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Safe third countries for asylum seekers

Report[1]
Committee on Migration, Refugees and Displaced Persons
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Summary

Member States of the Council of Europe have used a certain strategy to decrease their responsibility for asylum seekers: the so-called "safe third country" concept. By applying this concept, States delegate the responsibility for processing asylum applications to another State considered as safe. Hence, they can transfer asylum seekers to this third country and, in cases where protection is granted, the rights deriving from the refugee or subsidiary protection status also have to be fulfilled by the third State.

The 1951 Convention Relating to the Status of Refugees provides the right to apply for asylum. While it does not contain the obligation to apply for asylum in the first country of arrival, the safe third country concept implies that asylum seekers should do so.

However, the practice of States remains heterogenic and divergent presumptions of safety can be observed among them. The risk is imminent that a wrong presumption leads to undermining the right to apply for asylum. This risk cannot be taken light-hearted, because a violation of this right can in every single case lead to a violation of *ius cogens* and of a non-derogable right: the right not to be refouled pursuant to Article 3 of the European Convention on Human Rights.

And indeed: due to valid complaints, since the last recommendation on the application of the safe third country concept was adopted in 1997, the case law of the European Court of Human Rights evolved and has clarified that obligations deriving from the European Convention on Human Rights for its States Parties when applying the safe third country concept. Every case identifying a violation underlines the need for clarity and the importance of an up-to-date instrument as regards the safe third country notion. To support member States in their obligations, this report, after elaborating on current legal basis versus practice, identifies necessary measures to be taken to seek coherence in line with human rights obligations to be respected by member States.

1. Reference to committee: Doc. 15111, Reference 4519 of 26 June 2020.

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A. Draft resolution[2]

1. Recalling the right to apply for and seek asylum under the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and, for member States of the European Union, under Article 18 of the European Union Charter of Fundamental Rights, the Parliamentary Assembly notes with concern a tendency of returning asylum seekers to third countries without clarity on the safety of the respective third country.

2. The Assembly emphasises that Article 31, paragraph 1 of the 1951 Refugee Convention, stipulates only that penalties shall not be imposed on account of an illegal entry or presence of refugees or asylum seekers who came directly from a territory where their life or freedom was threatened. Hence, asylum seekers are not required to apply for protection in the first safe country of arrival and cannot be penalised for not doing so.

3. Referring to Conclusion No. 58 (XL) of the Executive Committee of the United Nations High Commissioner's Programme, the Assembly recognises the importance of clarifying the legal situation and protection of refugees and asylum seekers, who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere.

4. Whereas it is important for asylum seekers and member States alike to clarify in a timely manner which State is responsible for processing an asylum application, the Assembly is aware that the safe third country principle under Article 33 of the recast Asylum Procedures Directive of the European Union, according to which a EU member State can declare inadmissible an application for international protection ifa country which is not a member State is considered as a safe third country for the applicant, does not apply among non-member States. This situation may cause legal uncertainty to the detriment of asylum seekers.

5. The Assembly recalls Recommendation No. R (97) 22 of the Committee of Ministers of the Council of Europe to member States which contains Guidelines on the Application of the Safe Third Country Concept and enumerates criteria to assess whether a country can be considered as safe, among others "observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments" and "the third country will provide effective protection against refoulement and the possibility to seek and enjoy asylum". Since adoption of the Recommendation, there have been many legal developments.

6. Welcoming the relevant jurisprudence of the Court of Justice of the European Union (No. C-564/18, Nos. C-924/19 and C-925/19), the Assembly reaffirms that the return of an asylum seeker to a safe third country requires a connection to that country beyond the mere transit by the person concerned.

7. Welcoming the relevant jurisprudence of the European Court of Human Rights in the cases *Ilias and Ahmed v. Hungary* (No. 47287/15), *M.K. and Others v. Poland* (Nos. 40503/17, 42902/17 and 43643/17) and *M.S.S. v. Belgium and Greece* (No. 30696/09), the Assembly emphasises that competent authorities in member States must analyse, before returning or expelling an asylum seeker to a third country, whether this person would have access to an asylum procedure in the country concerned without being exposed to the risk of inhuman and degrading treatment or torture in violation of Article 3 of the European Convention on Human Rights (ETS N° 5).

8. Welcoming the work of the European Union Agency for Asylum towards a co-ordinated approach within the European Union to evaluate the safety of third countries, the Assembly believes that co-ordinated efforts should also be taken at the level of the Council of Europe. Therefore, building on this work and taking into consideration the recent jurisprudence of the European Court of Human Rights, the Assembly encourages the development of new and up-to-date criteria at the Council of Europe level to assess the safety of third countries.

