Safe Third Country Rules and Externalisation – Legal Standards and Legal Questions*

With the Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement[1] dating from 14 April 2022, the UK Nationality and Borders Bill[2] and the first actual implementation of the aforementioned instruments that is temporarily set at hold by a rule 39 intervention from Strasbourg[3], Europe has entered into a new phase of safe third country rules and externalisation.

I will not discuss the UK rules in detail for the mere fact that I am not an expert in UK immigration and asylum law. I will not examine Rwanda's asylum system, either. Nor will I touch ethical and moral questions of justice which in this context are at least as pressing as the legal – and to a certain extent – rather technical aspects of externalising any kind of flight migration. Unlike the UNHCR who distinguishes externalisation from lawful practices involving transfer of the responsibility for international protection[4], my use of the term externalisation[5] in this presentation does not include a judgment on the lawfulness of the procedure.

What I will do instead is to try to remind us on the standards that the ECtHR has established for safe third country concepts and to illuminate whether there are other standards for protection elsewhere concepts in international law that might be applicable. I will conclude by some thoughts on the role of judicial control of such concepts.

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[1] https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r (accessed on 8 August 2022).

[2] https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf.

[3] In the case of NKS v. United Kingdom, application no. 28784/22, see the Press Release at: https://hudoc.echr.coe.int/eng-press?i=003-7359967-10054452

[4] See UNHCR Note on the "Externalization" of International Protection, para 5 – 6 https://www.refworld.org/docid/60b115604.html [accessed 8 August 2022]

[5] There is no clear definition of externalisation, see Goodwin-Gil/McAdam/Dunlop, The Refugee in International Law, 4th Ed. 2021, p 461 et seq.

A. Standards to be derived from International Law

I. ECHR

In its Grand Chamber judgment of 21 November 2019 in the case of Ilias and Ahmed v. Hungary[6] the European Court of Human Rights had to assess the duty of a state resulting inter alia from Article 3 of the ECHR in cases of removals of asylum seekers to a third country without an examination of the asylum claim on the merits. The main results of this assessment are:

There is a duty not to deport a person if substantial grounds have been shown for believing that such action would expose them, directly or indirectly to treatment contrary to, in particular, Article 3 ECHR.[7] That means:

1. The main issue in safe third country decisions will be whether or not the individual will have access to an adequate asylum procedure including possible conditions of detention or living conditions for asylum seekers in the receiving third country. That is so because the removing country acts on the basis that it would be for the receiving third country to examine the asylum request on the merits, if such a request is made.[8]

2. Where a Contracting State removes asylum seekers to a third country without examining the merits of their asylum applications, it is important not to lose sight of the fact that in such a situation it cannot be known whether the persons to be expelled risk treatment contrary to Article 3 in their country of origin or are without any arguable claim regarding Article 3. Therefore, any assessment of a removal to a third country deemed as safe will be dominated by a thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention.[9]

3. It is for the authorities to carry out of their own motion an up-to-date assessment, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. It is the duty of the competent authorities to seek all relevant generally available information to that effect. The expelling State

[6] ECtHR, judgment of 21 November 2019 – 47287/15 – Ilias and Ahmed v. Hungary.
[7] Para 129
[8] Para 131.
[9] Para 137.

cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice.[10]

II. The Refugee Convention and other international instruments

1. The Inter-American Court of Human Rights in its 2018 advisory opinion[11] has interpreted Article 22 § 7 and § 8 of the IACHR and closely linked the provisions to – inter alia – the Refugee Convention.[12]. The opinion states inter alia that the non-refoulement principle can apply to the transfer or the removal of a person between jurisdictions.[13] It applies regardless whether they are on the land, water, maritime or air territory.[14]

This view of a wide application of Article 33 Refugee Convention can be said to be by far the leading view.[15] The same applies to the non-refoulement-principle of Article 3 CAT.[16]

This stresses that any externalisation mode for processing asylum application has to comply with the non-refoulement principle of Article 33 Refugee Convention. This includes that the test such an externalised procedure has to stand refers to any form of refoulement, whether direct or indirect. That is because Article 33 prohibits indirect refoulement of the kind that occurs when a refugee is sent to a state in which there is a foreseeable risk of subsequent refoulement.[17]

