

Legal and Physical Barriers to Refugee Protection: Interdiction, Push-Backs, and Externalization

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Introduction

- Refugee protection is rooted in the foundational principles of *access to territory* and *non-refoulement*.
- Practices such as *interdiction*, *push-backs*, and *externalisation* create significant barriers to these two core principles.
- These measures are designed to limit refugee flows, and often compromise human rights and violate international obligations.

The Terms

- ***Interdiction*** – Measures to prevent refugees from reaching borders of the intended host State's territory.
- ***Push-Backs*** - Forcibly returning individuals from the host State State's territory without due process. Includes mass exclusions and deportations.
- ***Externalisation*** – The practice of shifting responsibility for asylum to third states.

Interdiction

- Measures to prevent refugees from reaching state territories:
 - Naval operations;
 - Stringent visa controls;
 - Heavy carrier sanctions;
 - Placing their own immigration officers at foreign departure ports to stop asylum seekers from departing rather than to process them upon arrival in the host country.
 - Hard lock-downs, including border closures during pandemics – E.g. Covid-19. Most vulnerable suffered most.
- Article 33 of the 1951 Refugee Convention prohibits *refoulement*, including actions by States outside their borders.

Interdiction?



Hirsi Jamaa v. Italy

- Italian authorities intercepted migrants at sea and returned them to Libya without asylum assessments. The following violations were alleged:
 - Article 3 of the ECHR which prohibits torture, cruel and inhuman punishment or treatment;
 - Article 4 of Protocol No. 4 which prohibits collective expulsions; and
 - Article 13 which guarantees the right to an effective remedy.
- The ECTHR found Italy liable for violations, and reaffirmed the principle of *non-refoulement* and human rights obligations of states with regard to non-interdiction.

The Haitian Centre for Human Rights et al. v. US, Inter-Am. C.H.R., Doc. 7 rev. at 550 (1997)

- The Haitian boat people.
- The Inter-American Commission on Human Rights (IACHR) reviewed a petition claiming that the U.S. Haitian Migrant Interdiction Program at sea violated various Articles, including Articles I, II, XVII, XVIII, XXIV, XXVII, of the American Declaration of the Rights and Duties of Man (American Declaration) by denying Haitians, with a well founded fear of persecution in Haiti, the chance to seek asylum (denying access to territory) and also breaching the principle of *non-refoulement*.

The Haitian Centre for Human Rights et al. v. US, Inter-Am. C.H.R., Doc. 7 rev. at 550 (1997)

- The boat people interdicted and returned by the United States were routinely detained upon their return to Haiti.
- The United States defended its policy as lawful, aimed at preventing dangerous sea crossings. It argued that it was incorrect to state that the 1951 Convention, as read with the 1967 Protocol, applied to the Haitian asylum seekers interdicted on the high seas.
- It also argued that it was an error to interpret the *non-refoulement* obligation to require high seas asylum interdictees to receive the same hearing on their asylum claims as they would receive if they were present within the territory of the interdicting state.

The Haitian Centre for Human Rights et al. v. US, Inter-Am. C.H.R., Doc. 7 rev. at 550 (1997)

- The Inter-American Commission on Human Rights dismissed all these arguments.
- The Commission found that the program systematically deprived Haitians of fair refugee status determination, and emphasised the U.S.'s obligation to protect persons fleeing persecution.
- The Commission emphasised the importance of honouring the principle of *non-refoulement* and states' responsibilities in refugee protection.

The Haitian Centre for Human Rights et al. v. US, Inter-Am. C.H.R., Doc. 7 rev. at 550 (1997)(Cont.)

- The US still continues with the program. A recent Article in the Columbia Law Review states that *“On April 12, 2022, the Coast Guard intercepted a vessel near the Bahamas carrying sixty seven Haitian migrants. The rickety, U.S.-bound boat was stopped, its migrants were transferred onto a Coast Guard cutter, and ultimately, the entire group was sent back to Haiti. This is common practice for the Migrant Interdiction Program (MIP).”*



Perilous journeys at sea – SAR critical



Perilous journeys at sea – SAR critical (Cont.)

Push-Backs

- Pushbacks often occur either by way of indiscriminate expulsions, expulsions without due process, or practices of non-entrée at borders.
- The practice violates *non-refoulement*, access to territory and the prohibition of collective expulsions.
- Art. 33 of 1951 Convention. Art. 2(III) of the 1969 OAU Convention.

