found Italy's return of migrants intercepted at sea to Libya, without first screening them for risk of ill treatment or forcible repatriation by Libyan authorities, amounted to indirect refoulement and violated ECHR Art 3.[94] The ECtHR also held Italy's return of a large group of migrants intercepted at sea to Libya, pursuant to a bilateral migration agreement, without adequate *non-refoulement* screenings amounted to a collective expulsion in violation of Article 4, of Protocol 4 to ECHR.[95] Subsequent ECtHR decisions in *Sharifi and Others v. Italy and Greece*[96] and *Khlaifia and Others v. Italy*[97] reaffirmed the principle that large-scale

94. The ECtHR noted that the UNHCR stated Libya frequently conducted collected expulsions of refugees and asylum seekers to their countries of origin and emphasized the risk to Eritrean and Somali nationals of harm if repatriated by Libya. Hirsi Jamaa and Others v. Italy, App. No. 27765/09, ¶¶ 143, 146 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-109231%22]} [https://perma.cc/32BM-UU7X].

95. *Id.* ¶¶ 185–186.

96. *See* Sharifi and Others v. Italy and Greece, App. No. 16643/09, ¶¶ 210–225, (Oct. 21, 2014), https://hudoc.echr.coe.int/eng#{%22display%22:[2],%22languageisocode%22:[%22FRE%22],%22appno%22:[%2216643/09%22],%22itemid%22:[%22001-147287%22]} [https://perma.cc/DEA4-4L4C] (ruling that mass expulsion of a group of stowaways violated Art. 4 of Protocol 4's prohibition against collective expulsions).

97. Khlaifia and Others v. Italy, App. No. 16483/12, ¶¶ 237–242 (Dec. 15, 2016), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-170054%22]} [https://perma.cc/T9FU-UJDF] (reversing ECtHR Lower Chamber and ruling that return of migrants from a detention center did not amount to a collective expulsion in violation of Art. 4 of Protocol 4, but reaffirming prior ECtHR rulings finding the expulsion of migrants as a group without adequate screenings amounted to a collective expulsion in violation of Art. 4, Protocol 4).

removal and return of migrants as a group without adequate screenings violated Article 4 of Protocol 4's prohibition on collective expulsion of migrants.

This precedent made the ECtHR 2020 ruling in the case *ND and NT v. Spain*[98] a surprising departure from previous rulings protecting migrants from collective expulsions under Article 4 of Protocol 4. The *ND and NT* case differed slightly from previous ECtHR rulings in that it was the first case where the Court reviewed the forcible return of migrants at a land border near the Spanish enclave of Melilla.[99] The forcible returns in question involved an incident in August 2014 where a group of approximately 75 migrants were apprehended while scaling the Melilla border fence and returned to Morocco through pushbacks by the Spanish *Guardia Civil*, in coordination with Moroccan authorities.[100] In its decision, the ECtHR reversed a 2017 lower court decision, which found that the migrant pushbacks by the Spanish *Guardia Civil* amounted to an unlawful collective expulsion, and held the pushbacks did not violate Article 4 of Protocol 4 of ECHR prohibiting the collective expulsion of migrants. More specifically, while the ECtHR found the pushbacks by the Spanish *Guardia Civil* did amount to an "expulsion" as defined by Article 4 of Protocol 4, it did not amount to a collective expulsion in violation of Article 4 of Protocol 4 due to the migrants' culpable conduct by not attempting to request asylum at official border check points.[101] In essence, the Court excused the Spanish *Guardia Civil*'s failure to conduct individualized *non-refoulement* screenings prior to executing pushbacks of groups of migrants to Morocco because the migrants did not attempt to enter or request asylum in a regular manner at border checkpoints which were, in theory, accessible to migrants.[102] Of note, the ECtHR seemingly dismissed concerns that Moroccan authorities had blocked migrants from approaching official checkpoints , instead reaching the conclusion that the Spanish government provided practical and effective access to legal channels for entry at border checkpoints at the Melilla border fence.[103] However this conclusion clearly ignores that such action by Moroccan authorities to block migrant access to border checkpoints in Melilla was done at Spain's behest under various bilateral migration control agreements

98. ND and NT v. Spain, App. Nos. 8675/15 & 8697/15, ¶¶ 198–232, (Feb. 13, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-201353%22]} [https://perma.cc/4WRF-PEHL].

99. *Id.* ¶¶ 148, 165.

100. *Id.* ¶¶ 24–26.

101. *Id.* ¶ 231.

102. *Id.* ¶¶ 212, 227.

103. *Id.* ¶ 220.

between the two countries dating back to 1992. Additionally, when noting the different results in the *Hirsi* case in 2012 compared to *ND and NT* in 2020, one cannot help but consider the impact of external events in the intervening years, including the Syrian refugee crisis in Europe and the rise of far-right nationalist parties in many EU Member States, on ECtHR migration law jurisprudence.

Another consequence of the ECtHR ruling in *ND and NT v. Spain* is that it allowed the Spanish government to continue its policy of pushbacks at the Ceuta and Melilla land border with Morocco, leading to tragic results on June 24, 2022, the date of the 2022 Melilla Border Incident. In the early morning hours of June 24, 2022, a large group of between 1,300 and 2,000 African migrants, mostly from Sudan, South Sudan, and Chad attempted to scale the border fences around Melilla. The migrants were surrounded by both Spanish and Moroccan authorities on both sides of the border and were met with excessive force, which included beatings, the use of tear gas and rubber bullets and throwing rocks at migrants, leading to a stampede with some migrants being trampled or crushed to death.[104] Others were killed or injured after falling while attempting to cross the border fence or from injuries sustained in the confrontation with Spanish and Moroccan authorities as they pushed the migrants back to Morocco, leading to the death of 37 migrants and leaving dozens more injured.[105] Despite the high number of migrant casualties, both the Spanish and Moroccan governments exonerated security forces and found they had not engaged in any wrongdoing or excessive use of force in the 2022 Melilla

104. *2023 Melilla Border Human Rights Watch Report*, *supra* note 103 (describing how the group of migrants involved in the incident were composed of between 1,300 and 2,000 men, mostly from Sudan, South Sudan and Chad); see *also,* Ashifa Kassam, *Calls for Investigation Over Deaths in Moroccan-Spain Border Crossing,* THE GUARDIAN (Jun. 26, 2022), https://www.theguardian.com/world/2022/jun/26/calls-investigation-deaths-moroccan-spanish-border-melilla-enclave-crossing [https://perma.cc/34DW-JVBB] (describing lethal clashes at the Melilla border in which at least 23–37 migrants died amid a forceful response by both Spanish and Moroccan security authorities); Euan Ward & Aida Alami, *More Than 20 Migrants Die in Effort to Enter Spanish Enclave in Africa,* N.Y. TIMES, (Jul. 6, 2022), https://www.nytimes.com/2022/06/25/world/europe/melilla-spain-africa-migrants.html [https://perma.cc/8LDQ-9HSA] (reiterating deaths caused by the stampede and the force employed by Moroccan forces).

105. *See 2022 Melilla Border Human Rights Watch Report*, *supra* note 103 (noting migrant injuries and fatalities during the incident after falling while climbing the border fences and due to excessive force by Spanish and Moroccan authorities).

Border Incident, causing United Nations officials to condemn the lack of accountability for acts of violence against non-white migrants.[106]

Over the past year, migrant fatalities have continued to increase. In its recent report "Monitoring the Right to Life", Caminando Fronteras reveals that some 10,457 people died on access routes to Spain in 2024.[107] As is noted in the Caminando Fronteras report, this is a staggering increase in fatalities compared to previous years, caused not only by the failure to activate rescue protocols and the criminalization of people on the move, but also by the effects of the externalized border enforcement.[108] The report also highlights that "negotiations between the Spanish State, Morocco, Senegal and Mauritania prioritize migration control and the geopolitical benefits that come with it over human rights."[109] Caminando Fronteras further concludes that "the focus on intercepting migrants instead of protecting lives transfers responsibility for rescue operations to third countries with limited resources and capacities in exchange for economic and strategic incentives."[110]

In addition to the aforementioned corrosive effects on the principle of *non-refoulement* and human rights, Spain's and the EU's externalization of migration has devastating consequences for the political efforts undertaken by the African Union and African subregional

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106. While not a central theme of this article, the authors acknowledge that the externalized migration enforcement policies discussed in this section and other sections of this article overwhelmingly affect non-white migrants and asylum seekers from the Global South. The authors hope to explore the racial, colonial, imperialist and capitalist dimensions of migration policy and externalized migration enforcement policies by the Global North Countries in a subsequent publication. *See UN Experts Condemn the Continuing Lack of Accountability for Stark Dehumanisation of African Migrants at the Perimeters of Europe,* U.N. OFF. HIGH COMM'R (Oct. 31, 2022), https://www.ohchr.org/en/press-releases/2022/10/un-experts-condemn-continuing-lack-accountability-stark-dehumanisation [https://perma.cc/LT6P-AC6W] (emphasizing how the 2022 Melilla border incident is emblematic of how the EU's migration enforcement policies rely on racialized exclusion and deadly violence deployed to keep out people of African and Middle Eastern descent, and other non-white populations, irrespective of their rights under international refugee or international human rights law); *2023 Melilla Border Human Rights Watch Report*, *supra* note 105 (denouncing the lack of accountability and transparency by the Spanish and Moroccan governments following the 2022 Melilla border incident, including the exoneration of security forces involved in the incident by both Spain and Morocco).

107. CAMINANDO FRONTERAS, MONITORING THE RIGHT TO LIFE 2024, at 4 (Dec. 2024), https://caminandofronteras.org/wp-content/uploads/2024/12/DALV2024_EN-WEB.pdf [https://perma.cc/RVM4-LKD5].

108. *Id* at 16.

109. *Id.* at 19.

110. *Id.*

organizations to establish free movement and residence regimes.[111] It is not in vain that many critical voices, led by the prestigious Achille Mbembe and his coined concept of "necropolitics," find in this migration control externalization the revitalization of one of the more profound legacies of colonization and 19th Century "scramble for Africa."[112] This legacy and the resulting drawing of Africa's borders along colonial lines along with current migration externalization practices has turned the African continent into a mass penitentiary and every Black African into a potential "illegal" migrant, unable to move except under increasingly punitive conditions. Since then, being African and being Black means being relegated to one of the numerous spaces of confinement invented by modernity and its unstoppable capitalist and racist dynamics; it means, in any case, being deprived of both the right to mobility and the right to immobility (the right to remain and live in peace and dignity in one's own land).[113]

IV. THE UK EXTERNALIZATION POLICY: THE RWANDA OFFSHORING SCHEME

In January 2023, UK Prime Minister Rishi Sunak vowed to "stop the boats," which was understood as a commitment to reduce the number of migrant arrivals to the UK by small boats and reform the asylum system, as one of five 'pledges' to be accomplished in 2023.[114] This inclusion of migration and asylum reform as a national priority for the UK in 2023 was due to the increase in the number of small boat

111. *See e.g.*, Producciones Translocales, *supra* note 14, at 12 (highlighting how externalization policies by Spain and other EU member states restricts freedom of movement within the African continent and undermines efforts by subregional bodies in Africa, such as the Economic Community of West African States (ECOWAS), to form regional economic blocs similar to the EU with interconnected economies and freedom of movement).

112. *See e.g.,* MURIEL EVELYN CHAMBERLAIN, THE SCRAMBLE FOR AFRICA (3rd ed. 2010) (stating that the Scramble for Africa refers to the period in the late 19th and early 20th century when European imperial powers claimed control and colonized most of the territory in the African continent).

113. Achille Mbembe, *Africa Needs Free Movement*, MAI & GUARDIAN (March 24, 2017), https://mg.co.za/article/2017-03-24-00-africa-needs-free-movement/ [https://perma.cc/WXJ3-KNJR] (supporting the notion that being Black in Africa means being deprived of a good life at home and being unable to seek a better life elsewhere).

114. Daniel Sandford, *What Does Rishi Sunak's Promise to Stop the Boats Mean*, BBC NEWS (Jan. 4, 2023), https://www.bbc.co.uk/news/uk-64164339 [https://perma.cc/PZ6X-RCMX].

crossings over the English Channel following the UK's departure from the EU.

Before 2020, the UK was still a member of the EU and subject to the Dublin Regulation, an EU regulation that required migrants to file their asylum application in the EU member state where they were first fingerprinted.[115] For Northern EU member states, like the UK prior to Brexit, one benefit of the Dublin Regulation is that they have the authority to return asylum seekers to the EU member state where they were first fingerprinted, often a Southern EU member state like Spain, for processing of their asylum claim and reduce pressure on their national immigration systems.[116] However, after the UK left the EU in 2020, it created an incentive for asylum seekers to travel to the UK from the European continent to lodge their asylum claims in the UK, as asylum seekers knew they could not be returned to the EU by the UK government under the Dublin Regulation.[117] By December 2020, after the end of the Brexit transition period, the number of migrants arriving by boat had increased to 8,466 in 2020 and increased even more exponentially over the next two years, with 28,526 arrivals in 2021 and 47,755 arrivals in 2022.[118] This increase can be partly explained by greater security at channel ports after Brexit, which meant previously undetected clandestine crossings, for example, the transportation of migrants to the UK concealed in a freight truck arriving by

115. The Dublin III Regulation (Dublin Regulation) sets forth a hierarchy for determining which EU member state is responsible for processing an asylum claim, with asylum seekers typically being required to file an asylum claim in the EU member state where they first submitted biometrics through the Eurodac database. *See* MELANIE GOWER, HOUSE OF COMMONS LIBRARY, BREXIT: THE END OF THE DUBLIN III REGULATION IN THE UK 6 (Dec. 21, 2020), https://researchbriefings.files.parliament.uk/documents/CBP-9031/CBP-9031.pdf [https://perma.cc/F668-428S] (explaining that the Dublin regulation would stop applying to the UK after 2020).

116. *Id.*

117. *See* T. Kovacevic & T. Edgington, *Was Starmer Right to Link Brexit to a Rise in Small Boat Crossings?* BBC NEWS (Oct. 1, 2025), https://www.bbc.com/news/articles/c87yqp7eyqdo [https://perma.cc/D4GN-MTLA] (discussing remarks by UK Prime Minister Keir Starmer attributing increased number of unlawful migrant crossings by boat to no longer being subject to the Dublin Regulation following Brexit and confirming, in the years leading up to Brexit, more asylum seekers were transferred out of the UK to another EU member state than were transferred in to the UK under the Dublin regulation).

118. U.K. HOME OFFICE, *Irregular Migration to the UK, Year Ending December 2022*, (Feb. 23, 2023), https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022 [https://perma.cc/A5DW-SAHM].

ferry or through the Channel Tunnel, became much more visible. [119] Nonetheless, this rapid rise in the number of migrants arriving across the English Channel on small boats and resulting media scrutiny fueled a narrative of a crisis that became directly associated with current failings in the UK asylum system. The effort to address these perceived failures ultimately led the Tory government, primarily under the leadership of UK Prime Ministers Boris Johnson and Rishi Sunak, to establish the "Rwanda Scheme" to offshore processing of asylum claims from the UK to Rwanda.

A. The UK Government's Efforts to Establish and Later Repeal the Rwanda Scheme

The Rwanda deal came about, in part, to address the significant backlog of undecided asylum claims in the UK since 2020.[120] Since 2010, when the Conservative Party took power under Prime Minister David Cameron through the start of Rishi Sunak's leadership in late 2022, the number of asylum applications filed each year outnumbered decisions issued by the UK Home Office.[121] By 2023, the asylum backlog had reached historic levels with approximately 160,000 asylum seekers in the UK waiting for decisions in their cases.[122]

On April 14, 2022, Prime Minister Boris Johnson announced in a speech that individuals entering the UK illegally as well as those who had arrived illegally on or after January 1, 2022 could be relocated to Rwanda.[123] To give effect to this statement, in April 2022, the UK and Rwanda agreed to a Migration and Economic Development Partnership (MEDP), which included a five-year asylum partnership

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119. Marley Morris & Amreen Qureshi, *Understanding the Rise in Channel Crossings,* IPPR, (Oct. 26, 2022) at 17, https://www.ippr.org/articles/understanding-the-rise-in-channel-crossings [https://perma.cc/29H9-3PL5] (discussing how in the years prior to Brexit and immediately after Brexit in 2020, when the UK no longer benefited from the free movement of goods as an EU member state, there was an increase in migration and security checks at UK and French ports which made it more difficult for migrants to enter the UK through previous clandestine means, like travelling concealed in freight truck, known in the UK as a lorry).

120. Michael Collyer & Uttara Shahani, *Offshoring Refugees: Colonial Echoes of the UK-Rwanda Migration and Economic Development Partnership*, 12 SOC. SCI. 1, 6 (2023).

121. *Id.*

122. *Id.*

123. *One-Way Ticket to Rwanda for Some UK Asylum Seekers*, BBC NEWS (Apr. 14, 2022) https://www.bbc.co.uk/news/uk-politics-61097114 [https://perma.cc/KA3T-6K45].

arrangement embodied within a Memorandum of Understanding.[124] In line with the MEDP, it was anticipated that asylum seekers would be sent to Rwanda and their asylum claims would be processed there in accordance with the Rwandan asylum system.[125] This initial attempt to establish the MEDP was eventually halted by judicial rulings issued by the ECtHR and the UK Supreme Court, described further in subsequent sections below.

In late 2023, after legal challenges stymied earlier attempts to implement the Rwanda Scheme, Prime Minister Rishi Sunak announced he was reviving the UK's plan to offshore asylum processing to Rwanda through a new treaty between the two countries, known as the UK-Rwanda Treaty.[126] Prime Minister Sunak further indicated that his government would introduce 'emergency' legislation, titled the *Safety of Rwanda (Asylum and Immigration) Act 2024*, to enable Parliament to declare Rwanda a 'safe' country.[127] After extensive debate, the Act was ultimately passed by both houses of the UK Parliament and received royal assent on April 25, 2024.[128]

In the end, the *Safety of Rwanda (Asylum and Immigration) Act of 2024* was in effect for less than three months. Following the July 4, 2024 UK elections, the newly elected Labour Government, led by Prime Minister Keir Starmer, announced the termination of the UK's policy to deport asylum seekers to Rwanda under the Act. Prior to the current Labour Government suspending enforcement of the Act, efforts to implement

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124. Memorandum of Understanding Between the Government of the UK and Northern Ireland and Great Britain and the Government of the Republic of Rwanda for the Provision of an Asylum partnership Agreement, Apr. 13, 2022, Rwanda-U.K., at ¶ 2.1 [hereinafter Rwanda-U.K. Asylum Partnership Agreement Memorandum of Understanding], https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r [https://perma.cc/92SQ-WTJG].

