

Crimes Against Migrants as Crimes Against All of Us: The Relevance of International Criminal Law to Migrant Control

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This article examines three dynamics – externalization, privatization and re-orientation – within specific contexts that reveal both the evolving nature of borders and the continued relevance of crimes against humanity. Externalization refers to the allocation of migrant control beyond the immediate state, and this article analyzes it within the context of the atrocities committed through European migrant control on and over the Mediterranean. It also scrutinizes privatization, the increasing role of private actors in migration control – exemplified by the abuse of migrants in Australia’s offshore detention centers. Lastly, it examines re-orientation, which involves shifting migration control from the border deeper into the state by blending immigration and (international) criminal law in the US and Canada. A common theme amongst these three dynamics is the distancing of migrant abuse from mechanisms of accountability. As border control evolves, international criminal law offers a means to rehumanize migrants and expose the violence they face. Framing migrant abuses as crimes against humanity brings greater visibility to the violence of migration control and challenges the erosion of accountability caused by these shifting practices.

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Cet article examine trois dynamiques – l'externalisation, la privatisation et la réorientation – dans des contextes particuliers qui révèlent à la fois la nature évolutive des frontières et la pertinence continue de la notion de crimes contre l'humanité. L'externalisation, qui se définit par le transfert du contrôle des personnes migrantes au-delà du territoire étatique immédiat, est analysée dans le contexte des atrocités commises dans le cadre du contrôle des personnes migrantes par l'Europe dans l'espace méditerranéen et au-delà. Il examine également la privatisation, soit le rôle croissant d'acteurs privés dans le contrôle migratoire, illustrée par les mauvais traitements commis à l'encontre des personnes migrantes dans les centres extraterritoriaux de l'Australie. Enfin, la réorientation consiste à déplacer le contrôle migratoire à la frontière vers l'intérieur de l'État en fusionnant le droit de l'immigration et le droit pénal international, comme c'est le cas aux États-Unis et au Canada. Ces trois dynamiques visent toutes à mettre une distance entre les mauvais traitements commis à l'encontre des personnes migrantes et les mécanismes de responsabilité. À mesure que le contrôle frontalier évolue, le droit pénal international offre un moyen de réhumaniser les personnes migrantes et d'exposer les violences qu'elles sont susceptibles de subir. Qualifier les mauvais traitements commis à l'encontre des personnes migrantes de crimes contre l'humanité permet de mieux mettre en évidence la violence inhérente au contrôle migratoire et de lutter contre l'érosion de la responsabilité qu'entraîne l'évolution de ces pratiques.

I. Introduction

Every year for the past decade, thousands of migrants have crowded onto dinghies along the Libyan shoreline.¹ From there, they push off and attempt what thousands before them have failed to do: traverse the Mediterranean and land safely in Europe. Some make it. Many perish. Many are caught or “rescued” by the Libyan Coast Guard, herded onto ships by armed guards and returned to the North African country.² There, they are dumped into squalid, makeshift warehouses-turned-detention centers where they are exposed to risks of sexual violence, persecution, human trafficking and torture.³ The migrants have no legal rights in Libya and they do not end up there because Libya wants them.⁴ But when collecting migrants from the sea and bringing them back to shore, Libyan authorities are not working for themselves; their masters are in Rome and Brussels. The Libyan Coast Guard acts as an extension of European border control in international waters, hundreds of kilometers from the nearest European state.⁵ The border is no longer where it seems.

Almost 8,000 kilometers away from Libya, the border between Myanmar and Bangladesh has been the flashpoint of other atrocities. Seeking to ethnically cleanse Myanmar of the minority Muslim Rohingya population, Burmese authorities forcibly displaced some 700,000 Rohingya into Bangladesh.⁶ The border was a critical feature of these atrocities: the Burmese authorities wanted to ethnically cleanse Myanmar of the minority Muslim population, believing that they belonged “elsewhere”.⁷ Pushing

¹ See Sertan Sanderson, “Libya: Nearly 15,000 migrants intercepted and returned since start of the year”, *Info Migrants* (25 August 2025), online: <infomigrants.net> [perma.cc/65EN-XH7J].

² Euro-Mediterranean Human Rights Monitor, “Complex persecution: Report documents shocking accounts of Libyan Coast Guard’s involvement in migrant killing, kidnapping”, (13 December 2021), online: <euromedmonitor.org> [perma.cc/4KJZ-XY9C].

³ Ian Urbina, “The Secretive Prisons That Keep Migrants Out of Europe”, *The New Yorker* (28 November 2021), online: <newyorker.com> [perma.cc/BI7G-TAW3].

⁴ See *Report of the Independent Fact-Finding Mission on Libya*, UNHRC, 48th Sess, UN Doc A/HRC/48/83 (2021) at para 58, online: <documents.un.org> [perma.cc/YL88-799X] [UNHRC].

⁵ This continues as of late 2025. See Vincenzo Genovese, “European Commission dismisses NGOs’ call to stop financing of Libyan Coast Guard”, *Euro News* (24 September 2025), online: <euronews.com> [perma.cc/7ZUD-DDJQ].

⁶ See United Nations High Commissioner for Refugees, “Seven years of crisis for Rohingya refugees” (27 August 2024), online: <unhcr.org> [perma.cc/3UCW-TBZE]; United Nations Office of the High Commissioner for Human Rights, “UN expert demands accountability for the Rohingya and an end to ‘paralysis of indifference’” (24 August 2023), online: <ohchr.org> [perma.cc/L8LM-JCSQ].

⁷ For a critical analysis, see Kirsten J Fisher, “The Problem with the Crime of Forced Migration as a Loophole to ICC Jurisdiction: The PTC’s Decision on Myanmar and the Risk to Vulnerable Populations” (2020) 11:2 *J Intl Humanitarian Leg Stud* 385.

them across the border into Bangladesh was therefore a driving motivation of the Burmese authorities. At the same time, the border played a critical role in (ongoing) attempts to address the atrocities committed against the Rohingya by the International Criminal Court (ICC). While Myanmar is not a member-state of the ICC, Bangladesh is.⁸ In 2019, judges at the ICC accepted arguments that the forcible displacement of the Rohingya was a crime that originated in Myanmar but was completed in Bangladesh, a continuous crime that “spilled” across the border and into territory where the Court had jurisdiction.⁹ The ICC prosecutor was therefore granted jurisdiction to open an investigation into international crimes committed against the Rohingya.¹⁰

What are we to make of these two events, the role of the border and the centrality of abuses against migrants in the perpetration of atrocities? One thing is clear: in these moving, changing borderlands, international crimes – including crimes against *humanity* – are being committed. At the same time, borders are also places where the work of international criminal law is applied and justice is pursued. Numerous states have set up structural investigations into alleged international crimes – war crimes, crimes against humanity and genocide – committed in contexts like Ukraine, Gaza and Syria.¹¹ Such structural probes include the solicitation of evidence of atrocities from migrants and investigating the systems, structures and patterns of international crimes (rather than investigating specific individuals for specific crimes).¹² Along with migrants, calls to justice are also on the move, as evidenced by the increasing number of prosecutions of international crimes initiated on behalf of migrating victims against perpetrators of international crimes – especially across Europe and in

⁸ See International Criminal Court, “The States Parties to the Rome Statute” (last visited 5 November 2025), online: <icc-cpi.int> [perma.cc/4P2R-RH2X].

⁹ *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19/27, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar” (Pre-Trial Chamber III, International Criminal Court, 14 November 2019), online: <icc-cpi.int> [perma.cc/LY5S-SA38].

¹⁰ *Ibid.*

¹¹ See Royal Canadian Mounted Police, “Sensitive and International Investigations”, (last visited 25 September 2025), online: <rcmp.ca> [perma.cc/SG5K-K2GR]; Mark Kersten, “Sifting through speculation: What we do and don’t know about Canada’s Structural Investigation into the Israel-Hamas War”, *Justice in Conflict* (15 July 2025), online: <justiceinconflict.org> [perma.cc/D9QG-QC6W].

¹² Canada, for example, opened a structural investigation into alleged war crimes and crimes against humanity in Ukraine (see Royal Canadian Mounted Police, “A statement by the partners of Canada’s War Crimes Program on the conflict in Ukraine” (7 April 2022), online: <rcmp-grc.ca> [perma.cc/3XPN-JHMB]).

relation to war crimes.¹³ States undertaking the prosecutions are exercising universal jurisdiction, which allows them to investigate international crimes and prosecute perpetrators even when the crimes are committed against victims that are not nationals of the State.¹⁴ At the same time, states utilize immigration remedies to prevent perpetrators of international crimes from crossing their borders, as well as allegations of international crimes as a basis to deport.

While there are increased perpetration and prosecution of international crimes in borderland spaces, the relevance and impact of international criminal law to border spaces is neglected. This trend must change, especially when considering these borders act as locations where international criminal law primarily operates to protect the sovereign state and promote accountability, but are also locations where a growing number of atrocities are committed. This article argues that understanding and labeling atrocities against migrants as crimes against *humanity* – and therefore against all of us, as members of a *common humanity* – may offer some hope in stemming the most violent practices of migrant control. At a time when the location of the border and those doing the work of migrant control are evolving in ways that can frustrate accountability efforts, international criminal law has a role to play in returning a sense of humanity to how we perceive the plight of migrants. This article is not the first to suggest this, as it joins others, like Ioannis Kalpouzos, in an effort to shift the criminalization of migration and migrants themselves, to the criminalization of those who abuse the basic human rights of migrants.¹⁵

The article examines three dynamics and three contexts in which both the changing nature of the border, as well as the relevance of crimes against humanity, are evident: (i) *externalization* – the allocation of migrant control beyond the immediate state and the atrocities committed through European migrant control on the Mediterranean; (ii) *privatization* – the growing use of private actors in migration control and the atrocities committed against migrants in Australia’s offshore migrant detention facilities; and (iii) *re-orientation* – the shifting of migration control from the border deeper into the state and the blending of immigration and (international) criminal law

¹³ Máximo Langer & Mackenzie Eason, “The Quiet Expansion of Universal Jurisdiction” (2019) 30:3 Eur J Int’l L 779.

¹⁴ For recent developments regarding universal jurisdiction, see Trial International, “Universal Jurisdiction Annual Review 2024” (15 April 2024), online (pdf): <trialinternational.org> [perma.cc/M43T-6XRA].

¹⁵ Ioannis Kalpouzos, “International Criminal Law and the Violence against Migrants” (2020) 21:3 German LJ 571.

in the US and Canada. Each section details the harms produced by these processes. A theme that transcends externalization, privatization and reorientation is avoidance of accountability.

Far from suggesting that sovereignty is a *responsibility* or a *fiduciary duty*,¹⁶ the shifting of borders and migration control has produced a burgeoning industry of atrocities perpetrated against migrants. International criminal law is not *the answer*, but it is *an answer*. My contention is that international criminal law is *already* relevant in these shifting borderland spaces. Framing migrant abuses as crimes *against humanity* therefore represents an important – albeit imperfect – challenge to the pernicious consequences of border shifting and accountability distancing, as it also makes the violence of migration control more visible to more people. While not an orthodox method, each section of this article describes the relevant lived realities of the issue. This serves as a reminder that these issues are not merely about the “law” or “immigration policy” but grounded in and about human life.

