

## "SAFE THIRD COUNTRIES"

myths and realities

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SUMMARY  
MINIMUM SAFEGUARDS

European States are erecting one barrier after another in their attempt to prevent persons seeking refuge in Europe.

First visa requirements were introduced for nationals of countries from which the refugees normally come.

Then airlines were sanctioned with heavy fines if they carried an undocumented asylum seeker and European border officials were placed in airports abroad to conduct "pre-boarding checks" on passengers who wished to go to a European destination.

**Now European States do not examine an application for asylum if they believe that another country should do so.**

The practice of returning asylum seekers to other 'third' countries is being applied to all asylum seekers even if they have merely transitted through another country on their way to their destination.

The agencies of the European Council on Refugees and Exiles (ECRE) have exposed and documented cases in which asylum seekers, due to this practice, have been bounced from one country to another without any State taking responsibility for examining the claim - in some instances even resulting in refoulement.

ECRE, therefore, urges European States to discontinue the practice of returning asylum applicants to other States, until they, at the very least, adopt the following principles and practices:

1. Not return asylum seekers who have family ties in the country and take into consideration the intentions of the asylum seeker as regards the State in which s/he wishes to request asylum;
2. Not return asylum seekers to States which do not fully implement the provisions of the 1951 Geneva Convention;
3. Not return asylum seekers to States without obtaining that State's prior consent and guarantee of re-admission;
4. Not return asylum seekers to States without prior guarantees that that State will allow the applicant access to a fair and efficient refugee determination procedure;
5. Inform the applicant, in a language s/he understands, of the deportation order;

6. Provide the applicant with an effective opportunity to appeal against the deportation order;

7. Prior to the deportation provide the applicant with a document, in the language of the receiving country, stating that the application for asylum was rejected solely on third country grounds.

## **"SAFE THIRD COUNTRIES"**

### **myths and realities**

#### **PREFACE**

The asylum crisis in Europe is producing many casualties. The assertion is widely made that persons who need protection are denied it through the operation of a new policy based on the notion of so-called "safe third country". Is there evidence to prove this claim? Is it just a matter of administrative mistakes in a good system, or is there a fundamental flaw in the policy? If there is, what should be done about it? If the policy is wrong, the casualties will be not only individuals in need but our own human rights standards. This Report demonstrates there is a cause for concern.

ECRE acknowledges with thanks the co-operation of lawyers, legal counsellors, non-governmental agencies, airport services and others who have provided the information upon which this Report is based. We would also like to thank those officials of UNHCR who, in

various ways, have also assisted with the documentation of the case histories.

## INTRODUCTION

1. The Report focuses on one of the recent measures developed by the western European States: the notion variably called "country of first asylum", "safe third country" or "host third country".
2. This measure represents one of the main threats to the institution of asylum in the countries of western Europe.
3. As a response to some of the current developments, the UN High Commissioner for Refugees has repeatedly called for a greater understanding of the growing scale and complexity of the refugee problem. She stresses the need for an effective and coherent strategy which addresses the refugee question in its entirety, from tackling the root causes and preventive strategies, through emergency response, to protection and long-term solutions. Within this comprehensive approach, the institution of asylum remains one of the many actions open to states to meet their humanitarian objectives.
4. ECRE agencies wholeheartedly endorse the High Commissioner's call and are deeply concerned by the responses of the western European governments and the various measures introduced over the last few years on their own territory.
5. The critique which ECRE has been raising is well-known:
  - a) the lack of transparency and judicial control in European policy-making;
  - b) the targeting of refugees' countries of origin when imposing visa requirements;
  - c) the narrowing interpretation of the refugee definition in the 1951 Geneva Convention;
  - d) the failure to ensure adequate protection for *de facto* refugees;
  - e) the use of increasingly expeditious refugee status determination procedures, often lacking the most fundamental legal safeguards;
  - f) the denial of entry to the territory and access to the refugee status determination procedure for those asylum seekers who have travelled through other countries, deemed as "safe third countries" in their search for protection.