9. The Assembly also emphasises that no absolute presumption of safety can be made, as the situation in a safe country can deteriorate to a standard that renders the country in question unsafe. In this respect, the European Court of Human Rights clarified in *M.S.S. v. Belgium and Greece* ([GC], No. 30696/09) that applicants must be able to challenge the presumption that a country is safe in his or her particular circumstances without bearing the entire burden of proof. In the Chamber judgement *Ilias and Ahmed v. Hungary* (No. 47287/15), the Court stated that the burden of proof must not, in light of Article 13 of the European Convention on Human Rights, be reversed to the applicants' detriment. Therefore, referring to

2. Draft resolution adopted unanimously by the committee on 21 June 2022.

considerations of the European Court of Human Rights, the Assembly encourages the development of procedural requirements at the Council of Europe level for the asylum seeker to have a fair possibility to rebut the presumption of safety.

10. The Assembly recognises that the monitoring of safe third country decisions is essential to improve member States' practice and to strengthen the rights of asylum seekers and refugees. Therefore, the Assembly encourages member States to establish objective and independent monitoring mechanisms to monitor national law and practice in this regard.

11. Recalling Resolution 2409 (2021) "Voluntary relocation of migrants in need of humanitarian protection and voluntary resettlement of refugees", the Assembly welcomes the current discussion on relocation and resettlement of asylum seekers between European Union member States and beyond, while encouraging member States to undertake further efforts in this regard. Such engagement would prioritise solidarity over the recourse to the safe third country concept.

12. The Assembly invites the Special Representative of the Secretary General of the Council of Europe for Migration and Refugees to support greater co-ordination and co-operation among member States in applying the safe third country concept in the context of asylum.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2022) "Safe third countries for asylum seekers" and emphasises the need for greater co-ordination among member States, in order to effectively protect human rights of asylum seekers and the right to asylum in Europe.

2. Welcoming Recommendation No. R (97) 22 of the Committee of Ministers to member States containing Guidelines on the Application of the Safe Third Country Concept, the Assembly recommends that the Committee of Ministers:

2.1. review this Recommendation in the light of relevant jurisprudence of the European Court of Human Rights, develop new standards to enable member States to improve their assessment of the safety of third countries and regularly up-date them in accordance with legal developments to come and future jurisprudence;

2.2. consider setting standards on the transfer, return and readmission of asylum seekers and refugees, taking due account of the effective protection of their human rights under the European Convention on Human Rights (ETS No. 5) and their right to apply for and seek asylum;

2.3. seek co-operation of the Council of Europe and its member States with the European Union Agency for Asylum, in order to prevent discrepancies in the application of the safe third country concept in Europe to the detriment of human rights and the right to apply for and seek asylum;

2.4. invite member States to inform the Committee of Ministers about their practice regarding the safe third country concept as well as their practice as regards procedural means available to rebut the presumption of safety of a country.

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3. Draft recommendation adopted unanimously by the committee on 21 June 2022.

C. Explanatory memorandum by Ms Stephanie Krisper, rapporteur

1. Introduction

1. In Europe, the safe third country concept regularly finds wider public discussion when larger numbers of asylum seekers arrive at the external borders of the European Union (EU) and try to apply for asylum there or – at a later stage – in another EU country. It is every time we debate the situation on the Greek islands, on La Palma, in Italy, but also about the Greek-Turkish land and sea border, that we are legally debating on the terrain of the safe third country concept.

2. Under the EU Dublin III Regulation, the first country of registration in the EU is obliged to process asylum applications, for a statutory application of the safe third country concept within the EU. In addition, the EU and its member States have signed readmission agreements with countries such as Türkiye via the 2016 “EU-Turkey-Statement”. Further agreements are now in discussion due to the situation on the Polish-Belarussian border and the increasing arrivals of refugees and migrants, especially in Cyprus, Italy and Spain. The discussions focus on sensitive questions: are under such agreements the core human rights of asylum seekers and refugees respected? Are these concepts leading to sustainable asylum systems in member States? Or do they contribute to the deterioration of refugee rights?

3. After the debates heating up in the last years, I signed with colleagues the motion for a resolution on safe third countries for asylum seekers (Doc. 15111) with the intention to bring clarity to the issue, at the centre of concern being the human rights of asylum seekers and refugees. Hence, this report shall present the relevant legal basis and the compatibility of practice in member States with these legal requirements. An informed debate can then follow on the risks and the necessary steps to be taken to guarantee respect for and the protection of human rights of refugees in the region covered by the European Convention on Human Rights (ETS No. 5).

