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Safety as subjective: implementing the 'Safe Third Country' concept in practice

A multidisciplinary analysis of its implications on the international refugee protection regime

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1 Introduction

1.1 Introductory remarks

The international refugee protection regime is founded on the 1951 Convention on the Status of Refugees and its 1967 Protocol which recognises core rights and guarantees for those in need of international protection. A central component of this protection is the customary international legal principle of *non-refoulement* which protects refugees or other protection-seekers from being returned to a country in which they risk persecution[1]. Another key component of the protection regime is the fundamental right to seek and enjoy asylum from persecution, expressed in the Universal Declaration on Human Rights Article 14. However, this right is limited to the extent that it does not clearly state whether or not a refugee has a right to claim protection in a *particular* country[2]. The absence of such a clear-cut right has opened up space in refugee and asylum law for practices through which states may declare an asylum application inadmissible pursuant that the applicant has the opportunity to seek asylum elsewhere. This idea has been formally expressed through the 'Safe Third Country' (STC) concept. Defined by the United Nations High Commissioner for Refugees (UNHCR), such policies allow for the return or transfer of an asylum seeker to "A (third) state where they *had* found, *could have* found or, pursuant to a formal agreement, *can* find international protection."[3] According to this definition, states *may* choose to deny an applicant access to their asylum system, if he or she can find protection in another state. The concept was formally codified in the EU Asylum Procedures Directive in 2005[4] along with other 'safe country'-practices such as conceptualisations of 'First Country of Asylum and 'Safe Country of Origin'.

In 2015 about 1.25 million refugees and asylum-seekers arrived at European borders, many of whom fleeing war, violence and persecution[5]. This event was generally referred to as both a 'migrant/refugee crisis' and a 'mass influx'. It is debatable whether or not this event actually amounted to a crisis, as the numbers arriving in Europe, although high compared to previous years, only constituted a small portion of the total number of forcibly displaced persons

[1] Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', 162. The principle of non-refoulement is also embedded in Article 3 of the Convention against Torture (CAT) and is also a key component of the customary international law prohibiting torture or cruel, inhumane or degrading treatment.

[2] Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 35.

[3] UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries', 1 (emphasis added).

[4] Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 27.

[5] Greussing and Boomgaarden, 'Shifting the Refugee Narrative?', 1749.

worldwide that year[6]. Further, the UNHCR claim that what constitutes a 'mass or large-scale influx' has to be defined according to the resources available in the receiving country, and that the expression should be understood as a "Significant number of arrivals in a country over a short time period."[7] If we consider Greece or Italy, both of which experienced a concentrated influx of refugees at the time, the event may be understood as a mass influx, despite the overall high level of resources in Europe as a whole.

Although the event did not necessarily amount to a crisis, it was certainly described as one by Western media and by states whose domestic politics was highly affected by the influx[8]. The EU response varied to a great extent; however, one may still be able to draw some general conclusions. Notwithstanding a couple of exceptions (Germany and Sweden) most EU states and bordering third states closed down their borders and pursued a tightening of their immigration and asylum policies in response to the upsurge in arrivals. Several states pursued policies favouring national interests over solidarity and cooperation towards a collective response through responsibility-sharing[9]. Immigration policies which focus on discouraging or preventing migrants and refugees from reaching the physical border of a state are often referred to as containment policies[10]. Overall, the rise in so-called refugee containment policies can be seen as a general response to the influx of refugees to Europe four years ago.

This thesis will focus on analysing the nature of the Safe Third Country concept and its application in practice, especially following the 2015-influx. It will place the concept within the broader context of policies supporting containment of refugees outside of European borders. The thesis will engage with the different tools of containment, often referred to as efforts to 'externalise' migration control[11]. STC practices are represented among efforts to restrict asylum seekers' access to asylum procedures[12]. The thesis will analyse the origins and premises of the STC concept highlighting its development and legal scope of application as well as the wider political nature of the concept. Following this, the main implications arising from the application of the STC concept will be discussed.

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[6] See UNHCR, 'UNHCR Global Trends, Forced Displacement in 2015' 65,3 people were forcibly displaced worldwide. This number includes refugees, internally displaced persons and asylum-seekers.

[7] UNHCR, 'UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx', col. 3.

[8] Greussing and Boomgaarden, 'Shifting the Refugee Narrative?', 1749.

[9] Greenhill, 'Open Arms Behind Barred Doors', 317.

[10] Grahl-Madsen, 'Identifying the World's Refugees', 20.

[11] See Gammeltoft-Hansen, *Access to Asylum*, 15–16.

[12] Gammeltoft-Hansen, 15.

Additionally, the thesis will explore two particular cases where the concept was applied following the events of 2015. Firstly, the EU-Turkey Deal where Turkey was considered as a safe third country to redirect those seeking protection in Europe. Secondly, the Storskog border crossing-case in Norway which obtained both domestic and international criticism as it pertained to classifying Russia as a safe third country[13]. Lastly, the thesis will explore a *lex ferenda* discussion, regarding the European Commissions' proposal to pass a new Asylum Procedures Regulation which aims to change the criteria required for STC transfers[14]. The conclusion will offer a summary of the main findings and present the challenges the increased and expanded use of STC referrals poses to securing effective protection of the rights of those seeking asylum from persecution in the future.

1.2 Research questions

The application of the STC concept is a controversial feature of the European refugee protection regime. The overarching question explored in this thesis is as follows: *Which implications for refugee protection arise through the application of the 'Safe Third Country'-concept in practice?* In answering this overall question, the thesis will examine the following sub-questions:

1) In what ways has the refugee issue been 'securitized' in Europe and what, if any, are the linkages between such efforts and the STC concept?
2) What is the legal and political scope of application of the STC concept and how does it alter state responsibility for refugees?
3) In what ways, if any, do political concerns of individual states affect the application of the STC concept?
4) What are the challenges for the future application of the STC concept considering the preservation of the refugee protection regime?

After systematically going through these questions, the aim is to have demonstrated a deeper understanding of the ways in which STC practices affect the refugee protection regime and the rights of those seeking protection in Europe as well as how certain political mechanisms affect the application of such practices.

[13] Trellevik, 'Norge får refs av NOAS og Helsingforskomiteen'.

[14] European Council on Refugees and Exiles (ECRE), 'Debunking the Safe Third Country Myth', 2.

1.3 Thesis statement

This thesis aims to establish the links between the STC concept and refugee protection, as well as the implications of the former on the latter. It will show that an increase in the application of 'Safe Third Country'- policies may lead to a deterioration of the international refugee protection regime, both considering the rights of refugees as well as the system of responsibility-sharing between nation states. STC practices may be seen as contributing elements towards the weakening of well-established duties and responsibilities concerning refugees, as national sovereignty is increasingly prioritised by states. Hence, the concept can be applied in practice in order to circumvent international responsibilities which arise once asylum is sought at the border. Furthermore, the thesis contends that the STC concept is not only problematic in its own right but is also subject to political pressures aiming to widen its scope and application.

Several core arguments will be put forward in this thesis. Firstly, it will be argued that refugees have increasingly been framed as a security issue in Europe and that a set of political efforts to externalise migration are largely a result of that. Secondly, I aim to outline the origins, premises and legal scope of the STC concept describing the ways in which it affects states' responsibility to offer protection to refugees. Thirdly, the thesis will argue that the STC concept can be seen in conjunction with broader externalisation efforts. While it is not necessarily a clear-cut expression of securitization, it remains vulnerable to the political effects of such discourses. STC practices have existed in European legal systems for decades and if their criteria and safeguards are followed strictly, the concept does not necessarily challenge refugee protection. However, my fourth argument is that there are several implications for refugee protection connected to the application of the concept in practice. These include general declarations of safety, risks of exposure to direct or indirect refoulement and limited appeal rights.

The thesis will illustrate its fifth main argument through two contemporary cases where the STC concept has been applied in Europe; through the EU statement declaring Turkey as safe and the efforts of Norway to return asylum-seekers to Russia. I will make the claim that when such policies are applied in contentious situations where the refugee issue has been politicised, the STC concept risks being 'abused' by political forces seeking to contain refugees and migrants outside of physical borders. Furthermore, as the two case studies will show the STC concept can be subject to varying interpretations moving beyond its original legal scope. This further implicates effective refugee protection as the general issues surrounding STC practices are exacerbated. Hence, the underlying issue lies not with the nature of STC practices *per se*, but rather the consequences flowing from ignoring legal

criteria and safeguards which must be in place for STC referrals to be considered as legitimate. Efforts of states to prioritise national interests constructed through a security discourse to contain asylum-seekers elsewhere may ultimately shrink the individual right to seek asylum in Europe.

Lastly, the thesis aims to identify the ways in which the refugee regime may be challenged in the future through widened application of the STC concept. There is evidence to suggest that the criteria for STC transfers may be lowered considerably if a new EU Regulation on asylum procedures is adopted; thus, furthering risks of refoulement. Additionally, if the concept is subject to increased or even obligatory use, it may further erode the individual right to seek asylum in Europe as states are increasingly able to deflect responsibility for processing asylum claims.

Overall, the thesis will make the claim that the legal premise of the STC concept is flawed as it redefines the traditional conception of refugee protection. While the concept is not intrinsically political, it has become politicised at the point of interpretation by nation states. Through the increased and expanded subjective application of the concept, states may relieve themselves of responsibility under international refugee law. Thus, STC policies remain detrimental to the subsistence of the current refugee protection regime. If the trend continues in the future, the STC concept may contribute to the further erosion of some of the most fundamental rights awarded to those seeking asylum from persecution within that regime. The next chapter will outline the methods and theories which will be employed throughout the thesis in order to substantiate the claims made in this section.

2 Methodology and theory

2.1 Introduction

In order to further explore the research questions and substantiate the claims made in the thesis statement above it must be established which research methods and theories are most suitable for this thesis. The 'Safe Third Country' (STC) concept has both legal and political dimensions attached to it. Thus, it is important to analyse it from a multidisciplinary perspective. Firstly, to explore the legal issues surrounding the use of STC and potential consequences for the rights of refugees. Secondly, to place the legal analysis within a wider framework exploring the reasons *why* states may increasingly choose containment practices rather than processing applications within their own jurisdiction. This chapter will outline a methodology pursuant to a multidisciplinary approach, combining legal methods with insights from social science methods, specifically International Relations theory.

2.2 Methods

Refugee Studies as a field of research has no set of specific methods attached to it[15]. A multitude of academic scholarship engage with the topic ranging from law, to sociology and psychology. Arguably, one of refugee studies' distinctive characters is its multi-disciplinary nature[16]. Because of this, it is possible to use knowledge from different fields of research in an effort to analyse issues concerning refugees. This thesis can be placed within the general field of Refugee Studies. When deciding which methods to pursue within this field it is useful to look at the nature of the object of study, which in this case is the international refugee protection regime, and specifically STC practices.

It has been identified that studying the international refugee protection regime can bring about ethical implications[17]. This is mainly because the concepts that are dealt with in this field are often politically charged, and that those conducting research are subject to their own ethical biases on how to best secure the rights of refugees. As the field is so deeply rooted in the social world it is important to be aware of the processes in which its concepts are constructed[18]. Because of this added 'social layer' to the study of refugees it may be fruitful to combine legal methods with ideas from political science in order to truly understand the effects concepts and policies have on our societies.

International Relations (IR) theory can provide such alternative understandings of the issues at hand through situating the law in a broader socio-political context. Theories within IR and international legal research share similar theoretical divisions[19]. For example, both realism and legal positivism focus on the role of the sovereign state and largely disregard the role of norms and ethics in their approaches[20]. Thus, it is possible to combine the two disciplines. As will be outlined below, this thesis will make use of approaches which deviate from the classical views of realism and positivism, focusing on the social constructs underpinning international law. Knowledge gained from IR theory can arguably contribute to a greater understanding about the content, compliance and change of international law[21].

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[15] Schmidt, '"I Know What You're Doing", Reflexivity and Methods in Refugee Studies', 84.

[16] Voutira and Doná, 'Refugee Research Methodologies', 165.

