

**NATIONS UNIES**

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**UNITED NATIONS**

HIGH COMMISSIONER  
FOR REFUGEES

## **CONSIDERATIONS ON THE "SAFE THIRD COUNTRY" CONCEPT**

*EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation  
Vienna, 8 - 11 July 1996*

### ***Background***

The concept of first country of asylum, or protection elsewhere, has initially been limited to cases where refugees had already found effective protection in a specific country and had moved on in an irregular manner in search of a new country of asylum. The increase in asylum applications, including the number of persons moving from their countries of origin through many transit countries before depositing an asylum claim, has subsequently led to stricter immigration control measures, including greater reliance on legal barriers reducing access to asylum procedures. The effect of the indiscriminate application of the safe third country concept in essence denies an asylum-seeker an analysis of the substance of his/her claim. Formal procedural grounds seem to create the legal fiction that an asylum-seeker could request or should have requested asylum in a particular State. Due to this development, admission of asylum-seekers to countries not in proximity to their countries of origin has become increasingly difficult. Given that the development of standards in Europe has major repercussions in other regions, UNHCR closely follows how all European States intend to resolve the question of allocating responsibility for examining asylum applications in a spirit of burden-sharing whilst ensuring that refugees receive the protection they require somewhere. UNHCR sees an urgent need to promote a Europe-wide consensus on this issue.

### ***UNHCR position***

UNHCR recognizes the considerable burden that first countries of asylum are faced with, particularly in case of mass influx situations. The Office acknowledges the importance of the concept of first country of asylum to ensure full respect for fundamental principles of international protection, in particular the principle of non-refoulement.

UNHCR has taken the view that it is legitimate and useful for States to establish parameters for the purpose of identifying the countries where it would appear reasonable that asylum applicants be called upon to request asylum and which could reasonably be asked to assume responsibilities for the individuals concerned. UNHCR's position is based on Articles 1 (E), 31 and 33 of the 1951 Convention relating to the Status of Refugees (hereafter 1951 Convention), UNHCR Executive Committee Conclusions No. 15 and No. 58, the analysis of relevant State practice and relevant human rights law.<sup>1</sup> The responsibility of a State under the 1951 Convention is engaged whenever that State is presented with a request for asylum involving a claim of refugee status by a person either at its borders or within its territory or jurisdiction. In all such cases, States parties are required, *inter alia*, to observe the principle of non-refoulement. The fact that a refugee has found or could have found protection elsewhere does not remove the obligation of other States to respect the principle of non-refoulement, even though it may be agreed that the primary responsibility for providing international protection, including asylum, lies with another State. Furthermore, the Office discourages unilateral action by States to return asylum-seekers to countries through which they passed without the countries' agreement, because of the risk of chain deportations, forcible returns to situations of persecution, and of orbit situations as well as the need for international solidarity and burden-sharing.

The examination of whether an asylum-seeker has, or could have, found protection elsewhere may precede the examination of the substance of the claim. The applicant should be given the possibility of rebutting any presumption that s/he has found or could have found protection in a third country, and to this effect an appeal or review possibility with suspensive effect should be available (see Article 3 in connection with Article 13 of the European Human Rights Convention).

UNHCR has identified some factors for consideration in determining whether the return of a refugee or an asylum-seeker to a particular country can take place. These factors, which include both formal aspects and the practice of the State concerned, are:

- ratification of and compliance with the international refugee instruments, in particular compliance with the principle of non-refoulement;
- ratification of and compliance with international and regional human rights instruments;
- readiness to permit asylum-seekers to remain while their claims are being examined on the merits;
- adherence to recognized basic human rights standards for the treatment of asylum-seekers and refugees;
- and, notably, the State's willingness and practice to accept returned asylum-seekers and refugees, consider their asylum claims in a fair manner and provide effective and adequate protection.

