Non-Refoulement Obligations in Offshore Detention Facilities

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Offshore processing of asylum applications has become the new norm. One needs to look no further than examples in the European Union (EU) and countries such as Australia. International cooperation on migration control has seen an increasing trend towards privatization of detention facilities, including the funding, provision of equipment, as well as training of personnel to staff these detention facilities. As the dominant narrative continues to include the labeling of asylum claimants and refugees as the "illegal", "the other", and those who are "unwelcomed", this paper examines the ways in which States that do not operate these offshore detention facilities, but are nonetheless indirectly funding, providing equipment or training personnel, may also be found liable. As the trend towards increasing deterrence of asylum claimants from reaching the shores of Europe in search of safety continues, it is especially important now to raise the issue of liability, complicity, and responsibility for those countries which are either directly or indirectly involved in the facilitation of these detention centres.

This paper argues that cooperation with third States (non-EU countries) to permit detention of asylum claimants and refugees in offshore detention facilities would make the sending State at the very least complicit, if not responsible, for indirect refoulement. First, forcible removal of asylum claimants and refugees through deportation may violate the principle of non-refoulement where such deportation would put their lives or freedom at risk, including being exposed to future risk of persecution, death or torture. Second, indirect refoulement occurs when the sending State knew or ought to have known that the asylum claimant or refugee will be sent to a territory where their lives or freedom would be threatened, especially where they are unlikely to receive access to proper asylum procedures in the third State, regardless of any diplomatic assurances. Third, detention in offshore facilities would only exacerbate the situation of the individual being sent to be detained and heighten the criminality of the act and the culpability of the sending State.

Background and Overview

Non-refoulement is the prohibition of the forcible return of asylum claimants and refugees to territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion (Refugee Convention, Art 33(1)). The principle of non-refoulement has been widely regarded as a customary norm since it has been codified in various international human rights instruments such as the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and has been evidenced through State practice (CAT, Art 3; ICCPR, Arts 6 and 7; UNHCR, 1994). A customary norm in international law is an unwritten rule which States subjectively believe they are bound by (North Sea Continental Shelf, 1969). Non-refoulement protection is also applicable in the humanitarian law context, where protected persons are prevented from "being transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs" (Fourth Geneva Convention,, Art 45). It is suggested that non-refoulement obligations are being violated in third country agreements with States that operate detention facilities.

Asylum-receiving States are increasingly externalizing migration control through cooperation with third States which

operate detention facilities (Gammeltoft-Hansen, 2011). Migration controls, broadly defined, are deterrence mechanisms used by asylum-receiving States to discourage claimants from reaching their shores (Hathaway and Gammetloft-Hansen, 2014). Agreements and cooperation with third States, it is suggested, is a form of migration control (Poon, 2018). The strong nexus between cooperation with third States and migrant detention may lead to a heightened risk of refoulement.

Forcible Removal and Non-Refoulement

Forcible removal of asylum claimants does not in every case amount to a violation of non-refoulement. However, where such forcible removal can amount to a reasonable likelihood that the individual may be sent back to persecution, death or torture, or where their lives or freedom would be threatened, it will violate non-refoulement (Lauterpacht and Bethlehem, 2003). Since non-refoulement is a prohibition of future-oriented risk, it need not be demonstrated that the ill-treatment has in fact taken place in the receiving State (Wouters, 2009). As long as it can be shown that there is a reasonable likelihood where the individual may be subjected to persecution, or there are substantial grounds for believing that there is a real risk where the individual may be subjected to death or torture, the asylum State is obliged not to send back the claimant (Lauterpacht and Bethlehem, 2003). In the context of detention, especially regarding offshore detention facilities, detention is often not administered by the sending State. Therefore, it would be difficult or impossible for the sending State to ensure that proper procedural safeguards are in place to protect the claimant and that relevant international human rights law norms are complied with by the receiving State operating the offshore detention facilities. Another issue with offshore detention facilities which may increase the likelihood of refoulement is the issue of reliance upon diplomatic assurances. First, the improper use of diplomatic assurances has been denounced by treaty-monitoring bodies and international adjudicative bodies such as the United Nations High Commissioner for Refugees and the Committee Against Torture (UNHCR, 2006). Second, reliance upon diplomatic assurances should not be done lightly, and must be considered on a case-by-case basis, with due regard for the safety of the asylum claimant or refugee (UNHCR, 2006).