4. I am particularly grateful for the substantial contributions presented at hearings of the Committee on Migration, Refugees and Displaced Persons by Mr Adel-Naim Reyhani from the Ludwig Boltzmann Institute of Fundamental and Human Rights in Vienna, Ms Tineke Strik, member of the EU Parliament and former member of our committee, Ms Sophie Weidenhiller, Spokesperson of the German NGO Sea-Eye, Mr Henrik Nielsen, Head of Asylum Unit, Directorate-General Migration and Home Affairs, European Commission in Brussels, and Mr Christophe Hessels, Head of the Third Countries Research Unit, European Asylum Support Office of the EU in Valetta, Malta. I also thank the authorities of Croatia as well as of Bosnia and Herzegovina for having organised a fact-finding visit for me together with Mr Pierre-Alain Fridez, rapporteur on pushbacks on land and sea, to their common border on 21 and 22 February 2022.

5. Since 24 February 2022, we witness the largest movement of persons fleeing a country on European soil since the Second World War due to the Russian aggression against Ukraine. To this day (27 May 2022), the United Nations High Commissioner for Refugees (UNHCR) registered more than 6 million persons who fled Ukraine, seeking protection and safety mostly in neighbouring countries. Ukrainian nationals and persons being recognised as refugees in Ukraine are entitled to temporary protection under the Temporary Protection Directive 2001/55/EC in EU member States. Third country nationals fleeing Ukraine and who do not fall within the scope of this directive might however apply for asylum. An estimated 200.000 of them already fled Ukraine. In this context, asylum applications will potentially increase and the safe third country concept might gain further importance, both within the public debate and in practice.

2. The concept of safe third country: legal standards

6. As the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) does not contain an explicit reference to the allocation of responsibility for asylum claims, the approach of “protection elsewhere” has been elaborated by States around the world. Within this approach, the safe third country concept is an element. The concept grew out of the principle of “first country of asylum”, which was later expanded to the notion of “safe third country”.[4] While, according to the first, States transfer refugees back to States in which they had already found protection, the latter includes that States deny protection to refugees

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4. On first sight, a safe third country is to be easily distinguished from the “safe country of origin”: the latter is normally the country which has issued a passport or granted citizenship. However, it should be borne in mind that, in practice, the notions of safe country of origin and safe third country can overlap in particular circumstances. For instance when persons have not been issued a passport in their country of birth, but lived and worked in another country, which might even have issued a residence permit. A similarly unclear situation could arise where children of refugees or migrant workers are born

who could or should have accessed protection in another country. Hence, in applying the notion of safe third country, States usually refrain from determining the qualification of individuals as refugees. Instead, they only assess the possibility of removal to another country.

7. While international law is not explicitly addressing the safe third country concept, the notion has been further clarified at the regional level, including at the Council of Europe and the EU level. While the case law of the European Court of Human Rights mainly addresses the safe third country notion through Article 3 and Article 13 of the Convention, the EU's recast Asylum Procedures Directive enumerates criteria to be fulfilled before a person seeking international protection can be returned to the third country in question.

2.1. The 1951 Refugee Convention

8. Neither in the text of the 1951 Refugee Convention or elsewhere in international law, a provision can be found that explicitly authorises safe third country policies. However, Article 31, paragraph 1 of the 1951 Refugee Convention stipulates: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." Article 1 defines the term refugee and the applicability of the 1951 Refugee Convention.

9. Looking at the formulation "coming directly from a territory where their life or freedom was threatened in the sense of Article 1", it could be read to exclude persons from applying for asylum in a country that they entered from a safe third country. But this reading would undermine the underlying purpose of the 1951 Refugee Convention, hence the UNHCR and international practice have interpreted this formulation narrowly, in order not to unduly restrict the possibility to apply for asylum and receive international protection.

10. The 1951 Refugee Convention does only require member States to not return refugees to a location where they would face persecution in violation of the non-*refoulement* obligation. The UNHCR stated that the safe third country concept requires an individual assessment of whether the previous State will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Refugee Convention and international human rights standards, including protection from *refoulement*. Where she or he is entitled to protection, a right of legal stay and a timely durable solution are also required, UNHCR states.

11. The Executive Committee of the UN High Commissioner's Programme (UNHCR ExCom) adopted in 1989 its Conclusion No. 58 (XL) on refugees and asylum seekers who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere.[5] Paragraph (f) of Conclusion No. 58 (XL) allows for the return of those persons to the latter safe third countries or countries of first asylum.

