

Pushing Back Protection

HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM

CHAPTER 1:
LEGAL VEHICLES FOR EXTERNALIZATION REGIMES
UNDER INTERNATIONAL LAW



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CHAPTER 1

Legal Vehicles for Externalization Regimes Under International Law

This is an excerpt of the full report, [Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum](#), co-authored by the National Immigrant Justice Center (NIJC) and FWD.us.

For access to Acknowledgements, Abbreviations, Terminology, other Chapters, and Closing Recommendations please click [here](#). Executive summary is [here](#).

The codification of asylum protections in domestic and international law is a relatively recent development. Though fleeing from persecution is not new, modern nation states historically adopted blanket policies that ignored the specific vulnerability of forced migration. This late reckoning had tragic consequences. During World War II, tens of thousands of Jewish children, adults, and families fleeing the Holocaust were turned away by the U.S., ostensibly because they were viewed as a threat.⁶ This response resulted in a death sentence for many of these individuals. By the second half of the 20th century, consensus arose in the international community that turning back asylum seekers only compounded the atrocities which they fled.⁷ As a result, international refugee law was established with the adoption of a series of treaties and regional legal agreements that standardized who qualified as a refugee, and which codified their rights and benefits.

In recent decades, however, many countries have sought to seal their borders to asylum seekers and systematize push-backs to third countries. These actions represent a concerted effort by prominent affluent nations to externalize their border enforcement and asylum obligations to neighboring countries, so as to physically prevent people from reaching their territories and apply for asylum. Concurrently, these nations have begun dismantling their own domestic processes to receive and process asylum seekers.

Typical vehicles for systematized push-backs include refugee-transfer and border-externalization agreements. With transfer agreements, nations seek to displace responsibility for asylum processing onto neighboring countries. Despite substantial cash infusions and inflated promises from the transferring nation, conditions in the transferee nation usually fall far short of the safety and protections required for third-country transfers under international law. With border externalization, these affluent nations try to stop asylum seekers before they reach their borders by brokering deals with neighboring countries and private companies to act as proxy border agents. From a legal standpoint, these policies are legally dubious at best, and blatant violations of international law at worst. From a humanitarian standpoint, these costly agreements and policies have caused unimaginable human suffering and loss.

1.1. International Refugee Regime: the Principle of Non-Refoulement

Protections for asylum seekers are enshrined through various international and regional agreements and treaties. Article 14(1) of the 1948 Universal Declaration of Human Rights provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”⁸ Other regional agreements and human rights conventions also affirm the right for persons to seek refuge by addressing rights such as life, freedom from torture, liberty, security, and freedom of movement.⁹

The two most foundational international instruments that spell out a protection framework for asylum seekers are the Refugee Convention¹⁰ and the 1967 Protocol which removed geographical and temporal restrictions on protection included in the original Convention.¹¹ States which ratify these treaties must provide certain protections and rights to individuals determined to fit the definition of a refugee. Among these rights are the right to family life, equal justice, freedom of movement (including freedom to leave their country of nationality and freedom of movement within a host country), and, most importantly, the right of non-refoulement.¹² The principle of non-refoulement prohibits States from returning (“refouler”) an asylum seeker “in any manner whatsoever,” including “deportation, expulsion, extradition, informal transfer or ‘renditions,’ and non-admission at the border,” “to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”¹³ **Importantly, nations do not only violate non-refoulement by pushing asylum seekers back to their country of persecution; refoulement is also operative with expulsions or deportations to third countries where asylum seekers’ lives or freedom is endangered.**

Parties to the Refugee Convention, the 1967 Protocol and non-members.

