

POLICY PAPER

Externalisation of Migration Control Policies:
An introduction

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Comparative Network on
Refugee Externalisation Policies (CONREP)

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List of abbreviations

CONREP:	Comparative Network on Refugee Externalisation Policies
EU:	European Union
IOM:	International Organization for Migration
UNHCR:	United Nations High Commissioner for Refugees

1. Executive Summary¹

With 70.8 million people forcibly displaced globally, refugee protection is one of the most pressing transnational issues for migration scholars and policymakers to address. Increasingly, displaced people seek durable solutions in wealthy western states that are progressively hardening their migration control strategies. One way that destination states resist irregular movement of displaced people is by implementing refugee externalisation policies.

Destination states in the global north are often physically distant from refugee source countries, as the bulk of refugees remain in the region of displacement. These destination states have the technical, logistical and financial capacity to prevent refugees from reaching their territory where those people would be able to claim asylum. States use a range of measures to ‘externalise’ their borders, including maritime interceptions; extraterritorial processing and detention; third-country interceptions; carrier sanctions; bilateral and multilateral agreement with so-called ‘transit’ countries; and public messaging campaigns. These practices frequently breach international law. They prevent refugees from fleeing dangerous regions, and leave people stranded without durable solutions. Externalisation involves increasing the use of coercive and harmful practices including detention and deportation.

This policy report draws on research conducted as part of a research network entitled the ‘Comparative Network on Refugee Externalisation Policies’ (CONREP), funded by the European Commission under the Erasmus+ Jean Monnet funding scheme. CONREP is an international, interdisciplinary network of experts from six universities in Australia and Europe. It researches the impact and effects of the externalisation of refugee policies in two regions: Australia’s activities in Southeast Asia and the Pacific; and the European Union and its member states’ activities in North Africa. These policies exploit power asymmetries to transfer state and regional obligations and responsibility for asylum seekers and refugees to neighbouring states.

At their most destructive, externalisation policies can prevent refugees from reaching safety, and breach their human rights. Together, the urgent need to find safety, the lack of institutional pathways, and the additional enforcement barriers created by externalisation policies force people to take risky routes to seek safety in Europe or Australia. It is the first of two reports produced by the CONREP Network. This first policy report provides definitions of refugee externalisation policies, examples of the way that they are implemented by Australia, the European Union (EU) and its member states, and some of the implications of refugee externalisation. The second policy report will be produced at the conclusion of the project, and will focus on presenting policy recommendations.

2. Definitions

Refugee

The 1951 United Nations Refugee Convention defines a refugee as:

Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country.²

Asylum seeker

An asylum seeker is a person who has sought protection as a refugee, but whose claim for refugee status has not yet been assessed. However, under international law, a person is a ‘refugee’ as soon as they meet the definition of refugee, whether or not their claim has been assessed. If they are found to be refugees, then they are ‘recognised refugees’.³

The UNHCR describes the status of asylum seekers as follows:

When people flee their own country and seek sanctuary in another country, they apply for asylum – the right to be recognized as a refugee and receive legal protection and material assistance. An asylum seeker must demonstrate that his or her fear of persecution in his or her home country is well-founded.⁴

¹ The authors would like to thank Cameron Doig for his valuable research assistance. The authors would also like to thank Margherita Matera, Marco Borraccetti, Azadeh Dastyari, Philomena Murray, Claire Loughnan and Pierluigi Musarò for helpful feedback on earlier drafts.

² Article 1, *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

³ Refugee Council of Australia, *Who is a refugee? Who is an asylum seeker?* (13 May 2016) <<https://www.refugeecouncil.org.au/who-is-a-refugee/2/>>.

⁴ USA for UNHCR, *What is a Refugee?* <<https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>>.

Source country

The term ‘source country’ describes a country from which a person has been forcibly displaced, which may lead to them becoming an asylum seeker or refugee. The top 10 source countries for refugees in 2018 were Syria, Afghanistan, South Sudan, Myanmar, Somalia, Sudan, Democratic Republic of the Congo, Central African Republic, Eritrea, and Burundi.⁵ 67% of the world’s refugees came from the first five countries in this list.⁶

Destination country

The term ‘destination country’ describes the ultimate intended endpoint of forcibly displaced people, rather than a state through which they pass on the way to safety. FitzGerald characterises destination states as ‘the rich democracies of the Global North’, using the examples of Australia, Canada, the US, and the EU.⁷ Due to limited resettlement options, ‘for 99% of refugees, the only way to find safety in a country in the prosperous democracies of the Global North is to reach its territory and then ask for asylum.’⁸

Transit countries

The term ‘transit country’ describes a country through which a forcibly displaced person passes on their way to a destination country. The term can be reductive, failing to reflect the complexity of migration unrelated to displacement such as irregular labour migration.⁹

Externalisation

The term ‘externalisation’ has become useful in describing a range of policy approaches that aim to interrupt, halt or deter refugee movement. Crisp defines externalisation as

Measures taken by states in locations beyond their territorial borders to obstruct, deter or otherwise avert the arrival of refugees, asylum seekers and other migrants who do not have prior authorization to enter their intended country of destination.¹⁰

When implementing externalisation policies, destination states risk breaching their obligations under international law. Hirsch observes that states are undertaking ‘extraterritorial measures that seek to prevent refugees from reaching their territorial borders in order to claim protection’ and seeking to avoid their obligations under the 1951 Refugee Convention by keeping displaced people ‘in countries of origin and first asylum.’¹¹

Such measures include bilateral or multilateral ‘co-operative non-entrée’ policies jointly undertaken by transit and destination states.¹²

Externalisation policies necessarily involve cooperation, and can overlap and intersect to form a comprehensive barrier to refugee movement. FitzGerald identifies a global system of interlocking mechanisms for ‘remote control’ of irregular migration, with ‘governments reaching beyond their territories in extensive, routine collaboration to track and deter millions of individuals and particular groups trying to cross borders.’¹³ Examples of externalisation policies include: maritime interdiction; readmission agreements; offshore detention and processing; carrier sanctions; public messaging campaigns; and material and logistical support for foreign law enforcement agencies.