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[10] Para 141.
[11] IACtHR, advisory opinion of 30 May 2018 – OC-25/18 – requested by the Republic of Ecuador
[12] Ibid, para 37 – 45 and 142.
[13] Ibid, para 187.
[14] Ibid para 192.
[15] See concurring opinion of Judge Pinto de Albuquerque to ECtHR, judgment of 23 February 2012 – 27765/09 - <Hirsi Jamaa v Italy> with his references to the main "dissenters", the US Supreme Court in *Sale v. Haitian Centers Council*, 509 US 155 (1993) and the High Court of Australia in *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, 26 October 2000, S157/1999, para136.
[16] Committee against Torture, General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 9 et seq.
[17] See e.g. The Michigan Guidelines on Protection Elsewhere, 2007, para 6.

2. It is no surprise that e.g. Article 3 CAT[18] and Article 7 ICCPR are interpreted in the same way.[19]

III. CJEU and its interpretation of Article 4 CFR

The CJEU constantly states – correctly – that Article 4 CFR corresponds to Article 3 ECHR, and its meaning and scope are therefore, in accordance with Article 52(3) of the Charter, the same as those laid down by the ECHR.[20] Thus, it seems obvious that the approach in the Jawo Dublin III judgment needs to be followed in externalisation cases. The CJEU held that it were immaterial, for the purposes of applying Article 4 of the Charter, whether it is at the very moment of the transfer, during the asylum procedure or following it that the person concerned would be exposed, because of his transfer, to a substantial risk of suffering inhuman or degrading treatment.[21] That finding insinuates that the non-refoulement-principle as it has to be drawn from Article 3 ECHR asks for a prognosis on the living conditions after a successful asylum application in the safe third country. At least, UNHCR seems to demand this when it stipulates that the ability to enjoy asylum and/or access a durable solution is a prerequisite for transfer arrangements.[22]

B) UNHCR's views

I. The UNHCR Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers[23] deals with the legality and / or the appropriateness of such arrangements[24] and uses the term transfer to refer to the range of methods and processes by which asylum-seekers are moved from one country to another under special bilateral and/or multilateral State arrangements excluding the return to the country of origin.[25] As already stated I will concentrate on the legality keeping in mind, however, that a flagrant inappropriateness will have a decisive influence on the question of the legality of a transfer arrangement or a transfer in an individual case.

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[18] Committee against Torture, General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 12.
[19] See to that extent: IARLJ/EASO, Judicial Analysis - Asylum procedures and the principle of non-refoulement, 2018, p 28 with further references to national case law of courts from EU Member States.
[20] CJEU, judgment of 19 March 2019 – C-163/17 - <Jawo> para. 91.
[21] Ibid para 88.
[22] UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: https://www.refworld.org/docid/51af82794.html [accessed 11 August 2022]
[23] See fn. 23.
[24] Ibid, para 2.
[25] Ibid, fn. 2.

UNHCR has discovered six major guarantees to be met to state a transfer arrangement can be legal and appropriate[26]

- Individual assessment of the appropriateness of the transfer, subject to procedural safeguards, prior to transfer;
- Admittance to the proposed receiving State;
- Protection against refoulement;
- access to fair and efficient procedures for the RSD and/or other forms of international protection
- treatment in accordance with accepted international standards
- if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.

These six points are rather close to the criteria established by the ECtHR and its Article 3-test in safe third country cases. The demands on international standards for the treatment of asylum-seeker might be partially higher than what the rather basic protection by Article 3 ECHR promises but there is not so much difference in the standards to be applied.