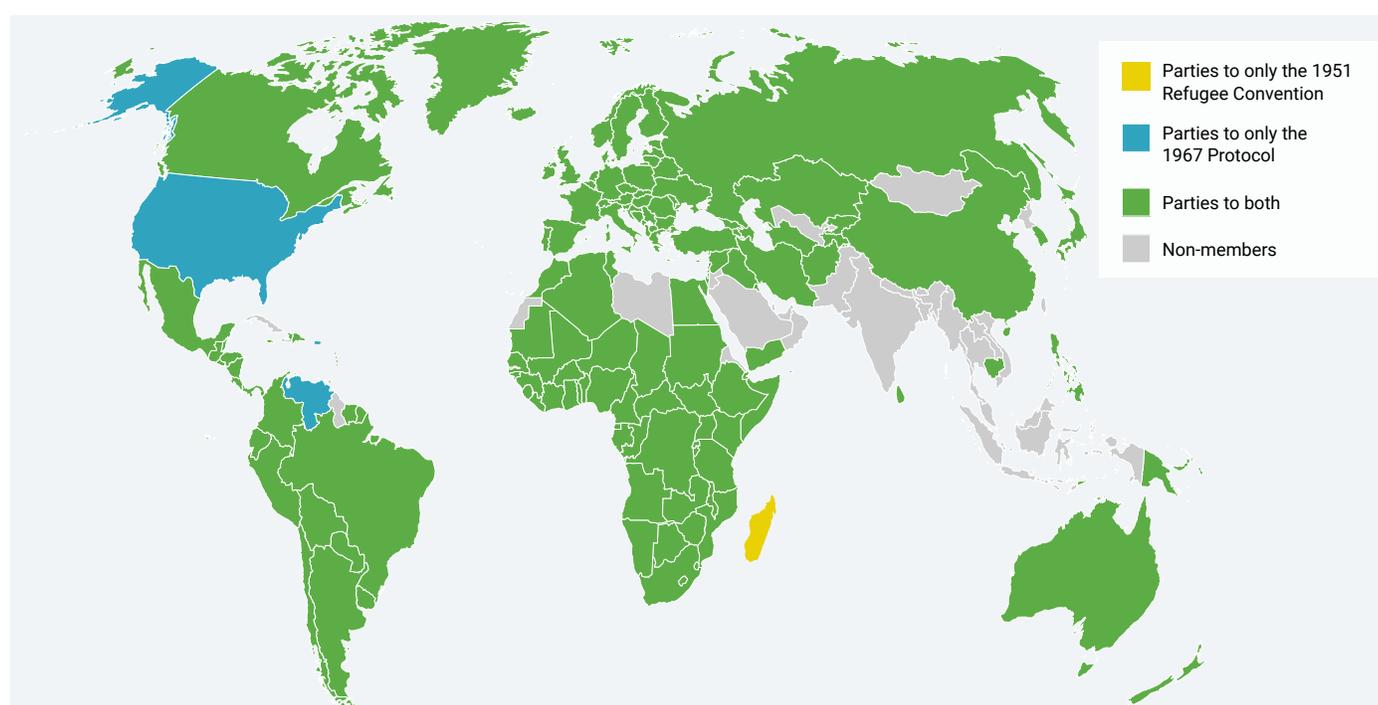


Image Credit: UNHCR <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>

By design, the principle of non-refoulement acts as a firewall to shield asylum seekers from harmful roll-backs of protection at the domestic or regional level. Some prominent legal scholars in fact claim that the principle of non-refoulement is a sufficiently established norm as to be considered peremptory or *jus cogens*, that is, a norm that is universally accepted in the international community and whose enforcement is mandatory. As such, any multilateral, bilateral, or domestic policy that violates a *jus cogens* norm is subject to *vacatur* in both domestic and international courts.¹⁴ If non-refoulement of asylum seekers is considered *jus cogens*, states do not have the discretion to apply the principle in a selective manner. UNHCR states that non-refoulement is “progressively acquiring the character of a peremptory rule of international law”¹⁵ and “is not subject to derogation.”¹⁶ Nevertheless, affluent nations have attempted to evade scrutiny through legally dubious agreements that transfer asylum seekers to other countries.

1.2. Externalization Regimes: Safe Third Country Practices

Under international law, there is no requirement for asylum seekers to seek protection in the first country they encounter. However, in recent decades, some nations have campaigned to retroactively impose this requirement through domestic law and regional agreements. While there are 148 nations party to either or both the Refugee Convention and the 1967 Protocol,¹⁷ it has become increasingly commonplace for countries to adopt more restrictive migration regimes, including programs meant to prevent asylum seekers from reaching their borders. One set of common restrictive practices includes programs aimed at returning or transferring asylum seekers to third countries through bilateral agreements, commonly referred to as Safe Third Country Agreements (STCAs). Initially, such laws and agreements were touted as ways to promote sharing the responsibility for processing and granting asylum. However, they are far more regularly used with the intent to deter migration from particular parts of the world and to offload asylum processing.

Crucially, there is no settled consensus on the legality of such agreements under international law.¹⁸ The origins of safe third country practices arguably began with the 1989 Conclusion by the UNHCR Executive Committee,¹⁹ which sought to prevent the irregular migration of individuals who had *already* received refugee protections but wanted to receive protections elsewhere.²⁰ The 1989 Conclusion delineated what is known today as the “first country of asylum” principle, which was meant to apply only to individuals who had already received asylum protections and never to people who merely transited through another State en route to their final destination. In fact, an earlier UNHCR Executive Conclusion from 1979 clearly articulated that asylum could not be denied “solely on the ground that it could be sought from another State.”²¹