II. Externalization: Outsourced Migration Control

As Leti Volpp has observed, the “management” of migration today “[detaches] migration control from a fixed territorial marker, via legal manipulation ... While nation-state borders are conventionally imagined as coterminous with territorial or cartographic frontiers, states engaged in these strategies can move the migration border deep *inside* a territory or push it out far *beyond* its geographic edges.”¹⁷ The push of migration control beyond the cartographic territorial demarcation of a state is especially clear with the attempts of European states to stem migration from northern Africa.

For migrants fleeing conflict, endemic poverty and persecution, the European Court of Human Rights’ (ECHR) landmark decision in *Hirsi Jamaa and Others v Italy* was meant to be a game-changer, one that improved the plight of asylum seekers and bolstered their chance of reaching European shores.¹⁸ In its judgment, the ECHR condemned Italy for returning twenty-

¹⁶ Evan J Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016).

¹⁷ Leti Volpp, “Pushing out and bleeding in: on the mobility of borders” in Ayelet Shachar, *The shifting border: Legal cartographies of migration and mobility* (UK: Manchester University Press, 2020) at 158.

¹⁸ *Hirsi Jamaa and Others v Italy*, No 27765/09 (23 February 2012), online: <hudoc.echr.coe.int> [perma.cc/LAY6-PPM4] [*Hirsi*].

four migrants, including Somali national Hirsi Jamaa, from Somalia and Eritrea to Libya, then under the control of Muammar Gaddafi, despite the grave risk that their human rights would be violated in Libya.¹⁹ The implication was clear: if Italian authorities intercepted migrants on the Mediterranean – even in areas outside of the exclusive territorial waters of Italy – Italy had an obligation to process any resulting claims of asylum.²⁰ Human rights advocates claimed victory and were effusive in their praise of the decision: “This historic judgment is a damning verdict on Italy’s willingness to cooperate with Colonel Mu’ammār al-Gaddafi’s government in Libya, which was known to systematically abuse human rights ... The ruling strengthens respect for human rights across Europe and upholds international legal safeguards for migrants and asylum-seekers.”²¹

The ECHR decision was treated as something of an aha moment – the self-interest of sovereign states that extraterritorially abuse migrants was defeated by valiant human rights advocates, as if David had triumphed over Goliath on the high seas, ushering in a new era of respect for migrant rights. But Goliath had other plans. While Jamaa and several of his companions involved in the case were eventually granted refugee status, thousands of others would not be so lucky.²² Rather than accepting the ECHR’s decision, addressing their complicity in migrant abuses and developing a migrant rights-focused approach to refugee flows on the Mediterranean, European states adopted a different strategy. Instead, they shifted their borders and crafted novel strategies involving new iniquitous partners in an attempt to avoid accountability for abuses and atrocities committed against migrants – some of which have been described as crimes against humanity.²³

A. European Borders on the Mediterranean

For decades prior to President Gaddafi’s coming “in from the cold” in the 2000s, Libya was regarded as an international pariah, a result of its sponsorship of terrorist activities abroad, involvement in atrocities such as the Lockerbie bombing, and its efforts towards building nuclear power and

¹⁹ *Ibid.*

²⁰ *Ibid.* at 75–76.

²¹ Amnesty International, “Italy: ‘Historic’ European Court judgment upholds migrants’ rights” (23 February 2012), online: <amnesty.org> [perma.cc/S98Z-6FDP].

²² See *Hirsi*, *supra* note 18.

²³ See European Center for Constitutional and Human Rights, “Migrants and refugees in Libya face crimes against humanity: The ICC must investigate”, (last visited 1 October 2025), online: <ecchr.eu> [perma.cc/A8HN-SSQD].

a chemical weapons arsenal.²⁴ Libya had historically been a *destination* as opposed to transit country for migrants, but with Gaddafi focused on improving relations with Western states in the mid-2000s, Libya's role in welcoming migrant workers plummeted.²⁵ Many migrants who faced the imposition of new restrictions and coercion subsequently turned to the sea and towards Europe.²⁶ Alarmed at this development, southern European states – Italy in particular – negotiated with Gaddafi, viewing him a viable partner capable of warding off unwanted migrants.²⁷ The southern border of European states would now extend into the Mediterranean and Gaddafi would be paid handsomely to control it.²⁸ In 2008, Italy and Libya signed the *Treaty of Friendship, Partnership and Cooperation*.²⁹ Despite continuing allegations of human rights abuses by his regime, Gaddafi held up his end of the bargain, deploying coercive measures to control migration flows towards European shores.³⁰ In 2008, Italy agreed to invest \$5 billion into Libya in exchange for Tripoli's help in controlling African migrants.³¹

In 2011, the Libyan regime collapsed, following a military intervention approved by the UN Security Council and supported by many of the same governments that had worked with Gaddafi to stem migration to Europe.³² Those states also pushed for Gaddafi to be targeted with a warrant for his arrest by the ICC on charges of war crimes and crimes against humanity in relation to violence ordered against Libyan civilians.³³ As Gaddafi's forty-

²⁴ For thorough overviews of Libyan history and Gaddafi's transformation from international pariah to Western partner, see *inter alia*, Ronald Bruce St John, *Libya: From Colony to Revolution* (UK: Oneworld Publications, 2011); Dirk Vandewalle, *A History of Modern Libya*, 2nd ed (Cambridge, UK: Cambridge University Press, 2012); and Alison Pargeter, *Libya: The Rise and Fall of Qaddafi* (US: Yale University Press, 2012).

²⁵ European Center for Constitutional and Human Rights, International Federation for Human Rights & Lawyers for Justice in Libya, "No Way Out: Migrants and Refugees Trapped in Libya Face Crimes Against Humanity" (November 2021) at 14, online: <fidh.org> [perma.cc/YNC5-PGN2].

²⁶ *Ibid.*

²⁷ See Human Rights Watch, "Italy/Libya: Gaddafi Visit Celebrates Dirty Deal", (9 June 2009), online: <hrw.org> [perma.cc/7FWY-BZ3G].

²⁸ *Ibid.*

²⁹ See Natalino Ronzitti, "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?" (2009) 1:1 Bull Italian Politics 125.

³⁰ See Ian Traynor, "EU keen to strike deal with Muammar Gaddafi on immigration", *The Guardian* (1 September 2010), online: <theguardian.com> [perma.cc/B5HN-EF8N].

³¹ See "Italy Agrees to \$5 Billion in Compensation for Colonizing Libya", *Deutsche Welle* (30 August 2008), online: <dw.com> [perma.cc/85S4-WFHN].

³² Resolution 1973 (2011), UNSC, 6498th meeting, UN Doc S/RES/1973 (2011) Res 1973.

³³ Resolution 1970 (2011), UNSC, 6491st meeting, UN Doc S/RES/1970 (2011) Res 1970 [Resolution 1970 (2011), UNSC]; *Situation in Libya*, "Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi", Pre-Trial Chamber I, International Criminal Court, ICC-01/11-13, (27 June 2011), online: <icc-cpi.int> [perma.cc/J9W7-6ERH].

year rule crumbled and rebel militias began to exert growing control over Libyan territory and institutions, Chadian President Idris Deby worried that Gaddafi's demise would create a political vacuum in the vast north African state and open "Pandora's box."³⁴ With Libya descending into further unrest – a strife which continues today³⁵ – this vacuum generated a vast marketplace of human smuggling and trafficking of migrants.³⁶ By the mid-2010s, Europe was facing a migrant "crisis".³⁷

With European borders extending outwards to North Africa, Italian ships patrolled the Mediterranean to intercept migrants and return them to Libya in a practice known as "pushbacks".³⁸ It was because of these forced returns to North Africa that migrants faced the sexual and gender-based violence, enslavement, arbitrary detention and torture that culminated in ECHR's decision in *Hirsi*.³⁹ With the ECHR holding Italy responsible for migrants' human right violations, a new strategy was needed, one that would further externalize Europe's borders while also increasing its distance from accountability. If pushbacks were to continue without further accountability, it would fall upon non-European actors to do the pushing back. The result has been a massive investment by European states into Libya and the Libyan Coast Guard, ensuring that Libyan authorities – and not European agents – would be the intervenors.⁴⁰ As Luiza Bialasiewicz writes, this is all about Libyan agents "doing Europe's border work".⁴¹ The strategy permits European officials to avoid processing asylum claims, thus avoiding direct violations of migrant rights, but in the alternative returning them to situations where they face abuses. As a recent report details: "While enhancing Libyan coastguards' capacities, EU institutions and member states have concurrently worked to ensure that rescue obligations would not

³⁴ See Alex De Waal, "African roles in the Libyan conflict of 2011" (2013) 89:2 Intl Affairs 370.

³⁵ See Ahmed Elumami "Worst Tripoli fighting in a year shows limits of Libya peace push", *Reuters* (3 September 2021), online: <reuters.com> [perma.cc/2BAX-VS7J]; Jalel Harchaoui, "The Libyan Civil War Is About to Get Worse", *Foreign Policy* (18 March 2020), online: <foreignpolicy.com> [perma.cc/6ASR-94HT].

³⁶ See Freedom Onuoha & Chukwuma Okafor, "State Failure, Irregular Migration, and Human Trafficking in Post- Gaddafi Libya" in Ufo Okeke-Uzodike, Christopher Isike & Emeka Iloh, eds, *The Political Economy of Migration in Africa* (Nigeria: African Heritage Institution, 2021) 143.

³⁷ William Spindler, UNHCR, "2015: The year of Europe's refugee crisis" (8 December 2015), online: <unhcr.org> [perma.cc/E2B7-L9JS].

³⁸ Andreas Noll, "When are pushbacks at the EU's external borders illegal?", *Deutsche Welle* (7 October 2021), online: <dw.com> [perma.cc/FP73-KC6N].

³⁹ See *Hirsi*, *supra* note 18.

⁴⁰ See Luiza Bialasiewicz, "Off-shoring and Out-sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean" (2012) 17:4 Geopolitics 852.

⁴¹ *Ibid* at 852.

fall on their own actors".⁴² The result is that the Libyan Coast Guard is a *de facto* extension of European immigration services and border patrol. After collecting evidence of atrocities committed against migrants detained in Libya, human rights groups denounced the practice and implored the EU to "stop 'collaborating' with horrific abuse of refugees".⁴³

The decision of European states to further externalize their borders and migration control efforts in response to *Hirsi* is no outlier. It is nothing new, nor is it restricted to European states. As Thomas Spijkerboer notes: "Since the end of the Cold War, migration law and policy of the global North has been characterised by *externalisation*, privatisation and securitisation."⁴⁴ It is of particular concern to rights advocates that European migration control in the Mediterranean appears to be complicit with a litany of abuses committed against those migrants.⁴⁵ European states are engaged in a joint migration control enterprise with Libyan authorities and are thus jointly responsible for the harms committed against migrants. Yet as the situation for migrants in Libya and the Mediterranean has worsened and reports detailing abuses have proliferated, the relationship between Libyan and European authorities has only deepened. In January 2017, the European Union (EU) unveiled a €200 million plan to stop migration through Libya, which included €32 million dedicated to expanding its training programme for the Libyan Coast Guard.⁴⁶ In July 2023, additional European funds were allocated to the Libyan Coast Guard, despite advocates stating that "[a]ssisting Libya's coast guard, knowing that it will facilitate the return of thousands of people to serious human rights violations, makes Italy and the European Union complicit in such crimes."⁴⁷

The well-being and protection of migrants appears to be an afterthought for European states when compared to the exigencies of "border management" and "national security". This is evidenced by the amount of funding apportioned to it. According to Oxfam, of the EU's €400 million

⁴² Amnesty International, "'No one will look for you': Forcibly returned from sea to abusive detention in Libya" (2021) at 12, online (pdf): <amnesty.org> [perma.cc/J9NG-P95C] [emphasis added].