125. *Id.*

126. Treaty Between the Governments of the UK and Rwanda for the Provision of an Asylum Partnership to Strengthen Shared Commitments on the Protection of Refugees and Migrants, Dec. 5, 2023, Rwanda-U.K. [hereinafter UK-Rwanda Treaty: Provision of an Asylum Partnership], https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership [https://perma.cc/4UAQ-T5XU].

127. Rishi Sunak, Prime Minister, PM Remarks on Supreme Court Judgment: 15 November 2023 (Nov. 15, 2023), https://www.gov.uk/government/speeches/pm-remarks-on-supreme-court-judgement-15-november-2023 [https://perma.cc/GZQ9-J5DT].

128. Safety of Rwanda (Asylum and Immigration) Act 2024, c. 8 (UK), https://www.legislation.gov.uk/ukpga/2024/8/data.pdf [https://perma.cc/2FJB-5733].

the Rwanda Scheme cost the taxpayers of the UK £700 million and in the end, a total of only four asylum seekers were sent to Rwanda under the Act.[129] On January 30, 2025, the Labour government introduced the *Border Security, Asylum and Immigration* Bill, a new immigration law that would repeal the *Safety of Rwanda (Asylum and Immigration) Act 2024* and the Rwanda asylum offshoring scheme.[130] Ultimately, on December 2, 2025, the *Border Security, Asylum and Immigration Act 2025,* which repealed the *Safety of Rwanda (Asylum and Immigration) Act 2024* in its entirely, was enacted following passage by both houses of the UK Parliament and royal assent. [131]

While this Act has now been formally repealed by Parliament , it nonetheless represents a recent and extreme example of a broader trend by the Conservative Government in the UK to erode the universality of human rights protections by targeting vulnerable groups, namely asylum seekers earmarked for relocation to Rwanda. The Act showed autocratic features because it contravened fundamental obligations under international law, namely the principle of *non-refoulement,* and weakened the UK's adherence to those legal standards.[132] Such an approach aligns with the hallmarks of autocratic governance, where power is concentrated in the hands of the executive, and mechanisms for accountability and legal scrutiny are diminished.

Additionally, the Act enabled Parliament to circumvent established international obligations and case law and prioritized government policy targeting a marginalized population over these international rules. The Act also explicitly asserted that the validity of its provisions was unaffected by international law and formally designated Rwanda as a 'safe' country for asylum purposes despite prior judicial rulings to the contrary.[133] Furthermore, the Act usurped the role of the judiciary by restricting judicial oversight over legislative and executive actions by mandating that judges 'must' regard Rwanda as a 'safe'

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129. *See* Megan Specia, *A UK Deportation Plan Cost $900 Million. Only Four People Left,* N.Y. TIMES (Jul. 22, 2024), https://www.nytimes.com/2024/07/22/world/europe/uk-rwanda-deportation-plan.html [https://perma.cc/T29F-E3HQ] (describing the £700M/$900M cost of the policy which resulted in zero asylum seekers' deportations and only four voluntary departures).

130. Border Security, Asylum and Immigration Bill 2024-25, HL Bill [101] cl. 37 (UK).

131. Border Security, Asylum and Immigration Act 2025, § 40

132. *See* Safety of Rwanda Act, § 1(4)(b) (stating that the validity of this Act is unaffected by international law).

133. *See id.* §§ 1(4)(b), 2(1) (providing that all decision-makers, including courts and tribunals, must conclusively treat Rwanda as a safe country despite prior judicial rulings).

country.[134] It also disapplied certain provisions of the Human Rights Act (HRA) 1998, a law codifying the ECHR in the UK's domestic statute, and excluded the applicability of interim measures by the ECtHR, thereby limiting judicial intervention and the protection of individual rights.[135] Most importantly, the Act was used as a mechanism to overturn a unanimous ruling by the UK Supreme Court, the highest court in the land.[136]

This section will examine the Rwanda Asylum Scheme as a case study of how migration outsourcing measures and domestic migration laws exhibit autocratic characteristics. This analysis aims to illustrate the extent to which the UK government can embed autocratic policies within its legal framework to limit the fundamental rights of a marginalized population, which often leads to a reduction in rights for all within society. This analysis of the Act will also provide a robust basis for comparison with the Migrant Protection Protocols (MPP) or "Remain in Mexico" program, first implemented in 2019 by U.S. President Donald Trump during his first term and discussed in a later section of this article.

B. Judicial Review of the Rwanda Asylum Scheme Prior to Enactment of the Safety of Rwanda (Immigration and Asylum) Act

One of the more troubling aspects of the Safety of Rwanda (Immigration and Asylum) Act was its provisions overturning UK Supreme Court precedent and limiting judicial review of the Act as a whole. The decision by Prime Minister Sunak and the Conservative Government to push the Act forward in late 2023 came after previous efforts to enact the Rwanda Scheme were blocked by the ECtHR and the UK Supreme Court. These ECtHR and UK Supreme Court rulings, described below, were clear in finding the Rwanda Scheme unlawful which further illustrates how the Act was a clear executive power grab intended to diminish the authority of the UK's judicial branch and the remedy of judicial review.

In the UK, judicial review operates within a constitutional framework rooted in parliamentary sovereignty, meaning that no court has

134. *Id.* § 2(2)–(4).

135. *Id.* § 2(1), (3), (5).

136. *See* R (on the application of AAA (and others) v Sec'y of State for the Home Dep't [2023] UKSC 42 [28] (UK) (holding that the sovereign right of the UK government to control the entry and residence of migrants is restrained by international law, namely the principle of *non-refoulement*, limiting the ability of the UK government to remove asylum seekers under the Rwanda Asylum Scheme).

the authority to strike down or invalidate an Act of Parliament.[137] Instead, the judiciary's role is to ensure that the executive and public bodies act lawfully and within the powers granted to them. Thus, judicial review in the UK reinforces the principles of accountable governance and the rule of law, rather than establishing the courts as a coequal constitutional power. The system relies on a balance between judicial oversight and parliamentary sovereignty, where the courts act as guardians of legality but not as final arbiters of constitutional validity.

The first ruling finding the Rwanda Scheme unlawful, a Rule 39 interim measure issued by the ECtHR on June 15, 2022, compelled the UK's Conservative Government to halt a flight intended to offshore four asylum seekers to Rwanda.[138] This Rule 39 interim measure, considered an extraordinary intervention by the ECtHR that is only used on a limited basis, occurred following a last-minute ruling in the case of *KN v UK*, in which the ECtHR determined the offshoring of asylum seekers to Rwanda could not proceed.[139] In this ruling, the ECtHR expressed concerns over potential breaches of the ECHR due to Rwanda's human rights record and ongoing legal challenges questioning the legality of the scheme.[140] This example underscores the critical role interim measures by the ECtHR play for countries, like the UK, that are members of the Council of Europe[141] as a judicial safeguard against actions that could violate fundamental rights.

Subsequently, on November 15, 2023, the Rwanda Asylum Scheme, pursuant to the MEDP, was deemed unlawful by the UK's domestic courts when the UK Supreme Court issued its ruling in *R (on the application of AAA and others) v Secretary of State for the Home Department*.

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137. ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION,. 39-40 (10th ed. 1959).

138. *See* Rules of Court of the Eur. Ct. H.R., 2025, r. 39 (permitting an applicant to lodge a request for interim measures while a case is pending).

139. NSK v. United Kingdom, App. No. 28774/22 (Apr. 5, 2023), https://hudoc.echr.coe.int/eng?i=001-224302 [https://perma.cc/3BLP-VM3S]; Press Release ECHR 197, Eur. Ct. H.R., The European Court Grants Urgent Interim Measure in Case Concerning Asylum-Seeker's Imminent Removal from UK to Rwanda (June 14, 2022).

140. *Id.*

141. *See generally Who We Are – The Council of Europe in Brief,* COUNCIL OF EUR., https://www.coe.int/en/web/about-us/who-we-are [https://perma.cc/6J3E-BSYV] (last visited Nov. 21, 2025) (defining he ECtHR is a judicial body of the Council of Europe, an international organization founded in 1949 to uphold human rights, democracy and the rule of law in Europe and showing that there are 46 countries that are members of the Council of Europe, including Spain and the UK, and all members are subject to the jurisdiction of the ECtHR).

[142] In this case, the Supreme Court ruled that the UK's sovereign right to control the entry and residence of migrants is constrained by international law, particularly by the principle of *non-refoulement*, which prohibits the return of individuals to a country where they face serious risks of harm or persecution.[143] This ruling underscored the necessity for the UK to align its domestic policies with its international obligations.[144] The Supreme Court also held that the prohibition on refoulement constitutes a fundamental principle of international law, one to which the UK government has consistently reaffirmed its commitment to upholding on the international stage.[145] This principle ensures that individuals are not returned to countries where they may face significant risks of harm or persecution, reflecting the UK's obligations under international human rights frameworks. The Supreme Court observed that the Rwandan government lacked a full understanding of the requirements of refugee law and the 1951 Refugee Convention, particularly concerning the principle of *non-refoulement*.[146] This raised significant concerns about Rwanda's ability to adequately protect asylum seekers from being returned to countries where they might face persecution or harm.[147] The Court also emphasized that Rwanda lacked the "practical ability" to fulfil its legal obligations under international refugee law and the Refugee Convention.[148] This limitation cast serious doubts on Rwanda's capacity to provide adequate protection to asylum seekers and to prevent violations of the principle of *non-refoulement*.[149]

C. The Safety of Rwanda (Immigration and Asylum) Act's Statutory Provisions Reversing the Supreme Court's Ruling and Limiting Judicial Review.

Despite the unanimous and forceful ruling by the UK Supreme Court finding the proposed Rwanda Scheme unlawfully violated the principle of *non-refoulement*, Prime Minister Sunak took steps to push forward the Act within weeks of this decision. To undercut the UK Supreme Court's authority, the Act contained a number of provisions that directly contradicted the conclusions of law and fact reached by

142. R (AAA) [2023] UKSC 42 [149].

143. *Id.* [19].

144. *See id.* (the right to expel aliens is limited by international treaties the UK has signed onto).

145. *Id.* [26].

146. *Id.* [91].

147. *Id.*

148. *Id.* [102].

149. *Id.*

the Court in *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department.* Additionally, as discussed below, the Act narrowed judicial review of the law's statutory text and significantly limited an asylum applicant's ability to pursue judicial remedies for violations of their rights resulting from the Act.

1. Deeming Rwanda a De Facto 'Safe' Third Country Through Unreviewable Statutory Text

Under Section 2 of the Act, Rwanda was deemed a de facto safe third country, regardless of how this term is defined under international law, and the courts were not allowed to challenge Rwanda's status as a safe third country. To provide additional context, a 'safe' third country is defined under international law as a location to which an asylum seeker can be transferred without facing the risk of harm, persecution, or violations of their fundamental rights, ensuring their safety outside their country of origin or any other place they fear persecution.[150] Typically, such a determination is fact specific and requires an examination of the current country conditions and the individual circumstances of the asylum applicant.

However, under the Act, all decision-makers, including the Secretary of State for the Home Department (SSHD), immigration officers, courts, and tribunals, were mandated to 'conclusively' regard Rwanda as a 'safe' country when making determinations related to asylum and immigration.[151] Courts and tribunals were also prohibited from considering complaints that Rwanda may transfer or deport individuals to another state in violation of its international obligations (i.e. indirect refoulement), including those under the 1951 Refugee Convention. Additionally, courts and tribunals were barred from addressing concerns that asylum seekers may not receive fair and adequate consideration of their asylum claim in Rwanda or that Rwanda may fail to comply with the terms of the UK-Rwanda Treaty.[152] This limitation on judicial review applied regardless of contrary provisions within the Immigration Acts, HRA 1998, domestic law and international law, including the ECHR, ECtHR rulings and 1951 Refugee Convention.[153] By including a provision explicitly stating that the validity of the Act remained unaffected by international law, the Conservative government under Prime Minister Sunak implicitly acknowledged the likelihood of contravening international legal obligations during the Act's

150. GINA CLAYTON, IMMIGRATION AND ASYLUM LAW 400-02 (9th ed. 2014).

151. Safety of Rwanda Act, §§ 2(1)–(2).

152. *Id.* § 2(4)(a)–(c).

153. *Id.* § 2(5).

passage. This suggests a deliberate decision to prioritize domestic policy objectives targeting migrants over adherence to international frameworks.[154]

Historically, the designation of countries as 'safe' was based on rebuttable presumptions, allowing individuals to challenge such designations to ensure access to an effective remedy and safeguard against potential violations of their rights.[155] The exclusion of the right to challenge removal based on generic safety concerns, as outlined in the Act, contradicts the ECHR, which upholds the right to an effective remedy at the domestic level.[156] By failing to provide any domestic remedy through administrative or judicial review, let alone an 'effective' one, the Act appeared to contravene established case law and the principles of the ECHR.[157] This lack of remedy raises significant concerns about potential violations of both the ECHR and the HRA of 1998.

Under the Act, the authority of the SSHD, immigration officers, courts, or tribunals to consider a challenge to the de facto safe country determination was limited to cases where the applicant presented 'compelling reasons' indicating that Rwanda may not be a 'safe' country for that individual in particular.[158] In such cases, courts and tribunals were authorized to grant interim remedies that delayed or prevented the removal of individuals to Rwanda.[159] This was contingent on the individual satisfying the burden of demonstrating they would face a real, imminent, and foreseeable risk of serious, irreversible harm if removed to Rwanda before the review or appeal was resolved.[160]

While this provision appears to be a positive addition to the Act, research indicates that many asylum seekers require significant time to disclose their experiences, with some taking years to fully articulate their past traumatic events.[161] Additionally, the financial burden of

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154. *Id.* § 1(4).

155. Sec'y of State for the Home Dep't v Nasseri [2009] UKHL 23 [51], [2010] 1 AC 1 (appeal taken from Eng.).

156. European Convention on Human Rights, *supra* note 91, art. 1.

157. Safety of Rwanda Act, § 2(3).

158. *Id.* § 4(1)(a)–(b)

159. *Id.*

160. *Id.* § 4(4).

161. ROSSELLA PULVIRENTI ET AL., MANCHESTER METROPOLITAN UNIVERSITY, THE RWANDA POLICY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: AN ANALYSIS OF UK LEGAL AND POLICY DUTIES 15–16 (2023), https://mcrmetropolis.uk/wp-content/uploads/2024/06/FREESIDE-%E2%80%94-httpsmcrmetropolis.ukwp-contentuploads202312Report-Rwanda-Policy-and-the-ECHR.pdf [https://perma.cc/UC7N-ZRWD] (describing how asylum seekers

obtaining evidence sufficient to meet the threshold of demonstrating "compelling reasons" could have posed a significant barrier. An excessively high evidentiary threshold also could have undermined the effectiveness of individual challenges under the Act, serving as window dressing instead of a meaningful safeguard to protect vulnerable individuals at risk of harm if sent to Rwanda.

The Conservative government's inclusion of statutory language mandating decision-makers conclusively treat Rwanda as a 'safe' third country also exemplifies autocratic practices by centralizing power in the executive branch and curtailing judicial oversight. By barring courts and tribunals from assessing complaints about Rwanda's compliance with international obligations, the policy undermines separation of powers between the UK's executive and judicial branches and violates the ECHR's guarantee of an effective remedy.[162] The doctrine of separation of powers ensures that the powers and responsibilities of the State are appropriately divided among the executive, legislative, and judicial branches.[163] This framework aims to prevent the concentration of power in any single branch, thereby promoting checks and balances and safeguarding democratic governance.[164] While the Act allowed limited challenges in specific cases, excessively high evidentiary thresholds and procedural barriers further restricted asylum seekers' access to justice, reflecting a deliberate erosion of democratic safeguards in favor of executive authority.

2. *Overruling Supreme Court Precedent Through Statutory Language Contrary to Past Judicial Rulings as a Mechanism to Undermine the Judicial Branch*

The Act's directive for decision-makers to unconditionally designate Rwanda as a 'safe' third country starkly contrasts with the Supreme Court's ruling in *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department*. [165] This decision by the Supreme Court,

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impacted by the Rwanda Policy have found it difficult to discuss their experiences due to fear and ongoing trauma).

162. *See* DICEY, *supra* note 138, at 39 (explaining that judicial review in the United Kingdom operates within an uncodified constitutional framework grounded in parliamentary sovereignty and the rule of law, rather than a strict separation of powers, with statutes, common law, and constitutional conventions creating a flexible balance among branches of government); *see also,* ECHR Art. 13

163. HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 50 (12th ed. 2017).

164. *Id.*

165. R (AAA) [2023] UKSC 42.

which found the Rwanda Scheme violated the principle of *non-refoulement*, underscores why the issue of whether a country is indeed safe requires a thorough and proper assessment of an individual's circumstances and the conditions in the destination country. This ensures the individual's transfer does not expose them to risks of persecution, harm, or violations of their fundamental rights. Under the Act, UK government officials were prohibited from taking the necessary steps to adequately assess the risks of transferring individuals to Rwanda in violation of the principle of *non-refoulement*.[166] The Act did not allow officials to undertake a comprehensive evaluation of the conditions in Rwanda or the specific circumstances of individuals as a matter of course before their transfer, undermining the safeguards required to protect asylum seekers from potential harm or persecution.[167] Thus, the Act directly conflicted with the Supreme Court's decision, representing a deeply troubling response that undermined the judiciary's role. By bypassing the judiciary's critical function in assessing the safety of individual asylum seekers, the Act created a legal fiction by fiat, diminished judicial oversight and eroded the balance of power essential for upholding the rule of law.

Furthermore, the Act's explicit prohibition of a comprehensive assessment of the risks asylum seekers face in Rwanda contravened fundamental international principles, such as *non-refoulement*. In doing so, it not only bypassed established human rights protections but also prioritized executive-driven policies aimed at penalizing migrants, a notably vulnerable population, over the rule of law and international legal commitments. These actions signal a deliberate erosion of democratic checks and balances, as the judiciary's critical function in protecting individual rights and reviewing the legality of statutory text is subordinated to the government's political agenda.

Such an approach aligns with the hallmarks of autocratic governance, where power is concentrated in the hands of the executive, and mechanisms for accountability and legal scrutiny are diminished. By creating legal provisions that explicitly prevent courts from fulfilling

166. *See* Safety of Rwanda Act, § 2(4) (stating that in removal proceedings, courts and tribunals must not consider claims that Rwanda might send a person to another state, that a person will not receive fair and proper consideration of an asylum claim in Rwanda, or that Rwanda will not act in accordance with the Rwandan Treaty).