While the 1989 Conclusion was quite narrow, some States broadened its scope when entering into STCAs.²² With the “safe third country” principle, States argued that they could transfer asylum seekers to another country which could have afforded them similar protections, including to countries of transit or to countries with which a transfer arrangement was struck. They first came into use under national laws and bilateral and multilateral refugee agreements. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), for example, amended U.S. asylum law to add

safe third country agreements,²³ though until 2019 there was only one such bilateral agreement, with Canada,²⁴ which has since been subject to litigation. The Trump administration stretched this concept further, brokering agreements with Central American countries to transfer asylum seekers apprehended at its borders. In Europe, the Asylum Procedures Directive and the EU's Dublin Regulation purported to formalize safe third country concepts within the EU and beyond.²⁵

States that deployed such transfer agreements claimed that the legal authority for such actions rests on the assumption that individuals had already received refugee protections or could have sought them in another country.²⁶ Yet, the legal concepts of "safe third country" or even "first country of asylum" are nowhere to be found in the actual text of the Refugee Convention or the 1967 Protocol.²⁷ Some nations have exploited this vacuum to create a parallel externalization regime.

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Another legal justification for transfer agreements arose from a faulty interpretation of the Refugee Convention itself. Restrictionist policymakers have wrongly utilized Article 31(1) of the Refugee Convention to justify refugee-transfer agreements by focusing on two words: "coming directly."²⁸ The article reads: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." In other words, Article 31 calls upon states *not* to impose harsh conditions like detention or criminal prosecution for the mere act of seeking refuge; it does not narrow the eligibility criteria for prospective asylum seekers on the basis of their travel route. Nonetheless, policymakers transplanted these two words to another context: the eligibility criteria for asylum protections, requiring asylum seekers to apply for refugee status in the first country that could have offered them refugee protections after fleeing persecution.²⁹ This interpretation would insulate many affluent countries from receiving asylum seekers from non-neighboring countries, repeating the inhumane World War II policies of returning boats full of refugees to harm.

The UNHCR has proposed guardrails to prevent States from implementing agreements using safe third country principles that limit protections for asylum seekers.³⁰ The 2002 UNHCR Lisbon Expert Roundtable specified that there is no mandate under international law for refugees "to seek international protection at the first effective opportunity."³¹ Still, they conceded that refugees did not "have an unfettered right to choose the country" of asylum, and sought to establish conditions that must be met in order to ensure the best interest of refugees through guidance notes and conclusions documents from their Executive Committee. UNHCR also produced guidelines encouraging transferring States to ensure the transferee country be party to the Refugee Convention and 1967 Protocol

(or adhere to commensurate protections); that States codify such agreements under legally-binding treaties able to be enforced and reviewed under legal scrutiny; and, that States maintain responsibility for the rights of refugees even after being transferred (at minimum the obligation of non-refoulement of the refugee in question).³² In addition, the UNHCR instructs States to provide guarantees to each asylum seeker that would be resettled, including those outlined below.³³

UNHCR Guidelines and Legal Considerations for the Transfer of Asylum Seekers to Safe Third Countries:³⁴

- ✔ Individually assessed, including a continuous review, as to the appropriateness of a transfer³⁵
- ✔ Permitted entry into the receiving State
- ✔ Protection against refoulement
- ✔ A fair and efficient asylum process in the receiving country that adheres to international standards
- ✔ Allowed to remain in the receiving State during the time of adjudication
- ✔ Living conditions and treatment in line with international standards, including adequate reception conditions, access to health, education, basic services, self-reliance and employment, as well as protection from arbitrary detention
- ✔ If protection need is established, provided with asylum status or long-term, lawful status in line with the Refugee Convention

As the next Chapters demonstrate, few if any agreements discussed in this report implement these threshold requirements and guidelines. What's worse, these agreements allow some policymakers to misrepresent asylum seekers as opportunists, and fault transit countries for not restricting their travels.

1.3. Externalization Regimes: Outsourcing Enforcement Operations

Another tactic frequently used alongside externalization is that of preventing asylum seekers from ever reaching an affluent nation's borders. This tactic plays out in two ways. First, some affluent nations task countries of transit with halting, detaining, or pushing back asylum seekers before they reach their destination. Second, some nations enlist private companies to perform the duties of border agents, imposing sanctions on corporations that allow the entry of asylum seekers without visas. This, in turn, incentivizes companies to incorporate migration control into their daily operations. This public and private outsourcing ultimately shifts affluent nations' borders far from their physical territory, and forces asylum seekers to turn in desperation to more dangerous transit routes.

Outsourcing policies have been implemented throughout Europe and North America. Intergovernmental agreements aimed at propping up the border controls of countries of transit were established in recent years between Spain and Morocco and Italy and Libya.³⁶ These agreements, however, plainly enlist transit countries as border guards in exchange for money. The primary intent of these agreements is the deterrence of asylum seekers, and routine human rights violations are their inevitable byproduct.