3. Forms of externalisation

3.1 Maritime interception

Destination states such as Australia and European Union (and EU institutions and agencies) member states use maritime military operations to prevent the arrival of irregular migrants aiming to claim protection. These measures include maritime surveillance, boat turn-backs, supporting law enforcement agencies in transit states, and refusing to allow boats carrying irregular migrants to dock.

5 UNHCR, ‘Global Trends: Forced Displacement in 2018’ (Report, 19 June 2019) 15 <<https://www.unhcr.org/5d08d7ee7.pdf>>.

6 UNHCR, ‘Global Trends: Forced Displacement in 2018’ (Report, 19 June 2019) 3 <<https://www.unhcr.org/5d08d7ee7.pdf>>.

7 David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers*, (Oxford University Press, 2019) 4.

8 *Ibid.*, 3.

9 Ahmet İcduygu, ‘Rethinking transit migration in Turkey: reality and re-presentation in the creation of a migratory phenomenon’ (2012) 18(4) *Population, Space and Place* 441.

10 Jeff Crisp, *Externalization and the erosion of refugee protection* (25 November 2019) Comparative Network on Refugee Externalisation Policies (CONREP), The University of Melbourne, <<https://arts.unimelb.edu.au/school-of-social-and-political-sciences/research/comparative-network-on-refugee-externalisation-policies/blog/externalization-and-the-erosion-of-refugee-protection>>.

11 Asher Lazarus Hirsch, ‘The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls’ (2017) 36, *Refugee Survey Quarterly* 48, 48-49.

12 *Ibid.*

13 FitzGerald, above n 7, 12.

Since 2013, Australia has turned around or towed back 33 vessels carrying 810 irregular migrants, many of whom sought asylum.¹⁴ This has shifted Australia's responsibilities onto neighbouring countries (particularly Indonesia), failed to address the underlying causes of irregular migration and people smuggling, and increased the use of non-seaworthy vessels and vessel sabotage, heightening the risk of serious injury or death.¹⁵

Similarly, the European Union and its member states (particularly Italy) have moved towards deterrent naval operations designed to return migrant boats to countries of origin. To block migrants from irregularly entering the EU, Member States have wound back search and rescue operations, blocked non-governmental organisations (NGOs) from conducting their own rescue operations and refused to allow people to disembark or access assistance at their ports.¹⁶

The European Border and Coast Guard Agency (Frontex) maintains that Operation Themis, under which it supports Italy's Mediterranean border control operations, 'does not foresee disembarking rescued migrants in Libya or other non-EU countries.'¹⁷ However, under an EU Naval military migrant interception operation in the central part of Southern Mediterranean Sea, the EU has trained Libyan coastguard personnel.¹⁸ Italy has provided material support to the Libyan navy by providing new boats and restoring existing vessels.¹⁹ This aid helps prevent people from leaving Libya, with the result that many migrants (including refugees and asylum seekers) are returned to detention in appalling conditions.²⁰

3.2 Extraterritorial processing and detention

Extraterritorial detention of migrants, including pending determination of visa status, is a form of externalisation. Offshore processing involves primary countries obtaining agreement from a secondary state that the secondary state will host migrants previously bound for the primary country. Secondary states then hold migrants while their visa status is determined, often in harsh detention conditions. This allows the primary country to claim that those migrants are not entitled to claim protection under international law in their territory. To this end, primary states combine offshore processing with legal fictions like excision of territory, and military interdiction to prevent physical access to territory.²¹

Australia

Between 2001 and 2007, Australia implemented a range of measures designed to deter people seeking asylum by boat, collectively labelled the 'Pacific Solution': excision of islands from Australia's migration zone; military interception of asylum seeker boats; and transportation of asylum seekers to Nauru and Papua New Guinea for refugee status determination.²² These policies were ended in 2008, but were resumed in 2012, this time under the title of 'offshore processing', when large numbers of people started once again to seek asylum by boat.²³ Since 13 August 2012, 4177 people have been sent to Nauru and Papua New Guinea for processing. As of 30 September 2019, 562 of these people remained in the system; 632 people had departed for the US; and 1,117 people had been transferred to Australia for medical or other reasons. As at 21 October 2019, 135 people had been transferred under the Medevac Bill, and another 39 were approved and awaiting transfer (although 10 were being detained by PNG).²⁴ People detained under Australia's offshore processing arrangements have experienced serious human rights violations, and the regime is characterised by secrecy.²⁵

14 Harriet Spinks, 'Boat 'turnbacks' in Australia: a quick guide to the statistics since 2001' (Research Paper, Parliamentary Library, Parliament of Australia, 2018) 3.

15 Andreas Schloenhardt and Colin Craig 'Turning Back the Boats': Australia's Interdiction of Irregular Migrants at Sea' (2015) 27(4) *International Journal of Refugee Law* 536, 571-572.

16 Azadeh Dastyari and Asher Hirsch 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19(3) *Human Rights Law Review* 435, 450.

17 Frontex, *Main Operations: Operation Themis (Italy)* (2019) <<https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy/>>.

18 Dastyari and Hirsch, above n 16, 450-451.

19 Ibid.

20 Violeta Moreno-Lax and Mariagjulia Giuffrè, 'The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019).

21 FitzGerald, above n 7, 15.

22 Janet Phillips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island' (Research Paper, Parliamentary Library, Parliament of Australia, 2012) 1-4.

23 Ellibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources' (Research Paper, Parliamentary Library, Parliament of Australia, 2016).