Push-Backs

- Art. II(3) of the 1969 Convention states that:
*“No person shall be subjected by a Member State to measures such as **rejection at the frontier, return or expulsion**, which would **compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened** for the reasons set out in Article I, paragraphs 1 and 2.”*

Examples: Push-Backs

- **Ghana** - The African Commission on Human and Peoples Rights, in a *“Press release on the expulsion of Burkinabe refugees and asylum seekers by Ghana, Jul 22, 2023”*, condemned Ghana for expelling over 200 Burkinabe asylum seekers and refugees, including women and children, since July 11, 2023.
- The Commission expressed concern about the security situation in Burkina Faso and highlighted that Ghana’s actions violated the principle of *non-refoulement* outlined in the OAU Convention, which prohibits returning individuals to places where their safety is at risk.

Examples: Push-Backs (Cont.)

- **Tunisia** - In a press release dated July 11, 2023, the African Commission on Human and Peoples Rights expressed concern over the deportation of sub-Saharan migrants to the Libyan desert following an indiscriminate roundup after the murder of a Tunisian citizen.
- The Commission urged Tunisian authorities to respect migrants' rights as outlined in the African Charter, stressing the importance of protecting them and avoiding deportations without proper assistance.

Examples: Push-Backs – Mass deportations/Expulsions



Examples: Push-Backs – Mass deportations/Expulsions



Physical and Humanitarian Consequences

- **Impact of Push-Backs:**

- Exposure to violence and unsafe conditions.
- Violation of international law and human dignity.

- **Recommendations:**

- Strengthen independent border monitoring by empowering UNHCR.

Externalisation

- Definition: Outsourcing asylum responsibilities to third countries.
- **Examples**
 - Australia's offshore processing in Nauru and Papua New Guinea.
 - UK-Rwanda asylum processing agreement (nullified by UK Supreme Court in 2023).

Case Study: UK-Rwanda Agreements

- In the case *R (AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42, the UK Supreme Court examined the legality of the Migration and Economic Development Partnership (MEDP) with Rwanda, which aimed to transfer asylum seekers to Rwanda for processing. The Court evaluated the policy against the principle of non-refoulement.

Case Study: UK-Rwanda Agreements (Cont.)

- While the Divisional Court initially upheld the policy despite procedural flaws, the Court of Appeal found it unlawful due to significant risks of *refoulement*.
- The Supreme Court concurred, stating that Rwanda's assurances about its asylum system lacked sufficient evidence and posed real risks to asylum seekers. Ultimately, the court ruled the MEDP unlawful, stressing the necessity for effective safeguards in third countries to protect against *refoulement* and ensure fair asylum processes.

Critiques on Externalisation

- Burden shifted, frequently by well-resourced States to less-resourced States.
- Undermines principle of refugee responsibility-sharing.
- Externalisation practices often place refugees in countries with inadequate protection frameworks, thereby violating the Refugee Convention and human rights standards.

Challenges and Solutions to interdictions, push-backs and externalisation

- **Challenges**

- National security concerns are frequently cited by states.
- Disproportionate resource challenges (burdens) on the national economy of preferred (targeted) host States.
- Leads to denial of access to asylum, thereby violating asylum/refugee rights.

- **Solutions**

- States must adhere to the the principles of non-refoulement and access to territory under the conventions and customary international law.
- States may conduct genuine search and rescue (SAR) missions at sea to save lives not to interdict asylum.
- States should enhance conversations on creating or strengthening responsibility-sharing mechanisms.

Challenges and Solutions to interdictions, push-backs and externalisation (Cont.)

- In the African context, Art. II(4) of the 1969 OAU Convention provides that:
- *“Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and **such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.**”*

Conclusion

- Interdiction, push-backs, and externalisation undermine refugee rights and international norms.
- There is need to strengthen responsibility-sharing mechanisms in sub-regions, regions and globally.
- Need to enhance general international cooperation and peer accountability monitoring.
- Paramount need to reaffirm the sanctity of the principles of *non-refoulement* and *access to asylum (territory)*.
- There is need to clarify the States' normative obligations under the law of the sea on the one hand, and under human rights and refugee law on the other.
- Need to value the inherent dignity and worth of refugees as human beings.

Conclusion (Cont.)

- THANK YOU VERY MUCH! MERCI BEAUCOUP!
- - ENDS-