In 2012, Italy's practice of intercepting migrants rescued at sea was brought to the European Court of Human Rights, resulting in a landmark decision halting the practice and deeming it illegal.³⁷ In *Hirsi Jamaa and Others v. Italy*, the Court considered the legality of the Italian Coast Guard's 2009 actions in intercepting more than 200 individuals who had departed Libya, and transferring them to Italian military vessels that returned them to Tripoli.³⁸ These individuals were unable to identify themselves and formally ask for protection. The Court held that Italy had failed to protect the migrants' rights and freedoms under the European Convention on Human Rights by putting the plaintiffs at risk of abuse in Libya and of being returned to Somalia or Eritrea where they had originally fled.³⁹ The court found that even though the event took place outside of Italy's territory, Italy had exercised control over these asylum seekers who were "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities," and therefore were under Italian jurisdiction.⁴⁰ Consequently, the state was obligated to secure their rights and freedom pursuant to Article 1 Section 1 of the European Convention on Human Rights.

The *Hirsi Jamaa* decision represents a rare glimmer of accountability for non-refoulement violations under European law. Unfortunately, Italy circumvented the decision by striking a deal with Libya through a Memorandum of Understanding wherein Italy provides support to Libyan maritime officials to intercept and return asylum seekers to detention facilities in the country.⁴¹ In essence, the Italian government sought to establish a proxy force in Libya that could physically carry out the same operations, while skirting legal scrutiny.

Mexico's National Guard at a checkpoint in Tapachula in southern Mexico, June 2019.



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Across the Atlantic in 2014, the United States also sought foreign assistance to substantially reduce the number of individuals arriving at its borders in response to the rise of asylum seekers fleeing widespread violence in Central America.⁴² The U.S. sought to increase Mexico's enforcement capabilities at the border and its interior.⁴³ Once again, the inherent goal of U.S. policy was to decrease the number of asylum seekers who would be able to reach the border in the first place.

Since the 1960s, Mexico had been the country of origin for most migrants reaching the U.S., yet it became a country of transit around 2013 when more than a quarter of a million non-Mexican asylum seekers were apprehended at the U.S.-Mexico border.⁴⁴ As a result, the Mexican government implemented a plan to strengthen its border-enforcement capabilities through the Programa Frontera Sur (PFS). While this was not the first such program, the PFS program specifically sought to curb migration at Mexico's southern border at the behest of the U.S., and with direct monetary assistance.⁴⁵ U.S. funding came primarily from the Merida Initiative, a program that started in 2008 with the aim of curbing organized crime in the region. Quietly conflating migration control and crime prevention, the U.S. transferred \$200 million of the Merida Initiative funds toward the PFS.⁴⁶ Consequently, there has been a dramatic increase in the militarization of Mexico's southern border and creation of "control belts" of interior enforcement that target common routes for asylum seekers, such as the freight trains known as "la bestia." These mechanisms only led migrants to find more dangerous routes north without any significant impact on the trade of illicit goods, one of the program's original aims.⁴⁷

In addition to outsourcing enforcement mechanisms to perimeter and southern governments, affluent nations have enlisted private corporations to prevent asylum seekers from reaching their territories at the point of embarkation. Legislation turning private carrier companies, such as airlines and other vessels, into *de facto* immigration enforcement agents⁴⁸ was widely adopted in the second half of the twentieth century. Under carrier sanction legislation in countries in Europe, Australia, and the United States,⁴⁹ private carriers are incentivized to block asylum seekers from boarding vessels such as planes through significant financial penalties. Penalties include bearing the cost of deporting individuals, covering related expenses including accommodation or detention, and additional fines.⁵⁰ As a result, private carrier companies bar asylum seekers, who frequently lack required travel documents, from safely reaching their country of destination and seeking refuge. This privatization of migration control yields another benefit for states eager to circumvent the principle of non-refoulement; because carriers are private companies and non-state actors, it is difficult to prove that their actions fall under the jurisdiction of the state, even if they are acting on behalf of said state.

Carrier sanctions drive asylum seekers into the hands of the very trafficking networks these policies are purported to stop. In many cases, asylum seekers cannot obtain the state-issued documentation required by the private carrier, particularly when the state is the persecuting actor from which they are fleeing. For example, a Black asylum seeker from Mauritania—the country with the highest rate of slavery in the world—may not be able to provide a passport or obtain a visa to present to an airline due to the fact that Black Mauritians are not recognized⁵¹ as citizens by their government. In this example, carrier sanction legislation would push Black asylum seekers from Mauritania back to their persecutors and leave them particularly vulnerable to smuggling networks.

Often masquerading as human rights protections, externalization regimes permit affluent nations to circumvent the core principle of non-refoulement. As Chapters 2-5 show, European Union Member States, Australia, and the United States have created such regimes, which violate their domestic and international obligations toward asylum seekers.

Endnotes

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