167. *Id.* at § 4(1)-(2) (stating review of the de facto presumption of Rwanda's status as a safe third country contained in § 2 of the Act is limited to instances where a person can present compelling evidence specific to the person's individual circumstances that they would not be safe in Rwanda, a narrow exception with a significantly high burden, and noting assertions of indirect refoulement by Rwanda cannot be presented as compelling evidence Rwanda is not a safe third country based on a person's individual circumstances)

their role of judicial review, the Act undermined key democratic safeguards that ensure fairness, justice, and adherence to international obligations. This erosion of judicial independence and marginalization of legal principles marked a troubling step toward autocratic policymaking.

3. Erosion of Judicial Oversight and Human Rights Safeguards by the ECtHR and the UK's Respect for the Jurisdiction of the ECtHR as a Member of the Council of Europe

Under the Act, a domestic court or tribunal in the UK could grant an interim remedy or a Rule 39 measure, in line with those issued by the ECtHR.[168] However this remedy is limited to instances where the court or tribunal was convinced that the individual would face a real, imminent, and foreseeable risk of serious and irreversible harm if removed to Rwanda.[169] This provision intended to provide a limited safeguard against extreme harm but was constrained by the Act's overall framework, which significantly narrowed the scope of judicial intervention to extraordinary circumstances.[170] Interim measures under Rule 39 are employed only in exceptional and rare circumstances and are a critical tool used by the ECtHR to temporarily halt actions that could lead to severe violations of human rights.[171] These measures are designed to prevent irreparable harm while ensuring there is sufficient time for thorough judicial review and a final judgment on the case.

Additionally, under the Act, the decision to comply with an interim measure issued by the ECtHR regarding the removal of individuals to Rwanda was left solely to the discretion of a UK Government Minister.[172] Courts and tribunals were expressly prohibited from considering or giving regard to such interim measures by the ECtHR in their deliberations. This significantly limited judicial oversight and the

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168. Safety of Rwanda Act, § 4(4); *see also* Rules of Court of the Eur. Ct. H.R., 2025, r. 39 (permitting an applicant to lodge a request for interim measures while a case is pending).

169. Safety of Rwanda Act, § 4(4).

170. *Id.* §§ 4–5.

171. *See* Alice Donald & Joelle Grogan, The UK's ECHR Record: How Common are Rule 39 Orders and How Often is the UK Found to have Violated Rights, UK IN A CHANGING EUROPE (April 4, 2024), https://ukandeu.ac.uk/explainers/the-uks-echr-record-how-common-are-rule-39-orders-and-how-often-is-the-uk-found-to-have-violated-rights/ [https://perma.cc/G3AG-WWC2] (stating that between 2017 and 2023, the ECtHR had granted only 2% of requests for Rule 39 interim measures in UK cases, issuing Rule 39 interim protections in only 15 out of 660 cases and averaging only two Rule 39 interim orders against the UK each year, further underscoring the rare and extraordinary nature of Rule 39 interim orders) .

172. Safety of Rwanda Act, § 5(2)–(3).

influence of international legal protections, concentrated decision-making power in the executive branch and undermined established mechanisms for safeguarding human rights in the UK through international instruments. The Act's failure to specify the circumstances under which a Minister could have disregarded an interim measure issued by the ECtHR also raised serious concerns about potential breaches of Articles 13 and 34 of the ECHR. Article 34 prohibits Contracting Parties from obstructing individuals' right to claim victim status in cases of human rights violations, while Article 13 guarantees the right to an effective remedy before a national authority.[173] Such a measure permitting a UK Government Minister to arbitrarily disregard a ruling issued by the ECtHR would amount to the UK disregarding its treaty obligations as a signatory to the ECHR and member of the Council of Europe.

Prior judicial precedent by the UK Supreme Court also reaffirmed the UK's treaty obligations under the ECHR. In *R (on the application of Begum) v SSHD*, Lord Reed affirmed that the courts are the appropriate forum for determining whether the SSHD has violated section 6 of the HRA 1998.[174] This section of the HRA establishes that it is unlawful for a public authority to act in a way that is incompatible with the ECHR, underscoring the judiciary's critical role in ensuring executive compliance with human rights obligations.

In response to concerns raised by the previous UK Conservative Government, the ECtHR updated its processes on the use of Rule 39 interim measures and confirmed that such measures would only be awarded in exceptional circumstances.[175] This adjustment reflects the ECtHR's effort to address criticisms while maintaining the integrity of its protective mechanisms.

The Act's provisions on interim measures, limiting application of interim measures and allowing UK Ministers to disregard an interim ruling by the ECtHR, represented a significant departure from the UK's commitment to fulfilling its obligations under the ECHR. As outlined earlier, courts or tribunals were permitted to grant an interim remedy only if they were convinced that the individual would face a real, imminent, and foreseeable risk of 'serious and irreversible harm' if offshored to Rwanda.[176] This restrictive threshold limited judicial intervention and reduced the scope for protecting vulnerable individuals,

173. European Convention on Human Rights , *supra* note 91, art. 13, 34.

174. R (on the application of Begum) v Special Immigr. Appeals Comm'n [2021] UKSC 7 [69] (UK).

175. Press Release ECHR 308, Eur. Ct. H.R., Changes to the Procedure for Interim Measures (Rule 39 of the Rules of Court) (Nov. 13, 2023).

176. Safety of Rwanda Act, § 4(4).

raising concerns about the UK's adherence to its human rights obligations under the ECHR.[177]

The definition of 'serious and irreversible harm' in the Act was drawn from section 39(4) to (8) of the Illegal Migration Act 2023, and encompasses death, persecution, torture, and inhuman or degrading treatment or punishment. However, this must be understood in the context of section 3 of the Act, which disapplied key provisions of the HRA 1998, including section 2 (interpretation of Convention rights) and section 3 (interpretation of legislation).[178] Furthermore, the Act also disapplied sections 6 to 9 of the HRA 1998, effectively limiting the influence of the ECHR on the interpretation and application of the law. Section 6 of the HRA 1998 clearly states that it is unlawful for public authorities (courts/tribunals or a body that exercises functions of a public nature) to act contrarily to the ECHR.[179] Also, section 7 of the HRA 1998 states that individuals can lodge legal proceedings against public authorities if they act unlawfully.[180]

The Act's exclusion of most key provisions of the HRA 1998, which codify the ECHR into the UK's domestic law, from applications for interim remedies effectively precluded arguments based on broader human rights grounds.[181] Interim remedies could only be granted if there was a "real, imminent, and foreseeable risk of serious and irreversible harm," a definition that aligns with Articles 2 and 3 of the ECHR but is far narrower than the UK's broader human rights obligations under the ECHR and other international instruments. Crucially, the disapplication of sections 2 and 3 of the HRA 1998 prevented courts from considering ECtHR interpretations of Articles 2 and 3, severely limiting the judiciary's ability to enforce comprehensive human rights protections. This restriction narrowed access to domestic interim relief, likely excluding many individuals facing "real risks" of harm. Consequently, cases involving indirect refoulement from Rwanda to the country where they fear persecution or general conditions in Rwanda could not form the basis for applications for interim remedies. This created a substantial risk that individuals with serious concerns regarding removal from Rwanda and repatriation to the country they fled would not have been able to seek interim measures, leaving them vulnerable to potentially grave outcomes.

177. *Id* § 4(5).
178. *Id.* § 3(2).
179. Human Rights Act 1998, c. 42, § 6(1)–(3) (UK).
180. *Id.* § 7(1).
181. Safety of Rwanda Act, § 3(5).

The Conservative Government, led by Prime Minister Sunak, anticipated that individual challenges to removal under the Act would primarily come from individuals deemed unfit to fly or those with rare medical conditions.[182] This assumption reflects a narrow view of the types of vulnerabilities that could necessitate legal intervention, potentially overlooking the broader spectrum of risks faced by asylum seekers, including psychological trauma, persecution, or conditions in the destination country. By focusing on these limited scenarios, the government downplayed the wider implications of its policies on human rights and access to justice.

Case law presents a position that directly contrasts with the provisions of the Act. In *A.M. v The Netherlands*, the ECtHR ruled that individuals who alleged a violation of their rights under Article 3 of the ECHR due to a planned removal must have access to a remedy with 'automatic suspensive effect.' [183] This means that any removal must be halted until the individual's claims are fully reviewed, ensuring that they are not exposed to potential harm in violation of their Article 3 rights. The Act's failure to provide such an automatic suspensive effect for challenges based on the risk of harm starkly deviated from this established legal principle.

In the immigration law context, the ECHR's guarantee of 'automatic suspensive effect' refers to the principle that, once an appeal against a decision, such as deportation or removal, is filed, the enforcement of that decision is automatically paused until the appeal is resolved. This ensures that individuals cannot be removed or deported while their appeal is under review, giving them a fair opportunity to challenge the decision without the immediate risk of removal. This principle is designed to safeguard individuals' rights and uphold due process. The courts have described it as 'a firmly embedded principle' in case law, underscoring its importance in protecting against potential human rights violations. In *De Souza Ribeiro v France*, the ECtHR emphasized the critical importance of Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment.[184] The Court noted

182. HOME OFFICE, SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) BILL 2023: LEGAL POSITION, 2023-4 (UK), https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-2023-legal-position/safety-of-rwanda-asylum-and-immigration-act-2023-legal-position-accessible [https://perma.cc/95MF-3EVZ].

183. A.M. v. The Netherlands, App. No. 29094/09, ¶ 66 (July 5, 2016), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-164460%22]} [https://perma.cc/X5P3-WE93].

184. De Souza Ribeiro v. France, App. No. 22687/07, ¶ 82 (13 Dec. 2012), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115498%22]} [https://perma.cc/5PLF-56RH].

that, given the irreversible nature of the harm that might occur if the alleged risk of torture or ill-treatment were realized, the effectiveness of a remedy under Article 13 requires that the individual concerned must have access to a remedy with automatic suspensive effect. This ensures that the individual is not subjected to removal while their claim is being reviewed, preserving their fundamental rights and preventing irreversible harm. This Act, however, precluded individuals from obtaining a 'suspensive remedy' from domestic courts, in breach of Articles 13 and 34 of the ECHR.

The risk of asylum seekers being refouled from Rwanda to their home countries could, in principle, be legally challenged domestically under section 4 of the HRA 1998. This section was one of the few provisions of the HRA 1998 that had not been disapplied by the Act, allowing courts to issue declarations of incompatibility. Such a declaration is made when judges determine that a provision of domestic law is inconsistent with the ECHR. However, it is important to note that a declaration of incompatibility does not empower the courts to strike down or invalidate the legislation; it merely highlights the conflict, leaving it to Parliament to decide whether to amend the law.[185] This limitation underscores the constrained role of the judiciary in directly remedying incompatibilities between domestic law and international human rights obligations.[186] Under Section 4 of the HRA 1998, Parliament bears the responsibility for amending domestic legislation to align it with the ECHR.[187] As mentioned above, courts cannot strike down or "invalidate" legislation they find incompatible; they can only issue a declaration of incompatibility, which highlights the defect without affecting the legislation's validity.[188] The defective legislation will continue to apply until Parliament rectifies the defect.[189] Parliament would then be required to determine whether Rwanda was 'safe' because a declaration of incompatibility does not affect the validity of the legislation. Thus, the courts would have continued to apply the Act and transfers would have continued.

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185. BARNETT, *supra* note 164, at 84.

186. *See* Ayesha Riaz, *Sections 3 and 4 of the Human Rights Act and their Impact on the United Kingdom's Constitutional Arrangements*, 1 QUEEN MARY L.J. 133, 144–45 (2021) (stating that a court declaration does not affect validity of an Act).

187. *See* BARNETT, *supra* note 164, at 84 (describing how a declaration of incompatibility signals misalignment with the ECHR while leaving it to Parliament to decide whether and how domestic legislation should be amended to achieve compliance).

188. *See* Riaz *supra* note 187, at 133–35.

189. *Id.* at 134.

In summary, by excluding judgments, decisions, declarations, or advisory opinions of the ECtHR, the Act effectively removed a fundamental component of the HRA 1998 that is essential for determining whether an individual's human rights, as upheld by the ECtHR, have been violated. By disapplying critical aspects of the HRA that safeguard access to these rights, the Act demonstrated a disregard for the ECHR, which is intended to protect the fundamental rights of asylum seekers and migrants in the UK. This approach undermined the broader framework of human rights protections and raised serious concerns about compliance with international obligations.

The Act's provisions on interim injunctions and the disapplication of key elements of the HRA 1998 illustrated autocratic tendencies by centralizing authority in the executive branch and limiting judicial oversight. By granting ministers discretion over compliance with ECtHR interim measures and excluding courts from considering such measures, the Act undermined judicial independence and access to remedies. The disapplication of sections of the HRA 1998 further eroded protections, as it prevented courts from interpreting legislation in line with the ECHR, excluding principles like 'automatic suspensive effect' recognized in ECtHR case law. This concentration of power marginalized the judiciary, prioritized political objectives over human rights obligations, and exemplified how domestic legislation could undermine democratic accountability and the rule of law, all hallmarks of an autocratic shift.

D. Future Risk that the UK Could Reimplement the Rwanda Scheme or Similar Autocratic Policy Targeting Migrants

While the Safety of Rwanda (Immigration and Asylum) Act did not take full effect prior to the election of the current Labour Government in the UK in July 2024 and was formally repealed by the UK Parliament in December 2025, there are several key warnings from the Act that should not be ignored. First, the Act underscored the ease with which the Prime Minister, in the UK's parliamentary system, could consolidate power under the executive branch and curtail the power of the judicial branch within the UK system. Additionally, the Act's provisions limiting judicial review further underscores limitations of the judiciary in providing comprehensive human rights protections, highlighting the flexible nature of the UK's uncodified constitution. The Act also demonstrated how, in the absence of entrenched constitutional safeguards, a future Parliament retains the authority to disapply or amend any part of the HRA 1998 and the UK's adherence to the ECHR, reflecting the primacy of parliamentary sovereignty in the UK's constitutional structure.

In the end, the only thing that prevented the Act from taking effect was the July 4, 2024 election and transfer of government control in the UK from the Conservative Party to the Labour Party, led by current Prime Minister Keir Starmer. The Act's provisions chipping away judicial review as a democratic safeguard set an especially dangerous precedent, leaving elections and the will of the voters as the only safeguard to prevent authoritarian policies from taking effect in the UK.

Contrasting this result with the U.S. also provides a glimpse of an alternate parallel track of what could have happened in the UK had the Conservative Party retained control following the July 2024 election. As will be discussed further below, unlike the Safety of Rwanda (Immigration and Asylum) Act, the MPP program in the U.S. was allowed to take effect in 2019, resulting in grave harm to thousands of asylum seekers subjected to this policy. Additionally, the rise of the administrative state in the U.S. over the past two decades, vesting vast authority under the President and executive branch, particularly in areas like immigration, illustrates the dangers of vesting too much power under the executive branch as was attempted by the Act. This can be seen in the U.S. through President Trump's use of executive authority to implement sweeping changes to immigration policy during his first term.[190] This ultimately paved the way for President Trump's vast agenda of immigration executive actions[191] and the dramatic increase in

190. *See generally* JESSICA BOLTER ET. AL., MIGR. POL'Y INST., FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY (Feb. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf [https://perma.cc/8WC2-CWSR] (illustrating how the MPP program was implemented through executive authority in 2019 and allowed to operate despite documented harms to asylum seekers, reflecting the risks of concentrating immigration power in the executive).

191. Since the start of President Trump's second term in January 2025, the Trump Administration has issued a series of Executive Orders and Presidential Proclamations on immigration policy, including border security, expansion of expedited removal, reinterpretation of the birthright citizenship clause and imposition of a new travel ban. *See e.g.,* Exec. Order No. 14159, Protecting the American People Against Invasion, 90 Fed. Reg. 8,443 (Jan. 29, 2025) (mandating heightened immigration enforcement by directing federal agencies to prioritize detention and removal of inadmissible and removable noncitizens and to rescind prior enforcement limitations through executive authority); Exec. Order No. 14160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8,449 (Jan. 29, 2025) (directing federal agencies to restrict birthright citizenship by denying recognition and documentation of U.S. citizenship for children born in the United States if neither parent is a U.S. citizen or lawful permanent resident under a new interpretation of the Fourteenth Amendment's jurisdiction clause); Proclamation No. 10949, Restricting the Entry of Foreign Nationals to Protect the United States From Foreign Terrorists and Other National Security and

immigration enforcement by the Department of Homeland Security (DHS) within the U.S. interior since the start of President Trump's second term.[192] These executive actions have become increasingly authoritarian in nature and illustrate a concerning departure from the U.S. system of federalism, respecting the authority of state and local governments under the 10th Amendment of the U.S. Constitution[193], and erosion of civil liberties, including the right of migrants to procedural due process.[194]

V. EXTERNALIZATION POLICY THROUGH BILATERAL

Public Safety Threats, 90 Fed. Reg. 24,297 (June 10, 2025) (mandating restrictions on the entry of foreign nationals from designated countries by suspending or limiting immigrant and nonimmigrant visas on national security and public-safety grounds to prevent individuals deemed a threat from entering the United States).

192. *See,* José Olivares, *Trump Administration Sets Quota to Arrest 3,000 People a Day in Anti-Immigration Agenda,* THE GUARDIAN (May 29, 2025), https://www.theguardian.com/us-news/2025/may/29/trump-ice-arrest-quota#:~:text=Trump%20administration%20sets%20quota%20to,agenda%20%7C%20US%20immigration%20%7C%20The%20Guardian [https://perma.cc/Y6YJ-J2ZW] (noting that DHS directed ICE to meet aggressive daily arrest quotas, leading to a sharp escalation of interior immigration enforcement under President Trump's second term).

193. *See* Lazaro Gamio & Chris Hippensteel, *How and Where the National Guard has Deployed to U.S. Cities,* N.Y. TIMES (Oct. 27, 2025), https://www.nytimes.com/interactive/2025/10/27/us/us-national-guard-deployments.html [https://perma.cc/KB37-UKV3] (discussing deployment of the National Guard by the Trump Administration to U.S. cities over the objections of state governors) ; Estelle Timar-Wilcox, *U.S. Justice Department Sues Minnesota, Minneapolis, St. Paul Over Immigration Enforcement Policies,* MPR NEWS (Sept. 30, 2025), https://www.mprnews.org/story/2025/09/30/doj-sues-over-sanctuary-city-policies-in-minnesota-minneapolis-st-paul [https://perma.cc/PK4H-GWJW] (discussing September 2025 suit by the U.S. Department of Justice (DOJ) against the state of Minnesota, Hennepin County (Minnesota's most populous county where Minneapolis is located) and the cities of Minneapolis and St. Paul over their separation policies limiting state and local cooperation with federal immigration enforcement).