UNHCR's Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries from April 2018[27] mirror more or less the pre-transfer requirements as they are laid down in the guidance on transfer arrangements.[28] UNHCR states in these legal considerations that there is no mandatory rule under international rule that required a connection between the applicant and a third state in order to declare an application inadmissible and to order the transfer to that third country deemed to be safe for the applicant.[29] UNHCR does, however, underline that a meaningful link or connection to the third country would make it reasonable and sustainable for a person to seek asylum in another state.[30] National safe third country rules in EU Member States have to require a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that

[26] Ibid, para 3 vi.
[27] UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, available at: https://www.refworld.org/docid/5acb33ad4.html [accessed 11 August 2022].
[28] Ibid para 4.
[29] Ibid, para 6.
[30] Ibid, para 6.

country.[31] This mandatory rule, however, sets a higher standard for the EU and cannot be applied beyond EU Law.

C) Sending asylum-seekers to countries they have no connection to?

There remains, however, at least a bold question mark. How appropriate can it be to send people seeking international protection in one country to a country they have never had any contact with? Or, to put in in a more legal wording: Where are the boundaries of proportionality when applying such a safe third country externalisation concept?

The UK inadmissibility rules that are related to a safe third country concept state that there needs to be a connection to such a country. The asylum seeker might have been present in that state before and have failed to apply for asylum, could have granted international protection there, could have an outstanding or refused application for asylum and/or it would have been reasonable to apply for asylum in the safe third country. Well and good, the general result however will be not to be sent or sent back to this third country but rather to Rwanda if there appears to stand a greater chance of a prompt removal when referred to Rwanda than to the country to which there is a connection established.[32]

I*. Safe Third Country Rule and transfer to Rwanda as penalty?*

Although such a strict third country concept that certainly is meant to have a massive – and will have a certain – effect of deterrence[33] on asylum-seekers, the - albeit cautious - attempts of UNHCR in the Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement[34] to argue that such a relocation scheme might not be in accordance with Article 31 (1) Refugee Convention[35] are not convincing. Even if there might be good reasons for a broad

[31] Art. 38 (2) (a) Dir. 2013/32/EU.
[32] UK Home Office, Inadmissibility: safe third country cases, version 7.0, 28 June 2022 p. 17; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084315/Inadmissibility.pdf [accessed 12 August 2022].
[33] See for the concepts of deterrence in refugee law and practice: Gammeltoft-Hansen/Hathaway, Non-Refoulement in a World of Cooperative Deterrence, Colum. J Transnat'l L 53 (2015), 235 – 284; with explicit reference to the Australian externalisation concept of 2001 and the processing of applications in Nauru and Papua New Guinea on pp. 249 et seq; see for the intentions of the UK Home Office; Home Office, Inadmissibility: safe third country cases, version 7.0, 28 June 2022 p. 7., see fn. 35
[34] UNHCR, Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement, 8 June 2022; https://www.unhcr.org/publications/legal/62a317d34/unhcr-analysis-of-the-legality-and-appropriateness-of-the-transfer-of-asylum.html [accessed 12 August 2022].
[35] Ibid, para 21: "UNHCR is … concerned that the relocation … is not in accordance with Article 31(1) … ."

approach and understanding of the term “penalty”- which could be contested with regard to the French “sanctions pénales” – beyond criminal penalties and thus read Article 31 (1) Refugee Convention that it does not permit a state to deny a person access to the refugee claim process on account of their illegal entry, or for aiding others to enter illegally in their collective flight to safety,[36] I cannot see how referring that person to a procedure in a safe third country should be interpreted as a penalty. A safe third country rule – applied in a proper and honest manner – does not imply a denial of Refugee Status Determination. Reading Article 31 (1) Refugee Convention as a prohibition of any form of discrimination based on the way of entering a country[37] is so far away from any state practice – see e.g. Article 31 (8) h) APD (recast) ; and misses the scope of Article 3 Refugee Convention – that it is rather clear that such an understanding is not correct.

II. Does “absence of an asylum-seeker’s right to choose the country of refuge” equal “ a right for states to choose the asylum-seeker’s country of refuge?”