Cooperation with Third States and Migrant Detention

Cooperation with third States may violate non-refoulement principles where the asylum claimant or refugee would be subjected to torture including inhuman or degrading treatment. For instance, sending asylum claimants and refugees to offshore detention centres where the condition of detention is such that the individual may not have proper access to adequate medical facilities, food and water, and proper hygiene standards would be a violation of the principle of non-refoulement (UNHCR, 2012). Further exacerbating an asylum claimant or refugee's likelihood of gaining access to fair and efficient asylum procedures and to territory is placing them in offshore detention facilities where such administrative detention has no definite end (UNHCR, 2005; ICCPR, Art 9(1); UNHCR, 2012). Procedural safeguards which are guaranteed in criminal detention contexts are also not available under administrative detention (Furman et al, 2016). Where asylum claimants and refugees are unable or unlikely to gain access to proper facilities and to procedural safeguards, their human rights such as their right to life are violated (UNHCR, 2012).

Cooperation with third States where the sending State knew or ought to have known that the asylum claimant or refugee is unable or unlikely to access fair and efficient asylum procedures and to territory, and where their lives or freedom are threatened, the sending State would have violated non-refoulement indirectly. Third country agreements then, which permit or promote the violation of the human rights of asylum claimants and refugees where they are sent to offshore detention facilities, would be an indirect violation of the non-refoulement principle, and corresponding international law obligations flowing therefrom.

State Responsibility and Migrant Detention

States should not be able to contract out of their responsibilities under international law, especially customary norms such as the non-refoulement principle, contrary to what some scholars may suggest (Worster, 2017). First, non-refoulement is a guarantee that applies equally to asylum claimants and refugees in international refugee law, and applies to all individuals in international human rights law (IOM, 2018). Although there are exceptions to the principle of non-refoulement in very restrictive circumstances, the exception found under refugee law is to be construed

narrowly, on a case-by-case basis, and must be demonstrably justified in a democratic society (UNHCR, 1977). Second, non-refoulement guarantees are especially important because of the detrimental effects of potential return to the individual. Therefore, it is essential that sending States take every precaution possible to ensure that non-refoulement safeguards are complied with to prevent potential negative consequences from arising.

Unless governed by treaty law or bilateral agreement, the law on State responsibility governs the situation where a State has committed an internationally wrongful act against another State where the wrongdoing State has the responsibility to make reparations to the wronged State (ARSIWA, 2001). Article 2 of the Articles on State Responsibility states that there are two ways that an internationally wrongful act may arise (ARSIWA, Art 2). First, an act or an omission of a State is an internationally wrongful act where it is attributable to the State under international law (ARSIWA, Art 2(a)). Second, an act or an omission of a State is an internationally wrongful act where it constitutes a breach of an international obligation of the State (ARSIWA, Art 2(b)). An internationally wrongful act, in this scenario, may occur due to either an act of the sending State to remove an asylum claimant or refugee to an offshore detention facility where their lives or freedom would be in danger, or an omission of the sending State by relying on diplomatic assurances and by not conducting a proper investigation of the receiving State. There are, however, caveats to this proposition. First, breach of non-refoulement obligations has to be shown to be an internationally wrongful act, where such an act or omission is attributable to the sending State and such an act or omission can be shown to be a breach of an international obligation (ARSIWA, Art 2). Second, whether an internationally wrongful act can be established is dependent upon whether it can be shown that a breach of non-refoulement obligations is an obligation owed from the wrongdoing State to the wronged State. This is an obligation that is owed between States, rather than between States and individuals (ARSIWA, Art 1). It would be difficult to establish non-refoulement obligations as an obligation owed between States unless it is a norm which protects or concerns the recipient State, for instance, a wrong has been committed against the recipient State as a result of breaching non-refoulement obligations.

