Offshore Interdiction Operations and the Refugee Rights of Irregular Migrants

https://www.e-ir.info/2015/04/12/offshore-interdiction-operations-and-the-refugee-rights-of-irregular-migrants/

SARA K. MCGUIRE, APR 12 2015

In February of this year, twenty-nine migrants perished, and more than one hundred were feared lost, off the coast of Italy while trying to cross the Mediterranean in inflatable boats. Carlotta Sami, a representative for the UN High Commission for Refugees (UNHCR) reported that the four boats, carrying nationals from Senegal, Cote D'Ivoire, Gambia, Guinea, Niger, Mali, and Mauritania, were "swallowed up by the waves". The UNHCR notes that the number of irregular migrants attempting to reach the Italian island of Lampedusa has increased by two-thirds since 2014. More than half of the African boat migrants attempting to reach European shores through irregular routes died while in transit, according to a 2015 report by the UNHCR. The Arab Spring has added a new element to the flow of migrants into Europe. The UN report cited in the *Washington Times*, estimated that the 2014 arrival of irregular migrants included approximately forty-two thousand Syrians fleeing their war-torn country. The UNHRC has called on the EU to implement new measures to facilitate search and rescue operations for irregular migrants attempting to reach Lampedusa and other destinations in Southern Europe. However, European attempts to limit the flow of irregular migrants predate these recent developments. In light of this recent tragedy, it is necessary to re-examine these efforts in order to assess the level of protection owed irregular migrants seeking refuge in Europe.

In today's terrorism-centric security environment, European concerns about maritime-borne asylum seekers focus on the potential for jihadi 'terrorists' to enter the country under the guise of seeking refugee protections. Egypt's ambassador to the UK, Nasser Kamel, told the BBC that, "There are boat people who go for immigration purposes and try to cross the Mediterranean," and that failure to interdict such groups would result in, "boats full of terrorists also." In response to the fear that ISIL fighters will attempt to enter Europe as irregular asylum-seekers, EU policymakers are scrambling to implement new policies that would prevent the arrival of these groups.

Irregular Migration and the Threat of Terrorism

The influx of migrants into Southern Europe is not a new phenomenon. In recent years, EU countries have sought to stem the arrival of would-be refugees by enacting various non-entrée policies, such as the offshore interdiction of irregular migrants prior to their arrival in Europe. These policies relied on broad interpretations of the concept of *non-refoulement*, suggesting that this protection was tied to the territoriality of would-be refugee claimants. The principle of *non-refoulement*, enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees, is an essential component of the refugee protection regime. In its simplest terms, it prohibits states from returning individuals to countries where their lives or freedoms might be endangered. According to Guy Goodwin-Gill, an implicit provision against the return of migrants has been inferred from the major human rights treaties. Additionally, the UN General Assembly (2010) has continued to, "…urge all States to respect the fundamental principle of non-refoulement" which is thus presumably binding on all states, regardless of their respective ratifications.

In the 1990s, the increase of asylum-seekers entering Western Europe from Eastern Europe and the former Yugoslavia was framed as a threat to European interests. Attempts to prevent the arrival of these migrants, and the resulting externalization of European border control led to, what Hathaway terms, the "non-entrée regime". In order to avoid the perceived security threats posed by Eastern European arrivals, receiving states enacted barriers that prevented these groups from claiming refugee status altogether. The non-entrée policies enacted by European

states effectively created what Hathaway called, a "geographical game of hopscotch" for asylum-seekers, as states erected barricades at their borders, and enlisted neighboring countries to help 'push-back' irregular migrants. Offshore interception – the process by which states deflect would-be asylum claimants in international waters – was one of the preferred non-entrée strategies. While there are few documented examples of western states publicly endorsing the practice of intercepting and then returning migrants, maritime interdiction is a commonly employed instrument of immigration deterrence.