2.2. European Convention on Human Rights

12. While the European Convention on Human Rights does not contain a human right to enter a country and apply for asylum or international protection, it protects persons from being returned or expelled to a country where their Convention rights are not respected. Under the case law of the European Court of Human Rights, this concerns primarily the right to life (Article 2 of the Convention) and the right to protection against torture (Article 3 of the Convention).

13. The Committee of Ministers of the Council of Europe has issued a set of Guidelines in 1997,[6] which similarly include, amongst others, that the third country must observe the principles embodied in the 1951 Convention and the 1967 Protocol. It must provide the possibility to seek and enjoy asylum, and it must be

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in another country while being considered nationals of the country of origin of their parents or, rarely but sadly, are even stateless. Or a person might be from an unsafe country of origin but have lived in a safe country before applying for asylum in another country or, vice-versa, originate from a safe country but have lived in an unsafe country.

5. UNHCR, ExCom Conclusion No 58 (XL), 'Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection', 1989, available at: www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html.

6. Recommendation No. R (97) 22 of the Committee of Ministers to member States containing Guidelines on the Application of the Safe Third Country Concept.

provided that the asylum-seeker has already been granted effective protection in the third country or has had the opportunity to make contact with that country's authorities in order to seek asylum or that there is clear evidence of the admissibility of the asylum-seeker to the third country.

14. The European Court of Human Rights has further clarified through its case law[7] that the competent authority in a member State must analyse, before returning or expelling an asylum seeker to a third country, whether this person would have access to an asylum procedure in the country concerned without being exposed to the risk of inhuman and degrading treatment or torture in violation of Article 3 of the Convention. Chain *refoulement* is also of concern.

15. In addition, Article 4 of Protocol No. 4 to the Convention (ETS No. 46) prohibits collective expulsions of aliens and requires competent authorities in member States to "ensure that each of the aliens concerned has a genuine and effective possibility of submitting arguments against his or her expulsion", as the European Court of Human Rights decided.[8]

2.3. EU law

16. Article 18 of the EU Charter of Fundamental Rights protects the right to asylum "with due respect for the rules of the 1951 Refugee Convention and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union". EU law specifies common rules for asylum procedures within the EU under the recast Asylum Procedures Directive.[9]

17. In accordance with Article 33 of the recast Asylum Procedures Directive, a member State can declare inadmissible an application for international protection under the 1951 Refugee Convention, if the applicant has entered from a safe third country.[10]

18. Article 38 of the recast Asylum Procedures Directive stipulates that member States "may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

a. life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

b. there is no risk of serious harm as defined in Directive 2011/95/EU;

c. the principle of non-*refoulement* in accordance with the Geneva Convention is respected;

d. the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;

e. the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."

19. Member States shall inform the European Commission periodically of the countries to which this concept is applied in accordance with the provisions of Article 38 of the recast Asylum Procedures Directive.[11]

20. Under Article 36 (3) of the recast Asylum Procedures Directive, the EU Commission should propose a common list of safe third countries. However, this provision was annulled by the Court of Justice of the European Union in the case *European Parliament v. Council of the European Union* (C-133/06) because this matter remained in the competence of member States. Therefore, national legislation and practices can remain very divergent within the EU – and they do so.

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7. *Ilias and Ahmed v. Hungary* (No. 47287/15); *M.K. and Others v. Poland* (Nos. 40503/17, 42902/17 and 43643/17), *M.S.S. v. Belgium and Greece* ([GC], No. 30696/09).
8. *N.D. and N.T. v. Spain* (Nos. 8675/15 and 8697/15).
9. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
10. The safe third country concept is to be distinguished from the safe country of origin concept laid down in Article 36 of the recast Asylum Procedures Directive which requires that an applicant has the nationality of that country or is a stateless person and was formerly habitually resident in that country. This means that a country of origin in this sense cannot be a mere country of residence if the resident person is not citizen of this country. Article 36 also stipulates that EU member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept. Subsequently, EU member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with Article 37 of the Asylum Procedures Directive.
11. Article 38 (5) of the recast Asylum Procedure Directive.

3. Practice

21. Practice is as worrying as it is heterogenic – on the application of the safe third country concept as well as on the level of burden of proof that is placed on the asylum seeker to rebut the presumption of safety.

3.1. Application of the safe third country concept

22. While national legislation and practices already diverge between States, many countries have also signed bilateral or multilateral readmission agreements that include a safe third country provision. Every of these ways to formalise the application of the safe third country concept has led to situations violating the human rights of asylum seekers.