⁴³ See Amnesty International, "Libya: EU must stop 'collaborating' with horrific abuse of refugees - new report" (23 September 2020), online: <amnesty.org.uk> [perma.cc/U9QL-ANHB].

⁴⁴ Thomas Spijkerboer, "The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control" (2018) 20:1 European J Migration & L 453 [emphasis added].

⁴⁵ UNHRC, *supra* note 4 at paras 57–58.

⁴⁶ Angela Guiffrida & Lorenzo Tondo, "Deaths at sea expose flaws of Italy-Libya migration pact", *The Guardian* (23 July 2018), online: <theguardian.com> [perma.cc/M7LL-2LT2].

⁴⁷ See Giulia Tranchina, "Italy Reups Funding to Force Migrants Back to Libya", *Human Rights Watch* (1 February 2023) online: <hrw.org> [perma.cc/P2HN-VHHB].

Emergency Trust Fund for Africa (Fund), “a meagre 3% of the budget is allocated to developing, or supporting African authorities to develop, safe and regular routes”.⁴⁸ Most of the Fund is dedicated to migration control, with much of it going to states that the EU criticizes as non-democratic, while simultaneously legitimizing them by treating them as partners in controlling migration.⁴⁹ For example, when the Gaddafi regime collapsed and Libya fell into a power vacuum, European authorities began funding Sudan to help it detain and deter migrants.⁵⁰ Despite being ruled until 2019 by Omar al-Bashir – who is wanted by the ICC for war crimes, crimes against humanity and genocide – Sudan was offered improved relations with the West and, crucially, European funding, if it restricted migrant movements on behalf of European states.⁵¹ For a state largely stigmatized by the international community, “the refugee crisis has been a godsend”.⁵²

For European states, having non-democratic partners willing to abuse migrants appears to be more of an advantage than a hindrance: non-democratic partners can commit crimes against humanity and other atrocities outside of European territory to deter further migration. In this way, the border as well as accountability for the crimes committed against migrants funded by European states shifts outwards, away from Europe. Moreover, as Lisa Heschl writes, Europe’s agreements “are often concluded without public or parliamentary oversight, preventing ‘democratic control, transparency and the scrutiny of their compatibility with international law’”.⁵³

B. Crimes Against Humanity on Foreign Shores, Distancing Accountability

The agreements between Libya and European states illustrate how states have moved their borders and externalized migrant control beyond their

⁴⁸ See Elise Kervyn & Raphael Shilhav, “An emergency for whom?: The EU Emergency Trust Fund for Africa – migratory routes and development aid in Africa”, *Oxfam International* (15 November 2017) at 19, online: <oxfam.org> [perma.cc/63Q9-D2KE].

⁴⁹ Caitlin L Chandler, “Inside the EU’s flawed \$200 million migration deal with Sudan”, *The New Humanitarian* (30 January 2018), online: <thenewhumanitarian.org> [perma.cc/YMV6-RA3M].

⁵⁰ Nesrine Malik, “Bashir Comes in From the Cold”, *Foreign Policy* (31 July 2016), online <foreignpolicy.com> [perma.cc/6PMG-SVBF]; Mark Kersten, “It is time for the ICC to address crimes against asylum seekers”, *Al Jazeera* (8 December 2021), online: <aljazeera.com> [perma.cc/MLV5-T3EP].

⁵¹ Malik, *supra* note 50.

⁵² *Ibid.*

⁵³ Lisa Heschl, *Protecting the Rights of Refugees Beyond European Borders* (UK: Cambridge University Press, 2018) at 47.

territory. The agreements and the motivations that underpin them are examples of how states shift and blur borders in an effort to share the “burden” of migrant control. *Externalization* affirms the power of states to move their borders further beyond their territories and to employ a diversity of actors to manage migration controls for them, including ones well-known for their atrocities and human rights violations. This shapeshifting has had the effect of distancing states from accountability for a litany of rights protected under international human rights and refugee law.⁵⁴ Undaunted, advocates have sought to highlight the responsibility of foreign states for atrocities committed with their – at least tacit – consent. The UN Fact-Finding Mission on Libya has found credible allegations of slavery and the systematic commission of torture and sexual violence against migrants in Libya – as well as a woeful lack of accountability.⁵⁵ The head of the Mission said that European decisions had “aided and abetted” the atrocities in Libya.⁵⁶ In 2022, the European Centre for Constitutional and Human Rights submitted its views to the ICC that “EU and Member States’ officials and Libyan actors allegedly commit crimes against humanity in the form of severe deprivation of liberty by intercepting migrants and refugees on the Central Mediterranean Sea and forcibly returning them to Libya.”⁵⁷ As further explored below, numerous additional human rights organizations and the ICC have announced their interest in investigating and prosecuting atrocities committed against migrants in Libya and on the Mediterranean – including murder, unlawful imprisonment, torture and so on – as possible crimes against humanity. The number of migrants abused, and the organized European–Libyan effort to commit atrocities, suggest that the attacks on non-combatant migrants are both widespread and systematic – thereby satisfying the legal requirements for a finding of crimes against humanity under the ICC’s Rome Statute.⁵⁸ The same appears to be also true elsewhere, including on two Pacific islands that Australia has used to

⁵⁴ Thomas Gammeltoft-Hansen, *Access to Asylum International Refugee Law and the Globalisation of Migration Control* (Cambridge, UK: Cambridge University Press, 2011) at 17.

⁵⁵ See United Nations, “Libya: Crimes against humanity committed since 2016 – rights probe”, *UN News* (27 March 2023), online: <news.un.org> [perma.cc/SP2A-49W7].

⁵⁶ See Emma Farge & Angus McDowall, “U.N. rights mission blasts EU on Libya migrant abuses”, *Reuters* (27 March 2023), online: <reuters.com> [perma.cc/SNT2-W8PB].

⁵⁷ European Center for Constitutional and Human Rights, “Migrants and refugees in Libya face crimes against humanity: The ICC must investigate” (last visited 26 September 2024), online: <ecchr.eu> [perma.cc/9QWK-9HNF] [ECCHR].

⁵⁸ *Rome Statute of the International Criminal Court*, A/CONF.183/9, 17 July 1998, art 7 [Rome Statute].

warehouse asylum seekers.⁵⁹ But unlike on the Mediterranean, those in charge of migration control and operating migrant detention camps are private actors.⁶⁰

III. Privatization: Sovereign Control of Migration Control via Private Actors

Reza Barati made it to Australia in 2013.⁶¹ After settling in, the 23-year-old Iranian Kurd, described as a “gentle giant”, hoped to continue his education.⁶² But his timing was tragically off. Barati’s arrival on Australian soil came just a few days after the adoption of the *Regional Resettlement Arrangement between Australia and Papua New Guinea*, which permits Australian authorities to transfer “illegal” refugees who arrive in Australia by boat to Manus Island.⁶³ Just weeks after he arrived in Australia, Barati was sent to the migration center on Manus.⁶⁴ Six months later, he was killed by guards during a riot.⁶⁵

Barati’s death occurred far from the eyes of Australian authorities, in a detention center over 1,000 kilometers away from the Australian mainland. While he was “nothing more than an ordinary youth with the kind of dreams that every single young man from every single culture has for his future ... he died at the hands of people who he requested to provide him protection and in a prison on a remote island.”⁶⁶ He died at the hands of private actors, G4S guards hired by Australia, who claimed to be overpowered by rioting asylum seekers.⁶⁷ One hit Barati with a piece of timber with nails protruding from it.⁶⁸ Witnesses claimed that at least thirteen G4S guards kicked Barati

⁵⁹ See Tendayi E Achiume et al, “Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute - The Situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers” (14 February 2017) online: <law.stanford.edu> [perma.cc/56VU-4JED].

⁶⁰ *Ibid.*

⁶¹ Ben Doherty, “Men accused of Reza Barati’s death in Manus detention centre stand trial”, *The Guardian* (20 September 2015), online: <theguardian.com> [perma.cc/U26X-53TE] [Doherty, “Men accused stand trial”].

⁶² Behrouz Boochani, “Four years after Reza Barati’s death, we still have no justice”, *The Guardian* (16 February 2018), online: <theguardian.com> [perma.cc/PBJ7-FF7W].

⁶³ United Nations High Commissioner for Refugees, “Regional resettlement arrangement between Australia and Papua New Guinea” (19 July 2013), online: <refworld.org> [perma.cc/9PY2-26GS].

⁶⁴ Doherty, “Men accused stand trial”, *supra* note 61.

⁶⁵ *Ibid.*

⁶⁶ Boochani, *supra* note 62.

⁶⁷ Doherty, “Men accused stand trial”, *supra* note 61.

⁶⁸ *Ibid.*

in the head.⁶⁹ Another guard dropped a large stone onto Barati's head while he laid on the floor, the blow that ultimately cost Barati his life.⁷⁰ Two private security guards from Papa New Guinea were eventually convicted of Barati's murder. Other guards from Australia were flown out in the immediate aftermath of the death and have never been prosecuted for their involvement in Barati's homicide.⁷¹ The young man's murder is just one particularly harrowing case of harm experienced in the privately-operated offshore migrant-detention centers.

A. Privatization: Manus Island and Nauru Migrant Detention Facilities

As with externalization, the *privatization* of migration control by Western states is expanding. As Ashwini Vasanthakumar writes:

Liberal democracies increasingly rely on private actors to enforce their immigration laws and control their borders. Commercial airlines turn away passengers whose travel documents are suspect; a host of private individuals, including doctors, landlords and bank managers, are charged with verifying and monitoring immigration status; and private security companies detain and remove unauthorised migrants, and provide housing and food for those seeking asylum. From entry to basic welfare, to detection and to deportation, private actors have long been instrumental in enforcing states' immigration policies.⁷²

Manus Island and Nauru are embodiments of this approach and ethos. They form part of the "most heavily privatized immigration detention system" in the world, operated at the behest of Australia, which is "known for having one of the harshest approaches to asylum seekers".⁷³ For years, Australia captured asylum seekers on its territory as well as those attempting to enter its territory via boat.⁷⁴ Australia then transported the migrants to privately operated processing centers in third countries – namely, Nauru and Manus Island in Papua New Guinea – with whom

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*; Eric Tlozek, "Reza Barati death: Two men jailed over 2014 murder of asylum seeker at Manus Island detention centre", *ABC News* (18 April 2016), online: <abc.net.au> [perma.cc/5BBD-67MZ].

⁷² Ashwini Vasanthakumar, "Privatising Border Control" (2018) 38:3 *Oxford J Leg Stud* 411.

⁷³ Daniel Halliday & Janine O'Flynn, "Economic Rent, Rent-Seeking Behaviour, and the Case of Privatized Incarceration," in David Boonin, ed, *The Palgrave Handbook of Philosophy and Public Policy* (Switzerland: Springer International Publishing) at 462.

⁷⁴ "Australia ends controversial asylum detention deal with Papua New Guinea", *BBC News* (6 October 2021), online: <bbc.com> [perma.cc/3XMZ-7Z4Y].