24 Refugee Council, *Offshore Processing Statistics*, 27 October 2019 <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/>>

25 Amy Nethery and Rosa Holman, 'Secrecy and human rights abuse in Australia's offshore immigration detention centres' (2016) 20(7) *The International Journal of Human Rights* 1018.

EU states

The EU and member states support governments or factions in states including Libya, Sudan, Niger, and Turkey to undertake migration control operations. This implicates the EU complicity in human rights abuses by state and non-state actors, particularly directed at migrants, asylum seekers and refugees.²⁶

In the Libyan context, the EU and some member states – primary Italy – have actively supported a ‘sophisticated system of abuse and exploitation of refugees and migrants by the Libyan coastguard, detention authorities and smugglers in order to prevent people from crossing the Mediterranean’. Three dimensions of EU support increase migrant detention in Libya: support for the Libyan Department for Combatting Illegal Migration which operates Libya’s immigration detention centres; support for the Libyan coastguard which returns people trying to cross the Mediterranean to detention in Libya; and deals with local authorities, leaders of tribes, and armed groups (many of whom operate their own detention facilities) to encourage those actors to help stop smuggling and increase border controls.²⁷

Support from EU member states, particularly Italy, has allowed and effectively supported the Libyan coastguard to intercept and detain individuals attempting to leave Libya.²⁸ Between 15,000 and 29,000 people were intercepted in 2018.²⁹ As at July 2018, there were between 8,000 and 10,000 detainees across Libya.³⁰ In total, the country hosts 43,113 refugees and asylum-seekers registered with UNHCR. Up to 90 per cent of people crossing the Mediterranean Sea to Europe depart from Libya.³¹

Detention conditions include arbitrary detention, torture, forced labour, extortion, and unlawful killings, at the hands of the authorities, traffickers, armed groups and militias alike.³² The respective roles of IOM, which provides upgrades to detention facility infrastructure,³³ and UNHCR, which provides basic assistance such as health and hygiene support, have been questioned.³⁴ The level of support has been critiqued by journalists and human rights NGOs.³⁵

3.3 Third-country interception

Destination countries often provide material support to law enforcement and immigration authorities in transit countries, and encourage transit countries to proactively target, detain, and/or deport irregular migrants including asylum seekers and refugees.

A significant number of forcibly displaced people reside in Indonesia without effective domestic legal protection mechanisms for refugees, and without prospects of a durable solution. Many of these people are refugees and asylum seekers *en route* to Australia, and Australia has sought to prevent the arrival of these people on its shores. To this end, Australia has encouraged.

More broadly, Australia imposes carrier sanctions on airlines and other organisations that transport a person without a visa to Australia; Australia posts personnel in Asian and Middle Eastern airports to prevent unauthorised people travelling to Australia; and it receives biometric surveillance and identification data from airlines and other states.³⁶

Similarly, Italy has engaged in longstanding cooperation with Libya to prevent irregular migrants, including refugees, from reaching Italian territory. This cooperation involves implementation of electronic controls, joint sea patrols, stationing of Italian police officers – in Libya to target irregular migration, the establishment of immigration detention facilities in Libya, deportation of sub-Saharan migrants and closure of Libya’s southern borders, Italian funding for equipment to assist Libyan authorities to combat irregular migration, and training of the Libyan coastguard.³⁷ This cooperation has contributed to detention of migrants, asylum seekers and refugees in Libya in conditions that do not meet international human rights standards.³⁸ It is noteworthy that neither Indonesia nor Libya are signatories to the Refugee Convention.

26 Kenan Malik, ‘When refugees in Libya are being starved, Europe’s plan is working’, *The Guardian* (online), 1 December 2019 <<https://www.theguardian.com/commentisfree/2019/nov/30/when-refugees-in-libya-are-being-starved-europes-plan-is-working>>.

27 Amnesty International, ‘Libya’s Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants’ (Report No 19/7561/2017, 11 December 2017) <<https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>>.

28 United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, ‘“Detained and Dehumanised” Report on Human Rights Abuses Against Migrants in Libya’, (Report, 13 December 2016) 19.

29 Ulf Laessing and Ahmed Elumami, ‘Libyan coast guard says it has intercepted 15,000 migrants in 2018’, *Reuters* (online), 21 December 2018 <<https://uk.reuters.com/article/uk-europe-migrants-un/libyan-coast-guard-says-it-has-intercepted-15000-migrants-in-2018-idUKKCN1QJ273>>.

30 ‘No Escape From Hell: EU Policies Contribute to Abuse of Migrants in Libya’ (Report, Human Rights Watch, 21 January 2019) 6 <https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf>.

31 UNHCR, *Libya* (2019) <<https://www.unhcr.org/en-au/libya.html>>.

32 ‘Libya’s Dark Web of Collusion’, above n 28.

33 Dastyari and Hirsch, above n 16, 454.

34 Sally Hayden, ‘Refugees being “starved out” of UN facility in Tripoli’ *The Guardian* (online), 28 November 2019 <<https://www.theguardian.com/global-development/2019/nov/28/refugees-being-starved-out-of-un-facility-in-tripoli>>.

35 ‘Libya’s Dark Web Of Collusion’, above n 28.

36 Hirsch, above n 11.

37 Dastyari and Hirsch, above n 16.

38 Dastyari and Hirsch, above n 16.

3.4 Public messaging campaigns

Destination countries often fund sophisticated messaging campaigns designed to prevent irregular migration, targeting migrants themselves as well as community members who might assist irregular migrants by providing shelter or transport.