194. *See generally* Noem v. Vasquez Perdomo, ___ U.S. ___ (2025) (interim U.S. Supreme Court Order granting a stay and lifting a lower court injunction that prevented the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) from detaining individuals based on reasonable suspicion they were present in the U.S. unlawfully based on factors including race, language spoken, occupation and presence in a particular area frequented by immigrants); DHS v. D.V.D., ___ U.S. ___ (2025) (interim U.S. Supreme Court Order granting a stay and lifting a lower court injunction that required DHS to provide non-citizens with written notice and the opportunity to raise a claim under the Convention Against Torture (CAT) before executing a third country removal).

COOPERATION WITH MEXICO

Similar to the EU and UK, the U.S. government has adopted a number of formal and informal policies to externalize migration control. While use of bilateral externalization agreements in the U.S. has increased exponentially under the second Trump administration, namely through third country removal agreements[195] and Asylum Cooperative Agreements (ACA's),[196] historically, most U.S. externalized migration enforcement policies have been enacted in cooperation with Mexico. Prior to the 2008 global recession, Mexico was primarily a country of emigration to the U.S. and its cooperative efforts with the U.S. on migration were aimed at facilitating repatriation of Mexican nationals deported by the U.S. government.[197] However, over the past twenty years as Mexico has shifted from being a country of emigration

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195. *See, e.g.,* Amy Fischer, *Third-Country Deportations: Another Cruel Piece of President Trump's Anti-Immigrant Agenda,* AMNESTY INT'L (Sept. 18, 2025), https://www.amnestyusa.org/blog/third-country-deportations-another-cruel-piece-of-president-trumps-anti-immigrant-agenda/ [https://perma.cc/K5U7-HQJ4] (describing Trump Administration's use of third country removal agreements to deport over 8,000 immigrants, as of July 2025, to third countries where they do not hold citizenship or nationality).

196. The Trump administration also revived use of Asylum Cooperative Agreements (ACA's), or Safe Third Country Agreements (STCA's), which were first implemented in 2019 by the first Trump Administration through interim final rule. During the first Trump Administration, the U.S. signed ACA with Guatemala, El Salvador and Honduras and as of December 2025, the U.S. has announced ACA/STCA's with the governments of Canada, Guatemala, Honduras, Uganda, Belize, Paraguay, and Ecuador. *See* AM. IMMIGR. COUNCIL, FACT SHEET: THIRD-COUNTRY REMOVALS IN UNITED STATES IMMIGRATION POLICY 3 (Dec. 2025) [hereinafter AIC THIRD COUNTRY REMOVALS FACTSHEET], https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/12/Third-Country-Removals-Factsheet_1225.pdf [https://perma.cc/K5MY-H9XQ] (discussing the first Trump Administration's establishment of Asylum Cooperative Agreements (ACA's) in 2019 with Guatemala, Honduras and El Salvador and revived use of ACA's by the second Trump Administration in 2025); *see also Banished by Bargain: Third Country Deportation Watch*, REFUGEES INT'L & HUM. RTS. FIRST [hereinafter *RI & HRF Third Country Deportation Watch*], https://www.thirdcountrydeportationwatch.org [https://perma.cc/6TXY-A5CH] (last visited Dec.5, 2025) (describing various agreements between the U.S. and third countries to accept immigrants removed from the U.S. including, agreements to incarcerate immigrants until their eventual onward transfer with El Salvador, Eswatini and South Sudan, agreements for temporary transfer before repatriation to their home countries with Poland, Uzbekistan, Costa Rica, Ghana and Panama, ACA's with Belize, Ecuador, Guatemala, Honduras, Paraguay and Uganda and other third country removal agreements with Guatemala, Mexico and Rwanda).

197. Francisco Alba, *Mexico at a Crossroads Once More: Emigration Levels Off as Transit Migration and Immigration Rise*, MIGR. POL'Y INST. (May 23, 2024), https://www.migrationpolicy.org/article/mexico-crossroads-emigration-transit [https://perma.cc/B2YB-4QLS].

to a country of transit to the U.S., the Mexican government has dramatically increased migration control at the Mexico-Guatemala border and within its own territory.[198] This increased migration control by the Mexican government has largely been undertaken in response to diplomatic pressure by the U.S. government, under both Republican and Democratic administrations.[199] Additionally, as will be described in later sections below, the Mexican government's actions to facilitate U.S. immigration enforcement have expanded exponentially since 2016.

Since 2016, the U.S. Government has engaged in various actions to prevent individuals from reaching US soil to exercise their right to seek asylum. These measures, which began in earnest under the President Trump's first term, served as a test case of autocratic policy limiting the rights of asylum seekers as a marginalized population. Additionally, the continuation of these policies by the Biden Administration exemplifies the willingness of both parties in the U.S. to enact draconian immigration enforcement measures when politically convenient.

With respect to the U.S. government's efforts to limit entry of migrants and asylum seekers, these measures are often undertaken in cooperation with the government of Mexico. These actions by the Mexican government to facilitate U.S. immigration enforcement include both passive measures, namely consenting to actions by the U.S. government requiring Mexico's cooperation, and active measures to increase immigration enforcement within Mexican territory.[200] This

198. *Id.*

199. *Id.*

200. Examples of these policies, enacted under both the first Trump and Biden administrations in cooperation with the Mexican government include: Title 42, a policy implemented in March 2020 at the beginning of the COVID-19 pandemic to block the entry of migrants on public health grounds; the DHS and DOJ *Circumvention of Lawful Pathways* Asylum Final Regulations, published in the Federal Register on May 11, 2023; and President Biden's June 3, 2024 *Securing the Border* Presidential Proclamation. *See generally* Suzanne Gamboa, *What to Know About Title 42: How its end Could Affect Immigration,* NBC NEWS (May 10, 2023), https://www.nbcnews.com/news/latino/title-42-end-covid-ban-migrants-border-immigration-rcna61803 [https://perma.cc/A3GK-TW47] (discussing the Title 42 Policy permitting the summary expulsion of migrants to Mexico or their country of origin without conducting an asylum or credible fear screening on public health grounds during the COVID-19 Public Health Emergency); U.S. DEP'T OF HOMELAND SEC., FACT SHEET: CIRCUMVENTION OF LAWFUL PATHWAYS FINAL RULE (May 11, 2023) [hereinafter LAWFUL PATHWAYS FACT SHEET], https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule [https://perma.cc/FG27-L9FD] (discussing the Circumvention of Lawful Pathways Asylum Regulations, which required asylum seekers to schedule an appointment to request asylum at a U.S. land port of entry using the CBP One

section will discuss two of these measures, turnbacks and metering of asylum seekers[201] and the Migrant Protection Protocols (MPP)[202] which are similar in nature to externalization policies by Spain and the UK discussed in previous sections of this article.

As a signatory to the 1967 Protocol, codified in its domestic law in the Refugee Act of 1980,[203] these measures arguably violate the U.S. government's obligations to offer protection to those fleeing persecution[204] and the *non-refoulement* principle to not return individuals to a country where they would face harm.[205] One limitation that distinguishes the U.S. from Spain and the UK, as members of the Council of Europe subject to the ECtHR's jurisdiction, is that the U.S. is not a party to the International Criminal Court (ICC), Inter-American Court of Human Rights (IACtHR) or any other international human rights tribunal.[206] However, these policies, enacted by the Trump and

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smartphone app and declared those who entered unlawfully to be presumptively ineligible for asylum, with limited exceptions); Proclamation No. 10773, Securing the Border, 89 Fed. Reg. 48,487 (June 7, 2024) (Presidential Proclamation and Interim Final Rule to temporarily suspend and limit the entry of certain non-citizens during periods of high border apprehensions and presumptive ban on asylum eligibility for individuals who entered the U.S. unlawfully and failed to request asylum at U.S. land port of entry through CBP One App appointment process).

201. *See also Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers,* AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers [https://perma.cc/LYA9-LBN3] (describing incidents of turnbacks of asylum seekers under the metering policy).

202. *See* Memorandum from Kristjen M. Nielsen, Sec'y, Dep't of Homeland Sec., to Comm'r U.S. Customs & Border Prot. Et. al., Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019) [hereinafter MPP Policy Guidance Memo], https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/5NJL-M7SS] (calling for the protection of Migrant Protection Protocols).

203. *See generally* Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (1980), https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf [https://perma.cc/YQ33-W9DK] (bringing U.S. refugee and asylum law into conformity with the 1967 Protocol).

204. 8 U.S.C. § 1158(a)–(b) (2022).

205. *Id.* § 1231(b)(3)(A).

206. While the U.S. is party to international and regional transnational organizations including the United Nations Security Council (UNSC) and the Organization of American States (OAS), has limited engagement with the Inter-American Commission on Human Rights (IACHR) as an OAS member, the U.S. is not party to the International Criminal Court or the Inter-American Court of Human Rights (IACtH). In the case of the IACHR and IACtHR, because the U.S. has not ratified the American Convention on Human Rights, any findings of human rights abuses and recommendations issued by IACHR are non-binding on the U.S. and the U.S. is not subject to the

Biden Administrations through executive action , have been challenged domestically in U.S. Federal Court as violations of U.S. domestic law governing asylum.[207] Nonetheless, these measures were allowed to go into effect or continue as their legality was determined by the courts.[208]

A. Turnbacks and Metering of Asylum Seekers at the U.S./Mexico Border

Practices limiting asylum seekers' access to U.S. Ports of Entry through measures like turnbacks and metering have been a pervasive

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jurisdiction of the IACtHR. *See generally International Criminal Court Project: The US-ICC Relationship,* A.B.A., https://web.archive.org/web/20250915071009/https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ [https://perma.cc/QY7Y-JAK9] (last visited Oct. 4, 2025) (summarizing the United States' historical relationship with the International Criminal Court and its positions on U.S. participation and cooperation); MICHAEL CAMILLERI & DANIELLE EDMONDS, THE DIALOGUE, AN INSTITUTION WORTH DEFENDING: THE INTER AMERICAN HUMAN RIGHTS SYSTEM IN THE TRUMP ERA (June 2017), https://thedialogue.org/wp-content/uploads/2024/12/IACHR-Working-Paper_Download-Resolution.pdf [https://perma.cc/YM42-YMN8] (discussing first Trump Administration's failure in 2017 to send delegates representing the U.S. to the IACHR, the lack of engagement by the U.S. in the IACHR under the first Trump Administration, and how U.S. is not party to American Convention on Human Rights (ACHR) and not subject to the jurisdiction of IACtHR).

207. With respect to DHS agency action under the Trump and Biden Administrations limiting access to asylum, the legal challenges to these administrative actions argued they were an unlawful ultra vires use of executive authority in violation of sections 208 and 241(b)(3) of the Immigration and Nationality Act (INA) and other sections of the U.S. Code. *See e.g.,* Al Otro Lado, Inc. v. Mayorkas, No. 17-cv-02366, 2022 WL 3970755 (S.D. Cal. Sept. 1, 2022); (challenging the government's practice of turning away asylum seekers at ports of entry as unlawful under the INA and the Refugee Act); Complaint for Declaratory and Injunctive Relief, Innovation Law Lab v. Nielsen, No. 19-cv-00807 (N.D. Cal. Feb. 14, 2019) (challenging the Trump Administration's policy of forcing asylum seekers to return to danger in Mexico while they await their removal proceedings).

208. *See e.g., Al Otro Lado, Inc.*, 2022 WL 3970755 (class action suit challenging legality of the turnback and metering policies at U.S. ports of entry beginning in 2016); *Innovation Law Lab*, No. 19-cv-00807 (challenging Migrant Protection Protocols (MPP) policy requiring asylum seekers to remain in Mexico pending adjudication of their asylum claims); P.J.E.S. v. Mayorkas, 652 F. Supp. 3d 103 (D.D.C. 2023) (challenging orders under 42 U.S.C. § 265 that authorized the expulsion of certain noncitizens, including unaccompanied children, on public health grounds.); Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146 (D.D.C. 2021) (granting motion for class certification for a group of asylum seeking families who alleged that CDC orders–Title 42 Process–subjecting them to summary expulsion were unlawful).

issue since 2016 that have only worsened in the intervening years.[209] These measures, undertaken in cooperation with Mexico, reflect a fundamental shift by the U.S. in respecting the right to lodge an asylum claim at U.S. Ports of Entry, particularly along the U.S. southern land border with Mexico.[210] Additionally, turnbacks, metering and similar policies described further below share many similarities to the Spanish externalization policies of pushbacks and expedited returns of migrants to Morocco and other countries through formal and informal bilateral agreements, previously discussed in this article. Similar to what has been observed in Spain and the EU, the U.S. policies of turnbacks and metering of asylum seekers have been justified as "politically necessary" to control migration flows into the U.S., reflecting how political interests in limiting migration supersede protection of the fundamental human rights of migrants.

1. Initial Reports of Turnbacks at the U.S./Mexico Border and Beginning of the Metering Policy – 2016-2017

Beginning in 2016, reports emerged of US Customs and Border Patrol (CBP) agents turning away asylum seekers presenting themselves at U.S. Land Ports of Entry at the southern border with Mexico. Reports of turnbacks first emerged in the spring and summer of 2016 and were documented in a July 27, 2016 letter by Human Rights First[211] to DHS Deputy Secretary Alejandro Mayorkas and CBP Commissioner R. Gil Kerlikowske.[212] This letter described asylum seekers from Mexico, Haiti, Cuba and Guatemala being turned away by CBP agents at the San Ysidro Port of Entry, near San Diego, California, and being told the U.S. is not giving asylum anymore.[213] A second letter submitted

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209. *See generally* BOLTER ET. AL., *supra* note 191, at 16–19 (providing comprehensive overview of border security and restrictions on the right to asylum during the first Trump Administration, ranging from turnbacks and metering, the asylum transit ban, the Migrant Protection Protocols and Title 42 Expulsions during the COVID-19 pandemic).

210. *Id.*

211. *See* Human Rights First, https://humanrightsfirst.org/ [https://perma.cc/3B5Z-HZVH] (last visited Nov. 27, 2025) (describing itself as an international non-governmental organization whose stated mission is to ensure the US is a global leader on human rights, working both domestically and abroad to promote respect for human rights and the rule of law).

212. *See Letter to Deputy Secretary Mayorkas and Commissioner Kerlikowske – San Ysidro Border,* HUM. RTS. FIRST (July 27, 2016), https://humanrightsfirst.org/library/letter-to-deputy-secretary-mayorkas-and-commissioner-kerlikowske-san-ysidro-border/ [https://perma.cc/KFX4-HSUB] (documenting case examples of turnbacks at ports of entry on the U.S.-Mexico border).

213. *Id.*

on January 17, 2017 by the American Immigration Council (AIC)[214] to the DHS Officer for Civil Rights and Civil Liberties and DHS Inspector General documented similar instances of asylum seekers being turned away by CBP agents in the summer and fall of 2016 at U.S. Ports of Entry across the U.S./Mexico border.[215]

With the inauguration of Donald Trump as President on January 20, 2017, the practice of turnbacks became pervasive at land ports of entry across the U.S. southern border.[216] Starting in November 2016, shortly after the election of President Trump to his first term and seemingly emboldened by the change in administration, some CBP agents reportedly told asylum seekers " Trump says we don't have to let you in" or " the U.S. is not processing asylum for people from your country."[217] By February 2017, shortly after President Trump's inauguration, turnbacks of asylum seekers became endemic, occurring with varying levels of frequency at ports of entry along the U.S. southern border.[218] Equally troubling, many asylum seekers subjected to turnbacks in 2016 and 2017 also reported that officers from the Mexican agencies Instituto Nacional de Migracion (INM) and Grupos Beta[219]

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214. *See* American Immigration Council, https://www.americanimmigrationcouncil.org/about-us/ [https://perma.cc/6FVJ-X93M] (last visited Dec. 21, 2025) (describing itself as a nonpartisan U.S. public policy organization affiliated with the American Immigration Lawyers Association, the national professional association of immigration attorneys).

215. *See* AM. IMMIGR. COUNCIL, LETTER TO DHS OFFICER FOR CIVIL RIGHTS AND CIVIL LIBERTIES AND DHS INSPECTOR GENERAL REGARDING U.S. CUSTOM AND BORDER PROTECTION'S SYSTEMIC DENIAL OF ENTRY TO ASYLUM SEEKERS AT PORTS OF ENTRY ON U.S.-MEXICO BORDER, (Jan. 13, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf [https://perma.cc/5ZLR-V6ZZ] (documenting reported turnbacks of asylum seekers at specific ports of entry near McAllen, Laredo, and El Paso, Texas, as well as at the San Ysidro and Otay Mesa crossings near San Diego, California).

216. *See* B. SHAW DRAKE, ELEANOR ACER & OLGA BYRNE, HUM. RTS. FIRST, CROSSING THE LINE – U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 1, 6 (Meredith Kucherov, David Mizner & Jennifer Quigley eds., 2017) [hereinafter HRF MAY 2017 REPORT], https://humanrightsfirst.org/wp-content/uploads/2022/10/hrf-crossing-the-line-report.pdf [https://perma.cc/46GM-8MLJ] (reporting observations of and interviews with numerous asylum seekers being turned away by immigration agents at land ports of entry along the U.S.-Mexico border in Texas, Arizona, and California).

217. *Id.* at 6.

218. *See id. at 5 (outlining reports of asylum seekers increasingly being turned away at various land ports of entry along the southern bo*rder).

219. *See Grupos Beta de Protección a Migrantes* [*Beta Groups for the Protection of Migrants*], GOBIERNO DE MÉXICO, INSTITUTO NACIONAL DE MIGRACION (Aug. 17, 2022),

had blocked them from approaching U.S. ports of entry to request asylum.[220] These reports from 2016 and 2017 of Mexican agents preventing migrants from approaching U.S. territory to request asylum were the first indication of the Mexican government's collusion with CBP in its turnback policy.

In conjunction with turnbacks, in 2016 CBP agents at the San Ysidro Port of Entry began the practice of "metering," where CBP agents would limit the total number of individuals permitted to request asylum at the port of entry each day. Initially, the metering system established in 2016 by CBP at the San Ysidro Port of Entry was created in partnership with Mexican government officials and local NGO s to manage the entry and processing of Haitian asylum seekers.[221] At the time, application of the metering policy to Haitian immigrants was justified by the increased arrival of Haitians, previously in Brazil as migrant workers, and limited resources, namely Haitian Creole language resources, to complete initial processing of their cases.[222] Nonetheless

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https://www.gob.mx/inm/acciones-y-programas/grupos-beta-de-proteccion-a-migrantes [https://perma.cc/38S6-HSLL] (describing INM as the Mexican government agency responsible for regulating migration, and Grupos Beta as its specialized unit tasked with migrant protection and humanitarian assistance within Mexico).