3.1.1. National legislation

23. A report[12] by the former European Asylum Support Office (EASO) of the EU, now EU Agency for Asylum (EUAA), found that all EU member States as well as Switzerland, Iceland and Norway had transposed the safe third country concept into national law in accordance with the recast Asylum Procedures Directive, with the exception of France, Italy and Poland, while Cyprus, the Czech Republic, Portugal, Romania, the Slovak Republic and Slovenia had not applied this concept in practice.

24. The EASO report found the following specific designations as safe third countries:

– Belgium considered as safe Switzerland.

– Denmark, which is not bound by the recast Asylum Procedures Directive, considered as safe Canada and the USA.

– Estonia considered as safe the EU candidate countries Albania, North Macedonia, Montenegro and Serbia as well as Armenia, Bosnia and Herzegovina, Georgia, Kosovo*[13] and Ukraine.

– Finland considered as safe the European Economic Area (EEA) countries as well as Australia, Canada, Japan, New Zealand and the USA.

– Germany considered as safe Norway and Switzerland.

– Greece considered as safe Türkiye, regarding nationals from Afghanistan, Bangladesh, Pakistan, Somalia and Syria.

– Hungary considered as safe the European Economic Area (EEA) countries, the EU candidate countries Albania, North Macedonia, Montenegro, Serbia and Türkiye as well as Australia, Bosnia and Herzegovina, Canada, Kosovo*, New Zealand, Switzerland and the USA regarding States which do not apply the death penalty.

– Iceland considered as safe the United Kingdom.

– Ireland considered as safe the United Kingdom.

– Switzerland considered as safe all EU member States, Iceland, Liechtenstein and Norway.

In addition to national legislation, national jurisprudence can also influence safe third country practices. For instance, following a decision of its Constitutional Court, Croatia stopped applying the safe third country concept to Serbia.

25. As rapporteur, I proposed Request No. 4750 to the European Centre for Parliamentary Research and Documentation (ECPRD), which asked ECPRD members the following questions:

– Which countries have been identified by a public authority of your country (court judgment, government agency, parliamentary decision) as not being safe, or as being safe, in the context of the return of a rejected asylum applicant or other irregular migrant during the last five years?

– Which criteria and procedures are used by authorities in your country to determine the safety of another country regarding the return of rejected asylum applicants or other irregular migrants?

– Which countries have concluded with your country readmission agreements regarding irregular migrants?

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12. EASO, “The concept of safe third countries applied in EU+ countries”, 5 October 2021.

13. *All reference to Kosovo, whether to the territory, institutions or population shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

The numerous replies were highly appreciated.[14]

26. The above diversity of the countries considered as safe third countries as well as the procedures described by the States in their answers to the ECPRD reflect an arbitrary diversity in applying the safe third country concept, emphasising the need for common criteria and clear standards for determining whether a third country is safe.

3.1.2. Externalisation of refugee protection being formalised: the "Dublin" system

27. The Dublin III Regulation aims to ensure that any application for asylum made on the territory of an EU member State is examined substantively by only one State. The Dublin procedure determines that the first country of arrival or registration is responsible for processing asylum applications. Within the EU, member States are not considered as third countries. However, the transfer of asylum seekers back to the country where he/she already registered as foreseen by the Dublin system relies on the safe third country concept. Safety is presumed among EU member States.

28. While EU member States have never challenged each other's safety by complaint to the European Court of Human Rights, individual cases proved the safety presumption wrong. For example, the European Court of Human Rights found in 2011 that Belgium violated its human rights obligation by transferring an asylum-seeker to Greece despite the systemic deficiencies within its asylum system.[15] In fact, for years now, hundreds of human rights violations have been reported, ranging from allegations of collective expulsions over deplorable living conditions in reception centres to the placement of asylum-seeking children in detention facilities. Pushbacks from Greece to Türkiye have been repeatedly documented over the years – Frontex being involved in many allegations and scandals, which recently even led to the resignation of its former director, Fabrice Leggeri. Dublin transfers to Greece are still inadmissible on the basis of *M.S.S. v. Belgium and Greece*. Further, Greece designated Türkiye as a safe third country for nationals from Afghanistan, Bangladesh, Pakistan, Somalia and Syria. However, the EU Fundamental Rights Agency (FRA) documented that, in practice, readmissions are not taking place. As a result, persons whose applications are found inadmissible based on the safe third country concept remain in limbo with no access to protection or rights and can be at risk of detention. In cases where an individual cannot be readmitted, access to an effective and fair asylum procedure must be provided.[16]