Public information campaigns have been implemented since the 1990s in Europe and Australia to prevent human trafficking and undocumented migration. They aim to normalise the extraterritorial border, and categorise migrants as voluntary/forced, desirable/undesirable, and regular/irregular. They attempt to prevent arrivals before migrants reach the border. Assuming that information plays a key role in migration decisions, these campaigns are designed to deter potential migrants from leaving by criminalising them a priori, or negatively stereotyping migration.³⁹

Australia and Indonesia

Since the early 1990s, Australia has implemented public information campaigns targeting both Indonesian locals and ‘potential illegal immigrants’ who may be considering engaging people smugglers in order to seek asylum in Australia. To achieve this, Australia hires multinational and foreign firms, alongside IOM, to design, administer, and evaluate campaigns encompassing ‘broadcasting/publishing of TV, radio, newspaper and cinema advertisements; billboards; “roadshows”, dissemination of leaflets and information, and community liaison’.⁴⁰ Campaigns deliver legal, moral, and religious warnings about helping irregular migrants without explaining the causes of displacement, displaced people’s motivations to go to Australia by boat, or their right to seek asylum.⁴¹ They convey the idea that transporting irregular migrants is immoral and a sin, frame immigration law as the ultimate determinant of moral migration, and link irregular migration to foreign threats and crime.⁴²

Australia funds IOM Indonesia’s Community Liaison Officer network, which involves IOM employing multilingual officers to work with migrants intercepted by Indonesian authorities en route to Australia. Officers research migrants’ views and aims, develop outreach materials, map trusted information sources, and inform Australia about migrants’ intentions and views.⁴³

IOM also target Indonesian locals to raise community awareness of people smuggling activities, reduce the involvement of locals in these activities, and encourage civilians to detect and report smuggling to authorities.⁴⁴

The IOM has also produced educational films designed to be screened at community events, which present transporting illegal migrants as criminal people smuggling; warn of negative impacts on smugglers’ reputation and self-esteem; and condemn the sinfulness of people smuggling.⁴⁵

IOM claims the campaigns have turned Indonesian public opinion strongly against people smuggling, where it had previously been accepting or neutral. Australia is funding the dissemination of misleading messages directed at asylum seekers, refugees, and those who could provide them with shelter or transport. This increases asylum seekers and refugees’ vulnerability and precarity by further isolating them within a key transit country. Instead of accurately informing people about their right to asylum and the circumstances that forcibly displace people to Indonesia, these messages form part of Australia’s externalisation agenda in Indonesia.⁴⁶ Notably, Australia has undertaken similar messaging campaigns elsewhere in Asia, targeting Sri Lankan would-be migrants with negative horoscopes to deter irregular maritime travel.⁴⁷

39 Pierluigi Musarò and Asher Hirsch, *The symbolic frontiers of border externalisation: Interceptions, information campaigns, and refugee policies* (25 June 2019) *Comparative Network on Refugee Externalisation Policies* (CONREP), The University of Melbourne, <<https://arts.unimelb.edu.au/school-of-social-and-political-sciences/research/comparative-network-on-refugee-externalisation-policies/blog/symbolic-frontiers>>.

40 Asher Lazarus Hirsch and Cameron Doig, ‘Outsourcing Control: The International Organization for Migration in Indonesia’ (2018) 22(5) *International Journal of Human Rights* 681.

41 Ibid.

42 Josh Watkins, ‘Irregular migration, borders, and the moral geographies of migration management’ (2020) 0(0) *EPC: Politics and Space* 1.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

47 Hannah Ryan, ‘The Australian Government Created A Bizarre And Very Bleak Horoscope Chart To Scare Asylum Seekers’, *Buzzfeed* (online), 18 December 2019 <<https://www.buzzfeed.com/hannahryan/australia-horoscopes-astrology-refugees-boats-dutton>>.

The EU and Libya

Since the early 1990s, EU member states have run information campaigns in countries of origin designed to discourage would-be migrants from leaving their home and travelling to Europe. With the assistance of the IOM, these campaigns have targeted Romania (1992 to 1996), Albania (1992 to 1995), Ukraine (1998 to present), the Philippines (1997 to 1999) and Vietnam (1998 to 1999). Since 2000, information campaigns have been used in Morocco, Gambia, Ghana, Senegal, Nigeria, Cambodia, Colombia, the Dominican Republic, and Libya, among others.⁴⁸

Information campaigns use several media outlets (internet, print materials, billboards videos, special events) to reach potential migrants and their families. On 3 February 2017, members of the European Council made the ‘Malta Declaration’ committing to enhance ‘information campaigns and outreach addressed at migrants in Libya and countries of origin and transit, in cooperation with local actors and international organisations, particularly to counter the smugglers’ business model.’⁴⁹ Pursuant to this aim, member states have undertaken campaigns to educate and inform migrants and family members about the dangers associated with traffickers and smugglers, the risk of removal and deportation, the difficulties of settling in Europe, finding a job or obtaining asylum, and to encourage migrants to return home to rebuild their lives in their own countries.⁵⁰ The European Commission in its statement of 3 March 2017 urged EU Member States to lower the number of irregular arrivals by making it clear to those not in need of protection and with no right to stay in the EU that they should not undertake the perilous journey to arrive in Europe ‘illegally’.⁵¹

4. Bilateral cooperation

Destination states often require cooperation from ‘transit’ states to prevent migrants passing through those states’ territory. As discussed above, this may involve a state providing training or equipment to another, law enforcement cooperation, information-sharing, and linking cooperation on migration control to other issues such as the provision of development aid. Bilateral agreements can formalise these arrangements, establishing the terms of cooperation.

