

# Externalisation of international protection: UNHCR's perspective

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**In recent years, some States have pursued increasingly restrictive policies and practices in order to deter refugees and asylum seekers from reaching their borders. Such policies of 'externalisation' are manifestly inconsistent with the spirit of international cooperation embodied in the 1951 Refugee Convention.**

International cooperation has always been indispensable to the effective functioning of the international regime for refugee protection. The drafters of the 1951 Convention Relating to the Status of Refugees (1951 Convention) explicitly acknowledged this, recognising that as the challenge of refugee protection is international in its "scope and nature", the solution "cannot therefore be achieved without international cooperation".<sup>1</sup>

There have been many positive examples of situations where States have shown their readiness to share responsibility and demonstrate international cooperation in practice. In addition, since 2018 the Global Compact on Refugees (GCR) has renewed the focus on responsibility sharing as a key element of global refugee protection. At the first Global Refugee Forum in 2019, UNHCR called for pledges to support development of the capacity of national asylum systems. As a result, support platforms were set up to assist States in identifying partners which could provide expertise and other resources to boost capacity. Among these, States participating in the Intergovernmental Authority on Development (IGAD) grouping in the East and Horn of Africa are working with the World Bank to strengthen regional efforts to promote return and integration, education, health and economic inclusion for refugees, including those from Somalia. A regional support platform in Latin America, known as MIRPS (the Spanish acronym for Comprehensive Refugee Response Framework), brings together eight States seeking to mobilise technical, financial and material support for refugee protection in the region, and promote the exchange of good

practices and lessons learned. In addition, the Asylum Capacity Support Group set up by States and UNHCR has provided a mechanism for matching support needs with offers. Such initiatives send positive signals regarding States' interest in upholding and strengthening protection standards.

Nonetheless, in recent years there have also been troubling instances where States have pursued restrictive policies or practices, seeking to deter arrivals through unilateral or collective measures. Some of these have aimed or served to shift responsibility for international protection elsewhere, in ways that have undermined access to protection and enjoyment of rights for asylum seekers and refugees. With the recent emergence of new proposals in this vein, in May 2021 UNHCR issued a note on the 'externalisation' of international protection, cautioning against measures which could deny refugees access to international protection and enjoyment of their rights, and underscoring the importance of positive engagement in lawful cooperative arrangements.<sup>2</sup> This sets out important parameters to help guide collaborative approaches to refugee protection in ways which respect international law and responsibility-sharing principles.

## **International cooperation and responsibility versus externalisation**

UNHCR defines the externalisation of international protection as: "measures taken by States – unilaterally or in cooperation with other States – which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum-seekers and refugees from reaching a particular 'destination' country or region,

November 2021

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and/or from being able to claim or enjoy protection there. Such measures constitute externalization where they involve inadequate safeguards to guarantee international protection as well as shifting responsibility for identifying or meeting international protection needs to another State, or leaving such needs unmet; making such measures unlawful.<sup>73</sup>

Externalisation practices frequently result in people being transferred between countries without essential safeguards or appropriate standards of treatment. Externalisation may lead to long-term or indefinite ‘warehousing’ of asylum seekers in isolated locations, or expose them to indirect *refoulement* and other threats. Externalisation policies may also create or feed negative perceptions of asylum seekers and refugees. Such measures have the potential to undermine the international protection system and, if adopted by a significant number of States, could place many asylum seekers and refugees at risk of mistreatment, *refoulement* or legal limbo, without access to procedural or substantive rights. Several categories of externalisation practices are described below.

### 1. Extraterritorial processing

Some arrangements transfer a State’s responsibility for determining claims for international protection to a third State. This may involve transferring responsibility for processing such claims under the laws either of the externalising State or the third State. Alternatively, it can involve refugee status determination being undertaken in the externalising State while asylum seekers are denied entry or removed from the territory to await the outcome of their claims.

Extraterritorial processing can also take place outside State territory, including aboard vessels in international waters. UNHCR considers that processing on



132 refugees and migrants disembarking at Tripoli naval base, after their boat was intercepted by Libyan Coast Guards off the Libyan coast.

board maritime vessels is not appropriate, unless reception arrangements and eligibility screening processes meeting international standards can be guaranteed.<sup>4</sup>

In some cases, States seek to avoid legal responsibilities by processing asylum claims in special zones within State territory where a lower standard of rights apply. This may occur in transit or ‘international’ zones at airports or border areas, or in other areas of a State’s territory, including territorial islands, that are declared to have some special ‘extraterritorial’ or ‘excised’ status. If processing and reception are subject to the same standards and safeguards as elsewhere on a State’s territory, it does not constitute unlawful extraterritorial processing. If, however, rights and obligations are less extensive or do not apply in that zone, it represents an attempt to avoid responsibility – which is at odds with international law.

States cannot avoid their obligations under international refugee and human rights law by processing claims outside their territory. A State that receives an asylum claim, or exercises effective control or jurisdiction over an asylum seeker, retains joint responsibility for fair processing and treatment along with the State on whose territory the determination takes place. Both bear responsibility for ensuring a swift and legally sound assessment of the

applicant's protection needs, and provision of international protection where needed.