220. *See* HRF MAY 2017 REPORT, *supra* note 217, at 10 (documenting several instances of Mexican immigration agents from Instituto Nacional de Migracion (INM) and Grupos Beta preventing and discouraging migrants from approaching ports of entry, including instances of physically blocking migrants from reaching U.S. ports of entry to request asylum).

221. *See* Sandra Dibble, *Surge of Haitians at San Ysidro Port of Entry*, THE SAN DIEGO UNION-TRIB. (May 26, 2016 at 09:21 PDT), https://www.sandiegouniontribune.com/news/border-baja-california/sdut-haitians-flood-san-ysidro-port-entry-2016may26-story.html [https://perma.cc/RJM4-NQBD] (explaining that, according to 2016 news reports and statements by Mexico's National Migration Institute (INM), the metering system was created to manage a surge in Haitian asylum seekers at the San Ysidro port of entry by requiring Haitians to obtain a numbered "ticket" from INM agents—working in coordination with U.S. Customs and Border Protection (CBP)—to hold their place in line to request asylum); *see also* HRF MAY 2017 REPORT, *supra* note 217, at 13 (describing the metering system established in 2016 at the San Ysidro, CA Port of Entry for processing Haitian asylum seekers); STEPHANIE LEUTERT, ET. AL, ROBERT STRAUSS CENTER FOR INT'L SECURITY AND LAW, ASYLUM PROCESSING AND WAITLISTS AT THE U.S.-MEXICO BORDER 1, 5–6, 8 (University of Texas at Austin, Dec. 2018) [hereinafter UT ASYLUM PROCESSING AND WAITLISTS REPORT], https://philosophy-of-movement.com/wp-content/uploads/2018/12/asylumreport-2018.pdf [https://perma.cc/SB96-AGM3] (describing the metering of Haitian asylum seekers at the San Ysidro, CA Port of Entry in 2016 and reports dating back to May 2016 documenting use of a similar metering system for Haitian asylum seekers at the Nogales, AZ, El Paso, TX and Brownsville, TX Ports of Entry) .

222. UT ASYLUM PROCESSING AND WAITLISTS REPORT, *supra* note 222, at 6, 10–11.

the anti-Black optics of singling out Haitian immigrants for metering are impossible to ignore.

However, by mid-2017, the practice of metering at the San Ysidro PedWest pedestrian port of entry was expanded to cover all asylum seekers, regardless of country of origin, significantly limiting the total number of individual asylum seekers allowed to enter the U.S. and be processed per day.[223] This expansion of metering at the San Ysidro port of entry in 2017 to all asylum seekers disproportionately impacted Latino immigrants from Mexico and the Northern Triangle countries of Guatemala, Honduras and El Salvador, the countries with the highest number of southern border apprehensions in 2016 and 2017.[224] Around the same time, CBP officials in the San Diego Border Sector closed the other two U.S. pedestrian land ports of entry near Tijuana, Mexico, the San Ysidro PedEast and Otay Mesa Ports of Entry, to asylum seekers.[225] Following this change, migrants who approached the San Ysidro PedEast and Otay Mesa Ports of Entry to request asylum were turned away and redirected to the San Ysidro PedWest Port of Entry, where they were then subjected to metering.[226] Mexican military and immigration agents also blocked asylum seekers from approaching the Otay Mesa and San Ysidro PedEast and PedWest ports of entry near Tijuana to ensure migrants complied with CBP's metering system at the San Ysidro PedWest Port of Entry.[227]

In the summer of 2017, in response to metering, a group of asylum seekers in Tijuana awaiting their turn to enter under the metering policy, together with Grupos Beta, created a waiting list to manage entry of asylum seekers into the U.S. on a first come first serve basis.[228] The Tijuana asylum list was retained in a notebook held by the Mexican agency, Grupos Beta, and managed by a group of volunteer asylum seekers, who would distribute numbers to arriving asylum seekers and add their name to the list.[229] While the asylum seekers created and managed the list, the Mexican government, through Grupos Beta, played a key role in facilitating the metering system by serving as a liaison between CBP and the asylum seekers waiting to enter the U.S. Under this system, CBP communicated how many asylum seekers they could

223. *Id.*, at 10–11.

224. U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER APPREHENSIONS FY 2021 28-33 (Aug. 2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF [https://perma.cc/S22N-VVNQ].

225. *Id.*

226. *Id.*

227. HRF MAY 2017 REPORT, *supra* note 217, at 10.

228. UT ASYLUM PROCESSING AND WAITLISTS REPORT, *supra* note 222, at 10.

229. *Id.*

accept that day to Grupos Beta, who would then communicate this to the volunteers managing the asylum list.[230] After confirming the final number of entrants with Grupos Beta, the volunteer asylum seekers managing the list would announce the names of those allowed to enter the U.S. and request asylum that day.[231] However, for the thousands of migrants forced to wait in dangerous conditions in Northern Mexico, the metering policy led to grave consequences.[232] According to reporting from various NGO's, many asylum seekers subjected to the metering policy experienced abduction, extortion, sexual assault and other forms of violence while waiting to enter the U.S. to pursue their asylum claim.[233]

2. *Expansion of Metering to Entire U.S./Mexico Border and Role of Metering in Exacerbating the 2018 Zero Tolerance Policy and Family Separation Crisis*

In May 2018, the Trump Administration expanded the use of metering to all U.S. Southwest Border Sectors across the 3,100 kilometer U.S.-Mexico border.[234] Under this expansion of metering, all Southwest Border Sectors designated a single port of entry for processing of asylum claims, closed all other land ports to asylum seekers and reduced the number of asylum seekers processed at designated ports to twenty or fewer individuals each day.[235] As part of this policy, land ports of entry began stationing CBP agents on pedestrian land bridges at the U.S.-Mexico international boundary to check immigration documents of border crossers and turn away asylum seekers before they

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230. *Id.* at 10–11.

231. *Id.*

232. *See id.* at 15–17 (reporting that asylum seekers in Northern Mexico faced abduction, extortion, sexual assault, and other forms of violence).

233. *Id.*

234. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-21-02, CBP HAS TAKEN STEPS TO LIMIT PROCESSING OF UNDOCUMENTED ALIENS AT PORTS OF ENTRY 6-7 (2020) [hereinafter 2020 OIG REPORT], https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf [https://perma.cc/CQW6-K7GE] (describing how in May 2018 DHS, at the direction of DHS Secretary Nielsen, implemented the metering policy, referred to as "queue management" across the U.S. southwest border and redirected resources at U.S. ports of entry to significantly limit the total number of asylum seekers processed each day); *see also* James Frederick, *'Metering' At The Border*, NPR (June 29, 2019), https://www.npr.org/2019/06/29/737268856/metering-at-the-border [https://perma.cc/ZHY7-V29W] (describing the Trump administration's implementation of metering as an official policy in April 2018, expanding what had previously been an ad hoc practice under the Obama administration).

235. UT ASYLUM PROCESSING AND WAITLISTS REPORT, *supra* note 224, at 4–5.

reached U.S. soil and triggered the U.S. government's obligation under INA § 208 to process their asylum claims.[236]

This expansion of metering also coincided with the April 6, 2018 announcement by Attorney General Jeff Sessions of the " Zero Tolerance Policy" requiring prosecution of all migrants unlawfully entering U.S. territory for the federal misdemeanor offense of illegal entry.[237] As the systematic practice of turnbacks and metering was implemented across all Southwest Border Sectors, DHS Secretary Kirstjen Nielsen minimized reports of asylum seekers being turned away at ports of entry and referred to metering as "queue management" only employed on an emergency basis.[238] Secretary Nielsen also advised migrants to request asylum at ports of entry to avoid prosecution under the Zero Tolerance Policy.[239]

In reality, asylum seekers faced the "Catch-22" of either presenting themselves at a port of entry, where they were subjected to metering and forced to wait for weeks or months in Northern Mexico, or unlawfully crossing the border to reach safety in the U.S., risking prosecution for illegal entry under Zero Tolerance. The expanded practice of metering also worsened the family separation crisis in May and June of 2018 by driving migrant family units with young children to unlawfully cross between ports of entry. In essence, the expansion of metering drove up the number of parents who opted to cross and enter unlawfully with their children, which then increased the total number of parents who were prosecuted for illegal entry under Zero Tolerance and forcibly separated from their children under the Family Separation Policy.[240] By the time the Family Separation Policy was formally suspended by Executive Order on June 20, 2018, approximately 3,000 children had been separated from their parents, including many

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236. *Id.* at 3–4.

237. Press Release, U.S. Dep't of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (May 7, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/5DN2-JR2J].

238. 2020 OIG REPORT, *supra* note 236, at 8.

239. *Id.*

240. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf [https://perma.cc/AUJ6-FZHH] (describing how, following a parent's arrest under Zero Tolerance, children forcibly separated from their parents were processed by CBP as unaccompanied minors and transferred to ORR custody within HHS, where they were placed in youth shelters until release to a U.S.-based sponsor).

children who had been subjected to both metering and the Family Separation Policy.[241]

3. Additional Measures Under the Trump and Biden Administrations Limiting Access to Asylum at the U.S./Mexico Border and Legal Challenges to These Policies

The use of turnbacks and metering at ports of entry continued in various forms under both the Trump and Biden Administrations. Between March 2020 and May 2023, the primary mechanism for turning away asylum seekers was Title 42, a policy implemented during the COVID-19 pandemic allowing expulsion of migrants from U.S. territory without undergoing an asylum screening on public health grounds.[242] Despite President Biden's campaign promises to welcome asylum seekers with dignity, the Biden Administration retained and expanded measures limiting the right of migrants to request asylum at ports of entry. While the Biden Administration formally rescinded the Trump Administration's metering policy in November 2021[243] and permitted exemptions from Title 42 in limited cases, President Biden kept Title 42 in place until May 11, 2023, the sunset date of the COVID-19 public health emergency.[244] On May 16, 2023, following the end of Title 42, the Biden Administration also promulgated final regulations requiring migrants to schedule an appointment using the CBP One Smartphone App to request asylum at a port of entry.[245] Under this process, asylum seekers with a CBP One App appointment would

241. Caitlin Dickerson, *We Need to Take Away Children: The Secret History of the U.S. Government's Family-Separation Policy,* THE ATL., (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/ [https://perma.cc/2GRH-E7LX].

242. Gamboa, *supra* note 201.

243. *See* Memorandum from Troy A. Miller, Acting Comm'r, U.S. Customs & Border Prot., to All Office of Field Operations Employees, Guidance for Management and Processing of Noncitizens at Southwest Border Land Ports of Entry (Nov. 1, 2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf. [https://perma.cc/8X9W-FASG].

244. *See* Elliot Spagat, *What is Title 42 and how has the US used it to curb migration?,* ASSOCIATED PRESS (May 11, 2023, at 4:14 EST), https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbefb798d [https://perma.cc/27QK-KRZA] (detailing the process and timeline of Title 42's lift in 2023).

245. *See* LAWFUL PATHWAYS FACT SHEET, *supra* note 201 (describing Biden administration regulatory change which included provisions requiring asylum seekers to schedule an appointment using the CBP One Smartphone App, to request asylum at a designated U.S. Port of Entry and demining individuals presumptively ineligible for asylum if they entered the U.S. unlawfully, subject to limited exceptions).

present themselves at a designated port of entry on the date of their appointment where they would undergo initial processing and typically be allowed to enter the U.S. with a two-year grant of humanitarian parole.[246] As part of this initial processing, asylum seekers who entered with CBP One humanitarian parole would also typically be issued a Notice to Appear (NTA), the formal charging document commencing removal proceedings, listing a date for their initial appearance in immigration court where they would be allowed to submit a defensive application for asylum.[247] Although the Biden Administration touted the CBP One App appointment process as necessary to restore order to the asylum system at the border[248], many critics noted that requiring asylum seekers to obtain a CBP One App appointment was effectively recreating metering in a digital format.[249] Under both the 2023 regulations and June 4, 2024 Presidential Proclamation by President Biden limiting entry and restricting asylum at the southern border, migrants who failed to obtain a CBP One App appointment and entered unlawfully were deemed categorically ineligible for asylum.[250]

On January 20, 2025, the day President Trump was inaugurated and began his second term, he issued an Executive Order entitled, *Securing our Border,* which directed the Secretary of Homeland Security to cease using the CBP One App as a method of paroling or facilitating the entry of otherwise inadmissible aliens into the U.S.[251] Effective January 20, 2025 at 12:00 PM EST, consistent with this Executive Order, CBP immediately cancelled all pending CBP One App appointments.[252] These cancelled appointments included CBP One App appointments scheduled for the day of the inauguration through February 2025, stranding thousands of migrants in Mexico.[253] On January 20,

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246. *Id.*

247. *Id.*

248. *Id.*

249. "*We Couldn't Wait" Digital Metering at the US-Mexico Border,* HUM. RTS. FIRST (May 2024), https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border [https://perma.cc/423T-M7PC].

250. Gamboa, *supra* note 201.

251. *See* Exec. Order No. 14165, 90 Fed. Reg. 8,467 at § 7(a) (Jan. 20, 2025) (directing DHS secretary to cease use of the CBP One application as a method of paroling or facilitating the entry of otherwise inadmissible immigrants into the U.S.).

252. *See* U.S. CUSTOMS & BORDER PROT., *CBP Removes Scheduling Functionality in CBP One App* (Jan. 21, 2025), https://www.cbp.gov/newsroom/national-media-release/cbp-removes-scheduling-functionality-cbp-one-app [https://perma.cc/K7X9-4HYX] (announcing the cessation of CBP One App's functionality).

253. *See* Julie Watson & Megan Janetsky, *Migrants Stranded When Thousands of Appointments to Enter the US are Cancelled as Trump Takes Office*, ASSOCIATED PRESS,

2025, President Trump also issued a Presidential Proclamation entitled *Guaranteeing the States Protection Against Invasion.*[254] This Executive Order, citing plenary authority to limit or suspend the admission of immigrants granted to the President under INA §212(f), indefinitely suspended the admission of immigrants without authorization, including the admission and processing of migrants seeking to enter the U.S. to request asylum.[255] Through these executive actions, President Trump effectively terminated processing of asylum claims at the U.S. border immediately upon taking office on January 20, 2025, in contradiction of domestic and international law.[256]

The Trump administration has also taken punitive measures targeting asylum seekers who lawfully entered the U.S. with CBP One humanitarian parole during the Biden Administration to pursue an asylum claim. In early April 2025, DHS sent out a mass notice of termination of humanitarian parole via email to approximately 936,000 asylum seekers who had entered the U.S. with a two-year grant of CBP One humanitarian parole.[257] This mass notice of termination of CBP One humanitarian parole contained language stating that "DHS is now exercising its discretion to terminate your parole immediately" and provided warnings that if the asylum seeker did not depart the U.S. immediately, they would be subject to potential law enforcement actions and deportation.[258] This mass termination of CBP One humanitarian parole occurred shortly after the January 2025 expansion of expedited removal, a fast-track deportation process under U.S. law, to the entire interior of the U.S. to any immigrant present with less than 2 years of physical presence in the U.S.[259] Because a majority of asylum seekers

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https://apnews.com/article/trump-immigration-cbp-one-border-app-652854b5f2a4e6ccd6ee2ccc729cbb55 [https://perma.cc/8MM6-SA9P] (reporting on individuals stranded due to existing CBP One App appointments being cancelled).

254. Proclamation No. 10888, Guaranteeing the States Protection Against Invasion, 90 Fed. Reg. 8333 (Jan. 29, 2025).

255. *Id.*

256. *See* Sergio Martínez-Beltrán, *President Trump's Suspension of Asylum Marks a Break from U.S. Past,* NPR (Jan. 23, 2025), https://www.npr.org/2025/01/23/nx-s1-5272406/trump-suspends-asylum [https://perma.cc/NU22-BAGH] (explaining the unprecedented and possibly unlawful nature of the cancelled appointments' effects).

257. Joel Rose & Sergio Martínez-Beltrán, *Migrants who Entered the U.S. via CBP One App Should Leave 'Immediately' DHS Says,* NPR (Apr. 8, 2025), https://www.npr.org/2025/04/08/g-s1-58984/cbp-one-app-migrants-dhs-border [https://perma.cc/N3TF-CLPB].

258. *Id.*

259. Designating Aliens for Expedited Removal*,* 90 Fed. Reg. 8,139 (Jan. 24, 2025) (to be codified at 8 C.F.R. pt. 235) [hereinafter Expedited Removal Notice], https://www.federalregister.gov/documents/2025/01/24/2025-01720/designating-aliens-for-expedited-removal [https://perma.cc/6B9L-FBB8].

who had entered with CBP One humanitarian parole had been present in the U.S. for less than 2 years, this mass termination of humanitarian parole also made them vulnerable to being quickly deported from the U.S. through expedited removal. In the months following the mass termination of CBP One humanitarian parole, thousands of asylum seekers who had entered with CBP One humanitarian parole were arrested by ICE and placed in expedited removal proceedings when they appeared for their immigration court hearing.[260] Often, these immigration court arrests occurred after the DHS/ICE attorney, who serves as the "prosecutor" in immigration court, moved to dismiss the asylum seeker's pending INA § 240 removal proceeding before the immigration court.[261] Immediately after the case was dismissed by the immigration court, an ICE agent waiting outside the courtroom would arrest the asylum seeker and place them in expedited removal proceedings, a streamlined process offering far fewer procedural due process protections than immigration court proceedings under INA § 240.[262] These actions, penalizing asylum seekers who attempted to comply with the law by entering with CBP One humanitarian parole and attending their immigration court hearings, further underscore the fundamental unfairness embedded in metering and other externalization practices.

Although turnbacks and metering of asylum seekers at the U.S.-Mexico border has been normalized by both the Trump and Biden administrations, these actions amount to a violation of U.S. and international law and have been challenged in U.S. domestic courts on these grounds. This legal challenge began in 2017 when the non-profit organization *Al Otro Lado* filed a class action suit challenging the legality of the U.S. government's asylum turnback and metering policy first implemented at the San Ysidro Port of Entry.[263] The plaintiffs argued

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260. *See* Laila Khan & Chris Opila, *ICE Attorneys Increasingly Request Case Dismissals at Immigration Court Hearings – and Immigration Judges Grant Them on the Spot,* AM. IMMIGR. COUNCIL (Oct. 7, 2025), https://www.americanimmigrationcouncil.org/blog/ice-attorneys-case-dismissals-immigration-court-hearings-judges-grant/ [https://perma.cc/6DHL-6TZB] (discussing dramatic increase between May 2025 and July 2025 in ICE Office of Principal Legal Advisor (OPLA) attorneys making oral motions to dismiss INA § 240 removal proceedings when immigrants appear for their immigration court hearings, which often led to the immigrant's immediate arrest by an ICE agent outside the courtroom and placement of immigrant into Expedited Removal Proceedings under INA § 235).

