

How the Safe Third Countries Concept Results in Prohibited Non-Refoulement and What Are the Limits of Forum Shopping in Migration?

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Contemporary refugee law builds on the 1951 Geneva Convention, but causes of forced migration not regulated by the Convention need to be addressed by national border and migration authorities. The right to asylum beyond the definition of the Convention does not entail the right of the migrant for refugee status but still entails the right to individual assessment of his legal status. This right remains relevant even if the respective state applies safe third country lists resulting in an almost instant rejection violating the non-refoulement principle. Naturally, states have the right to expel irregular migrants without legal grounds to stay. However, during this process, the state shall respect the prohibition of collective expulsion. Yet, as the ECtHR holds, if the lack of individual assessment derives from the culpable conduct of the alien – e.g. due to unauthorised en masse entry – the state can expel them without individual assessment.

Keywords: refugee status determination, non-refoulement, prohibition of collective expulsion, pushback procedure, European Court of Human Rights, safe third country list

Introduction

Migration is not a new phenomenon, and it is not the scale of the present migration trend that makes it unprecedented. It is rather the characteristics and the legal environment, which make recent and seemingly continuous migration crisis challenging.² There can be many reasons behind migration: economic aspirations, seeking asylum or other protection³ or even the mixture

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2 UN General Assembly: In Safety and Dignity: Addressing Large Movements of Refugees and Migrants. *Report of the Secretary-General*, 21 April 2016, A/70/59, para. 1 (hereinafter: UN Safety and Dignity).

3 Persons who are forced to flee across borders but for various reasons are not granted refugee status. See UNHCR: *The New York Declaration for Refugees and Migrants. Answers to Frequently Asked Questions* (hereinafter: UNHCR FAQs). Question 4.

of the two.⁴ The significant part of migration is managed in a regular, orderly manner.⁵ This regular migration does not pose a threat to any State as it is under careful legal control. Irregular migration nonetheless is an ever-growing challenge. It entails illegal border crossing, ungrounded residence,⁶ and quite often organised crimes of smuggling and human trafficking.⁷ As a main rule, entry to any State must be carried out in an authorised, orderly way.⁸ The only exception is provided for refugees directly escaping from danger.⁹ However, nowadays the situation is way more complex. The motives of seeking refuge and aspiring better life conditions are often combined in a delicate way¹⁰ and the migration route is becoming longer as even refugees strive to resettle in the most developed countries. This tendency combined with the large movements of migrants and refugees create a serious legal gap and uncertainty:¹¹ The balance between the human rights of the migrants and the sovereign rights of the States is more and more challenging to stabilise adequately. The attempt of this paper is to clarify some aspects of the current legal framework focusing on the migration challenge in Europe.

The right to asylum beyond the refugee definition of the Geneva Convention

It is undisputed that the right to asylum is a fundamental human right.¹² It is also universally accepted that the action of the state while providing the refugee status is purely declarative¹³ so that the state only acknowledges the *fact* that the person in question is a refugee.¹⁴ Therefore, *prima facie* even the declarative procedure and assessment of the State is unnecessary since provided that the conditions of being a refugee are met under the Geneva Convention and its Protocol, the

4 UN General Assembly: *New York Declaration for Refugees and Migrants: Resolution/Adopted by the General Assembly*. 3 October 2016, A/RES/71/1 (hereinafter: New York Declaration) para. 1.

5 UN Safety and Dignity, para. 87.

6 Eszter Karoliny – Ágoston Mohay: *A nemzetközi migráció jogi keretei*. Pécs, Publikon, 2009. 25.

7 Karoliny–Mohay (2009): op. cit. 26.

8 Tamás Vince Ádány: Nemzetközi jogi szempontok a migrációs válság értelmezéséhez. *Iustum Aequum Salutare*, 12, no. 2 (2016). 240.

9 Ádány (2016): op. cit. 240; UN General Assembly: *Convention Relating to the Status of Refugees*, 28 July 1951 and its 1967 Protocol (hereinafter: Geneva Convention), Article 31.

10 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, 1 January (hereinafter: RSD Handbook) para. 63.

11 Ádány (2016): op. cit. 243.

12 The Universal Declaration of Human Rights, United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) Article 14; Charter of Fundamental Rights of the European Union Article 18; Resolution 2299 (2019) of the Parliamentary Assembly of the Council of Europe, adopted on 28 June 2019: Pushback policies and practice in Council of Europe member States (hereinafter: Pushback Resolution) para. 6; New York Declaration paras. 27 and 67.