[17] Schmidt, '"I Know What You're Doing", Reflexivity and Methods in Refugee Studies', 84.

[18] Schmidt, 85.

[19] Armstrong, Farrell, and Lambert, *International Law and International Relations*, 74.

[20] Armstrong, Farrell, and Lambert, 74.

[21] See Armstrong, Farrell, and Lambert, 110–16.

2.2.1 Legal sources and methods

This thesis will consult several aspects of international law, specifically international refugee – and human rights law. The international refugee protection regime is mainly rooted in the 1951 UN Refugee Convention. Treaties and Conventions, of a general or specific nature are recognised as primary sources of international law by the Statute of the International Court of Justice Article 38[22]. Other sources include customary law recognised as such through practice as well as general principles of law[23]. Further, non-binding instruments can also be considered as key elements of the refugee regime, such as the Universal Declaration of Human Rights (UDHR) Article 14. The UDHR is not technically binding for states, but many of its provisions reflect customary law as well as having been expressed in national constitutions[24]. Thus, such sources of 'soft law' often retain normative value and may influence decision-making on state level despite their lack of formal commitment[25].

The Refugee Convention defines who constitutes a refugee and stipulates the rights of individuals who are granted such status. Other sources providing relevant protection are Article 3 of the European Convention on Human Rights as well as provisions set out in the Convention against Torture which supplement the protection against *refoulement* established in Article 33 of the Refugee Convention[26]. In addition to these main sources of international refugee and human rights law, this thesis will mainly engage with the rules set out in the EU Asylum Procedures Directive. The directive, which is binding on the Member States, is a part of the Common European Asylum System (CEAS) which aims to appropriate status to those requiring international protection in accordance with the Refugee Convention and the principle of non-refoulement[27]. Considering the centrality of these legal sources it is clear that the analysis must include methods of interpreting them.

There are several methods of research international law, as well as two overarching approaches which are important to distinguish between. The first is legal positivism. Classically, as represented by John Austin, positivism suggests that law is different from other social structures due to its authoritative nature[28]. From this view, law is seen as command

[22] Armstrong, Farrell, and Lambert, 25.

[23] Armstrong, Farrell, and Lambert, 25.

[24] Armstrong, Farrell, and Lambert, 169.

[25] Armstrong, Farrell, and Lambert, 169.

[26] See Council of Europe: European Court of Human Rights, Soering v. The United Kingdom, Application No. 14038/88, which established that responsibility under ECHR Art. 3 can incur in cases of extradition/return of foreign nationals.

[27] European Union, Consolidated version of the Treaty on the Functioning of the European Union, Article 78(1).

[28] Armstrong, Farrell, and Lambert, *International Law and International Relations*, 9.

backed by sanction by a sovereign. As there is no sovereign in the international system, international law has been considered not to constitute *true* law[29]. However, this view has since been altered and others have argued that international legal norms can still be coercive in nature because of their ability to influence state behaviour[30]. This view can be connected to the soft positivist method represented by H.L. Hart which makes the claim that international law is binding because states accept it as such[31]. Further, soft positivism argues that moral and political considerations have a space within law[32]. This thesis will also recognise that norms and 'soft' law can contribute to shaping the law, and therefore it makes sense to include them in the analysis.

Martin Scheinin supports a 'soft positivist' approach as he defines legal interpretation as "An effort to find and understand the legal norm that is expressed in writing in a legal text, such as a statute of national law or an international treaty, or […] in human action that is taken as an expression of an underlying legal norm."[33] Such an approach towards legal interpretation may be helpful in this project as the aim is to analyse the social contexts which underpin the use of STC practices in Europe. This approach may help reveal the underlying meanings of laws and policies connected to such practices[34]. By moving beyond studying primary sources of international law, we may be able to expand the focus toward the broader features of an issue through incorporating legal norms in the analysis.

Lastly, when researching international legal norms, one must keep in mind the methods of interpretation. The Vienna Convention on the Law of Treaties establishes the rules on treaty interpretation and states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[35] In this provision, three schools of interpretation are expressed: the objective (textual), subjective (the intention of the parties) and the teleological (object and purpose) approaches[36]. While textual interpretation is the main approach used, as well as preferred by the International Court of Justice[37], the other methods are important for seeing underlying meanings not necessarily expressed in the text. Overall, the thesis will consult primary sources of international law as well as sources of soft law regulating the refugee

[29] Armstrong, Farrell, and Lambert, 9.

[30] Armstrong, Farrell, and Lambert, 12.

[31] Janmyr, *Protecting Civilians in Refugee Camps*, 1:33.

[32] Janmyr, 1:33.

[33] Scheinin, 'The Art and Science of Interpretation in Human Rights Law', 19.

[34] Webley, 'Qualitative Approaches to Empirical Legal Research', 930.

[35] United Nations, Vienna Convention on the Law of Treaties, Article 31(1).

[36] Fitzmaurice, 'The Practical Working of the Law of Treaties', 153.

[37] Fitzmaurice, 153.

protection regime. This inclusion will arguably provide more information about the realities of the rules surrounding refugee protection, specifically STC practices. The following section outlines the nature of the methods of IR.

2.2.2 Methods of International Relations

As mentioned, this thesis will make use of IR theory in combination with legal methods. There are a wide range of theories within the field of IR, whose methods of analysis vary to a large degree[38]. However, IR scholarship can be divided into two broad epistemological traditions; empiricism which contents that knowledge can be accumulated through observation and interpretivism which seeks to understand the social meanings underpinning such observations[39]. A thorough discussion on which strand of theory is most suitable for this project is needed and will be conducted below.

Generally, the main contribution to this thesis from the IR discipline arguably comes from its ability to understand the motivations lying behind the creation of laws, institutions and policies. Specifically, analysing discourse is often used as a tool to unpack underlying motivations behind state decision-making. Discourses come about when "Representations that are put forward time and again become a set of statements and practices through which certain language becomes institutionalized and normalised over time."[40] Studying discourses allows us to understand how practices come into existence. It is important to look beyond the regular meaning of a subject and trace the processes through which something becomes 'status quo'. Overall, legal methods combined with analysis based on IR theory will hopefully uncover additional conclusions about the nature of the STC concept as well as the implications of its application in practice. The next section will outline some of the main theories of IR and justify the rationale behind the choice of a normative theoretical backdrop to further study the origins and premises of the STC concept as well as its application in practice.

2.3 Theories of international relations

In order to understand the development, application and effects of STC policies in Europe it is important to look to the existing literature on the *wider* topic to explore how international migration is conceptualized by various scholars within the field of International Relations (IR). Following the end of bipolarity, migration, asylum and refugee issues emerged as

[38] Lamont, *Research Methods in International Relations*, 17.

[39] Lamont, 18–19.

[40] Neumann, 'Discourse Analysis', 61.

matters of 'high politics' and became widely discussed within the international sphere[41]. Within classical IR theory, little was written on these issues before this turn in the 1990s and the 2000s. The main controversies within the field concerns the degree of recognition given to the importance of norms shaping national interest and policy. Classical theories (realism and liberalism) mostly speak of refugee protection as possible as long as it remains within the interest of the state and highlight the tension between national sovereignty and the individual rights of those who claim status as refugees.

Other, normative approaches confer a higher level of complexity towards the development of the 'refugee protection regime', arguing that it emerged within a society of states where norms and values helped shape and develop institutional protection mechanisms. These theories recognize that the tension between the 'Insider' and the 'Outsider' is constituted through a normative process, which is subject to change – not as a static predetermined conflict between the interests of the nation and the plea of the individual as classical theories would tend to argue.

Classical theories of IR have often been criticised for seeking to explain state conduct on the basis of the 'pursuit of assumed national interests.'[42] Alternatively, state interests can be explained as being generated through a process where norms affect behaviour, through a social construct. Interests are not exogenous, or set in stone derived from pure economic interest, or rationality[43]. They can be affected by ideas and discourses and change over time. A normative approach can unpack assumptions made by classical approaches.

Going back to the role of refugees, Andrew Hurrell recognises the aforementioned tension between national sovereignty and refugees and immigrants. He argues that the obligations the nation state owes its citizens differs from that owed towards humanity as a whole. Consequentially, states are seen not just as administrative units, but as encompassing a common *identity* of a community[44]. According to Hurrell, these communities are rather resilient and not really subject to much change[45]. The refugee 'problem' is arguably well accounted for through this framework, because of the recognition that the tension between the 'Insider' and 'Outsider' is constituted through a normative process of defining who belongs within the community.

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[41] Rosenblum and Tichenor, *The Oxford Handbook of the Politics of International Migration*, 12.

[42] Steiner, Gibney, and Loescher, *Problems of Protection*, 180.

[43] Steiner, Gibney, and Loescher, 180.

[44] Hurrell, 'Refugees, International Society, and Global Order', 90.

[45] Hurrell, 92.

The contemporary 'post-Westphalian' world faces several global challenges. Forced migration is one of them. In order to deal with this, states must engage with a wide range of actors, not just other states. Questions regarding migration, refugees and asylum are highly politicised, and states must answer to their obligations towards their inhabitants as well as those fleeing persecution, conflict or strife. This tension puts rights up against other rights, and it often results in the creation of discourses which demonise those seeking entry to states in which they are not citizens. Understanding such processes is helpful when explaining the reasons why migration and refugee issues are so controversial in today's political climate.

A 'securitization' approach can help us describe how the refugee regime is increasingly challenged by discourses in the public sphere painting migrants and refugees as 'threats' to the nation state. Alessandra Buonfino argues that looking at the language through which political discourse is articulated, can "Uncover the complexity of the real and will lead to a more thorough understanding of "what lies beneath" immigration policy in Europe."[46] A security discourse can be seen as a response to the imagined threat immigration poses towards national identity. Such a discourse aims to limit and control the phenomenon which is seen as a security threat[47]. On the basis of this, we can draw links between the 'deterioration in the protection climate for refugees' and the 'securitization of the refugee problem'[48]. When forced migration is securitized through a political discourse, it can have serious effects on the refugee protection regime. A discourse can become powerful enough to not only change public perception, but also directly affect policy towards an issue. When a security discourse is reinforced through the public space and the media, it can eventually become 'hegemonic' and in turn affect authorities to adopt policy which reconcile with that discourse[49].

Overall, classical theories of IR recognise the *tension* refugees and migrants bring to national politics claiming they present a challenge to the sovereignty of the state. Realists and liberals are able to *securitize* refugee protection by naming refugees as a challenge to security, the welfare state or regional stability. In other words, a challenge to the imputed national interest of the state. However, what these theories largely ignore is the process through which such perceptions are shaped. These processes are normative in nature, and they evolve and change over time. Refugees and migrants are *constituted* as a security issue. Therefore, the classical frameworks are not very useful towards researching migration policies and their effects on the protection regime as a whole. This thesis aims to study the STC concept within the context of today's political climate where the refugee issue has become highly politicised. The

[46] Buonfino, 'Between Unity and Plurality', 26.

[47] Buonfino, 39.

[48] Hammerstad, 'The Securitization of Forced Migration', 267.

[49] Buonfino, 'Between Unity and Plurality', 41.

securitization approach provides a solid framework for understanding the processes through which the concept is conceived and applied. By empirically studying the ways in which the refugee issue is framed, it may be possible to identify links between security and the official policies of nation states.

2.4 Conclusion

To conclude, this chapter on methodology and theory has discussed and justified taking a multi-disciplinary approach towards studying safe country practices within the field of Refugee Studies. The methods section explored the different sources of international law relevant to the study of the refugee protection regime and discussed the distinction between classical and soft positivist legal methods of analysis. Soft positivism was chosen as the preferred method because it allows for a more inclusive approach towards the use of legal norms as sources that are not necessarily defined as 'hard law'. Further, the chapter specified that there is no 'one size fits all'- method when it comes to international treaty interpretation. Lastly, different theories of IR were explored, and a securitization approach was found to be more useful in the context of refugee research compared to classical theories such as realism or liberalism. The thesis will now move onto exploring the links between security and migration control through insights gained from the discussion above, followed by an analysis of the origins and premises of the STC concept.