It was and is broadly discussed whether it follows directly from the Refugee Convention that there is no right to choose one’s country of refuge. The starting point – the absence of an explicit right to choose – is rather trivial and although a necessary criterion, by far not a sufficient one to proof that states may negotiate by themselves which of them shall be responsible for a status determination procedure and – in case of a positive outcome – for granting the rights a refugee is entitled to. But far beyond the statement that an explicit ‘right to choose’ is missing there is absolutely no indication that an unconditional right to choose could exist. In principle, a system of allocation of responsibilities – whether unilaterally imposed or multilaterally designed – does not contravene the concept of the Refugee Convention.[38]

But what does this mean for our question? Do the Refugee Convention and other international law instruments set no other limits to safe third country schemes than

[36] Supreme Court of Canada, B010 v Canada (Citizenship and Immigration) 2015 SCC 58 [2015] 3 SCR 704 para 63.

[37] This seems the underlying argument of Grundler/Guild, The UK-Rwanda deal and its Incompatibility with International Law, EU Migration Law Blog, 29 April 2022, who argue that there is a violation of Article 31 Refugee Convention; https://eumigrationlawblog.eu/the-uk-rwanda-deal-and-its-incompatibility-with-international-law/#:~:text=The%20UK-Rwanda%20deal%20and%20its%20Incompatibility%20with%20International%20Law,-29%20Friday%20Apr&text=On%2014%20April%202022%2C%20the,of%20an%20asylum%20partnership%20arrangement.[accessed 29 August 2022]

[38] Lübbe, Das Verbindungsprinzip im fragmentierten europäischen Asylraum, Europarecht 2015, p. 351, 354.

those already presented? Be safe but by all means not in my backyard? In the recent volume of the Michigan Journal of International Law, Tally Kritzman-Amir characterises such "unbound" third country agreements as the "bananaanisation" of persons, meaning that asylum-seekers are treated as goods which are shipped around for the benefits of the sending or selling state.[39] This accusation against and deliberate intensification of some third country agreements' characters is of course right in the middle of a de lege lata and de lege ferenda or even political criticism. But it helps to fill the gap between the denial of an unfettered right to choose the country of refuge and the discomfort that should be felt in any democratic society when it comes to unrestricted state powers. This gap is the logical consequence of a refugee specific rights regime offered by the Refugee Convention that does not and does not need to address main questions of a dignified life as family life and an adequate standard of living (whatever that is) and needs to be filled by international human rights law.[40] Human dignity as it is addressed in the Preamble of the Universal Declaration of Human Rights and in its Article 1 certainly demands as a core right the absence of a threat to life or person in the third country, whether directly or indirectly via a chain refoulement. But there is more. There might be family ties at stake that could be broken in an unrepairable way if the person concerned was transferred to a third country on a different continent. There may be persons who – due to their vulnerabilities or orientations – will find it hard to settle in their lives as refugees in the safe third country to which they have no connection whereas life in their chosen country of refuge might bring far less relevant obstacles on the way to a dignified life. Apart from clear Art. 3 ECHR, Art. 3 CAT (and so on) cases, there will be no clear guidance to where the boundaries of proportionality and appropriateness may or may not lie.[41] Deciding on proportionality needs a thorough examination of the individual case. That is exactly what safe third country agreements with an intentional effect of deterrence want to avoid. But reducing people fleeing a country to the question of (non) refoulement is close to the accused bananaanisation. Still, there will be by far more asylum-seekers where no or only few relevant

[39] Kritzman-Amir, Asylum Seekers are not Bananas Either: Limitations on Transferring Asylum-Seekers to Third Countries, , Mich J Int'L 2022, p. 669.
[40] Freier/Karageorgiou/Ogg, The Evolution of Safe Third Country Law and Practice, in: Costello/Foster/McAdam, The Oxford Handbook of International Refugee Law, 2021, p. 518 (520).
[41] See to that extent Lübbe, Verweisung auf Transitstaaten ohne Rücksicht auf die Familieneinheit, Zeitschrift für Ausländerrecht und Ausländerpolitik 2017, p. 15 (18).

circumstances may argue for an exclusion from a safe third country rule and who could be transferred to the country chosen by the receiving state.

