

The False Panacea of Offshore Deterrence¹

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Time and again, governments take often shockingly blunt action to deter refugees and other migrants found on the high seas, in their island territories, and in overseas enclaves. They act in ways they would never consider appropriate in their home territory. There is a pervasive belief that when deterrence is conducted at arms-length from the homeland, it is either legitimate or, at the very least, immune from legal accountability.

Perhaps most notoriously, the United States in the early 1990s not only interdicted thousands of Haitians fleeing the murderous Cedrés dictatorship on the high seas, but forced the asylum-seekers to board its Coast Guard vessels, destroyed their boats, and delivered them directly into the arms of their persecutors. While current practice is to conduct a cursory review of protection needs onboard the intercepting ship, the United States still maintains that it has no legal obligation to interdicted refugees, even if they manage to reach its territorial sea. Indeed, the U.S. recently argued that a Cuban asylum-seeker – traditionally a highly favoured group under its domestic law – could not assert a right to protection because the bridge where her tiny boat landed had been disconnected by storms from the American mainland.

Europe appears similarly committed to avoiding responsibility towards those who arrive at other than the core of its territory. When some 10,000 persons managed to reach the Italian island of Lampedusa this year, Italy responded by discontinuing its traditional practice of sending them to Sicily for processing of protection claims. Instead, the BBC reports that the “[m]igrants were despatched back handcuffed in military planes from Lampedusa direct to Libya. No questions asked.”

Spain has erected dual razor-wire fences around its North African enclaves of Ceuta and Melilla to deter groups of largely sub-Saharan migrants anxious to use the territories as a means of entering the European Union. Refugees and others periodically surge in waves against the metal fence, usually several times during the night. Many are injured in the attempts. Even those who successfully scale the barriers may be summarily sent back to Morocco, which is reported simply to dump them in desert border zones.

The effort to prevent entry at Ceuta and Melilla has put renewed pressure on the Spanish Canary Islands, a favoured destination until 2002 when radar and sea patrols were instituted to deter travel from Morocco to Fuerteventura and Lanzarote, some 100 km. away. The most recent flows have thus been forced to take a much longer and more perilous route from northern Mauritania to Tenerife. The Spanish government has responded to the upsurge in arrivals by offering patrol boats to stop departures, and to set up refugee camps inside Mauritania.

Are these practices legal?

The rules set by the 1951 *Refugee Convention* and its 1967 *Protocol* do not allow states to refuse protection to refugees just because they have not yet entered the core of its territory. Simply put, the most basic duties – including the critical duty of *non-refoulement*, requiring states not directly or indirectly to return refugees to the risk of persecution – apply wherever a state exercises jurisdiction. Whether the protection request is made on Lampedusa or in Rome, the refugee law implications are identical. It makes no difference whatsoever if asylum is claimed by a refugee clinging to the outermost razor wire fence at Ceuta or at a police station in Madrid. There may be no peremptory *refoulement* of refugees encountered by vessels patrolling a state’s territorial waters, or even of those intercepted on the high seas. Because *jurisdiction* is the lynchpin to responsibility, state parties to the Refugee Convention must provisionally honour the rights of persons under their authority who claim refugee status until and unless they are fairly determined not to qualify for protection.

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Despite the clarity of these legal rules, two kinds of arguments are made in support of deterrent measures.

The first is that insistence on rigorous respect for the rules of refugee law amounts to allowing the proverbial tail to wag the dog. Because in any given flow towards the developed world today refugees are significantly outnumbered by economic migrants – whose entry *can* normally be lawfully resisted – it is argued that governments must be free to respond effectively to the dominant (non-refugee) character of the arrivals. If governments are forced to abandon deterrence in order to respect the refugee rights of a small minority, meaningful border control would be more difficult. Adding fuel to this pragmatic fire is the fact that even as among the minority of entrants who claim refugee status, clearly not all are actually entitled to it.

As a matter of law, though, non-selective deterrent measures cannot be justified where genuine refugees are part of a mixed flow. There is no exception to the duty of *non-refoulement* for situations in which the cost or inconvenience of processing claims is great, or where only one in ten entrants is actually a refugee. Nor can states lawfully avoid refugee protection obligations by deciding simply not to assess claims made to them. This is because a person is a refugee as soon as he or she is *in fact* outside the country of origin owing to the risk of being persecuted for a Convention reason. As UNHCR rightly insists, a refugee “does not become a refugee because of recognition, but is recognised because he is a refugee.” In practice, this means that a person who may be a refugee must be provisionally treated as such until and unless he or she is fairly determined not to qualify for refugee status. Measures which deter refugee claimants from arriving in an asylum state are therefore no less in breach of refugee law than is the removal of a recognised refugee already present in a state’s territory.