29. The systematic application of the safe third country concept by "Dublin" has had a result that the EU's external border States are bearing the responsibility in cases of mass arrivals and potentially high numbers of returns. This is to the detriment of human rights of asylum seekers: The FRA confirmed that the treatment of persons at EU borders continues to be one of the main fundamental rights issues.[17]

30. In 2019, in a similar context, the Court of Justice of the European Union ruled that an asylum seeker may not be transferred to the member State that has previously granted him international protection, based on the safe third country presumption, if the living conditions in the concerned member State would expose him to a situation of extreme material poverty, as that would be contrary to the prohibition of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.[18]

31. Another example that highlights that the conditions in an EU member State can deteriorate to such a low standard that it becomes unsafe is provided by the case of *M.H. and others v. Croatia*,[19] in which 14 applicants crossed from Serbia into Croatia. Croatian police officers returned them to the Serbian border, instructing them to follow the train tracks back to Serbia, where an incoming train hit the youngest of them, a six-year-old child, and caused her death. The European Court of Human Rights unanimously found a violation, among others, of the right to life, of the prohibition of inhuman and degrading treatment and a violation of Article 4 of Protocol No. 4, prohibition of collective expulsions. Shortly after this decision, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment published a report expressing many concerns regarding the treatment of asylum seekers, confirming those that had already arisen due to this case.[20]

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14. They are available on request from the secretariat of the Committee on Migration, Refugees and Displaced Persons.
15. *M.S.S. v. Belgium and Greece* ([GC], No. 30696/09).
16. FRA, "Migration: Key Fundamental Rights Concerns", 17 December 2021.
17. Ibid.
18. *Bashar Ibrahim and Others v. Bundesrepublik Deutschland* (Joined Cases Nos. C-297/17, C-318/17, C-319/17 and C-438/17).
19. *M.H. and Others v. Croatia* (Nos. 15670/18 and 43115/18).
20. CPT, "Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", 3 December 2021.

3.1.3. Further externalisation by readmission agreements

32. Many member States of the Council of Europe have signed bilateral readmission agreements regarding persons who have not entered their territory legally through the territory of the other country. Under such agreements, persons can thus be returned to, and must be readmitted by, the concerned country.

33. For instance, the readmission agreement concluded by Morocco and Spain in 1992 covers readmission of both Moroccan nationals and third-country nationals who transited through Morocco and entered into Spain irregularly, thus considering Morocco as safe. In practice, this agreement has been criticised as doubts arose as to whether Morocco is a safe third country, since the asylum infrastructure is comparably inadequate. In this scenario, expulsions of asylum seekers without processing their asylum claims, pushbacks, arbitrarily detention by the State authorities and other kinds of human rights violations have been reported on various occasions over the past decades.[21]

34. Another critical example is the Statement reached in 2016 between the EU and Türkiye, that included that persons arriving irregularly from Türkiye to the EU would be returned to Türkiye and that the EU would provide financial support to Türkiye in order to cater for the needs of the persons concerned. Following the implementation of this agreement, arrivals to Greece and the number of registered deaths in the Mediterranean decreased significantly. However, criticism arose as whether Türkiye could be considered as safe,[22] starting with the fact that Türkiye has maintained a geographical limitation to the 1951 Refugee Convention, providing refugee status only to people originating from Europe. Complaints were brought to the Court of Justice of the European Union, challenging the legality of the 2016 Statement. The three applicants feared to be returned to Türkiye and possibly from Türkiye to Pakistan or Afghanistan – therefore addressing an underlying risk of readmission agreements: chain *refoulement*. However, the Court of Justice of the European Union declared that it lacked jurisdiction and dismissed the complaints.[23]

3.1.4. Externalisation at its worst: to arbitrarily chosen third countries

35. After the implementation of externalised asylum processing has already caused severe damage to asylum seekers in the past in offshore processing centres in the small Pacific countries of Nauru and Papua New Guinea run by Australia between 2012 and 2014,[24] recent examples on European soil bear similar risks.

36. For instance, the Danish Parliament passed a law to allow the transfer of asylum seekers to a third country outside the EU for the purposes of both asylum processing and protection of refugees in the third country. It currently pursues negotiations with the Rwandan Government on a mechanism for the transfer of asylum seekers. Similarly, the United Kingdom recently concluded a Memorandum of Understanding with Rwanda which foresees the transfer of asylum seekers whose claims are declared inadmissible because of their irregular entry into the United Kingdom – therefore being inconsistent with Article 31(1) of the 1951 Refugee Convention, as declaring an asylum claim of a person who enters irregularly as inadmissible constitutes a penalty.

