

DISCUSSION
BRIEF

July 2018

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ASYLUM

The Role and Limits of the Safe Third
Country Concept in EU Asylum



ReSOMA Discussion Briefs aim to address key topics of the European migration and integration debate in a timely matter. They bring together the expertise of stakeholder organisations and academic research institutes in order to identify policy trends, along with unmet needs that merit higher priority. Representing the first phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced, covering the following topics:

- hardship of family reunion for beneficiaries of international protection
- responsibility sharing in EU asylum policy
- the role and limits of the Safe third country concept in EU Asylum policy
- the crackdown on NGOs assisting refugees and other migrants
- migration-related conditionality in EU external funding
- EU return policy
- the social inclusion of undocumented migrants
- sustaining mainstreaming of immigrant integration
- cities as providers of services to migrant populations

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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LINGUISTIC VERSION

Original: EN

Manuscript completed in July 2018

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This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement *770730*



Discussion Brief

The Role and Limits of the Safe Third Country Concept in EU Asylum Policy*

1. Introduction

Cooperation with countries of origin and transit of migrants has featured prominently in EU responses to the so-called refugee crisis. The EU–Turkey Statement, agreed by EU heads of state and their Turkish counterpart in March 2016, is at the heart of this strategy. This statement enables the removal to Turkey of all irregular migrants coming to the Greek islands after 20 March 2016, including migrants not applying for asylum or whose applications have been found to be inadmissible in accordance with EU asylum law. The premise on which the transfers of asylum seekers from Greece to Turkey is based is that the latter can be considered a 'safe third country' for refugees.

The safe third country notion rests on the assumption that an asylum applicant could have obtained international protection in another country and therefore the receiving state is entitled to reject responsibility for the protection claim. In EU asylum law, the safe third country concept is applied as a ground for declaring applications inadmissible and barring applicants from a full examination of the merits of their claim, as is the case for the related concept of 'first country of asylum', which covers refugees who have already obtained and can again avail themselves of protection in a third country.

Beyond the crucial role it has played in ensuring the viability of the EU–Turkey 'deal', the safe third country notion also features prominently in the reform of the Common

European Asylum System (CEAS) presented by the Commission in 2016. Specifically, a key provision of the proposed regulation on asylum procedures is to make mandatory the use of safe third country (and first country of asylum) criteria, instead of leaving it optional as is the case under legislation currently in force. Moreover, the Commission proposes to progressively move towards full harmonisation in this area, by replacing national safe country lists with EU lists within five years of entry into force of the regulation.

Far from being uncontroversial, however, the notion of a safe third country has traditionally attracted strong criticism on several grounds, not least due to its uncertain legal status under the 1951 Geneva Convention relating to the Status of Refugees. Critics have stressed the potential negative impact of safe third country rules on refugees' rights, in particular on access to protection and the non-refoulement principle. Furthermore, safe third country rules have been associated with a strategy of deflecting asylum seekers towards third countries, which risks undermining the principle of burden sharing on which the long-term sustainability of the international protection regime is based.

2. Scoping the debate

Throughout the 1970s and 1980s, faced with a negative economic outlook and with rising anxieties about migration within their societies, governments across Europe started to



introduce a set of restrictive migration policies. The perception that a systematic misuse of the right to asylum was being perpetrated by 'economic migrants in disguise' legitimated the adoption of a *non-entrée* regime, which centred on restrictive visa policies, carrier sanctions and reinforced border controls (Hathaway 1993). The safe third country notion was one of the measures devised in that context, out of the conviction that adequate policy responses should be adopted to prevent 'forum shopping', that is, applicants' strategy of lodging multiple applications in different states to increase their likelihood of obtaining a positive decision (Moreno-Lax 2015).

The objective of preventing forum shopping and the related phenomenon of 'orbiting', whereby refugees are continually shuffled from one country to another without access to proper status determination, was also a central motivation for adopting the Dublin Convention in 1990. Although the Dublin system has often been seen as a 'burden-sharing tool', its goal is not to spread refugees equitably among Contracting Parties, but to introduce a set of criteria to swiftly assign responsibility for asylum seekers among them. The system is based on the fundamental assumption that member states may be considered 'safe' countries for asylum seekers, and for that reason, it is presumed that transfers from one member state to another do not violate the principle of non-refoulement. Seen against this backdrop, the ensuing development of safe third country notions in EU asylum law can be interpreted as an attempt to extend the logic underlying the functioning of the Dublin system also to countries outside the EU (Van Selm 2001, p. 3).