Legal Justification for Offshore Interdiction

The legal justification for offshore interdiction operations is generally found in informal memoranda of understanding between EU Member states and third party countries. Italy's diversions to Libya throughout 2009 following its Treaty on Friendship, Partnership, and Cooperation with dictator-led Libya are demonstrative of this practice. The appeal of these mid-sea 'push back' operations stems from the knowledge that gaps in the legal regime allow states to circumvent the principle of *non-refoulement.* These states argued that the principle is inherently tied to the territoriality of would-be refugees. Costello further asserts that the principle of *non-refoulement*, "presupposes some kind of contract between the state and the protection seeker." As such, offshore interdiction migration control strategies preclude this contact, and are thus permissible. While the 1951 Refugee Convention clearly protects those who are within a state's territory, the geographical scope of Article 33's provision against *refoulement* remains contentious.

International legal precedents demonstrate the lack of consensus governing the application of Article 33 protections to irregular migrants. In the *Sale v. Haitian Centers Council* case, the U.S. Supreme Court found that Article 33 of the Refugee Convention did not apply to the offshore interdiction of Haitian 'boat people' by the U.S. Navy in international waters. Likewise, the UK House of Lords held in the *Roma Rights* case that, if receiving states move their borders all the way to sending states, then Article 33 protections no longer apply to would-be refugee claimants. This position was challenged by the Committee Against Torture (CAT), commenting on the 2008 *Marine I* case, which found that, while the Refugee Convention does not presuppose a refugee claimant's right to enter a receiving state, Article 33's protection against *refoulement* also applies, "to rejection at the frontier".

The Extraterritorial Applicability of Non-Refoulement Protections

The issue of state jurisdiction continues to affect debates within the international legal community concerning the extraterritorial applicability of Article 33 protections against *refoulement.* Jurists such as Costello note that the use of offshore interdiction by a given state amounts to an exercise of that state's jurisdiction, and is thus subject to International Human Rights Law and Refugee Law obligations. The UNHCR asserted that Article 33 should be read "constructively" in light of evolving international human rights law on the meaning of "jurisdiction". Refugee Law has yet to establish a benchmark for determining whether or not a receiving state exercises the requisite degree of control over irregular migrants interdicted at sea. In the *Marine I* case, the CAT found that Spain, "…by virtue of a diplomatic agreement concluded with Mauritania, had constant *de facto* control over the alleged victims during their detention in Nouadhibou". In the *Sale* case, however, the U.S. Supreme Court found that the Refugee Convention was not applicable, since the interdicted Haitians were not within the jurisdiction of the United States. The continuing debate concerning the extraterritorial protection from *refoulement* centers on whether would-be refugee claimants interdicted at sea can be considered to come within the 'jurisdiction' of the receiving state that implemented the offshore stoppage policy.

In light of renewed interest in implementing offshore interdiction and processing policies to deal with the perceived 'terrorist' threat posed by irregular migrants entering Europe by boat, it is important to consider past court rulings on maritime 'push-back' policies. The European Court of Human Rights (ECtHR) has provided a forum in which to contest states' attempts to classify the area outside of their maritime borders as beyond their territorial jurisdiction in an attempt to evade their Article 33 legal obligations. In *M.S.S. v. Belgium and Greece,* the ECtHR emphasized the fact that all asylum seekers are entitled to "special protection" under international law. In the case of*Xhavara and Others v. Italy and Albania,* the ECtHR held that Italy had a responsibility to those intercepted at sea, and that the state had an obligation to ensure the protection of the *non-refoulement* principle. The court determined that,

following the collision of a boat carrying irregular migrants with an Italian warship, the sinking of the migrant boat, "could not exclude the international responsibility of Italy".

