

Pushing Back Protection

HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM

CHAPTER 6:
CLOSING RECOMMENDATIONS: LEARNING THE LESSONS
OF FAILED, DEADLY, AND COSTLY OFFSHORING AND
EXTERNALIZATION PRACTICES ACROSS THE WORLD



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CHAPTER 6

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“I keep waiting, but there is no answer... The truth is I don’t feel safe here. There’s nothing for me and my family here. But I don’t have anywhere else to go.”

— Honduran asylum seeker sent by the U.S. to Guatemala, where not a single asylum seeker was granted protection.³⁹⁹

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 recent asylum policies of the EU, Australia, and the U.S. have one fundamental flaw: their apparent forgetting of the moral and political failures that made the principle of non-refoulement a vital necessity in the aftermath of the Holocaust. Despite ratifying the Refugee Convention and/or 1967 Protocol and incorporating their principles into domestic law, these affluent nations continue to respond with callous push-backs. In particular, offshoring and externalization practices betray these affluent nations’ desire to circumvent humanitarian obligations, offload their duties on less fortunate, peripheral, or remote nations, and villainize asylum seekers.

Though they are oceans away from each other, these affluent nations use the same playbook. Framing primarily Black and Brown asylum seekers as a threat, they adopt policies that make safe routes to their nations nearly impossible to access. The few remaining routes become dangerous bottlenecks that incentivize the exploitation of asylum seekers and generate desperation. When this desperation comes knocking, a few hundred or thousand asylum seekers become a “crisis” for these affluent and populous nations. Governmental leaders fixate on the physical border and how to push back asylum seekers to peripheral countries, while international and domestic laws suddenly

appear malleable. Affluent nations turn outward to halt migration and erect indefinite offshore facilities abroad. Meanwhile, their domestic asylum systems remain underfunded, outdated, and ill-equipped to meet the needs of asylum seekers. Rather than funding domestic asylum processing and complying with non-refoulement, officials hope to deter asylum seekers through presumptive detention onshore, or expulsions and indefinite detention offshore.

The impact on asylum seekers is predictably devastating, exposing them to physical violence, torture, trafficking, mental health crises, and even death. Nevertheless, this grim record has done little to deter affluent nations from pursuing these harmful policies. Restrictionist policies remain widespread, repeating historical patterns across the globe. It is no coincidence that the violations of international law on one side of the globe—e.g., Haitians jailed indefinitely in Guantánamo Bay—become a blueprint⁴⁰⁰ for similar programs on the other—e.g., Australia’s “Pacific solution,” or offshoring aspirations in the U.K. Given their powerful status, affluent nations’ anti-asylum policies set harmful precedents that undermine protection for asylum seekers worldwide—even beyond their active exchange of proposals and consultation on adapting externalization policies at the local level.⁴⁰¹ Unsurprisingly, the U.S. has been a lead architect for offshoring practices, even guiding

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Australia on maritime push-back and externalization policies.

How can we avert a new iteration of Nauru and Manus? Guantánamo and the ACAs? Or Turkey and Libya’s agreements with Europe? If a blueprint is emerging, so are the lessons that the U.S. must finally learn:

- 1. Harsh deterrence policies do not work, because asylum seekers do not leave their homes voluntarily.** These measures, which bolster offshoring and externalization, perpetuate chaos and are shown to produce no discernable drop in migration, because asylum seekers flee from greater harms.⁴⁰² Preventing asylum seekers from reaching the United States continues to inform the Biden administration’s approach,⁴⁰³ even while they unwind MPP and rescind the ACAs. The continued expulsions under a specious public health rationale foreshadows further offshoring/externalization practices, particularly as it relates to the militarization of Mexico’s southern border. **Abandoning harsh deterrence policies is key to ending offshoring and border externalization once and for all.**