Clearly, the conclusion of formal agreements among States would enhance the international protection of refugees by leading to the orderly handling of asylum applications and ensuring some form of responsibility-sharing mechanism. To

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<sup>1</sup> The issue of protection elsewhere was discussed during the 1977 Diplomatic Conference on a Draft Convention on Territorial Asylum. Over the years the concept has been incorporated into the municipal law of a number of countries.

ensure that one of the State parties will give the asylum application due consideration within its own status determination procedure, the provisions of such agreements should regulate the responsibility of one country to examine asylum requests, and stipulate that prior to removal the receiving State indicates its willingness to admit the asylum-seeker and to grant access to the asylum procedure.

The Dublin Convention and the Schengen Implementation Agreement contain provisions determining which of the contracting parties is responsible for examining asylum requests lodged in their territory. The application of the Schengen Implementation Agreement and the expected entry into force of the Dublin Convention enhance the need for genuine harmonization of the implementation of the "safe third country" concept. Contracting parties should be encouraged to make use of fair and consistent criteria to assess if and when the notion is to be applied in order to avoid diverging policies and practices. In addition, significant differences persist among States' asylum procedures and the way they apply the criteria for recognition of refugee status. Thus a claim may be accepted in one State while the same claim would be rejected in another. Implementation of these instruments should be based on fair and expeditious asylum procedures and on a uniform application by all Contracting States of the criteria for determining refugee status. UNHCR has therefore encouraged Schengen States to continue their efforts to harmonize certain key elements of their procedural and substantive asylum law, with a view to achieving a common standard of protection in full conformity with principles of international refugee law. Once EU Associated States become part of such harmonization efforts, a truly comprehensive Europe-wide protection regime will evolve.<sup>2</sup>

In the absence of such formal agreements, Governments should apply the "safe third country" notion only if they have received, on a bilateral basis, the explicit or implicit consent of the third State to take back the asylum-seeker and to grant him/her access to a fair asylum procedure, so as to ensure that the application will be examined on its merits. There should be prior notification to the re-admitting country that the asylum claim has not been examined on the merits and that the person, if s/he wishes to do so, must be admitted in the refugee status determination procedure of the re-admitting country. In addition, it would be desirable that returned asylum-seekers could be provided with a form stating that the application has not been examined in substance, and with an information leaflet on the asylum procedure of the re-admitting country.<sup>3</sup> In considering whether to send asylum-seekers back to Central/Eastern European States by invoking the "safe third country" notion, Western European States should not only take into account the

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2 Readmission agreements should not be used for returning asylum-seekers unless they explicitly provide for the protection of refugees. If nevertheless applied to asylum-seekers, the application should have due regard to the special situation of asylum-seekers.

3 The German Constitutional Court in its recent ruling on the safe third country rule of the German Constitution indicated that it may generally be advisable for the German authorities to contact the authorities of the third country prior to returning an asylum-seeker in order to "*clarify the situation and if necessary take appropriate measures for the protection of the foreigner as foreseen among the States of the Schengen Implementation "agreement"*" (unofficial translation). It is current practice in Germany with regard to returns by air to notify the re-admitting country that the alien had applied for asylum in Germany but that the application has not been considered on its merits, owing to the safe third country provision in the German law. The British Home Office has recently agreed to provide returned asylum-seekers with a corresponding information leaflet.

possibility of access to a fair asylum procedure but also facilities for reception and longer-term integration in these countries, including absorption capacities.