6. The institution of asylum has been of immense importance throughout European history and is, in fact, one of the cornerstones of our culture in that it epitomises our common concern for justice, solidarity and human rights.
7. While the option of asylum in Europe must be put into perspective as only one of the many responses to the global refugee situation, it remains a fundamental element in the international regime of refugee protection.
8. It is in this light that ECRE has taken up the issue of current European thinking with regard to the various notions of countries as "safe".

#### THE PROBLEM: THE "SAFE THIRD COUNTRY" NOTION

9. The notion of "safe third country" or "host third country" is described as follows: An asylum seeker is denied access to the refugee status determination procedure in a European country on the grounds that he or she **already enjoyed, could or should have requested and, if qualified, would actually be granted asylum in another country.**
10. In practice this means that countries, with reference to this notion, may refuse entry to an asylum seeker solely on the grounds that s/he could or should have applied for asylum in a country through which s/he transitted on the way to the destination.
11. The Dublin Convention (the Convention Determining the State Responsible for examining Applications for Asylum lodged in one of the Member States of the European Union of June 1990) codifies this notion and defines "an examination of an application for asylum" in the following way: "All the measures for examination, decisions or rulings given by the competent authorities on an application for asylum, **except for procedures to determine the State responsible for examining the application for asylum pursuant to this Convention**".
12. The Convention further states that **"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."
13. As a supplement to the Dublin Convention, the European Union Ministers responsible for Immigration, in their Resolutions



of December 1992, adopted certain principles which form the basis for national legislation implementing the notion of host third country (see appendix C).

14. The Resolution makes clear that the formal identification of a host third country precedes the substantive examination of the application for asylum and that the principle of "host third country" is to be applied to all applicants for asylum, even if they may be regarded as refugees.
15. In practice this means that asylum seekers who have travelled through other countries before reaching their destination will not have their asylum application examined but will be expelled to another country as soon as practically possible.
16. If the asylum seeker has travelled through both European Union countries and non-EU countries, the asylum seeker will, according to the principles of the London Resolution on host third countries, be expelled directly to the ("host third") country which is **outside** the territory of the Twelve (now fifteen).
17. The Resolution applies an extremely wide definition of a so-called host third country in as much as it only requires the fulfilment of the following three criteria:
  - a) in those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention;
  - b) the asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country;
  - c) it must **either** be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, **or** that there is clear evidence of his admissibility to a third country.
18. In response to the increasing use of this notion, ECRE, in December 1993, produced a legal analysis (see Kjaergaard in bibliography). This Report takes that analysis further with an exposure of the paradoxes and consequences relating to the implementation of the notion in practice:

## THE CRITIQUE

19. One of the main reasons why asylum seekers do not apply for asylum in the first country in which they set foot is the varying standards of protection provided. The rates of recognition of refugees, according to the refugee definition of the Geneva Convention, vary considerably for similar groups of persons, even within the European Union countries. Large differences are also evident with regard to the different statuses provided for the so-called *defacto* refugees.
20. It is not hard to imagine that the newly democratised States of central and eastern Europe are facing even greater difficulties in setting up appropriate systems and procedures for the protection of refugees so as to ensure broadly similar quality of decision-making.
21. In order to facilitate the return of persons who have passed through other States on their way to their destination, many western European States have concluded re-admission agreements with a number of central and eastern European States (see appendix D) despite these well-known differences in circumstances and standards.
22. Most of these re-admission agreements, as well as the 'model' for such future agreements, produced by the EU Ministers in 1994 (see appendix E), appear to apply to the return of nationals of the contracting States and/or of third country nationals who entered a contracting State illegally.
23. However, they also apply to the return of asylum seekers but do not take into account the special circumstances connected to the requirements of refugee protection. In particular, they lack any reference to the responsibility of States to afford asylum seekers access to fair procedures for the determination of refugee status and the granting of asylum.
24. By omitting such requirements, there is a real risk that the State identified, unknowingly, as "responsible" for the asylum seeker, either does not yet have in place appropriate asylum procedures and systems which provide adequate protection (see for example case history no. 3 in appendix B), or assumes that the person thus returned has been rejected by the first State after a substantive examination of the asylum application (see for example case histories nos. 4, 7 and 10 in appendix B).
25. This situation has been proven to result in cases of chain-deportation of asylum seekers, in "bouncing-back" of asylum seekers to the country from which they were first expelled and