37. Both of these cases have caused wide criticism by the UNHCR and civil society organisations. Albeit Denmark and the United Kingdom hide behind the notion of safe third country to justify these policies, they are radically more far-reaching than the established safe third country practices. By ignoring discussions whether Rwanda might possibly be considered as a safe country, imposing penalties on asylum seekers and systematically transferring them to a country with which they have no connection, human rights safeguards and international law are severely jeopardised.

38. A meaningful link between asylum-seekers and Rwanda, for example family ties, links to a broader community, previous residence, linguistic or cultural links, will be missed in most cases despite respective prerogatives by the UNHCR[25] and the Court of Justice of the European Union. The latter clarified in two cases concerning Hungary[26] that Articles 33 (2) and 33 (2b) of the recast Asylum Procedures Directive required a connection to a safe third country or first country of asylum beyond mere transit of that country. The Court also confirmed that the conditions of Article 38 of this Directive were cumulative.

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21. Amnesty International, "Spain and Morocco Failure to protect the rights of migrants – Ceuta and Melilla one year on", October 2006, available at: www.amnesty.org/en/wp-content/uploads/2021/08/eur410092006en.pdf
22. Asylum Information Database, "Country Report: Turkey", 2019, available at: https://asylumineurope.org/wp-content/uploads/2020/04/report-download_aida_tr_2019update.pdf
23. *NF, NG and NM v. European Council* (Nos. T-192/16, T-193/16 and T-257/16).
24. All asylum seekers who arrived by boat in Australia have been sent to these centres for the determination of their claim for protection, and held there indefinitely, resulting in unlawfully detention and severely breaching the human rights of the persons concerned.

39. Divergent practices and decisions as regards the application of the safe third country concept can be observed among member States. For instance, within the EU, member States have to fulfil the criteria as defined in Article 38 of the recast Asylum Procedures Directive. Nevertheless, which approach is used for determining a country as safe remains in the discretion of member States. Hence, member States can decide to make case by case assessments, create general safe third country lists or safe third country lists with exceptions.

40. Member States of the Council of Europe apply very divergent decisions on safe third countries for asylum seekers. If procedural obligations are not upheld, people in need of international protection obviously risk being denied in an arbitrary manner the possibility to apply for asylum, which has to be avoided by all means. For example, applicants do not necessarily have access to effective remedies with automatic suspensive effect against decisions ordering their return to a safe third country. Thus, there remains a risk of irremediable human rights violation, especially if chain *refoulement* is at stake, which is why ensuring flawless procedures is essential.

3.2. Burden of proof for rebuttal of the presumption of safety

41. Established presumptions of safe third countries have, in practice, resulted in placing a higher burden of proof on the applicant. Applicants have in most cases to argue that, in their specific case, the country is not safe, which shifts the burden of proof from the State to the applicant.

42. While the UNHCR stated in general that the State in which a person claims for asylum has the burden of proving that it would be safe to transfer responsibility to a third country,[27] it had to be the European Court of Human Rights to clarify in the case of *Ilias and Ahmed v. Hungary*, that such shifts must not be absolute. In the Chamber judgement, the Court noted that the presumption of safety "involved a reversal of the burden of proof to the applicants' detriment including the burden to prove the real risk of inhuman and degrading treatment in a chain *refoulement* situation". Hence, the burden of proof cannot be reversed to the applicants' detriment, it is to be seen as disproportionate to ask applicants to furnish *prima facie* evidence of their allegations of a real risk of torture or ill-treatment if returned to the third country. However, as regards the burden of proof, "it is incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk is ascertainable from a wide number of sources". In this case, Hungary failed to perform this assessment before removing the applicants to Serbia based on a safe third country list.[28] The Grand Chamber confirmed the violation of Article 3 of the Convention, arguing that "it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement".[29]

43. From a procedural point of view, the Court additionally emphasised the fact that, even if a country is presumed to be a safe third country, this presumption cannot be absolute and applicants must be able to challenge the latter by having a chance to put forward their arguments, in order to avoid bearing the entire burden of proof. To be able to do so, applicants must be provided with the necessary information about the available procedure (Article 13 of the Convention).[30]

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25. According to the UNHCR, asylum seekers need to have a meaningful link with the third country. It recognised that neither mere transit through a country nor a simple entitlement to enter a country, nor clear evidence of admissibility constitute such a link. It seems reasonable that the mere transit of a refugee through a third country by plane, train, bus, lorry, car or even by walking cannot be sufficient to account for a "meaningful link", especially because transit is often the result of fortuitous circumstances.