In line with relevant Executive Committee Conclusions States should, furthermore, give due regard to any links which the applicant has with them as compared with a third country where s/he has no such links. Special regard should be given to family, cultural and other relevant links. Furthermore, the applicant should not be returned to a country where they have been in mere transit, in particular airport transit.<sup>4</sup>

### ***UNHCR activities***

In line with UNHCR's supervisory function according to Article 35 of the 1951 Convention, it may be recalled that UNHCR is ready to share with States, upon their request, information concerning practices and conditions in other countries.<sup>5</sup>

In this context, in response to requests by courts, national authorities, lawyers and NGOs, UNHCR has regularly issued public-domain position papers on the situation in a particular country in the context of the "safe third country" concept.<sup>6</sup> These papers describe in a factual manner the current legal framework of refugee protection and the prevailing practice. They therefore include references to deficiencies in the asylum procedure and a statement describing circumstances under which asylum-seekers and refugees can be returned to that country. In these papers UNHCR does not pass a judgement as to whether a country can be considered "safe" or not, and leaves it to the user of such papers to draw conclusions. Such papers encourage Governments to address current shortcomings and to take appropriate measures for proper reception, status determination and, particularly in Central and Eastern Europe, integration structures.

### ***Ruling of the German Constitutional Court***

The German Constitutional Court confirmed that the "safe third country" provision contained in German legislation is compatible with the German Constitution, thus acknowledging the constitutional provision according to which all EU countries are considered safe by definition, without any further verification. Concerning other neighbouring non-EU countries, the presumption of safety is based on verification that protection on the basis of the 1951 Convention and the European Human Rights Convention is available there. The Court also confirmed

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4 Various periods have been recognized by States for this "mere transit" rule. According to Article 7 of the Dublin Convention mere transit in an airport is not considered to be entry into a country. Underlying the "mere transit" rule are basic principles of international solidarity and burden-sharing.

5 Paragraph 2 of the 1992 London Resolution "On a Harmonized Approach to Questions Concerning Host Third Countries" in fact stipulates that "*Member States will take into account, on the basis in particular of the information available from the UNHCR, known practice in the third countries, especially with regard to the principle of non-refoulement before considering sending asylum applicants to them*".

6 Background Information Papers have so far been issued on the following countries: Albania, Bulgaria, Hungary, Poland, Romania, Slovakia, Slovenia and Ukraine. Update and new papers are forthcoming on the Czech Republic, the Russian Federation, Slovenia and Ukraine.

the safety of all neighbouring countries and agreed that the safety of those third countries listed in the legislation has been sufficiently established by the legislature, and that the presumption of safety need not be individually rebuttable.

Contrary to UNHCR's approach and considerable State practice providing for the individual rebuttability of the presumption of the safety in the third country, the Court did not consider it necessary to establish with certainty that the individual will have access to a formal asylum procedure in the third country, as long as s/he is in fact protected from refoulement there. The Court relied on the notion of "normative establishment of certainty" ("normative Vergewisserung"), according to which the "safety" of the third countries can sufficiently be established by the legislature. In terms of criteria, the Court, with regard to non-EU Member States stated that both the 1951 Convention and 1967 Protocol as well as the European Human Rights Convention must be ratified and implemented. According to the Court, this means that these third countries apply and respect Article 33 of the 1951 Convention and Article 3 of the European Human Rights Convention. In this context, the Court referred to the supervisory mechanism of both Conventions, that is, Article 35 of the 1951 Convention and Article 25 of the European Human Rights Convention (individual complaints procedure). Furthermore, the Court concludes that a third country cannot be considered safe if it returns asylum-seekers to "fourth" countries where no formal procedure or actual protection against refoulement exist. The Court, furthermore, formulated very limited exceptions to this concept which may yield a possibility of rebutting individually the presumption of the safety of a third country in specific cases.<sup>7</sup>

UNHCR regrets that the Court had not followed UNHCR's recommendation, based on international legal standards, that asylum-seekers should be given the opportunity, in an individual procedure, to rebut the presumption of safety in a third country. The ruling points to the need for increased international cooperation to prevent a unilateral handling of asylum and refugee matters.

### ***Issues for further discussion***

In the light of the above considerations, UNHCR would recommend to explore the feasibility of early accession of the Associated States to the parallel Dublin Convention. In this manner, the examination of an asylum request by safe third countries will in principle be ensured. A further implication of the accession would be that the Associated States harmonize their criteria for granting of asylum with those of EU Member States and international standards.