3 The EU and the 'externalisation' of migration control

3.1 Introduction

The first sub-research question posed at the outset of this thesis asks how the refugee issue has been 'securitized' in Europe. This chapter will address this through exploring the relationship between national security concerns and the efforts of states to contain asylum-seekers abroad. The research question also asks what role 'Safe Third Country' (STC) practices have within this context, which will be dealt with accordingly in the next chapter which focuses on the legal and political nature of the STC concept specifically. This chapter seeks to explore externalisation efforts in the name of security in order to further understand the overall research question at hand; what challenges the STC concept presents to the rights of refugees. In order to get a satisfactory answer to this it is key to understand the political climate in which the concept exists and what is at stake when STC, and other containment policies are implemented in practice.

As discussed in the theory section, a certain tension exists between national sovereignty and the individual rights of those who claim status as refugees. Haddad identifies refugees as a

product of our system of sovereign states[50], a system which inevitably creates a division along the lines of membership within the community of each state. Deciding who are admitted into the community is largely up to each state, and refuges are thus embedded in a "Complex interplay between state prerogatives and human rights, and politics and law."[51] The divergence between sovereign rights and international legal responsibility has politicised the refugee issue.

Migration control is the means through which this issue is regulated, identified as political strategies by the state to bypass the confrontation between sovereignty and the individual right to protection against *refoulement* altogether[52]. Gammeltoft-Hansen refers to the term 'externalised migration control', identifying it as the process where states prevent the arrival of asylum-seekers through specific measures of 'offshoring' their migration authorities[53]. Such policies include, but are not necessarily limited to visa regulations, carrier sanctions, interception of ships on the high seas and the outsourcing of responsibilities to third states or private parties[54]. Arguably, externalised migration control clashes with the traditional picture of refugee law as constraining the sovereign power of states to control migration[55]. Because of extraterritorial controls, states are able to circumvent obligations under non-refoulement claiming it does not apply if the applicant never reached the state border in the first place, thus making the right to seek asylum increasingly difficult to achieve. The next section will identify some of the underlying motivations behind externalised migration control, by linking the refugee issue to security concerns, exemplifying with specific deterrence policies situated within that framework.

3.2 Securitization process in the EU: building 'Fortress Europe'

Having previously justified the use of the securitization approach, I will outline what scholars often describe as the process of 'securitization of migration' in Europe. Securitization can be described as the practice through which an issue becomes one of security, because it is *presented* as such, not necessarily because of the objective facets of the issue itself[56]. It represents a transformation of the perception of an issue, both in the public and political

[50] Haddad, *The Refugee in International Society*, 297.
[51] Gammeltoft-Hansen, *Access to Asylum*, 11.
[52] Gammeltoft-Hansen, 11.
[53] Gammeltoft-Hansen, 15.
[54] Gammeltoft-Hansen, 16.
[55] Gammeltoft-Hansen, 17.
[56] Buonfino, 'Between Unity and Plurality', 28.

spheres. Migrants and refugees have increasingly been named as security threats in Europe[57]. Huysmans argues that by presenting migration as a security issue over time, and pursuing restrictive immigration policies, the presence of immigrants, asylum-seekers and refugees becomes de-legitimized[58]. Thus, immigration from outside of Europe is often portrayed as a potentially destabilizing factor for the continent.

This notion is not new. Before the 1970s, immigrants were generally seen as an additional workforce for European states. However, in the following years, immigration was increasingly seen as 'a subject of public concern.'[59] This trend continued, and in the 1980s, debates around migration were increasingly integrated into discourses surrounding insecurity[60]. This was largely done through three themes: internal security, cultural identity, and the crisis of the welfare state[61]. As an effect, policies were shaped in order to secure the perseverance of these three themes. For example, the strengthening of external border control can be seen as related to the securitization process. Huysmans sees border control as representing internal security concerns but also as having a cultural dimension which is created through the security framing of immigrants[62]. He essentially argues that cultural identity has been securitized through border controls and restrictive policy towards third country nationals. Indeed, "Emphasizing restrictions and control implies a negative portrayal of groups of migrants."[63] Looking at policies through a security prism allows us to understand more about their origins but also the normative features they possess, and what their application tells us about the perception of immigration in the EU.

Back in 2015, the so-called refugee crisis saw an upsurge in the security framing of the notions of migration and asylum. Lucassen argues that a 'perfect storm' brought together several factors which produced a general state of panic regarding the impact of refugees on societies in Europe[64]. This panic resulted in the boosting of the anti-immigrant discourse, leading to additional restrictive policies, hate crimes and the undermining of the principles in the 1951 Refugee Convention and its 1967 protocol[65].

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[57] Bigo, 'Security and Immigration', 63.
[58] Huysmans, *The Politics of Insecurity*, 64.
[59] Huysmans, 65.
[60] Huysmans, 68.
[61] Huysmans, 69.
[62] Huysmans, 74.
[63] Huysmans, 75.
[64] Lucassen, 'Peeling an Onion', 403.
[65] Lucassen, 404.

The term ‘Fortress Europe’ is often used to describe the normative process of securitizing the migration and asylum issues which Europe has gone through since the 1980s, building a range of laws and institutions around the management of the issue. Iov and Bogdan suggest that migration is securitized at two levels in the EU; at a discursive level as well as a second level ‘aiming at the creation of security agencies’ through the common European policies on migration.[66] It can be argued that certain policies are a direct response to the security threat which migrants or refugees are constructed to represent. Examples of policies aimed at limiting or even deterring arrivals to the continent may help illustrate how migration is securitized through political action.

The EU visa policy regime is one of the key tools applied to regulate migration beyond physical borders. Refugees are not exempted from formal visa requirements, except when applying for asylum at the EUs external borders[67]. In practice, without a Schengen entry visa, it becomes highly difficult to reach the border of a Member State through legal means. Another policy which further complicates this is carrier sanctions which obliges carriers (e.g. passenger airplanes, ferries etc.) to *inter alia* ensure that aliens transported have proper documentation required for entry[68]. With carrier sanctions blocking access to safe, legal travel routes, asylum-seekers are forced to embark on irregular, often dangerous journeys to reach Europe[69]. Arguably, when such measures effectively hinder access to asylum procedures, they breach state obligations towards refugees under international law[70]. Further, efforts among states to cooperate on border controls through Frontex (The European Border and Coast Guard Agency) operations have been accused to function as a security instrument aimed at diverting asylum-seekers to third states without providing access to an asylum determination procedure[71]. Strict visa policies along with carrier sanctions as well as broader efforts of border policing through Frontex are direct examples of externalised migration control.

As discussed above, it may be argued that certain policies aimed to deflect asylum-seekers from European borders may be viewed as directly connected to wider securitization efforts. The ways in which discourse affect policy help explain why states choose to pursue these specific externalisation policies. Referring to the ‘European migration crisis’ of 2015, Greenhill argues that public discourse in Europe associate Muslims with certain negative

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[66] Claudia Anamaria Iov and Maria Claudia Bogdan, ‘Securitization of migration in the European Union - Between discourse and practical action.’ (2017) 1 Research & Science Today, 14.

[67] den Heijer, *Europe and Extraterritorial Asylum*, 172–73.

[68] den Heijer, 174.

[69] Costello, ‘Refugees and (Other) Migrants’, 5.

[70] Feller, ‘Carrier Sanctions and International Law’, 64.

[71] den Heijer, *Europe and Extraterritorial Asylum*, 181.

stereotypes, thus viewing those arriving not as refugees, but as liabilities towards "National security, societal stability and cultural identity."[72] Pressure from such public discourse arguably provides incentive for policy-makers to prevent arrivals of migrants and refugees in order to mitigate real, or perceived public concerns. The effects of containment and externalisation policies are politically prominent, as they in many ways substantiate security discourses aimed at migrants and refugees. However, they may also have adverse legal effects.

Externalised migration policies neither require states to directly interfere with refugee rights, nor take into account the special position of refugees and others seeking protection[73]. Such policies may not reconcile with concerns of international refugee law. In reality, externalisation policies make accessing asylum systems in Europe exceedingly difficult as they are not able to effectively distinguish between persons in need of protection from persecution and those who are not in need of such protection. Thus, such policies conflict with the special protection awarded to refugees, not because they necessarily violate the rights stipulated in the refugee protection regime directly – but because their application in practice may lead to effective exclusion from the asylum systems in the increasingly impenetrable 'Fortress Europe'.

3.3 Conclusion

This chapter outlined the ways in which the refugee issue has been 'externalised' in Europe. A linkage was established between security, and refugees and migrants, pointing to the idea that externalisation policies are often motivated by security concerns. The discussion illustrated how the process of securitization has evolved in Europe and exemplified which policies are used as tools to confirm such discourses directed at migrants. Further, it explained how such policies are detrimental to the rights of refugees through adverse legal and political effects. The fact that the refugee issue has been externalised can be seen in conjunction with the construction of the refugee as a security threat through public discourse in Europe. The following chapter will draw focus back to the Safe Third Country-concept. Following a thorough outline of its origins, premises and legal scope, the chapter will discuss whether or not the STC concept may be linked to the process of securitization.

[72] Greenhill, 'Open Arms Behind Barred Doors', 323.

[73] den Heijer, *Europe and Extraterritorial Asylum*, 206.

4 The origins, premises and scope of the 'Safe Third Country' concept

4.1 Introduction

This chapter will explore the second sub-research question of the thesis, accounting for the legal and political origins, premises and scope of application of the 'Safe Third Country' concept (STC) in two parts. Firstly, through outlining the legal manifestation of the concept, its sources in international law as well as its scope of application and what its implementation in practice may entail. Secondly, through elaborating upon the political nature of the concept, through placing it within the context of the securitization of migration in Europe.

While the STC concept has received status as EU law, as well as having been incorporated in the national legislation of various states, it is very much influenced by political forces. Its application often involves political interference with the autonomy of the adjudicator[74] where governments may give instructions which differ from the regular procedure of evaluating asylum application. Scholars have put forward the idea that the process of designating a country as 'safe' is very much a political one. Costello notes that despite strict legal criteria underlying the safe country practices concerning human rights standards, it seems that political concerns often dominate the analysis of the country in question[75]. It is clear that STC practices have both legal and political implications and that the process of referring asylum applicants to third states is subject to interference by individual governments. Thus, the discussion regarding the *nature* of STC practices should be conducted from two distinctive perspectives; through legal analysis and an approach examining the broader, political characteristics of the STC concept.

4.2 Legal perspectives

This section aims to contextualise the STC concept, by exploring its origins and premises from a legal point of view. This means, in essence, to look at the process in which it has developed within EU law, and what the legal manifestation of this concept entails in practice. The substantive criteria and procedural safeguards expressed in the law which must be in place for STC practices to be employed will be outlined. Lastly, this section will discuss the scope of application of the concept within international law as well debate which human

[74] Costello, 'Safe Country? Says Who?', 603.
[75] Costello, 610.

rights considerations are necessary in the process of determining whether or not a country can be considered as safe.

4.2.1 Development of the STC concept

The STC concept was, in the early 1990s referred to as an 'emerging practice'[76] which, in later years manifested itself as a legal concept. The concept has largely been conceived and applied within a European context and has been subject to academic debate with scholars discussing its application in practice and ability to safeguard the rights of those seeking protection as refugees[77]. The STC concept was embedded in European asylum law through the 2005 Asylum Procedures Directive, which was recast in 2013[78]. It was also expressed through the Dublin Convention: "Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol."[79] It is important to highlight that safe country practices existed in Europe before the adoption of the Procedures Directive and the Dublin Regulations. Before 2005, such practices were implemented by individual states through their national legislation. The STC concept was first introduced in Europe in 1986, when it was incorporated into Danish law[80]. Subsequently, neighbouring states followed in the footsteps of Denmark, and by the end of the 1990s nearly every Western European state had implemented the concept in practice[81]. From this context, we can see that the use of STC practices increased following the end of the Cold War, along with a general harmonization of European policy towards immigration and asylum.