13 Dorottya Krisztina Pedryc: A menekült státusz meghatározása az 1951. évi Genfi Egyezmény szerint. *Pázmány Law Working Papers*, no. 5 (2017). 4.

14 RSD Handbook para. II, para. 28; UNHCR: *Refugee Status Determination*. s. a.

person in question is indeed a refugee.¹⁵ In practice, however, the State cannot be eliminated from refugee law relations.¹⁶ Even if it is dogmatically acceptable and teleologically favourable to maintain that being a refugee is a question of facts, the legal consequences of it still must be ensured. In refugee law, these consequences, primarily the protection, cannot be realised without the state.¹⁷ The whole point of refugee law is the fundamental principle that States are responsible for the protection of their nationals.¹⁸ Provided that the individual cannot seek protection from his or her own State due to the conditions laid down in the Geneva Convention, then another State has to provide temporary protection.¹⁹ This role of the State is an obligation under international law.²⁰ Therefore, refugee law usually involves two main participants: the refugee as the entitled party, and the State as the obliged party. Naturally, this entitled–obliged relation is more complex in reality. For example, the refugee is obliged to respect the laws and norms of the host country,²¹ and the State still has the right, or even obligation to control its borders²² and to determine rules on migration.²³ In ideotypical cases, this system can function without any problems. The refugee enters the territory of the host State, promptly seeks refugee protection, the State assesses the application and acknowledges the status based on the needed criteria and circumstances. The State provides temporal protection so that the refugee can remain within its territory.

However, the current refugee system faces many challenges as these anticipated criteria often do not meet. The most problematic issue derives from two phenomena. The first one is that the migration route of the refugees has elongated. The second is that the refuge definition of the 1951 Geneva Convention cannot provide refugee status

15 CJEU, *M. v. Ministerstvo vnitra and Others*, judgment of 14 May 2019 (C-391/16, C-77/17 and C-78/17) para. 90.

16 Tamás Molnár: A migráció nemzetközi jogi szabályozása. In András Jakab – Miklós Könczöl – Attila Menyhárd – Gábor Sulyok (eds.): *Internetes Jogtudományi Enciklopédia* (Nemzetközi jog rovat, rovatszerkesztő: Gábor Sulyok). Para. [3]. 2019.

17 Except the protection provided by the UNHCR itself; however, even this solution is reliant upon State cooperation. These are the mandate refugees. See RSD Handbook para. 16; for its own RSD procedure see UN High Commissioner for Refugees (UNHCR): *Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to RSD under UNHCR's Mandate*. 2020.

18 A/69/981-S/2015/500 (2015) A vital and enduring commitment: implementing the responsibility to protect: Report of the Secretary General para. 7; A/63/677 (2009) Implementing the responsibility to protect: Report of the Secretary General para. 11 (a); ICISS: *International Commission on Intervention and State Sovereignty Report, 2001*. Ottawa. XI.

19 UNHCR FAQs Question 4.

20 New York Declaration para. 70; UN General Assembly: *Report of the United Nations High Commissioner for Refugees. Part II: Global Compact on Refugees (A/73/12)*. New York, 2018 (hereinafter: Global Compact on Refugees) para. 61.

21 The 1951 Geneva Convention Relating to the Status of Refugees Article 2.

22 Council of Europe: Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies, Preamble; ECtHR, *Case of N.D. and N.T. v. SPAIN* (Applications nos. 8675/15 and 8697/15) para. 172.

23 *N.D. and N.T. v. Spain* para. 167; New York Declaration para. 42.

for those fleeing from climate change, or indeed from war and violence.²⁴ Yet, in most cases this is the driving force of migration nowadays²⁵ and States do tend to provide protection in cases of forced migration.²⁶ Yet, these two result in the same legal problem: it is more and more challenging to make distinction between migration for better circumstances and migration to seek refuge. The Geneva Convention is based on a very simple hypothesis: when the State cannot provide safety for its nationals against persecution, the endangered individual is forced to leave the country. He or she might have to cross borders illegally to find safety and refuge, but the hypothesis was that the refugee will apply for asylum at the first proper possibility.²⁷ In most cases it was the neighbouring State. Nowadays, however, it is not as easy to assess whether the individual is entitled to refugee status. When asylum seekers ask protection because of war, violence or climate change, causes not regulated in the Convention, the State is not obliged to declare that they are refugees, as the required persecution criterion is missing.²⁸ In these cases the State either provides some kind of other protection under its national or regional law²⁹ as these laws allow or dictate so, or it can decide whether to deny or grant the refugee status *within* its sovereign right.³⁰ However, in case of the latter, it really is *granting* the refugee status, and not acknowledging it. Therefore, in all cases not covered by the Convention, the State can provide refugee