even in cases of *refoulement* (see for example case histories nos. 4, 5, 6, 7, 8, 9, 10 and 11 in appendix B).

26. Western European States have justified these measures in various ways by claiming that, *inter alia*:

- i) such re-admission agreements would end the problem of "refugee in orbit" situations;
- ii) all measures guarantee protection for those who need it by explicitly prescribing compliance with the provisions of the Geneva Convention and especially the principle of *non-refoulement*;
- iii) they are an attempt to establish a mechanism for "burden-sharing";
- iv) they will stop the entry of so-called "bogus-refugees" and thereby ensure better conditions for the asylum seekers and refugees already in the territory;
- v) they will reduce the phenomenon of so-called "asylum-shopping";

Each of these assertions merits closer examination.

## **I Reducing the incidence of "refugee in orbit"?**

27. As for re-admission agreements between western European States, both the Dublin Convention and the Schengen Implementation Agreement were drawn up, allegedly, with the specific aim of determining the (single) country **responsible** for examining an application for asylum.
28. One of the main arguments used in favour of these Conventions was that, when in force, they would put an end to 'refugee in orbit' situations and guarantee that every request for asylum lodged in one of the contracting States would be fully examined by one of these States.
29. With regard to the contention that the Dublin Convention eliminates 'refugee in orbit situations' between the twelve Contracting Parties, this is correct in as much as a Contracting State would refer an asylum application to another Contracting State only if the latter is 'responsible' for the examination. However, the orbit practice would not be suppressed between the twelve Contracting States and the some 170 third States around the world, due to the fact that the Convention endorses the right of the individual State to decide **unilaterally** that

it does not consider itself responsible but that it considers yet another (third) State to be 'responsible'.

30. The London Resolution on host third countries of December 1992 (see appendix C) subsequently made clear that if a "host third country" exists, i.e. a country outside the European Union, then the provisions of the Dublin Convention are not to be invoked, since the asylum seeker may simply be returned directly to such "host third country" - outside the western European territory.
31. Since the various European countries differ in their views as to what can be considered a "safe third country", these measures constitute, to quote a judge at the German Constitutional Court "a roof for which no house yet exists".
32. In practice, of course, the result is that an asylum seeker refused entry in country A and sent to country B may well also be refused entry in country B and sent to country C - which that country (B), but not country A - considers to be a "safe third country" (see for example case histories nos. 1 and 3 in appendix B).

**By introducing various and varying categories of 'second' and 'third' "responsible" host countries, States have actually increased, rather than reduced, the situations of 'refugee in orbit'.**

## **II Guarantee of protection and compliance with the Geneva Convention, especially with the principle of *non-refoulement*?**

33. The absence of a duty to provide access to the territory of a(ny) State inevitably leads to the absence of right for the asylum seeker to gain access to a procedure for the determination of refugee status.
34. Apart from the threat this poses to the asylum seeker, the stakes for States are high: they risk a violation of the principle of *non-refoulement*, since the asylum seeker they are returning to a 'second' or 'third' host country, without ensuring that access can be obtained to the territory and to a fair refugee determination procedure, may well be sent onwards immediately to another country or even to the country of origin.
35. The cornerstone of refugee protection, codified in Article 33 of the 1951 Geneva Convention prohibits the return **in any manner whatsoever** of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his

race, religion, nationality, membership of a particular social group or political opinion.