The issues surrounding STC practices are grounded in the relationship between national sovereignty on the one hand, and the right to seek asylum from persecution on the other. There is a certain tension between the right of a state to manage immigration onto its territory and the right of a refugee to avail themselves of protection from a state other than its own. The STC concept can be seen as diverging from traditional conceptualisations of refugee protection. According to the United Nations High Commissioner for Refugees (UNHCR), the

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[76] Goodwin-Gill, 'Safe Country?', 248.

[77] See Hailbronner, 'The Concept of 'Safe Country'and Expeditious Asylum Procedures' arguing for general determinations of STC and ; Kjaergaard, 'The Concept of "Safe Third Country" in Contemporary European Refugee Law' for a critical discussion.

[78] Council of the European Union, 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), Article 38.

[79] European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ('Dublin Convention'), Article 3(5).

[80] Byrne, Noll, and Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union', 360.

[81] Byrne, Noll, and Vedsted-Hansen, 360.

primary responsibility to ensure protection and access to human rights to refugees lies with the state which has territorial jurisdiction over them[82]. From this follows the argument that if an asylum seeker is standing at the border of a state, it is that states' duty to assess their claim. Consequently, STC referrals can be seen in contrast to this 'primary responsibility' as they allow for states to pass on responsibility for asylum-seekers to a third state. The UNHCR maintain that its' application is restricted to cases where an asylum-seeker could have applied for protection in a third state but failed to do so or cases where an application was lodged but its outcome was not determined[83]. Thus, the STC concept allows for states to reject their primary responsibility of processing an asylum claim, if there are strong enough reasons to argue that protection *could* or *should* be sought elsewhere.

Debates revolving around the STC concept have existed in European discourse for decades. The UNHCR's Executive Committee started commenting on proposed policy on the topic early on, for example in 1989, stressing that refugees can only be returned to a country where they 'already found protection' if they are protected against refoulement and treated in accordance with 'basic human standards'[84]. Almost a decade later, the concept had become established in political discourse, and the Committee reaffirmed their position on the matter maintaining that the "Third country will treat the asylum-seeker in accordance with accepted international standards, will ensure effective protection against *refoulement,* and will provide the asylum-seeker with the possibility to seek and enjoy asylum."[85] This list of criteria developed significantly, and only looks slightly different in the EU legislation today.

In the 1990s concerns were expressed about the adoption of the Dublin Convention and the 'current trend' of denying entry to refugees who have travelled through other states to reach their destination[86]. Among scholars today, the general opinion regarding STC practices seems to be that deflecting responsibility for asylum-seekers to a third state is a conscious attempt to "Minimize states' obligations towards refugees"[87] or to "Keep asylum seekers from the procedural door"[88]. Safe country designations are controversial because they largely benefit the sovereign rights of the state, and in many ways relieves states of their responsibility under

[82] UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries', 1.

[83] UNHCR, 'Legal Considerations on the Return of Asylum Seekers and Refugees from Greece to Turkey as Part of the EU–Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept' (2017) International Journal of Refugee Law, 500.

[84] United Nations High Commissioner for Refugees (UNHCR), 'Executive Conclusion no 58' (1989) para 7.

[85] see UNHCR, 'Executive Conclusion No. 85'. (1998)

[86] Kjaergaard, 'The Concept of "Safe Third Country" in Contemporary European Refugee Law', 650.

[87] Foster, 'Protection Elsewhere', 225.

[88] Goodwin-Gill and McAdam, *The Refugee in International Law*, 392.

international refugee law to process the cases of new arrivals under their jurisdiction. Its increased use in Europe risks limiting the opportunity for individuals to seek asylum in the region, as it opens up for resettlement managed by the wishes of EU member states, not the refugees themselves. The next section will outline the legal substance of the STC concept expressed through its sources in international law.

4.2.2 Legal sources

The STC concept was crystalized in 2005 when the Asylum Procedures Directive (APD) was adopted as EU law. The APD was established under the Amsterdam Treaty of 1999 and constitutes a common approach by EU Member States to reach minimum procedural standards for granting and withdrawing refugee status[89]. It also includes the first supranational rules regarding the application of the STC concept[90]. The APD contains rules which determine whether or not a state is responsible to consider the substance of an asylum application. An asylum application can be deemed inadmissible if *inter alia*: there is a 'Dublin-claim' of first country of asylum in another state, if the asylum seeker already enjoys protection elsewhere (member state or elsewhere), or if the asylum seeker has transited through or has access to a 'safe third country' in which protection could be sought[91]. The APD was recast in 2013, with "A number of substantive changes made"[92] revoking the 2005 Directive.

The STC concept is also expressed in the national legislation of numerous states. However, as this thesis focuses on the EU level, these will not be outlined in detail. Furthermore, STC is regulated on the regional level through another mechanism. As previously mentioned, the Dublin Convention (later Dublin II and III Regulations) opened for the application of national STC policies on an EU level as well as laying down criteria determining which Member State has the responsibility to assess an asylum claim[93]. Through this, non-EU Member States in Europe, such as Norway, are also bound by international rules regarding STC through their obligations under the Dublin Regulation which states that a safe country referral must follow the rules stipulated in the Procedures Directive[94].

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[89] Goodwin-Gill and McAdam, 397.

[90] Goodwin-Gill and McAdam, 397.

[91] Goodwin-Gill and McAdam, 397.

[92] Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), 1.

[93] Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 41.

[94] Council of the European Union and European Parliament, Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for

Article 33 (2)(c) of the recast APD (rAPD) establishes that "Member States may consider an application for international protection as inadmissible only if: a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;" Following from this, Article 38 outlines substantive criteria, which must be respected in order to apply the STC concept in practice. The same article also outlines a number of procedural safeguards which must be in place in the third state before returning an asylum-seeker there.

The STC concept may only be applied if the authorities are satisfied the applicant will be treated according to the following principles outlined in Article 38(1):[95]

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

Further, Article 38(2) requires the concept to be subject to rules laid down in national law in order to be implemented in practice. This includes rules requiring a connection between the applicant and the third country, rules on methodology by which state authorities determine whether or not the STC concept should be applied to a particular applicant or country and rules allowing for an individual examination of whether or not a country can be considered safe for a particular applicant[96]. The rules set out in rAPD Article 38 shall be reviewed in the next section, which will discuss how the STC concept resonates with international refugee law, as well as unpack the criteria and safeguards set forth in order to understand what their fulfilment actually entails.

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international protection lodged in one of the Member States by a third-country national or a stateless person, Article 3(3).

[95] Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), Article 38(1).

[96] Council of the European Union, Article 38(2).

4.2.3 Scope of application

As specified in the introduction, the right to seek and enjoy asylum from persecution is stipulated in the UDHR Article 14. Goodwin-Gill and McAdam maintain that international law recognizes the existence of a 'limited right' for a refugee to choose where he or she wishes to seek asylum[97]. While this may be true, the 1951 Refugee Convention remains silent on the idea of a positive right to seek asylum in a particular state. It is precisely here, within this 'gap' in the law and between the conflicting rights of sovereignty and the rights of the individual where STC practices have found a space to develop in national and international law.

On the other hand, practices aiming to provide protection in a third state are not accounted for in the Convention either[98]. The idea of forcing an asylum-seeker to seek protection elsewhere remains controversial exactly for this reason. It can be understood as an effort to *circumvent* obligations towards refugees, not as following obligations set forward by the main instrument in the protection regime. Applying the STC concept does not technically violate the right to seek asylum, as long as protection is offered in the third state. However, the concept does raise questions around the guarantees of genuine refugee protection if states implement it without strict adherence to the criteria outlined in rAPD.

Looking closer at the scope of the STC concept reveals that before applying it in practice, it must be questioned whether *effective protection* is available in the third state in question[99]. This notion revolves first of all around the safety of the individual in the third state. In order to ensure this, certain guarantees must be in place. As mentioned above, rAPD Article 38 lists the required 'substantive criteria and procedural safeguards' for the STC concept to be applied in practice[100]. UNHCR notes that the application of the STC concept requires a 'careful and individualised case-by-case examination' of the fulfilment of the principles in Article 38[101]. Hence, if the requirements in the legislation are followed strictly, the standards are set fairly high and the application of STC would not violate international law.

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[97] Goodwin-Gill and McAdam, *The Refugee in International Law*, 392.

[98] Foster, 'Protection Elsewhere', 226.

[99] Goodwin-Gill and McAdam, *The Refugee in International Law*, 392.

[100] See Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) Article 38(1)(a-e) for the criteria and 38(2)(a-c) for the procedural safeguards.

[101] UNHCR, 'Legal Considerations on the Return of Asylum Seekers and Refugees from Greece to Turkey as Part of the EU–Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept', 505.

When evaluating whether effective protection is available, UNHCR highlights the importance of a proper legal framework being in place in each state, but stresses that the application of the laws in practice is what matters most. This means that mere ratification of relevant treaties does not always equate compliance[102]. Before the APD was launched, UNHCR commented on the substance of Article 38 (then 27) and stressed that "The country's practice in implementing the 1951 Convention and international as well as regional human rights instruments should be carefully examined."[103] This would mean that there needs to be institutions in place which can ensure the rights of refugees are genuinely protected in the third state before applying any transfer grounded in the STC concept.

Consequently, the main issue revolves around the country in questions' *real* fulfilment of international obligations, in other words, the procedural and substantive standards within its own asylum system. Without adequate guarantees and safeguards in place, STC transfers are risky as applicants may be returned to states lacking the proper structures for dealing with their claim or risk that the third state may return the applicant to their country of origin and hence violate the principle of *non-refoulement*[104].

Overall, while the current legislation on the STC concept in European law does not conflict with refugee and human rights law *per se*, it is key that the application of the concept includes considerations of effective protection. Unduly broad interpretations of the substantive criteria and procedural safeguards could deprive refugees of their rights under the refugee protection regime[105]. The next section will discuss to what extent broader human rights considerations must be included in a STC determination.

4.2.4 Scope of rights beyond *non-refoulement*

International refugee protection connects to issues of national sovereignty as well as human rights law. The tensions between the obligation to respect individual human rights and rights of sovereign power has been stressed several times in this thesis. Gammeltoft-Hansen views refugees as placed in the middle of two expressions of sovereignty: "As freedom to act as a state and sovereignty as international responsibility."[106] The refugee protection regime can be seen as a solution to the problem of those who find themselves between two states, unable to

[102] Goodwin-Gill and McAdam, *The Refugee in International Law*, 394.

[103] UNHCR, 'UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', 36.

[104] Kjaergaard, 'The Concept of "Safe Third Country" in Contemporary European Refugee Law', 653.

[105] European Council on Refugees and Exiles (ECRE), 'Debunking the Safe Third Country Myth', 1.

[106] Gammeltoft-Hansen, *Access to Asylum*, 13.

find protection in their homeland[107]. It is debated, however, which rights this regime extends to refugees. This is especially relevant when it comes to the debates revolving around safe country-practices. The discussion can change drastically depending on which view is taken, whether non-refoulement is seen as the only key right or if there are other rights which must be respected in order to conclude a STC-transfer. Hence, asking the question of how refugee protection relates to STC and wider concepts and which rights are owed to those returned to a safe third country is important for the analysis. It is key to understand which rights are affected by such policies when analysing their scope of application.

When assessing the feasibility of an STC transfer, it is important to take into account whether or not the asylum-seeker in question will receive protection in the third state. It may also be appropriate to outline the *quality* of that protection[108]. Gil-Bazo notes that that safe country practices are often founded on the notion that states are not obliged to offer additional rights to refugees other than non-refoulement, as granting asylum is seen as a discretionary act of the state, not an international obligation[109]. Additionally, Foster stresses that the general opinion among states is that non-refoulement is the only obligation relevant when considering the transfer of a refugee to another state[110]. However, both authors essentially argue that these assumptions are flawed, and that states have international obligations towards refugees which extend beyond the principle of non-refoulement[111]. Indeed, in order to secure that the rights of refugees are respected in line with the 1951 Refugee Convention, it is necessary to apply a holistic approach in the event of a STC transfer which includes considerations of the broader human rights situation on the ground.