The term 'safe third country' is often used in public debates to denote a variety of situations. In particular, a distinction should be made between the two concepts of first country of asylum and safe third country. According to the UN High Commissioner for

Refugees (UNHCR), the first country of asylum concept is generally applied in cases where a person has already, in a previous state, found international protection that continues to be accessible and effective for the individual concerned. The safe third country concept has been applied in cases where a person could have found or can find protection in a third state either in relation to a specific individual case or pursuant to a formal bilateral or multilateral agreement between states on the transfer of asylum seekers (UNHCR 2018).¹

The notion of a safe third country (and that of first country of asylum) has been widely debated in the literature. As stated by Moreno-Lax, "saving non-refoulement and the refugee definition, possibly no other single notion in refugee law has prompted such a heated and lasting debate" (Moreno-Lax 2015). While scholars have questioned the legality of the safe third country notion, arguing that the Refugee Convention does not provide an adequate legal basis for its use, thus far debates have concentrated on identifying the necessary conditions for a third country to be considered safe in accordance with international refugee and human rights law (Foster 2008; Gil-Bazo 2006, 2015; Lambert 2012; Moreno-Lax 2015; Van Selm 2001).

Recently, in light of ongoing discussions on the use of safe third country rules at the EU level, the UNHCR has summarised its position on this subject (UNHCR 2018). In particular, the

¹ A related concept that is codified in EU law, which is not addressed specifically in this brief, is that of 'safe country of origin'. This concept is used to refer to a country whose nationals may be presumed not to be in need of international protection. The concept is defined in the EU Procedures Directive and is a ground for channeling an asylum application into an accelerated procedure. As in the case of the safe third country concept, the Commission's 2016 proposal on the asylum procedures regulation calls for increased harmonisation in this area through the establishment of an EU list of safe countries of origin. For a detailed discussion on the safe country of origin concept, see ECRE (2015).



UNHCR has focused on two main issues to be addressed when carrying out returns to safe third countries: a) the relevance of a connection between the refugee and the third country; and b) the issue of access to and level of protection that needs to be guaranteed by the third country to be considered safe.

Regarding the first issue, the UNHCR has consistently advocated a 'meaningful link' or connection between an asylum seeker and a third country that would make it reasonable and sustainable for her or him to seek asylum in that country. According to the UNHCR, aspects such as the duration and nature of any stay, and connections based on family or other close ties, should be seen as crucial for increasing the viability of the return or transfer from the viewpoint of both the individual and the state.

On the issue of access to and level of protection that should be available in a third country to be deemed safe, the UNHCR legal considerations stress the requirement to establish that asylum seekers have access in that country to standards of treatment commensurate with the 1951 Refugee Convention, its 1967 Protocol and international human rights standards (notably protection from refoulement and access to the legal right to pursue employment). According to the UNHCR, in order to ensure that access to protection is effective and enduring, being a state party to the 1951 Convention and its 1967 Protocol and basic human rights instruments without any limitations are critical indicators. On this point, the UNHCR further specifies that access to those standards may only be effectively and durably guaranteed when the state is obliged to provide such access under international law and has adopted national laws to implement the relevant treaties.

3. EU policy agenda

The recast Asylum Procedures Directive, adopted in 2013, gives member states the option not to examine an asylum application on the merits and to dismiss it as inadmissible on grounds that an applicant has already received protection in a first country of asylum, or may effectively obtain it in a safe third country. The Directive also lays down the criteria for applying the two concepts. Under Art. 35 of the Directive, the concept of "first country of asylum" entails that an asylum seeker has obtained refugee status in a third country and may avail him- or herself of this protection, or otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement. Art. 38 on the concept of "safe third country" lists five criteria for a country to be considered "safe", including the possibility for the applicant to request refugee status and, if found to be a refugee, to receive protection "in accordance with the Geneva Convention". The Directive also requires that an assessment must be made as to the reasonableness of requiring the applicant to apply for international protection in the safe third country, through the existence of a connection to that country; the presumption of safety must be rebuttable and applied on a case-by-case basis; and the presumption of safety of the country for an individual applicant as well as his or her connection with that country must be challengeable (Council of the European Union and European Parliament 2013; ECRE 2017).

