10-11-2021

‘Safe third countries’ and our obligations to others

Paul Linden-Retek
University at Buffalo School of Law

Post 19, Baldy Center Blog, October 11, 2021

'Safe third countries' and our obligations to others

Paul Linden-Retek, Lecturer in Law & Society; Research Fellow at The Baldy Center for Law and Social Policy

Keywords: Conflict and Post-Conflict Studies; Culture and Society, Health and Society; Inequality; Human Rights, Civil Rights; International Relations, Law, Trade and Globalization; Law and Society; Legal and Professional Ethics; Social Justice and Social Change; Politics; Public Policy.

The devastating images of chaos and suffering in Afghanistan have left an indelible mark on citizens and policy-makers in the West. They have made the evacuation of those Afghans who served alongside U.S. and European militaries a moral obligation—and raised the question whether that obligation must extend, as well, to any and all Afghans who are imperiled by the return of Taliban rule.

The pledge that many countries—Canada, the United Kingdom, the United States, among them—will resettle tens of thousands of Afghan refugees is a positive development. But it is only a beginning—and not solely in the sense that these quotas remain far too conservative and that many more Afghans can build a home with us, safely and fairly. These policies are a beginning, too, in that we must think carefully about how to sustain such moral commitments over time.

In today's political climate, the commitment of states to their obligations under international refugee law is a fragile, often fleeting affair. French President Emmanuel Macron, while expressing solidarity with Afghans, immediately added that Europe must protect itself against 'major irregular migratory flows'. The leader of Germany's Christian Democrats tweeted that Germany must not repeat 2015, when the country opened its borders to Syrian refugees.

If the recent history of mass migration is a guide, we will see states, particularly those in the Global North, enact policies designed to control and to impede the free movement of refugees seeking safety. Some will be plain to see: the construction of border walls, the interdiction of ships at sea. Many of these efforts will be illegal. They will violate key provisions of the 1951 Refugee Convention and its codifications in domestic law—most prominently the principle of *'non-refoulement',* one of international human rights law's most sacred principles that prohibits states from returning anyone to where they will face danger of persecution.

Some of these actions, however, will have the cover of law. Not only will they appear to pass international legal muster; they will make active use of specific, long-standing legal concepts in refugee law itself to effectuate their goals of preventing refugees' free movement. Among them is the so-called 'safe third country' (STC) concept.

The concept's fundamental assumption is that certain asylum seekers may be sent, without full scrutiny of their asylum claim, to third states if those territories can be considered safe. It emerged first in the European Union, where concerns about unevenly shared burdens to hear asylum claims were attributed to the supposed possibility of 'forum shopping', whereby applicants would selectively apply in those Member States that are more generous in their asylum process. The principle has a number of applications and uses: as a filter for the admissibility of asylum claims and in some cases to deny applicants refugee status at the merits phase of proceedings; and as grounds for the accelerated return of refugees who have arrived in a state's territory but not yet submitted an application for asylum.

Scholars of the concept have focused their attention principally on the conditions under which STC transfers lawfully accord with the 1951 Convention's guarantees of effective protection of individual rights. Many have noted that states face countless challenges—practical and epistemic—in purporting to secure such guarantees and have thereby warned that the 'safe third country' concept might simply be infeasible. Few studies have spoken to the concept's intrinsic legality in light of human rights principles, and their findings have been tentative or mixed.

In ongoing work, I examine the effects of STC rules in the European Union (through the Dublin Regulation and in arrangements with Turkey) and in bilateral asylum cooperation agreements between the United States and Mexico, Guatemala, El Salvador, and Honduras. I offer a new analytic frame for critique. I reconceive the nature of the fundamental harm at stake in the 'safe third country' concept as a violation not, in the first instance, of the effective protection of individual human rights but instead of the principle of democratic responsibility. The key wrong is better conceptualized as a relational and distributive harm before it is felt as an individual one. It is relational in that it distorts the character of the relationship between the removing state and the individual refugee, which should be seen, I argue, as a relationship among those with meaningful agency. And it is distributive in that it unfairly maldistributes responsibilities among states for the protection of refugee rights, responsibilities that should be seen as shared among those with meaningful agency, as well. My argument does not deny that individual rights violations do indeed come as effects of that core harm. But as effects, they do not yet reveal the most vital dynamics of the concept—and why, even should its applications be made to satisfy individual rights *minima*, the 'safe third country' concept would remain immoral and unlawful.

Focusing on individual rights protection alone is too passive a mode of legal critique—and, as I argue, inadequately reflects recent important doctrinal innovations in international human rights law and scholarship. New conceptions of 'functional jurisdiction', for example, that emphasize creative, evolving

theories of effective control and the duty to prevent harm are usefully understood as democratic and relational concepts at their heart. The core illegality of the safe third country concept thereby lies in the manner it insulates the state from shared accountability in its relations with the refugee and the foreigner alike.

Consider how STC rules can entail subtle but consequential shifts in the burdens and standards of proof required of refugees seeking asylum. Under the Trump Administration's modification to asylum procedures in the United States, applicants who traveled through safe third countries were automatically subject to withholding of removal proceedings, which demand a higher standard of proof for establishing fear of persecution than do petitions for asylum and disregard any justification for the refugee's secondary movement. These shifts alter the dispositions of the questions asked and the testimony required—and in so doing change the nature of what the state hears. They displace in their own ways the applicant's agency: they fragment the integrity of the story a refugee can wish to tell, make it more difficult to understand how trauma can inform inconsistencies in that story, and thus prevent a responsive judgment on the merits of the claim to protection.

Seeing these broader dimensions of asylum law matters deeply. The language of rights can often appear too narrow. But we should find more in human rights and affirm, indeed, what those who assert rights for themselves have long known: that while a rights claim might seek redress for an individual harm, it also indicts the relations of recognition, power, and material distribution that make this harm possible.

All of this suggests that the normative horizon of international human rights law is not exhausted by the protection of the individual. The rights of refugees defend not only those who seek asylum—they also promise to restore concerns about equality and fairness to our sense of the world. Today, and in the months ahead, we should not close our eyes to them.