Foster highlights the fact that the 1951 Convention, the main legal component of the protection regime, confers several additional rights to refugees such as rights of non-discrimination, freedom of religion, rights to property, education, access to courts and so on[112]. Arguably, in the event of a STC transfer, rights acquired by a refugee in the sending state are highly relevant to consider as the sending state is responsible to ensure the same rights are respected in the receiving state as well as under their own jurisdiction[113]. This

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[107] Gammeltoft-Hansen, 13.

[108] Gammeltoft-Hansen, 30.

[109] Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice', 44.

[110] Foster, 'Responsibility Sharing or Shifting?', 66.

[111] Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', 73; Foster, 'Responsibility Sharing or Shifting?', 66.

[112] Foster, 'Responsibility Sharing or Shifting?', 67.

[113] Foster, 67.

argument is rooted in the judgement by the European Court of Human Rights (ECtHR) in which the court claimed that states are unable to avoid obligations owed to refugees under human rights treaties, in this case ECHR, simply by transferring them to a third state[114]. This is also true in relation to the Refugee Convention, and circumventing obligations under its provisions through a transfer of a refugee would contest the overall aim of the Convention itself[115].

In conclusion, the implementation of the STC concept must entail some assessment of the human rights conditions in the receiving state and ensure that broader rights are secured, in addition to protection against non-refoulement. This discussion shows the importance of applying a holistic approach towards general refugee protection as well with STC referrals. The opinion that protection against non-refoulement is the only key right which must be respected in order to implement a STC transfer is flawed. When assessing whether or not a transfer is viable, the sending state should consider the situation of the individual asylum-seeker, and whether or not they are able to enjoy effective protection in the third state in accordance with refugee law. The rights of refugees extend far beyond the protection against refoulement and include rights which facilitate the chance to live a dignified life in their country of refuge. As rightly noted by the UNHCR, the 1951 Convention does not focus on where protection can be found but rather the *quality* of that protection[116]. The refugee protection regime exists to secure the rights of those seeking fleeing persecution and strife, not to secure the sovereign rights of the state. Hence, the STC concept poses a challenge to the regime as it risks revising the nature of states' legal obligations towards refugees if applied in a restrictive rather than holistic manner. The next section will explore the broader, political context the STC concept is situated in.

4.3 Political perspectives

The general process of securitization of migration was discussed in the previous chapter. This section will look at the STC concept in relation to that process and determine whether or not its application by states can be linked to the construction of the refugee as a security threat and if it can be seen in conjunction with specific policies aimed at externalising migration control. As the history of the STC concept and its manifestation as a legal norm also has been outlined, this section will devote focus to the political nature of the concept and discuss the ways in which security discourses may influence its application. While it may be difficult to

[114] Council of Europe: European Court of Human Rights, T.I. v. The United Kingdom, Application. No. 43844/98 at 456–57 Referenced in; Foster, 'Responsibility Sharing or Shifting?', 67.

[115] Foster, 'Responsibility Sharing or Shifting?', 67.

[116] UNHCR (2004) quoted in Goodwin-Gill and McAdam, *The Refugee in International Law*, 394–95.

pinpoint exactly why the concept subsists and has gained support by policy makers, it is still possible to place it within a framework of analysis through which one can study it further. Employing a securitization approach can help place the safe country notion within a wider context of EU asylum policies over the last decades. Looking at how underlying discourses and perceptions can produce security language which again can contribute to change policy is helpful when attempting to 'unbox' the origins and premises of the STC concept.

4.3.1 The STC concept within a security prism

The securitization framework exposes some of the underlying motivations behind migration policy in post-Cold War Europe, and offers an understanding of how discourse can develop, manifest itself and produce meaning about a subject. Thomas Gammeltoft-Hansen argues that STC practices can be viewed in conjunction with "A general tightening of national asylum systems and border control"[117] as such practices have been implemented in order to restrict access to European asylum systems[118]. STC transfers theoretically allow for states to deflect responsibility for asylum-seekers without necessarily breaching their obligations under international law. While it may be clear that the STC concept can be used as an externalisation tool, the question remains whether it constitutes an expression of a *securitization* framework. In order to answer this, we must go back to the premises of the STC concept and recall its purpose and scope of application.

The notion of a 'safe third country' as expressed in rAPD Article 38, implies that EU member states *may* reject an application for asylum if protection can be found elsewhere, outside EU territory. This means that EU Member States may also choose to process the application within their jurisdiction. Then, for what reasons would they want to redirect asylum seekers to states outside the union? If we look at the ways in which migration and asylum has been securitized in Europe, it makes sense that if the applicant already has been constituted as a threat – deterring them from seeking asylum in their territory would solve the problem rather easily. Indeed, utilizing the STC concept would in many ways relieve EU member states of their duties and obligations under the 1951 Convention. Hence, application of the STC concept would produce similar results to other restrictive immigration policies. It would be possible to effectively push migrants and refugees away from EU borders, keeping them at a 'safe distance' without breaching obligations under international law.

[117] Gammeltoft-Hansen, *Access to Asylum*, 15.

[118] Gammeltoft-Hansen, 15.

Such efforts to refuse entry into the union can be compared to general ideas of border policing and efforts to 'outsource' the refugee issue. The idea to leave the management of migration to someone else was for instance expressed in the EU-Turkey Deal of 2016, where the EU essentially paid Turkey to strengthen its border controls and to deter migrants and refugees from crossing the Mediterranean[119]. The deal also facilitated returns to Turkey for those who had managed the crossing, which can arguably be seen as an effort to externalise migration control by the EU.

One can argue that the idea of returning asylum seekers to safe countries outside of the EU can be placed within the conceptualization of viewing migration and asylum as a security issue. Utilizing the STC concept involves a choice for the sending state to either process an asylum application or return applicants to a third state to seek alternative protection. Having observed that the EU has gone through a process of securitization, we can see that this concept in many ways fits into the discourse that asylum seekers' presence in Europe is viewed as illegitimate; and that Member States are able and willing to circumvent their duty to offer protection as long as the choice to refuse entry is available to them.

On the other hand, discourses regarding the application of the STC concept are often concerned with maintaining the rights of refugees, in line with the criteria listed in Article 38 rAPD. With the criteria being as rigorous as they are, a transfer does not in itself illegitimate refugees' claims but rather aims to secure that their rights are protected. However, despite the strict criteria and safeguards, the STC concept cannot set guarantees for what the third state chooses to do with the application in question. By pushing responsibility onto a different state, there is no way of knowing for sure whether the applicant will receive effective protection in accordance with the 1951 Convention and protection against refoulement.

Thus, the STC concept is not necessarily a *direct* expression of a securitization process against refugees. However, it arguably remains highly vulnerable to political interference. Thus, such practices risk being subject to political efforts to redirect refugees, which we have increasingly seen since 2015. The lack of political incentive to welcome refugees in many European states can influence the use of safe country referrals. An example of this is the Norwegian efforts to return asylum seekers to Russia in 2015, an issue which will be further discussed below. In order to facilitate the returns, the Norwegian Immigration Act was amended, and key legal safeguards were removed[120]. This changed the nature of the safe country provision in Norwegian law, as it no longer required asylum applications to be

[119] Collett, 'Destination: Europe', 150.

[120] Norwegian Organisation for Asylum Seekers (NOAS), 'Norway's Asylum Freeze', 20.

considered in the third state and instead aimed to exclude applicants who had previously stayed in another state[121]. In this case, the STC provision was altered due to political pressure likely stemming from a discourse framing the arrival of asylum-seekers as a security threat.

Overall, the STC concept exists alongside a conceptualisation of securitization processes in Europe. It can be seen as a tool for states to deflect their primary international responsibility to process asylum applications, without formally breaching international law. While the concept may not be a direct consequence of the construction of refugees as a threat, it risks being abused by such discourses if exposed to enough political pressure and if applied beyond the scope of the criteria listed in the rAPD.

4.4 Conclusion

This chapter has outlined the legal and political scope of application of the STC concept and the ways in which the concept alters state responsibility towards refugees. Arguably, the concept inevitably transforms the traditional conception of refugee protection. While the criteria expressed in the Procedures Directive are strict, interpretations of the scope of STC policies can vary significantly, making the concept unclear, diffuse and susceptible to political pressure. As discussed in the political section, the concept is highly vulnerable to political interference and can be generally viewed as diverting from states' primary responsibility to process asylum applications within their own jurisdiction. There is no guarantee that the rights of refugees will be respected in the third state, which questions whether or not a state legally can relieve itself of all responsibility for an asylum-seeker through a STC referral. Hence, instead of being rooted in refugee law, the STC concept can be viewed as more of a conscious political effort to externalise migration control, and push asylum-seekers out of state jurisdiction without breaching obligations under international refugee law. It exists to serve the rights of the states to control migration and not the rights of those seeking protection from persecution. This stands in stark contrast to the fundamental aims of the international refugee protection regime. The next chapter will analyse the ways in which the STC concept has been implemented in practice focusing especially on policies implemented post 2015.

[121] Norwegian Organisation for Asylum Seekers (NOAS), 24.

5 The 'Safe Third Country' concept in practice: challenging the effective protection of refugees

5.1 Introduction

This chapter aims to discuss the main research question of the thesis. In order to understand the implications for refugee protection the 'Safe Third Country' concept (STC) presents, it is key to look at the ways in which the concept has been applied in practice in addition to its theoretical nature and scope. This chapter will also engage with the third sub-question; outlining the ways in which political concerns of individual states affect the application of the STC concept in practice.

The chapter consists of two main sections, the first looking at implications regarding general implementation, followed by sections which focus on specific policies launched following the large-scale influx to Europe in 2015. The degree to which the application of the concept can vary, and specific cases where refugee rights were challenged will be illustrated through two case studies; EU policy post 2015 and the events at the Storskog border crossing in Norway.

5.2 The general implementation of the STC concept

Having previously established that the scope of rights under the STC concept includes considerations of human rights beyond the protection against refoulement, it is possible to highlight some of the main issues which arise when the concept is applied in practice. If the substantive criteria listed in the recast Asylum Procedures Directive (rAPD) Article 38 were perfectly fulfilled, STC transfers would not be as controversial as they are today. A legal transfer relies on the fulfilment of several key rights and safeguards. If these are not respected, a safe country referral could pose a threat towards upholding a certain standard of refugee protection. This section will discuss the main issues which arise through the application of the STC concept which includes general declarations of safety manifested through lists of safe countries, accelerated processing as well as the limits of the right to appeal a STC referral.

5.2.1 Safe-country lists and accelerated procedures

One of the main controversies regarding STC practices is the use of lists of safe countries or general declarations of safety. The Procedures Directive sets out the criteria which must be fulfilled in order to declare a country as safe, however, it largely allows for states to adopt

their own 'national methodology' for this determination process either through "Case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;"[122] Goodwin-Gill and McAdam note that lists of safe countries, may give states "An option to ignore the individual circumstances and privilege the generalized determination of safety"[123]. The UNHCR has advised against the use of such generalised lists, unless their implementation allows for an individualised assessment of the safety for a particular applicant[124]. Thus, it is not guaranteed that STC determinations are decided on a case-by-case basis as the choice of methodology is entirely at each states' discretion.

Generally, it seems the aim of broad declarations of safety is to allow for accelerated processing, and the possibility to redirect asylum-seekers without having to take a stand on the merits of their case. Such declarations may be an effective tool for stemming numbers of asylum-seekers entering a certain state or region. Often, states in the Global North are able to declare other states as safe as they exercise certain influence over them through aid, trade or investment[125]. It may also be favourable for a state to be declared as an STC as such a declaration implies a normative assumption about the quality of their institutions and human rights practices. The legitimacy of safe country lists is widely debated. Hailbronner has argued for increased application of general determinations of safety as it could, in his view, contribute to the harmonisation and effectivisation of European asylum systems[126]. This would be done through focusing resources on curbing illegal immigration and offering protection to those actually in need of it instead of processing every single asylum application lodged[127].