4.1 Australia and Indonesia

Australia and Indonesia have cooperated on asylum policy since the late 1990s, including cooperation on immigration detention, intelligence on people smuggling operations, and personnel training. Australia has provided Indonesia with sufficient financial and diplomatic incentives so that Indonesia’s cooperation with Australia is in its own domestic interests.⁵² The level of cooperation has fluctuated according to other factors impacting the bilateral relationship.⁵³ The most significant policy agreement is the Regional Cooperation Arrangement (RCA) was agreed between Australia, Indonesia, and IOM Indonesia in 2001. The RCA involves Indonesian authorities intercepting migrants thought to be intent on travelling irregularly to Australia or New Zealand. IOM’s role is described as the provision of ‘case management and care’ and ‘voluntary repatriation’ services to irregular migrants intercepted in Indonesia. Under the RCA, Australia has funded refurbishment of immigration detention facilities and provided \$14m for the return of 5,255 migrants to countries of origin like Afghanistan, Iraq, and Iran in questionable circumstances.⁵⁴

4.2 Italy and Libya

Successive bilateral agreements to reduce the entry of migrants into Italy from Libya have been signed by those two states.⁵⁵ In 2011, Italy signed a Memorandum of Understanding with the Libyan Government of National Accord to cooperate in combating irregular migration, including repatriation of migrants. In 2012, additional understandings between the states covered Italian support to strengthen Libya’s border management, training programmes, and assistance with ‘voluntary’ returns to Libya.

48 Pierluigi Musarò, *Information campaigns to deter migrants as new bordering practices* (15 October 2019) Comparative Network on Refugee Externalisation Policies (CONREP), The University of Melbourne, <<https://arts.unimelb.edu.au/school-of-social-and-political-sciences/research/comparative-network-on-refugee-externalisation-policies/blog/symbolic-frontiers>>.

49 European Council, ‘Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route’ (Statements and Remarks, 43/17, 3 February 2017).

50 Moreno-Lax and Giuffrè, above n 20, 9.

51 European Commission, ‘Remarks by Commissioner Avramopoulos on the migration package adopted by the College ahead of the March European Council’ (Speech, SPEECH/17/425, 2 March 2017), cited in Moreno-Lax and Giuffrè, above n 20, 9.

52 Nethery, A. and Gordyn, C. 2014, ‘Australia-Indonesia Cooperation on Asylum Policy: A Case of Incentivised Policy Transfer’, *Australian Journal of International Affairs*, 68(2), 184-185.

53 Missbach, A. 2018, ‘Big Fears about Small Boats: How Asylum Seekers Keep Upsetting the Indonesia-Australia Relationship’, in T. Lindsey and D. McRae (eds) *Strangers Next Door? Indonesia and Australia in the Asian Century*, Oxford and Portland: Hart Publishing.

54 Documents released pursuant to FOI Request FA17/06/00891-RI, held by authors, available on request.

55 Dastyari and Hirsch, above n 16.

In 2017, a bilateral MOU addressed ‘development, the fight against illegal immigration, human trafficking and fuel smuggling’ and the reinforcement of ‘borders between the State of Libya and the Italian Republic’, committing Italy to supporting Libyan authorities in their efforts to stem irregular migration.⁵⁶ On 2 November 2019, the agreement between Italy and Libya renewed automatically with Italian Foreign Affairs Minister Luigi Di Maio claiming that “[r]educing Italian assistance could result in the activities of the Libyan coastguard grinding to a halt, leading to an increase in the number of people leaving and conditions of migrants in the centres worsening.”⁵⁷

4.3 The EU and origin states

Since the 1990s, the EU and its member states have entered a range of migration agreements with source countries focused on border control and repatriation of irregular migrants. In 2004, the EU created FRONTEX which ultimately implemented the EU’s common external border policy; and began entering agreements with countries like Albania, Russia, Sri Lanka, Macau and Hong Kong to control irregular migration and ensure cooperation regarding readmission of irregular migrants. Individual EU member states signed individual readmission agreements and provided source countries with financial, material, and logistical support to build those states’ border control capacity.⁵⁸ Individual bilateral agreements to curtail irregular migration and secure readmission include those between Tunisia and Italy; between Morocco and Spain; between Libya and Italy (as discussed above); and Nigeria’s agreements with Ireland, UK, Italy, and Spain.⁵⁹ These agreements largely centre on combating trafficking, readmission of irregular migrants, and exchange of information.⁶⁰

From 2004 to 2006, the EU commenced cooperation with North African transit states and developed a comprehensive migration policy for the main West African and Sub-Saharan origin and transit countries. From 2006, the EU has pushed for re-admission agreements under which African countries would readmit irregular migrants in exchange for economic assistance.⁶¹

5. Multilateral cooperation

In order to make migration control a priority for their regional neighbours, some destination states will establish or participate in regional fora to raise the profile of irregular migration as a policy issue. This form of border externalisation relies on convincing neighbouring states that irregular migration is a security threat and a source of concern, despite the fact that those neighbouring states may not otherwise view irregular migration as a policy priority. The successful implementation of this strategy can help persuade neighbouring transit states that it is in their interests to begin proactively strengthening border control systems, targeting irregular migrants for detention and deportation, and cooperating with destination states.

5.1 Bali Process

Australia and Indonesia are co-chairs of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (‘the Bali Process’), a multilateral diplomatic forum that seeks to address irregular migration in the Asia Pacific region. Since its inception in 2002 until 2016, Australia has provided the majority of this funding, including \$7.27 million to the IOM to facilitate this forum. The Bali Process hosts regular meetings between operational representatives from each country to discuss combatting migrant smuggling and other forms of irregular migration. Australia dominates the forum, aiming to ensure that its regional neighbours approach irregular movement in accordance with Australia’s deterrence aims: ‘within a securitized discourse on “irregular migration”’.⁶²

This discourse has enhanced some Southeast Asian states’ views of refugees as a political embarrassment or problem, and as a threat to society, national identity, border security, and sovereignty, rather than as victims of human rights abuses.⁶³

In 2011, the Bali Process produced the Regional Cooperation Framework (RCF), wherein states undertake ‘burden sharing’, promote orderly migration, run anti-smuggling initiatives, secure readmission agreements, and share intelligence. This forum has encouraged the strengthening of border enforcement, the sharing of intelligence, the adoption of anti-people smuggling laws and policies, the training of law enforcement agencies and the detention and deterrence of refugees who would otherwise seek asylum in Australia.⁶⁴

56 Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, Libya-Italy, signed 2 February 2017, (entered into force 2 February 2017), available at <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

57 Ylenia Gostoli, ‘Anti-migration deal between Italy and Libya renewed’, *Al Jazeera* (online), 3 November 2019 <<https://www.aljazeera.com/news/2019/11/deal-curb-migrant-arrivals-italy-libya-renewed-191102122821537.html>>.