24 See The 1951 Geneva Convention Relating to the Status of Refugees Article 1.

25 Global Compact on Refugees para. 8; UN Safety and Dignity para. 3.

26 Roger Zetter: *Protection des migrants forcés Etat des lieux des concepts, défis et nouvelles pistes*. Documentation sur la politique de migration, Décembre 2014, 6.2. 90–91.

27 This is the reason why the Geneva Convention provided Article 31 only for those “coming directly from a territory where their life or freedom was threatened in the sense of Article 1”. As the Commentary [Commentary on the Refugee Convention 1951 Articles 2–11, 13–37 Published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997] affirms this deduction: (1) “It will be clearly seen that Article 31 does not obligate any State to admit any refugee into its territory.” (2) The first paragraph of Article 31 has no precedent in earlier conventions. The inclusion of a provision of this kind was proposed in the Secretary-General’s Memorandum to the Ad Hoc Committee because “a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a bona fide refugee. (4) It is clear that Article 31 (1) applies to a refugee who sneaks across the frontier, “direct” from the country when he is threatened with persecution. (7) The requirement that refugees must “present” themselves without delay to the authorities “in order to claim the benefit of Article 31 (1)”, is a very important proviso, which was discussed at some length in the Ad Hoc Committee. On the other hand Article 31 (1) is not applicable if the refugee chooses to remain in a country for a period of time with no intention of presenting himself to the authorities. If he then learns that he is about to be discovered and for that reason gives himself up, Article 31 (1) cannot be invoked.

28 CJEU, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, judgment of 2 March 2010, ECR I-1493) para. 69.

29 Tamás Hoffmann – Tamás Dezső Ziegler: *A menekültügyi jogi szabályozása*. MTA Migrációs Kutatócsoport, 2015. 4.

30 Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967 [Resolution 2312 (XXII)] Article 1; Karoliny–Mohay (2009): op. cit. 3.

status, but it will be its sovereign constitutive act. The same applies to the prolonged migration route. Refugee law is not a legal bazaar. The aim of the refugee is not to find the most favourable country to live in, but purely to find refuge against persecution as soon as possible.³¹ Therefore, the merging motivations for a better life and escape to safety may result that a Syrian national who would have undoubtedly be qualified as a refugee in the Turkish border could not be seen as easily as a refugee at the Swedish border after migrating through the safe countries of Europe. The problem is that these situations are not covered by the Convention therefore national solutions, bilateral or regional solutions must fill the gaps.³² However, these solutions also rely on the regulations of the Convention and do not change the system significantly.³³ Therefore, uncertainty remains. This is why migrants, being refugees or not, do not risk legal border crossing and standard procedures simply because they fear that the result of the assessment will not be satisfying for them.³⁴ Rather, they are willing to take the risk of illegal border crossing since their chances are better that way:³⁵ either they get rejection, which would be the result of legal crossing as well, or they get refugee status or other protective status, which again, would be the result of legal entry. Quite often, however, they can escape from the authorities and either remain in the country in illegality or continue their journey to the desired destination which is not a possibility in case of legal entry under the supervision of the authorities. Connecting the two phenomena together, when someone who is not a refugee under the Convention, but his escape from the country of origin is justifiable and imperative, may go through several transit states until reaching the desired destination where he