This argumentation is flawed as Hailbronner ignores the individual nature of persecution, including the fact that every refugees' situation is different and may be subject to change. Therefore, a state may be safe for one person and unsafe for another, depending on their situation. General classifications of safety could undermine the level of protection for an individual, for example if they belong to a protection category not recognised in the third state, or if they belong to a particular minority group[128]. Furthermore, circumstances in the third state can change quickly, hence there is no guarantee that the general level of safety

[122] Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), Article 38(2)(b).

[123] Goodwin-Gill and McAdam, *The Refugee in International Law*, 399.

[124] Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 59.

[125] Byrne and Shacknove, 'The Safe Country Notion in European Asylum Law', 202–3.

[126] Hailbronner, 'The Concept of 'Safe Country'and Expeditious Asylum Procedures', 64–65.

[127] Hailbronner, 65.

[128] Goodwin-Gill and McAdam, *The Refugee in International Law*, 400.

remains the same at any given time[129]. If an asylum-seeker is subject to an accelerated procedure and returned to a designated safe country, there may not be enough time or devoted resources to find out if that state really is safe for that particular person.

Hailbronner also stresses that respect of non-refoulement is the only safeguard required by the protection regime in order to transfer an asylum-seeker to a safe third country[130]. Protection against refoulement can be seen as one (although important) of many rights owed to refugees. Therefore, merely respecting that prohibition does not necessarily equate 'effective protection', as has been discussed above. A holistic approach to refugee protection would have to include other aspects than the principle of non-refoulement when deciding on the viability of returning an asylum-seeker under the criteria of STC.

Furthermore, while a country which has been declared as generally safe may refrain from returning refugees to their country of *origin*, refoulement may still occur. Costello points to the fact that STC policies have indeed led to cases of actual refoulement, either directly through return to an unsafe territory, or indirectly through the return to a territory where there is risk of subsequent expulsion[131]. Borchelt holds the view that STC practices are unable to fully secure protection against refoulement despite the presence of theoretical legal safeguards[132]. This is mainly due to the varying asylum practices in European states and different standards of determining safety[133]. On this premise, it seems fair to argue that the STC concept is inherently flawed as it always runs the risk of resulting in refoulement in one way or another.

5.2.2 Limited appeal rights

Another issue concerning the general implementation of STC practices is the lack of procedural safeguards offered to asylum-seekers who are subject to return to a third state. Specifically, appeal rights concerning decisions made under the recast Procedures Directive have been proven to be rather limited in scope[134]. The right to appeal a decision to be returned to a safe country under Article 38 does not necessarily have suspensive effects[135]. Costello

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[129] Goodwin-Gill and McAdam, 400.

[130] Hailbronner and Thiery, 'Schengen II and Dublin', 975.

[131] Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 47.

[132] Borchelt, 'The Safe Third Country Practice in the European Union', 521.

[133] Borchelt, 508, 521–22.

[134] Goodwin-Gill and McAdam, *The Refugee in International Law*, 400.

[135] Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), Article 46(1)(a)(ii) provides a right to effective remedy against having an application deemed inadmissible but does not necessarily stop the transfer .

notes that before the adoption of the APD, the UNHCR expressed deep concerns about the non-suspensory appeal rights which would allow for deportations despite the lodge of an appeal[136]. This further limit the rights owed to refugees under the international protection regime and further increases the risk of refoulement.

The overall concerns connected to the application of the STC concept in practice revolve around efforts to accelerate and generalise asylum procedures. Such efforts often result in the limitation of case-by-case processing. Safe country-lists and general declarations of safety are often used as tools to boost the efficacy of asylum systems in Europe. However, this may have serious effects on the rights of those seeking protection. STC policies based on general considerations of safety may result in actual refoulement, direct or indirect, lack of effective protection in the third state as well as limited rights to appeal the transfer before it occurs. Borchelt argues general assessments of safety fundamentally contradict the right to an individual assessment of an asylum claim as established under international refugee law and reiterated by the UN General Assembly and the UNHCR[137]. Thus, accelerated and generalised processing of asylum applications would be in violation of this right. Having observed the main concerns connected to the application of STC practices, the analysis will move on to consider policies common to the EU during the mass influx of asylum seekers to the union in 2015.

5.3 EU policy post-2015

5.3.1 The Dublin Regulation

The significant increase in arrivals of asylum-seekers in Europe in 2015 presented several challenges to the Common European Asylum System (CEAS). The upsurge in arrivals arguably served as a trigger of a state of crisis as it led to the exposing of systemic deficiencies within the system of responsibility-sharing in the EU[138]. These deficiencies mainly revolved around the 'Dublin system', i.e. the EU Regulation outlining criteria for the determination of which Member State is responsible for processing an asylum claim[139]. This system was one of the core efforts made to improve upon responsibility-sharing in the Union, by balancing numbers of applications lodged in each state through the Dublin mechanism.

[136] Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 53.
[137] Borchelt, 'The Safe Third Country Practice in the European Union', 509.
[138] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis', 3.
[139] Fullerton, 'Asylum Crisis Italian Style', 67.

Despite these aims, the Dublin system arguably "Collapsed under its' own weight"[140] following the so-called crisis of 2015. Greece and Italy were largely overwhelmed by the high number of arrivals on their shores. Consequently, both countries let asylum-seekers pass through causing large secondary movements throughout Western Europe[141]. Ultimately, the Dublin mechanism was unable to sustain a high number of arrivals because of the disproportionate amounts of responsibility put on states with EU external borders[142]. Generally, one can argue that the EU had several internal issues when dealing with the mass influx of 2015, leading to the situation to be named a crisis. Inherent flaws of the asylum system were exposed through the collapse of the Dublin regulation, and the arising challenges of responsibility-sharing were largely not met.

The rules under the Dublin Regulation are highly relevant for the discussion of the application of the STC concept. 'Safe country'- notions are one of the main foundations of the Dublin system as the assumed safety of states party to the Regulation is a key component of the system of responsibility-sharing. The concept of 'super-safe third country' applies to this context. Outlined in the Procedures Directive, this concept acknowledges that countries who have ratified the 1951 Refugee Convention and the European Convention of Human Rights (ECHR), and has an asylum procedure established by law are inherently safe for returns, thus no individual examination of the application is required[143]. The Dublin Regulation correspondingly assumes that that all EU Member States are considered as STCs, an assumption which is underlined by the idea that all 'Dublin' states have similar substantive protection mechanisms directed at those seeking asylum from persecution[144]. However, as with other general assumptions of safety, these notions have been challenged.

The main criticisms directed at the operation of the Dublin Regulation revolve around two central themes. Firstly, it has been contended that the asylum procedures in some EU countries are inadequate, thus heightening the risk of refoulement upon inaccurate decisions[145]. Secondly, concerns have been raised about the reception conditions in certain EU states with critics arguing that asylum-seekers risk facing inhuman or degrading treatment

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[140] Menéndez, 'The Refugee Crisis', 397.

[141] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis', 4.

[142] Niemann and Zaun, 6.

[143] Goodwin-Gill and McAdam, *The Refugee in International Law*, 400, see Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), Article 39 (1) and (2).

[144] Borchelt, 'The Safe Third Country Practice in the European Union', 507; Menéndez, 'The Refugee Crisis', 394.

[145] Fullerton, 'Asylum Crisis Italian Style', 96.

upon return there[146]. Both of these challenges were dealt with in the landmark case *M.S.S v. Belgium and Greece* in the European Court of Human Rights (ECtHR)[147]. In this judgement, the Court concluded that Greece could not be considered as a safe country and that Belgium violated ECHR Article 3 by returning an Afghan asylum-seeker there as he was subject to degrading treatment in Greece[148]. Following this case, it has become clear that relying on the presumptions in the Dublin Regulation is not sufficient as to determine whether or not a country can be considered as safe. Thus, 'super-safe country' notions under Dublin are not reliable and do not necessarily alleviate the risk of refoulement.

Further, as stressed above, the Dublin Regulations largely failed in 2015 because of the strain on the asylum systems of Greece and Italy. The situation presented new challenges to the CEAS overall, especially regarding STC policies. This challenge largely came from individual states declaring states of emergency, and pursuing unilateral policies diverting from the general rules manifested in the EU system[149]. Within the Union, responses to the crisis were highly divergent. The efforts of Germany to open its borders and refrain from returning applicants under Dublin stand in stark contrast to efforts of Hungary to raise physical walls around their borders. Thus, because of diverging unilateral policies, it became difficult to retain the Dublin-assumption that all Member States have similar asylum procedures. The aims of the CEAS have arguably failed to an extent post 2015, as challenges to the system led to divergence in policy instead of convergence[150], exposing the fragility of the European system of responsibility-sharing.

The 'Dublin system' for determining responsibility for processing asylum claims was envisaged as a key feature to contribute to the harmonization of asylum policy in the EU. However, as a consequence of the events in 2015, the system collapsed and, in many ways, deteriorated the already limited system of responsibility-sharing. This discussion has highlighted the inherent flaws of the Dublin Regulation itself, most importantly the notion that all Member States constitute STCs. This arguably fosters the subjective application of the STC concept by individual Member States. The next section explores the issue of 'chain refoulement' following STC transfers, a risk which arguably is heightened in today's political climate.

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[146] Fullerton, 96–97.

[147] Fullerton, 97.

[148] Council of Europe: European Court of Human Rights, M.S.S. v. Belgium and Greece, Application no. 30696/09 paragraphs 362–368.

[149] Menéndez, 'The Refugee Crisis', 399.

[150] Menéndez, 400.

5.3.2 Chain refoulement

The issue of 'refugees in orbit' was widely discussed prior to the implementation of the STC concept in international law. In 2002, Borchelt noted that STC practices could result in a situation where "The asylum-seeker is shuttled back and forth between various countries, none of which will accept responsibility for determining the substance of the asylum claim."[151] Thus, without a clear-cut system establishing which state has primary responsibility, asylum-seekers risk not receiving a determination based on the merits of their claim. The Dublin Regulation aimed to eliminate the refugee in orbit issue, through establishing such a system[152]. Although the regulation may, in theory have solved this issue within Europe, the wider application of the STC concept under the CEAS may well accelerate the processes of refoulement[153]. As mentioned above, when a transfer is conducted under the Dublin-rules, the sending state is not obliged to ensure that the applicant will be guaranteed access to a fair asylum procedure upon return to another Member State[154]. Thus, the risk of refoulement or 'chain-refoulement' where an applicant is subsequently refouled to persecution or ill-treatment is still present.

Costello contends that STC policies have resulted in numerous cases of direct as well as chain refoulement, which constitutes a serious breach of international law[155]. Following the events in 2015, a report was published by ECRE highlighting that a substantial quantity of case law has emerged in Europe suggesting that the risks of indirect refoulement through Dublin transfers are fairly high in relation to some Member States[156]. For instance, several domestic courts have ruled against transfers of Afghan asylum-seekers to Germany, Austria, Belgium, Sweden, Finland and Norway "Due to human rights risks stemming from their unduly strict policy on granting protection to Afghan claims."[157]

As established above, the EU system of responsibility-sharing is indeed flawed. The rules of general determinations of safety established in the Dublin Regulation and the Procedures Directive fail to work when Member States have completely diverging asylum policies, as was especially the case during and after the mass influx of 2015. Over a decade after the implementation of the CEAS, the same applicant may be qualified for international protection

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[151] Borchelt, 'The Safe Third Country Practice in the European Union', 501.

[152] Goodwin-Gill and McAdam, *The Refugee in International Law*, 401.

[153] Goodwin-Gill and McAdam, 402.

[154] Goodwin-Gill and McAdam, 402.

[155] Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 47.

[156] European Council on Refugees and Exiles (ECRE), 'To Dublin or Not to Dublin?', 2.

[157] European Council on Refugees and Exiles (ECRE), 2.

without doubt in one state and face rejection and removal to a place where they risk persecution in another state within the same cooperation system[158]. This is highly problematic and exposes asylum-seekers to a system based on chance, not universal human rights.