Australia has third country agreements.⁷⁵ In 2021, it was announced that Australia's deal with Papua New Guinea had finished and that the centers were no longer operational,⁷⁶ but migrants remained in the country and additional deals have since been struck with Papua New Guinea to send migrants to Australia.⁷⁷ In 2021, a deal with Nauru was signed to ensure the asylum detention centres remained open "indefinitely"⁷⁸ and the number of migrants was growing as of 2024.⁷⁹

Those migrants detained in the asylum centres have generally been given four options: return to their original state (irrespective of the harms they may face in doing so), find a third country that will accept them, attempt to resettle into the local communities in Nauru, Papua New Guinea, or stay in Manus or Nauru in the hope of having their claim processed by Australia.⁸⁰ If they choose to remain, they could be detained indefinitely. As the Australian government has admitted: "Immigration detention in Australia is indefinite – there is no limit in law or policy to the length of time for which a person may be detained."⁸¹ The costs to the state are enormous, with expenditures for offshore detention facilities in the billions of dollars each year and the average cost to detain a migrant in one of the island facilities costing Australia twice that of an onshore detainee.⁸² In 2022, it was reported that the private operators of Nauru – Canstruct International – had made \$101 million in profits, which amounted to over \$500,000 per asylum seeker held at the facility on the island.⁸³

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Paul Karp, "Australia to strike new funding deal with Papua New Guinea to manage transferred asylum seekers", *The Guardian* (3 July 2024), online: <theguardian.com> [perma.cc/GXY5-2QRC].

⁷⁸ Austli, Commonwealth, Department of Foreign Affairs and Trade, *Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru* (20 October 2021), online: <dfat.gov.au> [perma.cc/VZ74-VZ5J]; see also Ben Doherty, "Australia signs deal with Nauru to keep asylum seeker detention centre open indefinitely", *The Guardian* (24 September 2021), online: <theguardian.com> [perma.cc/AKS3-EVTK].

⁷⁹ See Ben Doherty, "'What is our future?': the Nauru detention centre was empty. Now 100 asylum seekers are held there", *The Guardian* (12 June 2024), online: <theguardian.com> [perma.cc/T4QM-6TQ6].

⁸⁰ For statistics on what outcomes for migrants, see Refugee Council of Australia, "Offshore processing statistics", (7 March 2025), online: <refugeecouncil.org> [perma.cc/DU97-KHSB].

⁸¹ Australian Human Rights Commission, "Asylum seekers and refugees", (last visited 2 December 2021), online: <humanrights.gov.au> [perma.cc/6MVK-A3MR].

⁸² Halliday & O'Flynn, *supra* note 73 at 462.

⁸³ Ben Doherty & Ben Butler, "Nauru detention centre operator makes \$101m profit – at least \$500,000 for each detainee", *The Guardian* (last modified 11 February 2022), online: <theguardian.com> [perma.cc/3YE7-EE9V].

The operation of offshore migrant detention centers by private security firms such as G4S,⁸⁴ Loda Security⁸⁵ and Paladin⁸⁶ has left asylum seekers living in dire circumstances. Perhaps this is no surprise: what interests do private companies have in running such camps, but to keep costs low and profits high? On Manus and Nauru, conditions were such that in 2017 the UN High Commissioner for Refugees called it “a man-made and entirely preventable humanitarian crisis” and “a damning indictment of a policy meant to avoid Australia’s international obligations”.⁸⁷ According to a former detention manager: “In Australia, this facility couldn’t even serve as a dog kennel. The owners would be jailed.”⁸⁸

Not all abuses on Manus Island are as blatant as Barati’s death, but they are no less devastating. Children draw self-portraits of themselves in cages, tears pouring down their faces, and with phrases like “I want go to school” [sic].⁸⁹ Some remained for years in an encampment that readily appears more like an open-air prison than a migrant processing center.⁹⁰ Human rights groups described an “epidemic of self-harm” on the island and an institutional failure to prevent violent attacks on migrants by the local population.⁹¹ Children on the island suffer from high levels of mental health issues while the government of Australia fights in court to refuse them medical care.⁹² While “[s]tates have the obligation to oversee and monitor privatised detention facilities and take appropriate steps towards redress and remedy to protect the rights of those deprived of their liberty”, the fact that these harms occur in privately operated facilities makes accountability

⁸⁴ Doherty, “Men accused stand trial”, *supra* note 61.

⁸⁵ Christopher Knaus, “Security firm says it would have been open to \$423m Manus Island contract handed to Paladin”, *The Guardian* (25 February 2019), online: <theguardian.com> [perma.cc/5WLS-T45V].

⁸⁶ *Ibid.*

⁸⁷ United Nations High Commissioner for Refugees, “Australia urged to ensure protection, assistance and solutions for refugees on Manus Island” (21 November 2017), online: <unhcr.org > [perma.cc/78LR-7PUX].

⁸⁸ Antony Loewenstein, “Meet the Firms Cashing in on Imprisoning Foreigners”, *New Internationalist* (1 January 2014), online: <newint.org> [perma.cc/3DZL-WTJS].

⁸⁹ Sarah Mares & Karen Zwi, “Sadness and fear: what the drawings by children in detention showed us”, *The Guardian* (12 May 2014), online: <theguardian.com> [perma.cc/Q9BP-C9B8].

⁹⁰ See Amnesty International, “Australia has turned Nauru into an open-air prison” (17 October 2016), online: <amnesty.org.au> [perma.cc/XF3D-SLJU].

⁹¹ *Ibid.*

⁹² Charli Shield, “Youth in Australia’s Nauru detention center suffering severe mental illness”, *Deutsche Welle* (30 August 2018), online: <dw.com> [perma.cc/F96N-UCYT].

efforts more difficult.⁹³ Once again, the border is shifted. Control is placed in the hands of private actors, who distance themselves from accountability.

There is strong evidence that human rights abuses (including torture and cruel, inhumane or degrading treatment or punishment) as well as alleged crimes against humanity are committed against the migrants.⁹⁴ The ICC received a thoroughly researched legal opinion that found reasonable grounds to believe Australian authorities and the private actors running the detention camp had committed crimes against humanity including, but not limited to, unlawful imprisonment, torture and persecution.⁹⁵ Despite this, Australia seems to be an inspiration to others. The EU, for example, has “[considered] whether to ‘off-shore’ services for asylum seekers and refugees when their claims are being considered so that they do not enter European countries”.⁹⁶ Before it was defeated, the Conservative government in the United Kingdom spent tremendous amounts of political, capital and financial resources on a plan to send asylum seekers back to Rwanda.⁹⁷ Human rights groups continue to demand that the EU reject the off-shoring of migrant control.⁹⁸ This contagion of violence against migrants, masked as valid migrant control policy, was something the aforementioned communication to the ICC explicitly raised in its argument for crimes against humanity committed on Manus Island and Nauru:

[T]he situation in Australia is of sufficient gravity because its potential to set a precedent, and to normalise subjecting vulnerable refugee populations to inhumane detention practices in order to deter future refugee flows. To the extent that the

⁹³ United Nations, Office of the High Commissioner for Human Rights, “Concerns over States contracting private security companies in migration situations” (20 December 2019), online: <ohchr.org> [perma.cc/SXN2-Z5VB] [OHCHR].

⁹⁴ See analysis below; see also Jamal Barnes, “Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia’s Offshore Detention Centres” (2022) 35:4 J Refugee Studies 1513.

⁹⁵ Document submitted by 17 leading international criminal law and refugee law scholars outlining the legal and factual basis for potential liability of Australian and corporate officials for crimes committed against refugees on Australia’s offshore detention centers on Nauru and in Papua New Guinea; information and analysis based on publicly available sources as well as over 70 interviews conducted between May 10 and May 25, 2016 in Australia by the Stanford International Human Rights and Conflict Resolution Clinic (see Achiume, *supra* note 59; see also Kalpouzos, *supra* note 15 at 572).

⁹⁶ Jane Lethbridge, “Privatisation of Migration & Refugee Services & Other Forms of State Disengagement”, *European Public Service Union* (March 2017) at 32, online (pdf): <epsu.org> [perma.cc/45NH-XMZF].

⁹⁷ For estimates of cost, see Peter William Walsh & Madeleine Sumption “The uncertain financial implications of the UK’s Rwanda policy”, *The Migration Observatory at the University of Oxford* (26 April 2024), online: <migrationobservatory.ox.ac.uk> [perma.cc/GE42-LD34]; Andrew Macaskill, “UK plan to deport asylum seekers to Rwanda suffers first parliamentary defeats”, *Reuters* (5 March 2024) online: <reuters.com> [perma.cc/L33S-Q2JP].

⁹⁸ Amnesty International, “EU: ‘Reject plans to offshore asylum and safeguard refugee protection,’ say over 90 NGOs” (9 July 2024), online: <amnesty.org> [perma.cc/EB66-5JWA].

policies Australia is adopting are taken up by other states, the Australian situation will result in the normalisation of crimes against humanity; the perception that a widespread and systematic attack against a civilian population may be seen as normal, banal, and potentially acceptable.⁹⁹

Of course, Australia is far from the only state using private companies for the purposes of migrant control. Private security companies operate on both sides of the Mexico and US border.¹⁰⁰ Private firms are also increasingly used to process visa applications, with allegations that some states exploit migrants for profit by doing so.¹⁰¹ Artificial intelligence is also being employed more frequently at territorial borders, despite the fact that it makes migration control “more arbitrary, unjust, discriminatory and invasive”.¹⁰² The spaces in which private actors are employed for the purposes of migrant control are proliferating. Some even push migrants into human trafficking and smuggling, to the financial benefit of criminal networks.¹⁰³ Nowhere is this shift of responsibility for migrant control and “protecting” European borders clearer than in directives to airline carriers.

B. Migration in Flight

A flight from Mitiga International Airport in Tripoli, Libya, to Rome, Italy, costs around \$595 CAD.¹⁰⁴ This amount pales in comparison to the thousands of dollars that asylum seekers pay to human traffickers and smugglers in an attempt to reach European soil.¹⁰⁵ Flying would also be much safer; the journey of migrants smuggled from source countries to the shores of Libya and then to Europe is harrowing and risky; in 2024, 2,452

⁹⁹ Achiume, *supra* note 59 at 114; Kalpouzos, *supra* note 15 at 572–573.

¹⁰⁰ OHCHR, *supra* note 93 at 74.

¹⁰¹ Anna Tims, “Government ‘exploits migrants for profit’ by outsourcing visa services to private firms”, *The Guardian* (17 November 2019), online: <theguardian.com> [perma.cc/RJ3-2X6F].

¹⁰² See Nicholas Keung, “How artificial intelligence is changing asylum seekers’ lives for the worse”, *Toronto Star* (9 November 2020), online: <thestar.com> [perma.cc/9PVQ-AR37].

¹⁰³ Onuoha & Okafor, *supra* note 36.

¹⁰⁴ See Google Flights search for flight on 11 January 2026, (last visited 5 November 2025) online: <google.com/travel/flights> [perma.cc/JJ3Z-V5LF].

¹⁰⁵ See Mahmoud Sobsky, “A bloody route through Libya: “Europe-Bound Migrants Caught Between Cham Wings Airlines And Haftar’s Army”, *Arab Reporters for Investigative Journalism* (1 October 2023), online: <arij.net> [perma.cc/KF9Y-WZUD] (“[t]he data collected during our investigation showed that the average cost per person smuggled to Italy from western Libya ranged between 2500 to 3000 USD, while the cost of smuggling from eastern Libya ranged from 4000 to 4500 USD. With an average of 53310 migrants passing through Libya each year, the profits of human trafficking networks in Libya (if we assume an average cost of 3600 USD per migrant) would reach approximately 192 million USD annually.”).

migrant deaths were recorded on the Mediterranean.¹⁰⁶ The question thus arises: if flying is both safer and cheaper, why do so many migrants pay exorbitant sums to travel to the north African coast just to face a real risk of drowning in the Mediterranean?

