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10-11-2021

'Safe third countries' and our obligations to others

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Recommended Citation

Paul Linden-Retek, *'Safe third countries' and our obligations to others*, (2021).

Available at: https://digitalcommons.law.buffalo.edu/baldy_center_blog/19

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Post 19. Paul Linden Retek: 'Safe third countries' and our obligations to others



Afghan citizens pack inside a U.S. Air Force C-17 Globemaster III, as they are transported from Hamid Karzai International Airport in Afghanistan, on Aug. 15, 2021. [Photograph](#) courtesy of Capt. Chris Herbert/U.S. Air Force via AP.

Blog Author: [Paul Linden-Retek](#), Lecturer in Law & Society; Research Fellow at The Baldy Center

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

'Safe third countries' and our obligations to others

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

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

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

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

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

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

The concept's fundamental assumption is that certain asylum seekers may be returned, without full scrutiny of their asylum request, to third countries if those states can be considered safe. It first emerged from the conviction that the uneven distribution of asylum seekers across the European Union was due to 'forum shopping' by applicants, who chose to travel to the Member State they perceived as more sympathetic to their plight. The principle has a number of applications and uses: as a filter for the admissibility of asylum claims and in some cases as a basis for exclusion from refugee status at the merits phase of proceedings; and as a justification for blocking the passage of refugees in transit or for summarily returning those who have reached national territory before they file a claim to protection.

Scholars of the concept have focused their attention principally on the conditions under which STC transfers lawfully accord with the 1951 Convention's guarantees of effective protection of individual rights. Many have pointed to the difficulties of securing such guarantees on the ground and have warned that the 'safe third country' concept is often unworkable in practice. Only a few studies have addressed the lawfulness of the concept itself from a refugee law and human rights perspective, and this without reaching a definite conclusion—and not discounting the legality of the STC idea itself.

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

Focusing on individual rights protection alone is too passive a mode of legal critique—and, as I argue, inadequately reflects important doctrinal innovations in international human rights law. New conceptions of 'functional jurisdiction', for example, that emphasize creative, evolving theories of effective control and the duty to prevent harm are usefully understood as relational concepts. Democratic responsibility also makes clearer sense of why performance of treaty obligations in good faith requires the fair distribution of burdens. The core illegality of the safe third country concept lies in the manner it insulates the state from accountability in its relations with the refugee and the foreigner alike.

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

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

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

Please see the Boston Review article, 'Whose Suffering Matters', by Dr. Paul Linden-Retek, [here](#).