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- 31 The difference is based on the two concepts: forced migration and voluntary migration. See International Organization for Migration: Glossary on Migration, International Migration Law no. 34. 77; Jan Niessen: *Diversité et cohésion: de nouveaux défis pour l'intégration des immigrants et des minorités*. Conseil de L'Europe, 2000. 26; Karoliny–Mohay (2009): op. cit. 1.
- 32 However, the UNHCR is concerned about these subsidiary solutions as they may erode the primacy of the Geneva Convention. See Jane McAdam: *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection. Policy Development and Evaluation Service of the United Nations High Commissioner for Refugees, New Issues in Refugee Research, Research Paper*, no. 125, July 2006. 13.
- 33 UN High Commissioner for Refugees: *Refugee Protection: A Guide to International Refugee Law*. 1 December 2001. 16.
- 34 UNHCR Regional Representation for Central Europe: UNHCR's position on Art. 31 of the 1951 Geneva Convention, ref.: HUNBU/OIN/HCR/0130. 3.
- 35 Cf. "There is little likelihood that a foreign country will consent to receive a refugee whose expulsion has been ordered and who is thereby stamped as an undesirable. As every frontier is barred to a refugee whose expulsion has been ordered, only two possibilities are open to him, either not to obey the order and to go into hiding to avoid being caught or to cross a frontier illegally and clandestinely enter the territory of a neighbouring country. In that country too he must go into hiding to avoid being caught. In either case, after a certain time he is discovered, arrested, prosecuted, sentenced and escorted to the frontier after serving his sentence. Caught between two sovereign orders, one ordering him to leave the country and the other forbidding his entry into the neighbouring country, he leads the life of an outlaw and may in the end become a public danger" (UN High Commissioner for Refugees [UNHCR]: *The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis*).

wishes to apply for asylum or other protection. However, to reach this goal, he must cross state borders illegally. If he chooses the legal way, he must justify his presence at the first safe country;³⁶ therefore, he must ask asylum or other protection as it is the only way of justifying his presence in the country.³⁷ This would mean, however, that first, the host state may not recognise the refugee status as it is not covered by the Convention, and second, he cannot continue his route to the desired country in either cases: if his refugee status is granted, he cannot move on since he has no justified reason to do so. Second, if protection is rejected by the state, evidently, he must leave the country, and backwards: to the country of origin or entry.³⁸ It means that both these two phenomena urge migrants to choose irregular migration even if they are entitled to refugee status at the first place.

Consequently, the question arises: is there a right to asylum in cases not provided by the Convention? If the right to asylum means that the individual who enters the State either legally or illegally has a right to request the assessment of refugee status the answer is affirmative. The reasons are rather practical than legal. As a main rule, the State can reject the entrance and the presence of the alien if he or she is not a refugee.³⁹ However, it can only be determined through a refugee status determination assessment (RSD).⁴⁰ This is why until the procedure is completed, the asylum seeker is presumed to be a refugee.⁴¹ It follows that seeking asylum and requesting RSD assessment is the right of the alien.⁴² Hence, it is the obligation of the state to carry out the procedure in substance and in an individualised manner.⁴³ It is also maintained

36 Crossing unsafe countries in most cases imperatively requires illegal border crossing due to the well-based fear of the migrant from the authorities. Cf. “Refugees who after leaving one country of persecution, arrived in another country where they might possibly remain unmolested for a certain period, but would then again be in danger of persecution. If, as a result, they moved on again and reached a country of true asylum.... it would be very unfortunate if [they were] ... penalized for not having proceeded direct to the country of asylum” [Commentary on the Refugee Convention 1951 Articles 2–11, 13–37 Published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997 (4)].

37 It is needed because international law only provides right to residence to refugees, migrants need to resort to the required national procedures concerning regular migration. Cf. Rosa da Costa: Rights of Refugees in the Context of Integration, Legal Standards and Recommendations. *Legal and Protection Policy Research Series of the UNHCR, Division of International Protection Services, Polas/2006/02*, June 2006. 41.

38 Gregor Noll: Rejected Asylum Seekers: The Problem of Return. *Policy Development and Evaluation Service of the United Nations High Commissioner for Refugees, New Issues in Refugee Research, Working Paper*, no. 4, May 1999. 1.

39 N.D. and N.T. v. Spain para. 167, para. 179; ECtHR, Case of Paposhvili v. Belgium (Application no. 41738/10) para. 172.

40 ECtHR, Case of Ilias and Ahmed v. Hungary (Application no. 47287/15) para. 137.

41 Ádány (2016): op. cit. 243.

42 Pushback Resolution para. 6; 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 (recast) (“the Asylum Procedures Directive”) (hereinafter: Directive 2013/32/EU) Article 43.

43 There are occasions where the States decide to collectively provide refugee status for a group of people. However, it is a positive derogation from the principle of individual RSD assessment as it

that RSD assessment is not an *ex officio* state act, so that it is dependent on a request.⁴⁴ The result of the RSD can be twofold. It can result refugee status or other protection. The other possible outcome of course is the rejection of the request. Sadly, it entails that the alien has no right to be present within the given state and consequences of illegal border crossing can be applied.⁴⁵ It means that the alien can be sent back to the country of origin or to the country of entry.⁴⁶ However, it can be quite problematic due to the principle of *non-refoulement*.