The answer lies in a 2001 directive from the Council of the European Union requiring airlines operating in the EU to refuse services to asylum seekers traveling to the Schengen area.¹⁰⁷ More specifically, in order to combat “illegal immigration” (a term the directive does not define), the EU requires its states to “take the necessary steps to ensure ... the obligation of carriers to return third country nationals”.¹⁰⁸ Should they fail to do so, airlines can be penalized with fines of anywhere from €3,000 per passenger up to a lump sum of €500,000, in addition to covering the costs of the migrant’s return trip.¹⁰⁹ The motivations behind this decision are multiple. As Georg Menz writes, “[c]ost shifting, blame avoidance, and ideological preference for private sector providers all play roles in the outsourcing of unpleasant control functions to transportation companies, including airlines.”¹¹⁰

According to Ayelet Shachar, “[a]llowing airline personnel to perform such passport-control activities in effect contributes to the growing role of private-sector intermediaries in conducting what is arguably a central plank of sovereign authority: deciding whom to admit and whom to keep at bay.”¹¹¹ Worse, the approach of European states is circular and self-defeating: its policies push migrants towards human trafficking networks, militias and authoritarian regimes, precisely the actors that liberal and democratic European states are seeking to thwart and defeat. As one writer observes: “only corrupt government officials and traffickers are benefiting from criminalising migrants.”¹¹² Such transnational organized crimes are

¹⁰⁶ See International Organization for Migration, “2024 is Deadliest Year on Record for Migrants, New IOM Data Reveals”, *International Organization for Migration* (21 March 2025), online: <iom.int> [perma.cc/28L9-S6KG].

¹⁰⁷ The Schengen area is the territory shared by 29 European states where internal borders have been abolished, allowing the free movement of people across sovereign territories (see EU, *Council Directive of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985*, [2001] OJ, L 187/45, online: <eur-lex.europa.eu> [perma.cc/5DDD-XK25]).

¹⁰⁸ *Ibid*, art 2.

¹⁰⁹ *Ibid*, art 4; Jasha Galaski, “How do refugees travel to other countries? Why don’t they take the plane?,” *Liberties* (10 December 2018), online: <liberties.eu> [perma.cc/RNN5-TCSY].

¹¹⁰ Georg Menz, “The Neoliberalized State and Migration Control: The Rise of Private Actors in the Enforcement and Design of Migration Policy” (2009) 17:3 *Debate: J Contemporary Central & Eastern Europe* 315 at 317.

¹¹¹ Shachar, *supra* note 17 at 34.

¹¹² Chandler, *supra* note 49.

intimately linked to the commission of international crimes, including crimes against humanity, although this linkage remains underexplored in the domain of international criminal law – a fact that may also explain the lack of attention paid to transnational migration.¹¹³

C. Privatizing Borders, Distancing Accountability

As with *externalization*, the *privatization* of migrant control affirms the sovereignty of states while locating borders in new, external domains patrolled by private actors. As Martin writes, the privatization of migration control is “a political technology that reorganizes and expands governmental authority”.¹¹⁴ Like *externalization*, *privatization* also frustrates accountability efforts. Due to its grounding in the public/private distinction and its emphasis on holding state actors to account, human rights law struggles to address rights violations by non-state private actors.¹¹⁵ So does international criminal law, which until now has turned a blind eye towards private actors who are accused of having committed international crimes.¹¹⁶ Privatization of migrant control by states purposefully blurs the lines of who is a state actor and who is a private actor, thereby complicating accountability efforts and, perhaps, insulating state authorities from scrutiny over private dealings.

Private actors should no longer be seen as private in such contexts, but instead as agents of the state. This would permit the state to be held responsible for its failure to prevent human rights violations and international crimes committed by private, non-state actors in their employ. Or perhaps we should heed the advice of Kalpouzos who argues that we could understand public-private partnerships through the lens of co-perpetration of international crimes:

[P]ublic-private partnership like the one struck between the Australian government and private corporations including G4S, Wilson Security and Ferrovial could be

¹¹³ Mark Kersten, “This Mass Atrocity was Brought to You by the Ivory Trade: Linking Transnational Organized and International Crimes” (2022) 22:4 Intl Crim L Rev 687.

¹¹⁴ Lauren L Martin, “Carceral economies of migration control” (2021) 45:4 Progress in Human Geography 2021 740 at 745.

¹¹⁵ Andrew Clapham, “Human Rights Obligations of Non-State Actors: Where Are We Now?” in Fannie Lafontaine & François Larocque, eds, *Doing Peace the Rights Way Essays in International Law and Relations in Honour of Louise Arbour* (Cambridge, UK: Cambridge University Press, 2019) at 11–36.

¹¹⁶ See Barrie Sander, “Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law’s Business or Blind Spot?”, *Justice in Conflict* (8 June 2015) online: <justiceinconflict.org> [perma.cc/T642-LX4X].

explored through the mode of co-perpetration: Did both public and private parties make “essential contributions” in the execution of a common plan? Were these contributions aimed at the realization of those parts of the migration management strategy that can be understood as constituting international crimes?¹¹⁷

Rather than attempt to re-establish distinctions between private and state actors in the context of migration control, it may be time to undermine the distinction altogether, thus reflecting the reality that private actors in such contexts are merely an extension of the sovereign state that pays them. That might likewise reduce the distance between the border and meaningful accountability and open new avenues to hold those who callously commit atrocities against migrants accountable.

IV. Re-Orientation: Immigration Law to Avoid Accountability

In 2002, a Liberian citizen by the name of Bill Horace arrived in Canada and claimed refugee status.¹¹⁸ His application was denied but he subsequently applied for permanent residency.¹¹⁹ For years, his case was left in legal limbo, as efforts were made to have him deported rather than prosecuted.¹²⁰ In 2012, journalist Michael Petrou relied on eyewitness accounts and evidence from the Sierra Leonean Truth and Reconciliation Commission to describe Horace’s participation in the National Patriotic Front of Liberia (NPFL).¹²¹ This rebel force was created by former Liberian President Charles Taylor, which wrought horrendous violence and cruelty upon civilians during the Sierra Leonean civil war.¹²² Around the same time as Taylor was convicted by the Special Court for Sierra Leone and sentenced to fifty years for aiding and abetting war crimes and crimes against humanity,¹²³ a team of Canadian investigators collected evidence implicating Horace in international crimes and detailing his participation in crucifixions, beheadings and sexual violence.¹²⁴ The team submitted their

¹¹⁷ Kalpouzos, *supra* note 15 at 590.

¹¹⁸ Robin Levinson-King, “Bill Horace: Why an accused Liberian warlord was killed in Canada”, *BBC News* (18 July 2022), online: <bbc.com> [perma.cc/8ZLX-ERSW].

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Michael Petrou, “Bill Horace: Accused in Liberia, living in Toronto”, *Macleans’s* (25 June 2012), online: <macleans.ca> [perma.cc/5K6D-JHVE].

¹²² *Ibid.*

¹²³ *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, Judgement Summary (Special Court for Sierra Leone, Trial Chamber II, 18 May 2012), online: <refworld.org> [perma.cc/YWB9-P3ZL].

¹²⁴ Michael Petrou, “How a Liberian warlord lived freely in Canada until he was gunned down”, *The Globe and Mail* (27 June 2020), online: <theglobeandmail.com> [perma.cc/KP85-7H7X] [Petrou, “How a Liberian warlord”].

findings to authorities at the Canadian Department of Justice.¹²⁵ They were ignored.¹²⁶

Even though Horace admitted that “of course” he was in the NPFL and even though Canada had the powers to investigate Horace for war crimes and crimes against humanity under its *War Crimes and Crimes Against Humanity Act*,¹²⁷ Canadian authorities declined to prosecute him.¹²⁸ Meanwhile, Horace engaged in criminal activities in Canada.¹²⁹ In doing so, he angered the wrong people. In June 2020, armed men entered Horace’s house on a leafy suburban street in London, Ontario, and shot him, in front of his young children.¹³⁰ He died from his wounds.¹³¹ A decade of pleading by rights groups to investigate him for his alleged crimes had failed.

Had things gone their way, Canadian authorities would have leveraged immigration law to deny Horace residency and deport him to Liberia – in defiance of his victims’ wishes.¹³² Horace was one of approximately 200 perpetrators of international crimes living in Canada, according to the last time the Canadian Department of Justice released statistics on the subject.¹³³ His case and those of others represent the shifting of borders further inside the sovereign state, where authorities seek to blend immigration and (international) criminal law – a union some call *crimmigration* – in order to control migrants who have arrived from conflict-affected countries.¹³⁴ While Western states have increasingly outsourced mechanisms of migration control to private actors and other states, including those accused of committing atrocities against migrants, they also use *crimmigration* to re-orient borders and migrant control inward. Rather than exercise their sovereign responsibility to investigate and prosecute perpetrators of

¹²⁵ *Ibid.*

¹²⁶ *Ibid*; Michael Petrou & Rodney Sieh, “Man killed in weekend shooting in Ontario linked to Liberian war crimes”, *The Globe and Mail* (last modified 23 June 2020), online: <theglobeandmail.com> [perma.cc/A22K-59ST].

¹²⁷ *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

¹²⁸ Petrou, “How a Liberian warlord”, *supra* note 124.

¹²⁹ Levinson-King, *supra* note 118.

¹³⁰ Colin Butler, “Man gunned down in London, Ont., home invasion linked to Liberian war crimes”, *CBC News* (23 June 2020), online: <cbc.ca> [perma.cc/6HT5-HWKW].

¹³¹ Levinson-King, *supra* note 118.

¹³² See Petrou, “How a Liberian warlord”, *supra* note 124.

¹³³ Canada, Department of Justice, “Crimes Against Humanity and War Crimes Program Evaluation, Final Report” (August 2016) at 71, online (pdf): <publications.gc.ca> [perma.cc/SM6Q-H9CS]; see also Mia Rabson, “Why has Canada’s war criminal unit not published a report in over 8 years?”, *Global News* (21 February 2024), online: <globalnews.ca> [perma.cc/U6SS-CB6D].

¹³⁴ See Jamie Rowen & Rebecca Hamlin, “The Politics of a New Legal Regime: Governing International Crime through Domestic Immigration Law” (2018) 40:3 *Law & Pol’y* 243.

international crimes, including crimes against humanity, these states seek to avoid accountability by translating opportunities to achieve justice into a matter of migrant control. In doing so, they feed into dangerous tropes about migrants as potential criminals, which in turn legitimizes the often-brutalizing policies of migrant control described above. The focus of this section is on this practice in Canada and the US, where *crimmigration* has brought the border inward and into communities in both countries, while doing little to address, let alone remedy, international crimes.