261. *Id.*

262. *Id.*

263. Press Release, Ctr. for Const. Rts., Class Action Lawsuit Challenges Practice of Turning Away Asylum Seekers at U.S. Southern Border (July 12, 2017), https://ccrjustice.org/home/press-center/press-releases/class-action-lawsuit-challenges-practice-turning-away-asylum [https://perma.cc/2TW9-P5M3].

that turnbacks and metering violated U.S. and international law by denying migrants the right to request asylum at U.S. ports of entry and forcibly returning them to Mexican territory.[264] Ultimately, on September 2, 2021 the U.S. District Court for the Southern District of California issued a ruling finding the practice of turnbacks and metering by the Trump Administration to be unlawful.[265] On October 23, 2024, this ruling was upheld by the U.S. Ninth Circuit Court of Appeals, which largely affirmed the lower court decision and granted injunctive relief to class members impacted by the Trump administration's metering policy.[266] However, the ruling did not address the legality of the 2023 asylum regulations or the CBP One App appointment process and litigation challenging the 2023 asylum regulations remains pending.[267] Additionally, following the executive action by the Trump Administration on January 20, 2025 to suspend processing of asylum claims at the U.S. border, three organizational plaintiffs, the Refugee and Immigrant Center for Education and Legal Services (RAICES), Las Americas Immigrant Advocacy, and the Florence Immigration and Refugee Rights Project, filed suit challenging the legality of these measures.[268] This case remains pending before the D.C. Circuit Court of Appeals and the Trump Administration's Executive Order banning admission of immigrants for the purpose of requesting asylum has remained in effect while this litigation is pending.[269]

It is also important to note that the practices of turnbacks, metering, the CBP One App Appointment Process, and the recent Trump Administration's suspension of asylum processing were made possible by the continuous cooperation of the Mexican government. With respect to metering during the first Trump Administration, Mexican

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264. *See* Al Otro Lado, Inc. v. Mayorkas, No. 23-cv-1367, 2024 U.S. Dist. LEXIS 179081 at *11–13 (S.D. Cal. Sep. 30, 2024) (reciting plaintiffs' four claims under domestic law and another claim under the Alien Tort Statute involving a violation of international law).

265. *See id.* (affirming that the metering policy was unlawful).

266.*See* Al Otro Lado, Inc. v. Exec. Office for Immigr. Rev., 120 F.4th 606, 646 (9th Cir. 2025) (affirming the judgment on the APA § 706(1) claim, declaratory relief, and injunctive relief other than the requirement that the Government reopen or reconsider past determinations).

267. Class Action Complaint for Vacatur, Declaratory Judgment, and Injunctive Relief at ¶ 9, Al Otro Lado, Inc. v. Mayorkas, No. 23-cv-1367 (S.D. Cal. July 27, 2023) (requesting court intervention to enjoin the asylum regulations and CBP One Turnback Policy).

268. *See* Complaint at ¶¶ 1–3, Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem, No. 25–cv–00306 (D.D.C. Feb. 3, 2025) (alleging Trump's 2025 immigration measures were unlawful).

269. Order Denying Preliminary Injunction, *Refugee & Immigrant Ctr. for Educ. & Legal Servs*., No. 25-cv-00306 (D.D.C. July 2, 2025).

officials from INM and Grupos Beta frequently communicated with their U.S. counterparts in CBP to manage daily entry of asylum seekers when metering began at the San Ysidro port of entry. Later, when use of turnbacks and metering was implemented across all U.S. Southwest Border Sectors in 2018, the Mexican government allowed CBP agents to cross into Mexican territory on border crossing pedestrian bridges to block migrants from reaching U.S. soil.[270] Mexican immigration and law enforcement officials also frequently blocked migrants from approaching U.S. ports of entry to request asylum.[271] While all these actions were well documented, neither Trump administration officials nor the Mexican government have officially acknowledged existence of a bilateral cooperative agreement between the U.S. and Mexico to enact a broadly sanctioned metering policy across the U.S. southern border during the first Trump administration.[272]

More recently, despite initial pushback immediately following President Trump's inauguration on January 20, 2025, Mexican President Claudia Scheinbaum has agreed to cooperate with the Trump Administration on migration enforcement policy.[273] These concessions on

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270. *See* UT ASYLUM PROCESSING AND WAITLISTS REPORT, *supra* note 223, at 3–4 (describing CBP's deployment of officers on border bridges to enforce "border access controls" and reduce processing capacity).

271. *Id.*

272. While 2018 internal communications by CBP did acknowledge existence of a large-scale metering system across the U.S.-Mexico land border, in Al Otro Lado v. Mayorkas and other litigation challenging the metering policy, the U.S. government denied existence of a systemic and large-scale metering program in coordination with the Mexican government. Additionally, while metering was executed in cooperation with frontline Mexican INM officials, high ranking officials within the governments of former Mexican Presidents Pena Nieto or Lopez Obredor have not publicly acknowledged Mexico's cooperation with the U.S. government to implement and execute metering. *See* UT ASYLUM PROCESSING AND WAITLISTS REPORT, *supra* note 222, at 5 (describing an internal email where CBP acknowledged the agency had established a collaborative bi-national effort with the government of Mexico and non-governmental organizations to assist with the flow of individuals to the border based on capacity and infrastructure contraints, made public in a news report); HILLEL R. SMITH, CONG. RSCH. SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S "METERING" POLICY: LEGAL ISSUES (2019), https://www.congress.gov/crs-product/LSB10295 [https://perma.cc/JS4R-TTTL] (Congressional Research Service report noting that the U.S. government disputed the existence of a broadly sanctioned metering policy for immigrants who had arrived at U.S. ports of entry).

273. *See* Mary Beth Sheridan, *Mexico's 'Presidenta' Takes on Donald Trump*, WASH. POST (Feb. 4, 2025), https://www.washingtonpost.com/world/2025/02/04/sheinbaum-mexico-trump-tariffs/ [https://perma.cc/G9EW-79R8] (describing consessions by Mexican President Sheinbaum to accept deported individuals and signaling Mexico's willingness to host asylum seekers for a revived "Wait in Mexico" program).

migration by President Sheinbaum include complying with U.S. repatriation of Mexican nationals and accepting third country nationals into Mexico expelled from U.S. territory under the Presidential Proclamation suspending entry of unauthorized migrants.[274] Ultimately, these actions by President Sheinbaum mark the latest in a series of measures by the Mexican government to facilitate the U.S. government's efforts to block migrants from exercising their lawful right to apply for asylum.

B. Migrant Protection Protocols (MPP) to Force Migrants to Await a Decision on Their Asylum Claim in Mexico

The Migrant Protection Protocols (MPP), also known as "Remain in Mexico," was a policy enacted during the first Trump administration where Non-Mexican nationals applying for asylum in the U.S. were returned to Mexico pending adjudication of their asylum claims.[275] While the asylum claims of individuals who were subjected to the MPP program were still adjudicated by the U.S., the MPP program shares similarities with the proposed Rwanda Scheme and Safety of Rwanda (Immigration and Asylum) Act in the UK, discussed in an earlier section. In particular, the MPP program relocated asylum seekers to a third country pending adjudication of their asylum claim. Additionally, the harm to asylum seekers under the MPP program when it was originally in effect between 2019 and 2022 illustrates the likely harm that would have occurred had the Rwanda Scheme taken full effect in the UK.

1. Creation and Implementation of the Migrant Protection Protocols (MPP) Program

Creation of the MPP program was first announced by DHS Secretary Nielsen on December 20, 2018[276] and on January 29, 2019, DHS officially launched MPP as a pilot program at the San Ysidro Port of Entry.[277] Shortly thereafter, in March 2019, MPP was expanded to

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274. *Id.*

275. *See generally* AM. IMMIGR. COUNCIL, FACT SHEET: THE "MIGRANT PROTECTION PROTOCOLS" AN EXPLANATION OF THE REMAIN IN MEXICO PROGRAM (Feb. 2024) [hereinafter AIC MPP FACT SHEET], https://www.americanimmigrationcouncil.org/fact-sheet/migrant-protection-protocols/ [https://perma.cc/8PLL-WGG6].

276. Press Release, U.S. Dep't of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [https://perma.cc/6WTC-JKAV].

277. *See* MPP Policy Guidance Memo, *supra* note 203 (agency memoranda issued January 25, 2019 by DHS Secretary Nielsen providing legal authority and policy

Calexico, California and El Paso, Texas[278] and, effective June 7, 2019, across the entire U.S. southern border.[279] Between January 2019 and January 2021, a total of 71,056 migrants were returned to Mexico under the MPP program.[280]

Unlike turnbacks and metering, MPP was created with the express acknowledgement and consent of the Mexican government through an agreement negotiated by the Trump Administration and Former Mexican President Andres Manuel Lopez Obrador.[281] Under the agreement, the Mexican government accepted Non-Mexican nationals into Mexican territory after they were placed into MPP removal

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guidance for implementation of MPP program); U.S. CUSTOMS & BORDER PROT., MPP GUIDING PRINCIPLES (Jan. 28, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf [https://perma.cc/P3T6-MSJ9] (CBP agency guidance describing implementation of MPP program on January 28, 2019 in CBP San Diego Field Office); U.S. Congressman Henry Cuellar (TX-28), *Migrant Protection Protocols* (Jul. 8, 2019) (hereinafter Cuellar MPP Memo), https://cuellar.house.gov/uploadedfiles/migrant_protection_protocols_brief—_fireside.pdf#:~:text=Migrant%20Protection%20Protocols%20(MPP)%20was,well%20as%20the%20San%20Diego%2C (describing how MPP was initially implemented at the San Ysidro, CA port of entry).

278. *See* Cuellar MPP Memo at 1 (discussing how MPP had been expanded to Calexico, CA and El Paso, TX ports of entry); Robert Moore, *Controversial 'Remain in Mexico' Policy for Asylum Applicants Heads to El Paso*, TEX. MONTHLY (Mar. 1, 2019), https://www.texasmonthly.com/news-politics/controversial-remain-in-mexico-policy-for-asylum-applicants-headed-to-el-paso/ [https://perma.cc/VB2S-DFAB] (noting El Paso was likely to soon see MPP implementation).

279. On June 7, 2019, the Trump Administration announced it had reached a deal with the Mexican government to "immediately expand implementation" of MPP across the entire border. U.S. DEP'T OF STATE, OFF. OF THE SPOKESPERSON, *U.S.-Mexico Joint Declaration*, MEDIA NOTE (June 7, 2019), https://2017-2021.state.gov/u-s-mexico-joint-declaration/ [https://perma.cc/8HZ8-TN59]; *see also We Can't Help You Here, U.S. Returns of Asylum Seekers to Mexico*, HUM. RTS. WATCH (July 2, 2019) [hereinafter HRW 2019 MPP Report], https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico#_ftn30 [https://perma.cc/8YDA-N5Z2] (describing how on June 7, 2019, President Trump announced that the U.S. had concluded a deal with Mexico to immediately expand the implementation of MPP across the entire border, with estimates that approximately 60,000 asylum seekers would be returned to Mexico under MPP by August 2019).

280. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, DETAILS ON MPP (REMAIN IN MEXICO) DEPORTATION PROCEEDINGS, EXISTING CASE AS OF JAN 2021 [hereinafter, TRAC MPP DATABASE], https://tracreports.org/phptools/immigration/mpp4/ [https://perma.cc/FER5-FM76] (last accessed Dec. 21, 2025) (statistical data on total number of MPP cases, with 46,927 in federal fiscal year (FY) 2019, 20,770 in FY2020 and 3,359 in FY2021, totaling 71,056 asylum seekers placed in MPP during the first Trump Administration between January 2019 and January 2021).

281. MPP Policy Guidance Memo, *supra* note 203.

proceedings by the U.S. government.[282] The Mexican government also committed to providing asylum seekers returned to Mexico under MPP temporary humanitarian visas, access to work permits and protection from discrimination.[283] However, despite these assurances by the Mexican government, human rights organizations found that most migrants returned to Mexico under MPP were unable to apply for humanitarian status or work permits, resulting in homelessness and economic hardship.[284] Asylum seekers placed in MPP also faced grave danger in Mexico, with many experiencing kidnapping, sexual assault, and other violent crimes at the hands of cartels, indicating that their return to Mexico by the U.S. likely violated the principle of *non-refoulement*.[285] Although U.S. officials stated that the MPP policy would comply with international law, MPP's *non-refoulement* safeguards were grossly inadequate, requiring asylum seekers to affirmatively assert a fear of harm in Mexico before receiving a *non-refoulement* screening.[286] Of those given a *non-refoulement* screening, only 13% were deemed to have a fear of harm in Mexico.[287]

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282. *See Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act*, GOBIERNO DE MÉXICO, SECRETARÍA DE RELACIONES EXTERIORES (Dec. 20, 2018), https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en [https://perma.cc/U68X-UGLC] (stating that Mexico would temporarily admit certain foreign individuals from the U.S. on a humanitarian basis while their immigration proceedings were pending).

283. *See id.* (providing that Mexico would allow returned asylum seekers a "stay for humanitarian reasons," apply for a work permit, and receive non-discriminatory treatment).

284. *See* HRW 2019 MPP Report, *supra* note 281, at 14–15 (reporting that asylum seekers who returned to Mexico under the MPP expressed "fear and confusion" about waiting in a city without social ties, shelter, or "legal authorization to work," and that asylum seekers were not being granted humanitarian visas).

285. *See* Alyssa Isidoridy, Eleanor Acer, Kennji Kizuka & Victoria Rossi, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seeker' Lives and Denies Due Process,* at 3–5, HUM. RTS. FIRST (Aug. 8, 2019), https://humanrightsfirst.org/wp-content/uploads/2022/10/Delivered-to-Danger-August-2019-.pdf [https://perma.cc/S8WR-42YB] (describing the danger and harm experienced by asylum seekers sent to Mexico under MPP including extortion, kidnapping, sexual assault, and other forms of violence).

286. *See id.* at 5–6 (reporting that asylum seekers are often "not asked if they fear return to Mexico (CBP officers are not required to ask under MPP) and, even if they affirmatively express a fear, CBP officers often fail to refer them for interview.").

287. U.S. DEP'T OF HOMELAND SEC., ASSESSMENT OF MIGRANT PROTECTION PROTOCOLS 5 (Oct. 28, 2019) https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf [https://perma.cc/7QNT-XMWT].

MPP also marked a significant departure from established procedures under U.S. law to screen asylum claims at the U.S. border. Prior to MPP, most migrants at the border were placed in expedited removal proceedings and referred to an asylum officer for a credible fear interview if they expressed a fear of return.[288] If a migrant passed their credible fear interview and was not deemed a danger to national security, they would typically be allowed to enter the U.S. and remain in the country pending adjudication of their asylum claim in removal proceedings before an Immigration Judge.[289] In contrast, under MPP, migrants at the U.S. border expressing a fear of return were placed in MPP removal proceedings and returned to Northern Mexico with an appointment letter for their MPP hearing.[290] The appointment letter instructed migrants to appear at a specified port of entry on the date of their hearing, where they would be paroled into the U.S. to appear for their hearing at an MPP Tent Court in a city near the U.S./Mexico border.[291]

While the MPP program appeared to afford asylum seekers the right to a hearing and the opportunity to present their asylum claim, there were significant shortcomings with this process. First, many asylum seekers in MPP were unable to travel to their assigned port of entry to enter the U.S. and attend their MPP hearings, resulting in their asylum claim being deemed abandoned and the asylum seeker receiving an in-absentia removal order.[292] According to available data, between January 2019 and January 2021, 30,789 migrants placed in MPP removal proceedings received in-absentia removal orders after failing to attend their MPP hearing, accounting for 94% of the 32,3664 MPP

288. *See* 8 U.S.C. § 1225(b)(1) (describing credible fear interview screening process for immigrants placed in expedited removal proceedings who express a fear of return).

289. *See id.* §§ 1229a, 1158 (describing the process by which an asylum seeker who passes a credible fear interview is placed into INA § 240 removal proceedings before the EOIR Immigration Court and may present an asylum application as a defense to removal).

290. *See* AIC MPP FACT SHEET, *supra* note 276, at 1 (stating that under MPP, individuals who arrived at the southern border and asked for asylum–either at a port of entry or after crossing the border between ports of entry–were given notices to appear in immigration court and sent back to Mexico).

291. *Id.* at 2.

292. *See id.* at 4 (detailing the logistical barriers faced by asylum seekers in MPP, including the absence of U.S. government support in Mexico, homelessness, inability to reach assigned ports of entry, and missed hearings resulting from kidnapping or theft of paperwork).

removal orders during this period.[293] Statistics also show less than 10% of asylum seekers placed in MPP were represented by a U.S. immigration lawyer, often due to logistical barriers that made it difficult to represent asylum seekers in Mexico,[294] which significantly impeded their procedural due process rights. These procedural barriers inevitably led to negative outcomes in their asylum claims, with only 641 MPP asylum seekers, less than 1% of the 71,000 asylum seekers placed in MPP, being granted humanitarian relief.[295]

2. *Litigation in U.S. Domestic Courts Challenging the Legality of MPP and Legal Challenge to Biden Administration's Attempt to Terminate MPP Program*

In response to the harm caused by MPP, several human rights organizations filed suit in February 2019 challenging the legality of MPP on statutory and constitutional grounds in the U.S. District Court of the Northern District of California.[296] After the U.S. District Court granted plaintiff's preliminary injunction in April 2019,[297] the Ninth Circuit Court of Appeals issued a stay of injunction in May 2019, allowing MPP to remain in effect.[298] In this order, the Ninth Circuit reasoned that the Mexican government's assurances and MPP's *non-refoulement* safeguards as offering sufficient protection to justify keeping MPP in place..[299] Later, on February 28, 2020, the Ninth Circuit issued a ruling that MPP violated U.S. and international law and affirmed the lower court injunction against the program.[300] However, following the government's emergency motion for stay, the U.S. Supreme Court

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293. *See* TRAC MPP DATABASE, *supra* note 281 (showing that between January 2019 and January 2021, 32,664 immigrants placed in MPP removal proceedings received a removal order and of the 32,664 immigrants issued a removal order, 30,789 were ordered removed in absentia after failing to attend their MPP hearing).

