REFUGEE LAW INITIATIVE | SCHOOL OF ADVANCED STUDY UNIVERSITY OF LONDON

Refugee Law Initiative
Declaration on Externalisation and Asylum
29 June 2022

1. The Refugee Law Initiative is an academic institution that brings together specialised refugee law researchers and practitioners from across the world. In this Declaration, we outline international law standards that govern the legality of externalisation measures impacting on access to territorial asylum,[1] with a particular focus on externalised border controls and externalised asylum systems. The Declaration offers guidance to law- and policy-makers, practitioners, scholars and others.

Externalisation as a concept

2. We understand 'externalisation' as the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory. Such externalised functions might be implemented by a State unilaterally, jointly with other States and/or entities – including International Organisations (IOs) and private actors – or through partially or wholly delegating the functions to other States and/or entities.

3. Externalisation of the core State functions of operating border controls (paras 11-15 below) and administering national asylum systems (paras 16-25) has increasingly impacted in detrimental ways on access to territorial asylum for refugees and asylum seekers. Such practices raise questions about the applicable international law standards, the legality of resulting externalisation measures and the accountability of States and other actors for any breaches of international law (paras 26-27).

Applicability of international law

4. Primary and secondary rules of international law govern the legality of measures that seek to externalise border controls and/or the asylum system itself.

5. The fact that externalisation measures are partly or wholly implemented outside a State's own territory will not usually release it from compliance with primary obligations imposed by specialised regimes of international law – and which continue in force as normal for cooperating States operating within their own territory.

6. Applicable international law rules include treaty law and customary obligations derived from UN Charter rules on non-interference and from international refugee law, international human rights law and from regional citizenship regimes, as well as from the international law of armed conflict and international law of the sea where relevant.

7. The factual scenarios of externalised border controls or asylum systems are unlikely to meet pertinent legal thresholds for derogation from treaty obligations in any but the most

[1] For a fuller legal analysis, please see accompanying analytical paper: David Cantor et al, 'Externalisation, Access to Territorial Asylum, and International Law' (2022).

extreme threats to the life of the State, and will need to be strictly justified in any case. In general, there is no basis in international law for States to refuse to receive asylum applications or to register asylum seekers during emergencies, or to deprive non-citizens of their liberty in offshore facilities.

8. States taking externalisation measures commonly delegate or share their authority with other States and/or entities. Where the primary rules are silent on legal responsibility, the secondary rules of international responsibility for States and IOs apply. Pertinent rules for States include:

i. A State can breach an international obligation via actions and/or omissions, whether committed singly or jointly, and regardless of the means by which it occurs;
ii. A State is responsible for conduct by its *de jure* and *de facto* organs of whatever level and function, regardless of whether they act within its territory or extraterritorially;
iii. Two or more States can bear legal responsibility for wrongful conduct when it can be attributed to more than one State under relevant international law rules of responsibility, such as where one State aids or assists another in the commission of a wrongful act.
iv. A State has responsibility for the conduct of any private person or entity when they are empowered by its law to exercise elements of governmental authority or they act in practice on the instructions of the State in carrying out that conduct.

9. IOs are governed by similar rules of responsibility for the conduct of their organs, including in contexts where they cooperate with States and other IOs or entities, such as private actors.

10. As a matter of international law, any rules of domestic law that are compatible with a State's international obligations also regulate the legality of externalised measures. A failure to comply with international law obligations can never be justified legally by reference to domestic law.

Externalised border controls and international law

11. Border control, a State function, is concerned with regulating the entry or stay of persons in the territory of the State, including through interception at the border. Increasingly, though, States use externalised forms of border controls to prevent access by non-nationals to their territory.

12. The general rule is that externalised border control measures that would be unlawful if carried out within the territory of a State, or at its borders, will remain so if implemented outside its own territory in relation to a person or location over which that State exercises effective control. For instance, pushbacks that summarily force back arrivals without adequately assessing claims for entry or international protection violate refugee and human rights law if carried out by a State at its border - they will be equally unlawful if committed extraterritorially by that State or its agents.[2]

[2] Pushbacks at sea of unseaworthy boats in distress will also breach the law of the sea obligation to rescue persons in distress and deliver them to a 'place of safety' on dry land where basic human needs are met. Similar legal standards apply to 'pullbacks', where a cooperating State agrees to prevent people from leaving its territory and/or to intercept them at sea and forcibly return them to its territory.

13. Externalised measures that involve the physical presence of a State or its agents in the territory of another State will require the latter's consent. However, such consent will not usually be required for externalised border control measures that do not involve a physical presence in the territory of another State, such as visa regimes and carrier sanctions or interceptions of vessels on the high seas.

14. Yet externalised border control measures not involving physical control over a person or place by a State, such as visa regimes and carrier sanctions, may have unlawful effects where the pertinent decision by that State forms part of a chain of conduct that directly exposes an individual to a breach of protected human rights, all the more where discrimination on protected grounds is in evidence.