A. *Crimmigration* in Canada and the US

In 2011, the Stephen Harper government published a *Most Wanted List* of thirty alleged war criminals believed to be residing in Canada.¹³⁵ The list was published not by the Canadian Department of Justice but by the Canadian Border Services Agency.¹³⁶ The aim of publishing the names of alleged perpetrators was made clear by Immigration Minister Jason Kenny: any alleged war criminal found on Canadian soil should be “rounded up and kicked out of Canada”.¹³⁷ This followed a pattern: with few exceptions, since the 1990s, Canada would not prosecute alleged perpetrators of international crimes under the laws permitting it to exercise universal jurisdiction; instead, it would seek to deport them.¹³⁸

The *Most Wanted List* was met with sharp criticism from the UN Committee Against Torture, which stressed that the scheme included no guarantees that justice would be served: “If they are apprehended and deported, they may escape justice and remain unpunished.”¹³⁹ The concern was also raised by Canadian advocates. In relation to the Horace case one advocate said: “It was our belief that deporting someone like Bill Horace back to Liberia, where he was going to live freely, is not accountability ... Yes, it deprives him of the ability to live in Canada, but that’s not real justice. And it would be putting witnesses and survivors in Liberia in danger.”¹⁴⁰

¹³⁵ Public Safety Canada, “Government of Canada expands ‘Wanted by the CBSA’ List” (18 August 2011), online: <publicsafety.gc.ca> [perma.cc/S4AX-DNP9].

¹³⁶ *Ibid.*

¹³⁷ “Suspected war criminal arrested in Alberta”, *CBC News* (last modified 22 July 2011), online: <cbc.ca> [perma.cc/4VAU-JZEX].

¹³⁸ Fannie Lafontaine, “Canada’s Crimes against Humanity and War Crimes Act on Trial: An Analysis of the Munyaneza Case” (2020) 8:1 *J Intl Crim Justice* 271.

¹³⁹ See Terry Milewski, “Canada accused of ‘complicity’ in torture in UN report”, *CBC News* (last modified 1 June 2012), online: <cbc.ca> [perma.cc/3LPL-UPLU].

¹⁴⁰ See comments by Matt Eisenbrandt in Petrou, “How a Liberian warlord”, *supra* note 124.

Canadian politicians were not having it. They responded to the UN Committee's concerns by engaging in a bit of whataboutism: "In times when there are serious concerns regarding human rights violations across the world, it is disappointing that the UN would spend its time decrying Canada".¹⁴¹ The state had – and continues to have – no apparent interest in guaranteeing that alleged war criminals cloaked as refugees are held to account for their atrocities; it is easier and cheaper to boot them out of the country.¹⁴²

Canada's *Most Wanted List* also finally and firmly drew the curtains on the country's willingness to prosecute perpetrators who came to Canada after committing atrocities abroad. In the mid-2000s, Canada invoked universal jurisdiction to prosecute two cases of international crimes relating to atrocities committed in the context of the 1994 Rwandan Genocide.¹⁴³ Désiré Munyaneza was arrested in Toronto and convicted of war crimes and crimes against humanity in 2009.¹⁴⁴ In 2013, Jacques Mungwarere was acquitted of the charges of war crimes and genocide.¹⁴⁵ The lesson that the government took from these trials was that the cost of exercising universal jurisdiction was too high.¹⁴⁶ By 2016, a report from the international crimes unit of the Department of Justice made clear that prosecuting alleged perpetrators of atrocities was the government's last and least preferred option and its primary focus was on using immigration controls to address the alleged perpetrators.¹⁴⁷ The Department of Justice explained its priorities as first pursuing "the least costly and complex remedy (denial of visas); [then] use the next level of cost and complexity (refugee exclusion and deportation proceedings); and, when appropriate, escalate to the most costly and complex remedies (revocations and criminal

¹⁴¹ See "UN condemns Canadian security practices over risk of torture, rights violations", *Toronto Star* (2 June 2012), online: <thestar.com> [perma.cc/4RJW-77SB].

¹⁴² See Amnesty International, "No safe haven: New report highlights Canada's failure to prosecute individuals accused of war crimes and crimes against humanity" (8 September 2020), online: <amnesty.ca> [perma.cc/KRZ4-XEVC] [Amnesty International, "No safe haven"]; see also Mark Kersten, "How should Canada handle criminals cloaked as refugees?", *The Globe and Mail* (19 November 2017), online: <theglobeandmail.com> [perma.cc/EA6S-MTGU].

¹⁴³ See *R v Désiré Munyaneza*, 2009 QCCS 2201 [Désiré]; *R v Jacques Mungwarere*, 2013 ONSC 4594 [Jacques].

¹⁴⁴ *Désiré*, *supra* note 143.

¹⁴⁵ *Jacques*, *supra* note 143.

¹⁴⁶ Estimates are that the price tag of prosecuting international crimes in Canada was approximately \$4 million. Les Perreux, "Munyaneza gets life in Rwandan war-crimes case", *The Globe and Mail* (29 October 2009), online: <theglobeandmail.com> [perma.cc/3ENY-M3ZP].

¹⁴⁷ Canada, Department of Justice, *supra* note 133.

investigations/prosecutions).¹⁴⁸ In reality, for the past decade the Department of Justice has only used the first two approaches, while the War Crimes Program's budget has remained stagnant since its creation in 1998.¹⁴⁹ In this context it is perhaps not surprising that when Canadian authorities gained custody of an alleged Islamic State fighter against whom there is concrete evidence that he committed war crimes, they charged him with "aggravated assault".¹⁵⁰

For Canada, the most cost-effective way to deal with war criminals is to play a proverbial game of hot potato, tossing alleged perpetrators back to their source countries. The border is thus turned inwards, to control alleged international criminals, while responsibility for their atrocities is thrown outwards, back to states who offer no guarantee that justice will subsequently be pursued. In fact, there appears to be evidence that only one perpetrator of war crimes, crimes against humanity or genocide has subsequently been convicted of an international crime following deportation.¹⁵¹ As Fannie Lafontaine observes: "The overreliance on administrative remedies, such as deportation and removal from the country, may serve the limited purpose of not allowing Canada to become a safe haven for war criminals, but it does very little to serve the broader objective of ensuring accountability for the core crimes."¹⁵² While the Minister of Justice has wide discretion on what assurances or conditions to attach to an extradition or deportation, Canada does not seek any guarantees that once deported, an alleged war criminal will face prosecution or sanction.¹⁵³

A similar trend can be seen in the US, where the Human Rights Violators and War Crimes Unit, a part of the US Department of Homeland Security, "is tasked with finding and assisting in the removal of immigrants who may have committed international human rights abuses and war crimes in their countries of origin".¹⁵⁴ In recent years, numerous high-profile cases have

¹⁴⁸ *Ibid* at 72.

¹⁴⁹ Amnesty International, "No safe haven", *supra* note 142.

¹⁵⁰ See Mark Kersten, "Canada should prosecute Ahmed Eldidi for war crimes", *The Globe and Mail* (19 August 2024) online: <theglobeandmail.com> [perma.cc/9MCJ-553B].

¹⁵¹ Leon Mugasera was deported to Rwanda in 2012 to face charges of inciting genocide (see "Canada deports Rwanda genocide suspect Leon Mugasera", *CBC News* (24 January 2012), online: <bbc.com> [perma.cc/3QDJ-JPMY]).

¹⁵² Fannie Lafontaine, "The Prosecutor or Expel Dilemma in Far-Away Lands" in Jo-Anne M Wemmers, ed, *Reparations for Victims of Crimes Against Humanity – The Healing Role of Reparation*, (London, UK: Routledge, 2014) at 97.

¹⁵³ See Amnesty International, "Canada: End Impunity Through Universal Jurisdiction: No Safe Haven report" (29 June 2020) at 90, online (pdf): <amnesty.org> [perma.cc/EZG8-DT9V].

¹⁵⁴ Rowen & Hamlin, *supra* note 134 at 243.

been litigated, resulting in the jailing and deportation of alleged war criminals.¹⁵⁵

At this juncture, one might claim that such an approach is justified. Immigration and refugee law have a role to play in preventing war criminals from abusing legal regimes reserved for persecuted persons and migrants. Canada and the US should not welcome international criminals onto their territory. But this again misses a critical point: the approach of internalizing borders and criminalizing migrants, or *crimmigration*, does not endeavour to achieve accountability or justice – and it may hinder efforts to achieve them elsewhere. The story of George Boley is a cautionary tale.

Boley was arrested in Buffalo, New York, in 2010, as part of the Human Rights Violators and War Crimes Unit's first major case.¹⁵⁶ He had resided in the US on and off for forty years but was deemed to be an "arriving alien" before being charged with immigration fraud for not declaring on his asylum application that he had participated in the recruitment of child soldiers.¹⁵⁷ Boley's case was the first under the *Child Soldiers Accountability Act*, which includes provisions for immigration and criminal charges.¹⁵⁸ He lost his case in 2012, with Immigration and Customs Enforcement (ICE) agents proudly celebrating his subsequent removal from the US as "a major step in addressing ... serious human rights abuses".¹⁵⁹ While some might argue that the deportation of alleged war criminals like Boley can galvanize domestic justice in source countries, his transfer may have aided in avoiding accountability for atrocities committed in Liberia. Rather than being investigated and prosecuted in the West African state, Boley was eventually elected to Liberia's House of Representatives, a position of power and influence through which he can frustrate ongoing efforts to establish a war crimes tribunal that would investigate atrocities committed during Liberia's civil war.¹⁶⁰

Like Boley, alleged perpetrators charged with immigration fraud are not given the full due process rights that they would receive had they been charged with international crimes. As Rowen and Hamlin observe:

¹⁵⁵ *Ibid*; see also Annie Hylton, "How the U.S. Became a Haven for War Criminals," *The New Republic* (29 April 2019), online: <newrepublic.com> [perma.cc/LJ2M-BQ23].

¹⁵⁶ Rowen & Hamlin, *supra* note 134 at 254.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

¹⁵⁹ US Immigration and Customs Enforcement, "Liberian human rights violator removed from US: First-ever removal under the Child Soldiers Accountability Act" (29 March 2012), online: <ice.gov> [perma.cc/X4DJ-YLSH].

¹⁶⁰ Rowen & Hamlin, *supra* note 134 at 255.

[I]mmigration law seems to reject the commitment in both international and domestic criminal law to protecting key due process rights such as providing publicly funded legal aid for defendants and holding accountable those most centrally responsible for violence ... If immigration law is used to target noncitizens suspected of committing crimes, many due process protections regarding detention, Miranda rights, search and seizure, and sentencing guidelines can be sidestepped.¹⁶¹

There also appear to be few safeguards to ensure that low-level figures who may never have perpetrated atrocity crimes are not caught up in *crimmigration* processes. This could have major implications given how many states abuse charges of terrorism to target their (legitimate) opponents.¹⁶² For example, might human rights or opposition activists charged with terrorism abroad be subject to *crimmigration*? This is a real risk, as *crimmigration* plays a role in the further securitization of migration, permitting states additional grounds to internalize their borders to locate and deport migrants from conflict-affected contexts. Perhaps unsurprisingly, then, the use of *crimmigration* makes the criminalization of migrants more likely: “the *crimmigration* phenomenon links criminals and immigrants in the minds of the public ... There is both a moral and practical valence to identifying immigrants as criminals deserving of punishment. This frame constructs immigrants as policy problems to be solved and objects to be governed.”¹⁶³

B. Internalizing Borders, Distancing Accountability

There is good reason to support efforts that address mass atrocities and ensure that perpetrators who escape to Western states are held to account, including through the use of universal jurisdiction.¹⁶⁴ But as a blunt instrument, *crimmigration* in Canada and the US does not pretend to achieve this aim. It does not address international crimes and may even undermine the ability to address those crimes, as the Boley example suggests.