294. *Id.* (showing that only 5,439 of the 71,061 individuals placed in MPP between 2019 and 2021 were represented in their removal proceedings).

295. *Id.*

296. *See* Complaint for Declaratory and Injunctive Relief at 2-3, Innovation Law Lab v. Mayorkas, No. 19-cv-00807 (N.D. Cal. Feb. 14, 2019) (initial complaint and request for declaratory and injunctive relief in legal challenge to MPP program filed by the NGO's Innovation Law Lab, Central American Resource Center of Northern California, Tahirih Justice Center, Centro Legal de la Raza, the Immigration and Deportation Defense Clinic at University of San Francisco School of Law and Al Otro Lado against DHS and other relevant U.S. government agencies).

297. Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1130–31 (N.D. Cal. 2019), *vacated*, 141 S. Ct. 2842 (2021).

298. Innovation Law Lab v. McAleenan, 924 F.3d 503, 510 (9th Cir. 2019).

299. *Id.*

300. Innovation Law Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2020).

issued a March 11, 2020 order granting the government's motion, allowing MPP to remain in effect pending decision by the Supreme Court on the merits.[301] On March 23, 2020, DHS postponed all MPP hearings, in response to the COVID-19 pandemic, and on July 17, 2020, MPP hearings were suspended indefinitely, leaving thousands of asylum seekers stranded in Mexico, with their asylum claims in limbo.[302]

The first iteration of MPP remained in effect until January 20, 2021, when President Biden suspended new enrollments into the program.[303] In February 2021, the Biden Administration began formally winding down the MPP program by paroling asylum seekers placed in MPP into the U.S., admitting over 13,000 MPP asylum seekers into the U.S. from Mexico over five months.[304] Later, on July 1, 2021, the MPP program was formally terminated through an agency memorandum by DHS Secretary Alejandro Mayorkas.[305]

The Biden Administration's efforts to wind down MPP were halted when the states of Texas and Missouri filed suit against the Biden Administration, challenging the President's executive authority to end the MPP program.[306] On August 15, 2021, a Texas Federal District Court Judge issued an injunction against the Biden Administration and ordered DHS to reinstate MPP, "enforcing and implementing MPP in good faith until the program is lawfully rescinded in compliance with the Administrative Procedures Act."[307] Ultimately, the Biden Administration was allowed to terminate the MPP program in 2022 following the U.S. Supreme Court's decision in *Biden v. Texas,* where the Court held the U.S. President and Executive Branch have broad

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301. Wolf v. Innovation Law Lab, 140 S.Ct. 1564, 1564 (2020).

302. *See* AIC MPP FACT SHEET, *supra* note 277, at 5–6.

303. Press Release, U.S. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program [https://perma.cc/NR5B-QLJ2].

304. Press Release, U.N. High Comm'r for Refugees, UN Agencies Begin Processing at Matamoros (Feb. 24, 2021), https://www.unhcr.org/us/news/news-releases/un-agencies-begin-processing-matamoros [https://perma.cc/6WJC-XGPZ]; AIC MPP FACT SHEET, *supra* note 277, at 6–7.

305. Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Troy A. Miller, Acting Comm'r, U.S. Customs & Border Prot. et al., Termination of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf. [https://perma.cc/6EW5-QQ6A].

306. *See* Biden v. Texas, 597 U.S. 785, 793–94 (2022) (detailing the claims put forth in the complaint by the State of Texas and Missouri that initiated the lawsuit).

307. *Id.*

discretionary authority in enforcement of immigration law, including the authority to terminate MPP.[308]

However, it is important to note the U.S. Supreme Court has not ruled on the legality of the MPP program under U.S. or international law on the merits, leaving open the possibility it could be reimplemented by President Trump during his second term. Indeed, President Trump's *Securing our Borders* Executive Order, issued on January 20, 2025, directed the Secretary of Homeland Security, in coordination with the Secretary of State and Attorney General, to take steps to resume the MPP program, identifying resumption of MPP as a policy goal of President Trump's second term.[309] Nonetheless, to date, the Trump Administration has not yet reinstituted the MPP program.

Yet, the decision to not revive MPP likely has more to do with the program no longer being necessary following the dramatic increase in funding for immigration enforcement contained in the One Big Beautiful Bill Act[310] and the expanded use of bilateral third country removal agreements[311] and Asylum Cooperative Agreements (ACA's.)[312] As of December 2025, the Trump administration has executed third country removals, the practice of deporting immigrants to a country where they have no legal connection as a citizen or permanent residence, to at least twelve countries.[313] These countries include: Rwanda, Eswatini, Ghana, South Sudan, Poland, Uzbekistan, Mexico, Honduras, Guatemala, Panama, Costa Rica, and most notoriously, El Salvador.[314] More recently, the Trump Administration revived its use of ACA's, which are bilateral agreements first implemented through interim final regulations in November 2019, that allow the U.S. to send

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308. *Id.* at 794–95.

309. *See* Exec. Order No. 14165, *supra* note 252.

310. One Big Beautiful Bill Act, Pub. L. No. 119-21, § 90003 (2025).

311. *See* Anna MacLennon, *Trump Administration's Third Country Removals Put Migrants in Harm's Way,* INT'L REFUGEE ASSISTANCE PROJECT, https://refugeerights.org/news-resources/trump-administrations-third-country-removals-put-migrants-in-harms-way [https://perma.cc/BB27-QU5P] (describing increased use of third country removal agreements by the Trump Administration to remove immigrants to third countries, including countries with increased civil unrest like South Sudan, where immigrants are likely to face harm or persecution, with little notice or opportunity for immigrants to assert a legal challenge to their removal to a third country).

312. *See* AIC THIRD COUNTRY REMOVALS FACTSHEET, *supra* note 197 (describing formalized ACA agreements between the U.S. and third countries in 2019 and 2025EXP).

313. *See RI & HRW Third Country Deportation Watch*, *supra* note 197 (noting the U.S. has removed immigrants, pursuant to ACA's and safe third country agreements to at least twelve countries, including: Costa Rica, El Salvador, Eswatini, Ghana, Guatemala, Honduras, Mexico, Panama, Poland, Rwanda, South Sudan and Uzbekistan).

314. *Id.*

asylum seekers to a third country that has entered into an ACA with the U.S.[315] Similar to the Rwanda Scheme in the UK, those removed by the U.S. pursuant to an ACA purportedly have the opportunity to seek asylum in the ACA country of removal, yet, whether these individuals will have a meaningful opportunity to lodge an asylum claim in these countries with an ACA agreement with the U.S. remains to be seen.[316] As of December 2025, the U.S. has announced that it has entered into ACA agreements with Belize, Ecuador, Guatemala, Honduras, Paraguay and Uganda.[317] Additionally, on October 31, 2025, the Board of Immigration Appeals issued a decision in *Matter of C-I-G-M- & L-V-S-G-,* holding that asylum seekers subject to an ACA are ineligible for asylum in the U.S. under the safe third country bar, unless they can establish a fear of persecution or torture in the ACA third country of removal.[318] Following the Board's ruling in *Matter of C-I-G-M- & L-V-S-G-,* is likely that many asylum seekers in the U.S. will be deemed ineligible for asylum under the safe third country bar and could face removal to countries with an ACA agreement with the U.S.

The Trump Administration's pursuit of bilateral third country removal agreements and ACA's appears to be influenced by the MPP

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315. *See* Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf (2019 interim final regulation setting forth policy for U.S. government to establish Asylum Cooperative Agreements (ACA's) with third countries); Ratification of Department Action, 90 Fed. Reg. 42,309 (Sep. 2, 2025), https://www.govinfo.gov/content/pkg/FR-2025-09-02/pdf/2025-16809.pdf (agency notice that DHS had ratified the 2019 ACA interim final rule, with an effective date of August 20, 2025); AIC THIRD COUNTRY REMOVALS FACTSHEET, *supra* note 197 , at 3 (describing process used by the first and second Trump Administration to establish ACA's through an ínterim final regulation in 2019 and final agency action in 2025).

316. *See,* AIC THIRD COUNTRY REMOVALS FACTSHEET, *supra* note 197, at 3.

317. See RI & HRW Third Country Deportation Watch, supra note 197 (noting that the U.S. had entered into formal ACA agreements with Belize, Ecuador, Guatemala, Honduras, Paraguay and UgandaEXP) .

318. *See* Matter of C-I-G-M- & L-V-S-G-, 29 I&N Dec. 291, 293–95 (BIA 2025) (holding that any immigrant who entered on or after November 19, 2019, the date the ACA interim final rule took effect, could be subjected to an ACA agreement. If DHS asserted an asylum seeker was subject to an ACA and could be removed to pursue an asylum claim in a specific third country with an ACA agreement with the U.S., the asylum seeker bears the burden of establishing they are either not subject to the ACA interim final rule or that they would face persecution or torture in the ACA third country. Asylum seekers who fail to meet their burden of demonstrating they are exempt from the ACA or that they would be subjected to persecution or torture in the designated ACA third country would be deemed ineligible for asylum in the U.S. under the safe third country bar pursuant to INA § 208(a)(2)(A), allowing DHS to file a motion for pretermission of the asylum application before the immigration court).

program which, in some respects, can be viewed in hindsight as a pilot program for the use of third country removals and ACA agreements that have become endemic during President Trump's second term. Additionally, like MPP during President Trump's first term, in a June 23, 2025 order in the case DHS v. D.V.D., the Supreme Court lifted a lower court injunction that allowed the Trump Administration to continue third country removals to South Sudan and other countries with bilateral third country removal agreements with the U.S.[319] Especially troubling, this order suspended a lower court requirement that immigrants be given at least ten days' notice prior to execution of a third country removal and an opportunity to file a legal challenge under the Convention Against Torture, a critical due process protection to prevent refoulement of immigrants.[320]

3. Legal Challenge to MPP Before the Mexican Supreme Court

In addition to legal challenges to MPP in U.S. courts, in 2019, the Mexican human rights organization, *Fundacion para la Justicia* (FPLJ), filed a suit for protective action in Mexican District Court for Administrative Matters challenging the legality of the MPP agreement between the governments of Mexico and the U.S.[321] The suit also alleged the Mexican government failed to provide adequate protection to migrants returned to Mexico under MPP, in violation of the Mexican Constitution and international law.[322] After the suit was dismissed by the Mexican District Court, in part because the court lacked jurisdiction to rule on executive matters of foreign policy, on October 20, 2022, the First Chamber of the Mexican Supreme Court (SCJN), overruled the lower court and ruled in the FPLJ's favor.[323] In its ruling, the First Chamber of the SCJN ordered the executive branch of the Mexican government to publish official guidelines for the reception of

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319. *D.V.D.*, ___ U.S. ___, 2025.

320. *Id.*

321. Comunicación Fundación, *En el marco del Día Internacional del Migrante, autoridades del Gobierno mexicano a juicio por acuerdo migratorio con Estados Unidos* [*On the occasion of International Migrants Day, Mexican government authorities are put on trial over a migration agreement with the United States*], FUNDACIÓN PARA LA JUSTICIA (Dec. 18, 2019), https://www.fundacionjusticia.org/en-el-marco-del-dia-internacional-del-migrante-autoridades-del-gobierno-mexicano-a-juicio-por-acuerdo-migratorio-con-estados-unidos/ [https://perma.cc/6QRD-L4M2].

322. *See id.* (alleging that the Mexican government failed to protect migrants returned under MPP, breaching constitutional and international duties).

323. Press Release, Suprema Corte de Justicia de la Nación [SCJN], Comunicado de Prensa No. 391/2022, SCJN (Oct. 26, 2022), https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7114 [https://perma.cc/F362-JA8L].

Non-Mexican nationals returned to Mexico under MPP which meet minimum standards for protection under relevant domestic and international law.[324] On October 11, 2023, the Second Chamber of SCJN rejected a proposed ruling drafted by SCJN Minister Yasmin Esquivel Mossa to dismiss the FPLJ's suit, in a four to one vote.[325] Following rejection of the proposed ruling, SCJN Second Chamber President, Alberto Perez Dayan, remanded the case to SCJN Minister Javier Laynez Potisek to draft a new ruling on the case.[326] On July 11, 2024, SCJN Minister Laynez Potisek issued a new proposed ruling dismissing the FPLJ's suit as moot based on a 2023 directive by the Mexican Ministry of Foreign Affairs which effectively terminated the MPP agreement.[327]

The FPLJ suit challenging the legality of MPP and the 2022 ruling by the SCJN First Chamber demonstrate that future efforts by the U.S. government to outsource immigration enforcement will be subject to the Mexican government's cooperation and compliance with SCJN rulings and judicial orders. Additionally, in a January 22, 2025 statement President Sheinbaum made clear that she had not agreed to accept non-Mexican asylum seekers into Mexico under the proposed revival of MPP by the Trump Administration.[328] President Sheinbaum also signed on to a joint declaration, signed by ten Latin American countries in January 2025, calling for the respect for international law and also made statements calling for a "humanistic approach…in the face of the threat of mass deportations" in the U.S.[329] Such statements by

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324. *Id.*

325. Difusion FJEDD, *Suprema Corte rechaza proyecto de la ministra Esquivel que proponía negar amparo contra política migratoria [Supreme Court Rejects Justice Esquivel's Draft Opinion Proposing to Deny Injunction Against Immigration Policy]*, FUNDACION PARA LA JUSTICIA, (Oct. 17, 2023), https://www.fundacionjusticia.org/suprema-corte-rechaza-proyecto-de-la-ministra-esquivel-que-proponia-negar-amparo-contra-politica-migratoria/ [https://perma.cc/6V8Z-FVJJ].

326. *Id.*

327. Suprema Corte de Justicia de la Nación [SCJN], Amparo en Revisión 606/2022 (July 11, 2024), https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2024-07/AR%20606_0.pdf [https://perma.cc/LFW2-W3F8] (last visited Dec. 22, 2025).

328. *See Mexico Has Not Agreed to Accept Non-Mexican US Asylum Seekers,Ssays President,* REUTERS (Jan. 22, 2025), https://www.reuters.com/world/americas/mexico-has-not-agreed-accept-non-mexican-us-asylum-seekers-says-president-2025-01-22/ [https://perma.cc/8HRY-XQP2] (reporting that President Claudia Sheinbaum stated Mexico had not agreed to accept non-Mexican asylum seekers under the Trump Administration's proposed revival of MPP).

329. *See* Catherine Osborn, *Mexico Responds to Trump's First Moves,* FOREIGN POLICY, (Jan. 24, 2025), https://foreignpolicy.com/2025/01/24/trump-mexico-deportation-immigration-tariffs-trade-sheinbaum/ [https://perma.cc/XF3D-WJJW]

President Sheinbaum appear, at a minimum, to acknowledge the legal obligations imposed on the Mexican government in the 2022 SCJN ruling to ensure any agreement to admit third country nationals into Mexico from the U.S. complies with relevant domestic and international law and respects the rights of migrants admitted into Mexican territory. Nonetheless, President Sheinbaum's acquiescence to the Trump Administration's demands on migration enforcement, namely accepting third country nationals expelled back to Mexican territory under the January 2025 Presidential Proclamation suspending entry of unauthorized migrants,[330] call Mexico's commitment to uphold human rights law into question.

However, the FPLJ suit, brought in Mexico's domestic courts, offers an example of alternative legal avenues, outside U.S. domestic courts, to challenge the legality of third country removal agreements. Since January 2025, human rights organizations have filed legal actions against countries that have entered into third country removal agreements with the U.S. in both the domestic courts of these nations and with transnational human rights bodies, like the Inter-American Commission on Human Rights (IACHR). One such action includes a petition for habeas corpus filed in Costa Rica's domestic court on behalf of third country migrants removed from the U.S. to Costa Rica in February 2025 pursuant to a safe third country agreement.[331] This action culminated in a June 24, 2025 ruling by the Costa Rican Constitutional Chamber which found that the indefinite detention of third country migrants sent to Costa Rica by the U.S. government and other actions amounted to a violation of the migrants' human rights.[332] The Costa Rican Constitutional Chamber also ordered the Costa Rican government to screen each migrant for refugee status and resolve their immigration status within Costa Rica within fifteen days of the tribunal's

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(reporting that President Claudia Sheinbaum signed a joint declaration with ten Latin American countries calling for respect for international law and a humanistic approach to U.S. deportation policies).

330. Sheridan, s*upra* note 274.

331. *See Sala Constitucional Protege Derechos Fundamentales de Personas Migrantes Deportadas a Costa Rica* [*Constitutional Court Protectes Fundamental Rights of Migrants Deported to Costa Rica*], SALA CONSTITUCIONAL DE LA REPUBLICA DE COSTA RICA (Jun. 24, 2025), https://salaconstitucional.poder-judicial.go.cr/index.php/sala-de-prensa/comunicados/sala-constitucional-protege-derechos-fundamentales-de-personas-migrantes-deportadas-a-costa-rica [https://perma.cc/ZCB7-AE27] (Costa Rican Constitutional Court ruling finding the indefinite detention of third country migrants deported by the U.S. to Costa Rica violated their fundamental rights and ordering the Costa Rican government to screen the migrants deported to Costa Rica for refugee status and international protectionEXP).

332. *Id.*

ruling.[333] Additionally, on March 1, 2025, a group of lawyers filed an action against the government of Panama before the Inter-American Commission on Human Rights (IACHR), alleging human rights violations of migrants who had been removed by the U.S. government to Panama in February 2025 and indefinitely detained, which remains pending.[334]

Such actions may be a more effective mechanism to protect the rights of migrants subjected to third country removals and other harm resulting from bilateral agreements with the U.S. government on migration enforcement. Many of the countries that have entered into third country removal agreements with the U.S. are parties to regional human rights instruments, like the American Convention on Human Rights (ACHR), and have codified these instruments into their constitution and domestic statute.[335] Additionally, in the case of Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, and Paraguay, eight of the nine countries in the Americas that have agreed to accept third country migrants from the U.S., all are party to the ACHR and subject to the jurisdiction of the IACHR and the Inter-American Court of Human Rights (IACtHR).[336] This is in marked contrast to the U.S., which has not ratified the ACHR, historically has not complied with recommendations issued by the IACHR and is not

333. *Id.*

334. *See* Farnaz Fassihi & Julie Turkewitz, *Lawsuit Against Panama Challenges Detention of Trump Deportees.* N.Y. TIMES (Mar. 1, 2025), https://www.nytimes.com/2025/03/01/world/americas/panama-migrants-us-lawsuit.html [https://perma.cc/QM97-YWUM] (describing a complaint filed on behalf of third country migrants deported to Panama by the U.S. government with the Inter-American Comission on Human Rights (IACHR) against the Panamanian government alleging violations of the migrants' human rights following their third-country removal to Panama.