Alternatively, it is argued that where the sending State is not primarily responsible for an internationally wrongful act, it may be liable through aiding and abetting the receiving State, where the offshore detention facilities are held, in committing an internationally wrongful act (ARSIWA, Art 16). A State may be complicit of an internationally wrongful act, where it was involved in the aiding or abetting of the State operating the detention facility, and thereby breaching non-refoulement indirectly (ARSIWA, Art 16). In this case, aiding or abetting the State operating the detention facility means, financing or providing equipment so that the receiving State may operate the detention facility (Nicaragua, 1986).

Concluding Remarks

It has been briefly demonstrated that cooperation with third States where asylum claimants and refugees are sent to be detained in offshore detention facilities would lead to a violation of non-refoulement indirectly, where such detention lacks sufficient safeguards against protecting the individual's right to life and prohibition against torture and ill-treatment. Furthermore, the sending State would be at the very least complicit, if not responsible, for violating indirect refoulement, where it knew or ought to have known of the deficient conditions of detention in the receiving State.

The protection against refoulement, especially with the ongoing trend in the increase in international cooperation on migration control, must be safeguarded against erosion. Detention facilities that are indirectly operated by countries that fund, equip, or train personnel to staff these facilities may increase instances of refoulement, especially where the conditions of detention are so poor that basic necessities such as adequate hygiene, proper access to medication and to food and water may be impeded. While international law may permit States to determine immigration and border controls through their domestic legislation, domestic law must comply with relevant international human rights norms and legal principles at the bare minimum. In the instance that fundamental human rights such as access to healthcare and to food and water may be deprived, the human rights of the individual detainee has been violated. In order to prevent instances of these types of human rights violations, and to reduce situations which may lead to a violation of the non-refoulement principle, cooperation with third States in offshore detention facilities should be carefully considered. Finally, to prevent further and potential onward violations of non-refoulement, asylum claimants

and refugees who may be subjected to detention measures in offshore detention facilities should be safeguarded against the reliance of diplomatic assurances. Diplomatic assurances that are misused by sending and receiving States to circumvent the principle of non-refoulement has been strictly cautioned against by the Committee Against Torture.

In a world where cooperative deterrence is constantly present and evolving, the international law obligations of sending States should be monitored and scrutinized to ensure full compliance with the non-refoulement principle. Now more than ever, the human rights of asylum claimants and refugees must be safeguarded.

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Jenny Poon is a Ph.D. candidate at the Faculty of Law of the University of Western Ontario, a Barrister & Solicitor in Ontario, and a Senior Fellow at the Canadian International Council. Jenny was a Visiting Fellow at the Refugee Studies Centre of the University of Oxford, a former Visiting Researcher at the Max Planck Institute for Comparative Public Law and International Law, and was the recipient of the American Society of International Law International Refugee Law Essay Award and the EU Studies Association Haas Fund Fellowship. Jenny's research examines non-refoulement as a norm in international and European law through a comparative analysis of United Kingdom and Germany. Jenny's research interests include international refugee law, EU asylum law, migration control and human rights. Under the supervision of Professor Valerie Oosterveld, Jenny is working on a Ph.D. dissertation entitled "Non-Refoulement in International and European law: A Comparative Analysis between the United Kingdom and Germany". Using a doctrinal approach, Jenny's thesis undertakes a comparative analysis of how the United Kingdom (UK) and Germany address the international legal principle of non-refoulement in their legislation, regulations and jurisprudence concerning asylum seekers. Jenny focuses upon the UK and Germany because they are two of the largest asylum-receiving countries in the European Union (EU) during the time period under consideration. As such, their practices with respect to non-refoulement affect large numbers of asylum applicants and also likely influence how other countries interpret the non-refoulement obligation.