58 Annelies Zoomers, Femke van Noorloos and Ilse van Liempt, ‘Will Tailor-Made Migration Deals Help To Solve The European Migration ‘Crisis?’ in Dina Siegel and Veronika Nagy (eds), *The Migration Crisis? Criminalization, Security and Survival* (Eleven International Publishing, 2018) 105.

59 Ibid.

60 Ibid.

61 Ibid.

62 Susan Kneebone, ‘The Bali Process and Global Refugee Policy in the Asia-Pacific Region’ (2014) 27(4) *Journal of Refugee Studies* 598–9.

63 Susan Kneebone, ‘ASEAN and the Conceptualization of Refugee Protection’ in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Routledge, 2014) 297–299.

64 Hirsch and Doig, above n 38.

5.2 European Union

The EU's funding of international organisations (IOs) has facilitated the dissemination of EU policy objectives and approaches to regional neighbours, including transit states in Africa and the Middle East. IOM and UNHCR are the major IOs undertaking this work. The EU relies on these IOs' personnel, expertise, contacts, facilities, money, and legitimacy to undertake projects that tend to advance the EU's externalisation objectives, including in the domain of migration control.⁶⁵ In particular, IOs help the EU repackage its priorities 'in terms of commitments to overarching and nearly universal international norms', because states perceive IOs as 'impersonal, value-neutral, not self-interested and hence technocratic actors whose purpose is not the exercise of power but equitable problem-solving.'⁶⁶ Thus, the EU regards IOs as 'crucial implementing partners in the external dimension of its policies.'⁶⁷

For their part, the IOs rely on EU funding as a 'principal source for their budget', making the EU a 'vital donor for these organisations'.⁶⁸ This reliance explains why the IOs have become subcontractors implementing EU policy in transit countries, while also encouraging those states to adopt 'normative frameworks that blur and legitimise EU policy transfer in the guise of (quasi) universal commitments.'⁶⁹

Regional Consultative Processes are a key mechanism through which the EU disseminates its policy objectives, 'often with the intermediary of the IOM or ... the UNHCR'.⁷⁰ These multilateral fora have 'increasingly come under the influence of the EU Commission and Member States', leading to a growing emphasis on EU policy transfer. Externalisation of EU migration control policies to North African transit states is a key focus of the '5+5 Dialogue' for the Western Mediterranean, between participants Algeria, France, Italy, Libya, Malta, Mauritania, Morocco, Portugal, Spain and Tunisia.⁷¹ The EU has directed this forum's focus towards cooperation in areas such as 'the fight against illegal migration and trafficking'⁷² to align transit states with its aim of regional migration control. EU engagement with states in transit regions has included the establishment of the AU-EU-UN Taskforce, the Africa-EU Migration and Mobility Dialogue, and the EU Emergence Trust Fund for Africa.

6. Implications of externalisation policies for refugees

6.1 Refugees unable to reach safety

Internationally, there are inadequate safe, institutional avenues to durable solutions for forcibly displaced people. While there are 20.4 million refugees worldwide under UNHCR's mandate,⁷³ less than 1% of these people are resettled every year.⁷⁴ Externalisation strategies such as those examined above do not address the underlying causes of displacement, nor do they seek to deliver long-term outcomes that respect refugees' human rights. Rather, externalisation strategies increase the barriers that asylum seekers and refugees face to achieving durable solutions.

These strategies frequently succeed in blocking asylum seekers and refugees from achieving durable solutions in the following ways: procuring their immobilisation, detention, repatriation, and/or deportation. Taken as a whole, the suite of policies adopted by Australia, the EU and its member states deprive irregular migrants, asylum seekers, and refugees of safety and liberty.

6.2 Refugee deaths at borders

Externalisation policies are a powerful expression of destination states' prerogative to choose which asylum-seekers they accommodate. To this end, leaders and policymakers create an artificial division between those who seek asylum the 'right way' (regular, through resettlement from refugee camps and countries of asylum) and the 'wrong way' (irregular, particularly by boat).⁷⁵ Asylum seekers and refugees who migrate irregularly are the key targets of externalisation policies. Together, the urgent need to find safety, the lack of institutional pathways, and the additional enforcement barriers created by externalisation policies force people to take risky routes to seek safety in Europe or Australia.

65 Sandra Lavenex 'Multileveling EU external governance: The role of international organizations in the diffusion of EU migration policies' (2016) 42(2) *Journal of Ethnic and Migration Studies* 1, 4, 7.

66 *Ibid.*, 6-7.

67 *Ibid.*, 10.

68 *Ibid.*, 10-11.

69 *Ibid.*, 12-13.

70 *Ibid.*, 13.

71 *Ibid.*, 13-14.

72 *Ibid.*, 14.

73 UNHCR, *Figures at a Glance*, <<https://www.unhcr.org/en-au/figures-at-a-glance.html>>.

74 UNHCR, *Resettlement*, <<https://www.unhcr.org/resettlement.html>>.

75 Fiona McKay, Samantha Thomas and Susan Kneebone, "It would be okay if they came through the proper channels": community perceptions and attitudes towards asylum seekers in Australia' (2012) 25(1) *Journal of Refugee Studies* 113, 114.

