

# THE CONCEPT OF SAFE THIRD COUNTRY

BERFIN NUR OSSO

---

## ***Origins and Governing Instruments of the Concept***

Externalization and preventive policies in terms of migration and asylum within the EU have been of importance especially in the late 1980s. Under this scheme, the concept of safe third country has come to the agenda of the Member States in spite of being contested in various fora.

The concept of “safe third country,” which was originated in the 1990 Dublin Convention, has been one of the first forms of the externalization of migration and asylum policies (European Parliament 2000) through the mobilization of third countries in the control of migration flows to Europe (Lavenex 2006, 334). The 1992 London Resolution reaffirmed the “safe third country principle”, which was surely evading the responsibility of the EU Member States by establishing a territorial exclusion (European Council 1992). In 2003, the Dublin II Regulation, the successor of the 1990 Dublin Convention, was adopted by the EU Member States. After the EU Member States have realized the ineffectiveness of the Dublin II Regulation, they revised and approved the Dublin III Regulation in 2013, which currently governs the rules implemented with regard to the examination of asylum applications by the Member States as well as involves the concept of safe third country.

In addition to the Dublin III Regulation, the Member States adopted the Asylum Procedures Directive (“APD”) in 2013 as the successor of its 2005 version, which sets out the common procedures for granting and withdrawing international protection for asylum-seekers (European Parliament and European Council 2013), including the provisions for the concept of “safe third country”.

## ***What is a Safe Third Country?***

A safe third country is a non-Member State where the asylum-seeker has transited before arriving the EU and to which s/he may be returned on the grounds that s/he should have lodged the asylum application there. Therefore the asylum application is examined not by the Member State but by the “safe third country” in question.

Currently there is no such a common list adopted by all Member States which shows the countries that are designated as safe third countries. Though there is a possibility to do so under the article 36 of the APD, and the Commission is considering the adoption of a common list of “safe third countries”, in order to harmonize this notion across the EU (AEDH & EuroMed Rights & FIDH 2016, 5).

Member States may consider an application for international protection as inadmissible if a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38 (APD 2013, art. 33/2(c)). According to article 38 of the APD, Member States may apply the safe third country concept if they are satisfied that the following principles in the third country are fulfilled:

- (a) the life and liberty of the people concerned are not threatened by virtue of their race, religion, nationality, membership in a particular social group or political opinion;

- (b) there is no risk of serious harm with regard to torture and cruel, inhuman or degrading treatment, the death penalty, etc. (as defined in Directive 2011/95/EU);
- (c) and (d) the principle of non-refoulement in accordance with the Geneva Convention, and the prohibition of the removal of migrants to their country of origin, where the people concerned would face torture et al., are respected; and
- (e) the possibility exists for the migrant to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

In addition to these conditions, according to article 39/2 of the APD, a third country can only be considered as a safe third country where:

- (a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
- (b) it has in place an asylum procedure prescribed by law; and
- (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.

When considering all criteria for the designation of a third country as safe, it should be noted that the domestic legislation of a “safe third country” must allow individuals’ applications for asylum to be examined in accordance with all the procedural safeguards established under international law, including the right to an effective remedy, to apply for refugee status, and to enjoy the rights enshrined in the Geneva Convention, including economic and social rights (AEDH & EuroMed Rights & FIDH 2016, 6).

The concept might also be part of readmission agreements. The EU-Turkey Statement of 18 March 2016, which involved readmission clauses for the irregular migrants who cross from Turkey into Greece, designates Turkey as a safe third country to which such migrants can be returned on the grounds that they could lodge their asylum claims in Turkey. However, whether Turkey is a safe third country is another question since it is very dubious that all of the criteria set forth in the APD are satisfied by Turkey.

### ***Who Benefits from This? Is There a Win-Win Situation?***

Designating a third country as “safe” may open the doors of endless opportunities where state or Union interests prevail over human rights and universal values. Here, it should be noted that the unilateral declaration of a third country as safe by the destination country only burdens the designated country. As Von Heldorff (2015) argues “the reason that the EU Member States have adopted this rule to which migrants can be sent back automatically, is to minimize the number of potential asylum-seekers” (von Heldorff 2015, 5) thus to establish preventive policies in terms of asylum on the side of the EU.

Whereas if included in a readmission agreement, there can be a win-win situation for the both negotiating parties: the safe third country may receive certain grants by the EU such as financial support and technical assistance for providing effective international protection in the refugee facilities within the country and for the return of irregular migrants to that country, visa facilitation or liberalization opportunities for its own citizens, and (if it is a candidate country, e.g. Turkey) the promise for the progress in the process of

accession to the EU is made. However, it is also noteworthy that these kind of carrot and stick clauses generate a context where the asylum-seekers are bargaining tools of soft-power.

Together with readmission agreements, the “safe third country” concept merely elevates the responsibility from the EU Member States in providing international protection to asylum-seekers, by establishing a territorial exclusion and shifting the burden to the third countries in processing the asylum claims. As Dimitriadi (2016) argues, there is a major concern for partner countries, as readmission agreements impose significant burdens on them in terms of receiving and returning third-country nationals (Dimitriadi 2016, 5) and so does the concept of safe third country as it is contrary to the spirit of international cooperation and responsibility sharing (UNHCR 2001, 3).