A more complex argument for deterrence is sometimes made on humanitarian grounds. Particularly where refugees and others arrive by sea, often in rickety or grossly overcrowded vessels, it has been said that departures must be stopped in order to avoid risk to life or limb. The Mauritanian Red Crescent and Spanish Red Cross, for example, believe that about 1200 sub-Saharan Africans have drowned on the Mauritania-Canary sea route since November 2005 alone. The northwest Mediterranean annual death toll is probably in the range of 1500-3000 persons. So long as the deterrence is land-based – for example, clamping down on corrupt officials who turn a blind eye to departures, banning the bulk import of outboard motors, or undertaking campaigns to warn would-be migrants about the real risks of their voyage – it is argued not only that is deterrence permissible, but that it is actually an ethical imperative. It may also be legally required. Governments are, moreover, actually bound to take border control measures to prevent migrant trafficking and smuggling – the main ways in which refugees and other migrants now enter developed countries.

There is, however, a critical legal distinction between sensible efforts to provide information and to make it difficult for traffickers to exploit people on the one hand, and more aggressive efforts to actually stop departures on the other. Whatever the risks, every person has the legal right to make the decision about departure for himself or herself. The relevant rule in such cases is not rooted in refugee law, but in the UN Civil and Political Covenant’s requirement that all persons be allowed to leave any country, including their own. Indeed, a foreign government which aids or abets efforts to prevent departure may itself be liable in such cases.

This right to leave is of paramount importance to refugees, who by definition face the risk of being persecuted at home. Allegedly humanitarian steps taken to shut down escape routes – such as the formal agreement between the United States and Cuba in 1994, requiring Cuba to “... take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods” – are little more than unlawful paternalism. It is the refugee’s right – not the prerogative of any state or humanitarian agency – to decide when the risks of staying put are greater than the risks of setting sail.

Until and unless the abuse that causes refugees to flee in the first place is ended, the only real answer is to provide *safe alternatives* to unsafe routes of escape. Blunt deterrence of refugee or mixed flows is unlawful, but states are perfectly free to conceive creative protection alternatives. Most sensibly, the focus should be on the establishment of genuine protection options within regions of origin. Where intra-regional alternatives

are truly safe, accessible, and deliver rights-based protection, it is likely that most refugees will feel no need to undertake perilous voyages. Indeed, where real protection options are declined for economic, social or other reasons not related to protection, refugees travelling farther afield may lawfully be returned to their own region – but only if dependable, high quality protection is actually in place there. For this reason, a reemphasis on making real protection available closer to home should be attractive to developed states: while less “efficient” than (unlawful) deterrence, it is nonetheless consistent with their more general migration control objectives. But it is also of real value to states in regions of origin, which desperately need binding guarantees of substantial resources to cope with endemic refugee flows. Most important, the logic of often dangerous travel by refugees to far-off lands is undermined, and the welfare of the overwhelming majority of refugees not able to flee beyond their own region is significantly enhanced.

Critically, though, a lawful managed protection regime cannot include mechanisms aimed at denying refugees the right to set out on their own to seek protection if that is what they genuinely wish to do. Nor may any refugee lawfully be returned to his or her region of origin until and unless solid and rights-regarding protection is actually and dependably in place there. These rules are important not just because they have been agreed by states, but because they are the practical means by which to drive governments and international agencies to move away from the warehousing of refugees in distant places, and to commit themselves to the forms of burden and responsibility sharing needed to establish dependable, rights-regarding protection on a global scale.

Discussions along these lines are, of course, already occurring. Perhaps spurred on by the formal commitments made on the fiftieth anniversary of the Refugee Convention, there is clear interest in exploring both the operational flexibility which refugee law affords, and the value of systems to share out both the responsibilities and burdens inherent in refugee protection. It is not at all clear, however, that these initiatives are predicated on the central importance of finding practical ways by which to respond to involuntary migration from within a rights-based framework. Poorer states are glad that there is, at last, some realisation by governments in the developed world that ad hoc charity must be replaced by firm guarantees to share responsibilities and burdens. Governments of wealthier and more powerful countries are pleased that UNHCR and other states are now prepared to acquiesce in demands that their refugee protection responsibilities not be construed to impose ongoing obligations towards all who arrive at their territory.

But potentially lost in the discussions as they have evolved to date is the central importance of reforming the mechanisms of refugee law not simply to avert perceived hardships for states, but also in ways that really improve the lot of refugees themselves. If the net result of reform is only to lighten the load of governments, or to signal the renewed relevance of international agencies to meeting the priorities of states, then an extraordinary opportunity to advance the human dignity of refugees themselves will have been lost.

The challenge, then, is twofold. Most obviously, we must flatly reject any effort to respond to refugee flight by deterrence, including even deterrence driven by genuine humanitarian concern. Second, we should embrace the opportunities which reform of the mechanisms of refugee law affords to both save lives now risked in the flight to asylum and to improve the quality of protection for all refugees in the world, wherever located.

But this is, and must be a discussion with clear boundaries. Simply put, refugee rights are not negotiable.

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