A study of asylum legislative frameworks of EU member states conducted by ECRE in 2016 revealed considerable disparities in the way admissibility criteria based on safe third country notions have been incorporated in domestic asylum systems. The study found that a significant number of countries have not introduced the notions of first country of asylum (Austria, Belgium, Bulgaria, Italy, Sweden, UK, Switzerland) or safe third country (Belgium, France, Ireland, Italy, Poland). Hungary introduced a list of safe third



countries in July 2015, including Serbia, FYROM and Kosovo among others, and resorting to a systematic application of the concept in respect of Serbia, which has been widely criticised for disregarding fundamental rights and protection guarantees in the asylum process (ECRE 2016a).

On 13 July 2016, the Commission put forward a legislative proposal on reform of the Asylum Procedures Directive (European Commission 2016a). The Commission proposed to replace the current directive with a regulation establishing fully harmonised, common procedures for international protection. The main objectives of the proposed regulation are to reduce differences in recognition rates from one member state to the other, discourage secondary movements and ensure common, effective procedural guarantees for asylum seekers.

The proposed regulation introduces a set of new provisions regarding safe country concepts. Specifically, a key provision of the proposal is to make mandatory the application of safe third country (and first country of asylum) criteria as a ground for inadmissibility, instead of leaving this to the discretion of the member states as is the case under the current EU Asylum Procedures Directive. Moreover, the Commission proposes to progressively move towards increased harmonisation in this area, by replacing national safe third country lists with EU lists or designations within five years of entry into force of the regulation.

In addition, the proposed reform of the Dublin Regulation presented by the Commission in May 2016 introduces an obligation for member states to check whether an application for asylum is inadmissible on the grounds that the applicant comes from a first country of asylum or a safe third country before applying the criteria for determining the member state responsible under the regulation (European Commission 2016b). In order to ensure the efficient functioning of the

Dublin system, when such pre-Dublin checks are applied by the member state of first entry, the proposed regulation on procedures also foresees that the duration of the examination of inadmissibility on the grounds relating to first country of asylum or safe third country rules should not take longer than ten working days.

At the time of writing, the asylum procedures regulation is still the object of negotiations between the Council and the European Parliament. The possibility of reaching a compromise on this proposal is linked to ongoing negotiations on other legislative measures that make up the 'asylum package' presented by the Commission in 2016, in particular the reform of the Dublin system. In this regard, a group of southern member states (including Cyprus, Greece, Italy, Malta and Spain) have voiced strong concerns about the overall direction taken in negotiations on the CEAS reform, pointing out how the envisaged rules would be disadvantageous for them. Those member states are refusing to introduce mandatory 'pre-Dublin checks' on applicants from safe third countries, arguing that such provisions would put an additional burden on their asylum systems, calling instead for inadmissibility checks to remain optional (ECRE 2018).

The LIBE Committee of the European Parliament (EP) adopted its report on the Asylum Procedures Regulation on 25 April 2018 as a basis to start interinstitutional negotiations with the Council. The EP Report introduces some important changes on safe third country rules. For example, contrary to the Commission's proposal, the EP would revise Art. 36 of the proposed regulation to keep the use of inadmissibility procedures optional. The EP report also sets a very high threshold in terms of the level of protection that should be available in a third country to be considered safe. According to the EP's position, the safe third country concept may only be applied when the applicant will



receive in that country protection in accordance with the Refugee Convention (ratified and applied without geographical limitation) or will enjoy “effective protection” in that country equivalent to the protection granted to refugees. Furthermore, the EP report states that a “sufficient connection” between the applicant and a third country is not ensured by mere transit but requires the existence of a previous residence or stay in that country (European Parliament 2018).

4. Key issues and controversies

A commonly held assumption among commentators is that the 1951 Geneva Convention relating to the Status of Refugees neither explicitly authorises nor formally prohibits the contested notion of a safe third country. According to some legal scholars, the ‘silence’ of the Refugee Convention regarding the right of refugees to choose their country of destination implies that states should be free to carry out removals to safe third countries as long as the non-refoulement principle stated in Art. 33 of the Convention is not violated and refugees are treated in the country of destination in accordance with recognised human rights standards (Hailbronner 1993; Thym 2018).

