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The First Safe Country Principle in Law and Practice

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The First Safe Country Principle in Law and Practice

This issue brief is intended as a reference guide on the legality of the 'first safe country' principle.

The first safe country principle refers to the practice of refusing entry to asylum seekers who, prior to their arrival in the country where they are seeking asylum, have travelled through an alternative country that could have offered them asylum protection. This principle has been advanced by the Department of Home Affairs (DHA) as a basis to deny entry to asylum seekers who have transited other countries en route to South Africa.

This issue brief highlights the conditions under which it is lawful to apply the first safe country principle, and explains why the DHA's current practices violate international law.

Key Messages

- There is no general, recognised first safe country principle in international law.
- Among the minority of states that have implemented the practice through treaties and legislation, all are legally obliged to do so in a manner that protects the fundamental rights found in international refugee law.
- International law demands that countries provide individuals fleeing persecution with access to asylum procedures, and South Africa's domestic refugee legislation gives effect to this principle.
- Under the principle of *non-refoulement* – found in both international and domestic law – South Africa may not refuse entry or return an individual to a country where he or she may face persecution or a threat to his or her life.
- Countries may not simply deny entry to an asylum seeker, and must consider claims individually before deciding to return an asylum seeker to a third country.
- Unless there is a guarantee of fair asylum procedures in transit countries that are deemed 'safe,' denying an asylum seeker entry based on a first safe country principle constitutes indirect *refoulement*, and is a violation of the first sending country's obligations under international law.
- South Africa's current implementation of the first safe country principle has no basis in international or domestic law, lacks the procedural guarantees that apply to the practice in other countries, fails to consider claims individually before turning asylum seekers away, and violates the principle established by a 2001 court order halting this practice by the DHA.

Background

Earlier in 2011, the DHA introduced amendments to the 2002 Immigration Act. Although these amendments are still being considered by Parliament and have yet to become law, DHA has already begun implementing one of the most controversial proposals – the use of pre-screening procedures for asylum seekers at the border based on the first safe country principle. The Minister for Home Affairs has refused to halt the practice.[1] As a result, asylum seekers who passed through another country on their way to South Africa are being turned away at the border. This practice contravenes international and domestic law, as outlined in this issue brief.

What is the 'First Safe Country' Principle?

An asylum seeker is someone who is forced to flee persecution or civil war in his or her home country. International law places obligations on states to offer protection to asylum seekers who declare their intention to seek refugee status, even if they lack identification documents or enter the country illegally.

Some states have sought to limit their humanitarian obligation to people fleeing conflict or persecution through the first safe country principle, also known as the safe third country principle. This principle requires fleeing asylum seekers to apply in the first country they enter that may potentially be able to offer them refugee protection.

Does International Law Enshrine the First Safe Country Principle?

No. The Minister of Home Affairs has stated that international law requires asylum seekers to seek refuge in the first safe country they transit.[2] Similarly, DHA officials have claimed that international law supports the department's practices of turning away asylum seekers on this basis, and requiring asylum seekers to produce valid travel documents, including asylum documents from the first country of safety.[3]

The claims that international law enshrines the first safe country principle are false. In fact, no first safe country principle exists in international law. Treaties (conventions) and customary international law are the two main sources of international law. Judicial decisions and the interpretations of highly recognised legal scholars are a secondary source for determining principles of international law.[4] As

[1] Statement by the Minister of Home Affairs, National Assembly of Parliament, 23 March 2011.
[2] See, e.g., 'South Africa: Home Affairs to Finalise Asylum Seeker Process,' 24 March 2011, available at http://allafrica.com/stories/printable/201103240076.html, and Loyisyo Langeni, 'SA, Zimbabwe mull tighter border controls,' *Business Day*, 23 Feburary 2011.
[3] See quote from the Deputy Director General of Immigration, Jackson McKay, cited in Mashuda Netsianda, 'SA/Zim Immigration Meet Over Somali Refugees,' 13 May 2011, available at http://www.zoutnet.co.za/details.asp?StoNum=9112
[4] The sources of international law are found in Article 38 of the Statute of the International Court of Justice (ICJ).

shown below, none of these sources provides a basis for South Africa's use of the first safe country principle.

The First Safe Country Principle in Treaty Law

Under international law, states are bound only by treaties that they have assented to through the signature and ratification process. South Africa is bound by two treaties specifically dealing with refugees:

1951 United Nations Convention Relating to the Status of Refugees

This treaty, whose scope was broadened by a 1967 Protocol, is the main international legal instrument governing the rights of asylum seekers and refugees, with 147 states party to the agreement. Together, the treaty and protocol define who is a refugee and set out the obligations of states with respect to asylum seekers (individuals seeking refugee status) and refugees (individuals who have obtained refugee status). The Convention enshrines the *non-refoulement* principle (Article 33), by which states are barred from returning an individual to a territory where his or her life or freedom may be in danger.

The 1951 Convention makes no reference to a first safe country principle, nor does it require a refugee to seek protection in the nearest country, or in the first state to which he or she flees.[5] In addition, Article 31 of the Convention prohibits states from imposing penalties on asylum seekers who enter or stay in a country unlawfully if they are fleeing persecution. Therefore, exclusion based on a lack of travel documents, including documents from the first country of safety, is not permitted.

1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

This is a regional convention that expands the refugee definition to account for the broader conditions of instability in Africa. It, too, includes no requirement that asylum seekers request protection from the first country they transit after fleeing. In addition, article 2(3) of the Convention specifies that the *non-refoulement* principle prohibits 'rejection at the frontier.'