Extraterritorial Non-Refoulement After Hirsi Jamaa and Others v. Italy

The case of *Hirsi Jamaa and Others v. Italy,* is especially relevant in evaluating the implementation of offshore interdiction policies aimed at preventing members of terrorist organizations from entering Europe. Hirsi Jamaa was part of a group of Somali and Eritrean nationals who were attempting to enter Italy aboard vessels launched from Libya. On May 6, 2009, the group was intercepted thirty-five miles south of Lampedusa by three ships of the Italian *Guardia di Finanza and Guardia Costiera.* This operation was part of a series of offshore 'push back' migration control missions undertaken by Italy during the period from May 6 to November 6, 2009, that were intended to stem the flow of refugees and migrants from Libya to Italy. Following their interception, the migrants were transferred onto the Italian ships, and were returned to Tripoli, where they were handed over to Libyan authorities. The applicants claimed that, prior to their transfer to Libya, they had informed the Italian crews that they intended to seek asylum. The applicants were neither identified nor processed by the Italian personnel.

Following their arrival in Tripoli, twenty-four of the migrants, assisted by the UNHCR, applied to the ECtHR on May 26, 2009. The applicants alleged that Italy had breached Article 3 of the European Convention on Human Rights (ECHR) by returning them to Libya, where they had reason to believe that they would be subjected to cruel treatment. The migrants maintained that they were the victims of an arbitrary *refoulement*, since they had been denied the opportunity to challenge their forced return to Libya, or to seek refugee protection. They further argued that they had been subjected to collective expulsion, in breach of Article 4 of Protocol 4 to the ECHR, and that they were denied the right to an effective remedy, in breach of Article 13.

In evaluating the migrants' claims, the ECtHR first had to determine whether or not Italy had jurisdiction over the applicants at the time they were 'pushed back' to Libya. In its ruling, the Court supported the UNHCR's position that states must respect the rights protected by the European Convention and the principle of *non-refoulement* stemming from these rights, where the receiving state has established effective control and authority outside of its territory. The Court determined that Italy had exercised both *de jure* and *de facto* jurisdiction over the migrants from the time that they had transferred them onto Italian ships. Thus, when Italian personnel took control of the Italy-bound boats, they brought the foreign nationals under their jurisdiction since anyone on board a ship falls within the *de jure* jurisdiction of the ship's flag state. The ECtHR further ruled that Italy had also exercised *de facto* control over the refugees, since the events took place on board ships belonging to the Italian armed forces. According to these findings, it can be determined that extraterritorial protection of refugee claimants applies when there is a "direct and immediate link", such as the establishment of state jurisdiction, that triggers the protections enshrined in the ECHR and the Refugee Convention.

The ECtHR's ruling in *Hirsi* determined that the principle of *non-refoulement* was not tied to territoriality, and applied even in cases of offshore interdiction. The Court held that states governed by the ECHR may not exercise their jurisdiction over migrants, and then "close their eyes" to potential asylum claims. It further found that the states have an obligation not to remove individuals where there exist substantial grounds for believing that the individual would face a real risk of treatments prohibited under Article 3 ECHR. The fact that Italy 'pushed back' potential refugee claimants without assessing their protection claims resulted in the *refoulement* of those individuals to a state in which their safety was not ensured. By requiring that State Members intercepting migrants carry out individual refugee examinations, the ECtHR effectively reaffirmed the Refugee Convention and the provision against *refoulement.* In his concurring opinion, Judge Pinto de Albuquerque noted the important implications of the Court's findings, in that, "the prohibition on *non-refoulement* is not limited to the territory of a State, but also applied to extra-territorial State action, including action occurring on the high seas". This ruling was an important step forward in ensuring the protection of asylum seekers, by the principle of *non-refoulement*, in the case of offshore interdiction policies.

The Court's ruling in *Hirsi* also recognized and sought to protect asylum seekers from the risk of secondary refoulement in cases where so-called 'safe third country' states could potentially send refugee claimants back to their country of origin. The ECtHR determined that, by sending the intercepted passengers back to Libya, Italy had

violated its *non-refoulement* obligations. The Court also recognized that this action also exposed the applicants to the risk of secondary *refoulement* because it was possible that Libya would arbitrarily return the migrants to their home countries, where they would face almost certain insecurity. Ultimately, the ruling emphasized the State's obligation to verify, before removal takes place, whether or not the intermediary 'safe third country' can ensure adequate guarantees against the removal of irregular migrants to their country of origin.