The Dublin system is not only fundamentally flawed, but also counterproductive as it pertains to expose asylum-seekers to risks of refoulement rather than protecting them from it. Its implementation today has shown an increase in risks of direct and indirect refoulement. Further, the Regulation invites the increase of uncritical use of STC referrals, which is allowed under the super-safe country concept. This, in turn is highly problematic in today's political climate, as the safety of several groups of asylum-seekers cannot be guaranteed in certain European states.

5.3.3 The EU-Turkey 'Deal'

The 'EU-Turkey Statement' was agreed upon in the spring of 2016 and established a plan to alleviate the pressure the CEAS found itself under due to the increased number of asylum-seekers entering Europe. Under the deal, Turkey agreed to readmit all irregular migrants who had reached Greece. In return, the EU would pay six billion euros to Turkey as compensation for hosting refugees and migrants remaining displaced in the country[159]. The European Council stressed that the returns would take place in full accordance with EUs obligations under international law, and that all migrants would be protected against refoulement[160]. The deal is particularly interesting to our discussion, as the Council further notes that asylum seekers whose applications have been found inadmissible or unfounded in accordance with the EU Procedures Directive will also be returned to Turkey[161]. On the basis of this, the deal opens for transfers to Turkey under the safe-country concepts pursuant to the criteria stipulated in rAPD.

Following the Councils' efforts to facilitate returns to Turkey, it has been asked whether or not Turkey can actually be considered as a safe third country. Amnesty International has been persistent in their critique of the deal arguing that the notion that Turkey is safe for refugees and asylum seekers is purely fictional[162]. This section will discuss the issues pertaining to the

[158] European Council on Refugees and Exiles (ECRE), 3.
[159] Collett, 'Destination: Europe', 150.
[160] European Council, 'EU-Turkey Statement, 18 March 2016', (1).
[161] European Council, (1).
[162] Amnesty International, 'No Safe Refuge', 5.

assumed safety of Turkey, which revolve around violations of the principle of non-refoulement as well as the lack of 'effective refugee protection' in the country.

rAPD Article 38(1)(b) and (c) establish that in order to return an applicant to a third state there must be no risk of persecution or serious harm in that state as well as no risk of subsequent return to another unsafe state or the state of origin. Amnesty International notes there is "consistent and compelling" evidence suggesting that asylum-seekers in Turkey are at risk of refoulement to human rights violations in Syria, Afghanistan and Iraq[163]. The existence of such a risk makes it highly problematic to return persons of certain nationalities to Turkey and given that most refugees in the region are persons fleeing war and conflict, this could possibly affect a large group of people.

The question of whether Turkey has the institutions in place in order to provide effective protection to refugees needs to be answered. The Procedures Directive requires that a possibility must exist to seek asylum in the third country and that if granted asylum, the applicant shall "Receive protection in accordance with the Geneva Convention" [164] (the 1951 Refugee Convention). Here, we are faced with an issue of legal interpretation. A textual interpretation of this provision may suggest that a country has to have ratified the Refugee Convention in full, in order to be considered as safe. While Turkey has ratified the Convention, it retains a geographical limitation, which means that the provisions only apply to those fleeing from events occurring in Europe, not elsewhere[165]. Thus, those fleeing from countries in the Middle East or North Africa cannot be considered as conventional refugees in Turkey.

A teleological interpretation, however, based on the object and purpose of the treaty would possibly argue that protection 'in accordance with' the Refugee Convention can be understood to include alternative domestic protection mechanisms. As the rAPD provides minimum standards for granting and withdrawing protection, it could be seen as admissible if the prospect third country has a system which provides protection *equating* to that of the Convention, through domestic rules. Despite its lack of obligations under international refugee law, Turkey introduced a new asylum law in 2014 based on the asylum acquis of the CEAS[166]. Through this law, 'conditional refugee status' may be awarded to those fleeing from

[163] Amnesty International, 11.

[164] Council of the European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), Article 38(1)(e).

[165] UNHCR, 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol', 5.

[166] Amnesty International, 'No Safe Refuge', 13.

events occurring outside Europe[167]. However, this body of law does arguably not succeed in fully establishing a right to asylum in Turkey[168]. The main concern is that Turkish authorities are not successful in implementing the law in practice, and that decisions are often unfair and lacking legal grounds for rejection[169]. Hence, it seems fair to argue that the asylum system in Turkey does not meet the standards required to give protection in accordance with the Refugee Convention.

The issue of interpretation may also be looked at from a human rights perspective. Whether or not Turkey can be considered safe in accordance with rAPD Article 38(1)(e) depends on its ability to provide *effective* protection. There are several things standing in the way of this. The UNHCR understands the provision to require ratification of the 1951 Convention as well as its 1967 Protocol, as well as implementation in practice[170]. As mentioned above, Turkey lacks this formal requirement. Furthermore, UNHCR understands effective protection to include respect for fundamental human rights in the third state, including but not limited to the right to life, liberty and the protection against torture, cruel, inhuman or degrading treatment[171]. A holistic, inclusive interpretation of the scope of the STC concept includes broader human rights concerns in addition to protection against refoulement. Thus, even if Turkey could provide protection in accordance with the 1951 Convention, the country would also have to retain a certain human rights record.

Turkey has an uneven record of protecting the human rights of both its citizens and non-citizens, demonstrated by the fact that it has received the highest number of judgements against it from the ECtHR[172]. Furthermore, the political climate in the country has become increasingly authoritarian over the last years[173]. Additionally, following the failed coup d'état in Turkey in 2016, European states have seen an increase in asylum applications from Turkish citizens[174]. These factors point to the conclusion that Turkey is not likely able to secure fundamental human rights for vulnerable persons finding themselves under its jurisdiction.

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[167] Amnesty International, 14.

[168] Borges, 'The EU-Turkey Agreement', 136–37.

[169] Amnesty International, 'No Safe Refuge', 16.

[170] UNHCR, 'UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', 37.

[171] UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers', 3.

[172] Borges, 'The EU-Turkey Agreement', 138.

[173] Borges, 138.

[174] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis', 10.

Overall, interpretation of the provisions in rAPD regarding safe country notions are important. STC policies can have highly different outcomes pursuant to varying and subjective interpretations. The above discussion suggests that there is compelling evidence to argue that the criteria in Article 38 are not fulfilled in relation to Turkey. The main arguments ascertaining this notion include the issues of Turkey's limited international legal obligations towards refugees as well as its relatively underdeveloped asylum system. If applying a narrow interpretation of Article 38(1)(e) it does not follow that Turkey is safe for returns. Furthermore, when including wider human rights concerns into the STC-analysis, the country's poor human rights record suggests that designating it as a safe state could put thousands of persons seeking protection at risk.

5.4 The Norwegian case: lessons from Storskog

In 2015 an unprecedented number of asylum-seekers arrived at the Storskog border crossing in northern Norway[175]. A report from the Norwegian Organisation for Asylum Seekers (NOAS) notes that 5,000 individuals crossed the Norwegian border from Russia in order to apply for asylum[176]. As the number of arrivals increased, the Ministry of Justice in Norway instructed the Norwegian Directorate for Immigration (UDI) to "Apply relevant provisions of the Norwegian Immigration Act to deny asylum-seekers arriving at Storskog the right to have their asylum cases considered on the merits."[177] One of the provisions referred to in the instruction is based on the STC concept and was to be applied in cases where an asylum-seeker arriving in Norway had previously stayed in a country where he or she was not subject to persecution and where their application could be assessed on its merits[178]. In light of the situation unfolding at Storskog, the STC provision was initially applied to 1316 cases by the UDI, who declared them inadmissible and referred the applicants for return to Russia[179]. However, many of these cases were later overturned.

The Storskog situation is highly relevant to the discussion on how STC practices can impact upon the rights of refugees and asylum-seekers. It is arguably a clear-cut case illustrating extended application of the STC concept beyond the scope of the criteria required by the Dublin Regulation and the Procedures Directive. This section will outline the main ways it adversely affected rights of those asylum-seekers affected. It will do so through highlighting

[175] Norwegian Organisation for Asylum Seekers (NOAS), 'Norway's Asylum Freeze', 16.
[176] Norwegian Organisation for Asylum Seekers (NOAS), 16.
[177] Norwegian Organisation for Asylum Seekers (NOAS), 19.
[178] Norwegian Organisation for Asylum Seekers (NOAS), 19.
[179] Norwegian Organisation for Asylum Seekers (NOAS), 17.

two main issues; the removal of a key legal procedural safeguard and the declaration of Russia as a safe third country.

5.4.1 Amending the Norwegian Immigration Act

The Norwegian Immigration Act section 32(1)(d) originally included safeguards protecting against refoulement, as well as requiring that an asylum application 'will be examined' in the third country upon return. However, in November 2015 the provision was amended by the Parliament, removing the latter procedural safeguard allowing for the UDI to reject applications lodged by those who previously had stayed in Russia[180]. The removal of this important safeguard effectively "Reduces the entire scope of refugee protection to the obligation of non-refoulement"[181] and strips asylum-seekers of a whole catalogue of rights which would be awarded to them under the Refugee Convention. As discussed, the principle of non-refoulement is an important right, but it is not the only right awarded under the refugee protection regime. Pursuant to the amended version of section 32(1)(d), asylum-seekers could risk being sent to a state lacking a fair and effective asylum system.

Another issue concerns the compatibility of the amended provision with the rules set out in the Dublin Regulation, which Norway is bound by. As mentioned in the section on legal sources in the previous chapter, the Regulation requires that domestic rules allowing for the application of the STC concept must be subject to the rules laid down in the Procedures Directive[182]. Thus, Norway is legally bound to follow the STC rules in the rAPD. The amended provision in the Norwegian Immigration Act clearly falls short of the criteria outlined in rAPD Article 38(1)(e) which, as outlined previously, requires that the asylum-seeker has the opportunity to request asylum in the third state, and if found to be a refugee to receive protection in accordance with the Refugee Convention. NOAS argues that through the application of this amended STC provision, Norway effectively forced persons with protection needs to flee the country and apply for asylum in other Dublin Member States[183] as staying in Norway could mean their forced return to Russia. Thus, one can argue that the Norwegian authorities stripped asylum-seekers of several of their rights and used the STC provision to effectively exclude a number of asylum-seekers from their asylum procedures.

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[180] Norwegian Organisation for Asylum Seekers (NOAS), 20.

[181] Norwegian Organisation for Asylum Seekers (NOAS), 23.

[182] Council of the European Union and European Parliament, Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 3(3).

[183] Norwegian Organisation for Asylum Seekers (NOAS), 'Norway's Asylum Freeze', 25.

5.4.2 The safety of Russia

The second core issue pertaining to Norwegian STC practices, is the degree to which Russia can be constituted as a safe country for returns. The risks asylum-seekers were exposed to as a consequence of the new STC practice are comparable to the Turkey case discussed above, mainly because of the risk of chain-refoulement and the limitations of the asylum system in Russia. The NOAS report stresses that the situation created real risks of chain refoulement. This claim is illustrated by several publicised cases, for example the case of a Syrian who was deported to Russia and travelled onward to Turkey in order to avoid detention and the risk of refoulement[184]. Through the amended STC practice toward Russia, Norway arguably breached a key international legal principle by exposing asylum-seekers to the risk of refoulement through facilitating returns to a place where they could risk being returned to their country of origin.

NOAS further argues that the presumption that Russia is safe for asylum-seekers is highly problematic[185]. A report by Landinfo, the Norwegian country of origin information centre, references documented cases of refoulement from Russia in addition to general concerns regarding arbitrariness and corruption in the processing of asylum applications[186]. Similarly, a report from the Norwegian Helsinki Committee points to 'disregard for human rights standards' in Russia as well as risks of 'arrest, detention and expulsion' facing asylum-seekers in the country.[187] Based on the findings in these reports, it is doubtful that Russia can be seen as a safe third country pursuant to the criteria established in the Procedures Directive and Dublin Regulation. The next section will explore the underlying motivations of Norway for applying the STC concept in relation to Russia.