The prohibition of non-refoulement and the safe third states concept

The principle of *non-refoulement* is problematic due to the fact that it can make it impossible, or at least unlawful, to expel aliens from the territory of a given state even if they have no legal ground to be present there. It can result that a migrant is not entitled to remain in the country due to the lack of refugee status, but he or she cannot be transferred back to the country of origin or to the country of entry either. Therefore, the state might be urged to provide a *quasi-refugee* status or alike, though the state intended the opposite, i.e. to get rid of a foreigner who has no legal ground to remain within its territory. Once again, the interests of the two parties are in conflict: the State's legitimate interest is to control who is allowed to enter and reside in its territory,⁴⁷ and the legitimate interest of the alien is not to be expelled to a state where his or her life or well-being is endangered.⁴⁸ On the one hand, it is widely accepted that the State has the sovereign right to control its borders, to determine who can enter and reside within its territory and the State has the right to expel those aliens who do not meet these requirements.⁴⁹ On the other hand, migrants have the

facilitates to determine refugee status for persons belonging to the same group. This practice is the *Prima Facie* RSD. Cf. Global Compact on Refugees para. 61.

44 Cf. *mutatis mutandis*: ECtHR, *Case of Khlaifia and Others v. Italy* (Application no. 16483/12) para. 247.

45 It is worth mentioning that unorderly entrance is still illegal even if the entrant is a refugee, but in his case, there shall be no sanctions applied.

46 *Ilias and Ahmed v. Hungary* para. 134.

47 International Organization for Migration: *Immigration Detention and Alternatives to Detention. Global Compact Thematic Paper*, 2017. 5; Office of the High Commissioner for Human Rights: *Migration, Human Rights and Governance. Handbook for Parliamentarians N° 24*. Co-published by the Inter-Parliamentary Union, the International Labour Organization, and the United Nations, 2015. 19; Dora Kostakopoulou: *Irregular Migration and Migration Theory: Making State Authorisation Less Relevant*. In Barbara Bogusz – Ryszard Cholewinski – Adam Cygan – Erika Szyszczak (eds.): *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. Leiden–Boston, Martinus Nijhoff, 2004. 42; Richard Barnes: *The International Law of the Sea and Migration Control*. In Bernard Ryan – Valsamis Mitsilegas (eds.): *Extraterritorial Immigration Control, Legal Challenges*. Leiden–Boston, Martinus Nijhoff, 2010. 121; Amnesty International: *The Human Rights Risks of External Migration Policies*. 2017. 4.

48 Cf. UN: *Global Compact for Safe, Orderly and Regular Migration*, Final Draft (hereinafter: *Global Compact on Migration*), 11 July 2018 Objective (21), para. 37 a).

49 International Law Commission: *Draft articles on the expulsion of aliens, with commentaries* 2014 Adopted by the International Law Commission at its sixty-sixth session, in 2014, and

right to seek asylum and the State is obliged to evaluate such a claim. Fundamentally, *non-refoulement* is the right of asylum seekers;⁵⁰ however, within the scope of the Council of Europe and the European Convention of Human Rights *non-refoulement* is applicable to all aliens.⁵¹ The most evident situation is when an asylum seeker faces the rejection of his application and consequently, he has to be expelled to the country of origin. Unless his return would mean serious risk to his safety.⁵² Therefore, the principle of *non-refoulement* requires double evaluation from the State: first the RSD, and if it is negative to the asylum seeker, the State must make sure that the country of origin does not pose a serious threat to the expelled.⁵³ This assessment must be in substance and in an individualised manner.⁵⁴

The situation is more complex when the foreign is not expelled to the country of origin but to the country of entry. Even more challenging when his refugee application is not examined in the merits. These lead to the concept of safe third countries. States have the right to determine so-called safe third countries lists,⁵⁵ naturally, within the framework of public international law norms.⁵⁶ The restraint means that basically those countries cannot be considered safe third countries to which the expulsion of aliens would violate the principle of *non-refoulement*.⁵⁷ Therefore, the safe third country only acts as a *presumption iuris*.⁵⁸ The reason for such lists is to ease the RSD process or even to create a preliminary question, *quasi* an issue of admissibility: if the asylum seeker or the migrant enters the country from a safe third country then it had the possibility to a fair asylum procedure; therefore, the migrant should have applied for refugee status there. Any movement afterwards is of a nature of economic migration for which only regular migration is acceptable for the states.⁵⁹ However, this state practice can lead to standardised decisions: all who enter from a safe third

submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10) (hereinafter: ILC: Draft articles on expulsion) para. 3; OHCHR: Expulsions of Aliens in International Human Rights Law. *Discussion Paper Geneva*, September 2006. 1; John P. Grant – J. Craig Barker: *Parry and Grant Encyclopaedic Dictionary of International Law*. New York, Oxford University Press, 2009. 24.