### ***Suggestions for the Future***

As set above, within the EU, the concept of safe third country is governed through various legal instruments and by the consent of third countries by virtue of readmission agreements. It is not certain, however, whether the criteria set in these legal instruments are met and there is no such institution that monitors the fulfillment of these conditions by the third countries. For instance, the return of asylum-seekers under safe third country provisions to countries in which certain fundamental human rights or other basic human needs are systematically denied has been a recurring problem (Legomsky 2003, 16). As in the case of Turkey, detention (Amnesty International Turkey 2016), repatriation (ECtHR 2000), torture and cruel, inhuman or degrading treatment (ECtHR 2009), and violation of the right to life (Euro-Mediterranean Human Rights Monitor, 2016) of the asylum-seekers have frequently come to the agenda of non-governmental organizations and UNHCR, but not of the EU itself.

The article 38/5 of the APD requires Member States to periodically inform the Commission of the countries to which the concept is applied. Therefore, firstly, Member States aiming to apply the concept of safe third country should make sure that all criteria prescribed in the articles 38 and 39/2 of the APD are fulfilled by the country to be designated as a safe third country before sending asylum-seekers to these countries. This may be done through monitoring the third country to make sure that people concerned are not exiled to their country of origin, and observing the conditions in the refugee facilities within that country.

As stated in the preamble of the 1951 Convention Relating to the Status of Refugees (“Geneva Convention”) the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international cooperation. Therefore, rather than imposing concepts such as safe third country, the primary goal of the Member States where the asylum applications are lodged and of the EU should be the protection of the rights of asylum-seekers by providing fully effective international protection.

## ***Bibliography***

- AEDH & EuroMed Rights & FIDH (2016). *“Safe” countries: A denial of the right of asylum* (Rep.). Retrieved from <http://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH20.pdf>.
- Amnesty International Turkey (2016). Aşkale Geri Gönderme Merkezi’nde neler oluyor?. İstanbul: Uluslararası Af Örgütü, 2.1.2016. Retrieved from <http://amnesty.org.tr/icerik/2/1776/askale-geri-gonderme-merkezi%E2%80%99nde-nel>.
- Dimitriadi, A. (2016). Deals Without Borders: Europe’s Foreign Policy on Migration. *European Council on Foreign Relations, Policy Brief*, 4.4.2016. Retrieved from [http://www.ecfr.eu/page/-/ECFR-165-DEALS\\_WITHOUT\\_BORDERS.pdf](http://www.ecfr.eu/page/-/ECFR-165-DEALS_WITHOUT_BORDERS.pdf).
- ECtHR (2000), *Hoda Jabari v. Turkey*, Application no. 40035/98, 11.7.2000.
- ECtHR (2009), *Abdolkhani and Karimnia v. Turkey*, Application no. 30471/08, 22.9.2009.
- Euro-Mediterranean Human Rights Monitor (2016). Turkish Border Guards Use Lethal Force with Syrian Asylum Seekers. Geneva: Euro-Mediterranean Human Rights Monitor, 20.6.2016. Retrieved from <http://www.euromedmonitor.org/en/article/1273/Turkish-border-guards-use-lethal-force-with-Syrian-asylum-seekers>.
- European Council (1992). European Council in Edinburgh: Conclusions of the Presidency (Part A - Annex 5). Edinburgh, 11-12.12.1992. Retrieved from <http://www.consilium.europa.eu/en/european-council/conclusions/pdf-1992-1975/edinburgh-european-council,-11-and-12-december-1992/>.
- European Parliament (2000). Asylum in the EU Member States: Working Paper. Brussels: European Parliament. Retrieved from: [http://www.europarl.europa.eu/workingpapers/libe/pdf/108\\_en.pdf](http://www.europarl.europa.eu/workingpapers/libe/pdf/108_en.pdf).
- European Parliament and European Council (2013). Asylum Procedures Directive (2013/32/EU). Brussels: European Parliament, 26.6.2013. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>.
- Lavenex, S. (2006). Shifting Up and Out: The Foreign Policy of European Immigration Control. *West European Politics*, 29:2, 329-350.
- Legomsky, S. H. (2003). Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection. *UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES (PPLA/2003/01)*, February 2003. Retrieved from <http://www.unhcr.org/protection/globalconsult/3e6cc63e4/2-secondary-refugee-movements-return-asylum-seekers-third-countries-meaning.html>.
- The Geneva Convention (1951). The Geneva Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954), as amended by the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).
- UNHCR (2001). Global Consultations in Budapest, Background Paper No. 2, May 2001.
- von Heldorff, J. (2015). The EU Migration Dilemma. *Heinrich Böll Stiftung*, 3.9.2015. Retrieved from <https://eu.boell.org/en/2015/09/03/eu-migration-dilemma>.