By not ensuring that an asylum seeker can gain access to the territory and to a fair refugee determination procedure in the receiving country, sending States risk, directly or indirectly, violating the principle of *non-refoulement* and thereby abrogating a fundamental principle recognised in customary international law as applying to all States, and not merely those signatory to the 1951 Geneva Convention and 1967 New York Protocol.

### III Burden-sharing mechanism?

36. Another contention which has been cited in favour of a European-wide application of a "safe third country" notion, is that it would provide some kind of system for "burden-sharing" or at least the beginnings of a burden-sharing arrangement.
37. However, the "safe third country" notion and practice, based entirely, as it is, on countries' geographical location in relation to refugee movements and travel routes, does not imply any element of equity or fair distribution of refugees.
38. If the issue of burden-sharing were a consideration, this practice on its own does not provide any means to that end, since in reality the countries in central and southern Europe are most likely to be the first stop for most refugees seeking protection in Europe.
39. On the contrary, it could well be argued that it constitutes a system of "burden-adding", since the same asylum seeker first has to go through admissibility procedures in one or more countries until s/he, in principle, finds a country willing to enter into the substance of the application.
40. For the refugee, the psychological effect of such uncertainty and worry as to which country, if any, in the end is going to "take responsibility", constitutes an inhumane, additional and avoidable strain.
41. For the States concerned, the total cost is that of possibly several admissibility procedures, examinations, accommodations, detentions and airfares before that moment may be reached where the asylum seeker's claim is examined on its merits.

42. In addition to being inhumane, the system is thus potentially very costly and seems clearly futile in the cases where the final decision on the merits of the case in a fair determination procedure results in the conclusion that the person is not to be recognised as a refugee.

**By returning asylum seekers to countries considered to be "safe third countries", States are adding to the psychological strain of refugees and greatly increasing the sum total use, cost and length of the asylum system.**

#### **IV Better conditions for the refugees who stay?**

43. Another intention, reported by some parliamentarians, was to stop asylum seekers from targetting certain western European countries in their search for asylum by introducing measures to prevent the physical access to their territory.
44. Assertions such as "the boat is full" combined with the expressed wishes to provide as good a service as possible to the refugees and asylum seekers already there, were often part of the explanation.
45. Indeed, recent statistics show that the number of asylum applications lodged in these countries has dropped.
46. However, experience and current indications tell another story: namely that the number of persons entering, fearing to be returned to other countries, and therefore choosing not to lodge applications at all, has increased dramatically as has the activities of illegal traffickers of persons to these countries.

**By erecting further barriers against the legal access of refugees, western European countries are indirectly adding to the number of persons without legal status in their countries and providing fertile soil for the illegal trafficking of persons.**

#### **V. Prevention of "asylum-shopping" ?**

47. These measures, it was argued, would also do away with the so-called phenomenon of "asylum-shopping", since the asylum seeker would no longer be able to choose the country in which he or she wished to lodge an application and, through the use of data exchange systems, only one country would examine a claim.

As far as the European Union countries were concerned, the result of such examination would be binding on all the other Contracting States.

48. It should be noted that on this issue, UNHCR Executive Committee's Conclusions clearly state that the intentions of the asylum seeker as regards the country in which s/he wishes to request asylum should as far as possible be taken into account. Furthermore, the Executive Committee states that asylum should not be refused solely on the grounds that it could be sought from another State.