5.4.3 Underlying motivations

The reasons why Norway chose to pursue the STC policy in the Storskog case may be numerous and complex, however it is possible to draw some general conclusions on the underlying motivations of the authorities. As previously discussed, the STC concept is vulnerable to political interference, something which may be easily abused if the political will to do so is present. States' application of the STC concept is often rooted in their concern for national sovereignty[188]. States tend to view increased immigration as a threat to their

[184] Norwegian Organisation for Asylum Seekers (NOAS), 28.
[185] Norwegian Organisation for Asylum Seekers (NOAS), 28.
[186] Norwegian Organisation for Asylum Seekers (NOAS), 29.
[187] Norwegian Helsinki Committee (NHC), 'Lost in Russia', 14.
[188] Borchelt, 'The Safe Third Country Practice in the European Union', 504.

sovereignty[189] and thus make use of the STC- and related concepts to limit the influx into their territory. One may argue that Norway pursued a STC policy exactly for this reason.

This claim can be backed up by several arguments. Firstly, if looking at the public discourse used to address the situation at Storskog, we see that government officials consistently named the individuals seeking asylum in Norway as migrants, not asylum-seekers[190]. Through the act of defining them as such, an assumption is created that they are not in need of international protection and thus denying them the right to an asylum procedure is legitimised. Had they not been defined in this manner, the public discourse constructed towards them could have been entirely different.

Secondly, the Ministry of Justice pushed for an expedited legislative procedure[191]. Efforts to enforce the amendment of the Norwegian Immigration Act rapidly and without public consultation points to the idea that the situation was rather politicised. The change in the law arguably bears witness of Norway not wishing to be a first country of arrival within the Schengen area. It seems the government found it necessary to remove the legal safeguard in the STC provision, in order to be able to return asylum-seekers to Russia[192]. The amendment was a direct response to the Storskog situation, and shows, through the attitude towards the applicants, as well as the expedited process that the Norwegian authorities did not particularly wish for them to stay or for more to arrive through the same route.

The previous points contribute to the argument that the Storskog situation had become highly politicised and warranting a rapid response from the authorities. One can argue that the STC concept was used as a tool to push back asylum-seekers and deter future arrivals. Authorities have admitted that the main aim underlying the amendment of the law was to tighten asylum policy, something which was seen as necessary and important in an era with large movements of 'migrants' in Europe[193]. Thus, we can see how the STC concept was distorted through political efforts to exclude a group of persons seeking protection. These efforts can be connected to the securitization of immigration process discussed in previous chapters. The Norwegian authorities publicly denounced the prospect of increased immigration, thus framing the asylum-seekers at Storskog as unwanted, and part of an issue that needs to be

[189] Borchelt, 504.

[190] Norwegian Organisation for Asylum Seekers (NOAS), 'Norway's Asylum Freeze', 17.

[191] Norwegian Organisation for Asylum Seekers (NOAS), 20.

[192] Norwegian Organisation for Asylum Seekers (NOAS), 21.

[193] Trellevik, 'Norge får refs av NOAS og Helsingforskomiteen' Paraphrasing the former Minister of Justice, Tor Mikkel Wara (my own translation).

controlled and reduced[194]. Through such a discourse, the asylum-seekers were seen as a threat, needing to be dealt with through exceptional measures. Through securitizing the immigration issue in public discourse, the Norwegian authorities secured a seemingly legitimate cause to change the law and apply the STC concept in relation to Russia.

The case of Norway illustrates how the rights of refugees are adversely affected through the expanded application of the STC concept. Furthermore, it shows how the concept can be misused and altered in order to fit with the political agenda of the country applying it. In this case, the concept was used largely as a tool to manifest an anti-immigration discourse prioritising the sovereign rights of the state before rights of those most vulnerable; the immigrants themselves.

5.5 Conclusion

This chapter addressed the main research question, identifying the main implications arising through the application of the STC concept in practice which revolve around efforts to accelerate and generalise asylum procedures. This leads to the marginalisation of key rights of refugees including the protection against refoulement, broader human rights considerations regarding reception conditions, appeal rights, and the right to an individual case-by-case processing. The chapter also highlighted the flawed assumptions made through the Dublin Regulation, its collapse during the 'refugee crisis' of 2015 as well as its failure to protect refugees against chain refoulement.

The second part of the chapter presented two case studies. Through broadened, teleological interpretations of the provisions in the Procedures Directive, and the removal of a key legal safeguard in the EU and Norway respectively; Turkey and Russia may be declared safe, thus likely denying asylum-seekers access to a fair and effective asylum procedure and exposing them to risks of refoulement. The case of Norway illustrated how the STC concept can be altered, broadened and manipulated by political forces with authority to change its legal scope and aims to sacrifice the rights of asylum-seekers for the protection of the sovereign rights of the state.

The two cases function as 'snapshots' presented in order to deepen the understanding of the broader issues at hand namely that the STC concept is detrimental to the protection of the rights of refugees due to its increased and expanded application by states in contentious

[194] See Buonfino, 'Between Unity and Plurality', 48 which explains how the influx of foreigners has become securitized through negative discourse.

situations, where the underlying goal is to relieve themselves of responsibility under international law. The final chapter will discuss the challenges which may arise through the future application of the STC concept as well as summarise the main findings of the thesis.

6 Conclusion: challenges ahead of the future implementation of the 'Safe Third Country' concept

6.1 Introduction

The previous chapter highlighted the various issues pertaining to the past and current application of the STC concept. This chapter will conclude the thesis by discussing the challenges which may arise in the future, through the expanded use of STC practices in the EU. The discussion is based on the proposal made by the European Commission to reform the CEAS. This reform includes, amongst other efforts, replacing the Procedures Directive of 2013 with a new Regulation, thus "Harmonising the current disparate procedural arrangements in all Member States and creating a genuine common procedure."[195] The proposal has not yet been ratified but has been discussed in the European Parliament and the Council, the latter calling for the conclusion of the reform as soon as possible[196]. It contains several amendments to the rules on safe third country-referrals. This discussion will provide links to a broader conclusion to the thesis which will summarise the main findings along with presenting a message of caution regarding the implementation of future versions of the STC concept.

6.2 The proposed Asylum Procedures Regulation

While EU Directives often set minimum standards applicable to all Member States, Regulations tend to be more binding as their rules are enforceable as law once they enter into force. Before offering a critique of the proposed Asylum Procedures Regulation, one positive aspect deserves to be mentioned. The European Commission suggests that the new law will provide for automatic suspensive effects of an appeal lodged in regard to a STC-decision, as application of the STC concept risks violating the ECHR Article 3[197]. This change would

[195] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, Explanatory Memorandum', 3.

[196] See 'Legislative Train Schedule, towards a New Policy on Migration'.

[197] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, Explanatory Memorandum', 18.

arguably contribute to alleviate the risk of refoulement which many asylum-seekers are currently exposed to. Furthermore, the Commission proposes harmonised rules on safe country-practices[198]. This could indeed help solve the discrepancy issues within the EU where processing of asylum applications widely differs from state to state. However, it could also mean that STC policies are increasingly applied, an becomes the norm rather than the exception. Increased application could lead to states furthering their deflection of responsibility under international law, a concern which has been alluded to in the past[199].

Notwithstanding these general changes, the Commission has also proposed specific amendments to the STC provision in EU law (currently rAPD Article 38). Two amendments are especially problematic. Firstly, the new provision, Article 45(1) states that pursuant to certain criteria, "A third country *shall* be designated as a safe third country."[200] This formulation differs from the current law and will create an obligation for states to apply the STC concept[201]. ECRE notes this is problematic because of the lack of a clear legal basis for the STC concept in international law[202]. As discussed previously, the primary responsibility to process an asylum case lies with the state that receives the application. Thus, to apply the STC concept on every case to see if a transfer is possible may not be in full accordance with international refugee law.

Secondly, the proposal expands upon the criteria required for a state to constitute a safe third country. The proposed Article 45(1) (e) requires the possibility to "Receive protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate."[203] Differing from the current wording in the rAPD, the new criterion considerably lowers the standard for declaring a country as safe. It does so by widening the scope of the degree of protection an asylum-seeker is guaranteed in the receiving state. ECRE criticises the proposed amendment by stressing that the 'substantive standards' of the Geneva Convention is a vague term which invites diverging

[198] European Commission, 18.

[199] See Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices', 68–69.

[200] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, Explanatory Memorandum', 68.

[201] European Council on Refugees and Exiles (ECRE), 'ECRE Comments on the Proposal for an Asylum Procedures Regulation', 55.

[202] European Council on Refugees and Exiles (ECRE), 'Debunking the Safe Third Country Myth', 2.

[203] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, Explanatory Memorandum', 68.

interpretations[204]. The wording risks that states effectively pick and choose which standards in the Convention they wish to fulfil and to ignore.

The proposal also adds the possibility to receive 'sufficient protection' in the third state as an alternative to protection under the Refugee Convention. This also widens the scope for states to increase their use of STC policies considerably[205]. Additionally, ECRE argues the new wording is largely construed to be in line with the asylum system in Turkey[206]. As the degree of safety in Turkey is widely debated, this amendment is controversial at the very least. Thus, if adopted, the Regulation could open up for returns from the EU to Turkey on a large scale.

6.3 Concluding remarks

The concerns expressed about the future application of STC practices link to broader issues at hand. An Asylum Procedures Regulation could contribute to the deterioration of the refugee protection regime as we know it today. By widening the scope of the STC concept, the proposed Regulation may correspondingly shrink the scope of the right to seek asylum. The proposal by the European Commission exists within a time and space that saw numerous political efforts to externalise migration control. Safe country practices are used as a tool for pushing migrants and asylum-seekers alike out of the jurisdictions of European states. If these practices are expanded upon through amending the existing substantive criteria, we risk seeing considerable political efforts to avoid taking in asylum-seekers and processing their applications, thus circumventing obligations under international refugee-and human rights law.

As migrants and asylum-seekers are increasingly seen as a security issue constituting a threat to European states[207], there is reason to believe that changes to the law regulating Member States' asylum procedures could lead to increased pursuance of STC referrals and returns. Thus, a new regime under the proposed criteria could further allow for STC practices to keep applicants 'from the procedural door' as rightly noted by Goodwin-Gill and McAdams[208]. Sustaining such a practice would be highly detrimental to the rights of refugees and could

[204] European Council on Refugees and Exiles (ECRE), 'ECRE Comments on the Proposal for an Asylum Procedures Regulation', 55.

[205] European Council on Refugees and Exiles (ECRE), 56.

[206] European Council on Refugees and Exiles (ECRE), 'Debunking the Safe Third Country Myth', 2.

[207] Gammeltoft-Hansen, *Access to Asylum*, 6–7; Bigo, 'Security and Immigration', 63; Huysmans, *The Politics of Insecurity*, 25.

[208] Goodwin-Gill and McAdam, *The Refugee in International Law*, 390 Note that this is a general description of the function of STC practices. .

eventually lead to the dismantling of the whole system of responsibility-sharing in Europe as states are able to facilitate returns to a wide range of third states.

This thesis found that the Safe Third Country concept is flawed in its own right as it in many ways contradicts the fundamental right to seek and enjoy asylum from persecution. The STC concept gives states the option to deny processing an asylum claim if the applicant *could* or *should* seek protection elsewhere. The concept has become politicised as states interpret it within a context focused on security, and the seemingly irreconcilable struggle between sovereign rights and the rights of the individual. The STC concept is not necessarily an expression of a process securitizing the refugee, however, it has been assimilated into public policy as a weapon designed to deter the arrival of asylum-seekers to the Global North. Through employing the STC concept, states are able to circumvent their legal responsibilities toward refugees without giving off the impression that they do not care about their rights and wellbeing. As long as the legal criteria are fulfilled, international law remains respected.

However, as the thesis has shown, the EU as a collective as well as individual states have the power to interpret and even change the legal scope of the STC concept. If the current political climate supporting the externalisation of migration control continues, new, altered versions of STC policies may be used to further diminish the right and ability to seek asylum in Europe. The pressure arising from the consensus of opinion among states could lead to the change of the legal criteria underlining the STC concept – making the idea of safety subject to whatever states want it to be.

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