26. *L.H. v. Bevándorlási és Menekültügyi Hivatal* (No. C-564/18), and *F.M.S. and Others v. Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság* (Nos. C-924/19 and C-925/19).

27. According to the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims, while the burden of proof lies with the asylum-seeker, the State official who examines the asylum claim carries with the asylum-seeker a shared duty to ascertain and evaluate all relevant facts. In its Handbook on Procedures and Criteria for Determining Refugee Status, the UNHCR also stated that, since the State in which a person claims for asylum has the primary responsibility for considering the claim, that country also has the burden of proving that it would be safe to transfer responsibility to a third country.

28. *Ilias and Ahmed v. Hungary* (No. 47287/15).

29. *Ilias and Ahmed v. Hungary* ([GC], No. 47287/15).

30. *M.S.S. v. Belgium and Greece* ([GC], No. 30696/09).

44. In a case concerning Germany,[31] the Court of Justice of the European Union furthermore clarified that an interview must be conducted before an inadmissibility decision is taken, based on the safe third country principle under the recast Asylum Procedures Directive.

4. Conclusions

45. With a view to the widely divergent approaches of the member States when applying the safe third country concept, the treatment of asylum seekers in the context of safe third country decisions remains a major human rights concern. Bearing in mind that the determination of safe third countries may decide over the fate and suffering of refugees and asylum seekers, these human rights concerns urgently need to be addressed and should be at the core of member States' considerations when applying this concept.

46. Elapse of time means potential human rights violations to be perpetuated, as it has needed applicants to reach a judgement in Strasbourg to have the European Court of Human Rights decide on violations of asylum seekers' human rights by the transfer to an only presumably safe third country. The jurisprudence of the Court confirmed that numerous persons' human rights are at risk to be violated due to safe third country decisions until remedy can be sought.

47. To prevent similar grave human rights violations as well as the risk of such in the future, member States of the Council of Europe should inform the Committee of Ministers on their safe third country practice and legislation in order to enable the elaboration of an up-dated Recommendation, containing a common set of minimum requirements for determining the safety of a third country that also takes into account jurisprudence, future legal developments and information provided by international courts and organisations.

48. For the purpose of preventing this grave human rights violation and providing information on safe third country practices, member States should also provide information on the manner in which the burden of proof is handled in safe third country procedures to the Committee of Ministers.

49. The United Nations High Commissioner for Refugees should also play a decisive role in this process. Hence, it is essential to improve the co-operation with relevant international organisations, in particular United Nations High Commissioner for Refugees, the International Organization for Migration, European Union Agency for Fundamental Rights and European Union Agency for Asylum as well as with relevant regional and international NGOs such as the European Council on Refugees and Exiles, which are active on the ground and can provide real-time information on the security situation of a country and on the treatment of asylum seekers in member States. The Special Representative of the Secretary General of the Council of Europe for Migration and Refugees is also invited to engage in this co-operation.

50. Further, information on national safe third country decisions would also increase transparency, while enabling the review of these decisions at European level, both from a political and legal perspective. In this context, legal reviews by the European Commission and the Court of Justice of the European Union under Article 38 of the recast Asylum Procedures Directive and decisions of the European Court of Human Rights or the UN Human Rights Council are particularly valuable. National parliaments and the Assembly can play an important role in this regard, especially by monitoring national decisions and providing information on this matter.

51. Such reviews become particularly relevant when sudden changes in the political and legal regime of safe third countries occur, as tragically demonstrated by the Russian aggression against Ukraine. When such changes occur, reactions have to be timely to make sure that no safer third country decisions are issued to the countries concerned. In addition, the situations in countries simultaneously affected by sudden changes, in this case by the armed conflict, have to be taken into account. Currently, the reception centres of Poland, Republic of Moldova, Romania, the Slovak Republic and Hungary are highly overwhelmed by the large number of persons seeking shelter and protection. Accordingly, reception conditions may not comply with human rights standards and issuing a safe third country return decision to these countries could severely undermine the rights of asylum seekers.

52. Finally, member States are strongly encouraged to establish objective and independent monitoring mechanisms to monitor national law and practice in this regard and ensure that international protection under the 1951 Refugee Convention is effectively granted to those in need.

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31. *Milkiyas Addis v. Bundesrepublik Deutschland* (No. C-517/17).