D. Safeguards

So how can it be assured that the third country offers what it needs to offer in order to fulfil the transferring state's obligations with regard to non-refoulement? The Michigan Guidelines on Protection Elsewhere[42] stipulate that there should be a written agreement between the transferring and the receiving (the safe third) country.[43] That includes that such an agreement should be binding[44] which contrasts the UK-Rwanda-Agreement that is declared as non-binding in international law.[45] It is argued that there is an obligation to undertake systematic (post-transfer) monitoring.[46] This is a transfer of the ideas of safeguards regularly applied in expulsion and extradition cases where the receiving state issued diplomatic assurances on how not to treat the person concerned.[47] Furthermore there needs to be an effective remedy before an independent body in order to ensure asylum-seekers' rights. None of the relevant guarantees for effective remedies are absolute[48] and so we should ask: what should be the prerequisites for a reduced density of control by the transferring state's judiciary. In my opinion these guarantees have to go far beyond the material conditions of the safe third country regime. They should be

- an effective system of human rights norms beyond the Refugee Convention or equivalent mechanisms[49] to which both, the transferring and the receiving state are bound to and which enables the asylum-seeker to enforce/defend their

[42] Fn. 21.
[43] Ibid. para 16,
[44] Cantor et. al., Externalisation, Access to Territorial Asylum and International Law, IJRL 2022, 120 <144> argue that this should usually be the case for reasons of equity between sovereign states.
[45] Fn. 1, No. 1.6 of the MoU.
[46] Foster, Protection Elsewhere, The Legal Implications of Requiring Refugees to Seek Protection in Another State, Mich J Int'L 2007, p. 223 (284); Cantor et. al., Externalisation, Access to Territorial Asylum and International Law, IJRL 2022, 120 <146>.
[47] See as example ECtHR, judgment of 17 January 2012 – 8139/09 – <Othman (Abu Qatada)> v. United Kingdom, esp. para 188.
[48] See eg CJEU, judgment of 26 July 2017 – C-348/16 - <Moussa Sacko> paras 37 – 38 with regard to Article 47 EU-Charter.
[49] On the one hand, there is certainly no absolute ban in international law (eg by the Refugee Convention itself) to apply safe third country rules with regard to non signatory states of the Refguee Convention. On the other hand, however, "effective protection" does not only include "refugee rights" as guaranteed be the Refugee Convention or equivalent national or international legal instruments.

rights themselves as the main basis for a justified trust in the receiving state and its system

- a transparent and rigorous scrutiny of the material safe third country conditions by the transferring state's executive or legislator by the time of the implementation of such a regime with a clear focus on the mechanisms of preventing indirect refoulement.
- a regular monitoring system of the safe third country regime

With these conditions fulfilled it may be acceptable to reduce judicial control especially with regard to the general prerequisite for a safe third country regime which means that only or foremost the individual circumstances brought forward by the asylum-seeker could be relevant.

Without those conditions fulfilled, however, I cannot see how a safe third country regime that intends to transfer asylum-seekers to a country they have not connection to, could be effectively workable without denying them the right to receive a status decision within a reasonable period of time as the individual procedure in the transferring state may consume an inappropriate amount of time.

E. Conclusion

The clear requirements of the ECtHR regarding the referral of asylum-seekers to third countries are important and are still - necessarily – of a basic nature. The ECHR does not include a right to asylum, the Ilias and Ahmed case did not offer any specialities on vulnerability or other striking arguments that could have triggered Article 8 ECHR. Furthermore, the requirements set out in this decision and those that are framed in UNHCR's guidelines need to be under judicial control. Especially when it comes to safe third country rules and externalisation regimes that intend to transfer asylum-seekers to status determination processes and possible countries of refuge to which they have no connection, a rather rigorous test of (individual) proportionality has to be applied. International Law does not, however, ban such safe third country externalisations as such. The idea of sending asylum-seekers to a different continent disturbs me to a very high extent. Whereas quite a bit of the uneasiness that I feel is more on a political or moral level, there is a strong judicial point. Safe third country rules as part of an externalisation process need a high level of trust which needs a

common basis. This basis can only be binding legal mechanisms that effectively ensure that the receiving state will offer an effective protection to the asylum-seekers who are transferred to that state.