50 Geneva Convention Article 31.

51 N.D. and N.T. v. Spain para. 188.

52 Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975–2017, No. 6 (XXVIII), Non-refoulement (1977) – 28th Session of the Executive Committee (c).

53 Ilias and Ahmed v. Hungary para. 134.

54 Ilias and Ahmed v. Hungary para. 152, 155; Global Compact on Migration para. 37.

55 Ilias and Ahmed v. Hungary para. 152; ECtHR, Research Division: Articles 2, 3, 8 and 13. The concept of a “safe third country” in the case law of the Court (hereinafter: ECtHR, Research Division). 7 para. 6.

56 Directive 2013/32/EU: Preamble para. 46.

57 Cf. Directive 2013/32/EU Article 38 1).

58 ECtHR, Research Division: 7 para. 6; Ilias and Ahmed v. Hungary para. 152, 163.

59 Cf. “The concept indirectly creates an obligation to seek asylum in the geographically closest safe State, punishing non-compliance with forced removal and limiting self-determination as regards the choice of the country of refuge” (Violeta Moreno-Lax: The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties. In Guy S. Goodwin-Gill – Philippe Weckel

country may face the automatic rejection of their refugee application.⁶⁰ According to the European Court of Human Rights, the concept of safe third country cannot mean the lack of the assessment of the individual circumstances in relation to the third country.⁶¹ The Court also stated that *non-refoulement* is to be examined in detail even if there is no RSD.⁶² It elaborated that it is against the principle of *non-refoulement* if the State expels the asylum seeker to the country of entry where the principle of *non-refoulement* is not adequately respected.⁶³ The reason is obvious. Such a chain of refoulements⁶⁴ can result in the fact that the migrant is sent back to a country of entry without due migration assessment procedure or even to the country of origin. Either way, he is imposed to serious danger and uncertainty. To avoid this and to fully respect the *non-refoulement*, states have to individually revise the presumption based on the safe third countries lists, or the state must ensure that the rights of the expelled are guaranteed and the expulsion is executed in an organised and orderly manner.⁶⁵ Otherwise, the expulsion will not only breach the *non-refoulement* principle but the lack of individual examination, hence the automatic application of safe third state lists can result in collective expulsion.⁶⁶

The prohibition of collective expulsion in the context of illegal migration

The prohibition of collective expulsion is not strictly a principle of refugee law, as it is applicable to any alien regardless of their status and the legality of their presence in the country.⁶⁷ Nevertheless, it is a crucial principle in situations of migration. Expulsion of aliens means that the persons who are not the nationals of the state of presence are compelled to leave the country.⁶⁸ Provided that the individual has no legal ground to be present, the state has the right to expel him within the national and international legal framework.⁶⁹ The most important guarantee against unlawful expulsion is the

[eds.]: *Migration and Refugee Protection in the 21st Century: Legal Aspects*. Leiden–Boston, Martinus Nijhoff, 2015. 671).

60 Ilias and Ahmed v. Hungary para. 158; AEDH, EuroMed Rights, FIDH: “Safe” Countries: A Denial of the Right of Asylum. May 2016. 8; Júlia Iván: Where Do State Responsibility Begin and End? Border Expulsions and State Responsibility. In Maria O’Sullivan – Dallal Stevens (eds.): *States, the Law and Access to Refugee Protection. Fortresses and Fairness*. Oxford–Portland, Hart, 2017. 61.

61 Ilias and Ahmed v. Hungary para. 134, 137, 152; N.D. and N.T. v. SPAIN para. 188.

62 Ilias and Ahmed v. Hungary paras. 138, 145.

63 Ilias and Ahmed v. Hungary paras. 158–159.

64 Roberto Cortinovis: The Role and Limits of the Safe Third Country Concept in EU Asylum Policy. *Discussion Brief of the Research Social Platform on Migration and Asylum*, July 2018. 9.