However, the majority of legal scholars have questioned the lawfulness of the safe third country notion, arguing that an interpretation in ‘good faith’ of the Refugee Convention implies that states should refrain from adopting practices that shift rather than share protection burdens and are thus not compatible with the object and purpose of the Convention (Moreno-Lax 2015, p. 718). From the point of view of rights accruing to individuals, the safe third country concept is also problematic in relation to Art. 31 of the Refugee Convention, which states that refugees must not be penalised for unauthorised entry. This is because the safe third country notion imposes an obligation on refugees to seek protection in the

geographically closest safe place, punishing non-compliance with removal without full scrutiny of their protection claims (Moreno-Lax 2015, p. 669). More broadly, it has been noted that denying the will of refugees in the selection of the country in which to submit a claim may create barriers to effective integration, thus precluding the achievement of a durable solution for refugees, which is a key objective of the international protection regime (Van Selm 2001, p.25).

Yet concerning use of the safe third country notion, the overriding emphasis in debates has been on specifying the requirements for a country of transfer to be considered safe for refugees. Traditionally, the scope and applicability of the safe third country principle has been a source of disagreement between states, as emerged from the discussion carried out in the framework of the United Nations. While major destination countries (including Western European countries) have generally embraced an expansive interpretation of safe third country rules, maintaining that earlier presence of an asylum seeker in the territory of a state, either through transit or stay, implies the responsibility of that state, countries in regions of origin of refugees have stressed the negative impact of this approach, requiring evidence of a more substantial link with the refugee (Moreno-Lax 2017).

Similar controversies have accompanied the codification of safe third country rules in EU law and their application in specific cases. The proposal to ‘mainstream’ the use of safe third country rules in EU asylum policy by making their application mandatory has been one the main concerns raised by human rights advocates in relation to the proposed asylum procedures regulation. More specifically, criticism has centred on two main issues: the non-inclusion in the Commission's proposal of full ratification of the Refugee Convention without geographical limitation among the requirements for applying the safe third country concept, and the reference to



“mere transit” as a sufficient condition for assuming a meaningful connection between the applicant and a third country (ECRE 2017).

Still, current discussions on safe third country rules cannot be considered in isolation from the broader political context in which they take place. Critics have pointed to potential changes in the definition of safe third countries currently discussed at the EU level as a case of ad hoc legislation, that is, as a way to regularise existing practices like those carried out under the 2016 EU–Turkey Statement (Chetail 2016). The EU–Turkey Statement enables the removal to Turkey of all irregular migrants coming to the Greek islands after 20 March 2016, including those migrants not applying for asylum or whose application has been found to lack sufficient grounds or be inadmissible in accordance with the Asylum Procedures Directive. The statement is based on the implicit premise that Turkey is a safe third country despite the fact that Turkey maintains a geographical limitation to the 1951 Refugee Convention. This assumption has nonetheless been subject to widespread criticism by scholars, NGOs, the UNHCR and also the Parliamentary Assembly of the Council of Europe, not least in light of mounting proof that Turkey cannot actually be considered ‘safe’ for refugees given increasing political instability and widespread rule of law and human rights violations in the country.²

The implementation of the EU–Turkey Statement has been subject to scrutiny regarding compliance with criteria set out in EU law. According to the UNHCR (2016, p. 2), when a state is considering applying the first country of asylum or safe third country concept, the individual asylum seeker must have an opportunity within the procedure to

² See Carrera and Guild (2016), Peers and Roman (2016), Carrera, den Hertog and Stefan (2017), ECRE (2016b), Amnesty International (2016), UNHCR (2016) and Council of Europe, Parliamentary Assembly (2016).

be heard, and to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment in a third country based on his or her personal circumstances. In addition, the Asylum Procedures Directive provides that an applicant must be able to appeal the inadmissibility decision before a court or tribunal and have a right to remain pending the outcome of an appeal.

NGOs providing legal support to asylum seekers in hotspots in Greece have reported that asylum officials (including those deployed by the European Asylum Support Office) apply the safe third country rule in a stereotyped fashion, relying only on the existing legislation in Turkey and the diplomatic assurances given by Turkish delegates in the framework of the EU–Turkey Statement with no reference to or assessment of other reports by independent bodies, such as the UNHCR. Moreover, admissibility assessments are carried out in truncated border procedures with short deadlines and limited safeguards for the applicants (ECRE 2017; HIAS & IRU 2018). This way of handling asylum claims raises serious questions of procedural fairness and compliance with the level of scrutiny of country information required by the European Court of Human Rights (ECtHR). In the case of *Ilias and Ahmed v Hungary*, the ECtHR found the automatic application of the safe third country rule by Hungarian authorities and their failure to consider country of origin information from reputable international organisations (such as the UNHCR) as inappropriate for providing the necessary protection against a real risk of inhuman and degrading treatment.³

A last controversial point associated with an expanded use of safe third country rules in the CEAS is the impact of that policy choice beyond EU borders. In the 2016 New York

³ See *Ilias and Ahmed v Hungary*, Application No. 47287/15, ECtHR, 14 March 2017.