**By introducing restrictive measures such as the "safe third country" notion, State practice runs contrary to the declared intentions in the conclusions reached by the inter-governmental Executive Committee of the UNHCR Programme.**

## CONCLUSIONS

49. States' domestic legislation varies greatly on the issue of what makes a country "safe" with regards to returning an asylum seeker. The range in practice varies from countries which in their domestic laws and procedures have included explicit lists of "safe third countries", through countries with formal procedures including appeal possibility on the issue of whether a particular country can be considered "safe" in the individual case, to countries with no legislation on the issue but with a well-known practice of returning asylum seekers to other, mainly neighbouring, countries.
50. The London Resolution on "a harmonised approach to questions concerning host third countries" offers, inter alia, the first attempt by European Union Ministers to define what constitutes a so-called host third country. The criteria, however, are very wide in as much as substantially they only require that in those countries the life or freedom of the asylum seeker must not be threatened and that the country is not violating the principle of *non-refoulement* nor the prohibition of exposure to torture or to inhuman or degrading treatment.
51. In terms of formal requirements, the Resolution only requires that the asylum seeker **has had the opportunity** to make contact with that country's authorities in order to seek their protection **or there is clear evidence of his/her admissibility to a third country.**
52. By entering into re-admission agreements with "third" States, the countries of the European Union have provided the practical

tools for facilitating such returns. However, existing re-admission agreements as well as the 'model' for future re-admission agreements formulated by the European Union Ministers, do not generally take into account the special situation of asylum seekers, and in particular the responsibility of States to afford them access to fair procedures for the determination of refugee status and the granting of asylum. Nor do they ensure that refugees are not subject, directly or indirectly, to *refoulement*.

53. To avoid the risk of *refoulement* and situations of orbit, UNHCR has recommended that the **consent** of the third State be obtained before an applicant for asylum is sent to that country and that, in any event there be full assurance that the asylum seeker will be admitted and the asylum application examined in fair procedures. To ensure that this in fact occurs, UNHCR has suggested that in all cases the authorities of the third country be informed in advance of the return of any asylum seeker whose application has not yet been substantively examined so that the appropriate notification can be given to the border officials and the necessary protection guaranteed.

54. UNHCR has also noted that, in line with the relevant Executive Committee Conclusions, States should give due regard to any links which the applicant has with them, as compared with a third country, with which he or she has no such links, and has further reminded States that special regard should be given to situations where the applicant has close family ties to the country concerned.

## RECOMMENDATIONS

Having conducted the "Safe Third Country Monitoring Project" exposing cases in which asylum seekers have been subjected to "orbit situations" as well as to chain-deportations and in some instances even to *refoulement*, **ECRE strongly recommends States to discontinue the practice of returning asylum applicants to other States, until they adopt the following minimum safeguards in the implementation of such a policy:**

1. All decisions concerning third country removals should be taken only by the central, competent authority responsible for carrying out substantive refugee status determinations.
2. Before taking a decision to return an applicant for asylum to another State, the sending State should:
  - 2.1. Ensure that no-one is returned who has family ties in the



country and take into account the intentions of the asylum seeker as regards the State in which s/he wishes to request asylum;

2.2. Obtain the consent of that State and determine that the following requirements are fulfilled:

2.2.1. The receiving State is Party to the 1951 Geneva Convention and the 1967 New York Protocol, and complies with UNHCR Executive Committee Conclusions;

2.2.2. The applicant will be admitted to the receiving State under conditions of safety and respect for the individual;

2.2.3. The applicant will be effectively protected by the receiving State against *refoulement* in the meaning of Article 33 of the 1951 Geneva Convention;

2.2.4. The applicant will be provided by the receiving State with full access to a fair and efficient refugee determination procedure as described by recent ECRE policy papers;

2.2.5. The applicant will be treated by the receiving State in accordance with human rights standards and international principles of refugee protection.

3. After taking a decision to return an asylum seeker to another State, the sending State should:

3.1. Inform the applicant, in a language s/he understands, of the decision to transfer him/her to that other State;

3.2. Provide the applicant with an opportunity to appeal, with suspensive effect, to an independent body against the decision to transfer him/her to another State;

3.3. Provide the applicant with a document, in the language of the receiving country, stating that the application for asylum had not been examined on its merits but was rejected solely on third country grounds.

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