## 2. Unilateral measures to prevent arrivals

Measures taken by States to prevent asylum seekers from reaching their borders or entering their territory to seek asylum may also violate international standards. Such measures can include land, sea or air border control measures such as 'pushbacks', and maritime interceptions and return to third countries, including where disembarkation is refused or where supplies or boat repairs are offered in order to facilitate onward journeys.

Arrangements amounting to externalisation may also include physical or procedural obstacles to entering a territory, or procedures which deny effective access to asylum. 'Metering' of arrivals (that is, numerical caps or limits on admission), externalised waiting periods for decisions on claims filed in the territory, or extraterritorial pre-screening (for example, where asylum seekers are prohibited from applying in the territory and are instead required to apply at embassies abroad)<sup>5</sup> may all fall within this category. Such measures may breach the prohibition on collective expulsion, the principle of *non-refoulement*, and the right to seek and enjoy asylum. States are entitled to manage entry at their borders but border measures need to be consistent with refugee and human rights law. Border management must not prevent access to international protection for those who need it.

## 3. Cooperative measures to prevent arrivals

Collective measures by a group of States are sometimes taken to prevent asylum seekers from reaching a particular country's territory. These may include bilateral or multilateral cooperation on migration control (for example, through posting migration officers in the territory of other States); joint or proxy interception or surveillance arrangements; informal cooperation at borders; and funding or training for migration control. Such cooperation may be for lawful and positive purposes, such as increasing search-and-rescue capacity or law enforcement measures against trafficking in persons and

migrant smuggling. However, if designed or implemented without adequate safeguards, or in order to avoid or shift international protection responsibilities, such cooperative measures may constitute externalisation.

## Cooperation without externalisation: lawful responses

UNHCR makes a clear distinction between externalisation measures and lawful arrangements for transfer of responsibility for international protection. These lawful 'transfer arrangements' are consistent with international standards, with safeguards ensuring refugees' access to international protection where needed. UNHCR has issued guidance on how such arrangements can be configured under bilateral or multilateral agreements among States; this guidance aims to provide clarity as to which State is responsible for processing claims and offering international protection where relevant.<sup>6</sup> States may also lawfully apply 'safe country' concepts,<sup>7</sup> as well as regional disembarkation mechanisms,<sup>8</sup> and emergency or humanitarian evacuations or transfers; these need to be regulated and implemented in the spirit of international cooperation with adequate guarantees of respect for rights. Protection and durable solutions for refugees may also be realised through resettlement, humanitarian admissions and other complementary and regular pathways or through protected entry schemes (involving admission for the purpose of claiming asylum) or embassy procedures. While these also entail a transfer of international protection responsibilities, they are distinct from externalization in that they feature important guarantees of procedural fairness and secure legal status if the people concerned are found to need international protection.

UNHCR has outlined the following set of principles to help States design arrangements which are consistent with international cooperation and responsibility sharing.

Primary responsibility for identifying and assessing international protection needs lies with the State in which an asylum seeker arrives and seeks that protection,

or under whose jurisdiction she or he falls. This responsibility extends also to ensuring adequate reception conditions and procedural standards during status determination, and providing international protection if required. States have a duty to make independent inquiries as to the need for international protection of persons seeking or likely to need asylum, and to provide them with access to fair and efficient asylum procedures.

States must fulfil their obligations under international refugee and human rights law in good faith. They must make every effort to ensure that any measures taken to manage displacement, migration or mixed movements, whether unilaterally or in cooperation with other States, are protection-sensitive: that is, that they differentiate between, and provide appropriate measures (based on international standards) to meet the needs of, all persons, including refugees, other people with international protection needs, and people with specific needs (such as unaccompanied or separated children, victims of trafficking or trauma, and migrants).

States cannot avoid their obligations under international refugee and human rights law by employing transfer or extraterritorial processing modalities. Both the State to which an asylum claim has been, or is intended to be, made and the State on whose territory the determination takes place retain joint responsibility for processing and reception (including for speedy and appropriate outcomes), consistent with their international obligations.

Wherever a State exercises effective control over persons or places on the territory of another State (or, for instance, in international waters), its obligations under international refugee and human rights law continue to apply.

International cooperation in sharing international protection responsibilities and ensuring access to international protection is a primary consideration of refugee law as affirmed in the Global Compact on Refugees of 2018. Practices that shift burdens, avoid responsibility or frustrate access to

international protection are inconsistent with global solidarity and responsibility sharing.

### Conclusion

In addition to being legally flawed, practices which effectively deny or shift responsibility from the responsible State are likely to prove ineffective and unsustainable. Refugees who are denied access to the means to seek and enjoy protection will not find solutions, and may be compelled to resort to irregular movement at the hands of unscrupulous smugglers or be exposed to trafficking, hardship and denial of their rights.

The COVID-19 pandemic has reminded us in stark terms that global challenges require global solutions. States need to work together towards clear and principled common goals, and to seek to support each other, rather than adopting narrow, inward-looking strategies which may be driven by short-term political expediency. Avoiding the pitfalls of externalisation is in the interests not only of asylum seekers and refugees but also of States themselves. 2021 marks the 70th anniversary of the 1951 Convention; ensuring the right to seek asylum and expanding international cooperation would be a fitting tribute to this resilient and enduring legal instrument.

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