¹⁶¹ *Ibid* at 244, 248; Dounard Bondo, “Liberia: Prince Johnson and George Boley, former warlords who remain powerful in politics”, *The Africa Report* (20 July 2021), online: <theafricareport.com> [perma.cc/2HKQ-5E6H].

¹⁶² See Kgalalelo Gaebee & David Kode, “9 / 11’s legacy: How anti-terrorism laws have become anti-human rights laws”, *African Arguments* (14 September 2021), online: <africanarguments.org> [perma.cc/Y3ZX-YVXF]; American Bar Association, “Misuse of Terrorism Charges Against Defenders”, (last visited 1 October 2025), online: <americanbar.org> [perma.cc/N4RY-BLKR].

¹⁶³ Rowen & Hamlin, *supra* note 134 at 248 [emphasis added].

¹⁶⁴ See Wolfgang Kaleck & Patrick Kroker, “Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?” (2018) 16:1 *J Intl Crim Justice* 165; Reem Salahi, “The road to justice for Syria goes through Europe”, *Middle East Institute* (14 July 2020), online <mei.edu> [perma.cc/22FU-78N7].

Crimmigration is an attempt to rid these states of problem migrants while re-orienting the sovereign border inwards, toward communities where migrants from conflict-affected contexts reside. Rather than addressing international crimes through the invocation of universal jurisdiction, *crimmigration* also moves the responsibility for international crimes outwards, beyond Canada and the US, back to states that may have little interest in addressing past atrocities or may lack the capacity to address international crimes. This is done while contributing to the conflation of the categories of migrant and criminal, as *crimmigration* practices within the sovereign state help to further justify the harsh forms of externalized and privatized migrant control detailed in the sections above.

Given that “close association of criminal law and migration therefore goes mostly one way”, the questions then, as Kalpouzos puts it, are as follows:

Would it be possible to explore the reversal of this configuration of power and criminalization? Could the labeling power of (international) criminal law be deployed against the (powerful, receiving) state? Could it be marshaled against those that treat migrants like criminals? What would be the value of attempting to articulate a description and assessment of anti-migrant policies and the violence against migrants using the categories of [international criminal law]?¹⁶⁵

It should first be noted that *crimmigration* already does the work of criminalizing migrants, but without any upstream guarantee of accountability for atrocities committed by *crimmigration*'s targets. Put otherwise, while accountability for international crimes is not the aim of *crimmigration*, the conflation of criminality and migration is a constant and serious risk of this approach of alleging perpetrators of international crimes. Moreover, while international criminal law is an imperfect tool and we should take Philip Alston's warning regarding the over-criminalization of harms and human rights seriously,¹⁶⁶ my answer to Kalpouzos' thoughtful questions is yes, international criminal justice can help and it is worth pursuing in relation to both addressing and *imagining* the violence of migrant control. Crimes against humanity are particularly helpful in this regard because they emphasize the humanity of migrants and the relevance of crimes against them as crimes against all of us, as members of a common

¹⁶⁵ Kalpouzos, *supra* note 15 at 576.

¹⁶⁶ Philip Alston, “The criminalization of human rights”, *Open Global Rights* (6 March 2024), online: <openglobalrights.org> [perma.cc/P3WT-C6EH]; see also Kalpouzos, who warns against the “fetishization” of international criminal law, *supra* note 15 at 595–597.

humanity. In doing so, an emphasis on crimes against humanity may promise shifting the label of criminality away from migrants to those who abuse them. Indeed, the invocation of international criminal law not only as *law* but also as language can “reflect an intuition of justice” in a way that may be “meaningful to those fighting against anti-migration policies”.¹⁶⁷

V. Making Migration Control Visible through the Law and Language of International Criminal Justice

The processes of *externalization*, *privatization* and *re-orientation* of migration control have not only led to direct harms against migrants, but also made it more difficult to address international crimes, including the crimes against humanity whose commission appears to be an afterthought in the treatment of migrants. Migration control is now rooted in spaces where unwanted migrants are kettled on international waters, in the digital realm and deep inside sovereign states. The actors doing this work are not only destination states, but also private companies, branches of non-democratic states and practitioners of *crimmigration*. It is a logical affectation of the process that these interlocking political agreements – as between Libya and Italy or Australia and island nations hosting its detention centers – (re)produce colonial-like relations between states.¹⁶⁸ So too is the distancing of accountability for violence waged against migrants, as the border and therefore migration control shifts further outside – and inside – the state.

Wendy Brown rightly notes that the notion of hard, opaque borders is outmoded and self-defeating.¹⁶⁹ A focus on walls and barriers misses the point that the borders of Western states are no longer limited to the contiguous lines on a map of the world. Migration control is happening inside and outside those territorial boundaries. This reality is captured by Shachar: “The remarkable development of recent years is that ‘our gates’ no longer stand fixed at the country’s territorial edges. The border itself has become a moving barrier, an unmoored legal construct ... The traditional

¹⁶⁷ Kalpouzos, *supra* note 15 at 597.

¹⁶⁸ The president of Christmas Island shire, which hosts an Australian migrant detention facility states: “We are a colony. That’s how we are treated.” (see Ben Doherty, “‘Hysterical and ruinous’: Christmas Island furious over Australia’s coronavirus plans”, *The Guardian* (6 February 2020), online: <theguardian.com> [perma.cc/7L3Z-GX2E]).

¹⁶⁹ Wendy Brown, *Walled States, Waning Sovereignty*, (Brooklyn, NY: Zone Books, 2010) at 99–100.

static border is thus reimagined as the last point of encounter, rather than the first.”¹⁷⁰

For some migrants, the border increasingly shifts outside of the state to queues in foreign airports, the middle of the Mediterranean or on the territory of other sovereign states thousands of miles from where they initially sought refuge. For others, the border is experienced in the middle of communities like that of London, Ontario or Buffalo, New York. The point is that as the processes of *externalization*, *privatization* and *re-orientation* continues, “the sovereign’s right to exclude – both at the level of territorial border control and at the level of sovereign-sovereign relations – is more active than it has ever been in international legal history.”¹⁷¹ And that action of exclusion is increasingly practiced through forms of violence that warrant investigation as crimes against humanity.

The shifting of borders and distancing of accountability pose a major challenge for human rights, global justice and refugee rights advocates, in part because much of international human rights and refugee law is wedded to the principle of (sovereign) territoriality.¹⁷² Far from illustrating sovereignty as a *responsibility*¹⁷³ or *fiduciary duty*,¹⁷⁴ the confluence of the trends I have described in this article has produced a plurality of actors operating a burgeoning marketplace of migration control and abuse, who are actively stifling efforts toward accountability and justice. Accountability advocates and states are mired in a game of cat and mouse, with the state shifting its borders to increasingly unaccountable zones in response to being held responsible for human and refugee rights violations. Each time advocates trump migration control and courts bend the law towards greater respect for the human rights of migrants, states develop new means of migrant control while further distancing accountability. As Gammeltoft-Hansen writes, “in the field of migration control a key purpose ... seems to be to reduce, shift or deconstruct legal obligations otherwise owed, *de jure* and/or *de facto*.”¹⁷⁵ That is the lesson of the *Hirsi Jamaa* case: rather than lead to entrenched respect and protection for the human rights of migrants,

¹⁷⁰ Shachar, *supra* note 17 at 4–5.

¹⁷¹ Justin Desautels-Stein, “A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights” (2021) 67:1 UCLA L Rev, 1536 at 1546.

¹⁷² Gammeltoft-Hansen, *supra* note 54 at 239.

¹⁷³ Francis M Deng, et al, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, D.C.: Brookings Institution Press, 1996).

¹⁷⁴ Criddle & Fox-Decent, *supra* note 16.

¹⁷⁵ Gammeltoft-Hansen, *supra* note 54 at 243.

European states identified new ways to grant further authority to entities to act on their behalf. It should only be expected that states will continue to exploit unsettled matters and grey zones in international human rights and refugee law to bolster their migrant control efforts.¹⁷⁶ Thus, even though “states do not rid themselves of international obligations simply by offshoring and outsourcing migration control” and efforts to hold them accountable should persist, the plight of migrants calls for more than chasing state practices.¹⁷⁷

A. Changing the Terms of the Debate, Making the Violence of Migration Control Visible

As part of the global, or international, justice movement, what role does international criminal law have to play in stemming abuses against migrants? Sara Dehm has asked a similar question: “How might we think about the regulation of human mobility alongside struggles for and projects of decolonization and *global justice* in our academic work and praxis?”¹⁷⁸

I offer only a partial answer, one that relies on the power of framing and the language of international justice, as much as it relies on accountability.¹⁷⁹ It is an attempt to address Shachar’s observation that, despite “the ‘near obsession’ of wealthier countries with reimagining migration and reinventing border control through sophisticated legal (not extralegal) border-shifting techniques and innovations, we currently lack the basic conceptual language to capture, describe and critique these rapid changes.”¹⁸⁰

One conceptual turn that could help in this regard is to devote increased resources to understanding and litigating migrant abuses as crimes *against humanity*. To date, the focus of human and refugee rights advocates has been on eliminating language that alienates, stigmatizes and justifies discriminatory practices against migrants.¹⁸¹ Experts are focused on how to

¹⁷⁶ See Bart Denaro, “Lessons from Australia: talking about privatised immigration detention”, *Open Democracy* (2 June 2014) online: <opendemocracy.net> [perma.cc/S795-FSXU].

¹⁷⁷ Gammeltoft-Hansen, *supra* note 54 at 232.

¹⁷⁸ Sara Dehm, “Transnational Migration Law: Authority, Contestation, Decolonization” in Peter Zumbansen, ed, *The Oxford Handbook of Transnational Law* (UK: Oxford University Press, 2021) at 698.

¹⁷⁹ On the expressivist power of international criminal law, Carsten Stahn, *Justice as Message – Expressivist Foundations of International Criminal Justice Expressivism* (Oxford, UK: Oxford University Press, 2020).

¹⁸⁰ Shachar, *supra* note 17 at 6–7.

¹⁸¹ François Crépeau, “Towards the 2013 High-Level Dialogue on International Migration and Development: The Legal International Framework in Place to Protect Migrants” (keynote address delivered at United Nations, New York, 20 February 2013), online: <ohchr.org> [perma.cc/B7B9-337H].

shift towards more “neutral” vernacular.¹⁸² But little is done to identify words that will *legitimize* the rights and justice claims of migrants and make their plight more visible, while *delegitimizing* the violence and atrocities waged against them. Identifying these terms is essential, given the insidious ways in which internal and external migrant control oscillates between vilifying migrants and pushing their plight “out of sight and out of mind.”¹⁸³ Imagining abuses as *crimes against humanity* and therefore against all of us and our common, shared community of human beings, may also help close the gap between state action against migrants and the pursuit of accountability.¹⁸⁴ This turn to *humanity* as the subject being harmed by the violence of migration control can helpfully keep up with shifting borders, as humanity exists wherever we, as members of humanity, exist – whether on distant islands, dinghies in the Mediterranean or airport queues.