It would, moreover, be desirable if the accession to the parallel Dublin Convention could be coupled with arrangements which would take into account the absorption capacities of the Associated States, possibly through a mechanism for the admission of asylum-seekers on their territory. This would constitute an interim step prior to the longer-term prospect of Associated States joining the European Union.

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<sup>7</sup> For example if an asylum-seeker is threatened with the death penalty in the third country, he may not be returned there.

UNHCR welcomes the setting up of a consultative process to this end, such as that existing within the Structured Dialogue between EU countries and the Associated States on justice and home affairs. The Office intends to contribute to that dialogue, in particular with regard to the follow-up to the so-called Langdon report.<sup>8</sup>

Another legitimate question refers to the fact that a substantial number of individuals coming through Central Europe did not apply for asylum in Central Europe. There are a number of reasons for this phenomenon, such as still rudimentary protection structures in Central European countries and the absence of meaningful integration possibilities. A more systematic monitoring and assessment of the problems specific to refugees and asylum-seekers in Central Europe could be a useful step, and one which might facilitate the basis of international assistance in establishing proper protection and integration structures in Central Europe. UNHCR also recognizes the many other pressing priorities of the EU Associated States. In the face of enormous social and economic difficulties inherent in a restructuring process, effective management of the refugee problem is not an easy task.

UNHCR is aware that many of those asylum-seekers who register claims in Central Europe eventually hope to move on at a later stage. Many refugees recognized by Central European States decide to leave for Western Europe, out of necessity for want of effective protection or meaningful integration possibilities or for family reunion reasons. Even when asylum-seekers are returned to Central Europe by Western European countries in application of the safe third country concept, they do not necessarily apply for asylum and may try to enter Western European countries again, possibly being bounced back to Central Europe several times in the process.

UNHCR observes that a number of practical problems resulting in the denial of protection arise. For instance, an individual returned to a country deemed to be safe is denied access to the asylum procedure on the grounds that the deadline for submitting the application has lapsed. Elsewhere—returned asylum-seekers are detained, pending deportation with no guaranteed access to legal aid or UNHCR. UNHCR furthermore notes that with the unilateral designation of safe third countries without due regard to objective criteria, asylum-seekers simply evade border controls or do not apply for asylum at borders. They often feel compelled to conceal their identity and travel route, to destroy their documents and to pay increasing sums of money to smugglers. These complex phenomena merit more research, analysis and concerted remedial action.

### ***Concluding observations***

It is in the interest of the international community to provide effective protection to refugees and to promote and find durable solutions for them. The unilateral application of the safe third country concept, in the absence of a multilateral responsibility-sharing framework, may result in countries closer to the regions of origin being overburdened. These countries may be overstretched with receiving higher numbers of asylum-seekers. Refugees who cannot establish a

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<sup>8</sup> Justice and Home Affairs Cooperation with Associated Countries. Report by A.J. Langdon, October 1995.

meaningful life somewhere will be tempted to move on. This only enhances irregular migration, which has a destabilizing effect.

Efforts must therefore be strengthened to support asylum structures in Central and Eastern Europe. UNHCR therefore advocates an approach which, based on more equitable and just responsibility-sharing, sets out a clear framework of international cooperation in dealing with the refugee problem. In the immediate future, the Office will more actively support and monitor bilateral and multilateral agreements determining the State responsible for the examination of an asylum request, and encourage States to conclude more of these agreements and to extend their scope to EU Associated States. Proper consideration of absorption and integration capacities in this area should be promoted and further discussed. Ideally, a multilateral framework which regulates in detail a comprehensive responsibility-sharing mechanism on the basis of common criteria should be the ultimate objective. This should be coupled with integrated policies, involving economic, social and development activities but also increased endeavours to promote refugee protection structures in EU Associated States.

UNHCR, July 1996

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