In particular, irregular maritime migration is a symptom of the inadequacy of safe institutional avenues for displaced people to reach safety. Deaths by drowning at the borders of Australia and Europe can be partly ascribed to externalisation policies: the strengthening of transit states' border capacities that prevent land ingress to Europe (through training, enhanced surveillance and identification technology); intensive policing of safe travel paths like commercial air travel to Australia; and boat turnbacks creating incentives for use of non-seaworthy boats and for crew and passengers to scupper boats, risking injury and death.

6.3 Refugees contained in regions

Since the late 1990's, the European Council has called for the integration of migration and asylum goals into the EU's external policy.⁷⁶ EU member states have taken two approaches to externalisation: first, exporting migration control measures to origin or transit countries outside the EU; and second, implementing 'preventive' measures:

designed to change the factors which influence people's decisions to move, or their chosen destinations [including] attempts to address the causes of migration and refugee flows, or provide refugees with access to protection nearer their countries of origin ... development assistance, trade and foreign direct investment, or foreign policy tools.⁷⁷

84% of the world's refugees are hosted by countries directly neighbouring their country of origin.⁷⁸ Part of the function of externalisation policies is to ensure those countries continue to do the work of hosting these people, while countries such as Italy and Australia are permitted to select the location and circumstances of people to be resettled at their discretion. Alternatively, the destination states overseeing externalisation initiatives aim to make sure that people who *are* able to travel from their country of origin to Libya or Indonesia are hosted by or returned from those countries. Detention, deportation, repatriation, or longstanding limbo are common outcomes for asylum seekers and refugees stranded in these transit countries.

7. Further implications of externalisation policies

7.1 International Law

Destination states undertaking externalisation initiatives often claim that legal and moral responsibility lies with the party most proximate to the migrants affected – for instance, this may be a transit state (like Indonesia); a state where asylum seekers are detained for refugee status determination (like Nauru); an NGO (like IOM or UNHCR); or a private organisation (like Wilson Security or Canstruct). Indeed, the perceived ability to publicly and legally disavow responsibility for human rights violations associated with externalisation policies is a key attraction of choosing externalisation over more traditional bordering practices.

Nevertheless, in international law, sponsoring states, such as Australia and Italy, remain legally responsible for participation in human rights violations in Indonesia and Libya, including refoulement; arbitrary detention; violations of the right to life; cruel, inhuman and degrading treatment or punishment; and violations of the right to leave.⁷⁹ Although states may claim to avoid responsibility, this is not correct under international law.⁸⁰

7.2 Sovereignty

Destination states' pursuit and promotion of externalisation policies may be difficult to reconcile with the democratic self-determination of transit states or offshore processing host states. While some forms of cooperation on refugee externalisation can be characterised as voluntary or incentivised, such as Australia-Indonesia cooperation, in other cases externalisation can be better characterised as policy purchasing. For example, Papua New Guinea's reliance on Australia as an aid donor has arguably weakened its capacity to negotiate the terms of offshore processing. Meanwhile, significant allegations of corruption have passed seemingly unnoticed by Australia. Requiring the cooperation of PNG's leadership for its offshore processing regime, Australia's complicity ultimately harms PNG's democracy.

⁷⁶ Christina Boswell, 'The 'external dimensions' of EU immigration and asylum policy' (2003) 79(3) *International Affairs* 619, 619.

⁷⁷ *Ibid.*, 619-620.

⁷⁸ UNHCR, 'Global Trends: Forced Displacement in 2018' (Report, 19 June 2019).

⁷⁹ Dastyari and Hirsch, above n 16.

⁸⁰ *Ibid.*

Questions of sovereignty are particularly acute in circumstances where transit states have weak institutions and democratic structures. In these cases, transit states carrying out destination states' migration control policies may be both a symptom and a further cause of authoritarianism and human rights violations.⁸¹ In a dramatic few months in early 2014, Nauru's running party sacked the chief justice, resident magistrate, and chief of police, and a group of opposition politicians were expelled from parliament. Since that time, the local media has continued to be government-controlled and does not publish opposing voices. Many states have condemned this democratic decline in Nauru, but Australia has insisted that Nauru remains a democracy and therefore a suitable partner.⁸²

7.3 Democratic implications

Destination states themselves also risk engaging in actions that are not subject to democratic constraints, including oversight, accountability, and fiscal responsibility. Once responsibility for policy execution (for instance, detention or deportation) has been outsourced to another state or organisation, it can be very difficult for destination states' citizenry to exercise influence over this conduct. Democracies such as Italy and Australia export migration control functions to other governments or factions in Indonesia and Libya, NGOs like IOM, and private organisations like Canstruct, thus inserting additional layers of accountability between the government and the policy outcome. Policies that restrict media access, such as those that exist in Nauru, further contribute to the opacity of these policies and increase the difficulty for citizens and organisations charged with providing democratic checks and balances.

At the same time, politicians in Australia and across Europe have sought to capitalise on their 'tough stance' on asylum seekers and refugees to win voter support.⁸³ In some locations this strategy has been successful in improving the electoral fortunes of far-right, populist political parties and leaders whose political agenda is to further erode democratic institutions. In the pursuit of electoral success, evidence-based deliberative debate on the complex challenge posed by the needs of refugees and asylum seekers has become nearly impossible.⁸⁴

8. Conclusion

Externalisation takes diverse forms, including maritime interception activities, extraterritorial processing and detention, third-country interception, and public messaging campaigns. Destination states build support for these measures among origin and transit states through bilateral agreements, as well as through multilateral fora designed to elevate and maintain migration control as a key policy priority.

The impact of these measures on people seeking asylum are devastating. As a result of externalisation measures, refugees find themselves unable to reach safety and taking risky routes that often result in deaths. Many refugees find themselves contained in their region of origin by these policies.