The First Safe Country Principle in Customary International Law

States also are bound by customary international law, which is defined as consistent state practice based on a general understanding of law or legal obligation. In order to become a norm of customary international law that is binding upon all states, a practice must be consistent, widespread, and generally believed to create a legal obligation. Key elements in establishing a customary norm are:

- repetition (how often it is practiced);
- duration (how long it has been practiced); and

[5] For an authoritative interpretation of the Convention that makes the same point, see *James Hathaway, The Law of Refugee Status (1993) 46.* As a well-recognised refugee expert, Hathaway's interpretation falls under the category of secondary sources of international law as provided in the ICJ statute.

- generality (how many states have adopted the practice).

One of the most common, best-established over time, and most widely practiced norms in refugee protection is that of unrestricted access to asylum. There is no consistent, widespread state practice requiring asylum seekers to request the protection of the first safe country. A minority of countries has established this practice through specific bilateral and multilateral agreements. These treaties bind only the signatory states and are not indicative of a customary norm of international law. They stem from shared interests rather than the shared sense of legal obligation that gives rise to customary international law.

Thus, neither treaty nor customary international law provides any support for DHA's assertions that countries are bound under international law to enforce a first safe country principle.

Conditions for Implementing the First Safe Country Principle

While there is no general first safe country principle in international law, countries may adopt the practice through bilateral and multilateral agreements or treaties, provided these agreements do not conflict with their international obligations. States are not entitled to enter into cooperative agreements that enable them to evade their obligation to uphold the rights of asylum seekers and refugees under the international refugee convention.[6]

Regional and national courts in Europe, America and Australia have examined the existing treaties and legislation outlined below, which implement a first safe country principle. They have issued authoritative interpretations of the international law applying to this principle, and the resulting judicial decisions ensure that the related practices adhere to strict guidelines that protect the rights of refugees and asylum seekers under international law.

The European Union's Dublin Convention

This convention – later replaced by the Dublin Regulation – was passed in 1997 to establish which member state has the responsibility for determining the status of an asylum seeker in any EU country. The agreement places the onus on the first EU country that the asylum seeker entered. However, **a state cannot return an asylum seeker to a safe third country without ensuring that his or her fundamental rights will be protected in that country, including the right to a proper examination of his or her asylum claim**.[7]

The Canada-US Safe Third Country Agreement in the Americas

Under the Canada-US Safe Third Country Agreement, individuals seeking protection must apply for asylum in the country where they first arrive – either the US or Canada. However, **it is unlawful to**

[6] European Court of Human Rights, *T I v the United Kingdom*, App. No. 43844/98 (7 March 2000), p. 15.
[7] European Court of Human Rights, *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (21 January 2011) at 342.

deny entry at the border or expel an asylum seeker without an individual consideration of his or her claim, as this violates the *non-refoulement* principle under international law. [8]

The return of an asylum seeker to the country of first arrival is considered indirect *refoulement* if that country subsequently returns the asylum seeker to the country of persecution. Thus, under the Canada-US agreement, the *non-refoulement* protection extends to the country employing the safe third country principle. Even if a state does not directly return an asylum seeker to the country of persecution, it nevertheless violates international law if it returns an asylum seeker to a country that does ultimately commit *refoulement*.[9]

Australia's Third Safe Country Principle

Australia's third safe country principle is unilateral and not based on any agreement with other countries. Instead, it forms part of Australia's Migration Act, which provides that Australia has no obligation to protect any non-citizen who has not first sought protection from another country.[10] However, the country's high court has ruled that **Australia remains obliged to individually assess an asylum seeker before returning him or her to a third country in order to ensure that the third country will provide effective protection**.[11]

The cases summarized above clearly indicate that the first safe country, or safe third country, principle cannot be employed as a general practice to free a country from its protection obligations under international refugee law. A country may only return an individual to another country if certain conditions are met. Specifically, the returning country must ensure that the asylum seeker will have access to fundamental rights around the asylum process, including a fair asylum determination procedure and protection against *refoulement*.

Implications: The First Safe Country Principle in South Africa

South Africa's implementation of the first safe country principle:

- Has no basis in international or domestic law;
- Ignores a 2001 order from the Pretoria high court giving effect to an agreement to halt the use of the first safe country principle to deny asylum;
- Lacks the established procedural guarantees that apply to the limited number of similar practices adopted by other countries; and
- Rests on a perfunctory consideration of countries that the asylum seeker may have transited, without any assessment of an individual's asylum claim or access to fair asylum procedures.

[8] Inter-American Commission on Human Rights, *John Doe et al v. Canada*, Case 12.586 (23 March 2011), para. 111, citing IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.l/V/II.106 Doc. 40 rev., para. 25 (February 28, 2000).
[9] Ibid, para. 103.
[10] Section 36(3).
[11] Ibid., para 25.

Turning away individuals at the border without considering whether they will be afforded access to a fair asylum process poses the threat of indirect *refoulement*. By denying entry to asylum seekers based on the mere fact of their transit through another country, South Africa is contravening its obligations under international law. This practice increases the risk that individuals will be returned to the life-threatening situations from which they fled, in violation of the *non-refoulement* principle.

Selected ACMS Publications on DHA Policy and Practice

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- Amit, R. (2010*). Protection and Pragmatism: Addressing Administrative Failures on South Africa's Refugee Status Determination Process*. Available at: http://www.migration.org.za/sites/default/files/reports/2010/FMSP_Protection_and_Pragmatism_Report_April_2010_doc_2.pdf
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