Implications of the Hirsi Ruling for Maritime Counterterrorism Policies

The *Hirsi* ruling has had important implications for the continuance of 'push back' and offshore interdiction operations by EU Member States. The Court determined that, even in international waters, states that are party to the ECHR may not push back attempted migrants without first conducting asylum interviews to determine refugee status. It follows that the prohibition of returning individuals to states where there is a risk that they will face torture or other cruel and inhumane treatment will force EU Member States to reconsider the implementation of future 'push back' operations that would preclude the personal identification and examination of irregular migrants seeking entry to the state by sea. The threat that such migrants will endeavor to carry out terrorist attacks within the state does not justify the interdiction and *refoulement* of these individuals in contravention of the ECHR and Article 33 of the Refugee Convention. The Court's ruling prompts serious questions about state policies aimed at preventing the maritime arrival of irregular migrants. What is needed is a further examination of the transnational securitization of asylum seekers. The continued securitization of this issue area is the driving force behind offshore interdiction policies and 'push back' operations that seek to exploit gaps in refugee protection in order to close off "Fortress Europe" from the incursion of those seeking protection within its borders. Policymakers implementing such border protection strategies should recall the last lines of Judge Pinto de Albuquerque's concurring opinion in *Hirsi*, admonishing them to respect the principle of *non-refoulement* and to refrain from "closing their ears" to the continued plight of those seeking refugee protection.

Sources

Neil Arun. "Militants, Migrants and the Med: Europe's Libya Problem." *BBC News.* (February 23, 2015). http://www.bbc.com/news/world-middle0east-31584236

Cathryn Costello. "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored." *Human Rights Law Review.* V.12, N. 2 (2012).

European Roma Rights Centre v. Immigration Officer at Prague Airport (2004) UKHL 55

Guy S. Goodwin-Gill and Jane McAdam. *The Refugee in International Law – Third Edition.* (Oxford University Press, 2007).

James C. Hathaway. "Preface: Can International Refugee Law Be Made Relevant Again?" in James C. Hathaway, ed., *Reconceiving International Refugee Law.* (Kluwer Law International, 1997).

J.H.A. v. Spain (Marine I) CAT/C/41/D/323/2007 (21 November 2008)

Eric J. Lyman. "Tiny Italian Island Becomes Symbol of Europe's Migrant Crisis." *Washington Times.* (March 8, 2015) . http://www.washingtontimes.com/news/2015/mar/8/lampedusa-italy-becomes-symbol-of-europes-migrant-/?page=all

Jane Onnyanga-Omara. "300 Migrants Feared Dead in Mediterranean Crossing." *USA TODAY.* (February 11, 2015).<http://www.usatoday.com/story/news/world/2015/02/11/migrants-dead–mediterranean-crossing/23220693/>

Sale v. Haitian Centers Council, 509 U.S. 155 (1993)

UN Doc. A/RES/65/225 (December 21, 2010), para. 1 (iii)

UN High Commission for Refugees. "UNHCR Appeals to EU for Beefed Up Mediterranean Search and Rescue Capacity as At Least 29 Deaths Are Reported Off Lampedusa." (February 10, 2015). http://www.unhcr.org/54da0a976.html

---

About the author:

Sara K. McGuire is Assistant Professor of Security Studies and Associate Director for Teaching and Learning of the National Security Studies Institute at the University of Texas at El Paso. She holds a Ph.D. in International Relations from McMaster University and an LLM in International Public and Comparative Law from the University of Exeter. Dr. McGuire has presented papers at over 20 academic conferences and has published in the Journal of Strategic Security and in an anthology published by Dalhousie University. You can follow her at her Academia.edu page.