Under international law, destination states remain responsible for many of the measures taken in pursuit of externalisation. Nevertheless, many of those states regard externalisation as a means of avoiding responsibility for or scrutiny over human rights violations. Destination states' pursuit and promotion of externalisation policies may also be difficult to reconcile with the democratic self-determination of transit states or offshore processing host states. Moreover, destination states themselves also risk engaging in actions that are not subject to democratic constraints, including oversight, accountability, and fiscal responsibility.

Although externalisation policies have now become a mainstay form of bordering in the global north, they are not beyond challenge. Externalisation policies undermine human rights principles, violate international law, cause significant harm for refugees and people seeking asylum, and undermine the entire system of refugee protection.

Such policies must be resisted and challenged to protect the rights of asylum seekers and refugees, including through legal challenges in domestic and international fora, democratic institutions, civil society and grassroots movements.

81 Jeff Sparrow, 'In PNG and Nauru, Australia's immigration policy comes at the expense of democracy' *The Guardian* (online) 15 June 2016, <<https://www.theguardian.com/commentisfree/2016/jun/15/in-png-and-nauru-australias-immigration-policy-comes-at-the-expense-of-democracy>>.

82 Amy Nethery, 'Australia's Refugee Detention Regime: Offshore and Unaccountable', *Current History*, September 2019, 227.

83 See eg Edgar Grande, Tobias Schwarzbözl and Matthias Fatke, 'Politicizing immigration in Western Europe' (2019) 26(10) *Journal of European Public Policy*, 1444; Philipp Lutz 'Variation in policy success: radical right populism and migration policy' (2019) 42(3) *West European Politics*, 517; Jordan McSwiney and Drew Cottle, 'Unintended consequences: One Nation and Neoliberalism in contemporary Australia' (2017) 79 *The Journal of Australian Political Economy* [87]; William Maley 'Australia's refugee policy: domestic politics and diplomatic consequences' (2016) 70(6) *Australian Journal of International Affairs* 670.

84 Catherine Wihtol de Wenden, 2018 'Knowledge and power: the impossible encounter', *Esprit*, no 7.

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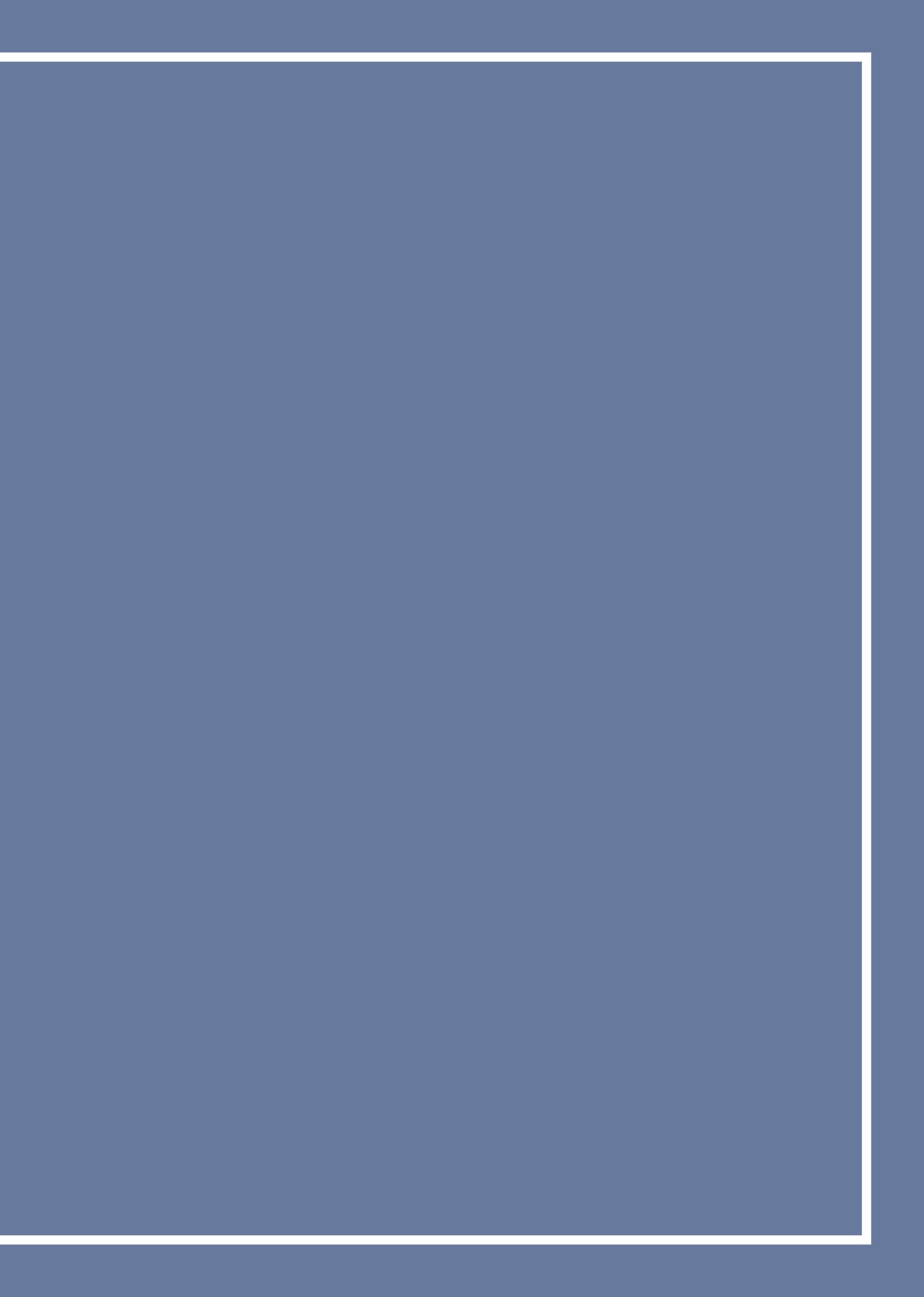
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