2. **Third country agreements with less affluent nations are not the solution either.** The U.S. exerts significant political control over its neighbors and other developing nations. Whether coercive or seemingly voluntary, these agreements export border militarization and bargain with the right to asylum. They also compound the harms asylum seekers suffer, as seen most recently in Turkey and Mexico. Most importantly, these agreements serve short-term political ends, not international obligations. As UNHCR’s basic threshold of protection shows (see Chapter 1), qualifying as a “safe” third country requires significant measures to ensure the welfare of asylum seekers. **Rather than investing in costly externalization or offshoring agreements, the U.S. should ensure that it does not offload its obligations onto ill-equipped nations with limited capacity or no capacity at all to process asylum seekers.**
3. **There is no “right way” to seek asylum.** Affluent nations fixate on “lawful” ways to seek refuge, at times pitting refugees against asylum seekers, or discriminating between asylum seekers who arrive by sea and land from other noncitizen travelers. The mode of entry of asylum seekers is irrelevant to the protection they seek. That is why ongoing sea interdiction, expulsions, and unequal treatment toward individuals entering between ports of entry must end. Historically, the fixation on unauthorized migration has been selective, and deeply discriminatory. **The U.S. cannot abide by the principle of non-refoulement by ascribing fault to asylum seekers depending on their mode of entry.**⁴⁰⁴
4. **Closing legal loopholes that skirt non-refoulement obligations is key to enforcing asylum protections.** Sea interdictions, expulsions, and other forms of push-backs over the past decades have relied on workarounds to suspend this fundamental protection owed to asylum seekers. The principle of non-refoulement does not disappear because U.S. authorities block asylum seekers’ arrival. Unlike *Hirsi Jamaa v. Italy* in the EU context, *Sale v. Haitian Refugee Centers* opened the door for the U.S. Coast Guard and DHS to push back migrants outside of U.S. territory. **Restoring the broad scope of non-refoulement obligations is key to fulfilling U.S. obligations under international law—as is granting asylum seekers access to justice when the U.S. refouls them.**
5. **Proxy border control, where the U.S. seeks to halt the arrival of asylum seekers through agreements with governments or with private carrier companies, breeds trafficking and deadly journeys.** Like Australia and the EU, the U.S. has invested extensive resources into externalization regimes in the public and private sector. Those agreements have proven deadly, as other nations brutalize asylum seekers on the U.S.’ behalf.⁴⁰⁵ Though outsourced, this interference with asylum seekers on their journey—while they flee life-threatening harm—turns asylum law on its head. **The U.S. should end proxy migrant control regimes, such as DHS’ agreement with Panama, or the recent agreement that the U.S. brokered with Central American nations and Mexico to “place more troops on their borders”— and expand safe pathways for asylum seekers to come to the United States.**

- 6. Asylum offshoring thrives on the presumption of detention; we cannot end one without ending the other.** The recent legal challenge to the U.S.-Canada safe third country agreement, though subject to ongoing litigation, named the elephant in the room: even among affluent nations, safe third country agreements may violate asylum seekers' rights if repressive detention policies are commonplace. Unsurprisingly, the U.S. has built the largest detention apparatus in the world;⁴⁰⁶ the system, built in tandem with the brutal repression of Haitian asylum seekers, taps into the same racism that has fueled the mass incarceration of Black and Brown people in communities across the United States. In the 21st century, this warped logic continues to justify anti-asylum policies, such as a deliberate misinterpretation of Title 42, which returns asylum seekers to harm. Individuals seeking asylum in the United States should be processed in the United States in accordance with domestic and international law. **Instead of incarcerating asylum seekers, the U.S. can unlearn its instinct to detain, and shift resources toward community-based civil society organizations to support asylum seekers—hundreds of which are waiting at the ready.**⁴⁰⁷
- 7. Managing asylum policy through a lens of political crisis management endangers the right to asylum and the U.S. asylum system and permits government leaders to perpetuate thinly veiled racism.** Affluent nations' leaders frequently criminalize and vilify predominantly Black, Brown, and Indigenous asylum seekers as representing an external threat or a "foreign invasion." The existence of people seeking asylum is not a crisis to quickly repress, but representative of binding legal obligations. **Divesting from a crisis-management response and investing in domestic asylum processing systems will shield asylum seekers and the United States from short-term politically motivated policies which are dangerous and ineffective.**

The Biden administration has a unique opportunity to build a new humanitarian asylum system not built upon the primacy of deterrence, enforcement, and detention—tried and failed policies that have spelled immeasurable harm for asylum seekers. These same policies, paired with a history of white supremacy, have also made offshoring and border externalization possible. As our report shows, U.S. offshoring and border externalization long predates the now-rescinded ACA with Guatemala, and has returned in many iterations since the early 20th century. No deterrence policy will end the arrival of asylum seekers. Every dollar spent on offshoring or externalization practices is one less dollar to build humane and efficient asylum processing domestically.

Only by investing in a robust domestic humanitarian reception system that treats asylum seekers fairly and with dignity can we avert a return to offshoring and externalization policies in the long term—in the U.S. and worldwide.⁴⁰⁸

Endnotes

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