65 Ilias and Ahmed v. Hungary para. 161.

66 Cf. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950 Article 4.

67 N.D. and N.T. v. Spain para. 181.

68 ILC: Draft articles on expulsion Article 2 a)–b).

69 ILC: Draft articles on expulsion Article 3, Article 4, Article 5.

prohibition of collective expulsion.⁷⁰ Therefore, it prohibits the expulsion of aliens *as a group*.⁷¹ The term ‘collective’ does not refer to its material sense so that the members share specific characteristics,⁷² rather it should be seen as a procedural term. “The decisive criterion in order for an expulsion to be characterised as ‘collective’ is the absence of ‘a reasonable and objective examination of the particular case of each individual alien of the group.’”⁷³ Hence, a state may expel concomitantly the members of the group of aliens as far as the procedures are carried out “on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”⁷⁴ Evidently, it refers back to the right of refugees and migrants, meaning that they are entitled to due process of law while assessing their status and right to entry or remain.⁷⁵ Also, it is in correlation with the principle that the return of the migrants with no rights to stay must follow an individual assessment.⁷⁶ Therefore, the prohibition of collective expulsion clearly relates to the law of migration: the aim of the individual assessment is to determine whether there is a legal obstacle against the expulsion.⁷⁷ There can be two main obstacles: a) if the alien is entitled to refugee status or other international protection;⁷⁸ or b) if the foreign cannot be sent back to the country of origin or the country of entrance without the violation of *non-refoulement*.⁷⁹ However, there are situations where the state cannot be expected to assess these issues as this failure cannot be attributed to the state but rather to the conduct of the alien. The typical situations where collective expulsion or methods alike are used are the ‘pushbacks’, which are quite regular in Europe during the migrant crisis.⁸⁰ Pushback means the refusal of entry and expulsion without individual assessment⁸¹ and usually takes place when a large group of migrants attempt to enter illegally.⁸² In these situations, the states are in a delicate situation, yet as a main rule, they must respect the prohibition of collective expulsion.⁸³

However, the ECtHR has found the violation of the prohibition in only four cases. In the *Čonka* case the expulsion was carried before the completion of the asylum

70 Charter of Fundamental Rights of the European Union Article 19 1); ILC: Draft articles on expulsion Article 9 2).

71 ILC: Draft articles on expulsion Article 9 1); N.D. and N.T. v. Spain para. 192.

72 For example: origin, nationality, beliefs, etc.

73 N.D. and N.T. v. Spain para. 195.

74 ILC: Draft articles on expulsion Article 9 3); Khlaifia and Others v. Italy para. 237.

75 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (subsequent version: Directive 2013/32/EU of 26 June 2013) (hereinafter: Council Directive 2005/85/EC) Article 8 2 a).

76 CJEU, Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques, case C-249/13, judgment of 11 December 2014, paras. 28–35; ILC: Draft articles on expulsion Article 9 (4).

77 Khlaifia and Others v. Italy para. 238; UN Safety and Dignity para. 56.

78 Cf. UN Safety and Dignity para. 72.

79 UN Safety and Dignity para. 92.

80 Pushback Resolution para. 2.

81 Pushback Resolution para. 1.

82 Pushback Resolution para. 3.

83 Pushback Resolution para. 6.

procedure and was performed regardless of the asylum request.⁸⁴ The Court found in the *Georgia v. Russia* case that a ‘routine of expulsion’ when following a regular pattern resulting in a coordinated policy of arrest, detention and expulsion without individual examination is against the prohibition of collective expulsion.⁸⁵ The same applies to situations where migrant intercepted on the high seas are sent back immediately and without identity check to the coast of departure (*Hirsi Jamaa and Others*)⁸⁶ The principle is also breached in case of automatic returns without the possibility to seek asylum as found in the *Sharifi and Others* case.⁸⁷

However, there are cases when the absence of an individual assessment in substance is not the responsibility of the state. In the *Khlaifia and Others* the ECtHR established that standardised refuse-of-entry orders where only the personal data differs may not,⁸⁸ *per se*, amount to collective expulsion,⁸⁹ provided that the foreigners had the opportunity to express the arguments against their expulsion.⁹⁰ It is not necessary to hold a hearing. Any real opportunity for the migrant to challenge the decision may suffice.⁹¹ Therefore, the Court held that the prohibition of collective expulsion is not violated “where the lack of an individual expulsion decision can be attributed to the culpable conduct of the person concerned.”⁹² In this particular case, the applicant did not raise any argument against the expulsion nor did they provide ground to the legality of their entry and presence in Italy during the adequate opportunities.⁹³

