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

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Introductory Overview

- UK-Rwanda Memorandum of Understanding as incentive for this presentation / session
 - Presentation is not about this MoU
- Externalisation as type of Safe Third Country Concept
- Standards established by ECtHR
- Other legal standards for ‚protection elsewhere concepts‘

Article 3 ECHR and safe third country concepts – ECtHR (GC), 21 November 2019 – 47287/15 – Ilias and Ahmed v. Hungary

- duty not to deport a person if substantial grounds for real risk to be exposed directly or indirectly to treatment contrary Article 3 ECHR (para 129)
- asylum procedure and living conditions in the STC have to be in centre of examination (para 131)
- up-to-date assessment by transferring state mandatory
 - law and its application in practice (para 141)

Refugee Convention and other international instruments – limits to STC-concepts?

Article 22 IACHR – Freedom of Movement and Residence

(7) Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

(8) In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.



The non-refoulement-principle in IHRL - direct and indirect refoulement prohibited

■ Article 22 (7) – (8) IACHR:

- IACtHR, advisory opinion of 30 May 2018 – OC-25/18 – requested by the Republic of Ecuador – Article 22 (7) – (8) IACHR
- paras 37 – 45; 142; 187; 192

■ Article 3 CAT

- 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.

The non-refoulement-principle in IHRL - direct and indirect refoulement prohibited

■ Article 33 Refugee Convention

- 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, para 136.

■ Article 7 ICCPR

- See IARLJ/EASO, Judicial Analysis - Asylum procedures and the principle of non-refoulement, 2018, p 28 with further references to national case law



The non-refoulement-principle in IHRL - widened scope in stc-cases?

- Article 4 EU-Charter and its influence on Article 3 ECHR
 - CJEU, 19 March 2019 – C-163/17 – <Jawo> para. 91.
 - prognosis of the living conditions after a successful asylum application in the safe third country is necessary
 - “real risk” of successful application

UNHCR on STC

UNHCR

1. individual assessment prior to transfer
2. admittance to the receiving state
3. protection against refoulement
4. access to fair and efficient procedures for the RSD
5. treatment in accordance with accepted international standards
6. ability to enjoy asylum / access to durable solution

ECtHR

1. Article 13 ECHR (not an issue in Ilias and Ahmed)
2. not an issue in ECtHR cases
3. protection against refoulement
4. access to an adequate asylum procedure
5. living conditions in line with human rights
6. see CJEU – Jawo approach

Externalisation as penalty – Article 31(1) Refugee Convention?

- Notion „penalty“ is difficult to interpret
 - French: „Sanctions pénales“
- Even with a broad understanding:
 - Article 31 (1) Refugee Convention does not include a prohibition of any form of discrimination based on the way of entering a country

Limits for externalisation concepts in international law?

- *“Absence of right to choose the country of refuge” equals “a right for states to choose the asylum-seeker’s country of refuge?”*
- a system of allocation of responsibilities – whether unilaterally imposed or multilaterally designed – does not contravene the concept of the Refugee Convention

Limits for externalisation concepts in international law?

- Externalisation as „banananisation“ of persons?
 - Kritzman-Amir, Asylum Seekers are not Bananas Either: Limitations on Transferring Asylum-Seekers to Third Countries, , Mich J Int’L 2022, p. 669.
- Filling the gap between „denial of unfettered right to choose“ and (partially) unrestricted state powers
 - derived from Human dignity which is more than absence of a threat to life or person in the third country, whether directly or indirectly via a chain refoulement

Necessary Safeguards

- Written and binding agreement between transferring and receiving state
- effective remedy before an independent body pre transfer
- effective system of human rights norms beyond the Refugee Convention or equivalent mechanisms binding for both countries as basis for a high level of trust
- 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
- post transfer monitoring



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