335. *See, e.g.,* CONSTITUCION art. 48, 1949 (ver. 2020) (Costa Rica); CONSTITUCION, 1974 (rev. 2004), Ch. 9, art. 129 (Panama).

336. Presently, twenty-three other member states of the Organization of American States (OAS), including Costa Rica, El Salvador and Panama, have ratified the ACHR and twenty countries, including Costa Rica, El Salvador and Panama, have recognized they are subject to the jurisdiction of the IACtHR. As a general matter, countries that have ratified the ACHR recognize the authority of the IACHR and duty to comply with recommendations issued by the Commission and the binding authority of rulings issued by the IACtHR. *See What is the I/A Court H.R.?* INTER-AMERICAN COURT OF HUM. RTS., https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en [https://perma.cc/4QKE-4GVJ] (providing an overview of the IACtHR and legal authority of IACtHR rulings on countries party to the ACHREXP).

subject to the jurisdiction of IACtHR, effectively precluding legal challenges to U.S. migration policy before these bodies.[337]

VI. COMMON THEMES: POTENTIAL VIOLATIONS TO THE PRINCIPLE OF NON-REFOULEMENT THROUGH EXTERNALIZED MIGRATION ENFORCEMENT BY SPAIN, THE UK AND THE U.S. AND LIMITATIONS OF JUDICIAL REVIEW

When reviewing the various practices implemented by the governments of Spain, the UK and the U.S. to outsource migration enforcement and manage processing of asylum claims, a common critique of these policies in all three jurisdictions is that they likely violate the principle of *non-refoulement*. A number of scholars, humanitarian actors, and human rights defenders have extensively analyzed and denounced the corrosive effects of the externalization of migration control practices carried out by Global North countries, including Spain, the UK and the U.S., on the principle of *non-refoulement* and human rights protection, in particular the right to asylum and the right to leave any country.[338]

It is worth recalling that the *non-refoulement* principle is the cornerstone of international refugee law, enshrined in Article 33 of the 1951 Refugee Convention. The principle of *non-refoulement* prohibits the return of asylum seekers and refugees to a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion.[339]

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337. *See generally* MICHAEL CAMILLERI & DANIELLE EDMONDS, *supra* note 207 THE DIALOGUE, AN INSTITUTION WORTH DEFENDING, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM IN THE TRUMP ERA (June 2017), https://thedialogue.org/wp-content/uploads/2024/12/IACHR-Working-Paper_Download-Resolution.pdf [https://perma.cc/EKH5-M84S] (describing limitations of IACHR and IACtHR in challenging actions by the U.S. government in violation of international human rights law and further disengagement of the Trump Administration from the Inter-American human rights system).

338. *See e.g.*, Violeta Moreno-Lax, *From Complementary to 'Primary' Pathways to Asylum: A Word on the 'Right to Flee*,' FORCED MIGRATION REV., Nov. 2021, at 21 (providing critique of current asylum and migration policy centered around enforcement and how these policies limit human mobility); Madeline Garlick, *Externalisation of International Protection: UNHCR's Perspective*, FORCED MIGRATION REV., Nov. 2021, at 4 (offering a critique of the restrictive nature of current asylum schemes and their inconsistency with the spirit of international cooperation embodied in the 1951 Refugee Convention); *see also* Nicolosi, *supra* note 4 at 15 (discussing how migration externalization agreements often leave vulnerable migrants unable to assert a claim for international protection and interfere with the right of human mobility, namely the right to leave, often overlooked in migration discourse).

339. 1951 Refugee Convention, *supra* note 90, art. 33.

Actions by Spain, the UK and the U.S. to outsource migration control to third countries in the Global South raise serious concerns about violations of the *non-refoulement* principle and arguably create extraterritorial liability for the resulting harm to migrants and asylum seekers.

The extraterritorial liability created by these cooperative agreements to outsource migration enforcement stems from their delegation of responsibility to third countries for intercepting, and detaining migrants, and in the recent case of the U.S., accepting deportees, exposing migrants to the possibility of refoulement. This need for extraterritorial accountability for Global North countries that benefit from migration externalization agreements is particularly evident in the case of Spain in its agreements with Morocco, Mauritania and Senegal and the U.S. in its agreements with Mexico and recent third country removal agreements. Both Spain and the U.S. use such agreements to prevent migrants from reaching their territory or to quickly expel or deport them but ultimately fail to take accountability for the harms that befall migrants when they are intercepted prior to reaching Europe or the U.S. or removed to a third country.

These agreements also result in harm to migrants by relying on third countries that lack the necessary safeguards and oversight to ensure the safety and rights of migrants and asylum seekers, utterly obstructing their access to protection of any kind under international or regional refugee law. These deficiencies, particularly ensuring the safety of asylum seekers and access to international protection, is especially evident in the UK's proposed Rwanda Scheme and the U.S. MPP program which required asylum seekers to await adjudication of their asylum claims in dangerous conditions in Mexico. Such deficiencies are also evident in recent ACA agreements between the U.S. and third countries predominantly located in the Global South to outsource the processing of asylum claims.

The undermining or outright breach of the principle of *non-refoulement* as a result of actions to outsource migration and border control by Spain, the UK and the U.S. also goes hand in hand with the violation of the right to freedom of movement. The fundamental right of human mobility entitles all to leave any country, including their own, and to return to their country, as enshrined in Article 13.2 of the Universal Declaration of Human Rights and in Article 12.2 and 4 of the International Covenant on Civil and Political Rights. This respect for the fundamental right of human mobility "creates a distinct obligation on States to admit the person concerned to avoid exposure to irreversible harm" and thus generates what Moreno-Lax calls "the right to flee" – "the right to leave any country in order to remove oneself from a

situation of grave peril"[340] - which the aforementioned externalization may be systematically undermining. As Moreno-Lax puts it,

> This resulting composite right, based as it is on international human rights law provisions, has legally binding force. It generates not only negative but also positive duties on the part of States to be vigilant when designing policies of border management or implementing measures of migration control, whether unilaterally or in cooperation with other countries.[341]

While the externalization practices by Spain, the UK and the U.S. likely violate the principle of *non-refoulement*, ensuring accountability for these violations through actions like judicial review is subject to limitations in each jurisdiction.

In the case of the U.S., because it is not a member of the ICC, IACtHR or any other international human rights tribunal, judicial review of U.S. government actions in violation of *non-refoulement* and other domestic and international law that is binding on the U.S. government is limited to actions in U.S. Federal Courts. While organizations and individual plaintiffs filed suit in U.S. Court to challenge domestic practices, including turnbacks, metering and the MPP program, the courts failed to impose preliminary injunctions blocking these measures. By failing to impose a preliminary injunction, these policies were allowed to remain in effect, causing irreversible harm to migrants and asylum seekers regardless of whether the plaintiffs in these cases were successful on the merits.

Another limitation, unique to the U.S. compared to Spain and the UK, is that it has not ratified a number of well-established international human rights agreements, including the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child,[342] further limiting U.S. accountability under international law. Additionally, although the U.S. is active within certain international bodies, including the United Nations (UN) and IACHR and the U.S. government's policies have undergone non-judicial review through UN Universal Periodic Review (UPR) and before IACHR, any findings and recommendations are treated by the U.S. as

340. *See* Moreno-Lax, *supra* note 339, at 21.

341. *Id.* at 22.

342. *See* UNITED NATIONS OFFICE OF THE HIGH COMM'R OF HUM. RTS., STATUS OF RATIFICATION INTERACTIVE DASHBOARD, https://indicators.ohchr.org/ [https://perma.cc/A6RS-8WL4] (last visited Dec. 21, 2025).

non-binding advisory opinions.[343] More recently, in November 2025, the U.S. government failed for the first time to participate in the UN UPR review process, marking a further shift by the U.S. government away from recognizing and respecting international human rights law.[344]

In contrast, both Spain and the UK are party to most recognized international agreements, including the ECHR, and are subject to the jurisdiction of the ECtHR, providing for much more robust accountability under international law compared to the U.S. Nonetheless, as noted in the previous discussion of the ECtHR ruling in *ND and NT v. Spain*, the Court's jurisprudence on migration is not always favorable to the interests of migrants and is limited in this regard. Additionally, in the case of the UK, the language contained in the Security of Rwanda (Immigration and Nationality) Act, limiting enforceability of ECtHR Rule 39 interim measures and ECtHR rulings within the UK illustrate that the enforceability of international agreements and judicial bodies is contingent on individual states remaining willing to abide by these agreements.

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343. Historically, the U.S. has been an active participant in international bodies including the United Nations (UN) where it serves as a permanent member of the UN Security Council, the OAS and IACHR. Additionally, the U.S. government and its policies have undergone review by international non-judicial bodies including through UN Universal Periodic Review (UPR) and the IAHRC based on complaints filed by parties with the Commission against the U.S. government. However, because the U.S. is not subject to the International Criminal Court (ICC), IACtHR or any other international human rights tribunal, any findings or recommendations issued by the UN through Universal Periodic Review or IACHR with regard to U.S. human rights practices and violations of international human rights law are viewed by the U.S. as non-binding advisory opinions and neither the UN nor the IACHR have the power to compel the U.S. government to implement their recommendations. *See* CAMILLERI & EDMONDS, *supra* note 207 (noting that the U.S. government considers IACHR's decisions on U.S. matters to be non-binding recommendations and, in practice, the U.S. government rarely takes steps to comply with IACHR decisions); INT'L COMM'N OF JURISTS, OVERVIEW OF THE UNIVERSAL PERIODIC REVIEW MECHANISM, https://www.icj.org/wp-content/uploads/2014/02/UPR.pdf(providing general overview of Universal Periodic Review (UPR), a process overseen by the UN Human Rights Council (HRC), to conduct a review of the human rights practices of all countries that are members of the UN General Assembly).

344. Nicola Paccamiccio & Lucy McKernan, *U.S. Skips UN Periodic Rights Review,* HUM. RTS. WATCH (Nov. 7, 2025), https://www.hrw.org/news/2025/11/07/us-skips-un-periodic-rights-review (discussing how on November 7, 2025, the U.S. failed to participate in its UN Universal Periodic Review (UPR), marking the first time a UN member state had failed to be reviewed since the UPR process was established by the UN HRC in 2006).

VII. CONCLUSION AND RECOMMENDATIONS

This paper has highlighted the deeply entrenched and increasingly widespread practice of outsourcing migration control and asylum management by Spain, the UK and U.S.

While this practice varies in form and implementation from jurisdiction to jurisdiction, it uniformly reflects a worrying departure from, or even contravention of, the fundamental principles and standards of international human rights and refugee law. In this regard, it has been noted that, as this practice becomes normalized as part of foreign policy and international cooperation, the spatial limits of state responsibility are also being redefined and blurred, a circumstance that threatens to undermine the essential pillars of the right to asylum, especially the core principle of *non-refoulement*.

Spain's pioneering role in this area within the EU demonstrates how bilateral agreements, informal cooperation protocols and security deterrence mechanisms have gradually reconfigured migration governance towards a model of remote migration control, largely detached from the legal obligations acquired by states in terms of the protection, promotion and fulfilment of human rights in the field of migration. In this sense, the increasing use of conditional development aid to induce cooperation from third countries is profoundly perverse from the perspective of international morality. Moreover, it reveals the asymmetrical power dynamics at play, where geopolitical strategy prevails over legal accountability and human dignity. Spain's agreements with Morocco and other African countries mentioned above are an obvious example of externalization arrangements that often result in the denial of access to asylum procedures and increased risk of human rights violations, while at the same time exempting state actors from direct responsibility under the guise of extraterritoriality.

In the UK, this outsourcing strategy materialized through the controversial plan to transfer asylum seekers to Rwanda for extraterritorial processing. This approach undermines the principle of territorial asylum and has faced significant legal and ethical challenges. The UK's emphasis on deterrence through remote processing, coupled with domestic legal reforms that restrict judicial oversight and access to remedies, reflects an increasingly hostile environment for asylum seekers. These measures align with a political rhetoric focused on sovereignty and border control, in a climate where migration management is framed more as a security issue than a legal obligation. Despite judicial setbacks, such as UK Supreme Court rulings and challenges before the ECtHR , the UK government continued to promote legal reforms that facilitate outsourcing, in defiance of existing international standards.

Similarly, the U.S. has institutionalized the externalization of migration control through policies such as MPP, Title 42 expulsions and bilateral agreements on migration enforcement with Mexico and Central American countries. More recently, these practices have expanded to include bilateral third country removal agreements and ACA's between the U.S. and over a dozen countries, primarily in Central America and Africa. These measures systematically restrict access to U.S. territory to apply for asylum, forcing migrants to wait for their procedures outside the U.S., seek protection in transit countries, or relocate to third countries that cannot guarantee their rights. In practice, these policies expose migrants to violence, a lack of legal protection and procedural barriers that make the right to asylum illusory. Although US courts have occasionally intervened to limit these excesses, the persistence of a deterrence-based framework in migration policy by both Republican and Democratic administrations demonstrates that externalization has become a structural feature of U.S. border practices.

The comparative findings presented here confirm that the externalization of migration control is a matter of geographical displacement and moral and legal displacement. The increasing reliance on bilateral and multilateral agreements to transfer asylum responsibilities to third countries generates conditions that often violate international legal norms, particularly the obligation to conduct individual protection assessments and respect the *non-refoulement* principle. While sometimes critical, judicial responses have been inconsistent and vulnerable to political pressure, further complicating efforts to ensure accountability.

Ultimately, this paper reinforces the urgent need for a recalibration of migration governance and asylum management, anchored in international legal obligations, transparency, and a human rights-centered approach. Rather than externalizing responsibility, states must be held accountable for the full implications of their border policies, no matter where they are implemented. Alternatives must be based on safe and legal migration channels, sound asylum procedures and an equitable sharing of responsibilities between states. Only through such transformative change will it be possible to uphold the principles enshrined in international refugee law and restore the legitimacy and integrity of global migration governance.

One such alternative model was the various humanitarian parole programs utilized by the Biden Administration to admit nationals of specific countries of humanitarian concern. This use of humanitarian parole authority by the Biden Administration included parole authority to admit Afghan nationals evacuated following the withdrawal of U.S.

forces from Afghanistan in 2021[345] and creation of the Uniting for Ukraine program in 2022 allowing for admission of Ukrainians fleeing the war with Russia.[346] Humanitarian parole was also used by the Biden Administration to successfully manage the flow of asylum seekers at the border by creating a lawful pathway for nationals of Cuba, Haiti, Nicaragua and Venezuela, known as the CHNV Parole Program, which allowed nationals of these countries to enter the U.S. on humanitarian grounds through sponsorship by an individual with qualifying lawful status in the U.S.[347] The CHNV program proved to dramatically reduce unlawful crossings by nationals of Venezuela, Haiti, Nicaragua and Cuba by 90% within months of the CHNV program being implemented.[348] Unfortunately, President Trump terminated these humanitarian parole programs through Executive Order,[349] which is likely to eventually lead to an increase in attempted unlawful entries into U.S.

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345. *See generally* U.S. CITIZENSHIP & IMMIGR. SERVS., *Information for Afghan Nationals* (Nov. 12, 2025), https://www.uscis.gov/humanitarian/information-for-afghan-nationals [https://perma.cc/F9LC-FDVB].

346. Implementation of a Parole Process for Cubans, 88 Fed. Reg. 1266 (Jan. 9, 2023); Implementation of a Parole Process for Haitians, 88 Fed. Reg. 1243 (Jan. 9, 2023); Implementation of a Parole Process for Nicaraguans, 88 Fed. Reg. 1255 (Jan. 9, 2023); Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63,507 (Oct. 19, 2022); *see also* AM. IMMIGR. COUNCIL, FACT SHEET: AN OVERVIEW OF THE UNITING FOR UKRAINE PROGRAM (Jan. 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/fact_sheet_uniting_for_ukraine.pdf. [https://perma.cc/GBE2-R884] (describing the Uniting for Ukraine or U4U Program established by the Biden Administration to admit Ukrainian refugees to the U.S. with a two-year grant of humanitarian parole).

347. *See generally* AM. IMMIGR. COUNCIL, FACT SHEET: THE BIDEN ADMINISTRATION'S HUMANITARIAN PAROLE PROGRAM FOR CUBANS, HAITIANS, NICARAGUANS, AND VENZUELANS: AN OVERVIEW (Sep. 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/09.23_chnv_factsheet.pdf [https://perma.cc/2RYV-JBJB] (description of Biden Administration humanitarian parole program for nationals of Cuba, Haiti, Nicaragua and Venezuela, known as CHNV Parole).

348. *See* David Bier, *Parole Sponsorship is a Revolution in Immigration Policy,* CATO INST. (Sep. 18, 2023), https://www.cato.org/briefing-paper/parole-sponsorship-revolution-immigration-policy [https://perma.cc/MJ5Q-QLW4] (describing the 90% reduction in unauthorized crossings by Cuban, Haitian, Nicaraguan and Venezuelan nationals following creation of the CHNV Parole program and other lawful pathways).

349. Exec. Order No. 14,165, § 7, 90 Fed. Reg. 8,467 (Jan. 20, 2025); *see* Dara Lind, *What we Know About Trump's Efforts to Roll Back TPS for Venezuelans and CHNV Parole,* AM. IMMIGR. COUNCIL (Feb. 18, 2025), https://immigrationimpact.com/2025/02/18/what-we-know-about-trumps-efforts-to-roll-back-tps-for-venezuelans/ [https://perma.cc/R2XR-RYQS] (overview of the Trump Administration's efforts to strip lawful status and work authorization from recent immigrant arrivals through termination of TPS and Biden Administration humanitarian parole programs).

territory, reinforcing the ever-present narrative by the Trump Administration of chaos at the border.

Despite recent measures to scale back lawful pathways in the U.S., increasing lawful pathways should be viewed as an opportunity for Global North countries, particularly countries like Spain, the UK and the U.S. with an aging native born population and declining birth rates. Such measures to respect the fundamental freedom of movement will ultimately be to the benefit of Global North countries to fill labor gaps in the economy and increase the percentage of working adults participating in the labor force and contributing to social safety net programs.

In light of all the above, the authors recommend that the Global North countries of Spain, the UK and the U.S. reduce their practice of outsourcing migration enforcement, which views international migration from Global South countries as a problem to be solved. As an alternative to these practices, it is recommended that Global North countries focus on increasing lawful pathways for migrants facing persecution, opening safe channels for their passage and admission, while also respecting their fundamental rights and human dignity.