15. A State does not avoid legal responsibility for unlawful border control measures committed extraterritorially by delegating this function to other cooperating States, IOs or private actors, as shown by the secondary rules of State responsibility (paras 8-9 above).

Externalised asylum systems and international law

16. States need a national asylum system to determine asylum claims and give effect to obligations to refugees. Some States seek to externalise key elements of this function by transferring asylum seekers who have arrived in their jurisdiction for 'third country processing', i.e. processing of the asylum claim and/or the provision of international protection in another State. Any arrangements to externalise asylum functions remain regulated by applicable rules of international law.

17. International agreements concerning third country processing must take a form suitable for protecting transferees' rights and ideally be binding under international law. Their content must detail the applicable substantive and procedural standards (see paras 18-24 below) and include an effective supervision mechanism to ensure that the legal rights of transferred asylum seekers are respected during implementation and to correct the situation if they are not. These agreements should be published and open to scrutiny by democratic and judicial mechanisms.

18. Prior to the transfer of any asylum seeker to a third country pursuant to such an agreement, an individual assessment of the legality of the individual transfer is required. This should take place in the territory of the transferring State and not on board a vessel or aircraft.

19. For each individual, this pre-transfer procedure must assess whether any of the following elements are present that would render the transfer contrary to international law:

i. Any real risk of direct or indirect *refoulement* as a result of the transfer;
ii. Any existing legal basis for the person to enter or remain in the transferring State, or other legal rules which would prevent their transfer out of the territory;
iii. Any real risk that reception or other arrangements in the receiving State would breach international human rights or refugee law standards applicable in the transferring State, including prohibitions on arbitrary detention and arbitrary restrictions on movement.

20. Such pre-transfer assessments should also consider the following practical elements in order to evaluate whether the individual transfer of the asylum seeker is reasonable on the facts:

i. Any risk that the asylum seeker will not be admitted to the receiving country;
ii. Any lack of prior connection of the person with the receiving country, especially where the arrangement envisages the provision of asylum in the receiving State;
iii. Any special needs of the person, including on the basis of their gender or other protected characteristics, and the capacity of the receiving State to meet those needs;
iv. Wider conditions in the receiving country and their stability, including any armed conflict or generalised violence, exposure to serious disasters and/or patterns of widespread violations of human rights, especially if on a discriminatory basis pertinent to the person concerned.

21. Asylum seekers subject to third country processing arrangements must be afforded access to a fair and efficient procedure in line with international standards, in both the pre-transfer evaluation in the transferring State and the asylum determination process in the receiving State.

22. Where a transferring State operates asylum facilities in a third country, those facilities are subject to the same international law standards that govern such functions in its own territory. Those standards apply to any externalised asylum facilities over which the transferring State retains extraterritorial jurisdiction, including through effective control over the person transferred or over the location of the facilities, or where conduct by that State forms part of a chain of action that directly exposes an individual to a breach of protected human rights. The receiving State must ensure that the operation of these facilities in its territory accords with its own international law obligations.

23. Where a State transfers asylum seekers into the hands of another State for the purpose of third country processing but retains no jurisdiction thereafter, then it may be required to ensure that the basic international law guarantees applicable to asylum seekers in its own territory are respected in law and in practice in the receiving State, regardless of whether or not the receiving State is a party to relevant treaties. Applicable international human rights law standards in the receiving State must continue to be observed in all circumstances.

24. Where third country arrangements extend to the provision of international protection by the receiving State, transferred asylum seekers must receive ongoing protection against *refoulement* in the receiving State. Applicable international human rights law standards in the receiving State must also continue to be observed in all circumstances. If the transferring State is a party to the Refugee Convention, then the full set of international law guarantees contained therein must be respected in law and practice in the receiving State, even if the receiving State is not a party to the Convention.

25. In general, international law principles suggest that States are allowed to externalise elements of their asylum functions to a State or entity outside their own territory only where this is done in a way consistent with their own legal obligations and for good faith reasons - to relieve an excessive burden on a country of first asylum in the context of mass influx, for example.

Accountability mechanisms in externalisation contexts

26. States and other entities engaged in externalisation practices are legally accountable for their actions, including any breach of international law standards, before international, regional and domestic judicial and other enforcement mechanisms. Neither the extraterritorial nature of any externalisation measures nor any attempts to delegate such measures allow States to escape their obligations under international law and legal accountability for any breaches of those standards.

27. Nonetheless, given that asylum seekers subject to externalised measures often face serious practical obstacles in accessing such legal remedies, the development of more robust systems of effective independent monitoring and domestic legal pathways for challenging the conduct of relevant actors are urgently required to promote transparency and reinforce the accountability of States and other entities for the standards imposed by international law.