Declaration, the international community reconfirmed its commitment to “a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among States”. As underlined by ECRE, deflecting protection obligations to third countries through the mandatory application of safe country concepts stands in contradiction with that responsibility-sharing commitment (ECRE 2017).

Furthermore, as safe third country rules need to be accompanied by a readmission agreement in order to be applied, their expanded use is likely to be hampered by the same political and implementation issues that have so far limited the effectiveness of EU readmission policy (Carrera 2016). In particular, experts have highlighted the inherently asymmetric relation that exists between countries of destination and countries of origin or transit on readmission, pointing to the failure of EU policy to balance the costs incurred by countries of origin or transit with concessions on other strategic issues areas of interest to them, such as the opening of channels for legal migration (Cassarino 2018; Cortinovis 2018).

5. Potential impacts of policies adopted in this area



EU and international human rights standards

NGOs, independent scholars and also international organisations, such as the UNHCR and the Council of Europe, have warned about the potential impact of safe third country rules on access to asylum and respect of the non-refoulement principle. This

is because the concept indirectly creates an obligation to seek asylum in the geographically closest safe state, punishing non-compliance with forced removal and limiting self-determination as regards the choice of the country of refuge. As a consequence, if this mechanism is not accompanied by adequate safeguards, the risk of refoulement may be substantial.

Some authors have even spoken of a 'domino effect', where the systematic use of safe third country rules creates a spiral of 'chain refoulement' that pushes refugees ever closer to the countries they have fled. In light of the above criticisms, current discussions on making mandatory the application of safe third country rules should carefully consider the potential impact of this policy choice on fundamental rights standards established in EU and international law.



EU rule of law and better regulation principles

The use of the Safe Third Country rule in the context of the EU-Turkey statement has raised concerns not only in relation to the status of Turkey a safe country, but also because of the specific legal nature of this “deal”. In fact, the EU–Turkey Statement has been presented in the form of a 'press release', that is as a non-binding document concluded by the Heads of State or Government of the member states, acting outside the EU legal framework and decision-making process. The EU-Turkey statement is part of a trend at the EU level towards increased informalization of cooperation with third countries on migration issues that contrasts with the process of 'Europeanisation' of readmission policy sanctioned by the Treaty of Lisbon. The proliferation of extra-Treaty and “crisis-led” policy-making undermines the EU *acquis* consistency and is likely to exacerbate mistrust in EU inter-institutional relations. More importantly, as highlighted in the case of the EU-Turkey Statement, it precludes the



possibility to adequately address potential violations of fundamental rights of asylum seekers and refugees.

In parallel, proposals to make mandatory the use of Safe Third country rules currently discussed at the EU level have been criticized as an attempt to “mainstream” contested practices carried out under the 2016 EU–Turkey Statement. As stated by the European Commission, consultations with interested parties revealed differing views on rendering mandatory the use of the concepts of first country of asylum and safe third country for rejecting applications as inadmissible. While several member states stressed the need for measures aimed at making the system more effective, including through further harmonisation at the EU level, most representatives of civil society cautioned against the mandatory use of safe third country rules. In light of these divergent perspectives, EU co-legislators should carefully assess the added value of introducing harmonised rules on safe third countries at the EU level, against the alternative of leaving the use of these rules to the discretion of member states.

The systematic use of safe third country



EU international relations

provisions at the EU level may induce third countries, including major refugee-hosting countries, to follow this same strategy in order to limit access to protection on their territories. In September 2016, EU member states committed in the New York Declaration to achieve a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among states. Given the burden-shifting effect of safe third country rules, current debates on the use of this notion at the EU level should thus take into consideration the impact of policies in this field on the sustainability of the international protection regime. This is especially relevant at a time when the international community is in the process of negotiating a 'global compact on refugees', whose central aim is to address the need for more predictable and equitable burden and responsibility sharing on refugee issues among states.



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This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement **770730**



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AND ASYLUM

ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

🌐 www.resoma.eu

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