Crimes against humanity may likewise focus attention on the plight of migrants and the atrocities they face. In the context of Canada, Audrey Macklin has observed that the country “expends more energy and resources than many people realize on deflecting potential asylum seekers. But because we do a lot of this remotely, extraterritorially, *people don’t notice it – it doesn’t have the visible violence of border policing.*”¹⁸⁵ I do not suggest that reframing, in both law and everyday language, the abuses against migrants as crimes against humanity would be a silver bullet to “chase” violent state practices. The history of international criminal law does not suggest that this legal regime has such power. But it could help to re-imagine migrant rights, making their plight visible, as well as offering an important potential challenge to the pernicious effects of *externalizing, privatizing* and *re-orienting* migrant control, precisely because one cannot *externalize, privatize* or *re-orient* humanity beyond its own reach.

¹⁸² François Crépeau & Maja Vezmar, “Words matter: ‘illegal’, ‘irregular’, ‘unauthorized’, ‘undocumented’”, *Knomad* (June 2021), online(pdf): <documents1.worldbank.org> [perma.cc/M778-XG2N]; Alison Durkee, “‘Aliens’ No More: Administration Directs Immigration Officials to Use ‘Inclusive Language’”, *Forbes* (16 February 2021), online: <forbes.com> [perma.cc/Y58D-A5S9].

¹⁸³ Gammeltoft-Hansen, *supra* note 54 at 240.

¹⁸⁴ On the history of crimes against humanity, see Philippe Sands, *East West Street: On the Origins of “Genocide” and “Crimes Against Humanity”* (New York: Vintage Books, 2017).

¹⁸⁵ See Sigal Samuel, “‘There’s a Perception That Canada Is Being Invaded’”, *The Atlantic* (26 May 2018), online: <theatlantic.com> [perma.cc/3LHZ-XFRP] [emphasis added].

VI. Conclusion

There have been some partial and welcome developments in line with labelling migration control's violence as crimes against humanity. As noted above, in 2017, international law scholars submitted a 105-page communication to the prosecutor of the ICC, in which they argued that the harms committed against migrants by Australia and its corporate contractors in offshore detention facilities – including imprisonment, torture, deportation and persecution – constituted crimes against humanity.¹⁸⁶ In 2020, the ICC prosecutor declared that because the harms did not meet the ICC's gravity threshold – a subjective assessment made by the prosecutor's office – the ICC could not proceed with an investigation into the matter.¹⁸⁷ Still, the prosecutor concluded that Australia's regime of offshore detention centers constituted "cruel, inhuman, or degrading treatment" and other possible crimes against humanity, an important finding in its own right.¹⁸⁸ In addition, Australia has been ordered to compensate asylum seekers and refugees held in its offshore detention centres in response to a class action suit on behalf of 1,905 detainees on Manus Island, which alleges negligence and the illegal detention of those migrants.¹⁸⁹ Further class actions are proceeding through Australian courts.¹⁹⁰

Since 2017, the Prosecutor of the ICC has also intimated the ICC's interest in investigating human trafficking and related abuses against migrants in Libya as crimes against humanity.¹⁹¹ In 2019, lawyers submitted evidence of alleged complicity of the EU and European states in atrocities committed against migrants via the EU and European states' work with institutions

¹⁸⁶ See Achiume, *supra* note 59.

¹⁸⁷ See Letter from Phakiso Mochochoko, Director, Jurisdiction, Complementarity and Cooperation Division, International Criminal Court, The Office of the Prosecutor, (12 February 2020), via email [communicated to Ms Kate Allingham, Office of Andrew Wilkie MP], online (pdf): <uploads.guim.co.uk> [perma.cc/M7UF-2PCU].

¹⁸⁸ *Ibid.*

¹⁸⁹ *Kamasae v Commonwealth of Australia & Ors*, S CI 2014 6770; see also Maria O'Sullivan, "The Dangers of Offshore Processing – Questioning the Australian Model" (5 October 2020), online: <arts.unimelb.edu.au> [perma.cc/A2M5-7UEX]; Helen Davidson, "Peter Dutton to face new class action alleging unlawful detention", *The Guardian* (26 October 2017), online: <theguardian.com> [perma.cc/V9H5-LGU2].

¹⁹⁰ O'Sullivan, *supra* note 189 at 136.

¹⁹¹ The ICC Prosecutor has jurisdiction in Libya (see Resolution 1970 (2011), UNSC, *supra* note 33); Article 7.2(c), of the Rome Statute of the International Criminal Court (1998) defines enslavement as a crime against humanity and includes "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." (see *Rome Statute*, *supra* note 58).

such as the Libyan Coast Guard.¹⁹² The ICC prosecutor admitted this evidence into the ongoing examination into abuses against migrants.¹⁹³ More recently, another report made similar allegations, imploring the prosecutor to open an official investigation into the matter.¹⁹⁴ It remains to be seen how the ICC Prosecutor's developing investigation relates to addressing migrant abuses and whether he is prepared to challenge the practices of European states. But recent events, including the prosecutor's request for warrants against Israeli officials over allegations of war crimes and crimes against humanity committed in Gaza, suggest that the prosecutors in The Hague may, at least in some instances, be able to confront rather than kowtow to the political expediencies of powerful Western states.¹⁹⁵

Nevertheless, implicated states have managed to shield Libyan authorities – and therefore themselves – from accountability for crimes against humanity committed against migrants. In late January 2023, Libyan militiaman Osama Elmasry Njeem was detained in Italy on the basis of a sealed ICC warrant. Njeem was in charge of the notorious Mitiga detention facility that, among other things, warehoused migrants in deplorable conditions. The warrant charged him with war crimes and crimes against humanity, including murder, torture and rape.¹⁹⁶ However, just hours after he was detained, Njeem was flown back to Libya by the Italian secret service, who claimed that it did so “because he was dangerous” and due to procedural issues.¹⁹⁷ Any opportunity to prosecute him – and therefore address atrocities committed against migrants – was foiled by a state itself implicated in those atrocities.¹⁹⁸ In response, the president of the Refugees in

¹⁹² Students of the Capstone on Counter-Terrorism and International Crimes PSIA – Sciences Po (Paris) 2017/2018, 2018/2019, “Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute” (2019), online: <statewatch.org> [perma.cc/C5AH-7G76] [Students of the Capstone]; see also Owen Bowcott, “ICC submission calls for prosecution of EU over migrant deaths”, *The Guardian* (3 June 2019), online: <theguardian.com> [perma.cc/C3QU-AA9D].

¹⁹³ *Ibid.*

¹⁹⁴ ECCHR, *supra* note 57.

¹⁹⁵ See International Criminal Court, “Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine” (20 May 2024), online: <icc-cpi.int> [perma.cc/K7EN-AJEK].

¹⁹⁶ International Criminal Court, Press Release, “Situation in Libya: ICC arrest warrant against Osama Elmasry Njeem for alleged crimes against humanity and war crimes” (22 January 2025), online: <icc-cpi.int> [perma.cc/X6GU-CJKV].

¹⁹⁷ Angelo Amante, “Italy says it sent home Libyan war crimes suspect because he was dangerous”, *Reuters* (23 January 2025), online: <reuters.com> [perma.cc/3WDF-7FE5].

¹⁹⁸ See Mark Kersten, “Impunity for Crimes against Migrants: How and why Italy ruined the best chance to bring accountability for atrocities committed against refugees on the Mediterranean”, *Justice in Conflict* (23 January 2025), online: <justiceinconflict.org> [perma.cc/938L-R8SL].

Libya, David Yambio, said: “There is no way that the Italian government can say it does not know about the murder, abuse and terrorism it is supporting. I say terrorism deliberately because that’s what it is. It’s terror against migrants.”¹⁹⁹

In a more positive turn of events, in July 2025, another Libyan suspect and senior official at the Mitiga Prison, Khaled Mohamed Ali El Hishri, was detained by Germany and surrendered to the ICC, who accused him of having “committed directly himself, ordered or overseen crimes against humanity and war crimes, including murder, torture, rape and sexual violence, allegedly committed in Libya from February 2015 to early 2020”.²⁰⁰ Victims of Mitiga included migrants and refugees and, as such, Hishri’s arrest could mark an opportunity to belatedly address some of the crimes against humanity committed against migrants by Libyan authorities and financed by European states.²⁰¹

Elsewhere, there is a lively debate among scholars of international criminal law as to whether the treatment of migrants in US detention reaches the threshold of constituting crimes against humanity.²⁰² In 2018, US Vice President Kamala Harris called the treatment of migrants at the Mexico border under the Trump administration a crime against humanity.²⁰³ Such debates and proclamations are welcome and, if sustained, could help change the framing of what is at stake for migrants while making migrant control and abuses more visible.

Rather than criminalize migrants, relevant institutions can help to criminalize those who abuse migrants. Bodies like the ICC, as well as domestic and regional courts with jurisdiction over international crimes can and should take on relevant cases. Wherever feasible, these cases should involve courts, institutions and jurists in refugee source-countries whose citizens are perishing in the hundreds or thousands each year due to Western migration control schemes, addressing the issues of an ever-shifting border and avoidance of state-accountability. Even a single, emblematic

¹⁹⁹ See Al Jazeera, “‘I saw him kill people’: Libya and Italy’s shadowy migrant deals”, *Al Jazeera* (13 February 2025), online: <aljazeera.com> [perma.cc/9RPR-XT32].

²⁰⁰ International Criminal Court, Press Release, “Situation in Libya: Khaled Mohamed Ali El Hishri in ICC custody” (1 December 2025), online: <icc-cpi.int> [perma.cc/B6AM-ERNK].

²⁰¹ European Center for Constitutional and Human Rights, “El Hishri arrest in Germany a breakthrough for the International Criminal Court’s Libya investigation” (21 July 2025), online: <ecchr.eu> [perma.cc/BPB4-B2LA].

²⁰² See Kalpouzos, *supra* note 15; see also Reilly Frye, “Family Separation under the Trump Administration: Applying an International Criminal Law Framework” (2020) 110:2 J Crim L & Criminology 349.

²⁰³ See John Bowden, “Kamala Harris: Trump’s treatment of migrants is ‘a crime against humanity’”, *The Hill* (22 June 2018), online: <thehill.com> [perma.cc/9QCP-5SC5].

case, for example, one regarding European migration control, could possess the necessary expressive power to alter state behavior *vis-à-vis* migrant control. Western prosecutors might also play a role here, in prosecuting the authors of violent migration control schemes and policies in domestic courts. In the meantime, and to get to such an outcome, states whose migrating citizens are victims of atrocities should take a greater leadership role in reframing the debates on migrants (*their* migrants) and, in so doing, challenge the colonial vestiges that persist in international and bilateral migration pacts.

There is no reason to believe that anything will stop people from migrating. On the contrary, they are likely to do so in increasing numbers.²⁰⁴ In 2020, during the COVID-19 pandemic, it was estimated that 3.6 percent of the global population – or 281 million people – were international migrants.²⁰⁵ There is no putting the proverbial cat back in the bag. Through the processes of *externalization*, *privatization* and *re-orientation*, migration control and accountability for atrocities against migrants has shifted and grown more distant. This is a reality that human and migrant rights advocates need to confront rather than wish away. To borrow from Desautels-Stein: if international criminal justice is an answer, so be it. But let it be reimagined and re-oriented to address atrocities against migrants as crimes against *humanity*, and therefore against all of us.²⁰⁶

²⁰⁴ “Why nothing will stop people from migrating”, *CBC Radio* (last modified: 24 December 2017), online: <cbc.ca> [perma.cc/E6YZ-4C5A].

²⁰⁵ International Organization for Migration, *World Migration Report 2020*, online: <publications.iom.int> [perma.cc/N5X2-W6Y3].

²⁰⁶ Desautels-Stein, *supra* note 171 at 1546.