The culpable conduct of the individual also occurred in a milestone case where the Grand Chamber changed the decision of the Chamber and provided a legal munition to states to tackle unauthorised border crossing *en masse*.⁹⁴ The case involved two individuals who participated in an organised attempt to storm the border fences between Morocco and Spanish territory involving a large number of migrants.⁹⁵ The Spanish *Guardia Civil* arrested the participants who were sent back to Moroccan territory through an immediate handover.⁹⁶ The applicants claimed that due to the lack of individual assessment their removal was a collective expulsion.⁹⁷ The Court

84 ECtHR: Case of Čonka v. Belgium (Application no. 51564/99) (Chamber judgment) 5 February 2002 paras. 60–63.

85 ECtHR: Case of *Georgia v. Russia* (Application no. 13255/07) judgment of 31 January 2019 paras.170–178.

86 ECtHR: Case of *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09) judgment of 23 February 2012 para. 185.

87 ECtHR: *Sharifi and Others v. Italy and Greece* (Application no. 16643/09) (Chamber judgment) 21 October 2014 paras. 214–225.

88 Cf. *Khlaifia and Others v. Italy* para. 214.

89 *Khlaifia and Others v. Italy* para. 251.

90 *Khlaifia and Others v. Italy* para. 239; *N.D. and N.T. v. Spain* para. 199.

91 *Khlaifia and Others v. Italy* para. 248; CJEU: *Khaled Boudjlida* paras. 55, 64–65 and 67.

92 *Khlaifia and Others v. Italy* para. 240.

93 *Khlaifia and Others v. Italy* para. 247.

94 *N.D. and N.T. v. Spain* para. 166.

95 *N.D. and N.T. v. Spain* para. 24.

96 *N.D. and N.T. v. Spain* para. 25.

97 *N.D. and N.T. v. Spain* para. 123.

established that the procedure was an expulsion;⁹⁸ however, the absence of the individual assessment is the result of the conduct of the applicants.⁹⁹ The applicants had access to means of legal entry and access to seek asylum.¹⁰⁰ Since they could not justify the reason of illegal entry instead,¹⁰¹ the ECtHR held that if the state provides adequate opportunities for legal entry and seeking asylum, it can fulfil its obligation to control borders,¹⁰² and it can require applications for international protection to be submitted at the existing border crossing points.¹⁰³ “Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons [...], to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force.”¹⁰⁴ Therefore in such cases, the *immediate* measures of the authorities to protect orderly border crossing do not entail the violation of collective expulsion.

Conclusion

It seems evident that the 1951 Geneva Convention and its 1967 Protocol cannot provide an adequate legal answer for the delicate question of how to deal with migrants who could have been identified as refugees during several of the countries they have crossed, but ultimately – and humanly understandably – they wished not to submit their application at the first safe country. The regional and national legal solutions can fill the international legal gap, but European states – either being part of the EU or the Council of Europe or both – must maintain and respect certain safeguards determined mainly by the ECtHR and partly by the CJEU. The most important one is the prohibition of refoulement which is connected to the issue of whether the country of entry maintains an adequate refugee assessment regime. Additionally, although states have the right to apply the safe third country lists, this can never result in the lack of individual and in merit assessment of the refugee application as it would lead to collective expulsion. It may seem that the jurisprudence of the European courts

98 N.D. and N.T. v. Spain para. 191.

99 N.D. and N.T. v. Spain para. 200.

100 N.D. and N.T. v. Spain para. 212; Cf. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) Article 4 “1. External borders may be crossed only at border crossing points and during the fixed opening hours” and “3. Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive”; see also Council Directive 2005/85/EC Article 6: “1. Member States may require that applications for asylum be made in person and/or at a designated place”.

101 N.D. and N.T. v. Spain para. 212.

102 N.D. and N.T. v. Spain para. 167, 201.

103 N.D. and N.T. v. Spain para. 209–210.

104 N.D. and N.T. v. Spain para. 231.

favours too much the migrants, leaving almost no room for the states to protect their borders, the population and the public order against unwanted and – more importantly – illegal migrants. However, the tendency did not only shifted in the domain of politics, but in the case law of the courts as well. The ECtHR definitively stated that the states have the right to step up against *en masse* and violent attempts of border storms, even by pushback procedures. This could even mean that individual assessment is not respected and the individuals participating in the action are expelled collectively. It is important to state, however, that this only prevails if this procedure of the state constitutes an immediate measure – hence not the basic RSD practice – and the individuals still need to be provided with a real chance to object the decision.

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